THE LAW
of
RADIO BROADCASTING

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§ 334. Generally.

The use of broadcasting as an advertising medium is a specialized branch of advertising. The preparation of advertising copy, the analysis of actual and potential markets, the design and lay-out of advertisements stimulating interest in products and services, and the myriad of other duties necessarily concomitant with the release of advertising matter in all media, establish beyond doubt the professional independence and recognized specialization of advertising agencies. A trained service is offered to advertisers by advertising agencies, who assume responsibility to a greater or lesser degree for the quality and success of advertising campaigns. Compensation for such service is generally fixed and directly dependent upon the extent of the sales promotion budget of the advertiser.

The advertising agency has made a gradual evolution in the advertising field. Even before the advent of radio broadcasting, the professional activities of the advertising agency brought about a skilled use and consequent development of such various advertising media as newspapers, periodicals, billboards, dealer displays, package inserts, etc. By reason of its background, it was quite natural for the advertising agency to assume the important role it now plays in the radio broadcast advertising medium.


Just as in any other medium in which the agency assumes the responsibility for advertising campaigns, the agency is the recognized liaison between the advertiser and all other persons connected with a commercial broadcast program. Among such persons are included the broadcast station personnel, program producers, performing artists, musicians, announcers and script writers.

1 A statement of the scope and functions of the modern advertising agency is found in the list of Agency Service Standards, adopted by the American Association of Advertising Agencies in 1918. Reprinted in Haase, Advertising Agency Compensation (1934) 13.

2 Cf. Haase, op. cit. supra n. 1, 29.
Executives of advertising agencies are trained to comprehend the complexities of broadcasting as an advertising medium. It is generally accepted that a new technique is essential for the dissemination of advertisements by way of broadcast programs. This new branch of the advertising business differs widely from the use of other media. The writing of "copy" is now designed for the ear, rather than the eye. A "lay-out" now rests upon a different structure, prepared to create a new appeal to the buying public whose habits have become changed by the influences of radio broadcasts and the program content thereof.

In the preparation and presentation of commercial broadcast programs, advertising agencies necessarily require assistance from such previously established fields of entertainment as the theatre and motion pictures. Commercial broadcast programs, however, have not yet uniformly developed new techniques and forms, with the result that many well-worn public stimuli, previously utilized in other media, have found their way into commercial announcements of broadcast programs.

§ 336. Function of the Agency.

An advertising agency serves as the direct representative of the advertiser whose market is designed to be enhanced by a broadcast program. The agency frequently acts not only as the liaison officer of its client, but also as the direct producer of the program sponsored by the client. In this chapter, attention will be addressed solely to the function of the advertising agency as the representative of its client, rather than as the producer of the program. Consideration will be given to the rights and liabilities which exist between the client and the advertising agency and the nature of their relation at law.

Where the advertising agency acts as the direct producer of a broadcast program, the rules governing producers are applicable. See Chapters XXII., XXIII., XXIV. and XXV. infra.
§ 337. Whether the Advertising Agency Is an Agent at Law Is a Question of Fact.

The common use of the word "agency" in the advertising business is misleading and perhaps unfortunate, because of the technical significance of the word "agency" as a matter of law. The legal status of the relation between the agency and the client depends entirely upon the facts giving rise to the representation. Undoubtedly, in numerous cases, advertising agencies are not agents of their clients, but independent contractors.\(^4\) It cannot be stated as a general rule that the relationship between the client and the agency is one of Principal and Agent. The question is purely one of fact, even though the evidence may be such as to make it unnecessary to submit it to a jury.\(^5\)

Agency is defined as the legal relation which results from the manifestation of consent by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act.\(^6\)

§ 338. Advertising Agencies Do Not Act as Brokers.

The acts of an advertising agency cannot ordinarily be construed as the acts of a broker. A broker is one whose occupation is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce or navigation.\(^7\) There is no precise line of demarcation between an agent and a broker.\(^8\) Whatever distinction may be made is usually important only where a statute is involved. It may be stated that a broker generally holds himself out for employment in matters of trade, commerce or navigation.\(^9\) The business of a broker is the business or calling of acting or offering to act for another.\(^10\)

\(^4\) See § 348 infra.


\(^6\) RESTATEMENT, AGENCY (1933) § 1.

\(^7\) II. MECHEM ON AGENCY (1923) § 2362.


\(^9\) II. MECHEM, op. cit. supra n. 7, § 2362.

ordinarily receives a fee or commission as compensation. The broker always makes his contracts in the name of the employer, whereas a factor does not.\(^1\) It is to be noted that brokers and factors are agents, but not all agents are brokers and factors. It is within this wider category of agency that the advertising agency belongs in its relation to the client.


The advertising agency is an expert in its work or holds itself out to be such. The client ordinarily engages an advertising agency in order to obtain for himself the benefits of the agency's skill, experience and knowledge so as to reap the fruits of the performance by the agency of its undertaking. The advertiser rightfully expects that the agency will further the interests of the client to the best of its ability and powers. If the agency seeks to serve itself or some person other than the advertiser, the purposes of the employment are naturally defeated.

Prior to its actual engagement by the client, the agency in making suggestions for a prospective advertising campaign is ordinarily an independent contractor. The agency acts in a mere advisory capacity and owes no duty beyond that of giving honest advice to the advertiser. The latter is interested in obtaining a result and usually has no control or concern over the means and manner by which the agency formulates the resultant advice. Until a definitive relation is established, the agency is in no sense a legal agent of the advertiser.

It has been held that where an agency submitted a scheme and lay-out at the request of the client, who rejected it but subsequently utilized part of the plan offered by the agency, the client was liable to compensate the agency as for services rendered or conversely, for a benefit received.\(^2\)

Upon its engagement by the sponsor to plan and execute

\(^{11}\) II. Mecham, op. cit. supra 185 Wash. 600, 55 P.(2d) 1053 n. 7, § 2362. \(1936\).

\(^{12}\) Ryan v. Century Brew. Assn.,
an advertising campaign, the agency usually functions as an agent. It acts for and represents the client in dealings with the broadcast station, the program producer, the artists and all other persons concerned in the program sponsored by the client. The advertising agency ordinarily may create, modify, accept the performance of, or end the contractual obligations between the program sponsor and third parties. In view of these qualifications, the advertising agency has the legal characteristics of an agent.\textsuperscript{13}

For example, the advertising agency enters into contracts for the purchase of "time" or other use of a station's facilities for broadcasts on behalf of the client. In doing so, it utilizes its experience and knowledge as an expert to select the most suitable stations and broadcast time to obtain maximum coverage and to secure the best results from the program for the benefit of the sponsor. In making such a facilities contract, it is apparent that the agency is not acting for itself.\textsuperscript{13a} It has no direct interest in the transaction, except that its engagement may be continued.

In 1933, the National Association of Broadcasters in cooperation with the American Association of Advertising Agencies formulated certain standard conditions governing contracts and orders for spot broadcasting in which their respective members were concerned. Under these

\textsuperscript{13}I. Meehern, op. cit. supra n. 7, § 36:

"The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons."

\textsuperscript{13a}In Collier Service Corp. v. Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4, Mr. Justice Collins said: "The controverted issue is whether the advertising agency . . . acted for itself as principal or for the defendant, as the latter's agent. In about two years this advertising agency placed about $400,000 worth of advertising of the defendant's razors. Apart from the implausibility of the contention that the agency personally obligated itself for this huge expenditure, the proofs are not only convincing, but nigh irrefutable that Cowan & Van Leer acted as agent for the defendant, its disclosed principal."
conditions the agency is held primarily liable for payment of the agreed rates to the broadcast station and the agency agrees to be solely responsible for payment thereof, unless otherwise agreed in writing. Similar provisions may be contained in agreements for broadcast facilities generally. While such contracts constitute the agency an independent contractor for broadcast facilities so far as the station is concerned, the agency is nevertheless the agent of its client for all other purposes unless a contrary agreement is made.

Where the advertising agency contracts for program material or for writers to create program scripts or commercial announcements, or where it engages producers, artists, musicians and other talent, or where it secures endorsements of the advertiser's product to be read personally by the endorser as part of the broadcast program, the agency is acting for the client and not for itself. Such contracts may, however, provide for independent liability on the part of the agency for performance of the obligations contained therein.

§ 340. Relation Between Client and Agency at Law.
As a result of the dearth of authority treating the relation between the advertising agency and the advertiser where radio broadcasting is used as an advertising medium, one must resort to the few cases which have

14 In this connection, see Brown v. Mollé Co., 20 F.Supp. 135 (S.D. N.Y., 1937) where an advertising agency was engaged by defendant to put an advertising program on the radio. The agency employed plaintiff to produce and direct the broadcast program. Plaintiff wrote a theme song containing defendant's trade name and slogans. The Court held that the words of the song belonged to the agency as the employer for hire of the plaintiff. However, the agency owned the words of the song as trustee for the defendant advertiser. The Court said:

"As for the words, I am of opinion that while they were Brown's production, they belonged to Stack-Goble (agency) in trust for the Mollé Company."

15 In Gardella v. Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937) the Court held that an advertiser would not be assessed punitive damages where the tort committed by the advertising agency was only within its apparent authority and not within its actual authority.
considered the problem with respect to other media. These cases are in point, in that only a slight difference exists in actual functions between the work of the advertising agency in broadcast advertising and that in other media. The real difference is in the materials with which the agencies work. Many practices in the field of publication advertising appear to have been carried over into broadcast advertising. For example, most broadcast stations, as do the publishers, have two sets of rates for the purchase of advertising space or broadcast time, a gross and a net rate. 16

Wherever the courts have considered the relation between the advertising agency and the advertiser, their discussion has been predicated on the view that the former is the agent of the latter. Illustrative of the courts' conception of the relation and function of the advertising agency is the opinion in the Missouri case of Kastor v. Elders, 17 in which it was said:

"The evidence shows that in the growth and development of the advertising business to its present large proportions there has come to be what may be termed a middle-man, or go-between, known as an advertising agent or agency. This man, or agency, deals with the advertiser on the one hand, advising and assisting him in the selection of the publications to be used and having put in type and preparing advertising matter or copy; making or having made drawings, of the advertising rates, irrespective of the medium employed. Such conditions are, however, a private contract and do not operate to change the rule of law by which an agency is considered the legal representative of the advertiser for purposes not covered by such independent arrangements.

16 Broadcasting, Year Book (1938) 165, 166, 170, 172, 176, 177. The American Association of Advertising Agencies has extended its cooperation to the broadcasting industry in establishing standard conditions to govern their business relations, similar to those it adopted with publishers of newspapers and periodicals. The essential characteristic of these conditions is the agreement that the agency is solely liable for payment

electrotypes, stereotypes; preparing letters, circulars, pamphlets, and literature generally for circulation through the mails and otherwise; and generally conducting what is termed an advertising campaign—while on the other hand, the agent deals with the publications used, placing all orders for advertisements and adjusting all charges and settlements with them, and paying all amounts due them. In fact, in such cases the publications deal with the agent only. The agent orders the space; the same is charged to him by the publication at the card rate, less the agency commission or the agency rate and he pays therefor, and the advertiser has no dealings with the publication whatever. In such case, however, the charge to the agent for the space used is lower than the card rate by from 5 to 15 per cent, each publication fixing its own rate or charge. This is what is variously designated in the testimony as ‘the agency rate’, ‘the lowest rate’, ‘the rate with the commission deducted’, etc. It is given uniformly to all agents or agencies who are recognized by the publications as trustworthy, and to whom the publications are willing to extend credit. It is allowed by the publication with the expectation (and it is required by a few publications) that the agent or agency retain as his or its commission the difference between the card rate and the rate charged the agent. It appears that an agent sometimes gives his advertising patrons the benefit of a part of the agent’s commission, but this is a matter of contract in each instance, and is determined by the nature of the account, the kind and extent of service required of the agent, competition, etc.”

In a series of cases involving the tax problems of several advertising agencies, the various courts held the advertising agency to be an instrumentality of personal service, rendering professional advice, skill and services.18

It is clear that this service is rendered and owed primarily to the advertiser as the principal and it has been so held. In *Kaden v. Moon Motor Car Co.*\(^\text{19}\) the Court said:

"... it is immaterial what terms are used by the parties, or by what name the transaction is designated, if the facts, taken as a whole, fairly disclose that the one party is acting for or representing another by the latter's authority; and that the relationship of agency does not depend in every instance upon an express appointment and acceptance, but is often to be implied from the words and conduct of the parties to the transaction. ... There is no doubt about the fact that the D'Arcy Company was the agent of defendant (advertiser) in having the advertisements prepared and printed, and that the defendant was chargeable with knowledge of everything that appeared therein." (parenthetical insertion supplied.)

§ 341. The Agreement Between the Advertiser and the Advertising Agency Creates the Relation of Principal and Agent.

Wherever the dealings between the advertiser and the advertising agency may be the subject of an express, oral or written agreement, they are usually set forth in terms which show an intent to create the relation of principal and agent.\(^\text{20}\)

In *Dorrance, Sullivan & Co. v. Bright Star Battery Co.*\(^\text{21}\) the contract before the Court was as follows:

"We desire to do our advertising through you, and this letter is to employ you as our advertising agents and merchandising advisers. We authorize you to plan, prepare, and place our advertising in accordance with our approval agreements of employment" are found in *Haase, Advertising Agency Compensation* (1934) 159, 160.

\(^{19}\) 26 S.W.(2d) 812, 813 (St. Louis C.A. Mo., 1930).

\(^{20}\) E.g., the typical agreement between the J. Walter Thompson Agency and its clients commences, "We are pleased to submit the terms upon which we act as your advertising agents." This and other

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on the following basis, covering the period of your employ-
ment under the terms of this letter. . . .”

In a per curiam decision, the New York Court of Appeals
held this agreement to be a valid, definite and binding con-
tract, upon which suit could be maintained by the agency.22
The Court’s interpretation confirms the view that the rela-
tion of principal and agent existed between the parties.

§ 342. Specific Authority Not Necessary for Contracts as
Agent.

It is not sufficient to determine that the advertising
agency functions as an agent. It must also be determined
whether he has authority so to act. Unless the agency has
authority so to act, the client will not ordinarily be liable
as a principal.23 Where the program sponsor has held out
the agency in such a manner to the world, that it is a
reasonable conclusion by one dealing with the agency that
it is the agent of the sponsor to do a certain act, the latter
will be liable as a principal.24

It is conceivable that the advertising agency may pre-
pare a program and contract for a period of broadcast
time in advance of any authority from a client, and then
seek to sell the broadcast time and program to a sponsor.
In such a case, it would appear that the agency is acting
on its own behalf, since it is in fact not acting with the
authority of a principal. Of course, the fact that the
agency does not intend to act for itself does not relieve
it of responsibility for the obligations it has thus created.

Where the agency makes a contract and discloses the
name of the client for whom it contracts, but in reality the

22 Ibid.
23 Plaff v. The Pacific Exp. Co.,
159 Ill. App. 493 (1911), affd. 251
Ill. 243, 95 N.E. 1089 (1911);
Walsh v. Hartford Fire Ins. Co.,
73 N.Y. 5 (1878); Alcorn v.
Buschke, 133 Cal. 655, 66 Pac. 15
(1901); II. Mecham on Agency
(1923) Sec. 1709.
24 Law v. Stokes, 3 Vroom 249,
32 N.J.L. 249, 90 Am. Dec. 655
(1867); I. Mecham on Agency
(1923) §§ 720–9.
agency has no authority so to act, it will be liable to the third person for breach of warranty of authority. Similarly, where the client represented to be the principal for whom the agency acts, has no legal existence, the agency will be liable on the contract.

If the agency fails to disclose the name of its principal in a contract which it was authorized to execute, the agency would be liable to perform, irrespective of the fact that it did not act for itself. The undisclosed client is also liable.

There are other instances of an agent’s liability on contracts where it has disclosed the name of the client for whom it intends to act. For example, where the agency, in the erroneous belief that it is authorized to act for a client, makes an express representation of authority to the third person. Although the agency knows it is not authorized to act as an agent for an advertiser, yet if it makes an express representation of authority, it will be liable to the third person for breach of warranty of authority. Liability will also be imposed upon the agency where it knows that it possesses no authority to act for a client and makes no express representation of authority, but assumes to act as though authorized.

Where the agency is authorized to bind the client as principal, but pledges its personal responsibility to the third person, liability will be imposed on the agency. Even where the agency, in the erroneous belief that it is authorized to act for a client, makes no express representation of such authority but assumes to act as though possessed of authority, it will likewise be liable.

25 I. MEchem, op. cit., § 1359.
26 Farmer’s Trust Co. v. Floyd, 47 Ohio St. 525, 21 Am. St. Rep. 846, 26 N.E. 110 (1890).
27 I. MEchem on Agency (1929) §§ 1359 et seq.

This is a condition of the standard provisions of the spot broadcasting order form prepared by the National Association of Broadcasters in cooperation with the American Association of Advertising Agencies.
§ 343. Liability of the Advertiser for Contracts of the Advertising Agency.

In the few cases which have arisen involving the question of the liability of the advertiser for debts contracted by the advertising agency retained by him, it has been held that the advertiser is liable. Although his relation of principal is undisclosed, the advertiser is liable as one who has received the proceeds of the agent’s contracts and as the one for whose benefit the contracts for advertising supplies were made.

In Clarke v. Watt, the Court said:

"The defense is that the contract was made with the H. B. Kohler Advertising Agency and that the plaintiff’s assignor extended the credit to the H. B. Kohler Advertising Agency and not to the defendant; that the defendant had no dealings with the plaintiff’s assignor.

"The contract introduced in evidence does not disclose the name of the defendant, but purports to be made between the plaintiff’s assignor and the ‘H. B. Kohler Advertising Agency’, so that it appears upon its face that it is an agency that is making the contract. The contract bears upon its face indisputable evidence that the advertising contracted for is for the benefit of some other person than the H. B. Kohler Agency. This being so, the plaintiff’s assignor was entitled to assume that there was an undisclosed principal other than the advertising agency...

"If the defendant was known to the plaintiff’s assignor to be the principal in the transaction and the Kohler Agency his agent, the defendant alone would be liable to the plaintiff, unless the plaintiff’s assignor gave credit exclusively to the Kohler Agency, in which event, of course, the Kohler Agency alone would be liable."

Later, the Court said:

"The defendant having received the full benefit of the advertising, the agent virtually acting for both parties, and

30 Ibid.
the agent having disappeared and become unresponsible, it is difficult to see the justice of the rule which allows the real beneficiary to escape payment, and deprive the plaintiff of the fruits of his labor simply because he gave credit to the agent instead of the principal. Had the plaintiff's assignor not known who the real party in interest was, he might have held him legally liable upon discovering him notwithstanding he had given credit exclusively to the agent."

To the same effect is the case of Montague v. All-Package Grocery Stores,\(^3\) where it was held that there was sufficient evidence to go to the jury on the question of whether the relation of principal and agent existed. The facts in the Montague case are similar to those in Clarke v. Watt.


Where an advertising agency prepares a program and enters into a contract for the use of the facilities of a broadcast station in advance of any authority from a client, and then seeks to dispose of the broadcast time and the program to a prospective sponsor, the agency would seem to be liable upon its contracts so made, although it acted ostensibly as an "agent." Is the prospective client also liable therefor? The process whereby the purported client becomes liable is denominated in the law of Agency as ratification.

A prior act which did not bind the client but was done or professedly done on his account by the advertising agency, is ratified where the client affirms the act.\(^3\) The affirmance of the act must be as to all of the persons involved.\(^3\) The ratification by the sponsor makes the prior acts as effective as though made by the advertising agency.

\(^3\) 182 App. Div. 500, 169 N.Y. Supp. 920 (1918). In People's Broadcasting Corp. v. Geo. Batten Co., 231 App. Div. 446, 247 N.Y. Supp. 569 (1931), aff'd. 258 N.Y. 551, 180 N.E. 328 (1931), it was held that the evidence was insufficient to establish sub-agency of an advertising agency employee.

\(^3\) Restatement, Agency (1933) § 82.

\(^3\) Id. at § 96.
agency in pursuance of an express authority therefor.\textsuperscript{34} The client can ratify only those acts which he had capacity to authorize.\textsuperscript{35} The ratification does not include acts which were done within the scope of the apparent authority of the advertising agency, since liability for such acts is predicated upon another doctrine.

An effective ratification can only be made where the advertising agency purported to act on the account of another.\textsuperscript{36} Only the client identified as the principal at the time of the prior act may affirm so as to make an effective ratification.\textsuperscript{37} But if no sponsor was identified with the program contracted for by the agency, only he for whom the advertising agency intended to act may affirm.\textsuperscript{38}

The effect of ratification is to make the sponsor liable for all acts done by the advertising agency and affirmed by him.\textsuperscript{39} Ratification once made is irrevocable.\textsuperscript{40}

\textsection{345. Duties of the Advertising Agency as Agent for Its Client.}

It is incompatible with the employment of an advertising agency that it serve both the sponsor and the broadcast

\textsuperscript{34} Dempsey v. Chambers, 154 Mass. 330, 28 N.E. 279 (1891); Nims v. Mount Hermon Boys’ School, 160 Mass. 177, 35 N.E. 776 (1893); RESTATEMENT, AGENCY (1933) \textsection{82.}


\textsuperscript{36} Grund v. Van Vleck, 69 Ill. 476 (1873); Hamlin v. Sears, 82 N.Y. 327 (1880); Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900); Flowe v. Hartwick, 167 N.C. 448, 83 S.E. 841 (1914); RESTATEMENT, AGENCY (1933) \textsection{85.} Accord: Collier Service Corp. v. Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4.

\textsuperscript{37} RESTATEMENT, AGENCY (1933) \textsection{87.}

\textsuperscript{38} Ibid.

\textsuperscript{39} Ibid., at Sec. 100. See Collier Service Corp. v. Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4.

\textsuperscript{40} Saunders v. Peck, 87 Fed. 61 (C.C.A. 7th, 1898); cert. den. 179 U.S. 682, 21 Sup. Ct. 915, 45 L.Ed. 384 (1900); Plummer v. Knight, 156 Mo. App. 321, 137 S.W. 1019 (1911); Haines v. Rumph, 147 Ark. 425, 228 S.W. 46 (1921).
station. The advertising agency is engaged to exercise an independent judgment in the selection of the station and in its arrangements for the facilities of the latter. The interests of the station owner are obviously in conflict with these purposes of the advertising agency's employment. The rule is that one may act as the agent of two or more principals, if his duties to each are not such as to oblige him to perform incompatible acts.\(^{41}\) Since his employment by an advertiser involves duties incompatible with the duties of an agent of the broadcast station, the advertising agency may not be the agent of both.\(^{42}\) It must decide for whom it will act and proceed accordingly. It is well established that the advertising agency acts for its client and not for the broadcast station, as is evidenced by the standard conditions of the latter's agreed form of order for spot broadcast facilities.

Where an advertising agency also carries on the functions of a manager or personal representative of a performing artist whose talents are made available by the same agency to one of its clients, is such dual representation incompatible? Since the exercise of independent judgment in the selection of performing artists for the client's broadcast program may be diminished by the fact that the agency also represents a performing artist engaged for the sponsor's program, it is likely that such dual agency is incompatible.\(^{43}\) If, however, the sponsor-


\(^{43}\) Where the agency carries on functions which conflict with its duties to its client, in the form of a subsidiary corporation, the veil of the corporate fiction should be pierced to prevent breach of fiduciary obligations owed by the agency to the program sponsor. The latter may, however, expressly consent to such activities.
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client accepts the engagement secured by the agency for its artist-client with full knowledge and disclosure of the dual representation, the infirmity therein is waived. Similarly, the artist-client may waive objections to the arrangements made by the agency with its sponsor-client if the artist has full knowledge of the terms thereof and of the dual representation. If such a waiver has been definitely established, the agency is entitled to compensation from both its clients in accordance with its respective agreements. The same rules would apply to the operations of the advertising agency as a talent booking agency.44

The advertising agency must reasonably execute the authority granted to it by the client.45 The agency must obey instructions strictly.46

Where it is found that the advertising agency is an agent of its client, it acquires the position of a fiduciary as to matters within the scope of its authority.47 The primary duty of a fiduciary is loyalty to his principal.48 The agency must act primarily for the benefit of its client in matters it has undertaken to carry out for him. Some other duties of the advertising agency as a fiduciary are as follows:

(a) The advertising agency may not act as, or on account of, an adverse party without the consent of its client.49 (Quaere: Would another client as a prospective program sponsor be an adverse party as to broadcast time and type of program?)50

44 See Chapter XXVI. infra.
45 Restatement, Agency (1933) § 383.
47 Restatement, Agency (1933) § 13.
48 Id., § 13, Comment A, Sec. 387.
49 Wadsworth v. Adams, 138 U.S. 380, 11 Sup. Ct. 303, 34 L.Ed. 984 (1891); Restatement, Agency (1933) § 13, Comment A.
50 Since advertising agencies are generally not engaged in the representation of one client only, it must be accepted that an advertising agency may serve numerous clients simultaneously. This fact should dispel any imputation which would preclude an advertising
(b) The advertising agency may not compete on its own account or on the account of another in any matters relating to the subject matter of the agency.  
(c) The advertising agency must deal fairly with its client in all transactions between them. 
(d) The advertising agency owes the duty to account to its client for all money and property which come into its hands by virtue of the engagement.

agency from acting for more than one client for the same purposes. The several clients of an advertising agency are not ordinarily competitors. The agency, however, may by its own acts create a situation where its representation of several clients may be incompatible with its duties to a particular client. As to such latter client, the liability of the advertising agency is predicated upon a breach, if any, of its fiduciary relationship and consequently, the breach of the contract of agency. Where, however, a waiver has been obtained which vitiates the incompatibility, there is no breach of fiduciary relationship and the contract of agency remains effective.

The fact that the advertising agency is also engaged in disseminating for another client a program which is broadcast over other stations at the same time and in the same area as, and in opposition to, the first client's program, would produce a conflict of interest. Close similarity as to type of program for each client may also constitute a breach of the agency's obligations to both clients. 

If the advertising agency secures for its client full rights of ownership in a broadcast program which may legally be presented again for radio broadcasting or for any other purpose, the agency may not dispose of or permit others to make use of this program without the consent of the original client. Cf. Brown v. Mollé Co., 20 F.Supp. 135 (S.D. N.Y., 1937) where it was held that the agency owns such literary property in trust for the advertiser.  

RESTATEMENT, AGENCY (1933) § 13, Comment A. 
Hobbs v. Monarch Refrig. Co., 277 Ill. 326, 115 N.E. 534 (1917); Bain v. Brown, 56 N.Y. 285 (1874); RESTATEMENT, AGENCY (1933) § 382, Comment A. It has been urged that there is a custom and usage for the broadcast station or publisher to look to the agency for payment of compensation. It is not yet clear whether such a custom and usage prevails to an extent sufficient to rebut the legal relation of principal and agent which exists between the client and the advertising agency. Independent liability of the agency, however, may be achieved by express contract.
An advertising agency commonly receives two types of moneys: that which represents its compensation for the services rendered to the advertiser and that which is given to it for the purpose of paying debts contracted on behalf of the advertiser. Included in the latter category are funds for the payment of broadcast station facilities, program production costs, talent, etc. The advertising agency must account for such funds, or under the particular circumstances it may be liable in conversion. In any event, it holds such moneys under an implied trust. In an article which proposed a model advertising agency contract with the advertiser, it was suggested that the agency maintain a separate account for the client’s moneys, for which it owes a fiduciary duty to account.54

(e) The advertising agency owes the duty to give notice to its client of all material facts which affect his interests.55

For the violation of any of these duties the advertising agency will be liable to its client for the damage caused thereby.

The advertising agency will also be liable to its client where it fails to exercise due care in the transactions entrusted to it. An advertising agency should be held to such skill as is ordinarily possessed and exercised by persons pursuing that occupation.56

§ 346. The Client’s Duties to the Advertising Agency.

The relation between the advertising agency and its client imposes upon the latter the duty to compensate the agency for its services.57

The compensation may be


55 Landy v. Girdner, 238 S.W. 788 (Mo., 1922).


57 RESTATEMENT, AGENCY (1933) § 441.
agreed to at the time of, or during the employment. It is not necessary that the services rendered by the agent be of benefit to the advertiser; the duty of the client to compensate the agent is independent thereof.\textsuperscript{58} The client may not terminate the relation of agency so as to avoid payment, unless the contract specifically empowers it to do so.\textsuperscript{59} In the absence of fixed agreed compensation, the agency is entitled to the reasonable value of its services\textsuperscript{60} unless it has been guilty of dereliction of its duty as an agent.

The rights of an agency against its client will be preserved in the case where the agency has conceived, planned and made arrangements for the broadcast of a program on behalf of its client, even if the latter has seen fit to terminate the relation and to engage another agency to complete performance of the program. Unless the agreement with the original agency gives the advertiser the right to the proceeds of all efforts of the agency during the term of the engagement, the client cannot arrogate unto itself the program plans of the agency which have not yet been acted upon. Since the agency's compensation is usually directly dependent upon the expenditure of funds by the client for the broadcast of programs planned by the agency, the advertiser cannot deprive the agency of the fruits of its efforts by terminating the relation. Where such programs have been planned by the agency and submitted to the client within the scope of the fiduciary relation, the advertiser should be restrained from appropriating same and will be held liable for damages occasioned by its use thereof.\textsuperscript{61} Of course, where the client commits a

\textsuperscript{58} Schwartze v. Yearly, 31 Md. 270 (1899).
\textsuperscript{59} Northwestern Port Huron Co. v. Zickrick, 32 S.D. 28, 141 N.W. 983 (1913).
\textsuperscript{60} Bard v. Banigan, 38 Fed. 13 (C.C.D.Conn., 1889), affd. 134 U.S. 291, 10 Sup. Ct. 565, 38 L.Ed. 932 (1890); Hollis v. Weston, 156 Mass. 357, 31 N.E. 483 (1892); Restatement, Agency (1933) § 441.
breach of the contract of agency and engages another to complete a series of programs embarked upon by the original agency, the advertiser will be responsible for all damages flowing to the agent by reason of such breach.

The client is under a duty to reimburse the advertising agency for such reasonable sums as were necessarily expended in furtherance of the agency and in the execution of the authority granted thereunder. Although the agency may be solely liable to third parties by the terms of agreements entered into by it on behalf of the client, the latter is nevertheless responsible to the agency for payment of such obligations incurred within the scope of the representation.

The advertising agency has a right of indemnity against its client for any loss or damage which it has sustained in the execution of its agency. The act or acts which constitute the basis of the loss must have been done within the scope of the authority of the advertising agency.


The advertising agency may exercise all of the powers expressly granted to it by its client. In the absence of a specific agreement to the contrary, the agency may exercise certain powers on behalf of its client, which are incidental to the express or implied authority. Such incidental powers must be reasonably necessary to the performance of the authorized acts in order to be lawfully exercised.

Other incidental powers may be exercised by the agency, where it is the established custom and usage in dealings between agencies and their clients for the former to exer-

62 Dolman Co. v. Rubber Corp. of America, 288 Pac. 131 (D.C.A. Cal., 1930).
cise such powers.\textsuperscript{65} The addition by implication of other powers is not permissible.

§ 348. The Advertising Agency as an Independent Contractor.

The learned author of \textit{Mechem on Agency} has defined "independent contractor" as follows: \textsuperscript{66}

\begin{quote}
"... 'independent contractor'... is one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it... Such a person... has no authority to bind his employer in any form of contractual dealings."
\end{quote}

Ordinarily, this definition does not apply to the advertising agency in its important broadcasting functions. The advertising agency does not, in fact, arrange for the facilities of a broadcast station on its own behalf. In fact, it cannot, as an agent, acquire broadcast facilities for itself, since the station is impressed with the duty of operating in the public interest and, therefore, must know whether the article or service to be advertised is one which is lawful or in the public interest to be disseminated. The advertising agency does not customarily act for itself in such a manner as to present to its client a finished product. Advertisers are generally concerned with the details of a


\textsuperscript{66}I. Mechem on Agency (1923) § 40.

"The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of the employer only as to the result of his work and not as to the means by which it is accomplished." Hexamer v. Webb, 101 N.Y. 377, 42 N.E. 755 (1886). Beach v. Velzy, 238 N.Y. 100, 143 N.E. 805 (1924); Dutcher v. Victoria Paper Mills Co., 219 App. Div. 541, 220 N.Y.Supp. 625 (1927).
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broadcast advertising program as well as with the results therefrom.

Despite the fact that the advertising agency may be made liable to the broadcast station for its facilities by an express contract, it is not ordinarily an independent contractor. Orders and reservations for broadcast facilities, when they involve the credit, judgment, taste or skill for which the agency was selected by the advertiser, are intended to be and are for the client’s business alone. Moreover, the advertising agency obtains no rights in the time reserved which would invest it with power to dispose of the period without the consent of the program sponsor and the broadcast station operator.

It is entirely possible that the parties may so draw their agreement as to constitute the advertising agency an independent contractor, rather than an agent of the advertiser. The facts applicable to each situation govern the determination of their legal significance.


An advertising agency is responsible for torts committed by it even though the acts giving rise to the torts were committed as an agent. The client will be liable only for such torts committed by its agent under express authority where the agent was acting within the scope of the employment.

Where the agent has been expressly authorized to commit a tort, as for instance, if a client should direct an agency to interfere with the contract relations between an artist and the sponsor of another program, the client is liable as a participant in the commission of the tort. Where the client is sought to be held liable for the commission of a tort by the agency within the scope of its employment,


68 Ibid.
the liability imposed is vicarious. In such a case, it must appear that the agency performed a tortious act for the purpose of serving its client,\textsuperscript{69} and that the commission of such tortious act was not an extreme deviation from the normal conduct of the agency. By "not an extreme deviation" is meant that the act must be done within the normal conduct of the agency or within a reasonable deviation therefrom.

The absence of any of these elements is sufficient to exempt the client from liability for the torts committed by its advertising agency. If no reasonable man could decide that the agency had any other motive except to serve itself, then a verdict for the advertiser should be directed.\textsuperscript{70} A similar verdict should also be directed where the only reasonable inference from the evidence is that the act was not done within a reasonable deviation from the duties of the agent. Conversely, a verdict should be directed for the plaintiff where the only reasonable conclusion upon the evidence is that the motive of the agent was to serve its client and that the act was done within a reasonable deviation from its duties. If reasonable men can differ as to the inferences to be drawn from the evidence, the case must be submitted to the jury in order that the various issues of fact may be determined.\textsuperscript{71}

A sponsor of a broadcast program would be liable for torts committed by its advertising agency in infringing copyrights, in the publication of defamatory matter, in committing acts of unfair competition and other program torts.\textsuperscript{72}

The advertising agency, vested by the sponsor with jurisdiction over the presentation of radio broadcast pro-

\textsuperscript{69} Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 N.W. 507 (1912).

\textsuperscript{70} Stone v. Hills, 45 Conn. 44 (1877); Illinois Central Ry. v. Lathand, 72 Miss. 32, 16 So. 757 (1894).

\textsuperscript{71} Ryre v. Liebers Farm Equip. Co., 107 Neb. 454, 186 N.W. 358 (1922); Tuttle v. Dodge, 80 N.H. 304, 116 Atl. 627 (1922).

grams and the contents thereof as part of its business, is liable for infringement of copyrights resulting from such sponsored broadcast programs, or transcriptions thereof, as a joint tortfeasor. The advertising agency cannot escape liability for such torts upon the claim that its principal is also liable therefor, since all persons concerned in an infringement of copyright are jointly and severally liable for damages, although they may not be liable for profits in which they do not share.


§ 350. Introductory.

The legal relation between the performing artist and the producer of the broadcast program is of great significance in the presentation of entertainment by means of the broadcasting medium.

Program producers engage various types of artists in their quest for talent to supply the tremendous demand which broadcasting imposes upon the entertainment profession. Artists who have already established reputations and secured fame in theatrical, operatic and motion picture productions have constituted the principal source of supply of talent for broadcast programs. Simultaneously, however, a new field of endeavor has been opened to younger and lesser known artists, who through the broadcasting
medium gain direct and speedy public acclaim and recognition. Artists who render their performances in radio broadcast programs exclusively are frequently not suited, by reason of their physical appearance or the peculiar scope of their talents, to appear in theatrical or motion picture productions. However, this is by no means the rule, since many performing artists gain wide popularity in broadcast programs and thereupon proceed to serve the public through other entertainment media.

The term, artist, as used in broadcasting may include an actor, singer, musician, orchestra conductor, political or news commentator, lecturer, announcer et cetera. The artist may be defined as one who renders his personal performance for transmission to the public as part of a broadcast program.

The program producer is vested with control over the presentation of a broadcast program and fulfills that duty by engaging the required program personnel, including the performing artists. The producer may direct the production himself or he may delegate such responsibility to another and retain supervisory jurisdiction only. The producer of a radio broadcast program may be an independent contractor, the broadcast station itself, the advertising agency, the advertiser, or any other commercial or public organization which arranges and presents broadcast programs.

The relation between the artist and the producer is essentially contractual. These agreements may be classified in the legal category which is denominated personal

1 See Rooney v. Weeks, Mass., 194 N.E. 666 (Mass., 1935). This action for an injunction to enforce a negative covenant was brought by an advertising agency whose principal field of endeavor was radio broadcasting. Plaintiff functioned as a program producer. He secured the talent and selected artists and music; he made the arrangement and the timing of the numbers to be presented and of the commercial announcements; he assembled the program, rehearsed and timed it; then he presented it at an audition. If acceptable to the advertiser, the plaintiff broadcast his production of the program.
service contracts. Whatever peculiar incidents attach to personal service contracts will also apply to agreements between the artist and the program producer.

Whether the artist is an employee or an independent contractor is a question which has already been considered.\(^2\) No such distinction is necessary herein since any agreement which creates either relation is a personal service contract. The difference is merely one of degree of control which the producer may exercise over the artist.\(^3\) The producer has greater power of control over the artist who is engaged as an employee.

The producer must be clearly distinguished from another functionary in radio broadcasting, namely, the personal or business representative of the artist, who is the actor's traditional agent or manager. Personal representatives may be divided into several classes. There are those agents who have the sole function of securing engagements and making the terms of such engagements for the artist. There are others who supervise business details and perform executive or ministerial duties for the performer. Other representatives act as agents of the artist for publicity purposes or to exploit his name and fame in commercial enterprises or in connection with products not related to the world of entertainment. These personal representatives are all agents of the artist.\(^4\) The program producer is in no sense an agent of the artists performing in his program.

§ 351. Generally.

The terms of the engagement of the artist's services by the producer may be expressed in an oral or written contract. This agreement is the prime determinant of the respective rights, obligations and liabilities of the contracting parties.

A mutual agreement on the terms of the relation is essential to the establishment of a valid contract between

\(^2\) See §§ 321, 332, supra. (Rev. Ed., 1936) § 1012.

\(^3\) Cf. Williston on Contracts

\(^4\) See Chapter XXVI. infra.
the parties. Where there is no accord or mutual agreement upon conditions which an artist considers essential and precedent to any contract between him and the producer, no binding obligation is created.

To constitute an enforceable agreement, each of the essential terms of the contract must be expressed with sufficient definiteness so that a court may find a clear meaning thereof. The mutual promises of the artist and the producer must be expressed in an unambiguous manner.

Among the essential elements of a personal service contract are the nature and extent of the services to be rendered, the compensation therefor, and the time and place of performance.

5 Beard v. Chicago Home for Convalescent Women & Children, 171 Ill. App. 268 (1912) (Plaintiff operatic society negotiated with the defendant to give an entertainment for the latter's benefit. The plaintiff offered to perform for a certain sum of money whether or not the entertainment realized that amount. In reply, the defendant informed the plaintiff that its understanding was that it was to receive a certain sum, all expenses were to be paid from the proceeds and the surplus above the plaintiff's fee and expenses were to go to the defendant. The entertainment yielded barely enough to pay the expenses. In an action to recover the plaintiff's fee, it was held that there was no agreement that the defendant pay the plaintiff the amount stated in its offer whether or not such sum was realized.); Hoey v. Alcazar Amusement Co., 197 Ill. App. 411 (1916);

6 Arliss v. Herbert Brenon Film Corp., 230 N.Y. 390, 130 N.E. 587 (1921) (actor versus motion picture producer).


That the term "season" is sufficiently definite for a contract to be enforceable may be inferred from the holding in Sherwood v. Crane, 12 Misc. 83, 33 N.Y.Sup. 17 (1895). In this case, the producer's agent told the artist when he engaged her for a particular play, "This means a permanent thing for you in New York, from the opening, until the balance of the season." The agent then assured her of the probable success of the play with a statement as to the length of the season. It was held that the engagement was for the season and not for the run of the particular play.
§ 352. Scope of Services Included in Contract with Artist.

Where the producer engages the services of an artist for a broadcast program, it becomes a question of fact to determine the scope of the contract, so as to ascertain whether certain demands by the producer must be fulfilled by the artist.

The contract should specify with some definiteness the period of time which the broadcast will require. It is necessary that the artist be informed of the period of time for the entire program, not only the length of time necessary for the rendition of the artist's personal performance in such program. Provision should be made as to whether the services of the artist are engaged exclusively for the producer. The contract should specify whether the program is to be a "live" show or a transcribed one. If the agreement engages the artist's services for a broadcast within a definite period of time, then the producer has no right to transcribe the artist's performances and rebroadcast the program by electrical transcription or otherwise during any other period of time. The artist's consent to the manufacture of such transcriptions should be the subject of express agreement. Mention should also be made of the intent of the parties with respect to the use of the artist's name or photograph for advertising purposes, program billing, publicity credits, et cetera. The agreement should specify whether the services contracted for are limited to performances only or whether any rights are granted to the producer to make use of literary, dramatic or musical works which are the property of the artist.

§ 353. Same: Whether Traveling Required.

The agreement should state the place where the artist's services are to be rendered for the actual broadcast, as well as the number and place of rehearsals. Where the contract does not describe the place of performance, the

8 See § 389 infra.
producer may not unreasonably require the performer to travel a great distance from the place of making of the contract. Since artists may perform in several programs within a few days, it is unreasonable for a producer to demand that an artist travel a great distance to another place to render his services under the contract because compliance with such a demand may thereby cause a breach of the artist’s agreements with other producers. If the contract requires the artist to travel, he is obliged to defray his own traveling expenses unless the agreement provides otherwise. Where the contract does not specify traveling and the artist proceeds to travel at the producer’s request, the producer must pay such traveling expenses.

If the artist should not present himself at the appointed place for the broadcast of a program by reason of his engagement in theatres, motion pictures or other productions at a point distant from the studio where the broadcast originates, the producer may hold the artist liable for all damages flowing from such breach of the contract.

The agreement may provide for the rendition of the artist’s services at any specified place where he may be located at the scheduled time of the broadcast. The contract must be interpreted to ascertain whether the artist is responsible for the payment of intercommunication or wire charges necessarily incurred in the inclusion of the artist’s performance in the program which is principally broadcast from another point. Such a hook-up accomplished by telephonic or other station-to-station communication may involve considerable expense and the contract should therefore be specific as to the person who shall defray such costs. If the contract provides that the artist may render his services from a place other than the studio from which the program originates and is silent as to the payment of line or wire charges, the producer is responsible for such expense.

§ 354. Same: Broadcast Coverage of Program.

The agreement should contain with some definiteness the approximate number of stations to be included in the network or system over which the program is to be broadcast. If the agreement contemplates that the program will be broadcast over a single station, the radio audience is necessarily limited and the value of the program restricted. If the producer adds such stations as increase substantially the public audience of the program and the value thereof, the artist may properly refuse to perform because of the change in the terms of the agreement. Similarly, the unauthorized addition of a national network or system to a program in which the artist contracted to perform over a regional network would excuse the non-performance by the artist of the contract. If the agreement, however, gives the producer the right to broadcast the program over the facilities of as many stations as may be engaged by the producer, the artist’s performances must nevertheless be rendered.

Where the agreement contemplates that the program will be broadcast over a major national network or system and the producer thereupon reduces the scope of the program to a broadcast over a few relatively unimportant stations, the artist may refuse to perform his services for such a limited audience if it tends to injure his professional reputation and standing. Such a limited broadcast of the program may thereby render it difficult for the artist to secure further engagements for broadcasts over major networks.

§ 355. Same: Repeat Broadcasts.

If the producer should require the performances of the artist to be repeated in an additional broadcast on the same day as the original performance, in order to make possible the reception of the program in another area of the country at the same hour there, the artist is not
required to render his performance again for such repeat broadcasts unless the contract so provides. Where the contract specifically describes the time at which the program will be received in a definite area as well as the time of broadcast of the program from another area, the contract should be so construed as to require rendition of the artist's performances for such repeat broadcasts.

If the producer's contract with the performer is so broad in scope that the artist's services must be performed for the purpose of transmitting the program by whatever means and at such times as the producer may deem necessary, the artist must nevertheless perform.\(^{11}\)

\[\text{§ 356. Duty of the Producer to Employ the Artist.}\]

Whether a duty is imposed upon the producer to employ the artist so as to give him an opportunity to perform is an interesting question. The answer depends upon the contract between the parties, the usage of the profession and any other relevant circumstances. It is clear, however, that the public appearance of the artist is of vital necessity to him. His ability to bargain for compensation depends upon his power to draw the attention of the listening public. Where he is not given such an opportunity, and is not permitted to work elsewhere, he may be unjustly deprived of larger present and future earnings. His professional reputation in such a case undoubtedly wanes until the expiration of the contract term. Equity courts have long been conscious of these facts and will not enforce a negative covenant in a contract which does not bind the producer to employ.\(^{12}\)

The law courts have not always followed this view and have sometimes allowed as a valid defense to an action for wrongful discharge the allegation of the producer


\(^{12}\) See § 400 infra.
that he was under no obligation to provide employment. This result obtained because, unless the producer is bound to furnish work, he is not bound to pay for services not rendered. These cases are based on such contractual provisions as that the artist will be paid only "when services are rendered" or "when he shall actually perform." The courts construed such clauses as absolute conditions precedent to compensation of the artist. Unless he worked, he could not recover. In the absence of an express contractual provision, the producer was held not to be required to employ the artist.

These cases have been distinguished in a later case on the ground that they came before the courts on motions for judgment on the pleadings. There was nothing before the court from which an obligation to furnish employment could be implied. In the later case, such an obligation was correctly implied. While there is no legal duty upon the employer to furnish employment, it should be implied wherever such a construction is possible.

The artist must, therefore, in such a case, show that the understanding of the parties was that the producer was to furnish work, or that there exists a custom and usage to that effect in the radio broadcasting branch of the entertainment world.

§ 357. Same: Understudies.

The producer is ordinarily under no obligation to allow an understudy to perform the role of the principal who becomes ill or who is otherwise unable to broadcast.
§ 359. Interpretation of Agreements Between Artist and Producer.

It is essential to discuss the interpretation and construction of contracts because by the use of these tools the

18 Ibid.
19a See § 246 supra.
courts seek out the true intention of the artist and the producer in making their agreement.\textsuperscript{21}

The general rule, of which discussion is unnecessary, is that a writing containing an agreement will be construed against the party who prepared the instrument.\textsuperscript{22} Hence, the contract will be construed most favorably to the party who did not prepare the instrument.\textsuperscript{23}

An agreement will be construed so that it shall be effective and reasonable.\textsuperscript{24} A contract will be interpreted as lawful rather than unlawful.\textsuperscript{25} If the agreement is partly unlawful, but divisible, the remainder should be upheld.\textsuperscript{26}

\textsuperscript{21} WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 37.

In Manufacturers Trust Co. v. Weldon, 267 N.Y. 488, 496, 196 N.E. 545 (1935), Judge Loughran quoted as follows:

"'Men can justly rely on one another's intentions, and courts of justice hold them bound to their fulfillment, only when they have been expressed in a manner that would convey to an indifferent person, reasonable and reasonably competent in the matter in hand, the sense in which the expression is relied on by the party claiming satisfaction.' (POLLOCK, PRINCIPLES OF CONTRACT [9th Ed.] p. 2.)"

Lehman, J., in Fox Film Corp. v. Springer, 273 N.Y. 434, 436, 8 N.E.(2d) 23 (1937) said, "In construing contracts the courts endeavor to arrive at the meaning intended by the parties."

\textsuperscript{22} Rice v. Miner, 89 Misc. 395, 151 N.Y.Supp. 983 (Sup. Ct., 1915); Vitagraph v. Watson, 177 Ark. 984, 8 S.W.(2d) 459 (1928).\textsuperscript{23} Rice v. Miner, 89 Misc. 395, 151 N.Y.Supp. 983 (Sup. Ct., 1915), where the court said at page 985:

"When an agreement such as this, drawn by the defendant, consisting of nearly four closely typewritten pages, and acted on by the parties for 33\(\frac{1}{2}\) weeks out of a 35 week term, is thereafter claimed by its author to be no contract because it is capable of an interpretation spelling lack of mutuality, such a claim does not commend itself for favorable consideration, and should be rejected if the 'agreement' is capable of a construction that will uphold it."


\textsuperscript{25} WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 620.

\textsuperscript{26} Paramount Famous Lasky Corp. v. National Theatre Co., 49 F.(2d) 64 (C.C.A. 4th, 1931); Goldwyn Loan & Inv. Corp. v.
But where the unlawful portion is not separable from the lawful, the whole contract falls.\textsuperscript{27} Where the intent is clearly expressed, the court will not make a forced construction of the terms of the agreement.\textsuperscript{28}

Many contracts for the employment of artists are printed or mimeographed forms, which in the process of negotiations are modified by the insertion of written provisions. Written matter in a contract will be given more effect than printed matter; it may even supersede the latter completely.\textsuperscript{29} In an instance where the printed form of the artist's contract provided that he was engaged for the run of the play "during the theatrical season of" but in the blank space following this there was written "1918–19, this engagement to be for not less than 10 weeks," and the printed form also provided that the producer could determine when the season should begin and end, it was held that the written provisions superseded the printed form and, therefore, the artist was guaranteed an engagement for at least ten weeks.\textsuperscript{30}

§ 360. Same: Evidence of Usage Admissible.

If the agreement or any part thereof is ambiguous, parol evidence may be introduced to enable the court to ascertain the intent of the parties.\textsuperscript{31} Parol evidence may also


In \textit{Fox Film Corp. v. Springer},
be admitted to prove an essential term of the contract which may be lacking or incomplete in the writing, as for example, where the duration of the engagement is not mentioned.\(^{32}\)

Parol evidence is admissible to explain the meaning

273 N.Y. 434, 436, 8 N.E. (2d) 23, 24 (1937), Judge Lehman said:

"Terms in common use in a business or art may acquire a definite meaning understood by those who use them in connection with that business or art. In construing contracts the courts endeavor to arrive at the meaning intended by the parties. The courts endeavor to apply the definitions accepted by both parties, though such definitions may be unknown to lexicographers. The parties may if they choose use their own special dictionaries, but when they ask the uninitiated to construe their contracts they must furnish them with the dictionaries they have used.

"They have not done so in this case. . . . The parties have used language understood, we must assume, by those cognizant of the special or technical meaning of words used in the profession or art of the parties. In that language we are illiterate. . . . It (the court) must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business. It must be made literate in a language in which it is now unschooled."

\(^{32}\) In De Carlton v. Glaser, 172 App. Div. 132, 158 N.Y.Supp. 271 (1916), the producer engaged the artist through an exchange of telegrams, in which no mention of term was made. Previously the producer had had oral conversations with the artist about the length of the engagement. The artist was discharged after two weeks notice. In an action by the artist, it was held reversible error for the trial court to exclude the parol evidence offered by the producer to show a usage in the theatrical business to the effect that two weeks notice was sufficient where there was no agreement as to the length of the engagement. Where telegrams do not show a complete and unambiguous contract, parol evidence is admissible to prove its terms.

In Tattersen v. Suffolk Mfg. Co., 106 Mass. 56, 58 (1870) the Court said:

"There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties; which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case."
which usage in the radio broadcasting industry has given to words or terms in the agreement.\textsuperscript{33} Where the contract for the employment of an artist for a theatrical engagement stated that it was for the "regular season", evidence was held admissible to show the common understanding of that term.\textsuperscript{34}

The judgment of the trial court was reversed where it excluded evidence offered by the defendant producer to show that, where the duration of the artist's engagement was not mentioned in the agreement, the usage was that the artist was entitled only to two weeks notice upon discharge.\textsuperscript{35} In another case, the plaintiff failed to recover where the contract stated its term to be for three seasons, but no evidence was introduced of a usage in the theatrical profession as to the meaning of such a phrase so as to make the duration of the artist's engagement definite.\textsuperscript{36}

Where a motion picture producer contracted to give the plaintiff artist the "star part", it was held, in the absence of evidence as to its meaning in the motion picture industry, that the phrase is synonymous with "sole star".\textsuperscript{37}

Where there is neither ambiguity nor failure to express completely the terms of the contract between the artist and the producer, and the rights of both are fixed by the law, no evidence is admissible to show a usage.\textsuperscript{38} In no case may evidence of a usage be admitted to change or

\textsuperscript{33} Newhall \textit{v.} Appleton, 114 N.Y. 140, 21 N.E. 105 (1889); Dana \textit{v.} Fiedler, 12 N.Y. 40 (1854); Hinton \textit{v.} Locke, 5 Hill. 437 (1843). See also Fox Film Corp. \textit{v.} Springer, 273 N.Y. 434, 8 N.E.(2d) 23 (1937).

\textsuperscript{34} Lovering \textit{v.} Miller, 218 Pa. 212, 67 Atl. 209 (1917).

In Strafford \textit{v.} Stetson, 41 Pa. Sup. Ct. 560 (1910) it was held not error to submit the question of the duration of "the theatrical season of 1902 and 1903" to the jury.


\textsuperscript{36} McIntosh \textit{v.} Miner, 37 App. Div. 483, 55 N.Y.Supp. 1074 (1899).

\textsuperscript{37} Nichols \textit{v.} Wharton, 179 App. Div. 62, 166 N.Y.Supp. 51 (1917).

vary the contract made.39 Such evidence is admissible only to ascertain with greater certainty the intention of the parties at the time they entered into their agreement.40

Whether or not a usage exists and what weight should be given thereto are questions of fact.41 However, a presumption of law may arise that the contracting parties knew of and agreed with reference to a certain usage.42

The rule in this connection is laid down by the New York Court of Appeals, as follows: 43

"It is for the jury then, under proper instructions from the court, to take all the evidence in the case; that as to the existence, duration and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties; and therefrom to determine whether there is shown a custom of such age and character, as that the presumption of law will arise, that the parties knew of, and contracted in reference to it; or whether the usage is so local and particular, as that knowledge in the party to be charged must be shown affirmatively or may be negatived."

The usage must be reasonably well settled and uniform.44 Before a usage may be relied upon it must be pleaded,45 or it may not be proved.46 The usage must be pleaded in full with the allegation that it was known to the artist and the producer at the time they entered


40 Newhall v. Appleton, 114 N.Y. 140, 21 N.E. 105 (1889); Mutual Chemical Co. v. Marden, etc., Co., 235 N.Y. 145, 139 N.E. 221 (1923).

41 Walls v. Bailey, 49 N.Y. 464 (1872).


44 Newhall v. Appleton, 114 N.Y. 140, 21 N.E. 105 (1889).


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into the contract, and further, that the usage was well recognized and established in the profession.\(^{47}\)

### § 361. Duration of Engagement.

The duration of the engagement of the artist by the producer is an essential term of their contract and must be definite.\(^{48}\) An agreement for the employment of an actor for the "season" has been held to be definite under the evidence.\(^{49}\) However, the court refused to enforce a contract of theatrical employment which was for three seasons, each of which was to commence at a certain time and "to continue as long as the same may be mutually agreed upon"; the term of employment in this agreement was regarded as too indefinite.\(^{50}\)

Where an actress was engaged for a theatrical production for the season to begin on May 12, 1902, in which contract there was a provision as to performance during the Christmas holiday week, it was held that the duration of the engagement was not too indefinite to be enforced as an executory obligation.\(^{51}\) Where an offer was made for a "long engagement" and was accepted by the producer, the duration of the employment was held to be too indefinite and the engagement was one at will.\(^{52}\)

An engagement was ruled to be for the season rather than for the run of a particular play where the evidence showed that the producer's agent engaged an actress for a particular play, but said, "This means a permanent thing for you in New York, from the opening until the balance


\(^{48}\) Arliss v. Herbert Brenon Film Corp., 230 N.Y. 390, 130 N.E. 587 (1921) (actor versus motion picture producer).

\(^{49}\) Spahn v. Winter Garden, 138 N.Y.Sup. 446 (Sup. Ct., 1912).

\(^{50}\) McIntosh v. Miner, 37 App. Div. 483, 55 N.Y.Sup. 1074 (1899).

\(^{51}\) Shubert v. Angeles, 80 App. Div. 625, 80 N.Y.Sup. 146 (1903).

\(^{52}\) Gray v. Wulf, 68 Ill. App. 376 (1896).
of the season,” and assured her that the play would be successful, stating the length of the season.53

In many cases the parties do not specify the duration of the period of employment of the artist in express terms. Such is often the situation where the agreement is the result of an exchange of letters or telegrams, or where the contract is oral and only confirmed by a writing. It is then the task of the court to ascertain the apparent intention of the parties from any circumstances which can be shown to prove a definite intention with respect to the length of the engagement.54 This is a question of fact.55

Where the contract is in fact oral, and a writing merely recites or confirms the agreement, parol evidence of the intention of the parties as to the length of the employment is admissible since the oral agreement is the real contract.56 Testimony as to what constitutes the duration of the “season” stated in a written contract is also admissible.57 If no evidence of the intention of the parties as to the duration of the artist’s engagement is available, or the evidence introduced is insufficient to show a definite intention, the employment is indefinite in time; the continuance thereof is subject to the will of either the artist or the producer.58

Where no definite period of employment is expressed in the contract and no implication thereof is possible from

54 WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 39.
the evidence, an agreement to pay the artist a fixed amount as compensation for a definite period of service does not raise the presumption that the employment was for a definite period.59 Thus, a provision in a contract that the producer will pay the artist a sum certain per week does not create an engagement for the definite period of a week, but rather constitutes a hiring at will.60 Nor does an agreement to pay a certain sum for a year's services create a definite term for the artist's engagement.61

Mr. Williston suggests that the contrary is a fair rule.62 In accordance with his view, the engagement of an artist at a sum certain per month would create an employment for one month.63 The continuance of the employment after the end of the period would create another contract for a similar period by implication of fact.


63 At least such a statement in the contract should be one of the elements used in deciding whether the term was definite. Williston on Contracts (Rev. Ed., 1936) § 39.

In Pfester v. Western Union Tel. Co., 282 Ill. 69, 118 N.E. 407, 409 (1917), the Court said:

"The message of the Milwaukee Club to plaintiff (baseball player) did not expressly say its offer was $300 per month for the season, but both that club and the plaintiff knew the custom and practice of contracting for the playing season of some six months, and it will be implied, in the absence of an expressed contrary intention, that it contracted with reference to such known custom and usage. . . . While a contract providing for payment at or for stated intervals, may create a presumption that the hiring was for corresponding intervals, the circumstances attending the hiring . . . should be looked to in determining the length of the employment. Smith v. Theobald, 86 Ky. 141, 5 S.W. 394. Applying this rule to the facts in this case, we think the contract, if entered into had the telegram been received and its terms accepted, would have been for the baseball season of 1912."
§ 362. Renewal of Contracts for Services of Artists.

Where the engagement of the artist is for a definite period, such as a week or month or year, and he is retained by the producer after the expiration of such period, the implication is that the artist has been re-engaged for a similar period at the same remuneration.\(^{64}\) The executory obligations of the artist and the producer to each other are thereby renewed. If the original contract was for a period in excess of one year, the automatic renewal thereof would nevertheless be for a period of one year.\(^{65}\) Where the term of the original engagement was for a period of less than one year, then the automatic renewal thereof is for a period co-extensive with the original term.\(^{66}\)

Where the artist and the producer upon the expiration of the original period enter into an agreement which modifies an essential term of the contract although the new agreement does not change the duration period, there is no renewal but a new contract.\(^{67}\) Therefore, where the new agreement is oral and the period is at least a year, the artist cannot recover in an action for salary due, since the new oral agreement is unenforceable under the Statute of Frauds.\(^{68}\)

§ 363. Termination of Artist’s Engagement.

The artist and the producer may provide in their agreement when and how the engagement shall terminate. In one case, the artist agreed to render services to the producer "for any period less than ten months, at the option


of either party,” commencing on a certain day. The agreement provided that it might be cancelled “at any time by either party giving two weeks notice to the other in writing”. It was held that this was an engagement for no more than ten months with the right of either party to terminate it on two weeks notice.\(^69\)

In another case, the producer employed the plaintiff as manager of his opera company “until the close of the season, which will not last longer than the middle of May”. The plaintiff on behalf of the producer entered into contracts with performers, which provided that, “in case of the serious or prolonged illness of . . . the leading soprano, this contract shall be terminated and cancelled.” The leading soprano became seriously ill and thereafter the opera company was disbanded and salaries due were paid. Plaintiff himself participated in causing such a cessation of activities. The court held that the disbandment was the “close of the season” within the plaintiff’s contract with the producer.\(^70\)

Where a contract provided for an engagement of the artist during the “season of 1918–19, this engagement to be for not less than 10 weeks,” that during the engagement either party might annul the agreement upon two weeks notice, and that the producer reserved the right to cancel the contract at any time before the opening of the season, it was held that the artist had been guaranteed ten weeks employment; the contract could not be terminated prior to the expiration of ten weeks.\(^71\)

Where the engagement is an indefinite employment at will, it is ordinarily the rule that no notice is required to terminate the relation.\(^72\) But in the so-called “legitimate” theatrical profession, such a relation can only be terminated upon two weeks notice.\(^73\) Of course, evidence is


\(^{70}\) Strakosch v. Strakosch, 11 N.Y.Supp. 251 (City Ct., 1891).


\(^{72}\) See § 286 infra.

\(^{73}\) De Carlton v. Glaser, 172
admissible to show that such custom exists.\textsuperscript{74} \textit{Quaere}: To what extent is this custom applicable to the engagement of "legitimate" theatrical artists for broadcast performances?

Termination of the engagement of the artist may occur by operation of law. Whether the contract is for a definite or indefinite term, the death of the artist works a termination of the contract.\textsuperscript{75} It is the general view that the death of the employer terminates a contract for personal services.\textsuperscript{76}

It follows that in the case of serious and protracted illness of the artist, the producer should, in order to carry on his enterprise, have the right to declare the contract at an end.\textsuperscript{77} This is the rule except as slightly modified to avoid arbitrary acts on the part of the producer.\textsuperscript{78}

App. Div. 132, 158 N.Y.Sup. 271 (1916); Briscoe v. Litt, 19 Misc. 5, 42 N.Y.Sup. 908 (1896); Hall v. Aronson, N.Y.L.J., Mar. 16, 1891; Hart v. Thompson, 39 App. Div. 668, 57 N.Y.Sup. 334 (1899). In the last mentioned case, the Court said at page 669:

"The evidence shows that there was a custom at the time in the theatrical profession where no definite contract of employment has been made, to give on the one part, and accept on the other, a notice of two weeks to terminate an employment, and that in pursuance of such custom, that notice was given to the plaintiff."

See Haines v. Thompson, 2 Misc. 385, 21 N.Y.Sup. 901 (1893). \textsuperscript{74}Hart v. Thompson, 39 App. Div. 668, 57 N.Y.Sup. 334 (1899). See \textsection 360 supra. \textsuperscript{75}This is the general rule as to all personal service contracts. Mulqueen v. Connor (lawyer) 65 F.(2d) 365 (C.C.A. 2d, 1933); Blakely v. Sousa (manager), 197 Pa. 305, 47 Atl. 286 (1900); \textit{WILLISTON ON CONTRACTS} (1920) \textsection 1940. \textsuperscript{76}\textit{WILLISTON ON CONTRACTS} (1920) Sec. 1941. See \textit{In re Rosenberg's Will}, 213 App. Div. 167, 209 N.Y.Sup. 315 (1925). \textsuperscript{77}In \textit{Shaw v. Ward}, 170 N.Y. Supp. 36, 38 (Sup. Ct., 1918), the Court said:

"It may be that, in a contract for services covering a considerable period of time, limited and unimportant absence for unavoidable cause may not be treated as a breach of the contract as a whole; but where the breach is manifestly serious, and, as in the case at bar, goes to the very root of the entire contract, it is quite clear that the employer must be at liberty to treat the contract as terminated."

\textsuperscript{78}Spaulding v. Rosa, 71 N.Y.
§ 364. Contracts for Satisfactory Services.

The radio broadcast artist is often engaged by the producer on a satisfaction basis, that is, the performance of the artist shall be rendered to the satisfaction of the producer. In an ordinary employment contract where the services are not unusual or performed by the exercise of special skill, such a satisfaction provision does not allow arbitrary or capricious discharge of the servant by the employer. The discharge must be made in good faith, which, in accord with the state of the evidence, is a question of fact for the court or jury.

However, a contract for the services of an artist is one involving the exercise of taste, fancy, sensibility or opinion. In such a case, the rule is generally different. The fact that the artist agreed to render such services to the satisfaction of the producer in itself indicates that the artist considered the producer the sole judge of the quality of his services. The artist may be discharged by the producer irrespective of the good faith or genuineness of the dissatisfaction of the producer. The court will not usurp the prerogative of the producer as the sole judge as to whether the artist’s services are satisfactory to him.

40 (1877); Fahey v. Kennedy, 230 App. Div. 156, 243 N.Y.Sup. 396 (1930). There the Court said:

"Where the services to be rendered are of immediate necessity or are of a special character that no ordinary person can perform them, and it is necessary to obtain the services of a skilled person in order to continue the business, the protracted illness of such an employee furnishes ground for the employer to declare the contract at an end."


The problems in this situation would seem to be whether the parties have contracted for the exercise of personal taste, judgment or opinion and whether the producer is to be personally satisfied. If so, the general rule applies.81

Various cases in New York82 have attempted to distinguish and limit this rule.83 However, these cases mainly concern employments which raise questions of ordinary services involving mechanical fitness or operation fitness. Their holdings require that the dissatisfaction be genuine and not feigned.84

Only one other case involving an artist has imposed the good faith requirement.85 Another case86 which has been...

81 Saxe v. Shubert, 57 Misc. 620, 108 N.Y.Sup, 683 (1908) (actor); Weaver v. Klaw, 16 N.Y.Sup, 931 (City Ct., 1891) (actor); Aquinto v. C. C. Fisher, Inc., 165 N.Y.Sup, 369 (Sup. Ct., 1917) (musician).
83 Crawford v. Mail & Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (1900) is the leading case in favor of the general rule. It has been approved in Wynkoop, etc., Co. v. Western U. Tel. Co., 268 N.Y. 108, 113, 196 N.E. 762 (1935).
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cited as seeking to impose the good faith requirement turned on the construction of the contract. The Court held "good faith" to be an express requirement of the contract. This decision therefore does not modify the rule in New York.

In several jurisdictions, the rule has been expressly modified even as to artists. This is true of California, Massachusetts and the Federal Courts which impose the good faith requirement.

A distinction is drawn between contracts which provide for "satisfactory services" and those which require "services satisfactorily performed". The latter provision raises a question of fact for the jury as to whether the services were performed so as to satisfy the requirements of the contract. Where the agreement provided that the producer would pay a broadcast artist "for the satisfactory performance of his duties", the question raised was whether the producer was reasonably dissatisfied; no question of personal dissatisfaction was involved. Where the producer may "deem" the services unsatisfactory, he has an absolute right of discharge. Where the contract is for "satisfactory services," the case is within the general rule and a discharge by the producer who claims to be dissatisfied is not wrongful.

It has been held that a contract which contains a personal satisfaction clause lacks mutuality to sustain the

87 See Frohlich & Schwartz, Law of Motion Pictures (1917) 113, n. 43.

Contra: Kendall v. West, 196 Ill. 221, 63 N.E. 683 (1902).
issuance of a negative injunction restraining the artist from rendering his services for another. However, mutuality is present where the agreement provides that the producer would pay the artist "for the satisfactory performance of his duties", since this provision raises the question of reasonableness so as to make the engagement one not terminable at will.

Where the agreement expressly or by implication provides that the services are to be satisfactory to the producer, the artist must prove such satisfaction to recover under the contract. Where the provision is that the producer may discharge if satisfied that the artist is incompetent, his good faith is a question for the jury.

Where the services are to be satisfactory to a corporate producer, an authorized local agent or manager may exercise the right of discharge for the producer. But where an individual is named as "the sole arbiter and judge," whether the producer is individual or corporate, that person alone may discharge on the ground of dissatisfaction.


Where the artist complains of a wrongful discharge by the producer, he has the burden of proof on the whole
case.\textsuperscript{1} The artist establishes a \textit{prima facie} case by the proof of a valid employment contract and discharge by the producer\textsuperscript{2} which has prevented him, though ready and willing, from further performing his part of the contract.\textsuperscript{3} The establishment of a \textit{prima facie} case by the artist imposes upon the producer the burden of going forward with evidence showing that the discharge was justifiable.\textsuperscript{4}

Where the justification relied on by the producer is the breach of a condition precedent by the artist, the latter, having the burden of the whole case, must prove performance of that condition precedent in order to recover.\textsuperscript{5} The artist must bring himself within all the terms of the contract to prevail ultimately.\textsuperscript{6}

\textbf{§ 366. Justifiable Discharge: Breach of Reasonable Rules and Regulations.}

Rules and regulations include orders, commands, requirements and whatever is ordinarily meant by this phrase.

The principal duty of the artist is obedience to all reasonable rules and regulations of the producer which are not inconsistent with the contract.\textsuperscript{7} Where the agreement expressly provides that the artist will obey or abide by or conform to all rules and regulations of the producer, such a clause contemplates only reasonable and necessary rules and regulations.\textsuperscript{8} Even where the agreement to obey reasonable rules and regulations is not expressly

\begin{footnotes}
\item [2] Ibid.
\item [4] Ibid.
\end{footnotes}
made, the law will imply such a promise. The breach of the artist's duty to obey all reasonable rules and regulations is sufficient justification for the discharge of the artist by the producer to free the latter of any liability therefor.

In determining whether a certain rule is reasonable, all the circumstances must be considered. The motive of the producer in formulating a certain rule is immaterial. Therefore, an order may be reasonable even though the producer issued it with knowledge that the artist would leave his engagement rather than obey.

The reasonableness of the order must be decided by the court or jury. In Corrigan v. E. M. P. Producing Co., it was said:

"Where the reasonableness of the master's order depends upon undisputed facts, and the inferences from the facts found or admitted all point one way, the question as to the reasonableness of the order or rule is one of law for the court, and not a question of fact for the jury. Where, however, the reasonableness of the order does not rest wholly upon undisputed facts, or its reasonableness is not so apparent that but one inference can reasonably be deduced from the proved or admitted facts, it is for the jury to determine whether the order is reasonable or not."

Where the artist agrees to report for rehearsals promptly when notified to do so, but is frequently tardy,
and the producer experiences difficulty in notifying him of the time, it is a reasonable rule to order him to be at the studio at a certain hour every day whether he is to perform or not. It is reasonable for the producer to make a rule that all publicity for the program should emanate from him. Where the artist has agreed to buy all necessary costumes, it may be reasonable under the circumstances to require him to buy new and additional costumes.

To be sufficient justification for the discharge of the artist, it is the preferable view that the breach of the reasonable rule be willful. "A willful disobedience is an intentional disobedience." It is not necessary that the artist bear any malice or commit a wrong against the producer to constitute an intentional violation. What is meant is that the act or omission was purposely and knowingly done.

§ 367. Same: Insubordination and Disobedience: Refusal to Play Role Assigned.

Where the artist is insubordinate and disloyal, the producer may justifiably discharge him without liability.

Is it disobedient or insubordinate for an artist to refuse to play an assigned role in a broadcast program? Where an opera singer refused to sing the tenor role in a certain opera without any reason, the court held that the jury should decide whether the discharge was justified. Where the artist agreed to play any role assigned to him

by the producer, a refusal by him to play an assigned role justified a discharge by the producer.\(^{22}\) Of course, the contract may provide otherwise.

In some cases, the artist has been permitted to refuse to play assigned roles upon reasonable grounds.\(^ {23}\) It has been held that a refusal to play a certain role for artistic reasons did not make the discharge wrongful since the contract did not limit the roles which could be assigned to the artist.\(^ {24}\) It would seem to be a general rule that the discharge of an artist for refusal to play a certain role, in the absence of a contract provision to the contrary, is justified.

Since such a rule seems harsh and an interference with the artistic and intellectual integrity of the artist, the courts have not pursued it to an extreme in certain cases. Thus, a dramatic actress could lawfully refuse or object to appear in a comedy part.\(^ {25}\) Whether such refusal or objection is in good faith is a dominant question and is for the jury.\(^ {26}\) To preserve his artistic integrity, the performer may object, even insistently, to an interpretation of the role which the producer directs or requires.

On this point, a California court in a well reasoned opinion has said:\(^ {27}\)

"To constitute a refusal or failure to perform the conditions of a contract of employment . . . there must be, on the part of the actress, a wilful act or wilful misconduct . . . a condition which is absent when the actress uses her best efforts to give an artistic performance and to serve the interests of her employer. . . ."

"Even in the most menial forms of employment there will

\(^{24}\) Rafalo v. Edelstein, 80 Misc. 153, 140 N.Y.Sup. 1076 (1913).
\(^{26}\) Rafalo v. Edelstein, 80 Misc. 153, 140 N.Y.Sup. 1076 (1913).
exist circumstances justifying the servant in questioning the order of the master . . . when the employment is of the services of 'a special, unique, unusual, extraordinary and intellectual character', as is agreed by the contract here under consideration, to be rendered 'conscientiously, artistically and to the utmost of her ability', sincere efforts of the actress to secure an artistic interpretation of the play, even though they may involve the suggestion of changes and the presentation of argument in favor of such changes, even though insistently presented, do not amount to wilful disobedience or failure to perform services under the contract, but rather a compliance with the contract which basically calls for services in the best interest of the employer.'”

A producer may not insist that the artist perform a role inferior to that for which he was engaged.28 Where an artist is known to the producer and to the listening public as skilled in a certain type of role, there is a presumption that the engagement is for similar roles.29

The producer is not justified in discharging an artist who refuses to perform in an obscene, lewd or seditious program. In the ordinary theatrical presentation, the jury would decide whether the show was obscene, lewd or seditious.30 The revocation of a broadcast station license by the Federal Communications Commission on the ground that the producer broadcast an obscene program should be equivalent to a jury finding to the same effect so as to relieve the artist from further performance of the contract.

A leading authority on the law of the theater seems to draw a distinction between an obscene or lewd show and the portrayal of a lewd or immodest character, such as a harlot or adventurer.31 As to the latter, the artist cannot justifiably refuse to play the role.32

31 Frohlich & Schwartz, Law of Motion Pictures (1917) 139.
32 Ibid.
§ 368. Same: Refusal to Wear Costume.

While costumes are occasionally worn in radio broadcast performances to entertain studio audiences, there is no such general usage. The parties should not be held to have contracted with respect thereto unless an express provision is contained in the contract. The agreement between the artist and the producer should, if it is so intended, provide for an obligation of the artist to wear costumes. Where the contract so provides, the artist cannot recover compensation if he refuses to wear the costume. The artist cannot object to the immodesty of the costume designed. In theatrical or motion picture performances, where costumes are generally necessary, the artist may not unreasonably refuse to wear the costume assigned unless the contract provides otherwise.


The incompetency of the broadcast artist will be sustained as a valid ground for his discharge by the producer. The justification for such discharge is found in the implied warranty by the artist that he has the requisite skill and ability to perform the role for which he has been engaged. Hence, "incompetency" is not equivalent to "unsatisfactory".

35 Ibid.

In Brandt v. Godwin, supra, the Court said at page 811:
"It is the rule that, when a person engages to perform a service requiring the possession of special skill and qualities, there is an implied warranty on his part that he is possessed of the requisites to perform the duties undertaken, and, if found wanting, the right to discharge exists."
38 Brandt v. Godwin, 8 N.Y.
The discharge of the artist for incompetency must be made in good faith.\textsuperscript{39} The evidence must show that the artist is in fact incompetent.\textsuperscript{40} It is only such incompetency as appears after the contract is made which justifies the discharge. Consequently, before the producer can assert such a ground, he must give the artist a reasonable opportunity to perform either at the rehearsal or on an actual broadcast program.\textsuperscript{41}

While the performance given during the audition by which most broadcast artists are engaged is not admissible as evidence of incompetency, yet the performance there rendered may be considered as a standard of competency.\textsuperscript{42} If the incompetency of the artist is evident at the commencement of the rehearsals, the producer at that time may justifiably discharge the artist.\textsuperscript{43}


The essence of the contract between the artist and the producer is the personal nature thereof. It is based upon the ability of the artist to perform at the times agreed upon. While it is unfortunate that the artist may be unable to perform because of illness, the producer may, however, justifiably discharge the artist without liability therefor.\textsuperscript{44} A minor illness which is not protracted and which does not seriously affect the broadcast of the program may be tolerated.\textsuperscript{45} More serious or protracted illnesses, however, justify discharge.\textsuperscript{46}

\textsuperscript{39} Grinnell v. Kiralfy, 55 Hun 422, 8 N.Y.Suppr. 623 (Sup. Ct., 1890).

\textsuperscript{40} Charley v. Potthof, 118 Wis. 258, 95 N.W. 124 (1903) (where it was held that it was for the jury to decide whether the artist gave the kind of performance contracted for); Harley v. Henderson, Law Times, Rep. Feb. 18, 19 (Eng., 1884) (where the evidence was held insufficient to show that the artist was incompetent).

\textsuperscript{41} See Walton v. Godwin, 58 Hun 87, 11 N.Y.Suppr. 391 (1890).

\textsuperscript{42} See § 364 supra.


gram will not be grounds for discharge.\(^ {45}\) If the artist is able to return to service within a reasonable time, there is no ground for discharge.\(^ {46}\)

Where the artist renders services which are immediately necessary or such that no ordinary artist can perform them, and the producer is required to secure the services of a skilled artist to continue his broadcasts, the protracted illness of the artist justifies his discharge.\(^ {47}\)

In the absence of a contractual provision specifying that the illness of the stellar artist which prevents the continuance of the broadcasts shall excuse the producer as to the other members of the cast,\(^ {48}\) the producer may not in such case discharge the other artists without liability therefor.\(^ {49}\) But where the stellar artist is the chief performer of a troupe which has been engaged by the producer, the latter may justifiably discharge the whole troupe upon the protracted illness or decease of the star.\(^ {50}\)

\(^ {45}\) Rubin v. International Film Co., 122 Misc. 413, 204 N.Y.Supp. 81 (City Ct., 1924); Fisher v. Monroe, 11 N.Y.Supp. 207 (City Ct., 1890).


In Rubin v. International Film Co., supra, the artist was accidentally injured on his way to the studio and required medical attention. Consequently he was delayed for a few hours. The discharge was held not justified.

The Court said at page 417:

"That the unforeseen accident incidentally caused the defendant a financial loss was unfortunate, but it does not follow necessarily, nor is it here shown, that plaintiff's disability interfered so substantially with the interests of the defendant as to go to the root of the consideration, which was, of course, his readiness, willingness and ability to continue to perform and defendant's undiminished ability to derive further benefit from the contract."


\(^ {48}\) See Strakosch v. Strakosch, 11 N.Y.Supp. 251 (City Ct., 1891) where the contract contained such a provision.

\(^ {49}\) Cf. Wentworth v. Whitney, 25 Pa. Super. 100 (1903) (deduction in salary); Gaitlin v. Searle, 1 N.Y. City Ct. 349 (1881).

\(^ {50}\) Spaulding v. Rosa, 71 N.Y. 40 (1877).

The intoxication of an artist to the extent that he is incapable of performance, is justifiable ground for his discharge by the producer. Since the employment of a performing artist in its very nature requires sobriety, a single instance of drunkenness at the time of broadcast or rehearsal is sufficient to excuse a discharge. The question is one of fact whether the artist was thereby rendered incapable of performing his services.

§ 372. Same: Unfaithfulness, Insolence and Insubordination.

Where the conduct of the artist is such as threatens the best interests of the producer, or is not an honest, faithful performance of the artist’s services, a discharge is justified. The assault by one member of the cast of another has been held ground for discharge.

The producer may, without liability, discharge an insolent artist or one who smokes while on duty in violation of express orders.

§ 373. Same: Immoral Conduct or Indecent Language.

An early case held that immoral or lewd conduct on the part of the artist sufficiently justified a discharge by the


53 Carpenter Steel Co. v. Norcross, 204 Fed. 537 (C.C.A. 6th, 1913); Berg v. Just Because, Inc., 205 App. Div. 31, 199 N.Y.Sup. 66 (1923) (where the business manager of a musical comedy abused the defendant’s president before the whole cast and stated that the show would be a failure); Alexander v. Potts, 151 Ill. App. 587 (1909).

54 Keane v. Liebler, 107 N.Y. Supp. 102 (Sup. Ct., 1907).

55 Forsythe v. McKinney, 8 N.Y.Sup. 561 (Sup. Ct., 1890).

56 Ibid.
§ 374. The Artist and the Producer

producer. This is so even though the artist thoroughly fulfills his duties as a broadcast performer.

This rule will probably be followed in such cases where the producer proves that the low moral conduct of the artist subsequent to the execution of the contract for his services has become so reprehensible to the public as to render the engagement unprofitable or injudicious. Such a ground for discharge should be substantial and should not concern itself with matters which have no direct effect upon the program for which the artist is engaged.

Where the artist in the course of a broadcast program utters violent or abusive language in deviation from the assigned role, the producer may discharge him without liability. The broadcast by an artist of indecent or off-color remarks is a justifiable ground of discharge, since such conduct threatens the best interests of the producer. Moreover, the radio broadcast station is affected injuriously in that the operating license is jeopardized thereby since the program may be considered as not in the public interest.

§ 374. Justifiable Discharge: Failure of Artist to Appear at Rehearsals.

The willful or intentional failure of an artist to appear at rehearsals is a justifiable ground for the discharge of the artist. Rehearsals are essential to the success of any broadcast program and agreements should specify the number thereof. On such occasions, the respective parts

57 Drayton v. Reid, 5 Daly (N.Y.) 442 (1874).
58 Ibid.
61 See § 567 infra.
are timed, cut or increased, arranged and corrected. The failure of an artist to appear is an inexusable non-performance of the contract since it constitutes an unwarranted interference with the producer’s business and the work of the other artists. The artist, of course, must have notice of the rehearsal and intentionally absent himself therefrom.

§ 375. Notice of Discharge.

It is an essential requirement that the producer communicate to the artist the fact that he has been discharged. Any language and any form of communicating the discharge is sufficient, so long as the artist is actually notified. Where the producer does assign a ground for the discharge of the artist in the notice, he is not bound thereby and may assign another as justification in an action by the artist.

If the agreement between the artist and the producer specifies the manner and terms of the discharge, then the parties are bound thereby.

Where the producer makes an invalid assignment to another of his contract with an artist and refuses to employ the artist, the latter may treat the conduct of the producer as a discharge.

§ 376. Waiver or Condonation of Acts Constituting Grounds for Justifiable Discharge.

There may be a waiver or condonation by the producer of any acts constituting grounds for justifiable discharge:


of the artist. The waiver or condonation, of course, may be express or implied in fact.

Where the continuance of the engagement of the artist by the producer after the wrongful act, is alleged as a waiver thereof, it is a question of fact for the jury on the whole case.\(^{69}\) However, in one instance a verdict was directed for an artist on the ground that the mere retention of him by the producer after lateness constituted a waiver thereof.\(^{70}\)

Payment of salary constitutes a waiver or condonation where it has been continued for a sufficient duration of time to permit such an inference.\(^{71}\)

Where an artist after breach sought his release by the producer to accept another position, the request of the producer that he continue performances and the acquiescence of the artist thereto constitutes a waiver.\(^{72}\)

Every waiver or condonation is subject to the implied condition of further good conduct on the part of the artist.\(^{73}\) However, in the event of a further breach by the artist, the producer may set up the whole course of the artist’s conduct as justification for the discharge.\(^{74}\)

\(^{69}\) Rafalo v. Edelstein, 80 Misc. 153, 140 N.Y.Supp. 1076 (1913). The Court said at page 155: “The fact, that an employer continues an employee in his employ after cause for discharge exists, is not, as a matter of law, a waiver of the right to discharge him. . . . Whether the plaintiff’s breach of contract was condoned by the defendants was a question of fact for the jury to determine under all the circumstances of the case.” See Rosbach v. Sackett & Wilhelms Co., 134 App. Div. 130, 118 N.Y.Supp. 846 (1909); Fröhlich & Schwartz, Law of Motion Pictures (1917) 142.


\(^{73}\) Rubin v. International Film Co., 122 Misc. 413, 204 N.Y.Supp. 81 (1924).

\(^{74}\) Yokel v. N. Y. Tribune Corp., 184 N.Y.Sup. 822 (City Ct., 1920); Ginsberg v. Friedman, 146 App. Div. 779, 131 N.Y.Sup. 517 (1911).
§ 377. Failure of Producer to Secure Broadcast Time
No Excuse for Non-Performance of Contract with Artist.

Unless a contract for the services of an artist is specifically conditioned upon the securing of an available period of broadcast time, the producer is firmly bound by his agreement wherein the artist has agreed to render his services in the contemplated program.

Where it is clear from the agreement that the producer is under a duty to furnish actual employment or to pay the specified salary, he will not be released from liability where he fails to furnish employment for a cause which was within his control. Even though the agreement provides that the producer will be excused "for any cause whatsoever", he will not thereby be excused where the cause was within his control. In the interpretation of an agreement containing such an exemption clause, the court will not construe it to include causes within the control of either party or both.75


The impossibility of performance of a contract for personal services resulting from acts of God or other circumstances beyond the control of the parties, has always been considered justifiable.

By arbitration under the Actors' Equity contract, the pregnancy of a female performer has been construed as an "Act of God".76 It is doubtful, however, whether in broadcasting, a female performer may justifiably withdraw her services on the grounds of her pregnancy. It would seem that justification for non-performance of her services should be founded upon the general grounds of illness which prevents substantial performance of the agreement. In any event, where the contract involves a long period of time, such a physical condition might justify

76 See N. Y. Times, Sept. 7, 1929, 15, col. 3.
suspension of performance under the contract rather than total non-performance.

Where the engagement has been postponed, or the parties are otherwise rendered incapable of performance under the contract by reason of *force majeure*, such as war, revolution and international conflicts, such non-performance is excusable.\(^77\)

§ 379. Artist’s Right to Compensation.

Where the amount of compensation is not stated in the agreement, the artist is entitled to a reasonable compensation \(^78\) unless it was requested that the services be rendered gratuitously.\(^79\)

If the contract between the producer and the artist fixes the specific amount to be paid as compensation to the latter, payment is due after performance of the services or at any other time agreed upon.\(^80\)

So long as the artist has substantially performed for the entire duration of the agreement, he is entitled to compensation for the whole period even where for short intervals during the contract period no work was provided for him. His idleness in such case is not a bar to recovery.\(^81\)


\(^78\) See *WILLISTON ON CONTRACTS* (Rev. Ed., 1936) § 1028.

\(^79\) Whether the services were requested as a favor or for the purposes of business is a question of fact.

\(^80\) *WILLISTON ON CONTRACTS* (Rev. Ed., 1936) § 1028.

Where the agreement specifies the payment of a lump sum as compensation for one or more broadcasts, the contract is necessarily indivisible and payment is due only at completion of performance of the agreed services.\textsuperscript{82}

The general view is that wherever possible the courts will construe a contract for personal services to be divisible. The mere statement in an agreement that compensation shall be a certain sum per week or per broadcast would lead many courts to hold that the contract is divisible as to the compensation, even though it may be otherwise indivisible.\textsuperscript{83} Where an artist was engaged for a thirty week period, the salary to be computed on a weekly basis, it was held that the separability of the contract extended only to weekly payments so that the artist could not recover under the contract for salary due for that part of a week in which he did no work.\textsuperscript{84} If the non-performance during the balance of the week was due to a wrongful discharge, the artist could only sue for breach of contract.\textsuperscript{85} \textit{A fortiori}, where the artist employed by the week, abandons his engagement in the middle of the week or other stated period.\textsuperscript{86} This is true also whenever the contract is found to be entire.\textsuperscript{87}

cannot avail himself of the non-performance of a condition precedent who has himself occasioned its non-performance.

"The question of quantum meruit does not arise, for the defendant bound himself to pay a specific sum for a week's work, and after the work had been partly performed the plaintiff was prevented from its continuance by the failure of the defendant to provide a theater."

\textsuperscript{82} See WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 862.

\textsuperscript{83} \textit{Ibid}.

\textsuperscript{84} Keane v. Liebler, 107 N.Y. Supp. 102 (Sup. Ct., 1907).


\textsuperscript{87} Corrigan v. E. M. P. Producing Co., 179 App. Div. 810, 167 N.Y. Supp. 206 (1917). In this case, the artist was employed as a star to make one motion picture. Before the completion of the picture he was discharged. He sued for salary due. The Court held that.
§ 380. Same: Default of the Artist.

An important question arises where the artist is guilty of a slight default or has committed a default which justifies a discharge. May the artist in either of such cases sue for salary due prior to his default? Mr. Williston has ably stated the rules, as follows:

"1. If the default is so slight as not to justify discharge, or if though sufficiently serious to justify discharge, the employer with knowledge of the facts nevertheless continues the employment, the employee is entitled to the agreed compensation, and the employer must seek redress by cross action, counterclaim or recoupment as local procedure may dictate.

"2. If the breach of duty is sufficiently serious to justify discharge, and the employee is discharged there can be no recovery of compensation under the contract if it is indivisible; and even though it is divisible there can be no recovery on the contract for any portion of a division which owing to the fault of the employee has not been completed.

"3. Salary may be recovered by the artist for time spent in traveling from one place of performance to another."

§ 381. Artist's Causes of Action for Breach.

Where the contract is divisible, so that it may be breached in part and performed as to the remainder, the artist may in the case of a partial breach by the producer recover only for that breach. In such a case, the recovery of the contract by its terms was necessarily entire; therefore, he could not recover in an action for salary due.

88 WILLISTON ON CONTRACTS (1920) § 1028.
does not bar an action for a total breach of contract subsequently occurring. In the case of a partial breach, the artist may elect between an action for partial breach and one for total breach. The continuance of performance by the artist, without suit, is an election by him to waive the partial breach.\textsuperscript{90}

However, the artist may maintain only one action for a total breach of contract by the producer.\textsuperscript{91} Where the contract is entire, only one action may be maintained for any breach.\textsuperscript{92}

Where the artist, although ready, willing and able to perform, is prevented from performing the contract by reason of the acts of the producer in not providing the agreed work, it has been held that the artist may recover the compensation agreed upon in the contract and need not sue for breach thereof.\textsuperscript{92a}

\textbf{§ 382. Anticipatory Breach.}

The artist may contract with the producer for an engagement to begin at a future date, while at some time before that date the producer may possibly repudiate or denounce the agreement. It is clear that the producer is in breach of contract. Is it such a breach that the artist need not wait until the day of performance and present himself, but may immediately sue for damages as for breach of contract?

It is settled law that if the artist is notified before the commencement of his period of service that the producer will not use his services, he may treat the contract as breached and sue for damages.\textsuperscript{93}


\textsuperscript{91} Ibid.

\textsuperscript{92} Frohlich & Schwartz, Law of Motion Pictures (1917) 145.

\textsuperscript{92a} Payne v. Pathé Studios, 44 P.(2d) 598 (Calif., 1935).

\textsuperscript{93} Hochster v. De La Tour, 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853); Woolbridge v. Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919); Frohlich & Schwartz, Law of Motion Pictures (1917) 135. For the most complete collection of cases and discussion of
§ 383. Damages for Breach of Contract.

Where the artist is entitled to recover for breach of the contract of employment, the least amount which can be awarded is nominal damages. This award establishes the right of the artist and the wrong of the producer.

To recover more than nominal damages the artist must prove his damage. The producer is liable for all the direct and proximate damages which result from the wrongful discharge.

It is sometimes said that damages must be certain. What is meant is that there must be certainty of proof that injury has resulted. The general rule is that where it is certain that damages have been caused by a breach of contract and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach.

Uncertainty most often arises in cases where it is agreed that the artist shall share in the profits of the production. May the artist recover prospective profits as damages? Where the artist has partially performed and there have been some renditions or sales of the production, as the case may be, the artist may introduce such evidence as a basis upon which to compute future profits. But where

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the proof by the artist presents no reasonable foundation upon which to compute prospective profits, they cannot be awarded as an element of damages. This seems generally true of every broadcast production, whether it be "live" or transcribed. Prospective profits from a broadcast program may be too speculative and conjectural. Where no broadcast performance has been transmitted, no reasonable foundation for determination of future profits can be shown. Therefore, a liquidated damages clause is to be preferred in such instances and should be included in the contract.

§ 384. Measure of Damages for Breach of Contract.

In any event the artist will be entitled to recover his actual loss resulting from the breach of contract. Damages for injury to health, reputation or feelings caused by the breach of contract of employment will not be awarded the artist since they are too remote and uncertain.

The artist’s damages are measured by the amount he would have received under the contract had it been performed, less any amount which the producer might be able to show that the artist could have received in similar employment during the contract term after the wrongful discharge, definite repudiation or abandonment by the producer.

If the action for damages is brought before the expiration of the term of service, the damages are awarded as


101 Westwater v. Rector of Grace Church, 140 Cal. 339, 73 Pac. 1055 (1903).

§ 385. The award will be for the entire period of the agreement.\textsuperscript{104} In computing the amount of damages, the jury must determine the present worth of the obligation to pay salary.\textsuperscript{105} Such present worth of the producer’s obligation to pay salary is the difference between the full compensation provided by the contract less such amount as the producer may show in mitigation of damages.\textsuperscript{106}

Where the artist is entitled under the contract to his living expenses and the action is based on an anticipatory breach, he must show what such expenses would have been if he had been permitted to perform the agreement.\textsuperscript{107}

§ 385. Mitigation of Damages.

Where the producer has committed a breach of contract, the artist must, so far as he can without loss to himself, mitigate the damages resulting from the producer’s wrongful act.\textsuperscript{108} This is so whether the breach occurred before or during the period of employment.

To mitigate the producer’s damages, the artist must with reasonable diligence seek other employment.\textsuperscript{109} The employment to be sought need only be of the same kind, character and grade as that embraced within the agree-

\textsuperscript{103} Everson v. Powers, 89 N.Y. 527 (1882).
\textsuperscript{105} Hollwedel v. Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266 (1933).
\textsuperscript{108} WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 1359.
ment."\textsuperscript{110} For example, this duty does not require an artist, who before her engagement by the producer was a chorus girl, to accept or continue an engagement as chorus girl after the producer’s breach of employment of the plaintiff as an actress.\textsuperscript{111}

The burden is on the producer to show that the artist failed to mitigate the damages.\textsuperscript{112} The partial defense of mitigation must be sustained where the producer shows that by the reasonable exercise of diligence the artist could have secured similar employment.\textsuperscript{113}

Where the producer has absolutely repudiated or refused to perform the contract, the artist, as a part of his duty to mitigate damages, must cease performance. Where the artist continues in such a case, he cannot recover as for full performance.\textsuperscript{114}

If the producer in good faith makes an offer of re-engagement to the discharged artist upon the same terms for the balance of the contract period, the artist, if still unemployed, must accept in order to mitigate damages.\textsuperscript{115} Where the artist has received employment elsewhere, there is no duty upon him to abandon the new employment to accept the producer’s offer.\textsuperscript{116}

\section*{§ 386. Notice as Liquidation of Damages.}

Where the producer, by virtue of an express provision in the contract or of a usage which has become part of

\textsuperscript{110} Howard \textit{v.} Daly, 61 N.Y. 362 (1875); Briscoe \textit{v.} Litt, 19 Misc. 5, 42 N.Y.Sup. 908 (1896).
\textsuperscript{111} Briscoe \textit{v.} Litt, 19 Misc. 5, 42 N.Y.Sup. 908 (1896).
\textsuperscript{116} Deering \textit{v.} Pearson, 8 Misc. 269, 28 N.Y.Sup. 715 (1894).
§ 387. THE ARTIST AND THE PRODUCER

the agreement, is entitled to discharge the artist upon two weeks notice, the effect of the exercise of such right is to liquidate the damages to salary for the two weeks. In such a case, the artist cannot recover more than the salary for the notice period.

Where the artist is engaged for at least ten weeks, the balance of the engagement being terminable upon two weeks' notice, and the producer repudiates the contract before performance, the court will deem the notice to have been given during the ten weeks' period so that the artist cannot recover for any time beyond the guaranteed period.


Liquidated damages constitute the compensation which the parties have agreed must be paid in satisfaction of the loss or injury flowing as a consequence of a breach of contract. It is important to determine whether the agreement provides for liquidated damages or for a penalty. If the latter, no court will enforce it.

The old rule was that the intent of the parties controlled the determination of whether the agreement provided for a penalty. This rule has been modified as follows:

1. If the parties at the time of the execution of the agreement intended to make a genuine pre-estimate of the probable damages, such a provision will be construed as "liquidated damages".


Wise v. United States, 249
2. The use of the words "liquidated damages" or "penalty" is evidence for the court in determining whether a genuine pre-estimate was intended.\textsuperscript{122}

The modern rule has been expressed by an authority as follows: \textsuperscript{123}

"... if, in light of the facts known to the parties at the time of the making of the contract, the sum agreed on was a reasonable forecast of the probable damages, the liquidated damages clause is enforceable, regardless of what later turns out to be the amount of the actual damages."

It is still a prerequisite for the validity of a liquidated damages provision that the actual damage contemplated from the breach be uncertain and difficult of ascertain-ment.\textsuperscript{124} The parties will be deemed to have made a reasonable forecast where the sum specified is reasonably proportioned to the actual loss.\textsuperscript{125}


\textsuperscript{123} MCCORMICK ON DAMAGES (1936) § 150.


\textsuperscript{125} See Kothe v. R. C. Taylor Trust, 280 U.S. 224, 226, 50 Sup. Ct. 142, 74 L.Ed. 382 (1930); Wirth & Hamid Fair Booking v. Wirth, 265 N.Y. 214, 192 N.E. 297 (1933); MCCORMICK ON DAMAGES (1936) § 149.
§ 388. Injunctions Against Artists for Breach.

Whether there is an express or implied affirmative promise on the part of the artist to perform for the broadcast producer, the latter cannot secure a decree of specific performance of that promise. Such a mandate is unavail-
able even though the artist’s services are unique and the damage irreparable with a consequent inadequacy of remedy at law.\(^1\) The factors upon which this rule is predicated are:

1. The traditional regard of our jurisprudence for the safeguard of personal liberty.\(^2\)

2. The historic rule in Equity jurisprudence that specific performance will not be granted where continued supervision of performance by the court is necessary.\(^3\)

3. The inherent practical difficulties in securing performance by the artist as contemplated by the agreement.\(^4\)

The function of law being remedial, this situation could not long remain. Judgment at law for damages cannot at all times compensate the producer for the loss of a unique and not readily replaceable artist. This is especially true in modern productions which are often built around well-known performers. Such productions may be radio broadcast programs, stage plays or motion pictures. To solve this difficult and unjust situation, the courts of Equity have developed the remedy of the negative injunction.

Since the famous English case of *Lumley v. Wagner*,\(^5\) an injunction will issue to restrain the artist, who is so unique as to make damages at law inadequate and the producer’s injury irreparable, from performance for one other than the producer with whom he contracted to render


\(^3\) Poultry Producers *v.* Barlow, 189 Cal. 278, 289, 208 Pac. 93 (1922); Stanton *v.* Singleton, 126 Cal. 665, 59 Pac. 146 (1899); *Walsh on Equity* (1930) §§ 65, 66.

\(^4\) See De Rivafrnoli *v.* Corsetti, 4 Paige Ch. 264 (N.Y., 1833).

his services.\(^6\) By such an injunction, commonly called "negative", the court seeks to compel the offending artist to fulfill his obligation to the producer if he is to work at all as an artist. Obviously, this is accomplishing indirectly what the court cannot do directly, namely, to compel specific performance of the artist's promise to work for the producer.\(^7\) While this objection is founded on a great


\(^7\) O. W. Holmes, J., is reported in (1894) 8 Harv. L. Rev. 172, as saying at the nisi prius trial of Rice v. D'Arville, 162 Mass. 559, 39 N.E. 180 (1895):

"It is agreed on all hands that a court of equity will not attempt to compel a singer to perform a contract to sing. . . . If this is so, as is admitted, it appears to me with all respect to judges who may have taken a different view, that there is no sufficient justification for saying to an artist that although I will not put him in prison if he refuses to keep his contract, I will prevent him from earning his living otherwise, as a more indirect means of compelling him to do the same thing. I do
principle of our jurisprudence, it is nevertheless outweighed by the principle that contracts ought to be performed. In addition, the practical considerations of this indirect method are appealing.  

§ 389. Express or Implied Negative Covenant Essential.

The basis of the issuance of a negative injunction is the sole and exclusive right of the producer to the services of the artist. There must be a promise or covenant by the artist not to work for another. In fact, some cases hold that the absence of an express negative covenant justifies the refusal of the injunction.  

The better rule, however, is that the negative covenant may be implied or expressed. A negative covenant will not be implied from a mere affirmative promise to perform for the producer. But where the affirmative promise is one of exclusive services, or the evidence shows that the parties intended that the artist should perform for no one else during the contract period, a negative covenant will be implied. A similar implication will be made where the language of the agreement is such that it would be not quite see why, if an equitable remedy is to be given for the purpose of making an artist keep his contract, the usual remedy should not be given, and the whole of it; why, if I say, 'If you do not sing for the plaintiff you shall not sing elsewhere,' I should not say, 'If you do not sing for the plaintiff you shall go to prison.'"

8 Walsh on Equity (1930), § 66.


11 Whitwood Chem. Co. v. Hardman, [1891] 2 Ch. 416 (Eng.); Walsh on Equity (1930) § 70.  

12 Hoyt v. Fuller, 19 N.Y.Supp. 962 (Super. Ct., 1892); Cort v. Lazzard, 18 Or. 221, 22 Pac. 1054 (1889).
impossible for the artist to render services elsewhere.\textsuperscript{13}

Unless the agreement expressly or by implication prohibits the artist from rendering his services for the producer of another broadcast program requiring the personal services of the artist, the latter cannot be enjoined from rendering his services in several programs during the term of the agreement.

The same rule should apply to deny an injunction against an artist who renders his services in the production of recorded programs intended for broadcast during the term of his agreement with the plaintiff producer under which he is required to perform in person only. If the latter agreement is broad enough to include an obligation of the artist to render all services, including recorded performances, an injunction will issue for breach thereof.

It is a matter of interpretation of the agreement between the artist and the producer to determine whether the scope of the services is limited to a specific branch of the entertainment industry. Where the agreement between an artist and a motion picture producer is so construed as to extend the negative covenant of the artist to apply to the rendering of his services in a radio broadcast program not in competition with the motion picture producer, the court will issue a negative injunction against such a breach by the artist of his contract.\textsuperscript{14}

\section*{§ 390. Negative Covenant to Be Valid Must Be Reasonable.}

An agreement by which the artist agrees to render his services exclusively on behalf of the producer is not invalid or illegal and is not in restraint of trade.\textsuperscript{15} Whether the

\textsuperscript{13} Duff \textit{v.} Russell, 14 N.Y.Supp. 134 (1891) \textit{aff.} 133 N.Y. 678, 31 N.E. 622 (1892).


negative covenant is express or implied, the restriction which it imposes must be reasonable to be valid.\textsuperscript{16} On this ground, a court refused to enforce a negative covenant by a prizefighter not to fight for anyone else until he fought for the plaintiff inasmuch as such a restriction might forever deprive the defendant of the right to earn his livelihood as he should choose.\textsuperscript{17}

\section*{§ 391. Negative Injunction Issued Where Remedy at Law Inadequate.}

Before a court will issue a negative injunction the producer must establish a clear right thereto.\textsuperscript{18} Every action for a negative injunction rests on its own facts. It is always a question of fact to determine whether a particular broadcast artist falls within the category of cases where an injunction will issue against him for the breach of his negative covenant.\textsuperscript{19}

The foundation of all the cases allowing negative injunctions is that the damages for the breach of the artist's covenant are not estimable with any certainty, so that the producer cannot by means of damages purchase the same services from others.\textsuperscript{20} The producer's injury is consequently not remediable by an action at law. The remedy at law being inadequate for that reason, the court will restrain the artist's breach of his negative covenant.\textsuperscript{21}


§ 392. The Artist and the Producer

It follows that an essential element of the impossibility of the producer to purchase the same services as those of the offending artist is that the services rendered or to be rendered must be special, unique and extraordinary. The rule may preferably be stated as follows: Where the artist’s services are of special merit, unique and extraordinary, and where the damages for the loss thereof are immeasurable, the producer may restrain him from appearing elsewhere, provided of course the artist’s contract contains an express or implied negative covenant.  

§ 392. Same: Provision for Liquidated Damages.

In the event that the parties at the time of the making of the contract agreed on a valid liquidated damages clause, no injunction will issue against the artist, according to an early Maryland case. This case has been correctly criticized. The rule is now settled that a stipulation for liquidated damages is not an absolute bar to a negative injunction. It is a question of the intent of the


23 See § 387 supra.

24 Hahn v. The Concordia Singing Soc., 42 Md. 460 (1875) where the Court said at 466:

"Having thus by their own contract, made presumably with full knowledge of the means and ability of the defendant, and having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition, and having indicated as clearly as if so stated in terms, that the only form in which they could seek redress and recover the stipulated penalty or forfeiture, was a court of law, the complainants are precluded from now resorting to a Court of Equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in irreparable damage and injury to them."


26 Wirth & Hamid Fair Booking v. Wirth, 265 N.Y. 214, 192 N.E. 301 (1934).
parties. If the parties intended the liquidated damages provision as a substitute for performance, no injunction may issue.27 Conversely, if performance of the contract was intended, an injunction may issue.28 But in any case the producer may not have both, and must elect between his legal and equitable remedies.29

§ 393. Artist's Services Must Be Unique.

It is not a simple matter to determine whether an artist's services are unique, extraordinary and of special merit. The question is always one of fact which must be determined by the court in each case.30 A stipulation in


"When there is a covenant to do or not to do a particular act, under a penalty, the covenantor is bound to do, or refrain from doing the very thing, unless it appears from the particular language, construed in the light of the surrounding circumstances, that it was the intention of the parties, that the payment of the penalty should be the price of non-performance and to be accepted by the covenantor in lieu of performance."


In Diamond Match Co. v. Roeber, 106 N.Y. 473, 486, 13 N.E. 419, 424 (1887), the New York Court of Appeals said:

"It is a question of intention to be deduced from the whole instrument and the circumstances; and if it appears that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced."


30 In Winter Garden Co. v. Smith, 282 Fed. 166 (C.C.A. 2d, 1922), the Court said:

"Each case necessarily stands on its own facts, and whether a particular actor falls within the class of cases where an injunction will lie against him for breach of his negative covenant is in the last analysis a question of fact."
the agreement that the services of the artist are unique is not controlling upon the court.\textsuperscript{31}

Numerous factors must be considered before the services of an artist will be deemed unique. The artist's appeal to the public constitutes an important factor. It is significant that he is able to command the attention of a sizeable portion of the listening public. However, the standards are flexible and no clear, concise yardstick has been established.

The salary to be paid is another important factor in determining whether the artist's services are unique. Where a large compensation was payable to the artist under the contract, the court considered same as evidence of his ability to attract the public.\textsuperscript{32} In another case, a high salaried opera star was held not unique and an injunction was denied to the producer.\textsuperscript{33} But an acrobat who earned a very low salary was held so unique as to warrant the issuance of a negative injunction against him.\textsuperscript{34}

To constitute his services unique, it is not necessary that the artist be the star or one without whom the program would not be broadcast.\textsuperscript{35} One artist was held to be within the class against whom injunctions will issue on the basis of several laudatory reviews in different newspapers.\textsuperscript{36}

The services of the artist must to a high degree be indispensable to be considered unique. It can not be urged that a substitute is readily obtainable unless such a substitute substantially answers the purpose of the contract.\textsuperscript{37}

\textsuperscript{31} Hammerstein v. Mann, 137 App. Div. 580, 122 N.Y.Sup. 276 (1910); Carter v. Ferguson, 58 Hun 569, 12 N.Y.Sup. 580 (1890).


\textsuperscript{34} Cort v. Lazzard, 18 Or. 221, 22 Pac. 1054 (1889).

\textsuperscript{35} Comstock v. Lopokowa, 190 Fed. 599 (C.C.S.D.N.Y., 1911).

\textsuperscript{36} Harry Hastings Attractions v. Howard, 119 Misc. 326, 196 N.Y. Supp. 228 (1922).

\textsuperscript{37} Dockstader v. Reed, 121 App. Div. 846, 106 N.Y.Sup. 795 (1907).

Equity will not enjoin an artist from the breach of his covenant not to perform for another producer where the plaintiff in turn has failed or refused to perform the conditions and obligations of the agreement on his part to be performed. It is a necessary prerequisite to the issuance of a negative injunction against the artist that the producer show performance of his obligations.\(^3\) The mere technical fulfillment by the producer of his obligations is not sufficient if the artist has not been given the opportunity to perform his services before the public. In such a case, an injunction will not issue against an artist whose professional career has been so stifled.\(^4\)

§ 395. Producer Must Continue Performance After Negative Injunction Granted.

The issuance of a negative injunction restores the parties to the *status quo ante*. The producer who secures such an injunction thereby revives his obligation to continue to perform under the contract. Consequently, the producer must continue to pay the agreed compensation and to provide employment for the artist whose breach of a negative covenant was enjoined.\(^5\)

The contract being in full force and effect, any failure of the producer to perform which constitutes a breach of contract entitles the artist to maintain an action at law for damages.

§ 396. Negative Injunctions *Pendente Lite*.

Where the producer has established the essential elements requisite to the grant of a negative injunction, the

\(^3\) Pratt v. Montegriffo, 10 N.Y. Supp. 903 (Sup. Ct., 1890); Hill v. Haberkorn, 3 Silv. Sup. 87 (N.Y., 1889).


§ 397. THE ARTIST AND THE PRODUCER

The court will issue a temporary injunction because delay in such a case is tantamount to a denial of justice.41 On a motion for a temporary injunction the court must resolve all doubts on disputed questions of fact in favor of the artist.42

The issuance of a preliminary negative injunction rests in the sound discretion of the court.43 The court has always to consider the balance of conveniences. If the injunction against the artist will result in an injury which is equal to or greater than its denial, no temporary injunction will issue.44 The court may also require a bond to indemnify the artist for any damages which he may sustain by reason of the temporary injunction.45

§ 397. No Negative Injunctions Against Infant Artists.

The courts consistently refuse to enjoin an infant artist from the breach of a contract for personal services.46 This is based on the right at common law of all infants to avoid contracts made during their infancy.47 Although the infant’s parent is bound by the contract and the services of the parent and the infant are included in the same contract, he may still avoid the contract.48

In California, however, it would seem that a negative injunction to restrain an infant artist’s breach may issue.49 Section 36 of the California Civil Code 50 provides:

41 Comstock v. Lopokowa, 190 Fed. 599 (S.D.N.Y., 1911).
42 Kerker v. Lederer, 30 Misc. 651, 64 N.Y.Supp. 506 (1900).
50 California, Statutes (1931), c. 1070, § 2.
"A minor cannot disaffirm a contract, otherwise valid, to perform or render services as actor, actress, or other dramatic services where such contract has been approved by the superior court of the county where such minor resides or is employed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard."

This statute has the effect of enacting as the public policy of California that infants' contracts to render dramatic services, if duly approved by the proper court, are enforceable at law or in equity since the infant artist cannot disaffirm such contract.

By statute, a contract for the services of an infant artist may be invalid as coming within Child Labor Laws.51

At common law, an infant is not liable in damages for repudiation of a contract for services.52 But an infant will not be allowed to profit by his fraud in inducing a producer to enter into a contract for his services 53 where such inducement consisted of a representation that he was under no legal impediment in making the contract.

§ 398. Negative Injunction Not Barred by Clause for Arbitration.

Where the contract between the artist and producer provides for arbitration of all disputes as to salary or claims thereto, a negative injunction is not thereby barred.54 It appears, however, that a clause which provided for arbi-

52 American Film Co. v. Reilly, 278 Fed. 147 (C.C.A. 9th, 1922).
54 Harry Hastings Attractions v. Howard, 119 Misc. 326, 196 N.Y.Supp. 228 (1922). It is interesting to note that an arbitration clause was sustained and enforced by a California court in a contract for the services of a person who possessed the qualities and skill of an artist, even though arbitration is not available in California to contracts for labor generally. Universal Films v. Hymer, 50 P. (2d) 500 (Calif., 1935).
tration of all disputes as to matters covered by the contract would bar a negative injunction.\textsuperscript{55}

§ 399. Negative Injunction May Not Be Secured by Producer's Assignee.

It has been held that the negative covenant is not assignable by the producer because of the personal nature thereof.\textsuperscript{56} The assignee of the artist's contract for services may not therefore secure an injunction to prevent the artist from performing for another producer.\textsuperscript{57}

§ 400. Negative Injunction Will Not Issue Where Contract Lacks Mutuality.

Mutuality of obligation is an essential prerequisite to the issuance of a negative injunction to restrain the artist from breach of his contract.\textsuperscript{58} A contract lacks mutuality of obligation where the artist is bound to perform for a definite period but where the producer is not bound to furnish him with employment.\textsuperscript{59} Such a defect is fatal to a petition for a negative injunction.\textsuperscript{60}

\textsuperscript{56} Hayes v. Willio, 4 Daly 259 (N.Y. Com. Pl., 1872).
\textsuperscript{58} Lerner v. Tetrazzini, 71 Misc. 182, 129 N.Y.Supp. 889 (1911); Shubert Theatrical Co. v. Rath, 271 Fed. 827 (C.C.A. 2d, 1921).
\textsuperscript{60} Lerner v. Tetrazzini, 71 Misc. 182, 129 N.Y.Supp. 889 (1911), Gerard, J., said: "The defendant claims this contract is void for want of mutuality. I am of this opinion. Suppose Tetrazzini were suing on the contract. What employment was the plaintiff bound to give her? There is nowhere any obligation on the part of plaintiff to employ Tetrazzini any given number of
It is also essential that the contract be reasonable and fair, and not inequitable and oppressive.\textsuperscript{61} If the contract is procured by fraud or other unconscionable means, Equity will not enforce it.\textsuperscript{62}

\section*{§ 401. Injunctions Beyond the Term of Employment.}
Contracts for services of an artist which contain restrictive covenants whereby the artist agrees not to perform his services in a designated territory during a specified time subsequent to the expiration of the contract, will be enforced if the terms of such restrictive covenants are not too broad or unreasonable.\textsuperscript{63}

\section*{§ 402. Where Contract for Services Gives Producer Exclusive Right to Use Artist's Photograph for Advertising.}
\textit{J. Walter Thompson Co. v. Winchell}\textsuperscript{64} is an interesting case involving radio broadcasting where a producer of a program sought to enjoin the breach by an artist of a subsidiary provision in the contract for his exclusive services. The artist continued to render his services for the program but violated a provision of the contract under which he granted to the producer of the program the exclusive use of his photograph in connection with advertising material for the article sponsored by his program. The artist later granted to the other defendants the right to use his name and photographs in a series of advertisements for other products, which advertisements did not employ the medium of radio broadcasting. The producer
times in any one week, or even during the whole term of the contract, which is cleverly devised for the benefit of the plaintiff alone.”
\textsuperscript{62} Carmen \textit{v.} Fox Film Corp., 269 Fed. 928 (C.C.A. 2d, 1920), cert. denied, 255 U.S. 569 (1920).
sought to enjoin the performance of the subsequent contracts between the defendants as a breach of the provision of the artist's contract for his services. The lower court granted such an injunction, which on appeal was reversed on the ground that the producer failed to show that the performance of the subsequent contracts would result in irreparable damage and would in any way interfere with the performance of the artist's contract with the producer.

§ 403. Implied Negative Covenant of Artist Not To Do Any Act in Derogation of Producer's Rights Under the Contract.

In *J. Walter Thompson Co. v. Winchell*, the New York Appellate Division refused to extend a negative covenant with respect to the performance of services to a breach of another provision of the contract. It does not appear that the producer contended that the act of defendant artist, in granting to another the right to use his photograph and name in violation of his agreement that the plaintiff should have the exclusive right thereto, was a breach of the artist's implied covenant not to impair or derogate from the contractual rights of the plaintiff. Such a negative covenant was held in *Uproar Co. v. National Broadcasting Company* to be implied in every contract. Had this proposition been urged upon and accepted by the court in the *Winchell* case, a negative injunction would have issued against the artist.

A firm foundation for the implication of such a negative covenant is found especially in contracts for exclusive services or grants of sole rights. The value of such a promise can be protected only by such an implied negative covenant.

A negative covenant will be implied where it is indispensable to give effect to the intentions of the parties.  

65 Ibid.  
66 81 F.(2d) 373 (C.C.A. 2d, 1936).  
The covenant must be clearly implied and understood by the parties and will not be recognized by the courts unless required by equity and justice. Doubts and ambiguities will be resolved in favor of the natural right to make free and unrestricted use of the property granted by a contract which contains express language against the restriction sought to be imposed by a negative covenant.

It follows that this implied covenant not to derogate from or impair the exclusive contractual rights granted to the producer by a unique or extraordinary artist, should be enforceable in Equity by a negative injunction as is an implied negative covenant not to work for another.

69 Ibid.
69 Ibid.
Chapter XXV.

THE PRODUCER AND THE AUTHOR OF THE BROADCAST SCRIPT.

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§ 404. Generally.

The relation between the producer of the broadcast program and the author of a script therefor is a matter of contract. A distinction must be made between arrange-
ments for the broadcast of an existing program script and agreements to create a new script for the purposes of a particular broadcast program.

A script writer may by the terms of the contract be an employee of the program producer. Likewise, he may be an independent contractor. The court in every instance analyzes the legal relation between the parties as established by the contract and performance of the parties thereunder, irrespective of descriptive designations which may be recited in the written agreement.

It is similarly a matter of interpretation of the contract to determine whether the producer becomes vested with all rights in the script or whether he has merely obtained a license from the author or owner for a broadcast performance of the script in a specified program.

Another consideration is the problem whether the author of the scripts for a series of broadcast programs has any right to continue in that capacity for the successive series of the producer's broadcast programs of the same general type.¹

Numerous other problems arise by reason of the different situations and facts peculiarly involving various producers and script authors. The protection of broadcast program scripts as literary property is considered elsewhere.²

§ 405. Whether Author Is Employee or Independent Contractor.

It is often difficult to determine whether the relation between a script writer and a producer of the program is one of master and servant or independent contractor. One major test is the extent of control and direction of the details and methods of doing the work and of the results thereof.³

An independent contractor is one who agrees to do a

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specific piece of work for another for a lump sum or its equivalent. An independent contractor retains control of himself as to the method and detail in which the work is to be performed and as to when he shall commence and finish the work.³ An independent contractor is one who is not subject to discharge because he chooses to perform his services one way rather than another.⁵

To determine whether the author of the script is in the employ of the producer of the program, the question first to be decided is whether the script represents the will of the producer solely as to the result achieved or whether it includes his control over the method by which it is created.⁶ If the producer contracts for the script as an end in itself and possesses no control or direction over the means and method by which the script is created, the script writer is an independent contractor who reserves all rights not specifically granted to the producer.⁷ If the author’s efforts are so dominated by the producer as to render the details of authorship subject to the control and direction of the producer, the author may be considered an employee who, by his employment, divests himself of all rights in his work in favor of his employer.

Generally, the author is an independent contractor who retains all rights in his work which have not been expressly or by necessary implication granted to the producer.⁸

If the author is in the employ of the program producer, there is a presumption that all creative work done by the author within the scope of his employment belongs to his employer.⁹ The law presumes that the employee-author surrendered all of the results of his mental labor for the

⁵ I ibid. See Chapter XXIII. supra for a discussion of the question of justifiable and unjustifiable discharge.
⁸ I ibid.
⁹ See § 587 infra.
stipend received. Unless the author so employed specifically reserves unto himself definite rights in his work, the employer will be deemed to be the sole proprietor thereof and entitled to all the benefits of such ownership. Despite the fact that the author’s compensation may be based upon a profit-sharing arrangement, the master and servant relation may nevertheless exist. An author who is paid upon a quantity basis, *via*, so much per page, per word, or per minute of broadcast may also be deemed to be an employee. The rights of ownership which inure to an employer as a consequence of the master and servant relation exist as a matter of law and no formal assignment of rights by the employee-author is necessary.

Where an author employed by a program producer attempts to dispose of writings, which have been created by him within the scope of his employment, to a producer who had knowledge of the existence of a contract of employment, such subsequent purchaser would not prevail over the employer. If the author creates a work as an incident to his employment and not within the scope thereof, and the work is nevertheless made from information and knowledge acquired in the course of his employment, the literary property rights therein belong to the author free from any proprietary interests on the part of the employer. An author is not precluded from basing

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12 Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118 (Eng., 1853).

13 *Lawrence v.* Affalo, [1902] 1 Ch. 264 (Eng.). But see London Universal Press *v.* University Tu-

torial Press, [1916] 2 Ch. 681 (Eng.).


his work on experience gained during his employment and may refer to basic sources of information. 16

A program producer who employs a script writer derives and receives full rights of ownership, which include the right to obtain copyright in his own name, of all works created by the script writer within the scope of the employment unless some express reservation to the contrary has been made by the author in the employment agreement. 17 The right of renewal of the copyright upon such works also specifically belongs to the employer. 18

A comedian or other performer who employs a writer to originate gags, comedy or other program material becomes the owner thereof by virtue of the employment relation. The comedian or performer, however, may, by the terms of his own agreement with the producer of the program, dispose of such rights to the latter. 19

§ 406. Contracts for Broadcast Program Scripts: License and Assignment Distinguished.

It is always a question of the interpretation of the contract between the program producer and the author of the script to determine whether a license or an assignment of the property in the script has been granted.

A license gives the producer no interest in the literary property itself, but merely grants a personal right to do an act which otherwise would be unlawful. 20 An assignment is a transfer of property rights, 21 conveying, among other things, the right to reassign and grant to others the rights acquired.

A mere license is a personal contract which is not assign-

16 Colliery Engineering Co. v. United Correspondence Schools, 94 Fed. 152 (C.C.S.D.N.Y., 1899).
17 See § 587 infra.
19 Cf. Uproar Co. v. National Broadcasting Co., 81 F.(2d) 373
21 Seventh Nat. Bank v. Iron
able by either party without the consent of the other.\textsuperscript{22}

If the author of a script has assigned and transferred all of his rights therein to the producer, then the latter has an unrestricted right to reassign, license or sub-license without any claims on the part of the author.\textsuperscript{23}

If the producer has merely received a license, an attempt by him to sub-license another to produce the script would be a breach of the license agreement,\textsuperscript{24} but if that agreement contains terms broad enough to include such sub-license privileges, the author has no right to interfere with the same. Accordingly, if the author's contract with the producer grants to the latter the right to "produce or have produced" the script for a broadcast program, the right of the producer to sub-license the broadcast of the script will be deemed to have been included.\textsuperscript{25}

§ 407. Agreements Between Authors and Copyright Proprietors.

It is often the case that the author who created a work capable of broadcast performance is not the owner of such rights, having sold the work to a producer or publisher. An important question in such cases is as to the ownership of the right to secure copyright registration and the enjoyment of the rights thereunder.\textsuperscript{26}

It is not necessary that the author himself secure copyright registration. He may assign his right to secure copyright registration to another. It is always a question of fact to determine the nature of the agreement between the author and the copyright owner of the work.

\textsuperscript{22} Frohlich & Schwartz, op. cit. supra n. 7, § 14.
\textsuperscript{23} Frohlich & Schwartz, op. cit. supra n. 7, p. 69, n. 5.
\textsuperscript{24} People v. Comstock, N.Y.L.J., April 27, 1909.
\textsuperscript{25} Heap v. Hartley, 42 Ch. Div. 461 (Eng., 1889). See Frohlich & Schwartz, op. cit. supra n. 7, pp. 70, 71 n. 7.
\textsuperscript{26} See §§ 586, 587, 642, 643 infra.
The author may make an oral or written grant of the right to secure copyright, but by agreement he may reserve rights thereunder to himself. If the agreement contains a reservation of rights by the author, he should secure from the copyright proprietor a specific assignment of copyright covering the reserved rights. Hence, an author who submits an unpublished program script to a producer, which work is copyrighted by the producer under Section 11 of the Act of 1909, must by agreement reserve his right to secure an assignment of the copyright for all other purposes not specifically included in the agreement with the producer. Likewise, such reservation must be made by the author in connection with the producer's registration of copyright upon publication of the work.

The agreement should clearly set forth the limitations intended to be placed by the author upon the use of his work by the copyright owner.

Where an author has agreed to assign all future writings to a producer or publisher, Equity will order specific performance and compel the author to assign works which he has already created. However, the chancellor will not require the author to produce or create future works. An agreement to produce works in the future will be void as against public policy unless a definite period of time therefor has been provided.

The producer's or publisher's rights under an agreement to assign works to be created in the future are not proprietary per se, but are founded on contract. Should the author, in violation of such an agreement, secure copy-

31 Ibid.
32 Ibid.
33 Ibid.
right in his own name upon works embraced thereunder, a constructive trust will be impressed thereon in favor of the producer or publisher. Subsequent assignees of such copyrights, who have had notice of the agreement between the author and the producer or publisher, cannot prevail over the latter.

§ 408. Same: Ownership of Rights in Scripts.

It is a common practice that no discussion of the terms of sale, assignment or license takes place between the producer and the author. The program producer or sponsor reads the script and, ordinarily agrees, if the script is acceptable, to pay a lump sum to the author for each script or series of scripts of the same general type. The broadcast program script is frequently regarded by the author and the producer as an end in itself. Little consideration seems to be given to the rights flowing from the script. The primary objective is the specific broadcast program for which the script is intended.

An inquiry as to the status of the rights in the script is usually generated by a successful presentation of the script and its consequent adaptability for other types of uses and performances. A written contract being lacking, both parties are interested in asserting the newly discovered, valuable rights.

The intention of the parties at the time of the acceptance of the script is determinative of the inquiry whether the author has reserved any rights in the script. In some cases, the contents of the scripts themselves will throw light on such intention. The fact that a script is of limited application would give weight to a determination of outright sale.

There is no precise formula by which an intention to


make an outright sale may be expressed. Thus, the simple sentence, "I will let you have my drama," was held in England to give the producer all rights in the work upon the exchange of manuscript and money.\(^{36}\) A similar decision has been made in this country.\(^{37}\) If the court finds that an outright sale has been made, then all the rights which the author possessed have been granted to the producer.\(^{38}\)

Where the author of a broadcast program script is also a performing artist, it is a matter of interpretation of the contract between the artist-author and the producer to ascertain whether the agreement is made for services as author, artist or both. If the agreement is made as author only, the producer has no right to the author's services as a performing artist unless it is so provided in the agreement. Conversely, if the agreement is made as an artist only, the producer has no rights in the performer's script. The same result obtains where the artists include their own original musical compositions in their broadcast performances.

Unless by agreement the different rights are specifically granted to the producer, the mere fact that the artist is also the author, or vice versa, confers no right, title or interest in the script or the performance thereof upon the producer of the program. Such rights can be acquired only by agreement between the parties.\(^{39}\)

§ 409. Use of Author's Name.

The law has increasingly recognized the valuable rights which accrue to a person's name.\(^{40}\) The use of his name and the rights therein are important to the author, depend-

\(^{36}\) Lacy v. Toole, 15 L.T. (N.S.) 512 (Eng., 1867).
\(^{38}\) Palmer v. De Witt, 47 N.Y. 532 (1872).
\(^{39}\) Boucicault v. Fox, 5 Blatch.
\(^{40}\) See Chapter XXVIII. and §§ 522, 523, 524 infra.
ent, of course, upon the quality and popularity of his work. Peculiarly enough, writers of broadcast program scripts are generally anonymous. This is particularly true of those authors who write specifically for radio presentation of their efforts. While there have undoubtedly been expressions of disapproval by authors, no appreciable departure has been made from this trade custom.

In fact, unless the agreement between the producer who acquires the property in a broadcast program script and the author thereof so provides, the author has no right to demand public mention of his name or appropriate broadcast credit as the author of the script. Where the author has undertaken to write scripts as the employee of a program producer, the author has no right to insist that his name be mentioned as the author of the script since generally the scripts are the property of the producer.\footnote{41} Moreover, in the case of a work created for hire, the employer is deemed the author for purposes of copyright registration under the Act of 1909.\footnote{42}

It would appear that only in the case of a retention or reservation of any rights in his work by the author, may his licensee be compelled to use the name of the author as the writer thereof.\footnote{43} The author's right to program credit should, however, be a subject of agreement even with his licensee producer.

It is immaterial whether the program script is protected at common law or by statutory copyright in this connection.

Where the work is in the public domain by virtue of a common law publication\footnote{44} or the expiration of a statutory copyright, the author has no right to insist upon the use of his name in connection with a broadcast performance.

\footnote{41}{Jones v. The American Law Book Co., 125 App. Div. 519, 109 N.Y.Supp. 706 (1908).}
\footnote{44}{See §§ 579, 580, 581, 582, 583 infra.}
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thereof. Conversely, the author cannot prevent the use of his name in connection with his work which is in the public domain.\(^{45}\) Where the author has divested himself of his work which is in the property of the producer or is in the public domain, the author may only prevent the use of another's name as the author thereof.\(^{46}\)

If an agreement whereby the producer agrees to give public credit or mention to the author of the script is specific in such requirement, the author may enforce it by an action for a mandatory injunction \(^{47}\) or for damages.\(^{48}\)

An agreement between the program producer and the script author concerning program credit to the latter may be oral, unless it is within the purview of the Statute of Frauds. Evidence of custom and usage may be introduced on this point where the agreement is silent as to program credit. Such evidence may give rise to the implication that the author is not, as a matter of custom and usage in the broadcasting industry, entitled to program credit.

If an author consents to the adaptation or treatment of his work for a broadcast program, and no agreement for program credit is made, the producer is not required to make such an announcement. The author, however, may restrain the unauthorized mention of another as the creator of his work.\(^{49}\) In the case of an adaptation or treat-

\(^{45}\) Clemens v. Belford, 14 Fed. 728 (C.C.N.D. Ill., 1883).


ment of a work for broadcast purposes, an agreement to give program credit to the author of the basic work will be enforceable. A question of fact may arise where the producer asserts that the script as actually broadcast is not based upon the author’s work. If it be found that the program script was not based upon the author’s work, no program credit need be given. In fact, such credit might be considered a deception of the public.

By analogy to the law of motion pictures, an author of a basic work which is adapted for broadcast performance has no right to restrain the performance of such adaptation of his work which he considers to be a mutilation or disparagement of the literary quality of the basic work. However, where the author expressly grants the right to elaborate upon his work in the adaptation thereof, the elaborator is obligated to retain and give appropriate expression to the theme and action of the basic work as originally written. In no event can the adapted work be discarded and the author’s name together with the title of his work be applied to an entirely different work unless the author expressly consents thereto. The same rule applies even where the contract does not require the producer to use the title of the work in connection with the adaptation.

Where the author has used an assumed name, he acquires no greater rights than if he had used his real name. If the work is in the public domain, the producer has the option to use the author’s real name or his pseudonym.

In any case, an author has the right to enjoin the associa-
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tion of his name with a work which he has not written.54 The executor of a deceased author may also exercise the right to disassociate the name of the author from a work which he did not create.55 An author who has agreed to render his services as a “ghost writer” may not complain of the use of another’s name as the author of the script because such use was contemplated in the agreement.

§ 410. Producer's Deviation from or Distortion of Broadcast Program Script.

Where the producer is a licensee, the author of a script has the right to see that his work is produced by his licensee in substantially the manner in which he wrote it.56 A producer cannot deviate from the script to such an extent as to distort it and render the work of the author incomprehensible. Such deviation is a matter of degree and has to do with the mutilation of the script so as to injure the reputation of the author.

But where the author of a script has transferred and assigned all of his rights therein to the producer, the author cannot complain about a distortion of his work to the same extent as if the producer were his licensee.57 The author, however, may, in a proper case, bring an action at law for damages against the producer for libel caused by the injury to or derogation of the reputation of the author which results from a mutilation of his work.58

An injunction cannot be obtained against the author’s assignee for libel unless fraud is established or it is shown that the mutilated work is passed off by the producer as

55 Wood v. Butterworth, Times, Dec. 23, 1901 (Eng.).
56 See Frohlich & Schwartz, op. cit. supra n. 7, 55, 56.
the work of the author.\textsuperscript{59} In such an action, the plaintiff author, who writes under a pseudonym, must show that he is known to the public under such assumed name.\textsuperscript{60}

It follows, therefore, that ordinarily a licensee will be enjoined,\textsuperscript{61} while an assignee is liable at law for damages in cases where a script is broadcast in mutilated form. The broadcast of an inferior work not written by the plaintiff author, but claimed to be so, is restrainable as a libel.\textsuperscript{62} Malice or actual damages are not essential elements of proof in such a case.\textsuperscript{63}

A restrainable deviation by the producer may occur where he makes or causes to be made another dramatization of a copyrighted script although he has been licensed only to perform the script.\textsuperscript{64} If, in addition to the new dramatization, the producer broadcasts it, he has infringed the author's exclusive right to perform and to dramatize his copyrighted broadcast program script.\textsuperscript{65}

A contract between the author and the producer which provides for limitations on the methods of exploitation and performance of a broadcast program script will be enforced in Equity. If the agreement specifies that the script is to be performed only when accompanied by certain music or for the advertisement of a particular product or by broadcast during specified periods on designated stations, systems or networks, a deviation therefrom by the producer is restrainable.

\section*{§ 411. Is Producer Required to Broadcast the Script?}

Where the program script has been the subject of an outright sale whereby the producer acquired all the prop-

\textsuperscript{59} Ibid.
\textsuperscript{60} Angers v. Leprohon, 22 Que. S.Ct. 170 (Can., 1899).
\textsuperscript{63} See Ridge v. English Illustrated Mag., 29 T.L.R. 592 (1912).
\textsuperscript{65} Ibid.
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Property rights in the script, no requirement is placed upon the producer to broadcast the script unless the agreement so provides.66

Creative efforts are entitled to see the light of day, consistent with the independent exercise of business and artistic judgment by the program producer. The latter, however, may not arbitrarily withhold production where compensation to the author depends upon performance.67 Consequently, if the compensation to the author of the script depends upon the broadcast of his work, as in the case of an obligation to pay a royalty which is based upon the number of stations over which the script is broadcast, the author is entitled to demand that the producer broadcast the script within a reasonable time.68 If the producer fails to broadcast the script for which royalty compensation is payable, the author may rescind the contract of sale and sue for the reasonable value of his services.69

Where the agreement provides for the production of the program scripts within a specified time and the producer fails so to do, all rights therein revert to the author.70

In the instance where an author’s compensation is based upon broadcast performances or other exploitation of a work which he sold to a producer, the trustee in bankruptcy of the producer obtains only qualified property rights in the work. Unless the purchaser of the bankrupt producer’s assets actually carries on the business of the bankrupt in performing and exploiting the author’s program script so as to derive compensation therefor to the

68 See Frohlich & Schwartz, op. cit. supra n. 7, 78.
author, the property rights in the work will revert to the author after a lapse of a reasonable time from the purchase of the bankrupt’s assets.71

§ 412. Termination of Licenses.

Since a license is a purely personal agreement, the death of either the author or the producer terminates the contract.72 Of course, the license agreement may provide that the legal representatives or heirs of the producer shall acquire all rights thereunder.

Where a license agreement with a producer does not provide for assignment of the license, the producer’s change of firm name or his creation of a new corporate entity to carry on his business may be held to have effected a termination of the license.73

Bankruptcy of a producer licensed to broadcast a program script causes a termination of the license. The rights revert to the licensor and do not pass to the producer’s trustee in bankruptcy.74 The same result should follow under state insolvency laws. Moreover, a receiver in supplementary proceedings or a sheriff levying execution may not secure the rights granted in a license to broadcast a program script.

Bankruptcy of the author terminates a contract by him to produce or deliver a script,75 his obligation being contractual only.


Because of the topical timeliness of many broadcast program scripts, time of delivery of the script to the producer

72 See § 648 infra.
75 Yerrington v. Greene, 7 R.I. 593 (1863); Gibson v. Carruthers, 8 M. & W. 343 (Eng., 1841).
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is an important consideration in agreements for the writing and production of scripts. The failure of an author to deliver a broadcast program script at the time specified in the agreement will make him liable to the producer for actual damages. In addition, the producer may recover all advances paid to the author under the contract.76

The requirement of a timely delivery may be waived by the producer by his accepting a late delivery of the script, in which event the author is not liable for breach of the agreement. In the case of such a waiver or if an extension is granted without definite limitations of the date for delivery of the script, the time is extended for a reasonable period after due notice has been given to the author by the producer.77 If the agreement is silent as to the time of delivery of the script, the courts will impose a duty upon the author to deliver the script to the producer within a reasonable time. Factors involved in determining a reasonable time are the known date or approximate time of broadcast of the script, the necessary interval for casting and rehearsals and similar circumstances.

§ 414. Same: Agreement for Series of Scripts.

An agreement between the producer and the author may require the writing of a series of scripts with or without sequence. If such an agreement is inseparable and is breached by the producer prior to the completion of the entire series, the author may recover for a breach of the whole agreement. This is so despite the fact that only one script was written and delivered.78

Moreover, if the acts of the producer constitute a withdrawal from or abandonment of a proposed broadcast program prior to completion of the scripts for which he has contracted, the author is under no duty to tender or deliver the scripts as a condition precedent to recovery.79

77 Mann v. Maurel, 126 N.Y. Supp. 731 (1911).
79 See Planché v. Colburn, 5 C. & P. 58, 8 Bing. 14 (Eng., 1832);
§ 415. Equitable Relief Where Author Has Breached His Agreement.

A contract for the exclusive services of a script writer whose talents are unique and extraordinary is enforceable in Equity if there is mutuality of obligation. Such equitable relief takes the form of a negative injunction which restrains the author from writing scripts for any other person. What Equity enforces is the implied or express negative covenant of the author not to write broadcast program scripts for any other person. The writer, however, will not be ordered to write or create the agreed scripts.

A third party who knowingly produces a program script written in violation of an agreement between the plaintiff producer and the author may be enjoined and compelled to account for profits.

§ 416. Same: Liquidated Damages.

It is desirable in agreements for the production of broadcast program scripts to make provisions for liquidated damages. If a liquidated damages clause is not intended as a fine or penalty but is a reasonable forecast of the probable damages, it is enforceable. It is also a requisite of a valid clause relating to liquidated damages that the actual damage contemplated from the breach be uncertain and difficult of ascertainment.


§ 417. Rescission of Agreement.

The agreement may be rescinded upon proof of fraud by the author or by the producer. It is necessary that a tender be made of all benefits received under the contract by the defrauded party as a condition precedent to the rescission.

§ 418. Breach of License Agreement.

If the author, as a proprietor of the copyright in a broadcast program script, has licensed the producer to perform or render his script in a specific broadcast program, he may sue the producer for breach of contract where the producer has violated the terms of the license. If the producer exceeds the scope of the license by unauthorized performances or recording of the script, the author may maintain an action for infringement of the copyright. In either case, the author may rescind the license.

§ 419. Relief Where Producer Breaches His Agreement with the Author.

In an action by the author for the reasonable value of his services in the creation of a broadcast program script, the author must offer definite evidence of the value of his services in the work in question. Evidence of the success of the broadcast program conditions v. Dewing, 50 F. (2d) 911 (D. Md., 1931); Metro-Goldwyn-Mayer v. Bijou Theatre, 3 F. Supp. 66 (D. Mass., 1933); Underhill v. Schenek, 238 N.Y. 7, 143 N.E. 733 (1924).


taining the script and of the criticisms and public reception thereof is relevant in an action by the author for payment of the value of his services where the script has already been produced. If the agreement provides that the author shall receive a definite amount for each performance of his script, the producer is liable only for actual performances. Unless stipulated to the contrary, repeat broadcasts should be considered additional actual performances. However, the producer may agree to pay a stipulated amount for the broadcast rights for a definite period irrespective of whether the script is actually broadcast during that period.

The agreement may provide that, in the event of a failure of the producer to pay royalties or the agreed compensation, the rights granted to the producer shall revert to the author. Such an agreement is enforceable. Where no provision is made for a reversion in the case of a failure to pay such royalties, the author is remitted to his action at law for the compensation due him. The rights remain with the producer.

§ 420. Remedy for Conversion, Loss or Destruction of Script.

Where the author’s broadcast program script is converted, he may recover its value. The possessor may also be restrained from performing the converted script and be compelled to deliver it to the owner or author.

If the producer is licensed to broadcast a program script and accepts possession thereof, he is generally not a gratuit-

97 Alexander v. Manners Sutton, Times, Mar. 28, 1911 (Eng.).

There are a great many literary and dramatic works which are valuable for adaptation and use in broadcast programs. These works may be protected either at common law or by copyright registration. It is important to determine the ownership of the broadcast performance rights of such works in the production of broadcast programs containing same.

If the work is dedicated to the public by common law publication or by expiration of copyright protection, it may be the subject of broadcast performance by anyone.

Where the work in question is in dramatic form, a license to produce it upon the stage is restricted to theatrical performances and the producer must secure from the author or other owner a license to make a broadcast performance thereof. If the author has granted a license to make a motion picture production of his work, it is similarly restricted to such limited use and it is necessary to obtain a specific license to broadcast the work. The author may, in the first instance, grant a license which includes broadcast performances of his work. Where the grant of this right is not specifically expressed, it is a matter of interpretation of the agreement to determine

98 Frohlich & Schwarz, op. cit. supra n. 7, 87.
101 Ibid. A transfer of motion picture rights includes talking motion picture rights, although the latter were unknown at the time of the contract. Cinema Corp. of America v. De Mille, 149 Misc. 358, 267 N.Y.Supp. 327 (1933), affd. 240 App. Div. 879, 267 N.Y.Supp. 959 (1933).
whether the broadcast performance license was granted by
necessary implication. 102 It has been held that a grant of
"dramatic performance rights" includes both stage and
screen productions of the work. 103 A similar ruling has
been made with respect to an exclusive license to "produce,
play or perform" a drama. 104

The grant of a dramatic production license at a time
when broadcast performances of such works were not con-
templated or known would not appear to include a license
to make broadcast performances thereof. 105 However, an
authorization to make dramatic performances, without
limitation as to media, granted at a time when broadcast
performances of similar works were not uncommon, should
include a license to make broadcast performances of the
work. 106

In instances where the grant to the original stage or
motion picture producer is not extensive enough to include
broadcast performance rights, the author or other owner
of the work generally may license the broadcast perform-
ance thereof unless circumstances exist from which the
court may imply a covenant not to compete with the
original producer. The implication of such a negative
 covenant must, however, be predicated upon the grant
of an exclusive license to the producer in the first
instance. 107 Should a negative covenant be implied to

102 But see the French decision
in Serriere v. Hugon, Frondaic and
Pathé Cinéma, Gazette des Tribu-
naux, Feb. 6th and 7th, 1935 (Civil
Tribunal of the Seine) where the
Court held that silent film rights
could not be extended to include
talking motion picture rights un-
less specific language in the con-
tract between the author and the
producer broadly included such
additional rights.
103 Klein v. Beach, 239 Fed.
104 Lipzin v. Gordin, et al., 166
105 But see Cinema Corp. of
America v. De Mille, 149 Misc. 358,
267 N.Y.Supp. 327 (1933), affd.
959 (1933).
106 Klein v. Beach, 239 Fed. 108
Fox, 166 N.Y.Supp. 793, 797
(1917).
107 See § 389 supra.
render the author or other owner of a dramatic work incapable of granting a license sanctioning the broadcast performance thereof,\textsuperscript{108} it would be necessary for both the author and the original producer to join in the grant of a broadcast performance license.\textsuperscript{109} The rights may be granted by the author alone where his contract with the original producer has terminated.\textsuperscript{110}

Where the author has divested himself, by assignment, of the right to authorize broadcast performances of his work, the program producer must obtain the required license from the appropriate owner of such rights.\textsuperscript{111} Similar principles govern the license or other disposition of dramatic performance rights in various media of novels and other non-dramatic literary works.\textsuperscript{112}


Chapter XXVI.

ARTISTS—THEIR MANAGERS AND PERSONAL REPRESENTATIVES.

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§ 422. Generally.

While some broadcast artists are under contract to perform exclusively for the program producer, most of the others are what are commonly called "free lance" artists. The arranging and securing of engagements is the essential business problem of such artists. This is true not only of the artists who perform regularly in broadcast programs, but also of those broadcast artists
who appear principally in the legitimate theatre or in motion pictures. Agencies for such business purposes range from the representative of one artist to the extensive booking agencies serving many artists and producers.

This class of middlemen serves as a link in the chain of personalities which brings about a broadcast program.* Performing artists generally leave their business arrangements to so-called artists’ managers or personal representatives. These managers and personal representatives are retained to secure and assist in securing engagements for the artist. In addition, many managers and representatives play an important part in the development of the professional life of the artist by helping to create a public demand for the services of the artist.

It is a not infrequent practice for the manager or personal representative of the artist to secure engagements for him through an established booking agency. The artist or his representative may deal directly with the program producer or with a subsidiary agency of the producer for that purpose.

§ 423. Manager, Personal Representative and Booking Agency Contrasted.

Historically, the manager of the artist functioned as a coach and guide who assisted the artist in the development of his talents as well as his business. A personal representative is a comparatively new character. He does not possess the same domination and control over the artist as the manager. He serves merely to act for the artist in certain phases of his business. The term, personal representative, is more frequently applied to those persons who represent successful artists who feel they no longer have need for a manager in the traditional sense of the word.

The booking agency in essence is an impersonal institution which arranges engagements for many artists. It is

* The discussion in this chapter author of the broadcast program may well apply to agents of the script.
in the nature of an employment agency, acting as a go-between for the artists and producers.

§ 424. Managers and Personal Representatives Are Agents of the Artist.

The relation between these middlemen and the artist is often complex and uncertain. In the great majority of cases, it is believed, although it is a question of fact, that the relation is one of Principal and Agent in one of its myriad forms. The relation of Principal and Agent is defined as that relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.2

"The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons."3

Managers and personal representatives belong in this category, since they are business representatives of artists. They act on behalf of the artist. Having been properly appointed they may create, modify, affect, accept the fulfillment of or end the contractual obligations between the artists and the program producer.

The booking agency is also a species of agent, namely a broker. A broker is one whose occupation is to bring parties together to bargain, or to bargain for them.4 The business of the booking agency may be characterized as prospectively bringing together the artist and the program producer so that an engagement may be consummated.

It is submitted that the subsidiary corporate organization of a program producer which engages talent for the latter, even though it may purport to represent or act for

1 Mechem on Agency (2d ed., 1923) § 50.
2 Restatement, Agency (1933), 2362.
3 Mechem, op. cit. supra, § 36.
4 Mechem, op. cit. supra, § 1.
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the artist, is merely the instrumentality of the parent producing company and not the agent of the artist.

§ 425. Same: Under the Statutes.

The only importance in distinguishing between the manager, personal representative and booking agency as different types of agents exists in the application of the various statutes regulating theatrical employment agencies. Principal consideration will be given to the New York statute, there being a similar statute in California.

This statute requires all persons operating theatrical employment agencies first to procure a license from the municipal authority. The statute defines a theatrical employment agency as follows:

"The term 'theatrical employment agency' means and includes the business of conducting an agency, bureau, office or any other place for the purpose of procuring or offering, promising or attempting to provide engagements for . . . theatrical and other entertainments or exhibitions or performances, or of giving information as to where such engagements may be procured or provided . . . but such term does not include the business of managing . . . the artists . . . constituting the same, where such business only incidentally involves the seeking of employment therefor."

The California statute contains a similar definition, except that there is no exemption from its effect where the seeking of employment is incidental to managerial services.

It has been held in New York that an unlicensed theatrical employment agency cannot maintain an action for services rendered. The question is one of fact as to whether the plaintiff was the manager of the artist or merely sought to secure engagements for him.

6 CALIFORNIA, STATUTES (1929) c. 89.
7 Id., at § 1.
9 Id., at § 171, subd. 4.
essence of the contract will be crystallized to determine the real purpose thereof. If it is one of management, the unlicensed plaintiff may recover. But if, despite the camouflaged language included in the agreement, the sole function of the plaintiff was to secure engagements, he cannot recover without a license.

It is frequently found that the contract between the artist and his representative is identical in many clauses with that which the artist enters into with the producer. The artist generally agrees in both contracts to render his best services for the other party, to serve him exclusively and not to perform for any other person. The obvious effort of these and other clauses is to impress the court with the idea that the representative is the employer of the artist. An effort is also made in the drafting of these agreements to persuade the court that the representative is performing managerial services chiefly and that the securing of engagements is only incidental thereto. To this end, numerous duties of a managerial nature are provided.

As has been pointed out, these matters raise questions of fact as to whether the exemption in the New York statute applies. It is believed that the weight of the express terms of the agreement may be overcome where necessary in either or both of two ways. The court must determine the intention of the parties as expressed in the contract. Upon such analysis of the whole agreement, it may be determined that the representative is not an employer but one who is to act on behalf of another, the artist. Moreover, where the compensation payable to the representative is based upon the engagements secured by him and not on the extent of other managerial duties performed by him, this fact may evidence that the main intention of the parties is that the representative shall act as an employment agency.


12 Pawlowski v. Woodruff, 122
The statute refers to the “business of” securing engagements and to the “business of” managing. Such words in their normal meaning must be taken to allow the court to examine the real activity of the representative. The statute, by the use of such words, is directed to the question of whether the representative is generally and principally engaged in the business of securing engagements for the artist. Where the artist by evidence has established that the affirmative is the case, the representative should be permitted to show that in the case at bar, he performed managerial services. This burden is clearly upon the representative under the statute.

§ 426. Creation of the Agency.

Since a manager or personal representative is an agent, it must be determined whether he has authority to act so as to bind the artist to a third party. This authority may be expressly conferred or it may be implied from the surrounding facts and circumstances. The relation of Principal to Agent is voluntary, the existence of authority does not require that there be an agreement between the artist and his representative. Sufficient to create the agency relation as to third persons is a manifestation by the artist to the representative that he may act for him and the consent by the latter so to act. The passage of consideration is unnecessary.

However, as between the artist and the representative,

13 Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 57 N.W. 144 (1893); Mecham on Agency (2d ed., 1923), § 241.

“Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act may be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal’s account.” Restatement, Agency (1933), § 26.

14 Mecham, op. cit. supra, § 28.

15 Restatement, Agency (1933), § 26, Comment (a), Mecham, op. cit. supra, § 30.

16 Restatement, Agency (1933), § 15.

17 Id., at § 16.
their obligations and liabilities to each other are determined by the agreement which exists between them. Generally, an express or implied contract of agency is found to exist. This agreement, to be binding, must possess the elements necessary in every valid contract.\(^{18}\)

Every binding contract of agency must be based upon sufficient consideration.\(^{19}\) Even though consideration be lacking, a representative who gratuitously promises to perform certain acts for an artist and subsequently enters upon performance thereof is bound to complete his undertaking.\(^{20}\)

In addition, a valid contract of agency requires an offer and acceptance,\(^{21}\) so that the artist and the representative are in mutual agreement on the terms of their relation.\(^{22}\) As in contracts of employment of the artist by producers,\(^{23}\) this agreement of representation must express with sufficient definiteness the essential terms of the agreement.\(^{24}\) For the interpretation and construction of the contract, reference is made to the section thereon.\(^{25}\)

§ 427. Duration of Agency Relation Between Artist and Representative.

The agreement of representation is basically one whereby the artist employs the representative as an agent for specific purposes. The duration of the agreement of representation will be governed by the rules of law applicable to employment contracts.

The duration of the employment of the representative

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\(^{18}\) *In re Carpenter*, 125 Fed. 831 (C.C.N.Y., 1903).

\(^{19}\) *Cunningham v. Irwin*, 182 Mich. 629, 148 N.W. 786 (1914); *Mechem, op. cit. supra*, § 30.


\(^{22}\) *Ibid.*

\(^{23}\) See Chapters XXII., XXIII. and XXIV., *supra*.

\(^{24}\) See *Capital City Garage & Tire Co. v. Electric Storage Battery Co.*, 113 S.C. 352, 101 S.E. 838 (1919).

\(^{25}\) See § 359 *supra*. 
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by the artist is an essential term of their agreement and must be definite. In many cases, however, the parties do not state the duration of the employment of the representative in express terms. This is the usual situation where the agreement is the result of an exchange of letters or telegrams, or where the contract is oral and only confirmed by a writing. In such a case, the task of the court is to ascertain the apparent intention of the parties from any circumstances which prove a definite accord as to the length of the employment.26 This is a question of fact.27

If no evidence of the intention of the parties as to the duration of the representative's employment is available, or the evidence before the court is insufficient to show a definite intention, the general rule is that the employment is indefinite in time and the continuance thereof is subject to the will of either the artist or the representative.28

Where no definite period of employment is expressed in the contract and no implication thereof is possible from the evidence, an agreement to pay the representative a fixed amount in compensation for a definite period of service does not raise the presumption that the employment was for a definite period.29 Thus, a provision in a contract that the artist will pay the representative a sum certain per week does not create an employment for the definite period of a week. It creates a hiring at will.30 Similarly, an agreement to pay a sum certain for a year's services rendered does not establish a definite term for the employment of the representative.31

26 WILLISTON ON CONTRACTS (Rev. ed., 1936), § 39.
29 Ibid.
§ 428. Termination of the Agency Relation Between Artist and Representative.

The artist and the representative may provide in their agreement when and how the relation shall terminate. This provision will govern. Where the relation is an indefinite employment at will, the rule ordinarily is that no notice is required to terminate the relation.\(^{32}\)

In any case, the death of the representative works a termination of the agreement. This is the general rule as to all personal service contracts.\(^{33}\) The accepted view is that the death of the employer terminates a contract for personal services.\(^{34}\) It is clear, therefore, that the death of the artist-employer should terminate his contract with the representative.

§ 429. Revocation of Authority of Representative by Artist.

The artist has the absolute power to revoke the authority of the representative at any time.\(^{35}\) This power to revoke on the part of the artist is not abrogated by his grant of an authority, declared to be irrevocable, to the representative. Even though the authority of the representative is declared to be irrevocable, the artist may revoke.\(^{36}\)

An exception to this rule exists if in addition to the authority, the representative is given an interest or estate in the subject matter of the agency. In such an instance, the artist has no power to revoke without the consent of the representative.\(^{37}\) In fact, this exception holds that

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\(^{32}\) See § 361 \textit{supra}.

\(^{33}\) Blakey \textit{v.} Sousa (manager), 197 Pa. 318, 47 Atl. 296 (1900); Mulqueen \textit{v.} Connor (lawyer), 65 F.(2d) 365 (C.CA. 2d, 1933); \textit{Williston}, \textit{op. cit. supra}, n. 26, § 1940.

\(^{34}\) \textit{Williston}, \textit{op. cit. supra}, n. 26, § 1941.

\(^{35}\) See Weaver \textit{v.} Richard, 144 Mich. 385, 108 N.W. 382 (1906); Roth \textit{v.} Moeller, 185 Cal. 415, 197 Pac. 62 (1921); Henderson \textit{v.} Lebow, 95 W.Va. 74, 120 S.E. 300 (1923).


\(^{37}\) See Hunt \textit{v.} Ronsmaniar, 8 Wheat. (21 U.S.) 174 (1823);
the grant of a power coupled with an interest in the subject matter of the agency creates an irrevocable agency unless expressly stated to be revocable.\textsuperscript{38} To come within this exception, the representative must have received an interest in the subject matter itself; an interest in the result of his execution of his authority is not sufficient to abrogate the artist's power of revocation.\textsuperscript{39} The great majority of artists' representatives possess no more than an interest in the result, and therefore, the artist may revoke the authority subject to the representative's right to recover at law in a proper case for breach of contract.

Where the contract of agency is for a specified time, the artist possesses the power to revoke the authority of the representative at any time, subject, however, to liability for breach of the agreement of representation.\textsuperscript{40}

A revocation of the authority conferred irrevocably or for a specified time is a breach of contract, and the artist must respond in damages to the discharged representative.\textsuperscript{41} A suit for damages at law should be the only remedy of the discharged representative; he should not have specific performance in equity.\textsuperscript{42} It should be immaterial that the agreement of representation is so expressed that it is made to appear that the representative employs the artist and a recital is contained therein as to the unique and irreplaceable talents of the artist. If the agreement is construed as a contract of representation and the relation of Principal and Agent exists between the artist and the rep-


\textsuperscript{40} Spier v. Michael, 112 Or. 299, 229 Pac. 1100 (1924).

\textsuperscript{41} Roth v. Moeller, 185 Cal. 415, 197 Pac. 62 (1921); W. B. Martin & Son v. Lamkin, 188 Ill. App. 431 (1914); Kerr S. S. Co. v. Kerr Nav. Corp., 113 Misc. 56, 184 N.Y. Supp. 646 (1920).

resentative, no specific performance or negative injunction should be decreed in equity as a remedy for breach by the artist-employer. It is conceivable, however, that the representative may be deemed so unique as to warrant the issuance of a negative injunction against him for breach of the agreement of representation.

Where the revocation in any case is for cause, the artist may set up the failure of the representative to perform as a complete defense.

§ 430. Revocation for Cause.

Where the revocation of the representative's authority is for cause, no liability arises on the part of the artist. The artist should occupy the position of any employer or principal. A revocation for cause is the same as a justifiable discharge of a servant. The cause for revocation in order to be justifiable must go to the substance of the contract of agency, so that if the representative is guilty of mere irregularities the artist may not justifiably refuse to perform.43

An artist may justifiably discharge his representative where the latter has breached an express material stipulation in the contract of agency.44 The failure of the representative faithfully to perform the express and implied duties imposed on him by the relation of Principal and Agent is sufficient ground for his discharge without liability of the artist.45

Whether they are express or implied, the following are the more important and material duties of the representative. The representative should negotiate for, attend to and arrange bookings for the appearance of the artist in

43 Elwell v. Coon, 46 Atl. 580 (N.J. Ch., 1900).
broadcast programs. He should attend to publicity and advertising for his employer and should advise the artist and render all necessary managerial services for him. The failure or neglect of the representative to arrange bookings and to perform all the other duties is a material breach which justifies his discharge.

§ 431. Duties of the Representative Which Are Implied in Law.

1. Must Execute Authority Strictly.
   The representative must execute strictly the authority granted to him by the artist. He must obey all instructions. Failure to pursue strictly his authority is ground for discharge of the representative.

2. Must Exercise Diligence and Skill.
   The representative upon entering the service of the artist impliedly warrants that he will exercise the diligence and skill necessarily and customarily exercised by the members of his profession. By holding himself out as an artist's representative, he is bound as would be anyone else who holds himself out as having qualifications of a certain profession, to exercise the skill possessed and exercised by persons pursuing that occupation. For failure to use such skill and diligence, the representative may justifiably be discharged.

Support for this proposition is found in the realities of the situation. If the representative is incompetent or simply fails to exercise the requisite skill and diligence, the artist will not secure engagements, except such as may

47 RESTATEMENT AGENCY (1933), § 383; WILLISTON, op. cit. supra, n. 26, § 1013; Whitney v. Express Co., 104 Mass. 152 (1870); Minn. Trust Co. v. Mather, 181 N.Y. 205, 73 N.E. 987 (1905).
49 WILLISTON, op. cit. supra, n. 26, § 1014.
be offered to him by third persons. The public appearance of the artist is a vital necessity to him in order that his earning power, which is based on his reputation, may not be curtailed or destroyed. The existence of the artist's reputation depends upon his appearance in public. Therefore, it is a material breach where the representative is not diligent or does not exercise skill and a consequent inadequacy of engagements ensues therefrom. This situation becomes particularly oppressive where the representative has received an exclusive agency from the artist for a long term.

3. Must Be Loyal.

The representative of the artist, being an agent, is a fiduciary as to matters within the scope of his authority. A fiduciary is one in whom trust and confidence are reposed. This fiduciary character of the representative is a product of the Principal and Agent relation. Hence, such relation must be shown to exist.

The representative as a fiduciary must act with utmost good faith and loyalty for the benefit of the artist in all matters which he has undertaken to carry out for him. As a consequence of the requirement of good faith and

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50 See Note, 98 N.Y.L.J. (Sept. 4, 1937) 580.
51 RESTATEMENT, AGENCY (1933), § 13.
53 Spinks v. Clark, 147 Cal. 439, 82 Pac. 45 (1905); Sanford v. Miller, 80 N.J.L. 411, 78 Atl. 177 (1910).

In Lambein v. Broadway Surf-
loyalty, the representative may not act as or for the account of a party adverse to the artist, unless the latter consents thereto.55 The representative may not compete on his own account or for the account of another in any matters relating to the subject matter of the agency.

The representative must deal fairly with the artist in all transactions between them.56 Most important is the fiduciary duty of the representative to account to the artist for all money and property which come into his hands by virtue of the employment.57

§ 432. The Artist's Duties to His Representative.

The relation between the artist and his representative requires that the former compensate the latter for services rendered.58 The amount of compensation may be agreed upon at the time of, or during, the employment of the representative by the artist. It is not necessary that the services rendered by the representative be of benefit to the artist. The duty of the artist to compensate is independent thereof.59

The artist may not terminate the relation of agency in order to avoid future payment, unless he is specifically empowered by the contract so to do.60 In the absence of fixed agreed compensation, the representative is entitled to the reasonable value of his services,61 unless he has been guilty of dereliction of a material duty as the agent of the artist.

56 Restatement, Agency (1933), § 13.
Unless otherwise provided in the agreement of representation, the artist is under the duty to reimburse the representative for such reasonable sums as were necessarily expended in furtherance of the agency and in execution of the authority granted thereunder.62

The representative has a right of indemnity against the artist for any loss or damage sustained by him in the execution of the agency. The act or acts which constitute the basis of the loss must have been done within the scope of the authority of the representative.63

Where the representative is obliged to incur traveling or other expenses in performing his duties within the scope of the agreement of representation, it is a question of fact to determine whether the parties intended that such expenses be defrayed out of the representative’s compensation or by the artist or out of the gross income. Since agreements of representation in the broadcasting industry may contemplate expenditures for traveling, it would seem that the cost thereof should be deducted from the gross income of the artist from engagements so secured. The agreement of representation may, however, provide otherwise.

§ 433. Authority of the Representative.

The representative may exercise all of the powers expressly granted to him by the artist. In the absence of a specific agreement to the contrary, the representative may exercise certain powers on behalf of the artist which are incidental to the express or implied authority. To be lawfully exercised, these powers must be reasonably necessary to the performance of the authorized acts.64

62 Dolman Co. v. Rubber Corp., 109 Cal. App. 353, 288 Pac. 131 (1930); RESTATEMENT, AGENCY (1933), § 443(b).
Other incidental powers may be exercised by the representative where it is the established custom and usage in dealings between representatives and their principals for the former to exercise such powers. The implication of additional powers is not permissible.


The representative may in many instances exceed his authority and perform acts which do not bind the artist. For example, he may arrange for the engagement of the artist to perform for the manufacture of an electrical transcription, when he is authorized only to arrange bookings for "live" performances. Such a prior act which does not bind the artist, but was done or professedly done on his behalf by the representative, may be ratified by the artist's affirmance of such act with knowledge of the facts. By ratification of such a prior act, the artist becomes liable therefor. The ratification by the artist makes such a prior act as effective as though originally done by the representative in pursuance of an express authority so to act.

An effective ratification can be made only where the representative purported to act on behalf of a principal. Furthermore, only the artist identified as the principal at the time of the prior act may affirm. Where

66 Restatement, Agency (1933), § 820.
67 See Lewis v. Adriance, 100 Misc. 725, 166 N.Y.Suppl. 774 (1916).
68 Restatement, Agency (1933), § 100.
69 Dempsey v. Chambers, 154 Mass. 330, 28 N.E. 279 (1891);
70 Friend v. Van Vlack, 69 Ill. 479 (1873); Hamlin v. Spars, 82 N.Y. 327 (1880); Rawlings v. Npal, 126 N.C. 271, 35 S.E. 597 (1900); Flowe v. Hartwick, 167 N.C. 448, 83 S.E. 841 (1914); Restatement, Agency (1933), § 85.
71 Restatement, Agency (1933), § 87.
no artist was identified, only he for whom the representative intended to act may affirm.\textsuperscript{72} The affirmance by the artist may be as to some or all of the persons involved.\textsuperscript{73} Ratification once made is irrevocable.\textsuperscript{74}

\section*{§ 435. Artist Bound by Apparent Authority of Representative.}

Unless the representative has express or implied authority to perform a certain act or acts, the artist is not ordinarily liable as a principal.\textsuperscript{75} But where the artist has held out the representative in such a manner to the world, that it is a reasonable conclusion by one dealing with the representative that he is the agent of the artist to do a certain act or acts, the artist will be liable as principal where the third party acts in reliance thereon.\textsuperscript{76} It is only where the artist is responsible for the appearance of authority that he will be liable to third persons for the acts of the representative.\textsuperscript{77} The appearance of authority caused solely by the representative may not be relied on.\textsuperscript{78}

\section*{§ 436. Execution of Agreements by Representatives Binding on Artist.}

So long as the representative is authorized to enter into contracts on behalf of the artist, he may make such an authorized agreement in his own name.\textsuperscript{79} Some cases hold

\textsuperscript{72} Ibid.
\textsuperscript{73} Id. at § 820.
\textsuperscript{74} Saunders v. Peck, 87 Fed. 61 (C.C.A. 7th, 1898); Plummer v. Knight, 156 Mo. App. 321, 137 S.W. 1019 (1911); Haines v. Rumple, 147 Ark. 425, 228 S.W. 46 (1921).
\textsuperscript{75} MECHEN ON AGENCY (2d ed., 1923) § 1709.
\textsuperscript{76} Law v. Stokes, 3 Vroom (N.J.L.) 249 (1867); MECHEN, op. cit. supra, §§ 720–729.
\textsuperscript{78} See Paul Armstrong Co. v. Majestic Motion Picture Co., 87 Misc. 42, 149 N.Y.Sup. 1039 (1914).
that by signing his own name, even though he intends to
bind the principal, the agent is liable on the contract.80

The better rule, however, looks to the intention of the
agent. Where surrounding facts and circumstances and
the nature of the transaction show an intention to bind
the artist-principal only, then this intention is controlling.81
This is especially true where the third party to the agree-
ment possesses full knowledge of the facts.82

The artist may authorize the representative to sign the
artist’s name to a contract. The representative may then
effectively bind the artist by signing the latter’s name as
though it were his own.83 By granting such an authority
to his representative, the artist is not foreclosed from per-
sonally executing contracts for his services. It would seem
that this would follow even though the agreement con-
tains an express provision to the contrary.

§ 437. Rights of Producer Where Disputes Exist Between
Artist and Representative.

Where a dispute exists between the artist and his repre-
sentative as to the effect of or the rights and liabilities
under the agreement of representation, the program pro-
ducer, having knowledge of such dispute, may nevertheless
engage the services of the artist. In such a case, the
producer should secure an agreement of indemnity from
the artist. The dispute between the artist and his repre-
sentative should not foreclose the artist from his right to
render his services for a producer during the pendency of
the dispute. Where, however, the producer wrongfully
induces the artist to breach the agreement of representa-
tion, the producer may be liable to the representative for
damages resulting therefrom.

81 Metcalf v. Williams, 104 U.S. 93, 26 L.Ed. 665 (1881);
82 Royal Indemnity Co. v. Corn, 162 N.Y.Sup. 659 (1917).
The authority of the representative may be such as to terminate upon the completion of negotiations for the engagement of the artist in a broadcast program. Where the representative exceeds his authority and interferes with the production of the program, the artist should not be held liable for the consequences of the representative's acts committed beyond the scope of his authority.
§ 438. Historically.

A conflict between the press and the radio as two rival media of mass communication was inevitable in the race to disseminate news of all kinds to the public. Broadcasting was early regarded by the previously unchallenged press as an upstart which threatened to make inroads upon both the advertising revenue and news value of publications.

The press has so entrenched itself in the American scene that it has disseminated news to the public independently of government control since Colonial times. Traditionally, the press has come to consider itself as the trustee of the constitutional guaranty of free speech, dispensing its bounty to the public at will. It cannot, however, be denied that
the press still serves as the most potent force for shaping public opinion in the country.

Broadcasting has not fully developed as a major instrumentality of news dissemination despite the fact that it has made rapid gains in other aspects of its communication functions. An analysis of the relation between the press and broadcasting is desirable to consider the legal implications of the abortive growth of broadcasting as a medium for the dissemination of news.

As long as broadcasting was confined to audible entertainment and other features not competitive with the press, the publishers promoted, rather than retarded, the widespread public acceptance of the new science.

It soon became apparent that both media were performing practically the same function and were dependent on advertising revenue for maintenance. During the years 1930–32, newspaper advertising declined sharply while appropriations for broadcast advertising increased steadily.¹

A vital issue was presented in the practice of some stations in broadcasting news reports taken verbatim from the daily papers. The resentment of competition was aggravated by the appropriation and gratuitous broadcast of news gathered by the press at great expense. Paradoxically enough, many broadcast stations were owned or operated by newspaper publishers who played a large part in introducing news broadcasts in an effort to make the public "news-conscious" as a stimulant to newspaper circulation.

A direct attack in the competitive battle was made when the Publishers' National Radio Committee submitted resolutions calling for the deletion of radio program listings

¹ Keating, *Pirates of the Air* (1934), 169 *Harpers* 463; Shapiro, *The Press, the Radio and the Law* (1935) 6 *Air L. Rev.* 128. See also statistics quoted in Brendze, *Not to Be Broadcast* (1937), 271, showing that "the total expenditures of national advertisers for network advertising (exclusive of program 'talent') increased by 476 per cent between the years 1928–37". During a like period, newspaper advertising decreased by $73,000,000.
as news features from the daily newspapers. However, the wide popular demand for such program logs rendered the movement ineffective in most instances.

§ 439. Litigation Instituted by the Press Against Broadcast Stations.

Early in 1933, the Associated Press, a news-gathering agency, brought suit in the United States District Court at Sioux Falls, South Dakota, to enjoin Station KSOO from broadcasting news stories which appeared in local member papers. A similar action was instituted in the Louisiana courts by a New Orleans newspaper against a broadcaster. The Associated Press commenced additional litigation in the Federal Courts by suing Station KVOS of Bellingham, Washington. In the Sioux Falls case, the publishers were successful and the defendant broadcast station was enjoined from appropriating news reports for use in connection with radio programs for so long a time as these reports had commercial value. The bill of complaint in the KVOS action was dismissed by the District Court but the Circuit Court of Appeals for the Ninth Circuit reversed and granted an injunction against the defendant station on grounds of unfair competition for the


3 See Keating, op. cit. supra, n. 1; Shapiro, op. cit. supra, n. 1.


5 New Orleans Times-Picayune v. Ohalt, N. Y. Times, June 20, 1933, 15 (New Orleans Civil District Court).


unauthorized broadcast of news prior to the expiration of the time during which the plaintiff had a quasi-property interest therein.\(^9\)

The news programs proved to be such popular features that despite the injunctions issued in the test cases, many of the smaller stations continued to broadcast newspaper reports, being careful, however, so to change the wording of the news scripts that no evidence of direct appropriation could be found.\(^10\)

While this litigation progressed, the demand for news broadcasts grew and many such programs found sponsors in commercial advertisers. The several injunctions protecting the publishers' news reports made the broadcasting industry aware of the necessity to obtain news for broadcasting from independent sources\(^11\) or by agreement with the publishers.\(^12\) A compromise was effected under the Press-Radio Plan.


At a conference with the Publishers' National Radio Committee, numerous independent as well as network or system affiliated stations agreed to broadcast news during only two periods of the day under certain stipulated con-
ditions. A board of editors named by the publishers constituted the Press-Radio Bureau which the broadcast stations agreed to maintain. News bulletins were prepared by the Bureau and transmitted to the member stations for broadcast as sustaining programs only. The bulletins were originally limited to thirty words each and were later extended to one hundred words. The broadcast period was so timed as to occur several hours after newspapers containing the same news had been distributed. After each such bulletin was broadcast, it was required that an announcement be made that the listener should consult his newspaper for further details. The service of the Bureau is available to any station agreeing to pay its pro rata share of the maintenance expenses.\(^1\)

Since the station subscribers agree not to use such bulletins in sponsored programs, commercial advertisers using the facilities of such stations for news broadcasts are obliged to engage news commentators and other indirect news services.

\(\S\) 441. Same: Other Services Supplying News for Broadcasting.

Although modified on several occasions, the Press-Radio Plan still operates closely along its original lines. It has frequently been the subject of criticism\(^2\) but it has also

\(^{13}\) For a full discussion of the Press-Radio Plan, see Shapiro, The Press, the Radio and the Law, (1935) 6 Air L. Rev. 128, 134 et seq.


"The Press-Radio agreement is a failure. It satisfies nobody, because it flies in the face of progress. The listeners are disgusted with it. Most stations refuse to use it. Many newspapers say it is unsatisfactory. Radio stations and newspapers all over the country are trying all sorts of schemes to furnish news by radio in violation of the spirit of the agreement. Even most of the stations now using the Press-Radio bulletins pronounce them highly unsatisfactory.

"Either the press associations must change the terms of the agreement so that radio stations can give their listeners up-to-the-minute
been often approved.\textsuperscript{15} It was evident that it was desirable to have a more timely and complete news service for broadcast stations without restrictions as to its use. Private enterprises sought to fulfill this need.\textsuperscript{16}

Several syndicated news-gathering agencies serving newspapers have extended their facilities to the broadcast stations since 1934.\textsuperscript{17} There also exist regional co-operative news services among stations so affiliated.\textsuperscript{18} Sponsored programs consisting of dramatizations of news incidents, commentators and other independent news contributions are employed to meet public demand for news broadcasts.

news and for longer periods of time, or the stations will find or create means and methods for securing news entirely independently of the press associations. This is not only their full right; it is their duty. It is part of that public service which they are bound to give if they are to justify the use of the frequencies the government has given them."

See also Shapiro, \textit{op. cit. supra} n. 1 at page 140 who says:

"Opinion has it that the Plan will be abandoned in the near future as a bad job."

\textsuperscript{15}Keating, \textit{Pirates of the Air}, (1934) 169 \textit{Harpers} 463, 469, reports as follows:

"Marlen Pew, ... editor of Editor & Publisher greeted the agreement with a rhapsodic Christmas editorial at the top of the page (it may have been coincidence). 'Glory to God in the highest, and on earth, peace and good will toward men.' 'Here', he wrote happily, 'was a sensible bunch of men who did not need to be dragooned by some dictator into doing right.'"

See also Harris, \textit{The Press and the Radio} (January, 1935) 177 \textit{The Annals} 163.

\textsuperscript{16}Trans-Radio Press was one of the agencies organized to cure the alleged defects in the Press-Radio Plan. The former imposes no time limit on the broadcast; there is no fear of competing with the press—rather all efforts are made to "scoop" the press. The programs may be sponsored; the reports may be broadcast at any time of the day; and news from other sources may be inserted.

\textsuperscript{17}International News Service, and United Press services are now available to broadcast stations. The Associated Press, however, has as late as April, 1938, refused to permit its news reports to be broadcast for commercial sponsorship. \textit{Broadcasting}, May 1, 1938, p. 16, col. 1.

\textsuperscript{18}E.g., Yankee Network in New England.

The actions instituted against broadcast stations to restrain further appropriation of published news reports were each based upon the contention that a news report constituted a form of property which could not lawfully be appropriated and used in competition with the gatherer of the news. The theories of such litigation had their roots in International News Service v. Associated Press\(^1\) where a competing news service was held to have been guilty of unfair competition in "pirating" news reports gathered by the plaintiff.\(^2\)

In that famous case, the United States Supreme Court, in a divided opinion, held that while the sale of a newspaper constituted a general publication to the public, yet as between competing news gathering agencies, news was "quasi-property"; and that it was unfair competition for one agency to appropriate such news property to the detriment of the creator thereof. The Court therefore enjoined the International News Service from using "pirated" news stories for as long a time as they had commercial value—i.e., for twenty-four hours after their publication.

It has been suggested, however,\(^3\) that the attempt on the part of the press to recognize property rights in news is "unfeasible and unnecessary" and "has led to logical incongruities" and that the courts will only enjoin unfair competition in the distribution of news.

The International News Service decision has been con-

\(^1\) 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1918).
\(^2\) The only protection afforded a newspaper publisher is the action for unfair competition. Since a substantial part of a daily newspaper is not composed of works which are the subject of copyright protection, there can be no general copyright upon the entire publication. Tribune Co. v. Associated Press, 116 Fed. 126 (N.D. Ill., 1900). See Note (1935) 30 Ill. L. Rev. 113, 115.
\(^3\) Shapiro, The Press, the Radio and the Law (1935) 6 Am. L. Rev. 128, 142.
sidered by many writers as extending new frontiers in the law of unfair competition. Frequent attempts have been made to apply the principle to other tortious appropriations of the fruits of another's efforts. \(^{22}\) However, as one writer has pointed out:\(^{23}\)

"... the courts have shown little inclination to apply the principle of the News case to other types of copying. ... In fact, virtually all the imitations allowed before the decision are still permitted today. We must look to the legislature for any fundamental change of doctrine and for the shaping of the compromise which will provide some measure of protection to the fruits of originality without shackling the competitive system."

While it is true that the International News Service case has been generally confined to its peculiar facts and has not been widely extended to impress property characteristics upon related subjects, it has nevertheless been applied to the talents of a performing artist whose recorded interpretative renditions were broadcast without his permission, so as to warrant the issuance of an injunction against the station's broadcast appropriation of his performance.\(^{24}\)

The doctrine of International News Service v. Associated Press has been correctly applied to the appropriation of news reports by a broadcast station.\(^{24a}\)


\(^{23}\) Handler, \textit{Unfair Competition}, (1936) 21 Iowa L. Rev. 175, 191.


§ 443. The Appropriation of News by Broadcast Stations as Unfair Competition.

The first case to reach the Federal courts in the controversy over the broadcast of pirated news was the action instituted in the United States District Court in South Dakota in which the Associated Press sought an injunction against Station KSOO, operated by the Sioux Falls Broadcasting Association. That Court found that the appropriation by the defendant broadcast station of news gathered by the complainant constituted unfair competition and resulted in substantial and irreparable injury. It was held as a conclusion of law that Equity would restrain such unfair competition.

The Court thereupon issued an injunction against the broadcast of complainant's news stories for a period of twenty-four hours after the publication thereof in local newspapers. This decision is a direct application of the International News Service case.

However, a contrary result was reached in another action brought in the United States District Court in Washington where the same complainant sued for an injunction against Station KVOS upon a similar news piracy charge. District Judge Bowen said "the International News Service case is not controlling here, because the rule of that case is confined to the peculiar facts there involved and they are unlike the facts here".

The Court, while recognizing that the International News Service and the Associated Press were competitors in the gathering and distribution of news and that therefore the appropriation of news by

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26 Id., Conclusions of Law, Par. 10.


one to the detriment of the other was unfair competition, held that insofar as the dissemination of news is concerned, the press and the broadcast station are not competitors. The Court said:

"The mere fact that the defendant radio station competes for business profit with complainant's member newspapers in the advertising field does not make of the defendant and such newspapers competitors for business profits in the dissemination of news."

In the KVOS case, the news program was a sustaining feature of the station's service. The Court refused to apply the Sioux Falls case and, in fact, expressly disagreed with its conclusion.

For a time the Sioux Falls case and the KVOS decision were in direct conflict and the entire question of the right to broadcast news reports from daily papers was unsettled. The reversal of Judge Bowen's decision by the Ninth Circuit Court of Appeals brought uniformity, at least for a time, to the previously conflicting decisions. Circuit Judge Denman said:

"KVOS's business of publishing, by the broadcast of combined advertising and the pirated news for the profit from its advertising income constitutes unfair competition with the newspapers' business of gathering the news pirated by KVOS and publishing it combined with the advertising, seeking the profit from both the advertising service and from the subscription of its readers. The papers are unconscionably injured in performing a public function as well as in conducting a legitimate business."

30 Id., at 286.
32 80 F.(2d) 575 (C.C.A. 9th, 1935).
33 Id., at 581.
The Circuit Court of Appeals based its reversal on the very grounds which the District Court refused to recognize, namely, that the newspapers and broadcast stations were competitors for advertising.

When the KVOS case reached the United States Supreme Court, the complaint was dismissed for want of jurisdiction because of the failure of the plaintiff to establish that the jurisdictional amount of $3,000 was in controversy. Thus, the Court's decision of the entire question of unfair competition in the piracy of news by broadcast programs was left in abeyance. The action has since been reported settled and discontinued and no final adjudication of the problem is likely within the near future. It is to be lamented that the United States Supreme Court failed to determine the controversy upon the merits. It is submitted that the decision of the Circuit Court of Appeals should be followed. Support for this view may be found in the opinion of Judge Stern in Waring v. WDAS Broadcasting Station, Inc.

The piracy of news by one broadcast station from another has been the subject of judicial consideration and has led to a recognition of property rights in broadcast news upon which a finding of unfair competition was predicated. In Pittsburgh Athletic Company, et al. v. KQV Broadcasting Company, the United States District Court held that the owners of the Pittsburgh "Pirates" had a legal right to capitalize on the news value of their baseball games by selling exclusive play-by-play broadcasting rights therein to the plaintiff advertisers. The latter had engaged the facilities of Stations KDKA and WWSW through the


35 80 F.(2d) 575 (C.C.A. 9th, 1935).


37 No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938).
plaintiff National Broadcasting Company for broadcast of the sanctioned descriptions of the games. The defendant station independently broadcast its own play-by-play descriptions by its paid observers from a point outside the baseball park as a sustaining feature of its program operations. A preliminary injunction was issued restraining the continuance of such competing broadcasts of the identical news of the baseball games as unfair competition. The defendant's contention that it was not competing unfairly because its broadcasts were not commercially sponsored, was properly rejected. The Court also said:

"It is perfectly clear that the exclusive right to broadcast play-by-play descriptions of the games played by the 'Pirates' at their home field rests in the plaintiffs, General Mills, Inc., and the Socony-Vacuum Oil Company under the contract with the Pittsburgh Athletic Company. That is a property-right of the plaintiffs with which defendant is interfering when it broadcasts the play-by-play description of the ball games obtained by the observers on the outside of the enclosure. . . . For it is our opinion that the Pittsburgh Athletic Company, by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games.

"The communication of news of the ball games by the Pittsburgh Athletic Company, or by its licensed news agencies, is not a general publication and does not destroy that right. This view is supported by the so-called 'ticker cases': Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236; Hunt v. New York Cotton Exchange, 205 U.S. 322; Moore v. N. Y. Cotton Exchange, 270 U.S. 593; McDearmott Commission Co. v. Board of Trade, 146 Fed. 961; Board of Trade v. Tucker, 221 Fed. 305."

§ 444. Appropriation of News Content of Broadcast Programs: By the Press.

Where a broadcast program contains a news report which is obtained solely through the efforts of the station or an
advertiser using its facilities, and the broadcast narration is unauthorizedly used as the basis for a newspaper report of the event without independent activity by the publisher, the latter should be held liable for unfair competition in appropriating the broadcaster's news property.

There seems to be no valid reason for denying property characteristics to news reports gathered by broadcast stations. The International News Service case has properly been applied to an instance of piracy by a competing station of news contained in a broadcast program. Moreover, a broadcast program as such may be protected against unfair competition.

The nature of the contents of broadcast news program scripts as well as the time element inherent therein, makes copyright protection thereof a practical impossibility to the same extent as daily newspapers. Therefore, unfair competition predicated on a violation of property rights in news is the only basis of relief against appropriation thereof.

It is well to advert to a decision of the Supreme Court of Germany rendered on April 29, 1930 in such a case. The plaintiff broadcast station sought damages for appropriation of its broadcast report of the landing of the dirigible Graf Zeppelin. Directly after the broadcast of such news, the defendant newspaper publisher issued a


41 Reported in III. ARCHIV FÜR FUNKRECHT 423, translated in (1931) 2 J. OF AIR LAW 63.
free "extra" to the public announcing the news. The Supreme Court affirmed the decision of the Intermediate Court in dismissing the complaint on the ground that the defendant's action was not against public policy. This case was predicated upon a German statute which provided: 42

"Whoever in commercial intercourse for purpose of competition engaged in dealings which offend against honest practices may be sued for injunction and damages."

It is submitted that a contrary result would obtain under common law jurisprudence. 42a

§ 445. Same: By Other Broadcasters.

If the whole or substance of a broadcast news program is appropriated without expenditure of time, effort or money by a competing broadcast station or broadcast news service, such unfair competition or threat thereof will be enjoined. 43 An unauthorized broadcast program of this type would constitute an invasion of such property rights in the appropriated program as may belong to the sponsor and producer thereof and to the originating broadcast station. 44

Similarly, an unauthorized rebroadcast of a news program originating from another station should be enjoined as unfair competition irrespective of the fact that a violation of Section 325 of the Communications Act of 1934 45 would also be involved.

44 Ibid. See Oranje, Rights affecting the use of broadcasts, (1938) 3 Geistiges Eigentum, Part 4, 347, 401 et seq.
45 48 Stat. 1091 (1934), 47
§ 446. Direct Broadcast of News: Right to Broadcast.

The great public interest in direct reporting of news events by broadcast programs has engendered active competition between stations for the right to broadcast current activities of wide popular appeal, such as sports events and other public entertainments.

Where the event sought to be broadcast takes place on public property, e.g. a parade, any station may broadcast its report of the event directly from the scene thereof. Similarly, no restrictions exist upon the right to broadcast an event which takes place in an unconfined area, such as a lake, river or other comparatively unlimited territory. In the latter category are such events as yacht races, long distance athletic contests and similar activities.

Where the event sought to be broadcast occurs in a con-


Rebroadcasting means that "the station engaged therein actually reproduced the signal of another station mechanically or by some other means, such as feeding the program received directly into a microphone. From a strict standpoint, the receiving of a program of another station over an ordinary receiving set and then restating the information thus received over the microphone does not constitute a violation of Section 325 of the Communications Act". Newton, 2 F.C.C.Rep. 281, 284 (1936).

In Pittsburgh Athletic Company, et al. v. KQW Broadcasting Company, No. 3415 Equity Term, 1938 (W.D.Pa., injunction granted, Aug. 8, 1938) the Court found as a conclusion of law that the defendant station violated the Communications Act of 1934. Conclusion of law, No. 6, ibid. However, the only finding of fact which tends to support this conclusion is No. 30(b), which in effect sets forth a restatement of a broadcast and not a direct reproduction of the transmitted signal within the rule enunciated in Newton, supra. Hence, Conclusion No. 6, supra, is apparently erroneous.

fined territory, such as a race track, theater or arena, the sponsor or producer of such an event has the exclusive right to broadcast a report of the activities thereof. A broadcast station, a commercial advertiser or any other person making lawful use of the facilities of a broadcast station.

A broadcast station will be enjoined from interfering with an exclusive contract between the proprietor of an event and another broadcast station under which the latter is granted the sole right to broadcast an account of the event. At common law, the maintenance of a theater or other limited enclosure to which the public is admitted is a private business which is not conducted under authority from the state. Except for statutory licensing requirements based upon police powers, such as fire prevention and zoning ordinances, the operation of such a business is not governed by the rules affecting public utilities. In the absence of express statutory enactment, proprietors of theaters, arenas and similar enclosures are not obliged, like common carriers, to admit everyone who desires a ticket. Admission may even be refused to a representa-


50 Woolcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911); Luxenberg v. Keith, 64 Misc. 69, 117 N.Y.Supp. 979 (1909); Purcell v. Daly, 19 Abb. N. Cas. 301 (N.Y., 1886); Sports
tive of the press. It would follow that they would likewise have the right to exclude representatives of broadcast stations.

In the exercise of control of their business, such proprietors may regulate the terms of admission in any reasonable way and make such reasonable rules and regulations for its conduct as they see fit. If they so choose, they may prevent a person from entering the establishment with broadcasting apparatus as a trespasser or upon the ground of his interference with their exclusive right to broadcast the event. Similarly, they may enjoin threatened broadcasts of such events in competition with a broadcast station to which a license to broadcast a report thereof has been issued.

However, it has been held in one English case, that the holder of a ticket to a dog show who had been admitted could take photographs of the dogs exhibited. In the absence of any contrary notice on the ticket or other prohibition against the use of cameras in the area, the right of any spectator to take pictures of the event was upheld. The proprietors of the show had the right to exclude the photographers or to prevent the taking of the pictures by


making this restriction a term of the contract of admission. Upon the authority of this case, it would seem that unless expressly prohibited, a broadcast station may send its representative into a theater or sports arena with a microphone and other equipment to broadcast the events therein. It is submitted, however, that this case should not be followed in this country.

In the "Our Dogs" case, the English court based its decision on the fact that the proprietors of the show did not possess an exclusive right to photograph the dogs and therefore they had no property right to assign to the plaintiff. An event to which the public is invited is ordinarily a subject of value to the producers or proprietors thereof and the latter have the sole right to control the broadcast of a description or report of the event. The charge of admission to such an event is not a criterion of value which affects the proprietor's exclusive right to broadcast a report thereof. An unauthorized broadcast of a controlled event would constitute such an actionable invasion of the property rights of the proprietor as to constitute unfair competition.

In instances where the event takes place in a limited territory which may not necessarily be wholly enclosed, the control of the proprietors thereof will be extended to such points outside of the area from which reports of the activities therein may be directly broadcast. Thus, the proprietor of an arena may enjoin the unauthorized broadcast of an event occurring in his establishment despite the fact that the broadcast originates from a vantage point outside the arena.

55 Ibid.
§ 447. The Broadcast of News Programs

A contrary ruling, however, was handed down in *Victoria Park Racing & Recreation Grounds Co. v. Taylor* 59 where the British doctrine was extended to deny an injunction against the unauthorized broadcast of descriptions and results of races run on plaintiff’s track. Although proof of damage had been adduced as well as plaintiff’s previous refusal to sell broadcasting rights, the Court found that the defendant’s acts in broadcasting the event from a platform built on land adjoining plaintiff’s track were neither a nuisance nor any other restrainable tort. The failure of Equity to exercise its jurisdiction in this instance is regrettable and is a result of the restricted application of the doctrine of unfair competition in British courts. 60 The American view 61 is less legalistic and more desirable.

§ 447. Same: Agreements Therefor.

Where a station obtains the right to broadcast an event as well as the right to make such a broadcast available to commercial advertisers, it is a matter of the agreement between the station and the owner of the event to determine whether there are limitations upon the rights granted. Unless the agreement so provides, the broadcast station may not be restricted as to the type of program.

In *Rudolph Mayer Pictures, Inc. v. Pathé News, Inc.*, 235 App. Div. 774, 255 N.Y. Supp. 1016 (1st Dept., 1932) the court enjoined the taking of motion pictures of a boxing exhibition from the roof of a building across the street from the ball park in which the prize-fights were taking place. The plaintiff maintained that the unauthorized taking of the motion pictures was an invasion of the promoter’s exclusive property rights therein.

59 37 S.R. 322 (N.So. Wales, 1936).
§ 448. Defamation in News Broadcasts.

A newspaper has no greater privilege in defamation than any ordinary citizen but is liable for what it pub-


63 Seelman, The Law of Libel and Slander (1933) 627; Root v. King, 7 Cow. 613 (N.Y. 1827):
lishes, whether the publication is in the form of an item of news,\textsuperscript{64} an advertisement\textsuperscript{65} or correspondence.\textsuperscript{66} Defamatory matter published in good faith in the honest belief in its truth, if false, is not privileged because published as a mere matter of news.\textsuperscript{67}

In the dissemination of news broadcasts, the station acts in a capacity similar to that of a newspaper.\textsuperscript{67a} A broadcast station has a duty not to falsify or color the news disseminated by it. After the broadcast presentation of unbiased news reports, a broadcast station, through a news commentator or in any other manner, may editorialize and assume a position with respect to controversial issues. It is essential that the station, however, make clear to the audience the fact that the program is an editorial opinion. The failure to define such partisanship should be deemed to constitute a substantial deviation from the station's operation in the public interest.

Where a broadcast program dramatizes a news event which consists of the arrest of a person for a crime, the individual described therein has a right to object to the


\textsuperscript{67a} See Irwin v. Ashurst, 74 P. (2d) 1127 (Oregon, 1938).
dramatization on the ground that it ceases to be news and is more than a direct report of the arrest.\(^6^8\)

Broadcast stations are permitted the same liberality in the use of descriptive language in reporting news as is available to a newspaper.\(^6^8^a\) Where a broadcast station transmitted a news report that the plaintiff had been convicted of the crime of assault whereas the conviction was based upon disorderly conduct, a defense interposed by the station, describing the acts of disorderly conduct to show that the plaintiff committed assaults in a non-technical sense, was not stricken.\(^6^9\)

Although a newspaper publisher has been held absolutely liable without fault for defamation published by him,\(^7^0\) it is submitted that the same rule should not apply to news broadcasts. The same result would probably be achieved in such cases upon principles predicated on the factual situation peculiar to radio broadcasting. It has been pointed out\(^7^1\) that liability for broadcast defamation in certain instances should be determined by the test as to whether due care was exercised by the broadcast station in disseminating a defamatory program. Where the news event is broadcast directly by the broadcasting station, the latter should be liable for defamatory matter so published because the injury could have been avoided by the exercise of due care. Where, however, the news event is broadcast by an advertiser or other independent person making use of the facilities of the broadcast station for that purpose, the advertiser is primarily responsible for the defamatory

\(^6^8\) See Rogers v. Lee, Stromberg-Carlson, etc., Variety, Feb. 9, 1938.
\(^6^8^a\) See Irwin v. Ashurst, 74 P. (2d) 1127 (Oregon, 1938).
\(^7^1\) See Chapter XXIX. infra.
§ 450. The Broadcast of News Programs

matter so broadcast. The station should be permitted to plead and prove the defense that it exercised due care in attempting to prevent or exclude the broadcast of the defamation over its facilities.72

§ 449. Control of Broadcast Stations by Newspapers.

Faced with the growing competition of the broadcasting industry in the dissemination of news, many publishers have entered into the broadcasting business. As of February 16, 1937, exactly two hundred of the less than seven hundred licensed broadcast stations, were owned or controlled by newspapers. Of these, 101 were granted licenses between January 1, 1934 and February 16, 1937.73

As one writer has pointed out:74

"... the competition between the press and the broadcasting industry served a more important purpose. News that a radio station might refuse to broadcast, the press would be glad to print, and vice versa. The real guarantee of the free dissemination of news was in this competition."

§ 450. Same: Constitutionality of Proposed Legislation.

This indirect inroad upon the broadcasting industry by newspaper publishers has been seriously challenged as frustrating competition. Efforts were made to check this trend during the 1937 Congressional session. Bills were introduced by Senator Wheeler75 of Montana and Representative Wearin76 of Iowa which had as their object the prohibition of ownership of broadcast stations by newspaper publishers. Senator Wheeler’s proposed legislation sought to deny the right of newspaper publishers to obtain broadcast station licenses in the future and provided that they divest themselves of their existing rights in broadcast stations within a reasonable time.77

72 Ibid.
73 BRINZIE, NOT TO BE BROADCAST (1937) 278.
74 Ibid.
Congress has the power to regulate broadcasting under the "commerce clause" of the Constitution. The object of these bills, however, is not to regulate commerce but rather to exclude a particular class of persons from engaging in interstate commerce. This, it is submitted, is unconstitutional. The inquiry is presented as to whether the right to engage in interstate commerce depends upon the "commerce clause" of the Constitution or whether it exists independently of the Constitution subject to regulation by Congress. Mr. Willoughby, after examining the dicta of many cases has reached the conclusion that the right to engage in interstate commerce exists independently of the Constitution, pointing out, moreover, that the right is one recognized and protected by the Constitution.

An analogous problem in the constitutionality of such Congressional legislation appears in the "commodities clause" of the Hepburn Act of 1903. That statute had as its object the prohibition upon interstate carriers against having financial connections with other businesses. The Act forbade railroads to transport in interstate commerce any commodity in which they had a direct or indirect interest, except when needed and intended for their use as common carriers. The United States Supreme Court, in a series of decisions held inter alia that the clause was constitutional as to commodities owned by the carrier and, therefore, if the Congress enacted a law of the purport suggested it should meet the constitutional requirement.

See Chapter I. supra.

But see N. Y. Times, Feb. 13, 1937, 11, col. 2, where Hampson Gary, General Counsel for the Federal Communications Commission in response to an inquiry as to the constitutionality of the Wheeler bill, replied: "I am of the opinion that the mutual ownership and control of newspapers and broadcast stations bear a reasonable relation to and have an effect upon interstate commerce, and, therefore, if the Congress enacted a law of the purport suggested it should meet the constitutional requirement."


or in which it had a real interest at the time of transportation.

This "commodities clause" and the proposed Wheeler bill are completely different in their operation although they have a common object. By prohibiting the transportation of certain articles or goods, the "commodities clause" is a constitutional regulation of interstate commerce. The Wheeler proposal, however, seeks to prevent a certain class of persons from engaging in interstate commerce. It is, therefore, greatly to be doubted whether the enactment of such proposed legislation as the Wheeler Bill will be held constitutional.
Chapter XXVIII.

BROADCAST PROGRAMS AND RIGHTS OF PRIVACY.

Section 451. Generally.

The extensive use of the broadcasting medium for communication of advertisements, news and other matter relating to specific persons, presents interesting problems. It is obvious that broadcast programs have the capacity to invade the personal lives of members of the public. The so-called right of privacy, which is the basis of protection against invasion of one’s personality, has had

§ 452. Nature of Right of Privacy.

The right of privacy has been characterized as "the right to be let alone" or the right of "inviolable personality". It is the right of a person who is not engaged in work of a public nature or involved in a public event to remain in seclusion. Messrs. Warren and Brandeis have pointed out that "even gossip apparently harmless,  

3 "Gossip is no longer the resource of the idle and the vicious, but has become a trade." Warren and Brandeis, op. cit. supra n. 2 at 196.
4 COOLEY ON TORTS (1907 ed.) 192.
5 Warren and Brandeis, op. cit. supra n. 2 at 205.

slight recognition at common law and express statutory enforcement in but two states. In 1890, Messrs. Warren and Brandeis wrote one of the most important and provocative articles in the development of Anglo-American Law. They pointed out that the common law was predicated upon the protection of property and property rights and that only as society developed and civilization became more complex did the law evolve safeguards against the invasion of personal rights, and protection for the intellectual and literary products of the mind. The development of broadcasting and other mechanized sound, the camera, motion pictures, the widespread circulation of newspapers, and the constant use of all these media to communicate intelligence universally, have made it apparent that the law must afford additional protection against the invasion of one's privacy. The improper use of such instrumentalities constitutes a substantial threat to the peace of every home and the privacy of every individual.
when widely and persistently circulated, is patent for evil".6

The intrusion into one's private life caused by the dissemination to the public of the thoughts, sentiments, emotions and other personal matters pertaining to an individual, may upset his peace of mind and destroy his social relations.7 Even where he has consented to such publicity, he should generally retain the power to control the extent thereof.8

The right of privacy does not depend upon the means of publicity used,9 or upon the quality thereof, or upon the nature or value of the information circulated.10

The inherent character of such a personal right and its foundation upon individual reactions of taste and sensibility have played a large part historically in the unwillingness of many courts to establish and recognize the right of privacy at common law. The absence of property characteristics has served as an excuse for the failure of such courts to exercise jurisdiction at common law over this distinctly personal right.11 Property values were attached to intellectual productions in the law of literary property although a definite connection with authors' personal lives may be established in many such instances.12

The extension of the right of privacy to new situations created in modern life was advocated by Messrs. Warren and Brandeis.13 Their article was the precursor of numerous attempts to extend the protection of the common law against a variety of personal intrusions. Judicial recognition of the right of privacy in many jurisdictions is

6 Ibid.
8 Ibid; Warren and Brandeis, op. cit. supra n. 2.
9 Ibid.
10 Ibid.
11 WALSH, EQUITY (1930) 270.
12 DONKEY ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879) 102; DE WOLFE, AN OUTLINE OF COPYRIGHT, (1925) 1, 2.
directly traceable to that stimulating discussion. Other jurisdictions have definitely repudiated the contention that the right of privacy existed at common law.

It is submitted that the elasticity of the common law makes it adaptable to grant protection against invasions of personality. Legislation is not essential. Self-imposed limitations may be assumed by the courts by extending the right of privacy to commercial or other unreasonable invasions only. The complete failure to grant judicial protection in such instances serves to stultify the common law as a growing instrumentality for the regulation of human conduct.


§ 453. Same: Persons Entitled Thereto.

In those jurisdictions which have recognized the right of privacy as a distinct right at common law, it has been held to be a purely personal right which may be enforced only by the person whose right has been infringed. It follows that the individual right of privacy dies with the person. Any privilege of surviving relatives of a deceased person to protect his memory exists solely for the benefit of protecting the survivors' own personal rights. Even where the memory of the deceased has been maligned or where statements concerning him would constitute libel, no cause of action arises in favor of his relatives.

The right is extended by these courts to all persons irrespective of social or professional standing. One class of persons, however, public characters, are deemed to have renounced the right to live screened lives. To the extent that they have received public recognition, they must sacrifice their right to privacy. This class is strictly limited.


21 Eagles v. Liberty Weekly, 137 Misc. 575, 244 N.Y.Supp. 430 (1930); SEELMAN, LIBEL AND SLANDER IN NEW YORK, (1933) § 97.


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The right of privacy is not confined to recluses and little known individuals.24

While the cases in which a right of privacy has been recognized have, for the most part, involved the use of the name or portrait of an individual, the right has also been recognized in other connections. The advertising of a person's debt to coerce payment,25 the public investigation of bank accounts26 and the tapping of telephone wires leading into the plaintiff's house27 have all been held to constitute invasions of an individual's right of privacy.

It has been held that the statutory right of privacy is not available to an employee who, during the course of employment, posed for a photograph to be used for the employer's business purposes even though the employment had been terminated.28 Where an employee's name or portrait is used for advertising or trade purposes beyond the scope of employment or consent, the right of privacy should be enforced. A performing artist's name or photograph cannot be used by the commercial sponsor of his broadcast program for advertising not related to the program unless written consent therefor is obtained.


24 Warren and Brandeis, op. cit. supra n. 2 at 214.
26 Brex v. Smith, 146 Atl. 34 (N.J.Ch., 1929).
The enforcement of the right of privacy at common law is not necessarily limited to the cases already decided. In jurisdictions where the right has been established at common law, further protection to meet new situations may be anticipated. Where the legislature has seen fit to deal with the problem, protection is limited to the provisions of such statutes.

§ 454. The Recognition of the Right of Privacy at Common Law.

There appears to be much conflict as to whether the right of privacy may be recognized as a distinct right at common law. There can be no doubt, however, that despite the fact that courts have cloaked their decisions in fictions of property rights, breaches of confidence and implied contracts, there has been a gradual recognition of the necessity for protecting the right of privacy.

Originally, the common law secured to the individual, protection of his person and his property only. Gradually the law recognized that there might be wrongs other than physical invasions of property and person, and gave

29 In Pennsylvania, the unauthorized broadcast of phonograph records containing the interpretative performances of a conductor of an orchestra was enjoined as an invasion of the artist's right of privacy. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.).


31 See nn. 14, 15 supra.


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redress for injuries to his feelings and intellect. Assault,35 nuisance,36 libel and slander,37 alienation of affections,38 and intangible rights in connection with property such as easements,39 were successively recognized. Thereafter, the law slowly evolved the principle that an individual ordinarily had a right to determine to what extent the expression of his thoughts, ideas and emotions should be communicated to others. The law of intellectual property was developed to protect these rights.40 The author of a poem, letter, or any other expression of human thought, was given the right to publish his work or refrain from so doing; if he published it, he had the right to fix the limits of its distribution.41

In several isolated cases,42 the courts openly admitted that the right of privacy is an independent legal right and granted relief on that theory alone.

35 See Warren and Brandeis, op. cit. supra n. 2 at 194; I. de S. v. W. de S., Y.B. Liber Assisarum 99 Pl. 60 (Eng., 1348).
37 Walsh, History of Anglo-American Law (1932) § 168; Warren and Brandeis, op. cit. supra n. 2 at 194.
38 Winsmore v. Greenbank, Walles, 577 (Eng., 1745); Warren and Brandeis, op. cit. supra n. 2, at 194.
39 Walsh, op. cit. supra n. 36, § 139 et seq.
40 Drone on the Law of Property in Intellectual Productions (1879) 102; De Wolfe, An Outline of Copyright (1925) 1, 2.

"The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, salable or unsalable, they shall not, without his consent, be published." Prince Albert v. Strange, 2 De G. & Sm. 652, 693, 1 M. & G. 25, 41 Eng. Repr. 1171 (1849).

§ 455. The Doctrine in New York.

In New York, two very early cases held that an injunction to restrain the publication of private letters would not lie. However, these cases cannot be regarded as properly indicative of the early common law as it existed in New York, since they were expressly overruled by a subsequent decision which impliedly recognized that there was a right of privacy. This later decision was followed in Schuyler v. Curtis, where the Court expressed the opinion that a right of privacy exists and that its invasion "... is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject". An examination of the New York decisions up to 1895 reveals a definite tendency to recognize the right of privacy as a distinct legal right and to enforce it as such.

A monumental case in this field was decided in 1902. In Roberson v. Rochester Folding Box Co., the Court refused to restrain the defendant from publishing a picture of the plaintiff, which the defendant was using for advertising purposes. Since the portrait was not libelous in any sense, the Court of Appeals refused to recognize the merits of the plaintiff's contention that there was an invasion of the right of privacy. The Court said:

"... the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence, and, as we view it, the common law is entirely satisfied by the protection afforded by the general law of libel. We think it would be a departure from the common law to extend the remedy of injunction for an invasion of rights which may be regarded as affecting the dignity and privacy of a person, but do not, under our constitution, come within the category of personal or tangible property."

43 Brandreth v. Lance, 8 Paige 24, 4 N.Y. Ch. 330 (1839); Wetmore v. Sevillo, 3 Edw. Ch. 515, 6 N.Y. Ch. 745 (1842).
45 147 N.Y. 434, 42 N.E. 22 (1895).
46 Id., at 443.
49 Id., at 556.
doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."

The Court suggested that if the right of privacy were ever to become a part of the law of New York, legislative action would be necessary to limit and define the new right. This decision met with so much disapproval\(^5\) that one of the members of the Court, shortly thereafter, felt obliged to justify the Court's conclusion.\(^5\)

§ 456. Enactment of Sections 50 and 51 of the New York Civil Rights Law.

As a result of the protests of leading members of the Bench and Bar, the New York legislature enacted Sections 50 and 51 of the Civil Rights Law.\(^5\) It will be noted that

\(^{50}\) New York Times, Editorial, August 23, 1902; Larrimore, The Law of Privacy, (1912) 12 Col. L. Rev. 693. In Vanderbilt v. Mitchell, 72 N.J.Eq. 910, 919, 67 Atl. 97, 100 (1907), the court referred to the Roberson decision as "a case seldom cited but to be disproved." The New York Court of Appeals was itself divided 4 to 3 in deciding Roberson v. Rochester Folding-Box Co.

\(^{51}\) O'Brien, The Right of Privacy, (1902) 2 Col. L. Rev. 437.


Section 50: "A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Section 51: "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be
this statute provides for relief against the unauthorized use of a person's name or portrait only, whereas the common law right of privacy is more extensive.

The rights of action established by this legislation are constitutional and do not violate either the State or Federal Constitution. It deprives persons of neither liberty nor property and does not impair the obligations of contracts.

A similar statute has been enacted in Virginia. Such legislation has been limited to instances of the use of one's name or photograph for commercial purposes. The statutes were enacted to fill the need created by the decision in Roberson v. Rochester Folding-Box Co. Although the Court expressly repudiated the existence of the right of privacy at common law, the case should be limited to its facts. It is submitted that the New York courts have jurisdiction to recognize rights of privacy in situations not covered by the statute, although it is doubtful whether such courts would be so inclined.

unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed.

See also Virginia Code of 1924, § 5782.


Virginia Code of 1924, § 5782.

The legislation is strictly construed where its criminal provisions are sought to be invoked. People (Stern) v. Robert R. McBride & Co., 159 Misc. 5, 288 N.Y.Supp. 501 (1936). Where civil rights are enforced, however, the statute is liberally construed. Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.Sup. 382, 5, 6 (1937).

§ 457. Use of Name in Broadcast Program.

The right of privacy at common law is still vague and uncertain. It cannot reasonably be foretold whether invasions of personality by broadcasting would be protected in every instance by judicial application of the right of privacy. Five states have definitely repudiated the proposition \(^{58}\) and only seven states and two Federal courts have recognized the right of privacy. The remaining jurisdictions have not yet passed upon the question. Only a few broadcasting cases appear to have involved rights of privacy at common law.\(^{59}\)


In New York, the doctrine was likewise repudiated in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 475, 59 Am. St. Rep. 528 (1902) but is now recognized by statute.


the New York Civil Rights Law was not granted in contemplation of broadcasting. Since the enactment of the statute, the cases thereunder have been concerned principally with invasions of privacy by newspapers, motion pictures and books. Only three cases invoking this statute and related to radio broadcasting have been decided.

At common law, the mere use of one's name in a broadcast program containing a news report or commentary thereon should not of itself constitute an actionable invasion of privacy. The courts have uniformly held that a single publication of a person's name or portrait in a newspaper or periodical is not a violation of the privacy statutes. These decisions have been predicated upon the recognition of value to society of freedom of the press and the public interest in receiving news. Consequently,

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66 See § 459, infra.

67 Martin v. New Metropolitan
such invasions have not been construed as "for purposes
of trade" although they were accomplished through the
medium of an independent commercial enterprise. Like-
wise, a broadcast station would not be liable for the use of
one's name in a news information program, whether sus-
taining or sponsored, as part of a report with which one
has a genuine connection.68

§ 458. Same: Commercial Programs Other Than News.

In all broadcast programs other than those transmitting
news information, where the name of a specific person is
unauthorizedly used for commercial purposes, relief should
be granted for violation of both the common law and statu-
tory rights of privacy. Where one's name is used without
intended application to him specifically, his right of privacy
should not be enforced because no invasion of personality
results from a mere harmless coincidence.69

The use of a person's name as a part of a broadcast
program which is unquestionably disseminated by an ad-
vertiser for purposes of trade, constitutes an actionable
violation of the Civil Rights Law if no written consent has
been granted.70 The use of the name must be directly
connected with the commercial motive. It is no defense
that the advertiser has expended large sums upon the
program for his advertising purposes.71

Fiction, Inc., 237 App. Div. 863, 260 N.Y.Supp. 972 (1932); Damar-
963 (1908).

(1937).

69 Beegel v. National Broadcast-
ing Co., Inc., decided June 30,
1936, S.D.N.Y. (unreported)
Docket No. L54-299.

70 See Garden v. Parfumerie
Rigaud, Inc., 151 Misc. 692, 271
N.Y.Supp. 187 (1933); Loftus v.
Div. 251, 182 N.Y.Supp. 428
(1920); Almind v. Sea Beach Ry.
Co., 157 App. Div. 230, 141 N.Y.
Supp. 842 (1913).

71 Garden v. Parfumerie Rig-
aud, Inc., 151 Misc. 692, 271 N.Y.
Supp. 187 (1933).
Where the broadcast program contains a well defined cleavage between the commercial and entertainment content thereof, the use of one's name therein must be analyzed. If the invasion is related to the advertising portion of the program, it is actionable. The fact that the program is used for advertising purposes is sufficient; it is unnecessary to show that the broadcast time was paid for. Where the name is used for entertainment purposes only and it is only casually incident to the purpose of the program, relief should be denied. The question is one of fact to be determined by the court.

In King v. Winchell, a commentator related, as part of a sponsored broadcast program, a story which allegedly made plaintiff appear ridiculous to the public. Plaintiff was not a prominent public character. A motion to dismiss the complaint was granted on the ground that the defendants did not violate the statute by a mere incidental mention of plaintiff's name during a sponsored broadcast program. The case may also be explained on the ground that the Court considered the narration of the story as a news report by a commentator.

Where, however, the advertising and the entertainment content of a commercial program have become so integrated that they both constitute a means of obtaining good will for the sponsor and his product, any unauthorized use of a person's name in such a program would be a violation of the statutory and common law rights. It is doubtful whether an injunction pendente lite will be granted against a broadcast program which is a mere literal invasion of privacy.

74 The Court was divided 3 to 2. The dissenting justices regarded the evidence adduced as sufficient to go to the jury on the question of defamation.
Of course, it must be indisputable that members of the listening public associated the plaintiff with the name used in the commercial program which is alleged to have invaded his right of privacy. In *Morris Beegel v. National Broadcasting Company, Inc.*, a New York attorney brought an action for defamation and also under the New York Civil Rights Law because of the broadcast over a national network of a comedy program which burlesqued the activities of a fictitious small law firm called "Beagle, Shyster and Beagle". The United States District Court decided that there was nothing to indicate that the defendants knew the plaintiff, nor that they used or intended to use his name for purposes of trade.

This principle should likewise apply at common law in jurisdictions where rights of privacy are recognized.

§ 459. Use of Name in News Broadcast.

By analogy to the newspaper cases, the single use of a person's name in a sustaining news broadcast would not be a violation of the right of privacy. The courts do not consider such a use as one for advertising or trade purposes. It has also been held that the presentation of current events in a motion picture film was legitimate news even though it had been done as a commercial enterprise. Such trade purposes were construed as not within the intent of the New York Legislature in enacting Sections 50 and 51.


It is submitted that the showing of a news film in a theatre is closely analogous to the broadcast of a news information program by a commercial sponsor. The principle that legitimate news constitutes an exception to the statute may be extended to include situations where one’s name is mentioned informatively by a news commentator employed on a commercial program.79

There is a strong public policy in favor of the free circulation of news, subject only to the limitation that such information shall not be defamatory.80 The public interest in such information outweighs the rights of individuals who, by reason of circumstances, are legitimate subjects of news items reported in broadcast programs. It has been held in New York that the imposition of a further limitation upon the press in the form of an extension of the right of privacy to persons concerned in news information, requires an express statutory declaration.81 Such legislative intent is lacking in the present statute.

The determination of whether a news program is in the public interest, from the point of view of the person referred to therein, depends upon the particular facts and circumstances of each incident.82 Although each broadcast program disseminated by a station is supposed to be in the public interest, convenience and necessity, the nominal compliance with this standard of operation does not serve to justify all invasions of personality as in the public interest. It is only when the rights of the individuals concerned in a broadcast program are ultimately resolved that the station’s compliance with the standards established by the operating license may be determined. The mere pleading of the defense of operating in the public interest should not exonerate the station from liability for

its programs which violate rights of privacy. Proof of such allegations must be shown affirmatively.

The fact that many broadcast programs transmitting news information are sponsored by commercial advertisers should not ordinarily overcome the public policy in preserving unhampered avenues of communication of news. While the broadcast of such news information would be in the public interest so far as the station is concerned, the commercial advertiser would be liable for violation of the statutory right of privacy because its sponsored programs are for purposes of trade. This results in an arbitrary distinction which should be adjusted by an amendment to the statute. At common law, both the advertiser and the station would probably be exempt from liability because their broadcast of news information is in the public interest. A broadcast by a news commentator is in the nature of an editorial and should be considered a news information program.

Where, however, programs are broadcast which dramatize or fictionalize news events, the cloak of public interest falls and the advertiser as well as the station would be liable to all persons whose privacy is invaded thereby, both at common law and under the statutes.

Since every unauthorized use of a person’s name over the radio is not a violation of his right of privacy, it is the duty of the courts to weigh the facts and circumstances presented in each case to determine whether the broadcast was legitimate news information or solely a dramatization for the purpose of trade.


§ 460. Use of Assumed Names in Broadcast Programs.

Since it is not uncommon for artists to use assumed names for professional purposes, it becomes important to determine whether the protection of the right of privacy at common law or under the statutes can be extended to include such assumed names.

In *Tess Gardella v. Log Cabin Products Co.*, 85a the plaintiff, a stage actress, alleged that her assumed professional name, “Aunt Jemima”, was used in connection with a broadcast program sponsored by the defendant company. The action was based on a claim of unfair competition and violation of the New York Civil Rights Law. The Federal District Court held that assumed names, if properly identifiable with the person, should also be protected by the statutory right of privacy. In the Circuit Court of Appeals, the decision was reversed because of other factors, but Circuit Judge Manton said by way of dicta, in discussing the applicability of the statute to assumed names: 86

"... having in mind the evident purpose of the statute, its application to a public or stage name, as well as a private one, seems inevitable. ... If the stage name has come to be closely and widely identified with the person who bears it, the need for protection against unauthorized advertising will be as urgent as in the case of a private name; if anything, the need will be more urgent. The public character of a name may mean the surrender of a certain degree of privacy and may affect the extent and limit of the protection accorded. But the abuse of such a name by an advertiser cannot be justified and it is against such abuse that the statute is directed."

This language would indicate that under the statute, and undoubtedly at common law, assumed or stage names would receive protection to the same degree as real names. There is, however, at least one case to the contrary.

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In *Davis v. RKO Radio Pictures*, it was held that the plaintiff, who had used the stage name "Cassandra", could not maintain an action for invasion of the statutory right of privacy by a motion picture producer on the ground that it had used the name "Countess Cassandra" in a motion picture since the statute applies only to legal names. It is submitted that this case was erroneously decided, since, as was pointed out by Judge Manton, *supra*, the obvious purpose of the statute was to protect the name associated by the public with the individual, regardless of whether the name was a legal one or an assumed one.

§ 461. Broadcast of Recordings as Invasion of Rights of Privacy.

The development of mechanized sound to a point where the voice, performance or other personal expression of an individual may be reduced to physical form by way of a recording thereof, is significant in its legal aspects. Whatever sacred be attached to one's name and photograph should apply with at least equal effect to a person's actual expressions and individual voice.

In *Waring v. WDAS Broadcasting Station, Inc.*, Mr. Justice Maxey of the Pennsylvania Supreme Court alone wrote a concurring opinion granting an injunction at common law against the unauthorized broadcast of a phonograph record which the plaintiff artist had made with the restriction that it be used solely for non-commercial purposes. Mr. Justice Maxey held that the plaintiff had the right to withhold and limit the dissemination to the public of his individual interpretative performances on the ground that the plaintiff had a right of privacy in the expression of his performances. The Justice said:

"I think plaintiff's right which was invaded by defendant was his right to privacy and this is a broader right than a mere right of property. A man may object to any invasion

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of his right to privacy or to an unlimited invasion of that right. He may choose to render interpretations to an audience of one person in a private home or to an audience in a great amphitheatre...

"The defendant by buying a phonographic disk on which plaintiff had impressed his orchestral rendition of musical compositions, which disk was expressly not to be used for radio broadcasting, and then by 'tattling abroad' by means of broadcasting what was on that disk, was invading the same right to privacy which the common law protected against eavesdroppers."

Where a recording of one's voice is made without his consent and such a recording is broadcast for commercial purposes, it is submitted that the right of privacy has been violated. The voice is unquestionably an expression of one's personality and an unauthorized appropriation thereof should be actionable.89

The restriction upon the dissemination of expressions of an individual's personality appears to be a justifiable extension of the right of privacy at common law.90 The same principle would apply to enjoin the unauthorized broadcast of performances or speeches recorded with the consent of the individual for purposes other than the actual broadcast of which he complains. Consequently, one who consents that an electrical transcription of his performance or speech may be broadcast for a specific advertiser or for a definite period of time or over certain stations may restrain the violation of such restrictions as invasions of his common law right of privacy.

Under the New York statute, relief would not be granted in such instances because the protection thereunder is limited to the unauthorized use of name, portrait or pie-

§ 462. Broadcast Programs Containing Interviews with Members of the Public.

Numerous broadcast programs are patterned after the "inquiring reporter" columns of newspapers. The programs are often referred to as "man in the street" broadcasts. The essential characteristic of such programs is the unknown personnel thereof. A principal character


"To constitute a violation of the Civil Rights Law I think it must appear that the use of the plaintiff's picture or name is itself for purposes of trade, . . . and even a use that may in a particular instance cause acute annoyance cannot give rise to an action under the statute unless it fairly falls within the terms of the statute."

92 See § 465 infra.


conducts the broadcast by directing questions to and otherwise conversing with strangers selected at random in public places. By means of a portable microphone, the discussions are disseminated to the station's radio audience. Such programs concern themselves with matters of public interest and current importance, general and local information, riddles, comedy entertainment and other subjects. The inquirer's use of lapel microphones may result in questions of fact as to the plaintiff's knowledge that his conversation would be broadcast.

Persons so selected to participate in broadcast programs of this type obviously have no connection with the station, sponsor or producer. If they, in fact, are employed to assist in the broadcast, no liability for infringement of their privacy exists. Where a bystander is accosted and asked to participate in the program and his conversation with the inquirer is broadcast without his consent, the right of privacy of the person so intruded upon is violated. If the subject of the inquiry is a matter of general news information, the policy in favor of free circulation of news would probably extend to sanction such broadcasts as sustaining programs.\textsuperscript{96} Where such conversations are broadcast as commercial programs, even though news information is thereby disseminated, the unauthorized broadcast constitutes an actionable invasion of the right of privacy at common law and under the statutes.

If such programs extend beyond the broadcast of news information and consist of dramatization or fictionalization of news events in which the plaintiff's conversation is transmitted to the public without his consent, his right of privacy is violated.\textsuperscript{97} This is true whether the program is sponsored or sustaining.

Even where a member of the public consents to participate in the broadcast of a news information program, if


he is without knowledge that the program is sponsored by a commercial advertiser, the use of his name, voice or discussion would constitute an invasion of his privacy. It would seem that the sponsor is under a duty to advise the plaintiff of the ultimate use which is to be made of his contribution to the program. A diversion of the unwitting speaker’s discussion is actionable. The original consent given by him to the inquirer need not be expressed; it may be implied from the conversation as actually transmitted, but that consent cannot be extended to include the unknown or unintended use.  

Where, however, the individual is informed that the program is a commercial broadcast, his oral consent will estop him from asserting an invasion of his right of privacy at common law. Where a statute is in effect, written consent in accordance with the provisions thereof, is necessary.

§ 463. Inapplicability of Right of Privacy to Certain Persons.

It is not every unauthorized use of a person’s name which constitutes an invasion of the right of privacy. In each case, it is necessary to ascertain whether the plaintiff is one of the class of persons capable of asserting a right of privacy. Many individuals are considered “news” and the public is deemed to have a right to be informed of their activities. This result is a consequence of a balance of interests. The public policy in favor of the dissemination of news in which the public is interested, serves to out-


weigh the rights of such persons to preserve their privacy.

The types of persons whose names are used in broadcast programs fall into three general classes:

1. The public character, i.e., the person whose activities constitute "news" to the community. As has been noted already, both at common law 100 and under the statutes, 101 members of this class of persons are deemed to have renounced their rights of privacy to the extent to which they have received public recognition. Messrs. Warren and Brandeis have pointed out 102 that "there are persons who may reasonably claim, as a right, protection from the notoriety entailed by being made the victim of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation."

2. The person whose name is incidentally and unintentionally used in the program script. Where the use of a person's name is made in a program script innocently and without knowledge of the fact that the name used is that of a particular person, and where no reasonable person would infer that the one portrayed was the plaintiff, the action should not lie. 103 The Beegel v. National Broadcasting Co. 104 case would fall into this classification.

3. The ordinary individual whose name is intentionally mentioned in a broadcast program merely as gossip, rather than as "news" in which the public has an interest. In


this category would be the case of King v. Winchell. Where the "purpose of trade" is established, it is clear that invasions of the privacy of this type of person should be protected either at common law or under the statutes.

§ 464. Liability for Invasion of the Right of Privacy.

Who is liable for the unauthorized use of another's name for advertising purposes or for purposes of trade? At common law, all persons who contribute to the performance of the tortious action are jointly liable therefor. In the case of a violation of the right of privacy of an individual in a broadcast program, the network or system, the station, the advertiser and the speaker should all be liable to the same degree as in the case of broadcast defamation. For a detailed discussion of the liability of these party defendants, see Chapter XXIX. infra.

The New York statute declares that "any person, firm or corporation" using the name or portrait of a person without written consent violates Sections 50 and 51. The vital point in the determination of the liability of the speaker, the sponsor of the program or the broadcast station under the statute is whether such person published the plaintiff's name for purposes of trade or advertising. It is submitted that such participants in the offensive broadcast program are all unauthorized users of the plaintiff's name for purposes of trade or advertising, since they hope to profit financially from the program containing that unauthorized publication. In view of the language of the statute, their liability must in every case be the same.

It is a more difficult question to determine the liability of the owner of a hotel or restaurant for the unauthorized use of another's name where the sole offense is that of causing reception of a broadcast program in which the name is used. Quaere: Would a strict construction of the New York statute include this class of persons who,

although they indirectly profit from the use of the program material, cannot control the content thereof? Reference may be made to the copyright infringement cases in which liability was imposed upon the hotel owner who furnished his guests with a service consisting of the public reception of broadcast programs,\textsuperscript{106} and upon the hotel owner who supplied his guests with individual receiving sets as part of the facilities of his establishment.\textsuperscript{107}

\textsection{465. Recommendations.}

"Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."\textsuperscript{108}

This statement expresses the rationale of the right of privacy at common law. Thirty-five states apparently have not been called upon to deal with the problem of invasions of personality. It is submitted that the five jurisdictions\textsuperscript{109} which have refused to recognize the right of privacy have not kept pace with the spirit of the common law.

The advent of radio broadcasting as a universal medium for the immediate transmission of information to millions simultaneously, and other scientific developments in the

\textsuperscript{106}Buck \textit{v.} Jewell La-Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).


\textsuperscript{108}Warren and Brandeis, \textit{The Right of Privacy} (1890), 4 Harv. L. Rev. 193.

field of communication within recent years, have made it essential that the judicial process evolve protection for the individual against serious invasions of privacy committed by means of such new instrumentalities. The apologetics of a few courts which have granted relief in such instances on fictions of property rights, breach of trust or implied contracts cannot be condoned. Logical incongruities are inevitable consequences of such holdings. Those jurisdictions which are unwilling to recognize the right of privacy at common law should enact statutes broad enough to cover existing as well as anticipated situations. The New York and Virginia statutes should likewise be amended.


Chapter XXIX.

LIABILITY FOR DEFAMATORY CONTENT
OF BROADCAST PROGRAMS.

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§ 466 Introductory.

Radio broadcasting as a medium of communication is capable of fulfilling the function of a vehicle for the publication of defamatory matter. As such, it differs substantially from other media through which defamatory remarks are customarily published.

Defamation by radio is the amplified dissemination to the public of statements orally delivered through the intervention of the mechanisms of broadcast and receiving apparatus. The tortious act giving rise to liability is committed when the defamation is picked up by the broadcast microphone. The defamatory remark is published, however, when the listener brings about the reception of the broadcast program.¹

Defamatory broadcasts are sui generis, but possess characteristics of both libel and slander. The oral delivery of slander is here combined with wide, uncontrolled dissemination of the defamatory matter to the general public. Previously, such wide circulation of defamatory remarks was possible only where contained in written form. In broadcasting, such extensive publication has tremendous consequences despite the fact that the duration of the defamatory broadcast may be but a brief period of time.

The peculiar facts upon which broadcast defamation is predicated make it difficult to determine whether the law of libel or slander should apply thereto. There are numerous factual situations which may result in defamatory broadcasts. Each situation presents a case which must

¹ Publication is the communication of the defamatory matter to some third person or persons. Sproul v. Pülsbury, 72 Me. 20 (1880); Wilcox v. Moon, 63 Vt. 481, 22 Atl. 80 (1891), Pullman v. Walter Hill & Co. [1891], 1 Q.B. 524 (Eng.).
be decided on its own facts. It may be stated generally that in most instances the law of libel is the most convenient common law form of action applicable to broadcast defamation. To mitigate the unreasonable severity in certain instances of the doctrine of liability without fault which governs the law of libel, it is desirable, insofar as broadcast stations are concerned, that different standards be imposed to govern their conduct.\(^2\)

§ 467. Defamation by Radio as Distinguished from Libel and Slander.

At common law, defamation is divided into two classes. Slander governs oral defamation and libel is the form of action for defamation in writing.\(^3\)

The distinction between libel and slander is based more on historic grounds than on principle.\(^4\) With the invention of the printing press and the widespread use of written material, the separate tort of libel was developed to put the law of defamation on a more satisfactory basis.\(^5\) The explanations usually given for the distinction between these types of defamation is that in libel, greater deliberation is involved, the diffusion is wider because of the permanency of the written material and, consequently, the damage resulting is more serious.\(^6\) It has been pointed

\(^2\) See §§ 477, 479, 480 infra.

\(^3\) Libel has been defined as defamation which is capable of perception by the sense of sight while slander is defamation whose publication is oral. 1 Cooley on Torts (4th ed., 1932) § 136; Newell, Slander and Libel (4th ed., 1924) § 1. A broadcast defamatory program may involve both sight and sound. See Weiglein v. Golden, 317 Pa. 437, 177 Atl. 47 (1935).

\(^4\) 8 Holdsworth, History of

\(^5\) Ibid.

\(^6\) See Dole v. Lyon, 10 Johns. (N.Y.) 447 (1813); Cooper v. Greeley, 1 Denio (N.Y.) 347 (1845); Bolby v. Reynolds, 6 Vt. 489 (1834); 8 Holdsworth, op. cit. supra, n. 4, 366; Veeder, History of the Law of Defamation, 3 Select Essays in Anglo-American Legal History (1907) 472.
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out, however, that the distinction between the two actions is at most a mere technical and artificial one.7

Defamation by radio includes a combination of the major evils of both libel and slander. Although it has its roots in oral delivery, the reasons which compelled the creation of libel as a common law tort are applicable *a fortiori* to radio broadcasting. The preparation of a broadcast program usually involves at least as much deliberation as written matter requires. The extensive radio audience developed by the continued use of the facilities of broadcast stations, as reflected by periodic surveys, makes it indisputable that a much wider diffusion of the defamatory content of broadcast programs takes place than in most written material. The fact that many programs are transcribed before being broadcast renders defamatory matter so published capable of being retained in permanent form. Moreover, the growing practice of manufacturing "off-the-air" recordings of broadcast programs increases the likelihood of wider dissemination of broadcast defamation since the latter is capable of being reproduced repeatedly through the medium of such recordings.

§ 468. Theories Which Attempt to Classify Broadcast Defamation.

It cannot be stated axiomatically that broadcast defamation is either libel or slander.8 Only a few courts have dealt with the problem and their rulings are not sufficiently decisive.

Only one case,9 and that was decided in Australia, has held that broadcast defamation sounds in slander and not in libel. In that case, the Supreme Court of Victoria, on a motion to strike out the allegations that the defama-

8 Mr. Seelman suggests that broadcast defamation be classified as libel. *Seelman, The Law of Libel and Slander* (1933) Part 7.
tory matter was written in a script, decided that such allegations were irrelevant and granted the motion. The Court said, "The defamatory words complained of were published by words spoken and not by means of a writing." It was observed that the listening public would not understand that the speaker had read from a script and that the case must turn on what the listeners would understand and not what the speaker meant.

In *Sorenson v. Wood*,\(^\text{10}\) decided by the Supreme Court of Nebraska in 1932, it was held that the reading of a defamatory script of a political broadcast program and the transmission thereof to the radio audience constituted libel. The Court said: \(^\text{11}\) "There can be and is little dispute that the written words charged and published constitute libel rather than slander."

A New York court, in a *dictum*,\(^\text{12}\) has made a distinction between defamatory statements which are read from a program script and extemporaneous remarks which are interpolated by the defendant. The Court was of the opinion that the broadcast of extemporaneous utterances is no different from the delivery of a speech to a vast audience over a public address amplification system and should, therefore, be treated as slander.

It has been suggested \(^\text{13}\) that a distinction can be made when the defamatory broadcast originates as an entirely oral delivery rather than where it is broadcast by reading from a script. Reading aloud has long been held to be libel.\(^\text{14}\) The listener is ordinarily not concerned with the

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\(^{11}\) Id., 243 N.W. 82, 85 (1932).


\(^{13}\) S. Davis, *Law of Radio Communication* (1927) 158.

\(^{14}\) *Case de Libellis Famosis*, 5 Co. 125a (1605); Lamb's Case, 9 Co. 59b (1610); Van Clief v. Lawrence, 2 N.Y.C. Hall Rep. 41 (1817); Johnson v. Hudson & Morgan, 7 Ad. & E. 233 (Eng., 1840); Snyder v. Andrews, 6 Barb. (N.Y) 43 (1849); McCoombs v.
situation in the studio.\textsuperscript{15} It should be immaterial, from the point of view of the consequence of the defamation, whether the remarks are read or merely spoken.

Another suggestion\textsuperscript{16} has been made that broadcast defamation is always libel because radio transmission takes place through active operations by the broadcast station which constitute "conduct" on its part, rather than because of speech or writing. Where defamatory impressions have been conveyed by conduct, there being neither writing nor speech, they have been classified by the courts as libel.\textsuperscript{17}

Liability for defamation by conduct is superimposed, as a convenience, upon the law of libel to which it has no historic relation whatsoever. In broadcasting, defamation by conduct can apply solely to the operation of the broadcast station. It cannot be adapted to hold the person who utters the defamatory remark since his only "conduct" is in exercising his vocal powers for defamatory purposes, which conduct is inherently slanderous. By this suggested view, the station would be liable for defamation by conduct as libel while the speaker would be dealt with under the traditional form of either libel or slander, depending upon the views of the courts.

It is submitted that the courts have erroneously and
inconsistently placed broadcast defamation in the existing patterns of either libel or slander. This new hybrid tort is becoming increasingly important. Uniformity of the rules applicable thereto is essential.

The determination of the liability of the different persons who contribute to the publication of broadcast defamation as well as the extent of such liability should be treated as original questions. It is desirable that these problems be considered without being fettered by traditional concepts and upon a basic analysis of the factual situations presented by this new and different medium of communication.

The number of cases which have involved broadcast defamation is limited. See Sprague, Freedom of the Air (1937) 8 AIR L. REV. 30, 45, n. 29; Note (1935) 6 AIR L. REV. 81, 88. Only one case has directly held broadcast defamation to be slander. Mel-drum v. Australian Broadcasting Co., Ltd. [1932] Vict.L.Rep. 425. Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82, 85 (1932) is considered dictum on the proposition that broadcast defamation is libel. Sprague, op. cit. supra, 42 (on the ground that the words used were actionable per se); Note (1935) 6 AIR L. REV. 81, 88. See Vold, The Basis for Liability For Defamation by Radio (1935) 19 MINN. L. REV. 611, 612 (only intimation that broadcast defamation is libel.) In any event, it is evident that the conclusion in Sorenson v. Wood, supra, is based on the fact that the tort was committed by reading from a prepared manuscript. Locke v. Gibbons, 164 Misc. 877, 299 N.Y.Supp. 188 (1937). Weg-
§ 469. Liability for Broadcast Defamation: Generally.  
In libel and slander, all persons who cooperate in the creation and publication of the defamatory remarks are liable as joint tortfeasors. In every broadcast defamation at least two participants, the speaker and the broadcast station, and frequently many others, are involved. It is necessary to examine the existing adjudications of liability of persons who cooperate in the creation or publication of broadcast defamation.

§ 470. Liability of the Speaker Whose Defamatory Remarks Are Broadcast.
There can be little doubt that the person who utters a defamatory statement which is disseminated by a broadcast station is liable absolutely for the consequences thereof. The general rules of tort liability apply to impose liability upon one whose acts are the proximate cause of the injury. The radio cases correctly hold the speaker liable for broadcast defamation.

It has been pointed out that the speaker "may not escape (liability) by asserting that he spoke in the privacy of his studio and would not have been heard but for the act of the broadcaster who gave his utterance publicity. His purpose was to reach an audience and he is held for the natural consequences of his act." It is clear that strict liability for broadcast defamation should be enforced against the performer or speaker uttering the same.

§ 471. Liability of the Broadcast Station Whose Facilities Are Used to Transmit the Defamatory Program.
It is fundamental to determine whether the broadcast station whose facilities are used to transmit a defamatory

19 Cooley on Torts (4th ed., 1932) 84, 85.
program is liable for matter so broadcast. Such liability must obviously be based upon the station's acts of publication of the defamatory content of programs broadcast over its wave-length. Analogy to other communications media is significant to ascertain whether broadcast stations are publishers of defamatory programs.

§ 472. Same: Analogy to Telephone Companies.

It has been argued that there is an exact analogy between broadcast stations and telephone companies in the field of defamation. Where a telephone company is not negligent and carries defamatory remarks over its wires to a listener, it is clear that the telephone connecting agency should not be held liable for the tortious use of its facilities by others. The application of this analogy to broadcast stations is fallacious since the latter are under a strict duty to supervise and control their program content while telephone companies are impersonally operated and are not required to exercise supervision over point-to-point conversations so far as their wires are concerned.

The renewal and revocation of licenses granted to broadcast stations by the Federal Communications Commission depend upon the content of the programs broadcast over their facilities as complying with the operation standard of public interest, convenience or necessity. This standard is inapplicable to conversations carried over the wires of telephone companies. Broadcast stations are not common carriers, while telephone companies are obliged to offer their facilities indiscriminately. It has also been pointed out that the wide diffusion and reception of conversations carried over the wires of telephone companies is fallacious since the latter are under a strict duty to supervise and control their program content while telephone companies are impersonally operated and are not required to exercise supervision over point-to-point conversations so far as their wires are concerned.


24 See Sections 559, 564 infra.


§ 474 Liability for Defamatory Content of Programs

Broadcast programs cannot be compared to telephone messages which are transmitted to one person only.

§ 473. Same: Analogy to Telegraph Companies.

The liability of a telegraph company for defamation has been limited to the transmission of messages which are obviously libellous and to instances of its negligence and failure to act in good faith. For the same reasons as advanced in criticism of the analogy to telephone companies, the factual situation in broadcasting is not comparable to that of telegraph transmission companies. The courts have correctly refused to apply this analogy.

§ 474. Same: Analogy to the Press.

The courts have regarded the acts of broadcast stations in transmitting defamatory programs as quite similar to the conduct of the publishers of newspapers and other periodicals by means of which defamatory matter is circulated.

Publishers, editors and reporters of newspapers are held absolutely liable for the unprivileged defamatory remarks appearing in their publications although ignorant of the contents thereof and although no active control is exercised by them over the conduct of the business.


28 See § 472 supra.


30 In Sorenson v. Wood, 123 Neb. 348, 352, 243 N.W. 82, 86 (1932), the Court said: “The fundamental principles of law involved in publication by a newspaper and by a radio station seem to be alike.” See Miles v. Louis Wasmer Inc., 172 Wash. 466, 468, 20 P.(2d) 847, 849 (1933).

Broadcast stations have the privilege of editorial selection which is partially exercised in the same manner as newspaper publishers. The latter, however, have greater powers to prevent the publication of a libel by the use of due care while such an opportunity is not always available to broadcast stations.

Where the program content is available to the station in written form or where the entire program is transcribed before broadcast, the station, like the newspaper publisher, has ample opportunity to prevent the use of its facilities for publication of defamatory statements. However, many broadcast programs which do not originate in the station’s studios deal with controversial subjects of great public interest. Scripts of such programs may be unavailable to the station and it is possible that extemporaneous remarks may be included without any reasonable opportunity of the broadcast station to enforce its duty to exclude defamatory matter. However unfortunate this situation may be for the constituent station of a network or system, the duty to prevent the broadcast of defamatory programs should not be relaxed.

§ 475. Specific Instances of Station’s Liability: Where the Defamatory Broadcast Is Uttered by the Station’s Employee.

The doctrine of respondeat superior imposes upon the broadcast station full liability for all torts committed by its servants within the scope of their employment. This rule is applicable to broadcast defamation uttered in the course of duty by announcers, performers and others employed directly by the station management.


32 See §§ 569-572 infra.
33 There can be no public interest in a defamatory program.
34 Davis v. Hearst, 160 Cal. 143, 116 Pac. 530 (1911); Dunn v. Hall, 1 Ind. 344 (1848); Crane v. Bennett, 177 N.Y. 106, 69 N.E. 274 (1904); De Severinus v. Press
Liability is imposed upon the principal regardless of whether it is a corporation, partnership or an individual.\textsuperscript{35}

Deviation from the script or other unauthorized utterances by such an employee, resulting in the broadcast of defamatory matter, should not relieve the station from liability since the broadcast is nevertheless within the scope of the tortfeasor's employment. Where the defamation is uttered by an employee whose duties do not include the oral delivery of the content of the broadcast programs, such as an engineer, usher, instrumentalist, etc., liability for defamation uttered by such an employee beyond the scope of his employment should not be imposed upon the station.\textsuperscript{36} But where the employee is engaged to express the contents of a script or to speak extemporaneously, a deviation from the script or an unauthorized utterance does not constitute a deviation from the employment. The station is liable for defamation committed by an employee engaged for the same general purpose which gave rise to the tort.\textsuperscript{37}

§ 476. Same: Where the Defamatory Matter Uttered by Others Is Included in a Script Previously Submitted to the Station.

Where an operator of a station knew or had reason to know that a program broadcast over his facilities contained defamatory matter, absolute liability should be imposed. Such knowledge may be implied in cases where the content of the program is available to the broadcast


\textsuperscript{36} See S. Davis, The Law of Radio Communications (1927) 167; Note (1933) 4 Air L. Rev. 80; Note (1932) 46 Harv. L. Rev. 133.

station in the form of a script or electrical transcription before the program is transmitted.

§ 477. Same: Where the Defamatory Matter Is Uttered by Others Deviating from a Previously Submitted Script.

The clearest example of hardship to a broadcast station by the application of the rules of libel or slander is illustrated where the defamation is uttered by persons who use the station’s facilities although not employed by or otherwise associated with the operator of the station.

Under the rules of libel, strict liability without fault is imposed upon one who contributes to the publication of defamatory matter. Likewise, there is absolute liability for the publication of utterances which are slanderous per se.

The writer is inclined to the view that a broadcast station should be required to exercise due care only, since it cannot reasonably predict deviation from scripts previously submitted to and approved by it. The station does not have as complete and direct control over its program facilities as does the newspaper publisher. It has been urged that broadcast stations should not be considered as publishers of such defamatory remarks but merely as mechanical factors in the process of publication. It seems fair to impose no responsibility upon a broadcast station to use more than due care in transmitting programs of others by means of its facilities.

So long as the broadcast station actually scrutinizes the contents of a script submitted before broadcast and the defamatory matter is not contained therein, the standard of due care would be satisfied to an extent sufficient to excuse the station from liability for the utterance of defamatory statements in deviation from such a script.

39 Id. at § 20.
40 See (1932) 32 Col. L. Rev.
The due care doctrine can be invoked by the courts only as a departure from the application of the law of libel to broadcast defamation. Although such a departure is within the flexible scope of common law jurisprudence, it would seem that the more efficacious method of achieving this desirable result would be the enactment of legislation by the various states.\[41\]

§ 478. Same: Where the Defamatory Matter Is Uttered by Others Without Previous Submission of an Existing Script to the Station.

In cases where defamatory remarks are contained in program scripts which are actually in existence before the broadcast of the program, the liability of the station seems clear.

The broadcast station, by the terms of its operating license, is obliged to conduct its business in the public interest, convenience or necessity.\[42\] This standard is not too indefinite\[43\] and may reasonably be construed to include a duty on the part of the licensee to examine all scripts of programs broadcast over its facilities so as to delete all offensive material contained therein. The station is charged with responsibility for the content of programs transmitted by it and should require all scripts to be submitted for approval to protect members of the public against defamatory broadcasts.

§ 479. Same: Where the Defamatory Matter Was Uttered by Others Extemporaneously.

Where the nature of the program is such that a script cannot be made available to the station before the broad-

\[41\] See McDonald & Grimshaw, How Libel and Slander Affect Radio, Broadcasting, October 1, 1937, 34; Sprague, Freedom of the Air, (1937) 8 Air L. Rev. 30, 44.

\[42\] See §§ 35 supra and 559, 564, infra.

cast thereof, the station's liability for defamatory matter contained in such extemporaneous programs is similar to that in instances of deviations from previously submitted scripts.

Obviously, extenuating facts and circumstances exist where a station's facilities are used to broadcast a program which is extemporaneous, such as an oral report broadcast from the scene of current action, including sports contests, parades and other public events inviting immediate dissemination as news. It is also necessary to give special consideration to extemporaneous programs founded upon personal interviews, the precise contents of which the station cannot reasonably foretell.

If the principles of libel are applied to hold the station liable for defamation so broadcast over its facilities, there would be no doubt that absolute liability would be imposed. By analogy to the liability of newspaper owners whose reporters render speedy running accounts of news events, the broadcast station is liable without fault for such defamation since it "publishes" same. It is submitted that the imposition of such liability, in instances of broadcasting, is unfair in that it fails to take into account the circumstances inherent in such programs. In newspaper publications, there always exists an opportunity on the part of editors and publishers to delete tortious statements. This time element is completely lacking in broadcasting. The announcer's report is broadcast immediately; no direct editorial supervision by the station is possible. The technicians in the control room do not have powers or capacities similar to those of a newspaper editor.

Such absolute liability is unnecessarily harsh. A result can be obtained which is at once fair to the public as well as the broadcast station by a departure from the law of libel in this instance. It is submitted that the liability of

the broadcast station in this instance should be predicated on the standard of due care. The rights of the defamed plaintiff would be fully protected by holding the broadcast station liable only where it failed to exercise due care and committed a breach of its duty reasonably to prevent the transmission of the defamatory broadcast.

It is submitted that this rule may be applied judicially as well as by legislative enactment. In Iowa, however, a statute relieves the station owner or operator from liability for defamation if proof is adduced that the owner or operator exercised due care to prevent its publication.

§ 480. Liability for Broadcast Defamation Originating from Other Stations.

The practice of disseminating broadcast programs over the facilities of numerous stations simultaneously presents interesting questions of liability of participating stations for defamatory matter originating from other stations.

It was contended in a case involving a system, a sponsor and a constituent station that, since the broadcast program is carried to the constituent station by wire and delivered by it to the local public, an analogy existed between the station and the telephone company so as to release the station from absolute liability. The Court refused to follow such an analogy. It declared that the analogy extended only to the carriage of the program over the wires and not beyond the point at which the local transmitter picks up the program. Moreover, the Court stated that it could not discern any difference between the defamatory act of

45 It has been suggested that the broadcast station should not be treated as a publisher of the defamation but rather there should be imposed on it the liability of a news vendor who disseminates libellous matter without knowledge of its contents. In the latter case, the defense of due care may be set up. (1932) 32 Col. L. Rev. 1255.

46 Iowa House, File 302, March 5, 1937.

47 See Coffey v. Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo., 1934), where the defendant station had not originated the program which was the subject of the action, but was on a network of stations broadcasting the program which originated in New York.
the speaker in the local studio and a similar act by one standing in a studio hundreds or thousands of miles distant and connected to the local station by wire.

While this case, Coffey v. Midland Broadcasting Co.48 was before the Court on a motion to remand to the State court on the ground that there was a resident defendant, the Court necessarily had to consider the question of the liability of the constituent station to decide the motion. For, if it found that no cause of action existed against the local station as a joint tortfeasor, it would have been obliged to deny the motion to remand.

This case goes a long way in establishing the absolute liability of broadcast stations for defamatory utterances, whether they are made in the local studio or in the remote studio of another station affiliated with the system. The defamatory utterance in this instance consumed no more than three seconds. Coffey v. Midland Broadcasting Co.,49 however, is not authority on the question of whether broadcast defamation is libel or slander, since the words uttered imputed conviction and prison service for a crime. The decision, however, is correct in its basic statement of principles.

Unquestionably, each station included in a network or system is liable for defamatory utterances made public through its own facilities.50 By analogy to the law of libel, each station is responsible for its own "publication" of the broadcast defamation.51 Liability should not be avoided on the ground that the defamatory statements were broadcast by another station and merely transmitted or rebroadcast by the local station.52

Certain statements contained in Judge Otis' opinion in

49 Ibid.
50 Cf. § 293 supra.
51 Every utterance of slanderous words is a distinct cause of action. Hearst v. New Yorker Staats Zeitung, 71 Misc. 7, 129 N.Y.Supp. 1089 (1911); Sharpe v. Larson, 70 Minn. 209, 72 N.W. 961 (1897).
the Coffey case should not be followed. The Court declared that the interpolation of defamatory extemporaneous remarks in the reading of a previously submitted non-defamatory script by a person of good reputation whose prior performances indicated nothing to put the station on its guard, would not relieve the station of liability therefor, even if the interpolation was of so short a duration as to make it impossible to cut off the speaker. In such a situation, the writer believes the only fair rule to be a requirement that the station observe the standard of due care.\textsuperscript{53} The exercise of due care by the originating station or system should inure to the benefit of the participating stations.

It should be noted that the Court in the Coffey case was influenced by the fact that the program complained of was commercially sponsored. The Court felt that in such a case the station may insure itself against the consequences of broadcast defamation by increasing the rates charged for its broadcast facilities. Obviously, such an opportunity is not available where the program is a sustaining operation, and therefore the Court's view suggests an arbitrary and unworkable remedy.

§ 481. Liability of Advertisers for Defamation in Broadcast Programs Sponsored by Them.

Commercial advertisers generally obtain by contract the use of the facilities of broadcast stations for designated periods of time. Where the programs broadcast during such periods are within the control of the advertiser or his agent, he is liable for broadcast of defamatory statements contained therein.

In an action for libel, all persons who cause or participate

\textsuperscript{53} Cf. Hawk v. American News Co., 33 N.Y.Supp. 848 (1895) where the defendant merely sold and distributed the publications of others, he was permitted to show in mitigation of damages that he was not the owner, proprietor or publisher, and that the haste of the public to receive news prevents his looking into the facts published by others.
in the publication of defamatory writings are liable for damages resulting therefrom.\textsuperscript{54} This rule would unquestionably include the sponsor of the defamatory program.\textsuperscript{55}

The same rule of liability of the advertiser should prevail if relief is sought in an action for defamation by radio. The advertiser cannot avail himself of the defense of due care merely by proving that he gave orders to the program producer that no defamatory remarks were to be uttered. The liability of such a direct principal persists even where there is no employment relation between the advertiser and the person who actually makes the defamatory remark. Since in the final practical analysis, the latter is usually under the control of the program sponsor, the defense of independent contractor should not be available to the advertiser to relieve him of liability for broadcast defamation.\textsuperscript{56} The defamatory program is broadcast on behalf of the sponsor by means of facilities obtained by him and no reason exists why liability should not be imposed on him.

\textbf{§ 482. Necessity That Defamatory Program Specifically Relate to Plaintiff.}

It is essential that an action for broadcast defamation should seek relief for defamatory statements broadcast concerning the plaintiff specifically. Where a comedy program broadcast over a national network contained a fictitious character named Beagle in burlesquing the activities of an imaginary law firm described as Beagle, Shyster &

\textsuperscript{54} Newell, Slander and Libel (4th ed., 1924) § 187.
\textsuperscript{55} See Hoffman v. Carter, 117 N.J.L. 205, 187 Atl. 576 (1936) where the Philco Radio and Television Corp. which sponsored the broadcast was joined as a party defendant in a broadcast defamation action. See also Locke v. Benton & Bowles, 165 Misc. 631, 1 N.Y.Supp.(2d) 240 (1937).
\textsuperscript{56} Cf. Herbert v. Shanley Co., 242 U.S. 591, 37 Sup. Ct. 232, 61 L.Ed. 511 (1917); Buck v. Jewell-LaSalle Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931) and other cases where the defense of independent contractor was of no avail to relieve the defendant from liability for copyright infringement. See § 627 infra.
Beagle, and an actual attorney in New York City named Beegel sought to recover damages for injury to his reputation, the complaint was dismissed because the plaintiff failed to prove that the broadcast specifically defamed him and that he was the butt of the defendants’ jest.\textsuperscript{57} The defendants did not know of the plaintiff’s existence and the program dealt obviously with a fictitious person. It is submitted that had the program been broadcast in a territory in which the plaintiff were well known, a different result would have been obtained. In such a situation, the defendants would have greater difficulty in establishing that they were unaware of plaintiff’s existence and that the listening public did not associate the plaintiff with the personality represented in the broadcast program.

In an action for unfair competition, which involved \textit{inter alia} an allegation that the plaintiff’s reputation as a singer had been injured by a broadcast program, it was held necessary for the plaintiff to prove that an actual impersonation of her talents had been broadcast which was in fact inferior and which constituted an attack on plaintiff’s professional reputation.\textsuperscript{58} It is clear that a necessary element of an action for broadcast defamation is proof of the fact that the public associated the alleged defamatory matter with the plaintiff.

\textsection{483. Privilege and Fair Comment.}

Privilege and fair comment are important defenses in actions for defamation. These defenses assume significance to broadcast stations particularly during political campaigns.

The matter complained of must consist of comment in order for the defense of fair comment to be available. If the matter broadcast by a station concerning a person is a


statement of false and defamatory facts, the defendant station cannot claim that the broadcast consisted of comment.\textsuperscript{59} The test of whether a broadcast is comment depends upon the reaction of the ordinary listener. If he were likely to understand that the matter complained of is an expression of opinion and not a direct statement of fact, the defense of fair comment may be pleaded.\textsuperscript{60}

The modern view is that the making of comment and criticism is a right and not a privilege.\textsuperscript{61} A station may, therefore, broadcast criticism of a literary work or its author, even if the judgment of the critic is that the work is inferior or ridiculous.\textsuperscript{62} But the critic or commentator may not misstate the material facts contained in the writing or go out of his way to denounce or attack the author personally under the guise of criticism or comment and thereby mark the author as a fit object for public contempt.

\textsuperscript{59} Burt \textit{v.} Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Starks \textit{v.} Comer, 190 Ala. 245, 67 So. 440 (1914).

\textsuperscript{60} \textsc{Harper on Torts} (1933) § 251. See \textsc{Seelman on the Law of Libel \& Slander} (1933) 196 et seq. for a discussion of the distinction between statement of facts and of opinions and the requirement of truth as a basis of comment.


"In order that defeasible immunity may attach to a publication purporting to be a fair comment on a subject of public interest, it must be (1) a comment, (2) based on facts truly stated, (3) free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, save in so far as such imputations are warranted by the facts truly stated, and (4) the honest expression of the writer's real opinion. . . ."

\textsuperscript{61} See \textsc{Seelman, op. cit. supra} n. 60, par. 235. But in \textsc{Harper on Torts} (1933) § 251, it is said: " . . . there is no question but what the rule of fair comment is a true case of privilege, in the larger and broader sense of that term, in that imputations which would usually constitute actionable libel because holding the plaintiff up to ridicule or hatred, are not tortious by reason of the public policy to be suberved, in view of the unusual circumstances of the publication, the relationship of the parties, and the general social interest in free public discussion."

scorn or obloquy. Comment or criticism may also be made of public officials, candidates for public office and other persons in the public eye.

The speaker must not go beyond the limits of criticism and opinion by attacking the motives or character of a plaintiff, irrespective of the type of broadcast program involved.

In *Irwin v. Ashurst*, it was held that the direct broadcast of the testimony of a witness in a murder trial which involved the utterances of defamatory matter, did not render the broadcast station liable for defamation. The Supreme Court of Oregon held that the broadcast station was entitled to the same privilege as a newspaper or other publication in transmitting a true and accurate report of news events. The broadcast station did not contribute any comment concerning the plaintiff, and its broadcast was merely a direct *verbatim* transmission of the testimony of a witness from the courtroom.

§ 484. Jurisdiction of Courts Over Defendants in Actions for Broadcast Defamation.

The difficulty of the plaintiff in an action for broadcast defamation to effect service on all the proper parties defendant has been illustrated in *Hoffman v. Carter*. The defamatory broadcast was heard in New Jersey and the plaintiff tried to sue jointly a non-resident news commentator, a non-resident advertiser and a non-resident network system, all of whom were domiciled in different jurisdictions.
states. The action was dismissed as to the defendant network system for want of jurisdiction. 68

Where there is a diversity of citizenship and jurisdiction cannot be obtained over all defendants in one action because of practical difficulties of service of process, justice cannot be done to all parties. Plaintiffs must content themselves with relief against only some tortfeasors or bring a multiplicity of actions. This situation creates unreasonable advantages among defendants who by reason of geographical accidents are not amenable to the jurisdiction of the court. 69

§ 485. Broadcast Defamation Is Actionable at Common Law Independently of Libel or Slander.

The common law is flexible and adaptable to new situations. 70 Defamation by radio is a newcomer upon the scene of personal wrongs. It has been pointed out that the application of the principles of libel is not wholly satisfactory in governing broadcast defamation. Written publications require rules different from oral defamation. 71 The distinction between libel and slander should not be controlling in the case of broadcast defamation. 72 Radio broadcasting is sui generis and a new body of law applicable to these new facts should be created at common law.

The tort of broadcast defamation should find its remedy at common law upon principles which reflect an understanding of the operation of broadcast stations and the transmission of radio programs. The right to damages from the station for such a tort should be conditioned upon the extent of the injury committed by it. Where a station fails to exercise due care or unreasonably ignores its duty

68 Ibid.
69 See § 483 infra.
70 "Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Brandeis and Warren, The Right of Privacy, (1890) 4 Harv. L. Rev. 193.
71 See §§ 467, 468 supra.
72 See §§ 466, 467, 468 supra.
to protect the public from broadcast defamation, the station operator should be liable for all the consequences of its action or inaction. It has been demonstrated\(^73\) that in certain situations the rules of absolute liability operate with injustice to the broadcast station. The rules which may be invoked at common law to govern broadcast defamation in the various specific instances discussed \textit{supra} are fair and reasonable. No greater protection to the public should be required. An evaluation should be made by the courts of the rights of the defamed plaintiff as compared with the tortious acts or omissions of the broadcast station. In each of these specific instances, it is submitted that the courts should find the station liable only where due care has not been exercised to prevent the defamatory broadcast.

\textbf{§ 486. Statutes Dealing with Broadcast Defamation.}

Although the common law may govern liability of the station for broadcast defamation, several states have enacted statutes dealing with the subject.

In Iowa,\(^74\) legislation has been passed exempting the station from liability where due care is exercised.\(^75\)

In Indiana, an act providing an opportunity to the station to mitigate damages by broadcasting timely retractions was made law in 1937.\(^76\) This statute does not affect the liability of the station for actual damages which is imposed absolutely on principles of libel. Indiana merely affirms by this legislation the applicability of the law of libel to broadcast defamation.\(^77\) The statute is at best a piecemeal treatment of the subject, and fails to provide relief to the broadcast station from its absolute liability for broadcast defamation in several of the specific instances discussed \textit{supra}.

\(^73\) See §§ 477, 478, 479, 480 \textit{supra}.

\(^74\) Iowa House, File 302, March 5, 1937.

\(^75\) See §§ 477, 478, 479, 480 \textit{supra}.

\(^76\) Indiana, S-80, March, 1937.

\(^77\) \textit{Ibid.}
In several states, it has been made a misdemeanor to broadcast defamatory remarks by radio. Such criminal liability can not be criticized so long as it is predicated upon the malicious or specific intent of the defendant.

Statutes generally have a tendency to narrow the scope of the subject sought to be regulated. This has been evidenced in the field of rights of privacy. Since the growth of the broadcasting industry is constantly increasing and new situations arise by reason of technical advances, a statute cannot be expected to deal adequately with the entire scope of broadcast defamation.

The jurisdictional problems, moreover, present serious complications. It has been suggested that a Federal statute should be enacted to regulate broadcast defamation uniformly in all the states. It is submitted that such an act of Congress would be unconstitutional as an invasion of the reserved police powers of the states. Federal regulation of the operation of broadcast stations cannot reasonably be extended to interfere with or limit the right of each state to apply its own substantive law to private wrongs committed within its borders. Procedural legislation in aid of jurisdiction, however, can be enacted constitutionally while administrative regulation can also assist materially in bridging the hiatus created by the technicalities of local adjective law.


80 See Chapter XXX. infra.

81 McDonald & Grinshaw, How Libel and Slander Affect Radio, Broadcasting, October 1, 1937, p. 34.

82 See § 183 supra.

83 Ibid.
Chapter XXX.

JURISDICTIONAL PROBLEMS IN ACTIONS FOR DEFAMATORY BROADCASTS.

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488. Jurisdiction Over the Parties. .................. 872
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§ 487. Jurisdiction Over Broadcast Defamation from Without the State.

Where a defamatory statement is broadcast from one state and is heard by reception in other states, the questions arise as to where the tort is committed and as to which law governs the plaintiff's right to redress. There is much authority for the proposition that where the consequences of an act done in one state occur in another state, the law of the place of the injurious effect of the defendant's conduct (the place of the wrong) governs.¹ The place of the wrong is said to be the state where the last event necessary to commit the alleged tort takes place.²

² Restatement of the Conflict of Laws (1934) § 377.
case of a defamatory broadcast, the tort would be committed where the broadcast is received since that is "the last event necessary to make an actor liable".

Publication of a defamatory remark is the communication of that remark to third persons. In the case of a defamatory radio broadcast, publication occurs simultaneously in all the states in which the broadcast is received and heard. It would follow that in each of these states, a right to redress for the defamation would be acquired by the person defamed.

The Restatement of the Conflict of Laws has stated the proposition differently. Its view is as follows:

"If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interest as a result thereof. (see Sec. 65) Thus, both the state in which the actor acts and the state in which legal consequences of his act occur have legislative jurisdiction to impose an obligation to pay for harm caused thereby."

The Restatement also declares that when a communication is sent from one state to another, each state has jurisdiction over the communication. It would follow that the state in which a broadcast program is received has jurisdiction over that communication to the same degree as the state from which it is broadcast.

§ 488. Jurisdiction Over the Parties.

Regardless of which view is accepted, it is clear that the state in which the defamation is heard, although having

5 Restatement of the Conflict of Laws (1934) § 377, Comment (a).
6 Id., at § 66.
the right to determine the legal effect of the defamation, has no power to impose personal liability upon the tortfeasor unless its court has jurisdiction over his person. The practical difficulty of acquiring jurisdiction over the person of various defendants in a broadcast defamation action was illustrated in *Hoffman v. Carter*.8

In that case, the plaintiff, in an action in the New Jersey courts, joined as defendants a non-resident news-commentator, two foreign manufacturing corporations who sponsored the defamatory program, a foreign corporation from whose broadcast station the program was transmitted, and the Columbia Broadcasting System, a foreign corporation which caused the program to be disseminated throughout the country. Since the speaker, the sponsors of the program, the station and the system are all held liable for the broadcast defamation,9 the parties named were all properly joined as defendants. The broadcast emanated from without the State but was heard in New Jersey where the plaintiff resided. The Court set aside the service of process on the foreign corporations since they were neither doing business in the State nor did they own property therein.

The situation in *Hoffman v. Carter*10 demonstrates the practical difficulty of obtaining jurisdiction over all the proper parties defendant in a single action in the state courts.11 In order to give the state court jurisdiction over

71 BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) § 84.1.
9See §§ 469-486 supra.
10117 N.J.L. 205, 187 Atl. 576 (1936). It has been reported that the case has been settled out of court. See N. Y. TIMES, September 21, 1937.
11It should be noted, however, that since the liability of joint tortfeasors is joint and several [THROCKMORTON'S COOLEY ON TORTS (1939) 67], separate actions may be brought in any jurisdiction in which one of the defendants may be found. However, because of the number of defendants involved in a broadcast defamation action, this would entail considerable expense as well as difficulty in obtaining witnesses and evidence. Since a single action in a court in the jurisdiction in which the plaintiff resides is most desirable,
the person of a defendant, it must appear that he was personally served with process in the state\textsuperscript{12} or that he has made a general appearance.\textsuperscript{13} The plaintiff usually is obliged to wait until each defendant can be personally served within the state.

§ 489. Same: Agent to Accept Service.

Service may be made upon an agent authorized to accept process for the non-resident or foreign corporation.\textsuperscript{14} In some cases, statutes have been enacted by which non-residents impliedly consent to the appointment of a state official as their agent to accept process in civil actions. For example, statutes in many states provide that non-resident motorists coming on the state’s highways may be served with process, in actions arising from accidents occurring within the state, by service on the Secretary of the State.\textsuperscript{15} In \textit{Pawloski v. Hess},\textsuperscript{16} such a statute was sustained as a constitutional exercise of the police powers of the state.

Although this type of statute has been extended to other


\textsuperscript{13} Entry of a general appearance has exactly the same effect as service of process. \textit{Hill v. Mendenhall}, 21 Wall. (U.S.) 453 (1874); \textit{United States v. New York, etc. S. S. Co.}, 216 Fed. 61 (C.C.A. 2nd, 1914); \textit{Beamer v. Weiner}, 159 Fed. 99 (C.C.A. 7th, 1907); \textit{Lyon v. Moore}, 259 Ill. 23, 102 N.E. 179 (1913); \textit{Myers v. American Locomotive Co.}, 201 N.Y. 163, 94 N.E. 605 (1911).


\textsuperscript{15} See, for example, N. Y. \textit{VEHICLE AND TRAFFIC LAW}, §§ 52-52a, as amended L. 1930, e. 57; MASS. GEN. LAWS (1932), e. 90 § 3A.

activities, it is doubtful whether it could be constitutionally applied to broadcast programs coming into the state. The statutes relating to non-resident motorists were declared a constitutional exercise of the state’s police power because the large number of automobile accidents involved the health and safety of the public. Torts committed by means of broadcasting have been comparatively few. Moreover, there is no adequate analogy between the motorist’s physical presence in the state while using the state’s roads and the reception of programs over invisible radio waves within the state. For these reasons, the usual jurisdictional requirements should apply to actions arising from tortious broadcasts rather than the statutory service of process recognized in *Pawloski v. Hess*.19


The United States Constitution provides that the Federal courts shall have jurisdiction in suits between the citizens of different states.20 Where the jurisdiction is founded on diversity of citizenship, suit may be brought only in the district of the residence of either the plaintiff or the defendant and service must be made in that district unless the defendant waives service and appears. Where there are multiple parties, all of the plaintiffs or all of the defendants must be residents of the district in which the suit is brought.24 Where the defendants are residents


19 *274 U.S. 352, 47 Sup. Ct. 632, 71 L.Ed. 1091 (1927).*

20 *U. S. Constitution, Art. III., § 2.*


of several districts, as is frequently true in a broadcast
defamation case, suit cannot be brought against all of them
in a single District Court since they cannot all be personally
served in the plaintiff’s district and since they are not all
residents of the same district. Moreover, if one of the
defendants lives in the same judicial district as the plain-
tiff, the action cannot be brought in the plaintiff’s district.25

In addition to these procedural difficulties attendant
upon the institution of a suit for broadcast defamation in
the Federal courts, there is the additional requirement that
the jurisdictional amount in controversy be at least
$3,000.26 The nature of broadcast torts is such that it is
frequently difficult to establish that the jurisdictional
amount is in controversy in such cases.27

§ 491. Same: Recommendations.

Section 1 of Article III of the United States Constitution
consfers upon Congress the power to create such inferior
courts as may be required and to regulate the jurisdiction
of such courts. Although the jurisdiction of a District
Court is limited to the boundaries of that district,28 Congress
has power to provide that the process of every Dis-
trict Court shall run into every part of the United States.29

In suits of a local nature which are in rem, such as to
enforce liens upon or to remove incumbrances, liens or
clouds upon title to property within the district where the
suit is brought, service on a non-resident defendant out-

25 Sewing Mach. Co.’s Case, 18 Wall. (U.S.) 553, 21 L.Ed. 214
(1874); Peninsular Iron Co. v. Stoves, 121 U.S. 631, 7 Sup. Ct. 1010, 30 L.Ed. 1020 (1887).


29 1 HUGHES, FEDERAL PRACTICE, (1931) § 250.
side the district of suit is authorized. In no other case can the Court acquire jurisdiction of a defendant by service outside the district.

In the light of the inherent difficulty of the courts to obtain jurisdiction over the many proper parties defendant in a broadcast defamation action, it is apparently desirable that Congress amend the Judicial Code to permit service of process outside the territorial boundaries of the United States District Courts. Such an amendment may, however, be considered oppressive as creating opportunities for abuse of process by compelling non-resident defendants to submit to the jurisdiction of distant courts which results in inconvenience and expense for the production of witnesses and proper defense upon the trial of such an action.

It is submitted that the Federal Communications Commission has jurisdiction to require as a condition precedent to the granting of an operating license that the station designate an official of each state wherein its broadcasts are likely to be received to act as agents upon whom valid service of process can be effected on behalf of the station. Public interest, convenience or necessity would thereby be greatly served since the station would be obliged to defend actions, arising out of programs broadcast by it, in those states in which the programs are received and the consequences of the station's acts take place. By such a requirement, the jurisdiction of the Federal Courts is not essential and the courts of each state may apply the local substantive law to each case.

While it is true that such a requirement by the Federal Communications Commission would serve to extend jurisdiction over broadcast stations only, it is submitted that the result thereof would be practicable and desirable from the point of view of the public. The broadcast station may, by contract, secure indemnity from its advertisers and

other persons using its facilities for damages recovered from the station in such suits. Where, however, the broadcast station is not held liable, the advertiser and speaker may continue to be liable to the plaintiff and the station's indemnity agreement would be of no avail. The plaintiff would thereupon be obliged to institute suit in jurisdictions where the primary tortfeasor could be served. In many cases, the advertiser would be doing business in the territory covered by the station and would, therefore, ordinarily be amenable to the jurisdiction of the court simultaneously with the broadcast station. While this suggested condition to the granting of a license by the Federal Communications Commission would not solve the jurisdictional dilemma in all cases, it is submitted that it would bring about a substantial solution of the problem.

§ 492. Jurisdiction Over Crimes by Broadcasting from Without the State.

Where the state constitutionally seeks to regulate the subject matter of radio broadcasts or where the state's penal law prohibits certain conduct (including acts of radio broadcasting), the question arises as to the effect of a broadcast, which violates these statutes, emanating from outside the state but received in the state. Liability would depend on whether the violation of the statute takes place within the state where the broadcast is received and heard. There are a number of cases which hold that where a force is set in motion in one state which causes an injury in another state, the crime or tort is committed in the second state. Thus, where a bullet is fired across a state

32 See §§ 183, 189, 190, 191 supra.

33 Crimes which can be committed by broadcasting include criminal libel, criminal syndicalism, the prohibition against advertising certain products, etc.

34 Simpson v. State, 92 Ga. 41, 17 S.E. 984 (1893); Cameron v. Vandergoff, 53 Ark. 381, 13 S.W. 1092 (1890) (blasting injures person across state line); Otey v. Midland Valley R. R. Co., 108 Kans. 755, 197 Pac. 203 (1921) (sparks from locomotive engine causing fire across state line); Le
line, the crime is committed where the force strikes the body and not where the force is set in motion. However, any state having jurisdiction, can by statute punish the offense. For example, where poisoned candy was sent from California to a person in another state who died from eating the candy, it was held that California under its statutes might prosecute the person who sent the candy.

The closest analogy to a crime by broadcasting, is where a crime is committed by sending a letter through the mails. The crime, in such a case, may be punished either at the place of mailing or where the letter is received. Upon the same theory, a crime by broadcasting may also be punished in the state in which the criminal broadcast is received.

§ 493. Same: Jurisdiction Over the Defendants.

Where a statute makes a certain broadcast a criminal offense, the person who utters statements which are malum prohibitum is clearly liable. Another question is presented as to whether the broadcast station is liable as an accessory to a crime committed by means of its facilities. The station should not be liable where it merely furnishes its broadcast facilities and has no reasonable means of knowing that a crime would be committed and where the criminal statements were made without its privity and permission.

Forest v. Tolman, 117 Mass. 109 (1875) (dog strays from Massachusetts and bites person in New Hampshire).


1 Beale, Treatise on the Conflict of Laws, § 65.2 (1935).

People v. Botkin, 132 Cal. 231, 64 Pac. 286 (1901).

United States v. Worrall, 2 Dall. (U.S.) 384 (C.C. Pa., 1798).

In re Pallisir, 136 U.S. 257, 10 Sup. Ct. 1034, 34 L.Ed. 514 (1890); Commonwealth v. Blanding, 3 Pick. (Mass.) 304 (1825); People v. Adams, 3 Denio 190, affd. 1 N.Y. 173 (1848); Lindsey v. State, 38 Ohio St. 507 (1882).

See Wash. Sess. Laws (1935)
But where the station, although not the originator of the plan, has knowledge that another intends to commit a crime and encourages him to carry out his plan by furnishing broadcast facilities for the criminal program, then the station should be liable as an accessory before the fact.42

§ 494. Same: Extradition or Interstate Rendition.

Although under its penal law, the state in which a criminal broadcast program is received can punish the speaker, the latter must be brought into the state before he can be subjected to its laws. He can be brought into the jurisdiction, if at all, by extradition or interstate rendition.43

The right of a state to demand extradition by another state of a person who has committed an offense against its laws is founded upon the United States Constitution.44 The provisions of the Constitution include every offense made punishable by the law of the state in which it was committed,45 including statutory crimes.46

However, in order to be subject to extradition, the crim-
inal must be a fugitive from justice. To constitute one a fugitive from justice, it is essential that the person shall have been within the demanding state, have left it and be within the jurisdiction of the state from which his return is demanded, and that the person shall have incurred guilt before he had left the former state and while bodily present therein. If he was only "constructively" in the state, although not personally within its borders, he is not a fugitive from justice and is therefore not extraditable. Where a crime is committed by broadcasting from outside the state, the offender is never actually present within the state and hence is not a fugitive from justice who can be extradited under the provisions of the United States Constitution. In such a case, the states are confronted with the problem of enforcing their penal statutes against persons who, although guilty of violating the statutes, cannot be extradited.

However, in New York and in those other states

People v. Donohue, 84 N.Y. 438 (1881); In re Clarke, 9 Wend. 212 (1832).

47 Tennessee v. Jackson, 36 Fed. 258 (E.D. Tenn., 1888); In re Whittington, 34 Cal. App. 344, 167 Pac. 404 (1917); Taft v. Lord, 92 Conn. 539, 103 Atl. 644 (1918).

48 Ex parte Montgomery, 244 Fed. 967 (S.D.N.Y., 1917); Taft v. Lord, 92 Conn. 539, 103 Atl. 644 (1918); People v. Hyatt, 188 U.S. 691, 23 Sup. Ct. 456 (1903).

which have adopted the Uniform Extradition Act,\textsuperscript{52} this difficulty is obviated. The Uniform Extradition Act provides for the extradition of persons who commit crimes in one state while actually in another and not crossing state lines.\textsuperscript{53} Obviously, this statute will include crimes committed by broadcasting. The constitutionality of this statute has not been questioned seriously by the authorities examining it.\textsuperscript{54} It should be noted that the New York

\textsuperscript{52} LAWS OF NEW YORK (1936) c. 892, \S 834. "EXTRADITION OF PERSONS NOT PRESENT IN DEMANDING STATE AT TIME OF COMMISSION OF CRIME. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section eight hundred and thirty with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this title, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; provided, however, that the governor of this state may, in his discretion, make any such surrender conditional upon agreement by the executive authority of the demanding state, that the person so surrendered will be held to answer no criminal charges of any nature except those set forth in the requisition upon which such person is so surrendered, at least until such person has been given reasonable opportunity to return to this state after his acquittal, if he shall be acquitted, or if he shall be convicted, after he shall be released from confinement. Nothing in this section shall apply to the crime of libel."

\textsuperscript{53} See N. Y. CODE CRIM. PROC. (1936) \S 834. The New York statute provides that where the act has criminal consequences both in New York and in another state, New York may refuse extradition and punish the offender in New York or may waive its right and surrender him to the demanding state.

\textsuperscript{54} See (1932) 32 COL. L. REV. 1411; (1936) 5 FORDHAM L. REV. 484; (1937) 14 N.Y.U.L.Q. REV. 234.
version of the Uniform Act, in Section 834 thereof, expressly excludes the crime of libel.

If the Uniform Extradition Act were adopted in every state, it would solve the problem of interstate rendition for crimes committed by radio broadcasts and would make Federal legislation unnecessary.55

55 It should be noted that Congress in supplementing the Constitutional provisions as to extradition gave the control to the states [1 Stat. 302 (1793), 18 U.S.C.A. § 662 (1926)]. Many states have adopted statutes in aid of the Constitutional provisions, subject of course to the supremacy of the Federal Law. Scott on Interstate Rendition, § 35 (1917). However, Congress has adopted the Federal Fugitive Felon Law [48 Stat. 782, c. 302 (1934), 18 U.S.C.A. § 804e (1934)] and the Federal Interstate Compact Act [48 Stat. 909 (1934), 18 U.S.C.A. § 420 (1934)] which will make important changes in the structure of interstate rendition. It is therefore proper and possible for Congress to enact further legislation dealing with extradition problems which the states cannot solve.
§ 495. Generally.

Sponsors of broadcast programs use various methods to determine the extent of their radio audiences. While surveys are frequently made for national network programs which are broadcast in series, information concerning less extensive broadcast programs is not always available for accurate and timely surveys. As a consequence, the program itself is often designed to include a check
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upon the extent of its reception. This is accomplished by means of the receipt of telephone calls from listeners, voluntary comments concerning the program contained in letters from the audience and "fan mail" relating to the performers appearing on the program. A direct result is also obtained by tie-ups with local outlets for the product so that distribution of free samples, tokens and other publicity material may be made directly to the consumer-listener. Another method employed is to offer some attractive prize so that the listener may communicate directly with the advertiser in an effort to win such a prize. The offer of prizes in the form of contests created by broadcast programs involves questions of the legality thereof.


Section 316 of the Communications Act of 1934 is patterned closely after the provisions of the Postal Anti-Lottery Statute.\(^2\)


\(^2\) 35 Stat. 1129 (1909), 18 U.S.C.A. § 336 (1936). The text of the Postal Anti-Lottery Statute is as follows:

"No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note, or money order for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall
Section 316 of the Communications Act of 1934 specifically provides:

"No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs."

§ 497. Liability for Violation of Section 316.

The force of Section 316 of the Communications Act of 1934 would seem to be applicable to the following persons who would be liable for a violation thereof:

1. The sponsor of a broadcast program.
2. The sponsor’s agent, the advertising agency or other producer of the program.
3. The broadcast station owner and operator.
4. The control room operator or engineer.
5. The announcer.

The language of the statute sets up two distinct standards upon which conviction must be based. The broadcast knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1,000, or imprisoned not more than 2 years, or both; and for any subsequent offense shall be imprisoned not more than 5 years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed."

station owner, operator, control room engineers, announcers and other persons connected with the operation of the facilities of the station are charged with criminal responsibility, only in the event that they knowingly permit the broadcast of programs which constitute lotteries or give information relating to same.

Criminal responsibility is directly chargeable to all persons other than the Commission’s licensees who are concerned in the violation of Section 316. Specific intent to violate the Statute does not appear to be required of such other persons.

Section 316 broadly provides that "any person" violating its provisions is subject to conviction for broadcasting lottery programs or programs which give information concerning lotteries. So far as persons other than licensees of the Commission are concerned, the crime is malum prohibitum and does not require knowledge or intent. Such persons would include the advertiser or other sponsor of the program and the producer thereof.

All persons connected with the broadcast station and its operations and not actually under the control of the sponsor or producer of the program must be proven to have knowledge of the character of the program to sustain their conviction under Section 316. The offensive program may be announced by an employee of the broadcast station, who for the purposes of this program is under the control of the sponsor, receiving compensation for his services directly from the program sponsor or producer. In such a case, an announcer employed by the sponsor or producer for the particular program can be convicted without proof of specific intent or knowledge. A fortiori, announcers, artists and other persons who actually participate in the dissemination of information concerning a lottery in a broadcast program, are under the control of the sponsor or producer thereof rather than the station operator, and thus are guilty of violation even in the absence of proof of specific intent or knowledge. It is not necessary to
prove control over these individuals by the sponsor or producer of the program containing the illicit matter. It is sufficient, in order to obviate the necessity of proof of specific intent or knowledge, to show that the individuals charged are not under the control of the broadcast station, owner or operator.

As a practical situation, proof of knowledge on the part of the broadcast station owner or operator or persons under their control can readily be shown. Since broadcast stations, by the terms of their licenses, must be operated in the public interest, convenience and necessity, the broadcast station has the responsibility of supervising the character of the programs broadcast from its studios by means of its facilities. The power of "editorial selection" is brought into play by operators of broadcast stations as a matter of daily practice, and a defense that a departure from such practice occurred in the single instance where the program is charged with violating Section 316 would hardly be sustained in the absence of additional extenuating circumstances.4

Where the program, however, originates from another station, as is the case in a network broadcast, and the station owner or operator proves that he had no knowledge of the character of the illicit program so broadcast by means of his facilities and that the offensive character of the program could not reasonably have been anticipated, it is necessary for proof to be introduced showing specific intent or knowledge on the part of such station owners and operators.

Where the station broadcasts an electrical transcription program prepared by or on behalf of the sponsor thereof, and such illicit matter is contained therein, it is a question of fact to determine whether it is reasonable to impose

4 See WRBL Radio Station, Inc., 2 F.C.C.Rep. 687 (1936) where there was a reorganization of the broadcast station management, a cessation of the lottery programs and the presentation of a meritorious program service.
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a duty upon a broadcast station to reproduce and perform the transcribed program for private audition before disseminating same to the public over the facilities of the station. Section 316, however, being penal, must be strictly construed and even if the jury should find that the broadcast station should have auditioned the program, its determination would be insufficient to support a conviction in the absence of positive proof of knowledge or intent. If, in fact, the station or operator had so auditioned the transcribed program or had knowledge in some other manner or means of the illicit character of the program, specific intent or knowledge would seem to be proven.

The penalty for violation applies with equal force to all persons found guilty under Section 316, irrespective of specific intent or knowledge. A fine of not more than $1,000. or imprisonment for not more than one year, or both, may constitute the penalty for each day during which such illicit programs are broadcast.

§ 498. Jurisdiction to Determine Violation of Section 316.

Section 316 establishes the jurisdiction of the Federal Courts over prosecution of offenders thereunder.

The Federal Communications Commission may not find that a crime has been committed by the violation of Section 316. The criminal offense must be established by a conviction in the Federal Courts before a broadcast station owner or operator can be held to have violated Section 316. This does not, however, curtail the power of the Federal Communications Commission to review the past conduct of a broadcast station licensee to determine whether his license should be renewed or revoked. Where the course of conduct of the licensee is in question, a series of acts, omissions and other offenses must be established and found by the Federal Communications Commission after full hearing. It is submitted that a single charge against the

5 A contrary view is expressed in Haley, The Broadcasting and Air L. Rev. 405, 408.
licensee for having broadcast a program claimed to be a lottery, should not of itself, and in the absence of other offending circumstances, be sufficient ground for revocation or refusal to renew a station license, in the absence of a conviction by the Federal Courts.\(^6\)

This section is applicable by its terms only to broadcast stations for which a license is required by the laws of the United States.

The extent of illicit information disseminated in the broadcast program is not a determinant of whether an offense has been committed. So long as some, no matter how little, information is given about a lottery or gift enterprise, the case is within the statute.

§ 499. The Difference Between Section 316 of the Communications Act of 1934 and the Postal Anti-Lottery Statute.

There is a striking similarity between the anti-lottery provisions of the Communications Act of 1934\(^7\) and the Postal Statute.\(^8\) They differ only as follows:\(^9\)

1. The former refers to radio broadcasts and the other to the use of the mails.

\(^6\) The first case before the Federal Communications Commission in which § 316 of the Communications Act was involved was WRBL Radio Station, Inc., 2 F.C.C.Rep. 687 (1936). The Commission found that the applicant who sought a renewal had violated § 316 by advertising certain lotteries. The Commission also found that a certain scheme similar to “Bank Night” was a lottery. The Commission further found that since the State of Georgia, in which the applicant was situated, prohibited by statute the advertising of lottery schemes, such programs were not in the public interest. On the whole record, however, the application for renewal was granted. The Federal Communications Commission has also considered the applicability of § 316 in KXL Broadcasters, 4 F.C.C.Rep. 186, 188 (1937).


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2. The Postal Statute contains the phrase, "cause to be deposited", which is not contained in Section 316.
3. The penalties contained in the Postal Statute are more severe.


Both anti-lottery statutes are consistent in their definition of the offense and seek to accomplish the same purpose, namely, to suppress lotteries within the jurisdiction of the Federal Government. These statutes are of the same substance and should be construed together.10

Lottery statutes are on the whole construed to avoid evasion of the law.11 It is submitted that Section 316 should be subject to a strict and literal construction. This view is consistent with the rule that evasion must not be countenanced and is supported under the Postal Statute by cases which involve the press. It has been held in such cases that because of the danger of infringement on a free press by a highly penal statute, the advertisement complained of should be clearly within the terms of the Postal Statute in order to be considered an offense.12

The broadcast station is clearly in the same situation as the press in this instance. The Communications Act of 193413 contains a legislative declaration of the freedom of the air. The anti-lottery section is highly penal.14 To avoid infringement of the freedom of the air, Section 31615 should be strictly construed.

15 Ibid.

The word, lottery, has no technical legal meaning but must be construed in the popular sense. The term, as popularly and generally used, refers to a gambling scheme in which chances are sold or disposed of for value and the sums thus paid are hazarded in the hope of winning a larger sum. A gift enterprise is a form of lottery "in which publishers or sellers give presents to members of the public to part with their money."

It is the rule that the elements of a lottery are: (1) consideration; (2) chance; (3) prize. The absence of any one of these elements is sufficient to take a broadcast program out of the lottery category.


There is no doubt that one can give away his money or property by chance, and where no valuable consideration has been paid, there is no lottery. In People v. Mail & Express Co., a newspaper distributed coupons gratuitously to everyone, including non-subscribers to the paper. These coupons entitled such persons to a chance for a prize to be determined by lot. The Court held that it was not a lottery because no valuable consideration passed for the chance to obtain the prize. The law does not prohibit an individual from giving away property or money for nothing.

17 Id., at 264 N.W. 608, 609 (1936).
In People v. Shafer, 160 Misc. 174, 289 N.Y.Supp. 649 (1936), the Court said, at page 175:
"... there are two essential elements which constitute lottery: First, a scheme for the distribution of property by chance; second, payment, or agreement to pay a valuable consideration for the chance."
Where there is this element of free participation but the scheme also includes the giving of the right to participate to persons who pay something of value, as for instance, "Bank Night", where some pay admission to a theatre while the public generally may participate on a free basis, a question of fact arises. It must be determined whether the group of persons who paid for admission were paying in part for the chance of a prize.\textsuperscript{22}

If free participation is found to be true only in theory and not in fact, there is a lottery.\textsuperscript{23}

"Violation is shown only where regardless of the subtlety of the device employed, the State can prove that as a matter of fact, the scheme in actual operation results in the payment in a great majority of cases, of something of value for the opportunity to participate."\textsuperscript{24}

Since consideration is essential to constitute a lottery, it is necessary to determine the nature of this requirement. Will the mere technical consideration sufficient to support a contract serve as a foundation of a charge of lottery or must something of value be passed?

There is no conflict where the entrant has paid money for the sole purpose of securing a chance for a prize; that is sufficient to make the scheme a lottery.\textsuperscript{25} Sufficient consideration is also given where a chance to win a prize by a drawing is distributed with a purchase of goods, despite the fact that the articles sold are not increased in price on account of the issuance of the prize chances.\textsuperscript{26} Williams Furniture Co. v. McComb Chamber of Commerce\textsuperscript{27} is the

\begin{itemize}
\item[\textsuperscript{22}] Commonwealth v. Wall, 3 N.E.(2d) 28 (Mass., 1936); State v. Eames, 87 N.H. 477, 183 Atl. 590 (1936); Affiliated Enterprises, Inc. v. Truber, 86 F.(2d) 958 (C.C.A. 1st, 1936).
\item[\textsuperscript{23}] Ibid.
\item[\textsuperscript{24}] State v. Eames, 87 N.H. 477, 183 Atl. 590, 592 (1936).
\item[\textsuperscript{25}] Haley, op. cit. supra n. 9, 411.
\item[\textsuperscript{26}] Horner v. United States, 147 U.S. 449, 13 Sup. Ct. 409, 37 L.Ed. 237 (1893); People v. Miller, 271 N.Y. 44, 2 N.E.(2d) 38 (1936); Haley, op. cit. supra n. 9, 411.
\item[\textsuperscript{27}] 147 Miss. 649, 112 So. 579 (1927).
\end{itemize}
only case contra on this proposition. This case involved a
scheme whereby merchants purchased tickets from the
Chamber of Commerce, which tickets they gave to their
customers entitling them to a chance on a prize. The
scheme was held not to be a lottery because there was no
consideration. The Court based this on the ground that
the customers stood no chance to lose since they did not
pay a higher price for the goods.

The conflict, however, really arises where the considera-
tion is other than money or something of value. The older
view, which has much authority to support it, is that any
detriment, no matter how minor, is sufficient to constitute
a consideration to support a lottery forbidden by the
Postal Statute. Mr. Thomas has set down the rule as
follows:

"Where a promoter of a business enterprise, with the evi-
dent design of advertising his business and thereby increasing
his profits, distributes prizes to some of those who call upon
him or his agent, or write to him or his agent, or put them-
selves to trouble or to inconvenience, even to a slight degree,
or perform some service at the request of and for the pro-
moter, the parties receiving the prize to be determined by
lot or chance, a sufficient consideration exists to constitute
the enterprise a lottery, though the promoter does not require
the payment of anything to him directly by those who hold
chances to draw prizes."

This proposition is followed in many Federal and state
cases.

29 THOMAS, LOTTERIES, FRAUDS
AND OBSCENITY IN THE MAILS (1900) 35.
E.D.N.Y., 1910); United States v. Wallis, 58 Fed. 942 (D. Idaho, 1893); United States v. Olney, Fed. Cas. No. 15,918, 1 Abb. (U.S.) 275 (D. Ore., 1868); United States v. Pollitzer, 59 Fed. 273 (N.D. Cal., 1893); General Thea-
tres, Inc. v. Metro-Goldwyn-Mayer Distributing Corp., 9 F.Supp. 546 (D. Colo., 1933) (This case in-
volved the Code of motion picture


In *Brooklyn Daily Eagle* v. Voorhies, 181 Fed. 579 (C.C.E.D. N.Y., 1910), a newspaper advertisement offered a prize for the best essay on the name of a breakfast food. The essay contest was to be judged by three named persons. Each essay when submitted had to be accompanied by three labels from packages of the food. The Court said:

"It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive."

Goodwin, *Elements of a Lottery* (Govt. Printing Office, 1912) 12, 13, cites an unreported case, *New York Evening Journal* v. *Morgan* (C.C.S.D.N.Y., Lacombe, J., 1907). In this case an article appeared in plaintiff's newspaper stating that its photographer on a certain day would photograph a group of people at one of the baseball stadia. A prize was offered to each person identifying himself as one of those photographed from the picture which was to appear the next day. The Court held that there was a valuable consideration paid, saying:

"The consideration paid is the admission fee, which puts the individual in the particular seat where he may be photographed, and thus secure the prize or gift, and also the price of the paper, which the individual must consult in order to see if he is a winner. That the latter may be paid to the promoter of the scheme indirectly (not personally by the winner) and the former is paid to the baseball exhibitors is not material."

Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), presents a case in which every person attending an auction sale was given a ticket, whether or not he bought anything, for a chance to win a prize. The court held that the consideration was paid by attending the auction sale.

Mr. Pickett in *Contests and the Lottery Laws*, (1932) 45 Harv. L. Rev. 1196, criticizes Maughs v. Porter, supra. He says:

"If the defendant was bargaining for any act it was the bidding at the auction sale. In any event the purpose of the lottery laws is to prevent people from giving up money or money's worth in the hope that chance will make their
Mr. Haley, in his article,\(^\text{31}\) approves of this rule and is of the opinion that it is applicable to broadcast programs under Section 316 of the Communications Act of 1934.\(^\text{32}\) It is his opinion that consideration sufficient to support a contract is ample to make the giving away of property by chance a lottery.

Mr. Haley's view would seem to be too strict and not necessary to accomplish the purpose of the anti-lottery statutes, nor is it essential to prevent evasion of the law. It has already been pointed out that one can lawfully give away his property freely by lot. The objective of anti-lottery laws is to prevent the hazarding of something of value for a prize, dependent on chance. It is submitted that the consideration to be proven by the prosecution under Section 316 of the Communications Act of 1934\(^\text{33}\) should be the passing of something of value from the entrant to the sponsor of the broadcast program. This view is in accord with the general public opinion and with the trend of the more recent cases, including decisions of the Federal Courts.

In *Affiliated Enterprises v. Truber*,\(^\text{34}\) a Federal Court case, where no payment of admission to participate in the drawing on "Bank Night" was required, but registration was open to the public at no cost, and where the winner had to claim within a reasonable time, it was held that no consideration was passed. This case emphasizes that free participation must be a fact in practice and not in theory.\(^\text{35}\)


\(^{33}\) Ibid.

\(^{34}\) 86 F.(2d) 958 (C.C.A. 1st, 1936).

\(^{35}\) Commonwealth *v.* Wall, 3 N.E.(2d) 28 (Mass., 1936); State
In State v. Eames, the statute specifically provided that to constitute a lottery, payment must be given for the right to participate. Therefore, mere registration and the requirement that the "Bank Night" winner claim within a reasonable time did not constitute a sufficient consideration.

In Commonwealth v. Wall, it was directly held error to charge the jury that any technical or non-valuable consideration, as for instance, registration to enter "Bank Night" games, is sufficient to constitute a lottery.

The words of the Court in State v. Hundling are sig-
significant on the question of whether the consideration may exist in the indirect profit to the sponsor, as is urged by Messrs. Thomas and Haley. It was there said: 39

"The question is not whether the donor of the prize makes a profit in some remote and indirect way, but rather whether those who have a chance at the prize pay anything of value for that chance. Profit accruing remotely and indirectly to the person who gives the prize is not a substitute for the requirement that he who had the chance to win the prize must pay a valuable consideration therefor, in order to make the scheme a lottery."

In a case involving a similar set of facts, the California Court of Appeals said: 40

"Whether the scheme for the distribution of prizes to holders of lucky tickets constitutes a lottery depends on whether such holders paid valuable consideration for the chance, not whether the distributor received something of value for the prize."

In Post Publishing Co. v. Murray, 41 it was held that a valuable consideration must be paid to constitute a lottery. In Central States Theatre Corp. v. Patz, 42 it was held that the consideration must move from the entrant to make the scheme illegal.

There are also two early cases which are in support of the writer's views. They are Yellow Stone Kit v. State 43 and Cross v. People. 44 In the former case, it was held that no valuable consideration passed directly or indirectly from the entrant to the sponsor, where chances were gratuitously distributed and admission to the drawing was free. In the latter case, business cards were distributed

which entitled the holders to a chance for a piano to be awarded as the holders of such chances might elect. The tickets were given indiscriminately to all persons. The Court held that it was gratuitous distribution of property and therefore not a lottery. It was said: 45

"The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent. . . . "The fact that such cards or chances were given away to induce persons to visit their store, with the expectation that they might purchase goods and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances."

It is submitted on the basis of the foregoing that the question of consideration should be treated under Section 316 of the Communications Act of 1934, as follows:

1. There must be a payment of a valuable consideration to constitute a lottery. 46 Consideration sufficient to support a contract is not enough.

2. Free participation must be a reality. The requirement by the program’s sponsor of minor qualifying acts and their performance by the entrant should not constitute consideration unless it is intended by the scheme to evade the law. Likewise, the indirect profit derived by the program sponsor in such a case should not constitute consideration unless the intent is to evade the law.

45 Id., at 18 Colo. 321, 324, 325 (1893).
46 In WRBL Radio Station, Inc., 2 F.C.C.Rep. 687 (1936), the winner in a "Bank Night" scheme, which was condemned by the Commission as a lottery, had to pay an admission fee to enter the hall and claim his prize.
The question as to whether the sponsor of such a program intended to evade the law is one of fact for the jury to determine. Its finding must be based upon a complete evaluation of the entire scheme and all of the acts committed in the development and exploitation thereof to the public.


From the point of view of the sponsor, advertising is the primary function of the broadcast program. Contests are included in broadcast programs with the object of increasing sales and creating commercial good will for the sponsor. Prizes offered in broadcast contest programs are calculated to stimulate sales of the product so advertised. This end is achieved by imposing as a condition precedent to participation in the contest, the requirement that some physical portion of the container or package in which the product is marketed be detached and forwarded to the contest judges. Obviously, the entrant's fulfillment of such conditions which involves the purchase of the article so advertised constitutes that consideration which is an element of a lottery.\textsuperscript{47}

Many broadcast contest programs have attempted to remove the element of consideration by imposing a condition which is alternative to the requirement that physical portions of the container of the advertised article be submitted to participate in the contest. The alternative generally offered is that the entrant submit facsimile reproductions of the package top, wrapper, label, etc. of the advertised article.

Since contests must be analyzed realistically to determine whether they are lotteries, it is submitted that the facsimile alternative is a specious evasion of the prohibition of the passage of consideration for a chance

at a prize. The effort required to produce a facsimile of a portion of a container is usually substantial in that it requires time and some skill. Moreover, the article advertised must serve as a basis for its facsimile reproduction and its purchase appears to be inevitable. Details of standards of quality or accuracy are usually not given to contestants. It may well be that the actual standards are such that a facsimile must be in such form and quality as would involve the expenditure of money for materials necessary to create the facsimile. The entrant may be considered to have parted with something of value in such cases. Consideration seems apparent in such a contest to an extent sufficient to constitute the same a lottery.

This may be regarded as a harsh result and an unnecessary frustration of advertising and sales promotion, but it is submitted that until appropriate legislation is enacted and a well-defined policy in favor of such programs is recognized, such lottery evasions should not be permitted.


An event presents the element of chance if after the exercise of research, investigation, skill and judgment, one is unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence.\(^48\) It is not


In State ex inf. McKitterick Att’y Gen. v. Globe-Democrat Publ. Co., 110 S.W.(2d) 705 (Mo., 1937), Judge Elison of the Missouri Supreme Court said at page 713:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the ‘Famous Names’ contest, here involved, the sole question being whether the third element—chance—was there. In England and Canada where the ‘pure chance doctrine’ prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that..."
necessary that the element of chance be pure chance. It may be accompanied by an element of calculation or even of certainty, but the fact that the exercise of some judgment may enable a competitor to make an approximation guess which could not so easily be made by a chance guess, does not deprive the scheme of the element of chance. If chance predominates and the other elements are present, the scheme will constitute a lottery. Even where the schemes are so planned that eventually all participants will receive a prize, but at different times and in different proportions, there is an element of chance. To save a contest from falling within the purview of the lottery laws, skill must be the predominant element. It is difficult, however, to formulate one definition which will fit all possibilities. The essential elements of chance can best be considered by examining some of the typical situations.

§ 505. Same: “Best” Contests.

In Brooklyn Daily Eagle v. Voorhies,\(^49\) the Court held that the offer of a prize for the best essay constituted a lottery since the entrants were not induced to compete with some definite standard as to what the word “best” meant. If a contest is honestly carried on and the best essay from any definite known standard is selected, the competition is not a lottery. However, the advertisement must contain a sufficiently unambiguous statement of what the word “best” means as applied therein so that competitors may be advised of the standards of comparison to be applied by the judges.

Association for Legalizing American Lotteries v. Gold-

\(^{49}\) 181 Fed. 579 (C.C.E.D.N.Y., 1910).
man (Postmaster),\textsuperscript{50} involved an enterprise whereby contestants, on payment of a certain sum for a ticket, selected a title for cartoons from suggested lists which contained many titles, any one of which might have been equally appropriate. The contestants who picked the titles most nearly corresponding to those selected by the judges were entitled to prizes. Judge Knox, holding it to be a lottery,\textsuperscript{51} said:

"An inspection of the cartoons and their possible titles would indicate that the selection of winners can hardly be anything than arbitrary and capricious, or by chance."

\textsuperscript{50} S.D.N.Y., May 2, 1936, Knox, J. (unreported); 	extit{dearce of dismissal for defect of parties aff'd}. 85 F.(2d) 66, 67, 68 (C.C.A. 2d, 1936).

\textsuperscript{51} The Supreme Court of Missouri has said of a similar scheme:

"In the instant case it stands conceded that at the beginning of the 'Famous Names' contest the cartoons were comparatively simple and the list of suggested titles was short. This made the contest inviting to entrants. But toward the end the cartoons became more 'subtle' and as many as 180 titles had to be considered. It was a weeding out process, undoubtedly, and if chance inhered in the solution of these latter cartoons, though only a few of them, and eliminated a large number of contestants, then it must be said the result was influenced by chance. * * *

"Now, as regards the cartoons to be labeled in the 'Famous Names' contest. Without further discussion it is evident that an element of chance inhered in some of them—of guessing what titles had been selected by the creators. They had in mind a title for each cartoon before it was drawn, but they also introduced foreign elements in the later ones to make them more confusing or subtle. There were no fixed rules by which these cartoons could be solved by the rank and file of contestants. * * * The fact that out of more than 45,000 contestants only 2 gave correct answers to the entire 84 cartoons proves their solution was not a matter of skill and judgment, and that chance did have a proximate effect on the final result. And the circumstance that the two winners, Mr. Kraus and Mrs. Hicks, were not experts does not establish the contrary; indeed, it indicates the contest in its final analysis was controlled by chance. We think it was a lottery." \textit{State ex inf. McKitterick, Atty. Gen. v. Globe-Democrat Publ. Co., 110 S.W.(2d) 705, 717, 718 (Mo., 1937).}
The same situation appeared in *People v. Rehm*.\(^{52}\) It was held that such a cartoon contest constituted a lottery. The Court said:\(^{53}\)

"In the contest before us we find that while the outcome could be foreseen in a measure by the exercise of thought, although 'fancy' would be a more accurate word, nevertheless thought played so small a part that the controlling force remained chance."

In *Hoff v. Daily Graphic*,\(^{54}\) the defendant conducted a contest known as the "Graphic Movie Title Contest." It offered to give to the winner of the contest a completely furnished house. The winner was to be the person who determined the best titles to the pictures published in defendant's paper. The contest was held not to be a lottery under the following ruling:\(^{55}\)

"... the mere presence of a chance element does not necessarily constitute the contest a lottery ..."

"The allegations in the complaint clearly indicate the exercise of judgment and taste in the selection of titles both by the contestant and by the judges, and while taste is to a certain extent individual and perhaps at times fanciful, nevertheless, the exercise of it is far removed from blind guesswork or chance."

In *Eastman v. Armstrong-Byrd Music Co.*,\(^{56}\) the defendant conducted a puzzle contest in which a piano was given to those who answered a fifteen square puzzle. The advertisement declared that there was no lot or chance connected with the solution and that the neatest correct solution would win the prize. The Court held that it was not a lottery, because the element of skill predominated. The Court probably based its decision on the fact that the prize would be awarded to the *neatest* correct solution.

Mr. Thomas, in his treatise, contends that in such cases the decision should depend on whether the party offering the prize is primarily interested in obtaining the winning production or in making money from the scheme. The cases, however, do not support this proposition. As long as the measure of taste or skill involved is greater than the element of chance, the scheme will be upheld.

§ 506. Same: Guessing Contests.

*Waite v. Press Publishing Assn.* presented a scheme by which a prize was offered to persons subscribing for certain periodicals who would guess nearest the popular vote cast for President at a certain election. This was held to constitute a lottery because chance was the dominating element even though some skill may have been employed in arriving at the solution.

In *Hudelson v. State*, an indictment which charged the defendant with publishing an advertisement that he would give a gold watch on a specified day to the person buying goods at his store in the amount of fifty cents who would guess the nearest number of beans in a glass globe in his window, was sustained as charging a lottery. Whether that person might guess the correct number would be purely a matter of chance. Since consideration and prize were also present, the scheme fell within the lottery laws.

In *Stevens v. Times Star*, a guessing contest was instituted by a newspaper company, a prize being offered to the person who came nearest in guessing the actual total vote cast for a State officer at an approaching election. It was held that the element of chance was involved because it was at best only a conjecture. The Court said:

"... there is an element of skill, possibly certainty, involved, but it is clear that the controlling, predominant element is mere chance."

57 THOMAS, op. cit. supra n. 48.  
58 155 Fed. 58 (C.C.A. 6th, 1907).  
59 94 Ind. 426 (1883).  
60 72 Ohio St. 112, 73 N.E. 1058 (1905).  
61 Id., at 72 Ohio St. 112, 151 (1905).
Post Publishing Co. v. Murray, seems to be the only case in conflict with the other decisions. There, twenty-five photographs of women, whose heads were removed from the photographs, were published in a newspaper. Any woman identifying her photograph received a $5 gold piece. This was held not to be a lottery because no consideration was paid. It was also said that there was "little, if any element of chance in the scheme." However, the price of the newspaper was the consideration for the chance, and as pointed out by Mr. Pickett:

"It was the uncontrolled whim of the photographer which selected the 25 possible winners, so that chance did govern the distribution of the gold pieces."

§ 507. Same: Voting Contests.

There is no skill involved in voting contests in which prizes are awarded to persons receiving the highest number of votes cast by participants. It is the absence of any chance which takes such voting contests out of the lottery laws.

In Brenard Mfg. Co. v. Jessup & Barret Co., a piano and a player-piano were offered as a grand prize to be given to the contestant receiving the highest number of votes which were obtained by selling cards to customers of the defendant. The vote cards entitled the holder to merchandise of the amount shown on the card and also to credit for a designated sum upon the retail price of silverware which the customer might purchase from the defendant. Premiums were to be given from time to time for the purpose of increasing the number of votes to be cast in the contest for the grand prize in favor of each contestant. The Court held that it did not constitute a lottery, saying:

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63 (1932) 45 Harv. L. Rev. 1196, 1212.
64 186 Iowa 872, 173 N.W. 101 (1919).
65 Id., at 186 Iowa 872, 877 (1919).
"The prize was to be awarded to the contestant receiving the highest number of votes, and no element of chance was involved in the manner of making the award. . . . Lacking the element of chance necessary therefor, the scheme did not provide for a distribution of prizes in a manner constituting a lottery. . . ."

In *Brenard Mfg. Co. v. Benjamin*, a similar scheme was declared illegal. However, the dissenting opinion seems to be preferable. The dissenting Judge said:

"Here there is no element of chance, nor is there any fee charged for participating in the contest. The prizes are awarded according to the number of votes cast. There is no drawing, no throwing of lots, nor any distribution of prizes. . . ."

A contest, whereby pianos were to be given to the person, society, church, school or lodge, having secured the greatest number of votes, a ticket for which was to be distributed with each twenty-five cents purchase, was upheld in *Quaiscoe v. Eggleston*. However, in *National Thrift Assn. v. Crews*, a contract of sale of 25,000 tickets at $1.00 each, containing an agreement by the seller to distribute $15,000 in cash in various amounts to entrants who would be determined by votes cast by ticket holders, was held to be illegal and in violation of the lottery laws because the element of chance dominated. The Court said:

"If instead of voting these tickets, they were marked with numbers and drawn from a box to determine who would receive the money, would it be contended that the law against lotteries was not violated? The mere fact that the winners are determined by the number of votes received does not, in this particular scheme, eliminate the element of chance.

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66 172 N.C. 53, 89 S.E. 797 (1916).  
67 *Id.*, at 172 N.C. 53, 57 (1916).  
68 42 Ore. 315, 71 Pac. 66 (1903).  
69 116 Ore. 352, 241 Pac. 72 (1925).  
70 *Id.*, at 116 Ore. 352, 355 (1925).
and make it less evil in its tendencies. It is a cleverly designed scheme to evade the law against lotteries and must not be countenanced."

In *Quatroso v. Eggleston*, however, the Court held that there was no element of chance in the award of the piano. In *National Thrift Assn. v. Crews*, the voting plan was clearly a subterfuge.

§ 508. Same: Gift Enterprises.

In *United States v. Wallis*, and *State v. Willis*, a chance to win a prize was given to newspaper subscribers. Both courts held that the scheme came within the lottery laws. The latter Court said:

""It is contended that the word chance in the paper means opportunity. We do not concur in this interpretation. It is conceded that the careless reader might see in the advertisement a game of chance. But that would so, only because the meaning is there to be seen. . . . However disguised by indirect or deceptive expression, the paper, as a whole, discloses a lottery. If it were not so, readers would not become buyers. It informs its patrons that every subscriber is sure to get a present, and the presents are of various values. Assurance is given that the presents will be 'awarded fairly'. How can presents of unequal value be fairly awarded unless by some lot or chance? A purchaser or subscriber receives for his money 'a numbered receipt'. What can be the purpose of numbers if all numbers are favored alike? . . . It is not an opportunity to win, so much as it is an opportunity for a chance to win."

In *Dunn v. People*, the defendant conducted a "gift sale" establishment. He kept a box filled with envelopes purporting to contain some valuable recipes and popular

§ 508.

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71 42 Ore. 315, 71 Pac. 66 (1903).
72 116 Ore. 362, 241 Pac. 72 (1925).
74 78 Me. 70, 2 Atl. 848 (1885).
75 Id., at 78 Me. 70, 73 (1885).
76 40 Ill. 465 (1866).
songs and also a card descriptive of some one of an immense stock of various articles of different values. The price of each envelope was twenty-five cents. The holder had the right to purchase the designated articles at one dollar each without regard to value and not to be paid for until the purchaser of the envelope knew what he was to receive. The Court held that the element of chance was present in the purchase of the envelope itself, which might contain a card or ticket that would give the purchaser the right to buy for one dollar an article worth hundreds of dollars or one of little or no value. The Court said: 77

"Neither would the character of the transaction be changed by assuming that the ticket in every envelope really represents some article of merchandise intrinsically worth the dollar which the holder will be obliged to pay. If every ticket in an ordinary lottery represented a prize of some value, yet, if these prizes were of unequal values, the scheme of distribution would still remain a lottery."

The trading stamp scheme, wherein the merchant delivers trading stamps with articles sold for cash, and the purchaser upon acquiring a designated number of such stamps can select and receive one of a number of articles exhibited at a store of the company issuing the stamps, has generally been upheld because there is no element of chance present. 78 By statute in some states, the issuance of trading stamps or redemption coupons is illegal.

§ 509. Same: Checker Problem and Word Building Contests.

In Johnson v. McDonald, 79 a player secured a checker problem by punching a board. If he solved the particular problem which he obtained, he was given a prize. The

77 Id., at 468.
78 State v. Shugart, 138 Ala. 86, 35 So. 28 (1903); State v. Caspare, 115 Md. 7, 80 Atl. 606 (1911); Commonwealth v. Sisson, 178 Mass. 578, 60 N.E. 385 (1901); City of Winston v. Beeson, 135 N.C. 271, 47 S.E. 457 (1904).
79 132 Ore. 622, 287 Pac. 220 (1930).
Court held that it was not a lottery because there was no element of uncertainty or chance, saying: 80

"The game would not appeal to anyone who did not like to play checkers. There is no apparent likelihood at all that the game, if played as designed, would cultivate a spirit of gambling."

While chance determined the difficulty of the puzzle drawn, each problem was capable of a solution depending upon the skill of the player. Similarly, the word building contest has been upheld.81 Skill is involved in such schemes although the success of each participant depends upon how skillful the other competitors are, since only the most successful will receive the prize. On the other hand, in the checker cases, everyone solving the puzzle receives a prize regardless of the success of the others. The courts, however, have not drawn any distinction between the two situations.

§ 510. Prize—An Essential Element to Constitute a Lottery.

A prize may be any inequality in value, resulting from chance in the distribution of the award. A prize is some advantage or inequality in amount or value which accrues to some but not all of the participants in a contest.82 It is not necessary that the inequality be great; it has been held that the difference between large and small candy eggs is enough.83 But no lottery exists if every contestant receives the same prize. Thus, penny sales in which a consumer may receive two articles by paying only one cent more than the price of one of those articles, have been upheld.84 Similarly, trading stamp schemes, except for

80 Id., at 625.
82 Carl Co. v. Lennon, 86 Misc.
special statutes, have been upheld because there was not any inequality in value which accrued only to some of the contestants.\textsuperscript{85}

However, the tailor suit club scheme, wherein members pay to a tailor one dollar per week in a weekly drawing as a result of which drawing the member holding the lucky number receives from the tailor a suit of clothes, has been held to constitute a lottery. It has been so held, even though an unlucky member, who continues to pay his dollar weekly for thirty weeks, is entitled to a thirty dollar suit of clothes regardless of the result of the drawings. There is an inequality of payment which constituted the prize so that the scheme was held to be a lottery.\textsuperscript{86}

\textsection{511. Broadcast Contest Programs: Specific Instances.}

A broadcast program which disseminates information concerning lotteries such as the Irish Hospital Sweepstakes is a violation of Section 316 of the Communications Act of 1934. Such a program is not a lottery in itself, but its sponsors may be prosecuted as accessories under local penal statutes in addition to Section 316.

Where contestants participate as part of a broadcast program and receive prizes therefor, dependent on their skill, the element of chance is lacking and such contest programs are not lotteries. In this classification fall spelling matches, quiz contests and similar programs which do not invite participation by the radio audience to win a prize.*

\textsuperscript{85} State v. Shugart, 138 Ala. 86, 35 So. 28 (1903); State v. Caspare, 115 Md. 7, 80 Atl. 606 (1911); Commonwealth v. Sisson, 178 Mass. 578, 60 N.E. 385 (1901); City of Winston v. Beeson, 136 N.C. 271, 47 S.E. 457 (1904).

\textsuperscript{86} People v. Mcfee, 139 Mich. 657, 103 N.W. 174 (1905); State v. Perry, 154 N.C. 616, 70 S.E. 387 (1911); State v. Lipkin, 169 N.C. 265, 84 S.E. 340 (1915); People v. Bloom, 248 N.Y. 582, 162 N.E. 533 (1928).

* The following is a list of cases which involve alleged lottery schemes:

- **VOTING AND GUESSING CONTESTS**
  - **Valid**
Millsaps v. Urban, 116 Ark. 90, 171 S.W. 1198 (1914); Brenard Mfg. Co. v. Jessup Co., 186 Iowa 872, 173 N.W. 101 (1919); Commission v. Jenkins, 159 Ky. 80, 166 S.W. 704 (1914); National Sales Co. v. Manciet, 53 Ore. 34, 162 Pac. 1065 (1917); Quatsoe v. Eggleston, 42 Ore. 315, 71 Pac. 66 (1903).

Invalid


Investment and Bond Schemes

Valid

Ex parte Shobert, 70 Cal. 632, 11 Pac. 786 (1886); Russell v. Equitable Loan, 129 Ga. 154, 58 S.E. 881 (1907).

Invalid


Checker Problem

Valid


Best Contest

Valid


Invalid

People v. Rehm, 13 Cal. App. (2d) 755, 57 P.(2d) 238 (1936);

**NUMBER GAMES AND SLOT MACHINES**

**Valid**

Lee v. City of Miami, 163 So. 486 (Fla., 1935); Ex parte Pierrotti, 43 Nev. 243, 184 Pac. 209 (1919).

**Invalid**


**GIFT ENTERPRISES**

**Valid**

Invalid

Theatre Enterprises (Bank Nights, Etc.)
Valid

Invalid
v. City of Seattle, 118 Wash. 258, 203 Pac. 21 (1922).

LAND SCHEMES
Valid
Burks v. Harris, 91 Ark. 205, 20 S.W. 979 (1909); Chaney Park Land Co. v. Hard, 104 Iowa 592, 73 N.W. 1059 (1898).

Invalid
Chapter XXXII.

BROADCAST PROGRAMS AND TRADE-MARK INFRINGEMENTS.

§ 512. Regulation of Trade Competition.

This and three subsequent chapters deal with private rights in the law of unfair competition as distinguished from proceedings instituted in the public interest by the Federal Trade Commission to restrain unfair methods of competition.¹ No effort will be made to cover the whole of this branch of the law. Some of the phases of unfair competition to be considered are:

1. Use of trade names and trade-marks in broadcast advertising.

2. Appropriation by one advertiser of another’s broadcast advertising ideas, programs or scheme of advertising.

3. Private remedies for false and misleading broadcast advertising.

¹ See Chapter XXXVI. infra.
The increased utilization of radio broadcasting as an advertising medium undoubtedly will invoke new problems in the law of unfair competition. Many of these problems may be easily solved by law already established. But, by reason of the more subtle devices and means susceptible of use over the new medium, new problems will be of first impression before the judiciary. Moreover, the difficulty in the enforcement of equity decrees restraining broadcast advertising practices must be considered in such cases. Broadcasting, being sui generis, and the law of unfair competition being incapable of generalization, actions for unfair competition in the broadcasting business must necessarily be decided upon the facts peculiar to each case. The few decisions already handed down in this field are helpful in charting the application of the law of unfair competition to this industry.

§ 513. Elements of Unfair Competition in Broadcasting.

The elements of unfair competition in radio broadcasting do not differ from the usual essential requirements. Where there is misrepresentation or misappropriation involving the use of broadcast facilities, and where confusion or deception of the public exists with a consequent divergence of trade, the typical elements of the tort are present.

It must be remembered that the courts in these cases are confronted with two problems:

1. To preserve competition;
2. To prevent unfairness.

2 See Handler, Cases and Materials on Trade Regulation (1937) 540.
3 Unfair competition "... has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own, to misappropriation of what equitably belongs to a competitor." Hughes, C.J., in Schechter Poultry Corp. v. United States, 295 U.S. 495, 532, 55 Sup. Ct. 83, 79 L.Ed. 1570 (1934).
4 See Handler, Unfair Competition, (1936) 21 Iowa L. Rev. 175.
In balancing these conflicting interests, the courts, except perhaps in the case of trade-marks, are cautious in the exercise of their broad restrictive powers. Mr. Justice Brandeis has best expressed the unfairness which the courts will seek out and prevent in order to preserve competition. In the famous case of International New Service v. Associated Press wherein Mr. Justice Holmes and he wrote separate dissenting opinions, Mr. Justice Brandeis said:

"The unfairness in competition which hitherto has been recognized by the law as basis for relief lay in the manner or means of conducting the business; and the manner or means held legally unfair involves either fraud or force or the doing of acts otherwise prohibited by law. In the 'passing off' cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. . . . In the other cases, the diversion of trade was affected through physical or moral coercion, or by inducing breaches of contract or of trust or by enticing away employees. In some others, called cases of simulated competition, relief was granted because defendant's purpose was unlawful; namely, not competition but deliberate and wanton destruction of plaintiff's business."

Illustrative of how the law of unfair competition applied to radio broadcast programs are the "Aunt Jemima" and "Old Maestro" cases. In the latter case, a Federal District Court restrained the designation by the defendant brewing company of its malt brew as "Olde Maestro" since that name, used by Ben Bernie, the orchestra conductor and leading performer of plaintiff's broadcast

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5 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1918).
7 Gardella v. Log Cabin Products Co., Inc., et al., 89 F.(2d) 891 (C.C.A. 2d, 1937).
advertising program, had acquired in the public mind such an intimate connection with the plaintiff's malt brew that its use as the name of the defendant's brew would cause confusion or deception of the public. In the "Aunt Jemima" case, a judgment based upon a large verdict for the plaintiff was reversed because she had failed to prove that the impersonation of the plaintiff and the use of her professional name resulted in the confusion or deception of the public.

In Pittsburgh Athletic Company, et al. v. KQV Broadcasting Company, an injunction was issued to restrain the unauthorized broadcast of play-by-play descriptions of professional baseball games on the ground that such broadcasts competed unfairly with the plaintiffs' sanctioned broadcasts of the identical news. The exercise of equity jurisdiction in this instance was predicated on the protection of a property right in the news value of the baseball games which the defendant station was found to have appropriated by broadcasting descriptions thereof from a vantage point outside of the baseball park. Indubitably, both broadcasts were duplicate descriptions of the identical action and were transmitted in the same area at precisely the same time. The defendant was unquestionably causing confusion or deception of the listening public and consequently diverting the plaintiffs' means of communicating their broadcast advertisements. The United States District Court rightly held that the fact that the defendant's broadcast was a sustaining program did not in any way diminish the injury to the plaintiffs. The Court said:

9 Ibid.

A motion for a temporary injunction has been denied on the ground it was difficult to determine without a trial the extent to which the use of a name caused confusion with another's use of the same name. Jewish Court of Arbitration v. Jewish Radio Service, Inc., N.Y.L.J., August 9th, 1938, p. 343, col. 3.  

10a No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938).
Defendant contends it is not unfairly competing with any of the plaintiffs because it obtains no compensation from a sponsor or otherwise from its baseball broadcasts. It concedes, however, that KQV seeks by its broadcast of news of baseball games to cultivate the good will of the public for its radio station. The fact that no revenue is obtained directly from the broadcast is not controlling, as these broadcasts are undoubtedly designed to aid in obtaining advertising business.

Another illustrative case is that of Waring v. WDAS Broadcasting Station, Inc., which involved a situation created by the program operations of a broadcast station, which were challenged by a performing artist on the ground inter alia of unfair competition. An injunction was granted restraining the broadcast of the artist’s phonograph records which had not been manufactured for broadcast purposes. The Pennsylvania Supreme Court found that the property right of the artist in his performance was being unfairly appropriated.


A trade-mark is a mark which identifies a salable article of merchandise or service as to origin or ownership. It has been compared to the seller or maker’s signature. A trade-mark may be a name, symbol, figure, form, device, word or combination of words affixed to his goods by the seller or manufacturer to distinguish them from those sold by others. A valid trade-mark may not be used by another.

15 Ibid.
Mr. Hopkins defines a trade name as follows: 16

"A trade name is a word or phrase by which a business enterprise or business location, or specific articles of merchandise from a specific source are known to the public, and which when applied to merchandise is a generic or descriptive term, and hence not susceptible of appropriation as a technical trade-mark."

§ 515. Same: Distinction Between Trade-Marks and Trade Names.

To protect his interest in a trade-mark, the owner may maintain an action for trade-mark infringement. Legal protection for the interference with the interest in a trade name is found in the action for unfair competition. 17

Judge Woolley of the Third Circuit Court of Appeals in Barton v. Rex-Oil Co. 18 summarized the distinctions between trade-marks and trade names as follows:

"It is essential that a trade-mark possess two characteristics: That either in meaning or association the mark point distinctively to the origin or ownership of the commercial article, and that it be of such a nature as to permit of an exclusive appropriation by one person. Nims on Unfair Business Competition, Sec. 2. But a descriptive name, though not originally capable of exclusive appropriation, may, by use and association with a commodity, obtain a secondary signification denoting that goods bearing it come from one source, and thus a superior right to its use may be acquired by the person who first adopted it. Inasmuch as no absolute ownership in or exclusive right to use such name as a trade-mark is vested in anyone, the rights obtained by the first user are not infringed by the mere use of such mark by a competitor even though such use be in association with competing goods. If this were the whole law of the subject the matter would be easy. But just here arises another body of law, that of unfair competition. The law governing

17 Handler, Unfair Competition, (1936) 21 Iowa L. Rev. 175, 184.
18 2 F.(2d) 402 (C.C.A. 3d, 1924).
trade-marks is but a branch of the law regulating trade competition. The policy of this law is to foster, not to hamper, competition, and it permits a monopoly in the use of a trade-mark only when it has become the absolute and exclusive property of the first user—good against the world. A merely descriptive name can never become such property, Warner & Co. v. Lilly & Co., 265 U. S. 526; and the utmost the first user of such a name after it has acquired a secondary meaning can insist upon is that no one shall use it against him in an unfair way. Accordingly, the second user becomes an infringer only when he makes an unfair use of the mark. Not any competition, but only unfair competition on the part of such user is actionable.

Today it is clear that a trade name is more correctly denominated a non-technical trade-mark. Mr. Handler in his work on trade regulation uses the term as follows:

"... a trade name signifies a term which is incapable of exclusive appropriation as a trade-mark, but, which is employed as a mark, and which serves the same purpose as a mark. The term "non-technical mark" is perhaps a more apt expression."

A trade-mark is a technical mark in that, unlike a trade name, certain technical requirements must be met before relief against infringement will be granted. One important requirement is that the trade-mark must be affixed to the commodity with which the mark is associated. Likewise, the infringing mark must be affixed to the counterfeit

19 "The word 'tradename' as used in the decisions has two different meanings. Standing alone, and separate from the word 'trademark' it includes all business names; while in the expression 'trademarks and tradenames' it means all business names which are not technical trademarks." 20 HANDLER, op. cit. supra n. 2, 553.

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article. Affixation by either the complainant or the infringer is not required in the action of unfair competition.

§ 516. Same: Functions and Purposes of Trade-Marks and Trade Names.

While the traditional view is that the purpose of a mark is to indicate origin or ownership, the modern view, in accord with the increase in the advertising of "branded" commodities by radio broadcasting, is that of identification and stimulation of further buying of the marked item. In fact, a significant trend of broadcast advertising is the attempt to create in the mind of the listener a belief that the "x" brand is the only one he should buy. Emphasis is laid upon the mark rather than upon the quality or worth of the actual product. The mark is portrayed by the broadcast salesman as embodying all the virtues of the product and as an assurance of satisfaction, present and future. A cursory survey of broadcast commercial announcements as transmitted would reveal the great importance placed by the advertiser upon emphasis of his mark upon the mind of the listener, whether the means be subtle or blatant.

That the true function of a mark, whether it be a slogan, coined word or other symbol, is to identify the associated product as worthwhile and satisfactory and to stimulate buying, has been recognized by the courts. In Northam


24 Handler, op. cit. supra n 17, 183.


26 Shechter, Rational Basis of Trade Mark Protection, (1927) 40 Harv. L. Rev. 813.

27 See id. at 818.
Warren Co. v. Universal Cosmetic Co., Judge Page said: 28

"A trade-mark is but a species of advertising, its purpose being to fix the identity of the article and the name of the producer in the minds of the people who see the advertisement, so that they may afterward use the knowledge themselves and carry it to others having like desires and needs for such article."

§ 517. Same: Basis of Protection of Broadcast Advertisers' Marks.

As a consequence of the important functions of a trade-mark or trade name in a broadcast program, the radio advertiser has a substantial interest therein which the law will protect. This interest is for convenience denominated a property interest, which will be protected against deceitful interference. 29 This is more definite in the case of technical trade-marks, 30 where the property lies in the exclusive right of the user to designate his product distinctively and to reap the advantages which he has acquired by the investment of his time, labor and capital to build

28 18 F.(2d) 774 (C.C.A. 7th, 1924); Shechter, op. cit. supra n. 26, 813 et seq.; Handler, op. cit. supra n. 2, 555.

29 "No doubt it is convenient for many purposes to treat a trade-mark as property; yet we shall never, I think, keep clear in our ideas on this subject, unless we remember that relief always depends upon the idea that no man shall be allowed to mislead people into supposing that his goods are the plaintiff's, and that there can be no right or remedy until the plaintiff can show that at least presumptively this will result." L. Hand, J., in Bayer Co. Inc. v. United Drug Co., 272 Fed. 505 (S.D.N.Y., 1921).

30 Sharpless Co. v. Lawrence, 213 Fed. 423 (C.C.A. 3d, 1914). "A technical trademark being treated as property, infringement thereof carries with it the presumption of fraud; but where no exclusive right to the use of a trademark exists, fraud—unfair competition—in the use of the mark by another must be proved ... and when proved, the utmost that the courts can do for the relief of the first user is to enjoin not the use of trade mark but the unfair method of the use." Woolley, J., in Barton v. Rex-Oil Co., 2 F.(2d) 402 (C.C.A. 3d, 1924).
up a market for his product predicated upon good will. It is not necessary that the trade-mark shall have been developed by means of broadcast advertising.

The protection of trade-marks and trade names is based not only on this property interest but also on the unlawful divergence of trade as a result of the deceitful imitation of the broadcast advertiser’s mark.31 The purpose of such protection is to avoid confusion or deception of the public.32

§ 518. Same: Technical Trade-Marks in Particular.

The protection of technical trade-marks exploited by radio broadcasting is a problem distinct from that which arises in the use of a reminiscent expression such as a theme song, slogan or other signature used to identify the sponsor’s program. Infringement may be committed in either case by deceitful imitation with or without the use of radio broadcast facilities.

No protection under the trade-mark registration statutes or the common law of technical trade-marks may be had against an infringement of a reminiscent expression not affixed to a product.

Program keys are not registerable under the Trade-Mark Act of 190533 as amended in 1920,34 inasmuch as the Act consistently requires that the mark be appropriated and affixed to goods which are included in one of many classes of merchandise.35 Furthermore, even if registration of a broadcast mark were possible, the lapse of time necessary in securing such protection would be so long as to make the effort worthless because of the very nature of the situation.

31 See comments of Hicks, J., on the term “good will” in Premier-Pabst Corp. v. Elm City Brewing Co., 9 F.Supp. 754 (D. Conn., 1935).
35 Ibid., § 81.
A broadcast mark or program key can gain a wide circulation in a comparatively brief period of time because of large audiences and the novelty and repetition of the mark. To meet this problem of inadequate protection as trade-marks, limited private systems of registration have developed to evidence priority of use. Such systems are designed to aid in securing protection against unfair competition.

Under the common law, a broadcast trade-mark is not entitled to protection as a technical trade-mark since there is no affixation, which is a necessary prerequisite to legal trade-mark protection. There is no affixation by mere use of a symbol in broadcast advertisements, be it a word, combination of words, or other form now transmissible by radio. Under the common law and the registration statutes, there must be an actual affixation of the mark to the commodity.

§ 519. Same: Exploitation by Broadcast Advertising of Trade-Mark Affixed to Sponsor's Product.

Where the trade-mark is of the usual physical form and use but on the whole is largely exploited by radio broadcasting, the acts of the defendant must be examined to ascertain whether or not he has attached the infringing mark to his product.

36 (1934 N.S.) 29 BULL., U. S. TR. MARK ASSN. 34.

"We receive from members from time to time new radio trademarks adopted by them as titles of radio broadcast features. In the absence of any statute defining the rights of the user of a radio trade mark, it has been deemed advisable to publish such claims, which publication and certificate of filing are evidence both of claim to the mark and of priority of use."

See Fawcett, Protecting the Trade Marks Fostered by Radio, 29 BULL., supra, 148. The trade publications, VARIETY and BILLBOARD also provide such registration facilities.

37 See §§ 514, 515, 516 supra and 519 infra.


39 See §§ 514, 515, 516 supra, and 519 infra.
Consideration of these circumstances is necessary because of the rising tide of branded products which are exploited solely or principally by broadcast advertising.

Infringement unquestionably occurs in a defendant's simulating and attaching to his product the mark of a radio advertiser. So long as there is affixation and deceitful user, the typical case of restrainable infringement is presented. The fact that the mark is exploited by means of radio advertising is immaterial. The appropriation of the mark is conclusive. It must be noted that even an innocent infringement will be restrained in the case of a technical trade-mark.40

There are apparently only two cases in which analogous situations have been passed upon by the courts. In one action, the "Amos 'n Andy" case,41 the defendant sought to register this combination of words in an arbitrary form as its technical trade-mark. The plaintiffs were radio performers who used these names in their broadcast dramatizations. Under these names the plaintiffs had built up a great reputation and a large following among the listening public. The plaintiffs had also been accustomed to license the use of these names in combination as trade-marks of certain manufacturers. An injunction was issued to restrain defendant's attempt at registration. The result would have been the same where the defendant had actually infringed, as in the "March of Time" case.42

In the "March of Time" case,43 the defendant produced and distributed recordings of current news events, under the name "Voice of Time". Time, Inc., publishers of a

40 This is because the wrongful or fraudulent intent is presumed. Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U.S. 665, 21 Sup. Ct. 270, 45 L.Ed. 365 (1901).

41 Correll and Gosden (Amos and Andy) v. Feldman, 156 M.D. 777, 22 T.M. Rep. 80 (1931); Fawcett, op. cit. supra n. 36.


43 Ibid.
weekly news magazine, claimed that this was unfair trading in competition with its broadcast program entitled "March of Time". An injunction was issued by the United States District Court restraining the defendant from such competition.

While these two actions do not strictly involve infringement of technical trade-marks, the decisions reveal the attitude of the courts in new problems of trade-mark law and the judicial willingness to meet such unprecedented cases in a manner which will protect the broadcast advertiser in preserving the good will which he has created by means of his programs.

Where an infringing mark is attached to the infringer's product, and the genuine mark has been largely exploited by broadcasting, some little aid is available to the injured party under the registration statute.\(^44\) It must be remembered that registration does not make the registered mark a technical trade-mark, nor is registration essential to the validity of a trade-mark.\(^45\) While the registration statute

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\(^44\) 33 STAT. 724 (1905), 15 U.S. C.A. § 81, et seq. (1936). See Lambert, Inc. v. O'Connor, 86 F.(2d) 980 (C.C.P.A., 1936). In this case the applicant sought to register the mark "Voo" for his depilatory product. Marion Lambert, Inc. had registered the mark "Dew" on a non-identical product. The Commission of Patents affirmed the decision of the Examiner who had granted the application. On appeal to the Court of Customs and Patent Appeals, the Examiner was reversed and the application denied. The Court said, at p. 980:

"The marks are very similar in sound. 'Dew' is pronounced 'Du' which is practically the equivalent of 'Doo'. The parts of the words which are given greatest stress in pronunciation are almost identical in sound. The initial letter of each word is a consonant and has a similar sound. Both words contain three letters."

The Court further said, at p. 981:

"Similarity in the sound of the names under which goods are sold is becoming a more important consideration in the decision of cases of this kind as the effective advertisement of goods becomes increasingly dependent upon radio facilities."

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does not confer any new substantive rights and while the essential changes resulting therefrom are procedural only, there are certain advantages to be gained by registration. Some of these advantages are as follows:

1. The Federal courts’ jurisdiction may be invoked without regard to the usual requirement of diversity of citizenship and when the sum in dispute is less than $3,000.00.

2. The registration of a trade-mark under the provisions of the statute is prima facie evidence of the ownership of the mark.

3. In an action for damages for infringement of a registered mark, the court may allow recovery of treble damages.

4. A test is made of the validity of the mark sought to be registered by Patent Office proceedings.

Where there has been simulation in broadcast advertising, but not by affixation to the spurious product, of a technical trade-mark exploited largely by radio broadcasting, there is no technical infringement and the usual broad restraining order cannot be had. Because of the technical requirements of protection against infringement in such a case, it is advisable to frame the bill of complaint as in an action for unfair competition to assure relief. Actually, in all cases of trade-mark infringement, such forms of pleading are preferable to avoid the pitfalls of technical trade-mark actions. It is not suggested, however, that a count for infringement of a technical trade-mark should be eliminated.

46 Ibid.
47 Ibid.
50 Ibid.
51 Ibid., § 81, et seq.
Chapter XXXIII.

PROTECTION OF TRADE NAMES USED IN BROADCAST PROGRAMS.

§ 520. Basis of Protection of Trade Names.

The protection of non-technical trade-marks, professional names, program keys, titles and business names, which are used in broadcasting, is based upon the doctrine of secondary meaning. This doctrine has to do with words or names which, in their primary sense or definition, are descriptive of the goods or of the place of manufacture or constitute the maker’s or seller’s name and are not capable of exclusive appropriation as a technical trade-mark. Such words or names may, nevertheless, by long use in connection with the goods or business of a particular manufacturer or seller come to be understood as designating the goods or business of that manufacturer or seller.¹


The doctrine of secondary meaning "contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing pub-
In their primary sense, such words are *publici juris*, so that all the world may use them. However, this freedom of use is restricted in that no one may use these words in such manner or form as falsely and deceitfully to convey the secondary meaning and thereby confuse or deceive the buying or listening public. Such an act would constitute unfair competition as directly tending to pass off to the public the goods of one man for those of another.\(^2\)

lic, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them his trade-marks. So it was said that the word had come to have a secondary meaning, although this phrase 'secondary meaning' seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning." Denison, J. in *G. & C. Merriam Co. v. Saalfield*, 198 Fed. 369 (C.C.A. 6th, 1912).

\(^2\) "'It makes no difference that dealers in the article are not deceived.' They are informed and usually know what they are buying. The law concerns itself with the casual purchaser who knows the commodity only by its name. . . . The effect in deceiving the public and in taking the complainant's trade was just as certain as though the deception had been more direct." Woolley, J., in *Barton v. Rex-Oil Co.*, 2 F.(2d) 402 (C.C.A. 3d, 1924).

In an action at law for unfair competition the plaintiff must prove actual confusion or deception of the public. *Gardella v. Log Cabin Products Co.*, 89 F.(2d) 891 (C.C.A. 2d, 1937). Where actual confusion or deception of the public is shown, the award of damages is confined to the losses actually suffered by the injured plaintiff as a result of the wrongful acts of unfair competition. *Downes v. Culbertson*, 153 Misc. 14, 275 N.Y.Sup. 233 (1934, Nims, Referee); *Underhill v. Schenck*, 238 N.Y. 7, 143 N.E. 773 (1924).

Where the action is in equity for an injunction to restrain the alleged acts of unfair competition, the question of the award of damages aside, a restraining order will issue upon proof of a probability of confusion or deception of the public. *Philadelphia Storage Battery Co. v. Mindlin*, 163 Misc. 52, 296 N.Y.Sup. 176 (Sup. Ct. Spec. Term, 1937).


The plaintiff need not prove actual confusion, deception or bad faith to establish a basis for injunctive relief. *New York World's
The perception of this doctrine of secondary meaning is the genesis of the existing law of unfair competition as distinguished from infringements of technical trade-marks which properly belong within the scope of a larger body of law, trade regulation.

The doctrine of secondary meaning has made an entrance into the field of radio broadcasting. The law of unfair competition protects trade names used in radio broadcasting. The courts seem to have had very little difficulty in recognizing that broadcast trade names deserve this protection. "Amos and Andy"; "Old Maestro"; and "March of Time" have all been protected against unfair simulation. These are distinctly radio trade names, exploited and enhanced by radio broadcasting by means of which they have acquired their secondary meaning.

§ 521. Test of Unfair Competition in Simulation of Broadcast Trade Names.

Radio broadcasting has introduced a new element in trade name simulation by the use of sound or phonetic inflection in addition to the graphic adoption or simulation of a broadcast trade name.

Since the basis of the protection of trade names is the


8 E.g., in Premier-Pabst Corp. v. Elm City Brewing Co., 9 F.Supp. 754 (D.C. Conn., 1935), the defendant adopted as a mark for its bottled malt brew the term, "Old Maestro", putting it on the label and advertising its malt brew as "Olde Maestro," which is a radio trade name, exploited and enhanced by the plaintiff in its radio advertising.
avoidance of confusion of the buying or listening public, the test of the infringement of a broadcast trade name is:  

"Whether there is an infringement of a trademark does not depend upon the use of identical words, nor on the question as to whether they are so similar that a person looking at one would be deceived into the belief that it was the other; but it is sufficient if one adopts a trade-name or a trademark so like another in form, spelling, or sound that one with a not very definite recollection as to the real trademark, is likely to become confused or misled."

This test may be translated into a form especially applicable to radio broadcasting. Whether there is an infringement of a broadcast trade name is not dependent on the question as to whether the infringing name is so similar that a listener would be deceived into the belief that it was the other. It is sufficient to constitute unfair competition in the use of a broadcast trade name for one to adopt a radio trade name so similar to another in sound or phonetic pronunciation or spelling, that a listener who has not a very definite recollection as to the real trade name is likely to become confused or misled.  

The application of this test is essentially not difficult. In Premier-Pabst Corp. v. Elm City Brewing Co., the plaintiff presented a broadcast advertising program in which its leading performer, Ben Bernie, assumed the nick-name of "Old Maestro". Plaintiff spent large sums

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An injunction will issue to restrain a partial imitation of a trade name, where such imitation is calculated and plainly intended to mislead the public. Amoskeag Mfg. Co. v. Spear & Ripley, 4 N.Y. Super. Ct. 599, 7 N.Y. Leg. Obs. 301 (1849).  
of money in establishing an intimate connection between this nick-name and its malt brew product. Defendant then commenced the manufacture of a malt brew and labelled it "Olde Maestro". The use of this nick-name as a mark by the defendant was restrained as unfair competition because it tended to confuse or deceive the public. This is clearly a correct application of the test of infringement of a broadcast trade name. "Olde Maestro" is so similar to "Old Maestro", there being in fact no difference in pronunciation and only a mere addition of one letter in spelling, that the ordinary listener, who had a hazy recollection of the real trade name, would be misled into believing that this was the product which Ben Bernie, the "Old Maestro", advertised in his radio broadcast performances.

§ 522. Professional Names of Radio Artists May Be Protected as Trade Names.

Many broadcast performers have, over a period of time, built up a following of listeners who accept their names as meaning something of value to them in the way of entertainment, amusement or instruction. These artists may restrain efforts to use their names or trade names by others attempting to trade on their reputation.

A professional name has the status of a trade name, where within the area of the artist's reputation and activities, his assumed name has acquired a secondary meaning. This professional name carries with it the good will, opinion and receptivity of the public towards the artist. Since his professional name possesses secondary meaning, the artist is entitled to protection against an effort to pass off another artist's talents as those of the owner of the original name. 12 This principle was established in other entertainment fields before radio broadcasting became important. 13


It is important, to avoid con-
In this connection, it is necessary to determine whether the complaint states a cause of action based on "passing off" in the use by another of the same professional name as well as the same general type or style of performance tantamount to an appropriation by means of an impersonation. If it be so determined, the complaint should be sustained as pleading a cause of action in unfair competition. This is one of the implications of the "Aunt Jemima" case. The impersonator has no right to attempt to profit by the reputation of the original user of the name by appropriating his name and imitating his singing or general form of entertainment so as to confuse or deceive the listening public or tend to do so. In the "Aunt Jemima" fusion, to consider the question of the property characteristics of the professional name, whether assumed or real, or other identifying phrases accompanying the professional name, such as "John Doe and his Do Re Mi Boys." The courts have distinguished between the good will of a firm or business dependent on the personal qualities and efforts of its members and that of a firm or business relying primarily upon the prestige of its name for the custom and trade of the public. Masters v. Brooks, 132 App. Div. 874, 117 N.Y.Supp. 585 (1909). Whatever good will attaches to the professional name is too intangible to be capable of sale. Louis Baily v. Adolfo Betti, 241 N.Y. 28, 148 N.E. 776 (1925) ("Flonzaley Quartet"); Coffey v. Metro-Goldwyn-Mayer Corp., 160 Misc. 186, 289 N.Y.Supp. 882 (1936); In re Caldwell's Estate, 176 N.Y.Supp. 425 (1919); In re Lesserman's Estate, 260 N.Y.Supp. 188 (1932). The reason for this rule is that the good will in such a case depends for its existence upon the personal skill and the professional qualities of the one to whom it is attached.

In the case where the firm or business depends upon the prestige of its name for the custom and trade of the public, such good will attaches to the name of the firm or business and may be sold or devised. Masters v. Brooks, 132 App. Div. 874, 117 N.Y.Supp. 585 (1909).

1489 F.(2d) 891 (C.C.A. 2d, 1937).

case the Court aptly described this as the "pirating of such secondary meaning" as the artist has attached to his professional name.

Appropriation by means of impersonation without more is not sufficient to sustain a cause of action in unfair competition. Just as one has no rights to be protected in a system or way of doing business, so an artist will not be protected in his style, method or type of performance alone. Such an appropriation is permissible. Where, however, there is an appropriation by way of impersonation plus the use of the complainant's professional name, recovery should be allowed in the absence of admitted mimicry. Where an unauthorized appropriation is made of the actual performance of the artist by means of a reproduction thereof, such appropriation will be restrained. In such cases, there is an actual passing off even where no deception occurs.

Passing off is not so clear in the case of the use of another's professional name without more. Even though the element of passing off is absent, recovery should be had on the ground that it confuses or misleads the public. There is such a high degree of integration and relation among the radio, theatrical and motion picture industries that use of one's professional name in any field of entertainment would undoubtedly be likely to cause confusion of the public. Consequently, appropriation of an artist's professional name should be restrained even where there is no attempt to impersonate.

This rule is to be modified where the appropriator has a legal right to use the professional name. Such a case is the "Aunt Jemima" case, where the alleged appropriator derived a legal right to use the name from the ownership of Gardella v. Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937). See §§ 533, 534, 535, infra.

But see §§ 536, 537, infra.

§ 523 Protection of Trade Names Used in Programs

of the name "Aunt Jemima" as a trade-mark. In such a situation, the probable confusion of the public must be balanced against the legal right of the alleged appropriator to use the name in advertising the trade-marked product. A proper balance is achieved by allowing the alleged appropriator to use the name in such a manner as to identify the name with the product, but not so as, in effect, to trade upon the reputation and good will of the owner of the professional name. Where the latter result occurs, such use of the professional name is unfair and should be restrained.

§ 523. Same: Injury to Professional Reputation.

There are cases involving appropriation of a professional name in which recovery should be allowed on the ground that the acts in connection with the appropriation amount to a defamation of or injury to the performer's business reputation. In such a case, confusion or deception of the public is also a necessary element of the cause of action.

There is no question that a legal remedy may be had for the conventional defamation of an artist's professional reputation. Just as a direct statement that the artist as a performer is inferior would be defamatory, so would a deceptive imitation by way of impersonation amount to a tort. If the wrongdoing artist, in connection with his deceptive imitation, either appropriated the professional name of the maligned artist or so identified his performance that the public would believe that the act was that of the maligned artist, he is guilty of unfair competition. The appropriator is liable for unfair competition where his deceptive imitation by way of impersonation is or may be

21 Ibid.
23 Ibid.
considered an inferior performance or in some way adversely reflects upon the owner of the professional name in his art.25

Appropriation of an artist’s professional name may be committed by persons other than artists. In such an event, the appropriation may also be restrained as unfair business practice, even though the appropriator is in no sense a competitor. In this connection the words of the District Court in Uproar Co. v. National Broadcasting Co.26 are in point, even though the decision of the case was squarely placed on another ground by the higher court.27 Plaintiff used the first name of Graham McNamee, a prominent broadcast announcer who performed on an important broadcast program headed by Ed Wynn. The name “Graham” and that of Wynn were used in the publication of a series of plaintiff’s booklets based on the “uproars”, a type of comedy scene enacted by Wynn and McNamee in the broadcast program. The District Court on a cross bill to restrain such use of “Graham” issued an injunction on the ground of unfair trade practices. The Court said:28

“While plaintiff’s undertaking is not, strictly speaking, unfair competition, in the sense that the plaintiff is attempting to palm off goods for the goods of a competitor, it comes within the rule which the courts have frequently applied in cases of unfair business practices regardless of the element of competition. . . .

“While the plaintiff is not a competitor of either of the defendants, logically the same rule would apply to one misappropriating to his own profit, and to the disadvantage of the other, rights which the latter had acquired fairly and at substantial costs.”


26 Ibid.

27 81 F.(2d) 373 (C.C.A. 1st, 1936).

The attachment to a product, without permission, of an artist's professional name is an unfair trade practice as well as a violation of the right of privacy because it is an effort to trade upon the reputation or good will connected with that name. Confusion or deception of the public is likely to result in that a connection may be assumed between the artist and the product or its manufacturer. Furthermore, such use may result in injury to the reputation of the artist in his calling, since the product may be inferior or unworthy.

In the "Amos and Andy" case, registration was refused to a work-shirt manufacturer of a trade-mark composed of these professional names. The plaintiffs had formed a corporation using their professional names in the corporate title and had transacted business thereunder. The action really sought protection of the corporate name. In this aspect also, the case represents a landmark in that fanciful radio trade names were protected in their use as a corporate name.

The "March of Time" case involved a situation similar to the "Uproar" case. In the former suit, the defendant affixed the name to phonograph records of

28a See Chapter XXVIII. supra.
29 In Churchill Downs, Inc. v. Churchill Downs Distilling Co., 262 Ky. 567, 90 S.W. 1041 (1936), the plaintiff sued to restrain the use of the name "Churchill Downs" in labelling whiskies, although there was no competition, since plaintiff operated a horse race track. The Court issued an injunction, saying: "Where one passes off his goods, his services or his business as the goods, services or business of another, equity will intervene to protect the good will and business reputation of the latter from an injury liable to be caused thereby. . . . It was sufficient that its (defendant's) use of the name 'Churchill Downs' was likely to produce deception."
rent events. "Voice of Time" was the fanciful name of an artist on plaintiff's broadcast advertising program. The plaintiff had spent much money and effort to establish this name as distinctive and as a mark of its program. The use of "Voice of Time" on defendant's phonograph records was restrained.

§ 524. Use of Real Name of Artist by Another as Unfair Competition.

Many broadcast artists use their real names in their professional activities. Obviously, the artist's real name, so used, may acquire secondary meaning in the same manner as pseudonymous professional names. In effect, the real name of the artist becomes more than an identification mark; it is the carrier to the attention of the public of his professional reputation, good will and ability. As such, real names will be protected similarly and for the same reasons as pseudonyms used as professional names.

Since real names may be professional names, only one problem is so novel as to require discussion. Where there are two artists, both owning and using the same real name, or, where one artist has the same real name as the pseudonym of another, the interesting question arises as to what rights one has in his own name. The courts have differed as to whether one has an absolute right in the use of one's name. Some have urged that it was absolute.34

34 "Therefore the proposition goes to this length; that if one man is in business and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business he must discard his own name. The proposition seems to me so monstrous that the statement of it carries its own refutation. Therefore upon principle, I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on—that statement being the simple truth—and he does nothing more with regard to the respective names, he is doing no wrong. He is doing what he has an absolute right by the law of England to do, and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." Tur-


Others have held that mere similarity of name in the same business by a late entrant will not be restrained.\textsuperscript{35}

The modern rule in the premises, and on which most courts agree, is, as stated by Mr. Justice Holmes:\textsuperscript{36} 

"... when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake."

Under present law, the use of a broadcast artist's real name in his profession is qualified by the rights of a prior user, so as to prevent confusion or deception of the public.\textsuperscript{37} The subsequent user, even though rightful, may not be such as to trade upon the good will or reputation

ton v. Turton [1886], 42 Ch.D. 128, 136.

"The right of a man to use his own name in his own business is part of the natural and inalienable rights guaranteed by the very first clause of our Constitution, without which the right to acquire, possess and protect property would be of little worth." Hilton v. Hilton, 89 N.J.Eq. 182, 183, 104 Atl. 375 (1918).

\textsuperscript{35} Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 140, 25 Sup. Ct. 609, 49 L.Ed. 972 (1905).


"While it is true that every man has a right to use his name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business, nor to commit a fraud upon his neighbor, nor a trespass upon his neighbor's rights or property; and, while it is true that every man has a right to use white paper, it also is true he has no right to use it for making counterfeit money, nor to commit a forgery. It might as well be set up, in defense of a highwayman that, because the Constitution secures to every man the right to bear arms he has a constitutional right to rob his victim at the muzzle of a rifle or revolver." Garrett v. Garrett & Co., 78 Fed. 472, 478 (C.C.A. 6th, 1896).

of the radio artist who has made prior use of the name.

The judicial restraint placed upon the competitive use of a similar name must be reasonable and so phrased as to save the rights of the subsequent user. In *L. E. Waterman Co. v. Modern Pen Co.*, the defendant was required to state that it was not connected with the plaintiff in order to be permitted to use the same name on its fountain pens, which name it had a legal right to use as selling agent of "A. A. Waterman & Co.". This, however, is a very ineffective method and particularly insofar as broadcasting is concerned.

A stricter restraint on the use of the real name is exercised in either of two cases:

1. Where there is a dishonest attempt to appropriate the business or good will of the prior user.
2. Where the qualified injunction is ineffective to secure adequate protection of the prior user.

The modern trend of decrees in unfair competition is to overcome their ineffectiveness. This can best be done by imposing upon the subsequent user the burden of avoiding confusion of the public. This restriction should not be relaxed even where the later entrant uses his real name and should be extended where necessary even to an absolute prohibition against the use of his own name.

41 *Barton v. Rex-Oil Co.*, 29 F. (2d) 474 (C.C.A. 3d, 1928).
Chapter XXXIV.

PROTECTION OF TITLES OF BROADCAST PROGRAMS.

§ 525. Protection of Titles or Other Reminiscent Expressions Associated with Radio Broadcast Programs.

The practice in radio broadcasting is to designate the broadcast programs by distinctive words or combinations of words as titles. Programs may also be distinguished by characteristic or identifying theme music performed at some time during the broadcast. Titles or theme music or both are attached to both commercial or sustaining programs. The program title is of value to the producer or other owner of the program in that it serves as a means of associating the production in the minds of the listening public as a broadcast presentation with specific and distinctive characteristics. The peculiar value of the program title or other identifying designation is in no way dimin-
lished by the fact that the program is not commercially sponsored.

Herein we are not concerned with the law of copyright as applied to musical compositions or with the protection of the program continuity. This chapter deals only with expressions designed to attract the attention of the radio audience or to refresh the public's recollection by the association of such expressions with the program and its sponsor or cast. These may be called reminiscent expressions.

Titles or theme music may be created and attached to broadcast programs by either the broadcast station, the program producer or the advertiser. The question is whether or not the simulation or use by another of the program title would be an act of unfair competition.

§ 526. Program Titles Containing Trade-Mark or Trade Name of Sponsor Protected.

The titles of broadcast programs may contain the trade name or trade-mark, even the corporate name, of the sponsor. In practice, no difference exists between such a title and one not so contrived, except in degree. A program title of this type already possesses secondary meaning as a trade name which should be protected in an action for unfair competition. Moreover, the owner of a mark may use it in any way to advertise his product. Consequently, the protection of a program title containing a trade-mark or trade name against simulation, imitation or appropriation is unquestionable and rests on firm principles. Such a title will be protected to the extent that the trade-mark or trade name is secured.

§ 527. Program Title Possessing Secondary Meaning Is Protected Against Unauthorized Use by Another for General Purposes of Entertainment.

Program titles now considered herein are other than those which include the sponsor's trade-mark or trade name.

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1 See §§ 520, 521 supra. Law of Motion Pictures (1917)
2 Frohlich and Schwartz, § 121, et seq.
Protection of titles of radio broadcast programs is based on the law of unfair competition, as are titles of motion pictures and plays. The copyright upon a literary or other work does not secure its title against infringement; nor is the Trade-Mark Registration Act available to insure the exclusive right to a program title.

Not every title will be protected against infringement. There are certain requirements which must be met. The word or combination of words used as a broadcast program title must constitute fanciful or arbitrary selections. The title ordinarily must not be generic, or descriptive of the program, its qualities or characteristics. Where descriptive words are used in the title, there must have been such use of the title as to give it a secondary meaning in the public's identification thereof with the particular broadcast program so designated.


7 Selchow v. Baker, 93 N.Y. 59 (1883); Welteome v. Thompson, [1904] 1 Ch. 736 (Eng.).

No producer of a broadcast program can acquire an exclusive right in a descriptive title, such as "play", "concert", "hour", "comedy" or "musical". Such words describe the program. It would be a severe interference with the rights of the public to allow a monopoly therein.

Essential to the securing of a monopoly in a title are prior appropriation and user. It seems that the innocent production of a program within a short time after the first rendition of another program with the same title, would not be a restrainable infringement. It has been suggested that it would be an infringement, no matter how brief the intervening period, where the second program was broadcast with knowledge of the previous rendition under the same title. While time is important, it is submitted that if it be found that a title has acquired secondary meaning and the alleged infringement confuses or deceives the listening public, relief should be granted irrespective of the lack of knowledge of the infringer and of the short lapse of time. It is the reaction of the public which determines secondary meaning, not the length of time of user. However, mere priority of user alone does not necessarily create the secondary meaning.

§ 528. Program Title Protected Against Use in Motion Picture, Play or Novel.

Up to this point the assumption has been that the title infringement has been committed by means of another of a musical composition did not prevent the use of such title in connection with a motion picture where no infringement of the work proper had occurred. The Court further held that no common law recovery could be had, since there was no passing off. Francis, Day & Hunter Ltd. v. 20th Century Fox Corp. Ltd., et al., Court of Appeal, June 13, 1938 (Canada).


11 McIndoo v. Musson Book Co. (1915), 35 Ont. L. Rep. 42 (Can.).

12 See Froehlich & Schwartz, op. cit. supra n. 2, § 121 et seq.

broadcast program. It is necessary now to consider the use in connection with other literary property of the title of a radio broadcast program.

It is settled that a play and a motion picture are in competition, so that the appropriation of the title of one for use with the other would be unfair, provided that the appropriated or simulated title would confuse or mislead the public. Likewise, the use of a title of a dramatic work, broadcast as part of a radio program, for a stage or motion picture play would be restrained.

But would the title of a non-dramatic broadcast program be protected against use for a novel, stage or motion picture play? It is submitted that the title should be so protected where it has acquired a secondary meaning. Moreover, the title of a dramatic broadcast program should be protected against use for a novel, and vice versa.

While on the face of it there is no competition between such different literary properties and, in fact, it has been held obiter that there is no competition between a novel and a dramatic composition, there are sufficient reasons to secure a broadcast program title against its use to denominate other works.

One reason is that broadcast program titles are being used increasingly to identify other types of literary prop-


erty, especially motion pictures.\textsuperscript{17} It would be entirely inequitable to allow the motion picture producer to appropriate the broadcast program title and, by virtue of his prior user in that field, prevent the owner of the broadcast program title from using it in connection with a motion picture adaptation of his program. The motion picture producer would be trading unfairly on the reputation and good will of the broadcast program owner to the confusion of the public.

Moreover, it is now settled that it is not necessary to find direct and actual competition as a basis for injunctive relief against simulation of a trade name.\textsuperscript{18} For example, a jewelry corporation can restrain the use of its name, "'Tiffany'", by a motion picture producing company.\textsuperscript{19} So long as there is a dilution of selling power and an erosion of uniqueness, there is a real injury for which redress should be given.\textsuperscript{20}

The use of a broadcast program title for a motion picture, novel or play will inevitably result in a dilution of its potential selling power in those fields. A valuable property would thus easily be destroyed by the first appropriator. The owner of broadcast literary property should not be subject to squatters' rights without redress.

Moreover, the value of the program title for broadcasting purposes may be injured by an inferior production in another field.\textsuperscript{21} The apparent connection between the

\textsuperscript{17} A broadcast program title has been adopted by a manufacturer for use as a trade-mark. See \textit{Variety}, February 2, 1938, 34.


\textsuperscript{21} Cf. \textit{Red, Hot & Blue}, Inc. v. Minsky's, \textit{N.Y.L.J.}, Dec. 23, 1937. (Plaintiff secured restraining order against defendant burlesque pro-
appropriator of the title and the owner, engendered in the public consciousness by the appropriation, may also embarrass the latter and destroy the program's value as a broadcast presentation.

§ 529. Title of Work in Public Domain May Be Protected Against Unfair Competition.

Since the title in protected only in conjunction with the broadcast program with which it is associated, the title of a work in the public domain is subject to appropriation for use with any literary property. But where the literary property has been copyrighted, which right has expired, the appropriation of the title is subject to the limitation that no confusion of the public may result therefrom. It must be made clear that the new work to which the title is attached is not the same program with which there was formerly an association. This is necessary to avoid confusion and deception of the public.

§ 530. Theme Music Protected Against Unfair Competition.

Theme music may become by prior appropriation so intimately associated with a broadcast program that it will be held to have acquired secondary meaning as an identifying characteristic thereof. Consequently, use of the same theme music on a competing broadcast program as a theme or reminiscent expression so as to pass off the second program as the first is unfair competition. Such use confuses or misleads the listening public, which is the market for which radio broadcast programs compete.
No monopoly will be granted in uncopyrighted theme music, but an effort will be made by the courts to restrict subsequent appropriation to prevent confusion or deception of the public.

This proposition assumes the absence of any question of copyright law. Since the question here is solely between the producers of broadcast programs, the question of copyright is immaterial, except that the remedy for unfair competition can not cut down the exclusive control of the copyright owner over the theme music. Where the copyright owner does not grant the producer an exclusive right to use the copyrighted music as a theme or reminiscent expression, the latter takes the performing license subject to the right of the copyright owner to permit similar use by another producer. Where the license is exclusive, the producer may enforce his rights in unfair competition against the appropriator. But upon expiration of the exclusive license, the same result would follow as in the case of the non-exclusive license. The program producer has a derivative right only and may not restrain the use by another licensee of copyrighted theme music.

However, an action for unfair competition would seem to lie where, upon the expiration of the producer's license to use as a theme a copyrighted composition which contained his trade name, another sought to use the same work, without any change, as a theme song for another program. While the copyright should be protected to the greatest possible extent, the producer has a real interest in his trade name which should be secured. Such protection of the producer of the original program may be accomplished by a qualified injunction which would prevent the use of the trade name in the defendant's program.

Chapter XXXV.

APPROPRIATION OF COMMON LAW INTELLECTUAL PROPERTY: FALSE BROADCAST ADVERTISING.

§ 531. Appropriation of Ideas: There Is No Property in Mere Ideas.

Ideas are concepts of the mind. Their importance in radio broadcasting is self-evident. The search for new program and advertising ideas is active and incessant. What is the protection granted to the originator of an idea? May his idea be appropriated without redress?

In this section, no consideration will be given to copyright or patent protection of an idea, except to state that...
a copyright never protects an idea, only its actual expression. The same is true of a patent, which secures only the means of reducing the idea to practice. In addition, it should be noted that the Copyright Office regulations seem, to some extent, to exclude from copyright registration expressions of ideas which possess too close a connection with commercial exploitation as advertising matter.

At common law, no property exists in a mere idea. There are a few modern cases which represent, perhaps, an inroad upon that ancient doctrine. In the absence of legislation, the common law has devised three methods which constitute certain limited protection of an original idea.

§ 532. Property in Literary Expression of Ideas.

The common law's first device to protect ideas was and is aimed only at the tangible expression thereof, e.g., a radio broadcast script, not the idea contained therein.


§ 532 Appropriation of Intellectual Property

At best, such protection of the idea is only indirect. The common law and the copyright statute recognize a property right in the literary expression of the idea, which is entitled to all the remedies any other intellectual property receives at law. Thus, there exists a property interest in the radio program script.

Common law property in the expression of an idea is very limited, in that immediately upon the publication of the work, it falls into the public domain and is subject to appropriation by anybody. The important question then is whether the author has published the work.

Mere exhibition of the script or continuity is not a publication. Nor is the public representation of a dramatic work a publication. No common law rights are lost by the performance of a musical composition or the exhibition of a motion picture of a work protected at common law or the delivery of a lecture or sermon. A fortiori, the public performance during a radio broadcast of a script, drama or other work is not such a publication as would dedicate the work to the public. It was so held by the United States District Court in Uproar Co.


7 Tompkins v. Hallock, 133 Mass. 32 (1882); Carter v. Bailey, 64 Me. 458 (1874); Stern v. Laemmle Music Co., 74 Misc. 262, 133 N.Y.Supp. 1082 (1911). (Composer has property right in original musical composition.)


On the appeal, the Circuit Court of Appeals passed over the question of publication.

It may, therefore, be regarded as sound law that a mere radio broadcast performance of an uncopyrighted work does not divest the owner of his rights therein. In such an indirect manner, the idea contained in an uncopyrighted radio program may be protected.

It has been held that the recording of a performance which is manufactured for a restricted purpose which may nevertheless be widely used is not such a publication as to divest the owner of his common law property rights therein. Similarly, the broadcast of play-by-play descriptions of baseball games has been held not to be a general publication and not to destroy the right to enjoin unauthorized competing broadcasts of the identical news.

§ 533. Protection of Original Ideas by Contract.

To avoid the complete surrender of his rights which occurs when he discloses an idea, the owner may protect himself by means of a contract. This is the only way the originator can directly protect his idea against the harsh common law rule.

The difficulty in protecting an idea has been recognized by the courts and for that reason they have been tolerant of contracts for that purpose. In Hamilton Mfg. Co. v. Tubbs, the Court said:

16 Where the radio broadcast program is electrically transcribed for reproduction, another situation is presented. See §§ 580, 582 infra.
17 See Oranje, Rights affecting the use of broadcasts (1938) 3 Geistiges Eigentum, Part 4, 347, 421.
Where an idea, or trade secret or system, cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it."

This principle was first established in Bristol v. Equitable Life Insurance Society, where the New York Court of Appeals refused relief to one who, to induce the Insurance Society to employ him, submitted to it in confidence a valuable system of advertising which the Society used without employing plaintiff. The Court held that relief could not be allowed on account of the failure of the plaintiff to safeguard his idea by means of a contract which would provide for compensation for either its submission or use.

The leading case, which is still followed, is Haskins v. Ryan. This case approved the principle that, in the absence of contract or statute, ideas are not capable of legal ownership. This case is most instructive on what constitutes a valid contract to protect an idea upon disclosure. It was held that the agreement must do more than to contract in the future and must provide some present obligation protecting the originator from an unauthorized use thereof. The agreement must contain more than a blanket statement providing for a future contract.

Consideration is a necessary element of every contract to be valid. Not every idea submitted for use in radio broadcasting is sufficient consideration to support a contract to compensate. Novelty and originality must characterize the idea. The idea must be a new creation to

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\[21\] 132 N.Y. 264, 30 N.E. 506 (1892).
\[22\] 71 N.J. Eq. 575, 64 Atl. 436 (1906).
the extent that the defendant would not ordinarily have used it but for the suggestion.\textsuperscript{25}


In *Liggett & Myers Tobacco Co. v. Meyer*\textsuperscript{26} and *Ryan v. Century Brewing Association*,\textsuperscript{27} a turning towards the view that there is property in an idea is evidenced.

In the *Liggett & Myers* case, the plaintiff offered to sell an original advertising scheme composed of a picture wherein one sportsman says to another, "'No, thanks, I smoke Chesterfields'". The defendant refused the offer, but used a similar layout. Recovery was allowed on the ground that the use by defendant constituted an acceptance of the offer by the plaintiff who had a property right in the idea. Compensatory damages were allowed.\textsuperscript{28}

It is difficult to see an express contract in this case.\textsuperscript{29} There was no actual acceptance within the requirement of *Haskins v. Ryan*\textsuperscript{30} to create a contract to pay for the idea, nor does the idea appear to have been very original.

In *Ryan v. Century Brewing Association*,\textsuperscript{31} the plaintiff advertising agency, upon request of defendant, submitted a scheme of advertising including the slogan, "'The Beer of the Century'". Plaintiff expressly reserved his rights and a warning not to use his ideas without his consent. The defendant used the slogan. Recovery was allowed on a *quantum meruit* theory of services rendered and accepted. In this case, there was held to be an implied contract. It is implicit in this decision that a property right existed in the idea.

\textsuperscript{25} *Ibid.*

\textsuperscript{26} 194 N.E. 206 (Ind. App., 1935).

\textsuperscript{27} 185 Wash. 600, 55 P.(2d) 1053 (1936).


\textsuperscript{29} (1935) 44 YALE L. J. 1269.

\textsuperscript{30} 71 N.J. Eq. 575, 64 Atl. 436 (1906).

\textsuperscript{31} 185 Wash. 600, 55 P.(2d) 1053 (1936).
These two decisions have not been followed as yet, so that the requirements of express contract and that the idea be novel and original still obtain.

§ 535. Appropriation of Broadcast Advertising Ideas May Be Prevented as Unfair Competition.

"Courts should be careful not to create a monopoly in advertising." 32

Where the plaintiff’s advertising idea is put in a physical form and has been either copyrighted or patented, or is a trade name or trade-mark, he is fully protected against misappropriation.33 If the advertising idea, scheme or layout is embodied in tangible form and is not subject to such protection, imitation thereof is not actionable as unfair competition unless such act is only part of a whole plan of deception.34 All the elements of unfair competition must be present, i.e. there must be an effort to “pass off” goods or to create such confusion as to divert trade from plaintiff.35 Recovery has been denied in the great majority of cases because of the absence of a simulation of trade name, trade-mark or other distinctive features of the plaintiff’s product.36

In Westminster Laundry Company v. Hesse Envelope Co.,37 plaintiff spent money and energy in publicizing as a “blind ad” the coined word, “Stopurkicken”. Before plaintiff could take the next step to associate this word with itself, the defendant envelope company distributed envelopes bearing the coined word and its own corporate

33 See §§ 531-534 supra.
34 Note (1932) 45 HARV. L. REV. 542.
35 See §§ 513-517, 521, 527, 528 supra.
37 174 Mo. App. 238, 156 S.W. 767 (1913).
name. Recovery was denied to the plaintiff on the ground that the word was neither a trade-mark nor a trade name.

In Dumore Co. v. Richards, a restraining decree was issued against the defendant who had simulated the plaintiff's trade name and copied its advertisements, color scheme, layout et cetera. The Court said:

"Had defendant confined his advertising to the use of the word "Do-More" accompanied with his trade name plaintiff could not complain. What defendant has actually done is to imitate as closely (and in some respects to precisely copy) plaintiff's advertising matter as to shape and size of advertising sheets, color scheme, slogans, and size and form of type and to use the word "Do-More" therewith as a trade name for the machine. Probably no one of these simulations alone would form sufficient basis from which to infer fraud or wrongful intent in fact. The combination of these circumstances, however, forces the conclusion that defendant has intended to appropriate, in a branch of industry closely analogous to, and in a minor degree competitive with, that occupied by plaintiff, a portion of the defendant's good will which it has established. . . . While it is stipulated that there is no evidence of actual confusion or mistake arising out of the use by the defendant of the word "Do-More" on his goods it is apparent that there is manifest liability to deceive and reasonable probability of injury. The intent is sufficiently apparent to justify a finding of unfair competition."

The simulation of a label containing a trade-mark and a whole scheme of advertising will be restrained as unfair competition. Likewise, the simulation of a slogan plus an infringement of a trade-mark or trade name has been restrained. The copying of a slogan and the erection

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38 52 F.(2d) 311 (W.D. Mich., 1930).  
39 Id., at 312.  
41 Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 165 Fed. 413
§ 535 Appropriation of Intellectual Property

of an identical store front and interior has been re-
strained.42 It has been held that the simulation need not
be identical.43

But the simulation by a competitor of a whole advertise-
ment, including a slogan which is descriptive of his product,
is not enjoinable without more.44

In the absence of simulation of a distinctive slogan,
trade name, trade-mark or a complete plan of deception,
the copying of substantially the whole of an uncopyrighted
advertisement is not unfair competition.45 So long as the
articles have distinctive names and the difference in the
identity of the manufacturers is apparent, such simulation
is not unfair. The prospective buyer who uses any care
would not be deceived by such simulation. It would seem
that the courts will protect the buyer, and consequently
the competitor, only to the extent that he may be able to
learn the origin and ownership of the article offered by a
simulated advertisement.

Of course, the advertiser who uses broadcast facilities
stands in the same position as any other advertiser. Where
his program script is copyrighted or his slogans or other
distinguishing devices are trade-marks or trade names, he
will be adequately protected against simulation. However,
he will not be protected against mere imitation of his tech-
nique, ideas, layout or even exact copying of his unpro-
tected commercial announcements. There is no unfair
competition unless there is a whole scheme to deceive or
confuse and to divert business from the broadcast adver-
tiser. Under the cases, this results usually where there is

(C.C.A. 8th, 1908); Bickmore Gall
Cure Co. v. Karns, 134 Fed. 383
(C.C.A. 3d, 1905).

42 Summerfield Co. v. Prime
Furn. Co., 242 Mass. 149, 136 N.E.
396 (1922); Cash, Inc. v. Stein-
Supp. 61 (1927).

43 See §§ 521, 528 supra.

44 Estate Stove Co. v. Gray &
Dudley Co., 50 F.(2d) 413 (C.C.A.
6th, 1931).

45 International Heating Co. v.
Oliver Oil Gas Burner Co., 288
Fed. 708 (C.C.A. 8th, 1923);
Wertheimer v. Stewart, Cooper &
Co., 23 R.P.C. 481 (1906).
in addition to the simulation of advertising, an infringement of a trade-mark or a trade name, or where fraud or deception takes place.

The attitude of the courts on this question may be found best expressed, insofar as unfair competition is concerned, in the following quotations:

"Everything is fair in trade, as it is in war, though it may not lead you to adopt everything that you think fair." 46
"Care must be taken in these cases not to extend the meaning of the word 'unfair' to cover that which may be unethical but is not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would in many instances be entirely legal." 47

§ 535A. Interference with Exclusive Right to Broadcast a Program Restrainable as Unfair Competition.

A competing program which is broadcast without the authority of the person who owns the exclusive right to control the broadcast thereof, will be restrained from interfering with a sanctioned broadcast of the same program on the ground of unfair competition. 48 The value of the right to broadcast the program is a species of property which will be protected against unauthorized appropriation. Of course, protection may be extended upon other grounds where infringement of copyright or literary property is involved.

In Pittsburgh Athletic Company, et al. v. KQV Broadcasting Company, 49 the news value of baseball games was recognized as property upon which an injunction against

49 No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted August 8, 1938).
unfair competition was issued to restrain unauthorized play-by-play descriptions thereof by the defendant broadcast station as a sustaining program. The identical news was being lawfully broadcast simultaneously in the same area by plaintiffs’ competing stations as commercial programs. In effect, the latter programs were protected as exclusive advertising media and a divergence of the listening public therefrom by the defendant’s similar program was restrained.

While both programs in this case were simultaneously transmitted, it would seem that the plaintiffs’ program would likewise be protected against a similar unauthorized broadcast of the identical news during an entirely different period of broadcast time, so long as the interval does not extend beyond the normal duration of the news value of the program’s contents. The same rule should apply to enjoin unauthorized identical broadcasts in any area which is within the reasonably contemplated scope of the program’s interested listener coverage. The latter is an essential element of the news value of the program.

§ 536. Unauthorized Broadcast of Phonograph Records Restrainable by Performing Artist as Unfair Competition.

In Waring v. WDAS Broadcasting Station, Inc., the Pennsylvania Supreme Court found that a performing artist has a common law property right in his recorded interpretative renditions. This right was established despite the fact that the artist performed a work copyrighted by another; the Court specifically held that the new property right in no way overlaps or duplicates that of the author of the work so performed.

The defendant broadcast station was enjoined from reproducing over its facilities the complaining artist’s phonograph records which had not been authorized for broadcast

performances. The Court held that the sale of the record for home use did not constitute a publication which would divest the artist of his property in his recorded performance.

The complainant sued for unauthorized appropriation by broadcast performance of his property as recorded. Judge McDevitt at nisi prius 51 enjoined the defendant broadcast station upon the theory of the bill of complaint.

The Pennsylvania Supreme Court, in affirming the decree, went beyond the cause of action alleged in the bill of complaint by granting relief against unfair competition. The Supreme Court affirmed the findings of the lower court that the performing artists’ common law property had not been dedicated to the public, but saw fit to grant relief against unfair competition apart from and without negating the right to restrain infringement of the common law property of the artist.

The Pennsylvania Supreme Court held that the artist and the radio station were in competition since both furnished broadcast entertainment to the public. Mr. Justice Stern said: 52

"The orchestra obtains its remuneration from contracts with advertisers who pay it for the music rendered as supplementary to their advertising. Defendant’s revenue also is derived from advertisers, and presumably it can exact a greater compensation from them by being able to furnish mechanized music of an attractive quality at nominal cost—partly because this makes it unnecessary for the advertisers to pay for ‘live talent,’ and partly because by thus entertaining the radio public a more receptive field is created for the advertising. Thus defendant can in effect ‘sell’ to its advertising customers and to the public, at practically no expense to


itself, the identical musical renditions of plaintiff’s orchestra. That such competition is extremely harmful to plaintiff and his orchestra is obvious. It probably must become increasingly difficult for them to demand and obtain $13,500 for a single performance over the radio if innumerable reiterations of their renditions can be furnished at a cost of seventy-five cents. There was testimony to the effect, and the learned chancellor found, that the constant broadcasting of the records diminished the commercial value of the orchestra’s performances."

It would seem that it is unnecessary that the artist have appeared in broadcast programs to be entitled to such relief. The property right would be protected on behalf of artists who perform in other entertainment media since radio broadcast performances are within the reasonably anticipated scope of the artists’ talents. Moreover, competition for audiences among the several vehicles of entertainment should suffice to extend relief to non-broadcast artists whose recorded performances are so appropriated.

The unfair competition enjoined in *Waring v. WDAS* did not involve fraud, deception or passing off. Despite the absence of these traditional tools of the action, the Court held that these elements were not indispensable. The decision is in line with the progressive doctrine enunciated by modern courts that the appropriation of the product of another’s labor or talent and its utilization for the defendant’s profit will be restrained as unfair competition.

The appropriation is no less wrongful where the broadcast performance is disseminated as a sustaining program. In *Waring v. WDAS*, the appropriation complained of was not used by defendant in connection with an advertising program. Sustaining programs are broadcast for the profit of the broadcast station in creating a more receptive listener audience for the broadcast advertising which sustains the station. Competition for audiences should be a
sufficient basis for injunctive relief where the appropriation is made by a non-commercial broadcast station.\textsuperscript{53}

\section{§ 537. Appropriation of an Artist's Broadcast Performance by Off-the-Air Recording for Commercial Purposes Restrained.}

Numerous companies operate devices which record for reproduction the artist's broadcast performance as it is received. These records are easily duplicated and sold to the public. Where such acts are committed without the authorization of the artist, there is an unlawful appropriation of the artist's common law property in his performance.\textsuperscript{54} It is the individual talents, personality and efforts of the artist, as represented in the broadcast performance, which the advertiser seeks. Moreover, the artist has built up in his performance his valuable good will and reputation which are seriously impaired by the uncontrolled and unauthorized broadcast of his records. These interests are further impaired by trespassing upon the artist's exclusive rights to render a performance when, where and for whom he chooses. Where the program sponsor cannot secure the performer's services exclusively, employment may be withheld. In such cases, there is a diminution of the artist's ability to secure employment or to bargain at an advantage for his compensation.

These factors have been recognized by two different courts, which have restrained such unauthorized off-the-air recording of the plaintiff artists' broadcast performances.\textsuperscript{55} Off-the-air recordings have been restrained as

\textsuperscript{53} Pittsburgh Athletic Company, \textit{et al.} v. KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted August 8, 1938).

\textsuperscript{54} Waring \textit{v.} WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

unfair competition as well as a violation of the distinct property rights of the artist in his broadcast performance.\textsuperscript{56}

another period of broadcast time was restrained at the suit of the performing artist.

\textsuperscript{56} In \textit{Waring v. Robinson}, supra, n. 55, the Court made the following findings of law:

"1. The right of the creator of a unique and personal interpretation of a musical and/or literary composition, in his interpretation, is a common law property right, and in the absence of legislative enactment providing for his protection, must be protected by equity.

2. The artistic individuality of such an interpreter identifies the performance and makes it a different product, having a monetary as well as artistic value.

3. The creative talent and the interpretive talent of such an artist are entitled to the same recognition as property and will be protected by equity against the unauthorized exploitation and misuse of such talents.

4. The unique and personal contribution of such interpretive talent is a creation that is entitled to protection as property.

5. The integrity of the art of such an interpretive artist is entitled to protection and a proper and commensurate return for any commercial use of his talents.

6. The talent, individuality and interpretive qualities of a performing artist may not be used by another for profit without the owner's consent, and such misuse is such an infringement of his common law right of property in and to his name, personality, reputation and talent, as to require an accounting.

7. Such an orchestral conductor, as the complainant, possesses full and complete power and dominion over his property right in his talents, efforts and interpretations, and may prohibit, enjoin or restrain the misuse or exploitation of the same without authority by persons other than the owner thereof.

8. A broadcast of a musical program is not a publication of the talents or property rights of the interpretive artist so engaged, and may not be recaptured for sale or exploitation.

9. The unauthorized recapture and transcription for commercial use of such a broadcast is illegal interference with his property rights and deprives the interpretive artist of his right of free contract for his talents, and, therefore, is against public policy.

10. Any interference with or restraint of the earning power of an interpretive artist is an illegal invasion of his exclusive property right.

11. The recapture, sale and distribution of such program by another, without permission or consent, is unfair competition and a violation of complainant's property rights."
Likewise, the producer of a broadcast advertising program may not appropriate by electrical transcription the performance of an artist who has contracted with him to render his services in a limited personal appearance as part of a specific broadcast program.\(^57\)

§ 538. False Broadcast Advertising.

False advertising, though designed to divert trade, or to destroy a competitor's business, his patronage and good will, is not considered unfair competition at common law,\(^58\) nor has the development of modern radio merchandising and advertising made any appreciable change in the law on the subject.\(^59\) The only real evolution towards meeting the problem is found in the work of the Federal Trade Commission,\(^60\) other public agencies and private business bureaus.\(^61\)

The more authoritative decisions hold that competitive misrepresentation and misappropriation are actionable only where it is established that the plaintiff is the sole dealer in the product in the field.\(^62\) Where there is competitive misrepresentation only, no action can be maintained.\(^63\) In the famous *Washboard* case,\(^64\) the Court

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57 See Pampanini v. Ente Italiano, etc., Tribunal Civil de Turin, Italy, April 5, 1938, 3 GEISTES EIGENTUM, Part 4, 478.

58 Handler, *False and Misleading Advertising*, (1929) 39 Yale L. J. 22. Remedies of the purchaser are discussed in Handler, *Cases and Materials on Trade Regulation*, (1937) 723.

59 Handler, *Unfair Competition*, (1936) 21 Iowa L. Rev. 175, 192.

60 See Chapter XXXVI infra.


refused to enjoin the defendant's misbranding of zinc boards as aluminum at the suit of the sole manufacturer of aluminum boards. In this case, the plaintiff did not claim a passing off of the defendant's product but a diversion of its trade, i.e., those who desired the original product. The Court expressly restricted unfair competition to acts of passing off and held that plaintiff may not sue to prevent a fraud upon the public.

In Mosler Safe Co. v. Ely Norris Safe Co., the United States Supreme Court reversed a decree restraining false advertising on the ground that the plaintiff did not establish that it was the sole manufacturer of the genuine product and hence there was no basis for the alleged divergence of trade. There is no implication in this case either of a critical attitude towards the Washboard case or that competitive misrepresentations alone are wrongful to competitors. In effect, both cases hold that competitive misrepresentations are not unfair competition except where there is passing off, or where the plaintiff is the sole competitor and there has been a misappropriation. Similarly, an advertiser's false claims to testimonials and prizes awarded are not actionable. It may therefore be concluded that a false and misleading broadcast advertisement is not actionable as unfair competition.

66 American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (C.C.A. 6th, 1900). This case was decided by Taft, Lurton and Day, JJ., all of whom were at different times members of the United States Supreme Court.
Chapter XXXVI.

FEDERAL REGULATION OF BROADCAST ADVERTISING.

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§ 539. Generally.

The owners and operators of radio broadcast stations do not possess absolute rights of ownership and control. They are always subject to regulation by the Federal Communications Commission in the public interest, convenience and necessity. In its regulation of the ether, this Commission has not assumed much authority over the subject matter of radio broadcast programs.

There does exist a Federal agency, namely the Federal Trade Commission, which by experience, equipment and personnel possesses an ability to meet some of the problems of the regulation of advertising content of broadcast programs. The Federal Trade Commission was established in 1914 to enforce the Congressional declaration that "unfair methods of competition in commerce are . . . unlawful." It is not to be assumed that the Federal Trade Commission has the statutory power to meet all of the problems of competition which the subject matter of radio broadcasting engenders. It is believed that Congress may validly amend the Federal Trade Commission Act to enlarge the scope of the Commission's jurisdiction. This will be discussed infra.

1 See § 35 supra. See also Chapter XIII. supra.
2 See § 35 supra.
3 38 STAT. 719 (1914), 14 U.S.C.A. § 45 (1927) (Federal Trade Commission Act). Section 5 as amended in 1938 now provides:
   "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."
4 See § 540 infra.

The greater part of the income of American radio broadcast stations is derived from the sale of broadcast facilities for advertising purposes. Persons engaged in all branches of commerce use this medium to sell their wares or to build good will. Broadcast programs for this purpose are commonly called "commercials".

The jurisdiction of the Federal Communications Commission may be regarded as indirect, in that it may only, except in the case of lotteries and contests, impose its control upon the station licensee. Where the station licensee has broadcast an advertiser's false and misleading statements, and the licensee's acts are found to make his operation of the station not in the public interest, the Communications Commission may revoke or refuse to renew the station license. For this reason, broadcast station licensees exercise the so-called power of editorial selection over advertising scripts and commercial announcements in order to prevent the transmission of matters which would jeopardize their licenses. The jurisdiction of the Federal Communications Commission goes beyond false and misleading advertising. For instance, the operation of a broadcast station in such a manner that it is the adjunct of a private business and not a public service, is not operation in the public interest.

The Federal Trade Commission's jurisdiction extends to the advertising of products which are sold in interstate commerce. The Trade Commission may not take action

6 On the Federal Communications Commission's power to revoke or refuse to renew station licenses, see §§ 45, 52, 53 supra.
7 See Chapter XXXVII. infra.
on advertising of articles sold in intrastate commerce. The fact that radio broadcasting, which is interstate commerce, is used to advertise articles of intrastate commerce, does not enlarge the jurisdiction of the Trade Commission to include such advertising matter. Consequently, there is a vast field of advertising which lies outside of the scope of the only national board exercising direct supervisory power over advertising. While, on the whole, the scope of the work of the Trade Commission may be deemed by some critics to be ineffectual and petty,\textsuperscript{10} the Commission has afforded some protection to the public and competitors. It is submitted that Congress should by appropriate legislation specifically extend the jurisdiction of the Trade Commission to include broadcast advertising, irrespective of whether the advertised article or service is a part of interstate commerce. Such legislation would be a proper exercise of the power of Congress to regulate interstate commerce and communications.

The jurisdiction of the Federal Trade Commission is direct, as contrasted with that of the Federal Communications Commission. The Trade Commission's control extends to any person, corporation or partnership which uses the method of advertising found to be an unfair method of competition in commerce.\textsuperscript{11} The Federal Trade Commission may, after due notice and hearing, order the unfair advertiser to cease and desist in the practice which is condemned.\textsuperscript{12} It may achieve the same result by entering into a stipulation with the advertiser wherein the latter agrees to cease such practice.\textsuperscript{13}

The kind of advertising which may be restrained by the


\textsuperscript{12} Ibid.

\textsuperscript{13} Federal Trade Commission, 22 Annual Report 50 (1936).
Trade Commission will be discussed *infra*. It may be stated as a general rule that provided all other jurisdictional elements are present, the Federal Trade Commission may restrain false and misleading advertising.


The *Annual Report* for 1936 of the Federal Trade Commission describes the procedure of that board as to radio advertising clearly and fully. Any other attempt would be a mere paraphrase and for that reason pertinent extracts from the 1936 report are printed below.

"False and misleading advertising matter . . . as broadcast over the radio is surveyed and studied by a special board set up by the Federal Trade Commission. . . . This board, known as the Special Board of Investigation, consists of three Commission attorneys designated to conduct hearings and specialize in this class of cases.

"Misrepresentation of commodities sold in interstate commerce is a type of unfair competition with which the Commission has dealt under authority of the Federal Trade Commission Act since its organization.

". . . the Commission, through its special board, has examined . . . since 1934 commercial advertising continuities broadcast by radio. It has noted any misleading representations appearing in this material, and has also received from the public complaints of false and misleading advertising. Each representation so noted and each complaint received from the public is carefully investigated, and, where the facts warrant, and informal procedure does not result in the prompt elimination of misleading claims and representations, formal procedure is instituted. While a number of orders have been issued, requiring the respondents to cease and desist from advertising practices complained of, in a

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14 § 549 et seq. *infra.*

majority of cases the matters have been adjusted by means
of the respondent signing a stipulation agreeing to abandon
the unfair practices."

§ 542. Same: Examination of Scripts and Transcribed Pro-
grams.

The Trade Commission has reviewed broadcast adver-
tising copy since the beginning of the fiscal year 1934–
1935. At the outset, the Commission, through the Special
Board of Investigation, made a survey of all commercial
scripts used in the broadcast programs of all stations dur-
ding July, 1934. The volume of returns received and the
character of the announcements indicated that a satis-
factory continuous scrutiny of current broadcasts could
be maintained by the Commission. By adopting a plan of
grouping the stations for certain specific periods, the
Commission has carried on this activity with a limited
personnel.

Since September, 1934, quarterly calls have been issued
by the Commission to individual stations according to their
licensed power and location requesting returns of adver-
tising scripts for specific fifteen day periods.

The returns filed by national and regional networks,
however, are on a continuous weekly basis. The programs
so reported are those involving two or more affiliated or
member stations.

Regular weekly and monthly returns of typed copies
of the commercial portions of all recordings manufactured
by producers of electrical transcription recordings for
radio broadcast are submitted. As the actual broadcast of
a commercial recording is not always known to the manu-
facturer of a commodity being advertised, the Commis-
sion’s knowledge of current transcription programs is
supplemented by special reports from individual stations
from time to time, which list the programs of recorded
transcriptions with essential data as to the names of the
advertisers and the articles sponsored.
The combined material received from the individual stations for specified periods, from the weekly returns on regional and national network broadcasts, and from the special transcriptions reports, furnishes the Commission with representative and specific data on the character of radio advertising which must have proven of great value in its efforts to curb false and misleading trade representations.

In its examination of advertising, the Commission's purpose is to prevent false and misleading representations. It does not undertake to dictate what an advertiser shall say, but rather indicates what he may not say. The Commission's jurisdiction is limited to cases which have a public interest as distinguished from a mere private controversy, and which involve practices held to be unfair to competitors in interstate commerce.

§ 543. Same: Methods of Stipulation Procedure in Advertising Cases.

If a periodical or radio advertisement appears on its face to be misleading, a questionnaire is sent by the Commission to the advertiser, requesting a sample of his product, if this is practicable, and a quantitative formula, if the product is a compound. This questionnaire requests copies of all advertisements published during the year, together with copies of all booklets, folders, circulars, form letters and other advertising literature used. Upon receipt of this data, the claims, sample and formula are referred to an appropriate technical agency of the Government for scientific opinion. Upon receipt of this opinion, a careful study is made of the advertising and a list of numbered excerpts made which appear to require justification or explanation. A copy of this numbered list with a copy of the opinions received are sent to the advertiser, who may then submit such evidence as he thinks may justify or explain the representations in his advertising.

An advertiser may answer by correspondence, or upon request, may confer personally with the special board.
Should the advertiser justify the representations which have been questioned, a report of the matter is made by the Board to the Commission with the recommendation that the case be closed without prejudice to the right of the Commission to reopen it should it become necessary. Should the advertiser be unable to justify any material statement in his advertising which the Board has reason to believe is false or misleading, the Board reports the matter to the Commission with a recommendation that the case be docketed, and the entire matter referred back to the Board for negotiation of a stipulation or agreement to abandon the unfair representations alleged, providing, of course, the advertiser desires to dispose of the matter in that manner.

If this recommendation is approved by the Commission, the Board then prepares a stipulation and forwards it to the advertiser for execution. If the advertiser objects to any of the provisions of the stipulation, he may negotiate further by mail or in person. When a stipulation has been agreed to and signed by the advertiser, the matter is again reported to the Commission with the recommendation that the stipulation be accepted and the case closed.

This procedure is essentially informal. Where the advertiser refuses to sign a stipulation, the Commission may resort to a formal procedure, as a result of which an order to cease and desist may or may not issue, depending upon the findings made by the Commission after complaint and hearing.

Formal complaints issue upon recommendation of the board. Complaints are usually recommended where: (1) the advertiser refuses to stipulate;\textsuperscript{16} (2) the advertiser has violated a stipulation;\textsuperscript{17} (3) the gross deception of or danger to the public involved in the practices is such that


\textsuperscript{17} Id., at 47.
the board was of the opinion that an opportunity to stipulate should not be given to the advertiser.\textsuperscript{18}

If the Commission decides to issue a formal complaint, the matter is referred to the chief counsel to prepare the complaint and the trial of the case.\textsuperscript{19}

All proceedings by the Commission prior to issuance of a formal complaint or publication of a stipulation are confidential.\textsuperscript{20}

\section*{§ 544. Same: Procedure on Formal Complaints.}

Only after the most careful consideration of the facts and evidence developed by the investigation does the Federal Trade Commission issue a formal complaint. The complaint, the answer of respondent thereto and subsequent proceedings constitute a public record.

A complaint is issued in the name of the Commission acting in the public interest. A respondent is named and a violation of law is charged, with a statement of the charges. The party who complained to the Commission is not a party to the formal complaint issued by the Commission, nor does the complaint seek to adjust matters between parties. The prime purpose of the proceedings is rather to prevent, for the protection of the public, those unfair methods of competition forbidden by the Federal Trade Commission Act.

The rules of practice and procedure of the Commission provide that in case the respondent desires to contest the proceedings, he shall, within twenty days from service of the complaint, file with the Commission an answer to the complaint.\textsuperscript{21} The rules of practice also specify a form of answer for use, should the respondent decide to waive hearing on the charges and not to contest the proceeding.

Under the rules of practice, failure of the respondent to

\textsuperscript{18} Ibid.
\textsuperscript{19} Id., at 44.
\textsuperscript{20} Ibid.
\textsuperscript{21} Federal Trade Commission, 22 Annual Report 152 (1936), Rules of Practice, Rule VII.
file an answer within the time provided and failure to appear at the fixed time and place of hearing is deemed to authorize the Commission, without further hearing or notice to the respondent, to proceed in regular course on the charges set forth in the complaint and make, enter, issue and serve upon the respondent findings of fact and an order to cease and desist.\textsuperscript{22}

In a contested case, the matter is set down for taking of testimony before a trial examiner. This may occupy varying lengths of time, according to the nature of the charge or the availability and number of witnesses to be examined. The hearings are held before a member of the Commission’s staff of trial examiners, who may sit anywhere in the country. The Commission and the respondents are represented by their respective attorneys.

After the testimony is taken and the evidence submitted on behalf of the Commission in support of the complaint, and then on behalf of the respondent, the trial examiner prepares a report of the facts for the information of the Commission, and counsel for the respondent. Exceptions to the trial examiner’s report may be taken by counsel for either side.

Within a stated time after the trial examiner’s report is made, briefs are filed and the case is set for final argument before the Commission. After the oral argument, the Commission reaches a decision sustaining the charges made in the complaint or dismissing the complaint or closing the case.

If the complaint is sustained, the Commission must state its findings as to the facts and its conclusion that the law has been violated. Thereupon an order is issued requiring the respondent to cease and desist from such violations.

If the complaint be dismissed or closed, an appropriate order is entered.

An order to cease and desist is the Commission’s final

\textsuperscript{22}Ibid.
step in its legal procedure, except in cases which are taken to court.

§ 545. Same: Jurisdiction of Federal Courts.

No penalty attaches to an order to cease and desist as such, but a respondent against whom one is directed is required within a specified time, usually sixty days, to report in writing the manner in which the order is being obeyed. If respondent fails to obey an order, the Commission may apply to a United States Circuit Court of Appeals for the enforcement of its order. Failure to obey the court's enforcement order may result in the respondent's being held for contempt of court and subjected to the consequent penalty of fine or imprisonment or both.

The respondent may petition for a review. The statute provides that such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. The Circuit Court of Appeals has the power to affirm, modify, or set aside an order of the Commission, but either party may apply to the United States Supreme Court for a writ of certiorari, through which, if granted, there may be obtained a review of the decision and judgment of the Circuit Court of Appeals and a final adjudication of the matter at issue.


The Federal Trade Commission was created in 1914 by the Federal Trade Commission Act. This Act is one of a series of acts, including the Sherman Anti-Trust Act and the Clayton Anti-Trust Act, which were enacted for the purpose of eliminating monopoly, restraint of trade and unfair methods of competition from the area of interstate commerce.

26 Handler, Unfair Competition (1936) 21 Iowa L. Rev. 175, 214, 220.
The pertinent sections of the Act read as follows:27

"Sec. 4. . . . ,
" ‘Commerce’ means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
"Sec. 5. That unfair methods of competition in commerce, unfair or deceptive acts or practices in commerce are hereby declared unlawful.
"The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in commerce.
"Whenever the Commission shall have reason to believe that any such person . . . has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public it shall issue and serve upon such person . . . a complaint. . . ."28

It has already been noted that after notice and hearing, the Commission may issue a cease and desist order against the respondent.29

§ 547. Validity of "Cease and Desist" Orders.

The validity of a "cease and desist" order depends upon the existence of certain jurisdictional facts. If these facts which form the basis of the Commission's power are not all present, the order is unenforceable.30 Since the Federal Trade Commission is an administrative body, its findings as to jurisdictional facts are not conclusive and binding upon the courts.31 The question of administrative jurisdiction is open to the reviewing court.32

28 Id., at § 45.
29 §§ 541, 542, 544 supra.
30 Fed. Trade Comm. v. Rala-
In *Federal Trade Commission v. Raladam Co.*,\(^3\) the United States Supreme Court enunciated the facts essential to the jurisdiction of the Commission. Mr. Justice Sutherland said:\(^4\)

"By the plain words of the Act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are unfair; (2) that they are methods of *competition* in commerce; (3) and that a proceeding by the commission to prevent the use of the methods appears to be in the *interest of the public*."\(^5\)

Later in the same opinion, the learned Justice said:\(^6\)

"The authority of the commission to proceed, if that body believes that there has been or is being used any unfair method of competition in commerce, was then qualified... by the further requirement... ‘and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.’ By these additional words, protection to the public interest is made of paramount importance, but nevertheless, they are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding. Thus, the commission is called upon first to determine as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial."

It is well settled that it is for the court to determine whether or not a certain practice constitutes an unfair

\(^3\) 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).  
\(^4\) Id., at 646.  
\(^5\) Id., at 648.
method of competition.\textsuperscript{36} It was formerly considered that this entitled the reviewing court to open up the record and make its own conclusions of fact. Where the Commission made certain findings, it was the practice to go behind these determinations.\textsuperscript{37} But in \textit{Federal Trade Commission v. Algoma Lumber Co.},\textsuperscript{38} the United States Supreme Court, through Mr. Justice Cardozo, condemned this assumption even though cloaked in the formal words of the statute that "findings of the commission as to the facts, if supported by testimony, shall be conclusive."\textsuperscript{39} The only power possessed by the reviewing court as to the findings is to ascertain if there is evidence to support the Commission's determination.\textsuperscript{40} If there is supporting evidence, the court is bound by the findings. Of course, the reviewing court still possesses the ultimate power to determine whether the practice found by the Commission constitutes an unfair method of competition.\textsuperscript{41}

Mr. Justice Brandeis has best expressed the basis for the reviewing court's power over the Commission's cease and desist orders. In his dissenting opinion in the famous case of \textit{Federal Trade Commission v. Gratz},\textsuperscript{42} he concurred with the majority of the Court in their view of the

\textsuperscript{38} 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).
power of the reviewing court but disagreed on other points. Mr. Justice Brandeis said: 43

"Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing legislation had taught that definition, being necessarily rigid, would prove embarrassing and, if vigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition, must necessarily soon prove incomplete, as, with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when . . . it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage. (Citing cases.) Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court."


In Federal Trade Commission v. Gratz,44 the United States Supreme Court was in accord as to the ultimate

43 Id., at 436.

44 Ibid.
power of the reviewing court, but a dichotomy existed as to whether the content of the phrase was frozen as of the date of enactment of the statute. The *dicta* of the majority, delivered by Mr. Justice McReynolds, is against growth or extension of the phrase. This view has aptly been called "sterile." Mr. Justice McReynolds said:

"The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

This definition sought to restrict the concept embodied in the statutory phrase to the various anti-trust enactments and to the common law meaning of unfair competition. This definition differs, as is apparent, from the views expressed by Mr. Justice Brandeis in his dissenting opinion in the *Gratz* case, in which he considered the phrase as capable by judicial interpretation to meet changing circumstances of business competition. This flexible view is the doctrine now adhered to by the United States Supreme Court. It may be accepted definitely that the *dicta* of the majority in the *Gratz* case is reversed.

First steps in that direction were taken by the Supreme Court in cases which immediately followed the *Gratz* case in point of time. In *Federal Trade Commission v. Winsted Hosiery Co.*, the United States Supreme Court held that

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47 Handler, *op. cit. supra* n. 45, 240.
the Commission could restrain false and misleading advertising which did not previously constitute a cause of action at common law or under the Sherman Act. In *Federal Trade Commission v. Beechnut Packing Co.*,\(^{50}\) the same Court treated the phrase as capable of expansion. However, the lower courts did not view the majority *dicta* in the *Gratz* case as modified entirely by the *Winsted* and *Beechnut* cases.\(^{51}\)

The Supreme Court has again declared the phrase, "unfair methods of competition," capable of expansion, thus widening the future scope of the Commission's inquiries. In *Federal Trade Commission v. Keppel*,\(^{52}\) the Supreme Court had before it an order of the Commission against the respondent to cease and desist in the sale of penny candy, which involved a lottery scheme. Mr. Justice Stone, speaking for the Court, said: \(^{53}\)

"Although the method of competition adopted by respondent induces children, too young to be capable of exercising intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this court has held subject to the Commission's prohibition. \dots\) But we cannot say that the Commission's jurisdiction extends only to those types of practice which happen to have been litigated before this Court.

"Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded

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\(^{50}\) 257 U.S. 441, 43 Sup. Ct. 150, 66 L.Ed. 178 (1922).


\(^{52}\) 291 U.S. 304, 54 Sup. Ct. 423, 78 L.Ed. 814 (1934).

\(^{53}\) Id., at 309.
a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

"The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. . . . But as this Court has pointed out it also had a broader purpose. . . . As proposed . . . the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful. But it was because the meaning which the common law had given to these words was deemed too narrow that the broader and more flexible phrase 'unfair methods of competition' was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called "the gradual process of judicial inclusion and exclusion".' Federal Trade Comm. v. Raladam Co. . . .

"While this Court has declared that it is for the courts to determine what practices or methods are to be deemed unfair . . . in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected', and it was organized in such a manner with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Con-
If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.

"We hold that the Commission correctly concluded that the practice was an unfair method of competition within the meaning of the statute. It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed."

§ 549. False and Misleading Broadcast Advertising May Be Restrainted by the Federal Trade Commission.

The Federal Trade Commission exercises a supervisory power over advertising through the medium of radio broadcasting. Its supervisory power is restricted to false and misleading advertising, i.e. advertising practices which are "inherently deceptive", immoral or against public policy and which are harmful to honest competitors. Under the cases, the Commission does not function to protect the consumer's interests. The Commission may not forbid practices which may be found to be economically wasteful, such as those which tend to increase...

54 See § 541 et seq. supra.
55 Federal Trade Commission, 22 Annual Report 107 (1936); Handler, Unfair Competition, (1936) 21 Iowa L. Rev. 175, 250.

"The Commission believes this procedure protects the American consumer from numerous unfair methods of competition."
the cost of production and distribution, or which may create competitive inequalities. In the words of Mr. Justice McReynolds,\(^{57}\) the Commission "has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition."\(^ {58}\)

False and misleading advertising is an unfair method of competition only where there is an injury to the competitor of the advertiser. There is no injury where the mere result is the indirect increase of the advertiser's sale of his product. Such is the holding of *Federal Trade Commission v. Raladam Co.*\(^ {59}\) which is based on the belief that the statute is aimed only against the restriction of competition.

This ruling is contrary to the principle established in *Federal Trade Commission v. Winsted Hosiery Co.*\(^ {60}\) The *Winsted* case involved false and misleading advertising in an industry, where most purchasers from manufacturers did not accept as true the labels or representations and were not deceived thereby. However, consumers who did not know of the state of the industry were deceived by this false advertising of the lower priced product which they naturally bought. The false and misleading advertising before the Court was the labelling of knit goods only partly made of wool as "natural merino", "natural worsted", or "natural wool", *et cetera*. The United States Supreme Court held this to be an unfair method of competition. Mr. Justice Brandeis said:\(^ {61}\)

"The facts show . . . also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers


\(^{58}\) Handler, *op. cit. supra* nn. 55, 251.


\(^{60}\) 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1922).

\(^{61}\) *Id.*, at 493.
of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.

"The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. . . . since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; . . ."

It is believed that the opinions in the cases in the Supreme Court 62 following the Raladam decision indicate that the Winsted case is still controlling and that in a proper case it will be re-approved. The holding of the Raladam case 63 should be restricted to its narrowest limits, namely, that the existence of competition cannot be assumed, but must be found as a fact by the Commission.

The requirement of a finding of injury to competitors may be met in the same fashion as was done in the Winsted case.\(^{64}\)

It should be noted that the Winsted case represents an extension of the concept of unfair competition in that false and misleading advertising was not actionable by a competitor at common law\(^ {65}\) or under the Sherman Act.\(^ {66}\)

\section*{§ 550. False and Misleading Advertising Must Affect Specific and Substantial Public Interest to Be Restrained by Federal Trade Commission.}

A proceeding by the Federal Trade Commission is not, as is sometimes asserted, in the public interest simply because the method of advertising utilized is unfair to a competitor or competitors. The public interest to be protected must be specific and substantial.\(^ {67}\) Where respondent advertised his shop as "The Shade Shop" which name had been used by one, S, for many years and where such misuse might tend to mislead S's customers, it was held that a complaint by the Federal Trade Commission should be dismissed as not in the public interest within the meaning of the statute. In this case, Mr. Justice Brandeis said:\(^ {68}\)

> "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for

\(^{64}\) 258 U.S. 483, 42 Sup. Ct. 394, 66 L.Ed. 442 (1922). The barrier raised by the Raladam case has been removed by the 1938 amendment to § 5 of the Federal Trade Commission Act. See Miller, \textit{A New and Stronger Advertising Statute}, \textit{Broadcasting}, April 1, 1938, p. 19.


\(^{66}\) Handler, \textit{Unfair Competition}, (1936) 21 \textit{Iowa L. Rev.} 175 et seq.


\(^{68}\) Id., at 25.
private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to or have any control over it. . . .

"While the Federal Trade Commission exercises under Section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public'. This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived, the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by 'passing off', proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under Section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. . . .

"In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial."
The jurisdiction of the Commission, as conferred by the statute, is not restricted by *Federal Trade Commission v. Klesner.* It quite properly points out the obligation of the Commission to proceed in the public interest, that is, to protect the public. The opinion distinguishes the public interest demanded by the statute from the private rights, the protection of which is invoked by the tort action at common law for "passing off".

The requirement of public interest appears to be the converse of the principle enunciated in the *Winsted case,* namely, that a method of competition is unfair whereby the consumer purchases an article misleadingly and falsely advertised, and loss and injury results to the competitor thereby. Such false and misleading advertising may be restrained in the public interest where it is specific and substantial and where the consumers are led by deceptive and confusing advertising to buy something other than that which they intended. The competitor alone is protected and not the interest of the consuming public.

For illustration, in *Federal Trade Commission v. Royal Milling Co.*, the respondents conveyed the impression by means of their trade names and circular advertising that they ground the wheat from which they prepared self-rising and plain flour for market, and that the flour came directly from processor to purchaser. The Commission’s order to cease and desist was affirmed by the Supreme Court. Mr. Justice Sutherland said:

"We also are of opinion that it sufficiently appears that the proceeding was in the interest of the public. It is true, as this court held in *Federal Trade Commission v. Klesner* . . . that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not

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70 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1922).
72 Id., at 216.
The public interest must be specific and substantial. In that case . . . various ways in which the public interest may be thus involved were pointed out; but the list is not exclusive. If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondent's acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial (Citing cases.) There is nothing in the Klesner case to the contrary.''

There is a specific and substantial public interest in false and misleading advertising. An even more liberal view is sometimes found among the lower courts. This view is found to be expressed best in Hughes, Inc. v. Federal Trade Commission where the Circuit Court of Appeals for the Second Circuit said: 73

"Petitioner's methods have been found to be unfair in that its representations in regard to its products are misstatements of fact and are misleading. The products are sold in interstate commerce and in competition with the products of other manufacturers. Selling by the use of false and misleading statements necessarily injures or tends to injure petitioner's products. Federal Trade Comm. v. Winsted Hosiery Co., supra; Federal Trade Comm. v. Artloom Corp., (C. C. A.) 69 F.(2d) 36. Such injury to competitors or tendency to injure,

73 77 F.(2d) 886, 888 (C.C.A. 2d, 1933).
fully establishes the public interest. Therefore, there was jurisdiction under Section 5 of the Federal Trade Commission Act. . . .”

The Hughes case involved false therapeutic claims for certain “salts” and, therefore, cannot be assimilated with the Royal Milling Co.\textsuperscript{74} or the Algoma Lumber Co.\textsuperscript{75} cases. But if the declaration in the Klesner case that the public is to be protected is to be taken at its face value, then the Hughes case would be upheld on appeal. The public is certainly deceived by false and misleading advertising of the therapeutic values of a product. In Federal Trade Commission v. Raladam Co.\textsuperscript{76} which involved a so-called “obesity cure”, the Supreme Court in striking down the Commission’s order admitted:\textsuperscript{77}

“"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the commission jurisdiction, the order could not successfully be assailed.”

§ 551. False and Misleading Radio Advertising Which Results in Gain to Public May Be Restrained by Federal Trade Commission.

In Federal Trade Commission v. Algoma Lumber Co.\textsuperscript{78} it was contended that the false and misleading advertising resulted in a gain to the consumer. This was held to be no saving grace. Mr. Justice Cardozo said:\textsuperscript{79}

“"But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not achieved by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order

\textsuperscript{74} 288 U.S. 212, 53 Sup. Ct. 587, 75 L.Ed. 1324 (1931).
\textsuperscript{75} 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).
\textsuperscript{76} 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).
\textsuperscript{77} Ibid.
\textsuperscript{78} 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).
\textsuperscript{79} Ibid.
for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. . . ."

§ 552. Long Duration of Condemned Practice Does Not Insure Condonation.

The false and misleading advertising condemned by the Federal Trade Commission in its order against the Algoma Lumber Co. was long practiced, even for years before the creation of the Commission. On certiorari the United States Supreme Court dismissed the respondent's contention that such longevity made the trade usage irreproachable by the Commission. Mr. Justice Cardozo said: 80

"There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake. . . ."


Early in the history of the Federal Trade Commission, the courts established a restriction on its control over advertising. Advertising must be false and misleading in fact before it can be restrained by the Commission. The advertiser is entitled to voice an opinion concerning his product. In accord with the tradition of the common law, the courts will indulge the advertiser in the puffing of his product.

In L. B. Silver Co. v. Federal Trade Commission, 81 the Circuit Court held that the advertised statement that petitioner's swine were members of a famous modern breed was an honest expression of opinion where swine breeding experts differed as to the truth of the matter. In Ostermoor & Co. v. Federal Trade Commission, 82 the petitioner

80 Ibid.
82 16 F.(2d) 962 (C.C.A. 2d, 1923).
utilized a picture to represent in its advertisements that the expansion of its mattress if partially opened was thirty-five inches or more. The Commission ordered the discontinuance of such advertising, as it had found that the expansion was only three to six inches in fact. The Circuit Court of Appeals annulled the order on the ground that this was mere exaggeration and the petitioner intended the picture as fanciful and not descriptive. This advertisement was held to be a sample of the time-honored tradition of puffing. It was believed that such puffing does not deceive the average customer.

In *Fairyfoot Products Co. v. Federal Trade Commission*, the petitioner advertised its bunion plaster for sale. *Inter alia*, it represented that its plaster dissolved bunions, that it stopped pain from bunions instantly, that permanent relief followed the use thereof, that the foot resumed its natural appearance, etc., and that the plaster was approved by leading medical authorities. The Court affirmed the cease and desist order, saying:

"That petitioner's plaster has virtue, may, for the purposes hereof, be conceded. . . . But this would not justify such sweeping claims as the condemned items of this advertising matter disclose, which were evidently intended to induce in the public mind the belief that there was an absolute and unfailing panacea for bunions of all kinds and degrees. Just where lies the line between 'puffing', which is not unlawful and unwarranted, and misleading representations in advertising, is often very difficult of ascertainment. But in our judgment this case does not present such embarrassment, since the advertising here condemned is well beyond any 'puffing' indulgence."

§ 554. Restraint of Broadcast Misrepresentations That Product Contained Absent Ingredient.

It is false and misleading advertising, amounting to unfair methods of competition within the Federal Trade

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Commission Act to represent that the advertiser’s product contains an ingredient which in fact is not contained therein, or if present, is in ineffective amounts so that in fact the product does not have the properties claimed.  

In Royal Baking Powder Co. v. Federal Trade Commission, the petitioner’s advertising had the effect of persuading purchasers that a new powder, although sold at a lower price, was the same as the old. The new powder contained no cream of tartar which had been the noteworthy claim of the old powder. The Commission’s order to cease and desist was affirmed on the authority of Federal Trade Commission v. Winsted Hosiery Co.  

In that case, the respondent advertised his suit goods as “natural wool”, et cetera, when in fact they were not. The Supreme Court therein definitely established the power of the Trade Commission to supervise false and misleading advertising.

In Procter & Gamble Co. v. Federal Trade Commission, the petitioner advertised certain of its soaps as containing naphtha in an amount sufficient to be effective as a cleansing ingredient. In fact, the chief ingredient of its soap was kerosene, naphtha being present in an amount insufficient to be effective. This advertising was condemned as an unfair method of competition.

The use of a combination of words including the word “satin” as a trade name for designation or description

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87 281 Fed. 744 (C.C.A. 2d, 1922).

§ 555 Federal Regulation of Broadcast Advertising

of a cotton fabric has been restrained.\textsuperscript{89} Likewise, the Commission may require the statement of "imitation" where a shellac is not entirely genuine.\textsuperscript{90}

Where the respondent labeled mirrors as "copper backed" when in fact the essentials of the copper backing process were lacking, an order to cease and desist was affirmed.\textsuperscript{91} Where respondent advertised his product as radium, but tests revealed no radioactivity, the Court upheld the order of the Commission.\textsuperscript{92}

§ 555. Use of Testimonials and Endorsements in Broadcast Programs.

In \textit{Northam Warren Corp. v. Federal Trade Commission},\textsuperscript{93} the petitioner used testimonials as a means of advertising its product. It was not disclosed in its advertisements that the testimonials were paid for. The order to cease and desist unless petitioner state the fact of payment, was annulled. So long as the testimonials are truthful, the fact that there is no disclosure of their purchase does not deceive the public.

The courts have, however, upheld the Commission in its measures against false claims of endorsement or adoption by the Government.\textsuperscript{94}

\textsuperscript{89} Flugelman Co. v. Fed. Trade Comm., 37 F.(2d) 59 (C.C.A. 2d, 1930).
\textsuperscript{93} 59 F.(2d) 196 (C.C.A. 2d, 1932). Of this case, Mr. Handler has said:

"One cannot be dogmatic in pre-

diction, but the practice is so out-
rageous that wishful thinking can be pardoned. The tone of this de-
cision is as unfortunate as the
Gratz case."

Handler, \textit{Unfair Competition},
(1936) 21 IOWA L. REV. 175, 249, n. 320.

\textsuperscript{94} Silvex Co., 1 Fed. Trade Comm. Dec. 301 (1918); Account-
§ 556. Misrepresentation of Advantage to Buyer in Purchasing from Seller.

The Federal Trade Commission has the power to restrain false advertising whereby the advertiser misrepresents that he is a manufacturer selling directly to the consumer, or that his purchases are in such huge quantities that he is able to sell at a lower price, or that his status is such that to purchase from him is to the advantage of the consumer.

Where the advertising and corporate name conveyed the idea that the respondent ground the wheat from which he prepared the self-rising flour which he sold, an order to cease and desist was affirmed. Likewise, where a retail mail order house misrepresented its purchase of sugar as in such quantities as to enable it to sell at much lower prices, it was ordered to cease and desist. Where the advertiser in fact did not sell as manufacturer but as a middleman, a representation that the purchaser would save by purchase from him as a manufacturer could be restrained.

§ 557. Miscellaneous Types of False and Misleading Advertising.

The following is a partial list of unfair methods of competition condemned by the Commission in 1936:

1. Use of false and misleading advertising, false branding and labeling of products, for example:
   (a) Use of the term "gold shell" to describe jewelry containing a very thin deposit of gold by electro-plating or electrolytic process.
   (b) Use of misrepresentations importing that paint offered for sale has been made in conformity with formu-

lae, specifications, or requirements of the United States Navy or the United States Government, or has been approved, tested, or adopted by the Navy or the Government.

(c) Representing extracts to be imported when they are in fact domestic-made.

(d) Representing automobile tires to be "reconstructed" when the reconditioning is limited to the repair of worn or damaged portions.

(e) Using the word "doctor" in connection with shoes not made in accordance with the design or under the supervision of a doctor or not having scientific or orthopedic features which are the result of medical advice or services.

(f) Misrepresenting that a preparation for the hair will impart color other than as the result of dyeing.

(g) Use of the word "Sheffield" in connection with silverware not made or manufactured in Sheffield, England, in accordance with the process used by the silversmiths of Sheffield.

(h) Misrepresenting the wood of which furniture is made.

(i) Misrepresenting dairy feeds by stating that the use of this feed decreases the amount of feed necessary; that the milk produced from such feed is purer, richer, more nutritious, has increased vitamin content; that it produces superiodized milk; that hospitals and similar institutions are paying a premium for superiodized milk and that this feed makes it possible for any dairyman to produce the required superiodized milk.

(j) Representing candy to be flavored and colored with juice of a fruit when in fact it is synthetically flavored and colored.

(k) Misrepresenting surgical supplies as being sterilized and packed under sanitary conditions when such is not the fact.

(l) Labeling wines of domestic make from domestic-grown grapes with the names of famous French wines.

2. Simulating the containers in which merchandise of com-
petitors is customarily packed and displayed, and passing off goods therein contained as the product of competitors.

3. Representing the prices at which goods are offered for sale as wholesale prices when they are in fact as high or higher than regular retail prices of the same or comparative goods.

4. Use of puzzle contests with the representation that the mere solution of the puzzle entitles the successful contestant to a prize, when in fact other services and requirements are imposed upon the contestant.

5. In advertising for house-to-house canvassers or sales agents, misrepresenting the prospective profits and the usual retail prices of the products which they are to sell.

* * *

7. Misrepresenting the advantage to prospective customers in dealing with the seller by—

(a) Representing that the seller is a manufacturer of the products he offers and that middlemen’s profits are thereby eliminated.

(b) Representing that the seller is a wholesaler and is offering his goods at wholesale prices.

(c) Misrepresenting the size and importance of the seller’s business by the use of illustrations of fictitious buildings, or exaggeration of the space occupied by the seller’s business, or the extent and value of his equipment.

(d) Misrepresenting that the seller’s line of farm implements and tools is the most complete line manufactured and has been on the market for a longer period than is the fact, and that he has an engineering department for experimentation and testing.

(e) Misrepresenting the volume of business done by the seller.

(f) Listing ordinary clerical help, in connection with a correspondence course of study, as “Home office registrar”, “Supervisor of aeronautical department”, etc.

8. Misrepresenting the geographical location of the place of manufacture of a product by specifying a place famous for such product.

9. Use of fictitious prices; for example, representing that
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the usual or ordinary sale price is actually higher than the price at which the goods are offered, when such is not the fact.

11. Misrepresenting the financial condition, or the business policy, or the quality of the product of a competitor, or otherwise disparaging a competitor's product.

12. Manufacturing and selling hats and caps made from used and reconditioned felts without disclosing the second-hand character of the material.

13. Using a method of sale involving an element of chance or lottery or preparing goods so that such a method of sale may be used.98


The following list illustrates unfair methods of competition condemned by the Commission from time to time in its cease and desist orders. This list is not limited to orders issued during the last fiscal year.

1. The use of false or misleading advertising, calculated to mislead and deceive the purchasing public to their damage and to the injury of competitors.

2. Misbranding of fabrics and other commodities respecting the materials or ingredients of which they are composed, their quality, purity, origin, source or qualities, properties, history, or nature of manufacture, and selling them under such names and circumstances that the purchaser would be misled in these respects.

6. Making false and disparaging statements respecting competitor's products, their value, safety, etc., and competitors' business, financial credit, etc., in some cases under the guise of ostensibly disinterested and specially informed sources or through purported scientific but in fact misleading demonstrations or tests.

8. Trade boycotts or combinations of traders to prevent

certain wholesale or retail dealers or certain classes of such dealers from procuring goods at the same terms accorded to the boycotters or conspirators, or to coerce the trade policy of their competitors or of manufacturers from whom they buy.

9. Passing off goods or articles for well and favorably known products of competitors through appropriation or simulation of such competitors' trade names, labels, dress of goods, etc., with the capacity and tendency unfairly to divert trade from the competitors, and/or with the effect of so doing to their prejudice and injury and that of the public.

10. Selling rebuilt, second-hand, renovated, or old products or articles made from used or second-hand materials as and for new.

16. Various schemes to create the impression in the mind of the prospective customer that he or she is being offered an opportunity to make a purchase under unusually favorable conditions when such is not the case, with capacity and tendency to mislead and deceive many of the purchasing public into buying products involved in such erroneous belief, and/or with the effect so to do, to the injury and prejudice of the public and of competitors, such schemes including—

(a) Sales plans in which the seller's usual price is falsely represented as a special reduced price made available on some pretext for a limited time or to a limited class only.

(b) The use of the "free goods" or service device to create the false impression that something is actually being thrown in without charge, when, as a matter of fact, it is fully covered by the amount exacted in the transaction as a whole.

(c) Use of misleading trade names calculated to create the impression that a dealer is a manufacturer or grower, importer, etc., selling directly to the consumer with resultant savings.

(d) Use of pretended, exaggerated retail prices in connection with or upon the containers of commodities intended to be sold as bargains at lower figures.

19. Misrepresenting in various ways the advantages to the
prospective customer of dealing with the seller, with the capacity and tendency to mislead and deceive many among the consuming public into dealing with the person or concern so misrepresenting, in reliance upon such supposed advantages, and to induce their purchases thereby, and/or with the effect of so doing, to the injury and prejudice of the public and of competitors, such as—

(a) Misrepresenting seller’s alleged advantages of location or size.
(b) Making false claim of being the authorized distributor of some concern.
(c) Alleged endorsement of a concern or product by the Government or by nationally known business organizations.
(d) False claim by a dealer in domestic products of being an importer, or by a dealer of being a manufacturer, grower or nursery, or by a manufacturer of some product of being also the manufacturer of the raw material entering into the product.
(e) Claiming to be a manufacturer’s representative and outlet for surplus stock sold at a sacrifice, etc., when such is not the fact.
(f) Representing that the seller is a wholesale dealer, grower, producer, or manufacturer, when in fact such representation is false.

* * *

22. Giving products misleading names so as to give them a value to the purchasing public or to a part thereof which they would not otherwise possess, with the capacity and tendency to mislead the public into purchasing the products concerned in the erroneous belief thereby induced, and with the tendency to divert and/or with the effect of diverting business from and otherwise injuring and prejudicing competitors who do not engage in such practices, all to the prejudice of the public and of competitors, such as names implying falsely that—

(a) The particular products so named were made for the Government or in accordance with its specifications and of corresponding quality, or are connected with it in
some way, or in some way have been passed upon, inspected, underwritten, or endorsed by it; or

(b) They are composed in whole or in part of ingredients or materials, respectively, contained only to a limited extent or not at all; or

(c) They were made in or came from some locality famous for the quality of such products; or

(d) They were made by some well and favorably known process, when, as a matter of fact, they were only made in imitation of and by a substitute for such process; or

(e) They have been inspected, passed, or approved after meeting the tests of some official organization charged with the duty of making such tests expertly, disinterestedly, or giving such approval; or

(f) They were made under conditions or circumstances considered of importance by a substantial part of the general purchasing public; or

(g) They were made in a country, place or city considered of importance in connection with the public taste, preference or prejudice.

* * *

27. Giving products a purported unique status or special merit or properties through pretended but in fact misleading and illfounded demonstrations or scientific tests, or through misrepresenting the history or circumstances involved in the making of the products, so as to give them a value to the purchasing public or to a part thereof which they would not otherwise possess, with the capacity and tendency to mislead the public into purchasing the products concerned in the erroneous beliefs thereby engendered, to the prejudice and injury of competitors and the public, as hereinabove set forth.99

§ 559. Regulation of Broadcast Advertising by Federal Communications Commission.

The Federal Communications Commission generally exercises hindsight in its regulation of broadcast adver-

99 Federal Trade Commission,
22 Annual Report 70 (1936).
tising. The great reluctance of the Commission to exercise its power of revocation, its lack of power to suspend licenses and its recognition of the importance of commercial advertising to radio broadcasting, make it customary for broadcast advertising to be considered by the Commission only on applications for renewal of station licenses.

Under the rule in *KFKB Broadcasting Association v. Federal Radio Commission*, the entire past conduct of a broadcast station is relevant in a hearing on an application for renewal. This was held to be a definite way to determine whether the continued operation of the station would be in the public interest.

The Commission is primarily concerned with the public interest. For that reason, advertising must be incidental to an actual service to the public. It would seem, therefore, that a solely commercial broadcast station could not secure a renewal of its license. This would be a question of quantity of advertising, which must always be limited by the interest and needs of the public.

Irrespective of the question of quantity of broadcast advertising, the Commission also considers the quality of the programs so broadcast. As to quality of advertising, the Commission has stated:

100 Cf. *Billboard*, June 12, 1937 where the Federal Communications Commission refused to rule on broadcast of “Bingo”, a game in which prizes are given.


102 “Broadcasting stations are licensed to serve the public and not for the purpose of furthering private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience or necessity means nothing if it does not mean this. The only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible.” *Federal Radio Commission, 3 Annual Report* 32.

103 *Id.*, 2 *Annual Report* 168.

"The rights of the people in this new art cannot be denied. And, if their share of this new form of entertainment can be received only at the expense of advertising statements or claims which are false, deceptive, or exaggerated, or at the expense of programs which contain matter which would be commonly regarded as offensive to persons of recognized types of political, social, and religious beliefs, then they are justified in demanding a change in the system."

The Commission has been more stringent with broadcast advertising of medical advice or cures. The Commission demands a high degree of responsibility for medical programs. It is decidedly against public interest to advertise false and fraudulent statements of the therapeutic and curative powers of medicines and nostrums. Broadcasting of cures for cross eyes and cancer is condemned. Moreover, although the Communications Act of 1934 does not condemn the broadcast programs containing information concerning contraceptives, the Commission will not allow dissemination of such information where it is in the form of an advertisement of a particular product which advises the public that by such use they may escape moral and physical consequences.


Chapter XXXVII.

CONTROL OF BROADCAST PROGRAM CONTENT: CENSORSHIP AND EDITORIAL SELECTION.


Section 326 of the Communications Act of 1934 expresses negatively any authority of the Federal Communications Commission to exercise censorship powers over the content of broadcast programs. The statute repeats exactly the language of the Radio Act of 1927 and provides as follows:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication."

§ 561. Rationale of Section 326 of the Act of 1934.

The Act of 1927, when introduced in the House of Representatives, contained no provision prohibiting the censorship of broadcast programs. The sponsors of the bill originally felt that it was unnecessary to amplify the Constitutional guarantee of freedom of speech contained in the First Amendment. When introduced in the Senate, a new bill was substituted therefor which was reported out by the Committee on Interstate Commerce with two sections relating to the content of broadcast programs. Senator Dill introduced the new statute, Section 7 of which provided for criminal prosecution for the utterance of libelous or slanderous communications by radio with guilty knowledge. Section 8 specifically excluded the Radio Commission from censorship powers with exceptions. The Committee’s report was challenged as imposing censorship powers in the administrative body. The Dill Bill was later revised. It eliminated Section 7 and the exceptions contained in Section 8. As modified, Section 8 became Section 29 of the Act of 1927, which has been re-enacted in its same form as Section 326 of the Act of 1934.

The prohibition against censorship by the Commission was criticized in the House of Representatives as not ex-

tensive enough in scope to forbid private censorship of the content of broadcast programs. It was regarded as axiomatic to allow freedom of the press and therefore considered dangerous for Congress to supervise by indirect the expression of opinion in broadcast programs.

Section 326 may therefore be considered a statutory reiteration of the Constitutional guarantees of freedom of speech in the regulation of broadcasting by the Commission. The failure to enact prohibitions against the regulation of defamatory broadcasts or the control of censorship of programs by broadcast stations would seem to support this analysis.


The First Amendment to the Constitution provides:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the public peaceably to assemble, and to petition the government for a redress of grievances."

The regulation of radio broadcasting by Congress did not, and was not intended to prevent the application of the First Amendment to communications by radio. The guarantees of the First Amendment against governmental interference with freedom of speech are specific and unconditional. The mere fact of the introduction of a new mechanism through which these ideas are more effectively communicated does not vitiate this fundamental right.

9 Id., at 5484.
10 68 Cong. Rec. 2567; id., at 3257.
13 The Press has considered itself the traditional trustee and guardian of the civil liberties of the country. In its conflict with the
However, governmental interferences with the communication of thoughts in other fields have been evidenced by the exclusion of indecent matter from the mails\(^1\) and by the sanction of state censorship of motion pictures.\(^2\)

Mr. Caldwell, in an excellent analysis\(^3\) of the First Amendment in its relation to radio broadcasting, more appropriately refers to the right of free speech as the liberty of expression. He is of the opinion that the First Amendment has for its primary purpose the right of society to receive the opinions of an individual, and secondarily to protect the individual in the expression of his beliefs.

The First Amendment is designed to prohibit Congressional legislation abridging freedom of speech and as such circumscribes the area of Congressional regulation of broadcasting. The Amendment does not infringe upon the control of citizens to select statements for dissemination to the public by means of their private property. The common carrier status of such media of communication as broadcasting industry (see Chapter XXVII.), the Press has maintained that the right to disseminate news should be in its hands rather than in the licensed broadcast stations. The guarantees of freedom of speech and freedom of the press as provided in the First Amendment may be construed to include the immunity to which liberty of expression through the broadcasting medium is entitled. The Press possesses no divine, exclusive power which is not available to broadcast stations, by which unbiased dissemination of news can be assured. Self-censorship is available to both media. President F. D. Roosevelt, in a letter to William S. Paley, President of the Columbia Broadcasting System, acknowledged that broadcasting "is a factor of the utmost importance in the maintenance and preservation of our Constitutional guarantee of free speech." See Broadcasting, May 1, 1938, p. 13, cols. 2, 3.


\(^2\) Mutual Film Corp. v. Ohio Industrial Comm., 236 U.S. 230, 243, 244, 35 Sup. Ct. 387, 59 L.Ed. 552 (1915).

\(^3\) Caldwell, op. cit. supra n. 11 at 181.
telegraph and telephone does impair the reasonable control by such companies of the content of communications transmitted over their facilities. Newspapers and broadcast stations, though serving the public, are not common carriers and a fortiori may exercise editorial selection over matters communicated by them without violating the First Amendment. By express statutory regulation, however, broadcast stations are required to refrain from such private censorship over the views of candidates for political office who use their facilities.

§ 563. Same: Congressional Limitations Thereon Under the Communications Act of 1934.

In addition to Section 315, which prohibits a broadcast station from censoring the contents of political broadcast programs, the Communications Act of 1934 imposes a duty on broadcast stations to refrain from disseminating obscene, indecent and profane language. Likewise, broadcast stations are forbidden by Section 316 to transmit programs giving information concerning lotteries.

The plenary powers given to the President in times of war or other national emergencies, include the assumption by the Executive of the facilities of broadcast stations. Section 606 of the Act of 1934 gives the President full power to direct that certain communications be broadcast during such emergencies.

§ 564. Indirect Control of Content of Broadcast Programs by Federal Communications Commission.

Broadcast stations, by the terms of their license from the Federal Communications Commission, are to be oper-

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17 See Chapter XIII. supra.  
ated in the public interest, convenience or necessity. This standard has been held not to be too indefinite and is applied to evaluate the use of the facilities of a broadcast station under the operating license.

Necessarily, the Commission appraises the quality and content of broadcast programs transmitted by a station which seeks to renew or modify its license. \(^{23}\) \textit{A fortiori}, such operations are evaluated by the Commission in proceedings to revoke a broadcast station’s license. It is obvious that the determinations of the Federal Communications Commission in proceedings wherein the quality and content of broadcast programs of specific stations are appraised, serve to compel other broadcast stations to refrain from the broadcasting of programs found or intimated by the Commission to be contrary to the public interest.

The semi-annual retrospective supervision of broadcast programs which is made necessary by the short term


§ 565. Control of Content of Broadcast Programs by the States.

Although broadcasting is interstate commerce, and is therefore subject to regulation by the Federal Government, the states may by the exercise of the police power regulate some aspects of the conduct of broadcast stations.

24 Although the Commission is authorized to grant licenses for a term not exceeding three years, it has not yet seen fit to extend the terms of its licenses beyond a period of six months. See Bellows, Is Radio Censored? (1935) Harper’s Magazine 704; Survey of Broadcasting in Fortune, May, 1938.


26 See Chapter XXXVI. supra.


28 See Chapter XI. supra.
Moreover, the prohibition against Federal interference with free speech imposed by the First Amendment does not extend to preclude the states from exercising such censorship powers, in the absence of similar prohibitions in their respective constitutions. Even where no state constitutional limitations exist, a state may not curtail by legislation the rights of its citizens by imposing a previous restraint on the right of free speech. In the landmark case of *Near v. Minnesota*, the United States Supreme Court struck a blow at censorship of the press by holding invalid a State statute which provided *inter alia* that anyone engaged in the business of regularly or customarily publishing "a malicious, scandalous and defamatory newspaper . . ." was guilty of a nuisance and subject to injunction. In this case, there was no doubt that the offensive publication was within the classification created by the statute, and no attempt was made to prove the truth of any of its statements. It was nevertheless held by the United States Supreme Court that even such a newspaper may not be suppressed in order to censor it, and the statute was held to be unconstitutional.

Therefore, a state has no jurisdiction to enjoin a broadcast station from transmitting programs which contravene standards previously imposed by its legislation. Such a statute would not be a valid exercise of the reserved police powers. The states may impose their restraint upon persons violating libel or other statutes founded on the police powers but may not directly work a censorship and suppression of the medium of communication by a statute so designed.

31 See Chapter XXIX. supra.
A state statute which is so vague and indefinite as to permit punishment for the fair use of the right of free political assembly or other exercise of the liberty of expression would be repugnant to the guarantee of liberty contained in the Fourteenth Amendment.32

A most interesting item of state legislation purporting to regulate the subject matter of broadcast programs is a New Jersey statute33 enacted in 1935. By this enactment, it is sought to prevent the broadcast of programs which incite hostility to race or religion. This statute places liability upon the person so broadcasting and upon the owner of the station who knowingly permits such broadcasts. The statute does not attempt to regulate broadcasts emanating from without New Jersey but there is no doubt that if the studio is within that State, even though the transmitter is outside the territory, the broadcast station would be liable under this law. There is no distinction made as to the language contained in the broadcast programs; so long as the speaker "incites, counsels, promotes or advocates hatred, violence or hostility against any group or groups of persons ... within this state by reason of race, color, religion or manner of worship of such group or groups, shall be guilty of a misdemeanor".

The broad language of this statute makes it susceptible to an attack that it imposes censorship by previous restraint upon the freedom of expression. Although the statute deals with a specific abuse, it nevertheless appears to be an infringement upon the right of freedom of speech protected by the Fourteenth Amendment34 under the pre-

tense of removing an abuse of that right.\textsuperscript{35} Despite the desirability of this legislation as a practical matter, and although it may be linked to the maintenance of public order and the prevention of molestation of the inhabitants, its comprehensive language and general terms make its enforcement of doubtful validity.\textsuperscript{36}

The police power of the states may be constitutionally exercised in the regulation of purely local matters relating to radio broadcasting which does not thereby impose an undue burden upon the interstate business of radio communication.\textsuperscript{37} A state may therefore prohibit or limit the broadcast of programs which advertise intoxicating liquors,\textsuperscript{38} tobacco, food\textsuperscript{39} and drug products considered inimical to the health and morals of its citizens.

Likewise, a state may impose its restraint upon a broadcast program which purports to give legal advice to the radio audience or to other participants, by prohibiting the participation by its judges and attorneys therein.\textsuperscript{40}

A bill introduced in the Michigan legislature\textsuperscript{41} requiring all broadcast stations in Michigan to file within twenty-four hours after the broadcast sworn copies of the contents of all non-commercial programs broadcast over their


\textsuperscript{36} Lovell v. City of Griffin, 58 Sup. Ct. 666, 82 L.Ed. 660, 662 (1938).

\textsuperscript{37} See §§ 183, 189, 190, 191 supra.

\textsuperscript{38} See Delaware Laws (1933) c. 18; Regulations of Oregon Liquor Comm., Broadcasting, July 1, 1937; Pennsylvania Liquor Comm., Broadcasting, April 1, 1938.

\textsuperscript{39} Michigan, Public Acts (1933) No. 259, § 11.

\textsuperscript{40} New York Supreme Court, Appellate Division, First Department, Rule 1A, Special Rules Regulating Conduct of Attorneys (Dec. 14, 1936); Second Department, Special Rule (Dec. 14, 1936); Fourth Department, Rule VI, Rules Relating to Attorneys (Jan. 6, 1937). The First and Second Departments have also forbidden the broadcast of trials from the courtrooms in their jurisdictions. Radio Daily, April 25, 1938, p. 1, col. 1.

A Colorado court rightly disqualified as jurors persons who had listened to a broadcast program which dramatized a case on trial. Variety, March 10, 1937.

\textsuperscript{41} Reported in Billboard, April 3, 1937.
facilities, would seem to be an unwarranted interference with interstate communications since no exemption is made for programs originating outside the State.

A bill was introduced in New York which made unlawful the broadcast of commercial material which had not first been submitted for censorship to the Motion Picture Division of the State Education Department. Since state censorship of motion pictures has been upheld as a reasonable exercise of the police power, may a state similarly censor the contents of broadcast programs before actual transmission?

The motion picture industry is a commercial activity operated as a strictly private enterprise. The United States Supreme Court in Mutual Film Corp. v. Industrial Commission of Ohio, held state censorship of motion pictures to be a valid exercise of police power since the exhibition of a motion picture within the state was an intrastate activity. Radio broadcasting being interstate commerce, the broadcast of a program is an interstate activity as contrasted with the purely local exhibition of a motion picture. A further distinction is found in the fact that broadcast stations are operated in the public interest, convenience and necessity as compared with the wholly private enterprise of motion picture exhibition. The proposed New York censorship statute would seem to impose a previous restraint upon the freedom of speech which was held unconstitutional in Near v. Minnesota. The conclusion seems inescapable that any attempt by a state to censor the contents of broadcast programs would be an unreasonable exercise of police power and an unconstitutional interference with interstate commerce.

§ 566. Federal Regulation of Political Broadcast Programs.

Section 315 of the Act of 1934 provides as follows:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office to the use of such broadcast station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

The prohibition of the First Amendment against Federal restraint upon free political discussion has been affirmatively reiterated by Section 315 which imposes upon broadcast stations the obligation to permit equal enjoyment of their respective facilities by candidates for political office. A broadcast station need not, however, make its facilities available to political candidates. But once a broadcast program containing the remarks of one candidate is transmitted, the station must permit all opposing candidates to make use of its facilities to an equal degree. Section 315 extends only during the period of the political campaign and not prior or subsequent thereto.

A broadcast station has the right to refuse its facilities to the holder of a public office who seeks re-election but who specifically wishes to broadcast a non-political program. Broadcast stations are not common carriers and may deny the use of their facilities at will. Where, however, the person seeking re-election desires to broad-

46 It would seem that candidates in primary election contests for nomination by their party come within the purview of § 315.
49 See Broadcasting, October 1, 1936, p. 15.
50 See §§ 215-217 supra.
cast a political program, and the station has made its facilities available to an opposing candidate, it may not refuse to transmit the program.

A broadcast station may not refuse the use of its facilities to candidates nominated by the Communist or other party on the ground that such a political entity is a combination of persons who conspire to overthrow or destroy by force the existing form of government of the United States, when political broadcasts by other candidates for the same office have been transmitted by it.51

Section 315 imposes no compulsion on a broadcast station to offer an identical period of time to all candidates. The station is not obliged to supersede existing programs already scheduled for the period requested by a candidate. So long as an equal period of time of a comparable nature is offered to all candidates, there is no violation of Section 315.

On July 1st, 1938, the Federal Communications Commission adopted new rules covering political broadcasting under Section 315 in substitution for the then existing Rule 178.51a The new rules are designed to assure fair treatment to all legally qualified candidates. The rules specifically provide that the broadcast station shall have no power of censorship over the material broadcast by any candidate for public office. It is further required that the rates charged for facilities offered to such candidates for the same office shall be uniform and shall not be rebated by any means directly or indirectly. No preference, prejudice or disadvantage may accrue to such candidates in connection with their use of a station’s facilities. The rules prescribe that the broadcast station shall make no discriminations in charges, practices, regulations, facilities or services rendered to candidates for political office who make

51 See N. Y. Times, Sept. 21, 1936, p. 3 (refusal to permit broadcast by Earl Browder, Communist candidate for President). See also Radio is Censored! Amer. Civil Liberties Union, Nov. 1936, 11.
use of broadcast campaign programs. The rules by inference permit a broadcast station to offer its facilities gratuitously to such a candidate. However, a station may not transmit the broadcast program of one candidate gratuitously and nevertheless insist that opposing candidates pay the established card rates for the use of its facilities. All candidates must be given equal opportunities.

The rules further prohibit the making of any agreement by a broadcast station which shall have the effect of permitting any candidate to broadcast to the exclusion of other legally qualified candidates for the same public office so long as the terms, rules and regulations offered by a broadcast station are uniform as to all candidates for the same office. The refusal of a candidate to comply with the reasonable rules and regulations of the broadcast station, or to accept the reasonable broadcast period offered, or to pay the scheduled bona fide charges for its service, should relieve the station of any further liability under Section 315.

The good faith of the broadcast station in political competition is required by the rules which provide that every broadcast station shall keep and permit public inspection of the complete record of all of the requests for broadcast time made by or on behalf of candidates for public office. The station is further required to indicate by appropriate notation the disposition made by it of such requests and the charges, if any, made for facilities furnished to such candidates.

§ 567. Prohibition of Broadcast of Obscene, Indecent or Profane Language.

Both the Communications Act of 1934 and its predecessor, the Radio Act of 1927, contain absolute prohibi-
tions against the utterance of any obscene, indecent or profane language by means of radio communication. The Commission is given authority under Section 303 of the Act of 1934, to suspend the license of any operator, for a period not exceeding two years, who has transmitted communications containing profane or obscene words or language.  

Such regulation by Congress is clearly an attempted exercise of a police power. While it is commonly stated that the Federal government does not possess a police power, the exercise of such power has been held proper in a field in which Congress has a delegated power to control, e.g., interstate commerce, postal service et cetera. Since the Congressional power to regulate radio broadcasting is founded on the power to regulate interstate and foreign commerce, Congress has the incidental power to regulate acts in interstate commerce which tend to harm the moral welfare of the people. Therefore, Congress may prohibit the utterance of indecent language over the air, under its power to regulate interstate commerce.

In Duncan v. United States, which was a prosecution under the relevant section of the Radio Act of 1927, the defendant urged very strongly, but unsuccessfully, that even though Congress could regulate radio broadcasting, and even though the words uttered were profane, the remedy existed only under the laws of the state in which the broadcast occurred. The basis of the conten-

56 Re Rapier, 143 U.S. 110, 12 Sup. Ct. 374, 36 L.Ed. 93 (1892); Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877 (1877).
57 48 F.(2d) 128 (C.C.A. 9th, 1931).
tion was that the use of such language was properly punishable by the state under its police power and that, under the Tenth Amendment of the United States Constitution, such powers were reserved to the states. However, the Circuit Court of Appeals was of the opinion that Congress possessed the power to make proper police regulations, such as prohibiting the broadcast of obscene or profane language, as an incident of the power to regulate interstate commerce.

Where a broadcast performance originates from a studio which is licensed as a theater by a state or by a municipality to which it has delegated such power, the local authority has jurisdiction which extends only to the prohibition of such elements of the performance as are not essential constituents of the actual broadcast program. The state or municipality cannot censor any broadcast program on the ground that it is obscene or immoral since such jurisdiction is exclusively in the domain of Congress. However, the local jurisdiction is not usurped by Congress over matters which are not direct constituents of the program as actually broadcast. The state or municipality may validly prohibit the wearing of costumes which are indecent or obscene, or any other phase of a performance which is not an essential part of the program as actually disseminated over the facilities of the station. Such local jurisdiction is sufficient to prevent the operation of a broadcast studio as a theater where the performance broadcast therefrom is found to be immoral or obscene. The state, however, has no direct control over the broadcast program.

59 See Chapters XI. and XV. supra. The New York State Boxing Commission, however, “instructed” two sports announcers not to make repeated use of the word “blood” and to give no opinion concerning the possible outcome of boxing contests described by them. See Variety, Feb. 10, 1937.

§ 568. Prohibition of Broadcast of Information Concerning Lotteries.

Congress has enacted a second police regulation of the content of broadcast programs in Section 316 of the Act of 1934\(^{61}\) which prohibits the broadcasting of information relating to lotteries.\(^{62}\) Section 316 reads as follows:

"No person shall broadcast . . . and no person operating any station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. . . ."

A penalty in the form of a fine or imprisonment of any person violating Section 316 is also provided. Moreover, the Communications Commission may suspend the license of any station operator, for a period not exceeding two years, for the violation of this section.\(^{63}\)

No judicial interpretation of Section 316 has as yet been made.\(^{64}\) However, there can be little doubt that it is a constitutional exercise of the power of Congress to regulate interstate commerce.

Since 1824,\(^{65}\) Congress has regulated the use of the mails in connection with lotteries. There is no essential difference between the postal lottery statute\(^{66}\) and the broadcast statute;\(^{67}\) both may be viewed as constitutional exercises of the powers delegated to Congress.

\(^{62}\) See Chapter XXXI. supra.
\(^{64}\) See HALEY, THE LAW ON RADIO PROGRAMS, (S. Doc. No. 137, Govt. Printing Office, 1938) 33 et seq.
\(^{67}\) See HALEY, op. cit., supra n. 57 at 34.
In Champion v. Ames\textsuperscript{68} (the Lottery Case), the United States Supreme Court held that Congress could constitutionally prohibit the carriage of lottery tickets in interstate commerce. Mr. Justice Harlan, in delivering the opinion of the Court, said: \textsuperscript{69}

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? . . . the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause . . . except the one providing that no person shall be deprived of his liberty without due process of law. . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."

This significant language would leave no doubt that Congress may constitutionally prohibit the broadcasting of advertisements or information concerning lotteries.

As a consequence of the exclusive jurisdiction of Congress to regulate broadcast lottery programs, the states and municipalities have no direct control over the broadcast of such programs. Such Congressional jurisdiction does not, however, interfere with the rights of local governments to prosecute or otherwise prohibit individuals

\textsuperscript{68} 188 U.S. 321, 23 Sup. Ct. 321, 47 L.Ed. 492 (1903).
\textsuperscript{69} Id., at 356.
who violate local lottery laws by participating in such offensive enterprises even if the act complained of relates solely to the sponsorship, presentation or other participation in the broadcast lottery program. Local lottery laws may continue to be enforced by the states and municipalities under the police power, with the sole exception that the local jurisdiction does not extend to the prohibition of the actual broadcast lottery program since that phase of the lottery is the subject of exclusive regulation by the Federal Communications Commission under the Act of 1934.

§ 569. Private Control of Contents of Broadcast Programs.

Apart from the jurisdiction of either the state or Federal governments, there exists a substantial amount of private censorship of the contents of broadcast programs. Such private censorship may take place by reason of the exercise of the opinions, discrimination or other personal standards of those who are identified with the broadcast program itself. The broadcast station, the program sponsor, the producer, the script writer, the performing artists, the announcers and others, all have the capacity and opportunity to reflect their personal tastes and opinions in the broadcast program.

§ 570. Same: By Broadcast Stations.

Although the operation of a broadcast station is licensed by the Federal Communications Commission in the public interest, convenience or necessity, broadcast stations are not public utilities. On the contrary, they are private enterprises operating within limits defined by the Federal government. Where there are no statutory or administrative restrictions on the contents of programs, a broadcast

70 For such instances, see BRINDZE, NOT TO BE BROADCAST (1937); Kassner, Radio Censorship, (1937) 8 AIR L. REV. 99; Siegel, Censorship in Radio, (1936)

71 See Chapter XIII. supra.
station may establish its own standards which shall govern and apply to the contents of programs transmitted over its facilities. Broadcast stations, however, should refrain from propagandizing or otherwise disseminating the private opinions and prejudices of the station management or of its customers upon controversial subjects. A broadcast station should provide equal opportunities for opposing points of view on public questions to be transmitted over its facilities. Wherever possible, a fair and non-partisan discussion should be permitted since the public interest will thereby be best served. This result can be achieved by the assistance of impartial representative groups of citizens who can function in relieving the station from the danger of reflecting its own private opinions in the creation of program standards. Broadcast stations may make available to advertisers and other program sponsors, designated periods of time during which their facilities may be used subject to the regulations and standards of the station. Reasonable private restrictions are justifiable since the station is responsible to the Federal Communications Commission for all programs broadcast within the term of the operating license.

It has been demonstrated supra 72 that the Federal Communications Commission exercises an indirect censorship over the contents of broadcast programs by considering past operations on applications to renew station licenses. Broadcast stations, therefore, may justifiably exercise their own private censorship over the contents of programs broadcast over their facilities where their objections are reasonable and are rooted in the fear that the program may be considered not in the public interest by the Federal Communications Commission on the station's next application to renew its operating license.

The broadcast station's rules and regulations should.

72 See §§ 559, 564 supra.
however, impose only reasonable restrictions upon the contents of broadcast programs. A regulation which is merely arbitrary, capricious or unjustifiably partisan should not be enforced by the courts if the program standard so established by the station has no reasonable relation to its operation in the public interest, convenience or necessity. Where, however, the facilities contract gives a broadcast station exclusive veto powers over the contents of a program broadcast during the specified period, the advertiser or other sponsor cannot complain of private censorship exercised by the station so long as the restraint has relation to its operation in the public interest. Where it is undisputed that the private censorship is unrelated to the station’s operation in the public interest, it is for the court to determine whether the regulation is reasonable.

75 William S. Paley, President of Columbia Broadcasting System, in a broadcast address on April 5, 1938, explained the general standards of private censorship as follows: "Regulation should be limited to the bare necessities of the case and should never go beyond that. Regulation should be devoted principally to making sure that facilities are used fairly and nonpartisanly." He then defined freedom of the air as "The right of any speaker to express his view, subject only to general laws and the laws of libel and slander; the rule is that he may not seek to provoke racial or religious hatred and the ordinary limitations of good taste and the decorum appropriate to the homes of the nation." N. Y. Times, April 17, 1938, § 10, p. 10, col. 2; Broadcasting, April 15, 1938, p. 15, cols. 3, 4.
76 Lenox R. Lohr, President of National Broadcasting Company, in an address before the Advertising Club of New York on April 7, 1938, said that freedom of speech per se does not exist in broadcasting, but instead the stations provide "freedom for equal opportunity for discussion on controversial public questions." See Broadcasting, April 15, 1938, p. 30, col. 1.
§ 571. Same: Same: Commercial Programs.

A newspaper may determine its own editorial policy and refuse to accept certain types of advertising copy and exclude advertisements of certain products, or may impose standards of veracity upon certain advertisers. By the same token, a broadcast station may refuse to enter into facilities contracts with advertisers for its own reasons; it may refuse to permit the broadcast of scripts and other material which conflict with its commercial program policy. A station may also refuse permission to its customers to broadcast phonograph records or electrical transcriptions in contravention of its standards. Likewise, a broadcast station may refuse to allow its facilities to be used to advertise certain classes of products or services.

Where a program is actually broadcast in contravention of the established standards of the station or in violation of the agreed rules and regulations of the station which are included in the facilities contract, the broadcast station may prevent further breach of the facilities contract by its customer and may, during the program, deprive the

77 Performing artists claim to have limited rights in connection with the manufacture of phonograph records containing their interpretative performances. In particular it is their contention that phonograph records are designed for private non-commercial performances only. This claim has been upheld. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) and other cases referred to in §§ 536, 537 supra. Consequently, the station which has secured no license from the performing artist to broadcast the performance of such records may validly forbid the use of such recordings in connection with its facilities.

78 The broadcast of recordings was prohibited in chain broadcasts by private regulations. This rule, however, has been relaxed by the National Broadcasting Company in its own program service.

79 Many broadcast stations refuse to make their facilities available for the advertising of intoxicating liquors, laxatives, loan companies and other products and services considered objectionable by the station management upon the ground that such broadcasts would not be in the public interest. See also Variety, July 7, 1937, report of Harris v. Station CJRC, Winnipeg, Canada.
advertiser of the facilities contracted for. The offensive program may thus be interrupted or deleted and another program substituted for the remainder of the period. In exercising such private censorship, the broadcast station can justify its withdrawal of facilities only if the courts are satisfied that a breach of the facilities contract had taken place when the program was interrupted or deleted. A mere threatened breach of contract should not be sufficient justification for such private censorship unless there was real, imminent and indubitable breach of the facilities contract threatened by the advertiser at the time the program was interrupted or deleted. If the courts should find that the interruption or deletion of the program was unjustified, the broadcast station would be liable in damages to the advertiser for its acts.

The same rules apply to the private censorship exercised by a broadcast station in refusing to make its facilities available to an advertiser to whom it has contracted to do so for a series of programs under an inseverable contract. The situation is the same whether the breach by the advertiser is anticipatory or committed during the term of the contract.

Of course, the broadcast station has undenied private censorship in prohibiting the broadcast of programs, the contents of which are defamatory or which violate other private rights, public laws or administrative regulations.

While private censorship may be imposed within these limits by individual broadcast stations, uniform regulations are generally exercised by the constituent stations of national or regional networks and systems. Such uniformity is obtained by private codes of ethics which

80 See N. Y. TIMES, October 20, 1936, p. 8 for interruption of Senator Vandenberg's "debate" with recordings of President Roosevelt's previous addresses.

81 In Siegel, Censorship in Radio, (1936) 7 AIR L. REV. 1, the following program restrictions of the codes appear at 20:

"(1) No program shall offend public taste and common decency.

(2) No program shall be planned as an attack on
§ 572. Same: By the Producer and Other Persons Presenting the Program.

The advertiser or other sponsor of a broadcast program obviously has the right to select the type of program which he considers most suitable to his needs and most appealing to the radio audience, subject only to the private regulation by the station and the law of the land. The program sponsor may thus include in his program whatever material he deems fit to broadcast, consistent only with the foregoing superior restrictions. The same rights enure to the benefit of the program producer, the script writer, the performing artists, the announcer and all other persons who derive their rights from the sponsor or other person who has acquired the privilege of using the station’s facilities. Accordingly, therefore, there can be no complaint against the program personnel’s refusal to broadcast any material submitted, or against the broad-

the United States Government, its officers or otherwise constituted authorities or its fundamental principles.

(3) No program shall be conceived or presented for the purpose of deliberately offending the racial, religious, or otherwise socially conscious groups of the community.”

82 Recognizing that public opinion would otherwise be controlled by the person or group expending the most money for broadcast facilities, this rule was established. In an address before the Advertising Club of New York on April 7, 1938, Lenox R. Lohr, President of National Broadcasting Co. said, “We regard paid or sponsored time as solely to be used for entertainment, and that may include education... Controversy should be confined to sustaining or free time... Any time a speaker talks on a controversial subject we hold ourselves ready to give the other side equal opportunity, in so far as that is possible, to present its case.” (N. Y. Times, April 17, 1938, § 10, p. 10, col. 2.) See Variety, July 21, 1937, report of National Broadcasting Company’s restrictions of Rev. Jardine’s broadcast interview on the Mollé Vox Populi program in reference to the abdication of King Edward of Great Britain.
caster's boycott of the works of certain writers or publishers, in the absence of contract and so long as no illegal restraint of trade or disparagement of property is involved.

As between the sponsor and the producer of the program, or as between the latter and the persons who actually participate in the broadcast program, it is a question of interpretation of the contracts between them to determine whether there exists any right of private censorship upon which can be based the exclusion of or other discrimination against the contents of the broadcast program. Where the contract makes no mention of such rights of private censorship, it is necessary to construe the terms of the engagement or employment to determine whether the producer, artist, script writer or announcer has the right to include in his contribution to the program, matters which are not approved by the program sponsor. Conversely, the terms of the engagement must be construed to determine whether the performing artists or announcers can justifiably refuse to broadcast material assigned to them by the sponsor or program producer.83 In any event, the courts will probably imply a covenant on the part of each party not to do anything which will interfere with or impair the rights of the other.84


A series of bills sponsored by the American Civil Liberties Union has been introduced in Congress by Representative Scott of California 85 and Senator Schwellenbach of Washington.86 These bills have as their object the elimination of private censorship of broadcast programs.

83 See § 367 supra.


One bill \textsuperscript{87} seeks to amend Section 315 of the Communications Act of 1934 so as to require every licensee to set aside regular periods at desirable times of the day and evening for the uncensored discussion of social, political and economic problems upon a non-profit basis. When any station permits the use of its facilities for such discussion, it must afford equal facilities to at least one exponent of an opposing viewpoint on the problem.\textsuperscript{88} It is also provided that the broadcast station shall not "be subject to liability, civil or criminal, in any State or Federal court for material so broadcast under the provisions of this section, nor shall any license be revoked or renewal refused because of material so broadcast".

The principle of requiring broadcast stations to provide forum periods for unrestricted discussion by both sides of controversial issues, is an admirable one. However, many questions arise as to the practicality of the instant proposal. The uncensored administration of a broadcast forum has potentialities which are inherently more objectionable than the present system of self-censorship. Because the speakers would be responsible to no one, listeners' criticism would be unavailing. Moreover, the public would be unable to determine the accuracy or reliability of the statements made by such speakers. The inevitable "cranks" would also seriously impair the value of such programs by insisting upon addressing the vast audience which would otherwise be unavailable to them. Unless some system of selection of participants is employed, such open forums have

\textsuperscript{87} H.R. 3039, 75th Cong., 1st Sess., S. 2756, 75th Cong., 1st Sess.
\textsuperscript{88} William S. Paley, President of Columbia Broadcasting System expressed the same view by way of self-regulation. In an address broadcast to stockholders of his corporation on April 5, 1938, he said, "By fairness we mean that no discussion must ever be one-sided so long as any qualified spokesman wants to take the other side. The party in power must never dominate the air. No majority must ever monopolize. Minorities must always have fair opportunities to express themselves." N. Y. Times, April 17, 1938, § 10, p. 10, col. 2, Broadcasting, April 15, 1938, p. 15, col. 4.
little public value. When selection takes place, the human element necessarily appears and the good taste of the forum chairman is substituted for that of the station operator. Little seems to be gained.

The requirement that regular and definite periods at desirable times of day and evening be set aside by commercial stations for such discussions, may seriously interfere with the income and program plans of systems, networks and stations, and might necessitate the cancellation of facilities contracts because of inability to accept commercial programs at such desirable times.

Moreover, such a statute appears to be unconstitutional because Congress does not have the power to grant legislative immunity from liability for the commission of crimes or private wrongs which are governed by the state laws. Although Congress may declare the same acts to be free of liability for violation of Federal laws, it cannot foist its policy on the states without similar action by each state. The proposed statute, therefore, would be invalid, and broadcast stations would nevertheless remain liable for violation of state laws which are enacted as incidents to the reserved police powers of the states, which local statutes are not otherwise invalid as interferences with interstate commerce.89

This question of constitutionality would similarly apply to the proposed bill 90 which seeks to amend Section 326 of the Communications Act of 1934 so as to protect stations from civil and criminal liability in both Federal and state courts for anything said or done in the course of any broadcast on any social, political or economic issue.

The motivation of these bills is the removal of responsibility from the broadcast stations for the consequences of such programs broadcast over their facilities. Although it is desirable to eliminate a station's unwarranted denial of facilities upon the convenient ground of potential lia-

bility, it seems that a situation more offensive to the public interest may be created by such a complete exemption from responsibility. It is not unlikely that the standard of program quality would be sensibly diminished as a result of the relaxed supervision thereof by the station.

Another bill ⁹¹ calls for the keeping of complete and open records of all applications for time, rejections and the reasons therefor, additions and changes requested in programs on social, political and economic subjects and of all interferences with and substitutions for such programs. If records of the type enumerated in the bill are kept, it should be required that the records be presented to the Federal Communications Commission on application for license renewal rather than be kept open for public inspection. This would protect the broadcast station from unnecessary harassing demands for inspection of the company’s private records or other unjust interferences which might be predicated upon the broad language of the proposed amendment. Such an administrative change may be accomplished by the Commission in its rules and regulations promulgated pursuant to the provisions of the suggested Section 315(a). ⁹²

It is submitted that the system of private ownership of broadcast stations produces a generally salutary effect upon the listening public. The business competition between broadcast stations in the matter of quality of broadcast programs is, albeit by indirection, a highly desirable public service. When compared with the content of programs

⁹² This apparently has already been achieved, insofar as political broadcast programs are concerned, by the rules of the Federal Communications Commission adopted on July 1, 1938, which provide:

“Rule 36 a 4. Every licensee shall keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges, if any, if request is granted.”

See N. Y. Times, July 10, 1938, § 10, p. 8, cols. 1, 2. See also § 566 supra.
transmitted by stations which are controlled by the govern-
ments of other countries, the United States system is far
superior. Private censorship within reasonable limits
is an inevitable incident of our competitive broadcasting
system. Since errors in judgment, the influence of per-
sonal taste and other deviations infrequently ensue, the
principles on which private control of broadcasting is
based do not call for revision. Such abuses as can be
minimized by appropriate regulation or legislation should
be speedily eliminated. However, the establishment of a
public censorship authority over the contents of broadcast
programs would not only strike a decisive blow to our
system of private ownership and operation of broadcast
facilities, but would also provide an inherently dangerous
opportunity for the violation of our Constitutional liberties.

The radio audience is the ultimate censor and regulation
must inevitably come from the need of the competitive
broadcast stations to transmit only such programs as meet
with the greatest popular approval.

93 No comparison need be elab-
orated upon as between the system
in the United States and that of
countries governed by dictators
where the broadcasting medium is
obviously dominated and used as
an agency for propaganda. For
a discussion of the differences be-
tween the system in this country
and that in England, see DEBATE
HANDBOOK ON RADIO CONTROL AND
Operation (1933) edited by Aly
and Schively. (Univ. of Iowa,
Extension Bull.)
Chapter XXXVIII.

LEGAL PROTECTION OF CREATIVE WORKS.

§ 574. Creative Works Used in Radio Broadcasts.

The value of a broadcast program is founded upon the originality of its contents as well as upon the manner of performance thereof.* Creative works are essential constituents of a broadcast program. These works are generally originated by persons not employed by the producer of the program.

Such creative works include material originally written for broadcast purposes as well as the more frequent adaptations of works created for other media. Musical compositions constitute the principal outside source upon which producers rely in their presentation of broadcast programs.

Musical compositions may be performed in broadcast

*It has been suggested that a broadcast program as an entirety possesses characteristics which make it deserving of copyright protection. Broadcast copyright in this form has been defined as "... the sole right of the broadcaster to dispose of his broadcasts and to prevent other people from using his broadcasts for commercial purposes without his previous permission and/or payment and from distorting, mutilating or modifying such broadcasts in any manner."

programs directly or through devices for the mechanical reproduction of such works. Among such devices are electrical transcriptions, phonograph records, film sound track and similar discs, tapes and rolls.

Dramatic works represent the next important source of broadcast program material. Such works include plays, scenarios, sketches and dramatic program scripts. The dramatization for broadcast purposes of literary works, such as novels and poems, and the presentation of news events in dramatic form are further examples of the dependence of broadcast programs on creative works.

Announcements, narrations, speeches and similar material for oral delivery included in broadcast programs are likewise creative works.

The talents of performing artists who are engaged for broadcast programs are also the subject of property characteristics and their performances have been protected at common law against unauthorized appropriation.¹

§ 575. Same: How Used.

The inclusion of creative works in a broadcast program is unquestionably for purposes of public performance and must be licensed therefor. Broadcast performances of such works may take place through personal "live" renditions or through the medium of recordings. Mechanical reproductions of creative works used for broadcast purposes must be authorizedly manufactured for such use, except in instances where the compulsory statutory license is applicable.

Musical compositions may be broadcast either as dra-

¹ Waring v. WDAS Broadcasting Station, Inc., 27 Dist. & Co. Rep. 297, 318 (Phila. Pa. Com. Pl., 1936) where McDevitt, J. expressed the opinion that the artist's performance was established as property when embodied in a tangible form and capable of reproduction.
matic or non-dramatic performances. The lyrics of musical compositions may conceivably be used alone or in conjunction with another musical work.

Dramatic works are frequently adapted for broadcast purposes and presented to the public through that medium. Novels, poems and similar literary works are also the subject of broadcast performance through the reading and recitation thereof.

Such broadcast uses of creative works may be made deliberately or unintentionally. Presentations may be in the form of direct broadcast or rebroadcast programs.

Public performances also take place at the point of reception of the broadcast program.²

Moreover, supplementary exploitation of broadcast programs may involve the publication and distribution of creative works in tangible form as copies of such works.


Owners of creative works have the exclusive right to the use of such intellectual products for broadcast as well as other purposes. These rights may exist at common law or by legislative enactment. The rights granted by statute depend upon the author's compliance with the formalities required by the copyright law. Where the author has not elected to avail himself of the benefits of the copyright statute, his property in his intellectual product is protected at common law until there has been such publication as to constitute a dedication of the work to the public.

Both at common law and by statute, creative works are protected against copying or other appropriation of the whole or a substantial part thereof.\(^3\) There may be instances of appropriation of creative efforts which are not protected by copyright registration by reason of the failure to meet technical requirements of the copyright statute or of works which cease to have common law protection because of their dedication to the public. In such cases, remedies may sometimes be found in the law of unfair competition \(^4\) or in actions for breach of fiduciary relation or contract.\(^5\)

Copyright protection extends to the individual form or sequence of the expression of the author’s intellectual labors.\(^6\) It is the product of the author, rather than the underlying concepts of his work, which is protected by


“While plaintiff’s undertaking is not, strictly speaking, unfair competition in the sense that the plaintiff is attempting to palm off his goods for the goods of a competitor, it comes within the rule which the courts have frequently applied in cases of unfair business practices regardless of the element of competition.”


copyright. Ideas as such are not copyrightable but the tangible expression thereof may be the subject matter of such protection.

The extent of protection of creative works under the Copyright Act is not necessarily coextensive with the protection accorded similar works at common law. While rights at common law have substantially the same purpose as statutory copyright, to protect creators of such works, it is more appropriate to apply the term "copyright" to statutory protection and to use the phrase "common law rights" to refer to protection extended by judicial decisions only.

§ 577. Historical View of Copyright.

Copyright protection of creative works in the United States has its antecedents in English history. The concept of protection of the author against appropriation and copying was not the original rationale of the monopoly of copyright.

Copyright protection was first granted to the author in England in 1709 by the Statute of Anne. That enactment is the forerunner of the statutory protection of all authors' literary property. Prior to the Statute of Anne, copyright assumed the form of customs regulations and operated to protect English printers, bookbinders and booksellers who had acquired complete proprietary interests in literary works from the authors thereof. Obviously, no copyright existed before the invention of printing in

7 Ibid.
9a See § 532 supra.
98 ANNE c. 19 (1709).
about 1472, although the copying of religious and other manuscripts had already occurred.

In addition to its economic aspects, copyright in its earlier form was an agency of royal censorship of matter deemed offensive to the realm. In particular, matters repugnant to the established church were thereby prohibited. The monopoly granted by the early statutes became the subject of court favors and only licensed printers secured copyright protection.

The Stationers' Company, consisting of licensed printers, was chartered in 1556 as an effective royal restriction upon the press. Only members of the Stationers' Company were empowered to publish books; copyright monopoly was therefore restricted to these favorites. The Court of Star Chamber lent its aid to the Stationers' Company by enjoining piracy by unlicensed printers and by importation.

The Stationers' Company provided a system of registration of literary works and of the names of the owners thereof. The copying of a literary work so registered, by one not the owner of the property therein, was punishable by forfeiture and fines.

The property right in creative works was thus an incident of protection of a manufacturing business rather than the right of an author. When the last extension of the monopoly to the Stationers' Company expired in 1681, no copyright protection existed until 1709 except that by ordinance or by-law, the Stationers' Company regulated copying by one member of a literary work owned by another, which was properly registered in the books of the Company. During that interval, the policy of protecting the author was formulated, leading to a cessation of the printers' monopolies by the Statute of Anne in 1709.10

That enactment acknowledged the author as well as the

9a See Oranje, Rights affecting the use of broadcasts, Chap. 1A (1938) 3 Geistiges Eigentum, Part 4, 355-360.
10 8 Anne c. 19 (1709).
publisher as being entitled to copyright protection. The term of copyright was fourteen years together with a privilege of renewal for an additional similar term.

The system of registration and deposit of copies which is now in vogue in the United States carries over from the days of the monopoly of the Stationers' Company. The latter was obliged to maintain registry books in which would be entered the titles of all authorized books and the name of its member who became the owner thereof. Even under the Statute of Anne, registration on the books of the Stationers' Company continued although the limitation that copyright be restricted to members was eliminated by that statute.¹²

The fact that copyright extends to the actual expression of the individual sequence of words in each writing is understandable. The traditional legal protection of creative works concerned itself only with the copying of existing works rather than with protection of the author's plot, theme or other intellectual qualities of the works apart from their expression.¹²a


Independently of the statutory copyright granted to authors under the Statute of Anne, the English courts had granted protection to literary property at common law. The fundamental issue arose early as to the compatibility or conflict of statutory and common law protection. In Millar v. Taylor,¹³ an author contended that his common law rights, being perpetual, survived the expiration of the statutory copyright term so as to continue to afford protection to his work. Lord Mansfield, in speaking for a majority of the King's Bench, upheld this contention and decided that the Statute of Anne did not deprive the author

¹¹ Ibid.
¹² For a more complete survey of the history of the law of copyright in England, see Copinger on THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 5 et seq.
¹²a See § 532 supra.
¹³ 4 Burr. 2303 (Eng. K.B., 1769).
of his common law rights. *Millar v. Taylor* by no means settled the raging controversy between author and publisher.

Five years later, the House of Lords was confronted *inter alia* with the same issue in *Donaldson v. Beckett*. There, too, the Court was divided. The majority held that common law literary property rights ceased to protect a work after publication. The Court held that although the common law right endured perpetually, insofar as it was supplanted by the statute, protection was limited to the term thereby created.

In the United States, it was likewise held in *Wheaton v. Peters* that while literary property was protected at common law, the Copyright Act superseded such common law rights as to works specified in the statute. The author of such works, of which there had been publication without compliance with the requirements of the statute, was held thereby to have lost his common law rights.

Where, however, the United States copyright statute affords protection to designated classes of works, the common law rights survive in works not within the purview of that statute. The scope of common law protection is not restricted by statutory limitations upon the subject matter of copyright. Intellectual property may be protected at common law upon the same basis as any other property.

The common law provides protection against all unauthorized uses of intellectual productions which take place prior to the first publication thereof.

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16 8 *Pet.* 591, 33 U.S. 591, 8 *L.Ed.* 1055 (1834).
18 *Id.*, at 634.
Chapter XXXIX.

PROTECTION OF CREATIVE WORKS
AT COMMON LAW.

§ 579. Common Law Rights Distinguished from Statutory
Copyright.

An author of a literary, musical or other artistic work
is granted exclusive rights of ownership therein, which
may be sold and conveyed absolutely.¹ Common law rights

¹Maurel v. Smith et al., 271 Fed. 211 (C.C.A. 2d, 1921); T. B.

In Maurel v. Smith, supra, Cir-
cuit Judge Manton said, at page
214:

"The rights of property which
the appellee had were transferable
by sale and delivery, and there is
no distinction, independent of stat-
ute, between literary property and
property of any other description.

The right to sell and transfer per-
sonal property is an unseparable
incident of the property. An au-
thor or proprietor of a literary
work or manuscript possesses such
a right of sale as fully and to the
same extent as does the owner of
any other piece of personal prop-
erty. It is an incident of owner-
ship. Therefore sales may be ab-
solute or conditional, and they may
be with or without qualifications
or restrictions, and the law relating
to personal property is applied in
determining the character of a sale
of literary property."
are protected independently of statute, until the author has permitted the contents of his work to be communicated generally to the public. Section 2 of the present copyright law expressly provides that statutory copyright does not in any way annul or limit the enforcement of common law rights at law or in equity. This provision has been construed as indicating only that the statute does not displace the common law rights, but that whoever avails himself of the statute must be held to have abandoned his common law right in the work so registered.

In England, common law rights in unpublished works continued until 1911 when the British Copyright Act was passed. Section 31 of the Act of 1911 expressly provides that after the enactment of that statute no person shall be entitled to copyright in any work, whether published or unpublished, except under that Act. Although statutory copyright has superseded common law rights in England, the copyright statute of the United States has expressly preserved judicial enforcement of rights at common law. Until publication, therefore, intellectual creations are protected perpetually at common law in the form in which the author has expressed his originality.


"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."


5 1 & 2 Geo. V, c. 46 (1911).


7 Ferris v. Frohman, U.S.
When the work is dedicated to the public by publication, the author ceases to have protection at common law unless his acts of publication have been such as to invest him with statutory copyright protection simultaneously by compliance with the formalities required by the Act of March 4, 1909.\(^8\)

Statutory copyright is not available to non-resident aliens whose governments are not parties to treaties or conventions to which the United States is signatory or whose governments do not enjoy copyright reciprocity as proclaimed by the President of the United States.\(^9\) Common law property rights are enforced irrespective of the citizenship of the author.\(^10\) The common law right is perpetual until publication, while statutory copyright exists for a limited term of years only.\(^11\) Where an inseparable work, such as a musical composition, is created jointly by a citizen of the United States and an alien ineligible to obtain copyright, as co-authors, the work may be copyrighted and will nevertheless be protected.\(^12\)

When common law rights are destroyed by publication

and no statutory copyright is obtained, the work falls into
the public domain. A copyright obtained after the
author's common law rights have been lost by publication
cannot be enforced. The acts of publication must be
simultaneous, so that the common law rights are super-
seded by statutory copyright as a result of the same publi-
cation. Once statutory copyright protection is obtained,
the author cannot rely upon his common law rights of which
he has been thereby divested. By electing to avail him-
selves of the statute, the author is deemed to have abandoned
his common law rights.

At common law, an author has the exclusive right to
prevent others from copying his works until he permits
general publication. The duration of such common law

13 Atlantic Monthly Co. v. Post
1928); Caliga v. Inter-Ocean News-
paper Co., 215 U.S. 182, 30 Sup.
 Ct. 38, 54 L.Ed. 150 (1909).
14 D'Ole v. Kansas City Star
Co., 94 Fed. 840 (C.C.W.D. Mo.,
1899).
15 West Pub. Co. v. Edward
Thompson Co., 169 Fed. 833 (C.C.
833 (C.C.A. 2d, 1910; Stern v.
16 Societe Des Films Menchen v.
Vitagraph Co. of America, et al.,
251 Fed. 258 (C.C.A. 2d, 1918); Photo-Drama Motion Pict. Co., Inc. v. Social Uplift Film Corp.,
220 Fed. 448 (C.C.A. 2d, 1915),
aff'd 213 Fed. 374 (S.D.N.Y.,
1914); Savage v. Hoffman, 159
Fed. 584 (C.C.S.D.N.Y., 1908).
In Photo-Drama Motion Pict. Co., Inc. v. Social Uplift Film Corp., supra, Circuit Judge La-
combe, at page 450, said:
"We do not concur in Judge

17 Ibid. It is clear that § 2
of the Act of 1909, 35 STAT. 1076,
17 U.S.C.A. (1927) does not pro-
vide for an election of remedies.
But quaere: May the author of an
unpublished work registered under
§ 11 of the Act of 1909 maintain
an action in a state court to pro-
tect his alleged common law literary
property right of first publication
as an alternative to an action in a
Federal court for infringement of
his statutory copyright?
18 Caliga v. Inter-Ocean News-
rights is perpetual so long as the work is unpublished, but publication terminates all rights. The author has the sole and exclusive right of first publication.

Physical transfer of possession of an unpublished manuscript does not carry with it the right to publish or multiply copies without the consent of the author. Intangible property rights, such as common law literary property and statutory copyrights, must be assigned as property separate from the physical chattels incorporating such works. Whether incorporeal or physical property is transferred depends upon the terms of sale. An author may part with physical possession of his manuscript which has not been published, and still retain his common law rights or...

[Note: The text is cut off at this point.]
assign same to another.\textsuperscript{22} The contrary, however, is true if the sale of the manuscript is absolute and unconditional.\textsuperscript{23} An author may transfer a manuscript with reservations limiting the extent of the common law rights granted.\textsuperscript{24}

\section*{580. Publication as a Divestment of Common Law Rights.}

Where a work protected at common law has been published without authority of the author, his common law rights are not destroyed.\textsuperscript{25} A restricted or limited publication does not divest the author of his common law rights, when the contents of his work were communicated under conditions expressly or impliedly precluding its dedication to the general public.\textsuperscript{26} Publication, however, must not
be confused with publishing or printing. The word “publication” is a term possessing legal significance. It refers to the act of making public a book, writing or other work by offering or communicating it to the public generally in the sale or distribution of copies. Publication need not take place in the United States; the same acts elsewhere will serve to defeat the author’s rights. When one or more copies of a work are prepared and made available to the general public, there is a publication at common law.

Where, however, a recording by way of a disc or film is given limited distribution for purposes of performance, which is in itself not a publication, no general dedication to the public is found and common law rights survive such limited publication. In Waring v. WDAS Broadcasting Station, Inc., Mr. Justice Stern said:

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

30 Universal Film Co. v. Copperman, 218 Fed. 577 (C.C.A. 2d, 1914).
such work common property”. . . . “The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom it may be committed”: Werckmeister v. Amer. Lith. Co., 134 Fed. 321, 68 L. R. A. 591, 596; Berry v. Hoffman, 125 Pa. Superior Ct. 261, 267, 268. . . . 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.”

The distribution of copies need not be for profit in order to constitute publication.32 The work may be leased33 or loaned34 but the author’s rights will nevertheless be barred because of publication.

§ 581. When Publication Is Effected: Specific Instances.

So long as copies, made by any means whatsoever, are available for distribution to the general public and actually so disseminated without restriction, a publication will be deemed to have taken place.35 The test of publication is not so much the kind of copy made or the means by which such copy is prepared or reproduced, but rather the circumstances under which the author parted with possession of his manuscript or a copy thereof.36 If copies are dis-

35 The accepted definition of publication is set forth in American Tobacco Co. v. Werckmeister, 207 U.S. 284, 28 Sup. Ct. 72, 52 L.Ed. 280 (1907) at page 299: “It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property.” See Berry v. Hoffman, 125 Pa. Super. 261, 267, 268, 189 Atl. 516 (1937).
36 In Werckmeister v. American Litho. Co., 134 Fed. 321 (C.C.A. 2d, 1904), at page 325, the Court said:
persed for a special use by the author and not placed within the reach of the general public for the author's benefit, it is such a limited publication as will preserve the common law rights of the author. It has been held that the transmission of a work by telegraph is in the nature of a manuscript communication and is not a general publication. Such a communication of a work protected at common law is definitely a transmission of the work from the sender of the telegram to the receiver thereof and is not a dedication to the general public.

Generally, the typewriting or even mimeographing of a limited number of copies of a broadcast script for the

"The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed."

In Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937), at page 636, Mr. Justice Stern said:

"In determining whether or not there has been such a publication (which operates as an abandonment to public use), 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." (Parenthetical matter supplied.)


In Berry v. Hoffman, supra, at page 267, the Court said:

"When the communication is to a select number upon condition, express or implied, that it is not intended to be thereafter common property, the publication is then said to be limited."

In Werckmeister v. American Litho. Co., 134 Fed. 321 (C.C.A. 2d, 1904), the Court said, at page 324:

"A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public."


39 However, reproduction by typewriting or mimeographing constitutes "printing" within the meaning of the copyright statute as to infringing copies. Macmillan Co. v. King, 223 Fed. 862 (D. Mass., 1914).
purposes of making the work available to several potential program producers should not alone constitute a publication to divest the author of his rights at common law and dedicate the script to the entire world. The making of a photostatic copy of a composition or even a printer's proof of a work typographically or lithographically reproduced, does not constitute a publication. If the author's acts are otherwise circumscribed and the work is not generally communicated, such a distribution of copies is limited and does not cause divestment of the creator's common law rights.40

Mere printing without circulation does not constitute publication. The number of copies made is not controlling, but rather the extent to which the author has permitted the dissemination or distribution of copies of his work to the general public.41 It is not necessary that copies of a work be sold to constitute a publication.42 It is sufficient if the author has leased copies of his work.43 Similarly, the lending of copies to the general public is tantamount to a dedication of the work to the public domain.44 It is sufficient that only one copy of a work be sold. If copies are made available to the general public by gratuitous distribution thereof, such acts will nevertheless constitute a publication.45 Accordingly, the inclusion of a work in

42 See Copinger on the Law of Copyright (Eng. 7th ed., 1936) 27.
44 Ibid., semble. See also Ladd v. Oxnam, 75 Fed. 703 (D. Mass., 1896); Shafter, Musical Copyright (1932) 91.
But a gratuitous private circulation of a work is not a publication. McCarthy & Fischer, Inc. v. White et al., 259 Fed. 364 (S.D.N.Y., 1919); Prince Albert v. Strange,
advertising material which is freely distributed, will bring about a loss of rights of literary property at common law.46

The author should not be held to have communicated his work to the general public because he has allowed numerous persons, related to the business for which the work may be suitable, the privilege of reading his manuscript and indefinitely retaining possession of a copy thereof.47

A manuscript should not be literally defined so as to be limited to holographic works. Manuscripts in the early common law times were confined to works written in the handwriting of the author. To-day the typewriter, photostat reproduction, mimeograph machines, offset and other processes take the place of the ancient scrivener. It would be unjust and an unfair application of the common law to extend the doctrine of publication to cause a divestment of literary property rights of an author who has made copies of his work, so long as he does not thereby distribute his creative efforts to the general public without restriction. The common law should not operate to bring about forfeitures of property rights unnecessarily. Publication should always depend upon the extent and character of the acts done by the author or his acquiescence in the doing of such acts by others, which indicate that the work has so been dealt with as to constitute an expression of the author’s intention to dedicate his work to the general public.48

§ 582. Same: Performance Not a Publication.

Curiously enough, the concept of a copy at common law seems to be restricted to a tangible concrete form by means of which the work can be communicated intelligibly to the public. Such communication generally involves the

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transmission of a graphic representation of the work, such as a printed book, score, song, etc. The actual presentation of the work itself to the public by an unrestricted performance, reading or expression thereof has long been held not to constitute publication. The performance of a play upon the stage, the rendition of a musical composition by an orchestra, instrumentalist or vocalist and the public delivery of a lecture or address have been considered as not an abandonment of the work by the author so as to constitute a dedication thereof to the public. The exhibition of a painting is likewise held not to constitute a publication. Although the contents of the work are made available to the public by general unrestricted performances and despite the fact that a limited number of copies of the work is transmitted to a few artists for public performance purposes, no divesting publication is found.


50 McCarthy & Fischer, Inc. v. White et al., 259 Fed. 364 (S.D. N.Y., 1919). Judge Augustus N. Hand said, at page 365:

"Because there was no publication, but only a performance of the musical composition, the authorities as to dedication relied on by the defendants are quite inapplicable."

51 Nutt v. National Inst. For The Improvement of Memory, Inc., 31 F.(2d) 364 (C.C.A. 2d, 1929). In England, before the Copyright Act of 1911, which in § 1(3) provides that a lecture is not published by delivery, the unauthorized publication of copies of a lecture which had only been delivered was restrained. Caird v. Sime, 12 App. Cas. 326 (Eng., 1887); Nichols v. Pitman, 26 Ch. Div. 374 (Eng., 1884). Pupils may take notes of or the whole lecture for their own use. Copinger, op. cit. supra, 33. See Keene v. Kimball, 16 Gray (82 Mass.) 545, 77 Am. Dec. 426 (1860). In Copinger, op. cit. supra, 33, it is pointed out that it is difficult to determine to what extent publication of unpublished works, such as lectures, were protected on the basis of infringement of common law literary property right rather than on the basis of an express or implied obligation of confidence.


53 McCarthy & Fischer, Inc. v. White et al., 259 Fed. 364 (S.D.
A similar qualification of the doctrine of publication is evidenced by the holding that a motion picture performance is in the same category as a stage presentation and consequently the exhibition of a motion picture is not a publication.\(^{54}\) Since a film print is necessary for such an exhibition, it may appear that the author has dedicated his work to the public by such copies as science has made possible, but the courts have held otherwise.\(^{55}\) It would seem, therefore, that any record, film, electrical transcription or other mechanical contrivance by means of which a work protected at common law may be publicly performed does not constitute a copy of such work or a publication thereof to divest the author of his common law rights therein.\(^{56}\) Judge Brewster, in *Uproar Co. v. National Broadcasting Co.*\(^{57}\) extended this theory to radio broadcasting by holding that the rendition and performance of a work publicly by means of the facilities of a network of broadcast stations is not an abandonment of ownership of the work or a dedication thereof to the public at large.


Where the author has assigned his common law rights for a certain territory, reserving to himself all rights elsewhere, and the assignee commits an act of publication in

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\(^{54}\) DeMille Co. v. Casey, 121 Misc. 78, 201 N.Y.Supp. 20 (1923).


the limited territory, a conflict of authority exists as to whether there has been such a publication as to defeat all the rights of the author in the reserved territory. The Federal Court in *Goldmark v. Kreling*\(^{58}\) held that there was no such publication as to cut off the rights of the author’s exclusive licensee for the territory of the United States, when the first publication occurred abroad. The New York ruling, however, which is preferable, as laid down in *Daly v. Walrath*,\(^{59}\) held that such first publication in Europe destroyed the common law rights of the author’s exclusive licensee for the United States.

Where the author has sold all of his right, title and interest in his work, he is unable to give another any rights related to said work, even if the name has been changed. The court would enjoin a competing publication since the author was possessed of no property rights which could lawfully be transferred to the second assignee.\(^{60}\) But if the author made an equitable assignment of his rights in future productions and authorized another person, who had no knowledge of the outstanding equitable assignment, to publish a work created during the term of the agreement, such authorized publication is effective to destroy the common law rights of the equitable assignee.\(^{61}\)

\[\text{§ 584. Extent of Protection at Common Law.}\]

The author or other owner of a literary, artistic or other intellectual production protected at common law has the exclusive right to make any use thereof which he sees fit.\(^{62}\)

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\(^{58}\) 35 Fed. 661 (N.D. Cal., 1888).


\(^{61}\) Stern v. Laemmle Music Co., 74 Misc. 262, 133 N.Y.Supp. 1082 (1911).

In *Buck v. Virgo*, 22 F.Supp. 156 (W.D.N.Y., 1938) it was held that unwritten musical compositions may be sold, that equitable title attaches to the composition when it comes into being and that such equitable title vests in the grantee.

\(^{62}\) At common law there is no exclusive right to multiply and vend copies. Frohlich & Schwartz, *op. cit. supra*, n. 54, 495.
He may secure damages at law for any unauthorized use of his property. For the same reasons, Equity will issue an injunction to restrain any unauthorized use and will decree an accounting for profits derived from such use.

The flexibility of the common law serves to enlarge the scope of its protection to new uses of such works by extending the monopoly therein to such acts as occur prior to publication. At common law, the unauthorized use of a work protected thereby, is actionable although a similar use of a copyrighted work would not constitute an actionable infringement under the statute. A common law work may not be copied, mechanically reproduced by any device whatsoever, arranged, translated, adapted or performed by any means or through any medium whatsoever without the consent of the owner of the work so protected.

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64 French v. Kreling, 63 Fed. 621 (C.C.N.D. Cal., 1894).

Chapter XL.

COPYRIGHT UNDER THE ACT OF 1909.

§ 585. Copyright Legislation Prior to 1909.

Shortly after the close of the Revolutionary War, the Colonial Congress convened and recommended inter alia that the States grant protection to authors by appropriate copyright legislation. Every State, with the exception of Delaware, passed copyright statutes prior to the adoption of the United States Constitution.

1 See Statement, Exhibit C, of Edwin P. Kilroe, Hearings before the Committee on Patents, Revision of the Copyright Laws, on S. 3047, 74th Cong., 2d Sess. (1936) 1195 [hereinafter referred to as Hearings (1936)]; Shafter, Musical Copyright (1932) 18.

2 Ibid. For important provisions of these early acts see Kilroe, op. cit. supra n. 1. As to Delaware, quaere whether the Statute of Anne, 8 Anne c. 19 (1709), was a part of the common law of that State.
Article I., Section VIII. of the United States Constitution provides that Congress shall have 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 grant of power to Congress did not divest the several states of jurisdiction to grant authors judicial protection at common law by way of literary and intellectual property. Copyright as such, being statutory, was placed in the domain of Congress exclusively so that the states have no power to pass substantive legislation in the field.

In 1790, the first Federal copyright statute was enacted. Additional legislation was then passed and in 1831 a revised consolidated statute was enacted, which for the first time granted protection to authors and composers of musical compositions. In 1856, a supplementary act was passed which enlarged the scope of copyright protection to dramatic works by granting to owners thereof the exclusive right publicly to perform, act or represent such works in addition to the existing sole right to print and sell copies. In later statutes, other creations became subjects of copyright protection.

The need for international arrangements for copyright

3 Act of May 31, 1790. This statute protected only books, maps and charts. It granted the sole right to print, reprint, publish and vend. For analysis see Statement, Exhibit C, of Edwin P. Kilroe, Hearings (1936) 1200.

4 Act of April 29, 1802 (Protection accorded to engravings, prints, etchings and designs); Act of Feb. 15, 1819.


reciprocity became apparent and led to the enactment in 1891 of appropriate legislation.⁹

No important change in copyright protection occurred until the 1909 legislation, which is still in force. The existing copyright law is known as the Act of March 4th, 1909,¹⁰ and has been amended to include the granting of copyright to motion picture productions.¹¹ Other amendments of comparatively minor character were enacted in 1913,¹² 1914,¹³ 1919,¹⁴ 1926,¹⁵ and 1928.¹⁶


The Act of 1909 is declaratory of the constitutional power and is designed to protect all the writings of the author.¹⁷

Section 5 of the Act of 1909,¹⁸ however, specifically enumerates without limitation the various classes of works which are the subject matter of copyright registration.

Of course, protection is granted by copyright only to such works as are the result of the author’s originality.¹⁹ Ma-

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⁹ Act of Mar. 3, 1891, 26 Stat. 1109.
¹⁹ Hartfield v. Peterson et al., 91 F.2d 998 (C.C.A. 2d, 1937) (Cable and telegraphic code compilation); Dymow v. Bolton, 11 F.2d 690 (C.C.A. 2d, 1926) (Play); American Code Co., Inc. v. Bensinger et al., 282 Fed. 829 (C.C.A. 2d, 1922) (Code book); Deutsch et al. v. Arnold et al., 22 F.Supp. 101 (E.D.N.Y., 1938) (Character analysis charts of handwriting); Roe-Lawton v. Hal E. Roach Studios et al., 18 F.2d 126 (S.D. Cal., 1927) (Motion pic-
material used by the author need not be original. It is his intellectual labor in arranging and combining old or new materials, or both, in a new form which renders his efforts the subject of copyright protection. Copyright protection is coextensive with the new and original matter in the copyrighted work.

Since the constitutional provision is designed to promote the progress of science and useful arts, no copyright protection will be granted to immoral or indecent works.

made the following interesting statement:

"As courts have repeatedly said, ideas as such are not copyrightable. . . . This is also true of the supposed facts of history which necessarily must be dealt with in a similar manner by all historians."

Exercising broad chancery powers, a court of Equity has refused an injunction against unfair competition by simulation of the name and set-up of plaintiff's magazine, on the ground that both magazines were indecent, obscene and within
This qualification has been added by way of judicial interpretation of the statute and is a form of censorship which should be exercised sparingly.\textsuperscript{25}

Mr. Justice Cotillo said:

"In the case at bar we do not have a criminal charge, but that is not the criterion. Courts of equity have and maintain moral standards based on social needs and demands both. . . .

". . . equity will furnish no aid in the furtherance of purposes unsound socially as well as tainted by depressed moral levels. . . .

"Granted that there be simulation both to name and as to the extent that the key word 'stocking' current with both magazines is used; that a legitimate doubt is raised as to which identity is involved, the fact remains that the same degree of licentiousness is involved in the stories and photographs of both litigants. The significant thing here is that the salient objectives which these approximate similarities are designed to promote lack distinguishing earmarks. . . .

"In fact, it is indubitably established in my mind that, regardless of which position either of these litigants occupied in this litigation, only a calloused equity, hindered and fettered by subservience to legal rule (which it is not) could extend its arm and grant the aid sought.

"In the case at bar, the litigants both protest their literary and moral sufficiency. It is sought in this litigation to secure and have made available, the high privilege found within the broad reach of the arm of equity. By the same token each must be prepared to stand to forfeit penalties, if any, such as that same court may see fit to impose.

"The court has no power to stop the publication of magazines of this type in a civil proceeding, but neither will it lend itself to granting to one the sole right to publish such filth. Nor will it grant either magazine a cloak of respectability by issuing an injunction. These magazines can have no useful place in the world of literature and the very selection of the names is indicative of the fact that the publishers' sole desire is a financial return for the dumping of obscene and filthy publications at a cheap price where the young, immature and impressionable people can buy. . . .

"In the interest of common decency and under the powers of the equity side of court, the prayer for an injunction will be denied." 


\textsuperscript{25} In Simonton v. Gordon, 12 F.(2d) 116 (S.D.N.Y., 1925), Judge Knox said, at page 124:

"Whatever may be the view of
Among the works designated for copyright registration under the Act of 1909 are books, directories and other compilations, periodicals including newspapers, lectures and addresses prepared for oral delivery, dramatic compositions with or without music, musical compositions and various other creative works not particularly germane to radio broadcasting.\footnote{35 STAT. 1076 (1909), 37 STAT. 488, 17 U.S.C.A. § 5 (1927).}

\section*{§ 587. Persons Entitled to Copyright Under the Act of 1909.}

Copyright is granted to an author or proprietor of any work which is entitled to protection, when such a person is a citizen of the United States.\footnote{35 STAT. 1077 (1909), 17 U.S.C.A. § 8 (1927).} Section 8 of the Act of 1909 also provides that copyright shall extend to aliens who are domiciled within the United States at the time of the first publication of the work,\footnote{Id., at § 8(a).} or to a non-resident alien who is a citizen or subject of a country enjoying copyright reciprocity with the United States by international agreement or law as determined by Presidential proclamation.\footnote{Id., at § 8(b).}

The executors, administrators or assigns of an author or proprietor are granted derivative protection.\footnote{Ibid.} The right a prudist with respect to Hell's Playground, I think that the book, when judged by the standards of current literature, should not be held to be unentitled to copyright protection.

"In any event, so far as morality is concerned, the play is no improvement upon the book, and for such reason I believe that any doubt as to the validity of the defense, based upon the alleged immorality of the book, should be resolved in favor of the complainant."

\emph{Davilla v. Brunswick-Balke Col-}\emph{lender Co. of N. Y. et al.}, 94 F.(2d) 567, 570 (C.C.A. 2d, 1938), would seem to hold by implication that evidence which tends only to prove that words were obscene in the mind of the author is insufficient to support a finding of obscenity which would bar copyright protection.

\emph{In Cookson v. Powatney, H.J.C., Ch. Div. (Eng.), June 14th, 1937,} it was stated that public policy did not seem to be against the protection of the copyright in a news item which set forth, rightly or wrongly, that a crime of a treasonous nature had been committed.\footnote{26 35 STAT. 1076 (1909), 37 STAT. 488, 17 U.S.C.A. § 5 (1927).}

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to secure copyright may be transferred,\textsuperscript{31} or a copyright actually obtained may be assigned.\textsuperscript{32}

The term \textit{proprietor} is equivalent to \textit{assign}.\textsuperscript{33} Under prior statutes, proprietor also referred to an employer


\textsuperscript{32} 35 \textit{STAT.} 1084 (1909), 17 \textit{U.S.C.A.} §§ 41, 42 (1927). § 42, \textit{supra}, provides:

"Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged . . . . or may be bequeathed by will."


The same rule existed under earlier copyright statutes. \textit{Mifflin \textit{v.} R. H. White Co.}, supra. Indeed, § 25, 35 \textit{STAT.} 1081 (1909) 37 \textit{STAT.} 459 (1912), 17 \textit{U.S.C.A.} (1927), provides in subsection (b) that the infringer must pay damages to the \textit{copyright proprietor} for his tort. The words \textit{author} or \textit{assigns} do not appear in § 25 of that statute. In order to pursue a remedy given by § 25, an \textit{assign} must possess the status of a \textit{proprietor}. For these reasons, \textit{proprietor} is equivalent to \textit{assign}. Consequently, in any case, the copyright secured by a legal assignee of the author or proprietor depends for validity upon whether the assignee has secured all right, title and interest in the common law copyright. Otherwise, he is not a proprietor. A proprietor is one who has received a full transfer of rights. \textit{New Fiction Pub. Co. \textit{v.} Star Co.}, 220 Fed. 994 (S.D.}
who, by the terms of the employment, became the owner of the work and all rights incident thereto.  

The contract between the author and publisher or other proprietor must define the nature of the relationship between the parties insofar as copyright ownership is concerned. The right to secure copyright upon the work is an essential term of the agreement and should be expressly referred to therein.  

It is particularly important to determine whether the agreement imposes any limitations upon the owner of the copyright or whether reservations of rights inconsistent with the exercise of his rights thereunder are included in the contract.  

In any event, a proprietor of a literary work cannot have a greater right than the author, so that if the author is not entitled to copyright by reason of his status, the proprietor claiming under him, although not so disqualified, is not entitled to the copyright.  


A licensee may not secure copyright. American Tobacco v. Werckmeister, 207 U.S. 284, 28 Sup. Ct. 72, 52 L.Ed. 208 (1907). One who has received an assignment of serial rights to a play is only a licensee and cannot secure a valid copyright thereon. New Fiction Pub. Co. v. Star Co., 220 Fed. 994 (S.D.N.Y., 1915). The grant of a right to examine newspaper “proofs” and to make résumés or copies thereof for publication with proper credit therefor is not an authorization to secure a copyright. Public Ledger Co. v. New York Times Co. et al., 279 Fed. 798 (1922).  

An agent may not secure copyright. Société Des Films Menchen v. Vitagraph Co. of America, 251 Fed. 258 (C.C.A. 2d, 1918). But an agent may be appointed to take copyright in the name of the author or proprietor or on their behalf.  

The right to secure copyright may be assigned by parol. M. Witmark & Sons v. Calloway, 22 F.(2d) 412, 413 (E.D. Tenn., 1927). See also Callaghan v. Myers, 128 U.S. 617, 9 Sup. Ct. 177, 32 L.Ed. 547 (1887).  


Under the Act of 1909, an employer is not the proprietor of a work produced for him by his employee, but is considered the author thereof and as such is entitled to the copyright. Even before the Act of 1909, an employer had the right to the copyright in the creative work of a salaried employee or servant, if created within the scope of employment. The mere existence of an employment for hire or of a contract for the production of a literary work does not necessarily preclude the employee or contracting writer from securing a valid copyright. The determinant is the intent of the parties as to who shall be entitled to the copyright. In the case of contractual silence on this point, the implication will be in favor of the employer, but where the author is an independent contractor, the implication should be in his favor.

It has been held that an infringer cannot attack the validity of a copyright taken in the name of the actual author and not in the name of the employer, where the work was produced for hire. Likewise, an infringer has


37 Colliery Engineer Co. v. United Correspondence School Co., 94 Fed. 152 (C.C.S.D.N.Y., 1899); Atwill v. Ferrett, Fed. Cas. No. 640, 2 Blatchf. 39 (C.C.S.D.N.Y., 1846). Compare Binns v. Woodruff, Fed. Cas. No. 1424 (C.C.D. Pa., 1821) (construing Act of April 29, 1802, 2 STAT. 171) where the Court held that under this statutory provision an employer who hired artists was not entitled to a copyright upon a historical print composed and executed by such artists.


no defense that the plaintiff’s assignment of copyright is not recorded.42

Under the Act of 1909 as amended in 1919, copyright is not limited to citizens of the United States but is also available to those aliens who are domiciled in the United States at the time of the first publication of their works. Moreover, non-resident aliens who are citizens of countries with which the United States has established reciprocal copyright relations, as set forth in proclamations by the President,43 are entitled to copyright protection in the United States coextensively with its citizens and domiciled aliens.44

§ 588. Same: Where Work Is Created by Two or More Persons.

Each person whose creative efforts have contributed to the originality of a work which is not a compilation, and whose participation was not that of an employee, is entitled to the benefits of copyright protection as a co-author. Where a copyright is obtained by one or more co-authors, such copyright is held in trust for all true co-authors thereof irrespective of who applies for the copyright.45

The same rule applies to co-owners as well as to co-authors.

The person or persons in whose name the copyright is registered holds the legal title thereto subject to the determination of true ownership by the trier of fact.46 The

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43 See § 704 infra.
46 Ibid.
true owners may maintain actions for infringements as equitable owners of the copyright.47 The true owners may even join the legal owner of the copyright as party defendant, where his interest is adverse or he refuses to co-operate.

Where the legal owner had no interest in or authority to obtain the copyright, he may be sued as an infringer where his position is inimical to the interests of the true owners.48

If the copyrighted work is distinct and separable from the efforts of another author, although both works may be used together, the claim of co-authorship is not well founded insofar as the independent copyrighted work is concerned. Hence, where the lyrics and music of a musical composition as used in an operetta are created by persons other than the author of the book, the dramatist is not a co-author of the musical composition copyrighted as such.49

In any event, a person claiming equitable ownership of a copyright as a co-author must be a person entitled to copyright as a legal owner thereof, as if correct registration had been made originally. Likewise, a claim of co-authorship should be rejected if the claimant’s work is in the public domain.


Registration of a copyrighted work was required prior to 1909 before any statutory protection could be invoked. The necessity for compliance with such formalities was

obviated under the Act of 1909 by Section 9 thereof, which provides that any person entitled to copyright may secure it for his work by publication thereof, provided that he affix properly the notice of copyright required by Section 18. The notice appearing on all published works must bear the name of the copyright owner and be in the form prescribed by Section 18 of the Act of 1909. Therefore, copyright now vests upon publication with notice, irrespective of the formalities of registration and deposit.50

The boon is a limited one, however, since Section 12 of the Act of 1909 provides that until the statutory requirements of deposit of copies and registration have been complied with, no action for infringement shall be maintained.51 If the required notice does not appear upon the title page or the page immediately following, a notice prominently placed on the back cover is considered inadequate and has been held to warrant a dismissal of a bill of complaint for infringement.51a

If a work not published for sale is registered for copyright under Section 11 of the Act of 1909 and the required single copy deposited, the owner thereof may not maintain an action for infringement where he has reproduced the work in copies for sale without deposit of the two copies required by Sections 12 and 13.52

The owner of a copyrighted work registered under Section 11 may enforce his right against an infringer, so long as he himself does not reproduce copies for sale without compliance with Sections 12 and 13.

§ 590. Same: Deposit Under Sections 12 and 13 of Act of 1909.

Section 12 of the Act of 1909 provides that after copyright is secured by publication with notice of copyright, a deposit shall be made promptly of two complete copies of the best edition of the work then published. If the work copyrighted is by an alien author and has been published in a foreign country, deposit is required of one complete copy of the best edition of the work then published in the foreign country; in addition, such a complete copy must comply with the manufacturing clauses of Section 15. Books or periodicals published abroad in the English language cannot secure copyright protection in the United States unless the work is reproduced and manufactured in the United States, except for ad interim protection.53

Section 12 also provides that if the work copyrighted is a contribution to a periodical, special copyright registration of such contribution may be secured by the deposit of one copy of the issue or issues containing such contribution. The deposit is deemed sufficient when the copies are addressed to the Register of Copyrights and mailed.54 Copies deposited must be physically complete55 and of the best edition then published which is not necessarily confined to mass production but refers to limited and private editions as well.

The statutory requirement that a deposit be made promptly has been the subject of judicial interpretation. Promptness is ordinarily measured from the date of publication.55a Where the copies are deposited before publication of the work, it is held that the requirement of Section

12 is met even though it states that such deposit should be made after publication. This is in accord with the spirit and intent of the Act of 1909 to clear away technicalities.\textsuperscript{56}

If the required copies are not promptly deposited, the Register of Copyrights may comply with the procedure specified in Section 13 of the Act of 1909, and require the deposit of copies at the penalty to the copyright owner of fines and invalidation of the copyright. Such penalties cannot be imposed until a due demand and a refusal of compliance therewith have been made.

It has been held that a deposit is not timely as against interim infringers when it is made approximately fourteen months after the date of publication.\textsuperscript{57} However, it has been held that the time of deposit is merely of secondary importance and that failure to make prompt deposit should not divest the copyright owner of the statutory protection.\textsuperscript{58} Since the term of copyright begins with the date of publication, delinquency in depositing copies should not work a forfeiture, except at the instance of the Register of Copyrights under Section 13 of the Act of 1909. A deposit made approximately four months after date of publication has been held to be a prompt deposit.\textsuperscript{59}


59 Lumière v. Pathé Exch., Inc. et al., 275 Fed. 428 (C.C.A. 2d, 1921). In Freedman v. Milnag Leasing Corp., 20 F.Supp. 802 (S.D.N.Y., 1937), Judge Patterson held that a deposit two or three months subsequent to publication does not prejudice the rights of the copyright proprietor. Compare the same jurist's strict adherence to the statutory requirements relating to the display position of the
§ 591. Registration and Issuance of Copyright Certificate.

Persons entitled to copyright on works embraced within the Act of 1909, who have made the required application and deposit, may obtain registration of their claim to copyright. The Register of Copyrights is charged with the duty of determining the character of the work deposited, to ascertain its eligibility for copyright and the classification thereof.

Beyond such administrative identification of the work and insistence upon compliance with the required formalities, no attempt is made to scrutinize the work to be registered. Unlike the practice with respect to patents and
trade-marks, no opportunity is given for the presentation of objections to the registration of a copyright. No proof of originality or first publication is required other than the answers to the questions in the application for copyright registration.

After such registration and compliance, a certificate of copyright is issued to the applicant by the Register of Copyrights. The certificate is required by Section 55 of the Act of 1909 to be admitted in any court as prima facie evidence of the facts stated therein. Where no evidence is offered to contradict the certificate, it is deemed sufficient proof of a valid copyright.

While registration does not act to vest copyright, since publication with notice accomplishes that result, registration is nevertheless essential before any action may be brought under the Act of 1909 to enforce any remedy granted therein.

§ 592. Duration or Term of Copyright Under Act of 1909.

The term during which protection is granted to copyrighted works is a period of twenty-eight years from the date of first publication. The latter date is defined 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.


In an action for copyright infringement, the plaintiff must allege the facts stated in the certificate of copyright. Foreign & D. M. Co. v. Twentieth Century-Fox Film Corp., 19 F.Supp. 769 (S.D.N.Y., 1937).
The duration of copyright protection of works deposited under Section 11 of the Act of 1909 as works not reproduced for sale, has been held not to be indefinite.69

During the twenty-eighth year of the term of copyright, application for renewal thereof, for an additional period of twenty-eight years commencing with the date of expiration of the original term, may be made by the persons described in Section 23 of the Act of 1909, depending upon the classification of the work involved.70 In the event of default of application for renewal and extension of the copyright term, the work falls into the public domain.71 Similarly, protection ceases to be available after the expiration of the second term of twenty-eight years.72

§ 593. Publication as an Essential of Statutory Copyright.

While publication is sufficient to divest the owner of his common law rights,73 it is significant to note that such publication also constitutes a necessary act to obtain the benefits of statutory protection.74 Of course, other formalities of the Act of 1909 must be complied with, such as notice of copyright, deposit and registration. The fact that a work is deposited in a public office does not ipso facto constitute a publication so as to make the work common property.75 Where an attempt has been made to

69 See §§ 594-595 infra.
70 See Chapter XLVI. infra.
72 Ibid.
secure statutory copyright registration without publication, the common law rights survive unless the work is registered under Section 11. If, however, there has been a publication sufficient to destroy common law rights, and an inadequate attempt to secure statutory copyright, the author ceases to have any protection whatsoever and the work falls into the public domain. Accordingly, publication divests the owner of rights at common law and at the same time invests him with statutory copyright protection if there has been compliance with all the necessary formalities of the statute. Common law rights cannot exist simultaneously with statutory copyright.

§ 594. Statutory Copyright in Unpublished Works.

It should no longer be mooted that statutory copyright supersedes common law rights once registration has been effected. Even without publication, common law rights


81 See Weil on Copyright (1917) 156; Shafter, Musical Copyright (1932) 101. Cf. De Wolfe, Outline of Copyright (1925) 35.
are destroyed by an election of the author to avail himself of the remedies of the copyright statutes.

Section 11 of the Act of 1909 expressly extends copyright protection to designated works of which copies are not reproduced for sale. Among the specified classes of works are various types of material for broadcast programs, including lectures and addresses, dramatic, musical and dramatico-musical compositions. Copyright therein may be claimed by registration and deposit of one complete copy of the work.

Should the work later be reproduced for sale, timely registration and deposit of two copies of the best available edition must be made to secure copyright protection thereafter. Until such publication, copyright in unpublished works under Section 11 exists for a period of twenty-eight years from the date of registration and all of the statutory remedies are continually available during said term for the protection of such copyrights.

Although Congress appears to have intended by Section 11 of the Act of 1909 to grant statutory protection to works ordinarily protected at common law, it would seem that the express language of Section 11 goes beyond that intention. The Act of 1909 does not specifically define what constitutes a publication. Reference must therefore be made to the body of common law defining and describing publication.

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The Act of 1909 seems to make further distinctions for purposes of classification. Of course, implicit in the Act is the distinction between published and unpublished works. The Act, however, in Section 62, apparently creates a distinction between works reproduced for sale and works reproduced for distribution. The distinction is not one which makes the former a publication and the latter not a publication. This distinction has bearing only with respect to the compliance with Sections 11, 12 and 13.

To secure copyright on a work reproduced not for sale but for distribution, one must comply with Section 11. Sections 9 and 10 are restricted to works reproduced for sale because of the language of Section 11 which states that "copyright may also be had of the works of an author, of which copies are not reproduced for sale."

Sections 12 and 13 are restricted to works reproduced for sale by the last sentence of Section 11.

Since the term of copyright, as set forth in Section 23, commences with the date of first publication, which, under Section 62, is defined as the date of first distribution in the case of works reproduced for distribution and not for publication for sale and for distribution is not drawn at common law. Jewelers' Merc. Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898) (leasing is a publication); Ladd v. Oxnard, 75 Fed. 703, 729 (D. Mass., 1896) (lending is a publication); D'Ole v. Kansas City Star Co., 94 Fed. 840 (C.C.W.D. Mo., 1899) (gratuitous distribution of a work is a publication).


1937), cert. den., 58 Sup. Ct. 758, 82 L.Ed. 731 (1938); Cardinal Film Corp. v. Beck, 248 Fed. 368 (S.D.N.Y., 1918). The rules of the Copyright Office cannot be referred to for the definition of the word, publication, since such rules cannot be extended beyond the bounds of the statute. Patterson v. Century Productions, Inc., supra. Deposit in the copyright office has been held to be a publication to commence the period of protection under the Act of 1909. Marx v. United States, 96 F.(2d) 204 (C.C.A. 9th, 1938).


sale, it would seem that as to such works, the term of copyright is twenty-eight years.

This distinction, however, does not carry with it any notification to the Register of Copyrights as to the date of first distribution of works already registered under Section 11. It may nevertheless be urged that Section 11 provides a fixed term of copyright for works reproduced for distribution. The term of other works registered under Section 11 would therefore appear to be indefinite upon a strict construction of this deficient statute.

§ 595. Same: Constitutionality of Section 11.

It would be illogical and inconsistent for the Act of 1909 to grant indefinite protection to works not reproduced for sale and copyrighted under Section 11, and at the same time impose a limited term of copyright in published works offered for sale.

The power of Congress to enact copyright legislation is found in the Constitution, where it is expressly provided that authors be secured the exclusive right to their writings for limited times.

Does Section 11 afford protection to authors of unpublished works for limited times? The Act of 1909 recites that the copyright shall endure for twenty-eight years from the date of first publication. If an unpublished work is never reproduced in copies for sale, the term of copyright apparently does not commence to run since there is no date of first publication. The court, however, may by construction define publication where the statute fails to do so. Where the work is distributed but not sold or offered for sale, the court should consider proof as to the date of first distribution, and should consider that, under Section 62, as the date of first publication. Just as common law rights are destroyed by publication, so too may statutory copy-

88 U. S. Const. Art. I, § VIII.
rights in unpublished works be defeasible by publication of copies for sale. In both instances, the acts which serve to divest the author of his rights are the same acts which, if directed through the appropriate channels of formality, will invest him with complete statutory copyright.90

A statutory copyright in perpetuity is paradoxical under our Constitution. Copyright under Section 11 might have been construed as being without limitation as to time. The fact that the work may be reproduced in copies for sale at some future date would not make the term more definite. Congress has anomalously grafted on to its copyright laws an incident of common law intellectual property and in so doing, it has apparently overlooked the constitutional prescription.

However, a strong public policy exists against such a strict construction of the statute which would result in the invalidation of thousands of copyrights issued since 1909. In Marx v. United States,91 the Court refused to consider this badly drafted legislation as granting perpetual copyright under Section 11 and held that the term of protection of unpublished works endured for twenty-eight years from the date of registration. Such a result is thoroughly desirable, but the consequences of eventual reproduction of the work for sale during the twenty-eight year period were not considered.

Quaere: Is the term of copyright protection upon works not reproduced for sale and registered under Section 11 extended by a subsequent reproduction for sale and compliance with Sections 12 and 13?

It is desirable that the Act of 1909 be amended to include provisions for the protection of unpublished works for a definite term and dealing with eventual reproduction for sale after registration of such works, so that all doubts of constitutionality may be thereby obviated. In-

91 Marx v. United States, 96 F.(2d) 204 (C.C.A. 9th, 1938).
dubitably, numerous works are not economically susceptible of reproduction for sale although sound public policy dictates their copyright protection. The deficiencies in the existing statute are of sufficient importance to merit their elimination by amendment.

§ 596. Works in the Public Domain.

Upon the expiration of the term of statutory copyright, the author's monopoly ceases and the work becomes public property. The author's exclusive rights are limited to the duration of his copyright protection which, under the present law, is twenty-eight years. The right of renewal, however, exists in the author, the surviving spouse, the executor or the next of kin for an additional period of twenty-eight years should the renewal be applied for within the statutory period, namely, within one year prior to the expiration of the original term of copyright. Should no renewal copyright be obtained, the work ceases to be protected.

If there has been such publication of a work at common law as divests a work of its common law protection, without investing any statutory copyright, the work falls into the public domain.

Since statutory copyright is extended to the expression of creative effort, arrangements or adaptations of works in the public domain may be copyrighted as new works because of the original contribution made by the adaptor or arranger. Works in the public domain may be freely

93 More specifically designated in the statute. See § 676 infra.
95 See §§ 579, 580 supra.
transcribed, modified or transformed,\textsuperscript{97} so long as copyrighted arrangements or adaptations thereof are not used as the basis for the claimant's work. To secure protection, the latter must be original treatments of the primary work which is in the public domain. It follows that statutory protection against the use of such an adapted or arranged version of the work will be extended only where a new copyright thereon has been obtained.\textsuperscript{98} Such new copyright protects the originality and creative contribution of the arranger or adaptor but does not give an exclusive right anew to the basic work since the latter is no longer susceptible of private ownership.\textsuperscript{99}

\section*{§ 597. State Statutes Dealing with Copyright.}

Copyright protection and the enforcement of rights thereunder are creatures of Federal law and the jurisdiction of Congress is supreme. Two states, however, have enacted penal laws which are designed to assist copyright owners in preserving their rights within the territorial limits of the respective states.

In California,\textsuperscript{100} it is made a crime to pirate dramatic or musical works. In New York,\textsuperscript{101} it is made a misdemeanor to print, publish, sell, distribute, circulate or cause same to be done for profit, any copy containing the words or music of a copyrighted musical composition, without the consent of the owner or proprietor thereof. In New York,\textsuperscript{102} it is also made a misdemeanor to give public

\begin{itemize}
\item \textsuperscript{99} McCaleb v. Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924).
\item \textsuperscript{100} Cal. Penal Code, § 367(a), (b).
\item \textsuperscript{101} N. Y. Penal Law, § 441a, Consol. L. (McKinney, 1938) c. 40.
\item \textsuperscript{102} Id., at § 441.
\end{itemize}
performances of copyrighted works for profit without the consent of the owner thereof.

These local criminal statutes differ from the provisions of Section 28 of the Copyright Act of 1909\(^\text{103}\) in that the former do not require specific intent to commit the infringing act.

The constitutionality of these state statutes has not been attacked. So long as they do not affect, modify or interfere with the enforcement of rights granted by Federal legislation, they may be sustained as a valid exercise of local police powers.

Numerous states have enacted or proposed statutes limiting the collective action of copyright owners of musical compositions in granting licenses to perform such works within their respective territories.\(^\text{104}\) The constitutionality of several of these statutes is being tested in the Federal courts in actions brought by the American Society of Composers, Authors and Publishers\(^\text{105}\) to restrain state officials from enforcing such legislation. Injunctions pendente lite have been granted in two instances\(^\text{106}\) and denied in a third.\(^\text{107}\)


\(^{106}\) Buck v. Swanson, Equity No. 562 (D. Neb., 1937); Buck v. Landis, (D. Fla., 1937).

# RATIONALE AND INCIDENTS OF COPYRIGHT PROTECTION

## § 598. Rationale of Copyright Protection

Copyright arises by virtue of the Federal statutes enacted in the exercise of the power vested in Congress by the Constitution.  

A copyrighted work is the property of the author or other owner thereof. The Federal government in purs-
surance of its constitutional authority grants a private monopoly for a specific term of years to such owner. The United States has no property rights therein. After the specific term of years has expired, the work falls into the public domain and the author's monopoly terminates. The primary object in the conferring of such a monopoly by copyright lies in the general benefits derived by the public from the intellectual labors of authors. Like patents, copyrights are "at once the equivalent given by the public for benefits bestowed by the genius, meditation and skill of individuals, and the incentive to further efforts for the same important object." 2

In creating rights under copyright ownership, the question arises whether Congress can limit or impose conditions upon the exclusive character of copyright or make other inroads upon the private monopoly intended to be conferred under the Constitution for a limited term of years.

In this connection, it has been a matter of frequent controversy as to whether copyright is a natural right or whether it is entirely dependent upon the statute. In the British Empire, copyright is now considered a purely statutory right. 3 It is established that Congress in its copyright legislation did not sanction an existing right, but created a new one. 4 Before the Act of 1909, the rights of American copyright owners were genuinely exclusive without the imposition of any limitations or conditions once copyright registration was obtained.


3 Copyright Act of 1911 (Eng.) Sec. 31; Copinger on The Law of Copyright (Eng., 7th Ed., 1936) 4.

If the Act of 1909 is deemed to have created a new right under the copyright with respect to mechanical reproductions, does Congress have the power in creating the right, to make reservations and impose conditions upon the exercise of such a right?

Chief Justice Hughes in writing the unanimous opinion of the United States Supreme Court in *Fox Film Corp. v. Doyal*, indicated that in the case of copyrights, no controlling distinction can be based upon the character of the right granted. He said:

"The argument that it is in the nature of a franchise or privilege bestowed by the Government is made by the fact that it is not a franchise or privilege to be exercised on behalf of the Government, or in performing a function of the Government."

Chief Justice Hughes also said:

"After the copyright has been granted, the Government has no interest in any action under it, save the general one, that its laws shall be obeyed. Operations of the owner, in multiplying copies, in sales, or performances, or exhibitions, or in licensing others for such purposes, are manifestly not the operations of the Government."

This language was used in a tax case wherein the United States Supreme Court sustained a State tax on income, measured by gross receipts, including royalties from copyrights, upon the theory that a copyright is property derived from a grant by the United States.

Are copyright property rights in the nature of contract rights, derived from an agreement in which the United States is one contracting party and the copyright owner

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6 *Id.*, at 126.
7 *Id.*, at 127.
the other? Or, is copyright property an indivisible subject of bargain and sale granted by the statute as a deed rather than by way of contract? Copyright is distinct and definite, though intangible, and is not to be confused with property in the object copyrighted.

The Constitution provides that Congress shall secure to authors an exclusive right in their writings. This is accomplished by the grant of a statutory right within the limits of the constitutional mandate. Such a grant appears to be in the nature of a unilateral common law deed and is a conveyance of property created by the statute. Although a corporate charter has been deemed a contract,⁹ it is submitted that the characteristics of copyright are readily distinguishable from the creation of a legal entity. It is straining the doctrine of the Dartmouth College case¹⁰ to assert that copyright property arises by virtue of a contract between the sovereign and its citizens. No meeting of minds is required. The statutory property is granted to all who make application therefor, within the terms of the statute.

Viewed historically, it seems clear that the private monopoly of copyright is a grant of property unconnected with any contractual obligation.

In creating copyright, Congress may impose conditions precedent to the vesting of the statutory rights. Among such is publication with notice of copyright. Moreover, Congress can, in its discretion, increase or decrease the term of copyright, modify the requirements for the obtaining of copyright and, in general, regulate the enforcement of the rights granted under the copyright.¹¹

The Constitutional mandate specifically prescribes that the statutory right be an exclusive one. It is submitted, therefore, that once copyright is vested, Congress has no

¹⁰ Ibid.
power to go beyond its mandate by imposing conditions subsequent or other limitations upon the exclusive character of copyright.\(^\text{12}\)

§ 599. Same: Originality as Substantive Basis of Copyright Protection.

Copyright affords protection to originality only. The statutory property right embraces only creative works by virtue of the constitutional mandate. The object or work is not protected \textit{per se}. The contents of such works are solely susceptible of copyright protection. Although an examination of works registered for copyright is not required to determine originality,\(^\text{13}\) protection will not be extended unless proof is adduced before the court that that which is sought to be protected was originated by the author.

In infringement actions, it is not necessary to prove that the entire work is novel or original. Protection is granted if it is shown that a substantial part of the author's originality has been appropriated.\(^\text{14}\) So much of a copyrighted work as is neither novel nor original may be appropriated with impunity because copyright protection is limited to the results of the originality of the author. The copyright owner has the burden of proving that the work sought to be protected was original when copyrighted.\(^\text{15}\)

The originality which is protected by copyright does not refer to ideas but to the form, sequence, arrangement or expression of the author's concept or idea.\(^\text{16}\) Copyright protection is also granted to an arrangement, adaptation or other treatment of an unprotected work or concept of another author. It is of no moment that the materials

\(^{12}\) See § 657 \textit{infra}.

\(^{13}\) Eggers \textit{v.} Sun Sales Corp. \textit{et al.}, 263 Fed. 373 (C.C.A. 2d, 1926).

\(^{14}\) Dymow \textit{v.} Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926).


\(^{16}\) Rush \textit{v.} Oursler, 39 F.(2d) 468 (S.D.N.Y., 1930).
used by the author are new or old; protection is granted
to his original plan, arrangement or combination of the
materials. By originality is meant that the author has
created the work by his own skill, labor and judgment
without directly copying or evasively imitating the work
of another.

Originality is present when the author has dealt with
common or familiar incidents by associating and grouping
them in such a manner that his work presents a new con-
ception or a novel arrangement of events.

§ 600. Incidents of Copyright Protection: Specific Rights.

A copyright may be termed a bundle of rights bound
together by publication with notice and enforced by com-
pliance with the formalities of registration and deposit.
Among the exclusive rights included in a copyright are
the following:

1. To print, publish and multiply copies.
2. To vend and otherwise distribute the work.
3. To translate the work into other languages or
dialects.
4. If the work copyrighted is a literary work, the
author has the exclusive right to make any other
version thereof.
5. If it be a non-dramatic work, the copyright owner
has the exclusive right to dramatize it.
6. If it be a drama, the copyright owner has the
exclusive right to convert it into a novel or other
non-dramatic work.
7. The copyright owner of a musical work has the
exclusive right to arrange or adapt it.

19 Stevenson v. Harris, 238 Fed. 432, 436 (S.D.N.Y., 1917). See
also Arnstein v. Edw. B. Marks Music Corp., 11 F.Supp. 535 (S.D.
8. The copyright proprietor of a lecture, sermon, address or similar production, has the exclusive right to deliver or authorize its delivery in public for profit.

9. To perform or represent publicly a dramatic work.

10. To vend any manuscript or any record of a dramatic work not reproduced for sale.

11. To make or cause to be made any record, or transcription of a copyrighted dramatic work, by means of which it may in any manner or by any method be exhibited, performed, represented, produced or reproduced in whole or in part.

12. To exhibit, perform, represent, produce or reproduce a copyrighted dramatic work in any manner, or by any method whatsoever.

13. To perform copyrighted musical compositions publicly for profit.

14. To make such arrangement of copyrighted musical works in any system of notation or form of record for the purpose of public performance for profit, from which the work may be read or reproduced. Upon this right, a substantive limitation is imposed in the form of a compulsory license and statutory royalty.\textsuperscript{21}

\section*{§ 601. Printing, Publishing and Multiplying Copies.}

The traditional protection granted to copyright owners includes specifically the exclusive right to print, publish and multiply copies.\textsuperscript{22} While ordinarily this right is not directly concerned with broadcast programs, there are occasions when the producer of a program may use copies of musical compositions, gags or other portions of the program script for advertising purposes, as supplements to the broadcast program. Such copying of copyrighted


works can only be done by specific license of the respective proprietors.

Conversely, where the content of a broadcast program is unauthorizedly published in pamphlet or other tangible form by persons having no privity of title, infringement of the rights of the program producer occurs. The rights of the producer may also be protected by an action for unfair competition, such as in *Uproar Company v. National Broadcasting Company.*\(^{23}\)

Protection, too, may be afforded against such appropriation of program material by actions for infringement of copyright or common law rights therein.

The copyright proprietor of the contents of a broadcast program possesses all of the rights flowing from the Act of 1909, among which is the exclusive right to print, publish and multiply copies.

Where protection of the material is sought at common law, relief against such unauthorized copying depends upon whether there has been a prior voluntary publication.\(^ {24}\) The District Court in *Uproar Company v. National Broadcasting Company,*\(^ {25}\) held that the mere broadcast performance of a program script did not constitute a publication which would divest the program sponsor of his common law property rights therein.

§ 602. Vending and Otherwise Distributing Copyrighted Works.

The exclusive right of the copyright proprietor to vend or otherwise distribute copies of his work is likewise important in broadcasting to the limited extent that such uses are auxiliary to broadcast programs. Even where permission is granted by copyright owners to multiply copies of


\(^{24}\) See §§ 579–583 supra.

their works, the advertiser has no right to distribute such copies by means or methods not specifically licensed.\textsuperscript{26}

Competition with the copyright owner in the sale of lawful copies of his works is distinctly prohibited by the monopoly of copyright, unless specific sanction from the owner is obtained. Such sanction may be implied from the terms of the license to publish copies, where the contemplated use of the copies is described therein.

Once lawful copies are sold, the jurisdiction of the copyright owner to restrict their re-sale price terminates,\textsuperscript{27} except where such sales are the subject of contracts under Fair Trade Acts.\textsuperscript{28}

\section*{§ 603. Translating the Work into Other Languages or Other Dialects.}

The copyright owner has the exclusive right under the Act of 1909 to translate his work into other languages or dialects.\textsuperscript{29} This exclusive right existed at common law where there had been no prior voluntary publication.\textsuperscript{30} The British Act of 1911 also expressly grants this exclusive right.\textsuperscript{31}

This exclusive right may be extended to re-translations into the original as well as other languages.\textsuperscript{32}

Accordingly, therefore, the contents of a broadcast program may not be translated or performed in other lan-


\textsuperscript{29} 35 Stat. 1075 (1909), 17 U.S.C.A. § 1(b) (1927).


\textsuperscript{31} 1 & 2 Geo. V. (1911) c. 46, § 1, subsec. 2(a); Byrue v. Statist Co., [1914] 1 K.B. 622.

\textsuperscript{32} Murray v. Bogue, (Eng., 1852) 1 Drew. 358, 368.
§ 604. Making Other Versions of Copyrighted Literary Works.

By express provision of the Act of 1909, the copyright owner of a literary work possesses the exclusive right to make any other version thereof.\(^{33}\) This right may be pursued against the making of such copies of the work as would constitute an infringement of copyright. Hence, where a version is made of a copyrighted literary work which consists merely of abridgements or modifications thereof, in which portions of the dialogue, words or phrases, stage directions, scenes or characters are reproduced, protection may be invoked against unauthorized versions as infringements of the copyright.\(^{34}\)

A newspaper review or criticism of a literary work which contains an outline or summary thereof, is not such a version as would constitute an infringement. Even where such a reviewer's summary forms the basis for a condensed version of the work in which none of the elements of the original work is copied, no infringement occurs unless the protected work has been thereby modified or abridged, or if portions of dialogue, scenes or character have been so reproduced.\(^{35}\) If such a version does more than to place the reader thereof on inquiry concerning the original work, an infringement may be found. Where the version communicates the contents of the copyrighted literary work or otherwise appropriates same, protection will be afforded the copyright owner.\(^{36}\)


As in the case of copying generally, versions of literary works will be deemed to be infringements where it is found that such versions appropriate substantial portions of the copyrighted literary work.37

§ 605. Dramatization of Non-Dramatic Works.

Among the broad rights incident to copyright ownership is the exclusive right of the copyright proprietor to dramatize a non-dramatic work 38 registered as such. Consequently, a copyrighted literary work such as a novel or poem, or any other non-dramatic work, may not be dramatized for radio broadcast purposes without license or permission of the copyright owner of such works.

Similarly, copyrighted non-dramatic musical compositions may not be made the subject of a dramatic broadcast performance thereof, unless specific license therefor is obtained.

This exclusive right to dramatize a non-dramatic work is not restricted to the making of one dramatization. The same non-dramatic work may be dramatized several times, each of which, if all other requirements are met, is capable of being copyrighted.39

Where, by means of dialogue, action, gesture or other elements of dramatic structure, a dramaturgist unauthorizedly so converts a non-dramatic work as to impress upon it the characteristics of dramatic unity and interest, infringement of copyright by dramatization takes place. The copyright owner has the exclusive right to make such changes in the form of his work.

It has been held that copyrighted cartoons may not be made the subject of unlicensed dramatization.40

37 Ibid. See § 615 infra.
§ 606. Conversion of Dramatic Work into Non-Dramatic Form.

The copyright owner of a dramatic work has the exclusive right to make such changes in the form thereof, as to impress upon it the characteristics and substance of a non-dramatic work.\footnote{35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).} Prior to the Act of 1909, an unauthorized novelization of a play did not infringe the copyright thereon unless the new form was held to be a copy of a protected work.\footnote{Fitch v. Young, 230 Fed. 743 (S.D.N.Y., 1916), affd. 239 Fed. 1021 (C.C.A. 2d, 1917).}

As an incident of modern copyright protection, the author or other copyright owner of a dramatic work has the exclusive right to convert it into a non-dramatic work. A script of a dramatic broadcast program cannot be converted into a novel, poem, article or other non-dramatic vehicle, unless license therefor is obtained from the copyright proprietor.


The copyright laws give the owner of a musical composition the exclusive right to arrange his work.\footnote{35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).} Publishers of copyrighted musical compositions generally publish, in addition to a piano copy of the sheet music, an arrangement of the work suitable for performance by various instruments in an orchestra. Such an arrangement is known as a "stock" arrangement or orchestration. Inasmuch as the copyright upon a musical work includes the right to arrange and adapt it,\footnote{Ibid.} the arrangements thereof may be performed upon instruments or sung by voices other than those for which the composition was originally designed."\footnote{Tobani v. Carl Fischer, Inc., 98 F.(2d) 57, 58 (C.C.A. 2d, 1938). See Wood v. Boosey, 7 B. & S. 869, 895 et seq. (Eng. Q.B., 1867).}
need not be copyrighted separately to support an action for infringement.\textsuperscript{45}

Since the performance of a musical composition varies directly with and depends upon the individual interpretation and rendition of the work by the different performing artists, a large number of so-called “special arrangements” of musical works is created by performing artists for their own individual uses and for specific purposes in connection with particular broadcast programs. Such special arrangements or orchestrations constitute the artist’s written translation of the works by musical notations reasonably necessary for their individual interpretation and rendition thereof.

Special arrangements may involve the transposition of the key in which the work was written, elaboration of the composition, emphasis and repetition of certain chords or phrases, interpolation of new notes or phrases, “build-ups” and various other types of individualistic scoring of the work. These special arrangements are often prepared at great expense to the performing artist or the producer of a broadcast program. Unless the copyright proprietor has expressly or impliedly consented to the making of such arrangements, the basic copyrighted work has been infringed.\textsuperscript{46} In the absence of a license to make such special arrangements, the copyright owner may enjoin the performance thereof and cause the destruction of the infringing work, irrespective of the cost involved in the making of the arrangement. The fact that the copyright proprietor has granted to others the right to make special arrangements of his work can not validate an


infringement caused by unauthorized similar acts of the defendant. No requirement of uniformity of conduct is imposed upon the copyright owner. The usual performance license should properly be construed to apply only to the performance of licensed arrangements of the work.

Since musical compositions are exploited to a large extent by public performances thereof, it is the general practice that prominent performing artists are requested orally by copyright proprietors to perform their works and thereby increase the popularity and enhance the business life thereof. The making of special arrangements by performing artists is encouraged by copyright owners and frequently, by solicitation, a license to do so is granted.

When the special arrangement is licensed expressly or by implication, it is a question of fact to determine whether the license is broad enough to permit the use of the special arrangement coextensively with the term of the copyright upon the work, or whether the license is limited to a particular program, or for a definite period of time. In order for such a license to be deemed coextensive with the term of the copyright, it should be in writing and recorded in the office of the Register of Copyrights. In the absence of a writing, it does not appear likely that the right of special arrangement extends beyond the particular engagement for which the artist is contracted at the time the license to make the special arrangement is granted. In the event that such a license is construed as a contract, which by its terms requires performance thereof to be extended for a period of more than one year, the license may not be enforced if it is oral.\(^{47}\) It appears that the customary practice in the granting of such licenses is that the term thereof shall be at the will of the copyright owner. Upon notice of revocation, the proprietor may enjoin the performance and use of special arrangements of his copyrighted works

\(^{47}\) This may eventuate if the Statutes of Fraud are deemed applicable.
by artists, program producers, broadcast stations and others.

§ 608. Same: Arrangements as Mutilations of Copyrighted Music.

Frequently, performing artists make their own individual and unique arrangements of copyrighted musical compositions without the solicitation or license of the copyright proprietor. Since the latter has the exclusive right to arrange or adapt a copyrighted musical composition, such performing artists may be held liable for infringement of copyright in the making of unauthorized arrangements. If, however, a musical composition is arranged with the license of the copyright proprietor, the arrangement must be of a quality and standard which is not injurious to the basic composition. The arranger cannot deviate from the original work in such a manner as to mutilate the composition or injure the reputation of the composer or the copyright property.

A grouping is often made of several musical compositions which are specially arranged to constitute a medley. If a medley includes the performance of at least a substantial part of the chorus of a musical composition, such a medley arrangement may not be considered a mutilation of the composition in the absence of other circumstances. However, medleys are often arranged in such a manner as to cause the performance of slight fragments, occasional notes, or mere snatches of a musical work. The copyright proprietor of a composition which is so abortively performed, may be justified in regarding the medley as so injurious as to mutilate his work and injure the reputation of the composer to an extent sufficient to constitute actionable libel. This same act may also serve to disparage the copyright property. Such a medley arrangement may also

represent sufficient cause for the revocation of the license by the copyright proprietor permitting the making of the special arrangement. If, after notice of revocation, improper arrangements continue to be performed, such acts constitute an infringement of copyright and also serve to provide the element of malice in a libel action.  

§ 609. Same: Making of Extractions Thereof.

If a license to perform a copyrighted musical work is obtained, the performer may make such legitimate use of the work as is necessary and appropriate for a performance thereof. Such use, however, does not include the making of a special arrangement of the work without the consent of the copyright proprietor. The holder of the performing license or the artist rendering the performance has no right to take passages or make extracts from such copyrighted works or otherwise orchestrate same without a special license from the owner of the copyright. The unauthorized orchestration or making of extractions or the taking of passages from a copyrighted work would constitute an infringement if a substantial part of the work was thereby appropriated.

It is not necessary that a large portion of the copyrighted work be appropriated to be considered a substantial part. If a particular theme, consisting of a few notes or a few words sufficient to suggest the fundamental conception of the copyrighted work, is reproduced by the infringer, it will constitute an unlawful appropriation. The test of

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53 See Boosey et al. v. Empire Music Co., Inc., 224 Fed. 646 (S.D.
whether the copyright is infringed is whether the ordinary public would see a connection between the two works.\textsuperscript{54} It is not necessary that a fine analysis or dissection of an expert establish a similarity.\textsuperscript{55} If the parts of the two works which seem alike are not continuous enough nor sufficiently extended to indicate that one was guided or aided by the other, the copyright will not be deemed infringed by the defendant creator of an original work which may be somewhat similar to the plaintiff's work.\textsuperscript{56}

The making of an extraction representing a copy of a part of a copyrighted work will constitute an infringement if the value of the copyrighted work is thereby sensibly diminished or the labors of the original author are substantially appropriated to an injurious extent.\textsuperscript{57} Slight differences and variations are no defense to a suit for copyright infringement.\textsuperscript{58}

\textbf{§ 610. Performance of Copyrighted Works: Generally.}

The earliest Federal copyright legislation, the Act of May 31, 1790,\textsuperscript{59} granted to the author or proprietor of the copyrighted work merely the exclusive right to print, publish and vend. It was not until the Act of 1856\textsuperscript{60} that the protection granted by copyright legislation was extended to other uses of copyrighted works. By that legislation, the owners of copyrighted dramatic compositions received the exclusive right to act, perform or represent the work

\begin{itemize}
  \item \textsuperscript{54} Hirsch v. Paramount Pictures, Inc., 17 F.Supp. 816 (S.D. Cal., 1937).
  \item \textsuperscript{55} Wiren v. Shubert Theatre Corp., 5 F.Supp. 358 (S.D.N.Y., 1933).
  \item \textsuperscript{57} National Institute, Inc., etc. v. Nutt, 28 F.(2d) 132 (D. Conn., 1928), affd. 31 F.(2d) 296 (C.C.A. 2d, 1929).
  \item \textsuperscript{59} 1 STAT. 124.
  \item \textsuperscript{60} 11 STAT. 138.
\end{itemize}
in public, in addition to the exclusive right to print, publish and vend. In 1891, copyright protection was extended to include the exclusive right to dramatize and translate copyrighted works. In 1897, copyright owners of musical compositions received additional protection and were granted the exclusive right of public performance of their works.

In 1909, when the present copyright law was enacted, the extent and nature of the exclusive rights granted to copyright owners were specifically defined in Section 1. The scope of copyright protection was by this Section specifically dependent upon the character and type of the copyrighted work. The historical protection was carried forward so that the copyright owners of all works which are the subject matter of copyright have the exclusive right to print, reprint, publish, copy and vend such works. The exclusive right to translate a copyrighted work into other languages or dialects, or make any other version thereof was confined to literary works.

The copyright owner of a non-dramatic work was granted exclusive right to dramatize it and the copyright owner of a dramatic work was granted the exclusive right to novelize it or convert it into any other type of non-dramatic work. The copyright proprietor of a musical composition was granted the exclusive right to arrange and adapt it. The copyright owner of a lecture, sermon, address or similar production was for the first time granted the exclusive right to deliver the work in public for profit. The owner of a dramatic work continued to have the exclusive right to perform or present the work publicly.

It was specifically provided that if a dramatic work is copyrighted and not yet reproduced in copies for sale, the

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61 26 Stat. 1107.
62 29 Stat. 481.
64 Ibid.
65 Id., at § 1(a).
66 Id., at § 1(b).
67 Ibid.
68 Ibid.
69 Ibid.
70 Id., at § 1(e).
71 Id., at § 1(d).
copyright owner has the exclusive right to vend any manuscript or any record whatsoever of such work. The copyright owner of such a work was also granted the exclusive right to make or procure the making of any transcription or record of such dramatic work by, or from which, the whole or any part of such work may be exhibited, performed, presented, produced or reproduced in any manner or by any means. The owner of such a copyrighted dramatic work was specifically granted the exclusive right to exhibit, perform, present, produce or reproduce the work in any manner or by any method whatsoever.

The copyright owner of a musical composition was granted the exclusive right to perform the work publicly for profit, which right was first given in 1897. A limitation upon exclusive rights granted to copyright owners of musical compositions was imposed by the Act of 1909 with respect to mechanical reproductions thereof, under the so-called compulsory license provisions.

Unlike the performing right in dramatic works, the Act of 1909 grants to the copyright owner of a non-dramatic musical composition a monopoly only in public performances for profit.

§ 611. The Public Delivery of Copyrighted Lectures, Sermons, Addresses or Similar Productions.

Under subdivision (c) of Section 1 of the Act of 1909, the copyright owner has the exclusive right to deliver in public for profit a copyrighted lecture, sermon, address or similar production. Moreover, he has the exclusive right to authorize the public delivery of such work for profit.

This exclusive right is confined to particular classes of copyrighted works, such as dramatic and musical works, lectures, sermons, addresses or similar productions. The

72 Ibid.
74 Ibid.
75 Ibid., at § 1(e).
76 29 Stat. 481.
§ 612 RATIONALE OF COPYRIGHT PROTECTION

phrase, "similar production", has been construed to mean a work intended primarily for oral delivery to an audience, similar to a lecture, sermon or address. A speech, argument, debate, interview and perhaps even an informal talk, have been held to be within the phrase, "similar production", if intended in the first instance for oral communication.

§ 612. Public Performances of Literary Works.

Based upon a technical analysis of copyright legislation from a historical point of view, one court has held that the broadcast rendition of a poem could be made with impunity since the exclusive right of public performance or delivery was not an incident of copyright protection of literary works registered as such.

In Kreymborg v. Durante, the author of a copyrighted poetic work was denied relief against the unauthorized broadcast recital thereof. The Court held that a poem was not included within the omnibus phrase, "similar production", and therefore its unauthorized broadcast performance was not an infringing performance of a work intended for oral delivery.

The Court drew a distinction between poems first communicated orally and those which were introduced to the public by the reproduction of copies. The Court reasoned that in the former instance the author had evidenced his intent to communicate the work to the public orally and therefore should be protected against unauthorized oral delivery of his work. It held that where the poem was first communicated to the public in printed form, it was a literary work and not a poetic address, and therefore the copyright thereon did not include the exclusive right of public performance.

It is submitted that this distinction is arbitrary, unneces-


79 Ibid.

80 Ibid.

81 Ibid.
The Act of 1909 should be liberally construed with a view to protecting the just rights of an author in order to encourage the development of literature and art. Unquestionably, poetic works are so composed as to appeal to the ear as well as the eye. Poetic construction involves rhythm, meter, cadence, form and occasionally rhyme. Poems and musical compositions have many common characteristics. The poet has reason to expect his works to be recited. The precedence of delivery over printing of copies should not control the extent of copyright protection of such works. It is almost the invariable rule that musical compositions are disseminated to the public in printed form before public performance. The distinction in *Kreymborg v. Durante*,\(^2\) carries over to modern copyright law unnecessary technicalities which contradict the spirit of the present statute.

From a consideration of the facts in *Kreymborg v. Durante*, it is submitted that the court might have found that the broadcast recital of a poem which introduced elements of dramatic structure, constituted a dramatization thereof and as such, was susceptible of protection against public performance.

The classification under which a copyrighted work is registered is not necessarily definitive. As an incident of copyright protection, the owner possesses exclusive rights to adapt and use his work in other forms. Where a poem is capable of being performed as a dramatic work, the copyright proprietor should have the exclusive right to perform his work publicly in that manner, irrespective of the classification under which his work was originally registered.

The same rule should apply to novels, stories, or other

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literary works.\textsuperscript{83} The foregoing analysis need not be limited to public performance and may be applied to mechanical reproduction and other rights not expressly applicable to literary works, once dramatization thereof occurs.

Of course, if a poem were created as an independent dramatic work, having dramatic structure of plot, character and action, it might be copyrightable as a dramatic work, and would, therefore, indubitably include the exclusive right of public performance.\textsuperscript{84} Similarly, if a poem were copyrighted as the lyrics of a musical composition, it would fall within that classification and could not be publicly performed for profit without the consent of the copyright owner.\textsuperscript{85}

There is no doubt that a copyrighted literary work cannot be used as the basis for a dramatic broadcast program script without resulting in an infringement since the copyright includes the exclusive right of dramatization of the literary work.

\section*{§ 613. Exclusive Right to Public Performance of Dramatic Works.}

The owner of a dramatic work or a dramatico-musical work has the exclusive right to perform the work in public, whether or not the performance is for profit.\textsuperscript{86} The

\textsuperscript{83} It should be noted that under this view no written translation of a non-dramatic work into dramatic form and structure is necessary to constitute an infringement of the right to dramatize. To avoid an oral copyright, the right to dramatize a non-dramatic work should not protect the method, system, stage business or inflection used by the author in the oral narration, recitation, reading or delivery of his non-dramatic work. An authorized dramatization of a non-dramatic work cannot be protected independently unless that dramatization has been reduced to written form and copyrighted as such. Cf. \textit{Seltzer et al. v. Sunbrock et al.}, 22 F.Supp. 621 (S.D. Cal., 1938).


\textsuperscript{85} \textit{Ibid.}

\textsuperscript{86} 35 \textit{STAT.} 1075 (1909), 17 U.S.C.A. § 1(d) (1927).
copyright owner of a non-dramatic musical composition must, however, establish that his work has been publicly performed for profit, to prove an infringement.\textsuperscript{87}

Performance through the medium of broadcasting has been held to be a public performance of copyrighted works.\textsuperscript{88} Since the profit element need not be present to constitute an infringement of a dramatico-musical copyrighted work, an unauthorized broadcast performance thereof is an infringement even when the program is broadcast for non-commercial purposes by a non-profit station. Works susceptible of infringing broadcast performances which do not require consideration of profit implications are dramatic and dramatico-musical compositions of all types. Among such works are plays, scenarios, dramatic broadcast scripts, operas, operettas, musical comedies and similar works copyrighted within that category.

Musical compositions which are included as part of dramatic works and are copyrighted as dramatico-musical compositions are known as "production numbers". Musical compositions which are written especially for motion picture productions and are copyrighted as part of such works are protected as dramatico-musical compositions. The creation of musical compositions for the express primary purpose of being performed as part of a dramatic broadcast program, may carry with it the protection of a dramatico-musical work, if the script and score are copyrighted together as a dramatico-musical composition.

The mere fact that a dramatico-musical work is exploited in the same manner as a non-dramatic musical composition does not alter the protection given such a work under its original registration of copyright within the classification

\textsuperscript{87} Id., § 1(e).
of dramatic works.89 The test as to whether a particular musical composition is protected as a dramatico-musical work or as a non-dramatic musical work depends directly upon the classification in which the work is registered for copyright.

Where individual musical compositions included in a copyrighted dramatico-musical work are also registered as independent non-dramatic musical compositions, whether profit is an essential constituent of infringement thereof depends upon the copyright on which the proprietor has elected to rely.

§ 614. Infringement Generally.

Specific instances of infringement of copyright by unauthorized interference with the separable rights arising out of the copyright have been previously discussed.¹

Where there is such a substantial similarity between two works that ordinary observers are confused in their identification thereof, and there is proof of access to the earlier work, the copyright thereon is infringed.² Although copying is the sine qua non of infringement, the question of access has been the subject of extended discussion by the courts. Undoubtedly, proof of access is important in that it may be said to raise a presumption of copying. Access alone, however, is inadequate since infringement depends upon copying. Proof of copying may be adduced without evidence of access.

The slight changing of a copyrighted work or the

¹ See §§ 601–613 supra.
minor addition or omission of parts thereof does not avoid infringement.\textsuperscript{3} Colorable changes are ineffective.\textsuperscript{4} The infringing work may be in a different medium and with the use of different materials.\textsuperscript{5} It is no defense that the plaintiff was benefited by the infringement.\textsuperscript{6}

Mere similarity or even identity of two works does not necessarily constitute infringement since copying is essential.\textsuperscript{7} Copying need not be direct. It may be made from memory and even unintentionally.\textsuperscript{8}

Access may be proved by circumstances and unexplained coincidences. As was said in Wilkie v. Santly: \textsuperscript{9}

"Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident."


\textsuperscript{6} Harms v. Cohen, 279 Fed. 276, 279 (E.D. Pa., 1922).


In Shipman et al. v. R. K. O. Radio Pict. Inc., et al., supra, Judge Woolsey said, at page 250:

"Whilst access is a sine qua non in a copyright cause, the fact that under the procedure followed herein the defendants had, by hypothesis, access to the plaintiff's work, is, obviously, not fatal to the defense . . . for the additional question always is whether having access, the defendant has made unfair use of a sufficient amount of the plaintiff's copyrightable matter to justify a holding of infringement."


\textsuperscript{9} Wilkie v. Santly Bros., Inc., et al., 91 F.(2d) 978, 979 (C.C.A. 2d, 1937).
Of course, similarity or identity, to constitute infringement, must be reasonably certain. It is not sufficient that it merely engenders a suspicion of piracy.\[^{10}\]

If two similar works are each the result of independent creative effort or of individual treatment of the same subject, no infringement can be found.\[^{11}\] Likewise, if the two works are the result of the use of common sources by both authors and there has been no overreaching or appropriation by the defendant, the plaintiff’s copyright will not be deemed infringed.\[^{12}\]

Even if access is proved or admitted, there is no infringement of copyright unless there is an appropriation of copyrightable matter which is a substantial and material part of the copyrighted work.\[^{13}\]

§ 615. Substantial and Material Appropriation.

Infringement exists where the defendant has appropriated copyrightable material. Once such appropriation is established, a question of fact exists in determining whether a substantial and material part of the plaintiff’s copyrighted work has been copied. It is not essential that the whole work be copied; it is sufficient that the labors of the author are substantially appropriated by another.\[^{14}\]

\[^{10}\] Ibid.


\[^{12}\] Harold Lloyd Corp. v. Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933).


The idea or plot is not copyrightable but where the expression of the fundamental theme is appropriated, infringement takes place. There must be an appropriation or adaptation by the defendant of such copyrightable matter as plays a role of consequence in the plaintiff's work.

A deliberate copying of but a small part of a copyrighted


"We did not in Dymow v. Bolton, 11 F.(2d) 690, hold that a plagiarist was never liable for stealing a plot; that would have been flatly against our rulings in Dam v. Kirk La Sheele Co., 175 Fed. 902, 41 L.R.A. (N.S.) 1002, 20 Ann. Cas. 1173, and Stodard v. Mutual Film Co., 249 Fed. 513, affirming my decision in (D.C.) 1934 249 Fed. 507; neither of which we meant to overrule. We found (in Dymow v. Bolton) the plot of the second play was too different to infringe, because the most detailed pattern, common to both, eliminated so much from each that its content went into the public domain; and for this reason we said, 'this mere subsection of a plot was not susceptible of copyright'. But we do not doubt that two plays may correspond in plot closely enough for infringement." (Parenthetical insertion supplied.)

It would seem that Wiren v. Shubert Theatre Corp. et al., supra, is not wrongly decided, inasmuch as the court there used the word "plot" interchangeably with "concept". Judge Goddard, at page 363, said:

"A plot or the mere concept of a situation around which to build and develop literary or artistic adornment is not copyrightable."

work may nevertheless be considered a substantial appropriation and an infringement.19

§ 616. Infringement at Common Law.

Since, theoretically, common law rights and statutory copyright are property rights of the same general type and closely analogous to each other, infringements of intellectual property rights at common law are governed by and enforced under the same principles of liability as infringements of statutory copyrights.20 Of course, such remedies as arise by reason of the peculiar provisions of the copyright statute are not available at common law.21

§ 617. Infringement: Intention Immaterial.

The result and not the intention at the time of doing the act complained of determines the question of infringement.22 Where infringement of copyright is established, the question of intent is immaterial,23 but where infringement does not otherwise appear, intention to infringe may be considered in determining whether there is an actual infringement.24 Where infringement has been proved, an intent to violate the copyright law will be presumed.25 The infringing acts need not be for profit.26 Even if the

20 Weil on the Law of Copyright, (1917) 109, 141.
§ 618 INFRINGEMENT OF COPYRIGHT AND REMEDIES

infringer intended to avoid an infringement, unconscious and unintentional copying may result, for which appropriation the infringer is liable.\textsuperscript{27}

It is immaterial that the infringer was innocent, since intent is not a necessary element in infringement,\textsuperscript{28} except when the criminal provisions of the statute are invoked\textsuperscript{29} or additional damages are assessed.\textsuperscript{30}

§ 618. Infringements: Fair Use.

In a few limited instances, a copyrighted work may be used without constituting an infringement. For example, it has been held that imitation, mimicry or parodying of copyrighted works is a fair use thereof.\textsuperscript{31} It is essential that good faith serve as a foundation for the imitation, and that due acknowledgement be made to the author or copyright proprietor. The imitation must not serve as a substitute for the copyrighted work.

No general license to imitate, mimic or parody a copyrighted work can be implied from these decisions. Such uses are infringements which may, in certain cases, be condoned. The doctrine of fair use is of limited scope and cannot be applied generally to sanction unauthorized appropriation of the creative efforts of another. In order

compositions may be infringed by a performance for profit only. Section 1(e), 35 Stat. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

\textsuperscript{27} Harold Lloyd Corp. v. Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933).


\textsuperscript{30} Schellberg v. Empringham, 36 F.(2d) 991 (S.D.N.Y., 1929).

that such judicial immunity be granted, there must be no copying or other unconscionable appropriation.

If the imitation or parody is of an entire work, it no longer constitutes a fair use, but is an actionable infringement.\(^{32}\) A synopsis of an opera or play is a fair use, if it is not an abridgment of a copyrighted work.\(^{33}\) It should serve merely to put the reader on inquiry concerning the original work. An outline or abridgment of the copyrighted work is an infringing version, because the author’s labors are thereby appropriated.\(^{34}\)

§ 619. Same: Jurisdiction.

Copyright protection being extended by reason of Federal statutes and by the express provision of the Act of 1909, the United States courts have exclusive jurisdiction over all actions, suits or proceedings arising under the copyright laws.\(^{35}\) Such jurisdiction includes the entry of judgment for damages, assessment of fines and sentences of imprisonment for criminal infringements, the granting of equitable relief such as injunctions, accounting of profits \textit{et cetera}.\(^{36}\)

The exclusive jurisdiction of the Federal courts is not affected by the interposition of defenses which are ordinarily litigated in the state courts, so long as infringement of statutory copyright is alleged.\(^{37}\) Even if the suit involves only a partial interest in a copyright, the jurisdiction of the United States court continues.\(^{38}\)


\(^{33}\) Ricordi & Co. v. Mason, 201 Fed. 182 (S.D.N.Y., 1911).


tions of the bill of complaint are controlling, rather than the plaintiff's probable ultimate success in the action.39

The work which is sought to be protected in the Federal courts must be an appropriate subject of copyright and registered as such.40 If the plaintiff's work is not copyrightable, although alleged as such, there is nothing upon which to predicate Federal jurisdiction, even if the defendant is estopped to deny the validity of the alleged copyright.41 Since jurisdiction depends upon the Federal question, the amount of the controversy and the citizenship of the parties are immaterial.42

Civil actions for relief under the copyright laws may be instituted in any United States District Court in whose jurisdictional territory the defendant or his agent is an inhabitant or in which he may be found.43 This specific statutory provision applies to copyright suits only, since infringement actions are not governed by the Judicial Code in such particulars.44 Although the statute permits service upon the defendant's agent, jurisdiction can not be obtained over a corporation by service upon its president within a district where the corporation has no office and is not doing business.45

Rule 1 of the United States Supreme Court Rules46 provides that the Federal Courts shall enforce the general equity rules promulgated by the Supreme Court,47 so far as they may be applicable, in all copyright infringement proceedings.

39 Ibid.
41 Ibid.
Actions for the enforcement of common law rights are properly lodged in state courts except where there is diversity of citizenship and where the amount in controversy necessary to confer Federal jurisdiction is present. No suit founded upon common law rights can be instituted in the United States courts, in the absence of other facts conferring jurisdiction, despite the fact that the defendant's allegedly infringing work has been registered for copyright. Jurisdictional requirements must ordinarily be met in the plaintiff's case rather than defendant's.

The state courts are not deprived of jurisdiction over royalty accounting proceedings, contract matters, unfair competition, fiduciary relations and other suits which involve copyrighted works, so long as such actions do not involve a determination of the validity of a copyright, an infringement thereof or a finding that any person is entitled to a copyright.

§ 620. Statutes of Limitation.

The Act of 1909 contains no provision as to the time within which remedies for copyright infringements must be prosecuted. Consequently, there is no uniform statute of limitation to govern such actions.


Where the suit is instituted at law, the District Court is obliged to follow the statute of limitations of the state in which the action is brought.\textsuperscript{55}

Where equity jurisdiction is invoked concurrently with a prayer for damages, as is the case in most infringement actions, equity courts consider themselves bound by the statutes of limitations which govern actions of a similar nature at law and apply the prescription of the state in which the action is instituted.\textsuperscript{56} A copyright proprietor cannot obtain equitable relief in a suit where the recovery of damages and an injunction and accounting are concurrently sought, if he is precluded from legal relief by the local statute of limitations.\textsuperscript{57} Such prescriptive legislation must be broad enough to include the class of actions to which the tort of copyright infringement belongs.\textsuperscript{58} Where a local statute bars actions for injury to "property", it must be clear that intangible property, such as copyrights, was intended to be included, or the limitations of that statute will not apply.\textsuperscript{59}

Where the action is one for the enforcement of equitable remedies, the courts invoke the customary rule of laches to bar relief to dilatory complainants.\textsuperscript{60}

\section*{§ 621. Damages for Infringement of Copyright.}

Section 25 of the Act of 1909 provides that in addition to an injunction restraining infringements of copyright, the proprietor shall be entitled to the profits derived from the infringement. The burden of proving the costs in-

\textsuperscript{55} Pathe Exchange, Inc. v. Dalke, 49 F.(2d) 161 (C.C.A. 4th, 1931) (applies the Virginia statute of limitations); McCabe v. Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924) (applies the Louisiana statute of limitations); Brady v. Daly, 175 U.S. 148, 20 Sup. Ct. 62, 44 L.Ed. 109 (1899).

\textsuperscript{56} Ibid.

\textsuperscript{57} McCabe v. Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924); Hall v. Law, 102 U.S. 461, 26 L.Ed. 217 (1880).

\textsuperscript{58} McCabe v. Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924).

\textsuperscript{59} Ibid.

volved in the infringing enterprise is placed upon the defendant, while the plaintiff is required to prove sales only in establishing profits. The plaintiff may, of course, recover judgment for actual damages sustained as a result of and reasonably flowing from the infringement.

In lieu of actual damages or profits, the court is empowered to assess statutory damages within the discretionary limits set forth in Section 25. Such recovery limitation does not apply, however, to infringements occurring after actual notice to the defendant. After enumerating several instances in which specified measures of damages apply, Section 25 contains an omnibus provision that the limitation of damages for non-specified infringements, before actual notice to the defendant of copyright ownership, shall be not less than $250.00 and not more than $5000.00. The statute specifically states that such damages shall not be regarded as penalties.

Copyright infringements by radio broadcasts of dramatic and non-dramatic musical and literary works come within the omnibus provisions of Section 25 and statutory damages within the limitations of $250.00 to $5000.00 are applicable to each infringement.

It is mandatory for the court to assess not less than $250.00 for each infringement and it is an abuse of discretion to grant damages for a lesser sum once the infringement has been proved. The discretion granted to the court by Section 25 relates solely to the amount of damages

63 Ibid.
to be assessed within the statutory limits. The court is vested with no discretion to determine whether any damages shall be awarded once infringement has been found.

Under Section 25, the plaintiff is absolved from any duty to prove his actual damages. The latter represents real as opposed to nominal damages. Actual damages are damages which are legally existent as well as legally ascertained.

Where the bill of complaint does not include an express prayer for the assessment of statutory damages, and the plaintiff undertakes to prove his actual damages but is unable to establish same in a sum which is included within the limits of statutory damages, the court cannot award judgment for the statutory amount. Section 25(b) has been interpreted to give the plaintiff a new right to apply to the court for such statutory damages as shall "appear to be just" in addition to his traditional right to pursue damages and profits by historic methods of equity.

The discretion given to the court by Section 25(b) is only as to amount. The right to invoke such discretion is within the sole province of the court which must by statute award damages within the minimum and maximum limitations. Plaintiff is entitled to ask the court in its

65 Ibid.

discretion to award damages within the statutory limits in lieu of actual damages.\textsuperscript{69} Defendant has no right to insist that statutory damages be awarded since he is bound by plaintiff’s legal proof of actual damages while the court is not so restricted by the discretion vested in it by Section 25(b).\textsuperscript{70} Plaintiff cannot resist the award of statutory damages by the court. Such discretion is exercised as a matter of right by the court and cannot be controlled by recitals in the prayer for relief.

Where the defendant had actual notice of the existence of a copyright upon the infringed work, the limitations upon the maximum amount of recovery do not apply and the court may exceed the $5000.00 maximum sum in awarding damages.\textsuperscript{71}

The unauthorized manufacture of electrical transcriptions and other recording devices for the reproduction of copyrighted musical works for public performance for profit, are infringements which are embraced within the aforesaid rules of damages. Section 25(e) refers to mechanical reproductions intended to come within the compulsory license provisions of Section 1(e) and is therefore inapplicable to recordings for public performance for profit.\textsuperscript{72}

The infringement of copyrights by the unauthorized making of arrangements, adaptations or other copies of musical and dramatic works are likewise controlled by the general rules of damages of Section 25.

\textsection{622. Damages for Infringement of Common Law Rights.}

Injunctions and accountings of profits are granted against infringers of common law rights. Where the
pleadings are such that an action at law is instituted for damages, the triers of fact may award damages for such unauthorized appropriation of the creative efforts of the author or other owner of the common law rights.\(^{73}\) Where an unpublished work is wrongfully published by the defendant, the court may award exemplary damages.\(^{74}\)

In an action for conversion of an unpublished work which was of value to the plaintiff but had no market or other definite provable value, it has been held that the actual value to the manuscript owner was the just and accepted rule of damages.\(^{75}\) By their very nature, such damages must be based upon the owner's estimate of the value of his work, but the amount thereof rests necessarily in the discretion of the jury, subject to the limitation that its verdict must not be inadequate or excessive.\(^{76}\) In such consideration of damages, the jury must, of course, be instructed to consider whether the infringement by the defendant was such as to destroy completely or partially the value of the plaintiff's work.

The rules of damages effective in each state are controlling in common law infringements. Similarly, the local adjective law governs the procedure in accountings of profits and injunctions.

\section{§ 623. Counsel Fees.}

It is discretionary for the court to award reasonable counsel fees to the victorious party in copyright litigation.\(^{77}\) Attorneys' fees are taxable as part of the costs.\(^{78}\) The courts generally award counsel fees against the infringer


\(^{75}\) Taft v. Smith, Gray & Co., 76 Misc. 283, 134 N.Y.Sup. 1011 (1912).

\(^{76}\) Ibid.


\(^{78}\) Ibid.
of a copyright. It is less customary to award counsel fees to the defendant and against the unsuccessful copyright owner.

The fact that the court considers the minimum damages fixed by statute to be an amount larger than might appear to be warranted by the evidence does not justify the court correspondingly to reduce the amount allowed for attorneys' fees.\(^7\) In determining reasonable counsel fees, the elements to be considered include the amount involved, since that measures counsel's responsibility, the kind of work necessary, the amount of work done, the skill used and the result.\(^8\) Where the action is based on a claim of infringement of common law intellectual property and is within the jurisdiction of the United States District Court on other jurisdictional grounds, that Court has no power to award counsel fees to the victorious defendant. The provisions of Section 40 of the Act of 1909 may be applied only to actions based on statutory copyright.\(^9\)

\(^7\) M. Witmark & Sons v. Calloway et al., 22 F.(2d) 412 (E.D. Tenn., 1927).

\(^8\) Ibid.

\(^9\) Ibid.

Chapter XLIII.
MUSICAL CONTENT OF BROADCAST PROGRAMS.

SECTION 624. Copyrighted Musical Works Generally

The principal constituent of broadcast programs is the musical content thereof. Broadcast performance of musical compositions in the public domain may be made without liability so long as copyrighted arrangements or other treatments of such works are not used.

The broadcast of copyrighted musical works requires the license and authority of the respective owners thereof. In dealing with liability for unauthorized use of copyrighted works, no consideration will be given to the related problem of electrical transcription or mechanical reproduction of such works, which problem is reserved for a later chapter.

Musical compositions are susceptible of broadcast performance either by way of dramatization or by non-dramatic rendition thereof. Broadcast programs which dram-

\[\text{\textsuperscript{1}}\text{ See Chapter XLV. infra.}\]
atize copyrighted musical works involve the so-called grand rights. Non-dramatic broadcast performances of musical compositions involve the so-called small performing rights.

§ 625. Grand Rights and Small Rights Distinguished.

A broadcast performance of a dramatico-musical work in substantially the same form and manner as was originally contemplated by the author thereof, is a dramatic performance which is controlled by the copyright owner's grand right. For example, if an operetta or musical comedy which is adapted for a broadcast program and performed with such a degree of continuity as to convey to the listener the idea that the original operetta or musical comedy is being presented in an approximation of its original form, a dramatic broadcast performance takes place. So long as the average listener believes that the work is being dramatized, an unauthorized broadcast performance thereof in such a manner is an infringement of the grand right.

The various kinds of stage presentation of a dramatico-musical work as well as a motion picture production thereof are each, unquestionably, dramatic performances. Where the same effect is sought to be accomplished by broadcast performances, the latter should be none the less dramatic performances regardless of the fact that a new medium is used to communicate the dramatization. The result and not the means is controlling.

Where, however, individual musical compositions contained in such an operetta or musical comedy are performed independently of the main work for purposes which cannot reasonably be considered dramatization, such a rendition which is merely incidental to a non-dramatic broadcast program involves the small performing right.

Since the copyright owner of a non-dramatic work has the exclusive right to dramatize it, any unauthorized dramatic broadcast performance of a non-dramatic work
infringes upon the grand right of the copyright owner thereof. It is always a question of fact to determine whether a performance is dramatic or non-dramatic. The nature of the composition which is so performed is not important. A dramatico-musical work may be the subject of a non-dramatic performance and vice versa. Where a dramatic performance is unauthorizedly broadcast, the copyright is infringed apart from considerations of profit. Where a non-dramatic musical broadcast performance is complained of, liability for infringement depends upon whether such a public performance is for profit.

Copyrighted symphonic musical works and such other compositions as are primarily intended for performance upon a stage are by usage protected as dramatico-musical works and their performances involve grand rights. Although such compositions are not strictly dramatico-musical works, their manner of presentation is such as resembles that of a dramatic performance and they are therefore protected as such.

The ordinary song is not a dramatic composition unless it is contained in a dramatic work as an integral part thereof; but a copyrighted non-dramatic musical composition may not be dramatized without infringing upon the exclusive rights of the owner of the copyright.

If it is not necessary for a copy to be made or a performance to be given of both the words and the music of a musical composition to constitute an infringement. The music and the lyrics are independently protected by

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5 Ibid.
the copyright whether the performance be dramatic or non-dramatic. The lyrics alone cannot be copyrighted as a musical composition. However, they can be copyrighted separately when construed as literary works. The music alone, however, may be copyrighted as a musical composition.

§ 626. Broadcast Performance as Infringement of Musical Copyright.

The Act of 1909 does not specifically deal with broadcasting. Liability, however, for the unauthorized broadcast performance of copyrighted musical works has been established by judicial interpretation of the provisions of the statute.7

The United States Supreme Court in the leading case of Herbert et al. v. The Shanley Co.,8 held that the performance of a copyrighted musical composition in a restaurant or hotel, without charge for admission to the hearing thereof, infringes the exclusive right of the copyright owner to perform the work publicly for profit. Mr. Justice Holmes considered such performances as competing with, and even tending to destroy, the success of the monopoly which the law grants to copyright proprietors. The Court held that it was immaterial that a specific charge was not made for the privilege of hearing the music; it held that so long as the purpose was to perform the music in connection with a business which was operated for profit, it was a public performance for profit within the meaning of the Copyright Law.9 It is unnecessary to plead that the copyrighted musical composition was written for the purpose of public performance for profit. The mental attitude of the composer is immaterial in a suit for infringement of copyright.10

The Act of 1909 was later interpreted so that the unauthorized performance of a musical selection by a pianist in a motion picture theatre is an infringement of the copyright thereon by the owner and the operator of the theatre.11

§ 627. Same: Defense of Independent Contractor Not Available.

It is important to note that the defense that the performing musicians are independent contractors is not countenanced by the courts. It was held that although the musicians had authority to play whatever compositions they considered appropriate and fitting in accordance with their own judgment, their employer must nevertheless be held responsible for their infringements because of his acquiescence in and ratification of their acts.12 If, under the contract with the performing musicians, the employer has parted with the right to exercise control over their actions without making inquiry as to what they intended to play, he must be deemed to have taken part in the infringement by having given general authority to perform the copyrighted compositions.13


The earliest case dealing with radio broadcast performance of copyrighted music is Witmark v. Bamberger14 where District Judge Lynch followed the previous decisions

interpreting the Act of 1909 and held that broadcasting was a public performance for profit of a copyrighted musical composition. The Court held that Station WOR, which was operated by the defendant department store owner, was made a part of the business system of defendant’s store since the cost of broadcasting was charged against the general expenses of the business. The broadcast advertising of the defendant’s business included the broadcast performance of copyrighted musical material which was held to be thereby infringed. The Court held that the profit motive was predominant in broadcasting and that the station was not an eleemosynary institution. This case is significant because the program involved was a sustaining program over a station owned and operated by another business institution as an advertising medium. The decision may therefore be construed as holding that both sustaining and sponsored programs infringe upon the copyrights of musical selections which are the subject of broadcast performance without the authority or consent of the copyright proprietors.

Witmark v. Bamberger was not reviewed by an appellate court and it was not until the institution of an action against Station WLW that the question of liability for infringement of the performing rights in a musical composition by a broadcast station was definitely settled. This case, Remick & Co. v. American Automobile Accessories Co., originated in the United States District Court for the Southern District of Ohio, where Judge Hickenlooper granted the defendant’s motion to dismiss the bill of complaint. The Court expressly disagreed with the holding in Witmark v. Bamberger and held that radio broadcasting was not a "performance" within the meaning of the Act of 1909 because Congress intended that infringement occur in a place where the public would congregate for the pur-

pose of entertainment, and that payment be made in one way or another as compensation for the entertainment provided.\textsuperscript{18} The Court relied largely on White-Smith Music Co. v. Apollo Co.\textsuperscript{19} where the United States Supreme Court held that a perforated player-piano roll was not a copy of a musical composition within the protection of the then existing Copyright Act. Judge Hickenlooper considered the White-Smith decision as a basis for interpreting the intent of Congress insofar as radio broadcasting was concerned.

The Circuit Court of Appeals for the Sixth Circuit reversed the District Court\textsuperscript{20} and held that the artist is consciously addressing "a great, though unseen and widely scattered, audience" and is therefore participating in a public performance. The Circuit Court of Appeals considered the question of public performance for profit under the Act of 1909 as settled by Herbert v. The Shanley Co.\textsuperscript{21} and held that a broadcast performance was an infringement of the performing rights of copyrighted musical works. The Circuit Court of Appeals expressly refuted the applicability of White-Smith Music Co. v. Apollo Co.\textsuperscript{22} on the ground that the question of what constituted a public performance did not arise in that case. The United States Supreme Court declined to review the case further and denied the broadcast station's application for certiorari.\textsuperscript{23}

The facts in Remick v. American Automobile Accessories Co.\textsuperscript{24} and M. Witmark & Sons v. L. Bamberger & Co.\textsuperscript{25} are

\textsuperscript{19} 209 U.S. 1, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).
\textsuperscript{22} 209 U.S. 1, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).
\textsuperscript{23} 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 409 (1925).
\textsuperscript{25} 291 Fed. 776 (D.N.J., 1923).
strikingly similar. In both cases, the stations were operated under commercial licenses from the Department of Commerce and served primarily as advertising media for their respective owners and operators who were also engaged in other business enterprises. It seems clear from these decisions that the rule is equally applicable to both sponsored and sustaining programs. The programs need not directly involve the profit motive; they are infringing performances so long as they are used in connection with a business which is operated for profit.

§ 629. Same: Rebroadcast Performances.

Liability for infringement of copyright was firmly fastened upon radio broadcast stations in Remick & Co. v. General Electric Company 26 where District Judge Thatcher held that picking up an unauthorized performance by a microphone and rebroadcasting such a performance constituted infringement. In this case, the performance of a copyrighted musical selection by an orchestra in a public ballroom of a hotel was broadcast over defendant's station. After final hearing, an injunction was granted. Here, too, the station was operated to stimulate the sale of products of defendant's primary business and the profit motive was obvious. The Court held that the acts of the operator of the broadcast station 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 selections by the members of the orchestra." It must be borne in mind that in this case the original performance by the orchestra in the hotel ballroom was unlicensed and the defendant station rebroadcast the originally unauthorized performance. The Court held the broadcast station to have clearly participated in the infringing acts. Similar liability of the broadcast

26 16 F.(2d) 829 (S.D.N.Y., 1926).
station for infringement has been determined under the copyright laws of Great Britain\(^2\) and Australia\(^2\).

Where the original performance by the orchestra in a hotel or cafe is licensed by the copyright proprietors, the question of infringement liability of the station for rebroadcasting such originally lawful performance seems not to have been decided squarely. Assuming that the original public performance license granted by the copyright owner does not include broadcasting specifically, the question becomes one of construction to determine whether the license is limited to the type and means of entertainment of the place where the selection is originally performed or whether it is broad enough to include radio broadcasting from such licensed establishment.

Since the customary performance license contains the express provision that the licensee is not authorized to grant to others any right to reproduce or perform publicly for profit the compositions embraced within the license, it would seem clear that such unauthorized rebroadcast would be an infringement of the copyrights of the musical compositions so rebroadcast. Since the direct broadcast of music has been held to be an infringement of copyright as a public performance for profit\(^2\) it is submitted that the acts of a station in rebroadcasting a performance under such circumstances would constitute an infringement of copyright. In a related situation, it has been held that infringement does not depend upon the rights of the station originating the performance, but rather upon the acts of the


person who creates another public performance which is predicated upon the original broadcast performance.\textsuperscript{30}

\textbf{§ 630. Same: Public Reception Thereof.}

Copyright owners of musical compositions, having settled the liability of broadcast stations for unlicensed broadcast performances of their works, later addressed their attention to the question of infringement by the reception of broadcast performances of their music in business establishments. In \textit{Buck v. Jewell-La Salle Realty Co.},\textsuperscript{31} Judge Otis, in the United States District Court for the Western District of Missouri, refused to uphold the contention of the copyright owners that the reception of broadcast musical entertainment in the public rooms and guest chambers of the La Salle Hotel in Kansas City, Missouri, was a public performance for profit within the meaning of the Act of 1909. In this case, the original broadcast performance by Station KWKC was not licensed and was in itself an infringement. The Court held that the performance itself must be intentional to hold the defendant liable, although intent to commit an infringement of copyright is immaterial. The Court rejected the plaintiff's contention that no difference in principle existed between performance by playing a phonograph record of the copyrighted composition and by playing the same work by means of a radio receiving set. Infringement, however, was admitted by the defendant on one count, minimum damages in the sum of $250.00 were awarded, and that issue was resolved in favor of the plaintiff.

A few months after \textit{Buck v. Jewell-La Salle Co.}\textsuperscript{32} was


\textsuperscript{31} Also sub nom. Buck et al. v. Duncan et al., 32 F.(2d) 366 (W.D. Mo., 1929).

\textsuperscript{32} \textit{Ibid.}
decided, another action was instituted in the United States District Court for the Southern District of California by the owners of the performing rights of certain copyrighted compositions which were lawfully broadcast, but received, heard and enjoyed by patrons of the defendant's cafe without the consent of the plaintiffs. District Judge McCormick denied relief to the copyright owners and refused to consider the acts of the cafe owner as infringing their rights. This case differs from Buck v. Jewell-La Salle Realty Co. because here the original broadcast performance was licensed by the plaintiff, whereas in the Missouri case the broadcast performance itself was an infringement. Judge McCormick, too, did not consider reception as performance within the Act of 1909. He regarded the licensed broadcast performance as an acquiescence by the copyright owner "in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition." Accordingly, the Court held that it was not within the intent of Congress, or within the reasonable purview of the Act of 1909, to regard the reception of musical entertainment in a business establishment as an infringement of copyright.

The copyright owners did not appeal from the decision of Judge McCormick but instead pursued their contention against the defendants in the Jewell-La Salle case by an appeal from the decision of Judge Otis. The Eighth Circuit Court of Appeals certified the issues in the case to the United States Supreme Court by presenting the following question of law:

"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 station, constitute a performance..."

33 40 F.(2d) 734 (S.D. Cal., 1929).
LAW OF RADIO BROADCASTING § 630

of such composition within the meaning of 17 U. S. C. A., Sec. 1(e)?"

The United States Supreme Court unanimously rendered an affirmative answer to this certified question. The contention of the copyright owners was upheld in full. The reception of broadcast programs in connection with commercial establishments was held to be an infringement of copyright as a "public performance for profit". It must be remembered that the facts in this case were such that the original broadcast performance by the broadcast station, the performances of which were received by the defendant hotel, was also unlicensed and therefore in itself was an infringement of the plaintiffs' copyright.

The Supreme Court rejected the defendant's contention that the copyright owners' control of the initial radio broadcast performance exhausted the monopoly conferred by the Act of 1909. Mr. Justice Brandeis, in writing the opinion of the Court, held inapplicable the analogy to the prohibition of the statute against control of the sale of copies by the copyright owner, and asserted that the monopoly is expressly granted by the statute with respect to all public performances for profit.

The Court found nothing in the Act of 1909 to preclude more than one liability for infringement of copyright by public performances for profit. The Court expressly held that the giving of full protection to the monopoly granted by Congress to the copyright owner was a duty imposed upon the courts. A single rendition of a copyrighted selection may result in more than one public performance for profit and the copyright owner was therefore allowed to...

34 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).
35 See (1932) 20 Geo. L. J. 215 and (1931) 26 Ill. L. Rev. 443.
enforce the plural liability of the infringers who participated in the several unauthorized public performances.

The Supreme Court also gave no countenance to the defendant's argument that its acts in operating a radio receiving set involved no element of control of the particular program which was broadcast. Mr. Justice Brandeis said that just as the failure to control the performances of an orchestra hired for public performance for profit does not relieve the hotel or cafe owner from liability for infringement, "similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another".\(^38\) The Supreme Court expressly affirmed the doctrine that intention to infringe is not essential under the Act of 1909,\(^39\) and that knowledge of the particular selection to be played or received is immaterial.

Mr. Justice Brandeis based his findings of plural performances on the premise that the reception of a radio broadcast is not a mere audition of the original program. The operator of a broadcast receiving set does not listen to the original performance but rather to a reproduction thereof. The Court found that radio waves in themselves are not audible but are rectified, converted and reproduced by means of a receiving set, in a comparable manner to the performance of phonograph records which require another mechanism for the reproduction of the recorded composition. Without the additional mechanism of the receiving set, the original broadcast program, like the phonograph record, is not heard. "Reproduction in both cases amounts to a performance."\(^40\) Mr. Justice Brandeis found that a public performance for profit in the defendant's hotel was brought about by the acts of the defendant in (1) installing, (2) supplying electric current to and (3) operating the

\(^38\) 283 U.S. 191, 198, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).
\(^39\) See § 617 supra.
radio receiving set and loud speakers which amplified the broadcast program after it had been received. Thus, the defendant was held to have produced the music by instrumentalities under its control.

Mr. Justice Brandeis, finding that a public reception for profit constitutes an infringement of copyright as a public performance for profit, commented by way of a footnote in his opinion, that where the original performance by the broadcast station was licensed by the copyright owner, a license for its commercial reception and distribution by others might possibly have been implied. This was the situation in *Buck v. Debaum*,41 where Judge McCormick found by implication a license for public reception for profit in the original license granted by the copyright owner to the broadcast station. Rather than rest the decision of this important issue upon a judicial construction of its license to broadcast stations, the copyright owners failed to press an appeal from the adverse decision in the *Debaum* case.42 Instead, they adopted the practical course of changing the terms of their license by reserving specifically their claims against commercial reception of broadcast performances of their copyrighted works.43

Following the decision in *Buck v. Jewell-La Salle*, a query44 was raised as to whether, since the broadcast itself is inaudible and does not reach the public except through a reproduction created by the listener, the broadcast station

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41 40 F.(2d) 734 (S.D. Cal., 1929).
43 Extract from license agreement between the American Society of Composers, Authors, and Publishers and broadcast stations as follows:

"3. Nothing herein contained shall be construed as permitting the licensee to grant to others the right to reproduce or perform 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."

could be said to perform publicly? Although admitting that a broadcast program by a station involves the profit motive, the necessary "public" element was thought to be lacking. This interpretation of *Buck v. Jewell-La Salle Realty Co.* appears to be unsound since the liability of broadcast stations for infringement of copyright had previously been determined. *Remick & Co. v. The American Automobile Accessories Company* is conclusive on the question of liability of broadcast stations as public performers for profit of copyrighted works. Moreover, the later decision by the United States Supreme Court in *Buck v. Jewell-La Salle Realty Co.* is in no way inconsistent with the *American Automobile Accessories Company* case. In the latter, the question of liability for broadcasting performances of copyrighted selections was determined, while the former decided an issue certified by a question relating only to the public reception of copyrighted works. Furthermore, Mr. Justice Brandeis expressly affirmed that broadcasting was within the scope of the Copyright Act, and made specific reference to the earlier decisions so holding. The implication that radio broadcasting from the transmission standpoint is not covered by the Copyright Act, does not seem justified in view of the express language used by Mr. Justice Brandeis and his reference to the earlier decisions which definitely fixed liability upon broadcast stations for infringement of copyright. If the Supreme Court had intended to overrule these earlier decisions by implication, an entirely different discussion and treatment of the issue in *Buck v. Jewell-La Salle Realty Co.* would have eventuated.

The question of liability for public reception of broadcast programs containing copyrighted works, was decided subsequently in the Chancery Division of the High Court.

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of Justice in a similar construction of the provisions of the British Copyright Act of 1911. In Performing Rights Society v. Hammond's Bradford Brewery Co., Ltd., the question of the liability of the defendant hotel operator for its public reception of copyrighted music resulting from a licensed broadcast performance, was determined in favor of the copyright owner. Mr. Justice Maugham followed the United States Supreme Court's decision in Buck v. Jewell-La Salle Realty Co. and held that public reception of the performance constitutes an infringement of the copyrights of the works so performed. The original license to the broadcast station which was granted by the plaintiff, was by its terms limited to reception for domestic and private use only. The Court expressly rejected the defendant's contention that the limitations contained in the broadcasting license were not binding on third parties. Mr. Justice Maugham said that the public was not justified or authorized by the original license to give public auditions of plaintiff's works by reproduction of the performances on receiving apparatus. The Court specifically found that reception was a performance within the meaning of Section 1 (2) of the British Copyright Act of 1911. A dictum

48 [1934] 1 Ch. 121 (C.A.).
50 1 & 2 Geo. V. c. 46 (1911).
In Performing Rights Soc., Ltd. v. Hammond's Bradford Brewing Co., Ltd. [1934] 1 Ch. 121 (C.A.), Mr. Justice Maugham, at page 128, said:

"The radio-frequency currents which arrive at the place where the defendant's loud-speaker is situate are selected by means of the well known tuning apparatus and led into the detector and thence are utilized for the purpose of generating from the radio-frequency currents audio-frequency currents which will conform exactly with the modulations of the original transmitted waves. I am quoting to some extent from Mr. Willans' report. 'These currents,' he says, 'are introduced into the low frequency amplifier, the currents from which operate the loud-speaker and cause it to emit sound waves which are substantially a repetition of those impinging on the microphone . . .' which was, of course, at the transmitting station. 'The loud-speaker is thus,' he observes, 'a translating device of converse character to the microphone in that it converts electrical currents into sound vibrations.' That process, in
by Mr. Justice McCardie in *Messager v. British Broadcasting Co., Ltd.*,51 decided six years earlier, gave support to the holding in the *Hammond's Bradford Brewery* case.

Similarly, the courts of Australia and France have held public reception for profit of broadcast programs containing copyrighted works to be infringements of their statutes.52 On the other hand, Germany, Denmark and the Free City of Danzig construed similar acts of public reception as permissible under their copyright statutes.53

In *Society of European Stage Authors, etc. v. New York Hotel Statler Co., Inc.*,54 a hotel was held liable for infringement of copyright by reason of its public reception of broadcast performances. The hotel's operation of a master receiving set and its unauthorized distribution of broadcast programs containing copyrighted works to guests de-

my opinion, . . . is essentially a reproduction and is not similar to the mere step of making distant sounds audible by some magnifying device. The sounds are produced by an instrument under the direct control of the hotel proprietor, and to my mind they are as much under his control as if his employee were turning a barrel organ or one of those distressing mechanical players which we sometimes used to hear. The fact that there is no power of selection is, I think, irrelevant to the question whether the sound amounts to a performance. The reproduction is, in my opinion, as much a performance as is a reproduction of a musical piece by a gramophone apparatus and if, as has to be admitted, that is a performance within the meaning of S. 1, sub-s. 2 of the Copyright Act, 1911 . . . , I can see no reason, having regard to the general observations that I have made as to the construction of the Act, why the loud-speaking apparatus is not also giving a performance. The musical piece is heard just as much as if a gramophone were being employed to do it and with just the same result from the point of view of the original author or his assigns.”

52 (1930) 1 J. Radio L. 584, 590 et seq.
siring to tune in on such programs, were held to be acts constituting a public performance by reception. Such intramural broadcast performances were considered not to differ significantly from the infringing acts upon which liability was predicated in *Buck v. Jewell-La Salle Realty Co.* The fact that there was individual reception of broadcast programs in the *Statler* case did not render the performances any the less public because it was held that the hotel guests receiving the broadcast performances constituted a cross-section of the public by reason of their inconstant character. The defense that the original broadcast performance was licensed by the station was of no avail since the defendant hotel’s liability was held to depend upon its own acts rather than upon the rights of another.

§ 631. Broadcast Performances for Profit.

The earliest case decided by the United States Supreme Court in its construction of Section 25 of the Act of 1909, passed upon the question of what constituted “profit” in the performance of copyrighted musical compositions.

Mr. Justice Holmes made short shrift of the defense that the copyright is infringed only when a specific charge is made for the right to hear the performance. Even where the performance of music is not the sole object of the defendant’s business and although no specific charge is made for the music, the Court held the copyright to be infringed. As Mr. Justice Holmes said in *Herbert v. Shanley*:

"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."

It is unnecessary for the copyright owner to plead that the music was composed for public performance for profit

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58 *Id.*, at 595.
§ 632. Musical Content of Broadcast Programs

and the mental attitude of the composer is of no moment in actions for infringement.59

§ 632. Same: Sustaining Programs.

A musical composition performed by a broadcast station in a sustaining program, which is of no direct profit to the producer, is nevertheless an infringement of copyright, if performed without authority or license from the copyright owner.60 Similarly, a rebroadcast of an unauthorized performance of a musical composition in connection with a sustaining program is an infringement of the copyright.61 The reasoning giving rise to such liability is sound. The operation of a broadcast station is generally a private business, although operated in the public interest, convenience or necessity. Sustaining programs are essential to the business of broadcasting, though the time during which sustaining programs are broadcast results in no direct revenue to the broadcaster. Sustaining programs have definite profit implications and represent a commercial activity. These programs are necessary in building listener-appeal for the station, which in turn serves as an inducement to advertisers.61a Sustaining programs also represent a proving ground for new program ideas and scripts which frequently are designed to attract commercial sponsors. Similarly, the talents of performers generally find their first expression in sustaining programs. It is well recognized that many broadcast artists gain commercial sponsorship and wide popular appeal by reason of their

61a In Pittsburgh Athletic Company, et al. v. KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938), the Court said: “The fact that no revenue is obtained directly from the broadcast is not controlling, as these broadcasts are undoubtedly designed to aid in obtaining advertising business.”
performances in sustaining programs. Consequently, the public performance of a musical composition in a sustaining program is motivated by profit and is therefore an infringement of the copyright on a selection unauthorizedly included therein.

There can be no question that the performance of a musical composition in a sponsored or commercial program is an infringement of copyright. The profit motive is direct and definite as is the case in all forms of commercial advertising in other media.

§ 633. Same: Non-Profit Stations.

Where a broadcast station is operated by an educational, philanthropic or civic group and the profit motive is distinctly lacking in its operations, by the very nature of its financial, corporate or other structure of organization, it is submitted that musical compositions included in sustaining programs broadcast by such stations are not infringements of the copyrights thereon. It is essential, however, that such broadcast stations be maintained at the public expense and be operated without profit or return of any kind.62 It is the purpose for which the station is operated that is controlling.63 Such stations are exempt from liability for copyright infringement in their public performance of non-dramatic musical compositions in connection with sustaining programs because their operations are non-commercial in character.

However, there are several instances of non-profit broadcast stations which derive their operating revenue from the sale of some of their allotted time for commercial programs. It is submitted that such operations destroy the exemption which would ordinarily inure to the broadcast station. If advertisers make use of some of the allotted time of a non-commercial station for their own pecuniary gain, the station ceases to operate solely for eleemosynary

purposes. Sustaining programs over such stations may be divided into two classes. One type is the program which is completely devoid of any profit implication, such as those programs which disseminate propaganda, appeals or other information directly pertaining to the scope of the educational, philanthropic or civic objects for which the station is primarily operated. The other class of sustaining programs may be motivated by eventual profit to the station. Programs of this second type may, therefore, include generally the customary motive of sustaining programs broadcast by commercial stations. 64

Where a commercial advertiser sponsors a program over an otherwise non-commercial broadcast station, there is no doubt that the advertiser is infringing upon the copyrights of musical compositions unauthorizedly performed therein. It is no defense to the advertiser in a suit for infringement of copyright that the broadcast station is an eleemosynary institution. The advertiser's acts constitute an infringement of the copyright and he cannot shield himself behind the non-profit structure of the broadcast station. The exemption of liability of a non-profit broadcast station for infringement of copyright would be destroyed if its operations are such as result in competition with commercial broadcast stations. Although the purpose of the operations is controlling, it is submitted that the result is evidence of the purpose. Where a non-profit broadcast station carries on its operations in the same manner as a commercial station, except that its sustaining programs propagandize its eleemosynary objects, it would seem that there is little difference in result between the commercial and the so-called non-profit stations. The question of such operations is one of fact, since it is a matter of degree as to how far the commercial operations of a non-profit broadcast station taint the character of the station so as to destroy its exemption from copyright

64 See § 632 supra.
liability in connection with public performances of non-dramatic musical works.

The British copyright law holds a copyright to be infringed by a performance in public. There is no express reference to "profit". The English courts, however, consider profit as a very important element in determining public performance.

§ 634. Same: Broadcast Performances—When Public.

Under the early English law, a performance was held to be an infringement of copyright only when presented at a place of dramatic entertainment. The courts held that if the composition were performed at any place in public, there would be a sufficient compliance with the provisions of the old law. In England, it is a question of fact to determine whether or not a performance is public before it can be held to constitute an infringement of copyright. However, the United States statute is specific in requiring a "public performance for profit" to constitute an infringement of copyright with respect to non-dramatic musical compositions. The British statute merely declares that a copyright is infringed by a performance in public. The profit motive is considered as an element in determining whether the performance was public. In the United States, it is unnecessary to regard public performance as a question of fact in each case. The test is clear and definite. Any performance which communicates a copyrighted work in any manner to one or more persons, even when they do not actually participate in the performance, should be deemed public. This liberal definition is desirable since

it does not strain the truth of the facts and because in the United States a mere public performance does not constitute an infringement of a non-dramatic musical copyright in the absence of proof of the profit motive. In the case of dramatic works protected by copyright, the profit motive is not controlling and a public performance thereof is sufficient to constitute an infringement.

The question has been suggested as to whether, since the broadcast itself is inaudible and does not reach the public except through a reproduction created by the listener, the broadcaster can be said to perform publicly? It is clear that the communication of a performance to the public by the setting of ether waves in motion, in the knowledge that a multitude of listeners would tune in and receive such performances, is a public performance. The United States Supreme Court in *Buck v. Jewell-La Salle Realty Co.*, has expressly decided that radio broadcasting is within the scope of the Act of 1909. The same conclusion had been reached by our courts previously, as well as by the courts of England.

§ 635. Same: Place Where Infringing Performance Broadcast Not Important.

Since the broadcast station is deemed to infringe the copyright of a musical composition by setting in motion the performance thereof by way of the ether waves, it would seem that the infringing acts take place wherever the broadcast station takes affirmative action. If the broadcast


emanates from the station’s studio, the infringement may be said to have been committed when the performance is received by the microphone and conducted to the transmitting apparatus and disseminated over the wave-length of the station.\(^72\) In numerous cases, the station’s transmitter is located in an adjoining state from the place where the studios are located. Since the broadcast station in such a case performs its infringing acts in two states, it would seem that the copyright has been infringed in both states, although but one infringement occurs. Ordinarily, the law of the state where the last effective act is performed, controls the commission of torts. That doctrine is unimportant where the tort arises by way of a Federal statute, since no conflict of laws is involved in copyright infringements.

Where the infringing program is rebroadcast by the station from a point outside of its regular studios, the infringing acts are committed at the remote point of origin of the broadcast as well as at the point of transmission. This is true despite the fact that the infringement is not completed until the broadcast is received. The burden of proving infringement of copyright by a broadcast station must be met not only with evidence of the acts of the broadcast station, but also with proof of reception.

\(^{72}\) See Copinger, op. cit. supra

§ 636. Same: Studio Audiences.

A common practice has developed in the broadcasting industry for audiences to gather in the broadcast studios and other points of origin to witness the presentation of broadcast programs. In such a case, two distinct performances occur and a number of infringements may result therefrom. The broadcast station is liable for infringement of copyright for its performance of the musical compositions over its radio broadcast facilities. Is the broadcaster also liable for its public performance of copyrighted works?
in the presence of the studio audience at the point of origin of the broadcast?

The same acts produce two results—the performance is broadcast and is also communicated to the studio audience directly without the operation of the station’s broadcast facilities. There can be no doubt that the performance heard by the studio audience is a public performance. The mere fact that the performance may be amplified and carried to the ears of the studio audience by means of microphones and amplifiers and so-called public address systems does not bring into operation the radio broadcast facilities of the station. The studio thereby becomes a place of assembly for the purpose of receiving a direct performance and not a broadcast performance.

The question must now be considered as to whether such studio public performances are for profit. Many advertisers bring about a direct connection with their potential market by inviting large audiences to witness the presentation of their radio broadcast programs. It is common knowledge that such audiences are of definite value and benefit to the advertisers. They also serve to promote listener-appeal to the reception of such programs. Where the station’s ordinary studios are inadequate to accommodate the sizeable studio audiences, larger studios have been known to be constructed for the sole purpose of accommodating such audiences. In some cases, too, theatres and concert halls have been acquired and have been adapted for broadcast studio purposes solely to make possible even larger studio audiences. It is a common practice for hundreds of persons to attend at the point of origin of a single broadcast performance. The advertisers invite such audiences for definite and often direct profit purposes. The advertisers pay substantial rentals for such studio theatres in addition to the cost of time and other broadcast facilities. Such a performance is an infringement because it is public and for profit. The broadcast station, too, regards such studio audiences as desirable because the station itself
is made known to and advertised among the members of the audience and a direct good will relationship is established with members of its listening public.

The station does not serve as a mere lessor of its studio. It continues to exercise its control over its large studios and theatres as part of its regular broadcasting business. Both the advertiser and the station are thus participating in a public performance which is undeniably for profit, by their presentation of copyrighted works directly to studio audiences. Though the radio broadcast of that performance may be licensed, if the studio program is not also licensed, the copyright may be held to be infringed.

Chapter XLIV.

COPYRIGHT PROTECTION OF BROADCAST PROGRAM SCRIPTS.

§ 637. Generally.

The broadcast program script is a new form of literary expression. It is an outgrowth of the development of broadcasting as an entertainment and advertising medium. Radio scripts may be of various types and a single program may embrace several distinct kinds of literary property. It remains to be considered whether the program as a whole may be copyrighted and whether the integral parts thereof
may be separately copyrighted in the absence of a copyright upon the entirety. This discussion rests upon an analysis of the Act of 1909 and does not preclude the protection at common law of new and creative efforts in the field of radio broadcasting as literary property.

§ 638. Broadcast Program Script and Continuity Distinguished.

The words "script" and "continuity" as used in radio broadcasting have come to mean various things. The terms are loosely applied in referring to any writing containing the words which are to be spoken by any person as part of a broadcast program. The script bears the same relation to a broadcast program as a manuscript of a play bears to a theatrical presentation or a scenario to a motion picture production.

Since the operation of broadcast stations must be in the public interest, it is necessary for station operators to be apprized of the contents of programs broadcast by means of their facilities. It is also necessary for performers, announcers, speakers and others whose voices are broadcast by radio to have before them in written form the words which they intend to use in the broadcast. The individual members of a program cast must receive instructions concerning their performances. Cues must be learned and the program as an entirety must be studied. Like all dramatic presentations, most broadcast programs are rehearsed. The script supplies all of these needs and is the unifying force which has for its consequence the program as finally broadcast.

The broadcast program script, however, does not include the entire content of the program. The script as such does not necessarily include music, announcements, special addresses by guest speakers and other material not specifically embraced within the scope of the script.

"Continuity" is a term erroneously used interchangeably

2 See Chapter XXXIX. supra.
with "script". Basically, "continuity" is a timetable or a chronological development of the contents of a program. A continuity is necessary to plan and control the use of the time within a broadcast period. By means of the continuity, a program is adapted to its limitations. The time element, as represented by the broadcast period, is the periphery of a broadcast program and is the dominant characteristic of this vehicle of expression.

The broadcast program script is the literary content of the matters described in the continuity. The continuity is thus the shell of the program and the script the substance thereof. This distinction is not generally made and the terms "script" and "continuity" are both used to refer to all or any portion of the written material to be broadcast in the program.

§ 639. Classification of Broadcast Program Scripts.

The commercial announcements in the program, being a necessary part thereof, are written and constitute the announcer's script. Artists and other persons connected with the program find their respective parts specifically described in the script. Frequently, several scripts make up one program. It is for this reason that the distinction between script and continuity should be made. A single broadcast program may include commercial announcements, a brief dramatic or comedy sketch, original musical compositions, poems, addresses or other literary creations. Each such component part of the broadcast program represents a different type of intellectual property. A script is generally necessary for each.

The respective scripts may have different authors. The copywriter in the advertising agency often prepares the commercial announcements. The gags and other comedy material are written by a comedian himself, or someone specifically engaged for that purpose.

A dramatic broadcast presentation may be in the form of what is commonly known as a sketch. Such dramatic content may be written and created originally for broadcast presentation. It may also be an adaptation for radio broadcasting of a play, opera, motion picture or other dramatic work. The dramatic content may likewise be an adaptation of a novel or other literary work. In any event, a dramatic program script is a new work created separately and apart from the other constituent elements of the program.

Speakers, commentators and others are often included in a program for the definite purpose of conveying to the radio audience specific messages, which may or may not have any connection with the remainder of the program. Such addresses and comments are scripts prepared and written as independent units, although later embraced within the program.

Parodies or original compositions, having limited application to a particular program, are also specially written and constitute the vocalist’s "script."

A broadcast program, however, may be of a limited type so as to require but one script written entirely by one author. In such a case, the continuity would be coextensive with the single script. Where there are several scripts, the continuity envelopes them all and represents the unified content of the program.

§ 640. Analysis of Contents of Scripts.

In order to determine whether a script is copyrightable, it is necessary to analyze the contents thereof to ascertain whether the script falls within the classes of works which are the subject matter of copyright. The copyright laws were enacted before the advent of radio broadcasting and when the broadcast program script was unknown. How-

4 If the work so adapted or arranged is copyrighted or protected at common law, the consent of the owner must be obtained.

ever, Section 5 of the Act of 1909 describes with some generality works which are the subject matter of copyright.\textsuperscript{6} Though broadcast program scripts are not specifically mentioned in the Statute, they may, nevertheless, by reason of their contents, secure copyright protection by registration under general classifications of copyrighted works set forth in Section 5. Since scripts are generally not published before the program is broadcast, they are protected without registration under the common law as a matter of course, so long as they remain unpublished.\textsuperscript{7} They may also secure the benefit of statutory copyright by registration as unpublished works.\textsuperscript{8} Authors of scripts embodying addresses, lectures or comments, may secure copyright registration under Section 5(c) of the Act of 1909,\textsuperscript{9} which provides parenthetically for the registration of works prepared for oral delivery.


Section 5, \textit{supra}, provides as follows:

"The application for copyright shall specify to which of the following classes the work in which copyright is claimed belongs:

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

The above specifications shall not be held to limit the subject matter of copyright as defined in § 4 . . . ."

Section 4, 35 Stat. 1076 (1909), 17 U.S.C.A. (1927), provides as follows:

"The works for which copyright may be secured under this title shall include all the writings of an author.”

\textsuperscript{7} See § 579 \textit{et seq. supra}.


Dramatic program scripts may be included under the generic term of dramatic compositions and are entitled to copyright registration under Section 5(d) of the Act of 1909. A dramatic program script should be regarded as a dramatic composition because it is a complete, exact reproduction in words of a dramatic performance, containing an orderly arrangement and development of a plot or theme, enabling performers to reproduce same before the microphone and communicate the contents of the script to the public by means of the broadcast facilities of the station. Such scripts contain "stage" directions to the performers and provide for sound effects, music and other components of a dramatic work. Where the script is broadcast before a studio audience, it may also contain directions concerning staging, scenery and costumes which confirm its dramatic characteristics. This right to registration of broadcast program scripts under the existing copyright laws has been recognized by the Copyright Office of the Library of Congress. When a broadcast program script is printed and published, copyright registration must be promptly secured thereon as a published work.

§ 641. Copyright Protection of Continuity.

Continuity has been distinguished supra from script and has been defined as the sum total of all material and scripts present in broadcast program scripts which have a plot or story narrated or presented by dialogue or action or both. The script must serve as a basis for a dramatic performance rather than as a mere illustration thereof. Seltzer et al. v. Sunbrock et al., supra.


The program script cannot secure protection as a dramatic work unless it possesses the fundamental characteristics which have been held to be indispensable to a dramatic composition. See *Seltzer et al. v. Sunbrock et al.*, 22 F.Supp. 621 (S.D. Cal., 1938). The characteristics of dramatic structure are present in broadcast program scripts which have a plot or story narrated or presented by dialogue or action or both. The script must serve as a basis for a dramatic performance rather than as a mere illustration thereof. *Seltzer et al. v. Sunbrock et al.*, supra.

in a program.\textsuperscript{13} If the continuity is coextensive with a complete dramatic program or a complete musical or other program consisting of new and original creative efforts, such a continuity may be separately registered and receive copyright protection as a dramatic or dramatico-musical work.\textsuperscript{14} Each continuity must be examined to determine whether the material contained therein is properly subject to copyright registration. Where several continuities are written for a group or series of programs, each such continuity must be copyrighted separately as a complete program, unless the series of continuities tells a single story, contains the same characters and continues the action from one day to another.\textsuperscript{15}

Where a continuity includes several scripts of varying types, so that there is no unified quality and type therein when analyzed, the continuity may not be copyrighted as an entirety. If, however, a continuity has as its dominant characteristic a particular type of work, which is the subject matter of copyright under Section 5 of the Act of 1909,\textsuperscript{16} the continuity should be copyrightable as within such classification. It is a question of fact whether the continuity represents a work which may be registered within the classifications enumerated in 'Section 5.\textsuperscript{17} The fact that a continuity may not be copyrightable because of its heterogeneous combination of different types of works, does not preclude the separate registration for copyright of the various scripts included within the continuity, so long as each such script is within the categorical classification of works enumerated in Section 5.\textsuperscript{18}

\section*{§ 642. Ownership of Copyright in Scripts and Continuities.}

Copyright registration by statute is granted to the author of a work. The author, however, may by contract

\begin{flushright}
\textsuperscript{13} See § 638 supra.
\textsuperscript{15} Ibid.
\textsuperscript{17} Ibid. Cf. Seltzer \textit{et al.} \textit{v.}\n\textsuperscript{18} Ibid.
\end{flushright}

\textit{Sunbrock \textit{et al.}, 22 F.Supp. 621 (S.D. Cal., 1938).}
grant to another the right to obtain copyright registration of his work.\(^9\) In such a case, the person to whom the copyright registration certificate is issued, will be possessed of all of the rights granted under the Act of 1909.\(^{20}\) The rights of the copyright owner, however, will be subject to such reservations as were made by the author in the contract which transferred the right to secure copyright.\(^{21}\) The author should file with the Copyright Office an instrument indicating his reserved rights; otherwise, a *bona fide* purchaser without notice of such rights will prevail over the author.\(^{22}\) If the author fails to file an instrument placing on record his reserved rights and loses such rights by reason of their sale to a *bona fide* purchaser, the author may pursue his claims against the copyright owner for breach of trust, although he has ceased to have any proprietary interest in the rights so sold.\(^{23}\) It is always a matter of contract in each case to determine whether the author has parted with all of his rights or has retained some.\(^{24}\)

In radio broadcasting, it is essential to ascertain whether the author of a script or entire continuity has sold and transferred all of his rights to the sponsor of the program or whether he has merely licensed the sponsor to make use of the script or entire continuity for purposes of broadcasting a specified program or series of programs. This inquiry is basic in the relations between script writers and program producers, sponsors and others.

If the script is copyrighted as a dramatic composition, the copyright owner has the exclusive right to make other

\(^9\) See §§ 587, 588 *supra*.


forms of dramatization thereof. A script may be adapted by the author or copyright owner as a stage play, motion picture scenario or other work. The Act of 1909 specifically gives the author of a dramatic work, including a broadcast program script, the exclusive right to convert his work into a novel or other non-dramatic work. This in turn carries with it the independent exercise of the exclusive right of reproducing copies of the non-dramatic work for sale.

If the script or continuity is sold outright, whether as an uncopyrighted work or after copyright registration has been secured, the producer has all of the rights which the author or copyright owner had. If a program producer pays a lump sum to the author of a script and no written contract of sale has been signed, it is a question of fact as to the oral agreement between the parties concerning the rights transferred or reserved.

It is frequently the case that no discussion of terms takes place. The producer or sponsor reads the script and if it is acceptable, agrees to pay a lump sum for each script or series of scripts of the same general type. Both the author and the producer generally regard the script as an end in itself and give little or no thought to the rights flowing from the script. Both the producer and the author are primarily interested in a specific broadcast program. It is when the program is produced and achieves wide popular success, that the parties usually inquire whether there has been any reservation of the rights by the author or whether they have all been transferred to the producer. A written contract being lacking, both parties are interested in asserting the now valuable rights.

It becomes a question for the court to consider what was the intention of the parties at the time the scripts were

25 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(b) (1927). This was not so before 1909. See Fitch v. Young, 230 Fed. 743 (S.D.N.Y., 1911).

26 Palmer v. De Witt, 47 N.Y. 532 (1872).
accepted by the producer. Frequently, the contents of the scripts themselves will throw light on such intention by reason of their limited application. An early English case\(^\text{27}\) held that where an author wrote a letter to the producer, saying, "I will let you have my drama," the producer acquired all rights in the work upon the exchange of manuscript and money. A similar rule has been expressed in this country.\(^\text{28}\)

If an author submits the same script to several producers and grants rights therein to one producer, the latter prevails over subsequent producers who have been granted rights by the author which are inconsistent with the rights of the first producer.\(^\text{29}\) The author, having parted with certain rights to the first producer, no longer is possessed of these rights and is unable to transfer them to other producers even if the latter acted in good faith.\(^\text{30}\)

§ 643. Same: Whether Author Is Employee or Independent Contractor.

The author is generally an independent contractor who retains all rights in his work which have not been expressly or by necessary implication granted to the producer.\(^\text{31}\) But if the author is in the employ of the producer of the program, it is a presumption of law that all creative work done by the author within the scope of his employment belongs to his employer. It is presumed that the author gave up all of the results of his mental labor for the stipend received. Unless the author so employed specifically reserves unto himself definite rights in his work, the employer will be deemed to be the sole proprietor thereof and entitled to all the benefits of such ownership.\(^\text{32}\) Where the employ-

\(^{27}\) Lacy v. Toole, 15 L.T. (N.S.) 512 (1867).


\(^{29}\) Kortlander v. Bradford, 116 Misc. 664, 190 N.Y.Sup. 311 (1921).

\(^{30}\) Ibid.

\(^{31}\) See Frohlich & Schwartz, The Law of Motion Pictures (1917) § 8.


ment agreement specifies the general type of composition which the author is engaged to create in exchange for a weekly salary, the employer becomes vested with full property rights therein, including the right to renew the copyright thereon.\textsuperscript{32a} Even where the compensation to the employee is based upon a profit-sharing arrangement, the master and servant relationship may exist.\textsuperscript{33} The author who is paid upon a quantity basis, \textit{viz.} so much per minute, per page or per word, may also be deemed an employee.\textsuperscript{34} The rights of ownership which inure to an employer under the so-called "shop rights" rule, exist as a matter of law and no formal assignment of rights by the employee-author is necessary.\textsuperscript{35}

Should the author who is employed by a producer of the program, attempt to dispose of his writings created within the scope of his employment, to a producer who had knowledge of a contract of employment, the latter would not prevail over the employer.\textsuperscript{36} If the author creates a work as an incident to his employment and not within the scope thereof, which work nevertheless makes use of information and knowledge acquired in the course of his employment, the literary property rights belong to the author, free from any claims by the employer.\textsuperscript{37} An author is not precluded from basing his work on experience gained during his employment and may refer to original sources of information.\textsuperscript{38}

A program producer who employs a script writer receives full rights of ownership, including the right to obtain copy-

\textsuperscript{32a} Tobani v. Carl Fischer, Inc., 98 F.(2d) 57, 59 (C.C.A. 2d, 1938).
\textsuperscript{33} Mallory v. Mackaye, 86 Fed. 122 (C.C.S.D.N.Y., 1898).
\textsuperscript{34} Cox v. Cox, 1 Eq. Rep. 94, 11 Hare 118 (Eng., 1853).
\textsuperscript{35} Lawrence v. Aflalo, [1902] 1 Ch. 264 (Eng.). But see London Universal Press v. University Tutorial Press, [1916] 2 Ch. 681 (Eng.).
\textsuperscript{38} Colliery Engineering Co. v. United Correspondence Schools, 94 Fed. 152 (C.C.S.D.N.Y., 1899).
right, of all works created by the script writer within the scope of the employment unless some express reservation has been made by the author. The right of renewal of the copyright also specifically belongs to the employer.\textsuperscript{39} The program producer thereby obtains all of the exclusive rights to the script as the owner of the literary property at common law or as the author\textsuperscript{39a} under the copyright registration secured by him.

The comedian who employs a writer to originate gags and other comedy material becomes the owner thereof. Such comedian, however, may by the terms of his own agreement with the producer of the program dispose of such rights to the latter.\textsuperscript{40}

It is often difficult to determine whether the relation between a script writer and a producer of the program is one of master and servant or independent contractor. The test, as laid down by the New York Court of Appeals,\textsuperscript{41} is the extent of control and direction of the details and method of doing the work as well as the results thereof. The independent contractor is one who agrees to do a specific piece of work for another for a lump sum or its equivalent and who has control of himself as to the method and detail in which the work is to be done and as to when within a reasonable time he shall begin and finish the work.\textsuperscript{42} The independent contractor is one who is not subject to discharge because he chooses to do his work as to method and detail in one way rather than another.\textsuperscript{43} In determining whether the author of the script is in the employ of the producer of the program, the question must first be

\textsuperscript{39a} Tobani v. Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938).
\textsuperscript{41} Beach v. Velzey, 238 N.Y. 100, 103, 143 N.E. 805 (1924).
\textsuperscript{42} Ibid. See also Dutcher v. Victoria Paper Mills Co., 219 App. Div. 541, 220 N.Y.Sup. 625 (1927).
\textsuperscript{43} Ibid.
decided as to whether the script represents the will of the producer only as to the result achieved and not as to the method by which it is accomplished.\textsuperscript{44} If the producer contracts for the script as an end in itself and has no control or direction over the means and method by which the script is created, the script writer is an independent contractor who reserves all rights not specifically granted to the producer. If the author's efforts are so dominated by the producer as to render the details of authorship subject to the control and direction of the producer, the author may be considered an employee who by his employment divests himself of all rights in his work in favor of his employer.\textsuperscript{44a}

Rights of common law and literary property may be obtained by adverse possession.\textsuperscript{45} Common law rights may be obtained by continued possession, claim of title and uninterrupted assertion of rights.


The Department of Agriculture and other Governmental authorities are making use of radio broadcast facilities for the purpose of disseminating to farmers and the public in general, certain information relating to public health, crops, cattle \textit{et cetera}. Such material broadcast by the Federal Government as sustaining programs of broadcast stations is not protected by copyright. By specific statutory provisions, there is no copyright upon matters appearing in Government publications.\textsuperscript{46}

It would seem that a program script created for and as an incident to the functions of a bureau, department or agency of the Federal Government is a government publication within the meaning of the Act of 1909. No greater

\textsuperscript{44} Hexamer \textit{v.} Webb, 101 N.Y. 377, 385, 4 N.E. 755 (1886). \textit{Amdur on Copyright Law} (1936) 53.
\textsuperscript{44a} Tobani \textit{v.} Carl Fischer, Inc., 98 F.(2d) 57, 59 (C.C.A. 2d, 1938).
\textsuperscript{45} Hart \textit{v.} Fox, 166 N.Y.Supp. 793 (1917); \textit{Amdur on Copyright Law} (1936) 53.
\textsuperscript{46} 35 \textit{Stat.} 1077 (1909), 17 USC.A. § 7 (1927).
protection should be granted to governmental broadcast matter than to printed material. The broadcast station in disseminating a government script may well be deemed a government publication medium since it is a means of expression by which official matters are communicated to the public. The program script itself, on being distributed to stations for broadcast purposes, may also be considered a government publication so as to exempt its contents from copyright protection. A broadcast station may broadcast government program scripts with impunity.\(^\text{47}\)

§ 645. The Broadcast of Letters.

At common law, the writer of a letter has literary property rights in his missive.\(^\text{48}\) The recipient of the letter has title to the physical property upon which the letter is written.\(^\text{49}\) The person to whom a letter is addressed is under no obligation to keep or preserve the paper upon which the letter is written,\(^\text{50}\) and the writer has the right to make copies of the letter in the hands of the recipient.\(^\text{51}\) Although the recipient possesses the letter, he does not own the literary property therein. The latter is not assignable by operation of law, by inheritance or by bankruptcy.\(^\text{52}\) Radio broadcast stations may infringe the common law rights of the author of a letter if the letter is read in a broadcast program. If, however, the letter is written to the station or to a person connected with the broadcast program, the writer may, by the terms of the letter or by necessary implication therefrom, grant to the station announcer, commentator or other person, the right to broadcast the contents thereof. If such license is expressed or implied,


\(^{50}\) *Ibid.*

\(^{51}\) *Ibid.*

\(^{52}\) *Ibid.*
§ 647  Copyright Protection of Program Scripts

the writer cannot claim any appropriation of his common
law literary property rights. If the letter is written to an-
other who thereupon allows it to become part of a broadcast
program, the writer of the letter may obtain an injunction
and such damages as may be proved. If, however, the letter
is copyrighted as a literary work and was not first
communicated orally, it would seem that its contents may
be read as part of the broadcast program without any
liability for infringement of copyright. If, at common
law, the letter is printed and circulated generally, there
is such a publication as to divest the writer of his common
law rights and his letter may then be freely broadcast.

§ 646. Broadcast of Telegrams.

The sender of a telegram has the same literary property
in his writing as the writer of a letter and the same prin-
ciples govern his legal rights. The fact that a letter is
dispatched telegraphically does not constitute a publication
which divests the author of his common law rights in
literary property therein.

§ 647. Right of Script Writer to By-Line, Billing, etc.

Unless the contract with the producer so provides, the
writer of a script has not the right to demand that his
name be mentioned as the author of a script. This is
true whether the script is protected by copyright registra-
tion or at common law. The author may prevent the use
of the name of another as the author of his work but has
no right, in the absence of a contract, to demand that

4901, 2 Story 100 (C.C.D. Mass., 1841).
54 Kreymborg v. National Broad-
casting Co., Inc., 22 U. S. Pat. Q.
248 (S.D.N.Y., 1894). See § 612
supra.
55 Kiernan v. Manhattan Quo-
tation T. Co., 50 How. Pr. 194
(N.Y., 1876). See Jewelers' Merc.
N.Y. 241, 253, 49 N.E. 872 (1892); Am
dur On Copyright Law (1936)
56 Ibid.
57 Frohlich & Schwartz, The
Law of Motion Pictures (1917)
his name be broadcast or used in any other way to describe him as the author thereof. Similarly, the author has no right, in the absence of a contract, to enforce the display of his name or photograph, or in any other way to demand billing which the producer does not voluntarily wish to grant.

The agreement between the program producer and the author of the script concerning program credit to the latter may be oral unless it is within the purview of the Statute of Frauds. Evidence of custom and usage may be introduced on this point where the agreement is silent as to program credit. Such evidence may give rise to the implication that the author is not, as a matter of custom and usage in the broadcasting industry, entitled to program credit.

Where the agreement is specific in its requirement that the author receive program credit, it may form the basis of an action for a mandatory injunction or for damages. Where the program script is an adaptation of or is based upon a literary or dramatic work created by another author, many questions arise. If the author consents that his work be adapted or treated for a broadcast program and no contract for program credit is made, the producer is not required to make such an announcement. However, the author may restrain the mention of another as the creator of his work. Where the producer has agreed to give program credit to the author of the basic work, such an agreement will be enforceable. Although such a contract exists, if the producer contends that the program script as actually broadcast is not based upon the author’s work, a question of fact exists. If it be found that the

58 Semble Brenan v. Fox Film Corp., N.Y.L.J., Aug. 25, 1916, Mullan, J.
program script was not based upon the author’s work, no program credit need be given. In fact, such credit might be deemed a deception of the public.

A finding by the jury or the court, that from the conflicting evidence, the production is an adaptation of or is based upon the author's work, will not be disturbed.62

Where an author’s work has been so distorted by treatment for broadcast purposes that the program reflects neither the letter nor the spirit of his original creation, it would seem that the producer may be enjoined from using the name of the author in connection with the program. Damages for breach of contract for program credit may be based upon evidence of amounts received by the author for similar work with or without credit.63

Where an author’s name is used in connection with a work not written by him, he may obtain an injunction against such misinformation.64 The author of a script may justifiably refuse to perform in the broadcast thereof, as not within the scope of his duties.65 Where the author of a script, however, by contract, agrees that he is rendering his services as a “ghost writer”, he may not complain of the use of another’s name as the author of the script.


Where the author of a script licenses a producer to broadcast his work and does not assign all his rights in the work, the license is a personal contract and is not assignable by either party without the consent of the other.66 Unless the license granted is an exclusive one, the author may also license others to broadcast his work.

If the producer should attempt to sub-license another to

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62 Ibid.
63 Ibid.
64 Landa v. Greenberg, 24 T.L.R. 441 (Eng., 1908); Clemens v. Hurst, 14 Fed. 728 (C.C.N.D. Ill., 1883).
65 Nash v. Krieling, 123 Cal. 18, 56 Pac. 260 (1899).
produce the script, it would be a breach of the license con-
tract, but if the license agreement by its terms is broad
enough to include such sub-license, the author cannot inter-
fere with same. Where the contract with the producer
grants to him the right to "produce or have produced"
the script for a broadcast program, then the right to sub-
license will be deemed to have been included. If the
author of a script has assigned and transferred all of his
rights to the producer, then the latter has an unrestricted
right to reassign, license or sub-license without any claims
on the part of the author.

Where a producer has been licensed to broadcast a script
and the contract does not provide for the assignment of
the license, and the producer thereafter changes his firm
name, or carries on business in a new corporate entity,
the license may thereby be held to have terminated.

If the producer is adjudicated a bankrupt, a license held
by him to broadcast a script does not pass to his trustee
in bankruptcy or other legal successor, but reverts to the
author. Similarly, a receiver in supplementary proceed-
ings or a sheriff levying execution may not obtain the rights
granted in a license to broadcast a script.

If the author of a script should become a bankrupt before
completing his agreement to deliver his work, he is relieved
of any obligation to complete the script. Such a license

69 Frohlich & Schwartz, op. cit. supra n. 56, 69, n. 5.
71 Gibson v. Carruthers Exchequer, 8 M. & W. 321 (Eng., 1841). But where the producer
becomes the copyright owner and the author receives royalties there-
from, the copyright may be sold by the trustee in bankruptcy of the
producer, subject to the purchaser's obligation to exploit and continue
to sell the work, to the end that
the author may receive royalties
therefrom. In re Waterson, Berlin & Snyder Co., 48 F.(2d) 704
(C.C.A. 2d, 1931).
§ 649. Copyright Protection of Program Scripts

If a script is registered for copyright as a dramatic work, it may not be broadcast without the consent of the copyright owner. A broadcast is a public performance. It is unnecessary that it be for profit to constitute an infringement of a copyrighted dramatic work. The criminal provisions of Section 28 of the Act of 1909 have been invoked in connection with the unauthorized performance of a broadcast program script and the conviction of a performer thereunder has been upheld.

The distinction is to be noted, however, between the broadcast of a dramatic script and of a lecture, musical composition or other non-dramatic work which is used in the same program in which the script is broadcast. A non-dramatic musical composition copyrighted as such is infringed by the public performance thereof for profit.

A script which is copyrighted as a dramatic composition is infringed merely by the public performance thereof even in the absence of the profit motive. The mere fact that a non-dramatic musical composition is used as a part of or in connection with a dramatic script program, does not in any way change the character of the protection granted by the copyright of such a musical work. Where a

73 See § 412 supra.
74 Marx v. United States, 96 F.(2d) 204 (C.C.A. 9th, 1939).
75 See §§ 626, 629, 632, 633, 634 supra.
work is of such a nature that it may be considered either a dramatic or a non-dramatic work, the test of status is not the use made of the work, but rather the classification under which it was originally copyrighted.

If, however, the script contains musical compositions especially composed for the broadcast of a dramatic script, then such musical compositions, when copyrighted as dramatico-musical works, would be infringed by the mere public performance thereof and would be governed by the same rights as the script itself.

§ 650. Producer's Deviation from or Distortion of Broadcast Program Script.

The author of a script has the right to see that his work is produced by his licensee in the manner in which he wrote it. The producer cannot deviate from the script to such an extent as to distort it and render the work of the author incomprehensible. Such deviation is a matter of degree and has to do with the mutilation of the script so as to injure the reputation of the author.

If, however, the author of a script has transferred and assigned all of his rights therein to the producer, the author cannot complain about distortion of his work to the same extent as if the producer were his licensee. The author may, however, sue the producer at law for damages for libel caused by the injury to the reputation of the author as a result of the mutilated production of his work.

The author may not obtain an injunction against his assignee for libel, except where fraud is established or where it is shown that the producer is passing off the mutilated work as the work of the author. In the case where the author's name is a pseudonym, it must be proven

77 See Frohlich & Schwartz, op. cit. supra n. 56, 54; Copinger on the Law of Copyright (7th ed., 1936) 257 et seq.
79 See Frohlich & Schwartz, op. cit. supra, n. 56, pp. 55, 56.
80 Ibid.
that the author was known to the public under such pseudonym.\textsuperscript{81}

Ordinarily, therefore, a licensee will be enjoined \textsuperscript{82} while an assignee will be held accountable at law for damages. The fact that the producer of the program has obtained a license to broadcast a series of scripts, gives him no right to change the work of the author.\textsuperscript{83} An author has a strict right to preserve the identity of his creation.\textsuperscript{84} An author may also maintain an action against a producer for libel for the broadcast of an inferior work, not written by the author, but claimed to be so.\textsuperscript{85} It is unnecessary to prove malice or actual damages in such a libel action.\textsuperscript{86}

The grant of a license to perform a script in a broadcast program does not give the licensee the right to make another dramatization of the same script.\textsuperscript{87} An unauthorized performance of such a copyrighted script by way of a new dramatization thereof infringes both the right to perform the script publicly and the right to dramatize it.\textsuperscript{88} The mere fact that the composition was copyrighted as a non-dramatic work does not preclude the owner of a copyright from asserting the exclusive right granted to him under the copyright laws of converting his non-dramatic work into a dramatic work. If such a conversion is made by another, even if licensed to perform the work, the performance of

\textsuperscript{81} Angers v. Leprohon, 22 Que. S.Ct. 170 (Can.).
\textsuperscript{83} See Humphries v. Thompson, Times (Eng.) April 29, 30, May 1, 1908, cited in Fröhlich & Schwartz, op. cit. supra n. 56, 57, n. 82.
\textsuperscript{86} See Ridge v. English Illustrated Mag., 29 T.L.R. 592 (Eng., 1913).
\textsuperscript{88} Ibid.
such dramatization thereof is a "grand" right and an infringement of the copyright.89

§ 651. Mechanical Reproduction of Broadcast Program Scripts.

The right of transcribing a copyrighted program script for radio broadcast purposes is exclusively vested in the copyright owner. Broadcasting rights are reasonably included within the copyright. Works in the public domain, however, may be freely transcribed, modified or transformed 90 so long as a copyrighted arrangement thereof is not appropriated. A copyrighted arrangement of public domain material is not infringed when the original work is transcribed, modified or transformed by another.91

The copyright proprietor of a dramatic broadcast program script has the exclusive right to authorize mechanical reproductions of his work.92 Electrical transcriptions or other recordings of such scripts may not be manufactured without the consent of the owner of the copyright. The compulsory license provisions of the Act of 1909 are not applicable to the mechanical reproduction of dramatic works.93


91 Ibid.


93 See § 658 infra.
Chapter XLV.

MECHANICAL REPRODUCTION OF COPYRIGHTED WORKS.

SECTION 652. Mechanical Reproduction of Copyrighted Musical Work Included Within Scope of Copyright Protection. 1172

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666. Right to Arrange Work Not Included in Compulsory License Provisions. 1187

667. Radio Broadcasting: Mechanical Reproductions: Phonograph Records. 1188

668. Same: Electrical Transcriptions. 1190

669. Same: Sound on Film and Similar Devices. 1194
§ 652. Mechanical Reproduction of Copyrighted Musical Work Included Within Scope of Copyright Protection.

The copyright owner is vested with the exclusive right to reproduce his works mechanically. Copyrighted works may be reproduced by such devices as phonograph records, electrical transcriptions, piano rolls, sound on film, discs, waxes, tapes and all other parts of instruments which would serve to reproduce mechanically a copyrighted work.

§ 653. No Right of Mechanical Reproduction Prior to Act of 1909.

Mechanical reproductions of musical works took on commercial significance about 1900. Protection under the copyright laws, however, was not extended to owners of musical works until 1909. The earlier statute granted the copyright owner limited protection by way of "the sole liberty of printing, reprinting . . . and vending the same . . .".

In a suit brought by a copyright owner of a musical composition against a manufacturer of piano rolls, alleging infringement by the unauthorized reproduction of the copyrighted work upon a perforated paper roll, the United States Supreme Court held that the player piano roll was not a "copy" of the copyrighted work within the meaning of the then existing law. The fact that such copyright

2 Id., at § 1(e).
statute limited protection to the copyright owner against printing and reprinting is based historically upon the scope of the earliest protection which was given to copyrighted works.\(^5\)

The primary purpose of early copyright legislation was to prevent unauthorized copying. The concept of a copy was limited to that which was visible. This concept was embodied in an early English case, wherein it was said:\(^6\)

"A copy is that which comes so near to the original as to give every person seeing it the idea created by the original."

This definition was quoted with approval in a later English case\(^7\) and was reiterated by the United States Supreme Court in *White-Smith Music Pub. Co. v. Apollo Co.*\(^8\) Thus, before 1909, the test of an infringement of copyright was whether the work had been copied in a visible and intelligible form. Although Mr. Justice Holmes wrote a concurring opinion in that case, he said that a musical composition is considered to be "a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy . . . ."\(^9\)

The refusal by our courts to construe the early copyright acts as including protection against infringement by mechanical reproductions\(^10\) led to specific remedial legislation in the form of the revised Copyright Act of 1909,\(^11\) which was suggested in a message from President Theodore Roosevelt.

\(^5\) See §§ 577, 578 *supra.*

\(^6\) West *v.* Francis, 5 B. & Ald. 737, 743 (Eng., 1822).

\(^7\) Boosey *v.* Whight, [1899] 1 Ch. 836 (Eng.). *Cf.* Hanfstaengl *v.* Smith [1905] 1 Ch. 519, 524 (Eng.).

\(^8\) 209 U.S. 1, 17, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).


§ 654. Right of Mechanical Reproduction Granted by Existing Copyright Law.

The Act of 1909 extends the scope of copyright protection of both dramatic and musical works to include the right to reproduce such works mechanically. The Act of 1909, however, departed from the fundamental concept of copyright in imposing a condition on the extension of copyright control to mechanical reproductions of musical compositions.

Under the United States Constitution, Article 1, Section VIII, Paragraph 8, Congress is granted the power:

"To promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." (Italics supplied)

Copyright is the creature of the Federal statute passed in the exercise of the power vested in Congress by the foregoing provision of the Constitution.


The advent of mechanical reproductions left its mark upon the basic concept of copyright. The copyright owner was not precluded from his right to exclude others from using his property, or from his right to refrain from making use of his property. However, under the provisions of the Act of 1909, it is compulsory for a copyright owner of a musical work to license the manufacturer of "parts of instruments serving to reproduce mechanically the musical work," upon payment of a fixed and arbitrary royalty of "2 cents for each such part manufactured." The copyright owner, however, is compelled to issue such a license only when he has used or permitted or knowingly acquiesced in the use of his work in such mechanical reproductions. The copyright owner has the right to withhold his work

11a Id., at § 1(d), (e).
12 Id., at § 1(e).
13 See §§ 585, 598 supra.
15 Ibid.
§ 656. Reproduction of Copyrighted Works

from the public in any form, but when he has allowed a mechanical reproduction thereof to be made for purposes of sale of the devices intended to be included in Section 1(e) of the Act of 1909, then and in such an event, all other manufacturers may make mechanical reproductions of the same type upon payment of the fixed statutory compulsory license fee.

§ 656. Same: When Effective.

A distinction should always be made when considering the operation of the compulsory license provisions of the Act of 1909. The copyright proprietors of dramatic, dramatico-musical and non-dramatic musical compositions have the exclusive right to make or cause to be made all types of mechanical reproductions of their works.\(^1\) Thus, the mere unsanctioned manufacture of a mechanical reproduction in any form constitutes an infringement of copyright of the works so recorded.

Where, however, such manufacture has been licensed and the records duplicated thereby are offered for sale in such a manner and in such quantity as would seem reasonably to invoke the accounting features of Section 1(e) of the Act of 1909, the compulsory license provisions of that section would thereby become effective as to such uses of non-dramatic musical compositions.

This distinction appears to be supported by the testimony given at the hearings before the House Committee on Patents and Copyrights which led to the passage of the Act of 1909. The compulsory license provisions of Section 1(e) of the Act of 1909 resulted from an attempt to protect manufacturers of phonograph records and piano rolls who were in commercial competition with the Aeolian Company which had been accused of monopolistic practices by reason of exclusive agreements with certain copyright proprietors.

\(^1\) Id., at § 1(d), (e).
The compulsory license provisions should apply only to manufacturers of mechanical reproductions which are offered for sale in quantities as a continual enterprise.

Since the right of mechanical reproduction is included within the scope of copyright protection under the Act of 1909, there can be little doubt that the mere manufacture of mechanical reproductions without more, constitutes an infringement of copyright if unauthorized. Where a license has been granted to manufacture and offer for sale the types of mechanical reproductions intended to be protected, the compulsory license provisions become effective as to all competitors of the first licensee so as to permit their manufacture of the same type of device only. Where a phonograph record manufacturer obtained a compulsory license to record a violin performance of a musical composition, its manufacture of records containing a vocal rendition of the same composition was held to be governed likewise by the compulsory license provisions.\textsuperscript{16a} Apparently, the statutory extension of the compulsory license to the making of "similar use of the copyrighted work" refers to the type of device rather than to the nature of the performance recorded thereon.

\section*{§ 657. Constitutionality of Compulsory License Provisions.}

Are the compulsory license provisions of the Act of 1909 unconstitutional because they interfere with the exclusive character of the rights granted to copyright owners?\textsuperscript{17} This question has not been decided by our courts. Since the compulsory license provisions do not become effective until the copyright owner has allowed a mechanical reproduction of his work to be manufactured for limited purposes only, and since compensation, though arbitrary, is provided for the further use of such mechanical reproductions of the copyrighted work, it would seem that the


\textsuperscript{17} See \section 598 et seg. \textit{supra}.
exclusive monopoly is not greatly interfered with or weakened by the compulsory license provisions.

The question, however, should not be one of degree and a strict view should be adopted by the courts in rendering ineffective any limitations or restrictions imposed upon the basically exclusive nature of copyright ownership. Compulsory licenses are abhorrent to sound logic and represent favoritism to one class of user over another. Any statutory compulsion interfering with the free exercise of the exclusive features of copyright is in terrorem of the authors and others included within the constitutionally privileged group. It must be noted particularly that the copyright owner, prior to the Act of 1909, was unable to enforce his rights against any mechanical reproduction of his works. When in 1909, Congress by statute created such rights in the copyright owner but imposed the compulsory license provisions which may not then have seemed unreasonable, it nevertheless impaired and destroyed the exclusive character of the rights under the copyright.

The public policy which motivated the court in Marx v. United States, in upholding the constitutionality of Section 11 of the Act of 1909, sought to preserve the thousands of copyrights upon unpublished works which have been issued continually since 1909. This policy against disturbing rights which have been enjoyed for a long period of years would not be applicable to the instant problem. The court preserved rather than impaired the rights of copyright owners. The rights of manufacturers of mechanical reproductions would not be affected by a determination that the compulsory license provisions of Section 1(e) are unconstitutional since the copyright owners would probably be prohibited from asserting that manufacturing already done constitutes actionable infringement. Moreover, the acceptance of royalties by way of compulsory license might be deemed a waiver of infringement liability of such licensees.

18 96 F. (2d) 204 (C.C.A. 9th, 1938).

It is also to be noted that the compulsory license provisions apply solely to non-dramatic musical compositions and not to other works which are the subject matter of copyright. If the work is copyrighted as a dramatico-musical composition, it falls within the classification of dramatic works, which are not affected by the compulsory license provisions. The monopoly in connection with dramatic works is strictly preserved so that mechanical reproductions thereof cannot be governed by the compulsory license provisions of the statute. Where a composition is of such a nature that it has the characteristics of both a musical and a dramatico-musical work, the question of whether the compulsory license provisions are applicable should depend upon the classification under which the work is registered rather than the actual use of the composition. Although classification is a clerical function, it does evidence the election of the copyright owner to obtain such rights as flow from registration thereunder.

§ 659. The British Copyright Act: Mechanical Reproductions and Compulsory Licenses.

In England, too, copyright owners were unable to obtain judicial interpretations of early statutes which would consider mechanical reproductions of their works as infringements.19 When copyright legislation was revised by the passage of the Act of 1911, the conflicting contentions urged by the lobbyists for both composers and manufacturers were finally resolved by grafting on to copyright protection in England the anomaly of compulsory licensing of mechanical reproduction of musical works which had already begun to bud in Section 1(e) of the United States Act of 1909.20


§ 660. United States and British Copyright Acts: Compulsory Licenses Distinguished.

Section 19 of the British Act of 1911 which provides for compulsory licenses to manufacturers of mechanical contrivances reproducing copyrighted musical works, differs considerably from our Section 1(e). Though the theory of compulsory licensing is somewhat similar and both statutes refer to musical works only, the scope of the English statute is much broader and constitutes a much greater and more complete restriction upon the exclusive character of copyright. The Act of 1911 contains no words of limitation which confine the compulsory licensing system to reproductions not intended for public performance. The general phrase "other contrivances" is considered by one writer as embracing motion picture uses wherein musical works are reproduced in synchronization with visual performances. Another fundamental difference between the two statutes lies in the inroads made by proviso (i) to sub-section 2 of Section 19 of the British statute on the right of the copyright owner to arrange and adapt the musical work. This proviso carries with the license to reproduce the work, the right of the manufacturer to make such arrangements and adaptations of the work as are reasonably necessary to make a satisfactory reproduction. This further right is not included in the compulsory license system under Section 1(e) of the United States Act of 1909 which imposes no limitations on the exclusive right of the copyright owner to arrange and adapt his work. Moreover, while the English compulsory license system may also be offensive to traditional concepts of copyright, it is not as objectionable as our Section 1(e) because it does not violate the constitutional boundaries which define the exclusive scope of protection to be granted to our authors by copyright.

21 Copinger, op. cit. supra n. 20, 213.
In any event, statutory impairment of the exclusive nature of copyright protection appears to be an unwarranted interference and regulation of private enterprise since no strong public policy militates against the monopoly of copyright which endures for but a limited period of years.

Mechanical reproduction may be defined technically as the manufacture of any device, by means of which a work may be reproduced mechanically. Under this broad definition, almost any device which is created in the development of science and machinery may be termed a mechanical reproduction. In 1909, when the compulsory license provisions were enacted, Congress intended to encompass within the anomaly of such provisions only the reproduction of non-dramatic musical works by piano rolls and phonograph records manufactured and offered for sale. Radio broadcasting, the use of sound on film, and other devices were then either undiscovered or unknown commercially.

§ 662. Mechanical Reproductions and the Act of 1909: Compulsory License Not Applicable to Electrical Transcriptions and Other Devices for Public Performance for Profit.
Since 1909, new types of mechanical reproductions have been created with great commercial significance. The question has arisen as to whether copyright owners of musical compositions are compelled by Section 1(e) of the Act of 1909 to accept the same statutory royalty from such new uses of their works in mechanical reproductions as they are obliged to accept from the manufacturers of the types of mechanical reproductions contemplated by Congress at the time of the passage of the Act of 1909. The problem is one of interpretation of Section 1(e) and has never been decided by the courts.
As a practical situation, however, a custom and usage has grown up by which it seems clear that mechanical
reproductions other than piano rolls and phonograph records cannot be manufactured and offered for sale under the compulsory license provisions of the Act. Electrical transcriptions for radio broadcasting and for wired point-to-point communication, synchronization of sound in motion pictures by way of discs, sound tracks, tapes, film and other devices intended and sold for public performance of music, are manufactured under an entirely different royalty arrangement and are voluntarily licensed by copyright proprietors.

Should this question ever be presented to the courts for adjudication, it seems reasonably certain that the custom and usage established among the related industries is sufficiently strong and convincing to lead to the conclusion that the compulsory license is inapplicable to devices designed and sold to reproduce copyrighted musical works publicly. This accepted trade practice corroborates the continually asserted interpretation that it was the intention of Congress to limit the compulsory license provisions of the Act of 1909 to the two distinct types of mechanical reproductions then commercially significant and designed for private non-commercial performances.

The uniform trade practice of considering mechanical reproductions designed for public performance for profit as not embraced within the compulsory license provisions was not established as a gratuitous gesture to copyright owners of such non-dramatic musical works. A mutual interpretation of Section 1(e) coupled with sound business ethics has engendered a system of voluntary licenses for the manufacture of devices capable of reproducing such copyrighted musical works in synchronism with or timed-relation to motion pictures for public exhibition, and in the form of electrical transcriptions for public performance by radio broadcasting and by telephonically or electrically wired point-to-point reproduction.

Section 1(e) contains language which may be considered as rebutting any contention that the compulsory license is
applicable to devices manufactured for public performance. After reciting the provisions concerning compulsory licenses of mechanical reproductions, the statute contains the following:24

"The payment of the royalty provided for by this section shall free the articles or devices for which such royalty (compulsory license fee) has been paid from further contribution to the copyright except in case of public performance for profit."

(Italics supplied.)

It is submitted that the intent of Congress to limit the compulsory license provision to devices not intended for public performance for profit is evidenced by this sentence in Section 1(e). While it may be argued that the exception relates to a reservation of compensation for public performance of the work rather than to reproduction thereof, it seems clear to the writer that Congress was dealing with the problem of the use to which the mechanical reproduction is adapted insofar as the compulsory license provisions are concerned. This interpretation is apparently supported by the fact that it is not until the last paragraph of Section 1(e) (fifteen lines after the mechanical reproduction exception clause) that the statute deals with the exception relating to performing rights under the copyright by expressly declaring that the rendition of a musical composition by or on coin-operated machines shall not be deemed a public performance for profit unless an admission fee is charged. Since coin-operated machines serve to reproduce piano rolls and phonograph records only, the limited interpretation of the compulsory license provisions would seem to be supported strongly by necessary implication from the language of Section 1(e).

Such a construction may also be considered desirable in this instance to obviate injustice to copyright owners of musical compositions. Copyrights upon other works which

are the subject matter of protection under the statute have no compulsory license restrictions whatsoever, and an interpretation of Section 1(e) should not foster the continuance of discrimination against one class of copyrighted works. Another factor which should motivate a court in making such a construction is the fact that the compulsory license provisions, if considered broadly, would become unreasonable interferences with the exclusive rights of copyright owners of non-dramatic musical works. Moreover, the entire compulsory statutory licensing system is probably unconstitutional.25

§ 663. Electrical Transcriptions Contain Special Arrangements and Exceptional Uses of Copyrighted Works, Rendering Compulsory License Inapplicable.

Irrespective of the commercial use made of an electrical transcription as controlling the view that the compulsory license provisions do not govern the manufacture of such devices, an analysis of the contents thereof lends strong and convincing support to such a construction of Section 1(e).

Electrical transcriptions containing musical works embody a completely unified entertainment or advertising vehicle. Each transcription is an individual production entity and the contents should be regarded as constituent elements of the production.

Since transcription programs are prepared to sell the particular advertiser's merchandize, many exceptional uses are made of copyrighted works to achieve that end. Orchestras and vocalists are engaged to render their individual and unique interpretative talents which generally involve the reproduction of special arrangements of copyrighted works. Such arrangements are not included within the scope of the compulsory license provisions 26 and require the voluntary consent of the copyright proprietors. Al-

25 See § 657 supra. 1075 (1909), 17 U.C.S.A. § 1(b)
though the performing artists may have been licensed to make such arrangements, an additional license from the copyright proprietor is required by the producer of the program and the manufacturer of the electrical transcription thereof. By the same token, the transcription cannot be reproduced for broadcast performances without an appropriate performing license with respect to the copyrighted works contained in such recorded programs.\(^{27}\)

Moreover, the requirements of the individual program may make necessary, adaptations of the musical works included therein to render the same suitable for electrical transcription. Such uses require the voluntary license of the copyright proprietor and sanction thereof cannot be extended under the compulsory license provisions.

The use of a musical composition as a theme song to identify the program is also an exceptional use to which the copyright owner must consent. Frequently, musical works become an integral part of the plot of the recorded program's continuity or serve to advance the action thereof to such an extent as to constitute a dramatization of the musical composition. Such exceptional uses involve so-called "grand" rights under the copyright which are clearly beyond the scope of the compulsory license.

Similarly where the work contained in the transcription has some dramatic significance or has some humorous use \textit{per se}, voluntary permission from the copyright owner is essential before an electrical transcription thereof can be manufactured.

Factually, therefore, the extraordinary uses made of copyrighted musical compositions in electrically transcribed programs make inevitable the conclusion that the compulsory license provisions of Section 1(e) are inapplicable to sales thereof apart from the construction of the statute and industrial custom and usage discussed \textit{supra}.\(^{28}\)


\(^{28}\) § 662 \textit{supra}.

Manufacturers of mechanical reproductions such as phonograph records and piano rolls intended and offered for sale for private non-commercial performances, whose royalty payments are controlled by the compulsory license provisions of the Act of 1909, do not secure the right to copy or duplicate the rolls or records manufactured by others, which reproduce the same work. A manufacturer cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record, but must resort to the basic copyrighted composition or sheet music. Pirating of a competitor’s product by copying licensed records or rolls is not sanctioned by the compulsory license provisions.

Section 1(e) is applicable to phonograph records “manufactured” in the United States, although the records may be sold and played elsewhere. By “manufactured” is meant the performance of a substantial number of the operations necessary for the making of the record. The limitations of the compulsory license provisions of the statute are such that compulsory licensees may make only such mechanical reproductions as are similar to the originally licensed reproduction. It was not intended that all the reproductions manufactured be exact duplicates of each other. The licensing of the manufacture of a phonograph record does not place the compulsory license in operation as to piano rolls or other types of mechanical reproductions.

The voluntary licensing of the manufacture and sale of reproductions by electrical transcription or motion picture sound film does not place the compulsory license provisions

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in operation because the statutory restrictions are not applicable to reproductions for public performance for profit.\textsuperscript{32}

The compulsory license has for its purpose the preservation of such rights as were reserved by the copyright owner in his grant to the original licensee.\textsuperscript{33}

A mechanical reproduction of a musical composition includes the music and the lyrics or either of them, depending upon the type of reproduction which is manufactured. A piano roll involves the reproduction of the music alone and the lyrics cannot be imprinted upon the roll without infringing upon the copyright.\textsuperscript{34} The test is whether the nature of the reproduction is such as to require the use of the lyrics. The device itself must be unintelligible without the aid of the reproducing instrument or other apparatus in order to be considered a mechanical reproduction.

\section*{§ 665. Mechanical Reproductions—Act of 1909 Not Retroactive}

The Act of 1909 specifically provides\textsuperscript{35} that all works published and copyrighted after July 1, 1909 are to be protected according to the terms thereof. Therefore, all musical compositions which were copyrighted prior to that date are founded upon the earlier legislation and may be reproduced mechanically upon piano rolls\textsuperscript{36} and phonograph records without the payment of any royalty. It is to be noted that the test is the date of the copyright of the work and not the date of the first manufacture of mechanical reproductions thereof. In England, where protection against mechanical reproduction was granted to copyright owners by the Act of 1911, the Court in construing the statute held that the manufacturer was obliged to pay royalties on all records sold after the effective date of the

\textsuperscript{32} See § 662 supra.  
\textsuperscript{34} Ibid.  
statute, even though the records had been manufactured and the works had been copyrighted prior to such date.\textsuperscript{37} Renewal of such copyrights, however, is granted under the terms of the statute in effect on the date of renewal and thus, mechanical reproductions of re-copyrighted works would be governed by the existing law.\textsuperscript{38}

§ 666. Right to Arrange Work Not Included in Compulsory License Provisions.

Although the copyright owner is given the exclusive right to arrange and adapt his work by statute,\textsuperscript{39} performing artists are generally licensed expressly or by implication to make such arrangements and extractions as are reasonably necessary to produce a \textit{bona fide} interpretative performance of the composition.

The proprietor of the copyright may, however, refuse to grant such a license to arrange and may withhold permission to perform such works even though the making of the arrangement was previously licensed.

By arrangement is meant only a written translation of the work by musical notations. The right to arrange does not include the right to perform the work. Performance is a separate and distinct right under the copyright. Since licenses to perform are invariably written, while permission to arrange is customarily granted orally, it is not likely that the license to arrange is intended to carry with it the right to perform. In fact there is a uniform reservation throughout the industry that the work may be performed only in such places and by such facilities as are licensed to perform the composition publicly by the appropriate owner of such right.

Section 1(e), in providing for compulsory licenses for

\textsuperscript{37} Monckton v. Pathé Frères, 30 T.L.R. 123 (Eng., 1913).
\textsuperscript{38} Renewal is a new and independent right, existing in the persons designated by statute. \textit{Harris v. Coca-Cola Co.}, 73 F.(2d) 370 (C.C.A. 5th, 1934); \textit{Fox Film Corp. v. Knowles}, 279 Fed. 1018 (C.C.A. 2d, 1922).
\textsuperscript{39} 35 \textit{Stat.} 1075 (1909), 17 U.S.C.A. § 1(b) (1927).
the manufacture of mechanical reproductions, expressly extends to the copyright proprietor the exclusive right to arrange and adapt his work by any system of notation or recording from which it may be read or reproduced. But the compulsory limitations on musical copyrights embrace mechanical reproduction only and do not interfere with or lessen the exclusive right to arrange which is specifically granted to the copyright proprietor by Sections 1(b) and 1(e).

Consequently, mechanical reproductions cannot contain unauthorized arrangements of the copyrighted musical work without infringing on the copyright. The compulsory license provisions apply to manufacturing only and do not include the right to make arrangements or adaptations. The British Copyright Act of 1911, however, expressly extends the compulsory license provisions to include permission to the manufacturer to make such arrangements and adaptations of the work as are reasonably necessary to produce a satisfactory reproduction.40


In radio broadcasting, recorded music represents a substantial portion of available program material. In a majority of stations, such mechanical reproductions constitute the basis of program operations. This situation is a consequence of the continual great demand on broadcast stations for music. Such program material being readily available in recorded form at a trivial cost thus became the subject of widespread use.

In the earlier days of radio, phonograph records were used widely and frequently for the purpose of supplying radio broadcast entertainment. Electrical transcriptions had not sufficiently developed and were not in regular use by advertisers and broadcasters. Phonograph records were

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inexpensive and contained reproductions of both standard and popular musical compositions, as well as performances rendered by artists of wide public appeal. It was simple and inexpensive for the operator of a broadcast station to adapt the ordinary home talking machine equipment for broadcast purposes. Records could be purchased at wholesale for small sums and could be retained in a library, which would serve as a storehouse for innumerable program combinations. The program problem appeared to be solved.

The fact that a royalty has been paid to a copyright owner for the manufacture of a mechanical reproduction of his work in the form of a phonograph record, does not carry with it any right of the purchaser of that record to perform it publicly for profit.41 Persons so using a phonograph record are held liable for infringement of copyright.42 The payment of a license fee for mechanical reproduction gives no right of public performance for profit. A further license permitting the performance must be obtained from the copyright owner.

The mechanical reproduction license granted to manufacturers of phonograph records under the compulsory license provisions of Section 1(e) does not extend to the manufacture of reproductions for public performances for profit. An additional voluntary mechanical reproduction license must be obtained from the copyright owner or the copyright will be deemed infringed by such extended use.43

A broadcaster has no right to perform a phonograph record or other mechanical reproduction of a copyrighted work, without a performance license from the copyright owner. The unauthorized performance of a copyrighted work over a broadcast station, whether by way of sustain-

42 Berlin v. Russo et al., 31 F.(2d) 832 (C.C.A. 5th, 1929); 24 F.(2d) 832 (C.C.A. 5th, 1929).
43 See § 662 supra.
ing or commercial programs, is deemed a public performance for profit and an infringement of the copyright.\footnote{44 Buck \textit{v.} Jewell-La Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931). See §§ 626-629 supra.}

There also should be considered on this point the rights of the performing artists to restrict the unauthorized broadcast of phonograph records by which their talents may be reproduced.\footnote{45 Waring \textit{v.} WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).} Similarly, the performance of a piano roll which serves to reproduce a copyrighted musical composition and which is broadcast over the facilities of a broadcast station, is an infringement of the performing rights under the copyright and is actionable.\footnote{46 See Buck et al. \textit{v.} Lester, 24 F.(2d) 877 (E.D.S.C., 1928).}

\section*{§ 668. Same: Electrical Transcriptions.}

An electrical transcription is a long-playing record which is manufactured exclusively for reproduction as part of broadcast and other commercial performances. The fact that phonograph records are manufactured upon small discs which have a relatively brief period of playing time, made it advisable for manufacturers to prepare long-playing records suitable for use by broadcast stations, which would not require the constant attention and supervision necessary in the frequent changing of phonograph records. Moreover, phonograph records are manufactured for a type of entertainment entirely different from radio broadcast programs and frequently are not suited for such a purpose. At best, the broadcast of phonograph records is a makeshift convenience. It became necessary for advertisers to "build" or prepare entire programs, capable of being broadcast as supplements to network programs. It became economically desirable also for broadcast stations, including those affiliated with networks, to market their facilities and broadcast time by way of so called "spot" broadcast bookings. The electrical transcription answered these needs and made such broadcasting possible. This
device is undoubtedly a substantial factor in the growth of radio broadcasting as an advertising medium. /

Electrical transcriptions brought about the development of a finer type of recording, by which the entire tonal range could be more faithfully reproduced than in the old type of phonograph record. Recordings were manufactured of a quality and type substantially different from phonograph records. Electrical transcriptions are much wider in diameter, thinner and of a better texture and quality than phonograph records. They are reproduced by different and more sensitive apparatus than the old talking machine. A new speed of recording was developed and the number of revolutions per minute was decreased to conform to the needs of the broadcasting industry. Surface noise of the old type of phonograph record was reduced to a minimum in electrical transcriptions. A different process of cutting sound grooves laterally has also been introduced. Vertical-cut transcriptions, however, have not been supplanted. Transcriptions are generally adapted to programs of fifteen minutes in duration and are about five times longer than phonograph records. Announcements, sound effects and dramatic material may be combined with music in the preparation of a unified program, specifically designed for the radio audience. There also came into being library services containing hundreds of hours of transcribed musical entertainment upon these new discs, capable of being used by broadcast stations to suit the needs of their program operations.

This new type of mechanical reproduction of a musical work differs so completely from the phonograph record in its character, use and effect, that no question was raised in the courts concerning the applicability of the compulsory license provisions of the existing copyright laws. 47 /

The use of this new mechanical reproduction device as a part of an advertising medium has definite commercial

47 35 STAT. 1075 (1909), 17
implications. The advertising of one’s product rests upon another’s copyrighted property as its foundation. Copyright owners were unable to estimate the amount of royalty which would be considered reasonable as a license fee for such new mechanical reproduction of their works. Some programs frequently involve lesser-known artists and are limited to use over a few stations. Others are prepared for broadcast of the talents of widely known artists over the facilities of hundreds of stations. The royalty yardstick necessarily had to be flexible in order to do justice to the different users and varying types of uses of copyrighted works.

By interpretation of Section 1(e) \(^{48}\) and by agreement, a trade custom and usage has grown up among users of copyrighted works for such mechanical reproductions as electrical transcriptions, whereby the compulsory license fees relating to phonograph records have no application whatsoever to this extended and improved recording device. Copyright owners are collecting a license fee for the manufacture of such electrical transcriptions predicated upon the number of times each transcription is performed. Instead of assessing their royalty claims upon the number of transcriptions manufactured, the copyright owners have based their charges upon the results obtained. A mechanical reproduction royalty is currently charged the advertiser in the sum of twenty-five cents for each time a non-dramatic musical composition is reproduced as part of a commercial program over the facilities of each station. A dramatico-musical composition or so-called “production number” now bears a mechanical reproduction royalty of fifty cents per commercial performance per station.

It must be clearly borne in mind that this mechanical reproduction royalty, though measured by the number of performances, is not a license to perform the work. Such users of copyrighted works must compensate the copyright owner for two independent rights. One right involves the

\(^{48}\) See § 662 supra.
mechanical reproduction royalty while the other right is based upon the public performance for profit of the composition. The payment of the mechanical reproduction fee of electrical transcription, which is measured by the number of performances, is a manufacturing royalty and is predicated upon the assumption that an appropriate performing rights license will be in force during the time the electrical transcription is actually reproduced.

Electrical transcriptions which have been manufactured for broadcast station library purposes are licensed upon another basis. Licenses are granted by the copyright owners to the manufacturing companies for a period of one year, at the current annual rate of fifteen dollars for each musical composition and thirty dollars for each dramatico-musical composition recorded. This royalty, too, is founded upon distinct and definite premises. The duration of the library service is unknown. Re-recordings and new pressings from master matrices seemingly have no limitations. Certain compositions may no longer be popular and cease to be desirable for library purposes within one year from the date of their manufacture. Thus, the actual fee for the mechanical reproduction rights in electrical transcription libraries is a hybrid arrangement.

The manufacturing license for such recorded libraries is not granted upon the payment of a fixed sum for the duration of the copyright but rather is assessed in installments from year to year, depending upon whether the electrical transcriptions are available for reproduction at the expiration of each year. If so, a new and additional license must be obtained from the copyright owners through their designated agent and trustee. Such further license is not a renewal of the expired license unless the terms of the latter so provide. The new license may not be predicated upon the terms of former licenses, which can be modified at the will of the copyright owner, whose property is so mechanically reproduced. This transcription library service, so far as the mechanical reproduction license is con-
cerned, is predicated upon the use thereof by broadcast stations for sustaining program purposes. When the broadcast station reproduces a program contained in a library service for a commercial sponsor or advertiser in combination with live or recorded announcements, the mechanical reproduction license fee payable to the copyright owner is increased by the customary charges made for commercial transcription programs.

§ 669. Same: Sound on Film and Similar Devices.

A scientific development has been under way for some time which threatens to supplant electrical transcriptions as the means of mechanical reproduction of broadcast programs. A narrow gauge sound on film device has been perfected for radio broadcasting which, it is contended, will perform the function of electrical transcriptions at decreased manufacturing costs. Film has the advantage of almost interminable playing time and its compactness reduces packing and shipping charges as well as storage requirements. It is also attractive for library purposes because of the greater variety of program combinations achieved by easy splicing of selected footage into an assembled program. The use of musical compositions in such a reproducing device for public performance for profit should be governed by voluntary agreement rather than by the compulsory license of Section 1(e).49

A close analogy to film for broadcast purposes may be found in the copyright status of music used in motion picture productions.

The mechanical reproduction of copyrighted musical compositions by way of sound on film, and the synchronization of music recorded on discs or other devices with motion pictures, are not such mechanical reproductions as are included within the compulsory license provisions of the Act of 1909.50 This situation has grown up, too, in

49 35 STAT. 1075 (1909), 17

50 Ibid. See § 664 supra.

the past decade by way of interpretation of Section 1(e) and by custom and usage in the relationship between the music publishing industry and the motion picture producing business.

The synchronization of music recorded on discs with ordinary motion picture film, presents a problem closely related to the comparison of electrical transcriptions with phonograph records insofar as the compulsory license provisions are concerned. The discs used by the motion picture producers are wider in diameter than ordinary phonograph records, are operated upon more sensitive reproducing devices and are amplified throughout the theatre.

The motion picture producers originally contended that the two cents royalty by way of compulsory license should apply. The copyright owners, through their designated agent and trustee, opposed this contention on the ground that the uses to which the discs were put were not contemplated by Congress at the time of the passage of the Act of 1909. It was also urged that the compulsory license, being a restrictive condition, should be narrowly construed. It could not be denied that the phrase, "parts of instruments serving to reproduce mechanically the musical work," was intended to embrace only such devices as were suitable for private non-profit use in homes. Sound on film, motion picture discs, electrical transcriptions and other devices manufactured for the purpose of reproducing music mechanically as a commercial enterprise for general dissemination of public entertainment in public places, are not of the same type as phonograph records and player piano rolls.

Accordingly, an acknowledgment was made of the copyright owners' contentions and the issue was not litigated. In England, it was held that the reproduction of a copyrighted musical composition as part of a newsreel motion picture was an infringement of the copyright where the owner did not consent thereto. 

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An agreement was entered into providing a measure of compensation to the copyright owner based upon the extent of the use made of each musical composition in a motion picture production and according to the different classifications of the latter. Various license fees have been established for such uses of music in background, visual vocal and visual instrumental performances, depending upon whether the compositions are used in feature films, short subjects or newsreels.

Similarly, licensing arrangements, apart from the compulsory license provisions, are made by copyright owners with manufacturers of industrial motion pictures such as "slide-films." Other parts of instruments which serve to reproduce music mechanically for public performance and commercial purposes are likewise manufactured under voluntary licenses from proprietors of the copyright.

The use of musical compositions in the manufacture of devices for television performances also constitutes a mechanical reproduction for public performance for profit. A system of voluntary licenses should be established for the compensation of the copyright owners of selections so reproduced. The compulsory license under Section 1(e) of the Act of 1909 is entirely inapplicable to such public performance devices by means of which musical compositions are reproduced for profit.

§ 670. Same: "Off-the-Air" Recordings for Public Performance.

Another type of mechanical reproduction has been developed as a result of increased technical advancement in the recording of sound. Low cost equipment is available and capable of transcribing performances which are broadcast by means of radio and other facilities. Both portable and stationary apparatus may be placed in operation near a radio receiving set for the purpose of recording the contents of broadcast performances as disseminated.
over radio waves. A broadcast by means of "live" talent previously evaporated and spent itself immediately upon reception. By means of this new device, such performances may now be reduced to physical, tangible form and may be duplicated in innumerable copies.

Thus, a single broadcast may serve as the seed for hundreds of repeated performances. Such recording devices are used by advertisers occasionally to supply supplements to a network program, so that the actual original network broadcast performance may be thereby forwarded for broadcast reproduction by stations not included in the original network hook-up. By these means, advertisers may use a single performance of one program for both network and "spot" broadcast purposes. Large coverage may be obtained by broadcasting the "live" program over a network of as many stations as are desired for simultaneous broadcasts. Concurrently, recordings of the same performance may be manufactured and shipped to hundreds of additional stations for broadcast during such periods of time as may be selected by the advertiser or its agency for extended coverage. Such station facilities are acquired by "spot" broadcast bookings.


Recordings which are made by means of such devices which reproduce broadcast programs upon reception thereof are known as "off-the-air" recordings. The result is accomplished by capturing a performance actually disseminated over radio waves.

An "off-the-air" recording is a species of "instantaneous" recording. The latter term is applied generally to all recordings which are manufactured directly and simultaneously with the actual performance. Another type of "instantaneous" recording is the direct manufacture of a program transmitted to the device from the place of origin over telephone wires and other point-to-point communications. This type is known as "line" recording as dis-
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tinguished from "off-the-air" recording. Both "off-the-air" and "line" recordings are classified as "instantaneous" recordings.

"Studio" recordings are programs achieved by assembling the performing artists and other program personnel in a specially equipped recording studio or laboratory expressly and purposely to manufacture electrical transcriptions.

In instantaneous recording, the primary object of the advertiser is the simultaneous network broadcast to which the electrical transcriptions serve as supplements. In studio recording, the primary object is the manufacture of electrical transcriptions for spot broadcasting, independent of network broadcasts.

§ 672. Same: Liability to Copyright Owner.

In all types of recording whereby mechanical reproductions are manufactured for public performance for profit, the voluntary license fee must be paid to the copyright owners of the musical works so mechanically reproduced.

It frequently occurs, however, that such off-the-air recordings are manufactured for private, non-commercial purposes. The station, the advertiser or the producer of the program may desire a recording of a broadcast performance for their respective files. These recordings may also be required for personal private purposes, without any intention of reproducing same for public performance.

Performers and conductors of orchestras frequently desire such recordings for the sole purpose of evaluating the quality of the respective efforts of the persons contributing to the performance. Orchestra conductors have been known to "play back" transcriptions of broadcast programs for the purpose of pointing out to their musicians and vocalists errors in interpretation and rendition, so that the defects might be avoided in future programs.

Irrespective of the limited use made of mechanical reproductions so recorded, the copyrights on works included therein are thereby infringed unless license therefor has

Since the mere manufacture of a mechanical reproduction is an infringement of the copyright on the work so recorded, it seems clear that the compulsory license provisions of § 1(e) do not become effective unless the manufacturer goes forward and offers his reproductions for sale. Consequently the manufacture of off-the-air recordings for personal purposes must be voluntarily licensed by the copyright proprietor.

Where such off-the-air recordings are offered for sale, even though they are so licensed, the compulsory license provisions do not apply to allow manufacture of similar devices by others without a voluntary license.

The sale of duplicate off-the-air recordings by the manufacturer thereof is generally limited. It cannot reasonably be said that such limited sales were intended to be governed by the accounting features of the compulsory license provisions. Moreover, the off-the-air recording devices, when used for public performance for profit, are in the nature of electrical transcriptions and therefore the consent of the copyright owners must be granted voluntarily.

Clandestine manufacturers of off-the-air recordings should be prevented, by means of restrictions imposed by copyright owners, from using such recordings for broadcast and other commercial purposes. "Bootlegging" of broadcast performances by such devices should also be prevented to avoid unfair trade practices resulting from rebroadcasts of such recordings in this country and in other parts of the world.

52 See § 668 supra.
It is a simple task to delete announcements contained in a live broadcast so recorded, and fraudulently to substitute new announcements of other products and advertisers in programs which have been broadcast at great expense. Substituted announcements, being sub rosa, are frequently made in foreign languages and exported to other countries for broadcast as new transcriptions. This is accomplished without the knowledge or consent of the copyright owners, the performing artists, the original advertiser or the producer of the pirated program. Such nefarious practices constitute unfair competition and should be restrained.

The public policy in this instance is the prevention of deception of the public as well as the protection of the rights of persons whose property has been so appropriated.

A voluntary licensing system which provides for reports and schedules of all "off-the-air" or "line" transcriptions irrespective of their intended use establishes a wholesome practice and imposes reasonable limitations upon the operation of such devices. At once this system protects the rights of the advertiser, producer, artists and copyright owners. Although such mechanical reproductions are manufactured for limited non-profit purposes, they constitute but a small part of an extensive commercial enterprise and are inherently capable of wide dissemination for public performances for profit. Effective regulation of the unauthorized use of such recordings can be achieved by subjecting manufacturers thereof to the voluntary license system with respect to copyrighted works which are so mechanically reproduced.

If the strict rule is adopted and such non-commercial recordings are deemed to be governed by the compulsory license system provided in § 1(e) of the Act of 1909, the control over the diversion of such recordings to purposes of public performances for profit is considerably lessened. The first licensee who manufactured the original program could restrain the pirating of his transcription by a mere
duplication thereof\textsuperscript{53} even under the compulsory license system. But the broadcast station, the advertiser or the producer who purchases such original transcription for his private use has doubtful standing under the compulsory license provisions. Since they are not licensees, they will probably not be considered "parties aggrieved" within the meaning of Section 36 of the Act of 1909.\textsuperscript{54}

\section*{§ 674. Same: Broadcast Performance of Phonograph Records.}

Another example of diverted use of non-commercial recordings to purposes of public performance for profit is the unauthorized broadcast performance of phonograph records. So far as copyright is concerned, the musical compositions contained in such records are licensed compulsorily under Section 1(e) of the Act of 1909. Such licenses do not extend to public performances for profit.\textsuperscript{55} Consequently, the broadcast performance of a phonograph record without the voluntary granting of an additional mechanical reproduction license by the copyright owner, is an infringement of copyright albeit a valid performing license is in effect.\textsuperscript{56} The practical difficulties inherent in detecting and supervising the broadcast of phonograph records present convincing proof of the desirability of the voluntary license system. Upon the filing of the required reports of manufacture, sales and schedules of performances,\textsuperscript{57} complete supervision may be imposed by copyright proprietors over the use of their works. In this manner, the copyright owner serves as the spearhead of the attack of the station, advertiser, producer, artists and others against such unconscionable and illegal diversion of privately recorded performances to public and profitable reproduction thereof.

\textsuperscript{53} Aeolian Co. v. Royal Music Roll Co., 196 Fed. 926 (W.D.N.Y., 1912).
\textsuperscript{55} See § 664 supra.
\textsuperscript{56} Berlin v. Russo \textit{et al.}, 31 F.(2d) 832 (C.C.A. 5th, 1929).
\textsuperscript{57} Each broadcast station is required to maintain a log.
§ 675. Historically.

The earliest United States Copyright Act provided for a term of copyright of fourteen years and for renewal of protection for an additional fourteen years. The right of renewal under this early Act was secured to the author or authors living at the expiration of the original term of copyright or their executors, administrators or assigns. It was essential that at the time of renewal of the copyright, the author or authors securing same were citizens of the United States and resident therein.

When the original term of copyright was later extended from fourteen years to twenty-eight years, the term of

1 Act of May 31, 1790, 1 Stat. 124.
renewal was not coextensively increased, but remained at fourteen years. The author, or, if deceased, his widow or children, was granted the privilege of renewal under the Act of 1831.\(^3\) Under later copyright legislation,\(^4\) the term of copyright and the renewal period were unchanged, but the privilege of renewal was available upon the fulfillment of certain specified conditions within six months before the expiration of the original term of copyright. The necessity for citizenship or residence of authors as a condition precedent to the right of renewal of copyright continued until the Act of March 3, 1891\(^5\) which extended the right of copyright to aliens under certain conditions.\(^6\)

§ 676. Under the Act of 1909.

The existing copyright law\(^7\) grants a right of renewal of the original twenty-eight year term of copyright for an additional period of twenty-eight years, provided that application for such renewal shall have been made to the Copyright Office and duly registered therein, within one year prior to the expiration of the original term of copyright. The right of renewal is granted to the proprietor of a copyright who does not claim by way of an assignment or a license from the author. An employer for whom a work was made for hire and who secured copyright registration thereon\(^7a\) and the proprietor of a copyright upon a posthumous work or a composite work\(^8\) are by statute specifically entitled to a renewal of the original copyright. All other copyrighted works, including portions of composite works which have been separately registered, are subject to renewal, as provided in the Act,\(^9\) by the author,

\(^3\) Ibid.  
\(^6\) Id., at § 13.  
\(^7a\) Tobani v. Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938).  
or if he is deceased, by the surviving spouse or children of the author, or in default of such named heirs, by the executors or next of kin of the author. It is necessary, however, that timely application for such renewal be made by a person entitled thereto. In default of such effective registration of the renewal application, the work falls into the public domain.\textsuperscript{10}

The Act of 1909 specifically provides \textsuperscript{11} for the renewal of copyrights subsisting in any works registered prior to the effective date of that statute for the extended term of twenty-eight years to the author, or if deceased, to certain described successors, provided that application for such renewal be duly registered in the office of the Register of Copyrights within one year prior to the expiration of the existing term.

The work may be published, performed or exploited in any other manner with impunity after the expiration of the original term of copyright and upon the failure of the person or persons entitled to a renewal of copyright to perfect same. The work may be published under either the real or assumed name of the author, once copyright protection thereof ceases to exist.\textsuperscript{12} The publisher may even omit the author’s name from copies of works in the public domain, but the author may enjoin, as unfair competition, the false advertising of another as the author of his work.\textsuperscript{13} Conversely, an author may prevent the false use of his name as the writer of a work or a substantial part thereof with which he has had no connection. Such relief may be extended at common law for unfair competition \textsuperscript{14} or by local statute.\textsuperscript{15}

\textsuperscript{12} Clemens v. Belford, Clark & Co., 14 Fed. 728, 730 (N.D. Ill., 1883).
\textsuperscript{13} See § 409 supra.
\textsuperscript{14} See § 409 supra.
\textsuperscript{15} Elliott v. Jones, 66 Misc. 95, 120 N.Y.Sup. 989 (1910), affd. 140 App. Div. 911, 125 N.Y.Sup. 1119 (1910).
§ 677. Nature of Right of Renewal.

The right to renew a copyright is a new but inchoate property right,16 vested exclusively by the statute in specifically described persons and in the order in which they are enumerated therein.17 The right of renewal is not absolute but is contingent upon being perfected by appropriate re-registration within the specified statutory period. The copyright renewal is a new grant of copyright and has absolutely all of the attributes of a new work copyrighted at the time the renewal is effected.18 The renewal of copyright is granted under the provisions of the law in effect upon the date of the commencement of the renewed term.19

The privileges of copyright being purely statutory, the right to renew must be found within the statute and is dependent upon the provisions thereof.20 The assignee of a copyright, therefore, has no right of renewal.21 The copyright can be renewed only in the name of the person entitled to the renewal and not by the assignee of such person.22 An administrator of a deceased author is not a person entitled to renew a copyright.22a The validity of the renewal of a copyright depends upon the validity of the


22 Ibid.

copyright as originally secured, although it is a new grant of copyright.23

§ 678. Where the Author Has Assigned His Inchoate Right of Renewal.

The right of renewal, being contingent, does not vest until the final year of the original term of copyright. Occasionally, authors attempt to dispose of the right of renewal before its maturity. In such cases, the agreement is one to do an act in the future and, upon maturity, specific performance by the author may be compelled in Equity.

The right of such equitable assignee, however, is confined to relief against the author during the last year of the original copyright term since the right of renewal can not be perfected until then. Relief would probably be extended also against the author’s subsequent assignee of the renewed copyright who took with notice of the outstanding earlier assignment previously made to the plaintiff and unfulfilled by the author.24

If the author dies before the vesting of the right of renewal, his equitable assignee would not prevail over his widow, children or other named successors, since their rights under the statute can not be affected by acts of the author from whom they derive their claims to the renewal. Where such heirs as are designated by the statute do not exist, the assignee should be permitted to obtain relief against the author’s executor or legatees.

If the author perfects his right of renewal, Equity should impose a constructive trust upon the renewed copyright in favor of the assignee with whom the author has broken faith. Similar relief should extend to the assignees of the renewal copyright who had notice of the outstanding assignment.

Actions at law for damages may also lie against the

23 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663, 8 L.Ed. 1055
§ 679. Renewal of Copyright Where There Are Two or More Authors.

Where there are two or more persons named as authors of a copyrighted work, they are tenants in common. The copyright may be renewed by either or both of said authors, their respective widows, widowers, children, executors or next of kin in the order specified in Section 23 of the Act of 1909.

The creative works of both authors are protected by a single copyright. Unity of registration is accomplished upon the issuance of the original certificate of copyright. But to-day in the case of renewal copyrights, a complication of the problem has been brought about as a result of the issuance by the Register of Copyrights of plural certificates to all co-authors and others who perfect their rights of renewal separately during the last year of the original copyright term. Although several renewal copyright certificates are extant, the work is nevertheless protected by a single copyright. Plural certificates represent evidence of the renewal registration of the interests of the various owners within the period required by the Act. Each such renewal copyright certificate, however, embraces the entire work and the holder deals therewith as he

desires, subject to an accounting to the remaining renewal copyright owners.

Where a number of copyright owners results from the exercise of the right of renewal by persons entitled to do so under the statute, either independently or derivatively, confusion frequently arises. Each such renewal copyright owner possesses limited rights of ownership in the copyrighted work, which are indivisible. For example, if upon the expiration of the original term of copyright, the author of the lyrics is alive, while the composer of the music is deceased but is survived by his widow, the author of the lyrics and the widow of the composer are each entitled to a renewal of the copyright in the entire work. Separate registration certificates are issued, evidencing the renewal of the copyright by the persons having the right to do so. Each such copyright holder thereupon deals with the entire work at will, since the renewal is of the entire copyright rather than of the lyrics or music alone. The lack of uniformity in utilizing and merchandising the copyright, the unnecessary licensing competition and the uncertainty among users of the work make obvious the difficulties of the situation resulting from the issuance of plural certificates.

There should be no race of diligence between authors in the renewal of their copyrights. There should be no magic in the priority of obtaining renewal registration. However, there is much validity to the view that since there can be but one renewal of a copyright, the co-author who first obtains a renewal certificate has renewed the copyright. Under this view, the issuance of subsequent renewal certificates is valueless; tardy co-authors take nothing by their subsequent registration and are at best relegated to equitable relief in such instances against their co-author who was victorious in the race of diligence.

It is to be regretted that the issuance of renewal copyright certificates by the Register of Copyrights is of doubtful value and that co-authors are misled by their perform-
The entire copyright would seem to be renewed upon the issuance of the first renewal certificate. The co-author obtaining same would, under this view, be deemed to hold the copyright property as trustee for his co-authors or their designated heirs or successors, as named in Section 23 of the Copyright Act, as they exist at the date of renewal, coextensively with their respective interests in the copyright property during the original term.

A distinction must be drawn between the inchoate statutory right of renewal and the equitable interest of the co-author or such persons designated by Section 23 as successors to his right of renewal. The statutory right is primary and is encompassed by legislative boundaries while the equitable interest is one which is rooted in historic equity jurisprudence. The right of a tardy co-author to appeal to Equity to impress a trust in favor of all co-authors upon a copyright renewed by one co-author is totally dissimilar from the statutory right of renewal with which all co-authors are vested. Although the inchoate right of renewal cannot be alienated or transferred per se, the equitable interest of the beneficiary against the co-author trustee may be assigned like any other chose in action.

It would seem to be a more satisfactory requirement that the copyright be renewed during the twenty-eighth year only upon joint application by all co-authors and persons who are entitled to exercise the right of renewal under Section 23 as of the date of such application.

Where it is impossible for the qualified persons to make joint application, the copyright should be renewed to the appropriate person or persons applying for same upon affidavit or other proof of the unavailibility of the remaining persons entitled to join in the application.

Since the statute is enacted in furtherance of a constitutional safeguard of the rights of authors, copyright renewals should not be forfeited by reason of the unavail-
ability of co-authors or their respective successors designated in Section 23, the personal differences between co-authors or other factors inimical to this policy.

§ 680. Same: Composite Works.

A musical composition created by two or more composers and authors is not a composite work. The lyrics and music are necessarily so created as to be adapted to and blend with each other to produce an integrated and unified composition, the constituent elements of which are the results of the efforts of individual co-authors. The term "composite work" as used in the Act has been construed to include such works as compilations, digests, encyclopaedias and similar collections which are independent and distinct works by various authors brought together and published as one work. The right of renewal of copyright of a composite work is given by Section 23 of the Act of 1909 to the proprietor of the original copyright rather than to the numerous contributing authors. The latter, however, may secure renewal copyrights on their own works where they have separately registered and secured copyrights upon their several contributions under non-composite classifications.

The copyright registration of a folio or book containing several musical compositions by different authors and composers under the classification of a composite work gives the copyright proprietor the right of renewal under Section 23 of the Act of 1909. In the absence of separate registration of the constituent compositions and the issuance of independent copyrights thereon, the authors and composers have no right of renewal. In the case of composite works, the right of renewal passes with the assignment of copyright and the proprietor may perfect such renewal by registration within the last year of the original copyright term.

§ 681. Renewal of Copyrights

Where a constituent of a composite work has been copyrighted separately under a classification of a non-composite work, and the author of such separately protected work fails to renew his copyright, while a renewal copyright is obtained by the proprietor of the composite work, the author ceases to have protection because of his omission. All rights in the work are thus enjoyed exclusively by the proprietor of the composite work during the renewed term. Conversely, where the author of a constituent of a composite work renews his separate copyright, but the proprietor of the whole work fails to do, the former may protect his part of the composite work against infringement, while the latter may not.

§ 681. Same: Where All Authors Do Not Perfect Renewal of Copyright.

It has been held that the renewal of the copyright upon a literary work published in a book containing pictorial illustrations of the text, embraced only the literary material written by the author whose widow obtained the renewed copyright. Since the artist who created the illustrations failed to renew the copyright upon them, the renewed copyright on the novel was held not infringed by the reprinting of the illustrations alone. Conversely, it is inequitable to grant renewal copyright protection of a literary work to an artist whose few illustrations are included in the novel. But Judge Sibley’s comment in the Coca-Cola case that the renewal of a copyright extends to one’s own work because of its merits and not to another’s work associated in the same book, should not be given indiscriminate lip-service as establishing principles generally applicable to the variegated gamut of copyright problems.

28 Id., at 373.
29 The writer is of the opinion that the decision in the Coca-Cola case may be sustained on its facts but upon different reasoning. Frost, the illustrator, had no connection with Harris, the author, but was an employee of Appleton,
The inadequacy of the provisions of the Act of 1909 with respect to the renewal of copyrights is apparent in many particulars. It seems clear, however, that the statute embraces a renewal and extension of the original copyright so as to preserve the monopoly for an additional term if the authors evidence such a desire by complying with the required formalities. Where the original copyright is not severable, why should the renewed copyright be severed to defeat protection to a diligent author whose co-authors cannot be found or are unwilling or indifferent insofar as the renewal of the copyright is concerned?

It is sound reasoning to extend renewed copyright protection to that which was created by the renewing author. But is it equally logical to cast into the public domain the efforts of a negligent or absent co-author which form an integral part of the work sought to be protected by a renewal of copyright perfected by a diligent collaborator? The writer is of the opinion that the problem should be resolved by applying the test as to whether the components of the work, the copyright of which is sought to be renewed, are necessarily dependent upon each other to produce an integrated work. In such an instance, the collaborators are

the publisher. Frost received a lump sum of $1250 for his services in preparing the illustrations for Appleton, without any participation by Harris in such payment, and gave to Appleton all his rights therein under the “Shop Rights” rule. Although it held no renewal copyright, Appleton gave Coca-Cola Co. permission to reprint the illustrations. Harris’ copyright never extended in scope to Frost’s illustrations. Though Appleton was the copyright owner during the original term both as publisher under the author’s contract with Harris and as employer of Frost, the copyright protection granted to Harris’ work did not in any way include the illustrations so far as Harris was concerned during such original term. The situation could not be changed upon the expiration of the original term to give Harris any greater rights thereafter than existed in him previously. Harris and Frost were never at any time co-authors or collaborators. Though the illustrations related to the text of Harris’ work, they were not an integral part of the novel. Their individual efforts were independent and distinct and were capable of separate registration as different works.

30 See § 579 supra.
co-authors. If so, as is frequently the case, the renewal of the copyright should embrace the entire work to protect those authors whose interests the statute is designed to foster and safeguard.

If the illustrations of a novel are created for the sole purpose of pictorializing the characters of the novel, it may nevertheless be an independent creative effort having no relation whatsoever to the novel, which is the primary, independent subject of copyright protection. Moreover, such illustrations may have extrinsic value as separate works of art which were not intended to be included within the scope of protection of a literary work. Consequently, such illustrations are not protected under the renewed copyright obtained by the author’s widow.31

§ 682. Same: Musical Compositions.

A musical composition is integrated by its lyrics and music, and although the music may be performed without the use of the lyrics, each is dependent on the other. If the original copyright covered the words and music,32 the renewal of the copyright thereon by either the author or the composer or both, embraces the complete work also.

Renewed copyrights are ordinarily coextensive in scope with the subject matter originally copyrighted. A renewed copyright likewise protects severally both the words and music of a musical composition.33 It is the copyright which is renewed and generally there is no divisibility of the work embraced therein and protected thereunder.

The renewal copyright owner has legal title to the copy-

right upon the entire work. Such title, however, must be held in trust for the benefit of all of the renewal copyright owners. Therefore, any and all proceeds derived or received by such a trustee from the exploitation of the renewed copyright should be distributed among the remaining persons entitled to renewal copyrights of the work, in accordance with their respective interests of ownership. The Act of 1909 is silent on this point and considerable difficulty ensues by reason of the plural ownership of renewal copyright certificates.

It may well be argued that the renewal copyright owners should not be compelled to hold their copyrights in trust for co-authors or their heirs who fail to perfect their rights of renewal within the period required by Section 23. On the other hand, it is contended that Equity dictates the opposite view.

A renewal copyright once granted may be assigned. The restrictions of the statute apply only to the right to obtain the renewal.

Under the present system, if the work is a musical composition, the several renewal copyright owners may separately assign their respective interests to different competing publishers. Several music publishers may thus publish the same work and exploit their individual property interests. Unless by agreement between such publishers or renewal copyright owners, a uniform standard and scale of business utilization of the copyright are adopted, the users and performers of such works are frequently enmeshed in a quandary which has as its consequence a diminution in the value of the work.

The statute is in sore need of amendment to clarify the respective rights of renewal by joint authors of a copyrighted work. Only diligent authors should be permitted to claim as beneficiaries of such a trust. A situation per-


34a See § 683 infra.
mitting several persons to obtain individual renewal copyright certificates inevitably produces confusion.

§ 683. Same: Where a Co-Author Fails to Renew.

Collaborators who create a work which is protected by copyright are tenants in common for the original term of copyright. Section 23 of the Act of 1909 gives "the author" the right to renewed protection of his work for an additional term upon the happening of the specified conditions subsequent. The renewal copyright is afforded to the author or his relatives or executor by reason of the author's own work and because of its merit. Each co-author has the right to secure the renewal of copyright on his own creative efforts. By statute, each co-author is under an obligation to fulfill certain specified conditions to perfect his right of renewal. The obligations imposed by statute as incidents to perfecting the renewal may be delegated by one co-author to the other.

If one co-author secures a renewal copyright while his collaborator fails to do so, it would seem that the former is a trustee for the latter. It may be argued, however, that the co-author who failed to renew has no rights of any kind in the renewed copyright obtained by his co-author. Under this view, the inchoate right of renewal is defeasible by the failure of a co-author to perform the required conditions subsequent. This view holds that there is no fiduciary relation between the co-authors with respect to the renewal, imposed either from their tenancy in common of the original copyright or by the statute, and that the author who for reasons of neglect or ignorance failed to perfect his right of renewal should not be permitted to hold his diligent collaborator as trustee of his interest in the renewed copyright. The failure to perfect the renewal of a copyright would thus destroy the defeasible statutory right to do so upon the expiration of the term.

§ 685 of original copyright. According to this view, such a delinquent author thereafter ceases to have any rights in his work which are susceptible of being imposed upon the renewed copyright obtained by his co-author. Even under this view, where the renewing author has defrauded his co-author into failing to perfect the latter's right of renewal, a constructive trust may be established within the general scope of equity jurisprudence.


For the purposes of uniformity, the private monopoly which is intended to ensue for the additional term of twenty-eight years, should be kept intact by unification of the rights of the several persons entitled to such renewal. This could be accomplished either by a specific statutory provision to the effect that there be registered the perfection of the rights of renewal by all persons entitled to and applying for same within the statutory period, and that a single certificate be issued to all such persons at the end of the original term of copyright; or by a specific legislative declaration that each such copyright owner shall be deemed a trustee for the owners of other outstanding renewal copyright certificates on the same work, with mandatory accountings in stated periods for all proceeds derived from such copyrights. In the latter instance, a penalty such as treble damages should be provided for failure to account. In addition, full rights of discovery and inspection of books and records should be permitted.36

§ 685. Licenses from Renewal Copyright Owners.

Since each co-owner of a renewed copyright has an undivided interest in the entire work, a licensee of one co-owner is not a proper party in an action brought by one co-owner against the other.37 The complaint is also

36 See § 679 supra. 1894); Dunham v. Indianapolis, Miller, 61 Fed. 401 (C.C.D. Del., 1876).
Where one co-owner of a renewed copyright sues for infringement thereof, he must join as parties all the remaining renewal copyright owners. The relation between the co-owners of a renewed copyright may, of course, be governed by an agreement between them, providing for the disposition and control of their joint property in the form of a partnership or joint venture.

In view of the several indivisible renewal copyright certificates which may be issued with respect to a single work which is used in radio broadcast programs, it is sufficient that a license be obtained from any one of such renewal copyright owners. If a performance of a musical composition is broadcast without any vocal rendition thereof, with the license and consent of the holder of a renewal certificate granted to the author, widow or other person deriving title from the author of the lyrics of the composition, such a performance is not an infringement even though the renewal copyright owner deriving his rights from the composer of the music, has refused to consent to the performance.


Where the author of a copyrighted work dies, leaving neither spouse nor children, and the estate has been settled and the executors have been discharged before the year prior to the expiration of the original term of copyright, the next of kin are vested with the right of renewal at the beginning of that year as tenants in common.

Where two out of a number of such next of kin exercise

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38 Ibid.
the right of renewal, it has been held that they are vested with legal title to the renewed copyright in trust for the benefit of all in that class.\textsuperscript{42}

Where the author is deceased, the test as to whether a specifically named person is entitled to a renewal of the copyright, depends upon whether such a person is in the first named class entitled to renewal during the year prior to the expiration of the original term of copyright.

If a person entitled to perfect his right of renewal of a copyright is living during the twenty-eighth year of the original term but dies before registering his renewal, the person next specified in Section 23 of the Act of 1909 may perfect his own right of renewal during the remainder of the original copyright term, even though he had no such right at the beginning of the last year thereof. If one such member of the available class secures a renewal of the copyright, he holds it as trustee for the remaining members of that class.\textsuperscript{43} Copyrights once issued may be bequeathed by the testament of the author, but the right of renewal of a copyright cannot be bequeathed to destroy the rights of the widow, children or other persons described by the statute, before the commencement of the last year of the original copyright term. The right of renewal arises only at the time specifically mentioned in the statute. A new right to protection springs into being only within the twenty-eighth year of the original copyright term. If an author had the right to dispose of his renewal copyright by will, it would defeat the purpose of the statute since he would be able by the same token to assign his renewal rights before the commencement of the last year of the term of original copyright. Since this result is repugnant to the intentions of Congress, any attempt to dispose of a renewal copyright before the commencement of the twenty-eighth year of the original term of copyright is invalid \textsuperscript{44} except as between the contracting parties.

\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid. (by will).
§ 687. Same: Where Author Was in the Employ of Original Copyright Proprietor.

Further difficulty in this already complex subject arises in the case of renewal of copyright upon works created by an author who was in the employ of the original copyright proprietor at the time the work was first published or registered.

Section 23 of the Act of 1909 specifically excludes such employee-authors from rights of renewal of the copyrights upon their works. The statute provides that employers for whom the work is created for hire and who originally secured copyright thereon have the right to renewal thereof. The right of renewal is broadly granted to the proprietor of such a copyright as a person within the statutory definition of "author" and is protected as a work created by the employee-author of the original registrant. The statute does not limit the right of renewal to the original registrant only but seems to extend the right to the proprietor of the copyright. On this theory, the right of renewal runs with the copyright, and subsequent assignees of the copyright claiming through and under the original employer-copyright owner would seem to have the right of renewal, which must be perfected by registration within the twenty-eighth year of the original copyright term.

The statute provides that "the proprietor of such copyright shall be entitled to a renewal." The renewal right thus depends on the original copyright and is not personal to the original registrant. The assignor of such a copyright may not exclude from his assignment of copyright, or otherwise reserve, the right of renewal. As in the case of authors, the right of renewal springs into being during the last year of the original term.

Since such a right of renewal is not personal, there is no hierarchy of persons entitled to the renewal of the copy-

right on a work created by an employee-author. Since such an author is himself excluded, all persons claiming through or under him are likewise not entitled to the renewal.45a

Where the proprietor of a copyright claims the right of renewal thereof on the ground that the original registrant was the employer of the author, such proprietor has the burden of proving the employment relationship. Obviously, facts showing the terms of the employment should be adduced by competent evidence. If the author was an independent contractor, he is entitled to the renewal as against the copyright proprietor. It must be determined as a fact that the work was created during the term of employment, that it was made within the scope of the employment and that the compensation paid to the author was a fee or salary in full payment for his creation. The application for copyright should properly bear some reference to the relation between the author and the proprietor. The fact that compensation to the author was upon a royalty basis would seem to negate the employment and make the author an independent contractor. The extent of control over the author by the employer likewise is significant. On the question of employment or independent contract, see Section 643 supra.

Of course, the employment of an author who is entitled to renew the copyrights upon works created by him before the employment relation existed, gives his employer no right of renewal of the copyrights upon such works. Such renewal rights are the author's personal property. By express contract, however, the renewing author may be obligated to assign his renewal copyrights to his employer.

§ 688. Citizenship as Affecting Right of Renewal.

While the right to obtain copyright in the first instance is governed by the citizenship of the author in that it extends only to citizens of the United States, resident

45a Tobani v. Carl Fischer, Inc., 98 F.(2d) 57, 60 (C.C.A. 2d, 1938).
aliens and citizens of those countries which are signatories to treaties and conventions to which the United States is a party, the question of citizenship as affecting the right of renewal under the Act of 1909 appears never to have been decided. Although the right of renewal is granted by the statute and is subject only to the performance of certain conditions subsequent, it has been regarded as a new grant of copyright. As such, and in view of the necessity for registration of the renewal of the copyright, it would seem that the citizenship of the renewing author would control the granting of the renewed copyright. If an author who satisfied the citizenship requirements for the original grant of copyright has expatriated himself and has become a citizen of a country which renders him ineligible for copyright protection here, such infirmity at the time of the application for renewal would probably be sufficient to warrant denial of the new grant of renewed copyright.

Congress paid little attention to these problems of renewal of copyright and the Act of 1909 is carelessly drawn in this important aspect. This chaotic situation should be rectified by an amendment setting forth precise rules to govern the rights of the respective claimants.

COPYRIGHT PROTECTION IN FOREIGN COUNTRIES AND BY INTERNATIONAL COPYRIGHT.
§ 690. Duration of Copyright Protection in Foreign Countries

Mexico is the only country which has patterned its term of copyright after the United States by extending protection the exclusive right of the author to dispose of, publish and reproduce his work, to perform and present publicly musical or dramatic compositions, to translate and adapt his work, and to authorize its reproduction by mechanical contrivances.

1 According to the United States Department of Commerce, Division of Commercial Laws, n. 2 infra, the following countries have not enacted special copyright laws: Aden, Albania, Belgian Congo, Ethiopia, Iran, Iraq, Manchuria, Paraguay, San Marino, Saudi Arabia, Sudan, and Vatican City. Estonia, Latvia and Lithuania have not enacted copyright laws but continue to operate under the Old Imperial Russian Civil Law Code. The law of copyright effective in Cuba is the Spanish law of 1879 with modifications.

2 For English translations of the copyright laws of all the major countries of the world, see KOEPPLE, COPYRIGHT PROTECTION THROUGHOUT THE WORLD (U. S. Dept. of Commerce, Division of Commercial Laws, 1936). Throughout this chapter, most references to foreign copyright laws are based on these translations.

tection to its authors for a stated term of years. In Guatemala, copyright is perpetual.

All other foreign countries grant protection during the lifetime of the author and in addition thereto a varying number of years during which the heirs of the author may enjoy the privileges of copyright. In such countries, the term of copyright upon a work which is the product of joint authorship is measured by the life of the last surviving co-author. Where a work is first published posthumously, copyright protection is limited to a stated term of years.

In Great Britain and the British dominions, recordings for mechanical reproduction are the subject of copyright

§ 23 (1927). The term of protection in the United States is twenty-eight years with the privilege of renewal for an additional twenty-eight years.

4 Mexico, Civil Code (1928) § 1183 (30 years), § 1186 (dramatic and musical works protected for 20 years).
5 Guatemala Decree No. 246 (Oct. 24, 1879) Art. 5.
6 The periods of copyright protection throughout the world are for the life of the author plus:
20 years from the death of the author—Chile.
25 years from the death of the author—El Salvador.
30 years from the death of the author—Argentina, China, Dominican Republic, Japan, Mexico, Nicaragua, Roumania, Siam, Sweden, Switzerland and Venezuela.
40 years from the death of the author—Uruguay.
50 years from the death of the author—Austria, Belgium, Costa Rica, Czechoslovakia, Danzig, Denmark, Ecuador, Finland, France, Germany, Great Britain (including dominions, colonies and protectorates), Greece, Hungary, Italy, Luxemburg, Netherlands, Norway, Poland and Portugal.
60 years from the death of the author—Brazil.
80 years from the death of the author—Spain, Panama.

In Haiti, the period of copyright protection is for the life of the author, then the life of his widow and for 20 years thereafter if there are surviving children, 10 years if none.

7 See Rome Copyright Convention, Art. 7 bis (1928).
8 See Copyright laws of Argentina (30 years), Belgium (50 years), China (30 years), Dominican Republic (30 years), Greece (50 years), Italy (50 years), Japan (30 years), Luxemburg (50 years), Siam (30 years) and Switzerland (30 years).
§ 692 Copyright Protection in Foreign Countries

and the term thereof is fifty years from the making of the original master or plate.  

§ 691. Same: Local Copyright Protection of Works of Aliens.

In most foreign countries, provision is made in the respective copyright statutes for the extension of local protection to works of aliens under definite conditions. Such provisions are usually based upon reciprocal arrangements between nations. If the work of the alien is also the subject matter of copyright protection in the country where protection is sought, and reciprocity prevails, the term of such copyright ordinarily does not exceed the period of protection granted in the country of origin of the work. China is the only country which grants a special period of protection for works of foreigners, limited to ten years from the date of publication of the work in China.

§ 692. Protection of Mechanical Reproductions Under Foreign Copyright Statutes.

The creator of a musical work is generally granted the exclusive right to authorize the performance or rendition of his work in public. The copyright laws of most countries expressly provide that the performing right includes the right to authorize a recording of the composition upon devices capable of reproducing the work mechanically, such as phonograph records, music rolls et cetera. It is

9 Copyright Act of 1911, 1 & 2 Geo. V., c. 46 § 19(1).
10 Ibid.
11 See §§ 696, 704 infra.
12 Rome Copyright Convention, Art. 7 (1928); Buenos Aires Copyright Convention, Art. 6 (1910).
14 The following countries with which the United States has established reciprocal copyright relations, recognize the author's exclusive right to authorize the manufacture of mechanical reproductions of his composition:
   Argentina (Art. 1.); Austria [Art. 15(2)]; Canada [§ 4(3) ]; Chile (Art. 1.); Costa Rica (Art. 11); Czechoslovakia (Art. 21, 27); Denmark [Art. 1(4)]; Finland (Art. 8); Germany [Art. 12(5)]; Great Britain ([including colonies and protectorates], also Australia
also provided in most foreign copyright statutes that the author has the sole right to authorize the public performance of his work by means of such mechanical contrivances. A copyright may be infringed in foreign countries by the unauthorized manufacture of recordings or by the unauthorized public performance of protected works by mechanical reproduction thereof.

The British Copyright Act of 1911 has incorporated a compulsory license provision with respect to the mechanical reproduction of copyrighted works. This limitation upon the right of the copyright proprietor to grant exclusive licenses for such purposes is patterned after Section 1(e) of the United States Copyright Law. This has been discussed supra.

§ 693. Protection of Works of Aliens in Other Countries.

There is no general principle of international law requiring nations to extend copyright protection to the works of foreigners. To limit protection of copyrighted works to the territory of the country of origin, has as its consequence the unrestricted exploitation of such works in other countries to the detriment of the author.

and the Union of So. Africa, § 19(1)); Greece (Art. 7); Hungary [Art. 6(9)]; Irish Free States [§ 160(1)]; Italy (Art. 2); Japan [Art. 22(6)]; Mexico (Art. 1,225); Netherlands (Art. 14); New Zealand (§ 25); Norway (Art. 22); Poland (Art. 2); Portugal (Art. 74); Rumania [Art. 22(3)]; Siam [§ 4(d)]; Sweden (Art. II.); Switzerland (Art. 4). Contra: Dominican Republic, Copyright Law, Art. 22 which provides that the manufacture and use of mechanical reproductions does not constitute an infringement.

15 Rome Copyright Convention (1928) Art. 13(1); statutes cited supra, n. 14. Contra: Copyright Law of Austria [Art. 53(1)]; Dominican Republic (Art. 22); Japan [Art. 30(8)]; Switzerland (Art. 66).

16 Protection of mechanical reproductions under the Berne Convention is discussed in § 699 infra. For the use of mechanical contrivances for broadcast purposes, see § 706 infra.

17 1 & 2 Geo. V., c. 46 § 19(2).


19 See § 660 supra.
With a view towards enabling their nationals to obtain copyright protection of their works in other countries, many countries have reciprocally extended copyright protection to citizens of those nations which have reached such an accord. A few countries appear to provide in their copyright laws that foreigners shall enjoy the same rights as their own citizens. Most countries extend copyright protection to the intellectual property of their nationals or to such creations, regardless of the nationality of the author, as are first published within their territory.

Where an alien creates a work which is protected in his own country, he may secure the benefit of the copyright laws of such other countries with which his nation enjoys reciprocity.

Prior to the Berne Convention of 1886, such international copyright relations were largely regulated by bilateral treaties.


Under these bilateral treaties, international copyright protection proved to be unsatisfactory. Not only did the rights of authors in foreign countries depend on the existence of treaties, but the extent of such rights varied in each country according to the particular treaty. The first attempt to secure uniformity in copyright protection was made by a conference of major European countries in 1886 at Berne, Switzerland, where the International Union for the Protection of Literary and Artistic Works was founded.

The fundamental principle adopted by the Berne Convention was that every nation belonging to the Union was to accord to authors who were citizens of, or who published their works in any other country of the Union, the same treatment as was accorded to its own citizens. To insure such treatment, certain uniform rules were laid down.

20 See Copyright Laws of Argentina (Art. 13); Belgium (Art. 38); Luxemburg (Art. 39); Portugal (Art. 136). 21 Berne Convention, Art. II., (1886).
down which have been largely incorporated into the copyright laws of each nation. It has been pointed out that this has created a tendency towards the establishment of a uniform copyright law for all countries but that the time has not yet arrived for a complete abandonment of the system of national protection.

Since the first conference at Berne, other conferences were called when experience had shown it to be necessary to revise the original Convention. In 1896, an Additional Act of Paris was adopted. In 1908 at Berlin, a new Convention was adopted which replaced the original. A further conference was held at Rome in 1928 when a new Convention known as the Rome Copyright Convention was formulated. Thirteen nations have ratified the Rome Convention, while twenty-five other countries and the British colonies now adhere thereto. The proposed Convention of Brussels in 1937 was postponed.

§ 695. Protection Rendered by Conventions to Citizens of Member Countries.

The motivating principle of the International Copyright Union is that its members shall extend to the citizens of all of the constituent countries the same copyright protection as is granted to their respective nationals. Included in such reciprocal protection are unpublished works, works published in a member country in which protection is sought or works published in any other Union country. The first publication of a work in a non-member country by

22 See COPINGER ON LAW OF COPYRIGHT (7th Ed., 1936) 257.
23 Bulgaria, Canada, Danzig, Finland, Great Britain, Hungary, India, Italy, Japan, Netherlands, Norway, Sweden and Switzerland have ratified the Convention.
24 Australia, Austria, Belgium, Brazil, Denmark, France, Germany, Greece, Ireland, Jugoslavia, Liechtenstein, Luxemburg, Malay
    Federated States, Monaco, Morocco (French and Spanish), Newfoundland, Poland, Portugal, Rumania, Siam, Spain, Spanish Colonies, Syria, Tunisia, Union of So. Africa and Vatican City. For list of British Colonies, see KOEPELLE, op. cit. supra n. 2, Part I., p. 47.
a national of a Union country would destroy all protection of the work under the Conventions.26

§ 696. Protection Under Conventions to Citizens of Non-Member Countries.

Where the work of a citizen of a non-member country is first published in a country which is a member of the Union, the author is accorded all of the privileges of nationals of the member countries.27 Under this provision, citizens of the United States, a non-member country, obtain protection of their works in all Union countries by publishing in a member country simultaneously with the publication of the work in the United States.

The practice generally employed is to cause copies to be offered for sale in Canada, a Union country, simultaneously with publication in the United States. Some doubt appears to exist as to whether a mere offer of sale in Canada is a sufficient publication within the meaning of the Berne Convention.28 A Dutch Court refused to extend protection under the Berne Convention to a work of a citizen of a non-member country, which work was offered for sale simultaneously in a member country with publication in a non-union country.29 This was held to be insufficient publication to secure automatic copyright in Union countries.

§ 697. Automatic Copyright Under Conventions: Formalities.

Another instance of uncertainty of protection in the International Copyright Union is that of the insistence by

27 Rome Convention Art. 6 (1928).
28 Hearings before Subcommittee of the Committee on Foreign Relations, United States Senate, Hearings on International Convention of the Copyright Union, April 12 and 13, 1937, Statement of Edwin P. Kilroe, at 17.
courts of member countries that the domestic requirements of registration formalities be fulfilled, in the absence of express reservations to such effect.\(^{30}\)

The attempt of the Conventions to dispense with compliance with the formalities of registration peculiar to each country is a forward step.\(^{31}\) Automatic copyright was not accomplished until the Berlin Convention. This informal copyright has been criticized as creating uncertainty by reason of the lack of notice to users.\(^{32}\) This criticism would be invalid if all countries participated in the Conventions since all works would then bear copyright protection universally and the necessity for notice would fall.

The Berne Convention originally provided that enjoyment of the rights conferred thereby was expressly subject to compliance with the formalities prescribed by the law of the country of origin of the work.\(^{33}\) Where a foreigner sought protection in another country, it was always necessary to determine what formalities were required in the country of origin of the work and whether such requirements had been fulfilled. To avoid this complication, the Berlin and Rome Conventions provide that "the enjoyment and exercise of such rights are not subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work." \(^{34}\)

It should be noted that this applies only to protection under the Convention. Any country can, and most countries do,\(^{35}\) require formalities of registration, filing of

\(^{30}\) Casa Musicale Sonzogno, A. G. v. City of Tokyo and Shigeo Ito (Tokyo Tribunal; Section, Civil Affairs, November 30, 1937), (claim for damages HA # 3092–1934).

\(^{31}\) Rome Convention, Art. 4(2) (1928).

\(^{32}\) Hearings before Subcommittee of Committee on Foreign Relations, op. cit. supra n. 28, Statements of Marvin Pierce, at 37.

\(^{33}\) Berne Convention, Art. II. (1886).

\(^{34}\) Berlin Convention, Art. 4(2) (1908); Rome Convention, Art. 4(2) (1928).

\(^{35}\) See §§ 702, 704 infra.
copies of the work and similar acts before granting copyright protection to their own citizens and to nationals of non-member countries with which reciprocal arrangements exist.

Despite adherence to these Conventions, the copyright statutes of Canada and Japan continue to impose the requirement of formalities of registration as a condition precedent to the enforcement of copyright protection in those countries. Membership is sustained upon the theory that the substantive right of copyright is created under the Convention but that the remedial rights can be enforced only upon compliance with local registration laws. Under this view, the fulfillment of local formalities in Canada and Japan is required as against member countries as well as non-members and thus the Convention’s program of automatic copyright is emasculated.

§ 698. Duration of Copyright Under Conventions.
The term of protection granted by Article 7 of the Rome Revision of the Convention endures for the life of the author plus a period of fifty years after his death. It is also provided, however, that protection shall not be for

36 Copyright Act 1921, 11-12 Geo. V., c. 24, § 39(2).
38 The Committee on Copyrights of the American Bar Assn., in its report to the Annual Meeting in Cleveland, Ohio, on July 25-27, 1938, countenanced the practice of imposing local conditions upon the enforcement of remedies for infringement of copyrights obtained without formalities in the first instance. The Committee said:

"It is the opinion of your Committee that there is today no serious objection in principle to International Copyright, if, in addition to these reservations, there is proper prior domestic enabling legislation. The copyright granted thereby to aliens in the United States, automatically without formality, can be sufficiently conditioned in respect of remedies, so as to require in effect such formalities as publication with notice or registration, if still desired, to avoid the practical result of inability to collect any serious damages against innocent infringers." Report of Section on Patent, Trade-Mark and Copyright Law (1938) 71.

39 Rome Convention, Art. 7(1) (1928).
a period exceeding the term fixed in the country of origin of the work.\textsuperscript{40} If a lesser period of protection is granted to the works of nationals, then that country need not, by the terms of the Convention, accord to aliens a longer term than that allowed by its law. The Rome Convention, for the first time, includes a provision dealing with the term of copyright in a work of joint authorship.\textsuperscript{41} Under this provision, the term of protection of such works may not in any case expire before the death of the last surviving author.

\textbf{§ 699. Mechanical Reproductions Under Conventions.}
Although today protection against the unauthorized mechanical reproduction of copyrighted musical works is universally recognized, the Berne Convention originally provided:

"It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyrighted, shall not be considered as constituting an infringement of musical copyright." \textsuperscript{42}

This was changed by Article 13 of the Berlin Convention which grants to the author of musical works the exclusive right of authorizing both the manufacture and the public performance of these recordings. It should be noted that this Article is restricted to musical works and does not apply to mechanical reproductions of dramatic and other works.

Article 13 also recites that its provisions shall not be retroactive and therefore shall not apply in any country to works which have been lawfully adapted to mechanical devices before the signing of the Berlin Convention.

\textbf{§ 700. Performing Rights Under Convention.}
The Berne Convention provides that the author of a published or unpublished dramatic or musical work shall

\begin{itemize}
\item \textsuperscript{40} Id., at Art. 7(2).
\item \textsuperscript{41} Id., at Art. 7 bis.
\item \textsuperscript{42} Berne Convention, Final Protocol § 3 (1886).
\end{itemize}
have the sole and exclusive control over its public performance.\textsuperscript{43} Later Conventions have expressly obviated the necessity of printing a warning notice on the title page by which unauthorized public performance of the work is forbidden.\textsuperscript{44}

The International Copyright Union has kept pace with the development of broadcasting by providing, in the Rome Revision of 1928, that the author shall have the exclusive right to authorize broadcast performances of his works in member countries.

\section*{§ 701. "Le Droit Morale" Under the Convention.}

The Rome Convention provides that, irrespective of and even after the assignment of his rights, the author shall have the right to continue his identity with his work and to object to unauthorized modifications or mutilations thereof.\textsuperscript{45} This provision seeks to safeguard the reputation of the author by way of the so-called moral right. Each Union country may establish its own conditions for the regulation of le droit morale created by the Convention.

It has been pointed out\textsuperscript{46} that in order to broadcast programs within specified periods of time, modifications must be made to fit copyrighted works to the needs of the program. The unqualified extension of the moral right to works capable of broadcast performance would create unnecessary hardship for the user. A bill introduced by

\textsuperscript{43} Id., at Art. IX.

\textsuperscript{44} Article IX. of the Berne Convention provided in the case of published works, that the author must expressly declare on the title page that he forbids the public performance of the work. This provision was not retained in the later Conventions.


\textsuperscript{46} Hearings before Subcommittee of Committee on Foreign Relations, \textit{op. cit. supra} n. 28, Statement of Sydney Kaye at 29.
Senator Duffy unsuccessfully sought the adherence of the United States to the International Convention. That proposed legislation provided for freedom of contract between author and user, and in the absence of a special notice from the author negating such right, the user was given the right to edit a work in accordance with the customary standards and requirements of such use. Only if such a reservation were made, would the modifications required in broadcast programs be lawful in Union countries.

§ 702. Pan-American Copyright Relations.
There has been a series of Inter-American Copyright Conventions, similar to the Berne Convention, seeking to protect intellectual and artistic property in North and South American countries.

The first such Convention was adopted in Montevideo in 1889 and was ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. In addition, Austria, Belgium, France, Germany, Italy and Spain have adhered to the Convention.

The Montevideo Convention was predicated upon a different principle than that of the Berne Convention. Under the former, the law of the country of origin of the works governed the extent of protection afforded in the other member countries. Later, Pan-American Conventions

48 Id., § 23:
"... (b) Independently of the copyright in any work secured under this Act, as amended, and even after assignment thereof, the author, retains the right to claim the authorship of the work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or to his reputation. ..."
49 For text, see Koeple, op. cit. supra n. 2, Part I, International Regime, p. 54.
50 Ibid.
51 Montevideo Convention, Art. 2 (1889).
were held at Mexico City, Rio de Janeiro, Buenos Aires, and Habana. These later conventions repudiated the theory of the Montevideo Convention and adopted the same principle as the Berne Convention, namely, that the citizens of a member country were to be accorded by all other member countries, the same rights as were extended to their own nationals.

The Buenos Aires Convention was the first to attempt automatic copyright. The author was required to address a petition and claim of protection to the official department of each government. Under Article 3 of the Buenos Aires Convention, the acknowledgment of a copyright in one Convention country is given effect in the other countries without the necessity of complying with any further formality, provided, however, there appear on the work a statement that indicates the reservation of the property right in the work. The Habana Revision of 1928 extends this requirement to include the name of the copyright owner, the country of origin, the country and year in which the work was first published and other details. Up to the present time, the complete elimination of all formalities so as to provide automatic copyright, has not been effected.

The Habana Convention, like the Rome Convention of the same year, granted to the composer of a musical work...
the exclusive right to authorize the adaptation of his work for reproduction by means of mechanical contrivances. It also granted him the exclusive right to authorize the public performance of such recordings of his work.\textsuperscript{59}

Unlike the Rome Convention, however, the Habana Revision failed to make express mention of broadcast performances of copyrighted works.\textsuperscript{60} There should be little doubt, however, that member countries extend protection against broadcast performance of copyrighted works. The other provisions of the Habana Convention are similar to those of the Rome Convention discussed \textit{supra}.\textsuperscript{61}

\textbf{§ 703. Copyright Protection of Interpretative Artists.}

The rendition of an interpretative performance by an artist is included within the scope of intellectual property and has been made the subject matter of copyright protection in several foreign countries.\textsuperscript{62} The artist's rights are distinct from the rights of the author and composer although the former are derivative in the sense that they can not be predicated upon an illicit reproduction of the copyrighted text. The interpretative performance is protected under these copyright statutes whether it be in the original or recorded form.

It may be noted that there is a growing trend towards extending copyright protection to such artists in many countries, and inclusion of this new right within the international conventions is not unlikely.

In the United States, the right of the performing artist has been recognized at common law\textsuperscript{63} and has been included

\textsuperscript{59} Id., at Art. 5.
\textsuperscript{60} Id., at Art. 4.
\textsuperscript{61} See §§ 694-701 \textit{supra}.
\textsuperscript{62} Uruguay, law enacted December 15, 1937, Articles 36-39 inclusive; Argentine Republic, law effective November 26, 1933, Art. 56; Mexico, Articles 1183, § VI., and 1191, Civil Code dated August 30, 1928; Poland, Articles 1 and 2, Statutes of March 29, 1926. See \textit{Speiser, Legal Rights of Performing Artists} (1934) 155-180.
in proposed copyright legislation introduced in both the Senate 64 and the House of Representatives.65

§ 704. Copyright Relations of United States With Other Countries.

In addition to the treaty-making powers, the United States Congress has specifically granted authority to the President to enter into reciprocal copyright relations with foreign countries.66 Section 8 of the Act of 1909 provides as follows: 67

"... The copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which said author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require."

Likewise, Section 1(e), which extends protection against unauthorized mechanical reproduction of copyrighted works to aliens, makes the same coextensive with the grant of


similar protection to United States citizens by foreign countries under reciprocal arrangements. The following specific proviso is contained in Section 1(e): 68

"... Provided, that the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights."

Pursuant to the authority conferred by the statute, proclamations have been issued by the President of the United States extending copyright reciprocity to citizens of twenty-eight countries. 69 Proclamations relating to protection against unauthorized mechanical reproductions must be specifically addressed thereto. A Presidential determination of reciprocity as to mechanical reproduction is essential and must be proclaimed separately from general international copyright protection. 70 Five other nations have concluded agreements under Section 8 of the Act of 1909 which do not provide for reciprocal recognition of the author's right to reproduce his copyrighted works mechanically. 71 Reciprocal copyright relations have no retroactive effect unless particular provision therefor is made.

In addition to these specific copyright arrangements, the

69 These countries are: Argentina, Australia, Austria, Belgium, Canada, Chile, Cuba, Czechoslovakia, Danzig, Denmark, Finland, France, Germany, Great Britain, Greece, Hungary, Irish Free State, Italy, Luxemburg, The Netherlands, New Zealand, Norway, Poland, Rumania, Spain, Sweden, Switzerland and the Union of So. Africa.
71 These countries are Costa Rica, Mexico, Palestine (excluding Transjordan), Portugal and Tunis.
United States is a party to general treaties with China, Japan, Korea and Siam. Provision is made in these general commercial treaties for reciprocal extension of copyright protection to nationals of the respective countries.

The United States is also a signatory to the Mexico and Buenos Aires Conventions which seek to establish reciprocal Pan-American relations.

It is important to note that the existing copyright relations of the United States with foreign countries provides only for reciprocality. Since the United States has not passed an enabling act to give effect to the Buenos Aires Convention here, it is doubtful whether citizens of signatory countries can claim copyright protection under our laws without complying with the formalities of registration and deposit of copies here.

To obtain copyright protection in foreign countries, citizens of the United States are obliged to comply fully with the formalities of the country in which protection is sought or with the formalities of the copyright conventions.

72 Treaty signed January 13, 1904, Art. XI.
73 Treaty signed May 10, 1906, Art. I. & II.
74 Treaty between United States and Japan, May 19, 1908.
75 Treaty of Oct. 21, 1921, Art. XII.
77 The following countries, with which the United States has reciprocal relations, provide for registration in their copyright laws: Argentina, Art. 57; Belgium, Art. 1.; Brazil, Art. 673; Canada, § 37 et seq.; China, Detailed Regulations, Art. 2 et seq.; Costa Rica, Chap. VII.; Dominican Republic, Chap. II.; Ecuador, Art. 43 et seq.; El Salvador, Art. 9; France, Law of May 19, 1925; Germany, Art. 56 et seq.; Greece, Law No. 3483, Art. 16; Great Britain, § 15; Guatemala, Art. 28; Haiti, Art. 2 & 3; Hungary, Art. 42, 43, 44; Italy, Art. 51 et seq.; Japan, Art. 16; Mexico, Art. 1, 189; Netherlands, Law of 1912, Art. 51; Nicaragua, Art. 831; Panama, Chap. III.; Portugal, Art. 107; Romania, Press Law of 1904, Art. 1; Siam, § 29; Spain, Art. 33 et seq.; Uruguay, Art. 20 et seq.

In Australia, § 26 of the Copyright Law makes registration op-
tions to which that country adheres.\textsuperscript{78} Automatic copyright is available to our citizens only when publication takes place in a member country simultaneously with publication in the United States.\textsuperscript{79}

\section*{§ 705. Broadcast Performance as Infringement of Copyright in Foreign Countries.}

The broadcast performance of a dramatic or musical work without the consent of the owner appears to be universally recognized as an infringement of copyright. This has been recognized not only in judicial decisions,\textsuperscript{80} but also by international convention\textsuperscript{81} and in the copyright laws of several countries.\textsuperscript{82}

In all countries, it is provided that the author has the exclusive right to authorize the public performance or rendition of his work. It is a matter of interpretation to determine whether a broadcast rendition constitutes a public performance of the copyrighted work. Most foreign
The courts which have been confronted with the problem held, as did the United States Supreme Court, that the copyright statutes could be construed as including public performance by broadcasting.

The Rome Revision of the International Copyright Union expressly provides that authors of literary and artistic works shall enjoy the exclusive right to authorize the public broadcast performance of their works. Judicial acknowledgment of this provision has since been made in various member countries.

In several countries, copyright statutes expressly provide that broadcast performances of an author's copyrighted work may be made without his consent in instances where the public interest is involved in the reception of such broadcast programs. In Poland, for example, the copyright statute contains the following provision:

"In the interest of greater usefulness, the Minister of Cults and Public Instruction may authorize the diffusion by radio or television of published works even without a permit from the author. . . ."

Likewise in the Soviet Union, the People's Commissariats of Education may authorize the public performance of any copyrighted work without the consent of the author. Moreover, in these countries, the royalty to be paid for the use of the composition is not fixed by the holder of the copyright but rather by a government agency. In these countries, even if the works of United States citizens are granted copyright protection, broadcast performances thereof may be rendered therein by governmental order over the objections of the copyright proprietors.

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84 See n. 80 supra.
85 Rome Convention, Art. 11 bis (1928).
86 See n. 80 supra.
87 See Copyright Law of the Netherlands, Art. 17 bis; Japan, Art. 22(5); Czechoslovakia, Art. 16 A; Norway, Art. 9(6) and Poland, Art. 54.
88 Poland, Copyright Law, Art. 54.
§ 706. Same: By Mechanical Reproductions.

Both the Rome $^{90}$ and Habana $^{91}$ Conventions provide that the author of a musical work which has been mechanically recorded shall have the exclusive right to authorize the public performance of such recordings. The unauthorized public broadcast performance by means of mechanical reproductions of a copyrighted work, constitutes an infringement of copyright.

This result, however, does not appear to have been achieved uniformly in all Union countries. In Japan, for example, it is expressly provided in the Copyright Law, that no infringement results from the broadcast of a phonograph record. $^{92}$ In Hungary, it was judicially held that no permission of the copyright owner is required to broadcast a recording of a copyrighted work originally made with the consent of the proprietor thereof. $^{93}$ The courts of other countries have correctly held that the purchase of a mechanical reproduction of a copyrighted work carries with it no right to make a public broadcast performance thereof. $^{94}$

§ 707. Same: Public Reception of Broadcast Performances as Infringement.

To provide musical entertainment in connection with the operation of a business conducted for profit, by means of a public reception of a broadcast performance of a copyrighted work, constitutes an infringement of the copyright. This result was reached by judicial decision in the United

$^{90}$ Rome Convention, Art. 13(1) (1925).

$^{91}$ Habana Revision, Art. 5.

$^{92}$ Japan, Copyright Law, Art. 30(8).

$^{93}$ Magyar Telefon-hirmondo v. Gramophone Co., Ltd. (Supreme Court of Hungary, May 24, 1935).

§ 708 Copyright Protection in Foreign Countries

States\(^95\) and in England,\(^96\) India\(^97\) and various other jurisdictions.

The Austrian copyright statute\(^98\) expressly provides that one who permits a theater or other place of entertainment to be used for public performance of a copyrighted work is guilty of an infringement. It is submitted that this provision should be interpreted as including the public reception of a broadcast performance.

It is anticipated that uniformity on this point will obtain in Union countries after the next revision of the International Copyright Convention.

§ 708. Copyright Infringement by International Broadcast Programs.

Broadcasting transcends territorial boundaries. Local programs originating in one country often are received publicly in other countries. In fact, programs are broadcast over short-wave frequencies which are expressly intended for reception in foreign countries. These practices involve interesting questions of the conflict of copyright laws.

Where the broadcast of a copyrighted work is authorized in the originating country, the copyright may also be infringed in the country where the broadcast program is publicly received. Such liability of the receiver would depend first upon whether the work is protected by copyright in the country of reception and second, whether public reception of a broadcast performance is deemed an infringement of copyright in that country. The liability of the person who produces the original broadcast performance which is received in another country would depend upon the scope of the original license to broadcast granted to


\(^96\) Performing Right Society, Ltd. v. Hammond's Bradford Brewery, Ltd. [1934] 1 Ch. 121.

\(^97\) See VI. Performing Rights Gazette 1 (July, 1937).

\(^98\) Austria, Law of April 9, 1936, Art. 18(3).
him by the copyright proprietor. If such a right is limited to broadcast performances within the territory of the originating country and the producer of such program has not, by the increase of power, made possible the reception of the program in foreign countries, he should not be liable for further infringements.

Where the copyright upon the work is held by different proprietors in the various countries, the liability of the producer of the broadcast program which was not authorized for performance in foreign countries, would depend upon the extent of his control over the reception of the performance. Where the producer has deliberately broadcast over a frequency capable of normal reception in a foreign country or has increased the transmitting power of the broadcasting apparatus with the intention of causing reception in a foreign country, the producer of the program and the broadcast station should be liable for infringement of copyright in the country of reception of works so broadcast. Liability should follow with the same effect as if the infringement had been committed within the country of reception.

In cases of international broadcast programs which involve the public performance of mechanical reproductions of copyrighted works, liability would depend upon the law of the country of reception as to whether a public performance by means of a mechanical reproduction constitutes an infringement of copyright.

§ 709. Recommendations.

Frequent criticism has been made of the copyright relations of the United States with foreign countries. There are several countries with which the United States has not established copyright reciprocity. The existing trea-

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99 The United States has no reciprocal agreements for the protection of literary and artistic property with the following countries: Bolivia, Bulgaria, Colombia, Egypt, Estonia, Ethiopia, India, Iran (Persia), Latvia, Liechtenstein, Lithuania, Russia and Tur-
ties and agreements lack uniformity. These critics therefore have urged that the United States join the International Copyright Union. Nevertheless, many authorities have opposed our adherence to the Convention.

Advocates of automatic copyright feel that the elimination of registration formalities is highly desirable. In opposition, it has been urged that publication as a condition precedent to copyright is a basic conception of our law to which the principle of automatic copyright is inimical. Automatic copyright has also been criticized as affecting the rights of labor which are protected by the "manufacturing clause" of the existing copyright law.

The deficiencies of the Rome Convention with respect to the definition of publication are illustrated by the Saxe Rohmer case supra. A further revision of the Convention with respect to this point has been urged before adherence of the United States thereto.

The proposal of new matters as the subject of copyright protection, the recognition of le droit morale and the extension of the principle of oral copyright have also caused alarm among opponents to the participation of the United States in the Copyright Union. The variance between the term of copyright protection in the United States and the duration of copyright under the Conven-

key. Bulgaria, Estonia, India and Liechtenstein are members of the International Copyright Union.

Hearings before Subcommittee of Committee on Foreign Relations, op. cit. supra n. 28, Statement of Thorwald Solberg, at 734.

Statement of John G. Paine, at 32, 33; Statement of Marvin Pierce, at 37.


Hearings before Subcommittee of Committee on Foreign Relations, op. cit. supra n. 28, Statement of Edwin P. Kilroe, at 14-18.

Ibid.

Id. Statement of Sydney M. Kaye at 29.
tion would result in confusion and hardship to users of alien works in the United States upon our adherence to the Convention. The Committee on Copyrights of the American Bar Association, in its report to the 1938 Annual Meeting, suggested that protection against the retroactive effect of adherence be accomplished by domestic enabling legislation.

Finally, the inconsistency of our present copyright legislation with the provisions of the Rome Convention has been frequently pointed out as an objection to the entry of the United States into the Union. By the United States Constitution, self-executing treaties, like acts of legislation, are made the supreme law of the land. If the United States were so to adhere to the Rome Convention without revising its present copyright law, such previous legislation would be thereby overruled. The copyright law of the United States would then consist first, of the provisions of the Rome Convention, while the provisions of our own copyright statutes and our common law decisions not inconsistent therewith would next apply respectively. Many questions would then arise as to which law is controlling and the resultant uncertainty would lead to endless confusion for both copyright owner and user.

Should the United States ratify the Rome Convention by a treaty which is not self-executing because it contemplates future enabling legislation, it would not be effec-

107 REPORT OF SECTION ON PATENT, TRADE-MARK AND COPYRIGHT LAW (1938) 70.
108 U. S. CONSTITUTION, Article VI.
109 Hearings before Subcommittee of Committee on Foreign Relations, op. cit. supra n. 28, Statement of Edwin P. Kilroe at 2; Statement of Sydney M. Kaye at 28.
110 It has been suggested that adherence by a self-executing treaty would make possible the anomaly of permitting the President and the Senate to make changes in the existing copyright law without the consent of the House of Representatives. See Note (1938), 51 HARV. L. REV. 906, 908.
111 See Robertson, Commr. of Patents v. General Electric Co., 32 F.(2d) 495 (C.C.A. 4th, 1929),
tive here until the required statutes were enacted. If the latter should vary, expressly or by implication, from the rules of the Convention, our adherence would be abortive and confusing. Ratification in such a manner would be no more than an idle gesture.

It is submitted that the United States should refrain from entering the International Copyright Union until the present Convention is revised. The opposing views in the United States should be presented to the next Convention for consideration. It is hoped that such a revision would make it necessary for the United States to offer only a minimum number of reservations, should it join the Union. Reservations considered appropriate have been suggested by the Committee on Copyright of the Association of the Bar of the City of New York. The Convention, as revised at Rome in 1928, does not permit new adherents to make reservations although adherents to


113 See Note (1938), 51 HARV. L. REV. 906, 908.

114 "1. Conformity to Article I, Section 8 of the Constitution of the United States, by limiting copyright to ‘writings’ as therein required;

"2. Preservation of full freedom of contract in respect of any work or any right therein, including, without being limited to the so-called moral rights of authors;

"3. Complete protection of the rights of American citizens against retroactivity with respect to past and future uses of any works or rights therein which, but for adherence to the convention, would be in the public domain in the United States and in connection with which, or in connection with the acquisition of which, there had been incurred any expenditure or liability prior to the effective date of adherence;

"4. Such other reservations, similar to those enjoyed by countries now adherent to the International Copyright Union (including the reservations enjoyed by Great Britain), as would prevent the granting of rights in the United States to nationals of foreign countries greater than the rights enjoyed by citizens of the United States in such other countries."
prior Conventions have been granted this privilege. Such early reservations are still in effect. There seems to be little doubt that the Convention would welcome the adherence of the United States thereto and that reasonable reservations not substantially different from those now effective would be accepted. Meanwhile, a restatement of copyright protection in the United States is desirable to keep pace with developments which have taken place since 1909. It is inadvisable to adhere to the Convention at a time when the few advantages therefrom are seriously to be questioned.
Chapter XLVIII.

TELEVISION.

§ 710. Introduction.

There are numerous situations which will inevitably arise when television assumes commercial proportions. These situations will present interesting legal problems, some of which will be analyzed and discussed in this chapter. The present inadequate development of the combined media of sight and sound in the communications world does not afford a complete prognosis of the legal implications of television performances.

As an undoubted extension of radio broadcasting by the addition of the sense of sight to the sense of hearing and their simultaneous dissemination over radio waves, many of the legal principles applicable to broadcasting are likely to govern television. New factors must inevitably intervene; analogies to motion pictures, the theater and the press may be closer to the new medium. There should be

1 See Felix, Engineering Foundations for Regulation of Television Broadcasting (1936) 7 AIR L. Rev. 387; Oppenheim, Commercial Background and Legal Aspects of Television (1937) 8 AIR L. Rev. 13; Wharton, Television in America, SCRIBNERS, p. 61 (Feb., 1937).
little doubt that the reproduction of a scene by way of a television performance constitutes a facsimile picture thereof, which involves a consideration of the laws governing photographs, motion pictures and other visual images despite the fact that the televised picture is of a transitory nature. No attempt will be made to discuss moot questions or matters which are treated at length elsewhere in this treatise but several provocative problems will be considered.

§ 711. Jurisdiction to Regulate Television.

The exclusive jurisdiction of the Federal government to regulate television seems assured. Despite the fact that coaxial cables are likely to be used in commercial television, ethereal frequencies are essential constituents of the medium. Problems of station interference must necessarily continue. The new domain will also be the subject of international treaties. Like radio broadcasting, television cannot be limited by state boundaries since it, too, is concerned with wave-bands and allocation of frequencies.

Congress has entered this field of jurisdiction in its enactment of the Communications Act of 1934. Section 153 of the Act defines the scope of administrative regulation by the Federal Communications Commission by describing radio communication as follows:

"'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds. . . .'" (Italics supplied)

Accordingly, therefore, television has become the subject matter of Federal regulation with which the states have no jurisdiction to interfere. Licenses have already been granted by the Federal Communications Commission which authorize the operation of experimental television stations only.

3 See Note (1936) 7 Air L. Rev. 240 as to the authority of the Federal Communications Commission to issue such licenses.
In *Fisher's Blend Station, Inc. v. Tax Commission of Washington*, the United States Supreme Court broadly defined the jurisdiction of Congress to regulate communications by radio. Mr. Justice Stone said:

"The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. . . . By its very nature, broadcasting transcends State lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control of the commerce clause."

This language may well be extended to include jurisdiction to regulate television, particularly when reference is made to the definition of radio communication as contained in Section 153 of the Act of 1934 *supra*.

The reserved police powers of the states remain unimpaired in the regulation of local acts and persons, so long as the jurisdiction of the states does not operate as an undue burden upon or interference with interstate communications.

§ 712. Specific Application of Act of 1934 to Television.

Proceeding on the assumption that the Federal Communications Commission may regulate television as radio communication under the Act of 1934, the various provisions of that statute which relate to radio broadcasting apply with equal force and effect to television. It seems clear, however, that the statute was not framed with a view towards an immediate regulation of visual communication.

For example, Section 326 of the Act, which prohibits the broadcast of obscene and indecent programs, refers specifically to the utterance of obscene, indecent or profane

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5 *Id.*, at 655, 56 Sup. Ct. 610, 80 L.Ed. 958 (1936).
6 See Chapter XI. *supra*.
language. Obviously, the telecast of an obscene picture would not be governed by Section 326, according to the provisions thereof. It would seem that Congress has sufficiently entered the field of regulating the contents of televised programs although the exhibition of an obscene picture is an indictable offense at common law.\(^8\)

Section 315 of the Act \(^9\) broadly recites that candidates for public office shall enjoy equal use of the facilities of broadcast stations. This requirement does not appear to be limited to oral remarks only, and a television station would be obliged to offer its facilities to candidates for the same office so long as it has permitted one candidate to appear in a televised political program.

The prohibition against the broadcast of lotteries and gift enterprises, or the giving of information concerning same, as contained in Section 136 of the Act, \(^10\) is comprehensive enough to extend to televised lottery broadcast programs.

§ 713. Censorship of Televised Programs.

The express negation of censorship powers of the Federal Communications Commission over the contents of radio broadcast programs as contained in Section 326, \(^11\) applies likewise to televised programs. Although the broadcast utterance of indecent language is prohibited by the same section, the telecast of obscene pictures is not expressly interdicted. It is not to be implied from this omission, that the Commission has authority to censor televised programs. The Commission may, however, consider the character of the programs transmitted by its licensees upon application for renewals. \(^12\)

Although the United States Supreme Court has upheld

\(^8\) Williams v. State, 130 Miss. 827, 94 So. 882 (1922); State v. Pfenninger, 76 Mo. App. 313 (1898); Commonwealth v. Sharpless, 2 Serg. & R. (Pa.) 91 (1815).
\(^10\) Id., at § 316.
\(^12\) See Chapter XXXVII, supra.
as constitutional the censorship of motion pictures by the states, it is submitted that such local jurisdiction would not extend to televised programs. The latter are definitely within the stream of interstate commerce, while the censorship of motion pictures is limited to the intrastate aspects of motion picture exhibition. For this reason, a dual standard is necessary for the regulation of motion pictures used in television programs.

A motion picture which has not been approved for exhibition in local theaters may nevertheless be communicated as a televised program and received in the homes without violating state laws. Where, however, the televised motion picture is received as a public performance and exhibited to the public, the local laws may be applied to the exhibition since the violation does not affect the operation of the television station and thus is not an interference with interstate commerce. Such a public exhibition of a motion picture may also take place in the television studio, constituting an unauthorized exhibition to the studio audience, and thus may be a violation of the state censorship laws. So long as the state does not interfere with the actual communication of the televised performance of the motion picture, it may exercise its jurisdiction over the unauthorized public exhibition thereof, irrespective of the medium of exhibition.

§ 714. Defamatory Televised Broadcasts.

Since a televised program necessarily introduces the element of sight and involves pictures and writings, however transitory their nature may be, the law of libel is closely analogous to telecast defamation. Despite this

14 "A libel . . . has been well defined to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure the memory of one dead or the reputation of one alive, and expose him to public hatred, contempt or ridicule." 2 Kent, Commentaries (Holmes, 13th ed., 1884) 17 (Italics supplied).
analogy, the elements of defamation by radio \textsuperscript{15} are, nevertheless, applicable to televised programs by reason of the peculiar operations of this communications medium.

Even if the televised picture is not defamatory \textit{per se}, its use in connection with defamatory utterances in a televised program is actionable.\textsuperscript{16}

The unauthorized use of one’s picture as part of a commercial televised program which erroneously serves as a defamatory endorsement of the advertised product, would likewise be actionable.\textsuperscript{17} Similarly, a mistaken telecast of a photograph as part of a news story with which the person photographed has no connection, which results in defamation of that person, would require compensation in damages.\textsuperscript{18}

Where the televised picture is distorted or otherwise creates an illusion which causes humiliation to the person whose image is reproduced, liability for defamation will ensue.\textsuperscript{19}

\textsection{715. Invasions of Rights of Privacy by Televised Broadcasts.}

Televised broadcasts have the undoubted capacity of causing even a greater invasion of rights of privacy than non-visual radio broadcast programs. Since the mere use of a name in a commercial broadcast program may be considered a violation of Civil Rights statutes or an intrusion, at common law, upon the private lives of individuals involved,\textsuperscript{20} a fortiori, the visual broadcast of one’s likeness as part of a commercial program should be deemed an invasion of the right of privacy. It would likewise appear that there is little difference in legal effect between an unauthorized use of one’s photograph or picture in a publi-
cation and an unauthorized telecast of one's image in a "live" program.

The use of a person's portrait without his consent for the purpose of exploiting the publisher's business is a violation of the right of privacy both at common law and under the statutes.

Where the right of privacy has been recognized as a distinct right at common law, its scope has not been limited merely to the unauthorized use of a name or portrait. It is conceivable, therefore, that in such jurisdictions it would be possible to enjoin the unauthorized televised broadcast of scenes of one's home life or other intimate activities unrelated to news reports, as an invasion of rights of privacy even though such telecasts were not transmitted for commercial purposes. Even in the case of a public character who may be deemed to have lost his right to prevent the televised broadcast of his likeness, such unauthorized invasion of his home should be actionable. Where, however, a person is of such public importance as to feature prominently in current news, his likeness may be telecast from any point to which the telecamera may be admitted without trespass. Moreover, a facsimile of a


23 See n. 21 supra; Brex v. Smith, 146 Atl. 34 (N.J. Ch., 1929).

24 See Chapter XXVIII. supra.
newspaper account of the activities of such a public figure may be transmitted. Likewise, a photograph or motion picture newsreel relating to such a person may be reproduced in television performances without infringing upon his right of privacy at common law or under the statutes.

Where a person voluntarily poses for a televised broadcast, he would be estopped from preventing its dissemination or from obtaining damages for the reproduction of his likeness. On the other hand, the fact that a person has voluntarily posed for a photograph or motion picture would not prevent an action based on the unauthorized televised broadcast of that picture.

Where a commercial telecast program reproduces the likeness of a person who was interviewed in a public place as part of an advertisement, and who had no knowledge of and did not consent to such commercial reproduction of his likeness, a cause of action for invasion of his right or privacy will lie at common law or under such statutes as may be applicable thereto.

If the person whose likeness is reproduced in a televised program is merely one of a large group whose likenesses


29 It is unnecessary to prove that the telecast facilities were paid for by the advertiser. The tort is committed even though the advertisement is gratuitous. See Wolins v. La Mode Chez Tappé, Inc., Supreme Court, N. Y. Co., Trial Term Part XIV., N.Y.L.J., Dec. 2, 1936, p. 1964, col. 1.

30 See § 462 supra.
§ 716. Television

are reproduced simultaneously in portraying a public event, and such reproduction is not an integral part of the commercial features of the program, no cause of action exists. If a gratuitous license is given to use one’s portrait for purposes of trade, it may be revoked at any time notwithstanding the licensee’s investment in exploiting that portrait in connection with his product. When a person has permitted the use of his picture for a televised broadcast or has consented to appear in such a performance, the broadcast station may make incidental use of the person’s picture in order to advertise the performance.

§ 716. Same: Unauthorized Use of Artist’s Performance.

A performing artist who contracts to render his services for a designated purpose or program has a valid cause of action for any unauthorized use of his performance. Just as an artist is actionably wronged when a phonograph record containing his renditions is broadcast without his consent, so may he obtain relief against the unauthorized use of an electrical transcription in a telecast program for which purpose he has not authorized his performance. Similarly, an artist has a meritorious cause of action to prevent the unauthorized televised use of a motion picture in which he has appeared for the limited purpose of exhibition in theaters.

Unless the performing artist has by contract assigned his rights to his performance, as contained in the film, to the producer of the motion picture, or has specifically

35 Ibid.
authorized such extended uses of his performance, he should be able to enjoin the unauthorized appropriation of his property therein. Such use of a motion picture would clearly involve an unauthorized use of the actor's portrait under the Civil Rights Law. In *Fairbanks v. Winik*, an actor who had appeared in a motion picture was not permitted to invoke Section 50 of the New York Civil Rights Law in order to prevent a producer from using the films in a different manner from that contemplated. In that case, the producer or his successor in interest sought to cut the film and exhibit it in the form of a series of playlets. This, it is submitted, can be distinguished from the use of the film in an entirely different entertainment medium, *viz.* television. There would appear to be no logical reason why an actor should not be permitted to invoke Section 50 of the New York statute or his common law rights in the event that his filmed performances are televised in a commercial program without his consent.


The appropriation of news from the daily papers by the broadcast stations has been enjoined as unfair competition. A facsimile transmission of a newspaper or any part thereof, would undoubtedly amount to an appropriation of the quasi-property of the newspaper publisher. Where the newspaper which is reproduced by the station in facsimile is protected by copyright, such a reproduction would also be an infringement thereof.

The acts of a television station in unfairly diminishing the value of an exclusive right of a competing station to reproduce a private event, by unauthorizedly trans-

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37 119 Misc. 809, 198 N.Y.Sup. 299 (1922).

mitting the identical program will be enjoined as unfair competition.\footnote{38a}

§ 718. Negative Covenants Between Artists and Producers as Affected by Television.

Unless the agreement between the artist and the producer expressly or by implication prohibits the artist from rendering his services in a televised program produced by another, the producer cannot enjoin the artist from so appearing. Thus, where an artist is engaged for the purpose of rendering his services in radio broadcast programs, in motion pictures or in other specified fields of entertainment, his agreement with the producer will not be deemed to extend to television appearances, unless by its terms the artist is obligated to render all of his services and appear exclusively on behalf of the producer.\footnote{39}

Television is recognized as a distinct medium of entertainment dissimilar from radio broadcasting in its present form. An analogy may be made to silent motion pictures and talking pictures and to the problems which have arisen in connection with the ownership of rights to material used therein.\footnote{40} It is reasonable to assume that if the relation between the artist and the producer contemplated television appearances, the agreement would so specify.\footnote{41}

§ 719. Copyright Problems.

Where a television performance has been reduced to physical form by way of a film combining photographs with sound, such a work would be copyrightable. Under Section 5(m) of the Act of 1909 "motion pictures other than photoplays" are classified as works which may be

\footnote{38a}{Pittsburgh Athletic Company} et al. v. KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938). See §§ 433 and 535A \textit{supra}.


\footnote{40}{See § 421 \textit{supra}.

registered for copyright protection. Television performances in written form may be considered the writings of an author and may be copyrighted as such, irrespective of the language of the classifications established in Section 5 of the Act of 1909.

Once copyright registration is obtained, the pertinent provisions of the Act of 1909 will protect the exclusive right of the copyright owner to print, publish and sell copies of his work as well as to control the public performance and mechanical reproduction thereof. These rights will vary with the determination as to whether the particular work copyrighted is dramatic or non-dramatic.

Where no copyright protection is obtained for creative works used in the television medium, the common law rights of the author thereof will survive a telecast public performance since the latter will not be deemed to be a divesting publication.

43 See § 601 supra.
44 See § 610 supra.
45 See § 652 supra.
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CONSTITUTION, 1787.

Art. 1, Sec. 8. The Congress shall have 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.

SCHEDULE OF COPYRIGHT ACTS IN FORCE.


December 18, 1919. An act to amend sections eight and twenty-one of the copyright act, approved March 4, 1909. (41 Stat. L., pt. 1, pp. 368–369.) [This act is now in effect only so far as section twenty-one is concerned.] See page 1310 infra.


May 23, 1928. An act to amend sections 57 and 61 of "An act to amend and consolidate the acts respecting copyright"
COPYRIGHT ACT OF 1909.

AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

Exclusive right to print, publish, and vend.

(a) To print, reprint, publish, copy, and vend the copyrighted work;

Exclusive right to translate, dramatize, arrange, and adapt, etc.

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

Exclusive right to deliver lectures, sermons, etc.

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

To represent dramatic works, or make record, or exhibit or perform, etc.

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;
To perform music and make arrangement, setting, or record.—
Act not retroactive.—Music by foreign author.—Control of
mechanical musical reproduction.—Royalty for use of music
on records, etc.—Notice and use of music on records.—
License to use music on records.

(e) To perform the copyrighted work publicly for profit if it
be a musical composition; and for the purpose of public perform-
ance for profit,¹ and for the purposes set forth in subsection (a)
hereof, to make any arrangement 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 from which it may
be read or reproduced: Provided, That the provisions of this Act,
so far as they secure copyright controlling the parts of instru-
ments serving to reproduce mechanically the musical work, shall
include only compositions published and copyrighted after this
Act goes into effect, and shall not include the works of a foreign
author or composer unless the foreign state or nation of which
such author or composer is a citizen or subject grants, either by
treaty, convention, agreement, or law, to citizens of the United
States similar rights: And provided further, and as a condition
of extending the copyright control to such mechanical reproduc-
tions, That whenever the owner of a musical copyright has used
or permitted or knowingly acquiesced in the use of the copyrighted
work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use
of the copyrighted work upon the payment to the copyright pro-
prietor of a royalty of two cents on each such part manufactured,
to be paid by the manufacturer thereof; and the copyright pro-
prietor may require, and if so the manufacturer shall furnish, a
report under oath on the twentieth day of each month on the
number of parts of instruments manufactured during the previous
month serving to reproduce mechanically said musical work, and
royalties shall be due on the parts manufactured during any
month upon the twentieth of the next succeeding month. The
payment of the royalty provided for by this section shall free the

¹ As printed in U. S. Code, title 17, section 1, subsection (e), lines one to
three read: "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 * * *," As printed
in this bulletin the text agrees with the construction placed thereon by
Mayer, J., in Hubbell v. Royal Pastime Amusement Co., D.C., S.D. of N.Y.,
articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. \textit{And provided further}, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

\textbf{Failure to pay royalties.}

In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

\textbf{Reproduction of music on coin-operated machines.}

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

\textbf{Right at common law or in equity.}

Sec. 2. That nothing in this Act 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.

\textbf{Component parts of copyrightable work.---Composite works or periodicals.}

Sec. 3. That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to
the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.

**Works protected.**

Sec. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

**Classification of copyright works.**

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

**Books, composite cyclopaedic works, directories, gazeteers, etc.**

(a) Books, including composite and cyclopaedic works, directories, gazeteers, and other compilations;
(b) Periodicals, including newspapers;
(c) Lectures, sermons, addresses (prepared for oral delivery);
(d) Dramatic or dramatico-musical compositions;
(e) Musical compositions;
(f) Maps;
(g) Works of art; models or designs for works of art;
(h) Reproductions of a work of art;
(i) Drawings or plastic works of a scientific or technical character;
(j) Photographs;
(k) Prints and pictorial illustrations;
(l) Motion-picture photoplays;
(m) Motion pictures other than photoplays;¹

**Classification does not limit copyright.**

*Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.

**Compilations, abridgments, dramatizations, translations, new editions.—Subsisting copyright not affected.**

Sec. 6. That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in

¹ The changes marked, and the addition of the words printed in italics are authorized by the amendatory Act of August 24, 1912, printed in full on pages 1304–8 *infra.*
the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

Not subject-matter of copyright; works in public domain;
Government publications.

Sec. 7. That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: Provided, however, That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

Copyright to author or proprietor for terms specified in Act.—Foreign authors who may secure copyright protection.

Sec. 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: Provided, however, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

Alien authors domiciled in U. S.

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or
Authors, when citizens of countries granting reciprocal rights.—

International agreement.

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

Presidential proclamation.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require.

Publication with notice initiates copyright.

Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act.

Registration of copyright.—Copyright certificate.

Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

Copyright protection of unpublished works: lectures, dramas, music, etc.—Deposit of copies after publication.

Sec. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one
print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale.

Two complete copies of best edition.—Label and print.—Work by foreigner, published abroad, only ONE copy required.—Periodical contributions.—Work not reproduced in copies for sale.—No action for infringement until deposit of copies.

SEC. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until

1 The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912, printed in full on pages 1304–8 infra.

2 The words printed in italics in section 12 are inserted by the amendatory Act of March 28, 1914, which also provides "That all Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed." For full text of Act see page 1309 infra.
the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

**Failure to deposit copies.**—Register of copyrights may demand copies. — Failure to deposit on demand. — Fine $100 and retail price of 2 copies, best edition. — Forfeiture of copyright.

**Sec. 13.** That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

**Postmaster’s receipt.**

**Sec. 14.** That the postmaster to whom are delivered the articles deposited as provided in sections eleven and twelve of this act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.


**Sec. 15.** That of the printed book or periodical specified in section five, subsections (a) and (b) of this act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States.
States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: Provided, however, That said requirements shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this act, or to works printed or produced in the United States by any other process than those above specified in this section.¹

Affidavit of American manufacture.—Printing and binding of the book.—Establishment where printing was done.—Date of publication.

Sec. 16. That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.

¹ Section 15 as amended by the Act of July 3, 1926. For full text see page 1311 infra.
False affidavit, a misdemeanor; fine, $1,000 and forfeiture of copyright

Sec. 17. That any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.

Notice of copyright.—Notice on maps, copies of works of art, photographs, and prints.—Notice on accessible portion.—Notice on existing copyright works.

Sec. 18. That the notice of copyright required by section nine of this act shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.

Notice of copyright on book.—On periodical.—One notice in each volume or periodical.

Sec. 19. That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: Provided, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.
Omission of notice by accident or mistake.—Innocent infringement.

Sec. 20. That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

Book published abroad in the English language.—Ad interim copyright term.

Sec. 21. That in the case of a book first published abroad in the English language the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office.¹

Extension to full term.—Deposit of copies, filing of affidavit.

Sec. 22. That whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section fifteen of this Act, and whenever the provisions of this Act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.

¹ Section 21 as amended by the Act of Dec. 28, 1919.
Duration of copyright: First term, 28 years.—Posthumous works, periodicals, cyclopaedic or composite works.—Renewal term, 28 years.—Other copyrighted works, first term 28 years.—Renewal term, 28 years; to author, widow, children, heirs, or next of kin.—Notice that renewal term is desired.—Copyright ends in 28 years unless renewed.

Sec. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Extension of subsisting copyrights.—Proprietor entitled to renewal for composite work.—Renewal application.

Sec. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term
provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author’s executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

Infringement of copyright.

Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

Injunction.

(a) To an injunction restraining such infringement;

Damages.—Proving sales.—Newspaper reproduction of photograph; recovery, $50–$200.—Infringement by motion pictures.—Undramatized or non-dramatic work, maximum damages, $100.—Dramatic work, maximum damages, $5,000.—Maximum recovery, $5,000.—Minimum recovery, $250.

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in 1 case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and in the case of the infringement

1 The word “the” before the words “case of a newspaper reproduction,” etc., was struck out by the amendatory Act of August 24, 1912.
of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.2

Painting, statue, or sculpture, $10 for every infringing copy.

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Other works, $1 for every infringing copy.

Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Lectures, $50 for every infringing delivery.

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

2 The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912, printed in full on pages 1304–8 infra.
Dramatic or musical works, $100 for first and $50 for subsequent infringing performance.—Other musical compositions, $10 for every infringing performance.

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

Delivering up infringing articles.

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

Destruction of infringing copies, etc.

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order;

Infringement by mechanical musical instruments.—Injunction may be granted.—Recovery royalty.—Notice to proprietor of intention to use.—Damages, three times amount provided.

—Temporary injunction.

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, send-
ing to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Rules for practice and procedure.

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States.

Judgment enforcing remedies.

Sec. 26. That any court given jurisdiction under section thirty-four of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided.

Proceedings, injunction, etc., may be united in one action.

Sec. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

Penalty for willful infringement.—Oratorios, cantatas, etc., may be performed.

Sec. 28. That any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court: Provided, however, That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo chorus by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.
False notice of copyright (penalty for).—Fraudulent removal of notice, fine, $100–$1,000.—Issuing, selling, or importing article bearing false notice; fine $100.

Sec. 29. That any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this Act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars.

Importation prohibited of articles bearing false notice and piratical copies.

Sec. 30. That the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited.

Prohibition of importation of books.—Exceptions to prohibition of importation.

Sec. 31. That during the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this Act, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photo-engraving process not performed within the limits of the United States, in accordance with the provisions of section fifteen of this Act, shall be, and is hereby, prohibited: Provided, however, That, except as regards piratical copies, such prohibition shall not apply:

Works for the blind.

(a) To works in raised characters for the use of the blind;
Foreign newspapers or magazines.

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization;

Books in foreign languages of which only translations are copyrighted.

(c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country;

Importation of authorized foreign books permitted.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

For individual use and not for sale.

First. When imported, not more than one copy at one time, for individual use and not for sale; but such privilege of importation shall not extend to a foreign reprint of a book by an American author copyrighted in the United States;

For the use of the United States.

Second. When imported by the authority or for the use of the United States;

For the use of societies, libraries, etc.

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith, by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State, school, college, university, or free public library in the United States;

Libraries purchased en bloc.—Books brought personally into the United States.

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions,
or libraries designated in the foregoing paragraph, or form parts of the libraries of personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale:

**Imported copies not to be used to violate copyright.**

*Provided,* That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this Act, and such unlawful use shall be deemed an infringement of copyright.

**Seizure of unlawfully imported copies.—Copies of authorized books imported may be returned.**

**Sec. 32.** That any and all articles prohibited importation by this Act which are brought into the United States from any foreign country (except in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the court, as the case may be, shall direct: *Provided, however,* That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this Act may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve willful negligence or fraud.

**Secretary of Treasury and Postmaster-General to make rules to prevent unlawful importation.**

**Sec. 33.** That the Secretary of the Treasury and the Postmaster-General are hereby empowered and required to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act, and may require notice to be given to the Treasury Department or Post-Office Department, as the case may be, by copyright proprietors or injured parties, of the actual or contemplated importation of articles prohibited importation by this Act, and which infringe the rights of such copyright proprietors or injured parties.
Jurisdiction of courts in copyright cases.

Sec. 34. That all actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

District in which suit may be brought.

Sec. 35. That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.

Injunctions may be granted.

Sec. 36. That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

Certified copy of papers filed.

Sec. 37. That the clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office.

Judgments, etc., may be reviewed on appeal or writ of error.

Sec. 38. That the orders, judgments, or decrees of any court mentioned in section thirty-four of this Act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively.
No criminal proceedings shall be maintained after three years.

Sec. 39. That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose.

Full costs shall be allowed.

Sec. 40. That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Copyright distinct from property in material object.—Transfer of any copy of copyrighted work permitted.

Sec. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

Copyright may be assigned, mortgaged, or bequeathed by will.

Sec. 42. That copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

Assignment executed in foreign country to be acknowledged.

Sec. 43. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

Assignments to be recorded.

Sec. 44. That every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of
which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

**Register of copyrights to record assignments.**

Sec. 45. That the register of copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this Act he shall furnish to any person requesting the same a certified copy thereof under the said seal.

**Assignee's name may be substituted in copyright notice.**

Sec. 46. That when an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this Act.

**Copyright records.**

Sec. 47. That all records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the copyright office, Library of Congress, District of Columbia, and shall be under the control of the register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights.

**Register of copyrights and assistant register of copyrights.**

Sec. 48. That there shall be appointed by the Librarian of Congress a register of copyrights, at a salary of four thousand dollars per annum, and one assistant register of copyrights, at a salary of three thousand dollars per annum, who shall have authority during the absence of the register of copyrights to attach the copyright office seal to all papers issued from the said office and to sign such certificates and other papers as may be necessary. There shall also be appointed by the Librarian such subordinate assistants to the register as may from time to time be authorized by law.

**Register of copyrights to deposit and account for fees.**—Shall make monthly report of fees.

Sec. 49. That the register of copyrights shall make daily deposits in some bank in the District of Columbia, designated
for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this Act, and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unapplied balances.

**Bond of register of copyrights.**

Sec. 50. That the register of copyrights shall give bond to the United States in the sum of twenty thousand dollars, in form to be approved by the Solicitor of the Treasury and with sureties satisfactory to the Secretary of the Treasury, for the faithful discharge of his duties.

**Annual report of register of copyrights.**

Sec. 51. That the register of copyrights shall make an annual report to the Librarian of Congress, to be printed in the annual report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works which have been deposited in the copyright office during the fiscal year, under the provisions of this Act.

**Seal of copyright office.**

Sec. 52. That the seal provided under the Act of July eighth, eighteen hundred and seventy, and at present used in the copyright office, shall continue to be the seal thereof, and by it all papers issued from the copyright office requiring authentication shall be authenticated.

**Rules for the registration of copyrights.**

Sec. 53. That, subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act.
Record books.—Entry of copyright.

Sec. 54. That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof.

Certificate of registration.—Nationality of author.—Certificate for book to state receipt of affidavit.—Certificate may be given to any person.—Receipt for copies deposited.

Sec. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered from which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyright shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

1 The words printed in italics indicate the amendments authorized by the amendatory Act of March 2, 1913, printed in full on pages 1308-9 infra.
Index to copyright registrations.—Catalogue of copyright entries.—Catalogue cards.—Catalogues and indexes prima facie evidence.

SEC. 56. That the register of copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalogue of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration.

Distribution of catalogue of copyright entries.—Subscription price.—Superintendent of Documents to receive subscriptions.

SEC. 57. That the said printed current catalogues as they are issued shall be promptly distributed by the copyright office to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, and they shall also be furnished in whole or in part to all parties desiring them at a price to be determined by the register of copyrights for each part of the catalogue not exceeding ten dollars for the complete yearly catalogue of copyright entries.1 The consolidated catalogues and indexes shall also be supplied to all persons ordering them at such prices as may be determined to be reasonable, and all subscriptions for the catalogues shall be received by the Superintendent of Public Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

1 Words printed in italics indicate amendments authorized by the amendatory Act of May 23, 1928, printed in full at page 1312 infra.
Record books, etc., open to inspection.—Copies may be taken of entries in record books.

Sec. 58. That the record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the register of copyrights and approved by the Librarian of Congress.

Disposition of copyright deposits.—Preservation of copyright deposits.

Sec. 59. That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

Disposition of copyright deposits.—Manuscript copies to be preserved.

Sec. 60. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: Provided, That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in this Act: And provided further, That no manuscript of an unpublished work shall be
destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it.

Fees.—Fee for registration.—Fee for certificate.—Fee for recording assignment.—Fee for copy of assignment.—Fee for recording notice of user upon mechanical musical instruments.—Fee for comparing copy of assignment.—Fee for recording renewal of copyright.—Fee for recording transfer of proprietorship.—Fee for search.—Only one registration required for work in several volumes.

SEC. 61. That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, $2, which sum is to include a certificate of registration under seal: Provided, That in the case of any unpublished work registered under the provisions of section 11, the fee for registration with certificate shall be $1, and in the case of a published photograph the fee shall be $1 where a certificate is not desired. For every additional certificate of registration made, $1. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in section one, subsection (e), or for any copy of such assignment or license, duly certified, $2 for each copyright office record-book page or additional fraction thereof over one-half page. For recording the notice of user or acquiescence specified in section one, subsection (e), $1 for each notice of not more than five titles. For comparing any copy of an assignment with the record of such document in the copyright office and certifying the same under seal, $2. For recording the renewal of copyright provided for in sections twenty-three and twenty-four, $1. For recording the transfer of the proprietorship of copyrighted articles, ten cents for each title of a book or other article, in addition to the fee prescribed for recording the instrument of assignment. For any requested search of copyright office records, indexes, or deposits, $1 for each full hour of time consumed in making such search: Provided, That only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time.

1 Words printed in italics indicate amendments authorized by the amendatory Act of May 23, 1928, printed in full at page 1312 infra.
Definitions: “Date of publication”.—“Author”.

Sec. 62. That in the interpretation and construction of this Act “the date of publication” shall in the case of a work of which copies are reproduced for sale or distribution be held to be 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, and the word “author” shall include an employer in the case of works made for hire.

Repealing clause.

Sec. 63. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, but nothing in this Act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Date of enforcement.

Sec. 64. That this Act shall go into effect on the first day of July, nineteen hundred and nine.

Approved, March 4, 1909.

[60th Congress, 2d session.]

NOTE TO SECTION 18, PROVISO.

(see page 1286, § 20.)

Notice of copyright: Act of 1874.

The Act of June 18, 1874, provides that the notice of copyright to be inscribed on each copy of a copyrighted work shall consist of the following words:

“Entered according to Act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington”; or, . . . the word “Copyright,” together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: “Copyright, 18—, by A. B.”
AN ACT To amend sections five, eleven, and twenty-five of an Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine.

Act of August 24, 1912.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections five, eleven, and twenty-five of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine, be amended to read as follows:

Classification of copyright works.

"Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

Books, composite, cyclopædic works; directories, gazetteers, etc.

"(a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations;

"(b) Periodicals, including newspapers;

"(c) Lectures, sermons, addresses (prepared for oral delivery);

"(d) Dramatic or dramatico-musical compositions;

"(e) Musical compositions;

"(f) Maps;

"(g) Works of art; models or designs for works of art;

"(h) Reproductions of a work of art;

"(i) Drawings or plastic works of a scientific or technical character;

"(j) Photographs;

"(k) Prints and pictorial illustrations;

"(l) Motion-picture photoplays;

"(m) Motion pictures other than photoplays:

Motion-picture photoplays; motion pictures not photoplays.—Classification does not limit copyright.

"Provided, nevertheless, That the above specifications shall not be held to limit the subject matter of copyright as defined in
section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

Copyright protection of unpublished works: lectures, dramas, music, etc.—Deposit of copies after publication.

“Sec. 11. That copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale.”

Infringement of copyright.

“Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

Injunction.

‘‘(a) To an injunction restraining such infringement;

Damages.—Proving sales.—Newspaper reproduction of photograph; recovery, $50–$200.—Infringement by motion pictures: Undramatized or non-dramatic work, maximum damages, $100.—Dramatic work, maximum damages, $5,000.—Maximum recovery, $5,000.—Minimum recovery, $250.

‘‘(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear
to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

Painting, statue, or sculpture, $10 for every infringing copy.

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Other works, $1 for every infringing copy.

"Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Lectures, $50 for every infringing delivery.

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;
Dramatic or musical works, $100 for first and $50 for subsequent infringing performance.—Other musical compositions, $10 for every infringing performance.

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

Delivering up infringing articles.

"(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

Destruction of infringing copies, etc.

"(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices or other means for making such infringing copies as the court may order.

Infringement by mechanical musical instruments.—Injunction may be granted.—Recovery of royalty.—Notice to proprietor of intention to use.—Damages, three times amount provided.—Temporary injunction.

"(e) Wherenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his
failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Rules for practice and procedure.

"Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."

Approved, August 24, 1912.
[62d Congress, 2d session]


AN ACT To amend section fifty-five of "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine.

Act of March 2, 1913.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-five of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine, be amended to read as follows:

Certificate of registration.—Nationality of author.—Certificate for book to state receipt of affidavit.—Certificate may be given to any person.—Certificate may be given to any person.—Receipt for copies deposited.

"Sec. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully
identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.”

Approved, March 2, 1913.

[62d Congress, 3d session]


An ACT To amend section twelve of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine.

Act of March 28, 1914.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twelve of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine, be, and the same is hereby, amended so as to read as follows:

Deposit of two copies required.—Work by foreigner, published abroad, only one copy required.—Manufacturing requirement.—Copies not reproduced for sale, one copy required.—Infringements.

“Sec. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best
edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction, to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

Repeal of conflicting laws.

Sec. 2. That all Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved, March 28, 1914.

[63d Congress, 2d session]


AN ACT To amend sections eight and twenty-one of the Copyright Act, approved March 4, 1909.

Act of Dec. 18, 1919.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 8 and 21 of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March 4, 1909, be amended to read as follows:

[Sec. 8 is omitted as no longer in effect.]

Book published abroad in the English language.—Deposit within 60 days of publication.—Ad interim copyright for 4 months.

"Sec. 21. That in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than
sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office."

Approved, December 18, 1919.

[66th Congress, 2d session]
published abroad in the English language seeking ad interim protection under this Act, or to works printed or produced in the United States by any other process than those above specified in this section.

Approved, July 3, 1926.
[69th Congress, 1st session]

AN ACT To amend sections 57 and 61 of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March 4, 1909.

Act of May 23, 1928.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 57 and 61 of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March 4, 1909 (section 57 and section 61, title 17, United States Code), be, and the same are hereby, amended so as to read as follows:

"Sec. 57. That the said printed current catalogues as they are issued shall be promptly distributed by the copyright office to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster General, and they shall also be furnished in whole or in part to all parties desiring them at a price to be determined by the register of copyrights for each part of the catalogue not exceeding $10 for the complete yearly catalogue of copyright entries. The consolidated catalogues and indexes shall also be supplied to all persons ordering them at such prices as may be determined to be reasonable, and all subscriptions for the catalogues shall be received by the Superintendent of Public Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

Sec. 61. That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, §2, which sum is to include a certificate of registration under seal: Provided,
ACTS AMENDATORY OF THE COPYRIGHT ACT

That in the case of any unpublished work registered under the provisions of section 11, the fee for registration with certificate shall be $1, and in the case of a published photograph the fee shall be $1 where a certificate is not desired. For every additional certificate of registration made, $1. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in section 1, subsection (e), or for any copy of such assignment or license, duly certified, $2 for each copyright office record-book page or additional fraction thereof over one-half page. For recording the notice of user or acquiescence specified in section 1, subsection (e), $1 for each notice of not more than five titles. For comparing any copy of an assignment with the record of such document in the copyright office and certifying the same under seal, $2. For recording the renewal of copyright provided for in sections 23 and 24, $1. For recording the transfer of the proprietorship of copyrighted articles, 10 cents for each title of a book or other article, in addition to the fee prescribed for recording the instrument of assignment. For any requested search of copyright office records, indexes, or deposits, $1 for each hour of time consumed in making such search: Provided, That only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time.

Sec. 2. This Act shall go into effect on July 1, 1928.

Approved, May 23, 1928.

[70th Congress, 1st session.]
RULES ADOPTED BY THE SUPREME COURT OF THE UNITED STATES FOR PRACTICE AND PROCEDURE UNDER SECTION 25 OF AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, APPROVED MARCH 4, 1909. TO GO INTO EFFECT JULY 1, 1909.*

1. The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the Act of March fourth, nineteen hundred and nine, entitled "An Act to amend and consolidate the Acts respecting copyright."

2. A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible.

3. Upon the institution of any action, suit, or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating, upon the best of his knowledge, information, and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk.

* The Rules of Civil Procedure for the District Courts of the United States provide:

"These rules . . . do not apply to proceedings . . . in copyright . . . except insofar as they may be made applicable thereto by rule promulgated by the Supreme Court of the United States" Rule 81(a)(1) thereof.
a bond executed by at least two sureties and approved by the
court or a commissioner thereof.

4.

Such bond shall bind the sureties in a specified sum, to be
fixed by the court, but not less than twice the reasonable value
of such infringing copies, plates, records, molds, matrices, or
other means for making such infringing copies, and be conditioned
for the prompt prosecution of the action, suit or proceeding; for
the return of said articles to the defendant, if they or any of them
are adjudged not to be infringements, or if the action abates, or
is discontinued before they are returned to the defendant; and
for the payment to the defendant of any damages which the court
may award to him against the plaintiff or complainant. Upon the
filing of said affidavit and bond, and the approval of said bond,
the clerk shall issue a writ directed to the marshal of the district
where the said infringing copies, plates, records, molds, matrices,
etc., or other means of making such infringing copies shall be
stated in said affidavit to be located, and generally to any marshal
of the United States, directing the said marshal to forthwith seize
and hold the same subject to the order of the court issuing said
writ, or of the court of the district in which the seizure shall
be made.

5.

The marshal shall thereupon seize said articles or any smaller or
larger part thereof he may then or thereafter find, using such
force as may be reasonably necessary in the premises, and serve
on the defendant a copy of the affidavit, writ, and bond by deliver-
ing the same to him personally, if he can be found within the
district or if he can not be found, to his agent, if any, or to the
person from whose possession the articles are taken, or if the owner,
agent, or such person can not be found within the district by leave-
ing said copy at the usual place of abode of such owner or agent,
with a person of suitable age and discretion, or at the place where
said articles are found, and shall make immediate return of such
seizure, or attempted seizure, to the court. He shall also attach
to said articles a tag or label stating the fact of such seizure and
warning all persons from in any manner interfering therewith.
6. A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

7. Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.

8. Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

9. The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

10. Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.
Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

For services in cases arising under this section, the marshal shall be entitled to the same fees as are allowed for similar services in other cases.

COMPLAINT FOR INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITION

1. Allegation of jurisdiction.

2. Prior to March 2, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled ...........

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class ......., No. .......

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of ....... and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by
publishing and placing upon the market a book entitled ..........., which was copied largely from plaintiff's copyrighted book, entitled ...........

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2".

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies in his possession or under his control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.
INTERNATIONAL COPYRIGHT RELATIONS.

Presidential Proclamations.

The following proclamations have been issued by the President, by which copyright protection is granted in the United States to works of authors who are citizens or subjects of the countries named. It is to be noted that this protection does not include "copyright controlling the parts of instruments serving to reproduce mechanically the musical work" provided in Sec. 1 (e) of the Act of March 4, 1909, except in the case of the countries named in the second part of this list.

July 1, 1891—Belgium, France, Great Britain and the British possessions, and Switzerland. (Stat. L., vol. 27, pp. 981–982.)
April 15, 1892—Germany. (Stat. L., vol. 27, pp. 1021–1022.)
October 31, 1892—Italy. (Stat. L., vol. 27, p. 1043.)
February 27, 1896—Mexico. (Stat. L., vol. 29, p. 877.)
May 25, 1896—Chile. (Stat. L., vol. 29, p. 880.)
April 9, 1908—Convention between the United States and other powers on literary and artistic copyrights, signed at the City of Mexico, January 27, 1902. (This treaty had previously been ratified and the ratifications deposited by the following countries: Guatemala, Salvador, Costa Rica, Honduras, and Nicaragua.)

August 11, 1908—Japan. (Treaty of May 19, 1908, for protection in Korea.) (Stat. L., vol. 35, pt. 2, pp. 2041-2043.)

April 9, 1910—Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland. (Stat. L., vol. 36, pt. 2, pp. 2685-2686.)


May 26, 1911—Sweden. (Effective June 1, 1911.) (Stat. L., vol. 37, pt. 2, pp. 1682-1683.)


October 15, 1912—Hungary. (Copyright convention between the United States and Hungary, effective October 16, 1912, including protection under Sec. 1 (e).) (Stat. L., vol. 37, pt. 2, pp. 1631-1633.)

June 13, 1914—Copyright convention between the United States and other American Republics, signed at Buenos Aires, August 11, 1910. (This convention is understood to be in effect as between the United States, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay.) (Stat. L., vol. 38, pt. 2, pp. 1785-1798. Spanish, English, Portuguese, and French texts.)

October 12, 1921—Siam. (Treaty of December 16, 1920, Art. XII.)

February 14, 1927—Poland. (Effective Feb. 16, 1927, including protection under Sec. 1 (e).)

April 27, 1927—Czechoslovakia. (Effective Mar. 1, 1927, including protection under Sec. 1 (e).)

May 14, 1928—Rumania.

Dec. 15, 1928—Finland. (Effective Jan. 1, 1929, including protection under Sec. 1 (e).)

Sept. 28, 1929—Irish Free State (effective Oct. 1, 1929, including protection under Sec. 1 (e)).

Feb. 23, 1932—Greece (effective Mar. 1, 1932, including protection under Sec. 1 (e)).

Sept. 29, 1933—Palestine (excluding Trans-Jordan) (effective Oct. 1, 1933, including protection under Sec. 1 (e)).
Apr. 7, 1934—Danzig (Free City of) (including protection under Sec. 1 (e)).

Aug. 23, 1934—Argentina (including protection under Sec. 1 (e)).

**PRESIDENTIAL PROCLAMATIONS UNDER SECTION 1 (e).**


June 14, 1911—Belgium (effective July 1, 1909), Luxemburg (effective June 29, 1910), and Norway (effective Sept. 9, 1910). (Stat. L., vol. 37, pt. 2, pp. 1687-1690.)


October 15, 1912—Hungary. (See above.)


February 26, 1923—The Netherlands. (Effective Oct. 2, 1922.)

December 27, 1923—Canada. (Effective Jan. 1, 1924.)

June 26, 1924—The Union of South Africa. (Effective July 1, 1924.)

November 22, 1924—Switzerland.

March 11, 1925—Austria. (Effective Aug. 1, 1920.)

November 18, 1925—Chile. (Effective July 1, 1925.)

February 14, 1927—Poland. (See above.)

April 27, 1927—Czechoslovakia. (See above.)

May 14, 1928—Rumania. (See above.)

Dec. 15, 1928—Finland. (See above.)

Sept. 28, 1929—Irish Free State. (See above.)
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Feb. 23, 1932—Greece. (Effective Mar. 1, 1932.)
Sept. 29, 1933—Palestine (excluding Trans-Jordan) (effective Oct. 1, 1933.)
Apr. 7, 1934—Danzig (Free City of).
Aug. 23, 1934—Argentina.
Oct. 10, 1934—Spain.

Copyright.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A Proclamation.

Whereas it is provided by the act of Congress of March 4, 1909, entitled "An act to amend and consolidate the acts respecting copyright," that the benefits of said act, excepting the benefits under section 1 (e) thereof, as to which special conditions are imposed, shall extend to the work of an author or proprietor who is a citizen or subject of a foreign State or nation, only upon certain conditions set forth in section 8 of said act, to wit:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign State or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto:

And whereas it is also provided by said section that "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time as the purposes of this act may require":

And whereas satisfactory evidence has been received that in Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland the law permits and since July 1, 1909, has permitted to
citizens of the United States the benefit of copyright on substantially the same basis as to citizens of those countries:

Now, therefore I, WILLIAM HOWARD TAFT, President of the United States of America, do declare and proclaim that one of the alternative conditions specified in section 8, of the act of March 4, 1909, is now fulfilled, and since July 1, 1909, has continuously been fulfilled, in respect to the citizens or subjects of Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland, and that the citizens or subjects of the aforementioned countries are and since July 1, 1909, have been entitled to all of the benefits of the said act other than the benefits under section 1 (e) thereof, as to which the inquiry is still pending.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this ninth day of April, [SEAL.] in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America the one hundred and thirty-fourth.

WM. H. TAFT.

By the President:

P. C. KNOX,
Secretary of State.

BERNE CONVENTION.

Text of the Convention creating an International Union for the protection of Literary and Artistic Works, Signed at Berne, Switzerland, September 9, 1886, Ratified September 5, 1887.

ARTICLE I.

Union to protect literary and artistic works.

The contracting States are constituted into an Union for the protection of the rights of authors over their literary and artistic works.

ARTICLE II.

Authors to enjoy in other countries the rights granted to natives.

Authors of any one of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

Conditions and formalities of country of origin to be fulfilled.—Term of protection.

The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin.

Country of first publication to be considered country of origin.

The country of origin of the work is that in which the work is first published, or if such publication takes

Amendments to the International Copyright Convention of September 9, 1886, agreed to at Paris, May 4, 1896.

ARTICLE I.

The International Convention of the 9th of September 1886, is modified as follows:

1. ARTICLE II. The first paragraph of Article II shall run as follows:

"Authors of any countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, either not published or published for the first time in one of those countries, the rights which the respective laws do now or shall hereafter grant to natives."
place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law.

Unpublished works.
For unpublished works the country to which the author belongs is considered the country of origin of the work.

ARTICLE III.
Publishers of works published in one of the countries of the Union protected.
The stipulations of the present Convention apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to the Union.

ARTICLE IV.
Definition of "literary and artistic works."
The expression "literary and artistic works" comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical works; musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE V.
Exclusive right of translation.
Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other coun-

A fifth paragraph is furthermore added which runs thus:

Posthumous works.
"Posthumous works are included amongst protected works."

2. ARTICLE III. Article III shall run as follows:
"Authors, not subjects of one of the countries of the Union, but who shall have published, or caused to be published for the first time, their literary or artistic works in one of those countries, shall enjoy for those works the protection accorded by the Berne Convention, and by the present additional act."

Right of translation expires after ten years.
3. ARTICLE V. The first paragraph of Article V shall run as follows:
"Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other
tries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.

Works published in incomplete parts.
For works published in incomplete parts ("livraisons") the period of ten years commences from the date of publication of the last part of the original work.

Works published in several volumes.
For works composed of several volumes published at intervals, as well as for bulletins or collections ("cahiers") published by literary or scientific societies, or by private persons, each volume, bulletin, or collection is, with regard to the period of ten years, considered a separate work.

Terms to date from end of year of publication.
In the cases provided for by the present article, and for the calculation of the period of protection, the 31st of December of the year in which the work was published is admitted as the date of publication.

ARTICLE VI.
Translators protected.
Authorized translations are protected as original works. They consequently enjoy the protection stipulated in Articles II and III as regards their unauthorized reproduction in the countries of the Union.

New translations by other writers.
It is understood that, in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.
Reproduction of newspaper articles.

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical.

Articles of political discussion, etc., not protected.

This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or current topics.

Extracts from literary or artistic works.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them.

Serial novels protected.

4. ARTICLE VII. Article VII shall run as follows:

"Serial novels ('Romans-feuillontons'), including novels published in newspapers or periodicals of one of the countries of the Union, cannot be reproduced, in original or in translation, in the other countries, without the authorization of their authors or of their lawful representatives.

Newspaper articles protected.

"This applies equally to other articles in newspapers or periodicals, whenever the authors or publishers shall have expressly declared in the paper or periodical in which they may have published them, that they forbid their reproduction.

Periodicals protected.

"For periodicals it is sufficient if the prohibition is made in a general way, at the beginning of each number.

Reproduction permitted if credit is given.

"In the absence of prohibition, reproduction will be permitted on condition of indicating the source.

"This prohibition cannot in any case apply to articles of political discussion, to the news of the day, or to current topics."
ARTICLE IX.

Representation of dramatic or dramatico-musical works.

The stipulations of Article II apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

Translation of dramatic works.

Authors of dramatic or dramatico-musical works, or their lawful representatives, are, during the existence of their exclusive right of translation, equally protected against the unauthorized public representation of translations of their works.

Public performance of musical works.

The stipulations of Article II apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance.

ARTICLE X.

Adaptations, etc., considered as infringement.

Unauthorized indirect appropriations of a literary or artistic work of various kinds, such as adaptations, arrangements of music, etc., are specially included amongst the illicit reproductions to which the present Convention applies, when they are only the reproduction of a particular work, in the same form, or in another form, with non-essential alterations, or abridgments, so made as not to confer the character of a new original work.

Courts of the various countries to conform to their own laws.

It is agreed that, in the application of the present article, the tri-
bunals of the various countries of the Union will, if there is occasion, conform themselves to the provisions of their respective laws.

ARTICLE XI.

Author's name to be indicated on work.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

Publisher of anonymous or pseudonymous works considered as representative of author.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, reputed the lawful representative of the anonymous or pseudonymous author.

Courts may require certificate of accomplishment of formalities.

It is, nevertheless, agreed that the tribunals may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article II.

ARTICLE XII.

Seizure of pirated copies.

Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection.

The seizure shall take place con-

5. ARTICLE XII. Article XII shall run as follows:

"Pirated works may be seized by the competent authorities of the countries of the Union where the original work has a right to legal protection."
formally to the domestic law of each State.

"The seizure will take place conformably to the domestic legislation of each country."

**ARTICLE XIII.**
Each government to exercise supervision.

It is understood that the provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right.

**ARTICLE XIV.**
Convention to apply to all works not in public domain at the time of its going into force.

Under the reserves and conditions to be determined by common agreement,* the present Convention applies to all works which at the moment of its coming into force have not fallen into the public domain in the country of origin.

**ARTICLE XV.**
Right of governments to make separate treaties reserved.

It is understood that the Governments of the countries of the Union reserve to themselves respectively the right to enter into separate and particular arrangements between each other, provided always that such arrangements confer upon authors or their lawful representatives more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention.

* See paragraph 4 of Final Protocol, pages 1334-5 infra.
ARTICLE XVI.

International office.

An International Office is established, under the name of "Office of the International Union for the Protection of Literary and Artistic Works."

This Office, of which the expenses will be borne by the Administrations of all the countries of the Union, is placed under the high authority of the Superior Administration of the Swiss Confederation, and works under its direction. The functions of this Office are determined by common accord between the countries of the Union.

ARTICLE XVII.

Revisions of Convention.

The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Future conferences.

Questions of this kind, as well as those which are of interest to the Union in other respects, will be considered in Conferences to be held successively in the countries of the Union by delegates of the said countries.

Alterations of Convention must be by unanimous consent.

It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries comprising it.

ARTICLE XVIII.

Accession of other countries.

Countries which have not become parties to the present Convention, and which grant by their domestic
law the protection of rights secured by this Convention, shall be admitted to accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention.

ARTICLE XIX.
Accession for colonies or foreign possessions.
Countries acceding to the present Convention shall also have the right to accede thereto at any time for their colonies or foreign possessions.
They may do this either by a general declaration comprehending all their colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

ARTICLE XX.
Convention to take effect three months after exchange of ratifications.
The present Convention shall be put in force three months after the exchange of the ratifications, and shall remain in effect for an indefinite period until the termination of a year from the day on which it may have been denounced.

Withdrawal from the Convention.
Such denunciation shall be made to the Government authorized to receive accessions, and shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union.

6. ARTICLE XX. The second paragraph of Article XX shall run as follows:

Denunciation of treaty.
'This denunciation shall be addressed to the Government of the Swiss Confederation. It shall only take effect in respect of the country which shall have made it, the Convention remaining operative for the other countries of the Union.'
BERNE CONVENTION

ARTICLE XXI.
Convention to be ratified within one year.
The present Convention shall be ratified, and the ratifications exchanged at Berne, within the space of one year at the latest.

ADDITIONAL ARTICLE.
Convention not to affect existing conventions conferring more extended rights.
The Convention concluded this day in no wise affects the maintenance of existing conventions between the contracting States, provided always that such conventions confer on authors, or their lawful representatives, rights more extended than those secured by the Union, or contain other stipulations which are not contrary to the said Convention.

FINAL PROTOCOL.
Protection of photographs.
1. As regards Article IV, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs, engage to admit them to the benefits of the Convention concluded to-day, from the date of its coming into effect. They are, however, not bound to protect the authors of such works further than is permitted by their own legislation, except in the case of international engagements already existing, or which may hereafter be entered into by them.

ARTICLE II.
The "Protocole de Clôture" annexed to the Convention of the 9th September, 1886, is modified as follows:
1. No. 1. This number shall run as follows:
"1. With regard to Article IV, it is agreed as follows:
(a.) Works of architecture protected.
"(a.) In the countries of the Union in which protection is accorded not only to architectural designs, but to the actual works of architecture, those works are admitted to the benefit of the provisions of the Convention of Berne and of the present additional act.
(b.) Photographic works.
"(b.) Photographic works, and those obtained by similar processes, are admitted to the benefit of the provisions of these acts, in so far as the domestic legislation allows this to be done, and according to
LAW OF RADIO BROADCASTING

Photograph of work of art protected.

It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as contemplated by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private arrangements between those who have legal rights.

Choregraphic works admitted to the benefits of the Convention in countries whose legislation includes them.

2. As regards Article IX, it is agreed that those countries of the Union whose legislation implicitly includes choregraphic works amongst dramatico-musical works, expressly admit the former works to the benefits of the Convention concluded this day.

It is, however, understood that questions which may arise on the application of this clause shall rest within the competence of the respective tribunals to decide.

Mechanical reproduction of music not infringement.

3. It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyrighted, shall not be considered as constituting an infringement of musical copyright.

4. The common agreement alluded to in Article XIV of the Convention is established as follows:

Application of the Convention.

The application of the Convention to works which have not fallen into the public domain at the time when the measure of protection which it gives to similar national works.

"It is understood that the authorized photograph of a protected work of art enjoys legal protection in all the countries of the Union, within the meaning of the Convention of Berne and the present additional act, as long as the principal right of reproduction of this work itself lasts, and within the limits of private conventions between those who have legal rights."

2. No. 4. This number shall run as follows:

4. "The common agreement provided for in Article XIV of the Convention is determined as follows:

Application of the Convention.

"The application of the Convention of Berne and of the present additional act to works that had not
it comes into force, shall operate according to the stipulations on this head which may be contained in special conventions, either existing or to be concluded.

Each country to regulate for itself the manner in which Convention shall apply.

In the absence of such stipulations between any countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV is to be applied.

fallen into the public domain in the country of origin when these acts came into force, shall take effect according to the stipulations relative to this point which are contained in special conventions either now existing or to be concluded to this effect.

"In the absence of such stipulations between countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV is to be applied.

Exclusive right of translation.

"The stipulations of Article XIV of the Convention of Berne and of the present number of the 'Protocole de Clôture' apply equally to the exclusive right of translation, as granted by the present additional act.

"The above-mentioned temporary provisions are applicable in case of new accessions to the Union."

Organization of International Office.

5. The organization of the International Office, established in virtue of Article XVI of the Convention, shall be fixed by a regulation which shall be drawn up by the Government of the Swiss Confederation.

Official language to be French.

The official language of the International Office will be French.

Duties of International Office.

The International Office will collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works. It will arrange and publish such information. It will study questions of general utility likely to be of interest to the Union, and, by the aid of documents placed at its disposal by the different admin-
istrations, will edit a periodical publication in the French language treating questions which concern the Union. The Governments of the countries of the Union reserve to themselves the faculty of authorizing, by common accord, the publication by the Office of an edition in one or more other languages, if experience should show this to be requisite.

The International Office will always hold itself at the disposal of members of the Union, with the view to furnish them with any special information they may require relative to the protection of literary and artistic works.

Country where a conference is to be held to prepare programme.

The Administration of the country where a Conference is about to be held, will prepare the programme of the Conference with the assistance of the International Office.

Director of the International Office.

The Director of the International Office will attend the sittings of the Conferences, and will take part in the discussion without a deliberate voice. He will make an annual report on his administration, which shall be communicated to all the members of the Union.

Expenses of the International Office to be shared by contracting States.

The expenses of the Office of the International Union shall be shared by the contracting States. Unless a fresh arrangement be made, they cannot exceed a sum of sixty thousand francs a year. This sum may be increased by the decision of one of the Conferences provided for in Article XVII.
Method of sharing expenses.

The share of the total expense to be paid by each country shall be determined by the division of the contracting and acceding States into six classes, each of which shall contribute in the proportion of a certain number of units, viz:

- First class: 25 units
- Second class: 20 units
- Third class: 15 units
- Fourth class: 10 units
- Fifth class: 5 units
- Sixth class: 3 units

These coefficients will be multiplied by the number of States of each class, and the total product thus obtained will give the number of units by which the total expense is to be divided. The quotient will give the amount of the unity of expense.

Each State will declare, at the time of its accession, in which of the said classes it desires to be placed.

Swiss Administration to prepare the budget of the International Office, etc.

The Swiss Administration will prepare the budget of the Office, superintend its expenditure, make the necessary advances, and draw up the annual account, which shall be communicated to all the other Administrations.

Next Conference to be held at Paris.

6. The next Conference shall be held at Paris between four and six years from the date of the coming into force of the Convention.

The French Government will fix the date within these limits after having consulted the International Office.

Exchange of ratifications.

7. It is agreed that, as regards the exchange of ratifications contemplated in Article XXI, each con-
tracting party shall give a single instrument, which shall be deposited, with those of the other States, in the Government archives of the Swiss Confederation. Each party shall receive in exchange a copy of the procès-verbal of the exchange of ratifications, signed by the pleni potentiaries present.

Present Protocol integral part of Convention.
The present Final Protocol, which shall be ratified with the Convention concluded this day, shall be considered as forming an integral part of the said Convention, and shall have the same force, effect, and duration.

ARTICLE III.
Accession of other countries.
The countries of the Union which have not become parties to the present Additional Act shall be allowed to accede to it at any time, on their request to that effect. The same rule shall apply to the countries which may eventually accede to the Convention of the 9th September, 1886. It shall be sufficient for the purpose if a notification is addressed in writing to the Swiss Federal Council, who will, in turn, notify this accession to the other Governments.

ARTICLE IV.
Additional Act to be ratified.
The present Additional Act shall have the same force and duration as the Convention of the 9th September, 1886.

It shall be ratified, and the ratifications shall be exchanged at Paris in the form adopted for that Convention, as soon as possible, and within a year at the latest.

It shall come into force between the countries who have ratified it three months after this exchange.

Interpretation of Convention.

1. By the terms of paragraph 2 of Article II of the Convention, the protection granted by the aforementioned Acts depends solely on the accomplishment in the country of origin of the work of the conditions and formalities that may be prescribed by the legislation of that country. The same rule applies to the protection of the photographic works mentioned in No. 1 (b), of the modified 'Protocole de Clôture.'

2. By published works must be understood works actually issued to the public in one of the countries of the Union. Consequently, the representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art, do not constitute publication in the sense of the aforementioned Acts.

3. The transformation of a novel into a play, or of a play into a novel, comes under the stipulations of Article X.

The countries of the Union which are not parties to the present Declaration shall be allowed to accede thereto at any time on their request to that effect. The same rule shall apply to countries which may accede either to the Convention of the 9th September, 1886, or to this Convention or to the Additional Act of the 4th May, 1896. It will be sufficient for this purpose if a notification be addressed in writing to the Swiss Federal Council, who will, in turn, notify this accession to the other Governments.

The present Declaration shall have the same force and duration as the Acts to which it refers.

It shall be ratified, and the ratifications shall be exchanged at Paris, in the form adopted for those Acts, as soon as possible, and within a year at the latest.
BERLIN CONVENTION


ARTICLE 1.
Union to protect literary and artistic works.

The contracting countries are constituted into a Union for the protection of the rights of authors in their literary and artistic works.

The contracting countries are pledged to secure protection in the case of the works mentioned above.

ARTICLE 2.
Definition of "literary and artistic works."

The expression "literary and artistic works" includes all productions in the literary, scientific or artistic domain, whatever the mode or form of reproduction, such as: books, pamphlets and other writings; dramatic or dramatico-musical works; choreographic works and pantomimes, the stage directions ("mise en scène") of which are fixed in writing or otherwise; musical compositions with or without words; drawings, paintings; works of architecture and sculpture; engravings and lithographs; illustrations; geographical charts; plans, sketches and plastic works relating to geography, topography, architecture, or the sciences.

Translations, arrangements, and adaptations protected.

Translations, adaptations, arrangements of music and other reproductions transformed from a literary or artistic work, as well as compilations from different works, are protected as original works without prejudice to the rights of the author of the original work.

Works of art applied to industry.

Works of art applied to industry are protected so far as the domestic legislation of each country allows.

ARTICLE 3.
Photographic works to be protected.

The present convention applies to photographic works and to works obtained by any process analogous to photography. The contracting countries are pledged to guarantee protection to such works.

ARTICLE 4.
Authors to enjoy in countries of the Union the rights granted to natives.

Authors within the jurisdiction of one of the countries of the Union enjoy for their works, whether unpublished or published for the first time in one of the countries of the Union, such rights, in the countries other than the country of origin of the work, as the respective laws now accord or shall hereafter accord to natives, as well as the rights specially accorded by the present Convention.

No formalities required.

The enjoyment and the exercise of such rights are not subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country.
of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard his rights, are regulated exclusively according to the legislation of the country where the protection is claimed.

Definition of country of origin.

The following is considered as the country of origin of the work: for unpublished works, the country to which the author belongs; for published works, the country of first publication, and for works published simultaneously in several countries of the Union, the country among them whose legislation grants the shortest term of protection. For works published simultaneously in a country outside of the Union and in a country within the Union, it is the latter country which is exclusively considered as the country of origin.

Published works.

By Published works ("œuvres publiées") must be understood, according to the present Convention, works which have been issued ("œuvres éditées"). The representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art and the construction of a work of architecture do not constitute publication.

ARTICLE 5.

Authors of countries of the Union have same rights as natives of other countries.

Authors within the jurisdiction of one of the countries of the Union who publish their works for the first time in another country of the Union, have in this latter country the same rights as national authors.

ARTICLE 6.

Authors not belonging to countries of the Union also protected if they first publish in a Union country.

Authors not within the jurisdiction of any one of the countries of the Union, who publish for the first time their works in one of these countries, enjoy in that country the same rights as national authors, and in the other countries of the Union the rights accorded by the present Convention.

ARTICLE 7.

Term of protection: Life and 50 years.

The term of protection granted by the present Convention comprises the life of the author and fifty years after his death.

If not adopted; Laws of country to govern term.

In case this term, however, should not be adopted uniformly by all the countries of the Union, the duration of the protection shall be regulated by the law of the country where protection is claimed, and can not exceed the term granted in the country of origin of the work. The contracting countries will consequently be required to apply the provision of the preceding paragraph only to the extent to which it agrees with their domestic law.

Term for photographic, posthumous, anonymous or pseudonymous works.

For photographic works and works obtained by a process analogous to photography, for posthumous works, for anonymous or pseudonymous works, the term of protection is regulated by the law of the country where protection is claimed, but this
term may not exceed the term fixed in the country of origin of the work.

ARTICLE 8.

Exclusive right of translation for entire term.
Authors of unpublished works within the jurisdiction of one of the countries of the Union, and authors of works published for the first time in one of these countries, enjoy in the other countries of the Union during the whole term of the right in the original work the exclusive right to make or to authorize the translation of their works.

ARTICLE 9.

Serial novels protected when published in newspapers or periodicals.
Serial stories ("romans-feuilletons"), novels and all other works, whether literary, scientific or artistic, whatever may be their subject, published in newspapers or periodicals of one of the countries of the Union, may not be reproduced in the other countries without the consent of the authors.

Reproduction of newspaper articles.
With the exception of serial stories and of novels ("romans-feuilletons et des nouvelles") any newspaper article may be reproduced by another newspaper if reproduction has not been expressly forbidden. The source, however, must be indicated. The confirmation of this obligation shall be determined by the legislation of the country where protection is claimed.

News items not protected.
The protection of the present Convention does not apply to news of the day or to miscellaneous news having the character merely of press information.

ARTICLE 10.

Extracts from literary or artistic works for educational publications.
As concerns the right of borrowing lawfully from literary or artistic works for use in publications intended for instruction or having a scientific character, or for chrestomathies, the provisions of the legislation of the countries of the Union and of the special treaties existing or to be concluded between them shall govern.

ARTICLE 11.

Representation of dramatic or dramatico-musical works.
The stipulations of the present Convention apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether these works are published or not.

Representation of translations of dramatic works.
Authors of dramatic or dramatico-musical works are protected, during the term of their copyright in the original work, against the unauthorized public representation of a translation of their works.

Notice of reservation of performance not required.
In order to enjoy the protection of this article, authors, in publishing their works are not obliged to prohibit the public representation or public performance of them.

ARTICLE 12.

Adaptations, etc., considered as infringements.
Among the unlawful reproductions to which the present Convention
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applies are specially included indirect, unauthorized appropriations of a literary or artistic work, such as adaptations; arrangements of music, transformations of a romance or novel or of a poem into a theatrical piece and vice versa, etc., when they are only the reproduction of such work in the same form or in another form with non-essential changes, additions or abridgments and without presenting the character of a new, original work.

ARTICLE 13.
Adaptation of musical works to mechanical instruments.
Authors of musical works have the exclusive right to authorize: (1) the adaptation of these works to instruments serving to reproduce them mechanically; (2) the public performance of the same works by means of these instruments.

Each country to regulate for itself the manner in which Convention shall apply.

The limitations and conditions relative to the application of this article shall be determined by the domestic legislation of each country in its own case; but all limitations and conditions of this nature shall have an effect strictly limited to the country which shall have adopted them.

Not retroactive.
The provisions of paragraph 1 have no retroactive effect, and therefore are not applicable in a country of the Union to works which, in that country, shall have been lawfully adapted to mechanical instruments before going into force of the present Convention.

Importation of mechanical musical appliances prohibited.
The adaptations made by virtue of paragraphs 2 and 3 of this article and imported without the authorization of the parties interested into a country where they are not lawful, may be seized there.

ARTICLE 14.
Reproduction by cinematograph.
Authors of literary, scientific or artistic works have the exclusive right to authorize the reproduction and the public representation of their work by means of the cinematograph.

Cinematographic productions protected.
Cinematographic productions are protected as literary or artistic works when by the arrangement of the stage effects or by the combination of incidents represented, the author shall have given to the work a personal and original character.

Cinematographs Copyrightable.
Without prejudice to the rights of the author in the original work, the reproduction by the cinematograph of a literary, scientific or artistic work is protected as an original work.

Also any analogous production.
The preceding provisions apply to the reproduction or production obtained by any other process analogous to that of the cinematograph.

ARTICLE 15.
Author's name indicated on work sufficient proof of authorship.
In order that the authors of the works protected by the present Convention may be considered as such, until proof to the contrary, and admitted in consequence before the
courts of the various countries of the Union to proceed against infringers, it is sufficient that the author's name be indicated upon the work in the usual manner.

Publisher of anonymous or pseudonymous works considered as representative of author.

For anonymous or pseudonymous works, the publisher whose name is indicated upon the work is entitled to protect the rights of the author. He is without other proofs considered the legal representative of the anonymous or pseudonymous author.

ARTICLE 16.
Seizure of pirated copies.

All infringing works may be seized by the competent authorities of the countries of the Union where the original work has a right to legal protection.

Seizure may also be made in these countries of reproductions which come from a country where the copyright in the work has terminated, or where the work has not been protected.

Seizure to be made according to the laws of each country.

The seizure takes place in conformity with the domestic legislation of each country.

ARTICLE 17.
Each government to exercise supervision as to circulation, representation or exhibition of works.

The provisions of the present Convention may not prejudice in any way the right which belongs to the Government of each of the countries of the Union to permit, to supervise, or to forbid, by means of legislation or of domestic police, the circulation, the representation or the exhibition of every work or production in regard to which competent authority may have to exercise this right.

ARTICLE 18.
Convention to apply to all works not in public domain at the time of its going into force.

The present Convention applies to all works which, at the time it goes into effect, have not fallen into the public domain of their country of origin because of the expiration of the term of protection.

But if a work by reason of the expiration of the term of protection which was previously secured for it has fallen into the public domain of the country where protection is claimed, such work will not be protected anew.

Special Conventions and domestic legislation may govern.

This principle will be applied in accordance with the stipulations to that effect contained in the special Conventions either existing or to be concluded between countries of the Union, and in default of such stipulations, its application will be regulated by each country in its own case.

Provisions of Convention to apply to new accessions.

The preceding provisions apply equally in the case of new accessions to the Union and where the term of protection would be extended by the application of Article 7.

ARTICLE 19.
More extensive right may be granted by domestic legislation.

The provisions of the present Convention do not prevent a claim for the application of more favorable provisions which may be enacted by
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the legislation of a country of the Union in favor of foreigners in general.

ARTICLE 20.

More extensive right may be secured by special treaties.
The governments of the countries of the Union reserve the right to make between themselves special treaties, when these treaties would confer upon authors more extended rights than those accorded by the Union, or when they contain other stipulations not conflicting with the present Convention. The provisions of existing treaties which answer the aforesaid conditions remain in force.

ARTICLE 21.

Bureau of the International Union.
The international office instituted under the name of "Bureau of the International Union for the Protection of Literary and Artistic Works" ("Bureau de l'Union internationale pour la protection des œuvres littéraires et artistiques") is maintained.

Under control of Switzerland.
The Bureau is placed under the high authority of the Government of the Swiss Confederation, which controls its organization and supervises its working.

Language of Bureau to be French.
The official language of the Bureau is the French language.

ARTICLE 22.

Duties of International Bureau.
The International Bureau brings together, arranges and publishes information of every kind relating to the protection of the rights of authors in their literary and artistic works. It studies questions of mutual utility interesting to the Union, and edits, with the aid of documents placed at its disposal by the various administrations, a periodical in the French language, treating questions concerning the purpose of the Union. The governments of the countries of the Union reserve the right to authorize the Bureau by common accord to publish an edition in one or more other languages, in case experience demonstrates the need.

Will furnish information as to copyright.
The International Bureau must hold itself at all times at the disposal of members of the Union to furnish them, in relation to questions concerning the protection of literary and artistic works, the special information of which they have need.

Annual report of Director of International Bureau.
The Director of the International Bureau makes an annual report on his administration, which is communicated to all the members of the Union.

ARTICLE 23.

Expenses of the International Bureau to be shared by contracting states.
The expenses of the Bureau of the International Union are shared in common by the contracting countries. Until a new decision, they may not exceed sixty thousand francs per year. This sum may be increased when needful by the simple decision of one of the Conferences provided for in Article 24.

Method of sharing expenses.
To determine the part of this sum total of expenses to be paid by each of the countries, the contracting countries and those which later adhere
to the Union are divided into six classes each contributing in proportion to a certain number of units, to wit:

1st class ........... 25 units
2nd class ........... 20 units
3rd class ........... 15 units
4th class ........... 10 units
5th class ........... 5 units
6th class ........... 3 units

These coefficients are multiplied by the number of countries of each class, and the sum of the products thus obtained furnishes the number of units by which the total expense is to be divided. The quotient gives the amount of the unit of expense.

Each country shall declare, at the time of its accession, in which of the above-mentioned classes it desires to be placed.

Swiss Administration to prepare the budget of the International Bureau, etc.

The Swiss Administration prepares the budget of the Bureau and superintends its expenditures; makes necessary advances and draws up the annual account, which shall be communicated to all the other administrations.

ARTICLE 24.
Revisions of Convention.

The present Convention may be subjected to revision with a view to the introduction of amendments calculated to perfect the system of the Union.

To take place successively in the countries of the Union.

Questions of this nature, as well as those which from other points of view pertain to the development of the Union, are considered in the Conferences which will take place successively in the countries of the Union between the delegates of the said countries. The administration of the country where a Conference is to be held will, with the cooperation of the International Bureau, prepare the business of the same. The Director of the Bureau will attend the meetings of the Conferences and take part in the discussions without a deliberative voice.

Changes require unanimous consent.

No change in the present Convention is valid for the Union except on condition of the unanimous consent of the countries which impose it.

ARTICLE 25.
Accession of other countries.

The States outside of the Union which assure legal protection of the rights which are the object of the present Convention, may accede to it upon their request.

To be made known by Switzerland.

This accession shall be made known in writing to the Government of the Swiss Confederation and by the latter to all the others.

May substitute provisions of previous conventions.

Such accession shall imply full adhesion to all the causes and admission to all the advantages stipulated in the present Convention. It may, however, indicate such provisions of the Convention of September 9, 1886, or of the Additional Act of May 4, 1896, as it may be judged necessary to substitute provisionally, at least, for the corresponding provisions of the present Convention.

ARTICLE 26.
Accession for colonies or foreign possessions.

The contracting countries have the right to accede at any time to the
present Convention for their colonies or foreign possessions. They may, for that purpose, either make a general declaration by which all their colonies or possessions are included in the accession, or name expressly those which are included therein, or confine themselves to indicating those which are excluded from it.

This declaration shall be made known in writing to the Government of the Swiss Confederation, and by the latter to all the others.

**ARTICLE 27.**

Present Convention to replace Berne Convention and Additional Articles.

But Berne Convention remains in force between countries not signatory to present Convention.

The present Convention shall replace, in the relations between the contracting States, the Convention of Berne of September 9, 1886, including the Additional Article and the Final Protocol of the same day, as well as the Additional Act and the Interpretative Declaration of May 4, 1896. The conventional acts above-mentioned shall remain in force in the relations with the States which do not ratify the present Convention.

Signatory States may declare themselves bound by former Conventions upon certain points.

The States signatory to the present Convention may, at the time of the exchange of ratifications, declare that they intend, upon such or such point, still to remain bound by the provisions of the Conventions to which they have previously subscribed.

**ARTICLE 28.**

Convention to be ratified not later than July 1, 1910.

The present Convention shall be ratified, and the ratifications shall be exchanged at Berlin, not later than the first of July, 1910.

Instrument to be filed with Swiss Government.

Each contracting party shall send, for the exchange of ratifications, a single instrument, which shall be deposited, with those of the other countries, in the archives of the Government of the Swiss Confederation. Each party shall receive in return a copy of the procès-verbal of the exchange of ratifications, signed by the Plenipotentiaries who shall have taken part therein.

**ARTICLE 29.**

Convention to take effect three months after exchange of ratifications.

The present Convention shall be put into execution three months after the exchange of the ratifications and shall remain in force for an indefinite time, until the expiration of one year from the day when denunciation of it shall have been made.

Withdrawal from the Convention.

This denunciation shall be addressed to the Government of the Swiss Confederation. It shall be effective only as regards the country which shall have made it, the Convention remaining in force for the other countries of the Union.

**ARTICLE 30.**

Adoption of term of life and 50 years to be notified.

The States which introduce into their legislation the term of protec-
tion of fifty years* provided for by Article 7, paragraph 1, of the present Convention, shall make it known to the Government of the Swiss Confederation by a written notification which shall be communicated at once by that Government to all the other countries of the Union.

Notice shall be given of renunciation of any reservations.

It shall be the same for such States as shall renounce any reservations made by them in virtue of Articles 25, 26, and 27.

* Article 7 provides for a general term of protection for life and fifty years.

Signatures.

In testimony of which, the respective Plenipotentiaries have signed the present Convention and have attached thereto their seals.

Date of signing, November 13, 1908.

Done at Berlin, the thirteenth of November, one thousand nine hundred eight, in a single copy, which shall be deposited in the archives of the Government of the Swiss Confederation, and of which copies, properly certified, shall be sent through diplomatic channels to the contracting countries.
Additional Protocol to the International Copyright Convention of Berlin, November 13, 1908, Signed at Berne, March 20, 1914.

The countries, members of the International Union for the protection of literary and artistic works, desiring to authorize an optional limitation of the extent of the Convention of November 13, 1908, have by mutual agreement adopted the following Protocol:

1. When a country not belonging to the Union does not protect in a sufficient manner the works of authors within the jurisdiction of a country of the Union, the provisions of the Convention of November 13, 1908, can not prejudice, in any way, the right which belongs to the contracting countries to restrict the protection of works by authors who are, at the time of the first publication of such works, subjects or citizens of the said country not being a member of the Union, and are not actually domiciled in one of the countries of the Union.

2. The right accorded to the contracting States by the present Protocol, belongs also to each of their transmarine possessions.

3. No restriction established by virtue of No. 1, above, shall prejudice the rights which an author has acquired in a work published in one of the countries of the Union prior to the putting into force of this restriction.

4. The countries which, by virtue of the present Protocol, limit the protection accorded to authors, shall notify the Government of the Swiss Confederation by a written declaration indicating the countries against which the protection is restricted, and also the restrictions to which the rights of authors belonging to these countries are subject. The Government of the Swiss Confederation will at once communicate the fact to all the other States of the Union.

5. The present Protocol shall be ratified, and the ratifications shall be deposited at Berne within a maximum period of twelve months from its date. It shall enter into force one month after the expiration of this period and shall have the same force and duration as the Convention to which it relates.
In witness whereof the Plenipotentiaries of the countries members of the Union have signed the present Protocol, of which a certified copy shall be transmitted to each of the Governments of the Union.

Done at Berne, the 20th day of March, 1914, in a single copy, deposited in the Archives of the Swiss Confederation.

Signed by the representatives of the following eighteen countries: Belgium, Denmark, France, Germany, Great Britain, Haiti, Italy, Japan, Liberia, Luxembourg, Monaco, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and Tunis.

[SIGNATURES]
Rome Revision of the International Copyright Convention.

In their desire to protect in an efficacious and uniform manner the rights of authors as to their literary and artistic works, the delegates from fifty-three countries met at Rome from May 7, to June 2, 1928, and signed the Rome revision of the Berne Convention Creating an International Union for the protection of Literary and Artistic Works. The Rome Convention follows:

ARTICLE 1. The countries to which the present convention applies are constituted into a Union for the protection of the rights of authors in their literary and artistic works.

ARTICLE 2. (1) The terms "literary and artistic works" include all productions in the literary, scientific, and artistic domain, whatever the mode or form of expression, such as: books, pamphlets, and other writings; lectures, addresses, sermons and other works of like nature; dramatic or dramatico-musical works; choreographic works and pantomimes, the stage directions (mise en scene) of which are fixed in writing or otherwise; musical compositions with or without words; drawings, paintings; works of architecture and sculpture; engravings and lithographs; illustrations; geographical charts; plans, sketches, and plastic works relating to geography, topography, architecture, or the sciences.

(2) Translations, adaptations, arrangements of music and other reproductions transformed from a literary or artistic work, as well as compilations from different works, are protected as original works without prejudice to the rights of the author of the original work.

(3) The countries of the Union are pledged to secure protection in the case of the works mentioned above.

(4) Works of art applied to industry are protected so far as the domestic legislation of each country allows.

ARTICLE 2. (bis.) (1) The authority is reserved to the domestic legislation of each country of the Union to exclude, partially or wholly, from the protection provided by the preceding Article political discourses or discourses pronounced in judicial debates.

(2) There is also reserved to the domestic legislation of each country of the Union authority to enact the conditions under which
such lectures, addresses, sermons and other works of like nature may be reproduced by the press. Nevertheless, the author alone shall have the right to bring such works together in a compilation.

**Article 3.** The present convention applies to photographic works and to works obtained by any process analogous to photography. The countries of the Union are pledged to guarantee protection to such works.

**Article 4.** (1) Authors within the jurisdiction of one of the countries of the Union enjoy for their works, whether unpublished or published for the first time in one of the countries of the Union, such rights, in the countries other than the country of origin of the work, as the respective laws now accord or shall hereafter accord to nationals, as well as the rights specially accorded by the present Convention.

(2) The enjoyment and the exercise of such rights are not subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard his rights, are regulated exclusively according to the legislation of the country where the protection is claimed.

(3) The following is considered as the country of origin of the work: for unpublished works, the country to which the author belongs; for published works, the country of first publication; and for works published simultaneously in several countries of the Union, the country among them whose legislation grants the shortest term of protection. For works published simultaneously in a country outside of the Union and in a country within the Union, it is the latter country which is exclusively considered as the country of origin.

(4) By “published works” (“œuvres publiées”) must be understood, according to the present Convention, works which have been issued (“œuvres éditées”). The representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art and the construction of a work of architecture do not constitute publication.

**Article 5.** Authors within the jurisdiction of one of the countries of the Union who publish their works for the first time in
another country of the Union, have in this latter country the same rights as national authors.

**ARTICLE 6.** (1) Authors not within the jurisdiction of any one of the countries of the Union, who publish their works for the first time in one of the Union countries, enjoy in such Union country the same rights as national authors, and in the other countries of the Union the rights accorded by the present Convention.

(2) Nevertheless, when a country outside of the Union does not protect in an adequate manner the works of authors within the jurisdiction of one of the countries of the Union, this latter Union country may restrict the protection for the works of authors who are, at the time of the first publication of such works, within the jurisdiction of the non-union country and are not actually domiciled in one of the countries of the Union.

(3) Any restriction, established by virtue of the preceding paragraph, shall not prejudice the rights which an author may have acquired in a work published in one of the countries of the Union before the putting into effect of this restriction.

(4) The countries of the Union which, by virtue of the present article, restrict the protection of the rights of authors, shall notify the fact to the Government of the Swiss Confederation by a written declaration indicating the countries in whose case protection is restricted, and indicating also the restrictions to which the rights of authors within the jurisdiction of such country are subjected. The Government of the Swiss Confederation shall immediately communicate this fact to all the countries of the Union.

**ARTICLE 6 (bis.)** (1) Independently of the patrimonial rights of the author, and even after the assignment of the said rights, the author retains the right to claim the paternity of the work as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation.

(2) It is left to the national legislation of each of the countries of the Union to establish the conditions for the exercise of these rights. The means for safeguarding them shall be regulated by the legislation of the country where protection is claimed.

**ARTICLE 7.** (1) The duration of the protection granted by the present Convention comprises the life of the author and fifty years after his death.
(2) In case this period of protection, however, should not be adopted uniformly by all the countries of the Union, its duration shall be regulated by the law of the country where protection is claimed, and it can not exceed the term fixed in the country of origin of the work. The countries of the Union will consequently not be required to apply the provision of the preceding paragraph beyond the extent to which it agrees with their domestic law.

(3) For photographic works and works obtained by a process analogous to photography; for posthumous works; for anonymous or pseudonymous works, the period of protection is regulated by the law of the country where protection is claimed, but this period may not exceed the term fixed in the country of origin of the work.

ARTICLE 7 (bis.) (1) The duration of the author’s right belonging in common to collaborators in a work is calculated according to the date of the death of the last survivor of the collaborators.

(2) Persons within the jurisdiction of countries which grant a shorter period of protection than that provided in paragraph 1 can not claim in the other countries of the Union a protection of longer duration.

(3) In any case the term of protection shall not expire before the death of the last survivor of the collaborators.

ARTICLE 8. Authors of unpublished works within the jurisdiction of one of the countries of the Union and authors of works published for the first time in one of these countries, enjoy in the other countries of the Union during the whole term of the right in the original work the exclusive right to make or to authorize the translation of their works.

ARTICLE 9. (1) Serial stories ("romans-feuilletons") novels and all other works, whether literary, scientific, or artistic, whatever may be their subject, published in newspapers or periodicals of one of the countries of the Union, may not be reproduced in the other countries without the consent of the authors.

(2) Articles of current economic, political, or religious discussion may be reproduced by the press if their reproduction is not expressly reserved. But the source must always be clearly indicated; the sanction of this obligation is determined by the legislation of the country where the protection is claimed.

(3) The protection of the present Convention does not apply to
news of the day or to miscellaneous news having the character merely of press information.

**Article 10.** As concerns the right of borrowing lawfully from literary or artistic works for use in publications intended for instruction or having a scientific character, or for chrestomathies, the provisions of the legislation of the countries of the Union and of the special treaties existing or to be concluded between them shall govern.

**Article 11.** (1) The stipulations of the present Convention apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether these works are published or not.

(2) Authors of dramatic or dramatico-musical works are protected, during the term of their copyright in the original work, against the unauthorized public representation of a translation of their works.

(3) In order to enjoy the protection of this article, authors in publishing their works are not obliged to prohibit the public representation or public performance of them.

**Article 11 (bis.)** (1) The authors of literary and artistic works enjoy the exclusive right to authorize the communication of their works to the public by radio diffusion.

(2) It belongs to the national legislatures of the countries of the Union to regulate the conditions for the exercise of the right declared in the preceding paragraph, but such conditions shall have an effect strictly limited to the country which established them. They cannot in any case adversely affect the moral right of the author, nor the right which belongs to the author of obtaining an equitable remuneration fixed, in default of an amicable agreement, by competent authority.

**Article 12.** Among the unlawful reproductions to which the present Convention applies are specially included indirect, unauthorized appropriations of a literary or artistic work, such as adaptations, arrangements of music, transformations of a romance or novel or of a poem into a theatrical piece and vice-versa, etc., when they are only the reproduction of such work in the same form or in another form with non-essential changes, additions, or abridgments and without presenting the character of a new, original work.
Article 13. (1) Authors of musical works have the exclusive right to authorize: (1) the adaptation of these works to instruments serving to reproduct them mechanically; (2) the public performance of the same works by means of these instruments.

(2) The limitations and conditions relative to the application of this article shall be determined by the domestic legislation of each country in its own case; but all limitations and conditions of this nature shall have an effect strictly limited to the country which shall have adopted them.

(3) The provisions of paragraph 1 have no retroactive effect, and therefore are not applicable in a country of the Union to works which, in that country, shall have been lawfully adapted to mechanical instruments before the going into force of the Convention signed at Berlin, November 13, 1908; and, in the case of a country which has acceded to the Union since that date, or shall accede to it in the future, then when the works have been adapted to mechanical instruments before the date of its accession.

(4) Adaptations made by virtue of paragraphs 2 and 3 of this article and imported without the authorization of the parties interested, into a country where they would not be lawful, may be seized there.

Article 14. (1) Authors of literary, scientific or artistic works have the exclusive right to authorize the reproduction, the adaptation and the public representation of their works by means of the cinematograph.

(2) Cinematographic productions are protected as literary or artistic works when the author shall have given to the work an original character. If this character is lacking, the cinematographic production enjoys the same protection as photographic works.

(3) Without the prejudice to the rights of the author of the work produced or adapted, the cinematographic work is protected as an original work.

(4) The preceding provisions apply to the reproduction or production obtained by any other process analogous of that of the cinematograph.

Article 15. (1) In order that the authors of the works protected by the present Convention may be considered as such, until proof to the contrary, and admitted in consequence before the
courts of the various countries of the Union to proceed against infringers, it is sufficient that the author’s name be indicated upon the work in the usual manner.

(2) For anonymous or pseudonymous works, the publisher whose name is indicated upon the work is entitled to protect the rights of the author. He is without other proofs considered the legal representative of the anonymous or pseudonymous author.

ARTICLE 16. (1) All infringing works may be seized by the competent authorities of the countries of the Union where the original work has a right to legal protection.

(2) Seizure may also be made in these countries of reproductions which come from a country where the copyright in the work has terminated, or where the work has not been protected.

(3) The seizure takes place in conformity with the domestic legislation of each country.

ARTICLE 17. The provisions of the present Convention may not prejudice in any way the right which belongs to the Government of each of the countries of the Union to permit, to supervise, or to forbid, by means of legislation or of domestic police, the circulation, the representation or the exhibition of every work or production in regard to which competent authority may have to exercise this right.

ARTICLE 18. (1) The present Convention applies to all works which, at the time it goes into effect, have not fallen into the public domain of their country of origin because of the expiration of the term of protection.

(2) But if a work by reason of the expiration of the term of protection which was previously secured for it has fallen into the public domain of the country where protection is claimed, such work will not be protected anew.

(3) This principle will be applied in accordance with the stipulations to that effect contained in the special Convention either existing or to be concluded between countries of the Union, and in default of such stipulations, its application will be regulated by each country in its own case.

(4) The preceding provisions apply equally in the case of new accessions to the Union and where the protection would be extended by the application of Article 7 or by the abandonment of reservations.
ARTICLE 19. The provisions of the present Convention do not prevent a claim for the application of more favorable provisions which may be enacted by the legislation of a country of the Union in favor of foreigners in general.

ARTICLE 20. The governments of the countries of the Union reserve the right to make between themselves special treaties, when these treaties would confer upon authors more extended rights than those accorded by the Union, or when they contain other stipulations not conflicting with the present Convention. The provisions of existing treaties which answer the aforesaid conditions remain in force.

ARTICLE 21. (1) The international office instituted under the name of "Bureau of International Union for the Protection of Literary and Artistic Works" (Bureau de l'Union internationale pour la protection des œuvres litteraires et artistiques") is maintained.

(2) This Bureau is placed under the high authority of the Government of the Swiss Confederation, which controls its organization and supervises its working.

(3) The official language of the Bureau is the French language.

ARTICLE 22. (1) The International Bureau brings together, arranges and publishes information of every kind relating to the protection of the rights of authors in their literary and artistic works. It studies questions of mutual utility interesting to the Union, and edits, with the aid of documents placed at its disposal by the various administrations, a periodical in the French language, treating questions concerning the purpose of the Union. The governments of the countries of the Union reserve the right to authorize the Bureau by common accord to publish an edition in one or more other languages, in case experience demonstrates the need.

(2) The International Bureau must hold itself at all times at the disposal of members of the Union to furnish them, in relation to questions concerning the protection of literary and artistic works, the special information of which they have need.

(3) The Director of the International Bureau makes an annual report on his administration, which is communicated to all the members of the Union.
ARTICLE 23. (1) The expenses of the Bureau of the International Union are shared in common by the countries of the Union. Until a new decision, they may not exceed one hundred and twenty thousand Swiss francs per year. This sum may be increased when needful by the unanimous decision of one of the Conferences provided for in Article 24.

(2) To determine the part of this sum total of expenses to be paid by each of the countries, the countries of the Union and those which later adhere to the Union are divided into six classes each contributing in proportion to a certain number of units to wit:

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(3) These coefficients are multiplied by the number of countries of each class, and the sum of the products thus obtained furnishes the number of units by which the total expense is to be divided. The quotient gives the amount of the unit of expense.

(4) Each country shall declare, at the time of its accession, in which of the above-mentioned classes it demands to be placed, but it may always ultimately declare that it intends to be placed in another class.

(5) The Swiss Administration prepares the budget of the Bureau and superintends its expenditures, makes necessary advances and draws up the annual account, which shall be communicated to all the other administrations.

ARTICLE 24. (1) The present Convention may be subjected to revision with a view to the introduction of amendments calculated to perfect the system of the Union.

(2) Questions of this nature, as well as those which from other points of view pertain to the development of the Union, are considered in the Conferences which will take place successively in the countries of the Union between the delegates of the said countries. The administration of the country where a Conference is to be held will, with the cooperation of the International Bureau, prepare the business of the same. The Director of the Bureau
(3) No change in the present Convention is valid for the Union except on condition of the unanimous consent of the countries which compose it.

ARTICLE 25. (1) The countries outside of the Union which assure legal protection of the rights which are the object of the present Convention, may accede to it upon their request.

(2) This accession shall be communicated in writing to the Government of the Swiss Confederation and by the latter to all the others.

(3) The full right of adhesion to all the clauses and admission to all the advantages stipulated in the present Convention are implied by such accession and it will go into effect one month after the sending of the notification by the Government of the Swiss Confederation to the other countries of the Union, unless a later date has been indicated by the adhering country. Nevertheless, such accession may contain an indication that the adhering country intends to substitute, provisionally at least, for Article 8 concerning translations, the provisions of Article 5 of the Convention of the Union of 1886, revised at Paris in 1896, it being of course understood that these provisions relate only to translations into the language or languages of the country.

ARTICLE 26. (1) Each of the countries of the Union may, at any time, notify in writing the Government of the Swiss Confederation that the present Convention is applicable to all or to part of its colonies, protectorates, territories under mandate or all other territories subject to its sovereignty or to its authority, or all territories under suzerainty, and the Convention shall then apply to all the territories designated in the notification. In default of such notification, the Convention shall not apply to such territories.

(2) Each of the countries of the Union may, at any time, notify in writing the Government of the Swiss Confederation that the present Convention ceases to be applicable to all or to part of the territories which were the object of the notification provided for by the preceding paragraph, and the Convention shall cease to apply in the territories designated in such notification twelve months after receipt of the notification addressed to the Government of the Swiss Confederation.
(3) All the notifications made to the Government of the Swiss Confederation, under the provisions of paragraphs 1 and 2 of this article, shall be communicated by that Government to all the countries of the Union.

**ARTICLE 27.** (1) The present Convention shall replace in the relations between the countries of the Union the Convention of Berne of September 9, 1886 and the acts by which it has been successively revised. The acts previously in effect shall remain applicable in the relations with the countries which shall not have ratified the present Convention.

(2) The countries in whose name the present Convention is signed may still retain the benefit of the reservations which they have previously formulated on condition that they make such a declaration at the time of the deposit of the ratifications.

(3) Countries which are actually parties to the Union, but in whose name the present Convention shall not have been signed, may at any time adhere to it. They may in such case benefit by the provisions of the preceding paragraph.

**ARTICLE 28.** (1) The present Convention shall be ratified, and the ratifications shall be deposited at Rome not later than July 1, 1931.

(2) It will go into effect between the countries of the Union which have ratified it one month after that date. However, if, before that date, it has been ratified by at least six countries of the Union it will go into effect as between those countries of the Union one month after the deposit of the sixth ratification has been notified to them by the Government of the Swiss Confederation and, for the countries of the Union which shall later ratify, one month after the notification of each such ratification.

(3) Countries that are not within the Union may, until August 1, 1931, enter the Union, by means of adhesion, either to the Convention signed at Berlin November 13, 1908, or to the present Convention. After August 1, 1931, they can adhere only to the present Convention.

**ARTICLE 29.** (1) The present Convention shall remain in effect for an indeterminate time, until the expiration of one year from the day when denunciation of it shall have been made.

(2) This denunciation shall be addressed to the Government of the Swiss Confederation. It shall be effective only as regards the
country which shall have made it, the Convention remaining in force for the other countries of the Union.

**Article 30.** (1) The countries which introduce into their legislation the term of protection of fifty years* provided for by Article 7, paragraph 1, of the present Convention, shall make it known to the Government of the Swiss Confederation by a written notification which shall be communicated at once by that Government to all the other countries of the Union.

(2) It shall be the same for such countries as shall renounce any reservations made or maintained by them in virtue of Articles 25 and 27.

**IN TESTIMONY OF WHICH,** the respective Plenipotentiaries have signed the present Convention.

Done at Rome, the second of June, one thousand nine hundred and twenty-eight, in a single copy, which shall be deposited in the archives of the Royal Italian Government. One copy, properly certified, shall be sent through diplomatic channels to each of the countries of the Union.

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*Article 7 provides for a general term of protection for life of author and fifty years.*
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