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## COPYRIGHT LAW AND THE MODERN DANCE ARRANGEMENT\*

Popular tunes are usually published in sheet form, containing a melody line, the chord-progressions (harmony), and a simple piano adaptation. The work of the modern dance arranger is to so treat this material as to make it playable by the orchestra. Ordinarily he will first write a score,<sup>1</sup> embodying all the instrumental parts in concert key. Then he will transpose the individual parts from this score, providing each musician with a part. When these parts are played by the musicians, together, the orchestra is playing the arrangement. The arranger usually writes for a particular group of musicians, and will adapt the parts to their individual capabilities. If the orchestra has a style, his arrangements will be in that style. Actually, this style is an important identifying feature of the orchestra. It, and the identity of the leader are, in most instances, the only permanent parts of the orchestra. Contrary to popular conception, sidemen change continuously, and a well known orchestra today and the same orchestra a year from now will probably have little in common besides the leader and his library of musical arrangements.

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\*This article received a certificate of award in the Nathan Burkan Memorial Competition of 1947 and is published here with the permission of the American Society of Composers, Authors and Publishers.

<sup>1</sup> Various musical terms which may be unfamiliar to the reader are used in this paper. A brief definition of some of them may be of value.

*Scores:* a master sheet on which the parts of all the instruments in the orchestra are written in the same key.

*Sidemen:* a term used in modern dance orchestra parlance meaning any instrumentalist in the band other than the leader.

*Band or orchestra:* In modern dance music these terms are used interchangeably, the distinction made in classical music and based upon the instrumentation being disregarded.

*Stock arrangements:* These are arrangements published and sold for general use by dance orchestras. They are to be distinguished from *special arrangements*, which are written for one band and are not reproduced for or used by another. Name bands ordinarily have their own arrangers and employ special arrangements exclusively.

The ordinary popular tune is thirty-two bars long. This will amount, on the average, to about one minute of playing time—a period too short to be satisfactory for dancing purposes. For this reason it is necessary for the arranger to so employ the song as to provide a continuous piece of music of three to five minutes playing time. To accomplish this the arranger will include two and a half to four choruses of the song in his arrangement. To avoid monotony and to take advantage of the resources of the orchestra, he will probably present these different choruses in different ways and with different instruments carrying the lead. He will perhaps include a vocal chorus with an instrumental background. Modulations will be necessary to pass from one key to another; a beginning (introduction) and an ending will be provided. In writing for the orchestra, the arranger will not adhere strictly to the melody and phrasing of the original song, but will employ rhythmic and melodic alterations to suit his purpose. In all these respects there is room for originality and musical skill on the part of the arranger. In altering or adding to the original song, he becomes a composer in his own right, and it is for the protection of these contributions that he is awarded the copyright.

Although dance arrangements have not ordinarily been of sufficient economic importance to warrant their exploitation in the past, the growing public recognition of arrangers and the increasing awareness that here is one of the few uniquely American art forms will lead to a corresponding appreciation of dance arrangers as musical creators. This appreciation will undoubtedly lead, in turn, to the greater economic importance of dance arrangements. The final result may well be that the hitherto practically ignored arrangement copyright will become of major importance. This paper discusses some of the fundamentals of arrangement copyright and suggests some already quite practical uses for it.

*Common Law Copyright*—At the common law, the unpublished works of an author or composer were protected

against infringement.<sup>2</sup> The author was said to have a property right in his own creation until he dedicated it to the public or abandoned it. This common law protection is still available to unpublished works and is the author's only safeguard for works which are not yet copyrighted. The question of what constitutes publication so as to amount to an abandonment of the composer's rights in the composition is still a troublesome one, in some respects. It is well settled that public performance of a musical composition is not abandonment,<sup>3</sup> but that publication of the manuscript is a dedication to the public and deprives the composer of his property right in the composition.<sup>4</sup> While it is not the purpose of this paper to discuss fully the problem of publication, certain problems raised by a recent series of cases involving orchestra leaders and "the distinctive styles created by them"<sup>5</sup> are definitely of interest as affecting arrangements.

In *Waring v. WDAS* <sup>6</sup> *Broadcasting Station*, a case of first impression, the question whether an orchestra leader had the power to limit the use of his recordings was raised. Fred Waring and His Pennsylvanians had recorded two popular tunes with the Victor Talking Machine Company. A label placed upon the records read "Not Licensed for Radio Broadcasting". The defendant radio station purchased these records and used them in a broadcast. The copyright owner of the songs had given the Victor Talking Machine Company license to record the songs but not for public performance for profit. The defendant, however, obtained a license to broadcast these songs from the American Society of Composers, Authors and Publishers, to whom the publishers had assigned the exclusive right of public performance under the copyright. As a result, the publishers were barred from any

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<sup>2</sup> *McCarthy v. White*, 259 F. 364 (1919).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Waring v. Dunlea*, 26 F. Supp. 338 (D. C. E. D. N. C. 1939).

<sup>6</sup> 327 Pa. 433, 194 A. 631 (1937).

attack upon defendant. Waring, however, brought suit to enjoin defendant from broadcasting the records and succeeded. In an opinion by Justice Stern of the Supreme Court of Pennsylvania the injunction was granted on two grounds: an enforceable property right in the artistic interpretation, and unfair competition. The opinion deserves study and consideration, if only for the force with which it brings home to us the need of specially qualified judges in musical copyright cases.

The opinion begins with the false premise that an orchestra such as Waring's lends to a composition the same artistic type of interpretation as would a classical musician to a solo.<sup>7</sup> As we have attempted to point out in the introduction to this paper, this is not true. The two are completely foreign and are not subject to parallel consideration. Except for solos in the dance arrangement, which are the artistic efforts of the soloist, not the orchestra, any artistic interpretation must be attributed, not to the orchestra, but to the arranger. Seen in this light, the court's comparison of Waring's arrangements and Paderewski's interpretations of piano compositions is unfortunate.<sup>8</sup>

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7 "A number of witnesses, themselves of fame in the musical world, testified, and the learned chancellor found, that 'Waring's Pennsylvanians' were nationally and even internationally acclaimed as unique in their artistry. Indeed as already stated, the fact that they receive from the Ford Motor Company, \$13,500 for a radio performance is striking testimony to the effect." . . . While the major part of the credit for the work of the orchestra is probably due to plaintiff as conductor . . ." The hopeless mass of misconceptions contained in Justice Stern's opinion is aptly illustrated by the above quotations.

8 "Does the performer's interpretation of a musical composition constitute a product of such novel and artistic creation as to invest him with a property right therein? It may be said that the ordinary musician does nothing more than render articulate the silent composition of the author. But it must be clear that such actors as David Garrick, Mrs. Siddons, Rachel, Booth, Coquelin, Sarah Bernhardt, and Sir Henry Irving, or such vocal and instrumental artists as Jenny Lind, Melba, Caruso, Paderewski, Kreisler and Toscanini, by their interpretations, definitely added something to the works of authors and composers which not only gained for themselves enduring fame but enabled them to enjoy financial rewards from the public in recognition of their unique genius; indeed, the large compensation frequently paid to such artists is testimony in itself of the distinctive and creative nature of their performance."

The court then proceeds to the statement that such property rights (rights of performer in his artistic interpretation) are not the subject of protection under our copyright laws.<sup>9</sup> As to Paderewski's renditions this is true, but as to Waring's arrangements it is false. Such arrangements are copyrightable under our statutes, as will be shown in a succeeding part of this paper.

Having already convinced itself that Waring had a property right in his orchestra's renditions, and that there was no adequate protection for this right under existing copyright laws, both of which statements are incorrect, the court then considers whether this right has been abandoned by such a publication as would, under the general American doctrine, terminate that right. In other words, for the first time in any court, the question is posed as to whether or not recording an uncopyrighted work for public sale and distribution is publication. Though the question was posed, it was never answered. The court preferred to say, in effect, that this did not matter; that whether or not such a recording amounted to publication was not the question. The court preferred to adopt the reasoning that even if recording was a publication, the affixing of the warning, "Not Licensed for Radio Broadcasting" was, in effect, a condition attached to the publication. The final effect being that Waring's records, even though published, were published with an accompanying condition which could validly limit the effect of the publication. This was the first instance of a conditional publication in the law of copyrights. The court, in discussing the possibility of construing the warning on the record as a valid limi-

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<sup>9</sup> "The property rights claimed by plaintiff are admittedly not the subject of protection under existing copyright laws. The act . . . enumerates the various literary and artistic productions which may be copyrighted . . . The creator of such a work may protect his property rights therein, but the statute does not recognize any right of a performing artist in his interpretive rendition of a musical composition, or in the acting of a play, composed by another. It is to the common law, therefore, that the performer must turn, and the question arises whether an actor or musician has any property rights at common law in his performance."

tation on the publication, admitted that this had never been done before but gave as its excuse the reasoning that such limitations had always been held invalid before as against public policy.<sup>10</sup> Here, according to this court, no public policy would be violated by allowing the condition to be effective and for that reason there was no objection to its effectiveness. Thus, the court finally held that Waring had a property right in his phonograph recordings; that this property right was not the subject of statutory protection under the copyright laws; and that the publication of an uncopyrighted work could be so limited as to put the work into the public domain except for a certain class of the public—in this case radio broadcasters.

Throughout its opinion the court is preoccupied with the proposition that Waring was without any form of legal protection; a situation which it felt called upon to correct. If the court had been informed by someone with enough knowledge of music to recognize the difference between an artistic interpretation and an arrangement such an error could have been avoided. It is true that there is no protection for the artistic interpretation, but that is not the question under consideration here. What was really at issue in this case was whether or not Waring's arrangements, as distinguished from artistic interpretations, were published by being recorded. Such arrangements are certainly copyrightable under our statutes—a procedure which affords them ample protection. The opinion might have been more satisfactorily received also if it had squarely answered the question of whether or not recording on phonograph records for public use was a

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<sup>10</sup> "In the present case it is clear that the restriction affixed to the records 'Not Licensed for Radio Broadcast' was not unreasonable, nor did it operate in restraint of trade. It was intended to effect a legitimate purpose; indeed, unless such a restriction can be imposed and enforced, it will be impossible for distinguished musicians to commit their renditions to phonograph records—except probably for a prohibitive financial compensation—without subjecting themselves to the disadvantages and losses which they would inevitably suffer from the use of the records for broadcasting. Such a restriction, therefore, works for the encouragement of art and artists."

publication, instead of conjuring up the idea of a limited publication to further obscure an already dim legal principle. That part of the opinion which held that the injunction would also be awarded on the ground of unfair competition is not within the scope of this paper.

*Waring v. Dunles*<sup>11</sup> presents a slightly different situation. Here Waring made an electrical transcription of a broadcast program which was supplied to certain network stations to be broadcast as a network program. It was not offered for sale to the public and was intended to be used on a single broadcast by licensed stations on a program known as the Ford Motor Program. A notice of such restrictions appeared on the transcription. Respondent, who was not even one of the licensed distributees of the transcription, used part of it in one of his broadcasts. Waring brought this suit in equity for an injunction restraining respondent from further violations of these restrictions. In his opinion, Judge Meekins adopted, practically in toto, the views of the Pennsylvania Supreme Court in *Waring v. WDAS*, including those which were incorrect. The court speaks again of "artistic interpretations" and limited publications. Logical and harmless as it might seem to allow the concept of a limited publication to control in this case, it must be remembered that the result of allowing it to apply in the case of transcriptions of the nature involved in the instant case will necessitate another rule of law (actually a standard, not a rule) defining the allowable extent of limitation. Another reason for disallowing the suit is that Waring could have protected these transcriptions in at least two ways, if he had merely taken the necessary simple steps of copyrighting the arrangements used or distributing the transcriptions under covenant with the broadcaster not to use for any purpose other than the one intended. These cases, as we have attempted to show, achieve this final result. They conjure up a new legal con-

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<sup>11</sup> 26 F. Supp. 338 (D. C. E. D. N. C. 1939).

cept, the limited publication; to correct a misconception, they consider the artistic interpretation of the orchestra leader; and for the reason that no remedy exists at law, which is not correct.

Although this is the law in two jurisdictions, it has fortunately not been accepted elsewhere. A similar case, *RCA Manufacturing Company v. Whiteman*,<sup>12</sup> arose in the Federal courts in 1940. The Federal District Court for the Southern District of New York adopted the views of the Pennsylvania court in *Waring v. WDAS* and granted an injunction on the grounds of property right in the performer's artistic interpretation and unfair competition. On review, the Circuit Court of Appeals, Second Circuit, in an opinion by Justice Learned Hand, reversed the decision on both grounds and expressly rejected the theories advanced in the Pennsylvania case. Here the court held that recording a popular song for public sale and use was publication. In discarding the idea of a limited publication it was stated, "Restrictions upon the uses of chattels once absolutely sold are at least prima face invalid; they must be justified for some exceptional reason, normally they are repugnant to the transfer of title". Even here, however, the distinction between an artistic interpretation and an arrangement is not made. As a result, an easy disposition of the case on well settled principles is made impossible and the court must deal with standards instead of rules. The point is this: arrangements of songs can be copyrighted. None of the cases just discussed ever mention arrangements; instead they begin with the presumption that the orchestra leader has no statutory protection. In the *Waring* cases the court attempted to supply such protection, but in the *Whiteman* case such judicial legislation was refused. If, in either case, the fact that the orchestra leader could have provided ample protection for himself and at the same time validly limited the use of

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<sup>12</sup> 114 F. 2d 86 (C. C. A. 2d 1940); reversing 28 F. Supp. 787.

his records if he had merely thought to copyright the arrangements had been mentioned, considerable unnecessary material in these opinions could have been omitted. We shall further discuss this point in a succeeding section of this paper entitled "Utility of Copyrighted Arrangements."

*Statutory Copyright*—An arrangement is entitled to statutory copyright under the laws of the United States,<sup>13</sup> under certain conditions. If the song to be arranged is copyrighted, the arranger must have the consent of the copyright owner to use his song in the arrangement. If the song is a work in the public domain, there is no restriction on its use.<sup>14</sup> In either case, to be entitled to copyright, the arrangement must contain some original material.

*Consent of the Copyright Holder*—Section 1, subsection (e) of the copyright act<sup>15</sup> gives the holder of the copyright on a musical work the exclusive right to make an arrangement. The arranger must, therefore, have the copyright owner's permission to use his song in an arrangement or the arrangement will infringe upon the song writer's rights. Usually this permission is easily obtained, since the song writer will benefit from the publicity his song receives upon being played by a dance orchestra in public and will retain his rights in public performance for profit of the composition.

*Works in the Public Domain*—Since works in the public domain are not the subject of copyright, no use of them for arrangements can be an infringement of anyone's right, unless the arrangement is so similar to a previous copyrighted arrangement as to be a plagiarism of it. Some such cases of piracy of arrangements have occurred. In *Schuberth v. Shaw*<sup>16</sup> Schuberth had made an arrangement of a Waldteufel

<sup>13</sup> Copyright Act of March 4, 1909, § 6; 17 U. S. C. A. § 44.

<sup>14</sup> *Aronson v. Fleckenstein*, 28 F. 75 (C. C. N. D. Ill., 1886); *Hoffman v. Le Traunik*, 209 F. 375 (D. C. N. D. N. Y. 1913); *Carte v. Evans* 27 F. 861 (C. C. D. Mass. 1886).

<sup>15</sup> 17 U. S. C. A. 44.

<sup>16</sup> Fed. Cas. No. 12,482 (C. C. E. D. PA. 1879).

waltz suite and copyrighted it. Shaw made a close copy of this arrangement and answered Schubert's suit for infringement by saying that his (Schubert's) arrangement was not an original composition. The court answered, "Labor bestowed on the production of another is enough to constitute a claim to copyright, and it is not necessary that complainant be the sole creator of the work for which protection is claimed." Likewise in *Cooper v. James*<sup>17</sup> the court protected a collection of hymns arranged for bass, tenor and soprano against a substantial copy, the only alteration being the addition of an alto part. But if the alleged infringer can show that the offended arrangement was not entitled to copyright, a subsequent copying is not unlawful.<sup>18</sup>

*Originality*—In order that an arrangement may be entitled to copyright, it must be more than a mere copy. It is impossible to state exactly what degree of originality is required of the arranger, as the courts themselves are at variance on this subject, and have proposed many varieties of originality requirements. At one extreme is the statement that any new, original plan, arrangement or combination of materials will entitle the author to copyright, unless it be directly copied or evasively imitated from another work.<sup>19</sup> At the other extreme is a more recent case,<sup>20</sup> which held that the same test should apply in arrangements as in patents: that the work must indicate an exercise of inventive genius as distinguished from mere mechanical skill or change. These are the extremes; between them we find many degrees of originality required. A transposition of a foreign song, heretofore unknown in this country, and not copyrighted, is not properly the subject of copyright. In *Jollie v. Jacques*<sup>21</sup> the

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<sup>17</sup> 213 F. 871 (D. C. N. D. Ga. 1914).

<sup>18</sup> *Jollie v. Jacques*, Fed. Cas. No. 7437 (C. C. S. D. N. Y. 1850).

<sup>19</sup> *Emerson v. Davies*, Fed. Cas. No. 4,436 (C. C. D. Mass. 1845).

<sup>20</sup> *Arnstein v. Edward B. Marks Music Corporation*, 11 F. Supp. 535 (D. C. S. D. N. Y. 1935).

<sup>21</sup> Fed. Cas. No. 7437 (C. C. S. D. N. Y. 1850).

court inferred that the mere fact that a song, the "Roschen Polka", was introduced into this country by the arranger would not entitle him to a copyright on his arrangement unless his version was original, and not merely a copy with minor variations. The question of whether the transposition of this polka for clarinet would involve sufficient originality to entitle it to copyright protection was not decided, but it was inferred that it would not.

In *Cooper v. James*<sup>22</sup> the mere addition to a book of hymns arranged for tenor, bass and soprano of an alto part was not considered to be such a new and original work as to entitle the arranger to copyright protection.

Copying a part of a copyrighted work, or assembling several copyrighted songs in a collection is not, in itself, such an expression of originality as to amount to a copyrightable arrangement.<sup>23</sup> On the other hand, in discussing an operatic libretto one court held "It is not necessary that a dramatic work should be entirely original, or original in anything except its arrangement or construction, to make it the proper subject of private ownership (common law copyright)."<sup>24</sup>

An arrangement of the orchestral score of an opera for piano is an original composition within the meaning of the copyright law.<sup>25</sup> One court has gone so far as to say that the composition of the piano score from the original operatic score requires musical skill, if not invention, equal to that

<sup>22</sup> 213 F. 871 (D. C. N. D. Ga. 1914).

<sup>23</sup> *Atwill v. Ferrett*, Fed. Cas. No. 640 (C. C. S. D. N. Y. 1846); *Reed v. Carusi* Fed. Cas. No. 11,642 (C. C. D. Md. 1855).

<sup>24</sup> *Aronson v. Baker*, 43 N. J. Eq. (16 Stew.) 365, 12 A. 177 (1887). Other statements of the originality requirements include the following from *Jollie v. Jacques*, op cit. f. n. 18; "The musical composition contemplated by the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with ordinary experience and skill might readily make." *Atwill v. Ferrett*, op. cit. fn. 23: "An author must produce an arrangement or compilation new in itself—he may arrange or compile a new production from materials before known, or obtained for him by the labor of others, but he cannot obtain a copyright for these materials in the same state in which they were furnished to him."

<sup>25</sup> *Carte v. Evans*, 27 F. 861 (C. C. D. Mass. 1886).

required for the writing of the original opera.<sup>26</sup> This, of course, is not true. Schafter, in his book on musical copyright<sup>27</sup> says that this is the most difficult type of arranging. Such statements are misleading. Transferring the composer's intentions from the grand sweep of an orchestra to the limited scope of the piano is simply a mechanical process of simplification, and involves very little, if any, originality. The reverse process, that of making an orchestral score from a piano arrangement, is by far the most difficult and musically creative task. This is the work of the modern dance arranger. He begins with an arrangement for one instrument, with one tone, and passes to the orchestra, consisting of many instruments, with many varieties of tone and with infinite possibilities for phrasing and effect. Such work involves originality, by its very nature. The choice of instruments, voicing of chords, composition of backgrounds, introductions, modulations, and the addition of variations in rhythm and melody are all fields for the arranger's creative effort.

An adequate discussion of the proper tests of originality for copyrighting arrangements would occupy more space than the problem deserves. In the popular music field there is little possibility that a dance arrangement will fail to prove amply original and unique. This is so because of the special character of the music concerned and the demands of orchestra leaders for arrangements containing new, original ideas. If the arrangement is so stereotyped as to show a lack of the inventive genius necessary to qualify it for copyright there is little chance of its having enough value to warrant use of infringement.

This brings up the interesting question of what, in the arrangement, is copyrighted. Is it the whole arrangement, or is

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<sup>26</sup> *Wood v. Boosey*, L. R. 2 Q. B. 340 ( ); *aff'd* L. R. 3 Q. B. 223.

<sup>27</sup> *SCHAFER, MUSICAL COPYRIGHT*, p. 77 (2d ed. 1939).

it merely that part of the arrangement which the arranger has contributed? Section 3 of the Copyright Act <sup>28</sup> says:

The copyright provided by this act shall protect all the copyrightable components of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright.

This would seem to indicate that the copyright on an arrangement would extend to the whole work, and not merely to the arranger's contribution. The cases are at variance on this subject. In a case involving books, the court raised this distinction:

It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright so obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work.<sup>29</sup>

Other cases have, at least impliedly, held exactly the opposite.

In the interesting case of *Edmonds v. Stern* <sup>30</sup> the court held that the originally copyrighted song and a copyrighted arrangement thereof were entirely distinct and separate. Edmonds wrote the song and copyrighted it, later transferring the copyright to Stern. Stern then had an arrangement of the song made, in the form of an orchestral score, which was also copyrighted. Later Stern transferred the copyright on the original song back to Edmonds, but retained the copyrighted arrangement and continued to sell it. Edmonds brought this action, maintaining that Stern's arrangement was an infringement upon his copyright in the song. The court ruled that this was not an infringement, but had to say, in order to support this conclusion, that the original song and the copyrighted arrangement were separate and independent compositions, or, to put it differently, that the copy-

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<sup>28</sup> 17 U. S. C. A.

<sup>29</sup> *American Code Co. v. Bensinger*, 282 F. 829 (C. C. A. 2d 1932).

<sup>30</sup> 248 F. 897 (C. C. A. 2d 1918).

right on the arrangement extended to the whole arrangement, and not merely to the original parts introduced by the arranger.

In the same manner, in *Carte v. Evans*<sup>31</sup> the court held that the piano arrangement of an orchestral score was substantially a new and distinct composition. Actually, this is not true in most cases, and it seems much more logical to limit copyright protection of an arrangement to the part which is original with the arranger. If the other view is pursued, an infringer upon the original song would be liable to suit, both by the song writer and the arranger. A sounder approach would seem to be to estop the song writer from suing because of his prior consent to the arrangement. Of course, if the arrangement was made without first obtaining this consent, the question would not arise.

*The Utility of Arrangement Copyright*—Granting that modern dance arrangements are properly the subject of copyright protection, the question arises as to what utility is served by copyrighting such arrangements. Two rights granted by the statute to the arranger can be thus protected. One is the right to prevent or recover for plagiarism or copying. The other is the right to protect against the unauthorized public performance of the arrangement for profit.<sup>32</sup>

Since dance arrangements are not ordinarily published, and are usually found only in manuscript form, statutory copyright could not possibly afford any additional protection against copying or otherwise plagiarising. The common law rights of the arranger will give him ample protection in his unpublished work. In the case of stock arrangements, which are published for general use by dance orchestras, statutory copyright is necessary, however, if the arrangement is to be protected, since the common law rights end upon publication.

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<sup>31</sup> 27 F. 861 (C. C. D. Mass. 1886).

<sup>32</sup> *Remick Music Corporation v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. C. D. Neb. 1944).

The value of the copyright holder's right solely to perform his composition publicly for profit may be aptly shown by examining a series of cases arising in the 1880's. At that time there were, apparently, no treaty arrangements whereby a foreign composer could prevent the public performance for profit of his compositions in this country. In *Thomas v. Lennon*,<sup>33</sup> the first of these cases, the court realized the injustice of the situation and protected the composer against unauthorized public performance of his composition. The court adopted the reasoning that a book could not publish what it did not contain, and that the orchestration made from the published piano and vocal score was an infringement. In the "*Iolanthe*" case<sup>34</sup> the court, in a similar situation, held that such an orchestration was not an infringement and refused to enjoin performance of the unofficial score. The defendant was ordered, however, to include in his advertising the information that his was not the original score of the opera. Finally, in the "*Mikado*" case<sup>35</sup> the court refused to enjoin performance of the unauthorized score and further refused to compel the defendant to advertise that his was not the composer's score. As long as he did not advertise his orchestration as that of Gilbert and Sullivan, he was safe in using the score and the dedicated vocal parts and libretto. Of course, the person damaged in these cases was not the composer, but the impresario who had purchased the

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<sup>33</sup> 14 F. 849 (C. C. D. Mass. 1883). A book containing the words and vocal score of Gounod's "Redemption" together with a piano accompaniment with references in the margin as to the instrumentation was dedicated to the public. Defendant prepared a score based on the published work. Plaintiff, the authorized holder of performing rights, sought to restrain its use.

<sup>34</sup> *Carte v. Ford*, 15 F. 439 (C. C. D. Md. 1883). Gilbert and Sullivan published a book containing the vocal score of "Iolanthe", together with a piano accompaniment. The defendant paid John Philip Sousa to make an independent orchestration based on the piano accompaniment. This suit was brought to restrain use of this unauthorized arrangement.

<sup>35</sup> *Carte v. Duff*, 25 F. 183 (C. C. D. N. Y. 1885). Gilbert and Sullivan published the vocal score and libretto of *The Mikado* and had a United States citizen prepare a pianoforte arrangement of the orchestral score, which he copyrighted. The defendant, by using the piano arrangement made an orchestral score from it and formed his own troupe to compete with the authorized company.

rights to performance for profit of the works in this country. Regardless of who was hurt, however, the injustice is clear. The right to recover for plagiarism or copying is of little value when it is not accompanied by the sole right to public performance for profit of a musical work. Here the thing sought to be protected was the orchestration (arrangement) provided by the original composer.

It is well settled that a radio broadcast is a public performance for profit.<sup>36</sup> If a broadcaster airs a copyrighted song without first obtaining permission of the owner of the performing rights he is guilty of infringement of the copyright. That the alleged infringing performance was of a phonograph record instead of a live performance made no difference; the song has still been publicly performed for profit.<sup>37</sup> An arrangement is entitled to the same protection as an original composition under our copyright laws,<sup>38</sup> and therefore it follows that the unlicensed broadcast of a copyrighted arrangement, whether by a live orchestra or *by a recording*, is an infringement of the arranger's copyright. The procedure is simple. If the arranger wishes to limit the use of phonograph records of his arrangement he needs merely to have that arrangement copyrighted. Then he may, in licensing the use of recordings using his arrangement, limit their use to whatever extent he wishes. As a practical matter, of course, the arranger will not be concerned with such

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<sup>36</sup> *Jerome H. Remick & Co. v. American Automobile Accessories Co.* 5 F. 2d 411 (C. C. A. 6th, 1925). The extent to which the courts protect the rights to public performance for profit is strikingly shown in the case of *Society of European Stage Authors and Composers v. New York Hotel Statler Co.*, 19 F. Supp. 1 (D. C. S. D. N. Y. 1937). Here a radio station broadcasted copyrighted musical compositions with consent of plaintiff, holder of the performing rights. Defendant hotel maintained two master receiving sets connected with the hotel bedrooms so that the guest could turn on his speaker and select either of two programs. The court held that the hotel was publicly performing for profit these musical compositions. For a similar holding see *Buck v. Jewell-LaSalle Realty Co.* 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971, 76 A. L. R. 1266 (1931).

<sup>37</sup> *Associated Music Publishers, Inc. v. Debbs Memorial Radio Fund, Inc.* 46 F. Supp. 829, Aff'd. 141 F. (2d) 852 (1942).

<sup>38</sup> Copyright Act of 1909, 17 U. S. C. A.

things but will sell the arrangement to the orchestra leader, who will copyright it and then have a most effective means of control over the use of his recordings, at least in so far as radio broadcasts are concerned.<sup>39</sup> This enables an orchestra leader to avoid radio competition with his own recordings or to charge a profitable license fee for the privilege of broadcasting them. Another advantage is that the courts will no longer feel compelled to extemporize with such meaningless expressions as "protection of the performing artist in his interpretive rendition" in discussing popular orchestra leaders.

Now let us rediscuss the *Waring*<sup>40</sup> and the *Whiteman*<sup>41</sup> cases. If the courts had recognized that the thing sought to be protected was an arrangement, not an "artistic interpretation," then they would not have been misled into believing that there was no statutory protection for the orchestra leaders. They could, on the other hand, have pointed out to them that such statutory rights existed and that their present lack of legal remedy was due to their previous lack of diligence in taking the measures provided by law for their protection. The injunctions sought could well have been refused without any fear by the courts that justice had not been done. The idea of a limited publication need not have been raised. The court could have pointed out to the orchestra leaders the simplicity and certainty of this process for protecting their recordings against unauthorized uses. The ultimate result could have been that a new and uncertain problem in the law was solved in terms of rules instead of hazy standards. On the contrary, the result reached through the faulty reasoning and lack of specialized musical

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<sup>39</sup> *Protection of the Performing Artist's "Interpretative Rendition" through the Arranger's Copyright*. 37 Ill. L. Rev. 245 (1942-43).

<sup>40</sup> *Waring v. WDAS*, 327 Pa. 433, 194 A. 631 (1937); *Waring v. Dunlea*, 26 F. Supp. 338 (D. C. E. D. N. C. 1939).

<sup>41</sup> *RCA Manufacturing Co. v. Whiteman*, 114 F. (2d) 86 (C. C. A. 2d 1940) reversing 28 F. Supp. 787.

knowledge of the courts has led to wrong conclusions and uncertain principles.

*Practice*—Here is an unexplored field. In general the relations between arranger and orchestra leader or arranger and publisher are most casual. Ordinarily the arranger will submit an arrangement for approval or disapproval. If it is approved and used, the arranger will be paid a price for his work and will promptly lose interest in any further developments. If the arrangement is uncommonly successful he may momentarily chide himself for selling it so cheaply. Likewise, the orchestra leader, when making a recording, may do so under a simple royalty agreement whereby he receives a certain percentage of the record sales. He will not, however, receive any income from the public performance of this record for profit by broadcasting stations.

To help illustrate our point let us discuss the practice as to popular songs. The song writer may be a member of the American Society of Composers, Authors and Publishers, or he may sell the song to a publisher who is a member.

This society is a unique organization which “. . . is engaged solely in issuing licenses for the non-dramatic public performance for profit of the musical compositions of its members, and distributes to them the net fees it collects from its licenses. Its licensees consist principally of the owners of hotels, cabarets, radio stations, motion picture theaters and other places of amusement. Its work has grown from a modest beginning in 1914 to a state where it now collects several million dollars annually in fees from its licensees.”<sup>42</sup>

Its purposes are more formally set out in the Articles of Association.<sup>43</sup> The fees collected from licensed public performances are then distributed to members of the Society on the basis of use of the members' compositions in the various

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<sup>42</sup> Broadcast Music, Inc. and Edward B. Marks Music Corporation v. American Society of Composers, Authors and Publishers, 55 NYS 94 (1945).

<sup>43</sup> ARTICLES OF ASSOCIATION OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Article 1 (objects):

places of public amusement. Night clubs ordinarily pay a flat periodic fee for a blanket license to publicly perform compositions of members of the Society. This license also includes permission to use copyrighted arrangements.<sup>44</sup> The license fee paid by broadcasting stations is based upon actual logged use by the station. The great importance of these functions of the Society to its members will be appreciated when the impossibility of detection of infringements and collection of fees by the individual author, composer or publisher is considered.

Orchestra leaders are not ordinarily members of the Society, nor are arrangers.<sup>45</sup> It is suggested that the inclusion of these persons as members would operate to the benefit of all. Such prolific "stock" arrangers as Johnny Warrington,

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Section 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers" for the following purposes, to-wit:

(a) To protect composers, authors and publishers of musical works against piracies of any kind;

(b) To promote reforms in the law respecting literary property;

(c) To procure uniformity and certainty in the law respecting literary property in all countries;

(d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;

(e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;

(f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;

(g) To grant licenses and collect royalties for the public performance of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;

(h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings involving the right of public performance of any work of any member, or the question of authorship in any work of any member;

(i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;

(j) To etc.

(k) To etc.

(l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

<sup>44</sup> Communication from Mr. Herman Finkelstein, Resident Counsel of The American Society of Composers, Authors and Publishers.

<sup>45</sup> *Ibid.*

Paul Weirich and Jack Mason may honestly claim a most extensive use of their arrangements in places of public entertainment. Orchestra leaders, as members, could protect themselves against damaging competition with their own recordings by employing the facilities of the Society to license the public performance of their copyrighted arrangements, as suggested in the section on utility of arrangement copyright, *supra*. This broadening of its activities would increase the Society's usefulness to the music profession and help it more completely to fulfill some of its declared objects.<sup>46</sup>

The public is daily growing more aware of the function and importance of the arranger. The average well-informed person of today has at least heard of Eddie Sauter, Fletcher Henderson, George Handy or Sy Oliver. The time may yet come when some of the popular acclaim now accorded band leaders will be directed toward the usually more deserving arranger. At such time the law of arrangement copyright may become an important field of law.

*John H. Merryman*

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<sup>46</sup> Attention should be called to the highly effective activities of The American Federation of Musicians in promoting the cause of its members and protecting them from exploitation by the radio interests.