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Copyright Law Applied to Radio Broadcasting

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COPYRIGHT LAW APPLIED TO RADIO BROADCASTING

I. The Constitution and the Copyright Act

THE CONSTITUTIONAL authority for Congressional legislation respecting copyright law is found in Article 1, Section 8 of the Federal Constitution, wherein Congress is given power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This constitutional guaranty to authors and inventors of protection in their work called forth the copyright law,[3] giving to authors, composers, inventors, etc. the protection that their creative genius merited. The important parts of the copyright act[4] for this discussion are as follows:

> Art. 1. Any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right:
> (a) To print, reprint, publish, copy and vend the copyrighted work; . . . .
>
> (b) to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangment or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and and from which it may be read or reproduced.

It is particularly section (e) of the above enactment that has caused difficulty in the application of the copyright law to the field of radio broadcasting. A great deal of litigation has centered about the interpretation of the clause, "public per-

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1 291 Fed. 776 (D. C. N. J. 1923).

2 At common law the author of an unpublished proprietary work was given an absolute proprietary right therein. Whether this common law proprietary right ceased on the first publication, the English view (early English view) held that it did not. 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 however tends to the contrary. 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. Rep. 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).

3 Act of March 4, 1909, Chap. 320, Sections 1, 64; 35 Stat. at L. 1075, 1088, 17 U. S. C. A. No. 1.

4 Act of March 4, 1909, Chap. 320, Sections 1, 64; 35 Stat. at L. 1075, 1088, 17 U. S. C. A. No. 1.

formance for profit," appearing in that section. Considerable doubt was entertained in the beginning of radio as to whether this section of the copyright act could be so broad as to embrace the field of radio broadcasting. It is only from the cases that have considered the point that we can make a determination as to the applicability of the act to the new industry of radio. We turn then to a consideration of the cases touching each element of the disputed clause. We have not considered the various elements of the disputed clause in their grammatical order, but in what we felt to be their logical order.

II. Radio Broadcasting—A Performance

In considering the question of "performance" we have been constrained by the cases involving that particular problem to consider the *termini* of broadcasting, *viz.* radio transmission and radio reception, as affecting works and compositions coming under copyright law. We shall first consider cases bearing on the protection of copyrights involving radio reception. A principal case on this point, holding that radio reception does amount to a performance, is that of *Jewell v. LaSalle Realty Co.*[5] However two cases which preceded the *Jewell case* [6] must be noted as indicating the attitude toward radio reception as late as 1929. In *Buck v. Debaum* [7] a cafe unauthorizedly received the licensed broadcast of a musical composition for the benefits of its patrons. Question was raised as to whether there was a performance on the part of the cafe. It was held that the reception did not constitute a performance within the meaning of the Act. This holding was indicated by the language of the court as follows:

> The performance, which is licensed as just stated, occurs entirely in the studio of the broadcasting station where the copyrighted musical composition is lawfully used, and the section occurring at the receiving set is simultaneous therewith, and is in no sense a reproduction of the musical composition that is being lawfully performed at the broadcasting studio. The action, play, and use of the copyrighted composition has been completed within the studio. . . . The owner of a copyrighted musical composition can fully protect himself. . . . by refusing to license the broadcasting station to perform his musical composition, but, when he ex-

5 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

6 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

7 40 Fed. 2d. 734 (S. D. Calif. 1929).

> pressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast.

By the license to the broadcasting station, the court reasoned, the plaintiff impliedly sanctioned and consented to any "pick-up" by way of radio reception. The court criticized the extension of the Copyright Act to making reception a performance in these words:

> It is common knowledge, of which the court should take judicial notice, that programs from commercial radio broadcasting stations are interspersed with lectures, instrumental and vocal musical compositions, sermons, speeches, etc., many of which are not protected by the copyright laws of the United States, and many of which can be unconditionally and freely performed by the broadcasting station, and, if during the reception of such programs, one using the radio in his business is required to turn the dial of his receiving set so as to render inaudible any copyrighted composition, the utmost difficulty and confusion will result, and a condition ensue that to my mind is unreasonable, and one that was never within the intent of Congress in passing the Copyright Act or within the reasonable purview of the terms thereof.

The case of *Buck v. Duncan* [8] differed from the *Debaum case* [9] in this that in the former the radio station was not licensed to broadcast the copyrighted composition. However the conclusion reached as to performance was the same. The court observed that by maintaining the radio in its hotel for the entertainment of its guests the defendant did not perform the musical composition. It was the performance of a musical composition, not by the defendant, but by the broadcaster on the defendant's instrument. The holding of the two cases however was "exploded" by the decision two years later in the *Buck v. Jewell La Salle Realty Co.*[10] case which concluded that a public radio reception for profit of a copyrighted musical composition was a "performance" which made the receiver liable for an infringement of the Copyright Act.

In *Jewell v. La Salle Realty Co.*[11] action was brought by

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8 32 Fed. 2d. 366 (W. D. Mo. 1929).

9 40 Fed. 2d. 734 (S. D. Calif. 1929).

10 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

11 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

the American Society of Authors, Composers and Publishers against station KWKC of Kansas City and the La Salle Hotel for the unauthorized performance of a musical composition belonging to one of the members of the society. Similar to the *Duncan case*[12] the broadcasting station was not licensed to broadcast the composition. Since the case was defended only as to the hotel company, the decision is important only in that regard for the particular problem of radio reception.

The hotel maintained a master radio receiving set with extensions to public and private rooms for the entertainment of guests. The lower court reflected the prevailing opinion of the time, and by a method of analogical reasoning on the part of Judge Otis concluded, like the *Debaum and Duncan cases,*[13] that the plaintiff had no right to recover, inasmuch as the reception did not constitute a performance. Judge Otis compared the radio reception in the hotel to a deaf person who hears a piano rendition by means of an amplifier which he operates (the piano rendition being otherwise inaudible to him); to the person who hears a piano rendition by means of a telephone; to the person who opens a window and hears a street band. He based his decision on the erroneous assumption that radio waves are not a *record* of the original performance, but the original performance itself. Their reception therefore is not a performance but simply a hearing of a performance.

The case was appealed to the Circuit Court of Appeals which submitted to the Supreme Court of the United States the following question:

> Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting section, constitute a performance of such composition within the meaning of 17 U.S.C.A. Sec. 1, (e)?

The question was answered by the Supreme Court in the affirmative.[14] The final result of the *Jewell v. La Salle Realty*

12 32 Fed. 2d. 734 (W. D. Mo. 1929).

13 See notes 7 and 8 supra.

14 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

Co.[15] case was the determination, under the authority of the highest court in the land, that radio reception did constitute a performance within the meaning of the copyright act.[16]

> Nothing herein contained shall be construed as permitting the licensee to grant to others the right to reproduce publicly for profit, by any means, method or process whatsoever, any of the musical compositions within the repertoire of the Society, so broadcast, or as permitting any receiver of the broadcast of any of said compositions to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

We turn then from the reception terminus of radio to reverse, the transmitting or actual broadcasting of a radio program. Noteworthy in this regard is the case of *Remick v. General Electric Co.*[17] Interesting are the opinions given by the lower court [18] and the appeal court [19] in that case. The lower court denied the plaintiff relief, adopting the view that the acts of the broadcaster did not amount to a performance under the act. It expressed its view thus:

> By means of radio art he (the broadcaster) simply makes a given performance available to a greater number of persons who, but for his efforts, would not hear it. So far as practical results are concerned, the broadcaster of the authorized performance of a copyrighted musical selection does little more than the mechanic who rigs an amplifier or loud speaker in a large auditorium to the end that persons in remote sections of the hall may hear what transpires upon its stage or rostrum. Such broadcasting merely gives the authorized performer a larger audience, and is not to be regarded as a separate and distinct performance of the copyrighted composition on the part of the broadcaster.

The appeal court,[20] while not holding definitely that the broadcast constituted a separate and distinct performance, nevertheless held the broadcaster liable as a contributory infringer in "transmitting to the radio audience the original unauthorized production. It criticizes the reasoning of analogy adopted by the lower court in the following language:

> It is not enough to say that the broadcaster merely opens the

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15 283 U. S. 191, 75 L. ed. 971, 51 S. Ct. 410, 76 A. L. R. 1266 (1931).

16 Consequent upon the Debaum and Jewell-LaSalle decisions the American Society has inserted restrictive provisions in its license agreements with broadcasting stations, to the effect that:

17 16 Fed. 2d. 829 (S. D. N. Y. 1926).

18 4 Fed. 2d. 160 (S. D. N. Y. 1924).

19 16 Fed. 2d. 829 (S. D. N. Y. 1926).

20 16 Fed. 2d. 829 (S. D. N. Y. 1926).

> 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 members of the orchestra.

In such a case the broadcaster is just as guilty of a violation of the copyright act as is the performer. This fact the court pointed out in these words:

> If he broadcasts without authority from the owner of the copyright a private rehearsal of a copyrighted production, thus converting the private rendition into a public performance for profit, he contributes to the resultant infringement.... the presence or absence of an audience in the hotel cannot change the character of his acts of contributory infringement.

As a result of the ruling of the appeal court we may now conclude that radio transmission amounts to a new and separate performance.

III. Radio Broadcasting—A "Public" Performance

It is almost an asuumed premise that the effect of broadcasting is to make public the performance of the broadcaster. Radio production is not thought of in terms of the studio walls within which a broadcast is produced, but in respect to the vast public which radio serves. The cases which we have already considered have more or less taken for granted such a presumption. Thus in the *Remick v. General Electric Co.* case[21] the lower court, for instance, considered broadcasting as giving the "authorized performer a *larger audience* (italics mine); while the appeal court spoke of the broadcaster converting the private rendition into a *public* performance.

In *Remick & Co. v. American Auto Accessories Co.*[22] the broadcasting of a song "Dreamy Melody" by an advertising radio station was a public performance for profit and constituted a violation of the copyright owned by the plaintiff. Defendant operated a radio station as an advertising and publicity medium for the sale of radio parts and accessories which he manufactured. Plaintiff sought to enjoin the unauthorized

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21 4 Fed. 2d. 160 (S. D. N. Y. 1924).

22 5 Fed. 2d. 411 (C. C. A. 6th, 1925).

playing of his copyrighted song. In treating of the public aspect of the broadcast, the court pointed out that the performance was none the less public because each listener might enjoy the broadcast alone in the privacy of his home. "Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance."

That radio broadcasting constituted a public performance became a determined question when the United States Supreme Court refused to grant certiorari.[23] The general attitude towards radio broadcasting as being a public performance prior to the denying of certiorari by the United States Supreme Court in the *Remick case*[24] is evidenced in the opinion of the Federal Court for the Southern District of Ohio in that case.[25] The lower court erroneously ruled as follows,

> In order to constitute a public performance in the sense in which we think Congress intended the words, it is absolutely essential that there be an assemblage of persons—an audience congregated for the purpose of hearing that which transpires at the place of amusement.... We simply feel that the rendition of a copyrighted piece of music in the studio of a broadcasting station, where the public are not admitted and cannot come, but where the sound waves are converted into radio frequency waves and thus transmitted over thousands of miles of space, to be at last reconverted into sound waves in the homes of the owners of receiving sets, is no more a public performance in the studio, within the intent of Congress, than the perforated music roll, which enables the reproduction of copyrighted music by one without musical education, is a copy of such music. A private performance for profit is not within the act, nor is a public performance not for profit.

Contrary to the contention of the broadcasters the Supreme Court decided that radio broadcasting did come under the Copyright law in respect to its being a *public* performance within the meaning of that act.

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23 269 U. S. 556 (1925).

24 5 Fed. 2d. 411 (C. C. A. 6th, 1925).

25 298 Fed. 628 (S. D. Ohio 1924).

IV. Radio Broadcasting—A Public Performance "For Profit"

We have so far treated the 'performance' and 'public' phases of the "public performance for profit" clause of the Copyright Act. We have yet to consider the last phrase in that highly controversial clause of the Act, viz. "for profit." That angle was touched upon somewhat in the case of *Remick and Co. v. Am. Auto Accessories Co.*[26] The court there held that the playing of the melody in the hope and with the expectation of enhancing the sale of radio parts, although no direct proceeds were realized from the broadcast, constituted a performance for profit. "It is immaterial," the court pointed out, "whether that commercial use be such as to secure direct payment for the performance by each listener, or indirect payment, as by a hat-checking charge, when no admission fee is required, or a general commercial advantage, as by advertising one's name in the expectation and hope of making profits through the sale of one's products, be they radio or other goods." However the case most frequently referred to for a recognition of the profit angle in radio broadcasting is the case of *Herbert v. Shanley Co.*[27] Although it does not directly involve radio, it can be applied in an analogical sense to the field of radio broadcasting, and has been relied upon in later cases involving radio litigation on the commercial or 'for profit' phase of the copyright enactment. It will be noted that it preceded by only two or three years the rise and development of the radio industry. In the case a restaurant company for the entertainment of its paying customers hired an orchestra which unauthorizedly played the copyrighted song known as "Sweethearts" belonging to the plaintiff. The lower court judges erroneously held that since there was no admission charged at the door there was no 'performance for profit.' Justice Holmes of the Supreme Court held contra in the following language:[28]

> The defendant's performances are 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

26 5 Fed. 2d. 411 (C. C. A. 6th, 1925).
27 242 U. S. 591, 37 S. Ct. 232, 61 L. ed. 511 (1917).
28 242 U. S. 591, 37 S. Ct. 232, 61 L. ed. 511 (1917).

> the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.

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When we tune in our radio to the currently popular "jazz band," follow our favorite radio serial story or disport ourselves intellectually at the expense of radio's greatest comedians we enjoy as it were only the finished product, *viz.* the presentation to the public. The work of radio broadcasting includes more. One of the many details connected with radio production is its legal phase, especially in respect to copyrights. It is the legal interest of the author in the field of radio broadcasting that has called forth the present article in the latter regard.

Tremendous success has been achieved in the field of radio broadcasting since 1920, when there was only one radio station in the United States. Radio has developed into a vast industry. Concurrently with this rapid growth there have followed the inevitable legal consequences attendant on such expansion. Particularly have radio broadcasters been opposed by the interests of artists, composers and publishers whose compositions and productions grace our air waves today.

In the early days of radio, owners of copyrighted works considered radio an invaluable advertising ally in the sale and distribution of their works; little thinking that radio might soon supersede them. This idealistic outlook of the early composers was evidenced in the opinion of a case in the early twenties, *viz. Witmark and Sons v. Bamberger and Co.*,[1] wherein the court observed: * * * Our own opinion of the possibilities of advertising by radio leads us to the belief that the broadcasting of a newly copyrighted musical composition would greatly enhance the sales of the printed sheet." From such a statement there could not be inferred a conclusion that the copyright owner, by submitting his work or composition to being broadcast, had divested himself of the exclusive property right therein.[2] The court merely pointed out in this early

case the then laudable advertising effect of getting the public acquainted with a musical composition by means of radio. It observed, however, that this method of advertising was discretionary with the copyright owners themselves. Its final words are significant: "He (the copyright owner) has the exclusive right to publish and vend, as well as to perform."

As radio became less and less eleemosynary and constituted rather a rival and a competitor of the authors, composers and publishers than an ally, the latter sought protection against the encroachment of radio on their property interest by an application of Constitutional provisions and Congressional enactment to the field of broadcasting.

It has been observed that this decision, which was not too remote from the rise of the radio industry, established somewhat of a precedent for the application of the same doctrine to the field of radio. Perhaps the first case in radio involving the subject of 'profit' in connection with broadcasting and which relied on the holding in the *Shanley case* [29] was that of *Witmark and Sons v. Bamberger and Co.*[30] Like the *Remick and Co. case* [31] which it preceded by two years it involved the operation of a radio station in connection with a department store. In the *Bamberger case* [32] the defendant operated a radio station for the purpose of advertising and publicizing the radio parts sold in its department store. The program sponsored by the defendant was interspersed throughout with the following slogan: "L. Bamberger & Co., One of America's Great Stores, Newark, N. J." The alleged infringement of the Copyright law was the unauthorized singing over the defendant's station of the song, "Mother Machree." The defendant sought to distinguish the present case from the *Shanley case,*[33] averring that in that case there was a direct charge. The court's reply to this was that although "the diner at no time had the subject of entertainment charge called to his attention except in the high price of the food which he was permitted to procure," nevertheless in the court's opinion, "it was an *indirect* way of collecting the charge for musical enter-

29 242 U. S. 591, 37 S. Ct. 232, 61 L. ed. 511 (1917).
30 291 Fed. 776 (D. C. N. J. 1923).
31 5 Fed. 2d. 411 (C. C. A. 6th, 1925).
32 291 Fed. 776 (D. C. N. J. 1923).
33 242 U. S. 591, 37 S. Ct. 232, 61 L. ed. 511 (1917).

tainment from those who were there to pay." Applying this situation to the facts in the *Bamberger case* [34] the court found that the cost of broadcasting was made an item of general expense in the running of the profitable running of the department store business of the Bamberger Company. To epitomize the language of Justice Holmes in the *Shanley case* [35] the court, in deciding in favor of the plaintiff said: "Whether it pays or not the purpose is profit, and that is enough."

Radio broadcasting has become in recent years a highly developed industry. To protect the interests of the artists, composers and publishers in their copyrighted works, the copyright law has been interpreted by the judicial decisions to extend to the rendition of such works over the radio. Because of the novelty and the comparative recent development of radio, there was some question at first as to whether a rendition by radio constituted a "public performance for profit" within the meaning of the Act. A summation of the foregoing cases establishes this proposition in the affirmative.

V. The Mechanical Rendition in Radio and Effect of Copyright Law

We have considered so far only the *human* [36] performances of radio artists and actors giving expression to an author's work or composition. And yet mechanical recordings comprise the practical and everyday routine of radio broadcasting.[37]

Under the old copyright act [38] the sale of perforated music, phonograph records, etc. did not constitute an infringement, because they were not *copies* within the meaning of the then existing copyright act. Thus in *White Smith Music Publishing Co. v. Apollo Co.*[39] the court said:

> These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism

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34 291 Fed. 776 (D. C. N. J. 1923).

35 242 U. S. 591, 37 S. Ct. 232, 61 L. ed. 511 (1917).

36 This word is chosen to distinguish the performances of artists and actors themselves from the mechanical reproduction of a former rendition.

37 The growth of the radio industry has called forth many small stations, which, unable to hire the performing artists themselves, have resorted to recorded productions of such artists for a means of providing entertainment and filling up space on the air. This has brought on a great deal of litigation not only from the composers but also from the performing artists whose exclusive interpretation of the composition has given it a distinctive character peculiar only to the genius and artistry of the interpreter.

> to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

The revised statutes [40] extended copyright protection to the unauthorized *sale* of these mechanical devices.

The copyright law itself has not yet been extended so as to embrace within its protection the broadcasting of the mechanical recordings of our modern musical maestros for instance. It has been settled by the cases that the copyright act can not be extended thus far.[41] At common law however a right of property was recognized in the products of "mental labor." [42] This common law property right has been recognized in our copyright law.[43] Thus in *Aronson v. Baker* [44] it was said:

> Every new and innocent product of mental labor, which has been embodied in writing or some other material form, while it remains unpublished, is the exclusive property of its author, entitled to the same protection which the law throws around the possession and enjoyment of other kinds of property.

The performance of an actor or artist is the result of mental labor and should be given protection as an intellectual property interest continued until general publication or dediplates. At common law the exclusive right in an intellectual property interest continued until general publication or dedication to the public.

As early as 1918 in *International News Service v. Associated Press* [45] the court, recognizing a "quasi-property" right in news for instance, held that the scale of a newspaper, although it did not constitute a publication as to the competing news service, did amount to unfair competition, since one

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38 Rev. Stat. 4948-71, 17 U. S. C. A. No. I (1926).

39 209 U. S. 1,18, 28 S. Ct. 319,323 (1907).

40 Act of March 4, 1909, Chap. 320 No. 1, 35 Stat. at L. 1075, 17 U. S. C. A. No. 1 (1926).

41 Muller 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).

42 Miller v. Taylor, 4 Burr. 2303, 98 Eng. Reprint 201 (1774) ; Borden v. Amalgamated Picture Co. 1 Ch. 386 (1911) ; Am. Tobacco Co. v. Werchmeister, 207 U. S. 284, 28 S. Ct. 72 (1907) ; Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. 2d. 556 (Mass. 1928) ; Univ. Film Co. v. Cooperman, 218 Fed. 577 (C. C. A. 2d. 1914) ; Aronson v. Baker, 43 N. J. Eq. 365, 12 A. 177 (1888) ; Palmer v. DeWitt, 47 N. Y. 532 (1872).

43 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. 35 Stat. 1076 (1909), 17 U. S. C. A. No. 2 (1926).

44 43 N. J. Eq. 365, 12 A. 177 (1888).

45 248 U. S. 215, 235 (1918).

competitor was thereby misappropriating such news as quasi property to the detriment of the creator of the news.[46]

Keeping in mind the common law recognition of a property right in the products of mental labor, we turn to the unique property right had in musical recordings. We find that much of the spirit and purpose of the Copyright Act has been observed by the courts in extending protection to these musical interpretations. The case of *Waring v. WDAS Broadcasting Station* [47] is a notable example. In that case the plaintiff sought to enjoin the defendant station from broadcasting his "recorded performances," on which he had stamped the words "For Home Use Only." Although, the court pointed out, the copyright law did not apply in the case, nevertheless the spirit of the Act was observed in giving protection to the artist Waring on the basis of his having a property right in his recordings. The court held that the interpretative genius of the artist brings forth something novel, and of intellectual and artistic value which will be recognized as a property right. Further such a right is not lost by publication when the records have printed on them: "For home use only." By stamping on the records "For home use only" there was a public dedication only as to the purchasers of records for use on phonographs, and not a dedication to competitors who might profit from them at the expense of the plaintiff. This line of reasoning had been adhered to in *Associated Press v. International News Service* [48] and was relied on in the *Waring case*.[49] It is desirable that the recorded musical interpretation of the artist be given the same protection under the copyright law as is afforded the composer for the unauthorized performances of his musical compositions. By his talents and interpretative ability the performing artist creates something new and unique. Through his interpretative genius he differentiates his work from that of any other performer.[50] His position is analogous to that of the composer who creates some-

46 The case of Fonotipa v. Bradley, 171 Fed. 951 (E. D. N. Y. 1909) held that it was unfair competition to misappropriate the property of the composer of the musical composition in a phonograph record.

47 194 A. 631 (Sup. Ct. of Pa. 1937).

48 248 U. S. 215, 235 (1918).

49 194 A. 631 (Sup. Ct. of Pa. 1937).

50 Nims in his work *Unfair Competition* says: "It has been held that an actor has rights in the characteristic style of acting used by him, and by which he is known to and distinguished by the public."

thing new in writing the musical composition. In a later Waring case, *viz. Waring v. Dunlea* [51] the plaintiff, Waring, was likewise granted an injunction to restrain the defendant's unlicensed broadcasting of plaintiff's orchestra recordings, where the plaintiff had granted permission for their use only for a designated program and the defendant had exceeded such permission. The court held that an orchestra leader has an exclusive property right in his performance of musical numbers in a distinctive style created by him, and has a right to prohibit their unauthorized performance. The results of such artistry of interpretation have a pecuniary worth that deserves to be protected along with other property rights. Such rights, we have pointed out, were protected at common law. The Copyright Act[52] does recognize such a property right in the products of mental labor. Since the performing artist does have a common law right, and if he does not divest himself of such right by publication, he is entitled to a remedy by injunction against the unauthorized presentation of his work.

VI. Copyright Law and the Protection of Ideas and Radio Script

We have considered thus far mainly musical compositions of artists, composers and publishers and the human and mechanical rendition of their works, in so far as the performances thereof may be inconsistent with the rule or spirit of the copyright act. There is, however, in connection with radio yet another property interest that appeals for protection to the Copyright Act, *viz.* the property interest in ideas.

At common law no protection was to be given to the originator of an abstract idea on the ground that there was no property interest therein.[53] The copyright law protects only the author's peculiar expression of ideas, not the ideas themselves. We have noted heretofore that at common law protection was given to the products of mental labor. It is the policy of the courts to veer away from litigation involving ideas, on the ground that ideas are so ephemeral and abstract that the

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53 Hamilton Mfg. Co. v. Tubbs Mfg. Co., 216 Fed. 401 (W. D. Mich. 1908); Haskins v. Ryan, 71 N. J. Eq. 575, 64 A. 436 (1906); Bristol v. The Equitable Assurance Society, 132 N. Y. 264, 30 N. E. 506 (1892).

51 Fed. Supp. 338 (E. D. N. C. 1939).

52 35 Stat. 1076 (1909), 17 U. S. C. A. No. 2 (1926).

courts would be flooded with fictitious and sundry suits on the part of originators of ideas if they were to give ear to their many and facetious allegations of unfair competition and infringement of the Copyright Act. But the concrete expression of ideas may take on a peculiar value. In recent years, however, the expression of ideas has become so tied up with the field of advertising as to give the expression of ideas a property value worthy of protection against misappropriation. Concrete ideas with such value have been defined as the reduction to tangible form of something original and novel, on which the creator's effort and labor were exerted. Such ideas have been protected on the ground that their misappropriation amounted to unfair competition. On the basis of unfair competition [54] protection has been afforded such modern day advertising ideas and slogans as "No thanks, I smoke Chesterfields," appearing in a picture advertisement;[55] "The Beer of the Century";[56] and "A Macy Xmas and a Happy New Year." [57]

Program ideas and radio script may have a peculiar property interest to authorize their protection against unlawful infringement. In *American Broadcasting Co. v. Wahl Co. et al.*[58] the plaintiff was owner of a radio quiz show entitled "Double or Nothing." Plaintiff charged that defendant, who had a similar program entitled "Take it or Leave it," was guilty of infringement of plaintiff's copyright and trademark and also of unfair competition. Plaintiff's motion was dismissed. The court refused to give the plaintiff relief on the ground that there was no evidence that the words "Double or Nothing" or "Take it or Leave it" had become associated in the public mind with the plaintiff as to give him a property interest therein. Because of the highly commercial interest in radio broadcasting today it would seem that the broadcaster should have just as much a property right in his program as the artist in his musical composition.

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54 Unfair competition consists in the palming off of the goods or business of one person as that of another: Neva-Wet Corp. of America v. Never Wet Processing Corp. 277 N. Y. 163, 13 N. E. 2d. 755 (1938).

55 Liggett and Myers Co. v. Meyer, 161 Ind. App. 420, 194 N. E. 206 (1935).

56 Ryan v. Century Brewing Association, 185 Wash. 600, 55 P. 2d. 1053 (1936).

57 Healey v. R H. Macy & Co., 251 App. Div. 440, 297 N. Y. Supp. 163 (1st Dept. 1937).

58 36 F. Supp. 167 (S. D. N. Y. 1940).

Radio script may be the subject of copyright protection. The case of *Uproar v. Nt. Broadcasting Co.*[59] represents the protection given the script of a popular radio comedian. Against the contention of the plaintiff that he had been assigned the right to publish the broadcasts; the defendants, the Texas company sponsoring the show and the National Broadcasting Company, interposed that to do so would violate contract rights which they then had. The comedian Wynn had been hired by the Texas company to put on a half hour show each week. The National Broadcasting Company had contracted with the announcer Graham McNamee for "the exclusive management of his services, trade name or names and productions for all purposes of whatsoever kind and nature." In one of the parts of the script the name "Graham" appeared forty-five times. The court ruled against the right of the plaintiff to broadcast the script in which appeared the name "Graham," as also all script of Wynn while he was the radio star of the Texas company. The court pointed out that the script was prepared by Wynn under his contract with the Texas company, and under such circumstances the production belonged to the employer. And in behalf of the National Broadcasting Company the court observed that the name of "Graham McNamee" had acquired a very substantial intrinsic value, apart from McNamee's services as a radio announcer, for advertising purposes. Hence the name had acquired a particular property right which equity would protect.

VII. The American Society of Composers, Authors and Publishers

To protect the property interest in their musical compositions, recordings and mental creations the authors, composers and publishers who were scattered here and there found that in unity there was strength. Single handed the individual artist could do nothing. The expense alone of seeking redress against an unauthorized performance of an artist's work would preclude the bringing of any action. Under such circumstances the individual is the victim of his own creative genius and can do nothing in a practical way against the misappropriation of his ingenious creations.

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59 8 F. Supp. 358 (D. C. Mass. 1934).

Out of this situation there arose, for the protection of rights under copyright law and their enforcement, the organization known as the American Society of Composers, Authors and Publishers (popularly referred to as A S C A P). Being an unincorporated association organized under the laws of the State of New York for the purpose of licensing performances of copyright music for profit, it is composed of more than a thousand authors, composers and publishers. There was definitely a need for some such organization, so that the music producers and composers of America might present a strong front for the enforcement of their rights under the copyright law. As a recent case pointed out, *viz. Buck v. Harton,*[60] the individual composer previously had no practical means of enforcing the exclusive rights given him under the copyright act, and any litigation that might be involved for the enforcement of such rights would involve too great expense and time to the individual. Now such matters are handled by the association, and an accounting of royalties, etc. is made to the individual members. Likewise the association serves as an agency of the individual authors to deal with those wishing to obtain public performance rights and privileges. In protecting and enforcing the rights of the individual authors, composers and publishers the Society has performed a beneficial and useful service.

When the broadcasters realized the strength of the Society they began to negotiate with them for the use of the copyright compositions. The practical result on the part of the Society is to grant blanket licenses to such broadcasters. The efforts of the Society at organization and control of their copyright works have proven successful and of benefit to the thousand or more members who comprise the association.

CONCLUSION

To conclude this article we may make a brief summation of the material treated. We saw that there was a Constitutional authorization for copyright enactment. It was particularly with Article 1, Section (e) of the Act that we concerned ourselves in the first portion of the material. It was judicially determined from the cases adduced in support thereof that the

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60. F. Supp. 1014 (1940 D. C.).

Copyright Act is applicable to radio broadcasting and that radio broadcasting may be a "public performance for profit" within the meaning of that Act. To that point we dealt only with *human* performances and their application to copyright law. We noted however that much of radio time is taken up with recordings. Although the Copyright Act is not directly applicable to musical recordings; yet the recording artist by his interpretative genius and ability creates something novel and unique, which courts, adopting the spirit of the Copyright Act, have protected against infringement because of the property interest involved. It is analogous to the property interest that in this modern day of radio is attached also to concrete ideas and radio script. It is to the American Society of Authors, Composers and Publishers that much is owed for the recognition of such property right and the application of the Copyright Act to radio broadcasting. It is the united effort of the Society that has brought about to the individual members the recognition of those rights under Copyright law which they were powerless previously to enforce.

This article was born of the interest of the author in radio broadcasting, and with a view to serve soon in some branch of communications of the military forces of our country. Needless to say that that interest has been stimulated and enhanced throughout the writing of this paper. The author feels himself generously rewarded in the satisfaction felt on its final completion and the pleasure experienced in the pursuit of its attainment.

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