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PERFORMER'S RIGHT TO ENJOIN UNLICENSED BROADCASTS OF RECORDED RENDITIONS

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"Not Licensed for Radio Broadcast"[1] was the notice impressed on phonograph records of musical renditions by Paul Whiteman's orchestra. The records were made by RCA Mfg. Company and sold to the public at large with Whiteman's consent. Bruno-New York, Inc., purchased certain of the records from RCA under a contract that it would resell "only for non-commercial use on phonographs in homes." With knowledge of this contract and of the restrictive legend W.B.O. Broadcasting Corporation purchased records from Bruno-New York and proceeded to broadcast therefrom, duly announcing that the particular music was transcribed. In *RCA Mfg. Co., Inc. v. Whiteman,*[2] the U. S. Court of Appeals for the Second Circuit refused to enjoin the unlicensed broadcasts and reversed the trial court[3] which had granted relief under the *Waring*[4] case.

Concededly neither Whiteman nor RCA had any interests protected

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[1] This notice appeared on five of the records in question which were sold between November 1932 and August 1937. After the latter date the notice was changed to read, "Licensed by Mfr. Under U. S. Pats. (giving numbers) Only For Non-Commercial Use On Phonographs In Homes. Mfr. & Original Purchaser Have Agreed This Record Shall Not Be Resold Or Used For Any Other Purpose. See Detailed Notice On Envelope." The envelope containing the record gave further notice of the same limitations. Apparently four of the earlier records bore no restrictive legends.

[2] 114 F. (2d) 86 (C. C. A. 2d, 1940) *cert. denied* 61 Sup. Ct. 393, 394 (1941). The original suit had been instituted by Whiteman to restrain W.B.O. Broadcasting Corporation and Elin, Inc., the sponsor of the program. By leave of court RCA Mfg. Co., Inc., then filed a complaint ancillary to Whiteman's action in which it asked the same relief against W.B.O. and Elin and further asked that Whiteman who had made certain assignments to it be enjoined from representing that he had the sole right to license broadcasts. Whiteman then discontinued his action without prejudice. At the trial W.B.O. and Elin elected not to put in a defense while Whiteman defended.

[3] RCA Mfg. Co., Inc. v. Whiteman, 28 F. Supp. 787 (S. D. N. Y. 1939), Note (1940) 49 YALE L. J. 559.

[4] Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937), Notes (1938) 38 COL. L. REV. 181, (1937) 51 HARV. L. REV. 171, (1937) 86 U. OF PA. L. REV. 217, and other law reviews. The result of the decision now being reviewed is to sanction a broadcast in New York which is certain to be heard in Pennsylvania where it is forbidden. A Pennsylvania station, if a member of a chain, may find itself guilty of a tort in permitting its facilities to be used for a broadcast originating in New York. See in this connection Buck v. Jewell-La Salle Realty Company, 283 U. S. 191, 51 Sup. Ct. 410, 75 L. ed. 971 (1931) followed in Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd. [1934] 1 Ch. Div. 121.

The *Waring* decision was followed in a North Carolina case involving the same plaintiff: Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939).

by the federal Copyright Act,[5] which unlike the English statute,[6] does not include records in the classification of copyrightable subjects. Common Law theories which have been advanced in behalf of the orchestra leader are: (1) An orchestra leader has a "common law property" in his rendition;[7] (2) the records are burdened with an equitable servitude;[8] (3) an unlicensed broadcast constitutes unfair competition[9] or an unfair trade practice;[10] (4) an unlicensed broadcast is an invasion of the orchestra leader's right of privacy.[11]

THE COMMON LAW PROPERTY THEORY

This presents a dual question. Is there a common law property in the rendition of an orchestra, and if so, is it lost by reason of the public sale of the records notwithstanding the restrictive legend? A new musical arrangement of an old piece,[12] a translation[13] or dramatization[14] of a novel, a reporter's stenographic notes of a public speech,[15] an adaptation of a Shakespearian play with alterations in the text[16] have all been held to embody such originality as to create a distinct property right which is itself entitled to copyright protection. It would seem to

[5] 35 STAT. 1075 (1909), 17 U. S. C. §1 (1934). Section 5 contains a detailed list of works which are copyrightable. From the original subjects of maps, charts and books under the Act of May 31, 1790, the classification has gradually been enlarged by amendments. Motion pictures and photoplays were added by the Act of August 24, 1912, c. 356. No provision has as yet been made to cover phonograph records.

[6] Copyright Act of 1911 (1 and 2 Geo. 5, c. 46) specifically provides in Sec. 19, subsection 1 that, "Copyright shall subsist in records . . . in like manner as if such . . . were musical works . . . and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work. . . ." See COPINGER, LAW OF COPYRIGHT (7th ed. 1936) 230.

[7] Such common law property was found by both courts in the two *Waring* cases, *supra* note 4, and by the trial court in the *Whiteman* case, *supra* note 3. It is apparently conceded by the court in the principal case, 114 F. (2d) 86 at 88.

[8] Waring v. WDAS, 327 Pa. 433, 194 Atl. 631 (1937); RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787 (S. D. N. Y. 1939).

[9] *Ibid.*

[10] Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939). It is interesting to note that the court did not find "unfair competition" but merely an "unfair trade practice". Possibly the court was influenced by the then recent Wheeler-Lea amendment to the Federal Trade Commission Act, 15 U. S. C. §45 (Supp. 1938) which added to the existing power of the commission to prevent unfair competition in commerce the power to prevent "unfair or deceptive acts or practices in commerce."

[11] This view was urged by Justice Maxey in his concurring opinion in Waring v. WDAS, 327 Pa. 433, ——, 194 Atl. 631, 642 (1937).

[12] Arnstein v. Marks Music Corporation, 11 F. Supp. 535 (S. D. N. Y. 1935), *aff'd.* 82 F. (2d) 275 (C. C. A. 2d, 1936); Wood v. Boosey (1868) L. R. 2 Q. B. 340, *aff'd.* L. R. 3 Q. B. 223 (opera score arranged for a pianoforte); Edmonds v. Stern, 248 Fed. 897 (C. C. A. 2d, 1918) (orchestration of song).

[13] Byrne v. Statist Co., [1914] K. B. 622; Stevenson v. Fox, 226 Fed. 990 (S. D. N. Y. 1915).

[14] Fleron v. Lackaye, 14 N. Y. Supp. 292 (Sup. Ct. N. Y. 1891).

[15] Walter v. Lane, [1900] A. C. 539.

[16] Hatton v. Kean, [1859] 7 C. B. 268. See also Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177 (1888), and Aronson v. Fleckenstein, 28 Fed. 75 (C. C. N. D. Ill. 1896).

follow that there is a common law property in the rendition of an orchestra which is "interpreting" the work of another.[17]

The difficulty is not in finding the common law property in the rendition but in determining when such property is lost by reason of a publication. The performance of a play,[18] or the broadcast of a radio skit,[19] is not a publication. So likewise the performance of an orchestra, even though it be broadcast, should not be deemed a publication.[20] But if the author of an uncopyrighted play or musical work sells copies thereof to the public, there is a publication and anyone may copy and perform the play or musical composition.[21] Consequently where copies of an orchestral rendition are sold by means of records anyone should be free to use the record. In the one case the author has failed to avail himself of statutory copyright protection; in the other no such protection exists.

Can a restrictive legend on the record supply the deficiency in the copyright statute? Such restrictive legends have been held ineffective when applied to writings and musical compositions. So a notation on the title page of the score of "Parsifal" that "This copy must not be used for production on the stage" was held ineffective where the scores containing such legends had been sold to the general public.[22] Likewise restrictions on the use of credit reports have been held of no effect where the reports were available to the public.[23] It has been said that "Where

[17] "The law has never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator. . . . It must be clear that such actors . . . as . . . Booth . . . Sarah Bernhardt, and Sir Henry Irving, or such vocal and instrumental artists as Jenny Lind, Melba, Caruso, Paderewski, Kreisler and Toscanini, by their interpretations definitely added something to the work of authors and composers. . . ." Justice Stern in Waring v. WDAS, 327 Pa. 433, ——, 194 Atl. 631, 635 (1937).

[18] Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. ed. 492 (1911); Tompkins v. Halleck, 133 Mass. 32 (1882).

[19] Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. C. Mass. 1934), modified 81 F. (2d) 373 (C. C. A. 1st, 1936).

[20] See the principal case, 114 F. (2d) 86 at 88 where the court after assuming for the purpose of its decision that a conductor has a common law property right in his orchestra's rendition said, "It would follow from this that, if a conductor played over the radio, and if his performance was not an abandonment of his rights, it would be unlawful without his consent to record it as it was received . . . and to use the record."

[21] Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. ed. 904 (1899); Wagner v. Conried, 125 Fed. 798 (C. C. S. D. N. Y. 1903).

[22] Wagner v. Conried, *ibid.*

[23] Jewelers' Mercantile Agency v. Jewelers Publishing Co., 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846 (1898). "The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might increase, rather than diminish, the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication," Parker, C. J., 49 N. E. 872, 875. The *Jewelers* case was followed in Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C. C. S. D. N. Y. 1898) (restrictions on the use of printed lectures sold to the public); *cf.* F. W. Dodge Corporation v. Comstock, 251

the publication in fact is a general one, even express words of restriction upon use are inoperative."[24] Therefore, it would seem that the public sale of records, notwithstanding a broadcast prohibition appearing thereon, is a publication which results in the destruction of the orchestra leader's common law property.

THE EQUITABLE SERVITUDE THEORY

But if the restrictive legends do not negative a publication, do they clog the records with an equitable servitude? The court in the principal case made short shrift of the matter, concluding that restrictions on the use of chattels are "prima facie invalid"[25] and that the records were not subject to an equitable servitude. The law of equitable servitudes on chattels is anything but clear.[26] In England such servitudes have been upheld in charter party cases. Thus an interlocutory injunction was issued to restrain a mortgagee who had taken a mortgage on a vessel with knowledge of an outstanding charter party contract.[27] English

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N. Y. Supp. 172 (Sup. Ct. 1931) (where the court found the so-called confidential reports had not been "put within the reach of the general public").

[24] Dissent of Mr. Justice Brandeis in International News Service v. Associated Press, 248 U. S. 215, 256, 39 Sup. Ct. 68, 75, 63 L. ed. 211, 224, 2 A. L. R. 293 (1918): "But it is also well settled that where the publication in fact is a general one, even express words of restriction upon use are inoperative. In other words, a general publication is effective to dedicate literary property to the public, regardless of the actual intent of the owner."

[25] 114 F. (2d) 86, 89 (C. C. A. 2nd, 1940).

[26] See generally on the situation in England, Wade, *Restrictions on User* (1928) 44 L. Q. REV. 51. See also Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 944.

[27] De Mattos v. Gibson, 4 De G. & J. 276, 45 Eng. Rep. 108 (1858). Lord Justice Knight Bruce said (4 De G. & J. p. 282, reprint p. 110), "Reason and justice seems to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. *This rule applicable alike in general as I conceive to movable or immovable property,* and recognized and adopted, as I apprehend, by the English law, may like other general rules be liable to exception arising from special circumstances; but I see at present no room for any exception in the instance before us." (Italics supplied.) Sixty years after this pronouncement, Scrutton, L. J., in Barker v. Stickney, [1919] 1 K. B. 121, 132, declared that while the doctrine of equitable servitudes was well established in regard to real property it did not apply to chattels and the rule declared by Knight Bruce, L. J., *supra,* had been found to be "quite impracticable", citing cases on price restrictions (*infra* note 28). However, seven years after *Barker v. Stickney,* Lord Shaw followed the *De Mattos* case in Lord Strathcona SS. Co. v. Dominion Coal Co., Ltd., [1926] A. C. 108. The purchaser of a ship had bought with knowledge that the ship was under charter for a long period and was restrained from using the vessel contrary to the charter party. Lord Shaw said (p. 118), "In the opinion of their Lordships the case of De Mattos v. Gibson still remains, notwithstanding many observations and much criticism of it in subsequent cases of outstanding authority."

courts have, on the other hand, declared restrictions on the resale price of chattels to be ineffective.[28]

On the other hand, two American cases have apparently approved the fastening of such servitudes on chattels. In the one, a manufacturer of presses had covenanted with the plaintiff purchaser that it would not sell any press which could be used to print strip tickets in competition with the plaintiff. Defendant, with knowledge of that contract, purchased such a press and used it to print strip tickets. An injunction was granted, the court stating that since contracts may be entered into restraining the carrying on of business in certain limits it saw no reason why contracts could not restrict the use of personal property.[29] In the other, a vendor had sold to plaintiff one of several electrotype plates for printing a prayer book. The vendor agreed not to sell any of the remaining plates without the plaintiff's consent and also agreed to a price schedule which both parties were to maintain for their publications. The defendant, with notice of that agreement, purchased the remaining plates from the receiver of the vendor and then proceeded to publish and sell under the agreed price. In granting the plaintiff's prayer for an injunction, the court referred to the doctrine of equitable servitudes as applied to land and added, "We can see no reason why the same rule should not apply in the case of personal property."[30] Oddly enough, both cases were decided in the same state in which the case now under review arose but no reference was made to either by the court.[31]

Restrictions on user have often been attempted in the case of patented chattels. Thus a manufacturer of a patented article who desired to spread the benefit of his patent monopoly to non-patented articles which he also manufactured would place a notice on the patented article that it was only to be used in conjunction with unpatented articles made by him. Originally these user restrictions were upheld by the United States

[28] Taddy & Co. v. Sterious & Co., [1904] 1 Ch. Div. 354, Note (1904) 17 HARV. L. REV. 415; McGruther v. Pitcher, [1904] 2 Ch. Div. 306; Dunlop Pneumatic Tyre Co. v. Selfridge & Co., [1915] A. C. 847.

[29] New York Bank-Note Co. v. Hamilton Bank-Note Co., 83 Hun 593, 31 N. Y. Supp. 1060 (1895), 28 App. Div. 411, 50 N. Y. Supp. 1093 (1st Dep't 1898), 180 N. Y. 280, 73 N. E. 48 (1905).

[30] Murphey v. Christian Press Ass'n. Publishing Co., 38 App. Div. 426, —, 56 N. Y. Supp. 597, 598 (2nd Dep't. 1899), citing *New York Bank Note* case, *ibid.*

[31] The opinion in the principal case was rendered by Judge Learned Hand. Nine years earlier Judge Augustus N. Hand, speaking for the same court in *In Re* Waterson, Berlin & Snyder Co. 48 F. (2d) 704 (C. C. A. 2d, 1931) had approved the doctrine of equitable servitudes on chattels as announced by Knight Bruce, L. J. and Lord Shaw, L. J. in the *De Mattos* and *Lord Strathcona SS. Co.* cases, *supra* note 27. He also approved the *New York Bank Note Co.* and *Murphey* cases, *supra* notes 29 and 30, and said (p. 708), "Courts in the United States have enforced rights resembling an equitable servitude binding on a third party who has acquired personal property from one who is under a contract to use it for a particular purpose or in a particular way."

Supreme Court,[32] but that tribunal later reversed its position and it is now well settled that they are invalid.[33] Except as permittted by the Miller-Tydings Act[34] and the various state Fair Trade Acts,[35] a manufacturer cannot impose resale price restrictions on his articles be they patented or unpatented.[36]

A contract provision that a certain lot of stale cigarettes should not be sold within the United States has been enforced against a purchaser with notice of the restriction.[37] On the other hand, it has been held that an agreement between a manufacturer and buyer of skee-ball alleys restricting their use to a specific locality is not binding on a subsequent purchaser with notice.[38]

Obviously the law of equitable servitudes on chattels is still in a state of flux. It has been suggested that complexities of modern business may eventually make such servitudes desirable.[39] Does the perfection of the radio and the "swing orchestra" present such a complexity as to warrant the application of the equitable servitude doctrine to records? Having applied the rule to records, where should the courts stop? The possibilities are endless. Relief for the orchestra leader should be given by Congress.[40] By legislation the uncertainties of the equitable servitude concept will be avoided.

UNFAIR COMPETITION

Courts enjoining the broadcasting company have invoked the elastic law of unfair competition. That the broadcasting company is in com-

[32] Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880 (1912), overruled by Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959 (1917). For a discussion of this change in policy of the Supreme Court see TOULMIN, TRADE AGREEMENTS AND THE ANTI-TRUST LAWS (1937) 186, *et seq.*

[33] *Motion Picture Patents Co.* case, *ibid.*, and Ethyl Gasoline Corporation v. United States, 309 U. S. 436, 60 Sup. Ct. 618, 84 L. ed. *559 (1940). Cases are collected on p. 456 of the official report. On the subject of Tying Contracts see WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE (1940) 220, *et seq.*

[34] 50 STAT. 693 (1937), 15 U. S. C. §1 (Supp. 1939). The Act is an amendment to the Sherman Anti-Trust Act.

[35] For an excellent review on the effects of these acts see WATKINS, PUBLIC REGULATIONS OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE (1940) 101, *et seq.*

[36] Ethyl Gasoline Corporation v. United States, 309 U. S. 436, 60 Sup. Ct. 618, 84 L. ed. 559 (1940). See collection of citations appearing on p. 457 of the official report.

[37] P. Lorillard Co. v. Weingarden, 280 Fed. 238 (W. D. N. Y. 1922), Note (1922) 36 HARV. L. REV. 107.

[38] National Skee-Ball Co., Inc., v. Seyfried, 110 N. J. Eq. 18, 158 Atl. 736 (1932); *cf.* Keeler v. Standard Folding Bed Company, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. ed. 848 (1895).

[39] Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 944, at p. 1013.

[40] See *infra* notes 57 and 61.

petition with the orchestra leader is readily apparent.[41] Both are engaged in furnishing musical entertainment to the public for which they are either directly or indirectly compensated. Just what does the broadcaster do that is "unfair"? There is no deception, for the company announces it is about to play a transcription of a rendition by Whiteman's orchestra. Yet it broadcasts knowing that the orchestra leader is unwilling to have it do so and that it is in some measure taking away from him a valuable source of revenue.[42] Is it guilty of playing "a dirty trick"[43] on the performing artist? Certainly it is getting a "ride" on the artist's fame, even if not entirely "free".[44]

The bulwark relied upon by courts granting relief on the theory of unfair competition is *International News Service v. Associated Press*,[45] in which the Supreme Court enjoined agents of the Hearst papers from copying news bulletins of the Associated Press in New York and telegraphing the items to the Pacific coast where they were published as Hearst news. The majority declared Hearst guilty of unfair competition. On the authority of that case a broadcasting station was enjoined from sending out news bulletins which it had taken from the early editions of the plaintiff's newspaper.[46] So also a broadcasting company was enjoined from broadcasting the progress of a baseball game from outside points of vantage when the proprietor of the game had sold the "sole broadcasting rights" to another.[47] The opinion now under

[41] Judge Meekins in Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939), found the defendant guilty of an unfair trade practice and made no mention of unfair competition although he said (p. 339), "Both complainant and respondent are engaged in a business of selling musical entertainment to the public."

[42] A record may be bought for $.75. Waring was paid $13,500 for a radio performance on the Ford Motor Hour. See Waring v. WDAS, 327 Pa. 433, ——, 194 Atl. 631, 635 (1937).

[43] See review of Nims, THE LAW OF UNFAIR COMPETITION AND TRADE MARK, by Rogers, book review (1929) 39 YALE L. J. 301.

[44] A broadcasting company purchasing the records has of course paid something. If the record instead of costing $.75 should cost $75 or even $750, it is readily apparent that the ride of the broadcaster would not be free albeit the general public would purchase few records. The court in the principal case suggests that perhaps Whiteman did not get enough for his recording. Conceivably Whiteman may be forced to make a choice, to charge so little that the public will buy in quantities and risk the loss due to broadcasting of his records, or to charge so much that the general public will not buy but broadcasters and their advertising sponsors would still find it more profitable to use his records than to engage his personal services.

[45] *Supra* note 24. See note on the *International News* case by Kocourek (1919) 13 ILL. L. REV. 708. Also Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor* (1935) 33 MICH. L. REV. 322.

[46] Associated Press v. KVOS, Inc., 80 F. (2d) 575 (C. C. A. 9th, 1935) reversing Associated Press v. KVOS, Inc., 9 F. Supp. 279 (D. C. Wash. 1934). The Circuit Court of Appeals was itself reversed, on the ground that the jurisdictional amount of $3,000 had not been established, in 299 U. S. 269, 57 Sup. Ct. 197, 81 L. ed. 183 (1936). The Circuit Court of Appeals decision is noted in (1936) 34 MICH. L. REV. 738, and the District Court decision in (1935) 44 YALE L. J. 877.

[47] Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W. D. Pa. 1938), Notes (1939) 24 CORN. L. Q. 288, (1938) 25 VA. L. REV. 243, and other law reviews. *Contra:* National Exhibition Co. v. Teleflash, Inc., 24 F. Supp.

review makes no mention of these extensions of the *International News* case, but rather relies upon the dissenting opinion of Mr. Justice Brandeis in that case and concludes that competition is not unfair merely because the profits gained are unearned and at the expense of a rival. The *International News* case, we are told, "In spite of some general language must be confined to that situation (and) certainly . . . cannot be used as a cover to prevent competitors from ever appropriating the results of the industry, skill and expense of others."[48] In the *International News* case as well as the broadcasting cases in which injunctions have been granted against the dispersing of news produced at the expense of the plaintiff, the courts have not given the plaintiff an unlimited monopoly but have restrained the defendants only during that period of time when the news had a value as such. Applying this principle to the instant case, shall the court say that the broadcasting of the record is not permanently enjoined but only for such time as music of that nature has a "value"? When and if the public taste no longer desires the Whiteman type of music, then may the defendant broadcast? Such a rule would indeed present practical obstacles.

The difficulties inherent in a future application of the principles announced in the *International News* case were foreshadowed by Mr. Justice Brandeis,[49] who favored legislation as the remedy. Mr. Justice Holmes felt that if recognition of the source of the news were given by Hearst there would be no unfair competition.[50] Here such recognition was given by the announcer.

Notwithstanding the declared purpose of the majority in the *International News* case to prevent a "competitor from reaping the fruits" of another's efforts and expenditures,[51] a number of subsequent decisions have refused to apply that policy. A Virginia court in 1921 denied an injunction against an auto parts jobber who by means of a cheap photographic process had copied certain pages of his competitor's uncopyrighted catalogue and incorporated them in his own which he accordingly issued at an appreciably lower cost.[52] In 1929 the Circuit Court of Appeals which rendered the decision now being reviewed refused to enjoin a competitor in the necktie silk industry from copying

488 (S. D. N. Y. 1936); Victoria Park Racing & Recreation Grounds Co. v. Taylor, 37 S. R. 322 (New South Wales 1936), Note (1938) 51 HARV. L. REV. 755. See also Sports and General Press Agency, Ltd. v. "Our Dogs" Pub. Co., [1916] 2 K. B. 880, 85 L. J. K. B. N. S. 1573, 115 L. T. N. S. 378, 32 Times L. R. 651.

[48] 114 F. (2d) 86, 90 (C. C. A. 2d, 1940).

[49] 248 U. S. 215, 262, 39 Sup. Ct. 68, 75, 63 L. ed. 211, 224 (1918), cited *supra* Note 24.

[50] Separate opinion of Mr. Justice Holmes in the *International News* case, *id.* at 246, 39 Sup. Ct. at 75, 63 L. ed. at 223 (1937).

[51] See opinion of Mr. Justice Pitney, 248 U. S. 215, 241, 39 Sup. Ct. 68, 73, 63 L. ed. 211, 221 (1937).

[52] Crump Co. v. Lindsay, 130 Va. 144, 107 S. E. 679 (1921). See Note, *The Imitation of Advertising* (1932) 45 HARV. L. REV. 542.

unpatented designs which had been produced at great expense by Cheney Brothers and which had "taken" with the public. Having spared himself the expense of making his own designs, the competitor was able to undersell Cheney.[53] The decision in the instant case is in line with these authorities which despite apparent hardship on the plaintiff have wisely rejected the broad language of the majority opinion in the *International News* case and confined it to its specific facts.

Dishonest and fraudulent business practices frequently are and should be curbed by the courts as unfair competition. Our problem, however, is neither one of fraud nor dishonesty but rather a doubtful question of ethics on which reasonable men may differ.[53a] Enjoining as "unfair competition" what to the court appears unethical will not only create practical obstacles in the application of such a policy but is sure to result in uncertainty due to a contrariety of decisions. A further objection to the use of the injunction on the unfair competition theory is that the court thereby creates a perpetual monopoly in favor of the unpatented or uncopyrighted work in excess of any monopoly afforded by the patent and copyright acts. If monopolistic protection is to be given the performer in his rendition, Congress and not the courts should declare and fix the limits of that monopoly.

The Right of Privacy

The court in the principal case properly dismissed, as unworthy of consideration, the theory that Whiteman's right of privacy had been invaded. Such a basis for relief had been urged by Judge Maxey in *Waring v. WDAS*.[54] It is difficult to see how a conductor who has caused hundreds of his orchestral recordings to be sold to the public and whose daily occupation is to perform in public either by personal appearance or via the radio can be said to have had his right of privacy, his right to be let alone, invaded by the broadcast of his records. The essence of his success is his ability to keep the attention and admiration of the public. Only in comparatively recent years has an individual's right of privacy been accorded recognition by the courts,[55] and the limits of the doctrine are still uncertain and necessarily difficult of definition.[56] But to protect the business interests of an orchestra leader on

[53] Cheney Bros. v. Doris Silk Corp., 35 F. (2d), 279 (C. C. A. 2d, 1929), Note (1929) 43 Harv. L. Rev. 330. See also Gotham Music Service v. D. & H. Music Pub. Co., 259 N. Y. 86, 181 N. E. 57 (1932) (no relief given to plaintiff where defendant copied a new name under which plaintiff had at much expense popularized an old song). See generally Chafee, *Unfair Competition* (1940) 53 Harv. L. Rev. 1289.

[53a] The actions of the broadcasters have already received legislative sanction in two states. See *infra* note 62.

[54] 327 Pa. 433, ——, 194 Atl. 631, 642 (1937).

[55] Since the well-known article by Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv. L. Rev. 193, much has been written in the reviews on this subject. See, for example, Brandis, *The Right of Privacy* (1929) 7 N. C. L. Rev. 435, See also 1 Cooley, Torts (4th ed., 1932) §135.

[56] See Flake v. News Co., 212 N. C. 780, 790, 195 S. E. 55, 62 (1938).

the ground that his privacy has been invaded by the public broadcast of his records would be a gross misapplication of the principle.

LEGISLATION

Bills extending copyright protection to cover phonograph records and the renditions of performing artists have been periodically introduced in Congress since 1906. During 1940 Representative McGranery sponsored such a measure.[57] It was referred to the House Committee on Patents which has failed to act upon it. In all likelihood the bill will die with the adjournment of the 76th Congress, in which event we may expect the introduction of a similar measure at the next session.[58]

Since in every orchestra several individuals are giving their own renditions each artist might claim copyright protection.[59] The McGranery bill accordingly provides that the performer of a rendition is to be regarded as the author but that in the event of joint renditions the conductor or leader shall be deemed the author and be entitled to the protection of the Act.[60]

Whether Congress will eventually act to safeguard the interests of the performer is problematical.[61] Meanwhile certain states have enacted statutes favoring the broadcaster. Both North and South Carolina in 1939 adopted legislation which provides that upon the sale of a phonograph record any asserted intangible rights shall be deemed to have passed to the purchaser who may use the record free from any restrictions.[62]

It is submitted that the interests of uniformity and certainty will be better served if the ultimate policy is determined by Congress.

[57] H. R. 9703, introduced May 8, 1940. This bill is a substitute for Representative McGranery's earlier bill, H. R. 6160, introduced May 4, 1939. H. R. 9703 proposes among other things to amend Sec. 5 of the present Copyright Act by adding, "(c) The rendition and/or performance of any work when recorded in a fixed, permanent form on phonograph records, disks, sound tracks, tapes, or on any and all other substances or by any other means whatsoever, from and by the means of which it may be acoustically communicated, performed, delivered, or reproduced" (p. 7, of bill). Sec. 6 of the Act would be amended by adding after the word "translation" the words "and recorded renditions and performances" (p. 7 of bill).

[58] In a letter to this reviewer the Secretary of the House Committee on Patents under date of Dec. 5, 1940, said, "I have been informed Congressman McGranery is making a study of proposed amendments to the Copyright law, and will introduce a bill again in the next Congress."

[59] See Chafee, *Unfair Competition* (1940) 53 HARV. L. REV. 1289, 1319.

[60] H. R. 9703, Sec. 29, p. 24.

[61] For a discussion of earlier bills and hearings had thereon see *Revision of the Copyright Law* (1938) 51 HARV. L. REV. 906; PFORZHEIMER, COPYRIGHT SYMPOSIUM (1938) 28, *et seq.;* Note (1940) 49 YALE L. J. 559. In *Pforzheimer* there will be found a summary of legislation in foreign countries which have afforded relief to the performer.

[62] N. C. PUB. LAWS 1939, c. 113, p. 129, ratified March 16, 1939, N. C. CODE ANN. (Michie, 1939) §5126(s); South Carolina Acts of 1939, §28, p. 53, approved Feb. 17, 1939. It will be noticed that both of these acts are after the decision in Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939), which was rendered on January 25, 1939.