THE LAW
of
RADIO BROADCASTING

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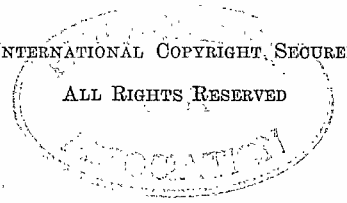

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TABLE OF CONTENTS

VOLUME II

Chapter XXI.

BROADCAST ADVERTISERS AND THEIR AGENCIES.

		Page
Section 334.	Generally	662
335.	The Advertising Agency in Radio Broadcasting	662
336.	Function of the Agency	663
337.	Whether the Advertising Agency Is an Agent at Law Is a Question of Fact	664
338.	Advertising Agencies Do Not Act as Brokers	664
339.	Relation Between Client and Agency: Generally	665
340.	Relation Between Client and Agency at Law	667
341.	The Agreement Between the Advertiser and the Advertising Agency Creates the Relation of Principal and Agent	670
342.	Specific Authority Not Necessary for Contracts as Agent	671
343.	Liability of the Advertiser for Contracts of the Advertising Agency	673
344.	Client's Ratification of Unauthorized Acts of Advertising Agency	674
345.	Duties of the Advertising Agency as Agent for Its Client	675
346.	The Client's Duties to the Advertising Agency	679
347.	Powers of the Advertising Agency	681
348.	The Advertising Agency as an Independent Contractor	682
349.	Client's Liability [illegible] Agency	683

Chapter XXII.

THE ARTIST AND THE PRODUCER.

		Page
Section 350.	Introductory	686
351.	Generally	688
352.	Scope of Services Included in Contract with Artist	690
353.	Same: Whether Traveling Required	690
354.	Same: Broadcast Coverage of Program	692
355.	Same: Repeat Broadcasts	692
356.	Duty of the Producer to Employ the Artist	693
357.	Same: Understudies	694
358.	Contracts for Services of Artists in Sunday Broadcasts	695
359.	Interpretation of Agreements Between Artist and Producer	695

PAGE

SECTION 360. Same: Evidence of Usage Admissible..... 697
361. Duration of Engagement..... 701
362. Renewal of Contracts for Services of Artists..... 704
363. Termination of Artist's Engagement..... 704
364. Contracts for Satisfactory Services..... 707

Chapter XXIII.

THE ARTIST AND THE PRODUCER (Continued).

SECTION 365. Discharge of Artist by Producer: Burden of Proof.. 711
366. Justifiable Discharge: Breach of Reasonable Rules and Regulations..... 712
367. Same: Insubordination and Disobedience: Refusal to Play Role Assigned..... 714
368. Same: Refusal to Wear Costume..... 717
369. Justifiable Discharge: Where Artist Is Incompetent 717
370. Justifiable Discharge: Illness of the Artist..... 718
371. Justifiable Discharge: Intoxication of Artist..... 720
372. Same: Unfaithfulness, Insolence and Insubordination 720
373. Same: Immoral Conduct or Indecent Language..... 720
374. Justifiable Discharge: Failure of Artist to Appear at Rehearsals 721
375. Notice of Discharge..... 722
376. Waiver or Condonation of Acts Constituting Grounds for Justifiable Discharge..... 722
377. Failure of Producer to Secure Broadcast Time No Excuse for Non-Performance of Contract with Artist 724
378. Acts of God and *Force Majeure*..... 724
379. Artist's Right to Compensation..... 725
380. Same: Default of the Artist..... 727
381. Artist's Causes of Action for Breach..... 727
382. Anticipatory Breach..... 728
383. Damages for Breach of Contract..... 729
384. Measure of Damages for Breach of Contract..... 730
385. Mitigation of Damages..... 731
386. Notice as Liquidation of Damages..... 732
387. Liquidated Damages Provisions..... 733

Chapter XXIV.

THE ARTIST AND THE PRODUCER (Continued).

SECTION 388. Injunctions Against Artists for Breach..... 735
389. Express or Implied Negative Covenant Essential.... 738

PAGE

SECTION 390. Negative Covenant to Be Valid Must Be Reasonable.. 739
391. Negative Injunction Issued Where Remedy at Law Inadequate 740
392. Same: Provision for Liquidated Damages..... 741
393. Artist's Services Must Be Unique..... 742
394. Necessity That Producer Have Performed Contract Before Artist Enjoined..... 744
395. Producer Must Continue Performance After Negative Injunction Granted..... 744
396. Negative Injunctions *Pendente Lite*..... 744
397. No Negative Injunctions Against Infant Artists.... 745
398. Negative Injunction Not Barred by Clause for Arbitration 746
399. Negative Injunction May Not Be Secured by Producer's Assignee..... 747
400. Negative Injunction Will Not Issue Where Contract Lacks Mutuality..... 747
401. Injunctions Beyond the Term of Employment..... 748
402. Where Contract for Services Gives Producer Exclusive Right to Use Artist's Photograph for Advertising.. 748
403. Implied Negative Covenant of Artist Not To Do Any Act in Derogation of Producer's Rights Under the Contract 749

Chapter XXV.

THE PRODUCER AND THE AUTHOR OF THE BROADCAST SCRIPT.

SECTION 404. Generally 751
405. Whether Author Is Employee or Independent Contractor 752
406. Contracts for Broadcast Program Scripts: License and Assignment Distinguished..... 755
407. Agreements Between Authors and Copyright Proprietors 756
408. Same: Ownership of Rights in Scripts..... 758
409. Use of Author's Name..... 759
410. Producer's Deviation from or Distortion of Broadcast Program Script..... 763
411. Is Producer Required to Broadcast the Script?..... 764
412. Termination of Licenses..... 766
413. Remedy at Law: Where Scripts Are to Be Delivered by Specified Time..... 766
414. Same: Agreement for Series of Scripts..... 767

PAGE

SECTION 415. Equitable Relief Where Author Has Breached His Agreement 768
416. Same: Liquidated Damages..... 768
417. Rescission of Agreement..... 769
418. Breach of License Agreement..... 769
419. Relief Where Producer Breaches His Agreement with the Author..... 769
420. Remedy for Conversion, Loss or Destruction of Script 770
421. Radio Rights in Non-Broadcast Works..... 771

Chapter XXVI.

ARTISTS—THEIR MANAGERS AND PERSONAL REPRESENTATIVES.

SECTION 422. Generally 774
423. Manager, Personal Representative and Booking Agency Contrasted..... 775
424. Managers and Personal Representatives Are Agents of the Artist..... 776
425. Same: Under the Statutes..... 777
426. Creation of the Agency..... 779
427. Duration of Agency Relation Between Artist and Representative 780
428. Termination of the Agency Relation Between Artist and Representative..... 782
429. Revocation of Authority of Representative by Artist.. 782
430. Revocation for Cause..... 784
431. Duties of the Representative Which Are Implied in Law 785
432. The Artist's Duties to His Representative..... 787
433. Authority of the Representative..... 788
434. Artist May Ratify Unauthorized Acts of Representative 789
435. Artist Bound by Apparent Authority of Representative 790
436. Execution of Agreements by Representatives Binding on Artist..... 790
437. Rights of Producer Where Disputes Exist Between Artist and Representative..... 791

Chapter XXVII.

THE BROADCAST OF NEWS PROGRAMS.

SECTION 438. Historically 793
439. Litigation Instituted by the Press Against Broadcast Stations 795

PAGE

SECTION 440. The Press-Radio Plan 796
441. Same: Other Services Supplying News for Broadcasting 797
442. The Doctrine of *International News Service* v. *Associated Press* 799
443. The Appropriation of News by Broadcast Stations as Unfair Competition 801
444. Appropriation of News Content of Broadcast Programs: By the Press 804
445. Same: By Other Broadcasters 806
446. Direct Broadcast of News: Right to Broadcast 807
447. Same: Agreements Therefor 811
448. Defamation in News Broadcasts 812
449. Control of Broadcast Stations by Newspapers 815
450. Same: Constitutionality of Proposed Legislation 815

Chapter XXVIII.
BROADCAST PROGRAMS AND RIGHTS OF PRIVACY.

SECTION 451. Generally 818
452. Nature of Right of Privacy 819
453. Same: Persons Entitled Thereto 822
454. The Recognition of the Right of Privacy at Common Law 824
455. The Doctrine in New York 826
456. Enactment of Sections 50 and 51 of the New York Civil Rights Law 827
457. Use of Name in Broadcast Program 829
458. Same: Commercial Programs Other Than News 831
459. Use of Name in News Broadcast 833
460. Use of Assumed Names in Broadcast Programs 836
461. Broadcast of Recordings as Invasion of Rights of Privacy 837
462. Broadcast Programs Containing Interviews with Members of the Public 839
463. Inapplicability of Right of Privacy to Certain Persons 841
464. Liability for Invasion of the Right of Privacy 843
465. Recommendations 844

Chapter XXIX.
LIABILITY FOR DEFAMATORY CONTENT OF BROADCAST PROGRAMS.

SECTION 466. Introductory 847
467. Defamation by Radio as Distinguished from Libel and Slander 848

PAGE

SECTION 468. Theories Which Attempt to Classify Broadcast Defamation. 849
469. Liability for Broadcast Defamation: Generally. 853
470. Liability of the Speaker Whose Defamatory Remarks Are Broadcast. 853
471. Liability of the Broadcast Station Whose Facilities Are Used to Transmit the Defamatory Program. . . . 853
472. Same: Analogy to Telephone Companies. 854
473. Same: Analogy to Telegraph Companies. 855
474. Same: Analogy to the Press. 855
475. Specific Instances of Station's Liability: Where the Defamatory Broadcast Is Uttered by the Station's Employee. 856
476. Same: Where the Defamatory Matter Uttered by Others Is Included in a Script Previously Submitted to the Station. 857
477. Same: Where the Defamatory Matter Is Uttered by Others Deviating from a Previously Submitted Script. 858
478. Same: Where the Defamatory Matter Is Uttered by Others without Previous Submission of an Existing Script to the Station. 859
479. Same: Where the Defamatory Matter Was Uttered by Others Extemporaneously. 859
480. Liability for Broadcast Defamation Originating from Other Stations. 861
481. Liability of Advertisers for Defamation in Broadcast Programs Sponsored by Them. 863
482. Necessity That Defamatory Program Specifically Relate to Plaintiff. 864
483. Privilege and Fair Comment. 865
484. Jurisdiction of Courts Over Defendants in Actions for Broadcast Defamation. 867
485. Broadcast Defamation Is Actionable at Common Law Independently of Libel or Slander. 868
486. Statutes Dealing with Broadcast Defamation. 869

Chapter XXX.

JURISDICTIONAL PROBLEMS IN ACTIONS FOR DEFAMATORY BROADCASTS.

SECTION 487. Jurisdiction Over Broadcast Defamation from Without the State. 871
488. Jurisdiction Over the Parties. 872
489. Same: Agent to Accept Service. 874

PAGE

SECTION 490. Jurisdiction of Federal Courts in Tort Actions Arising from Broadcasts. 875
491. Same: Recommendations. 876
492. Jurisdiction Over Crimes by Broadcasting from Without the State. 878
493. Same: Jurisdiction Over the Defendants. 879
494. Same: Extradition or Interstate Rendition. 880

Chapter XXXI.

CONTEST PROGRAMS AND THE LOTTERY LAWS.

SECTION 495. Generally. 884
496. Anti-Lottery Provisions of Communications Act of 1934. 885
497. Liability for Violation of Section 316. 886
498. Jurisdiction to Determine Violation of Section 316. . . 889
499. The Difference Between Section 316 of the Communications Act of 1934 and the Postal Anti-Lottery Statute. 890
500. Construction of Anti-Lottery Legislation. 891
501. Definition of a Lottery. 892
502. Consideration: An Essential Element to Constitute a Lottery. 892
503. Consideration: Package Tops, Wrappers, Etc. 900
504. Chance: An Essential Element to Constitute a Lottery 901
505. Same: "Best" Contests. 902
506. Same: Guessing Contests. 905
507. Same: Voting Contests. 906
508. Same: Gift Enterprises. 908
509. Same: Checker Problem and Word Building Contests 909
510. Prize: An Essential Element to Constitute a Lottery. . 910
511. Broadcast Contest Programs: Specific Instances. 911

Chapter XXXII.

BROADCAST PROGRAMS AND TRADE-MARK INFRINGEMENTS.

SECTION 512. Regulation of Trade Competition. 916
513. Elements of Unfair Competition in Broadcasting. . . . 917
514. Protection of Trade-Marks and Trade Names Exploited by Broadcasting: Definitions. 920
515. Same: Distinction Between Trade-Marks and Trade Names. 921

PAGE

SECTION 516. Same: Functions and Purposes of Trade-Marks and Trade Names. 923
517. Same: Basis of Protection of Broadcast Advertisers' Marks. 924
518. Same: Technical Trade-Marks in Particular. 925
519. Same: Exploitation by Broadcast Advertising of Trade-Mark Affixed to Sponsor's Product. 926

Chapter XXXIII.
PROTECTION OF TRADE NAMES USED IN BROADCAST PROGRAMS.

SECTION 520. Basis of Protection of Trade Names. 930
521. Test of Unfair Competition in Simulation of Broadcast Trade Names. 932
522. Professional Names of Radio Artists May Be Protected as Trade Names. 934
523. Same: Injury to Professional Reputation. 937
524. Use of Real Name of Artist by Another as Unfair Competition. 940

Chapter XXXIV.
PROTECTION OF TITLES OF BROADCAST PROGRAMS.

SECTION 525. Protection of Titles or Other Reminiscent Expressions Associated with Radio Broadcast Programs. 943
526. Program Titles Containing Trade-Mark or Trade Name of Sponsor Protected. 944
527. Program Title Possessing Secondary Meaning Is Protected Against Unauthorized Use by Another for General Purposes of Entertainment. 944
528. Program Title Protected Against Use in Motion Picture, Play or Novel. 946
529. Title of Work in Public Domain May Be Protected Against Unfair Competition. 949
530. Theme Music Protected Against Unfair Competition. . 949

Chapter XXXV.
APPROPRIATION OF COMMON LAW INTELLECTUAL PROPERTY: FALSE BROADCAST ADVERTISING.

SECTION 531. Appropriation of Ideas: There Is No Property in Mere Ideas 951

PAGE

SECTION 532. Property in Literary Expression of Ideas..... 952
533. Protection of Original Ideas by Contract..... 954
534. *Liggett & Myers Tobacco Co.* v. *Meyer; Ryan* v. *Century Brewing Association*..... 956
535. Appropriation of Broadcast Advertising Ideas May Be Prevented as Unfair Competition..... 957
535A. Interference with Exclusive Right to Broadcast a Program Restrainable as Unfair Competition.... 960
536. Unauthorized Broadcast of Phonograph Records Restrainable by Performing Artist as Unfair Competition 961
537. Appropriation of an Artist's Broadcast Performance by Off-the-Air Recording for Commercial Purposes Restrained 964
538. False Broadcast Advertising..... 966

Chapter XXXVI.

FEDERAL REGULATION OF BROADCAST ADVERTISING.

SECTION 539. Generally 969
540. Jurisdiction of Federal Trade Commission Extends to Advertising of Articles in Interstate Commerce: Jurisdiction of Federal Communications Commission Distinguished 970
541. Supervision of the Federal Trade Commission Over Broadcast Advertising 972
542. Same: Examination of Scripts and Transcribed Programs 973
543. Same: Methods of Stipulation Procedure in Advertising Cases 974
544. Same: Procedure on Formal Complaints..... 976
545. Same: Jurisdiction of Federal Courts..... 978
546. The Federal Trade Commission Act..... 978
547. Validity of "Cease and Desist" Orders..... 979
548. Phrase "Unfair Methods of Competition" Not Restricted to Probable Meaning at Time of Enactment of Federal Trade Commission Act..... 982
549. False and Misleading Broadcast Advertising May Be Restrained by the Federal Trade Commission.... 986
550. False and Misleading Advertising Must Affect Specific and Substantial Public Interest to Be Restrained by Federal Trade Commission..... 989

PAGE

SECTION 551. False and Misleading Radio Advertising Which Results in Gain to Public May Be Restrained by Federal Trade Commission..... 993
552. Long Duration of Condemned Practice Does Not Insure Condonation 994
553. Broadcast Advertising May Be Restrained Only Where It is False in Fact: Advertiser Possesses Freedom of Opinion and "Puffing"..... 994
554. Restraint of Broadcast Misrepresentations That Product Contained Absent Ingredient..... 995
555. Use of Testimonials and Endorsements in Broadcast Programs 997
556. Misrepresentation of Advantage to Buyer in Purchasing from Seller..... 998
557. Miscellaneous Types of False and Misleading Advertising 998
558. General List of Unfair Competitive Practices..... 1001
559. Regulation of Broadcast Advertising by Federal Communications Commission 1004

Chapter XXXVII.

CONTROL OF BROADCAST PROGRAM CONTENT: CENSORSHIP AND EDITORIAL SELECTION.

SECTION 560. Specific Federal Statutory Provisions..... 1007
561. Rationale of Section 326 of the Act of 1934..... 1008
562. Constitutional Guarantee of Freedom of Speech.... 1009
563. Same: Congressional Limitations Thereon Under the Communications Act of 1934..... 1011
564. Indirect Control of Content of Broadcast Programs by Federal Communications Commission..... 1011
565. Control of Content of Broadcast Programs by the States 1013
566. Federal Regulation of Political Broadcast Programs.. 1018
567. Prohibition of Broadcast of Obscene, Indecent or Profane Language 1020
568. Prohibition of Broadcast of Information Concerning Lotteries 1023
569. Private Control of Contents of Broadcast Programs.. 1025
570. Same: By Broadcast Stations..... 1025
571. Same: Same: Commercial Programs 1028
572. Same: By the Producer and Other Persons Presenting the Program 1030
573. Proposed Legislation 1031

Chapter XXXVIII.

LEGAL PROTECTION OF CREATIVE WORKS.

PAGE

SECTION 574. Creative Works Used in Radio Broadcasts..... 1036
575. Same: How Used 1037
576. Rights of Owner of Creative Work Used in Broadcast Program: Generally 1038
577. Historical View of Copyright..... 1040
578. Same: *Donaldson* v. *Beckett* and *Wheaton* v. *Peters* 1042

Chapter XXXIX.

PROTECTION OF CREATIVE WORKS AT COMMON LAW.

SECTION 579. Common Law Rights Distinguished from Statutory Copyright 1044
580. Publication as a Divestment of Common Law Rights.. 1049
581. When Publication Is Effected: Specific Instances.. 1051
582. Same: Performance Not a Publication..... 1054
583. Effect of Acts of Publication in One Jurisdiction Upon Rights in Another..... 1056
584. Extent of Protection at Common Law..... 1057

Chapter XL.

COPYRIGHT UNDER THE ACT OF 1909.

SECTION 585. Copyright Legislation Prior to 1909..... 1059
586. Subject Matter of Copyright Protection Under Act of 1909 1061
587. Persons Entitled to Copyright Under the Act of 1909 1064
588. Same: Where Work Is Created by Two or More Persons 1068
589. Formalities Necessary to Secure Copyright Protection Under Act of 1909..... 1069
590. Same: Deposit Under Sections 12 and 13 of Act of 1909 1071
591. Registration and Issuance of Copyright Certificate.. 1073
592. Duration or Term of Copyright Under Act of 1909.. 1074
593. Publication as an Essential of Statutory Copyright... 1075
594. Statutory Copyright in Unpublished Works..... 1076
595. Same: Constitutionality of Section 11..... 1079
596. Works in the Public Domain..... 1081
597. State Statutes Dealing with Copyright..... 1082

Chapter XLI.

RATIONALE AND INCIDENTS OF COPYRIGHT PROTECTION.

		PAGE
SECTION 598.	Rationale of Copyright Protection	1084
599.	Same: Originality as Substantive Basis of Copyright Protection	1088
600.	Incidents of Copyright Protection: Specific Rights	1089
601.	Printing, Publishing and Multiplying Copies	1090
602.	Vending and Otherwise Distributing Copyrighted Works	1091
603.	Translating the Work into Other Languages or Other Dialects	1092
604.	Making Other Versions of Copyrighted Literary Works	1093
605.	Dramatization of Non-Dramatic Works	1094
606.	Conversion of Dramatic Work into Non-Dramatic Form	1095
607.	Copyrighted Musical Compositions: Arrangements Thereof	1095
608.	Same: Arrangements as Mutilations of Copyrighted Music	1098
609.	Same: Making of Extractions Thereof	1099
610.	Performance of Copyrighted Works: Generally	1100
611.	The Public Delivery of Copyrighted Lectures, Sermons, Addresses or Similar Productions	1102
612.	Public Performances of Literary Works	1103
613.	Exclusive Right to Public Performance of Dramatic Works	1105

Chapter XLII.

INFRINGEMENT OF COPYRIGHT AND REMEDIES THEREFOR.

SECTION 614.	Infringement Generally	1108
615.	Substantial and Material Appropriation	1110
616.	Infringement at Common Law	1112
617.	Infringement: Intention Immaterial	1112
618.	Infringements: Fair Use	1113
619.	Same: Jurisdiction	1114
620.	Statutes of Limitation	1116
621.	Damages for Infringement of Copyright	1117

PAGE
SECTION 622. Damages for Infringement of Common Law Rights.. 1120
623. Counsel Fees 1121

Chapter XLIII.

MUSICAL CONTENT OF BROADCAST PROGRAMS.

SECTION 624. Copyrighted Musical Works Generally..... 1123
625. Grand Rights and Small Rights Distinguished..... 1124
626. Broadcast Performance as Infringement of Musical Copyright 1126
627. Same: Defense of Independent Contractor Not Available 1127
628. Same: *Witmark* v. *Bamberger; Remick* v. *American Automobile Accessories Co.* 1127
629. Same: Rebroadcast Performances 1130
630. Same: Public Reception Thereof..... 1132
631. Broadcast Performances for Profit..... 1140
632. Same: Sustaining Programs 1141
633. Same: Non-Profit Stations 1142
634. Same: Broadcast Performances—When Public..... 1144
635. Same: Place Where Infringing Performance Broadcast Not Important..... 1145
636. Same: Studio Audiences 1146

Chapter XLIV.

COPYRIGHT PROTECTION OF BROADCAST PROGRAM SCRIPTS.

SECTION 637. Generally 1149
638. Broadcast Program Script and Continuity Distinguished 1150
639. Classification of Broadcast Program Scripts..... 1151
640. Analysis of Contents of Scripts..... 1152
641. Copyright Protection of Continuity..... 1154
642. Ownership of Copyright in Scripts and Continuities.. 1155
643. Same: Whether Author Is Employee or Independent Contractor. 1158
644. Scripts Prepared by Government Agencies and Appearing in Government Publications..... 1161

PAGE

SECTION 645. The Broadcast of Letters..... 1162
646. The Broadcast of Telegrams..... 1163
647. Right of Script Writer to By-Line, Billing, etc..... 1163
648. Contracts for Broadcast Program Scripts: Assignability Thereof..... 1165
649. Copyright Upon Scripts as Affecting Performance Thereof..... 1167
650. Producer's Deviation from or Distortion of Broadcast Program Script..... 1168
651. Mechanical Reproduction of Broadcast Program Scripts..... 1170

Chapter XLV.

MECHANICAL REPRODUCTION OF COPYRIGHTED WORKS.

SECTION 652. Mechanical Reproduction of Copyrighted Musical Work Included Within Scope of Copyright Protection..... 1172
653. No Right of Mechanical Reproduction Prior to Act of 1909..... 1172
654. Right of Mechanical Reproduction Granted by Existing Copyright Law..... 1174
655. Compulsory License Provisions..... 1174
656. Same: When Effective..... 1175
657. Constitutionality of Compulsory License Provisions.. 1176
658. Compulsory License Provisions Not Applicable to Dramatico-Musical Works..... 1178
659. The British Copyright Act: Mechanical Reproductions and Compulsory Licenses..... 1178
660. United States and British Copyright Acts: Compulsory Licenses Distinguished..... 1179
661. What Constitutes Mechanical Reproduction: Generally 1180
662. Mechanical Reproductions and the Act of 1909: Compulsory License Not Applicable to Electrical Transcriptions and Other Devices for Public Performance for Profit..... 1180
663. Electrical Transcriptions Contain Special Arrangements and Exceptional Uses of Copyrighted Works, Rendering Compulsory License Inapplicable..... 1183

PAGE

SECTION 664. Compulsory License: Phonograph Records and Piano Rolls. 1185
665. Mechanical Reproductions—Act of 1909 Not Retroactive. 1186
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
670. Same: "Off-the-Air" Recordings for Public Performance. 1196
671. Same: "Off-the-Air," "Line," "Instantaneous" and "Studio" Recordings Distinguished. 1197
672. Same: Liability to Copyright Owner. 1198
673. Compulsory License Provisions Not Applicable to Off-the-Air Recordings. 1199
674. Same: Broadcast Performance of Phonograph Records 1201

Chapter XLVI.

RENEWAL OF COPYRIGHTS.

SECTION 675. Historically. 1202
676. Under the Act of 1909. 1203
677. Nature of Right of Renewal. 1205
678. Where the Author Has Assigned His Inchoate Right of Renewal. 1206
679. Renewal of Copyright Where There Are Two or More Authors. 1207
680. Same: Composite Works. 1210
681. Same: Where All Authors Do Not Perfect Renewal of Copyright. 1211
682. Same: Musical Compositions. 1213
683. Same: Where a Co-Author Fails to Renew. 1215
684. Suggested Amendments to the Act of 1909. 1216
685. Licenses from Renewal Copyright Owners. 1216
686. Right of Renewal: When Exercised and by Whom. . . . 1217
687. Same: Where Author Was in the Employ of Original Copyright Proprietor. 1219
688. Citizenship as Affecting Right of Renewal. 1220

Chapter XLVII.

COPYRIGHT PROTECTION IN FOREIGN COUNTRIES AND BY INTERNATIONAL COPYRIGHT.

PAGE

SECTION 689. Extent of Copyright Protection in Foreign Countries.. 1223
690. Duration of Copyright Protection in Foreign Countries 1223
691. Same: Local Copyright Protection of Works of Aliens 1225
692. Protection of Mechanical Reproductions Under Foreign Copyright Statutes..... 1225
693. Protection of Works of Aliens in Other Countries... 1226
694. The Berne Convention and Its Revisions: Generally... 1227
695. Protection Rendered by Conventions to Citizens of Member Countries..... 1228
696. Protection Under Conventions to Citizens of Non-Member Countries..... 1229
697. Automatic Copyright Under Conventions: Formalities 1229
698. Duration of Copyright Under Conventions..... 1231
699. Mechanical Reproductions Under Conventions..... 1232
700. Performing Rights Under Convention..... 1232
701. "Le Droit Morale" Under the Convention..... 1233
702. Pan-American Copyright Relations..... 1234
703. Copyright Protection of Interpretative Artists..... 1236
704. Copyright Relations of United States With Other Countries 1237
705. Broadcast Performance as Infringement of Copyright in Foreign Countries..... 1240
706. Same: By Mechanical Reproductions..... 1242
707. Same: Public Reception of Broadcast Performances as Infringement..... 1242
708. Copyright Infringement by International Broadcast Programs 1243
709. Recommendations 1244

Chapter XLVIII.

TELEVISION.

SECTION 710. Introduction 1249
711. Jurisdiction to Regulate Television..... 1250

PAGE

SECTION 712. Specific Application of Act of 1934 to Television.... 1251
713. Censorship of Televised Programs..... 1252
714. Defamatory Televised Broadcasts..... 1253
715. Invasions of Rights of Privacy by Televised Broadcasts..... 1254
716. Same: Unauthorized Use of Artist's Performance.... 1257
717. Press-Radio Relation: Unfair Competition..... 1258
718. Negative Covenants Between Artists and Producers as Affected by Television..... 1259
719. Copyright Problems..... 1259

Appendix to Volume II.
Index to Copyright Law..... 1263
U. S. Constitution, Art. 1, § 8..... 1275
Schedule of Copyright Acts in Force..... 1275
Copyright Act of 1909..... 1276
Acts Amendatory of the Copyright Act
Act of August 24, 1912..... 1304
Act of March 2, 1913..... 1308
Act of March 28, 1914..... 1309
Act of December 18, 1919..... 1310
Act of July 3, 1926..... 1311
Act of May 23, 1928..... 1312
United States Supreme Court Rules of Practice and Procedure under Section 25 of Act of 1909..... 1314
International Copyright Relations—Presidential Proclamations 1319
Berne Convention of 1886 with Paris Amendments of 1896... 1324
Berlin Convention of 1908..... 1340
Additional Protocol of 1914..... 1349
Rome Revision of the International Copyright Convention, 1928..... 1351

General Index to Volumes I and II..... 1363

Law of
RADIO BROADCASTING

VOLUME II

Chapter XXI.

BROADCAST ADVERTISERS AND THEIR AGENCIES.

		PAGE
SECTION 334.	Generally	662
335.	The Advertising Agency in Radio Broadcasting	662
336.	Function of the Agency	663
337.	Whether the Advertising Agency Is an Agent at Law Is a Question of Fact	664
338.	Advertising Agencies Do Not Act as Brokers	664
339.	Relation Between Client and Agency: Generally	665
340.	Relation Between Client and Agency at Law	667
341.	The Agreement Between the Advertiser and the Advertising Agency Creates the Relation of Principal and Agent	670
342.	Specific Authority Not Necessary for Contracts as Agent	671
343.	Liability of the Advertiser for Contracts of the Advertising Agency	673
344.	Client's Ratification of Unauthorized Acts of Advertising Agency	674
345.	Duties of the Advertising Agency as Agent for Its Client	675
346.	The Client's Duties to the Advertising Agency	679
347.	Powers of the Advertising Agency	681
348.	The Advertising Agency as an Independent Contractor	682
349.	Client's Liability for Torts of Its Advertising Agency	683

§ 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.[1] 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.[2] 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.

§ 335. The Advertising Agency in Radio Broadcasting.

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.[3] 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.

[3] 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] The broker

[4] See § 348 *infra*.

[5] *Cf.* I. MECHEM ON AGENCY (1923) § 50. See Collier Service Corp. *v.* Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4.

[6] RESTATEMENT, AGENCY (1933) § 1.

[7] II. MECHEM ON AGENCY (1923) § 2362.

[8] Stratford *v.* Montgomery, 110 Ala. 619, 20 So. 127 (1895). Collection of definitions of "broker" in *Banta* v. *City of Chicago,* 172 Ill. 204, 50 N.E. 233 (1898).

[9] II. MECHEM, *op. cit. supra* n. 7, § 2362.

[10] Stratford *v.* Montgomery, 110 Ala. 619, 20 So. 127 (1895).

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.[11] 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.

§ 339. Relation Between Client and Agency: Generally.

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.[12]

Upon its engagement by the sponsor to plan and execute

[11] II. MECHEM, *op. cit. supra* n. 7, § 2362.

[12] Ryan *v.* Century Brew. Assn., 185 Wash. 600, 55 P.(2d) 1053 (1936).

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.[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.[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

[13] I. MECHEM, *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."

[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 [14] or for writers to create program scripts or commercial announcements, or where it engages producers, artists,[15] 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,

[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 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.

[17] Kastor & Sons Advertising Co. *v.* Elders, 170 Mo.App. 490, 492, 156 S.W. 737 (1913).

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]

[18] Fuller & Smith *v.* Rontzahn, 23 F.(2d) 959 (N.D.Ohio, 1927); H. K. McCann Co., Inc. *v.* Commissioner, Docket 6578, 14 B.T.A. 234 (1928). See Potts-Turnbull Advertising Co. *v.* United States, 37 F.(2d) 970 (Ct.Cl., 1930); Appeal of Conover, Docket No. 3926, 6 B.T.A. 679 (1927). *Cf.* Bashan *v.* Lucas, 21 F.(2d) 550 (W.D.Ky., 1927).

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.*,[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.[20]

In *Dorrance, Sullivan & Co.* v. *Bright Star Battery Co.*,[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

[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 "agreements of employment" are found in HAASE, ADVERTISING AGENCY COMPENSATION (1934) 159, 160.

[21] 223 App. Div. 222, 223, 227 N.Y.Supp. 675, *revd.* 249 N.Y. 593, 164 N.E. 596 (1928).

on the following basis, covering the period of your employment 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 contract, upon which suit could be maintained by the agency.[22] The Court's interpretation confirms the view that the relation 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 prepare 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), *aff'd.* 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. MECHEM ON AGENCY (1923) Sec. 1709.

[24] Law *v.* Stokes, 3 Vroom 249, 32 N.J.L. 249, 90 Am. Dec. 655 (1867); I. MECHEM ON AGENCY (1923) §§ 720–9.

agency has no authority so to act, it will be liable to the third person [25] 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.[26]

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.[27]

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.[28] 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 (1923) §§ 1359 *et seq.*

[28] Sadler *v.* Young, 78 N.J.L. 594, 75 Atl. 890 (1910); Carrol v. Bowen, 113 Md. 150, 77 Atl. 128 (1910); Jones *v.* Gould, 200 N.Y. 18, 92 N.E. 1071 (1910). 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*,[29] 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:[30]

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

[29] 83 Misc. 404, 145 N.Y.Supp. 145 (Sup. Ct. App. Term, 1913).

[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,*[31] 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.*

§ 344. Client's Ratification of Unauthorized Acts of Advertising Agency.

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.[32] The affirmance of the act must be as to all of the persons involved.[33] The ratification by the sponsor makes the prior acts as effective as though made by the advertising

[31] 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.

[32] RESTATEMENT, AGENCY (1933) § 82.

[33] *Id.* at § 96.

agency in pursuance of an express authority therefor.[34]

The client can ratify only those acts which he had capacity to authorize.[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.[36] Only the client identified as the principal at the time of the prior act may affirm so as to make an effective ratification.[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.[38]

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

§ 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

[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) § 82.

[35] Marsh *v.* Fulton Co., 10 Wall. (U.S.) 676, 19 L.Ed. 1040 (1870); Dobbs *v.* Atlas Elev. Co., 25 S.D. 177, 126 N.W. 250 (1910). A person who has no capacity to authorize cannot ratify. *Reid* v. *Alaska Packing Co.*, 47 Or. 215, 83 Pac. 139 (1905).

[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) § 85. *Accord:* Collier Service Corp. *v.* Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4.

[37] RESTATEMENT, AGENCY (1933) § 87.

[38] *Ibid.*

[39] *Id.*, at Sec. 100. See Collier Service Corp. *v.* Progress Corp., N.Y.L.J., June 24, 1938, 3049, col. 4.

[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-

[41] Rupp *v.* Sampson, 82 Mass. 398 (1860); Ranney *v.* Donovan, 78 Mich. 318, 44 N.W. 276 (1889); Knauss *v.* Krueger Brewing Company, 142 N.Y. 70, 36 N.E. 867 (1894).

[42] Where an agent acts for adverse parties in the same transaction, unless his duties and services are purely ministerial, either party may repudiate. *New York Cent. Ins. Co.* v. *Insurance Co.*, 14 N.Y. 85 (1856); *Guthrie* v. *Huntington Chair Co.*, 71 W.Va. 383, 76 S.E. 795 (1912). *Cf. Cahall* v. *Lofland*, 114 Atl. 224 (Del. Ch., 1921). See n. 46 *infra*.

[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.

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.

[46] Whitney *v.* Express Co., 104 Mass. 152 (1870); Minn. Trust Co. *v.* Mather, 181 N.Y. 205, 73 N.E. 987 (1905).

[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.[51]

(c) The advertising agency must deal fairly with its client in all transactions between them.[52]

(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.[53]

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.

[51] 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.

[52] RESTATEMENT, AGENCY (1933) § 13, Comment A.

[53] 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

[54] Haase & Digges, *Suggestions for a New Form of Agency Contract* (1935, No. 5) 170 *Printers Ink* 25. See *All-Package Grocery Stores Co., Inc.* v. *McAtamney,* 161 N.Y.Supp. 622 (App. Div. 1st Dept., 1916); RESTATEMENT, AGENCY (1933) § 398.

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

[56] Chapel *v.* Clark, 117 Mich. 638, 76 N.W. 62, 72 Am. St. R. 587 (1898); Malone *v.* Gerth, 100 Wis. 166, 75 N.W. 972 (1898); Ericksson *v.* Reine, 139 Minn. 282, 166 N.W. 333 (1918). *Cf.* Varnum *v.* Martin, 32 Mass. 440 (1834).

[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.[58] The client may not terminate the relation of agency so as to avoid payment, unless the contract specifically empowers it to do so.[59] In the absence of fixed agreed compensation, the agency is entitled to the reasonable value of its services[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.[61] Of course, where the client commits a

[58] Schwartze *v.* Yearly, 31 Md. 270 (1869).

[59] Northwestern Port Huron Co. *v.* Zickrick, 32 S.D. 28, 141 N.W. 983 (1913).

[60] Bard *v.* Banigan, 38 Fed. 13 (C.C.D.Conn., 1889), *aff'd.* 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.

[61] Ryan *v.* Century Brew. Assn., 185 Wash. 600, 55 P.(2d) 1053 (1936) *semble.* See § 534, *infra.*

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.[62] 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.[63]

§ 347. Powers 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.[64] 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).

[63] Bibb *v.* Allen, 149 U.S. 481, 13 Sup. Ct. 950, 37 L.Ed. 819 (1893); Dozier *v.* Davidson & Fargo, 138 Ga. 190, 74 S.E. 1086 (1912) (express agreement to that effect).

[64] National Bank *v.* Bank, 112 Fed. 726 (C.C.A. 7th, 1902); Law Reporting Co. *v.* Elwood Grain Co., 135 Mo. App. 10, 115 S.W. 475 (1909); Quint *v.* O'Connell, 89 Conn. 353, 94 Atl. 288 (1915).

cise such powers.[65] The addition by implication of other powers is not permissible.

§ 348. The Advertising Agency as an Independent Contractor.

The learned author of MECHEM ON AGENCY has defined "independent contractor" as follows:[66]

> ". . . '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."

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

[65] Johnston *v.* Milwaukee, *etc.* Inv. Co., 46 Neb. 480, 64 N.W. 1100 (1895); Hall *v.* Paine, 224 Mass. 62, 112 N.E. 153 (1916).

[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).

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.

§ 349. Client's Liability for Torts of Its Advertising Agency.

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 [67] 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.[68] Where the client is sought to be held liable for the commission of a tort by the agency within the scope of its employment,

[67] Semple *v.* Morganstern, 97 Conn. 402, 116 Atl. 906 (1922); Herring *v.* Hoppock, 15 N.Y. 409 (1857); Virtue *v.* Creamery Mfg. Co., 123 Minn. 17, 142 N.W. 930 (1913). See Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

[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,[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.[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.[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.[72]

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

[69] Firemen's Fund Ins. Co. *v.* Schreiber, 150 Wis. 42, 135 N.W. 507 (1912).

[70] Stone *v.* Hills, 45 Conn. 44 (1877); Illinois Central Ry. *v.* Lathand, 72 Miss. 32, 16 So. 757 (1894).

[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).

[72] *Cf.* Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

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.[73] 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.[74]

[73] 35 STAT. 1075, 1088 (1909), 17 U.S.C.A. § 25 (1927); American Code Co., Inc. *v.* Bensinger, 282 Fed. 829 (C.C.A. 2d, 1922); Gross *v.* Van Dyk Gravure Co., 230 Fed. 412 (C.C.A. 2d, 1916). *Cf.* Fromont *v.* Aeolian Company, 254 Fed. 592 (S.D.N.Y., 1918).

[74] Gross *v.* Van Dyk Gravure Co., 230 Fed. 412 (C.C.A. 2d, 1916).

Chapter XXII.

THE ARTIST AND THE PRODUCER.

		PAGE
SECTION 350.	Introductory	686
351.	Generally	688
352.	Scope of Services Included in Contract with Artist	690
353.	Same: Whether Traveling Required	690
354.	Same: Broadcast Coverage of Program	692
355.	Same: Repeat Broadcasts	692
356.	Duty of the Producer to Employ the Artist	693
357.	Same: Understudies	694
358.	Contracts for Services of Artists in Sunday Broadcasts	695
359.	Interpretation of Agreements Between Artist and Producer	695
360.	Same: Evidence of Usage Admissible	697
361.	Duration of Engagement	701
362.	Renewal of Contracts for Services of Artists	704
363.	Termination of Artist's Engagement	704
364.	Contracts for Satisfactory Services	707

§ 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,[1] 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.*

[3] *Cf.* WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 1012.

[4] See Chapter XXVI. *infra.*

the parties.[5] 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.[6]

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.[7] 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); Ripon *v.* Alcazar Amusement Co., 197 Ill. App. 416 (1916).

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

[7] Spahn, *et al. v.* Winter Garden, 138 N.Y.Supp. 446 (Sup. Ct., 1912).

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.Supp. 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.[8] 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.[9] 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.[10]

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.

[9] See Gath *v.* Interstate Amusement Co., 170 Ill. App. 614 (1912).

[10] Day *v.* Klaw, *et al.*, 112 N.Y. Supp. 1072 (1908).

§ 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 nonperformance 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]

§ 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

[11] Corrigan *v.* E. M. P. Prod. Corp., 179 App. Div. 810, 167 N.Y. Supp. 264 (1917). See Lumley *v.* Wagner, 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1832).

[12] See § 400 *infra*.

that he was under no obligation to provide employment.[13] 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[14] have been distinguished in a later case[15] 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.[16]

§ 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.[17]

[13] See Pollock *v.* Shubert, 146 App. Div. 628, 131 N.Y.Supp. 386 (1911); Plympton *v.* Liebler, 156 App. Div. 944, 142 N.Y.Supp. 1140 (1913).

[14] *Ibid.*

[15] Dixey *v.* A. H. Woods Prod. Co., 88 Misc. 506, 151 N.Y.Supp. 224 (1914).

In *Morang & Co.* v. *Le Seur*, 45 Can. Sup. Ct. 95 (Can., 1911), the Canadian court implied a promise to publish on the part of the defendant publisher who had purchased a manuscript from the plaintiff writer.

[16] See Rooney *v.* Weeks, 194 N.E. 666 (Mass., 1935).

[17] Newman *v.* Gath, 24 T.L.R. 18 (Eng., 1907).

The understudy, however, may be obligated to perform. In the absence of such a provision in the contract, the understudy cannot demand that the producer permit him to perform.[18]

§ 358. Contracts for Services of Artists in Sunday Broadcasts.

A contract for theatrical performances on Sunday is valid if such performances are permitted by the authorities.[19] The producer and the artist are presumed not to have intended to violate the law. Since radio broadcasting on Sunday is considered legal, contracts requiring the performance of the services of an artist in a Sunday broadcast are valid. The artist may not refuse to perform his agreement on the ground that the services are required to be rendered on Sunday. It should be no defense permitting a producer to escape liability for payment of the services of an artist, that the services contravened a statute prohibiting entertainment on Sunday. Such statutes were not enacted in contemplation of radio broadcasting and, if so, would be an unreasonable exercise of police power.[19a]

An agreement for the services of an artist in a broadcast program "every evening in the week", should be construed to include a Sunday, even though an English court held that a similar contract for theatrical performances did not include Sunday.[20] Today, an agreement to render services in "daily" broadcasts should not be construed to exclude Sunday performances.

§ 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.*

[19] Strauss *v.* Hammerstein, 152 App. Div. 128, 136 N.Y.Supp. 613 (1912); Zenatello *v.* Hammerstein, 231 Pa. 56, 79 Atl. 922 (1911).

[19a] See § 246 *supra.*

[20] Kelly *v.* London Pavilion, 77 L.T. 215 (Eng., 1897).

courts seek out the true intention of the artist and the producer in making their agreement.[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.[22] Hence, the contract will be construed most favorably to the party who did not prepare the instrument.[23]

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

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."

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).

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 33½ 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."

24 Parsil *v.* Onyx Hosiery, 220 App. Div. 148, 221 N.Y.Supp. 174 (1927); 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); RESTATEMENT, CONTRACTS (1932) § 236(a); WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 620.

25 WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 620.

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.[27] Where the intent is clearly expressed, the court will not make a forced construction of the terms of the agreement.[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.[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.[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.[31] Parol evidence may also

Weinfeld, 144 Misc. 159, 258 N.Y.Supp. 217 (1932); Leavitt *v.* Palmer, 3 N.Y. (3 Const.) 19 (1849).

[27] *Semble* Moller *v.* Pickard, 197 App. Div. 333, 188 N.Y.Supp. 791 (1921).

[28] Dixey *v.* A. H. Woods, 168 App. Div. 337, 154 N.Y.Supp. 49 (1915).

[29] Dutschle *v.* Wilson, 39 F.(2d) 406 (C.C.A. 8th, 1930); Robertson *v.* Charles Frohman, Inc., 198 App. Div. 782, 191 N.Y.Supp. 55 (1921); Poel *v.* Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915); Fagan *v.* Ulrich, 166 App. Div. 342, 152 N.Y.Supp. 37 (1915); RESTATEMENT, CONTRACTS (1932) § 236(e); WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 622.

[30] Robertson *v.* Charles Frohman, Inc., 198 App. Div. 782, 191 N.Y.Supp. 55 (1921).

[31] Pathé Exchange Co. *v.* Miller, 278 Fed. 997 (App. D.C., 1922); De Carlton *v.* Glaser, 172 App. Div. 132, 158 N.Y.Supp. 271 (1916).

In *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 *Tatterson* 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.[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.[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.[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.[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".[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.[38] In no case may evidence of a usage be admitted to change or

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

[34] Lovering *v.* Miller, 218 Pa. 212, 67 Atl. 209 (1917).

In *Strafford* 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.

[35] De Carlton *v.* Glaser, 172 App. Div. 132, 158 N.Y.Supp. 271 (1916).

[36] McIntosh *v.* Miner, 37 App. Div. 483, 55 N.Y.Supp. 1074 (1899).

[37] Nichols *v.* Wharton, 179 App. Div. 62, 166 N.Y.Supp. 51 (1917).

[38] Hart *v.* Cort, 165 App. Div. 583, 151 N.Y.Supp. 4 (1914).

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

[39] Fahy *v.* Irving Trust Co., 247 App. Div. 767, 286 N.Y.Supp. 578 (1936).

[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).

[42] Walls *v.* Bailey, 49 N.Y. 464 (1872); Newhall *v.* Appleton, 114 N.Y. 140, 21 N.E. 105 (1889).

[43] Walls *v.* Bailey, 49 N.Y. 464, 477 (1872).

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

[45] Beard *v.* Marine Lighterage Corp., 296 Fed. 146 (E.D.N.Y., 1924); Simms *v.* Sullivan, 100 Or. 487, 198 Pac. 240 (1921).

[46] Globe & Rutgers Fire Ins. Co. *v.* Losher, Whitman & Co., 126 Misc. 874, 215 N.Y.Supp. 225 (1926); Bender *v.* South, 189 Ky. 623, 225 S.W. 504 (1920); Mendenhall *v.* Sherman, 193 Mo. App. 684, 187 S.W. 271 (1916).

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

[47] De Carlton *v.* Glaser, 172 App. Div. 132, 158 N.Y.Supp. 271 (1916); Hart *v.* Cort, 84 Misc. 44, 144 N.Y.Supp. 627, *aff'd.* 165 App. Div. 583, 151 N.Y.Supp. 4 (1913); Newhall *v.* Appleton, 114 N.Y. 140, 21 N.E. 105 (1889).

[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.Supp. 446 (Sup. Ct., 1912).

[50] McIntosh *v.* Miner, 37 App. Div. 483, 55 N.Y.Supp. 1074 (1899).

[51] Shubert *v.* Angeles, 80 App. Div. 625, 80 N.Y.Supp. 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

[53] Sherwood *v.* Crane, 12 Misc. 83, 33 N.Y.Supp. 17 (Com. Pl., 1895).

[54] WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 39.

[55] Sherwood *v.* Crane, 12 Misc. 83, 33 N.Y.Supp. 17 (Com. Pl., 1895); Fellows *v.* Fairbanks Co., 205 App. Div. 271, 199 N.Y.Supp. 772 (1923); Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56 (1870).

[56] Perry *v.* Bates, 115 App. Div. 337, 100 N.Y.Supp. 881 (1906).

[57] See Spahn *v.* Winter Garden, 138 N.Y.Supp. 446 (Sup. Ct., 1912).

[58] Watson *v.* Gugino, 204 N.Y. 535, 98 N.E. 18 (1912); Martin *v.* N. Y. Life Ins. Co., 73 Hun 496, 26 N.Y.Supp. 283 (1893); Thill *v.* Hoyt, 37 App. Div. 521, 56 N.Y.Supp. 78 (1899) (actress engaged for trial during rehearsals is employed at will).

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.

[59] Watson *v.* Gugino, 204 N.Y. 535, 98 N.E. 18 (1912); Martin *v.* N. Y. Life Ins. Co., 73 Hun 496, 26 N.Y.Supp. 283 (1893); WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 39; See McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 557, 11 Atl. 176 (1887).

[60] Watson *v.* Gugino, 204 N.Y. 535, 98 N.E. 18 (1912).

[61] Martin *v.* N. Y. Life Ins. Co., 73 Hun 496, 26 N.Y.Supp. 283 (1893).

[62] WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 39.

[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 *Pfiester* 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

[64] Adams *v.* Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891); Carter *v.* Bradlee, 245 App. Div. 49, 280 N.Y.Supp. 368 (1935); LABATT ON MASTER AND SERVANT (2d ed., 1913) §§ 230, 232.

[65] Wade *v.* Robt. Arthur Theatres Co., 24 T.L.R. 77 (Eng., 1907); Brighton *v.* H. B. Claflin Co., 84 App. Div. 557, 82 N.Y. Supp. 667 (1903).

[66] See Wood *v.* Miller, 78 Misc. 377, 138 N.Y.Supp. 562 (1912).

[67] Lonsdale *v.* J. A. Migel, Inc., 222 App. Div. 197, 225 N.Y.Supp. 593 (1927). See Wheeler *v.* Woods, 120 N.Y.Supp. 80 (Sup. Ct., 1909).

[68] Lonsdale *v.* J. A. Migel, Inc., 222 App. Div. 197, 225 N.Y.Supp. 593 (1927).

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

[69] Howe *v.* Robinson, 13 Misc. 256, 34 N.Y.Supp. 85 (Com. Pl., 1895).

[70] Strakosch *v.* Strakosch, 11 N.Y.Supp. 251 (City Ct., 1891).

[71] Robertson *v.* Chas. Frohman, Inc., 198 App. Div. 782, 191 N.Y. Supp. 55 (1921). See § 386 *infra.*

[72] See § 286 *infra.*

[73] De Carlton *v.* Glaser, 172

admissible to show that such custom exists.[74] *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.[75] It is the general view that the death of the employer terminates a contract for personal services.[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.[77] This is the rule except as slightly modified to avoid arbitrary acts on the part of the producer.[78]

App. Div. 132, 158 N.Y.Supp. 271 (1916); Briscoe *v.* Litt, 19 Misc. 5, 42 N.Y.Supp. 908 (1896); Hall *v.* Aronson, N.Y.L.J., Mar. 16, 1891; Hart *v.* Thompson, 39 App. Div. 668, 57 N.Y.Supp. 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.Supp. 991 (1893).

[74] Hart *v.* Thompson, 39 App. Div. 668, 57 N.Y.Supp. 334 (1899). See § 360 *supra.*

[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); WILLISTON ON CONTRACTS (1920) § 1940.

[76] WILLISTON ON CONTRACTS (1920) Sec. 1941. See *In re* Rosenberg's Will, 213 App. Div. 167, 209 N.Y.Supp. 315 (1925).

[77] In *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."

[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,[79] 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.[80] 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.Supp. 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."

[79] Studner *v.* H. & N. Carburetor Co., Inc., 185 App. Div. 131, 172 N.Y.Supp. 836 (1918); Zitlin *v.* Max Heit Dress Co., 151 Misc. 241, 271 N.Y.Supp. 275 (1934); Carter *v.* Bradlee, 245 App. Div. 49, 280 N.Y.Supp. 368 (1935). *Accord:* Fuller *v.* Downing, 120 App. Div. 36, 104 N.Y.Supp. 991 (1907). *Contra:* Kramer *v.* Wien, 92 Misc. 159, 155 N.Y.Supp. 193 (1915) (where contract provided "to the entire personal satisfaction").

[80] Crawford *v.* Mail & Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (1900) (writer); Peverly *v.* Poole, 19 Abb. N.C. 271 (1886) (chorister). *Accord:* Wynkoop Hallenbeck Crawford Co. *v.* West-

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 York[82] 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 case[86] which has been

ern Union Tel. Co., 268 N.Y. 108, 196 N.E. 762 (1935); RESTATEMENT, CONTRACTS (1932) § 265.

[81] Saxe *v.* Shubert, 57 Misc. 620, 108 N.Y.Supp. 683 (1908) (actor); Weaver *v.* Klaw, 16 N.Y.Supp. 931 (City Ct., 1891) (actor); Aquinto *v.* C. C. Fisher, Inc., 165 N.Y.Supp. 369 (Sup. Ct., 1917) (musician).

[82] Aquinto *v.* C. C. Fisher, Inc., 165 N.Y.Supp. 369 (Sup. Ct., 1917) (musician); Saxe *v.* Shubert, 57 Misc. 620, 108 N.Y.Supp. 683 (1908) (actor); Crawford *v.* Mail & Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (1900) (writer); Weaver *v.* Klaw, 16 N.Y.Supp. 931 (City Ct., 1891) (actor); Peverly *v.* Poole, 19 Abb. N.C. 271 (1886) (chorister); Studner *v.* H. & N. Carburetor Co., Inc., 185 App. Div. 131, 172 N.Y.Supp. 836 (1918); Zitlin *v.* Max Heit Dress Corp., 151 Misc. 241, 271 N.Y.Supp. 275 (1934) and cases cited therein; Carter *v.* Bradlee, 245 App. Div. 49, 280 N.Y.Supp. 368 (1935).

[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).

[84] Aquinto *v.* C. C. Fisher, Inc., 165 N.Y.Supp. 369 (Sup. Ct., 1917) (musician); Saxe *v.* Shubert, 57 Misc. 620, 108 N.Y.Supp. 683 (1908) (actor); Crawford *v.* Mail & Express Pub. Co., 163 N.Y. 404, 57 N.E. 616 (1900) (writer); Weaver *v.* Klaw, 16 N.Y.Supp. 931 (City Ct., 1891) (actor); Peverly *v.* Poole, 19 Abb. N.C. 271 (1886) (chorister); Studner *v.* H. & N. Carburetor Co., Inc., 185 App. Div. 131, 172 N.Y.Supp. 836 (1918); Zitlin *v.* Max Heit Dress Corp., 151 Misc. 241, 271 N.Y. Supp. 275 (1934) and cases cited therein; Carter *v.* Bradlee, 245 App. Div. 49, 280 N.Y.Supp. 368 (1935).

[85] Parker *v.* Hyde & Behman Amusement Co., 53 Misc. 549, 103 N.Y.Supp. 731 (Sup. Ct., 1907).

[86] Smith *v.* Robson, 148 N.Y. 252, 42 N.E. 677 (1896).

cited [87] 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,[88] Massachusetts [89] and the Federal Courts [90] 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.[91] 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.[92] Where the producer may "deem" the services unsatisfactory, he has an absolute right of discharge.[93] 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.

[88] Schuyler *v.* Pantages, 54 Cal. App. 83, 201 Pac. 137 (1921) (vaudeville performer).

[89] Fried *v.* Singer, 242 Mass. 527, 136 N.E. 609 (1922) (burlesque performer). See Rooney *v.* Weeks, 194 N.E. 666 (Mass., 1935) (radio vocalist).

[90] American Music Stores *v.* Kussell, 232 Fed. 306 (C.C.A. 6th, 1916); Gilman v. Lamson Co., 234 Fed. 507 (C.C.A. 1st, 1916). *Contra:* Kendall v. West, 196 Ill. 221, 63 N.E. 683 (1902).

[91] Hydecker *v.* Williams, 18 N.Y.Supp. 586 (Com. Pleas, 1892).

[92] Rooney *v.* Weeks, 194 N.E. 666 (Mass., 1935).

[93] Glyn *v.* Miner, 6 Misc. 637, 27 N.Y.Supp. 341 (Com. Pleas, 1894); *Contra:* Schuyler *v.* Pantages, 54 Cal. App. 83, 201 Pac. 137 (1921).

issuance of a negative injunction restraining the artist from rendering his services for another.[94] 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.[95]

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.[96] 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.[97]

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.[98] 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.[99]

[94] Kenyon *v.* Weissberg, 240 Fed. 536 (S.D.N.Y., 1917).

[95] Rooney *v.* Weeks, 194 N.E. 666 (Mass., 1935).

[96] Fried *v.* Singer, 242 Mass. 527, 136 N.E. 609 (1922); Rooney *v.* Weeks, 194 N.E. 666 (Mass., 1935).

[97] Saxe *v.* Shubert, 57 Misc. 620, 108 N.Y.Supp. 683 (1908); See WILLISTON ON CONTRACTS, (Rev. Ed., 1936) § 1014.

[98] Schuyler *v.* Pantages, 54 Cal. App. 83, 201 Pac. 137 (1921).

[99] Lipschutz *v.* Proctor, 95 N.Y. Supp. 566 (Sup. Ct., 1905).

Chapter XXIII.

THE ARTIST AND THE PRODUCER (Continued).

PAGE

SECTION 365. Discharge of Artist by Producer: Burden of Proof.. 711
366. Justifiable Discharge: Breach of Reasonable Rules and Regulations..... 712
367. Same: Insubordination and Disobedience: Refusal to Play Role Assigned..... 714
368. Same: Refusal to Wear Costume..... 717
369. Justifiable Discharge: Where Artist Is Incompetent 717
370. Justifiable Discharge: Illness of the Artist..... 718
371. Justifiable Discharge: Intoxication of Artist..... 720
372. Same: Unfaithfulness, Insolence and Insubordination 720
373. Same: Immoral Conduct or Indecent Language..... 720
374. Justifiable Discharge: Failure of Artist to Appear at Rehearsals 721
375. Notice of Discharge..... 722
376. Waiver or Condonation of Acts Constituting Grounds for Justifiable Discharge..... 722
377. Failure of Producer to Secure Broadcast Time No Excuse for Non-Performance of Contract with Artist 724
378. Acts of God and Force Majeure..... 724
379. Artist's Right to Compensation..... 725
380. Same: Default of the Artist..... 727
381. Artist's Causes of Action for Breach..... 727
382. Anticipatory Breach..... 728
383. Damages for Breach of Contract..... 729
384. Measure of Damages for Breach of Contract..... 730
385. Mitigation of Damages..... 731
386. Notice as Liquidation of Damages..... 732
387. Liquidated Damages Provisions..... 733

§ 365. Discharge of Artist by Producer: Burden of Proof.

Where the artist complains of a wrongful discharge by the producer, he has the burden of proof on the whole

case.[1] The artist establishes a *prima facie* case by the proof of a valid employment contract and discharge by the producer[2] which has prevented him, though ready and willing, from further performing his part of the contract.[3] The establishment of a *prima facie* case by the artist imposes upon the producer the burden of going forward with evidence showing that the discharge was justifiable.[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.[5] The artist must bring himself within all the terms of the contract to prevail ultimately.[6]

§ 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.[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.[8] Even where the agreement to obey reasonable rules and regulations is not expressly

[1] Zitlin *v.* Max Heit Dress Co., 151 Misc. 241, 271 N.Y.Supp. 275 (1934).

[2] *Ibid.*

[3] Vernon *v.* Rife, 294 S.W. 747 (Mo. App., 1927).

[4] *Ibid.*

[5] See Fisher *v.* Monroe, 11 N.Y. Supp. 207 (City Ct., 1890).

[6] Broughton *v.* Kalich, 185 N.Y. Supp. 318 (Sup. Ct., 1920).

[7] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Dixey *v.* Punch & Judy Theater Co., 165 N.Y.Supp. 357 (Sup. Ct. 1917); Fisher *v.* Monroe, 11 N.Y.Supp. 207 (City Ct., 1890); MECHEM ON AGENCY (1923) § 607.

[8] Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910).

made, the law will imply such a promise.[9] 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.[10]

In determining whether a certain rule is reasonable, all the circumstances must be considered.[11] 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.[12]

The reasonableness of the order must be decided by the court or jury. In *Corrigan* v. *E. M. P. Producing Co.*,[13] 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."[14]

Where the artist agrees to report for rehearsals promptly when notified to do so, but is frequently tardy,

[9] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910); Violette *v.* Rice, 173 Mass. 82, 53 N.E. 144 (1899).

[10] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Dixey *v.* Punch & Judy Theater Co., 165 N.Y.Supp. 357 (Sup. Ct., 1917); Fisher *v.* Monroe, 11 N.Y.Supp. 207 (City Ct., 1890); MECHEM ON AGENCY (1923) § 607; Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910).

[11] See Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910).

[12] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920).

[13] *Id.* at 404, 187 Pac. 788.

[14] *Cf.* Corrigan *v.* E. M. P. Prod. Co., 179 App. Div. 810, 167 N.Y.Supp. 206 (1917).

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.[15] It is reasonable for the producer to make a rule that all publicity for the program should emanate from him.[16] 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.[17]

To be sufficient justification for the discharge of the artist, it is the preferable view that the breach of the reasonable rule be willful.[18] "A willful disobedience is an intentional disobedience."[19] 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.[20]

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.[21] Where the artist agreed to play any role assigned to him

[15] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920).

[16] Dixey *v.* Punch & Judy Theater Co., 165 N.Y.Supp. 357 (Sup. Ct., 1917).

[17] Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910).

[18] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Goudal *v.* C. B. DeMille Pictures Co., 118 Cal. App. 407, 5 P.(2d) 432 (1931).

[19] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920).

[20] Berg *v.* Just Because, Inc., 205 App. Div. 31, 199 N.Y.Supp. 66 (1923).

[21] Zenatello *v.* Hammerstein, 231 Pa. 56, 79 Atl. 922 (1911); See Makletzova *v.* Diaghileff, 227 Mass. 100, 116 N.E. 231 (1917).

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

[22] Standing *v.* Brady, 157 App. Div. 657, 142 N.Y.Supp. 656 (1913).

[23] Essanay Film Mfg. Co. *v.* Lerche, 267 Fed. 353 (C.C.A. 9th, 1920).

[24] Rafalo *v.* Edelstein, 80 Misc. 153, 140 N.Y.Supp. 1076 (1913).

[25] Essanay Film Mfg. Co. *v.* Lerche, 267 Fed. 353 (C.C.A. 9th, 1920).

[26] Rafalo *v.* Edelstein, 80 Misc. 153, 140 N.Y.Supp. 1076 (1913).

[27] Goudal *v.* C. B. DeMille Pictures Co., 118 Cal. App. 407, 5 P.(2d) 432, 435 (1931).

> 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]

[28] FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 139.

[29] See Essanay Film Mfg. Co. *v.* Lerche, 267 Fed. 353 (C.C.A. 9th, 1920).

[30] See Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910); Rafalo *v.* Edelstein, 80 Misc. 153, 140 N.Y.Supp. 1076 (1913).

[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.[33] The artist cannot object to the immodesty of the costume designed.[34] 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.[35]

§ 369. Justifiable Discharge: Where Artist Is Incompetent.

The incompetency of the broadcast artist will be sustained as a valid ground for his discharge by the producer.[36] 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.[37] Hence, "incompetency" is not equivalent to "unsatisfactory".[38]

[33] Rafalo *v.* Edelstein, 80 Misc. 153, 140 N.Y.Supp. 1076 (1913).

[34] Duff *v.* Russell, 14 N.Y.Supp. 134 (Sup. Ct., 1892); Dis Debar *v.* Hoeffle, 4 N.Y.L.J. 1475; Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910). FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 136.

[35] *Ibid.*

[36] See McLaughlin *v.* Hammerstein, 99 App. Div. 225, 90 N.Y. Supp. 943 (1904).

[37] WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 1014. Brandt *v.* Godwin, 3 N.Y.Supp. 807, 811 (1889), *affd.* 8 N.Y. Supp. 339 (Com. Pleas, 1890).

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.[39] The evidence must show that the artist is in fact incompetent.[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.[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.[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.[43]

§ 370. Justifiable Discharge: Illness of the Artist.

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.[44] A minor illness which is not protracted and which does not seriously affect the broadcast of the pro-

Supp. 339 (Com. Pleas, 1890); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 159.

[39] Grinnell *v.* Kiralfy, 55 Hun 422, 8 N.Y.Supp. 623 (Sup. Ct., 1890).

[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).

[41] See Walton *v.* Godwin, 58 Hun 87, 11 N.Y.Supp. 391 (1890).

[42] See § 364 *supra.*

[43] Thill *v.* Hoyt, 37 App. Div. 521, 56 N.Y.Supp. 781 (1899); Zamco *v.* Hammerstein, 29 T.L.R. 217 (Eng., 1913).

[44] Poussard *v.* Spiers [1876] 1 Q.B.D. 410 (Eng.); Macaulay *v.* Press Pub. Co., 170 App. Div. 640, 155 N.Y.Supp. 1044 (1915).

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).

[46] Fahey *v.* Kennedy, 230 App. Div. 156, 243 N.Y.Supp. 396 (1930); Rubin *v.* International Film Co., 122 Misc. 413, 204 N.Y. Supp. 81 (City Ct., 1924).

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."

[47] Fahey *v.* Kennedy, 230 App. Div. 156, 243 N.Y.Supp. 396 (1930).

[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).

§ 371. Justifiable Discharge: Intoxication of Artist.

The intoxication of an artist to the extent that he is incapable of performance, is justifiable ground for his discharge by the producer.[51] 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.[52] 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.[53]

The assault by one member of the cast of another has been held ground for discharge.[54]

The producer may, without liability, discharge an insolent artist[55] or one who smokes while on duty in violation of express orders.[56]

§ 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

[51] Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315 (1886); Brown *v.* Baldwin & Gleason Co., 13 N.Y.Supp. 893 (Com. Pleas, 1891); Gonsolis *v.* Gearhart, 31 Mo. 585 (1862). *Cf.* Linton *v.* Unexcelled Fireworks Co., 124 N.Y. 533, 27 N.E. 406 (1891); Atkinson *v.* Heine, 134 App. Div. 406, 119 N.Y.Supp. 122 (1909) (salesman).

[52] Batchelder *v.* Standard Plunger El. Co., 227 Pa. 201, 75 Atl. 1090 (1910). *Cf.* Herbert *v.* Wood, Dolson Co., 113 Misc. 671, 185 N.Y.Supp. 325 (1920).

[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.Supp. 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.Supp. 561 (Sup. Ct., 1890).

[56] *Ibid.*

producer.[57] This is so even though the artist thoroughly fulfills his duties as a broadcast performer.[58]

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.[59]

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.[60]

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.[61] 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.[62]

§ 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.[63] 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.*

[59] Brownell *v.* Ehrich, 43 App. Div. 369, 60 N.Y.Supp. 112 (1899).

[60] *Cf.* Ernst *v.* Grand Rapids Engr. Co., 173 Mich. 254, 138 N.W. 1050 (1912); Wade *v.* Hefner, 84 S.E. 598 (Ga. App., 1915).

[61] See § 567 *infra.*

[62] Communications Act of 1934, 48 STAT. 1091, 47 U.S.C.A. § 326 (1937), prohibits the broadcast of "any obscene, indecent, or profane language by means of radio communication". See § 567 *infra.*

[63] See Fisher *v.* Monroe, 12 N.Y.Supp. 273 (Com. Pleas, 1891).

are timed, cut or increased, arranged and corrected. The failure of an artist to appear is an inexcusable 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.[64] Any language and any form of communicating the discharge is sufficient, so long as the artist is actually notified.[65] 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.[66]

If the agreement between the artist and the producer specifies the manner and terms of the discharge, then the parties are bound thereby.[67]

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.[68]

§ 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

[64] Sigmon *v.* Goldstone, 116 App. Div. 490, 101 N.Y.Supp. 984 (1906); De Gellert *v.* Poole, 2 N.Y.Supp. 651 (City Ct., 1888).

[65] Sigmon *v.* Goldstone, 116 App. Div. 490, 101 N.Y.Supp. 984 (1906).

[66] Graves *v.* Kaltenbach & Stephens, 205 App. Div. 110, 199 N.Y.Supp. 248 (1923).

[67] Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y.Supp. 864 (1902); Watson *v.* Russell, 49 N.Y. 388, 44 N.E. 161 (1902).

[68] Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y.Supp. 864 (1902).

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); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 142.

[70] Rubin *v.* International Film Co., 122 Misc. 413, 204 N.Y.Supp. 81 (1924).

[71] Gerber *v.* Kalmar, Puck & Abrahams, Consolidated, Inc., 104 Misc. 85, 171 N.Y.Supp. 92 (1918).

[72] Standing *v.* Brady, 157 App. Div. 657, 142 N.Y.Supp. 656 (1913).

[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.Supp. 822 (City Ct., 1920); Ginsberg *v.* Friedman, 146 App. Div. 779, 131 N.Y.Supp. 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]

§ 378. Acts of God and Force Majeure.

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

[75] Rice *v.* Miner, 89 Misc. 395, 151 N.Y.Supp. 983 (1915); Hardie *v.* Balmain, 18 T.L.R. 539 (Eng., 1902).

[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]

[77] Foster's Agency, Ltd. *v.* Romaine, 32 T.L.R. 545 (Eng., 1916); Auckland & Brunelli *v.* Collins, 32 T.L.R. 545 (Eng., 1916).

[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.

[81] Sterling *v.* Bock, 37 Minn. 29, 32 N.W. 865 (1887); Coghlan *v.* Stetson, 19 Fed. 727 (C.C.S.D. N.Y., 1884).

In *Wheeler* v. *Woods,* 120 N.Y. Supp. 80 (Sup. Ct., 1909), the artist was engaged for a two weeks period. The show was closed by the producer in the middle of the second week. The artist sued for entire second week's salary. The Court said at page 81:

"When defendant engaged plaintiff to play in Chicago for two weeks, he impliedly engaged to provide a theater where the play could be presented. That was a condition precedent. It failed, and because of its failure defendant cannot avoid responsibility, on the well-established principle that one

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.[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.[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.[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.[85] *A fortiori*, where the artist employed by the week, abandons his engagement in the middle of the week or other stated period.[86] This is true also whenever the contract is found to be entire.[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."

82 See WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 862.

83 *Ibid.*

84 Keane *v.* Liebler, 107 N.Y. Supp. 102 (Sup. Ct., 1907). *Contra:* where non-performance by the artist is due to non-performance of condition precedent by producer. *Wheeler* v. *Woods,* 120 N.Y.Supp. 80 (Sup. Ct., 1909).

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

86 Solotaroff *v.* Edelstein Amusement Co., 85 Misc. 445, 147 N.Y. Supp. 938 (1914).

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:[88]

> "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. If the contract is divisible, however, the right of the employee to recover the amount for any division of the contract completed at the time of his discharge is unaffected by the question whether there was cause for the discharge, though it may be important in deciding the employer's right of recoupment or counterclaim."

Salary may be recovered by the artist for time spent in traveling from one place of performance to another.[89]

§ 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

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.

[89] Day *v.* Klaw, 112 N.Y.Supp. 1072 (Sup. Ct., 1908).

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.[90]

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

§ 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.[93]

[90] Livingston *v.* Klaw, 137 App. Div. 630, 122 N.Y.Supp. 264 (1910).

[91] *Ibid.*

[92] FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 145.

[92a] Payne *v.* Pathé Studios, 44 P.(2d) 598 (Calif., 1935).

[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.[94] 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.[95] The producer is liable for all the direct and proximate damages which result from the wrongful discharge.[96]

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.[97]

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.[98] But where

the rule, see WILLISTON ON CONTRACTS (Rev. Ed., 1936) §§ 1296 *et seq.*, particularly §§ 1313 and 1314. For an illustrative situation in broadcasting see *Morris* v. *F. W. Armstrong Co., et al.*, noted in BROADCASTING, July 1, 1937.

[94] Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919); Ellsler *v.* Brooks, 54 N.Y. Super. Ct. (22 Jones & Spencer) 73 (1886).

[95] Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919).

[96] *Cf.* Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264 (1886).

[97] *Cf.* Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919); Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264 (1886); Present *v.* Glazer, 225 App. Div. 23, 232 N.Y. Supp. 63 (1928).

[98] Ellsler *v.* Brooks, 54 N.Y. Super. Ct. (22 Jones & Spencer) 73 (1886).

the proof by the artist presents no reasonable foundation upon which to compute prospective profits, they cannot be awarded as an element of damages.[99] 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.[100] 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.[101]

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.[102]

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

[99] Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 149.

[100] *Cf.* American Hungarian Pub. Co. *v.* Miles Bros., 68 Misc. 334, 123 N.Y.Supp. 879 (Sup. Ct., 1910); Pappas v. Miles, 104 N.Y. Supp. 369 (Sup. Ct., 1907); Savery *v.* Ingersoll, 46 Hun 176, 46 N.Y. Sup. Ct. 176 (1887).

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

[102] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y.Supp. 864 (1902); Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919).

though the period had already expired.[103] The award will be for the entire period of the agreement.[104] In computing the amount of damages, the jury must determine the present worth of the obligation to pay salary.[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.[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.[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.[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.[109] The employment to be sought need only be of the same kind, character and grade as that embraced within the agree-

[103] Everson *v.* Powers, 89 N.Y. 527 (1882).

[104] Carvil *v.* Mirror Films, 178 App. Div. 644, 165 N.Y.Supp. 676 (1917); Cottone *v.* Murray's, 138 App. Div. 874, 123 N.Y.Supp. 420 (1910).

[105] Hollwedel *v.* Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266 (1933).

[106] May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 187 Pac. 785 (1920); Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y.Supp. 864 (1902); Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919).

[107] Woolbridge *v.* Shea, 186 App. Div. 705, 175 N.Y.Supp. 130 (1919).

[108] WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 1359.

[109] Howard *v.* Daly, 61 N.Y. 362 (1875); May *v.* N. Y. Motion Picture Corp., 45 Cal. App. 396, 186 Pac. 785 (1920); Goudal *v.* C. B. DeMille Pictures Co., 118 Cal. App. 407, 5 P.(2d) 432 (1931); Evesson *v.* Ziegfeld, 22 Pa. Super. 79 (1902); Vernon *v.* Rife, 294 S.W. 747 (Mo. App., 1927).

ment.[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.[111]

The burden is on the producer to show that the artist failed to mitigate the damages.[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.[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.[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.[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.[116]

§ 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

[110] Howard *v.* Daly, 61 N.Y. 362 (1875); Briscoe *v.* Litt, 19 Misc. 5, 42 N.Y.Supp. 908 (1896).

[111] Briscoe *v.* Litt, 19 Misc. 5, 42 N.Y.Supp. 908 (1896).

[112] Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y. Supp. 864 (1902).

[113] Goudal *v.* C. B. DeMille Pictures Co., 118 Cal. App. 407, 5 P.(2d) 432 (1931).

[114] Greenwall Theat. Circ. *v.* Markowitz, 97 Tex. 479, 79 S.W. 1069 (1904). *Cf.* Clark *v.* Marsiglia, 1 Denio 317 (N.Y., 1845); WILLISTON ON CONTRACTS (Rev. Ed., 1936) § 1298.

[115] Stockman *v.* Slater Bros. Cloak & Suit Co., 182 N.Y.Supp. 815 (Sup. Ct., 1920); Bigelow *v.* American Forcite Powder Mfg. Co., 39 Hun 599 (N.Y., 1886); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 154.

[116] Deering *v.* Pearson, 8 Misc. 269, 28 N.Y.Supp. 715 (1894).

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.[117] 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.[118]

§ 387. Liquidated Damages Provisions.

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.[119] It is important to determine whether the contract 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.[120] 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".[121]

[117] *Express provision:* Watson *v.* Russell, 149 N.Y. 388, 44 N.E. 161 (1895); Griffin *v.* Brooklyn Ball Club, 68 App. Div. 596, 73 N.Y.Supp. 864 (1902); Fisher *v.* Monroe, 2 Misc. 326, 21 N.Y.Supp. 995 (1893); Dallas *v.* Murry, 37 Misc. 599, 75 N.Y.Supp. 1040 (1902); Leslie *v.* Robie, 84 N.Y. Supp. 289 (Sup. Ct., 1903). *Usage:* Briscoe *v.* Litt, 19 Misc. 5, 42 N.Y.Supp. 908 (1896).

[118] Robertson *v.* C. Frohman, Inc., 198 App. Div. 782, 191 N.Y. Supp. 55 (1921); *Accord:* Koupal *v.* Baker, 172 N.Y.Supp. 114 (Sup. Ct., 1918).

[119] Wirth & Hamid Fair Booking *v.* Wirth, 265 N.Y. 214, 218, 192 N.E. 297 (1934).

[120] Conried Metropolitan Opera Co. *v.* Brin, 66 Misc. 282, 123 N.Y. Supp. 6 (1913).

[121] 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.[122]

The modern rule has been expressed by an authority as follows:[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 ascertainment.[124] The parties will be deemed to have made a reasonable forecast where the sum specified is reasonably proportioned to the actual loss.[125]

U.S. 361, 39 Sup. Ct. 303, 63 L.Ed. 647 (1919) (building contract).

[122] Pastor *v.* Solomon, 26 Misc. 125, 55 N.Y.Supp. 956 (1899); Tuten *v.* Morgan, 160 Ga. 90, 127 S.E. 143 (1925).

[123] McCORMICK ON DAMAGES (1936) § 150.

[124] Mosler Safe Co. *v.* Maiden Lane Safe Dep. Co., 199 N.Y. 479, 93 N.E. 81 (1910); Ressig *v.* Waldorf-Astoria Hotel Co., 185 App. Div. 4, 172 N.Y.Supp. 616 (1918).

[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.

Chapter XXIV.

THE ARTIST AND THE PRODUCER (Continued).

PAGE

SECTION 388. Injunctions Against Artists for Breach..... 735
389. Express or Implied Negative Covenant Essential.... 738
390. Negative Covenant to Be Valid Must Be Reasonable.. 739
391. Negative Injunction Issued Where Remedy at Law Inadequate 740
392. Same: Provision for Liquidated Damages..... 741
393. Artist's Services Must Be Unique..... 742
394. Necessity That Producer Have Performed Contract Before Artist Enjoined..... 744
395. Producer Must Continue Performance After Negative Injunction Granted..... 744
396. Negative Injunctions *Pendente Lite*..... 744
397. No Negative Injunctions Against Infant Artists.... 745
398. Negative Injunction Not Barred by Clause for Arbitration 746
399. Negative Injunction May Not Be Secured by Producer's Assignee..... 747
400. Negative Injunction Will Not Issue Where Contract Lacks Mutuality..... 747
401. Injunctions Beyond the Term of Employment..... 748
402. Where Contract for Services Gives Producer Exclusive Right to Use Artist's Photograph for Advertising.. 748
403. Implied Negative Covenant of Artist Not To Do Any Act in Derogation of Producer's Rights Under the Contract 749

§ 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

[1] Mapleson *v.* Del Puente, 13 Abb. N.C. 144 (1883); Sanquirico *v.* Benedetti, 1 Barb. 315 (N.Y., 1847); De Rivafinoli *v.* Corsetti, 4 Paige Ch. 264 (N.Y., 1833). See Clark Paper & Mfg. Co. *v.* Stenacker, 100 Misc. 173, 165 N.Y. Supp. 367, 368 (1917).

[2] See Stevens, *Involuntary Servitude by Injunction*, (1921) 6 CORN. L.Q. 235.

[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 Rivafinoli *v.* Corsetti, 4 Paige Ch. 264 (N.Y., 1833).

[5] 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1852).

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

[6] *England:* Lumley *v.* Wagner, 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1852) (opera singer); Montague v. Flockton, L.R., 16 Eq. 189 (1873).

Federal: Madison Square Garden Corp. *v.* Carnera, 52 F.(2d) 47 (C.C.A. 2d, 1931) (prize-fighter); Winter Garden Co. *v.* Smith, 282 Fed. 166 (C.C.A. 2d, 1922) (comedians); Shubert Theatrical Co. *v.* Rath, 271 Fed. 827 (C.C.A. 2d, 1921) (acrobat); Cincinnati Exhibition Co. *v.* Marsans, 216 Fed. 269 (D.C.Mo., 1914); Comstock *v.* Lopokowa, 190 Fed. 599 (C.C.S.D.N.Y., 1911) (ballet dancer); Kieitti *v.* Kellerman, 169 Fed. 197 (C.C.S.D.N.Y., 1909) (acrobat). See *dictum* by Fake, D.J., in *Madison Sq. Garden Corp.* v. *Braddock,* 19 F.Supp. 392, 394 (D.C.N.J., 1937) on the power of Equity side of the United States District Court to issue such an injunction.

State: Harry Rogers Theatrical Enterprises *v.* Comstock, 225 App. Div. 24, 232 N.Y.Supp. 1 (1929) (actor); Harry Hastings Attractions *v.* Howard, 119 Misc. 326, 196 N.Y.Supp. 228 (1922) (actor); Tribune Assn. *v.* Simonds, 104 Atl. 386 (N.J. Eq., 1918) (writer); Cain *v.* Garner, 169 Ky. 633, 185 S.W. 122 (1916) (jockey—here injunction was refused on other grounds); Philadelphia Ball Club *v.* Lajoie, 202 Pa. 210, 51 Atl. 973 (1902); Duff *v.* Russell, 14 N.Y. Supp. 134 (1891) *aff'd.* 133 N.Y. 678, 31 N.E. 622 (1892) (actress); Hoyt *v.* Fuller, 19 N.Y.Supp. 962 (Super. Ct., 1892) (actress and dancer); Pratt *v.* Montegriffo, 57 Hun 587, 10 N.Y.Supp. 903 (1890) (opera singer); Cort *v.* Lazzard, 18 Or. 221, 22 Pac. 1054 (1889); Daly *v.* Smith, 49 How. Prac. 150 (N.Y., 1874) (actress).

[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.[8]

§ 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.[9]

The better rule, however, is that the negative covenant may be implied or expressed.[10] A negative covenant will not be implied from a mere affirmative promise to perform for the producer.[11] 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.[12] 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.

[9] Cincinnati Exhibition Co. *v.* Marsans, 216 Fed. 269 (D.C. Mo., 1914); Whitwood Chem. Co. *v.* Hardman, [1891] 2 Ch. 416 (Eng.); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 99. See Cain *v.* Garner, 169 Ky. 633, 185 S.W. 122 (1916) (*dictum*).

[10] Harry Rogers Theatrical Enterprises *v.* Comstock, 225 App. Div. 34, 232 N.Y.Supp. 1 (1929); Essex Specialty Co., Inc. *v.* Bueschel, 173 Atl. 595 (N.J. Eq., 1934); Stevens, *Involuntary Servitude by Injunction,* (1921) 6 CORN. L.Q. 235.

[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.[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.[14]

§ 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.[15] Whether the

[13] Duff *v.* Russell, 14 N.Y.Supp. 134 (1891) *aff'd.* 133 N.Y. 678, 31 N.E. 622 (1892).

[14] Columbia Pictures Corp. *v.* Jean Arthur, Calif. Super. Ct., L.A.Co., No. 412824, Sept. 10, 1937 (unreported).

[15] Daly *v.* Smith, 49 How. Prac. 150 (N.Y., 1874); Clark Paper & Mfg. Co. *v.* Stenacker, 100 Misc. 173, 165 N.Y.Supp. 367 (1917); Morris *v.* Colman, 18 Ves. Jun. 437, 34 Eng. Rep. 382 (1812); Tivoli, Manchester *v.* Colley, 20 T.L.R. 437 (Eng., 1904).

negative covenant is express or implied, the restriction which it imposes must be reasonable to be valid.[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.[17]

§ 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.[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.[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.[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.[21]

[16] Madison Sq. Garden Corp. *v.* Braddock, 19 F.Supp. 392 (D.C. N.J., 1937); Stevens, *Involuntary Servitude by Injunction,* (1921) 6 CORN. L.Q. 235.

[17] Madison Sq. Garden Corp. *v.* Braddock, 19 F.Supp. 392 (D.C. N.J., 1937).

[18] Duff *v.* Russell, 14 N.Y.Supp. 134 (1891) *affd.* 133 N.Y. 678, 31 N.E. 622 (1892).

[19] *Cf.* Winter Garden Co. *v.* Smith, 282 Fed. 166 (C.C.A. 2d, 1922).

[20] Shubert Theatrical Co. *v.* Rath, 271 Fed. 827 (C.C.A. 2d, 1921); Philadelphia Ball Club, Ltd. *v.* Lajoie, 202 Pa. 210, 51 Atl. 973 (1902); Tribune Assn. *v.* Simonds, 104 Atl. 386 (N.J. Eq., 1918); Madison Sq. Garden Corp. *v.* Carnera, 52 F.(2d) 47 (C.C.A. 2d, 1931).

[21] Shubert Theatrical Co. *v.* Rath, 271 Fed. 827 (C.C.A. 2d, 1921).

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.[22]

§ 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,[23] no injunction will issue against the artist, according to an early Maryland case.[24] This case has been correctly criticized.[25] The rule is now settled that a stipulation for liquidated damages is not an absolute bar to a negative injunction.[26] It is a question of the intent of the

[22] Lumley *v.* Wagner, 1 De G. M. & G. 604 (Eng., 1852); Cain *v.* Garner, 169 Ky. 633, 185 S.W. 122 (1916); Tribune Assn. *v.* Simonds, 104 Atl. 386 (N.J. Eq., 1918); Cincinnati Exhibition *v.* Marsans, 216 Fed. 269 (D.C. Mo., 1914); Madison Sq. Garden Corp. *v.* Carnera, 52 F.(2d) 47 (C.C.A. 2d, 1931); FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 95 *et seq.*

[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."

Accord: Mapleson *v.* Del Puente, 13 Abb. N.C. 144 (N.Y., 1883).

[25] FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 101, 102.

[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

[27] Wirth & Hamid Fair Booking *v.* Wirth, 265 N.Y. 214, 192 N.E. 301 (1934); Diamond Match Co. *v.* Roeber, 106 N.Y. 473, 13 N.E. 419 (1887); Phoenix Ins. Co. *v.* Continental Ins. Co., 87 N.Y. 400 (1882).

In *Phoenix Ins. Co.* v. *Continental Ins. Co., supra,* Andrews, C.J., said:

"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."

Approved in Maskert *v.* Feinblatt, 224 App. Div. 525, 526, 231 N.Y.Supp. 524, 525 (1928).

[28] Wirth & Hamid Fair Booking *v.* Wirth, 265 N.Y. 214, 192 N.E. 201 (1934); Phoenix Ins. Co. *v.* Continental Ins. Co., 87 N.Y. 400 (1882).

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."

[29] Wirth & Hamid Fair Booking *v.* Wirth, 265 N.Y. 214, 192 N.E. 297 (1934).

[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.[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.[32] In another case, a high salaried opera star was held not unique and an injunction was denied to the producer.[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.[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.[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.[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.[37]

[31] Hammerstein *v.* Mann, 137 App. Div. 580, 122 N.Y.Supp. 276 (1910); Carter *v.* Ferguson, 58 Hun 569, 12 N.Y.Supp. 580 (1890).

[32] See Winter Garden Co. *v.* Smith, 282 Fed. 166 (C.C.A. 2d, 1922).

[33] Hammerstein *v.* Mann, 137 App. Div. 580, 122 N.Y.Supp. 276 (1910).

[34] Cort *v.* Lazzard, 18 Or. 221, 22 Pac. 1054 (1889).

[35] Comstock *v.* Lopokowa, 190 Fed. 599 (C.C.S.D.N.Y., 1911).

[36] Harry Hastings Attractions *v.* Howard, 119 Misc. 326, 196 N.Y. Supp. 228 (1922).

[37] Dockstader *v.* Reed, 121 App. Div. 846, 106 N.Y.Supp. 795 (1907).

§ 394. Necessity That Producer Have Performed Contract Before Artist Enjoined.

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.[38] 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.[39]

§ 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.[40]

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

[38] Pratt *v.* Montegriffo, 10 N.Y. Supp. 903 (Sup. Ct., 1890); Hill *v.* Haberkorn, 3 Silv. Sup. 87 (N.Y., 1889).

[39] Fechter *v.* Montgomery, 33 Beav. 22, 55 Eng. Rep. 274 (1863); Newman *v.* Gath, 24 T.L.R. 18 (Eng., 1907); Pratt *v.* Montegriffo, 10 N.Y.Supp. 903 (Sup. Ct., 1890). See § 356 *supra*.

[40] Kenyon *v.* Weissberg, 240 Fed. 536 (S.D.N.Y., 1917); Palace Theatre, Ltd. *v.* Clensy, 26 T.L.R. 28 (Eng., 1909).

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).

[43] Madison Sq. Garden Corp. *v.* Carnera, 52 F.(2d) 47 (C.C.A. 2d, 1931).

[44] Peerless Features *v.* Fields, N.Y.L.J. September 28, 1915; De Koven *v.* Lake Shore & M. Co., 216 Fed. 955 (S.D.N.Y., 1914).

[45] Madison Sq. Garden Corp. *v.* Carnera, 52 F.(2d) 47 (C.C.A. 2d, 1931).

[46] Aborn *v.* Janis, 62 Misc. 95, 113 N.Y.Supp. 309 (1907); Cain *v.* Garner, 169 Ky. 633, 185 S.W. 122 (1916).

[47] See Farnum *v.* O'Neill, 141 Misc. 555, 252 N.Y.Supp. 900 (1931).

[48] Cain *v.* Garner, 169 Ky. 633, 185 S.W. 122 (1916).

[49] Metro - Goldwyn - Mayer *v.* Freddie Bartholomew, Calif. Superior Ct., L. A. Co., No. 418894 — 1937 (unreported). Temporary injunction issued Aug. 5, 1937.

[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-

[51] State *v.* Rose, 125 La. 462, 51 So. 496 (1910); Newman *v.* Rogers, 139 Misc. 795, 248 N.Y. Supp. 297 (1930).

[52] American Film Co. *v.* Reilly, 278 Fed. 147 (C.C.A. 9th, 1922).

[53] Carmen *v.* Fox Film Corp. 269 Fed. 928, (C.C.A. 2d, 1920), *cert. denied* 255 U.S. 569 (1920).

[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.[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.[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.[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.[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.[59] Such a defect is fatal to a petition for a negative injunction.[60]

[55] Hines *v.* Ziegfeld, 222 App. Div. 543, 226 N.Y.Supp. 562 (1928).

[56] Hayes *v.* Willio, 4 Daly 259 (N.Y. Com. Pl., 1872).

[57] Hayes *v.* Willio, 4 Daly 259 (N.Y. Com. Pl., 1872). *Accord:* Avenue Z Wet Wash L. Co. *v.* Yarmush, 129 Misc. 427, 221 N.Y. Supp. 506 (1927).

[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).

[59] Lerner *v.* Tetrazzini, 71 Misc. 182, 129 N.Y.Supp. 889 (1911); Keith *v.* Kellermann, 169 Fed. 197 (D.C.N.Y., 1909); Shubert Theatrical Co. *v.* Coyne, 115 N.Y. Supp. 968 (Sup. Ct., 1908).

[60] Lerner *v.* Tetrazzini, 71 Misc. 182, 129 N.Y.Supp. 889 (1911); Keith *v.* Kellermann, 169 Fed. 197 (D.C.N.Y., 1909); Shubert Theatrical Co. *v.* Coyne, 115 N.Y. Supp. 968 (Sup. Ct., 1908); Weegham *v.* Killefer, 215 Fed. 168 (D.C. Mich., 1914).

In *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.[61] If the contract is procured by fraud or other unconscionable means, Equity will not enforce it.[62]

§ 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.[63]

§ 402. Where Contract for Services Gives Producer Exclusive Right to Use Artist's Photograph for Advertising.

J. Walter Thompson Co. v. *Winchell* [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."

[61] Shubert Theatrical Co. *v.* Coyne, 115 N.Y.Supp. 968 (Sup. Ct., 1908); Shubert Theatrical Co. *v.* Rath, 271 Fed. 827 (C.C.A. 2d, 1921).

[62] Carmen *v.* Fox Film Corp., 269 Fed. 928 (C.C.A. 2d, 1920), *cert. denied,* 255 U.S. 569 (1920).

[63] Witkop & Holmes Co. *v.* Boyce, 61 Misc. 126, 112 N.Y.Supp. 874 (1908); STRONG ON DRAMATIC & MUSICAL LAW (3d ed., 1909), citing *London Music Hall* v. *Poluski* at 42.

[64] J. W. Thompson Co. *v.* Winchell, 244 App. Div. 195, 278 N.Y.Supp. 781 (1935).

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,*[65] 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*[66] 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.[67]

[65] *Ibid.*

[66] 81 F.(2d) 373 (C.C.A. 2d, 1936).

[67] Dela. & Hudson Canal Co. *v.* Penn. Coal Co., 8 Wall. (75 U.S.) 276, 19 L.Ed. 349 (1869); Kennerly *v.* Simonds, 247 Fed. 822 (S.D.N.Y., 1917).

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.[68] 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.[69]

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.[70]

[68] Macloon *v.* Vitagraph, Inc., 30 F.(2d) 634 (C.C.A. 2d, 1929).

[69] *Ibid.*

[70] See Kennerly *v.* Simonds, 247 Fed. 822 (S.D.N.Y., 1917).

Chapter XXV.

THE PRODUCER AND THE AUTHOR OF THE BROADCAST SCRIPT.

		PAGE
SECTION 404.	Generally	751
405.	Whether Author Is Employee or Independent Contractor	752
406.	Contracts for Broadcast Program Scripts: License and Assignment Distinguished	755
407.	Agreements Between Authors and Copyright Proprietors	756
408.	Same: Ownership of Rights in Scripts	758
409.	Use of Author's Name	759
410.	Producer's Deviation from or Distortion of Broadcast Program Script	763
411.	Is Producer Required to Broadcast the Script?	764
412.	Termination of Licenses	766
413.	Remedy at Law: Where Scripts Are to Be Delivered by Specified Time	766
414.	Same: Agreement for Series of Scripts	767
415.	Equitable Relief Where Author Has Breached His Agreement	768
416.	Same: Liquidated Damages	768
417.	Rescission of Agreement	769
418.	Breach of License Agreement	769
419.	Relief Where Producer Breaches His Agreement with the Author	769
420.	Remedy for Conversion, Loss or Destruction of Script	770
421.	Radio Rights in Non-Broadcast Works	771

§ 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

[1] See Bixby *v.* Dawson, N.Y.L.J., July 1, 1936, p. 7, col. 2, Cohalan, Ref., Sup.Ct., N.Y.Co.

[2] Chapter XLIV. *infra.*

[3] Beach *v.* Velzy, 238 N.Y. 100, 143 N.E. 805 (1924).

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.[4] 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

[4] *Ibid.* See also Dutcher *v.* Victoria Paper Mills Co., 219 App. Div. 541, 220 N.Y.Supp. 625 (1927).

[5] *Ibid.* See Chapter XXIII. *supra* for a discussion of the question of justifiable and unjustifiable discharge.

[6] Hexamer *v.* Webb, 101 N.Y. 377, 4 N.E. 755 (1886).

[7] See FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) § 8.

[8] *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.[10] Despite the fact that the author's compensation may be based upon a profit-sharing arrangement, the master and servant relation may nevertheless exist.[11] An author who is paid upon a quantity basis, *viz.*, so much per page, per word, or per minute of broadcast may also be deemed to be an employee.[12] 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.[13]

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.[14] 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.[15] An author is not precluded from basing

[10] See Brown *v.* Mollé Co. *et al.*, 20 F.Supp. 135 (S.D.N.Y., 1937). *Cf.* Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936). See also § 587 *infra.*

[11] Mallory *v.* Mackaye, 86 Fed. 122 (C.C.S.D.N.Y., 1898).

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

[13] Lawrence *v.* Aflalo, [1902] 1 Ch. 264 (Eng.). But see London Universal Press *v.* University Tutorial Press, [1916] 2 Ch. 681 (Eng.).

[14] T. B. Harms & Francis, Day & Hunter *v.* Stern, 222 Fed. 581 (S.D.N.Y., 1915) *aff'd.* 231 Fed. 645 (C.C.A. 2d, 1916); Wardlock & Co. *v.* Long, [1906] 2 Ch. 550 (Eng.).

[15] Peters *v.* Borst, 24 Abb. N.C. 1, 9 N.Y.Supp. 789 (1889), *revd. on other grounds* 142 N.Y. 62, 36 N.E. 814 (1894).

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.*

[18] 35 STAT. 1075 (1909), 17 U.S.C.A. §§ 23, 62 (1927).

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

[20] Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654 (1875); Message Photo-Play Co. *v.* Bell, 179 App. Div. 13, 166 N.Y.Supp. 338 (1917).

[21] Seventh Nat. Bank *v.* Iron

able by either party without the consent of the other.[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.[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,[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.[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.[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.

Co., 35 Fed. 436 (C.C.W.D.Va., 1887); Haug *v.* Riley, 101 Ga. 372, 29 S.E. 44 (1897); Hight *v.* Sackett, 34 N.Y. 447 (1866).

[22] FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, § 14.

[23] FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, p. 69, n. 5.

[24] People *v.* Comstock, N.Y.L.J., April 27, 1909.

[25] Heap *v.* Hartley, 42 Ch. Div. 461 (Eng., 1889). See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, pp. 70, 71 n. 7.

[26] See §§ 586, 587, 642, 643 *infra.*

The author may make an oral [27] or written [28] 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.[29] 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.[30] However, the chancellor will not require the author to produce or create future works.[31] 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.[32]

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.[33] Should the author, in violation of such an agreement, secure copy-

[27] Witmark *v.* Calloway, 22 F.(2d) 412 (E.D.Tenn., 1927).

[28] *In re* Waterson, Berlin & Snyder Co., 48 F.(2d) 704 (C.C.A. 2d, 1931).

[29] Brady *v.* Reliance Motion Pict. Corp., 232 Fed. 259 (S.D. N.Y., 1916).

[30] T. B. Harms & Francis, Day & Hunter *v.* Stern, 229 Fed. 42 (C.C.A. 2d, 1915).

[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.[34] 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.[35]

§ 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

[34] See Bisel *v.* Ladner, 1 F.(2d) 436 (C.C.A. 3rd, 1924); T. B. Harms & Francis, Day & Hunter *v.* Stern, 229 Fed. 42 (C.C.A. 2d, 1915); Sebring Pottery Co. *v.* Steubenville Pottery Co., 9 F.Supp. 383 (N.D. Ohio, 1932).

[35] T. B. Harms & Francis, Day & Hunter *v.* Stern, 229 Fed. 42 (C.C.A. 2d, 1915).

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).

[37] Dam *v.* Kirke La-Shelle Co., 175 Fed. 904 (C.C.A. 2d, 1910).

[38] Palmer *v.* De Witt, 47 N.Y. 532 (1872).

[39] Boucicault *v.* Fox, 5 Blatch. 87, Fed. Cas. No. 1691 (C.C.S.D. N.Y., 1862); O'Neill *v.* General Film Co, 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916).

[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.[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.[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.[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[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

[41] Jones *v.* The American Law Book Co., 125 App. Div. 519, 109 N.Y.Supp. 706 (1908).

[42] 35 STAT. 1087 (1909), 17 U.S.C.A. § 62 (1937). See § 587 *infra.*

[43] Clemens *v.* Press Pub. Co., 67 Misc. 183, 122 N.Y.Supp. 206 (1910). *Cf.* Brook *v.* Lloyd, 26 T.L.R. 549 (Eng., 1910).

[44] See §§ 579, 580, 581, 582, 583 *infra.*

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).

[46] Jones *v.* The American Law Book Co., 125 App. Div. 519, 109 N.Y.Supp. 706 (1908); Mallory *v.* Mackaye, 86 Fed. 122 (C.C.S.D.N.Y., 1898), *modified* 92 Fed. 749 (C.C.A. 2d., 1899). The author cannot prevent omission of his name. *Brook* v. *Lloyd,* 26 T.L.R. 549 (Eng., 1910). The name of the author is not part of the title, even though it appear on the title-page. *Crookes* v. *Petter,* 6 Jur. 1131 (Eng., 1860); COPINGER ON THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 288 n. q.

[47] *Semble* Brenan *v.* Fox Film Corp., N.Y.L.J., Aug. 25, 1916, Mullan, J., Sup.Ct., N.Y.Co.

[48] Paramount Productions, Inc. *v.* Smith, 91 F.(2d) 863 (C.C.A. 9th, 1937).

[49] *Semble* De Bekker *v.* Frederick A. Stokes Co. *et al.,* 168 App. Div. 452, 153 N.Y.Supp. 1066 (1915), *modified* 172 App. Div. 960, 157 N.Y.Supp. 576 (1916).

ment of a work for broadcast purposes, an agreement to give program credit to the author of the basic work will be enforceable.[50] 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.[51] 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.[51a] 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.[51b]

Where the author has used an assumed name, he acquires no greater rights than if he had used his real name.[52] If the work is in the public domain, the producer has the option to use the author's real name or his pseudonym.[53]

In any case, an author has the right to enjoin the associa-

[50] Paramount Productions, Inc. *v.* Smith, 91 F.(2d) 863 (C.C.A. 9th, 1937).

[51] Dreiser *v.* Paramount Publix Corp., N.Y. Sup. Ct., Westchester County, Witschief, J., Aug. 1, 1931 (unreported).

[51a] Curwood *v.* Affiliated Distributors, Inc. *et al.*, 283 Fed. 219 (S.D.N.Y., 1922).

[51b] Packard *v.* Fox Film Corp., 207 App. Div. 311, 202 N.Y.Supp. 164 (1923).

[52] Clemens *v.* Belford, 14 Fed. 728 (C.C.N.D. Ill., 1883).

[53] *Ibid.* See Ellis *v.* Hurst, 70 Misc. 122, 128 N.Y.Supp. 144 (1910).

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

[54] *Ibid.* Curwood *v.* Affiliated Distributors, Inc. *et al.*, 283 Fed. 219 (S.D.N.Y., 1922); Landa *v.* Greenberg, 24 T.L.R. 441 (Eng., 1908). See COPINGER, *op. cit. supra* n. 46, 190.

[55] Wood *v.* Butterworth, Times, Dec. 23, 1901 (Eng.).

[56] See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, 54; COPINGER, *op. cit. supra* n. 46, 287 *et seq.*

[57] American Malting Co. *v.* Keitel, 209 Fed. 351 (C.C.A. 2d., 1913); American Law Book Co. *v.* Chamberlayne, 165 Fed. 313 (C.C.A. 2d., 1908).

[58] See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, 55, 56.

the work of the author.[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.[60]

It follows, therefore, that ordinarily a licensee will be enjoined,[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.[62] Malice or actual damages are not essential elements of proof in such a case.[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.[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.[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.

§ 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-

[59] *Ibid.*

[60] Angers *v.* Leprohon, 22 Que. S.Ct. 170 (Can., 1899).

[61] Royle *v.* Dillingham, 53 Misc. 383, 104 N.Y.Supp. 783 (1907). See also Manners *v.* Famous Players-Lasky Corp., 262 Fed. 811 (S.D.N.Y., 1919).

[62] *Cf.* Curwood *v.* Affiliated Distributors, Inc. *et al.*, 283 Fed. 219 (S.D.N.Y., 1922). See Clemens v. Belford, 14 Fed. 728 (C.C.N.D. Ill., 1883).

[63] See Ridge *v.* English Illustrated Mag., 29 T.L.R. 592 (1912).

[64] See Harper Bros. *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916).

[65] *Ibid.*

erty 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

[66] *Cf.* Morang *v.* Le Soeur, 45 Can. Super. Ct. 95 (1911).

[67] *In re* Waterson, Berlin & Snyder Co., 48 F.(2d.) 704 (C. C.A. 2d., 1931).

[68] See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, 78.

[69] *Ibid. Cf. In re* Waterson, Berlin & Snyder Co., 48 F.(2d) 704 (C.C.A. 2d, 1931).

[70] Bobbs-Merrill Co. *v.* Universal Film Mfg. Co., 160 N.Y.Supp. 37 (1916); White *v.* Constable, Times, Mar. 23, 1901 (Eng.). But see Kerker *v.* Lederer, 30 Misc. 651, 64 N.Y.Supp. 506 (1900). See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, 76.

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.

§ 413. Remedy at Law: Where Scripts Are to Be Delivered by Specified Time.

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

[71] See *In re* Waterson, Berlin & Snyder Co., 48 F.(2d) 704 (C.C.A. 2d, 1931).

[72] See § 648 *infra*.

[73] Waterman *v.* Shipman, 55 Fed. 982 (C.C.A. 2d, 1893); Lucas *v.* Moncrieff, 21 T.L.R. 683 (Eng., 1905).

[74] See Lucas *v.* Moncrieff, 21 T.L.R. 683 (Eng., 1905). *Cf. In re* Waterson, Berlin & Snyder Co., 48 F.(2d) 704 (C.C.A. 2d, 1931).

[75] Yerrington *v.* Greene, 7 R.I. 593 (1863); Gibson *v.* Carruthers, 8 M. & W. 343 (Eng., 1841).

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]

[76] Yemans *v.* Tannehill, 15 N.Y. Supp. 958 (1891).

[77] Mann *v.* Maurel, 126 N.Y. Supp. 731 (1911).

[78] Clark *v.* West, 137 App. Div. 23, 122 N.Y.Supp. 380 (1910).

[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[80] whose talents are unique and extraordinary is enforceable[81] in Equity if there is mutuality of obligation.[82] 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.[83] The writer, however, will not be ordered to write or create the agreed scripts.[84]

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.[85]

§ 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.[86]

Gollancz *v.* Dent, 88 L.T. 358 (Eng., 1903); Thorne *v.* French, 4 Misc. 436, 24 N.Y.Supp. 694 (1893), *aff'd.* 143 N.Y. 679, 39 N.E. 494 (1894).

[80] Stern *v.* Laemmle, 74 Misc. 262, 133 N.Y.Supp. 1082 (1911).

[81] See §§ 389, 391 *supra.*

[82] Star Co. *v.* Press Pub. Co., 162 App. Div. 486, 147 N.Y. Supp. 579 (1914). See § 400 *supra.*

[83] Morris *v.* Colman, 18 Ves. 437 (Eng., 1812); Macdonald *v.* Eyles [1921] 1 Ch. 631 (Eng.). See §§ 389, 390 *supra.*

[84] COPINGER, *op. cit. supra* n. 46, 298.

[85] Stern *v.* Laemmle, 74 Misc. 262, 133 N.Y.Supp. 1082 (1911).

[86] See § 387 *supra.*

§ 417. Rescission of Agreement.

The agreement may be rescinded upon proof of fraud by the author [87] or by the producer.[88] 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.[89]

§ 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.[90] In either case, the author may rescind the license.[91]

§ 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.[92]

Evidence of the success of the broadcast program con-

[87] Hackett *v.* Walter, 80 Misc. 340, 142 N.Y.Supp. 209 (1913). See *In re* Waterson, Berlin & Snyder Co., 48 F.(2d) 704 (C.C.A. 2d, 1931).

[88] See Outcault *v.* Bonheur, 120 App. Div. 168, 104 N.Y.Supp. 1099 (1907).

[89] Hackett *v.* Walter, 80 Misc. 340, 142 N.Y.Supp. 209 (1913).

[90] Harper *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916); Tiffany Productions *v.* Dewing, 50 F.(2d) 911 (D.Md., 1931); Metro-Goldwyn-Mayer *v.* Bijou Theatre, 3 F.Supp. 66 (D. Mass., 1933); Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 733 (1924).

[91] Saltus *v.* Bedford, 133 N.Y. 499, 31 N.E. 518 (1892); Bobbs-Merrill Co. *v.* Universal Film Mfg. Co., 160 N.Y.Supp. 37 (1916).

[92] See Bernstein *v.* Meech, 130 N.Y. 354, 29 N.E. 255 (1891).

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.[93]

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.[94] 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.[95] 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.[96] 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.[97]

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

[93] Charley *v.* Pothoff, 118 Wis. 258, 95 N.W. 124 (1903); Ellis *v.* Thompson, 1 App. Div. 606, 37 N.Y.Supp. 468 (1896).

[94] St. Cyr *v.* Sothern & Marlowe, 140 App. Div. 888, 125 N.Y. Supp. 10 (1910); Kennedy *v.* Rolfe, 174 App. Div. 10, 160 N.Y. Supp. 93 (1916); Schonberg *v.* Cheney, 3 Hun (N.Y.) 677 (1875).

[95] Arden *v.* Lubin, N.Y.L.J., Mar. 2, 1916. See FROHLICH & SCHWARTZ, *op. cit. supra* n. 7, 84 n.

[96] Karst *v.* Prang, 132 App. Div. 197, 116 N.Y.Supp. 1049 (1909); Moore *v.* Coyne, 113 App. Div. 152, 98 N.Y.Supp. 892 (1906); McCullough *v.* Pence, 85 Hun 271, 32 N.Y.Supp. 986 (1895).

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

tous bailee. He is liable to the author if the script is lost or destroyed as a consequence of the negligence of his employees.[98] However, if the script is submitted to the producer solely for criticism, suggestions or advice, then he is a gratuitous bailee. A gratuitous bailee is liable only for gross negligence.[99]

§ 421. Radio Rights in Non-Broadcast Works.

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.[100] 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.[101] 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 & SCHWARTZ, *op. cit. supra* n. 7, 87.

[99] Hellawell *v.* Hempstead Coop. Building & L. Assn., 249 App. Div. 622, 290 N.Y.Supp. 954 (1936).

[100] Klein *v.* Beach, 239 Fed. 108 (C.C.A. 2d, 1917).

[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), *aff'd.* 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 contemplated 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 performance 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 Cinema,* Gazette des Tribunaux, 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 unless specific language in the contract between the author and the producer broadly included such additional rights.

[103] Klein *v.* Beach, 239 Fed. 108 (C.C.A. 2d, 1917); 33 A.L.R. 312 (1924).

[104] Lipzin *v.* Gordin, *et al.,* 166 N.Y.Supp. 729 (1915).

[105] But see 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).

[106] Klein *v.* Beach, 239 Fed. 108 (C.C.A. 2d, 1917). See Hart *v.* 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,[108] it would be necessary for both the author and the original producer to join in the grant of a broadcast performance license.[109] The rights may be granted by the author alone where his contract with the original producer has terminated.[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.[111] Similar principles govern the license or other disposition of dramatic performance rights in various media of novels and other non-dramatic literary works.[112]

[108] See Harper Bros. *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916); Manners *v.* Morosco, 252 U.S. 317, 40 Sup. Ct. 335, 64 L.Ed. 590 (1919); Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 773 (1924); Frohman *v.* Fitch, 164 App. Div. 231, 149 N.Y.Supp. 633 (1914); Kirke La-Shelle Co. *v.* Armstrong, 263 N.Y. 79, 188 N.E. 163 (1933). A negative covenant has been implied where the contract was made at a time when the other medium was not known. *Harper Bros.* v. *Klaw, supra.* But see *Klein* v. *Beach,* 239 Fed. 108 (C.C.A. 2d, 1916).

[109] Harper Bros. *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916).

[110] Gillette *v.* Stoll Film Co., 120 Misc. 850, 200 N.Y.Supp. 787 (1922).

[111] See Photo-Drama Motion Pict. Corp *v.* Social Uplift Film Corp., 220 Fed. 449 (C.C.A. 2d, 1915).

[112] Harper Bros. *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916).

Chapter XXVI.

ARTISTS—THEIR MANAGERS AND PERSONAL REPRESENTATIVES.

		PAGE
SECTION 422.	Generally	774
423.	Manager, Personal Representative and Booking Agency Contrasted	775
424.	Managers and Personal Representatives Are Agents of the Artist	776
425.	Same: Under the Statutes	777
426.	Creation of the Agency	779
427.	Duration of Agency Relation Between Artist and Representative	780
428.	Termination of the Agency Relation Between Artist and Representative	782
429.	Revocation of Authority of Representative by Artist	782
430.	Revocation for Cause	784
431.	Duties of the Representative Which Are Implied in Law	785
432.	The Artist's Duties to His Representative	787
433.	Authority of the Representative	788
434.	Artist May Ratify Unauthorized Acts of Representative	789
435.	Artist Bound by Apparent Authority of Representative	790
436.	Execution of Agreements by Representatives Binding on Artist	790
437.	Rights of Producer Where Disputes Exist Between Artist and Representative	791

§ 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 may well apply to agents of the author of the broadcast program 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,[1] 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), § 1.

[3] MECHEM, *op. cit. supra,* § 36.

[4] MECHEM, *op. cit. supra,* § 2362.

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,[5] there being a similar statute in California.[6] This statute requires all persons operating theatrical employment agencies first to procure a license from the municipal authority.[7] The statute defines a theatrical employment agency as follows:[8]

> "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[9] 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.[10] 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.[11] The

[5] N. Y. Gen. Bus. L., §§ 170–192.

[6] CALIFORNIA, STATUTES (1929) c. 89.

[7] *Id.*, at § 1.

[8] N. Y. Gen. Bus. L., § 173.

[9] *Id.*, at § 171, subd. 4.

[10] Meyers *v.* Walton, 76 Misc. 510, 135 N.Y.Supp. 574 (1912).

[11] Hyde *v.* Vinolas, 234 App.

essence of the contract will be crystallized to determine the real purpose thereof.[12] 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 Misc. 695, 203 N.Y.Supp. 819 (1924). Div. 364, 254 N.Y.Supp. 687 (1932).

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.[13]

While the relation of Principal to Agent is voluntary,[14] the existence of authority does not require that there be an agreement between the artist and his representative.[15] 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.[16] The passage of consideration is unnecessary.[17]

However, as between the artist and the representative,

[13] Haluptzok *v.* Great Northern Ry. Co., 55 Minn. 446, 57 N.W. 144 (1893); MECHEM 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] MECHEM, *op. cit. supra,* § 28.

[15] RESTATEMENT, AGENCY (1933), § 26, Comment (a), MECHEM, *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

[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.

[20] See Pease & Elliman *v.* Wegeman, 223 App. Div. 682, 229 N.Y.Supp. 398 (1928); Laurence *v.* Pacific Oil & Lead Works, 27 Cal. App. 69, 148 Pac. 964 (1915).

[21] See Thompson *v.* Cedar Rapids Nat. Bank, 207 Iowa 786, 223 N.W. 517 (1929).

[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*.

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.

[27] See Sherwood *v.* Crane, 12 Misc. 83, 33 N.Y.Supp. 17 (Com. Pl., 1895); Fellows *v.* Fairbanks Co., 205 App. Div. 271, 199 N.Y. Supp. 772 (1923); Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56 (1870).

[28] See Watson *v.* Gugino, 204 N.Y. 535, 98 N.E. 18 (1912); Martin *v.* N. Y. Life Ins. Co., 73 Hun 496, 26 N.Y.Supp. 283 (1893); WILLISTON, *op. cit. supra,* n. 26, § 39.

[29] *Ibid.*

[30] See Watson *v.* Gugino, 204 N.Y. 535, 98 N.E. 18 (1912).

[31] See Martin *v.* N. Y. Life Ins. Co., 73 Hun 496, 26 N.Y.Supp. 283 (1893).

§ 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

[32] See § 361 *supra.*

[33] Blakely *v.* Sousa (manager), 197 Pa. 318, 47 Atl. 286 (1900); Mulqueen *v.* Connor (lawyer), 65 F.(2d) 365 (C.C.A. 2d, 1933); WILLISTON, *op. cit. supra,* n. 26, § 1940.

[34] WILLISTON, *op. cit. supra,* n. 26, § 1941.

[35] See Weaver *v.* Richard, 144 Mich. 395, 108 N.W. 382 (1906); Roth *v.* Moeller, 185 Cal. 415, 197 Pac. 62 (1921); Henderson *v.* Lebow, 95 W.Va. 74, 120 S.E. 300 (1923).

[36] See Edward Sales Co. *v.* Harris Structural Steel Co., 17 F. (2d) 155 (S.D. Me., 1927); Roth *v.* Moeller, 185 Cal. 415, 197 Pac. 62 (1921); Campbell *v.* Tunnicliff, 185 App. Div. 506, 173 N.Y.Supp. 242 (1918).

[37] See Hunt *v.* Ronsmanier, 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.[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.[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.[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.[41] A suit for damages at law should be the only remedy of the discharged representative; he should not have specific performance in equity.[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-

Capital Nat. Bank of Sacramento *v.* Stoll, 30 P.(2d) 411 (Sup. Ct. Cal., 1934); Wesley *v.* Beakes Dairy Co., 72 Misc. 260, 131 N.Y. Supp. 212 (1911).

[38] *Ibid.*

[39] See Babcock *v.* Chicago Ry. Co., 325 Ill. 16, 155 N.E. 773 (1927); Wilson *v.* Smith, 256 Mass. 85, 152 N.E. 88 (1926).

[40] Sphier *v.* Michael, 112 Or. 299, 229 Pac. 1100 (1924).

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

[42] Cook *v.* Zionist Org. of America, 232 App. Div. 481, 250 N.Y.Supp. 348 (1931); Spitzer *v.* Pathé Exchange, 132 Cal. App. 612, 23 P.(2d) 308 (1933).

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).

[44] See Standard Fashion Co. *v.* Thomas, 96 Vt. 319, 119 Atl. 417 (1923); E. L. Husting Co. *v.* Coca Cola Co., 205 Wis. 356, 237 N.W. 85 (1931).

[45] See Lower *v.* Muskegon Heights Co-op. Dairy, 251 Mich. 450, 232 N.W. 181 (1930); Fantl *v.* Joyce Pruitt Co., 34 N.M. 573, 286 Pac. 830 (1930).

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.[46] He must obey all instructions.[47] 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.[48] For failure to use such skill and diligence, the representative may justifiably be discharged.[49]

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

[46] See Andrew Gulick & Co. *v.* Cyclemotor Corp., 192 App. Div. 350, 182 N.Y.Supp. 316 (1920).

[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).

[48] Varnum *v.* Martin, 32 Mass. 440 (1834); Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835 (1892); Godwin *v.* Kreft, 230 Okla. 329, 101 Pac. 856 (1909); Erickson *v.* Reine, 139 Minn. 282, 166 N.W. 333 (1918).

[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.[50] 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.[51] A fiduciary is one in whom trust and confidence are reposed.[52] This fiduciary character of the representative is a product of the Principal and Agent relation. Hence, such relation must be shown to exist.[53]

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.[54] As a consequence of the requirement of good faith and

[50] See Note, 98 N.Y.L.J. (Sept. 4, 1937) 580.

[51] RESTATEMENT, AGENCY (1933), § 13.

[52] See Stoll *v.* King, 8 How. Prac. (N.Y., 1853) 298, 299; Svance *v.* Jurgens, 144 Ill. 507, 513, 33 N.E. 955, 957 (1893).

[53] Spinks *v.* Clark, 147 Cal. 439, 82 Pac. 45 (1905); Sanford *v.* Miller, 80 N.J.L. 411, 78 Atl. 177 (1910).

[54] Bates *v.* Campbell, 213 Cal. 438, 2 P.(2d) 383 (1931); Elco Shoe Mfrs. *v.* Sisk, 260 N.Y. 100, 183 N.E. 191 (1932).

In *Lambdin* v. *Broadway Surface Adv. Corp.*, 272 N.Y. 133, 138, 5 N.E.(2d) 66 (1936), Crane, C.J., said:

"On the whole case we are of the opinion that the plaintiff in this instance fell below the standard required by the law of one acting as an agent or employee of another. He is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties . . . he also forfeits his right to compensation for services rendered by him if he proves disloyal."

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.

[55] Wadsworth *v.* Adams, 138 U.S. 380, 11 Sup. Ct. 303, 34 L.Ed. 984 (1891); Lambdin *v.* Broadway Surface Adv. Corp., 272 N.Y. 133, 5 N.E.(2d) 66 (1936).

[56] RESTATEMENT, AGENCY (1933), § 13.

[57] Hobbs *v.* Monarch, 277 Ill. 326, 115 N.E. 534 (1917); Bain *v.* Brown, 56 N.Y. 285 (1874); Lambdin *v.* Broadway Surface Adv. Corp., 272 N.Y. 133, 5 N.E.(2d) 66 (1936); RESTATEMENT, AGENCY (1933), § 382, Comment (a).

[58] RESTATEMENT, AGENCY (1933), § 441.

[59] Schwartz *v.* Yearly, 31 Md. 270 (1869).

[60] Northwest Port Huron Co. *v.* Ziekrick, 32 S.D. 28, 141 N.W. 983 (1913).

[61] Case *v.* Rudolph Wurlitzer Co., 186 Mich. 81, 152 N.W. 977 (1915).

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).

[63] See Bibb *v.* Allen, 149 U.S. 481, 13 Sup. Ct. 950 (1893); Dozier *v.* Davidson & Fargo, 138 Ga. 190, 74 S.E. 1086 (1912).

[64] National Bank *v.* Bank, 112 Fed. 726 (C.C.A. 7th, 1902); Law Reporting Co. *v.* Grain Co., 135 Mo. App. 10, 115 S.W. 475 (1909); Quint *v.* O'Connell, 89 Conn. 353, 94 Atl. 288 (1915).

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.[65] The implication of additional powers is not permissible.

§ 434. Artist May Ratify Unauthorized Acts of Representative.

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[66] with knowledge of the facts.[67] By ratification of such a prior act, the artist becomes liable therefor.[68] 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.[69]

An effective ratification can be made only where the representative purported to act on behalf of a principal.[70] Furthermore, only the artist identified as the principal at the time of the prior act may affirm.[71] Where

[65] Johnston *v.* Milwaukee Inv. Co., 46 Neb. 480, 64 N.W. 1100 (1895); Hall *v.* Paine, 224 Mass. 62, 112 N.E. 153 (1916).

[66] RESTATEMENT, AGENCY (1933), § 820.

[67] See Lewis *v.* Adriance, 100 Misc. 725, 166 N.Y.Supp. 774 (1916).

[68] RESTATEMENT, AGENCY (1933), § 100.

[69] Dempsey *v.* Chambers, 154 Mass. 330, 28 N.E. 279 (1891); Nims *v.* Boys' School, 160 Mass. 177, 35 N.E. 776 (1893).

[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.[72] The affirmance by the artist may be as to some or all of the persons involved.[73] Ratification once made is irrevocable.[74]

§ 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.[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.[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.[77] The appearance of authority caused solely by the representative may not be relied on.[78]

§ 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.[79] Some cases hold

[72] *Ibid.*

[73] *Id.* at § 820.

[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).

[75] MECHEM ON AGENCY (2d ed., 1923) § 1709.

[76] Law *v.* Stokes, 3 Vroom (N.J.L.) 249 (1867); MECHEM, *op. cit. supra*, §§ 720–729.

[77] See Churchill Grain & Seed Co. *v.* Buchman, 204 App. Div. 30, 197 N.Y.Supp. 552 (1922); Figueira *v.* Lerner, 52 App. Div. 216, 65 N.Y.Supp. 293 (1900).

[78] See Paul Armstrong Co. *v.* Majestic Motion Picture Co., 87 Misc. 141, 149 N.Y.Supp. 1039 (1914).

[79] See Schneidman *v.* Shapiro, 125 Misc. 892, 211 N.Y.Supp. 647 (1925); Gordon *v.* Andrews, 222 Mo. App. 609, 2 S.W.(2d) 809 (1927).

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 agreement 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 personally executing contracts for his services. It would seem that this would follow even though the agreement contains 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 representative as to the effect of or the rights and liabilities under the agreement of representation, the program producer, 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 representative 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 representation, the producer may be liable to the representative for damages resulting therefrom.

[80] Herringer *v.* Schumacher, 88 Cal. App. 349, 263 Pac. 550 (1928); *In re* Barron's Estate, 92 Vt. 460, 105 Atl. 255 (1919).

[81] Metcalf *v.* Williams, 104 U.S. 93, 26 L.Ed. 665 (1881); Andrews *v.* Estes, 11 Me. 267 (1834).

[82] Royal Indemnity Co. *v.* Corn, 162 N.Y.Supp. 659 (1917).

[83] Kiekhoefer *v.* United States Nat. Bank, 39 P.(2d) 807 (Sup. Ct. Cal., 1934).

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.

Chapter XXVII.

THE BROADCAST OF NEWS PROGRAMS.

		PAGE
SECTION 438.	Historically	793
439.	Litigation Instituted by the Press Against Broadcast Stations	795
440.	The Press-Radio Plan	796
441.	Same: Other Services Supplying News for Broadcasting	797
442.	The Doctrine of *International News Service* v. *Associated Press*	799
443.	The Appropriation of News by Broadcast Stations as Unfair Competition	801
444.	Appropriation of News Content of Broadcast Programs: By the Press	804
445.	Same: By Other Broadcasters	806
446.	Direct Broadcast of News: Right to Broadcast	807
447.	Same: Agreements Therefor	811
448.	Defamation in News Broadcasts	812
449.	Control of Broadcast Stations by Newspapers	815
450.	Same: Constitutionality of Proposed Legislation	815

§ 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 BRINDZE, *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.[2] However, the wide popular demand for such program logs rendered the movement ineffective in most instances.[3]

§ 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.[4] A similar action was instituted in the Louisiana courts by a New Orleans newspaper against a broadcaster.[5] The Associated Press commenced additional litigation in the Federal Courts by suing Station KVOS of Bellingham, Washington.[6] In the Sioux Falls case,[7] 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[8] 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

[2] BROADCASTING, July 1, 1932 and Nov. 15, 1932, 25; Whittemore, *Radio's Fight for News* (1935), 81 NEW REPUBLIC 354; Shapiro, *op. cit. supra,* n. 1, 132.

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

[4] Associated Press *v.* Sioux Falls Broadcasting Assn. (D. S.D., March 14, 1933), 1 U. S. DAILY 164 (1933), *appeal by broadcast station dismissed pursuant to stipulation* 68 F.(2d) 1014 (C.C.A. 8th, 1933).

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

[6] Associated Press *v.* KVOS, Inc., 9 F.Supp. 279 (W.D. Wash., 1934), *revd.* 80 F.(2d) 575 (C.C. A. 9th, 1935); *dismissed for want of jurisdiction,* 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936).

[7] Associated Press *v.* Sioux Falls Broadcasting Assn. (D.C.S.D., March 14, 1933) 1 U. S. DAILY 164 (1933), *appeal by broadcast station dismissed pursuant to stipulation* 68 F.(2d) 1014 (C.C.A. 8th, 1933).

[8] 9 F.Supp. 279 (W.D. Wash., 1934).

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.

§ 440. 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-

[9] 80 F.(2d) 575 (C.C.A. 9th, 1935) *dismissed for want of jurisdiction,* 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936).

[10] See Keating, *op. cit. supra* n. 1; Shapiro, *op. cit. supra* n. 1.

[11] In September 1933, the Columbia Broadcasting System organized its own news-gathering agency. It established offices in and contacts with the principal cities of the world and acquired access to several of the smaller press services. Within six months, sixty stations affiliated with the Columbia System were broadcasting sponsored news programs emanating from that service.

[12] The publishers also realized that, despite the adjudications in favor of the press, stations were still able to broadcast news reports. Loss in newspaper circulation and advertising apparently continued. Resolutions were adopted condemning the furnishing of news to broadcasters, the daily listing of radio programs, and similar aids to the new industry. See Whittemore, *Radio's Fight for News* (1935) 81 NEW REPUBLIC 354.

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.[13]

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.

§ 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[14] 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.*

[14] Clarence C. Dill, *Radio and the Press: A Contrary View* (January, 1935). 177 THE ANNALS 170. Senator Dill, formerly Chairman of the Senate Committee on Interstate Cimmerce, said at page 172:

"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.[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.[16]

Several syndicated news-gathering agencies serving newspapers have extended their facilities to the broadcast stations since 1934.[17] There also exist regional co-operative news services among stations so affiliated.[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, *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."

[15] Keating, *Pirates of the Air*, (1934) 169 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, *The Press and the Radio* (January, 1935) 177 THE ANNALS 163.

[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.

[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. BROADCASTING, May 1, 1938, p. 16, col. 1.

[18] *E.g.*, Yankee Network in New England.

§ 442. The Doctrine of *International News Service* v. *Associated Press.*

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*[19] where a competing news service was held to have been guilty of unfair competition in "pirating" news reports gathered by the plaintiff.[20]

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,[21] 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-

[19] 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1918).

[20] 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.

[21] Shapiro, *The Press, the Radio and the Law* (1935) 6 AIR 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]

[22] Cheney Bros. *v.* Doris Silk Corp., 35 F.(2d) 279 (C.C.A. 2d, 1929) *cert. denied,* 281 U.S. 728, 50 Sup. Ct. 245, 74 L.Ed. 1145, (1930); Gotham Music Service, Inc. *v.* Denton and Haskins Music Pub. Co., 259 N.Y. 86, 181 N.E. 57 (1932). See Notes (1932) 45 HARV. L. REV. 542; (1934) 47 HARV. L. REV. 1419; (1931) 31 COL. L. REV. 447.

[23] Handler, *Unfair Competition,* (1936) 21 IOWA L. REV. 175, 191.

[24] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937). See §§ 536, 537 *infra.*

[24a] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted Aug. 8, 1938); Associated Press *v.* KVOS Inc., 80 F.(2d) 575 (C.C.A. 9th, 1935), *rev'g* 9 F.Supp. 279 (W.D. Wash., 1934); Associated Press *v.* Sioux Falls Broadcasting Assn. (D. S.D., March 14, 1933) 1 U. S. DAILY 164 (1933).

§ 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.[25] 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.[26] 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.[27]

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.[28] 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".[29] 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

[25] Associated Press *v.* Sioux Falls Broadcasting Assn. (D.C. S.D., March 14, 1933) 1 U. S. DAILY 164 (1933), *appeal by broadcast station dismissed pursuant to stipulation* 68 F.(2d) 1014 (C.C.A. 8th, 1933).

[26] *Id.*, Conclusions of Law, Par. 10.

[27] 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1918).

[28] Associated Press *v.* KVOS, Inc., 9 F.Supp. 279 (W.D. Wash., 1934), *revd.* 80 F.(2d) 575 (C.C.A. 9th, 1935), *dismissed for want of jurisdiction,* 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936).

[29] 9 F.Supp. 279, 286 (W.D. Wash., 1934).

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:[30]

> "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.[31]

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[32] brought uniformity, at least for a time, to the previously conflicting decisions. Circuit Judge Denman said:[33]

> "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.

[31] *Id.*, at 287. For critical analyses of the *KVOS* decision, see R. F. Payne, *The Appropriation of News By Broadcasting Stations,* (1936) 21 IOWA L. REV. 33; Note (1935) 35 COL. L. REV. 304; Note (1935) 44 YALE L. J. 877; Shapiro, *The Press, the Radio and the Law* (1935) 6 AIR L. REV. 128.

[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.[34] 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 [35] should be followed. Support for this view may be found in the opinion of Judge Stern in *Waring* v. *WDAS Broadcasting Station, Inc.*[36]

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,*[37] 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

[34] 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936). *Cf.* Buck *v.* Case, Eq. No. 606 (D. Wash., 1938) *complaint dismissed for want of jurisdiction,* C.C.A. 9th, June 26, 1938.

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

[36] 327 Pa. 433, 194 Atl. 631 (1937).

[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.[38] Moreover, a broadcast program as such may be protected against unfair competition.[39]

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.[40] 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.[41] 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

[38] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938). See Associated Press *v.* KVOS, Inc., 80 F.(2d) 575 (C.C.A. 9th, 1935); Associated Press *v.* Sioux Falls Broadcasting Assn. (D. S.D., March 14, 1933) 1 U.S. DAILY 164 (1933).

[39] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938). See Waring *v.* WDAS Broadcast Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937). See also Chapter XXXV. *infra.*

[40] Tribune Co. *v.* Associated Press, 116 Fed. 126 (N.D. Ill., 1900); Note (1935) 30 ILL. L. REV. 115. See also National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294 (C.C.A. 7th, 1902).

[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.

[42] 1 Unl. W. G., cited in (1931) 2 J. OF AIR LAW 63.

[42a] See Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938).

[43] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); 20th Century Sporting Club *v.* Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct., 1937).

[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

The broadcast of an electrical transcription or a script of a news program without the consent of the producer or other owner thereof should likewise be actionable as unfair competition.[46]

§ 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-

U.S.C.A. § 325 (1937). See § 286 *supra*.

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. *KQV 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.

[46] Waring *v.* Dunlea, Eq. No. 183 (E.D.N.C., 1938) (unreported). See Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

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.[47] This right may be assigned or licensed to 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.[48]

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.[49] 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.[50] Admission may even be refused to a representa-

[47] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); 20th Century Sporting Club *v.* Transradio Press Service, 165 Misc. 71, 800 N.Y. Supp. 159 (Sup. Ct., 1937). *Cf.* National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81–313 (S.D. N.Y., 1936) (unreported).

[48] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415, Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); Station WIND *v.* Station WGN, U.S.D.C. Illinois, Nov. 24, 1936 (unreported).

[49] People *v.* Flynn, 189 N.Y. 180, 82 N.E. 169 (1907); Collister *v.* Hayman, 183 N.Y. 250, 76 N.E. 20 (1905); People *v.* Steele, 231 Ill. 340, 83 N.E. 236 (1907); Horney *v.* Nixon, 213 Pa. 20, 61 Atl. 1088 (1905); Boswell *v.* Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916); Finnesey *v.* Seattle Baseball Club, Inc., 122 Wash. 276, 210 Pac. 679 (1922).

[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.[51] 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.[52] 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.[53]

However, it has been held in one English case,[54] 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

and General Press Agency *v.* "Our Dogs" Pub. Co. [1916] 2 K.B. 880, *aff'd.* [1917] 2 K.B. 125 (Eng.). But see N. Y. CIVIL RIGHTS LAW, § 40 *re* equal rights in public accommodation or amusement resort.

[51] Woolcott *v.* Shubert, 217 N.Y. 212, 111 N.E. 829 (1916).

[52] Collister *v.* Hayman, 183 N.Y. 250, 76 N.E. 20 (1905); People *v.* Newman, 109 Misc. 622, 180 N.Y.Supp. 892 (1919). See National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81–313 (S.D.N.Y., 1936) (unreported).

[53] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); 20th Century Sporting Club. *v.* Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct., 1937). See Rudolph Mayer Pictures, Inc. *v.* Pathé News, Inc., 235 App. Div. 774, 255 N.Y.Supp. 1016 (1st Dept., 1932).

[54] Sports and General Press Agency, Ltd. *v.* "Our Dogs" Publishing Co., [1916] 2 K.B. 880, *aff'd.* [1917] 2 K.B. 125 (Eng.). *Semble* National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81–313 (S.D.N.Y., 1936) (unreported).

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,[55] 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.[56] 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.[57]

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.[58]

[55] *Ibid.*

[56] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); 20th Century Sporting Club *v.* Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct., 1937).

[57] *Ibid. Contra:* National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81–313 (S.D.N.Y., 1936) (unreported).

[58] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938).

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).

[60] (1938) 51 HARV. L. REV. 755; Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted August 8, 1938).

[61] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); Rudolph Mayer Pictures, Inc. *v.* Pathé News, Inc., 235 App. Div. 774, 255 N.Y.Supp. 1016 (1st Dept., 1932); 20th Century Sporting Club *v.* Transradio Press Service, 165 Misc. 71, 300 N.Y.Supp. 159 (Sup. Ct., 1937).

the sponsor thereof, the nature and extent of the commercial announcements broadcast therewith or other acts of the station in connection with the program. The owner of the event which is the subject of a broadcast program cannot ordinarily limit the station in the choice of an announcer or other program personnel unless a specific reservation of such rights is included in the agreement under which the broadcasting rights are granted to the station. Where the license to broadcast the event contains a prohibition against the subsequent broadcast use by the station of any of the contents of the original broadcast program of the event, the station will be bound thereby. Any other broadcast station, however, is entitled to broadcast the results of a sports event as news.

Where a station has obtained the exclusive broadcasting right to a specific event and a representative of a competitor station attempts to interfere with such exclusive rights by broadcasting a running account of the event, the owner of the event and his exclusive licensee may prevent the unauthorized broadcast by all legal acts.[62] Where, however, they use unnecessary physical force or otherwise commit a breach of the peace in ejecting the trespasser, they may be liable for the consequences thereof. The trespasser may be arrested under local statutes. In such a case, it is necessary to determine whether such statutes prescribe that prohibitions of trespass be communicated by appropriate signs and posters.

§ 448. Defamation in News Broadcasts.

A newspaper has no greater privilege in defamation than any ordinary citizen[63] but is liable for what it pub-

[62] See Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938); 20th Century Sporting Club *v.* Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct., 1937). But see National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81–313 (S.D.N.Y., 1936) (unreported).

[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,[64] an advertisement[65] or correspondence.[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.[67]

In the dissemination of news broadcasts, the station acts in a capacity similar to that of a newspaper.[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

Commercial Pub. Co. *v.* Smith, 149 Fed. 704 (C.C.A. 6th, 1907); Stuart *v.* Press Pub. Co., 83 App. Div. 467, 82 N.Y.Supp. 401 (1903); Patter *v.* Harpers' Weekly Corp., 93 Misc. 368, 158 N.Y.Supp. 70 (1916).

[64] Snively *v.* Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921); Republican Pub. Co. *v.* Conroy, 38 Pac. 423 (Colo., 1894); Williams *v.* Black, 24 S.D. 501, 124 N.W. 728 (1910); Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097 (1896).

[65] Cox *v.* Strickland, 101 Ga. 482, 28 S.E. 655 (1897); Riley *v.* Lee, 88 Ky. 603, 11 S.W. 713 (1889); Williams *v.* Black, 24 S.D 501, 124 N.W. 728 (1910); McKillip *v.* Grays Harbor Pub. Co., 100 Wash. 647, 171 Pac. 1026 (1918).

[66] Williams *v.* Black, 24 S.D. 501, 124 N.W. 728 (1910).

[67] Edwards *v.* Kansas City Times Co., 32 Fed. 813, (W.D. Mo., 1887); Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N.E. 275 (1897); Scheckell *v.* Jackson, 10 Cush. 25 (Mass., 1852); Turton *v.* N. Y. Recorder Co., 144 N.Y. 144, 38 N.E. 1009 (1894); Heyler *v.* N. Y. News Pub. Co., 71 Hun 4, 24 N.Y.Supp. 499 (1893).

[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.[68]

Broadcast stations are permitted the same liberality in the use of descriptive language in reporting news as is available to a newspaper.[68a] 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.[69]

Although a newspaper publisher has been held absolutely liable without fault for defamation published by him,[70] 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[71] 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

[68] See Rogers *v.* Lee, Stromberg-Carlson, *etc.*, VARIETY, Feb. 9, 1938).

[68a] See Irwin *v.* Ashurst, 74 P. (2d) 1127 (Oregon, 1938).

[69] Fleisig *v.* Debs Memorial Fund, Inc., N. Y. Sup. Ct. Kings Co., Lockwood, J., VARIETY, Feb. 9, 1938.

[70] Smith *v.* Matthews, 6 Misc. 162, 27 N.Y.Supp. 120 (1893); McMahon *v.* Bennett, 31 App. Div. 16, 52 N.Y.Supp. 390 (1898); Crane *v.* Bennett, 177 N.Y. 106, 69 N.E. 274 (1904); N. Y. Society for the Suppression of Vice *v.* McFadden Publications, 260 N.Y. 167, 183 N.E. 281 (1932).

[71] See Chapter XXIX. *infra.*

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 Wheeler[75] of Montana and Representative Wearin[76] 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] BRINDZE, NOT TO BE BROADCAST (1937) 278.

[74] *Ibid.*

[75] N. Y. TIMES, Jan. 9, 1937, 4, col. 6; *id.*, Feb. 13, 1937, 11, col. 2.

[76] H.R. 3892, 75th Cong., 1st Session, CONG. RECORD, 650.

[77] N. Y. TIMES, Feb. 13, 1937, 11, col. 2.

Congress has the power to regulate broadcasting under the "commerce clause" of the Constitution.[78] 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.[79] 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.[80]

An analogous problem in the constitutionality of such Congressional legislation appears in the "commodities clause" of the Hepburn Act of 1903.[81] 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[82] held *inter alia* that the clause was constitutional as to commodities owned by the carrier

[78] See Chapter I. *supra*.

[79] 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."

[80] WILLOUGHBY ON THE CONSTITUTION OF THE UNITED STATES (2nd Ed., 1929) § 416.

[81] 34 STAT. 584 (1906), 49 U.S. C.A. § 1, (8) (1926).

[82] United States *v.* Delaware and Hudson Co., 213 U.S. 366, 29 Sup. Ct. 527, 53 L.Ed. 836 (1908).

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.

		PAGE
SECTION 451.	Generally	818
452.	Nature of Right of Privacy	819
453.	Same: Persons Entitled Thereto	822
454.	The Recognition of the Right of Privacy at Common Law	824
455.	The Doctrine in New York	826
456.	Enactment of Sections 50 and 51 of the New York Civil Rights Law	827
457.	Use of Name in Broadcast Program	829
458.	Same: Commercial Programs Other Than News	831
459.	Use of Name in News Broadcast	833
460.	Use of Assumed Names in Broadcast Programs	836
461.	Broadcast of Recordings as Invasion of Rights of Privacy	837
462.	Broadcast Programs Containing Interviews with Members of the Public	839
463.	Inapplicability of Right of Privacy to Certain Persons	841
464.	Liability for Invasion of the Right of Privacy	843
465.	Recommendations	844

§ 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

slight recognition at common law and express statutory enforcement in but two states.[1]

In 1890, Messrs. Warren and Brandeis wrote one of the most important and provocative articles in the development of Anglo-American Law.[2] 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.[3]

§ 452. Nature of Right of Privacy.

The right of privacy has been characterized as "the right to be let alone"[4] or the right of "inviolate personality".[5] 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,

[1] New York Civil Rights Law, Laws of 1903, c. 132, § 2, p. 308; CONSOL. LAWS OF 1909, c. 14, §§ 50, 51; Laws of 1911, c. 226, p. 504; CAHILL'S CONSOL. LAWS OF N. Y., v. 7, Art. 5, §§ 50 and 51; amended by Laws of 1921, c. 501; VIRGINIA CODE OF 1924, § 5782.

[2] Warren and Brandeis, *The Right of Privacy* (1890) 4 HARV. L. R. 193.

[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.

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.*

[7] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.).

[8] *Ibid;* Warren and Brandeis, *op. cit. supra* n. 2.

[9] *Ibid.*

[10] *Ibid.*

[11] WALSH, EQUITY (1930) 270.

[12] DRONE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879) 102; DE WOLFE, AN OUTLINE OF COPYRIGHT, (1925) 1, 2.

[13] *Op. cit. supra* n. 2.

directly traceable to that stimulating discussion.[14] Other jurisdictions have definitely repudiated the contention that the right of privacy existed at common law.[15]

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.[16]

[14] The following states have recognized the right of privacy at common law: *California,* Melvin *v.* Reid, 112 Calif. App. 285, 297 Pac. 91 (1931); *Georgia,* Bazemore *v.* Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); *Louisiana,* Deon *v.* Kirby Lumber Co., 162 La. 671, 111 So. 55 (1927); Itzkovitch *v.* Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A. (N.S.) 1147, 112 Am. St. Rep. 272 (1905) *aff'd.* 117 La. 708, 42 So. 228, 116 Am. St. Rep. 215 (1906); *Missouri,* Munden *v.* Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Kansas,* Kunz *v.* Allen, 102 Kans. 883, 172 Pac. 532 (1918); *Kentucky,* Rhodes *v.* Graham, 238 Ky. 225, 37 S.W.(2d) 46 (1931); Brents *v.* Morgan, 221 Ky. 765, 299 S.W. 967 (1928); Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S.W. 364 (1909); *Pennsylvania,* Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.); *Federal Courts,* Peck *v.* Tribune Co., 214 U.S. 185, 25 Sup. Ct. 554, 53 L.Ed. 960 (1909); Corliss *v.* E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass., 1894).

[15] The right of privacy has been repudiated at common law in: *Michigan,* Atkinson *v.* Doherty, 121 Mich. 372, 80 N.W. 285 (1899); *Rhode Island,* Henry *v.* Cherry, 30 R.I. 13, 73 Atl. 97 (1909); *Washington,* Hillman *v.* Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911); *Wisconsin,* Judevine *v.* Benzies-Montanye Fuel Co., 222 Wisc. 512, 269 N.W. 295 (1936).

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. 478, 89 Am. St. Rep. 828 (1902) but is now recognized by statute. Civil Rights Law, CONSOLIDATED LAWS OF 1909, c. 14, §§ 50, 51; amended by Laws of 1921, c. 501.

[16] See Sarat Lahiri *v.* Daily Mirror, 162 Misc. 776, 295 N.Y. Supp. 382, 5, 6 (1937) (construction of New York statute).

§ 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 [17] which may be enforced only by the person whose right has been infringed.[18] It follows that the individual right of privacy dies with the person.[19] 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.[20] 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.[21]

The right is extended by these courts to all persons irrespective of social or professional standing.[22] 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.[23] This class is strictly limited.

[17] Von Thodorovich *v.* Franz Josef Ben. Assn., 154 Fed. 911 (C.C.E.D.Pa., 1907); Shulman *v.* Whitaker, 117 La. 704, 42 So. 227 (1906). It should be noted that neither a corporation nor a public institution such as a college has any right of privacy which will be protected by injunction. *Vassar College* v. *Loose-Wiles Biscuit Co.*, 197 Fed. 982 (D.C. Mo., 1912). A partnership name is likewise not protected under the privacy doctrine. *Rosenwasser* v. *Ogoglia,* 172 App. Div. 107, 158 N.Y.Supp. 56 (1916).

[18] Von Thodorovich *v.* Franz Josef Ben. Assn., 154 Fed. 911 (C.C. Pa., 1907).

[19] Wyatt *v.* Hall's Portrait Studio, 71 Misc. 199, 128 N.Y. Supp. 247 (1911); Schuyler *v.* Curtis, 147 N.Y. 434, 42 N.E. 22 (1895). See Atkinson *v.* Doherty, 121 Mich. 372, 80 N.W. 285 (1909).

[20] Schuyler *v.* Curtis, 147 N.Y. 434, 42 N.E. 22 (1895).

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

[22] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.).

[23] See Melvin *v.* Reid, 64 Calif. App. 836, 297 Pac. 91 (1931); Corliss *v.* E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass., 1894).

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 accounts[26] and the tapping of telephone wires leading into the plaintiff's house[27] 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.

See also Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919); Ruth *v.* Educational Films, decided Sept. 15, 1920 by Guy, J., Sup. Ct. New York (unreported); Jeffries *v.* N. Y. Eve. Journal Pub. Co., 67 Misc. 570, 124 N.Y.Supp. 780 (1910); Chaplin *v.* Pictorial Review Corp., decided March 2, 1927 S.D.N.Y. (unreported).

[24] Warren and Brandeis, *op. cit. supra* n. 2 at 214.

[25] Brents *v.* Morgan, 221 Ky. 765, 299 S.W. 967 (1927). *Contra:* Judevine *v.* Benzies-Montanye Fuel Co., 222 Wisc. 512, 269 N.W. 295 (1936).

[26] Brex *v.* Smith, 146 Atl. 34 (N.J.Ch., 1929).

[27] Rhodes *v.* Graham, 238 Ky. 225, 37 S.W.(2d) 46 (1931).

[28] Wendell *v.* Conduit Mach. Co., 74 Misc. 201, 133 N.Y.Supp. 758 (1911). But see *Stone* v. *Metropolitan Life Ins. Co.* (Sup. Ct. N. Y. Co., Lauer, J.) N.Y.L.J., Nov. 10, 1937, p. 1589, col. 3 where the defense of employment was held to be valid as a partial defense in mitigation of damages only.

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.[29] Where the legislature has seen fit to deal with the problem, protection is limited to the provisions of such statutes.[30]

§ 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.[31] There can be no doubt, however, that despite the fact that courts have cloaked their decisions in fictions of property rights,[32] breaches of confidence [33] and implied contracts,[34] 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.).

[30] Kimmerle *v.* N. Y. Eve. Journal, Inc., 262 N.Y. 99, 186 N.E. 217 (1933).

[31] See nn. 14, 15 *supra*.

[32] Grigsby *v.* Breckenridge, 65 Ky. (2 Bush.) 480 (1867); Prince Albert *v.* Strange, 1 Mac. & G. 25, 2 De G. & Sm. 652, 41 Eng. Repr. 1171 (1849); Wetmore *v.* Scoville, 3 Edw. Ch. 515, 6 N.Y. Ch. 745 (1842); Gee *v.* Pritchard, 2 Swanst. 403, 36 Eng. Repr. 670 (1818); Pope *v.* Curl, 2 Atk. 342, 26 Eng. Repr. 608 (1741).

[33] Yovatt *v.* Winyard, 1 J. & W. 394, 37 Eng. Repr. 425 (1820); Morrison *v.* Moat, 9 Hare 241, 68 Eng. Repr. 492 (1851); Brandreth *v.* Lance, 8 Paige 24, 4 N.Y. Ch. 330 (1839).

[34] Abernathy *v.* Hutchinson, 3 L. J. Ch. (O.S.) 209, 1 H. & T. 28 (Eng., 1825); Caird *v.* Sime, 12 App. Cas. 326 (Eng., 1887); Pallard *v.* Photographic Co., 40 Ch. Div. 345, 58 L. J. Ch. (N.S.) 251 (Eng., 1888).

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).

[36] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1923) 53; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1923) 11.

[37] WALSH, HISTORY OF ANGLO-AMERICAN LAW (1932) § 168; Warren and Brandeis, *op. cit. supra* n. 2 at 194.

[38] Winsmore *v.* Greenbank, Welles, 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.

[41] Nicols *v.* Pitman, 26 Ch. Div. 374 (Eng., 1884); Turner *v.* Robinson, 10 Irish Ch. Rep. 121 (1859); Duke of Queensbury *v.* Shebbeare, 2 Eden 328 (Eng., 1758); Lee *v.* Simpson, 3 C.B. 871, 881 (Eng., 1847); Jeffreys *v.* Boosey, 4 H.L. Cas. 815 (Eng., 1845).

"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).

[42] Munden *v.* Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Schuyler *v.* Curtis, 147 N.Y. 434, 42 N.E. 22 (1895).

§ 455. The Doctrine in New York.

In New York, two very early cases[43] 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[44] which impliedly recognized that there was a right of privacy. This later decision was followed in *Schuyler* v. *Curtis*,[45] 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".[46] 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.[47]

A monumental case in this field was decided in 1902. In *Roberson* v. *Rochester Folding Box Co.*,[48] 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:[49]

> ". . . the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence, and, as we view it, the

[43] Brandreth *v.* Lance, 8 Paige 24, 4 N.Y. Ch. 330 (1839); Wetmore *v.* Scoville, 3 Edw. Ch. 515, 6 N.Y. Ch. 745 (1842).

[44] Woolsey *v.* Judd, 4 Duer 379, 596, 11 How. Pr. 49 (N.Y., 1855).

[45] 147 N.Y. 434, 42 N.E. 22 (1895).

[46] *Id.*, at 443.

[47] Schuyler *v.* Curtis, 147 N.Y. 434, 42 N.E. 22 (1895); Marks *v.* Joffa, 6 Misc. 290, 26 N.Y.Supp. 908 (1893); Moore *v.* N. Y. Elevated R. R. Co., 130 N.Y. 523, 20 N.E. 997 (1892); Mayor of New York *v.* Lent, 51 Barb. 19 (N.Y., 1868); Eyre *v.* Higbee, 35 Barb. 502, 22 How. Pr. 198 (N.Y., 1861); Woolsey *v.* Judd, 4 Duer 379, 596, 11 How. Pr. 49 (N.Y., 1855).

[48] 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478 (1902).

[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 [50] that one of the members of the Court, shortly thereafter, felt obliged to justify the Court's conclusion.[51]

§ 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.[52] 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.

[52] Civil Rights Law, Laws of 1903, c. 132, § 2, p. 308; CONSOL. LAWS OF 1909, c. 14, § 51; Laws of 1911, c. 226, p. 504; CAHILL'S CONSOL. LAWS OF N. Y., c. 7, art. 5, §§ 50 and 51.

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 [53] 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.[54]

A similar statute has been enacted in Virginia.[55]

Such legislation has been limited to instances of the use of one's name or photograph for commercial purposes.[56] The statutes were enacted to fill the need created by the decision in *Roberson* v. *Rochester Folding-Box Co.*[57] 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.

[53] Rhodes *v.* Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097, 34 L.R.A. (N.S.) 1143, 127 Am. St. Rep. 945 (1908), *aff'd.* 220 U.S. 502, 31 Sup. Ct. 490, 55 L.Ed. 561 (1910).

[54] *Ibid.;* Wyatt *v.* McCreery Co., 126 App. Div. 650, 111 N.Y. Supp. 86, (1908) *aff'g* 58 Misc. 429, 110 N.Y.Supp. 900 (1908).

[55] VIRGINIA CODE OF 1924, § 5782.

[56] 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.Supp. 382, 5, 6 (1937).

[57] 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478 (1902).

§ 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.[59] 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.[60]

The statutory protection under Sections 50 and 51 of

[58] *Michigan,* Atkinson *v.* Doherty, 121 Mich. 372, 80 N.W. 285 (1899); *Rhode Island,* Henry *v.* Cherry, 30 R.I. 13, 73 Atl. 97 (1909); *Washington,* Hillman *v.* Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911); *Wisconsin,* Judevine *v.* Benzies-Montanye Fuel Co., 222 Wisc. 512, 269 N.W. 295 (1936).

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. 478, 89 Am. St. Rep. 828 (1902) but is now recognized by statute. Civil Rights Law, CONSOLIDATED LAWS OF 1909, c. 14, §§ 50, 51; amended by Laws of 1921, c. 501.

[59] *California,* Melvin *v.* Reid, 112 Calif. App. 285, 297 Pac. 91 (1931); *Georgia,* Bazemore *v.* Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); *Louisiana,* Deon *v.* Kirby Lumber Co., 162 La. 671, 111 So. 55 (1927); Itzkovitch *v.* Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A. (N.S.) 1147, 112 Am. St. Rep. 272 (1905) *aff'd.* 117 La. 708, 42 So. 228, 116 Am. St. Rep. 215 (1906); *Missouri,* Munden *v.* Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Kansas,* Kunz *v.* Allen, 102 Kans. 883, 172 Pac. 532 (1918); *Kentucky,* Rhodes *v.* Graham, 238 Ky. 225, 37 S.W.(2d) 46 (1931); Brents *v.* Morgan, 221 Ky. 765, 299 S.W. 967 (1928); Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S.W. 364 (1909); *Pennsylvania,* Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.); *Federal Courts,* Peck *v.* Tribune Co., 214 U.S. 185, 25 Sup. Ct. 554, 53 L.Ed. 960 (1909); Corliss *v.* E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass., 1894).

[60] Uproar Co. *v.* National Broadcasting Co., 8 F.Supp. 358 (D. Mass., 1934), *mod.* 81 F.(2d) 373 (C.C.A. 1st, 1936), *cert. den.* 298 U.S. 670, 56 Sup. Ct. 835, 80 L.Ed. 1393 (1936); Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

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,[61] magazines,[62] motion pictures[63] and books.[64] Only three cases[65] 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.[66] 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.[67] 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,

[61] Sarat Lahiri *v.* Daily Mirror, 162 Misc. 776, 295 N.Y.Supp. 382 (1937); Kimmerle *v.* N. Y. Evening Journal, Inc., 262 N.Y. 99, 186 N.E. 217 (1933); Colyer *v.* Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.Supp. 999 (1914); D'Altomonte *v.* N. Y. Herald Co., 154 App. Div. 453, 139 N.Y.Supp. 200 (1913); Jeffries *v.* N. Y. Evening Journal Pub. Co., 67 Misc. 570, 124 N.Y. Supp. 780 (1910); Moser *v.* Press Pub. Co., 59 Misc. 78, 109 N.Y. Supp. 963 (1908).

[62] Martin *v.* New Metropolitan Fiction, Inc., 237 App. Div. 863, 260 N.Y.Supp. 972 (1932) *rev'g*, 139 Misc. 290, 248 N.Y.Supp. 359 (1931); Colyer *v.* Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.Supp. 999 (1914).

[63] Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919); Merle *v.* Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.Supp. 829 (1915); Binns *v.* Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913).

[64] Damron *v.* Doubleday, Doran & Co., Inc., 133 Misc. 302, 231 N.Y.Supp. 444 (1928), *aff'd.* 226 App. Div. 796, 234 N.Y.Supp. 773 (1929); Eliot *v.* Jones, 66 Misc. 95, 120 N.Y.Supp. 989 (1910) *aff'd.* 140 App. Div. 911, 125 N.Y. Supp. 1119 (1911); Moser *v.* Press Pub. Co., 59 Misc. 78, 109 N.Y. Supp. 963 (1908).

[65] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d. 1937); King *v.* Winchell, 290 N.Y.Supp. 558 (App. Div., 4th Dept. 1936); Beegel *v.* National Broadcasting Co., Inc., decided June 30, 1936, S.D.N.Y. (unreported) Docket No. L54-299.

[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. Likewise, a broadcast station would not be liable for the use of one's name in a news information program, whether sustaining 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 statutory 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 advertiser 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); Damron *v.* Doubleday, Doran & Co., Inc., 133 Misc. 302, 231 N.Y.Supp. 444 (1928) *affd.* 226 App. Div. 796, 234 N.Y.Supp. 773 (1929); Colyer *v.* Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.Supp. 999 (1914); Moser *v.* Press Pub. Co., 59 Misc. 78, 109 N.Y.Supp. 963 (1908).

[68] Sarat Lahiri *v.* Daily Mirror, 162 Misc. 776, 295 N.Y.Supp. 382 (1937).

[69] Beegel *v.* National Broadcasting 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.* Greenwich Litho. Co., 192 App. 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 Rigaud, 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.[72] 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*,[73] 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.[74] 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.[75]

[72] Wolins *v.* LaMode Chez Tappé, Inc., decided Dec. 1, 1936, N.Y.Co. Sup. Ct. Trial Term, Part XIV., N.Y.L.J. Dec. 2, 1936, p. 1964, col. 1.

[73] 290 N.Y.Supp. 558 (App. Div., 4th Dept., 1936).

[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.

[75] See Cook *v.* 20th Century, decided Dec. 14, 1936, N.Y. Sup. Ct., Spec. Term, Part III., N.Y.L.J., Dec. 15, 1936, p. 2200, col. 7;

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.*,[76] 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.[77] 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.[78] Such trade purposes were construed as not within the intent of the New York Legislature in enacting Sections 50 and 51.

Nann *v.* Raimist, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669 (1931) *aff'g* 228 App. Div. 856, 241 N.Y. Supp. 832 (1930).

[76] Decided June 30, 1936, S.D. N.Y. (unreported) Docket No. L54-299.

[77] Martin *v.* New Metropolitan Fiction, Inc., 237 App. Div. 863, 260 N.Y.Supp. 972 (1932); Damron *v.* Doubleday, Doran & Co., Inc., 133 Misc. 302, 231 N.Y.Supp. 444 (1928) *aff'd.* 226 App. Div. 796, 234 N.Y.Supp. 773 (1929); Colyer *v.* Richard K. Fox Publ. Co., 162 App. Div. 297, 146 N.Y. Supp. 999 (1914); Moser *v.* Press Pub. Co., 59 Misc. 78, 109 N.Y. Supp. 963 (1908).

[78] Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919).

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

79 King *v.* Winchell, 290 N.Y. Supp. 558 (App. Div., 4th Dep., 1936).

80 Sweenek *v.* Pathé News, Inc., 16 F.Supp. 746 (E.D.N.Y., 1936).

81 Sarat Lahiri *v.* Daily Mirror, 162 Misc. 776, 295 N.Y.Supp. 382, 8 (1937).

82 Sweenek *v.* Pathé News, Inc., 16 F.Supp. 746 (E.D.N.Y., 1936).

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.[83] 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.[84] 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.[85]

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.

[83] See Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919). *Cf.* Binns *v.* Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913); Blumenthal *v.* Picture Classics, Inc., 235 App. Div. 570, 257 N.Y.Supp. 800 (1932), *aff'd.* 261 N.Y. 504, 185 N.E. 713 (1933).

[84] See Sarat Lahiri *v.* Daily Mirror, 162 Misc. 776, 295 N.Y. Supp. 382, 6, 7, 8 (1937).

[85] *Ibid;* Binns *v.* Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913); Blumenthal *v.* Picture Classics, Inc., 235 App. Div. 570, 257 N.Y.Supp. 800 (1932) *aff'd.* 261 N.Y. 504, 185 N.E. 713 (1933).

§ 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.

[85a] 89 F.(2d) 891 (C.C.A. 2d, 1937).

[86] 89 F.(2d) 891, 4 (C.C.A. 2d, 1937).

In *Davis* v. *RKO Radio Pictures,*[87] 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 characteristics may 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.,*[88] 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

[87] 16 F.Supp. 195 (S.D.N.Y., 1936).

[88] 327 Pa. 433, 194 Atl. 631 (1937).

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 pic-

[89] Voorhies *v.* Audio-Scriptions, Inc., New York Sup. Ct. Spec. Term, Part I., Pecora, J., August 10, 1936 (unreported); Waring *v.* Robinson, Phila. Ct. Com. Pleas, McDevitt, J., February 9, 1936 (unreported).

[90] Note (1910), 8 MICH. L. REV. 221; Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904).

ture.[91] It is desirable that the present inadequacy of the statute be corrected by amendment.[92]

An interesting incident occurred during the 1936 presidential campaign. Senator Vandenberg broadcast a program in the form of a debate between himself and certain portions of President Roosevelt's previously recorded speeches.[93] Did such a program violate the President's right of privacy? Were the absent debater an ordinary citizen, his right of privacy at common law would clearly have been violated. In the case of a prominent public character, however, analogy may be made to newspaper publications. In the latter case, the principle is invoked that a person who participates in a public event emerges from his seclusion and therefore his right of privacy is not invaded by a publication of his photograph and an account of the incident.[94] The analogy may further be extended to the right to report the incident and use motion pictures of the individual in a newsreel of current events for exhibition in theatres.[95]

§ 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

[91] Swacker *v.* Wright, 154 Misc. 822, 277 N.Y.Supp. 296 (1935). In *Merle* v. *Sociological Research Film Corp.*, 166 App. Div. 376, 380, 152 N.Y.Supp. 829, 832 (1915), it was said:

"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.*

[93] NEW YORK TIMES, October 20, 1936, p. 8.

[94] Jones *v.* Herald Post Co., 230 Ky. 227, 18 S.W.(2d) 972 (1929).

[95] Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919).

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.[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.[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

[96] See Middleton *v.* News Syndicate Co., Inc., 162 Misc. 516, 295 N.Y.Supp. 120 (1937).

[97] See Sarat Lahiri *v.* Daily News, 162 Misc. 776, 295 N.Y. Supp. 382 (1937).

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.[98] 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.[99]

§ 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-

[98] *Cf.* Fuchs *v.* Seiden Sound System, Inc., Sup. Ct. N.Y. Co., N.Y.L.J., Oct. 23, 1937, p. 1305, col. 6 (unreported).

[99] If no written consent is obtained, the fact that plaintiff gave oral consent may affect the award of damages. *Harris* v. *H. W. Gossard Co.,* 194 App. Div. 688, 185 N.Y.Supp. 861 (1921). Plaintiff's consent may be shown by a previous course of conduct as an estoppel, but only as a partial defense. *Hammond* v. *Crowell Pub. Co.,* 1 N.Y.Supp.(2d) 728 (App. Div., 1st Dept., 1938). Similarly, by a general custom in plaintiff's profession, but not as a complete defense. *Sidney* v. *A. S. Beck Shoe Corp.,* 153 Misc. 166, 274 N.Y.Supp. 559 (1934).

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

[100] See Melvin *v.* Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Corliss *v.* E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass., 1894).

[101] Chaplin *v.* Pictorial Review Corp., decided March 2, 1927, S.D. N.Y. (unreported); Ruth *v.* Educational Films, decided Sept. 15, 1920, New York Co. Supreme Court (unreported); Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919); Jeffries *v.* N. Y. Eve. Journal Pub. Co., 67 Misc. 570, 124 N.Y.Supp. 780 (1910).

[102] *The Right of Privacy,* (1890) 4 HARV. L. R. 193, 215.

[103] Swacker *v.* Wright, 154 Misc. 822, 277 N.Y.Supp. 296 (1935).

[104] Decided June 30, 1936, S.D. N.Y. (unreported) Docket No. L54-299.

this category would be the case of *King* v. *Winchell.*[105] 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,

[105] 290 N.Y.Supp. 558 (App. Div., 4th Dept., 1936).

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,[106] and upon the hotel owner who supplied his guests with individual receiving sets as part of the facilities of his establishment.[107]

§ 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."[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 [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

[106] Buck *v.* Jewell La-Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

[107] Society of European Stage Authors and Composers *v.* N. Y. Statler Hotel Co., 19 F.Supp. 1 (S.D.N.Y., 1937).

[108] Warren and Brandeis, *The Right of Privacy* (1890), 4 HARV. L. REV. 193.

[109] *Michigan,* Atkinson *v.* Doherty, 121 Mich. 372, 80 N.W. 285 (1899); *Rhode Island,* Henry *v.* Cherry, 30 R.I. 13, 73 Atl. 97 (1909); *Washington,* Hillman *v.* Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911); *Wisconsin,* Judevine *v.* Benzies-Montanye Fuel Co., 222 Wisc. 512, 269 N.W. 295 (1936). In *New York,* the failure of the courts to grant relief at common law [Roberson *v.* Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828 (1902)] has been at least partially corrected by a remedial statute. N.Y. Civil Rights Law, CONSOL. LAWS OF 1909, c. 14, §§ 50, 51; amended by Laws of 1921, c. 501.

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,[110] breach of trust [111] or implied contracts,[112] 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.

[110] Grigsby *v.* Breckenridge, 65 Ky. (2 Bush.) 480 (1867); Prince Albert *v.* Strange, 1 Mac. & G. 25, 2 De G. & Sm. 652, 41 Eng. Repr. 1171 (1849); Wetmore *v.* Scoville, 3 Edw. Ch. 515, 6 N.Y. Ch. 745 (1842); Gee *v.* Pritchard, 2 Swanst. 403, 36 Eng. Repr. 670 (1818); Pope *v.* Curl, 2 Atk. 342, 26 Eng. Repr. 608 (1741).

[111] Yovatt *v.* Winyard, 1 J. & W. 394, 37 Eng. Repr. 425 (1820); Morrison *v.* Moat, 9 Hare 241, 68 Eng. Repr. 492 (1851); Brandreth *v.* Lance, 8 Paige 24, 4 N.Y. Ch. 330 (1839).

[112] Abernathy *v.* Hutchinson, 3 L.J.Ch. (O.S.) 209, 1 H. & T. 28 (Eng., 1825); Caird *v.* Sime, 12 App. Cas. 326 (Eng., 1887); Pallard *v.* Photographic Co., 40 Ch. Div. 345, 58 L.J.Ch. (N.S.) 251 (Eng., 1888).

Chapter XXIX.

LIABILITY FOR DEFAMATORY CONTENT OF BROADCAST PROGRAMS.

		PAGE
SECTION 466.	Introductory	847
467.	Defamation by Radio as Distinguished from Libel and Slander	848
468.	Theories Which Attempt to Classify Broadcast Defamation	849
469.	Liability for Broadcast Defamation: Generally	853
470.	Liability of the Speaker Whose Defamatory Remarks Are Broadcast	853
471.	Liability of the Broadcast Station Whose Facilities Are Used to Transmit the Defamatory Program	853
472.	Same: Analogy to Telephone Companies	854
473.	Same: Analogy to Telegraph Companies	855
474.	Same: Analogy to the Press	855
475.	Specific Instances of Station's Liability: Where the Defamatory Broadcast Is Uttered by the Station's Employee	856
476.	Same: Where the Defamatory Matter Uttered by Others Is Included in a Script Previously Submitted to the Station	857
477.	Same: Where the Defamatory Matter Is Uttered by Others Deviating from a Previously Submitted Script	858
478.	Same: Where the Defamatory Matter Is Uttered by Others without Previous Submission of an Existing Script to the Station	859
479.	Same: Where the Defamatory Matter Was Uttered by Others Extemporaneously	859
480.	Liability for Broadcast Defamation Originating from Other Stations	861
481.	Liability of Advertisers for Defamation in Broadcast Programs Sponsored by Them	863
482.	Necessity That Defamatory Program Specifically Relate to Plaintiff	864
483.	Privilege and Fair Comment	865

PAGE

SECTION 484. Jurisdiction of Courts Over Defendants in Actions for Broadcast Defamation. 867
485. Broadcast Defamation Is Actionable at Common Law Independently of Libel or Slander. 868
486. Statutes Dealing with Broadcast Defamation. 869

§ 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. *Pillsbury,* 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 *Weglein* v. *Golder,* 317 Pa. 437, 177 Atl. 47 (1935).

[4] 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 366; Vold, *Defamation by Radio* (1932), 2 J. OF RADIO L. 673, 689.

[5] *Ibid.*

[6] See Dole *v.* Lyon, 10 Johns. (N.Y.) 447 (1813); Cooper *v.* Greely, 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.

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-

[7] S. DAVIS, THE LAW OF RADIO COMMUNICATION (1927) 158.

[8] Mr. Seelman suggests that broadcast defamation be classified as libel. SEELMAN, THE LAW OF LIBEL AND SLANDER (1933) Par. 7.

[9] Meldrum *v.* Australian Broadcasting Co., Ltd. [1932], Vict.L. Rep. 425. See (1932) 6 AUSTRALIAN L. J. 301.

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,*[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:[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,*[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[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.[14] The listener is ordinarily not concerned with the

[10] 123 Neb. 348, 243 N.W. 82 (1932) *appeal dismissed sub nom.* KFAB Broadcasting Co. *v.* Sorenson, 290 U.S. 599, 54 Sup. Ct. 209, 78 L.Ed. 527 (1933).

[11] *Id.,* 243 N.W. 82, 85 (1932).

[12] Locke *v.* Gibbons, 164 Misc. 877, 299 N.Y.Supp. 188, 192, 193 (Pecora, J., Sup. Ct. N.Y. Co., 1937).

[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.[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[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.[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

Tuttle, 5 Blackf. (Ind.) 431 (1840); Beardsley *v.* Tappan, Fed. Cas. No. 1189 (C.C.S.D.N.Y., 1867); Adams *v.* Lawson, 17 Grattan (Va.) 251 (1867). See ODGERS, LIBEL AND SLANDER (6th ed., 1929) 132; DAVIS, *op. cit. supra* n. 13, 159.

[15] Meldrum *v.* Australian Broadcasting Co., Ltd. [1932] Vict.L. Rep. 425.

[16] See Vold, *The Basis for Liability by Radio* (1935) 19 MINN. L. REV. 611; Vold, *Defamation by Radio* (1932) 2 J. OF RADIO L. 673.

[17] Peck *v.* Tribune Co., 214 U.S. 185, 29 Sup. Ct. 554, 53 L.Ed. 960 (1909) (picture); Merle *v.* Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.Supp. 829 (1925) (motion pictures); Schultz *v.* Frankfort Marine Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913) (detective shadowing the plaintiff); Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N.W. 1022 (1898) (telegraph transmission).

inconsistently placed broadcast defamation in the existing patterns of either libel or slander.[18] 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.

[18] 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. *Meldrum* 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). *Weglein* v. *Golder,* 317 Pa. 437, 177 Atl. 47 (1935) involved a technical publication by delivery of the script to a newspaper and, hence, there was no error in giving the case to the jury as solely one for libel, although plaintiff declared in both slander and libel. *Singler* v. *Journal Co.,* 218 Wis. 263, 260 N.W. 431 (1935), and *Miles* v. *Louis Wasmer, Inc.,* 172 Wash. 466, 20 P.(2d) 847 (1933) are also cases in which the question of classifying broadcast defamation was considered but not decided. Both courts expressly stated that they would not decide the question. Moreover, the defamatory words used were actionable in slander or libel. *Cf.* Opinion of Cussen, A.C.J., in *Meldrum* v. *Australian Broadcasting Co., Ltd., supra. Coffey* v. *Midland Broadcasting Co.,* 8 F.Supp. 889 (W.D.Mo., 1934), insofar as it considered the question (see Section 480 *infra*) is also not decisive thereof, as the defamatory words were actionable in slander or libel.

§ 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.[19] 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.[20] The general rules of tort liability apply to impose liability upon one whose acts are the proximate cause of the injury. The radio cases[21] 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."[22] 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] 1 COOLEY ON TORTS (4th ed., 1932) 84, 85.

[20] S. DAVIS, THE LAW OF RADIO COMMUNICATION (1927) 162.

[21] Sorenson *v.* Wood, 123 Neb. 348, 243 N.W. 82 (1932); Locke *v.* Gibbons, 164 Misc. 877, 299 N.Y.Supp. 188 (1937); Weglein *v.* Golder, 317 Pa. 437, 177 Atl. 47 (1935); Miles *v.* Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933).

[22] S. DAVIS, THE LAW OF RADIO COMMUNICATION (1927) 162.

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.[23] 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.[24] This standard is inapplicable to conversations carried over the wires of telephone companies. Broadcast stations are not common carriers,[25] while telephone companies are obliged to offer their facilities indiscriminately. It has also been pointed out[26] that the wide diffusion and reception of

[23] See Coffey *v.* Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo., 1934); Sorenson *v.* Wood, 123 Neb. 348, 243 N.W. 82 (1932); Vold, *Defamation By Radio* (1932), 2 J. OF RADIO L. 673; Note (1935) 6 AIR L. REV. 81.

[24] See Sections 559, 564 *infra.*

[25] Sta-Shine Products Co. *v.* Station WGGB, 188 I.C.C. 271 (1932). See Section 215 *supra.*

[26] Coffey *v.* Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo., 1934).

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.[27] For the same reasons as advanced in criticism of the analogy to telephone companies,[28] the factual situation in broadcasting is not comparable to that of telegraph transmission companies. The courts have correctly refused to apply this analogy.[29]

§ 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.[30]

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.[31]

[27] Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N.W. 1022 (1898); Nye *v.* Western Union Tel. Co., 104 Fed. 628 (C.C.A. 7th, 1900); Western Union Tel. Co. *v.* Cashman, 149 Fed. 367 (C.C.A. 5th, 1906). See Smith, *Liability of a Telegraph Company for Transmitting a Defamatory Message*, (1920) 20 COL. L. REV. 369; (1931) 29 MICH. L. REV. 339.

[28] See § 472 *supra*.

[29] See Coffey *v.* Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo., 1934).

[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).

[31] Peck *v.* Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L.Ed. 960 (1909); Washington Post Co. *v.* Chaloner, 250 U.S. 290, 39 Sup. Ct. 448, 63 L.Ed. 987 (1919); Taylor *v.* Hearst, 107 Cal.

Broadcast stations have the privilege of editorial selection which is partially exercised in the same manner as newspaper publishers.[32] 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.[33]

§ 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.[34]

262, 40 Pac. 392 (1895); Walker *v.* Bee-News Pub. Co., 122 Neb. 511, 240 N.W. 579 (1932); Cassidy *v.* Daily Mirror Newspapers, [1929] 2 K.B. 331 (Eng.).

[32] See §§ 569–572 *infra*.

[33] There can be no public interest in a defamatory program. *Cf.* § 564 *infra*.

[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.[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.[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.[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

Pub. Co., 147 App. Div. 161, 132 N.Y.Supp. 80 (1911).

[35] Fogg *v.* Boston & L. R. Co., 148 Mass. 513, 20 N.E. 109 (1899); NEWELL, SLANDER AND LIBEL (4th ed., 1924) 343 *et seq.* See (1922) 70 U. OF PA. L. REV. 138.

[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.

[37] *Cf.* Trapp *v.* Du Bois, 76 App. Div. 314, 78 N.Y.Supp. 505 (1902); Pollasky *v.* Minchener, 81 Mich. 280, 46 N.W. 5 (1890); Wilson *v.* Noonan, 27 Wis. 598 (1871).

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.[38] Likewise, there is absolute liability for the publication of utterances which are slanderous *per se*.[39]

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 [40] 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.

[38] NEWELL, SLANDER AND LIBEL (4th ed., 1924) § 187.

[39] *Id.* at § 20.

[40] See (1932) 32 COL. L. REV. 1255. But see Vold, *The Basis for Liability for Defamation by Radio,* (1935) 19 MINN. L. REV. 611.

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.*

[43] Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U.S. 266, 53 Sup. Ct. 627, 77 L.Ed. 1166 (1932). See Section 35 *supra.*

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.[44] 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

44 See Coffey *v.* Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo., 1934).

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 [45] as well as by legislative enactment. In Iowa,[46] 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.[47]

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

[48] 8 F.Supp. 889 (W.D.Mo., 1934).

[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).

[52] *Cf.* Jerome H. Remick & Co. *v.* General Electric Co., 16 F.(2d) 829 (S.D.N.Y., 1926).

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.[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

[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.[54] This rule would unquestionably include the sponsor of the defamatory program.[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.[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.

§ 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 &

[54] NEWELL, SLANDER AND LIBEL (4th ed., 1924) § 187.

[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).

[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.[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 *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.[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.

§ 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

[57] Morris Beegel *v.* National Broadcasting Company, *et al.*, (S.D.N.Y., June 30, 1936), Docket No. L 54–299 (unreported).

[58] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

statement of false and defamatory facts, the defendant station cannot claim that the broadcast consisted of comment.[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.[60]

The modern view is that the making of comment and criticism is a right and not a privilege.[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.[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,

[59] Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Starks *v.* Comer, 190 Ala. 245, 67 So. 440 (1914).

[60] HARPER ON TORTS (1933) § 251. See 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 *Foley* v. *Press Pub. Co.,* 226 App. Div. 535, 544, 235 N.Y.Supp. 340 (1929), Mr. Justice Proskauer said:

"In order that defeasible immunity may attach to a pubcation 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. . . ."

[61] See SEELMAN, *op. cit. supra* n. 60, par. 235. But in 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 subserved, in view of the unusual circumstances of the publication, the relationship of the parties, and the general social interest in free public discussion."

[62] Dowling *v.* Livingstone, 108 Mich. 321, 66 N.W. 225 (1896).

scorn or obloquy.[63] Comment or criticism may also be made of public officials,[64] candidates for public office[65] 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,[66] irrespective of the type of broadcast program involved.

In *Irwin* v. *Ashurst*,[66a] 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*.[67] 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

[63] Triggs *v.* Sun Printing etc. Assn., 179 N.Y. 144, 71 N.E. 739 (1904); MacDonald *v.* Sun Printing etc. Assn., 45 Misc. 441, 92 N.Y.Supp. 37 (1904).

[64] Hoey *v.* N. Y. Times Co., 138 App. Div. 149, 122 N.Y.Supp. 978 (1910).

[65] Bennet *v.* Commercial Advertiser Assn., 230 N.Y. 125, 129 N.E. 343 (1920). A leading and instructive case on this question is *Coleman* v. *MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908).

[66] Hoey *v.* N. Y. Times Co., 138 App. Div. 149, 122 N.Y.Supp. 978 (1910).

[66a] 74 P.(2d) 1127 (Oregon, 1938).

[67] Hoffman *v.* Carter, 117 N.J. L. 205, 187 Atl. 576 (1936).

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 § 488 *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 *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.

§ 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 *supra.*

[73] See §§ 477, 478, 479, 480 *supra.*

[74] Iowa House, File 302, March 5, 1937.

[75] See §§ 477, 478, 479, 480 *supra.*

[76] Indiana, S-80, March, 1937.

[77] *Ibid.*

In several states,[78] 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.[79] 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.[80] It has been suggested that a Federal statute should be enacted to regulate broadcast defamation uniformly in all the states.[81] It is submitted that such an act of Congress would be unconstitutional as an invasion of the reserved police powers of the states.[82] 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.[83]

[78] Illinois, Laws, 1927, 406, REV. STAT. (Cahill) c. 38, § 567 (1); CALIFORNIA PENAL CODE, §§ 258, 259, 260, 784a, Laws, 1929, 1174, Laws, 1931, 120; WASHINGTON, SESSION LAWS, 1935, 329.

[79] N. Y. Civil Rights L., §§ 50, 51; VA. CODE (1924), § 5782. See Chapter XXVIII. *supra.*

[80] See Chapter XXX. *infra.*

[81] McDonald & Grimshaw, *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.

		PAGE
SECTION 487.	Jurisdiction Over Broadcast Defamation from Without the State	871
488.	Jurisdiction Over the Parties	872
489.	Same: Agent to Accept Service	874
490.	Jurisdiction of Federal Courts in Tort Actions Arising from Broadcasts	875
491.	Same: Recommendations	876
492.	Jurisdiction Over Crimes by Broadcasting from Without the State	878
493.	Same: Jurisdiction Over the Defendants	879
494.	Same: Extradition or Interstate Rendition	880

§ 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] In the

[1] 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 Forest *v.* Tolman, 117 Mass. 109 (1875) (dog strays from Massachusetts and bites person in New Hampshire).

[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.[3] 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.[4] Its view is as follows:[5]

> "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.[6] 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

[3] NEWELL, SLANDER & LIBEL (4th Ed., 1924) § 175.

[4] RESTATEMENT OF THE CONFLICT OF LAWS (1934) § 65. For a critique of the RESTATEMENT'S view, see Cook, *Tort Liability and the Conflict of Laws,* (1935) 35 COL. L. REV. 202. See also Goodrich, *Tort Liability and the Conflict of Laws,* (1925) 73 U. OF PA. L. REV. 19.

[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.[7] 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

[7] 1 BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) § 84.1.

[8] 117 N.J.L. 205, 187 Atl. 576 (1936).

[9] See §§ 469–486 *supra*.

[10] 117 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.

[11] It should be noted, however, that since the liability of joint tortfeasors is joint and several [THROCKMORTON'S COOLEY ON TORTS (1930) 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 [12] or that he has made a general appearance.[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.[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.[15] In *Pawloski* v. *Hess,*[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

such an objective is the basis of the discussion.

[12] Webster *v.* Reid, 11 How. 437, 13 L.Ed. 761 (1850); Pennoyer *v.* Neff, 95 U.S. 714, 24 L.Ed. 565 (1877); Nat. Exchange Bank *v.* Wiley, 195 U.S. 257, 24 Sup. Ct. 70, 49 L.Ed. 184 (1903); Old Wayne Mut. Life Assn. *v.* McDonough, 204 U.S. 8, 27 Sup. Ct. 70, 51 L.Ed. 345 (1906); Grannis *v.* Ordean, 234 U.S. 385, 34 Sup. Ct. 779, 58 L.Ed. 1363 (1913).

[13] Entry of a general appearance has exactly the same effect as service of process. *Hill* v. *Mendenhall,* 21 Wall. (U.S.) 453 (1874); *United States* v. *New York, etc. S. S. Co.,* 216 Fed. 61 (C.C.A. 2nd, 1914); *Beamer* v. *Weiner,* 159 Fed. 99 (C.C.A. 7th, 1907); *Lyon* v. *Moore,* 259 Ill. 23, 102 N.E. 179 (1913); *Myers* v. *American Locomotive Co.,* 201 N.Y. 163, 94 N.E. 605 (1911).

[14] Goldey *v.* Morning News, 156 U.S. 518, 15 Sup. Ct. 559, 39 L.Ed. 517 (1895).

[15] See, for example, N. Y. VEHICLE AND TRAFFIC LAW, §§ 52–52a, as amended L. 1930, c. 57; MASS. GEN. LAWS (1932), c. 90 § 3A.

[16] 274 U.S. 352, 47 Sup. Ct. 632, 71 L.Ed. 1091 (1927). See also Kane *v.* New Jersey, 242 U.S. 160, 37 Sup. Ct. 30, 61 L.Ed. 223 (1916).

activities,[17] 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.[18] 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]

§ 490. Jurisdiction of Federal Courts in Tort Actions Arising from Broadcasts.

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[21] and service must be made in that district[22] unless the defendant waives service and appears.[23] 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

[17] Airplanes flying over the state, LAWS OF PA. (1935) No. 35 p. 130 [See (1936) 7 AIR L. REV. 428]; also the sale of corporate securities by non-residents, *Davidson* v. *Henry L. Doherty & Co.*, 214 Iowa 739, 241 N.W. 700 (1932).

[18] Pawloski *v.* Hess, 274 U.S. 352 at 356 (1927).

[19] 274 U.S. 352, 47 Sup. Ct. 632, 71 L.Ed. 1091 (1927).

[20] U. S. CONSTITUTION, ART. III., § 2.

[21] U. S. JUDICIAL CODE, § 51, 28 U.S.C.A. § 112 (1937).

[22] Gutschalk *v.* Peck, 261 Fed. 212 (N.D. Iowa, 1919).

[23] Levy *v.* Fitzpatrick, 15 Pet. (U.S.) 167, 10 L.Ed. 699 (1841).

[24] Turk *v.* Illinois Cent. R. Co., 218 Fed. 315 (C.C.A. 6th, 1914); Nelson *v.* Braughler, 35 F.(2d) 779 (N.D. Cal., 1929).

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 plaintiff, 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 confers 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 District 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. 914 (1874); Peninsular Iron Co. *v.* Stoves, 121 U.S. 631, 7 Sup. Ct. 1010, 30 L.Ed. 1020 (1887).

[26] U. S. JUDICIAL CODE, § 24(1), 28 U.S.C.A. § 41(1) (1937).

[27] KVOS, Inc. *v.* Associated Press, 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936); Buck *v.* Case, Equity No. 606 (D. Wash., 1938), *complaint dismissed for want of jurisdiction,* C.C.A. 9th, June 28, 1938.

[28] Primos Chemical Co. *v.* Fulton Steel Corp., 254 Fed. 454 (N.D. N.Y., 1918); United States *v.* Kessel, 63 Fed. 433 (N.D. Iowa, 1894).

[29] 1 HUGHES, FEDERAL PRACTICE, (1931) § 250.

side the district of suit is authorized.[30] In no other case can the Court acquire jurisdiction of a defendant by service outside the district.[31]

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

[30] U. S. JUDICIAL CODE, § 57, 28 U.S.C.A. § 118 (1937).

[31] Cely *v.* Griffin, 113 Fed. 981 (C.C. So. Car., 1902); Winter *v.* Koon, Schwartz & Co., 132 Fed. 273 (C.C. Or., 1904).

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 [32] or where the state's penal law prohibits certain conduct [33] (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.[34] 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 [35] and not where the force is set in motion.[36] However, any state having jurisdiction, can by statute punish the offense.[37] 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.[38]

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 [39] or where the letter is received.[40] 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.[41]

Forest *v.* Tolman, 117 Mass. 109 (1875) (dog strays from Massachusetts and bites person in New Hampshire).

[35] Green *v.* State, 66 Ala. 40 (1880); Stout *v.* State, 76 Md. 317, 25 Atl. 299 (1892); State *v.* Gessert, 21 Minn. 369 (1875); Simpson *v.* State, 92 Ga. 41, 17 S.E. 984 (1893).

[36] United States *v.* Davis, Fed. Cas. No. 14932, 2 Sum. 482 (C.C. Mass., 1837); State *v.* Hall, 114 N.Car. 909, 19 S.E. 602 (1894).

[37] 1 BEALE, TREATISE ON THE CONFLICT OF LAWS, § 65.2 (1935).

[38] People *v.* Botkin, 132 Cal. 231, 64 Pac. 286 (1901).

[39] United States *v.* Worrall, 2 Dall. (U.S.) 384 (C.C. Pa., 1798).

[40] 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, *aff'd.* 1 N.Y. 173 (1848); Lindsey *v.* State, 38 Ohio St. 507 (1882).

[41] 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-

p. 329, § 2, REV. STAT. (Remington, Supp. 1937) § 2427, providing that the owner of the broadcast station shall be liable criminally for defamations broadcast through its facilities unless it can show that the libel was published "without his knowledge or fault and against his wishes". See also *State* ex rel. *Dooley* v. *Coleman,* 170 So. 722 (Fla., 1936), where a telephone company which furnished facilities but could not prevent their use for gaming purposes, was not held criminally liable.

[42] See Bragg *v.* State, 166 S.W. 162 (Tex. Crim. App., 1914).

[43] See SCOTT ON INTERSTATE RENDITION (1917) § 1.

[44] U. S. CONSTITUTION, ART. IV, § 2, Clause 2: "A person charged in any state with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another state, shall on Demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

[45] Lascelles *v.* Georgia, 148 U.S. 537, 13 Sup. Ct. 687, 37 L.Ed. 549 (1893); *Ex parte* Reggel, 114 U.S. 642, 5 Sup. Ct. 1148, 29 L.Ed. 250 (1884); Kentucky *v.* Dennison, 24 How. (U.S.) 66, 16 L.Ed. 717 (1861); People *v.* Cross, 135 N.Y. 536, 32 N.E. 246 (1892); Ross *v.* Crofutt, 84 Conn. 370, 80 Atl. 90 (1911).

[46] Reed *v.* United States, 224 Fed. 378 (C.C.A. 9th, 1915); In *re* Fetter, 23 N.J.L. 311 (1852);

inal must be a fugitive from justice.[47] 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.[48] If he was only "constructively" in the state, although not personally within its borders, he is not a fugitive from justice[49] 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[50] and in those other states[51]

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).

[49] Hyatt *v.* New York, 188 U.S. 691, 23 Sup. Ct. 456 (1903); *Ex parte* Hoffstot, 180 Fed. 240 (C.C. S.D.N.Y., 1910) *affd.* 218 U.S. 665, 31 Sup. Ct. 222, 54 L.Ed. 1201 (1910); *Ex parte* Shoemaker, 25 Cal. App. 551, 144 Pac. 985 (1914); Jones *v.* Leonard, 50 Iowa 106 (1878).

[50] LAWS OF NEW YORK, 1936, chapter 892; N. Y. CODE CRIMINAL PROC. (1936) §§ 827–859.

[51] ALA. CODE ANN. (Michie, Supp. 1936) §§ 4183(1) to 4183 (28); ARK. ACTS (1935) n. 126, p. 353; IDAHO CODE ANN. (1932) §§ 19–4601 to 19–4630; IND. STAT. ANN. (Burns, Supp. 1936) §§ 9–419 to 9–448; MAINE REV. STAT. (1930) c. 150; NEB. COMP. STAT. (Supp., 1935) §§ 29–707 to 29–736; NEW MEX. STAT. ANN. (Courtright, 1929) §§ 56–101 to 56–129; NO. CAR. CODE ANN. (Michie, 1935) §§ 4556(a) to 4556(y); ORE. CODE ANN. (Supp., 1935) §§ 13–2620 to 13–2647; PA. STAT. ANN. (Purdon, 1930) title 19, §§ 101 to 183; S. D. COMP. LAWS (1929) §§ 4637-H to 4637-Z 11; UTAH REV. STAT. ANN. (1933) §§ 105–

which have adopted the Uniform Extradition Act,[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.[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.[54] It should be noted that the New York

56–1 to 105–56–26; VT. PUBL. LAWS (1933) §§ 2506 to 2539; WIS. STAT. ANN. (1933) §§ 364.01 to 364.27; WYO. SESS. LAWS (1935) c. 122.

[52] LAWS OF NEW YORK (1936) c. 892, § 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 demand ing 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."

[53] See N. Y. CODE CRIM. PROC. (1936) § 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.

[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. § 804 e (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.

Chapter XXXI.

CONTEST PROGRAMS AND THE LOTTERY LAWS.

		PAGE
SECTION 495.	Generally	884
496.	Anti-Lottery Provisions of Communications Act of 1934	885
497.	Liability for Violation of Section 316	886
498.	Jurisdiction to Determine Violation of Section 316	889
499.	The Difference Between Section 316 of the Communications Act of 1934 and the Postal Anti-Lottery Statute	890
500.	Construction of Anti-Lottery Legislation	891
501.	Definition of a Lottery	892
502.	Consideration: An Essential Element to Constitute a Lottery	892
503.	Consideration: Package Tops, Wrappers, Etc	900
504.	Chance: An Essential Element to Constitute a Lottery	901
505.	Same: "Best" Contests	902
506.	Same: Guessing Contests	905
507.	Same: Voting Contests	906
508.	Same: Gift Enterprises	908
509.	Same: Checker Problem and Word Building Contests	909
510.	Prize—An Essential Element to Constitute a Lottery	910
511.	Broadcast Contest Programs: Specific Instances	911

§ 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

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.

§ 496. Anti-Lottery Provisions of Communications Act of 1934.

Section 316 of the Communications Act of 1934 [1] is patterned closely after the provisions of the Postal Anti-lottery Statute.[2]

[1] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1937).

[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[3] 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 $1000, 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."

[3] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1937).

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.

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.[5] 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 Postal Lottery Statutes*, (1936) 7 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).

[7] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1937).

[8] 35 STAT. 1129 (1909), 18 U.S. C.A. § 336 (1936). For text of the Postal Anti-Lottery Statute see n. 2 *supra.*

[9] Haley, *The Broadcasting and Postal Lottery Statutes,* (1936) 7 AIR L. REV. 405.

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.

§ 500. Construction of Anti-Lottery Legislation.

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 1934[13] 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 316[15] should be strictly construed.

[10] People *v.* Wallace, 291 Ill. 465, 126 N.E. 175 (1920); McGrath *v.* Kaelin, 66 Cal. App. 41, 225 Pac. 34 (1924). See Haley, *op. cit. supra,* n. 9, 407.

[11] Horner *v.* United States, 147 U.S. 449, 13 Sup. Ct. 409, 37 L.Ed. 237 (1893); Ballock *v.* State, 73 Md. 1, 20 Atl. 184 (1890).

[12] Post Pub. Co. *v.* Murray, 230 Fed. 773 (C.C.A. 1st, 1916); United States *v.* Hughes, 53 F.(2d) 387 (S.D. Tex., 1931).

[13] 48 STAT. 1091 (1934), 47 U.S. C.A. § 326 (1937).

[14] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1937).

[15] *Ibid.*

§ 501. Definition of a Lottery.

The word, lottery, has no technical legal meaning but must be construed in the popular sense.[16] 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." [17]

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.[18]

§ 502. Consideration: An Essential Element to Constitute a Lottery.

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.[19] In *People* v. *Mail & Express Co.*,[20] 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.[21] The law does not prohibit an individual from giving away property or money for nothing.

[16] State *v.* Hundling, 220 Iowa 1369, 264 N.W. 608 (1936).

[17] *Id.,* at 264 N.W. 608, 609 (1936).

[18] Post Pub. Co. *v.* Murray, 230 Fed. 773 (C.C.A. 1st, 1916).

[19] Public Clearing House *v.* Coyne, 194 U.S. 497, 24 Sup. Ct. 789, 48 L.Ed. 1092 (1904); State *v.* Wong Took, 147 Wash. 190, 265 Pac. 459 (1928); Dunn *v.* People, 40 Ill. 465 (1866).

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."

[20] 231 N.Y. 586, 132 N.E. 898 (1921).

[21] 231 N.Y. 586, 132 N.E. 898 (1921).

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.[22]

If free participation is found to be true only in theory and not in fact, there is a lottery.[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."[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.[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.[26] *Williams Furniture Co.* v. *McComb Chamber of Commerce*[27] is the

[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).

[23] *Ibid.*

[24] State v. Eames, 87 N.H. 477, 183 Atl. 590, 592 (1936).

[25] Haley, *op. cit. supra* n. 9, 411.

[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.

[27] 147 Miss. 649, 112 So. 579 (1927).

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 consideration 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.[28] Mr. Thomas has set down the rule as follows:[29]

> "Where a promoter of a business enterprise, with the evident 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 themselves to trouble or to inconvenience, even to a slight degree, or perform some service at the request of and for the promoter, 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.[30]

[28] 35 STAT. 1129 (1909), 18 U.S.C.A. § 336 (1936).

[29] THOMAS, LOTTERIES, FRAUDS AND OBSCENITY IN THE MAILS (1900) 35.

[30] Horner *v.* United States, 147 U.S. 449, 13 Sup. Ct. 409, 37 L.Ed. 237 (1893); Brooklyn Daily Eagle Co. *v.* Voorhies, 181 Fed. 579 (C.C. 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 Theatres, Inc. *v.* Metro-Goldwyn-Mayer Distributing Corp., 9 F.Supp. 546 (D. Colo., 1933) (This case involved the Code of motion picture

exhibitors promulgated under the National Industrial Recovery Act.); Central States Theatre Corp. *v.* Patz, 11 F.Supp. 566 (S.D. Iowa, 1935) (Whether consideration is paid is a question of fact.); Eastman *v.* Armstrong-Byrd Music Co., 212 Fed. 662 (C.C.A. 8th, 1914).

Maughs *v.* Porter, 157 Va. 415, 161 S.E. 242 (1931); State *v.* Danz, 140 Wash. 546, 250 Pac. 37 (1926); Equitable Loan Co. *v.* Waring, 117 Ga. 599, 44 S.E. 320 (1903).

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,[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.[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[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*,[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.[35]

investment profitable, not to forbid them from performing acts having no intrinsic value to anyone."

Maughs v. *Porter, supra,* is also severely criticized in (1931) 80 U. OF PA. L. REV. 744; 18 VA. L. REV. 465. In the latter it is pointed out that "the authorities cited in its decision seem to contradict rather than support it."

[31] Haley, *The Broadcasting and Postal Lottery Statutes,* (1936) 7 AIR L. REV. 405.

[32] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1936).

[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,*[36] 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,*[37] 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* [38] are sig-

v. Eames, 87 N.H. 477, 183 Atl. 590 (1936).

Mr. Haley in a revised reprint of his article, *The Broadcasting and Postal Lottery Statutes* [this revision may be found in HALEY, THE LAW ON RADIO PROGRAMS (Govt. Printing Office, S. Document No. 137, 1938)] mentions, in n. 68 on p. 33 thereof, the case of *WRBL Station, Inc.,* 2 F.C.C. Rep. 687 (1936). He states that the "Federal rule" was adhered to. It should be noted, however, that three of the programs condemned by the Commission came within the generally accepted rule that consideration is present where a chance on a prize drawing is given with the purchase of legitimate goods, even though in fact there is no increase in price because of the issuance of the chances on a prize. *WRBL Station, Inc.,* 2 F.C.C.Rep. 687 (1936).

It would seem that in condemning the fourth program broadcast by Station WRBL as an announcement of a lottery, the Commission did not necessarily apply the "Federal rule". The fourth program involved a scheme identical to the "Bank Night" plan. At the hearing, testimony was adduced to show that the announced winner of a prize who was not in the hall was not allowed to enter to claim his prize until he had purchased a ticket. As a consequence, he apparently was too late to claim his prize. It is submitted that this scheme is condemned as a lottery not only by the "Federal rule" but by the rule set forth in *Commonwealth* v. *Wall, supra* and *State* v. *Eames, supra.* In both cases, if participation had not in fact been free, the result would have been otherwise. In short, the facts of the case of *WRBL Radio Station, Inc. supra,* are not such as to require the application of the strict "Federal rule" because under any other rule the scheme there condemned would be considered a lottery.

[36] 87 N.H. 477, 183 Atl. 590 (1936).

[37] 3 N.E.(2d) 28 (Mass., 1936).

[38] 220 Iowa 1369, 264 N.W. 608 (1936). This was a "Bank Night" case involving free registration, a reasonable time to claim and a free entry to claim the prize.

nificant 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

[39] *Id.*, at 264 N.W. 608, 610 (1936).

[40] People *v.* Cardas, 137 Cal. App. 788, 28 P.(2d) 99 (1933).

[41] 230 Fed. 773 (C.C.A. 1st, 1916).

[42] 11 F.Supp. 566 (S.D. Iowa, 1935).

[43] 88 Ala. 196, 7 So. 338 (1890).

[44] 18 Colo. 321, 32 Pac. 821 (1893).

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 spirt of gamblng 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.

§ 503. Consideration: Package Tops, Wrappers, Etc.

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.[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

[47] Brooklyn Daily Eagle *v.* Voorhies, 181 Fed. 579 (C.C.E.D. N.Y., 1910).

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.

§ 504. Chance: An Essential Element to Constitute a Lottery.

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

[48] People *v.* Lavin, 179 N.Y. 164, 71 N.E. 753 (1904). See THOMAS, LOTTERIES, FRAUDS AND OBSCENITY IN THE MAILS (1900) 43 *et seq.*; Haley, *The Broadcasting and Postal Lottery Laws,* (1936) 7 AIR L. REV. 405, 420 *et seq.*

In *State* ex inf. *McKitterick Atty. 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-*

chance need be only the *dominant* factor 38 C.J., § 5 p. 291; 17 R.C.L. § 10 p. 1223; Waite *v.* Press Publishing Ass'n, 155 Fed. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence, a contest may be a lottery even though skill, judgment or research enter thereinto in some degree if chance in a larger degree determine the result."

[49] 181 Fed. 579 (C.C.E.D.N.Y., 1910).

man (*Postmaster*),[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,[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."

[50] S.D.N.Y., May 2, 1936, Knox, J. (unreported); *decree of dismissal for defect of parties affd.* 85 F.(2d) 66, 67, 68 (C.C.A. 2d, 1936).

[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." *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.

[52] 57 P.(2d) 238 (Cal. Super. App. Dep't, L. A., 1936).

[53] *Id.*, 57 P.(2d) 238, 240.

[54] 132 Misc. 597, 230 N.Y.Supp. 360 (1928).

[55] *Id.*, at 132 Misc. 597, 600 (1928).

[56] 212 Fed. 662 (C.C.A. 8th, 1914).

Mr. Thomas, in his treatise,[57] 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.*[58] 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,*[59] 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,*[60] 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:[61]

> ". . . 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*,[62] 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:[63]

> "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.*,[64] 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:[65]

[62] 230 Fed. 773 (C.C.A. 1st, 1916).

[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,*[66] a similar scheme was declared illegal. However, the dissenting opinion seems to be preferable. The dissenting Judge said:[67]

> "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 *Quatsoe* v. *Eggleston.*[68] However, in *National Thrift Assn.* v. *Crews,*[69] 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:[70]

> "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

[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 *Quatsoe* v. *Eggleston*,[71] however, the Court held that there was no element of chance in the award of the piano. In *National Thrift Assn.* v. *Crews*,[72] the voting plan was clearly a subterfuge.

§ 508. Same: Gift Enterprises.

In *United States* v. *Wallis*,[73] and *State* v. *Willis*,[74] 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:[75]

"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*,[76] the defendant conducted a "gift sale" establishment. He kept a box filled with envelopes purporting to contain some valuable recipes and popular

[71] 42 Ore. 315, 71 Pac. 66 (1903).

[72] 116 Ore. 352, 241 Pac. 72 (1925).

[73] 58 Fed. 942 (D.C.D. Idaho, 1893).

[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.

[81] Gilbert *v.* Houck Piano Co., 159 Ill. App. 347 (1911); Scott *v.* People's Monthly Co., 209 Iowa 503, 228 N.W. 263 (1929); Holb *v.* Rural Weekly Co., 173 Minn. 337, 217 N.W. 345 (1928).

[82] Carl Co. *v.* Lennon, 86 Misc. 255, 257, 148 N.Y.Supp. 375, 376 (1914).

[83] People *v.* Runge, 3 N.Y. Cr. 85, 34 Hun 634 (1885).

[84] Boon-Isely Drug Co. *v.* Doughton, 189 N.C. 720, 128 S.E. 341 (1925). *Accord:* United Jewelers Mfg. Co. *v.* Keckley, 77 Kan. 797, 90 Pac. 781 (1907).

special statutes, have been upheld because there was not any inequality in value which accrued only to some of the contestants.[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.[86]

§ 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.*

[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, 135 N.C. 271, 47 S.E. 457 (1904).

[86] People *v.* Mcfee, 139 Mich. 687, 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

Post Pub. Co. *v.* Murray, 230 Fed. 773 (C.C.A. 1st, 1916);

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. 794 (1914); National Sales Co. *v.* Manciet, 83 Ore. 34, 162 Pac. 1055 (1917); Quatsoe *v.* Eggleston, 42 Ore. 315, 71 Pac. 66 (1903).

Invalid

Public Clearing House *v.* Coyne, 194 U.S. 497, 24 Sup. Ct. 789, 48 L.Ed. 1092 (1904); Waite *v.* Press Pub. Ass'n, 155 Fed. 58 (C.C.A. 6th, 1907); Corp. Organization *v.* Hodges, 47 App. D.C. 460 (1918); District of Columbia *v.* Kraft, 35 App. D.C. 253 (1910); District of Columbia *v.* Gregory, 35 App. D.C. 271 (1910); Lansburgh *v.* District of Columbia, 11 App. D. C. 512 (1891); Hudelson *v.* State, 94 Ind. 426, 48 Am. Rep. 171 (1883); People *v.* Lavin, 179 N.Y. 164, 71 N.E. 753 (1904); Brenard Mfg. Co. *v.* Benjamin, 172 N.C. 53, 89 S.E. 797 (1916); Stevens *v.* Times-Star, 72 Ohio St. 112, 73 N.E. 1058 (1905); National Thrift Assn. *v.* Crews, 116 Ore. 352, 241 Pac. 72 (1925).

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

Horner *v.* United States, 147 U.S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237 (1893); New *v.* Treboud Corp., 57 App. D.C. 197, 19 F. (2d) 671 (1927); United States *v.* Fulkerton, 74 Fed. 619 (S.D.Cal., 1896); United States *v.* McDonald, 59 Fed. 563 (N.D.Ill., 1893); United States *v.* Zeisler, 30 Fed. 499 (N.D.Ill., 1887); State *v.* United States Exp. Co., 95 Minn. 442, 104 N.W. 556 (1905); State *v.* Hughes, 299 Mo. 529, 253 S.W. 229 (1923); State *v.* Nebraska Home Co., 66 Neb. 349, 92 N.W. 763 (1902); Kohn *v.* Koehler, 96 N.Y. 362, 48 Am. Rep. 628 (1884); State *v.* Interstate Sav. Inv. Co., 64 Ohio St. 283, 60 N.E. 220 (1901); Fisher *v.* State, 14 Ohio App. 355 (1921); Fidelity Co. *v.* Vaughn, 18 Okla. 13, 90 Pac. 34 (1907); Ballock *v.* State, 73 Md. 1, 20 Atl. 184 (1890).

CHECKER PROBLEM

Valid

Johnson *v.* McDonald, 132 Ore. 619, 287 Pac. 219 (1930); Boatwright *v.* State, 38 S.W.(2d) 87 (Tex. Crim. A., 1931); D'Ario *v.* Startup Candy Co., 71 Utah 410, 266 Pac. 1037 (1928); D'Ario *v.* Jacobs, 151 Wash. 297, 275 Pac. 724 (1929).

BEST CONTEST

Valid

Eastman *v.* Armstrong-Byrd Music Co., 212 Fed. 662 (C.C.A. 8th, 1914); Brooklyn Daily Eagle *v.* Voorhies, 181 Fed. 579 (E.D. N.Y., 1910); Hoff *v.* Daily Graphic, Inc., 132 Misc. 597, 230 N.Y. Supp. 366 (1928).

Invalid

People *v.* Rehm, 13 Cal. App. (2d) 755, 57 P.(2d) 238 (1936);

Association for Legalizing Lotteries *v.* Goldman, S.D.N.Y., May 2, 1936, Knox, J. (unreported).

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

State *v.* Gilbert, 29 Del. 374, 100 Atl. 410 (1917); Bueno *v.* State, 40 Fla. 160, 23 So. 862 (1898); Kolsborn *v.* State, 97 Ga. 343, 23 S.E. 829 (1895); Jenner *v.* State, 173 Ga. 86, 160 S.E. 115 (1931); Almy Mfg. *v.* Chicago, 202 Ill. App. 240 (1916); State *v.* Kansas Merch. Assn., 45 Kan. 351, 25 Pac. 984 (1891); State *v.* Googin, 117 Me. 102, 102 Atl. 970 (1918); Lang *v.* Merwin, 99 Me. 486, 59 Atl. 1021 (1905); Commonwealth *v.* Ward, 281 Mass. 119, 183 N.E. 271 (1932); Commonwealth *v.* McClintock, 257 Mass. 431, 154 N.E. 264 (1926); Territory *v.* Jones, 14 N.M. 579, 99 Pac. 338 (1908); In *re* Max Shapiro, 245 App. Div. 835, 281 N.Y.Supp. 72 (1935); State *v.* Lawe, 178 N.C. 770, 101 S.E. 385 (1919); State *v.* McLeer, 129 Tenn. 535, 167 S.W. 121 (1914); Painter *v.* State, 163 Tenn. 627, 45 S.W.(2d) 46 (1932); Queen *v.* State, 93 Tex. Cr. 173, 246 S.W. 384 (1922); Prendergast *v.* State, 41 Tex. Cr. 358, 57 S.W. 580 (1899); Christopher *v.* State, 41 Tex. Cr. 235, 53 S.W. 852 (1899); Mills *v.* Browning, 59 S.W.(2d) 219 (Tex. Civ. App., 1933); Moore *v.* Adams, 91 S.W.(2d) 447 (Tex., 1936); State *v.* Gaughan, 55 W.Va. 692, 48 S.E. 210 (1904).

BOARD AND RAFFLE SCHEMES

Valid

McRea *v.* State, 46 Tex. Cr. 489, 81 S.W 741 (1904).

Invalid

United States *v.* McGuire, 64 F. (2d) 485 (C.C.A. 2d, 1933); Reeves *v.* State, 105 Ala. 120, 17 So. 104 (1894); In *re* Gray, 23 Ariz. 461, 204 Pac. 1029 (1922); Leake *v.* Isaacs, 262 Ky. 640, 90 S.W.(2d) 1001 (1936); State *v.* Laseele, 154 La. 168, 97 So. 389 (1923); Shreveport *v.* Kahn, 136 La. 371, 67 So. 35 (1914); People *v.* Welch, 269 Mich. 449, 257 N.W. 859 (1934); People *v.* Babdaty, 30 P.(2d) 634 (Cal. App., 1934); Einzig *v.* Board of Police Comm'rs, 32 P.(2d) 1103 (Cal. App., 1934); Stanger *v.* State, 107 Tex. Cr. 574, 298 S.W. 906 (1927).

GIFT ENTERPRISES

Valid

Cross *v.* People, 18 Colo. 321, 32 Pac. 821 (1893); State *v.* Caspare, 115 Md. 7, 80 Atl. 606 (1911); Commonwealth *v.* Sisson, 178 Mass. 578, 60 N.E. 385 (1901); Williams Furn. Co. *v.* McComb Ch. of Com., 147 Miss. 649, 112 So. 579 (1927); People *v.* Mail & Exp. Co., 231 N.Y. 586, 132 N.E. 898 (1921); People *ex rel.* Madelen *v.* Dycker, 72 App. Div. 308, 76 N.Y.Supp. 111 (1902); City of Winston *v.* Beeson, 135 N.C. 271, 47 S.E. 457 (1904); Young *v.* Commonwealth, 101 Va. 853, 45 S.E. 327 (1903).

Invalid

Standridge *v.* Williford & Co., 148 Ga. 283, 96 S.E. 498 (1918); De Florin *v.* State, 121 Ga. 593, 49 S.E. 699 (1904) (suit club); Meyer *v.* State, 112 Ga. 20, 37 S.E. 96 (1900); Dunn *v.* People, 40 Ill. 465 (1866); Thomas *v.* People, 59 Ill. 160 (1871); Loveland *v.* Bode, 214 Ill. App. 399 (1919); Utz *v.* Wolf, 72 Ind. App. 572, 126 N.E. 327 (1920) (trading stamps); Whitney *v.* State, 10 Ind. 404 (1858); Davenport *v.* City of Ottawa, 54 Kan. 711, 39 Pac. 708 (1895); State *v.* Boneil, 42 La. Ann. 1110, 8 So. 298 (1890); State *v.* Willis, 78 Me. 70, 2 Atl. 848 (1885); Hull *v.* Ruggles, 56 N.Y. 424 (1874); Carl Co. *v.* Lennon, 86 Misc. 255, 148 N.Y.Supp. 375 (1914); Negley *v.* Devlin, 12 Abb. Pr. (N.S.) 210 (N.Y., 1872); State *v.* Moren, 48 Minn. 555, 51 N.W. 618 (1892) (suit club); State *v.* Emerson, 318 Mo. 633, 1 S.W.(2d) 109 (1927) (furniture club); State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532 (1881); State *ex rel.* Cantley *v.* Tailoring Co., 324 Mo. 795, 25 S.W.(2d) 98 (1930) (tailoring club); State *v.* Raffie, 60 S.W.(Mo.)(2d) 668 (1933) (tailoring club); Retail Section of Chamber of Comm. of Plattsmouth *v.* Kieck, 128 Neb. 13, 257 N.W. 493 (1934); People *v.* Runge, 3 N.Y. Cr. Rep. 85 (1885); La France *v.* Cullen, 196 Mich. 726, 163 N.W. 101 (1917) (furniture club); Glover *v.* Malloska, 238 Mich. 216, 213 N.W. 107 (1927); People *v.* McPhee, 139 Mich. 687, 103 N.W. 174 (1905) (suit club); People *v.* Wassmus, 214 Mich. 42, 182 N.W. 66 (1921); State *v.* Clarke, 33 N.H. 329, 66 Am. Dec. 723 (1856); State *v.* Shorts, 32 N.J.L. 398, 90 Am. Dec. 668 (1868); Market Plumbing Co. *v.* Spangenberger, 114 N.J.L. 271 (1935); State *v.* Lipkin, 169 N.C. 265, 84 S.E. 340 (1915); State *v.* Lumsden, 89 N.C. 572 (1883); State *v.* Perry, 154 N.C. 616, 70 S.E. 387 (1911) (suit club); Bell *v.* The State, 5 Sneed 507, 37 Tenn. 264 (1857); Blair *v.* Lowham, 73 Utah 599, 276 Pac. 292 (1929); U. S. *v.* Jefferson, 134 Fed. 299 (W.D. Ky., 1905); Maughs *v.* Porter, 157 Va. 415, 161 S.E. 242 (1931); U. S. *v.* McKenna, 149 Fed. 252 (W.D.N.Y., 1906); Conqueror Trust Co. *v.* Summa, 62 Okla. 252 (1917); Rountroev *v.* Ingle, 94 S.C. 231, 77 S.E. 931 (1913); U. S. *v.* Wallis, 58 Fed. 942 (D. Idaho, 1893).

THEATRE ENTERPRISES (BANK NIGHTS, ETC.)

Valid

State of Iowa *v.* Hundling, 220 Iowa 1369, 264 N.W. 608 (1936); State *v.* Eames, 87 N.H. 477, 183 Atl. 590 (1936); People *v.* Cardas, 28 P.(2d) 99 (Cal. App., 1933).

Invalid

Central States Theatre Corp. *v.* Patz, 11 F.Supp. 566 (S.D.Iowa, 1935); General Theatres, Inc. *v.* M. G. M., 9 F.Supp. 546 (D.C. Colo., 1935); People *v.* Miller, 271 N.Y. 44, 2 N.E.(2d) 38 (1936); State *v.* Danz, 140 Wash. 546, 250 Pac. 37 (1926); Society Theatre

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); Chancy Park Land Co. *v.* Hard, 104 Iowa 592, 73 N.W. 1059 (1898).

Invalid

Glennville Inv. Co. *v.* Grace, 134 Ga. 572, 68 S.E. 301 (1910); Whitley *v.* McConnell, 133 Ga. 738, 66 S.E. 933 (1909); Elder *v.* Chapman, 176 Ill. 142, 52 N.E. 10 (1898); Emshwiler *v.* Tyner, 21 Ind. App. 347, 52 N.E. 459 (1899); Guenther *v.* Dewien, 11 Iowa 133 (1860); Den, Wooden *v.* Shotwell, 23 N.J.L. 465 (1852); Allebach *v.* Godshalk, 116 Pa. 329, 9 Atl. 444 (1887); Allebach *v.* Hunsicker, 132 Pa. 349, 19 Atl. 139 (1890); U. S. *v.* Olney, Fed. Case No. 15,918, 1 Abb. U.S. 275 (1868).

Chapter XXXII.

BROADCAST PROGRAMS AND TRADE-MARK INFRINGEMENTS.

PAGE

SECTION 512. Regulation of Trade Competition..... 916
513. Elements of Unfair Competition in Broadcasting.... 917
514. Protection of Trade-Marks and Trade Names Exploited by Broadcasting: Definitions..... 920
515. Same: Distinction Between Trade-Marks and Trade Names..... 921
516. Same: Functions and Purposes of Trade-Marks and Trade Names..... 923
517. Same: Basis of Protection of Broadcast Advertisers' Marks..... 924
518. Same: Technical Trade-Marks in Particular..... 925
519. Same: Exploitation by Broadcast Advertising of Trade-Mark Affixed to Sponsor's Product..... 926

§ 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 [2] in radio broadcasting do not differ from the usual essential requirements. Where there is misrepresentation or misappropriation [3] 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.[4]

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* [5] wherein Mr. Justice Holmes and he wrote separate dissenting opinions, Mr. Justice Brandeis said: [6]

> "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" [7] and "Old Maestro" [8] 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

[5] 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1918).

[6] International News Service *v.* Associated Press, 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).

[8] Premier-Pabst Corp. *v.* Elm City Brewing Co., 9 F.Supp. 754 (D.C.Conn., 1935).

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.[9] 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.[10]

In *Pittsburgh Athletic Company*, et al. v. *KQV Broadcasting Company*,[10a] 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.*

[10] Gardella *v.* Log Cabin Products Co., Inc., *et al.*, 89 F.(2d) 891 (C.C.A. 2d., 1937).

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.*,[11] 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.

§ 514. Protection of Trade-Marks and Trade Names Exploited by Broadcasting: Definitions.

A trade-mark is a mark which identifies a salable article of merchandise or service as to origin or ownership.[12] It has been compared to the seller or maker's signature.[13] 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.[14] A valid trade-mark may not be used by another.[15]

[11] 327 Pa. 433, 194 Atl. 631 (1937). See Note (1937) 51 HARV. L. REV. 171, Note (1937) 86 U. OF PA. L. REV. 217; (1938) 38 COL. L. REV. 181.

[12] Ball *v.* Broadway Bazaar, 194 N.Y. 429, 434, 87 N.E. 674 (1909). See DERENBERG, TRADE MARK PROTECTION AND UNFAIR TRADING (1936) 28 *et seq.*

[13] Star Co. *v.* Wheeler Syndicate, 91 Misc. 640, 155 N.Y.Supp. 782 (1915).

[14] Ball *v.* Broadway Bazaar, 194 N.Y. 429, 434, 87 N.E. 674 (1909).

[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

[16] HOPKINS, TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION (4th ed., 1924), 13.

[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.[19] Mr. Handler in his work on trade regulation uses the term as follows:[20]

> ". . . 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.[21] 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." HOPKINS, *op. cit. supra* n. 16, 4.

[20] HANDLER, *op. cit. supra* n. 2, 553.

[21] St. Louis Piano Co. *v.* Merkel, 1 Mo. App. 305 (1876); Koehler *v.* Sanders, 122 N.Y. 65, 25 N.E. 235 (1890); Illinois Match Co. *v.* Broomall, 34 App. D.C. 427 (1910).

article.[22] Affixation by either the complainant [23] or the infringer is not required in the action of unfair competition.[24]

§ 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,[25] 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.[26] 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.[27] 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*

[22] New York Mackintosh Co. *v.* Flam, 198 Fed. 571 (S.D.N.Y., 1912); Diederich *v.* Schneider Wholesale Wine Co., 195 Fed. 35 (C.C.A. 8th, 1912).

[23] *Semble:* Premier-Pabst Corp. *v.* Elm City Brewing Co., 9 F. Supp. 754 (D.C.Conn., 1936).

[24] HANDLER, *op. cit. supra* n 17, 183.

[25] Delaware & H. Canal Co. *v.* Clark, 13 Wall. (U.S.) 311, 322, 20 L.Ed. 581 (1871); Hanover Star Milling Co. *v.* Metcalf, 240 U.S. 403, 412, 36 Sup. Ct. 357, 60 L.Ed. 713 (1915).

[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 1905[33] 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. C.Conn., 1935).

[32] Barton *v.* Rex-Oil Co., 2 F. (2d) 402 (C.C.A. 3d, 1924); G. & C. Merriam Co. *v.* Saalfield, 198 Fed. 369 (C.C.A. 6th, 1912).

[33] 33 STAT. 725, (1905) 15 U.S. C.A. § 81 *et seq.* (1936).

[34] 41 STAT. 535 (1920), 15 U.S. C.A. § 81 *et seq.* (1936).

[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.[36] 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.[37] 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.[38] Under the common law and the registration statutes, there must be an actual affixation of the mark to the commodity.[39]

§ 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.*

[38] *Cf.* Battle Creek Sanitarium Co. *v.* Fuller, 30 App. D.C. 411 (1908); Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S.W. 467 (1898); De Long Co. *v.* Hump Hairpin Mfg. Co., 297 Ill. 359, 130 N.E. 765 (1921).

[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).

Where the innocent infringer has desisted and acquiesced, plaintiff will not receive costs or an accounting. *Millington* v. *Fox*, 3 Myl. & C. 338, 40 Eng. Rep. 956 (1838); *Bass*, etc., *Ltd.* v. *Guggenheimer*, 69 Fed. 271 (C.C. Md., 1895).

[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.

[42] Time, Inc. *v.* Anschel Barshay, (S.D.N.Y., 1937) (unreported).

[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

[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."

[45] See Davids Co. *v.* Davids, 233 U.S. 461, 34 Sup. Ct. 648 (1914); Klivitzky, *Protection of Unpatentable Ideas,* (1935) 17 J. PATENT OFF. SOC. 854, 855; HANDLER, *op. cit. supra* n. 2, 644, 649.

does not confer any new substantive rights [46] and while the essential changes resulting therefrom are procedural only,[47] 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.[48]
2. The registration of a trade-mark under the provisions of the statute is *prima facie* evidence of the ownership of the mark.[49]
3. In an action for damages for infringement of a registered mark, the court may allow recovery of treble damages.[50]
4. A test is made of the validity of the mark sought to be registered by Patent Office proceedings.[51]

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.[52] 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.*

[48] 36 STAT. 1091 (1911), 28 U.S. C.A. § 41(1) (1927).

[49] 33 STAT. 728 (1905), 15 U.S. C.A. § 96 (1936).

[50] *Ibid.*

[51] *Id.*, § 81, *et seq.*

[52] N. Y. Mackintosh Co. *v.* Flam, 198 Fed. 571 (S.D.N.Y., 1912); Diederich *v.* Schneider Wholesale Wine Co., 195 Fed. 35 (C.C.A. 8th, 1912).

Chapter XXXIII.

PROTECTION OF TRADE NAMES USED IN BROADCAST PROGRAMS.

PAGE

SECTION 520. Basis of Protection of Trade Names..... 930
521. Test of Unfair Competition in Simulation of Broadcast Trade Names..... 932
522. Professional Names of Radio Artists May Be Protected as Trade Names..... 934
523. Same: Injury to Professional Reputation..... 937
524. Use of Real Name of Artist by Another as Unfair Competition..... 940

§ 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]

[1] Barton *v.* Rex-Oil Co., 2 F.(2d) 402 (C.C.A. 3d, 1924); G. & C. Merriam Co. *v.* Saalfield, 198 Fed. 369 (C.C.A. 6th, 1912).

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.Supp. 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.Supp. 176 (Sup. Ct. Spec. Term, 1937).

Injunctive relief is justified by the likelihood of confusion. *Macy & Co.* v. *Colorado Clothing Co.,* 68 F.(2d) 690 (C.C.A. 10th, 1934); *Nu Enamel Corp.* v. *Nate Enamel Co.,* 243 App. Div. 292, 276 N.Y. Supp. 30 (1935).

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 [3] 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",[4] "Old Maestro",[5] and "March of Time" [6] 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 [7] in addition to the graphic adoption or simulation of a broadcast trade name.[8]

Since the basis of the protection of trade names is the

Fair, 1939, *Inc.* v. *World's Fair News, Inc.*, 163 Misc. 661, 297 N.Y. Supp. 923 (1937). See HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 635, n. 52. See also Illustrated Newspapers, Ltd. *v.* Publicity Services, Ltd., [1938] 1 Ch. 414, 158 L.T. 195, 54 T.L.R. 364, [1938] 1 All Eng. R. 321.

[3] Elgin Nat. Watch Co. *v.* Illinois Case Co., 179 U.S. 665, 21 Sup. Ct. 270, 45 L.Ed. 365 (1901).

[4] Correll and Gosden (Amos and Andy) *v.* Feldman, 156 M.D. 777, 22 T.M. Rep. 80 (1931).

[5] Premier-Pabst Corp. *v.* Elm City Brewing Co., 9 F.Supp. 754 (D.C. Conn., 1935).

[6] Time, Inc. *v.* Barshay, (S.D. N.Y., 1937) (unreported).

[7] Lambert, Inc. *v.* O'Connor, 86 F.(2d) 980 (C.C.P.A., 1936).

[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:[9]

> "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.[10]

The application of this test is essentially not difficult. In *Premier-Pabst Corp.* v. *Elm City Brewing Co.*,[11] 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

[9] Page, J. in *Northam Warren Corp.* v. *Universal Cosmetic Co.*, 18 F.(2d) 774 (C.C.A. 7th, 1927).

[10] *Accord:* Ball *v.* Broadway Bazaar, 194 N.Y. 429, 87 N.E. 674 (1909); C. S. Cash, Inc. *v.* Steinbook, 220 App. Div. 569, 222 N.Y. Supp. 61 (1927); Ford Motor Co. *v.* Cady Co., 124 Misc. 678, 208 N.Y.Supp. 574 (1925). *Cf.* Lambert, Inc. *v.* O'Connor, 86 F.(2d) 980 (C.C.P.A., 1936).

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).

[11] 9 F.Supp. 754 (D.C. Conn., 1935).

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]

[12] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

[13] Chaplin *v.* Amador, 93 Cal. App. 358, 269 Pac. 544 (1928); Kimball *v.* Hall, 87 Conn. 563, 89 Atl. 166 (1913).

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.[14] 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 [15] 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 Bailly* 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) ("Ziegfeld"); *Read* v. *Mackay,* 95 N.Y.Supp. 935 (1905). Nor does such good will become an asset in the possession of the executor or administrator. *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).

[14] 89 F.(2d) 891 (C.C.A. 2d, 1937).

[15] *Cf.* Sweet Sixteen Co. *v.* Sweet "16" Shop, 15 F.(2d) 920 (C.C.A. 8th, 1926). Or where likely to do so. *Queen Mfg. Co.* v. *Ginsberg & Bros., Inc.,* 25 F.(2d) 284 (C.C.A. 8th, 1928).

case [16] 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,[17] so an artist will not be protected in his style, method or type of performance alone. Such an appropriation is permissible.[18] 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.[19] 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

[16] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

[17] Kaeser & Blair, Inc. *v.* Merchants Assn., Inc., 64 F.(2d) 575 (C.C.A. 6th, 1933). See §§ 533, 534, 535, *infra*.

[18] But see §§ 536, 537, *infra*.

[19] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

of the name "Aunt Jemima" as a trade-mark.[20] 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.[21]

§ 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.[22] Just as a direct statement that the artist as a performer is inferior would be defamatory,[23] 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.[24] The appropriator is liable for unfair competition where his deceptive imitation by way of impersonation is or may be

[20] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

[21] *Ibid.*

[22] *Cf.* Cruickshank *v.* Gordon, 118 N.Y. 178, 26 N.E. 457 (1890); Bornucan *v.* Star, 174 N.Y. 212, 66 N.E. 723 (1903).

[23] *Ibid.*

[24] Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937).

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."

[25] D'Altomonte *v.* N. Y. Herald Co., 154 App. Div. 543, 139 N.Y. Supp. 200 (1913); Gardella *v.* Log Cabin Products Co., 89 F.(2d) 891 (C.C.A. 2d, 1937). See Uproar Co. *v.* National Broadcasting Co., 8 F.Supp. 358 (D.C.Mass., 1934).

[26] *Ibid.*

[27] 81 F.(2d) 373 (C.C.A. 1st, 1936).

[28] 8 F.Supp. 358 (D.C.Mass., 1934), *aff'd.* 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 [28a] 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.[29]

In the "Amos and Andy" case,[30] 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.[31]

The "March of Time" case [32] involved a situation similar to the "Uproar" case.[33] In the former suit, the defendant affixed the name to phonograph records of cur-

[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."

[30] Correll and Gosden (Amos and Andy) *v.* Feldman, 156 M.D. 777, 22 T.M.Rep. 80 (1931).

[31] Fawcett, *Protecting the Trademarks Fostered by Radio,* (1934, N.S.) 29 BULL., U. S. TR. MARK ASSN. 148.

[32] Time, Inc. *v.* Anschel Barshay, (S.D.N.Y., 1937) (unreported).

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

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.[35]

The modern rule in the premises, and on which most courts agree, is, as stated by Mr. Justice Holmes:[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.[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).

[35] Howe Scale Co. *v.* Wyckoff, Seamans & Benedict, 198 U.S. 118, 140, 25 Sup. Ct. 609, 49 L.Ed. 972 (1905).

[36] L. E. Waterman Co. *v.* Modern Pen Co., 235 U.S. 88, 35 Sup. Ct. 91, 59 L.Ed. 142 (1914).

"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).

[37] Dorothy Gray Salons *v.* Mills Sales Co., 295 N.Y.Supp. 204, 207 (Sup. Ct. Spec. Term, 1937); Westphal *v.* Westphal's World Best Corp., 216 App. Div. 53, 215 N.Y. Supp. 4 (1926).

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.*,[38] 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[39] 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.[40]
2. Where the qualified injunction is ineffective to secure adequate protection of the prior user.[41]

The modern trend of decrees in unfair competition is to overcome their ineffectiveness.[42] 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.[43]

[38] L. E. Waterman Co. *v.* Modern Pen Co., 235 U.S. 88, 35 Sup. Ct. 91, 59 L.Ed. 142 (1914).

[39] See Handler, *Unfair Competition*, (1936) 21 IOWA L. REV. 175, 184.

[40] Westphal *v.* Westphal's World Best Corp., 216 App. Div. 53, 215 N.Y.Supp. 4 (1926).

[41] Barton *v.* Rex-Oil Co., 29 F. (2d) 474 (C.C.A. 3d, 1928).

[42] *The Hilton Litigation:* Hilton *v.* Hilton, 89 N.J.Eq. 149, 102 Atl. 16 (1917), 89 N.J.Eq. 182, 104 Atl. 375 (1918), 89 N.J.Eq. 417, 105 Atl. 65 (1918), 89 N.J.Eq. 472, 106 Atl. 139 (1919), 90 N.J.Eq. 564, 107 Atl. 263 (1919).

[43] *Ibid.*

Chapter XXXIV.

PROTECTION OF TITLES OF BROADCAST PROGRAMS.

PAGE

SECTION 525. Protection of Titles or Other Reminiscent Expressions Associated with Radio Broadcast Programs..... 943
526. Program Titles Containing Trade-Mark or Trade Name of Sponsor Protected..... 944
527. Program Title Possessing Secondary Meaning Is Protected Against Unauthorized Use by Another for General Purposes of Entertainment..... 944
528. Program Title Protected Against Use in Motion Picture, Play or Novel..... 946
529. Title of Work in Public Domain May Be Protected Against Unfair Competition..... 949
530. Theme Music Protected Against Unfair Competition.. 949

§ 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-

ished 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.[1] Moreover, the owner of a mark may use it in any way to advertise his product.[2] 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.

[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.[3] The copyright upon a literary or other work does not secure its title against infringement;[4] nor is the Trade-Mark Registration Act available to insure the exclusive right to a program title.[5]

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 selection.[6] The title ordinarily must not be generic, or descriptive of the program, its qualities or characteristics.[7] 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.[8]

[3] Glaser *v.* St. Elmo Co., 175 Fed. 276 (C.C.S.D.N.Y., 1909); Corbett *v.* Purdy, 80 Fed. 901 (C.C.S.D.N.Y., 1897).

[4] See n. 8 *infra*. See Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913).

See also Jurasovic *v.* National Broadcasting Company (W.D.Pa., October 29th, 1935) (unreported).

[5] See National Pictures Co. *v.* Foundation Film Co., 266 Fed. 208 (C.C.A. 2d, 1920); Aronson *v.* Fleckenstein, 28 Fed. 75 (C.C.N.D. Ill., 1886); Robertson *v.* Berry, 50 Md. 591 (1878).

[6] Social Register Assn. *v.* Howard, 60 Fed. 270 (C.C.N.J., 1894). Frohman *v.* Morris, 68 Misc. 461, 123 N.Y.Supp. 1090 (1910).

[7] Selchow *v.* Baker, 93 N.Y. 59 (1883); Wellcome *v.* Thompson, [1904] 1 Ch. 736 (Eng.).

[8] Downes *v.* Culbertson, 153 Misc. 14, 275 N.Y.Supp. 233, 241 (Nims, Referee, 1934); Selig Polyscope Co. *v.* Unicorn Film Serv. Corp., 163 N.Y.Supp. 62 (Sup. Ct., 1917); Klaw *v.* General Film Co., 154 N.Y.Supp. 988 (Sup. Ct., 1915); Frohman *v.* Morris, 68 Misc. 461, 123 N.Y.Supp. 1090 (1910); Outcault *v.* Lamar, 135 App. Div. 110, 119 N.Y.Supp. 930 (1909); Frohman *v.* Payton, 34 Misc. 275, 68 N.Y.Supp. 849 (1901); Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913). *Cf.* Whitman *v.* Metro-Goldwyn-Mayer Corp., 159 Misc. 850, 289 N.Y.Supp. 961 (Sup. Ct., 1936). The Canadian Copyright Act, 21–22 GEORGE V (1931) c. 8, Pars. (u) and (v) provides that copyright protection of literary works extends to the title where such title is original and descriptive. It has been held that such copyright protection of the title

No producer of a broadcast program can acquire an exclusive right in a descriptive title, such as "play", "concert", "hour", "comedy" or "musicale". Such words describe the program.[9] 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.[10] 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.[11] 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.[12] 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.[13] 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).

[9] Frohman *v.* Morris, 68 Misc. 461, 123 N.Y.Supp. 1090 (1910).

[10] Barton *v.* Rex-Oil Co., 2 F. (2d) 402 (C.C.A. 3d, 1924); George *v.* Smith, 52 Fed. 830 (C.C.S.D.N.Y., 1892).

[11] McIndoo *v.* Musson Book Co. [1915], 35 Ont. L. Rep. 42 (Can.).

[12] See FROHLICH & SCHWARTZ, *op. cit. supra* n. 2, § 121 *et seq.*

[13] *Cf.* Barton *v.* Rex-Oil Co., 2 F.(2d) 402 (C.C.A. 3d, 1924).

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,[14] provided that the appropriated or simulated title would confuse or mislead the public.[15] 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.[15a] 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,[16] 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-

[14] Selig Polyscope Co. *v.* Unicorn Film Serv. Corp., 163 N.Y. Supp. 62 (Sup. Ct., 1917); Dickey *v.* Mutual Film Co., 160 N.Y.Supp. 609 (Sup. Ct., 1916); Klaw *v.* General Film Co., 154 N.Y.Supp. 988 (1915); Miracle Co. *v.* Danziger, N.Y.L.J., Mar. 8, 1913.

[15] Warner Bros. *v.* Majestic Corp., 70 F.(2d) 310 (C.C.A. 2d, 1934); B. S. Moss M. P. Corp. *v.* Ivan Film Prod., N.Y.L.J., Jan. 23, 1917, 1445; Savage *v.* Kerker, N.Y.L.J., April 25, 1914.

[15a] See Motta *v.* Soc. Fox Film Corp., Appelhof Mailand (Italy) Dec. 22, 1936, 3 GEISTIGES EIGENTUM Part 4 (1938) 475.

[16] Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913); Harper *v.* Ranous, 67 Fed. 904 (C.C.S.D.N.Y., 1895). An injunction *pendente lite* was denied an author who brought an action against a broadcast advertiser for the alleged wrongful broadcast use of the title of her novel. *Brown* v. *Bristol-Myers Co.,* Sup. Ct., N. Y. Co., N.Y.L.J., Sept. 24, 1938. See also FROHLICH AND SCHWARTZ, LAW OF MOTION PICTURES (1917) 434.

erty, especially motion pictures.[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.[18] For example, a jewelry corporation can restrain the use of its name, "Tiffany", by a motion picture producing company.[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.[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.[21] The apparent connection between the

[17] A broadcast program title has been adopted by a manufacturer for use as a trade-mark. See VARIETY, February 2, 1938, 34.

[18] Tiffany & Co. *v.* Tiffany Productions, Inc., 147 Misc. 679, 264 N.Y.Supp. 459 (1932), *aff'd.* 262 N.Y. 482, 188 N.E. 30 (1933); Long's Hat Stores Corp. *v.* Long's Clothes, Inc., 224 App. Div. 497, 231 N.Y.Supp. 107 (1928); Dunhill, Inc. *v.* Dunhill Shirt Shop, 3 F.Supp. 487 (S.D.N.Y., 1929); Walls *v.* Rolls-Royce, 4 F.(2d) 333 (C.C.A. 3d, 1925).

[19] Tiffany & Co. *v.* Tiffany Productions, Inc., 147 Misc. 679, 264 N.Y.Supp. 459 (1932), *aff'd.* 262 N.Y. 482, 188 N.E. 30 (1933).

[20] Philadelphia Storage Battery Co. *v.* Mindlin, 163 Misc. 52, 296 N.Y.Supp. 176 (Sup. Ct., 1937).

[21] *Cf.* Red, Hot & Blue, Inc. *v.* Minsky's, 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,[22] the title of a work in the public domain is subject to appropriation for use with any literary property.[23] 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.[24] 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.

ducer who used the title "Red, Hot and Nude," while title of plaintiff's musical comedy was "Red, Hot and Blue".)

[22] *Cf.* Black *v.* Ehrlich, 44 Fed. 793 (C.C.S.D.N.Y., 1891); Aronson *v.* Fleckenstein, 28 Fed. 75 (C.C.N.D.Ill., 1886).

[23] Merriam Co. *v.* Strauss, 136 Fed. 477 (C.C.S.D.N.Y., 1904); Merriam Co. *v.* Saalfield, 198 Fed. 369 (C.C.A. 6th, 1912).

[24] Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913); Glaser *v.* St. Elmo Co., 175 Fed. 276 (C.C.S.D.N.Y., 1909); Merriam Co. *v.* Ogilvie, 159 Fed. 638 (C.C.A. 1st, 1908).

No monopoly will be granted in uncopyrighted theme music,[25] 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.

25 "Familiar, or new songs, if composed for purposes of advertising, are protectable under the law of copyrights." DERENBERG, TRADE MARK PROTECTION AND UNFAIR TRADING (1936) 321. *Cf.* Brown *v.* Mollé Co., 20 F.Supp. 135 (D.C.S.D.N.Y., 1937).

Chapter XXXV.

APPROPRIATION OF COMMON LAW INTELLECTUAL PROPERTY: FALSE BROADCAST ADVERTISING.

PAGE

SECTION 531. Appropriation of Ideas: There Is No Property in Mere Ideas 951
532. Property in Literary Expression of Ideas 952
533. Protection of Original Ideas by Contract 954
534. *Liggett & Myers Tobacco Co.* v. *Meyer; Ryan* v. *Century Brewing Association* 956
535. Appropriation of Broadcast Advertising Ideas May Be Prevented as Unfair Competition 957
535A. Interference with Exclusive Right to Broadcast a Program Restrainable as Unfair Competition 960
536. Unauthorized Broadcast of Phonograph Records Restrainable by Performing Artist as Unfair Competition 961
537. Appropriation of an Artist's Broadcast Performance by Off-the-Air Recording for Commercial Purposes Restrained 964
538. False Broadcast Advertising 966

§ 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,[1] only its actual expression. The same is true of a patent, which secures only the means of reducing the idea to practice.[2] 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.[3]

At common law, no property exists in a mere idea.[4] There are a few modern cases which represent, perhaps, an inroad upon that ancient doctrine.[5] 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.[6]

[1] Holmes *v.* Hurst, 174 U.S. 82, 86, 19 Sup. Ct. 606, 43 L.Ed. 904 (1899); Sheldon *v.* Metro-Goldwyn-Mayer, 81 F.(2d) 49 (C.C.A. 2d, 1936); Nichols *v.* Universal Pictures Corp., 45 F.(2d) 119 (C.C.A. 2d, 1930); Dymow *v.* Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926); Guthrie *v.* Curlett, 36 F.(2d) 694 (C.C.A. 2d, 1929); Fendler *v.* Morosco, 253 N.Y. 281 (1930); Downes *v.* Culbertson, 153 Misc. 14, 275 N.Y.Supp. 233, 243 (1933, Nims, Referee).

[2] Holmes *v.* Hurst, 174 U.S. 82, 19 Sup. Ct. 606, 43 L.Ed. 904 (1899); Downes *v.* Culbertson, 153 Misc. 14, 275 N.Y.Supp. 233 (1933).

[3] Klivitzky, *Protection of Unpatentable Ideas,* (1935) 17 J. PAT. OFF. SOC. 854, 855. But *cf.* DERENBERG, TRADE MARK PROTECTION AND UNFAIR TRADING (1936) 321.

[4] Lueddecke *v.* Chevrolet Motor Co., 70 F.(2d) 345 (C.C.A. 8th, 1934); Downes *v.* Culbertson, 153 Misc. 14, 275 N.Y.Supp. 233, 243 (1933); Haskins *v.* Ryan, 71 N.J. Eq. 575, 64 Atl. 436 (1906); Stein *v.* Morris, 120 Va. 390, 91 S.E. 177 (1917).

[5] Liggett & Myers Tob. Co. *v.* Meyer, 194 N.E. 206 (Ind. App., 1936); Ryan *v.* Century Brewing Assn., 185 Wash. 600, 55 P.(2d) 1053 (1936).

[6] Nichols *v.* Universal Pictures Corp., 45 F.(2d) 119, 121 (C.C.A. 2d, 1930); Sheldon *v.* Metro-Goldwyn-Mayer, 81 F.(2d) 49 (C.C.A. 2d, 1936); Fendler *v.* Morosco, 253 N.Y. 281, 171 N.E. 56

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.[7] 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.[8] The important question then is whether the author has published the work.

Mere exhibition of the script or continuity is not a publication.[9] Nor is the public representation of a dramatic work a publication.[10] No common law rights are lost by the performance of a musical composition [11] or the exhibition of a motion picture of a work protected at common law [12] or the delivery of a lecture or sermon.[13] *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.*

(1930). See Casino Productions, Inc. *v.* Vitaphone Corp., 163 Misc. 403, 295 N.Y.Supp. 501 (1937).

[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.)

[8] Wheaton *v.* Peters, 8 Pet. (U.S.) 591, 8 L.Ed. 1055 (1834); Harper *v.* Donohue, 144 Fed. 491 (C.C.N.D.Ill., 1905); Palmer *v.* De Witt, 47 N.Y. 532 (1872); Potter *v.* McPherson, 21 Hun (N. Y. Sup. Ct.) 559 (1880).

[9] French *v.* Maguire, 55 How. Prac. (N.Y.) 471 (1878).

[10] Ferris *v.* Frohman, 223 U.S. 424, 32 Sup. Ct. 214, 56 L.Ed. 492 (1912); Palmer *v.* De Witt, 47 N. Y. 532 (1872); O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916); Tompkins *v.* Hallock, 133 Mass. 32 (1882).

[11] McCarthy & Fisher *v.* White, 259 Fed. 364 (S.D.N.Y., 1919).

[12] DeMille *v.* Casey, 121 Misc. 78, 201 N.Y.Supp. 20 (1920).

[13] Nutt *v.* National Institute, *etc.*, Inc., 31 F.(2d) 236 (C.C.A. 2d, 1929).

v. *National Broadcasting Company.*[14] On the appeal, the Circuit Court of Appeals passed over the question of publication.[15]

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.[16] In such an indirect manner, the idea contained in an uncopyrighted radio program may be protected.[17]

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.[18] 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.[19]

§ 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*,[20] the Court said:

[14] 8 F.Supp. 358 (D.C.Mass., 1934).

[15] Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 375 (C.C.A. 1st, 1936).

[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.

[18] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[19] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D.Pa., injunction granted August 8, 1938). See § 433 *supra.*

[20] 216 Fed. 401, 404 (C.C.W.D. Mich., 1908).

> ". . . 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*,[21] 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*.[22] 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.[23] 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.[24] The idea must be a new creation to

[21] 132 N.Y. 264, 30 N.E. 506 (1892).

[22] 71 N.J. Eq. 575, 64 Atl. 436 (1906).

[23] Adams *v.* Gillig, 199 N.Y. 314, 92 N.E. 670 (1910).

[24] Soule *v.* Bon Ami, 201 App. Div. 794, 195 N.Y.Supp. 574 (1922); Masline *v.* N. Y., N. H. & H. R. Co., 95 Conn. 702, 112 Atl. 639 (1921); Burwell *v.* B. & O. Ry. Co., 31 Ohio App. 22, 164 N.E. 434 (1929); Stein *v.* Morris, 120 Va. 390, 91 S.E. 17 (1917).

the extent that the defendant would not ordinarily have used it but for the suggestion.[25]

§ 534. Liggett & Myers Tobacco Co. v. Meyer; Ryan v. Century Brewing Association.

In *Liggett & Myers Tobacco Co.* v. *Meyer* [26] and *Ryan* v. *Century Brewing Association,*[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.[28]

It is difficult to see an express contract in this case.[29] There was no actual acceptance within the requirement of *Haskins* v. *Ryan* [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,*[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.

[25] *Ibid.*

[26] 194 N.E. 206 (Ind. App., 1935).

[27] 185 Wash. 600, 55 P.(2d) 1053 (1936).

[28] See Stone *v.* McCann-Erickson, Inc. unreported, L. 61—335 (S.D.N.Y., 1935) Judgment No. 36,746, Feb. 3, 1937. See also Healey *v.* R. H. Macy & Co., Inc., 251 App. Div. 440, 297 N.Y.Supp. 165 (1937).

[29] (1935) 44 YALE L. J. 1269.

[30] 71 N.J. Eq. 575, 64 Atl. 436 (1906).

[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

[32] Crump & Co., Inc. *v.* Lindsay, Inc., 130 Va. 144, 107 S.E. 679, 685 (1921).

[33] See §§ 531–534 *supra*.

[34] Note (1932) 45 HARV. L. REV. 542.

[35] See §§ 513–517, 521, 527, 528 *supra*.

[36] Westminster Laundary Co. *v.* Hesse Envelope Co., 174 Mo. App. 238, 156 S.W. 767 (1913); International Heating Co. *v.* Oliver Oil Gas Burner & Mach. Co., 288 Fed. 708 (C.C.A. 8th, 1923); Crump & Co. *v.* Lindsay, Inc., 130 Va. 144, 107 S.E. 679 (1921).

[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*,[38] 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:[39]

> "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.[40] Likewise, the simulation of a slogan plus an infringement of a trade-mark or trade name has been restrained.[41] The copying of a slogan and the erection

[38] 52 F.(2d) 311 (W.D. Mich., 1930).

[39] *Id.*, at 312.

[40] Dumore Co. *v.* Richards, 52 F.(2d) 311 (W.D. Mich., 1930); Rosenberg Bros. & Co. *v.* Elliott, 7 F.(2d) 962 (C.C.A. 3d, 1925); Potter-Wrightington, Inc. *v.* Ward Baking Co., 288 Fed. 597 (D.C. Mass., 1923); Elbs *v.* Rochester Egg Carrier Co., 134 N.Y.Supp. 979 (1912).

[41] Wolf Bros. & Co. *v.* Hamilton-Brown Shoe Co., 165 Fed. 413

of an identical store front and interior has been restrained.[42] It has been held that the simulation need not be identical.[43]

But the simulation by a competitor of a whole advertisement, 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 technique, ideas, layout or even exact copying of his unprotected commercial announcements. There is no unfair competition unless there is a whole scheme to deceive or confuse and to divert business from the broadcast advertiser. Under the cases, this results usually where there is

(C.C.A. 8th, 1908); Bickmore Gall Cure Co. *v.* Karns, 134 Fed. 883 (C.C.A. 3d, 1905).

[42] Summerfield Co. *v.* Prime Furn. Co., 242 Mass. 149, 136 N.E. 396 (1922); Cash, Inc. *v.* Steinbook, 220 App. Div. 569, 222 N.Y. 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

[46] Wertheimer *v.* Stewart, Cooper & Co., 23 R.P.C. (1906).

[47] Perlberg *v.* Smith, 70 N.J. Eq. 638, 642, 62 Atl. 442 (1905).

[48] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted August 8, 1938). *Contra:* Victoria Park Racing & Recreation Grounds Co. *v.* Taylor, 37 S.R. 322 (N.So. Wales, 1936); National Exhibition Company *v.* Tele-Flash, Inc., Eq. 81-313 (S.D.N.Y., 1936) (unreported).

[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.*,[50] 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

[50] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

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

[51] Waring *v.* WDAS Broadcasting Station, Inc., 27 Dist. & Co. Rep. 297 (Pa. Com. Pl., No. 9053, 1936).

[52] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

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.[53]

§ 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.[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.[55] Off-the-air recordings have been restrained as

[53] Pittsburgh Athletic Company, *et al. v.* KQV Broadcasting Company, No. 3415 Eq. Term, 1938 (W.D. Pa., injunction granted August 8, 1938).

[54] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[55] Waring *v.* Robinson, (Phila.; Ct. Com. Pleas, McDevitt, J., 1935) (unreported); Voorhees *v.* Audio-Scriptions, Inc. (N.Y. Sup. Ct., Special Term, Part I, Pecora, J., Aug. 10th, 1936) (unreported). *Cf. Waring* v. *Dunlea,* Eq. No. 183, E.D.N.C., 1938 (unreported), where the unauthorized use in a sustaining program by a broadcast station of an electrical transcription furnished it by a sponsor for

unfair competition as well as a violation of the distinct property rights of the artist in his broadcast performance.[56]

another period of broadcast time was restrained at the suit of the performing artist.

[56] In *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

[57] See Pampanini *v.* Ente Italiano, etc., Tribunal Civil de Turin, Italy, April 5, 1938, 3 GEISTIGES 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.*

[61] HANDLER, *op. cit. supra* n. 58, 762; KENNER, THE FIGHT FOR TRUTH IN ADVERTISING (1936).

[62] Ely-Norris Safe Co. *v.* Mosler Safe Co., 273 U.S. 132, 47 Sup. Ct. 314, 71 L.Ed. 578 (1927).

[63] Armstrong Cork Co. *v.* Ringwalt Linoleum Works, 235 Fed. 458 (D.C.N.J., 1916); Borden's Condensed Milk Co. *v.* Horlick's Malted Milk Co., 206 Fed. 949 (D.C. Wis., 1913); American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281 (C.C.A. 6th, 1900); N. Y. & Rosendale Cement Co. *v.* Coplay Cement Co., 44 Fed. 277 (C.C.E.D. Pa., 1890.

[64] American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281 (C.C.A. 6th, 1900).

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.*,[65] 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 [66] 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.[67] It may therefore be concluded that a false and misleading broadcast advertisement is not actionable as unfair competition.

[65] 273 U.S. 132, 47 Sup. Ct. 314, 71 L.Ed. 578 (1927).

[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.

[67] Singer Mfg. Co. *v.* Domestic Sewing Mach. Co., 49 Ga. 70 (1872); Centaur Co. *v.* Marshall, 92 Fed. 605 (C.C.W.D. Mo., 1899).

Chapter XXXVI.

FEDERAL REGULATION OF BROADCAST ADVERTISING.

PAGE

SECTION 539. Generally 969
540. Jurisdiction of Federal Trade Commission Extends to Advertising of Articles in Interstate Commerce: Jurisdiction of Federal Communications Commission Distinguished 970
541. Supervision of the Federal Trade Commission Over Broadcast Advertising 972
542. Same: Examination of Scripts and Transcribed Programs 973
543. Same: Methods of Stipulation Procedure in Advertising Cases 974
544. Same: Procedure on Formal Complaints..... 976
545. Same: Jurisdiction of Federal Courts..... 978
546. The Federal Trade Commission Act..... 978
547. Validity of "Cease and Desist" Orders..... 979
548. Phrase "Unfair Methods of Competition" Not Restricted to Probable Meaning at Time of Enactment of Federal Trade Commission Act..... 982
549. False and Misleading Broadcast Advertising May Be Restrained by the Federal Trade Commission.... 986
550. False and Misleading Advertising Must Affect Specific and Substantial Public Interest to Be Restrained by Federal Trade Commission..... 989
551. False and Misleading Radio Advertising Which Results in Gain to Public May Be Restrained by Federal Trade Commission..... 993
552. Long Duration of Condemned Practice Does Not Insure Condonation 994
553. Broadcast Advertising May Be Restrained Only Where It is False in Fact: Advertiser Possesses Freedom of Opinion and "Puffing"..... 994
554. Restraint of Broadcast Misrepresentations That Product Contained Absent Ingredient..... 995
555. Use of Testimonials and Endorsements in Broadcast Programs 997

PAGE

SECTION 556. Misrepresentation of Advantage to Buyer in Purchasing from Seller..... 998
557. Miscellaneous Types of False and Misleading Advertising 998
558. General List of Unfair Competitive Practices..... 1001
559. Regulation of Broadcast Advertising by Federal Communications Commission 1004

§ 539. Generally.

The owners and operators of radio broadcast stations do not possess absolute rights of ownership and control.[1] They are always subject to regulation by the Federal Communications Commission in the public interest, convenience and necessity.[2] 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."[3] 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*.[4]

[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."

See Miller, *A New and Stronger Advertising Statute,* BROADCASTING, April 1, 1938, p. 19.

[4] See § 540 *infra*.

§ 540. Jurisdiction of Federal Trade Commission Extends to Advertising of Articles in Interstate Commerce: Jurisdiction of Federal Communications Commission Distinguished.

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,[5] impose its control upon the station licensee.[6] 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.[7] 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.[8]

The Federal Trade Commission's jurisdiction extends to the advertising of products which are sold in interstate commerce.[9] The Trade Commission may not take action

[5] 48 STAT. 1088 (1934), 47 U.S. C.A. § 316 (1937). See Chapter XXXI. *supra.*

[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.*

[8] KFKB Broadcasting Assn. *v.* Fed. Radio Comm., 47 F.(2d) 670 (App. D.C., 1931).

[9] 38 STAT. 719 (1914), 15 U.S. C.A. § 45 (1927).

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,[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.[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.[12] It may achieve the same result by entering into a stipulation with the advertiser wherein the latter agrees to cease such practice.[13]

The kind of advertising which may be restrained by the

[10] The following are some informative and critical articles: Handler, *Jurisdiction of the Federal Trade Commission Over False Advertising,* (1931) 31 COL. L. REV. 527; Handler, *False and Misleading Advertising,* (1929) 39 YALE L. J. 22; Watkins, *An Appraisal of the Work of the Federal Trade Commission,* (1932) 32 COL. L. REV. 272.

[11] 38 STAT. 719 (1914), 15 U.S. C.A. § 45 (1927).

[12] *Ibid.*

[13] FEDERAL TRADE COMMISSION, 22 *Annual Report* 50 (1936).

Trade Commission will be discussed *infra.*[14] 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.

§ 541. Supervision of the Federal Trade Commission Over Broadcast 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.[15]

> "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

[14] § 549 *et seq. infra.*

[15] FEDERAL TRADE COMMISSION, 22 *Annual Report* 105 *et seq.* (1936). See also Davis, *Regulation of Radio Advertising,* (1935) 177 ANNALS 154; Miller, *A New and Stronger Advertising Statute,* BROADCASTING, April 1, 1938 p. 19.

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 Programs.

The Trade Commission has reviewed broadcast advertising 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 during July, 1934. The volume of returns received and the character of the announcements indicated that a satisfactory 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 advertising 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 manufacturer of a commodity being advertised, the Commission'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;[16] (2) the advertiser has violated a stipulation;[17] (3) the gross deception of or danger to the public involved in the practices is such that

[16] FEDERAL TRADE COMMISSION, 22 *Annual Report* 105 *et seq.* (1936).

[17] *Id.*, at 47.

the board was of the opinion that an opportunity to stipulate should not be given to the advertiser.[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.[19]

All proceedings by the Commission prior to issuance of a formal complaint or publication of a stipulation are confidential.[20]

§ 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.[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

[18] *Ibid.*

[19] *Id.*, at 44.

[20] *Ibid.*

[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.[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

[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.

§ 546. The Federal Trade Commission Act.

The Federal Trade Commission was created in 1914 by the Federal Trade Commission Act.[23] This Act is one of a series of acts, including the Sherman Anti-Trust Act [24] and the Clayton Anti-Trust Act,[25] which were enacted for the purpose of eliminating monopoly, restraint of trade and unfair methods of competition from the area of interstate commerce.[26]

[23] 38 STAT. 717 (1914), 15 U.S. C.A. § 41 (1927).

[24] 26 STAT. 209 (1890), 15 U.S. C.A. § 1 (1927).

[25] 38 STAT. 730 (1914), 15 U.S. C.A. § 12 (1927).

[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]

[27] 38 STAT. 719, 730 (1914), 15 U.S.C.A. § 44 (1927).

[28] *Id.*, at § 45.

[29] §§ 541, 542, 544 *supra*.

[30] Fed. Trade Comm. *v.* Raladam, 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).

[31] See § 166 *supra*.

[32] *Ibid.*

In *Federal Trade Commission* v. *Raladam Co.*,[33] the United States Supreme Court enunciated the facts essential to the jurisdiction of the Commission. Mr. Justice Sutherland said:[34]

> "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.*"

Later in the same opinion, the learned Justice said:[35]

> "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

[33] 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).

[34] *Id.*, at 646.

[35] *Id.*, at 648.

method of competition.[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.[37] But in *Federal Trade Commission* v. *Algoma Lumber Co.*,[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."[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.[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.[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 *Federal Trade Commission* v. *Gratz*,[42] he concurred with the majority of the Court in their view of the

[36] Fed. Trade Comm. *v.* Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L.Ed. 993 (1920).

[37] *E.g.* Fed. Trade Comm. *v.* Curtis Pub. Co., 260 U.S. 568, 43 Sup. Ct. 210, 67 L.Ed. 408 (1928). See Handler, *Jurisdiction of Federal Trade Commission,* (1931) 31 COL. L. REV. 527.

[38] 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).

[39] 38 STAT. 719 (1914), 15 U.S. C.A. § 45 (1927).

[40] Fed. Trade Comm. *v.* Algoma Lumber Co., 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934); Fed. Trade Comm. *v.* Artloom Corp., 69 F.(2d) 36 (C.C.A. 3d, 1934); Fed. Trade Comm. *v.* Hires Turner Glass Co., 81 F.(2d) 362 (C.C.A. 3d, 1935).

[41] Fed. Trade Comm. *v.* Algoma Lumber Co., 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934); Fed. Trade Comm. *v.* Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L.Ed. 993 (1920).

[42] Fed. Trade Comm. *v.* Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L.Ed. 993 (1920).

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."

§ 548. Phrase "Unfair Methods of Competition" Not Restricted to Probable Meaning at Time of Enactment of Federal Trade Commission Act.

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".[45] Mr. Justice McReynolds said:[46]

> "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.[47] 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.[48]

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.*,[49] the United States Supreme Court held that

[45] Handler, *Unfair Competition,* (1936) 21 IOWA L. REV. 175, 240.

[46] Fed. Trade Comm. *v.* Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L.Ed. 993 (1920).

[47] Handler, *op. cit. supra* n. 45, 240.

[48] Fed. Trade Comm. *v.* Keppel & Bros., Inc., 291 U.S. 304, 54 Sup. Ct. 423, 78 L.Ed. 814 (1934); Handler, *op. cit. supra,* n. 45, 241.

[49] 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1923); Watkins, *An Appraisal of the Work of the Federal Trade Commission* (1932) 32 COL. L. REV. 272.

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. . . . 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

[50] 257 U.S. 441, 43 Sup. Ct. 150, 66 L.Ed. 178 (1922).

[51] *E.g.* Northam Warren Co. *v.* Fed. Trade Comm., 59 F.(2d) 196 (C.C.A. 2d, 1932); Handler, *Jurisdiction of Fed. Trade Comm.*, (1931) 31 COL. L. REV. 527.

[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-

gress, 2d Sess., pp. 9, 11. . . . 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 Restrained by the Federal Trade Commission.

The Federal Trade Commission exercises a supervisory power over advertising through the medium of radio broadcasting.[54] 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.[55] Under the cases, the Commission does not function to protect the consumer's interests.[56] 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.

[56] Handler, *Jurisdiction of Federal Trade Commission over False Advertising,* (1931) 31 COL. L. REV. 527; Handler, *False and Misleading Advertising,* (1929) 39 YALE L. J. 22; Watkins, *An Appraisal of the Work of the Federal Trade Commission,* (1932) 32 COL. L. REV. 272. *Cf.* FEDERAL TRADE COMMISSION, *op. cit. supra,* nn. 55, 50, where the Commission in discussing its stipulation procedure said:

"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

[57] Fed. Trade Comm. *v.* Sinclair Ref. Co., 261 U. S. 463, 475, 43 Sup. Ct. 450, 67 L.Ed. 746 (1923).

[58] Handler, *op. cit. supra* nn. 55, 251.

[59] 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).

[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.

[62] See Fed. Trade Comm. *v.* Royal Milling Co., 288 U.S. 212, 53 Sup. Ct. 335, 77 L.Ed. 706 (1932); Fed. Trade Comm. *v.* Keppel & Bros., Inc., 291 U.S. 304, 54 Sup. Ct. 423, 78 L.Ed. 814 (1934).

[63] 283 U.S. 643, 51 Sup. Ct. 587, 75 L. Ed. 1324 (1931).

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]

§ 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. 384, 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, *A New and Stronger Advertising Statute,* BROADCASTING, April 1, 1938, p. 19.

[65] *I.e.,* not actionable as unfair competition. Mosler Safe Co. *v.* Ely-Norris Safe Co., 273 U.S. 132, 47 Sup. Ct. 314, 71 L.Ed. 578 (1927), *rev'g* 7 F.(2d) 603 (C.C.A. 2d, 1925); Amer. Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281 (C.C.A. 6th, 1900); Handler, *False and Misleading Advertising,* (1929) 39 YALE L. J. 22. See § 538 *supra.*

[66] Handler, *Unfair Competition,* (1936) 21 IOWA L. REV. 175 *et seq.*

[67] Fed. Trade Comm. *v.* Klesner, 280 U.S. 19, 50 Sup. Ct. 1, 74 L.Ed. 138 (1929).

[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*.[69] 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,[70] 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.*,[71] 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:[72]

> "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

[69] 280 U.S. 19, 50 Sup. Ct. 1, 74 L.Ed. 138 (1929).

[70] 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1922).

[71] 288 U.S. 212, 53 Sup. Ct. 335, 77 L.Ed. 706 (1932).

[72] *Id.*, at 216.

enough. 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.*[74] or the *Algoma Lumber Co.*[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.*[76] which involved a so-called "obesity cure", the Supreme Court in striking down the Commission's order admitted:[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.*,[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:[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

[74] 288 U.S. 212, 53 Sup. Ct. 335, 77 L.Ed. 706 (1932).

[75] 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).

[76] 283 U.S. 643, 51 Sup. Ct. 587, 75 L.Ed. 1324 (1931).

[77] *Ibid.*

[78] 291 U.S. 67, 54 Sup. Ct. 315, 78 L.Ed. 655 (1934).

[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. . . ."

§ 553. Broadcast Advertising May Be Restrained Only Where It Is False in Fact: Advertiser Possesses Freedom of Opinion and "Puffing".

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.*

[81] 289 Fed. 985 (C.C.A. 6th, 1923).

[82] 16 F.(2d) 962 (C.C.A. 2d, 1927).

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,*[83] 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:[84]

> "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 here 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

[83] 80 F.(2d) 684 (C.C.A. 7th, 1935).

[84] *Id.,* at 686.

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.[85]

In *Royal Baking Powder Co.* v. *Federal Trade Commission,*[86] 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.*[87]

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,*[88] 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

[85] Fed. Trade Comm. *v.* Winsted Hosiery Co., 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1922); Fed. Trade Comm. *v.* Hires Turner Glass Co., 81 F.(2d) 362 (C.C.A. 3d, 1935); Fed. Trade Comm. *v.* Good-Grape Co., 45 F.(2d) 70 (C.C.A. 6th, 1930); Flugelman Co. *v.* Fed. Trade Comm., 37 F.(2d) 59 (C.C.A. 2d, 1930); Procter & Gamble *v.* Fed. Trade Comm., 11 F.(2d) 47 (C.C.A. 6th, 1926); Guarantee Veterinary Co. *v.* Fed. Trade Comm., 285 Fed. 853 (C.C.A. 2d, 1922); Royal Baking Powder Co. *v.* Fed. Trade Comm., 281 Fed. 744 (C.C.A. 2d, 1922).

[86] 281 Fed. 744 (C.C.A. 2d, 1922).

[87] 258 U.S. 483, 42 Sup. Ct. 384, 66 L.Ed. 442 (1922).

[88] 11 F.(2d) 47 (C.C.A. 6th, 1926).

of a cotton fabric has been restrained.[89] Likewise, the Commission may require the statement of "imitation" where a shellac is not entirely genuine.[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.[91] Where respondent advertised his product as radium, but tests revealed no radioactivity, the Court upheld the order of the Commission.[92]

§ 555. Use of Testimonials and Endorsements in Broadcast Programs.

In *Northam Warren Corp.* v. *Federal Trade Commission,*[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.[94]

[89] Flugelman Co. *v.* Fed. Trade Comm., 37 F.(2d) 59 (C.C.A. 2d, 1930).

[90] Fed. Trade Comm. *v.* Cassoff, 38 F.(2d) 790 (C.C.A. 2d, 1930).

[91] Fed. Trade Comm. *v.* Hires Turner Glass Co., 81 F.(2d) 362 (C.C.A. 3d, 1935).

[92] Fed. Trade Comm. *v.* Kay, 35 F.(2d) 160 (C.C.A. 7th, 1929).

[93] 59 F.(2d) 196 (C.C.A. 2d, 1932). Of this case, Mr. Handler has said:

"One cannot be dogmatic in prediction, but the practice is so outrageous that wishful thinking can be pardoned. The tone of this decision is as unfortunate as the *Gratz* case."

Handler, *Unfair Competition,* (1936) 21 IOWA L. REV. 175, 249, n. 320.

[94] Silvex Co., 1 Fed. Trade Comm. Dec. 301 (1918); Accounting Machine Co., 3 Fed. Trade Comm. Dec. 361 (1921). *Cf.* William Soap Co., 6 Fed. Trade Comm. Dec. 107 (1923).

§ 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.[95] 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.[96] 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.[97]

§ 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-

[95] Fed. Trade Comm. *v.* Royal Milling Co., 288 U.S. 212, 53 Sup. Ct. 335, 77 L.Ed. 706 (1932).

[96] Sears, Roebuck & Co. *v.* Fed. Trade Comm., 258 Fed. 307 (C.C.A. 7th, 1910).

[97] Brown Fence & Wire Co. *v.* Fed. Trade Comm., 64 F.(2d) 1934 (C.C.A. 6th, 1933).

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

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]

§ 558. General List of Unfair Competitive Practices.

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

[98] FEDERAL TRADE COMMISSION, 22 *Annual Report* 64 (1936).

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,[100] 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*,[101] 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.[102] For that reason, advertising must be incidental to an actual service to the public.[103] 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:[104]

[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.

[101] 47 F.(2d) 670 (App. D.C., 1931).

[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.

[104] Release of Dec. 31, 1931, cited in BERRY, COMMUNICATIONS (1937) § 1243.

> "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.[105] Broadcasting of cures for cross eyes and cancer is condemned.[106] 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.[107]

[105] WSBC, Inc., 2 F.C.C. Rep. 293 (1936); Oak Leaves Broadcasting Station, 2 F.C.C. Rep. 298 (1936); Hammond-Calumet Broadcasting Station, 2 F.C.C. Rep. 321 (1936).

[106] Yount, 2 F.C.C. Rep. 200 (1935).

[107] Knickerbocker Broadcasting Co., 2 F.C.C. Rep. 76 (1935).

Chapter XXXVII.

CONTROL OF BROADCAST PROGRAM CONTENT: CENSORSHIP AND EDITORIAL SELECTION.

		PAGE
SECTION 560.	Specific Federal Statutory Provisions	1007
561.	Rationale of Section 326 of the Act of 1934	1008
562.	Constitutional Guarantee of Freedom of Speech	1009
563.	Same: Congressional Limitations Thereon Under the Communications Act of 1934	1011
564.	Indirect Control of Content of Broadcast Programs by Federal Communications Commission	1011
565.	Control of Content of Broadcast Programs by the States	1013
566.	Federal Regulation of Political Broadcast Programs	1018
567.	Prohibition of Broadcast of Obscene, Indecent or Profane Language	1020
568.	Prohibition of Broadcast of Information Concerning Lotteries	1023
569.	Private Control of Contents of Broadcast Programs	1025
570.	Same: By Broadcast Stations	1025
571.	Same: Same: Commercial Programs	1028
572.	Same: By the Producer and Other Persons Presenting the Program	1030
573.	Proposed Legislation	1031

§ 560. Specific Federal Statutory Provisions.

Section 326 of the Communications Act of 1934 [1] expressly negatives 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 [2] and provides as follows:

[1] 48 STAT. 1091 (1934), 47 U.S. C.A. § 326 (1937).

[2] 44 STAT. 1170 (1927), 47 U.S. C.A. § 98 (1937).

"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,[3] contained no provision prohibiting the censorship of broadcast programs. The sponsors of the bill originally felt[4] that it was unnecessary to amplify the Constitutional guarantee of freedom of speech contained in the First Amendment.[5] When introduced in the Senate, a new bill was substituted therefor[6] 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[7] was challenged as imposing censorship powers in the administrative body.[8] 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-

[3] 67 CONG. REC. 5479 (1926).
[4] *Id.*, at 5480.
[5] U. S. CONSTITUTION, Amend. I.
[6] Report No. 772, 69th Cong., 1st Sess. p. 4.
[7] *Ibid.*
[8] 67 CONG. REC. 12615 (1926).

tensive enough in scope to forbid private censorship of the content of broadcast programs.[9] It was regarded as axiomatic to allow freedom of the press and therefore considered dangerous for Congress to supervise by indirection the expression of opinion in broadcast programs.[10]

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.[11]

§ 562. Constitutional Guarantee of Freedom of Speech.

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.[12] 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.[13]

[9] *Id.*, at 5484.

[10] 68 CONG. REC. 2567; *id.*, at 3257.

[11] Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 THE ANNALS (Amer. Acad. of Political Science) 179, 188 (January, 1935).

[12] A contrary contention was once asserted by the Federal Radio Commission in its brief in *Trinity Meth. Church South* v. *Fed. Radio Comm.*, 62 F.(2d) 850 (App. D.C., 1932). See Caldwell, *op. cit. supra* n. 11 at 182.

[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 [14] and by the sanction of state censorship of motion pictures.[15]

Mr. Caldwell, in an excellent analysis [16] 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.

[14] See 19 OP. ATTY. GEN. 667, 669, cited in the dissenting opinion of Brandeis, J. in *United States* v. *Burleson,* 255 U.S. 407, 422, 41 Sup. Ct. 352, 65 L.Ed. 704 (1921). But see Dearborn Publ. Co. *v.* Fitzgerald, 271 Fed. 479, 482 (N.D. Ohio, 1921).

[15] Mutual Film Corp. *v.* Ohio Industrial Comm., 236 U.S. 230, 243, 244, 35 Sup. Ct. 387, 59 L.Ed. 552 (1915).

[16] 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 [17] and *a fortiori* may exercise editorial selection over matters communicated by them without violating the First Amendment. By express statutory regulation,[18] 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.[19] Likewise, broadcast stations are forbidden by Section 316 to transmit programs giving information concerning lotteries.[20]

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.[21]

§ 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-

[17] See Chapter XIII. *supra.*

[18] 48 STAT. 1088 (1934), 47 U.S. C.A. § 315 (1938). See *Sorenson* v. *Wood,* 243 N.W. 82 (Nebraska, 1932) where § 315 was construed as merely preventing censorship of words of political and partisan implication.

[19] 48 STAT. 1091 (1934), 47 U.S.C.A. § 326 (1937). See also 44 STAT. 1172 (1927).

[20] 48 STAT. 1088, 47 U.S.C.A. § 316 (1937).

[21] 48 STAT. 1104 (1934), 47 U.S. C.A. § 606(c) (1937).

ated in the public interest, convenience or necessity. This standard has been held not to be too indefinite [22] 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] *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

[22] Federal Radio Comm. *v.* Nelson Bros. Bond & Mtge. Co., 289 U.S. 266, 53 Sup. Ct. 627, 77 L.Ed. 1166 (1932).

[23] See letter from Federal Communications Commission to National Broadcasting Co., Inc., January 14, 1938, N. Y. TIMES, January 15th, 1938, 1, 18; Hammond-Calumet Broadcasting Corp. (WWAE), 2 F.C.C.Rep. 321 (1936); Trinity Meth. Church South *v.* Fed. Radio Comm., 62 F.(2d) 850 (App. D.C., 1932), *cert. denied,* 288 U.S. 599, 53 Sup. Ct. 317, 77 L.Ed. 975 (1933); KFKB Broadcasting Assn., Inc. *v.* Fed. Radio Comm., 47 F.(2d) 670, 60 App. D.C. 79 (1931); Norman Baker (Station KTNT), Decision of the Commission in Docket 967, June 5, 1931. The practice of the Federal Communications Commission in taking action on general complaints against station licensees, including their program operations, by issuing temporary renewal licenses or in giving formal notice of hearing on the complaints and license renewal jointly, is a definite censorship of broadcast programs, particularly where such action is based upon uninvestigated, unverified and informal complaints. See BROADCASTING, May 1, 1938 p. 28, cols. 2, 3; VARIETY, May 24, 1938, p. 35, cols. 1, 2; BILLBOARD, May 28, 1938, p. 8. *Cf.* Western Broadcast Co., 3 F.C.C.Rep. 179 (1936); Missouri Broadcasting Corp., *et al.,* 3 F.C.C.Rep. 349 (1936); Advertiser Publishing Co., Ltd., 3 F.C.C.Rep. 361 (1936).

licenses to stations granted by the Commission,[24] has effectively operated as a form of indirect governmental censorship of the contents of broadcast programs. Since stations have the burden of proving that their operations comply with the statutory standards,[25] it is not an infrequent practice for the Commission to hear evidence concerning the nature and quality of the contents of the programs broadcast by licensed stations. Thus, while pretending to exercise no direct censorship over the contents of communications by radio, the government's administrative body is possessed of a potent power of censorship over broadcast programs, which it exercises indirectly as part of its licensing powers. Despite its indirect control, the Commission has frequently asserted that its statutory injunction against censorship has rendered it powerless to regulate the content of broadcast programs, including advertising.

Governmental control of the program content of broadcast advertising may be seen in the regulation of competition by the Federal Trade Commission [26] which imposes restraint upon the advertiser rather than upon the broadcast station.

§ 565. Control of Content of Broadcast Programs by the States.

Although broadcasting is interstate commerce,[27] 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.[28]

[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.

[25] Riker *v.* Fed. Radio Comm., 55 F.(2d) 535, 60 App. D.C. 373 (1931).

[26] See Chapter XXXVI. *supra.*

[27] Fisher's Blend Station, Inc. *v.* Tax Commission of State of Washington, 297 U.S. 650, 56 Sup. Ct. 608, 80 L.Ed. 956 (1936).

[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,*[29] 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.[30] 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[31] but may not directly work a censorship and suppression of the medium of communication by a statute so designed.

[29] 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

[30] See Lovell *v.* City of Griffin, 58 Sup. Ct. 666, 82 L.Ed. 660 (1938); De Jonge *v.* Oregon, 299 U.S. 353, 364, 57 Sup. Ct. 255, 81 L.Ed. 278 (1937); Grosjean *v.* American Press Co., 297 U.S. 233, 244, 56 Sup. Ct. 444, 80 L.Ed. 660 (1936); Stromberg *v.* California, 283 U.S. 359, 368, 51 Sup. Ct. 532, 75 L.Ed. 1117 (1931); Gitlow *v.* New York, 268 U.S. 652, 666, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925).

[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 statute [33] 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 Amendment [34] under the pre-

[32] Stromberg *v.* California, 283 U.S. 359, 51 Sup. Ct. 532, 75 L.Ed. 1117 (1931).

[33] New Jersey, STAT. SERVICE (1935) ANNUAL, § 52–270.

[34] Lovell *v.* City of Griffin, 58 Sup. Ct. 666, 82 L.Ed. 660, 662 (1938); De Jonge *v.* Oregon, 299 U.S. 353, 364, 57 Sup. Ct. 255, 81 L.Ed. 278 (1937); Grosjean *v.* American Press Co., 297 U.S. 233, 244, 56 Sup. Ct. 444, 80 L.Ed. 660 (1936); Stromberg *v.* California, 283 U.S. 359, 368, 51 Sup. Ct. 532, 75 L.Ed. 1117 (1931); Gitlow *v.* New York, 268 U.S. 652, 666, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925).

tense of removing an abuse of that right.[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.[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.[37] A state may therefore prohibit or limit the broadcast of programs which advertise intoxicating liquors,[38] tobacco, food[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.[40]

A bill introduced in the Michigan legislature[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

[35] De Jonge *v.* Oregon, 299 U.S. 353, 364, 57 Sup. Ct. 255, 81 L.Ed. 278 (1937).

[36] Lovell *v.* City of Griffin, 58 Sup. Ct. 666, 82 L.Ed. 660, 662 (1938).

[37] See §§ 183, 189, 190, 191 *supra.*

[38] See Delaware Laws (1933) c. 18; Regulations of Oregon Liquor Comm., BROADCASTING, July 1, 1937; Pennsylvania Liquor Comm., BROADCASTING, April 1, 1938.

[39] Michigan, Public Acts (1933) No. 259, § 11.

[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.

[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 [42] 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,[43] 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,*[44] 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.*[45] 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.

[42] Reported in VARIETY, March 24, 1937.

[43] Mutual Film Corp *v.* Ohio Industrial Comm., 236 U.S. 230, 35 Sup. Ct. 387, 59 L.Ed. 552 (1915).

[44] 236 U.S. 230, 35 Sup. Ct. 387, 59 L.Ed. 552 (1915).

[45] 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

§ 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 [46] 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." [47]

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.[48] 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.[49] Broadcast stations are not common carriers [50] 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.

[47] 48 STAT. 1088 (1934), 47 U.S.C.A. § 315 (1937).

[48] An excellent analysis of the language of § 315 may be found in HALEY, THE LAW ON RADIO PROGRAMS, (S. Doc. No. 137, Govt. Printing Office, 1938) Addenda pp. 8–10.

[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.

[51a] See RADIO DAILY, July 6, 1938, p. 1, col. 3; NEW YORK TIMES, July 10, 1938, § 10, p. 8, cols. 1, 2.

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[52] and its predecessor, the Radio Act of 1927,[53] contain absolute prohibi-

[52] 48 STAT. 1091 (1934), 47 U.S.C.A. § 326 (1937).

[53] 44 STAT. 1172 (1927), 47 U.S.C.A. § 109 (1937).

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.[54]

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,[55] postal service[56] *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*,[57] which was a prosecution under the relevant section of the Radio Act of 1927,[58] 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-

[54] 48 STAT. 1082 (1934), 47 U.S.C.A. § 303(m) (1) (1937).

[55] Wilson *v.* United States, 232 U.S. 563, 34 Sup. Ct. 347, 58 L.Ed. 728 (1914); Hoke *v.* United States, 227 U.S. 308, 33 Sup. Ct. 281, 57 L.Ed. 523 (1913); United States *v.* Popper, 98 Fed. 423 (N.D. Calif., 1899).

[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).

[58] 44 STAT. 1171 (1927), 47 U.S.C.A. § 104 (1937).

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.[59] 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.[60] 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.

[60] *Cf.* Block *v.* City of Chicago, 239 Ill. 251, 87 N.E. 1011 (1909); Public Welfare Pictures *v.* Lord, 224 App. Div. 311, 230 N.Y.Supp. 137 (1928).

§ 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.

[61] 48 STAT. 1088 (1934), 47 U.S.C.A. § 316 (1937).

[62] See Chapter XXXI. *supra.*

[63] 48 STAT. 1082 (1934), 47 U.S.C.A. § 303 (1937).

[64] See HALEY, THE LAW ON RADIO PROGRAMS, (S. Doc. No. 137, Govt. Printing Office, 1938) 33 *et seq.*

[65] Act of Mar. 2, 1827, 4 STAT. 238 § 6. For a history of the "Anti-Lottery Act", see 18 U.S. C.A. § 336 (1927).

[66] 35 STAT. 1129 (1909), 18 U.S.C.A. § 336 (1927).

[67] See HALEY, *op. cit., supra* n. 57 at 34.

In *Champion* v. *Ames* [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: [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

[68] 188 U.S. 321, 23 Sup. Ct. 321, 47 L.Ed. 492 (1903).

[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.[70] 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.[71] 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) 7 AIR L. REV. 1; RADIO IS CENSORED! Amer. Civil Liberties Union, Nov. 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 nonpartisan 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.[73] 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.[74] 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.[75] 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.[76]

[73] *Cf.* Morrison *v.* Hurtig & Seamon, 198 N.Y. 352, 91 N.E. 842 (1910).

[74] See Corrigan *v.* E. M. P. Producing Co., 179 App. Div. 810, 167 N.Y.Supp. 206 (1917).

[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.

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.

[76] See Corrigan *v.* E. M. P. Producing Co., 179 App. Div. 810, 167 N.Y.Supp. 206 (1917).

§ 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[77] or electrical transcriptions in contravention of its standards.[78] Likewise, a broadcast station may refuse to allow its facilities to be used to advertise certain classes of products or services.[79]

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.[80] 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[81] 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

prohibit discussion of controversial issues in commercially sponsored programs.[82]

§ 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]

§ 573. Proposed Legislation.

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*.

[84] Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936) *modifying* 8 F.Supp. 358 (D.C.D. Mass., 1934), *cert. den.* 298 U.S. 670, 56 Sup. Ct. 835, 80 L.Ed. 1393 (1936).

[85] H.R. 3033, 3038, 3039, 75th Cong. 1st Sess. (January 14, 1937) formerly H.R. 9229, 9230, 9231, 74th Cong., 1st Sess.

[86] S. 2755, 2756, 2757, 75th Cong., 1st Sess. (July 8, 1937).

One bill [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.[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

[87] H.R. 3039, 75th Cong., 1st Sess., S. 2756, 75th Cong., 1st Sess.

[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-

[89] See §§ 183, 189, 191, *supra*.

[90] H.R. 3039, 75th Cong., 1st Sess., S. 2757, 75th Cong., 1st Sess.

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

[91] H.R. 3033, 75th Cong., 1st Sess., S. 2755, 75th Cong., 1st Sess.

[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 governments of other countries, the United States system is far superior.[93] Private censorship within reasonable limits is an inevitable incident of our competitive broadcasting system. Since errors in judgment, the influence of personal 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 elaborated 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 between 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.

PAGE

SECTION 574. Creative Works Used in Radio Broadcasts..... 1036
575. Same: How Used 1037
576. Rights of Owner of Creative Work Used in Broadcast Program: Generally 1038
577. Historical View of Copyright..... 1040
578. Same: *Donaldson* v. *Beckett* and *Wheaton* v. *Peters* 1042

§ 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." Oranje, *Rights affecting the use of broadcasts,* (1938) 3 GEISTIGES EIGENTUM, Part 4, 347, 425.

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., 327 Pa. 433, 194 Atl. 631 (1937). See Notes (1937) 51 HARV. L. REV. 1171; 86 U. OF PA. L. REV. 217; Bass, *Interpretative Rights of Performing Artists* (1938) 42 DICKINSON L. REV. 57. *Cf. 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.

§ 576. Rights of Owner of Creative Work Used in Broadcast Program: Generally.

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.

[2] Buck *v.* Jewell-LaSalle Realty Corp., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931); Society of European Stage Authors and Composers, Inc. (SESAC) *v.* New York Hotel Statler, Inc., 19 F.Supp. 1 (S.D.N.Y., 1937); Performing Right Soc., Ltd. *v.* Hammond's Bradford Brewery Co., Ltd. (1934) 1 Ch. 121 (C.A., Eng.); Canadian Perf. Rights Soc. *v.* Ford Hotel (1935) 2 D.L.R. 391 (Que. Super. Ct.). See Note (1937) 3 GEISTIGES EIGENTUM 105. See also § 630 *infra*.

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

[3] Sheldon *v.* Metro-Goldwyn-Mayer Pict. Corp., 81 F.(2d) 49 (C.C.A. 2d, 1936), *rev'g* 7 F.Supp. 837 (S.D.N.Y., 1934), *cert. den.* 298 U.S. 669, 56 Sup. Ct. 835, 80 L.Ed. 1392 (1936); Wiren *v.* Shubert Theatre Corp., 5 F.Supp. 358 (S.D.N.Y., 1933), *aff'd. without opinion* 70 F.(2d) 1023 (C.C.A. 2d, 1934), *cert. den.* 293 U.S. 591, 55 Sup. Ct. 105, 79 L.Ed. 685 (1934), *rehearing den.* 293 U.S. 631, 55 Sup. Ct. 140, 79 L.Ed. 716 (1934); Carr *v.* National Capital Press, Inc., 63 App. D.C. 210, 71 F.(2d) 220 (1934); Frankel *v.* Irwin, 34 F.(2d) 142 (S.D.N.Y., 1929); Roe-Lawton *v.* Hal E. Roach Studios, 18 F.(2d) 126 (S.D.Cal., 1927); Dymow *v.* Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926).

[4] See Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Uproar Co. *v.* National Broadcasting Co., *et al.*, 8 F.Supp. 358 (D. Mass., 1934), *aff'd. on other grounds,* 81 F.(2d) 373 (C.C.A. 1st, 1936). In the latter case, District Judge Brewster said at p. 362.

"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."

[5] Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 773 (1924). See Bixby *v.* Dawson, N.Y.L.J., July 1, 1936.

[6] Rush *v.* Oursler *et al.*, 39 F.(2d) 468 (S.D.N.Y., 1930); Dymow *v.* Bolton *et al.*, 11 F.(2d) 690 (C.C.A. 2d, 1926); Sheldon *v.* Metro-Goldwyn-Mayer Pict. Corp. *et al.*, 7 F.Supp. 837 (S.D.N.Y., 1934).

copyright.[7] Ideas as such are not copyrightable [8] but the tangible expression thereof may be the subject matter of such protection.[8a]

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.[9] 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.*

[8] Holmes *v.* Hurst, 174 U.S. 82, 86, 19 Sup. Ct. 606, 43 L.Ed. 904 (1899); Dymow *v.* Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926); Sheldon *v.* Metro-Goldwyn Mayer Pict. Corp., 81 F.(2d) 49 (C.C.A. 2d, 1936), *cert. den.* 298 U.S. 669, 56 Sup. Ct. 835, 80 L.Ed. 1392 (1936); Nichols *v.* Universal Pict. Corp., 45 F.(2d) 119 (C.C.A. 2d, 1930); Fendler *v.* Morosco, 253 N.Y. 281 (1930); Downes *v.* Culbertson, 153 Misc. 14, 275 N.Y. Supp. 233, 243 (1934) (Nims, Referee).

[8a] See § 532 *supra.*

[9] 8 ANNE c. 19 (1709).

about 1472,[9a] 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,[11] 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]

§ 578. Same: Donaldson v. Beckett and Wheaton v. Peters.

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* [14] 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.*[15] 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* [16] 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.[17] 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.[18]

The common law provides protection against all unauthorized uses of intellectual productions which take place prior to the first publication thereof.[19]

[14] *Ibid.*

[15] 4 Burr. 2408 (Eng. House of Lords, 1774).

[16] 8 Pet. 591, 33 U.S. 591, 8 L.Ed. 1055 (1834).

[17] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); DRONE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879) 118.

[18] *Id.*, at 634.

[19] Wheaton *v.* Peters, 8 Pet. 591, 33 U.S. 591, 8 L.Ed. 1055 (1834); Holmes *v.* Hurst, 174 U.S. 82, 19 Sup. Ct. 606, 43 L.Ed. 904 (1899); Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Palmer *v.* De Witt, 47 N.Y. 532, 7 Am. Rep. 480 (1872); Bamforth *v.* Douglass Post Card & Mach. Co., 158 Fed. 355 (C.C.E.D. Pa., 1908).

Chapter XXXIX.

PROTECTION OF CREATIVE WORKS AT COMMON LAW.

PAGE

SECTION 579. Common Law Rights Distinguished from Statutory Copyright 1044
580. Publication as a Divestment of Common Law Rights.. 1049
581. When Publication Is Effected: Specific Instances.. 1051
582. Same: Performance Not a Publication..... 1054
583. Effect of Acts of Publication in One Jurisdiction Upon Rights in Another..... 1056
584. Extent of Protection at Common Law..... 1057

§ 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

[1] Maurel *v.* Smith *et al.*, 271 Fed. 211 (C.C.A. 2d, 1921); T. B. Harms *et al. v.* Stern *et al.*, 229 Fed. 42 (C.C.A. 2d, 1916), *rev'g* 222 Fed. 581 (S.D.N.Y., 1915), *revd. on other grounds* 231 Fed. 645 (C.C.A. 2d, 1916).

In *Maurel* v. *Smith, supra,* Circuit 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 statute, between literary property and property of any other description. The right to sell and transfer personal property is an unseparable incident of the property. An author 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 property. It is an incident of ownership. Therefore sales may be absolute 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.[2] 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.[3]

In England, common law rights in unpublished works [4] continued until 1911 when the British Copyright Act was passed.[5] Section 31 of the Act of 1911 [6] 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.[7]

[2] 35 STAT. 1076 (1909), 17 U.S. C.A. § 2 (1927). Section 2, *supra,* provides:

"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."

[3] Société Des Films Menchen *v.* Vitagraph Co. of America, 251 Fed. 258 (C.C.A. 2d, 1918); Photo Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 220 Fed. 448 (C.C.A. 2d, 1915), *aff'g* 213 Fed. 374 (S.D.N.Y., 1914).

[4] Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441; Philip *v.* Pennell [1907] 2 Ch. 577; Exchange Tel. Co., Ltd. *v.* Central News [1897] 2 Ch. 48; Exchange Tel. Co., Ltd. *v.* Gregory & Co. [1896] 1 Q.B. 147; Caird *v.* Sime, 12 App. Cas. 326 (1887); Prince Albert *v.* Strange, 1 Mac. & G. 25. 2 DeG. & Sm. 652, 41 Eng. R. [illegible] 1171 (1849).

[5] 1 & 2 GEO. V, c. 46 (1911).

[6] *Ibid.* See COPINGER ON THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 21.

[7] Ferris *v.* Frohman, [illegible] 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

424, 32 Sup. Ct. 263, 56 L.Ed. 492 (1912); Bobbs-Merrill Co. *v.* Straus, 147 Fed. 15 (C.C.A. 2d, 1906); Werckmeister *v.* American Litho. Co., 134 Fed. 321 (C.C.A. 2d, 1904); Crowe *v.* Aiken, Fed. Cas. No. 3441 (C.C.N.D. Ill., 1870); Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480 (1882); Palmer *v.* De Witt, 47 N.Y. 532 (1872); Donaldson *v.* Beckett, 4 Burr. 2408 (Eng., 1774).

[8] Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Savage *v.* Hoffman, 159 Fed. 584 (C.C.S.D. N.Y., 1908); Eisman *et al. v.* Samuel Goldwyn, Inc., *et al.*, 23 F.Supp. 519 (S.D.N.Y., 1938).

[9] 35 STAT. 1077 (1909), 17 U.S. C.A. § 8 (1927).

[10] Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Bobbs-Merrill Co. *v.* Straus, 147 Fed. 15 (C.C.A. 2d, 1906); Crowe *v.* Aiken, Fed. Cas. No. 3441 (C.C. N.D. Ill., 1870); Bartlett *v.* Crittenden, Fed. Cas. No. 1076 (C.C.D. Ohio, 1849).

[11] 35 STAT. 1080 (1909), 17 U.S. C.A. § 23; Hoague-Sprague Corp. *v.* Meyer Co., Inc., 31 F.(2d) 583, 584 (E.D.N.Y., 1929).

[12] See Ricordi *v.* Columbia Gramophone Co., 258 Fed. 72 (S.D.N.Y., 1919). *Cf.* Ricordi *v.* Columbia Gramophone Co., 256 Fed. 699 (S.D.N.Y., 1919).

and no statutory copyright is obtained, the work falls into the public domain.[13] A copyright obtained after the author's common law rights have been lost by publication cannot be enforced.[14] The acts of publication must be simultaneous, so that the common law rights are superseded by statutory copyright as a result of the same publication.[15] Once statutory copyright protection is obtained, the author cannot rely upon his common law rights of which he has been thereby divested.[16] By electing to avail himself of the statute, the author is deemed to have abandoned his common law rights.[17]

At common law, an author has the exclusive right to prevent others from copying his works until he permits general publication.[18] The duration of such common law

[13] Atlantic Monthly Co. *v.* Post Pub. Co., 27 F.(2d) 556 (D. Mass., 1928); Caliga *v.* Inter-Ocean Newspaper 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. E.D.N.Y., 1909), *modified* 176 Fed. 833 (C.C.A. 2d, 1910); Stern *v.* Rosey, 17 App. D.C. 562 (1901).

[16] Société 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'g* 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 Lacombe, at page 450, said:

"We do not concur in Judge Hand's holding that one who has obtained statutory copyright of a book or play has left in him any common-law right in literary property by virtue of section 2 of the Act. We think that section is intended only to indicate that the statute does not displace the common-law right. Whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right."

[17] *Ibid.* It is clear that § 2 of the Act of 1909, 35 STAT. 1076, 17 U.S.C.A. (1927) does not provide 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 protect 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.[19] The author has the sole and exclusive right of first publication.[20]

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.[21] 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

paper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Atlantic Monthly Co. *v.* Post Pub. Co., 27 F.(2d) 556 (D. Mass., 1928); Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913), *cert. den.* 231 U.S. 755, 34 Sup. Ct. 323, 58 L.Ed. 468 (1913); Palmer *v.* De Witt, 47 N.Y. 532 (1872); Kortlander *v.* Bradford, 116 Misc. 664, 190 N.Y.Supp. 311 (1921). See Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Berry *v.* Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

[19] Donaldson *v.* Beckett, 4 Burr. 2408 (Eng. House of Lords, 1774); Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Savage *v.* Hoffman, 159 Fed. 584 (C.C.S.D. N.Y., 1908).

[20] Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Atlantic Monthly Co. *v.* Post Pub. Co., 27 F.(2d) 556 (D. Mass., 1928); Atlas Mfg. Co. *v.* Street & Smith, 204 Fed. 398 (C.C.A. 8th, 1913), *cert. den.* 231 U.S. 755, 34 Sup. Ct. 323, 58 L.Ed. 468 (1913); Harper & Bros. *v.* Donohue & Co., 144 Fed. 491 (C.C.N.D. Ill., 1905); Tribune Co. *v.* Associated Press, 116 Fed. 126 (N.D. Ill., 1900); Palmer *v.* De Witt, 47 N.Y. 532 (1872); Kortlander *v.* Bradford, 116 Misc. 664, 190 N.Y.Supp. 311 (1921). See FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) § 135; COPINGER ON THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 3.

[21] See Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896), *writ of error dismissed* 164 U.S. 105, 17 Sup. Ct. 40, 41 L.Ed. 367 (1896); Bartlett *v.* Crittenden, Fed. Cas. No. 1082, 4 McLean 300 (C.C.

assign same to another.[22] The contrary, however, is true if the sale of the manuscript is absolute and unconditional.[23] An author may transfer a manuscript with reservations limiting the extent of the common law rights granted.[24]

§ 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.[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.[26] Publication, however, must not

Ohio, 1847); Berry *v.* Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937). See also Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[22] Parton *v.* Prang, Fed. Cas. No. 10784 (C.C.D. Mass., 1872); Stevens *v.* Cady, 14 How. (N.Y.) 528, 530 (1852).

[23] Atlantic Monthly Co. *v.* Post Pub. Co., 27 F.(2d) 556 (D. Mass., 1928); Parton *v.* Prang, Fed. Cas. No. 10784 (C.C. Mass., 1872).

[24] Atlantic Monthly Co. *v.* Post Pub. Co., 27 F.(2d) 556 (D. Mass., 1928); Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896) *writ of error dismissed* 164 U.S. 105, 17 Sup. Ct. 40, 41 L.Ed. 367 (1896).

[25] Harper & Bros. *v.* Donohue & Co., 144 Fed. 491 (C.C.N.D. Ill., 1905); Boucicault *v.* Wood, Fed. Cas. No. 1693, 2 Biss. 34 (N.D. Ill., 1867); Daly *v.* Walrath, 40 App. Div. 220, 57 N.Y.Supp. 1125 (1899); Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898). See FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) 495.

[26] Caird *v.* Sime, 12 App. Cas. 326 (Eng., 1887) (lectures); Nicols *v.* Pitman, 26 Ch. Div. 374 (Eng., 1884) (lectures); Abernethy *v.* Hutchinson, 3 L.J. (O.S.) Ch. 209 (Eng., 1825) (Where a student is reading for the Bar in an attorney's office, he may copy precedents for his own use, but not for publication.); Bobbs-Merrill Co. *v.* Straus, 147 Fed. 15, 18 (C.C.A. 2d, 1906); Werckmeister *v.* American Litho. Co., 134 Fed. 321, 326 (C.C.A. 2d, 1904); Keene *v.* Wheatly, Fed. Cas. No. 7644 (C.C.E.D. Pa., 1861); Tompkins *v.* Halleck, 133 Mass. 32 (1882); Palmer *v.* De Witt, 47 N.Y. 532, 7 Am. Rep. 480 (1872). See Berry *v.* Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937); Keene *v.* Kimball, 16 Gray (82 Mass.) 545 (1860).

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.[27] When one or more copies of a work are prepared and made available to the general public, there is a publication at common law.[28]

Where, however, a recording by way of a disc[29] or film[30] 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.*,[31] 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

[27] See O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y. Supp. 1028 (1916); Ferris *v.* Frohman, 223 U.S. 424, 434, 32 Sup. Ct. 263, 56 L.Ed. 492 (1912). *Cf.* Italian Book Co. *v.* Cardilli, 273 Fed. 619 (S.D.N.Y., 1918); Universal Film Co. *v.* Copperman, 218 Fed. 577 (C.C.A. 2d, 1914).

[28] Baker *v.* Libbie, 210 Mass. 599, 97 N.E. 109 (1912); Werckmeister *v.* American Litho. Co., 134 Fed. 321 (C.C.A. 2d, 1904).

[29] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[30] Universal Film Co. *v.* Copperman, 218 Fed. 577 (C.C.A. 2d, 1914).

[31] 327 Pa. 433, 194 Atl. 631, 636 (1937).

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 leased[33] or loaned[34] 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-

[32] D'Ole *v.* Kansas City Star Co., 94 Fed. 840 (C.C.W.D. Mo., 1899).

[33] Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[34] Ladd *v.* Oxnard, 75 Fed. 703 (D. Mass., 1896). See Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896 (S.D.N.Y., 1898).

[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.[37] 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.[38] 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[39] 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.*)

[37] See Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Berry *v.* Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

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."

[38] Kiernan *v.* Manhattan Quotation T. Co., 50 How. Pr. 194 (N.Y., 1876). See Jewelers' Merc. *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 253, 49 N.E. 872 (1892); AMDUR ON COPYRIGHT LAW (1936) 50, 353.

[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).

purpose 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

[40] *Cf.* Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896).

[41] Bartlett *v.* Crittenden, Fed. Cas. No. 1082 (C.C.D. Ohio, 1847). See Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898). See also § 580 *supra*.

[42] See COPINGER ON THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 27.

[43] Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[44] *Ibid., semble.* See also Ladd *v.* Oxnard, 75 Fed. 703 (D. Mass., 1896); SHAFTER, MUSICAL COPYRIGHT (1932) 91.

[45] Blanchett *v.* Ingram, 3 T.L.R. 687 (Eng., 1887). See COPINGER ON THE LAW OF COPYRIGHT (Eng. 7th ed., 1936) 27; SHAFTER, MUSICAL COPYRIGHT (1932) 90.

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

2 DeG. & Sm. 652, 41 Eng. Repr. 1171 (Eng., 1849); COPINGER, *op. cit. supra,* 27.

[46] D'Ole *v.* Kansas City Star Co., 94 Fed. 840 (C.C.W.D. Mo., 1899).

[47] *Cf.* Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896).

[48] See Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Berry *v.* Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

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,[49] the rendition of a musical composition by an orchestra, instrumentalist or vocalist[50] and the public delivery of a lecture or address[51] 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.[52] 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.[53]

[49] Ferris *v.* Frohman, 223 U.S. 424, 32 Sup. Ct. 263, 56 L.Ed. 492 (1912); Aronson *v.* Fleckenstein, 28 Fed. 75 (C.C.N.D. Ill., 1886); Palmer *v.* De Witt, 47 N.Y. 532, 7 Am. Rep. 480 (1872).

[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 in applicable."

[51] Nutt *v.* National Inst. For The Improvement of Memory, Inc., 31 F.(2d) 236 (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); *Nicols* 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.

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

[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.

§ 583. Effect of Acts of Publication in One Jurisdiction Upon Rights in Another.

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

N.Y., 1919); Werckmeister *v.* American Litho. Co., 134 Fed. 321 (C.C.A. 2d, 1904); Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896).

[54] DeMille Co. *v.* Casey, 121 Misc. 78, 201 N.Y.Supp. 20 (1923).

However, publication may occur upon the leasing of the film to the exhibitor for public exhibition. FROHLICH & SCHWARTZ, LAW OF MOTION PICTURES (1917) 504. See Statement, Exhibit A, of Edwin P. Kilroe, *Hearings before the Committee on Patents, Revision of the Copyright Laws, on S.* 3047, 74th Cong., 2d Sess. (1936) 1185, 1186.

[55] DeMille Co. *v.* Casey, 121 Misc. 78, 201 N.Y.Supp. 20 (1923); Universal Film Mfg. Co. *v.* Copperman, 218 Fed. 577 (C.C.A. 2d, 1914).

[56] *Ibid.;* Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[57] 8 F.Supp. 358 (D. Mass., 1934).

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]

§ 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]

[58] 35 Fed. 661 (N.D. Cal., 1888).

[59] 40 App. Div. 220, 57 N.Y. Supp. 1125 (1899).

[60] Kortlander *v.* Bradford, 116 Misc. 664, 190 N.Y.Supp. 311 (1921).

[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.[63] 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.[64]

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.[65]

[63] Even exemplary or punitive damages may be awarded. *Press Pub. Co.* v. *Monroe,* 73 Fed. 196 (C.C.A. 2d, 1896).

[64] French *v.* Kreling, 63 Fed. 621 (C.C.N.D. Cal., 1894).

[65] Harper & Bros. *v.* Donohue & Co., 144 Fed. 491 (C.C.N.D. Ill., 1905).

Chapter XL.

COPYRIGHT UNDER THE ACT OF 1909.

PAGE

SECTION 585. Copyright Legislation Prior to 1909..... 1059
586. Subject Matter of Copyright Protection Under Act of 1909 1061
587. Persons Entitled to Copyright Under the Act of 1909 1064
588. Same: Where Work Is Created by Two or More Persons 1068
589. Formalities Necessary to Secure Copyright Protection Under Act of 1909..... 1069
590. Same: Deposit Under Sections 12 and 13 of Act of 1909 1071
591. Registration and Issuance of Copyright Certificate.. 1073
592. Duration or Term of Copyright Under Act of 1909.. 1074
593. Publication as an Essential of Statutory Copyright... 1075
594. Statutory Copyright in Unpublished Works..... 1076
595. Same: Constitutionality of Section 11..... 1079
596. Works in the Public Domain..... 1081
597. State Statutes Dealing with Copyright..... 1082

§ 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.[1] Every State, with the exception of Delaware, passed copyright statutes [2] 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.[3] Additional legislation was then passed[4] and in 1831 a revised consolidated statute[5] was enacted, which for the first time granted protection to authors and composers of musical compositions.[6] In 1856, a supplementary act[7] 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.[8]

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.

[5] Act of Feb. 3, 1831, 4 STAT. 436. For an analysis of the provisions of this Act see Statement, Exhibit C, Edwin P. Kilroe, *Hearings* (1936) 1201.

[6] The Act of Feb. 3, 1831 was followed by the Act of June 30, 1834, Act of Aug. 10, 1846, and the Act of Mar. 3, 1855.

[7] Act of Aug. 18, 1856, 11 STAT. 138.

[8] See Statement, Exhibit C, Edwin P. Kilroe, *Hearings* (1936) 1203 *et seq.*

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]

§ 586. Subject Matter of Copyright Protection Under Act of 1909.

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-

[9] Act of Mar. 3, 1891, 26 STAT. 1109.

[10] 35 STAT. 1075 *et seq.*, 17 U.S.C.A. § 1 *et seq.* (1927).

[11] Act of Aug. 24, 1912, 37 STAT. 488, 489, 17 U.S.C.A. §§ 5(l) (m), 11, 25. See Edison *v.* Lubin, 122 Fed. 240 (C.C.A. 3rd, 1903).

[12] Act of Mar. 2, 1913, 37 STAT. 724, 17 U.S.C.A. § 55 (1927).

[13] Act of Mar. 28, 1914, 38 STAT. 311, 17 U.S.C.A. § 12 (1927).

[14] Act of Dec. 18, 1919, 41 STAT. 369, 17 U.S.C.A. § 21 (1927).

[15] Act of July 3, 1926, 44 STAT. 818, 17 U.S.C.A. § 15 (1927).

[16] Act of May 23, 1928, 45 STAT. 713, 714, 17 U.S.C.A. §§ 57, 61 (1937).

[17] 35 STAT. 1076 (1909), 17 U.S.C.A. § 4 (1927).

[18] 35 STAT. 1076 (1909), 37 STAT. 488 (1912), 17 U.S.C.A. § 5 (1927).

[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-

terial used by the author need not be original.[20] It is his intellectual labor in arranging and combining old or new materials, or both,[21] in a new form which renders his efforts the subject of copyright protection.[22] Copyright protection is coextensive with the new and original matter in the copyrighted work.[23]

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.[24]

ture); Stevenson *v.* Harris, 238 Fed. 432 (S.D.N.Y., 1917) (Play); Pagano *et al. v.* Chas. Beseler Co., 234 Fed. 963 (S.D.N.Y., 1916) (Photograph); Hoffman *v.* Le Traunik, 209 Fed. 375 (N.D.N.Y., 1913) (Monologue, gags). See FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) § 146. See § 599 *infra.*

[20] Boucicault *v.* Fox, Fed. Cas. No. 1691, 5 Blatchf. 87 (C.C.S.D. N.Y., 1862).

[21] Stephens *v.* Howell Sales Co., 16 F.(2d) 805 (S.D.N.Y., 1926); Woodman *v.* Lydiard-Peterson Co., 192 Fed. 67 (C.C.D. Minn., 1912); West Pub. Co. *v.* Edw. Thompson Co., 169 Fed. 833 (C.C.E.D.N.Y., 1909), *modified* 176 Fed. 833 (C.C. A. 2d, 1910); Brightley *v.* Littleton, 37 Fed. 103 (C.C.E.D. Penn., 1888); Laurence *v.* Dana, Fed. Cas. No. 8136 (C.C.D. Mass., 1869); Boucicault *v.* Fox, Fed. Cas. No. 1691, 5 Blatchf. 87 (C.C.S.D.N.Y., 1862); Gray *v.* Russell, Fed. Cas. No. 5728 (C.C.D. Mass., 1839).

[22] *Ibid.*

In an action involving common law copyright, Judge Woolsey 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." *Caruthers* v. *R. K. O. Radio Pictures, Inc.,* 20 F.Supp. 906, 907 (S.D.N.Y., 1937).

[23] American Code Co., Inc. *v.* Bensinger, 282 Fed. 829 (C.C.A. 2d, 1922); Andrews *v.* Guenther Pub. Co., 60 F.(2d) 555 (S.D.N.Y., 1932).

[24] Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74 (C.C.N.D. Cal., 1898); Martinetti *v.* Maguire, Fed. Cas. No. 9173 (C.C. Cal., 1867). See Hoffman *v.* Le Traunik, 209 Fed. 375 (N.D.N.Y., 1913). As to English rule, see (1938) 3 GEISTIGES EIGENTUM 181.

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.[25]

the purview of § 1141 of the New York Penal Law. 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." *Ulten Publications, Inc.* v. *Arrow Publications, Inc., et al.,* Sup. Ct., Sp. Term, Part IV., N. Y. County, N.Y.L.J., Mar. 19, 1938, 1354, col. 4.

[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.[26]

§ 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.[27] 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,[28] 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.[29]

The executors, administrators or assigns of an author or proprietor are granted derivative protection.[30] 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."

Davilla v. *Brunswick-Balke Collender 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.

In *Cookson* v. *Pountney,* 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.

[26] 35 STAT. 1076 (1909), 37 STAT. 488, 17 U.S.C.A. § 5 (1927).

[27] 35 STAT. 1077 (1909), 17 U.S.C.A. § 8 (1927).

[28] *Id.,* at § 8(a).

[29] *Id.,* at § 8(b).

[30] *Ibid.*

to secure copyright may be transferred,[31] or a copyright actually obtained may be assigned.[32]

The term *proprietor* is equivalent to *assign.*[33] Under prior statutes, proprietor also referred to an employer

[31] American Tobacco Co. *v.* Werckmeister, 207 U.S. 284, 28 Sup. Ct. 72, 52 L.Ed. 208 (1907); Callaghan *v.* Myers, 128 U.S. 617, 9 Sup. Ct. 177, 32 L.Ed. 547 (1887); Werckmeister *v.* Pierce & Bushnell Mfg. Co., 63 Fed. 445 (C.C.D. Mass., 1894), *revd. on other grounds sub nom.* Pierce & Bushnell Mfg. Co. *v.* Werckmeister, 72 Fed. 54 (C.C.A. 1st, 1896).

[32] 35 STAT. 1084 (1909), 17 U.S.C.A. §§ 41, 42 (1927). § 42, *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 assignment must be written. § 42, supra; *Public Ledger Co.* v. *Post Printing & Pub. Co.,* 294 Fed. 430 (C.C.A. 8th, 1923).

[33] Public Ledger Co. *v.* Post Printing & Pub. Co., 294 Fed. 430 (C.C.A. 8th, 1923); Public Ledger Co. *v.* New York Times Co. *et al.,* 275 Fed. 562 (S.D.N.Y., 1921), *affd.* 279 Fed. 747 (C.C.A. 2d, 1922), *cert. den.* 258 U.S. 627, 42 Sup. Ct. 383, 66 L.Ed. 798 (1922). The same rule existed under earlier copyright statutes. *Mifflin* v. *R. H. White Co.,* 190 U.S. 260, 262, 23 Sup. Ct. 769, 770, 47 L.Ed. 1040, 1041 (1903) (Construing Act of Feb. 3, 1831, 4 STAT. 436); *Saake* v. *Lederer,* 174 Fed. 135 (C.C.A. 3d, 1909) [Construing REV. STAT. (U.S., 1898) § 4952, as amended 26 STAT. 1107 (1891)]. *Belford, Clark & Co.* v. *Scribner,* 144 U.S. 488, 12 Sup. Ct. 734, 36 L.Ed. 514 (1892) is not considered *contra.* See *Public Ledger Co.* v. *New York Times Co.* et al. supra; *Public Ledger Co.* v. *Post Printing & Pub. Co., supra.* The rationale of the rule is the same, even though there have been changes in the wording of the statute. The rule seeks to carry out Congress' intention to give the legal assignee of the author the right to secure a valid copyright. *Mifflin* v. *R. H. White Co., supra.* Indeed, § 25, 35 STAT. 1081 (1909) 37 STAT. 489 (1912), 17 U.S.C.A. (1927), provides in subsection (b) that the infringer must pay damages to the *copyright proprietor* for his tort. The words *author* or *assigns* do not appear in § 25 of that statute. In order to pursue a remedy given by § 25, an *assign* must possess the status of a *proprietor.* For these reasons, *proprietor* is equivalent to *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. *New Fiction Pub. Co.* 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.[34]

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.[34a] 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.[34b]

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.[35]

N.Y., 1915); *Public Ledger Co.* v. *New York Times Co. et al.,* 275 Fed. 562 (S.D.N.Y., 1921).

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. 747 (C.C.A. 2d, 1922), *aff'g* 275 Fed. 562 (S.D.N.Y., 1921), *cert. den.* 258 U.S. 627, 42 Sup. Ct. 383, 66 L.Ed. 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.

[34] Schumacher *v.* Schwencke, 25 Fed. 466 (C.C.S.D.N.Y., 1885).

[34a] 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).

[34b] See Edmonds *v.* Stern *et al.,* 248 Fed. 897 (C.C.A. 2d, 1918).

[35] Yuengling *v.* Schile, 12 Fed. 97 (C.C.S.D.N.Y., 1882).

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 [36] 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,[37] 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.[38] In the case of contractual silence on this point, the implication will be in favor of the employer,[39] but where the author is an independent contractor, the implication should be in his favor.[40]

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.[41] Likewise, an infringer has

[36] 35 STAT. 1087 (1909), 17 U.S. C.A. § 62 (1927); Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57, 59 (C.C.A. 2d, 1938); Yale U. Press *v.* Row, Peterson & Co., 40 F.(2d) 290 (S.D.N.Y., 1930); National Cloak & Suit Co. *v.* Kaufman, 189 Fed. 215 (C.C.M.D. Penn., 1911). *Cf.* Copyright Act of 1911 (England), § 5, subd. (1).

[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.

[38] W. H. Anderson Co. *v.* Baldwin Law Pub. Co., 27 F.(2d) 82 (C.C.A. 6th, 1928).

[39] *Ibid.* But *cf.* Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936).

[40] *Cf.* W. H. Anderson Co. *v.* Baldwin Law Pub. Co., 27 F.(2d) 82 (C.C.A. 6th, 1928); Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936).

[41] No-Leak-O Piston Ring Co. *v.* Norris *et al.,* 277 Fed. 951 (C.C. A. 4th, 1921).

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

[42] New Fiction Pub. Co. *v.* Star Co., 220 Fed. 994 (S.D.N.Y., 1915).

[43] See § 704 *infra.*

[44] 35 STAT. 1077 (1909), 41 STAT. 369 (1919), 17 U.S.C.A. § 8 (1927).

[45] Maurel *v.* Smith *et al.,* 271 Fed. 211 (C.C.A. 2d, 1921).

". . . the legal title to a copyright vests in the person in whose name the copyright is taken out. It may, however, be held by him in trust for the true owner, and the question of true ownership is one of fact, dependent upon the circumstances of the case." *T. B. Harms & Francis, Day & Hunter* v. *Stern,* 229 Fed. 42, 46 (C.C.A. 2d, 1916). See also Bisel *v.* Ladner, 1 F.(2d) 436 (C.C.A. 3d, 1924).

[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.

§ 589. Formalities Necessary to Secure Copyright Protection Under Act of 1909.

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

[47] Bisel *v.* Ladner, 1 F.(2d) 436 (C.C.A. 3d, 1924); Waterman *v.* Mackenzie, 138 U.S. 252, 255, 11 Sup. Ct. 334, 34 L.Ed. 923 (1891); Littlefield *v.* Perry, 21 Wall. (88 U.S.) 205, 223, 22 L.Ed. 577 (1874).

[48] Bisel *v.* Ladner, 1 F.(2d) 436 (C.C.A. 3d, 1924). Where the equitable owner of a copyright sues for infringement, he must ordinarily join the legal owner. *Ted Browne Music Co.* v. *Fowler,* 290 Fed. 751 (C.C.A. 2d, 1923).

[49] Herbert *v.* Fields, 152 N.Y. Supp. 487 (1915).

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.

[50] National Cloak & Suit Co. *v.* Kaufman, 189 Fed. 215 (C.C.M.D. Pa., 1911).

[51] Dallin *v.* John Drescher Co., Inc., *et al.*, (S.D.N.Y., 1926), (1936) 20 COPYRIGHT OFF. BULL. 181, U. S. DAILY, Dec. 20, 1926; Lumière *v.* Pathé Exch., Inc. *et al.*, 275 Fed. 428 (C.C.A. 2d, 1921).

[51a] J. A. Richards, Inc. *v.* New York Post, Inc., 23 F.Supp. 619 (S.D.N.Y., 1938).

[52] Dallin *v.* John Drescher Co., Inc. *et al.*, (S.D.N.Y., 1926), (1936) 20 COPYRIGHT OFF. BULL. 181, U. S. DAILY, Dec. 20, 1926; Lumière *v.* Pathé Exch., Inc. *et al.*, 275 Fed. 423 (C.C.A. 2d, 1921).

§ 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 complete [55] 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

[53] 35 STAT. 1080 (1909), 41 STAT. 369 (1919), 17 U.S.C.A. § 21 (1927).

[54] 35 STAT. 1078 (1909), 38 STAT. 311 (1914), 17 U.S.C.A. § 12; Maddux *v.* Grey, 43 F.(2d) 441 (S.D. Cal., 1930).

[55] 28 OP. ATTY. GEN. 176 (U.S., 1910).

[55a] Pearson, *et al. v.* Washingtonian Pub. Co., Inc., 98 F.(2d) 245, 248 (App. D.C., 1938).

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.[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.[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.[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.[59]

[56] No-Leak-O Piston Ring Co. *v.* Norris *et al.*, 277 Fed. 951 (C.C.A. 4th, 1921); Joe Mittenthal, Inc. *v.* Irving Berlin, Inc., *et al.*, 291 Fed. 714 (S.D.N.Y., 1923); Cardinal Film Corp. *v.* Beck *et al.*, 248 Fed. 368 (S.D.N.Y., 1918). *Cf.* J. A. Richards, Inc. *v.* New York Post, Inc., 23 F.Supp. 619 (S.D.N.Y., 1938).

[57] Pearson, *et al. v.* Washingtonian Pub. Co., Inc., 98 F.(2d) 245 (App. D.C., 1938) *rev'g* Washingtonian Pub. Co. *v.* Pearson *et al.*, 25 U. S. Pat. Off. 83, (1936) 20 COPYRIGHT OFF. BULL. 783 (Sup. Ct. D.C., 1935).

[58] Joe Mittenthal, Inc. *v.* Irving Berlin, Inc., *et al.*, 291 Fed. 714 (S.D.N.Y., 1923); Freedman *v.* Milnag Leasing Corp. *et al.*, 20 F.Supp. 802 (S.D.N.Y., 1937).

[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

It is submitted that the requirement that a deposit be made promptly after publication refers only to the jurisdiction of the court in enforcing the remedies against infringement under the statute. Since copyright vests on publication with notice thereof, there should be no invalidation of the copyright by reason of the failure to make prompt deposit. The issue is one of jurisdiction rather than of substantive copyright protection. If the deposit is made, albeit tardily, the court must exercise its jurisdiction.[60]

The Register of Copyrights in accepting delinquent deposits would seem to confer jurisdiction upon the courts to protect the owner against infringements. In keeping with the spirit of eliminating the maelstrom of technicalities of copyright, the courts should not be concerned with determining trivial questions of fact as to the promptness of a deposit once made.

§ 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.[61] 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.[62]

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

copyright notice in *J. A. Richards, Inc.* v. *New York Post, Inc.*, 23 F.Supp. 619 (S.D.N.Y., 1938).

[60] *Contra:* Washingtonian Pub. Co. *v.* Pearson *et al.*, 25 U. S. Pat. Off. 83 (1936) 20 COPYRIGHT OFF. BULL. 783 (Sup. Ct. D.C., 1935), *revd. sub nom.* Pearson, *et al. v.* Washingtonian Pub. Co., Inc., 98 F.(2d) 245 (App. D.C., 1938). *Cf.* WEIL ON COPYRIGHT (1917) 313 *et seq.*

[61] 35 STAT. 1078 (1909), 17 U.S.C.A. § 10 (1927).

[62] 28 OP. ATTY. GEN. 176 (U.S. 1911).

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.[63] 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.[64]

While registration does not act to vest copyright,[65] 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.[66]

§ 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.[67] 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.[68]

[63] 35 STAT. 1078 (1909), 17 U.S.C.A. § 10 (1927).

[64] Nutt *v.* National Institute, Inc., *etc.*, 31 F.(2d) 236 (C.C.A. 2d, 1929). M. Witmark & Sons *v.* Calloway *et al.*, 22 F.(2d) 412 (E.D. Tenn., 1927); Chautauqua School of Nursing *v.* National School of Nursing, 211 Fed. 1014 (W.D.N.Y., 1914).

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).

[65] National Cloak & Suit Co. *v.* Kaufman, 189 Fed. 215 (M.D. Pa., 1911).

[66] Dallin *v.* John Drescher Co., Inc. *et al.*, (S.D.N.Y., 1926), (1936) 20 COPYRIGHT OFF. BULL. 181, U. S. DAILY, Dec. 20, 1926.

[67] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1927).

[68] 35 STAT. 1087 (1909), 17 U.S.C.A. § 62 (1927).

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*.

[71] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1927); Ogilvie *v.* G. & C. Merriam Co., 149 Fed. 858 (C.C.D. Mass., 1907); Glaser *v.* St. Elmo Co., Inc., 175 Fed. 276 (C.C.S.D.N.Y., 1909).

[72] *Ibid.*

[73] Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834). See §§ 579, 580 *supra*.

[74] Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Holmes *v.* Hurst, 174 U.S. 82, 19 Sup. Ct. 606, 43 L.Ed. 904 (1899); Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Palmer *v.* De Witt, 47 N.Y. 532 (1872).

[75] Blunt *v.* Patten, Fed. Cas. No. 1579, 2 Paine 393 (C.C.S.D. N.Y., 1828). But see Callaghan *v.* Myers, 128 U.S. 617, 9 Sup. Ct. 177, 32 L.Ed. 547 (1888); Wright *v.* Eisle, 86 App. Div. 356, 83 N.Y.Supp. 887 (1903); Rees *v.* Peltzer, 75 Ill. 475 (1874). *Cf.* Atlantic Monthly Co. *v.* Post Pub.

secure statutory copyright registration without publication, the common law rights survive[76] unless the work is registered under Section 11.[77] 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.[78] 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.[79] Common law rights cannot exist simultaneously with statutory copyright.[80]

§ 594. Statutory Copyright in Unpublished Works.

It should no longer be mooted that statutory copyright supersedes common law rights once registration has been effected.[81] Even without publication, common law rights

Co., 27 F.(2d) 556 (D. Mass., 1928); Cardinal Film Corp. *v.* Beck *et al.*, 248 Fed. 368 (S.D. N.Y., 1918).

[76] Jewelers' Merc. Agency *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[77] Société des Films Menchen *v.* Vitagraph Co. of America, 251 Fed. 258 (C.C.A. 2d, 1918); Photo-Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 220 Fed. 448 (C.C.A. 2d, 1915); West Pub. Co. *v.* Edw. Thompson Co., 169 Fed. 833 (C.C.E.D.N.Y., 1909). See §§ 594, 595 *infra*.

[78] Koppel *v.* Downing, 11 App. D.C. 93 (1897). See Universal Film Mfg. Co. *v.* Copperman *et al.*, 212 Fed. 301 (S.D.N.Y., 1914).

[79] Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Globe Newspaper Co. *v.* Walker, 210 U.S. 356, 362, 28 Sup. Ct. 726, 52 L.Ed. 1096 (1908); Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834); Photo-Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 220 Fed. 448, 450 (C.C.A. 2d, 1915); Bobbs-Merrill Co. *v.* Straus, 147 Fed. 14 (C.C.A. 2d, 1906).

[80] Société des Films Menchen *v.* Vitagraph Co. of America, 251 Fed. 258 (C.C.A. 2d, 1918); Photo-Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 220 Fed. 448 (C.C.A. 2d, 1915); Savage *v.* Hoffman, 159 Fed. 584 (C.C.D. N.Y., 1908). *Cf.* Maurel *v.* Smith, 220 Fed. 195 (S.D.N.Y., 1915).

[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.[82] 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.[83]

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.[84]

[82] Universal Film Mfg. Co. *v.* Copperman *et al.*, 212 Fed. 301 (S.D.N.Y., 1914), *aff'd.* 218 Fed. 577 (C.C.A. 2d, 1914), *cert. den.*, 235 U.S. 704, 35 Sup. Ct. 209, 59 L.Ed. 433 (1914). See Patterson *v.* Century Productions, Inc., 93 F.(2d) 489 (C.C.A. 2d, 1937), *aff'g* 19 F.Supp. 30 (S.D.N.Y., 1937). See §§ 589, 590, 591 *supra.*

[83] Marx *v.* United States, 96 F.(2d) 204 (C.C.A. 9th, 1938). *Cf.* FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) 546. In *Patterson v. Century Productions, Inc.*, 93 F.(2d) 489 (C.C.A. 2d, 1937) the Court refused to consider the question of term of copyright under § 11 of the Act of 1909.

[84] Universal Film Mfg. Co. *v.* Copperman *et al.*, 212 Fed. 301 (S.D.N.Y., 1914). § 62 does not define what constitutes publication. *Patterson* v. *Century Productions, Inc.*, 93 F.(2d) 489 (C.C.A. 2d,

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.[85] This distinction has bearing only with respect to the compliance with Sections 11, 12 and 13.[86]

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

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).

85 A distinction between reproduction 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).

86 See Patterson *v.* Century Productions, Inc., 93 F.(2d) 489 (C.C.A. 2d, 1937), *cert. den.* 58 Sup. Ct. 758, 82 L.Ed. 731 (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.[87] 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.*[88]

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.*[89] 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-

[87] *Cf.* FROHLICH & SCHWARTZ, *op. cit. supra,* n. 83, 546.

[88] U. S. CONST. ART. I, § VIII.

[89] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1937).

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-

[90] Patterson *v.* Century Productions, Inc., 93 F.(2d) 489 (C.C.A. 2d, 1937).

[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.[92] The right of renewal, however, exists in the author, the surviving spouse, the executor or the next of kin [93] 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.[94] 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.[95]

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.[96] Works in the public domain may be freely

[92] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1927).

[93] More specifically designated in the statute. See § 676 *infra*.

[94] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1927).

[95] See §§ 579, 580 *supra*.

[96] 35 STAT. 1077 (1909), 17 U.S.C.A. § 6 (1927); McCaleb *v.* Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924); Jewelers' Circular Pub. Co. *v.* Keystone Pub. Co., 274 Fed. 932 (S.D.N.Y., 1921); Stevenson *v.* Fox *et al.*, 226 Fed. 990 (S.D.N.Y., 1915); O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916); Arnstein *v.* Edw. B. Marks Music Corp., 11 F.Supp. 535 (S.D.N.Y., 1935), *aff'd.* 82 F.(2d) 275 (C.C.A. 2d, 1936).

transcribed, modified or transformed,[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.[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.[99]

§ 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,[100] it is made a crime to pirate dramatic or musical works. In New York,[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,[102] it is also made a misdemeanor to give public

[97] Bachman *v.* Belasco, 224 Fed. 817 (C.C.A. 2d, 1915), *aff'g* 224 Fed. 815 (S.D.N.Y., 1913); Stevenson *v.* Fox *et al.*, 226 Fed. 990 (S.D.N.Y., 1915); Glaser *v.* St. Elmo Co., 175 Fed. 276 (S.D.N.Y., 1909); O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916).

[98] Stevenson *v.* Fox *et al.*, 226 Fed. 990 (S.D.N.Y., 1915); Glaser *v.* St. Elmo Co., 175 Fed. 276 (S.D. N.Y., 1909); O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916).

[99] McCaleb *v.* Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924).

[100] Cal. Penal Code, § 367(a), (b).

[101] N. Y. Penal Law, § 441a, Consol. L. (McKINNEY, 1938) c. 40.

[102] *Id.*, at § 441.

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[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.[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[105] to restrain state officials from enforcing such legislation. Injunctions *pendente lite* have been granted in two instances[106] and denied in a third.[107]

[103] 35 STAT. 1082 (1909), 17 U.S.C.A. (1937).

[104] Grimshaw, *State Radio Legislation,* (1937) 1. FED. COMMUNICATIONS BAR J. 9.

[105] See 174th St. & St. Nicholas Ave. Amus. Co. *v.* Maxwell *et al.,* 169 N.Y.Supp. 895 (Sup. Ct. N. Y., 1918).

[106] Buck *v.* Swanson, Equity No. 562 (D. Neb., 1937); Buck *v.* Landis, (D. Fla., 1937).

[107] Buck *v.* Case, Equity No. 606 (D. Wash., 1938), *Complaint dismissed for want of jurisdiction,* C.C.A. 9th, June 26, 1938.

Chapter XLI.

RATIONALE AND INCIDENTS OF COPYRIGHT PROTECTION.

		PAGE
SECTION 598.	Rationale of Copyright Protection	1084
599.	Same: Originality as Substantive Basis of Copyright Protection	1088
600.	Incidents of Copyright Protection: Specific Rights	1089
601.	Printing, Publishing and Multiplying Copies	1090
602.	Vending and Otherwise Distributing Copyrighted Works	1091
603.	Translating the Work into Other Languages or Other Dialects	1092
604.	Making Other Versions of Copyrighted Literary Works	1093
605.	Dramatization of Non-Dramatic Works	1094
606.	Conversion of Dramatic Work into Non-Dramatic Form	1095
607.	Copyrighted Musical Compositions: Arrangements Thereof	1095
608.	Same: Arrangements as Mutilations of Copyrighted Music	1098
609.	Same: Making of Extractions Thereof	1099
610.	Performance of Copyrighted Works: Generally	1100
611.	The Public Delivery of Copyrighted Lectures, Sermons, Addresses or Similar Productions	1102
612.	Public Performances of Literary Works	1103
613.	Exclusive Right to Public Performance of Dramatic Works	1105

§ 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.[1]

A copyrighted work is the property of the author or other owner thereof. The Federal government in pur-

[1] U. S. CONST. ART. I, § VIII.

suance 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.

[2] Kendall *v.* Winsor, 21 How. (62 U.S.) 322, 327, 328, 16 L.Ed. 165 (1858); Grant *v.* Raymond, 6 Pet. (31 U.S.) 218, 241, 242, 8 L.Ed. 376 (1832).

[3] Copyright Act of 1911 (Eng.) Sec. 31; COPINGER ON THE LAW OF COPYRIGHT (Eng., 7th Ed., 1936) 4.

[4] Caliga *v.* Inter-Ocean Newspaper Co., 215 U.S. 182, 188, 30 Sup. Ct. 38, 54 L.Ed. 150 (1909); Globe Newspaper Co. *v.* Walker, 210 U.S. 356, 362, 28 Sup. Ct. 726, 52 L.Ed. 1096 (1908); American Tobacco Co. *v.* Werckmeister, 207 U.S. 284, 291, 28 Sup. Ct. 72, 52 L.Ed. 280 (1907); Wheaton *v.* Peters, 8 Pet. (33 U.S.) 591, 661, 8 L.Ed. 1055 (1834).

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,*[5] indicated that in the case of copyrights, no controlling distinction can be based upon the character of the right granted. He said:[6]

> "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:[7]

> "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[8] 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

[5] 286 U.S. 123, 52 Sup. Ct. 546, 76 L.Ed. 1010 (1932), *aff'g* 172 Ga. 403, 157 S.E. 664 (1931).

[6] *Id.*, at 126.

[7] *Id.*, at 127.

[8] Fox Film Corp. *v.* Doyal, 286 U.S. 123, 52 Sup. Ct. 546, 76 L.Ed. 1010 (1932), *aff'g* 172 Ga. 403, 157 S.E. 664 (1931).

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* case[10] 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

[9] Dartmouth College *v.* Woodward, 4 Wheat. (17 U.S.) 517, 4 L.Ed. 629 (1819).

[10] *Ibid.*

[11] New York Times Co. *v.* Star Co., 195 Fed. 110 (C.C.S.D.N.Y., 1912).

power to go beyond its mandate by imposing conditions subsequent or other limitations upon the exclusive character of copyright.[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 *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,[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.[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.[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.[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 *infra*.

[13] Eggers *v.* Sun Sales Corp. *et al.*, 263 Fed. 373 (C.C.A. 2d, 1926).

[14] Dymow *v.* Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926).

[15] See Public Ledger Co. *v.* Post Printing & Pub. Co., 294 Fed. 430 (C.C.A. 8th, 1923).

[16] Rush *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.[17] 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.[18]

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 conception or a novel arrangement of events.[19]

§ 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 compliance with the formalities of registration and deposit. Among the exclusive rights included in a copyright are the following:[20]

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.

[17] Stevenson *v.* Harris, 238 Fed. 432 (S.D.N.Y., 1917).

[18] Hoffman *v.* Le Traunik, 209 Fed. 375 (N.D.N.Y., 1913); Deutsch *v.* Arnold, 22 F.Supp. 101 (E.D.N.Y., 1938).

[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. N.Y., 1935), *aff'd.* 82 F.(2d) 275 (C.C.A. 2d, 1936).

[20] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1, (1927).

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.[21]

§ 601. Printing, Publishing and Multiplying Copies.

The traditional protection granted to copyright owners includes specifically the exclusive right to print, publish and multiply copies.[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

[21] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(e) (1927).

[22] See Act of May 31, 1790, 1 STAT. 124; Act of April 29, 1802, 2 STAT. 171; Act of Feb. 3, 1831, 4 STAT. 436. See also Statement, Exhibit C, of Edwin P. Kilroe, *Hearings* (1936) 1200.

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

[23] 8 F.Supp. 358 (D. Mass., 1934), *modified* 81 F.(2d) 373 (C.C.A. 1st, 1936). See Chapters XXXII., XXXIII., XXXIV., XXXV. *supra.*

[24] See §§ 579–583 *supra.*

[25] 8 F.Supp. 358 (D. Mass., 1934).

their works, the advertiser has no right to distribute such copies by means or methods not specifically licensed.[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,[27] except where such sales are the subject of contracts under Fair Trade Acts.[28]

§ 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.[29] This exclusive right existed at common law where there had been no prior voluntary publication.[30] The British Act of 1911 also expressly grants this exclusive right.[31]

This exclusive right may be extended to re-translations into the original as well as other languages.[32]

Accordingly, therefore, the contents of a broadcast program may not be translated or performed in other lan-

[26] Bobbs-Merrill Co. *v.* Snellenburg, 131 Fed. 530 (C.C.E.D. Pa., 1904); Henry Bill Pub. Co. *v.* Smythe, 27 Fed. 914 (C.C.S.D. Ohio, 1886).

[27] Bobbs-Merrill Co. *v.* Straus, 210 U.S. 339, 28 Sup. Ct. 722, 52 L.Ed. 1086 (1908); Bobbs-Merrill Co. *v.* Snellenburg, 131 Fed. 530 (C.C.E.D. Pa., 1904).

[28] *Eg.*, ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 121½, § 188 *et seq.* See Note (1937) 50 HARV. L. REV. 667.

[29] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).

[30] Harper & Bros. *v.* Donohue & Co., 144 Fed. 491 (C.C.N.D. Ill., 1905).

[31] 1 & 2 GEO. V. (1911) c. 46, § 1, subsec. 2(a); Byrne *v.* Statist Co., [1914] 1 K.B. 622.

[32] Murray *v.* Bogue, (Eng., 1852) 1 Drew. 353, 368.

guages for broadcast purposes without the consent of the owner.

§ 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]

[33] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).

[34] See G. Ricordi & Co. *v.* Mason, 201 Fed. 182 (C.C.S.D. N.Y., 1911), *aff'd.* 201 Fed. 184 (S.D.N.Y., 1912), *aff'd.* 210 Fed. 277 (C.C.A. 2d, 1913).

[35] G. Ricordi & Co. *v.* Mason, 201 Fed. 182 (C.C.S.D.N.Y., 1911), *aff'd.* 201 Fed. 184 (S.D.N.Y., 1912), *aff'd.* 210 Fed. 277 (C.C.A. 2d, 1913).

[36] Macmillan Co. *v.* King, 223 Fed. 862 (D. Mass., 1914).

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.*

[38] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927); Gillette *v.* Stoll Film Co., 120 Misc. 850, 200 N.Y.Supp. 787 (1922).

[39] Harper & Bros. *v.* Kalem Co., 169 Fed. 61 (C.C.A. 2d, 1909), *aff'd.* 222 U.S. 55, 32 Sup. Ct. 20, 56 L.Ed. 92 (1911).

[40] Hill *v.* Whalen & Martell, Inc., 220 Fed. 359 (S.D.N.Y., 1914).

§ 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.[41] 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.[42]

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.

§ 607. Copyrighted Musical Compositions: Arrangements Thereof.

The copyright laws give the owner of a musical composition the exclusive right to arrange his work.[43] 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,[44] the arrangements thereof

[41] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).

[42] Fitch *v.* Young, 230 Fed. 743 (S.D.N.Y., 1916), *affd.* 239 Fed. 1021 (C.C.A. 2d, 1917).

[43] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927). "An 'arranger' is one who adapts the score of a musical composition so that it may be performed upon instruments or sung by voices other than those for which the composition was originally designed." *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).

[44] *Ibid.*

need not be copyrighted separately to support an action for infringement.[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.[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

[45] Shapiro Bernstein & Co. *v.* Dreamland Ball Room, 36 F.(2d) 354 (C.C.A. 7th, 1929). *Cf.* Fitch *v.* Young, 230 Fed. 743 (S.D.N.Y., 1916); Dam *v.* Kirk LaShelle Co., 175 Fed. 902 (C.C.A. 2d, 1910); Ford *v.* Blaney Amusement Co., 148 Fed. 642 (C.C.S.D.N.Y., 1906); Edmonds *v.* Stern *et al.*, 248 Fed. 897 (C.C.A. 2d, 1918).

[46] See Buck *v.* Hillsgrove Country Club, 17 F.Supp. 643 (D. Iowa, 1937) *followed in* Buck *v.* Del Papa, 17 F.Supp. 645 (D.R.I., 1937).

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,[48] 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.[49]

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

[48] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(b) (1927).

[49] Clemens *v.* Press Pub. Co., 67 Misc. 183, 122 N.Y.Supp. 206 (1910).

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.[50]

§ 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.[51] 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.[52]

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.[53] The test of

[50] American Malting Co. *v.* Keitel, 209 Fed. 351 (C.C.A. 2d, 1913); American Law Book Co. *v.* Chamberlayne, 165 Fed. 313 (C.C.A. 2d, 1908).

[51] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(b) (1927).

[52] Carr *v.* National Capital Press, Inc., 71 F.(2d) 220 (App. D.C., 1934); Wiren *v.* Shubert Theatre Corp., 5 F.Supp. 358 (S.D.N.Y., 1933), *affd. without opinion,* 70 F.(2d) 1023 (C.C.A. 2d, 1934), *cert. den.* 293 U.S. 591, 55 Sup. Ct. 105, 79 L.Ed. 685 (1934), *rehearing den.* 293 U.S. 631, 55 Sup. Ct. 140, 79 L.Ed. 716 (1934).

[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.[54] It is not necessary that a fine analysis or dissection of an expert establish a similarity.[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.[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.[57] Slight differences and variations are no defense to a suit for copyright infringement.[58]

§ 610. Performance of Copyrighted Works: Generally.

The earliest Federal copyright legislation, the Act of May 31, 1790,[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[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

N.Y., 1915). *Cf.* Marks *v.* Leo Feist, Inc., 290 Fed. 959 (C.C.A. 2d, 1923).

[54] Hirsch *v.* Paramount Pictures, Inc., 17 F.Supp. 816 (S.D. Cal., 1937).

[55] Wiren *v.* Shubert Theatre Corp., 5 F.Supp. 358 (S.D.N.Y., 1933).

[56] Arnstein *v.* Edw. B. Marks Music Corp., 11 F.Supp. 535 (S.D. N.Y., 1935), *aff'd.* 82 F.(2d) 275 (C.C.A. 2d, 1936).

[57] National Institute, Inc., *etc. v.* Nutt, 28 F.(2d) 132 (D. Conn., 1928), *aff'd.* 31 F.(2d) 236 (C.C.A. 2d, 1929).

[58] Fleischer Studios, Inc. *v.* Ralph A. Freundlich, Inc., 73 F.(2d) 276 (C.C.A. 2d, 1934), *aff'g* 5 F.Supp. 808 (S.D.N.Y., 1934), *cert. den.* 294 U.S. 717, 55 Sup. Ct. 516, 79 L.Ed. 1250 (1935).

[59] 1 STAT. 124.

[60] 11 STAT. 138.

in public, in addition to the exclusive right to print, publish and vend. In 1891,[61] copyright protection was extended to include the exclusive right to dramatize and translate copyrighted works. In 1897,[62] 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,[63] the extent and nature of the exclusive rights granted to copyright owners were specifically defined in Section 1.[64] 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.[65] The exclusive right to translate a copyrighted work into other languages or dialects, or make any other version thereof was confined to literary works.[66]

The copyright owner of a non-dramatic work was granted exclusive right to dramatize it[67] 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.[68] The copyright proprietor of a musical composition was granted the exclusive right to arrange and adapt it.[69] 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.[70] The owner of a dramatic work continued to have the exclusive right to perform or present the work publicly.[71]

It was specifically provided that if a dramatic work is copyrighted and not yet reproduced in copies for sale, the

[61] 26 STAT. 1107.
[62] 29 STAT. 481.
[63] 35 STAT. 1075 (1909), 17 U.S.C.A. (1927).
[64] *Ibid.*
[65] *Id.*, at § 1(a).
[66] *Id.*, at § 1(b).
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Id.*, at § 1(c).
[71] *Id.*, at § 1(d).

copyright owner has the exclusive right to vend any manuscript or any record whatsoever of such work.[72] 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.[73] 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.[74]

The copyright owner of a musical composition was granted the exclusive right to perform the work publicly for profit,[75] which right was first given in 1897.[76] 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.[77]

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.*

[73] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(d) (1927).

[74] *Ibid.*

[75] *Id.*, at § 1(e).

[76] 29 STAT. 481.

[77] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

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.[78] 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.[79]

§ 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.[80]

In *Kreymborg* v. *Durante,*[81] 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-

[78] Kreymborg *v.* Durante, 21 U. S. Pat. Q. 557 (S.D.N.Y., 1934), *aff'd. on rehearing* 22 U. S. Pat. Q., 248 (S.D.N.Y., 1934).

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

sary and not a reasonable interpretation of the copyright statute.

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,*[82] 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

[82] 21 U. S. Pat. Q. 557 (S.D. N.Y., 1934), *affd. on rehearing* 22 U. S. Pat. Q. 248 (S.D.N.Y., 1934).

literary works.[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.[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.[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.

§ 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.[86] The

[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. Seltzer* et al. v. *Sunbrock* et al., 22 F.Supp. 621 (S.D. Cal., 1938).

[84] Kreymborg *v.* Durante, 21 U. S. Pat. Q. 557 (S.D.N.Y. 1934), *affd. on rehearing* 22 U. S. Pat. Q. 248 (S.D.N.Y., 1934).

[85] *Ibid.*

[86] 35 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.[87]

Performance through the medium of broadcasting has been held to be a public performance of copyrighted works.[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

[87] *Id.*, § 1(e).

[88] Buck *v.* Jewell-LaSalle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931); Jerome H. Remick & Co. *v.* American Auto Accessories Co., 5 F.(2d) 411 (C.C.A. 6th, 1925) *reversing* 298 Fed. 628 (S.D. Ohio, 1924), *cert. den.* 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 409 (1925); M. Witmark & Sons *v.* Bamberger, 291 Fed. 776 (D.N.J., 1923).

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.

[89] Green *v.* Luby, 177 Fed. 287 (C.C.S.D.N.Y., 1909).

Chapter XLII.

INFRINGEMENT OF COPYRIGHT AND REMEDIES THEREFOR.

		PAGE
SECTION 614.	Infringement Generally	1108
615.	Substantial and Material Appropriation	1110
616.	Infringement at Common Law	1112
617.	Infringement: Intention Immaterial	1112
618.	Infringements: Fair Use	1113
619.	Same: Jurisdiction	1114
620.	Statutes of Limitation	1116
621.	Damages for Infringement of Copyright	1117
622.	Damages for Infringement of Common Law Rights	1120
623.	Counsel Fees	1121

§ 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*.

[2] Echevarria *v.* Warner Bros. Pict. Corp., 12 F.Supp. 632 (S.D. Cal., 1936).

minor addition or omission of parts thereof does not avoid infringement.[3] Colorable changes are ineffective.[4] The infringing work may be in a different medium and with the use of different materials.[5] It is no defense that the plaintiff was benefited by the infringement.[6]

Mere similarity or even identity of two works does not necessarily constitute infringement since copying is essential.[7] Copying need not be direct. It may be made from memory and even unintentionally.[8]

Access may be proved by circumstances and unexplained coincidences. As was said in *Wilkie* v. *Santly:*[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."

[3] Fleischer Studios *v.* Ralph A. Freundlich, Inc., 73 F.(2d) 276 (C.C.A. 2d, 1934) *aff'g* 5 F.Supp. 808 (S.D.N.Y., 1934) *cert. den.* 294 U.S. 717, 55 Sup. Ct. 516, 79 L.Ed. 1250 (1935).

[4] Nutt *v.* National Institute, Inc., *etc.,* 31 F.(2d) 236 (C.C.A. 2d, 1929); Woodman *v.* Lydiard-Peterson Co., 192 Fed. 67 (C.C.D. Minn., 1912); Bracken *v.* Rosenthal, 151 Fed. 136 (N.D. Ill., 1907); Lawrence *v.* Dana, Fed. Cas. No. 8136, 15 Fed. Cas. 26 (C.C.D. Mass., 1869).

[5] King Features Syndicate *v.* Fleischer, 299 Fed. 533 (C.C.A. 2d, 1924); Hill *v.* Whalen & Martell, Inc., 220 Fed. 359 (S.D.N.Y., 1914).

[6] Harms *v.* Cohen, 279 Fed. 276, 279 (E.D. Pa., 1922).

[7] Harold Lloyd Corp. *v.* Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933). See Shipman *et al. v.* R. K. O. Radio Pict., Inc., *et al.,* 20 F.Supp. 249 (S.D.N.Y., 1937); Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906 (S.D.N.Y., 1937).

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."

[8] Edward & Deutsch Litho. Co. *v.* Boorman, 15 F.(2d) 35 (C.C.A. 7th, 1926), *cert. den.* 273 U.S. 738, 47 Sup. Ct. 247, 71 L.Ed. 867 (1926).

[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.*

[11] Wilkie *v.* Santly Bros., Inc., *et al.*, 91 F.(2d) 978, 979 (C.C.A. 2d, 1937); Sheldon *v.* Metro-Goldwyn Pict. Corp., 81 F.(2d) 49 (C.C.A. 2d, 1936), *cert. den. sub. nom.* Metro-Goldwyn Pict. Corp. *v.* Sheldon, 298 U.S. 669, 56 Sup. Ct. 835, 80 L.Ed. 1392 (1936); Harold Lloyd Corp. *v.* Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933); Nutt *v.* National Institute, Inc., *etc.*, 31 F.(2d) 236 (C.C.A. 2d, 1929).

[12] Harold Lloyd Corp. *v.* Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933).

[13] Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906 (S.D. N.Y., 1937); Shipman *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 249 (S.D.N.Y., 1937); Eisman *et al. v.* Samuel Goldwyn, Inc., *et al.*, 23 F.Supp. 519 (S.D.N.Y., 1938).

[14] Dam *v.* Kirk La Shelle Co., 175 Fed. 902 (C.C.A. 2d, 1910), *aff'g* 166 Fed. 589 (C.C.S.D.N.Y., 1908); West Pub. Co. *v.* Edw. Thompson Co., 169 Fed. 833 (C.C. E.D.N.Y., 1909), *modified* 176 Fed. 833 (C.C.A. 2d, 1910).

The idea[15] or plot[16] is not copyrightable but where the expression of the fundamental theme is appropriated, infringement takes place.[17] 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.[18]

A deliberate copying of but a small part of a copyrighted

[15] Nichols *v.* Universal Pict. Corp., 34 F.(2d) 145 (S.D.N.Y., 1929) *aff'd.* 45 F.(2d) 119 (C.C.A. 2d, 1930).

[16] Harold Lloyd Pict. Corp. *v.* Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933) *rev'g* 46 F.(2d) 792 (S.D. Cal., 1930); Wiren *v.* Shubert Theatre Corp. *et al.*, 5 F.Supp. 358 (S.D.N.Y., 1933), *aff'd. without opinion* 70 F.(2d) 1023 (C.C.A. 2d, 1934), *cert. den.* 293 U.S. 591, 55 Sup. Ct. 105, 79 L.Ed. 685 (1934) *rehearing den.*, 293 U.S. 631, 55 Sup. Ct. 140, 79 L.Ed. 716 (1934); Fendler *v.* Morosco, 253 N.Y. 281 (1930).

The opinion in *Wiren* v. *Shubert Theatre Corp., supra,* cites *Dymow* v. *Bolton,* 11 F.(2d) 690 (C.C.A. 2d, 1926) as authority for the proposition that a plot is not copyrightable. In *Harold Lloyd Pict. Corp.* v. *Witwer,* supra, *Nichols* v. *Universal Pict. Corp.,* 45 F.(2d) 119, 121 (C.C.A. 2d, 1930) is cited for the same proposition. But in *Nichols* v. *Universal Pict. Corp., supra,* Judge Learned Hand, at page 121, said:

"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 Shelle Co.,* 175 Fed. 902, 41 L.R.A. (N.S.) 1002, 20 Ann. Cas. 1173, and *Stodart* v. *Mutual Film Co.,* 249 Fed. 513, affirming my decision in (D.C.) 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."

[17] Simonton *v.* Gordon, 12 F.(2d) 116 (S.D.N.Y., 1925).

[18] Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906 (S.D. N.Y., 1937); Dymow *v.* Bolton, 11 F.(2d) 690 (C.C.A. 2d, 1926).

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

[19] Warren *v.* White & Wyckoff Mfg. Co., 39 F.(2d) 922 (S.D. N.Y., 1930).

[20] WEIL ON THE LAW OF COPYRIGHT, (1917) 109, 141.

[21] See Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906, 908, 909 (S.D.N.Y., 1937).

[22] M. Witmark & Sons *v.* Calloway, *et al.*, 22 F.(2d) 412 (E.D. Tenn., 1927); Lawrence *v.* Dana, Fed. Cas. No. 8136, 15 Fed. Cas. 26 (C.C.D. Mass., 1869).

[23] Altman *v.* New Haven Union Co., 254 Fed. 113 (D. Conn., 1918). See Buck *et al. v.* Jewell-La Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931); Pathé Exchange, Inc. *v.* International Alliance, *etc.*, Local No. 306, *et al.*, 3 F.Supp. 63 (S.D.N.Y., 1932). *Cf.* Meccano, Ltd. *v.* Wagner *et al.*, 234 Fed. 912 (S.D. Ohio, 1916).

[24] Meccano, Ltd. *v.* Wagner *et al.*, 234 Fed. 912 (S.D. Ohio, 1916).

[25] Journal Pub. Co. *v.* Drake, 199 Fed. 572 (C.C.A. 9th, 1912).

[26] Pathé Exchange, Inc. *v.* International Alliance, *etc.*, Local No. 306, *et al.*, 3 F.Supp. 63 (S.D. N.Y., 1932). Except that musical

infringer intended to avoid an infringement, unconscious and unintentional copying may result, for which appropriation the infringer is liable.[27]

It is immaterial that the infringer was innocent, since intent is not a necessary element in infringement,[28] except when the criminal provisions of the statute are invoked[29] or additional damages are assessed.[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.[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).

[27] Harold Lloyd Corp. *v.* Witwer, 65 F.(2d) 1 (C.C.A. 9th, 1933).

[28] Buck *v.* Jewell-La Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931); Journal Pub. Co. *v.* Drake, 192 Fed. 572 (C.C.A. 9th, 1912); Pathé Exchange, Inc. *v.* International Alliance, *etc.*, Local No. 306 *et al.*, 3 F.Supp. 63 (S.D. N.Y., 1932); M. Witmark & Sons *v.* Calloway *et al.*, 22 F.(2d) 412 (E.D. Tenn., 1927); Stern *v.* Remick & Co., 175 Fed. 282 (C.C.S.D. N.Y., 1910); Fishel *v.* Lueckel, 53 Fed. 499 (C.C.S.D.N.Y., 1892).

[29] 35 STAT. 1082 (1909), 17 U.S.C.A. § 28, 29 (1927).

[30] Schellberg *v.* Empringham, 36 F.(2d) 991 (S.D.N.Y., 1929).

[31] Chappell & Co. *v.* Fields, 210 Fed. 864 (C.C.A. 2d, 1914); Green *v.* Minzensheimer, 177 Fed. 286 (S.D.N.Y., 1909); Savage *v.* Hoffman, 159 Fed. 584 (S.D.N.Y., 1908); Bloom & Hamlin *v.* Nixon, 125 Fed. 977 (E.D. Pa., 1903).

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 *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] The allega-

[32] Green *v.* Luby, 177 Fed. 287 (S.D.N.Y., 1909).

[33] Ricordi & Co. *v.* Mason, 201 Fed. 182 (S.D.N.Y., 1911).

[34] Macmillan Co. *v.* King, 223 Fed. 862 (D. Mass., 1914).

[35] 35 STAT. 1084 (1909), 17 U.S.C.A. § 34 (1927).

[36] Chapman *v.* Perry, 12 Fed. 693 (C.C.D. Or., 1882).

[37] T. B. Harms & Francis, Day & Hunter *v.* Stern, 229 Fed. 42 (C.C.A. 2d, 1916); Photo-Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 213 Fed. 374 (S.D. N.Y., 1914), *aff'd.* 220 Fed. 448 (C.C.A. 2d, 1915); Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 773 (1924).

[38] Goldwyn Pict. Corp. *v.* Howells Sales Co. *et al.*, 292 Fed. 458 (S.D.N.Y., 1922).

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 Rules[46] 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.*

[40] Royal Sales Co. *v.* Gaynor, 164 Fed. 207 (S.D.N.Y., 1908).

[41] *Ibid.*

[42] Photo-Drama Motion Pict. Co. *v.* Social Uplift Film Corp., 220 Fed. 448 (C.C.A. 2d, 1915).

[43] 35 STAT. 1084 (1909), 17 U.S.C.A. § 35 (1927).

[44] Lederer *v.* Ferris, 149 Fed. 250 (C.C.S.D.N.Y., 1906); Spears *v.* Flynn, 102 Fed. 6 (W.D. Mich., 1900); Lederer *v.* Rankin, 90 Fed. 449 (C.C.S.D. Ohio, 1898).

[45] Lumiere *v.* Mae Emma Wilder, Inc., 261 U.S. 174, 43 Sup. Ct. 312, 67 L.Ed. 596 (1923).

[46] Promulgated pursuant to § 25, 35 STAT. 1081 (1909), 17 U.S.C.A. (1927). See 17 U.S.C.A. (1927) at page 139.

[47] 28 U.S.C.A. § 723 (1928), 17 U.S.C.A. (1927) at page 197.

Actions for the enforcement of common law rights are properly lodged in state courts [48] 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.[49] 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,[50] contract matters,[51] unfair competition,[52] fiduciary relations [53] and other suits [54] 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.

[48] Boucicault *v.* Hart, Fed. Cas. No. 1692 (C.C.S.D.N.Y., 1875); Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 773 (1924); Palmer *v.* De Witt, 47 N.Y. 532 (1872); O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916). See Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906, 908 (S.D.N.Y., 1937).

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

[50] Danks *v.* Gordon, 272 Fed. 821 (C.C.A. 2d, 1921). See Ehrlich *v.* Jack Mills, Inc., 215 App. Div. 116, 213 N.Y.Supp. 395 (1926), *aff'd.* 248 N.Y. 598, 162 N.E. 539 (1928).

[51] Bird *v.* Thanhouser, 160 Ill. App. 653 (1911).

[52] Gotham Music Service *v.* Denton & Haskins Music Pub. Co., 259 N.Y. 86, 181 N.E. 57 (1932).

[53] Underhill *v.* Schenck, 238 N.Y. 7, 143 N.E. 773 (1924); April Prod., Inc. *v.* Harms, Inc., 1 N.Y. Supp.(2d) 382 (Sup. Ct. Spec. Term N. Y. County, 1937).

[54] State *ex rel.* Atty. Gen. *v.* American Soc. of Composers, Authors & Pub. (ASCAP), 13 F. Supp. 141 (W.D. Wash., 1935).

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.[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.[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.[57] Such prescriptive legislation must be broad enough to include the class of actions to which the tort of copyright infringement belongs.[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.[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.[60]

§ 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-

[55] Pathé Exchange, Inc. *v.* Dalke, 49 F.(2d) 161 (C.C.A. 4th, 1931) (applies the Virginia statute of limitations); McCaleb *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).

[56] *Ibid.*

[57] McCaleb *v.* Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924); Hall *v.* Law, 102 U.S. 461, 26 L.Ed. 217 (1880).

[58] McCaleb *v.* Fox Film Corp., 299 Fed. 48 (C.C.A. 5th, 1924).

[59] *Ibid.*

[60] See Sandler & Robins, Inc. *v.* Katz, unreported (S.D.N.Y., Knox, J., 1925).

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 occuring after actual notice to the defendant.[61] 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.[62]

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.[63] The discretion granted to the court by Section 25 relates solely to the amount of damages

[61] 35 STAT. 1081 (1909), 17 U.S.C.A. § 25(b) (1927).

[62] Jewell-La Salle Realty Co. *v.* Buck *et al.*, 283 U.S. 202, 51 Sup. Ct. 407, 75 L.Ed. 978 (1931) (musical composition); Westerman Co. *v.* Dispatch Printing Co., 249 U.S. 100, 39 Sup. Ct. 194, 63 L.Ed. 499 (1919) (style sketches); Buck *v.* Bilkie, 63 F.(2d) 447 (C.C.A. 9th, 1933) (musical composition); Tiffany Prod., Inc., *et al. v.* Dewing *et al.*, 50 F.(2d) 911 (D. Md., 1931) (dramatic motion pictures); Berlin *v.* Daigle, 31 F.(2d) 832 (C.C.A. 5th, 1929) (musical composition); Fred Fisher, Inc. *v.* Dillingham *et al.*, 298 Fed. 145 (S.D.N.Y., 1924) (musical composition).

[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.[64] The latter represents real as opposed to nominal damages. Actual damages are damages which are legally existent as well as legally ascertained.[65]

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.[66] 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.[67]

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[68] which must by statute award damages within the minimum and maximum limitations. Plaintiff is entitled to ask the court in its

[64] S. E. Hendricks Co. *v.* Thomas Pub. Co., 242 Fed. 37 (C.C.A. 2d, 2d, 1917).

[65] *Ibid.*

[66] Jewell-La Salle Realty Co. *v.* Buck *et al.*, 283 U.S. 202, 51 Sup. Ct. 407, 75 L.Ed. 978 (1931) (musical composition); Westerman Co. *v.* Dispatch Printing Co., 249 U.S. 100, 39 Sup. Ct. 194, 63 L.Ed. 499 (1919) (style sketches); Buck *v.* Bilkie, 63 F.(2d) 447 (C.C.A. 9th, 1933) (musical composition); Tiffany Prod., Inc., *et al. v.* Dewing *et al.*, 50 F.(2d) 911 (D. Md., 1931) (dramatic motion pictures); Berlin *v.* Daigle, 31 F.(2d) 832 (C.C.A. 5th, 1929) (musical composition); Fred Fisher, Inc. *v.* Dillingham *et al.*, 298 Fed. 145 (S.D.N.Y., 1924) (musical composition).

[67] S. E. Hendricks Co. *v.* Thomas Pub. Co., 242 Fed. 37 (C.C.A. 2d, 1917).

[68] Davilla *v.* Brunswick-Balke Collender Co. of N. Y. *et al.*, 94 F.(2d) 567 (C.C.A. 2d, 1938); Douglas *v.* Cunningham, 294 U.S. 207, 55 Sup. Ct. 365, 79 L.Ed. 862 (1935).

discretion to award damages within the statutory limits in lieu of actual damages.[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).[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.[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.[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.

§ 622. Damages for Infringement of Common Law Rights.

Injunctions and accountings of profits are granted against infringers of common law rights. Where the

[69] S. E. Hendricks Co. *v.* Thomas Pub. Co., 242 Fed. 37 (C.C.A. 2d, 1917).

[70] *Ibid.*

[71] 35 STAT. 1081 (1909), 17 U.S.C.A. § 25(b) (1927); General Drafting Co., Inc. *v.* Andrews, 37 F.(2d) 54 (C.C.A. 2d, 1930); Warren *v.* White & Wycoff Mfg. Co., 39 F.(2d) 922 (S.D.N.Y., 1930); Schellberg *v.* Empringham, 36 F.(2d) 991 (S.D.N.Y., 1929).

[72] See § 662 *infra.*

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.

§ 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

[73] O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916); Taft *v.* Smith, Gray & Co., 76 Misc. 283, 134 N.Y.Supp. 1011 (1912); Tams *v.* Witmark, 30 Misc. 293, 63 N.Y.Supp. 721 (1900).

[74] Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896).

[75] Taft *v.* Smith, Gray & Co., 76 Misc. 283, 134 N.Y.Supp. 1011 (1912).

[76] *Ibid.*

[77] 35 STAT. 1084 (1909), 17 U.S.C.A. § 40 (1927); Marks *v.* Leo Feist, Inc., 8 F.(2d) 460 (C. C.A. 2d, 1925).

[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.[79] 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.[80] 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.[81]

[79] M. Witmark & Sons *v.* Calloway *et al.*, 22 F.(2d) 412 (E.D. Tenn., 1927).

[80] *Ibid.*

[81] Caruthers *v.* R. K. O. Radio Pict., Inc., 20 F.Supp. 906 (S.D. N.Y., 1937).

Chapter XLIII.

MUSICAL CONTENT OF BROADCAST PROGRAMS.

PAGE

SECTION 624. Copyrighted Musical Works Generally..... 1123
625. Grand Rights and Small Rights Distinguished..... 1124
626. Broadcast Performance as Infringement of Musical Copyright 1126
627. Same: Defense of Independent Contractor Not Available 1127
628. Same: *Witmark* v. *Bamberger; Remick* v. *American Automobile Accessories Co.* 1127
629. Same: Rebroadcast Performances 1130
630. Same: Public Reception Thereof..... 1132
631. Broadcast Performances for Profit..... 1140
632. Same: Sustaining Programs 1141
633. Same: Non-Profit Stations 1142
634. Same: Broadcast Performances—When Public..... 1144
635. Same: Place Where Infringing Performance Broadcast Not Important..... 1145
636. Same: Studio Audiences 1146

§ 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.[1]

Musical compositions are susceptible of broadcast performance either by way of dramatization or by non-dramatic rendition thereof. Broadcast programs which dram-

[1] 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;[2] but a copyrighted non-dramatic musical composition may not be dramatized without infringing upon the exclusive rights of the owner of the copyright.[3]

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[4] and the lyrics[5] are independently protected by

[2] *Cf.* M. Witmark & Sons *v.* Pastime Amusement Co., 298 Fed. 470 (E.D.S.C., 1924); Green *v.* Luby, 177 Fed. 287 (C.C.S.D.N.Y., 1909).

[3] M. Witmark & Sons *v.* Pastime Amusement Co., 298 Fed. 470 (E.D.S.C., 1924). See Kalem Co. *v.* Harper Bros., 222 U.S. 55, 32 Sup. Ct. 20, 56 L.Ed. 92 (1911). See § 605 *supra*.

[4] M. Witmark & Sons *v.* Calloway *et al.*, 22 F.(2d) 412 (E.D. N.D. Tenn., 1927); Standard Music Roll Co. *v.* F. A. Mills, Inc., 241 Fed. 360 (C.C.A. 3d, 1917). See 35 STAT. 1076 (1909), 17 U.S.C.A. § 3 (1927). *Contra* under prior copyright statutes. *M. Witmark & Sons* v. *Standard Music Roll Co.*, 221 Fed. 376 (C.C.A. 3d, 1915).

[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]

[6] M. Witmark & Sons *v.* Standard Music Roll Co., 221 Fed. 376 (C.C.A. 3rd, 1915).

[7] 35 STAT. 1075, 1081 (1909), 17 U.S.C.A. §§ 1, 25 (1927).

[8] 242 U.S. 591, 37 Sup. Ct. 232, 61 L.Ed. 511 (1917).

[9] Herbert *et al. v.* The Shanley Company, 242 U.S. 591, 37 Sup. Ct. 232, 61 L.Ed. 511 (1917).

[10] Hubbell *et al. v.* Royal Pastime Amusement Co., 242 Fed. 1002 (S.D.N.Y., 1917).

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 acquiescense 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]

§ 628. Same: Witmark v. Bamberger; Remick v. American Automobile Accessories Co.

The earliest case dealing with radio broadcast performance of copyrighted music is *Witmark* v. *Bamberger*[14] where District Judge Lynch followed the previous decisions

[11] M. Witmark & Sons *v.* Pasttime Amusement Co., 298 Fed. 470 (E.D.S.C., 1924); Waterson, Berlin & Snyder Co. *v.* Tollefson, 253 Fed. 859 (S.D. Cal., 1918). See M. Witmark & Sons *v.* Calloway *et al.*, 22 F.(2d) 412 (E.D.N.D. Tenn., 1927) (player piano).

[12] M. Witmark & Sons *v.* Pasttime Amusement Co., 298 Fed. 470 (E.D.S.C., 1924); Harms *v.* Cohen, 279 Fed. 276 (E.D. Pa., 1922).

[13] *Ibid.* See Berlin *v.* Edelweiss Cafe, No. 7201, Filed Oct. 7, 1921 (U.S. D.C., Colo., 1921). See also Performing Rights Soc., Ltd. *v.* Thompson, 34 Times L. Rep. 351 (Eng., 1918).

[14] M. Witmark & Sons *v.* L. Bamberger & Co., 291 Fed. 776 (D.N.J., 1923).

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*[15] 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.*,[16] 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*[17] 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-

[15] *Ibid.*

[16] 298 Fed. 628 (S.D. Ohio, 1924).

[17] M. Witmark & Sons *v.* L. Bamberger & Co., 291 Fed. 776 (D.N.J., 1923).

pose of entertainment, and that payment be made in one way or another as compensation for the entertainment provided.[18] The Court relied largely on *White-Smith Music Co.* v. *Apollo Co.*[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[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.*[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.*[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.*[23]

The facts in *Remick* v. *American Automobile Accessories Co.*[24] and *M. Witmark & Sons* v. *L. Bamberger & Co.*[25] are

[18] Remick & Co. *v.* American Automobile Accessories Co., 298 Fed. 628 (S.D. Ohio W.D., 1924).

[19] 209 U.S. 1, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).

[20] Remick & Co. *v.* American Automobile Accessories Co., 5 F.(2d) 411 (C.C.A. 6th, 1925).

[21] 242 U.S. 591, 37 Sup. Ct. 232, 61 L.Ed. 511 (1917). See § 626 *supra.*

[22] 209 U.S. 1, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).

[23] 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 409 (1925).

[24] 5 F.(2d) 411 (C.C.A. 6th, 1925), *rev'g* 298 Fed. 628 (S.D. Ohio W.D., 1924), *cert. den.* 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 409 (1925).

[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 [27] and Australia.[28]

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,[29] 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

[27] Messager *v.* British Broadcasting Co., Ltd., [1927] 2 K.B. 543, *revd. on other grounds* [1928] 1 K.B. 660, *affd.* [1929] A.C. 151. See COPINGER ON THE LAW OF COPYRIGHT (7th ed., 1936) 144 *et seq.*

[28] Chappell & Co., Ltd. *v.* Associated Radio Co. of Australia, Ltd., [1925] Vict. L. R. 350.

[29] Remick & Co. *v.* American Automobile Accessories Co., 5 F.(2d) 411 (C.C.A. 6th, 1925), *rev'g* 298 Fed. 628 (S.D. Ohio W.D., 1924); M. Witmark & Sons *v.* L. Bamberger & Co., 291 Fed. 776 (D.N.J., 1923).

person who creates another public performance which is predicated upon the original broadcast performance.[30]

§ 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 *Buck* v. *Jewell-La Salle Realty Co.*,[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 *Buck* v. *Jewell-La Salle Co.*[32] was

[30] Society of European Stage Authors, *etc. v.* N. Y. Hotel Statler Co., Inc., 19 F.Supp. 1 (S.D.N.Y., 1937). See Performing Right Soc., Ltd. *v.* Hammond's Bradford Brewery Co., Ltd. [1934] 1 Ch. 121 (C.A.); Canadian Performing Soc. *v.* Ford Hotel, [1935] 2 D.L.R. 391 (Que. Super. Ct.).

[31] Also *sub nom.* Buck *et al. v.* Duncan *et al.*, 32 F.(2d) 366 (W.D. Mo., 1929).

[32] *Ibid.*

decided, another action was instituted in the United States District Court for the Southern District of California [33] 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).

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.[34] 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''.[35] 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.[36] 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,[37] 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.

[36] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1 *et seq.*

[37] 35 STAT. 1084 (1909), 17 U.S.C.A. § 41 which enacts the rule of *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 28 Sup. Ct. 722, 52 L.Ed. 1086 (1908). See H. Rep. No. 2222, 60th Cong., 2d Sess., Feb. 22, 1909, 19.

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*.

[40] Buck *v.* Jewell-La Salle Realty Co., 283 U.S. 191, 201, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

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 query [44] 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

[41] 40 F.(2d) 734 (S.D. Cal., 1929).

[42] *Ibid.*

[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."

[44] Sprague, *Copyright — Radio and the Jewell-La Salle case,* (1932) 3 AIR L. REV. 417, 424.

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.*[45] 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*[46] 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[47] 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

[45] 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

[46] 5 F.(2d) 411 (C.C.A. 6th, 1925) *rev'g* 298 Fed. 628 (S.D. Ohio, 1924), *cert. den.* 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 409 (1925).

[47] See Sprague, *op. cit. supra* n. 44.

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.*,[48] 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.*[49] 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.[50] A *dictum*

[48] [1934] 1 Ch. 121 (C.A.).

[49] 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

[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 Wr. 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."

[51] [1927] 2 K.B. 543, 548, *revd. on other grounds* [1928] 1 K.B. 669, *affd.* [1929] A.C. 151.

[52] (1930) 1 J. RADIO L. 584, 590 *et seq.*

[53] Reichsgericht (Sup. Ct.), June 11, 1932, (1932) 2 J. RADIO L. 758; The Amtsgericht at Sinsheim, Sept. 29, 1927, (1931) 1 J. RADIO L. 156; Court of Appeals at Copenhagen, Jan. 20, 1930, (1931) 1 J. RADIO L. 144; Landsgericht at Danzig, April 10, 1929, (1931) 1 J. RADIO L. 146.

[54] 19 F.Supp. 1 (S.D.N.Y., 1937).

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.*[55] 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 [56] 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.[57] 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*:[58]

> "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

[55] 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

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

[57] *Ibid.*

[58] *Id.*, at 595.

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

[59] Hubbell *et al. v.* Royal Pastime Amusement Co., 242 Fed. 1002 (S.D.N.Y., 1917).

[60] Remick & Co. *v.* American Automobile Accessories Co., 5 F.(2d) 411 (C.C.A. 6th, 1925).

[61] Remick *v.* General Electric Co., 16 F.(2d) 829 (S.D.N.Y., 1926).

[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

[62] DE WOLF, AN OUTLINE OF COPYRIGHT LAW (1925) 110.

[63] *Ibid.;* Note (1936) 7 AIR L. REV. 115.

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.[65] 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.[66] 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.[67] 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

[65] Russell *v.* Smith, 12 Q.B. 217 (Eng., 1848).

[66] Harms, Inc., *etc. v.* Martans Club, Ltd., 136 L.T. Rep. 362, [1927] 1 Ch. 526 (C.A.); Performing Right Society, Ltd. *v.* Hawthorne's Hotel (Bournemouth), Ltd., 149 L.T. Rep. 425, [1933] 1 Ch. 855.

[67] Duck *v.* Bates, 12 Q.B. 79 (Eng., 1884); Jennings *v.* Stephens, 154 L.T. Rep. 479 (Eng., 1936), [1935] W.N. 141. See COPINGER ON THE LAW OF COPYRIGHT (7th ed., 1936) 140 *et seq.*

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 [68] 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.*,[69] 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,[70] as well as by the courts of England.[71]

§ 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

[68] Sprague, *Copyright — Radio and the Jewell-La Salle Case*, (1932) 3 AIR L. REV. 417.

[69] 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931).

[70] Remick & Co. *v.* American Automobile Accessories Co., 5 F.(2d) 411 (C.C.A. 6th, 1925), *rev'g* 298 Fed. 628 (S.D. Ohio W.D., 1924), *cert. den.* 269 U.S. 556, 46 Sup. Ct. 19, 70 L.Ed. 22 (1925); M. Witmark & Sons *v.* L. Bamberger & Sons, 291 Fed. 776 (D.N.J., 1923).

[71] Performing Rights Soc., Ltd. *v.* Hammond's Bradford Brewery Co., Ltd. [1934] 1 Ch. 121 (C.A.). See Messager *v.* British Broadcasting Co., [1927] 2 K.B. 543, 548; COPINGER, *op. cit. supra* n. 66, 144 *et seq.*

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.

§ 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

[72] See COPINGER, *op. cit. supra* n. 66, 145 *et seq.*

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.[73] 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.

[73] *Cf.* Fromont *v.* Aeolian Co., 254 Fed. 592 (S.D.N.Y., 1918).

Chapter XLIV.

COPYRIGHT PROTECTION OF BROADCAST PROGRAM SCRIPTS.

PAGE

SECTION 637. Generally 1149
638. Broadcast Program Script and Continuity Distinguished 1150
639. Classification of Broadcast Program Scripts 1151
640. Analysis of Contents of Scripts 1152
641. Copyright Protection of Continuity 1154
642. Ownership of Copyright in Scripts and Continuities . . 1155
643. Same: Whether Author Is Employee or Independent Contractor 1158
644. Scripts Prepared by Government Agencies and Appearing in Government Publications 1161
645. The Broadcast of Letters 1162
646. Broadcast of Telegrams 1163
647. Right of Script Writer to By-Line, Billing, etc 1163
648. Contracts for Broadcast Program Scripts: Assignability Thereof 1165
649. Copyright Upon Scripts as Affecting Performance Thereof 1167
650. Producer's Deviation from or Distortion of Broadcast Program Script 1163
651. Mechanical Reproduction of Broadcast Program Scripts 1170

§ 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[1] and does not preclude the protection at common law of new and creative efforts in the field of radio broadcasting as literary property.[2]

§ 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

[1] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1 *et seq.* (1927).

[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,[3] or someone specifically engaged for that purpose.

[3] *E.g.*, Uproar Co. *v.* National Broadcasting Co., 8 F.Supp. 358 (D. Mass., 1934).

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.[4] 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 [5] 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.

[5] Act of Mar. 4, 1909, 35 STAT. 1075 (1909), 17 U.S.C.A. § 1 *et seq.* (1927).

ever, Section 5 of the Act of 1909 describes with some generality works which are the subject matter of copyright.[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.[7] They may also secure the benefit of statutory copyright by registration as unpublished works.[8] Authors of scripts embodying addresses, lectures or comments, may secure copyright registration under Section 5(c) of the Act of 1909,[9] which provides parenthetically for the registration of works prepared for oral delivery.

[6] *Ibid.,* amended by Act of Aug. 24, 1912, 37 STAT. 488 (1912), 17 U.S.C.A. § 5 (1927).

Section 5, *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."

[7] See § 579 *et seq. supra.*

[8] See STAT. 1078 (1908), 37 STAT. 488 (1912), 17 U.S.C.A. § 11 (1927).

[9] 35 STAT. 1075 (1909), 17 U.S.C.A. (1927).

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.[10] 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.[11] When a broadcast program script is printed and published, copyright registration must be promptly secured thereon as a published work.[12]

§ 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

[10] *Ibid.*

[11] C. L. Bouvé, Register of Copyrights, *Radio Material,* Circular Letter No. 7.

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.*

[12] 35 STAT. 1078 (1909), 38 STAT. 311 (1914), 17 U.S.C.A. §§ 10, 12 (1927). See §§ 589, 590, 591 *supra.*

in a program.[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.[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.[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,[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.[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.[18]

§ 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

[13] See § 638 *supra*.

[14] 35 STAT. 1076 (1909), 17 U.S.C.A. § 5(d) (1927).

[15] C. L. Bouvé, *op. cit. supra* n. 11.

[16] 35 STAT. 1076 (1909), 17 U.S.C.A. § 5 (1927).

[17] *Ibid.* *Cf.* Seltzer *et al. v.* Sunbrock *et al.*, 22 F.Supp. 621 (S.D. Cal., 1938).

[18] *Ibid.*

grant to another the right to obtain copyright registration of his work.[19] 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

[19] See §§ 587, 588 *supra*.

[20] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1. See § 600 *supra*.

[21] Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896). See §§ 587, 588 *supra*.

[22] Brady *v.* Reliance Motion Pict. Corp., 232 Fed. 259 (S.D. N.Y., 1916).

[23] *Cf.* Mail & Exp. Co. *v.* Life Pub. Co., 192 Fed. 899 (C.C.A. 2d, 1912); Dam *v.* Kirke La Shelle Co., 175 Fed. 902 (C.C.A. 2d, 1910).

[24] See Press Pub. Co. *v.* Monroe, 73 Fed. 196 (C.C.A. 2d, 1896).

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.[25] 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.[26] 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 [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.[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.[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.[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.[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.[32] Where the employ-

[27] Lacy *v.* Toole, 15 L.T. (N.S.) 512 (1867).

[28] Dam *v.* Kirke La Shelle Co., 175 Fed. 902 (C.C.A. 2d, 1910).

[29] Kortlander *v.* Bradford, 116 Misc. 664, 190 N.Y.Supp. 311 (1921).

[30] *Ibid.*

[31] See FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) § 8.

[32] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938). See Brown *v.* Mollé Co. *et al.*, 20 F.Supp. 135 (S.D.N.Y., 1937). *Cf.* Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936). See also § 587 *supra.*

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.[32a] Even where the compensation to the employee is based upon a profit-sharing arrangement, the master and servant relationship may exist.[33] The author who is paid upon a quantity basis, *viz.* so much per minute, per page or per word, may also be deemed an employee.[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.[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.[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.[37] An author is not precluded from basing his work on experience gained during his employment and may refer to original sources of information.[38]

A program producer who employs a script writer receives full rights of ownership, including the right to obtain copy-

[32a] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57, 59 (C.C.A. 2d, 1938).

[33] Mallory *v.* Mackaye, 86 Fed. 122 (C.C.S.D.N.Y., 1898).

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

[35] Lawrence *v.* Aflalo, [1902] 1 Ch. 264 (Eng.). But see London Universal Press *v.* University Tutorial Press, [1916] 2 Ch. 681 (Eng.).

[36] T. B. Harms and Francis, Day & Hunter *v.* Stern, 222 Fed. 581 (S.D.N.Y., 1915), *aff'd.* 231 Fed. 645 (C.C.A. 2d, 1916); Ward-Lock & Co. *v.* Long, [1906] 2 Ch. 550 (Eng.).

[37] Peters *v.* Borst, 24 Abb. N.C. 1, 9 N.Y.Supp. 789 (1889), *rev'd on other grounds sub nom.* 142 N.Y. 62, 36 N.E. 814 (1894).

[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.[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[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.[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,[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.[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.[43] In determining whether the author of the script is in the employ of the producer of the program, the question must first be

[39] 35 STAT. 1075 (1909), 17 U.S.C.A. §§ 23, 62 (1927); Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938).

[39a] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938).

[40] *Cf.* Uproar Co. *v.* National Broadcasting Co., 81 F.(2d) 373 (C.C.A. 1st, 1936), *aff'g* 8 F.Supp. 358 (D. Mass., 1934).

[41] Beach *v.* Velzey, 238 N.Y. 100, 103, 143 N.E. 805 (1924).

[42] *Ibid.* See also Dutcher *v.* Victoria Paper Mills Co., 219 App. Div. 541, 220 N.Y.Supp. 625 (1927).

[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.[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.[44a]

Rights of common law and literary property may be obtained by adverse possession.[45] Common law rights may be obtained by continued possession, claim of title and uninterrupted assertion of rights.

§ 644. Scripts Prepared by Government Agencies and Appearing in Government Publications.

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 *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.[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

[44] Hexamer *v.* Webb, 101 N.Y. 377, 385, 4 N.E. 755 (1886).

[44a] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57, 59 (C.C.A. 2d, 1938).

[45] Hart *v.* Fox, 166 N.Y.Supp. 793 (1917); AMDUR ON COPYRIGHT LAW (1936) 53.

[46] 35 STAT. 1077 (1909), 17 U.S.C.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.[47]

§ 645. The Broadcast of Letters.

At common law, the writer of a letter has literary property rights in his missive.[48] The recipient of the letter has title to the physical property upon which the letter is written.[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,[50] and the writer has the right to make copies of the letter in the hands of the recipient.[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.[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,

[47] *Ibid.* See Du Puy *v.* Post Telegram Co., 210 Fed. 883 (C.C.A. 3d, 1914).

[48] *In re* Ryan's Estate, 115 Misc. 472, 188 N.Y.Supp. 387 (1921); Folsom *v.* Marsh, Fed. Cas. No. 4901, 2 Story 100 (C.C.D. Mass., 1841); Baker *v.* Libbie, 97 N.E. 109 (Mass., 1912). See Chapter XXXIX. *supra.*

[49] Baker *v.* Libbie, 97 N.E. 109 (Mass., 1912).

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

the writer cannot claim any appropriation of his common law literary property rights. If the letter is written to another 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[53] 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.[54] 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 principles govern his legal rights.[55] 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.[56]

§ 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 registration 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,[57] to demand that

[53] Letters are copyrightable. *Folsom* v. *Marsh,* Fed. Cas. No. 4901, 2 Story 100 (C.C.D. Mass., 1841).

[54] Kreymborg *v.* National Broadcasting Co., Inc., 22 U. S. Pat. Q. 248 (S.D.N.Y., 1934). See § 612 *supra.*

[55] Kiernan *v.* Manhattan Quotation T. Co., 50 How. Pr. 194 (N.Y., 1876). See Jewelers' Merc. *v.* Jewelers' Weekly Pub. Co., 155 N.Y. 241, 253, 49 N.E. 872 (1892); AMDUR ON COPYRIGHT LAW (1936) 50, 353.

[56] *Ibid.*

[57] FROHLICH & SCHWARTZ, THE LAW OF MOTION PICTURES (1917) 206, 210.

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 [58] or for damages.[59]

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.[60] Where the producer has agreed to give program credit to the author of the basic work, such an agreement will be enforceable.[61] 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.

[59] Paramount Productions, Inc. *v.* Smith, 91 F.(2d) 863 (C.C.A. 9th, 1937).

[60] *Semble* De Bekker *v.* Frederick A. Stokes Co. *et al.*, 168 App. Div. 452, 153 N.Y.Supp. 1066 (1915), *modified* 172 App. Div. 960, 157 N.Y.Supp. 576 (1916).

[61] Paramount Productions, Inc. *v.* Smith, 91 F.(2d) 863 (C.C.A. 9th, 1937).

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.

§ 648. Contracts for Broadcast Program Scripts: Assignability Thereof.

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

[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).

[66] See FROHLICH & SCHWARTZ, *op. cit. supra* n. 56, § 14. See § 412 *supra.*

produce the script, it would be a breach of the license contract,[67] but if the license agreement by its terms is broad enough to include such sub-license, the author cannot interfere 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.[68] 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.[69]

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.[70]

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.[71] Similarly, a receiver in supplementary proceedings 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.[72] Such a license

[67] Peple *v.* Comstock, N.Y.L.J., April 27, 1909.

[68] Heap *v.* Hartley, 42 Ch. Div. 461 (Eng., 1889). See FROHLICH & SCHWARTZ, *op. cit. supra* n. 56, 70, 71, n. 7.

[69] FROHLICH & SCHWARTZ, *op. cit. supra* n. 56, 69, n. 5.

[70] Waterman *v.* Shipman, 55 Fed. 982 (C.C.A. 2d, 1893); Lucas *v.* Moncrieff, 21 T.L.R. 683 (Eng., 1905).

[71] Gibson *v.* Carruthers Exchequer, 8 M. & W. 321 (Eng., 1841). But where the producer becomes the copyright owner and the author receives royalties therefrom, 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).

[72] Yerrington *v.* Greene, 7 R.I. 593 (1863). See § 412 *supra*.

to broadcast a script being purely personal, it terminates upon the death of either the producer or the author.[73]

A judgment creditor of an author may not levy execution upon the latter's unpublished broadcast scripts. If the author's scripts, however, are fully owned by a corporation, it does not appear likely that the exemption granted to the author individually would similarly be available to the corporation.

§ 649. Copyright Upon Scripts as Affecting Performance Thereof.

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.[74]

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.[75]

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.[76] 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, 1938).

[75] See §§ 626, 629, 632, 633, 634 *supra*.

[76] Clemens *v.* Press Pub. Co., 67 Misc. 183, 122 N.Y.Supp. 206 (1910).

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.[77] 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.[78] 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.[79]

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 multilated work as the work of the author.[80] 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) 287 *et seq.*

[78] American Malting Co. *v.* Keitel, 209 Fed. 351 (C.C.A. 2d, 1913); American Law Book Co. *v.* Chamberlayne, 165 Fed. 313 (C.C. A. 2d, 1908).

[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.[81]

Ordinarily, therefore, a licensee will be enjoined [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.[83] An author has a strict right to preserve the identity of his creation.[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.[85] It is unnecessary to prove malice or actual damages in such a libel action.[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.[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.[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

[81] Angers *v.* Leprohon, 22 Que. S.Ct. 170 (Can.).

[82] Royle *v.* Dillingham, 53 Misc. 383, 104 N.Y.Supp. 783 (1907). See also Manners *v.* Famous Players-Lasky Corp., 262 Fed. 811 (S.D.N.Y., 1919).

[83] See Humphries *v.* Thompson, Times (Eng.) April 29, 30, May 1, 1908, cited in FROHLICH & SCHWARTZ, *op. cit. sppra* n. 56, 57, n. 82.

[84] De Bekker *v.* Frederick A. Stokes Co., 168 App. Div. 452, 153 N.Y.Supp. 1066 (1915), *modified* 172 App. Div. 960, 157 N.Y.Supp. 576 (1916).

[85] *Cf.* Curwood *v.* Affiliated Distributors, Inc. *et al.*, 283 Fed. 219 (S.D.N.Y., 1922). See Clemens *v.* Belford, 14 Fed. 728 (C.C. N.D. Ill., 1883).

[86] See Ridge *v.* English Illustrated Mag., 29 T.L.R. 592 (Eng., 1913).

[87] See Harper Bros. *v.* Klaw, 232 Fed. 609 (S.D.N.Y., 1916).

[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]

[89] *Cf.* Kalem Co. *v.* Harper Bros., 222 U.S. 55, 32 Sup. Ct. 20, 56 L.Ed. 92 (1911); Metro-Goldwyn, *etc.*, Corp., *et al. v.* Bijou Theatre Co., Inc., *et al.*, 59 F.(2d) 70 (C.C.A. 1st, 1932).

[90] O'Neill *v.* General Film Co., 171 App. Div. 854, 157 N.Y.Supp. 1028 (1916). See Chapter XXXIX. *supra.*

[91] *Ibid.*

[92] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(d) (1927).

[93] See § 658 *infra.*

Chapter XLV.

MECHANICAL REPRODUCTION OF COPYRIGHTED WORKS.

PAGE

SECTION 652. Mechanical Reproduction of Copyrighted Musical Work Included Within Scope of Copyright Protection. 1172
653. No Right of Mechanical Reproduction Prior to Act of 1909. 1172
654. Right of Mechanical Reproduction Granted by Existing Copyright Law. 1174
655. Compulsory License Provisions. 1174
656. Same: When Effective. 1175
657. Constitutionality of Compulsory License Provisions. . 1176
658. Compulsory License Provisions Not Applicable to Dramatico-Musical Works. 1178
659. The British Copyright Act: Mechanical Reproductions and Compulsory Licenses. 1178
660. United States and British Copyright Acts: Compulsory Licenses Distinguished. 1179
661. What Constitutes Mechanical Reproduction: Generally 1180
662. Mechanical Reproductions and the Act of 1909: Compulsory License Not Applicable to Electrical Transcriptions and Other Devices for Public Performance for Profit. 1180
663. Electrical Transcriptions Contain Special Arrangements and Exceptional Uses of Copyrighted Works, Rendering Compulsory License Inapplicable. 1183
664. Compulsory License: Phonograph Records and Piano Rolls. 1185
665. Mechanical Reproductions—Act of 1909 Not Retroactive. 1186
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

PAGE

SECTION 670. Same: "Off-the-Air" Recordings for Public Performance. 1196
671. Same: "Off-the-Air," "Line," "Instantaneous" and "Studio" Recordings Distinguished. 1197
672. Same: Liability to Copyright Owner. 1198
673. Compulsory License Provisions Not Applicable to Off-the-Air Recordings. 1199
674. Same: Broadcast Performance of Phonograph Records 1201

§ 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.[1] 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.[2]

§ 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 . . .".[3]

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.[4] The fact that such copyright

[1] 35 STAT. 1075 (1909), 17 U.S. C.A. § 1(d) (1927). See § 600 *supra*.

[2] *Id.*, at § 1(e).

[3] REV. STAT. (U.S., 1898) § 4952, as amended by Act of Mar. 3, 1891, 26 STAT. 1109.

[4] White-Smith Music Pub. Co. *v.* Apollo Co., 209 U.S. 1, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).

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).

[9] White-Smith Music Pub. Co. *v.* Apollo Co., 209 U.S. 1, 19, 28 Sup. Ct. 319, 52 L.Ed. 655 (1908).

[10] Stern *v.* Rosey, 17 App. D.C. 562 (1901); Kennedy *v.* McTammany, 33 Fed. 584 (C.C.D. Mass., 1888).

[11] 35 STAT. 1075 (1909), 17 U.S.C.A. (1927).

§ 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.[11a] 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.[12]

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.[13]

§ 655. Compulsory License Provisions.

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,[14] 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."[15] 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*.

[14] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

[15] *Ibid.*

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.[16] 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.

[16] *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.[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.

§ 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?[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

[16a] G. Ricordi & Co., Inc. *v.* Columbia Graphophone Co., 263 Fed. 354 (C.C.A. 2d, 1920). See § 666 *infra*.

[17] See § 598 *et seq. 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*,[18] 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).

§ 658. Compulsory License Provisions Not Applicable to Dramatico-Musical Works.

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]

[19] Boosey *v.* Whight, [1900] 1 Ch. 122; Newmark *v.* National Phonograph Co., 23 T.L.R. 439 (Eng., 1907); Monckton *v.* Gramophone Co., 106 L.T. 84 (Eng., 1912).

[20] 1 & 2 GEO. V, c. 46, § 19 (1911). See COPINGER ON THE LAW OF COPYRIGHT (7th ed., 1936) 211 *et seq.*

§ 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 [21] 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.[22] 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.[23]

[21] COPINGER, *op. cit. supra* n. 20, 213.

[22] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(b) (1927). See §§ 600, 607, 608 *supra.*

[23] U. S. CONST. ART. VIII., § 8. *Cf.* Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834). See §§ 598, 657 *supra.*

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.

§ 661. What Constitutes Mechanical Reproduction: Generally.

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 nondramatic 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

[24] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

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 mechandise, 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.*

[26] See § 660 *supra.* 35 STAT. 1075 (1909), 17 U.C.S.A. § 1(b) (1927).

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 *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 *supra.*[28]

[27] See Irving Berlin, Inc. *v.* Daigle, *et al.,* 31 F.(2d) 832 (C.C. A. 5th, 1929).

[28] § 662 *supra.*

§ 664. Compulsory License: Phonograph Records and Piano Rolls.

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.[29]

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.[30] 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.[31] 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

[29] Aeolian Co. *v.* Royal Music Roll Co., 196 Fed. 926 (W.D.N.Y., 1912); Fonotipia *v.* Bradley, 171 Fed. 951 (C.C.E.D.N.Y., 1909).

[30] G. Ricordi & Co., Inc. *v.* Columbia Graphophone Co., 270 Fed. 822 (S.D.N.Y., 1920); Leo Feist, Inc. *v.* Columbia Graphophone Co., 188 App. Div. 958, 176 N.Y.Supp. 908 (1919).

[31] See Aeolian Co. *v.* Royal Music Roll Co., 196 Fed. 926 (W.D.N.Y., 1912).

in operation because the statutory restrictions are not applicable to reproductions for public performance for profit.[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.[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.[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.

§ 665. Mechanical Reproductions—Act of 1909 Not Retroactive.

The Act of 1909 specifically provides[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[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 manufacure 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

[32] See § 662 *supra*.

[33] Standard Music Roll Co. *v.* F. A. Mills, Inc., 241 Fed. 360 (C.C.A. 3d, 1917).

[34] *Ibid.*

[35] 35 STAT. 1077 (1909), 17 U.S.C.A. § 7 (1927).

[36] Standard Music Roll Co. *v.* F. A. Mills, Inc., 241 Fed. 360 (C.C.A. 3d, 1917).

statute, even though the records had been manufactured and the works had been copyrighted prior to such date.[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.[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,[39] performing artists are generally licensed expressly or by implication to make such arrangements and extractions as are reasonably necessary to produce a *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

[37] Monckton *v.* Pathé Frères, 30 T.L.R. 123 (Eng., 1913).

[38] Renewal is a new and independent right, existing in the persons designated by statute. *Harris* v. *Coca-Cola Co.*, 73 F.(2d) 370 (C.C.A. 5th, 1934); *Fox Film Corp.* v. *Knowles*, 279 Fed. 1018 (C.C.A. 2d, 1922).

[39] 35 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]

§ 667. Radio Broadcasting: Mechanical Reproductions: Phonograph Records.

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

[40] 1 & 2 GEO. V, c. 46, § 19 (1911). See § 660 *supra*.

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-

[41] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

[42] Berlin *v.* Russo *et al.*, 31 F.(2d) 832 (C.C.A. 5th, 1929); Buck, *et al. v.* Heretis, 24 F.(2d) 876 (E.D.S.C., 1928).

[43] See § 662 *supra.*

ing or commercial programs, is deemed a public performance for profit and an infringement of the copyright.[44]

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.[45] 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.[46]

§ 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

[44] Buck *v.* Jewell-La Salle Realty Co., 283 U.S. 191, 51 Sup. Ct. 410, 75 L.Ed. 971 (1931). See §§ 626–629 *supra.*

[45] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[46] See Buck *et al. v.* Lester, 24 F.(2d) 877 (E.D.S.C., 1928).

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 U.S.C.A. § 1(e) (1927).

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 U.S.C.A. § 1(e) (1927).

[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.[50a]

[50a] 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. *Hawkes & Son, Ltd.* v. *Paramount Film Service, Ltd. et al.*, 151 L.T. Rep. 294 (1934).

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.[51] 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

[51] See § 719 *infra*.

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.

§ 671. Same: "Off-the-Air," "Line," "Instantaneous" and "Studio" Recordings Distinguished.

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-

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

been obtained. Liability exists by reason of the unauthorized manufacture of mechanical reproductions despite the fact that they are not offered for sale. The compulsory license provisions do not appear to be applicable to such devices.[52]

§ 673. Compulsory License Provisions Not Applicable to Off-the-Air Recordings.

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 [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.[54]

§ 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.[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.[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,[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.

[53] Aeolian Co. *v.* Royal Music Roll Co., 196 Fed. 926 (W.D.N.Y., 1912).

[54] 35 STAT. 1084 (1909), 17 U.S.C.A. § 36 (1927).

[55] See § 664 *supra*.

[56] Berlin *v.* Russo *et al.*, 31 F.(2d) 832 (C.C.A. 5th, 1929).

[57] Each broadcast station is required to maintain a log.

Chapter XLVI.

RENEWAL OF COPYRIGHTS.

		Page
Section 675.	Historically	1202
676.	Under the Act of 1909	1203
677.	Nature of Right of Renewal	1205
678.	Where the Author Has Assigned His Inchoate Right of Renewal	1206
679.	Renewal of Copyright Where There Are Two or More Authors	1207
680.	Same: Composite Works	1210
681.	Same: Where All Authors Do Not Perfect Renewal of Copyright	1211
682.	Same: Musical Compositions	1213
683.	Same: Where a Co-Author Fails to Renew	1215
684.	Suggested Amendments to the Act of 1909	1216
685.	Licenses from Renewal Copyright Owners	1216
686.	Right of Renewal: When Exercised and by Whom	1217
687.	Same: Where Author Was in the Employ of Original Copyright Proprietor	1219
688.	Citizenship as Affecting Right of Renewal	1220

§ 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.[1] 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,[2] the term of

[1] Act of May 31, 1790, 1 Stat. 124.

[2] Act of Feb. 3, 1831, 4 Stat. 436.

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.*

[4] REV. STAT. (U.S., 1898) §§ 4953–4954, Act of July 8, 1870, § 87, 16 STAT. 212, 26 STAT. 1107 (1891).

[5] 26 STAT. 1107 (1891) § 20.

[6] *Id.*, at § 13.

[7] 35 STAT. 1080 (1909), 17 U.S. C.A. §§ 23, 24 (1927).

[7a] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938).

[8] See Harris *v.* Coca-Cola Co., 1 F.Supp. 713 (N.D. Ga., 1932), *bill dismissed on rehearing* 22 U. S. Pat. Q. 72 (1934), *aff'd.* 73 F.(2d) 370 (C.C.A. 5th, 1934), *cert. den.* 294 U.S. 709, 55 Sup. Ct. 406, 79 L.Ed. 1243 (1935).

[9] 35 STAT. 1080 (1909), 17 U.S. C.A. § 23 (1927).

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.[10]

The Act of 1909 specifically provides [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.[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.[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 [14] or by local statute.[15]

[10] Glaser *v.* St. Elmo Co., 175 Fed. 276 (C.C.S.D.N.Y., 1909); Tobani *v.* Carl Fischer, Inc., 98 F. (2d) 57, 60 (C.C.A. 2d, 1938).

[11] 35 STAT. 1080 (1909), 17 U.S.C.A. § 24 (1927).

[12] Clemens *v.* Belford, Clark & Co., 14 Fed. 728, 730 (N.D. Ill., 1883).

[13] See § 409 *supra.*

[14] See § 409 *supra.*

[15] Elliott *v.* Jones, 66 Misc. 95, 120 N.Y.Supp. 989 (1910), *aff'd.* 140 App. Div. 911, 125 N.Y.Supp. 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

[16] Fox Film Corp. *v.* Knowles, 274 Fed. 731 (E.D.N.Y., 1921) *revd. on other grounds,* 261 U.S. 326, 43 Sup. Ct. 365, 67 L.Ed. 680 (1923); Southern Music Pub. Co., Inc. *v.* Bibo-Lang, Inc., 10 F.Supp. 975 (S.D.N.Y., 1935).

[17] Fox Film Corp. *v.* Knowles, 274 Fed. 731 (E.D.N.Y., 1921) *revd. on other grounds* 261 U.S. 326, 43 Sup. Ct. 365, 67 L.Ed. 680 (1923); White-Smith Music Pub. Co. *v.* Goff, 187 Fed. 247 (C.C.A. 1st, 1911), *aff'g* 180 Fed. 256 (C.C. D.R I., 1910).

[18] Fox Film Corp. *v.* Knowles, 274 Fed. 731 (E.D.N.Y., 1921), *revd. on other grounds* 261 U.S. 326, 43 Sup. Ct. 365, 67 L.Ed. 680 (1923).

[19] Southern Music Pub. Co., Inc. *v.* Bibo-Lang, Inc., 10 F.Supp. 975 (S.D.N.Y., 1935).

[20] 28 OP. ATTY. GEN. 162 (U.S., 1910).

[21] West Pub. Co. *v.* Edw. Thompson Co., 169 Fed. 833 (C.C. E.D.N.Y., 1909), *modified* 176 Fed. 833 (C.C.A. 2d, 1910); 28 OP. ATTY. GEN. 162 (U.S., 1910). *Cf.* Paige *v.* Banks, 13 Wall. 608, 80 U.S. 709 (1872).

[22] *Ibid.*

[22a] Danks *v.* Gordon, 272 Fed. 824 (C.C.A. 2d, 1921).

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 auther 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 (1834).

[24] *Cf.* Harms *v.* Stern, 222 Fed. 581 (S.D.N.Y., 1915), *aff'd.* 231 Fed. 645 (C.C.A. 2d, 1916).

author or his estate, but since the breach does not occur until the granting of the renewal copyright in violation of the agreement, the statute of limitations does not begin to run until such date.

Where a person who is not entitled thereto obtains a certificate purporting to renew a copyright, the renewal is void and therefore cannot be made the *res* of an effective constructive trust in favor of one who had failed to exercise his right to renew the copyright.[24a] In such a case, the work falls into the public domain.

§ 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

[24a] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57, 60 (C.C.A. 2d, 1938).

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-

ance of useless acts. 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 unavailiability 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.[25] 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.[26]

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.

[25] Harris *v.* Coca-Cola Co., 1 F. Supp. 713 (N.D. Ga., 1932).

[26] 35 STAT. 1080 (1909), 17 U.S.C.A. § 23 (1909).

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 so 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.[27] 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 [28] 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.[29]

[27] Harris *v.* Coca-Cola Co., 73 F.(2d) 370 (C.C.A. 5th, 1934), *cert. den.* 294 U.S. 709, 55 Sup. Ct. 406, 79 L.Ed. 1243 (1935).

[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.[30] 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 § 679 *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-

[31] Harris *v.* Coca-Cola Co., 73 F.(2d) 370 (C.C.A. 5th, 1934), *cert. den.*, 294 U.S. 709, 55 Sup. Ct. 406, 79 L.Ed. 1243 (1935).

[32] Musical compositions copyrighted under the Act of 1909 are protected in their words and music. *Standard Music Roll Co.* v. *Mills, Inc.*, 241 Fed. 360 (C.C.A. 3d, 1917).

[33] Southern Music Pub. Co., Inc. *v.* Bibo-Lang, Inc., 10 F.Supp. 975 (S.D.N.Y., 1935), *modified* 85 F.(2d) 63 (C.C.A. 2d, 1936). *Semble:* Standard Music Roll Co. *v.* Mills, Inc., 241 Fed. 360 (C.C.A. 3d, 1917).

right upon the entire work. Such title, however, must be held in trust for the benefit of all of the renewal copyright owners.[34] 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.[34a] 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-

[34] Wheaton *v.* Peters, 33 U.S. (8 Pet.) 591, 663, 8 L.Ed. 1055 (1834). See §§ 679 *supra* and 683 *infra*.

[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.[35] 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

[35] Harris *v.* Coca-Cola Co., 73 F.(2d) 370, 374 (C.C.A. 5th, 1934), *cert. den.* 294 U.S. 709, 55 Sup. Ct. 406, 79 L.Ed. 1243 (1935).

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.

§ 684. Suggested Amendments to the Act of 1909.

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*.

[37] See Pusey & Jones Co. *v.* Miller, 61 Fed. 401 (C.C.D. Del., 1894); Dunham *v.* Indianapolis, *etc.* R. R. Co., Fed. Cas. No. 4151, 7 Biss. 223 (C.C.N.D. Ill., 1876).

demurrable by the licensee.[38] Where one co-owner of a renewed copyright sues for infringement thereof, he must join as parties all the remaining renewal copyright owners.[39] 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.

§ 686. Right of Renewal: When Exercised and by Whom.

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[40] as tenants in common.[41] Where two out of a number of such next of kin exercise

[38] *Ibid.*

[39] See Lauri *v.* Renad (1892) 3 Ch. Div. 402 (Eng.); Nillson *v.* Lawrence, 148 App. Div. 678, 133 N.Y.Supp. 293 (1912); Jackson *v.* Moore, 94 App. Div. 504, 87 N.Y. Supp. 1101 (1904).

[40] Silverman *v.* Sunrise Pict. Corp., 290 Fed. 804 (C.C.A. 2d, 1923), *cert. den.* 262 U.S. 758, 43 Sup. Ct. 705, 67 L.Ed. 1219 (1923).

[41] Silverman *v.* Sunrise Pict. Corp., 273 Fed. 909 (C.C.A. 2d, 1921).

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.[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.[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[44] except as between the contracting parties.

[42] *Ibid.*

[43] *Ibid.*

[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.[45] 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-

[45] Tobani *v.* Carl Fischer, Inc., 98 F.(2d) 57 (C.C.A. 2d, 1938) construing §§ 23, 24, 62, 35 STAT. 1075 (1909), 17 U.S.C.A. (1927).

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,[46] 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.[47] 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.

[46] 35 STAT. 1077 (1909), 41 STAT. 369 (1919), 17 U.S.C.A. § 8 (1927).

[47] Southern Music Pub. Co., Inc. *v.* Bibo-Lang, Inc., 10 F.Supp. 975 (S.D.N.Y., 1935).

Chapter XLVII.

COPYRIGHT PROTECTION IN FOREIGN COUNTRIES AND BY INTERNATIONAL COPYRIGHT.

		Page
Section 689.	Extent of Copyright Protection in Foreign Countries	1223
690.	Duration of Copyright Protection in Foreign Countries	1223
691.	Same: Local Copyright Protection of Works of Aliens	1225
692.	Protection of Mechanical Reproductions Under Foreign Copyright Statutes	1225
693.	Protection of Works of Aliens in Other Countries	1226
694.	The Berne Convention and Its Revisions: Generally	1227
695.	Protection Rendered by Conventions to Citizens of Member Countries	1228
696.	Protection Under Conventions to Citizens of Non-Member Countries	1229
697.	Automatic Copyright Under Conventions: Formalities	1229
698.	Duration of Copyright Under Conventions	1231
699.	Mechanical Reproductions Under Conventions	1232
700.	Performing Rights Under Convention	1232
701.	"Le Droit Morale" Under the Convention	1233
702.	Pan-American Copyright Relations	1234
703.	Copyright Protection of Interpretative Artists	1236
704.	Copyright Relations of United States With Other Countries	1237
705.	Broadcast Performance as Infringement of Copyright in Foreign Countries	1240
706.	Same: By Mechanical Reproductions	1242
707.	Same: Public Reception of Broadcast Performances as Infringement	1242
708.	Copyright Infringement by International Broadcast Programs	1243
709.	Recommendations	1244

§ 689. Extent of Copyright Protection in Foreign Countries.

Copyright is universal. It has been extended to grant protection to citizens of almost all the countries of the world[1] against appropriation of their intellectual and artistic creative efforts. The various foreign copyright statutes[2] do not uniformly embrace the same works as subjects of copyright protection in each country. Such statutes generally extend copyright protection to literary and artistic creations of almost every form and mode of expression. Included in these categories are books and other writings, dramatic and musical works, lectures, choreographic works and pantomimes, paintings, sculpture and other works of art, photographs *et cetera.*

The rights of an author of a copyrighted work vary according to the statutes of each country. Most nations, however, include within the scope of their copyright 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.

§ 690. Duration of Copyright Protection in Foreign Countries

Mexico is the only country which has patterned its term of copyright after the United States[3] by extending pro-

[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 KOEPFLE, 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.

[3] Act of Mar. 4, 1909, c. 320, § 23, 35 STAT. 1080, 17 U.S.C.A.

tection to its authors for a stated term of years.[4] In Guatemala, copyright is perpetual.[5]

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.[6] 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.[7] Where a work is first published posthumously, copyright protection is limited to a stated term of years.[8]

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).

protection,[9] and the term thereof is fifty years from the making of the original master or plate.[10]

§ 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.[11] 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.[12] 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.[13]

§ 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*.[14] 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).

[13] China, Copyright Law of May 23, 1928, Regulations, Art. 14.

[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. I.); Austria [Art. 15(2)]; Canada [§ 4(3)]; Chile (Art. I.); Costa Rica (Art. 11); Czechoslovakia (Art. 21, 27); Denmark [Art. 1(d)]; 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.[15] 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.[16]

The British Copyright Act of 1911[17] 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.[18] This has been discussed *supra.*[19]

§ 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 [§ 169(1)]; Italy (Art. 2); Japan [Art. 22(6)]; Mexico (Art. 1,225 I.); 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).

[18] 35 STAT. 1075, 1088 (1909), 17 U.S.C.A. § 1(e) (1927).

[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.[20] 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.

§ 694. The Berne Convention and Its Revisions: Generally.

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.[21] To insure such treatment, certain uniform rules were laid

[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.[22]

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,[23] while twenty-five other countries and the British colonies now adhere thereto.[24] 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.[25] The first publication of a work in a non-member country by

[22] See COPINGER ON THE 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 KOEPFLE, *op. cit. supra* n. 2, Part I., p. 47.

[25] Rome Convention, Art. 4(1) (1928).

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

[26] See Ward *v.* Handelsvennootschap onder de firma vitgeversmaatschappis "de combinatie," High Court of the Netherlands (Civil Chamber) June 26, 1936 [1936] Nederlandsche Jurisprudentie 1706.

[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.

[29] Ward *v.* Handelsvennootschap onder de firma vitgeversmaatschappis "de combinatie," High Court of the Netherlands (Civil Chamber) June 26, 1936 [1936] Nederlandsche Jurisprudentie 1706.

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 [36] and Japan [37] 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.[38]

§ 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.[39] It is also provided, however, that protection shall not be for

[36] Copyright Act 1921, 11–12 GEO. V., c. 24, § 39(2).

[37] Law of June 4, 1910, Art. 15, KOEPFLE, *op. cit. supra* n. 2, Part VII., p. 15.

[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 formality 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.[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.[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.

§ 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." [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.

§ 700. Performing Rights Under Convention.

The Berne Convention provides that the author of a published or unpublished dramatic or musical work shall

[40] *Id.*, at Art. 7(2).
[41] *Id.*, at Art. 7 *bis*.
[42] Berne Convention, Final Protocol § 3 (1886).

have the sole and exclusive control over its public performance.[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.[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.

§ 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.[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[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

[43] *Id.*, at Art. IX.

[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.

[45] Art. 6 *bis.* (1). For a full discussion of the *droit morale,* see Hearings before Subcommittee of Committee on Foreign Relations, *op. cit. supra* n. 28, Statement of Edwin P. Kilroe at 19–22. See Stravinsky, N. Y. TIMES, Feb. 4, 1938, p. 16, col. 6. See Note (1938) 51 HARV. L. R. 906, 912.

[46] Hearings before Subcommittee of Committee on Foreign Relations, *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.[47] 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.[48] 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.[49] In addition, Austria, Belgium, France, Germany, Italy and Spain have adhered to the Convention.[50]

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.[51] Later, Pan-American Conventions

[47] Duffy Copyright Bill, S. 3047, 74th Cong., 1st Sess. (1935).

[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 KOEPFLE, *op. cit. supra* n. 2, Part I, International Regime, p. 54.

[50] *Ibid.*

[51] Montevideo Convention, Art. 2 (1889).

were held at Mexico City,[52] Rio de Janeiro,[53] Buenos Aires [54] and Habana.[55] 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.[56]

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.[57] 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.[58] 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

[52] Ratified by Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Uruguay, and the United States. For text, see KOEPFLE, *op. cit., supra* n. 2, Part I, p. 54.

[53] For text, see KOEPFLE, *op. cit. supra* n. 2, Part I, p. 58. Ratified by Brazil, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

[54] For text, see KOEPFLE, *op. cit. supra* n. 2, Part I, p. 63. Ratified by Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, United States and Uruguay.

[55] For text, see KOEPFLE, *op. cit. supra* n. 2, Part I, p. 66. Ratified by Panama, Guatemala, Costa Rica and Nicaragua.

[56] Mexico Convention, Art. 5 (1902); Rio de Janeiro Convention Art. 7 (1906); Buenos Aires Convention Art. 6 (1910).

[57] See Mexico Convention, Art. 4 (1902).

[58] Habana Revision of Buenos Aires Convention, Art. 3 (1928).

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.[59]

Unlike the Rome Convention, however, the Habana Revision failed to make express mention of broadcast performances of copyrighted works.[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 *supra*.[61]

§ 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.[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[63] and has been included

[59] *Id.*, at Art. 5.

[60] *Id.*, at Art. 4.

[61] See §§ 694–701 *supra*.

[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 SPEISER, LEGAL RIGHTS OF PERFORMING ARTISTS (1934) 155–180.

[63] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Waring *v.* Robinson, Phila. Ct. Com. Pleas, McDevitt, J. (unreported, 1935). See

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

Noble *v.* One Sixty Commonwealth Avenue, Inc., 19 F.Supp. 671 (D.C. Mass., 1937) (appeal pending).

[64] S. 2240, 75th Cong., 1st Sess., (1937) (Guffey Bill).

[65] H.R. 5275, 75th Cong., 1st Sess. (1937) (Daly Bill).

[66] 35 STAT. 1075 (1909), 17 U.S.C.A. § 8 (1927).

[67] *Ibid.*

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

[68] 35 STAT. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

[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.

[70] 29 OP. ATTY. GEN. 64–72 (1926).

[71] These countries are Costa Rica, Mexico, Palestine (excluding Transjordan), Portugal and Tunis.

United States is a party to general treaties with China,[72] Japan,[73] Korea [74] and Siam.[75] 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 reciprocity. 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.[76]

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 [77] or with the formalities of the copyright conven-

[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.

[76] See Portuondo *v.* Columbia Phonograph Co., Inc., *et al.* Docket # E 84–207, S.D.N.Y., May 13, 1937 (unreported).

[77] The following countries, with which the United States has reciprocal relations, provide for registration in their copyright laws: Argentina, Art. 57; Belgium, Art. I.; 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; Roumania, Press Law of 1904, Art. I; 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.[78] Automatic copyright is available to our citizens only when publication takes place in a member country simultaneously with publication in the United States.[79]

§ 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,[80] but also by international convention[81] and in the copyright laws of several countries.[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

tional, but if the work is registered, the author enjoys certain summary remedies.

[78] See §§ 694–702 *supra* for formalities required under Buenos Aires Convention to which the United States is signatory.

[79] But see *Ward* v. *Handelsvennootschap onder de firma vitgeversmaatschappis "de cominatie,"* High Couirt of the Netherlands (Civil Chamber) June 26, 1936 [1936] Nederlandsche Jurisprudentie 1706, as to what constitutes publication in a member country. See § 696 *supra.*

[80] Canadian Perf. Right Soc. *v.* Ford Hotel, [1935] 2 Dom. L.R. 391; Chappell *v.* Associated Radio Co. of Australasia, Ltd. [1925] Vict. L.R. 350; Messager *v.* British Broadcasting Co., [1927] 2 K.B. 543 (*revd. on other grounds* [1928] 1 K.B. 660). According to the International Copyright Union, similar results have been reached in Belgium (1934); Czechoslovakia (Aug. 9, 1932; Feb. 21, March 27, and Sept. 24, 1936); Denmark (May 30, 1930); Finland (April 6, 1934); France (1925, 1930, 1932); Rumania (Oct. 31 and Dec. 3, 1932); Sweden (Dec. 23, 1933). *Contra:* Germany (June 12, 1932); Italy (Dec. 9, 1933).

[81] Rome Convention, Art 11 *bis* (1928).

[82] Argentina, Art. 50; Canada, § 3; Chile, Art. I.; Czechoslovakia, Art. 16 A; Italy, Art. 10; Japan, Art. 22(5); Netherlands, Art. 17 *bis*; Norway, Art. 9(6); Poland, Art. 16; Sweden, Art. III; Jugoslavia, Art. 22(8).

courts which have been confronted with the problem held, as did the United States Supreme Court,[83] that the copyright statutes could be construed as including public performance by broadcasting.[84]

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.[85] Judicial acknowledgment of this provision has since been made in various member countries.[86]

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.[87] In Poland, for example, the copyright statute contains the following provision:[88]

> "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.[89] 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.

[83] Jewell-La Salle Realty Co. *v.* Buck, 283 U.S. 202, 51 Sup. Ct. 407, 75 L.Ed. 978 (1931).

[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); Czechoslavakia, Art. 16 A; Norway, Art. 9(6) and Poland, Art. 54.

[88] Poland, Copyright Law, Art. 54.

[89] U.S.S.R., The Principles of Copyright Law, Art. 8.

§ 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) (1928).

[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).

[94] Swiss Federal Tribunal, July 7, 1936; Civil Chamber in Buenos Aires, Argentina, Oct. 28, 1930, both translated in SPEISER, LEGAL RIGHTS OF PERFORMING ARTISTS (1934) *Addendum*. See Berlin *v.* Daigle, 31 F.(2d) 832 (C.C.A. 5th. 1929); Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

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

[95] Jewell-La Salle Realty Co. *v.* Buck, 283 U.S. 202, 51 Sup. Ct. 407, 75 L.Ed. 978 (1931).

[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.[99] The existing trea-

[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.[100] 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.[101] Automatic copyright has also been criticized as affecting the rights of labor which are protected by the "manufacturing clause" of the existing copyright law.[102]

The deficiencies of the Rome Convention with respect to the definition of publication are illustrated by the *Saxe Rohmer* case *supra*.[103] A further revision of the Convention with respect to this point has been urged before adherence of the United States thereto.[104]

The proposal of new matters as the subject of copyright protection,[105] the recognition of *le droit morale*[106] 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.

[100] Hearings before Subcommittee of Committee on Foreign Relations, *op. cit. supra* n. 28, Statement of Thorwald Solberg, at 734.

[101] *Id.* Statement of John G. Paine, at 32, 33; Statement of Marvin Pierce, at 37.

[102] 35 STAT. 1078 (1909), 17 U.S.C.A. § 15 (1929). This section requires all books published in English to be printed in the United States.

[103] Ward *v.* Handelsvennootschap onder de firma vitgeversmaatschappis "de combinatie", High Court of the Netherlands. (Civil Chamber) June 26, 1936 [1936] Nederlandsche Jurisprudentie, 1706.

[104] Hearings before Subcommittee of Committee on Foreign Relations, *op. cit. supra* n. 28, Statement of Edwin P. Kilroe, at 14–18.

[105] *Ibid.*

[106] *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,[107] 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,[108] 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.[109] 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.[110]

Should the United States ratify the Rome Convention by a treaty which is not self-executing because it contemplates future enabling legislation,[111] 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.[112] 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.[113]

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.[114] The Convention, as revised at Rome in 1928, does not permit new adherents to make reservations although adherents to

cert. den. 280 U.S. 571, 50 Sup. Ct. 28, 74 L.Ed. 624 (1929); Cameron Septic Tank Co. *v.* Knoxville, 227 U.S. 39, 33 Sup. Ct. 209, 57 L.Ed. 407 (1913); Rousseau *v.* Brown, 21 App. D.C. 73 (1903).

[112] See Portuondo *v.* Columbia Phonograph Co., Inc., Docket # E 84–207, S.D.N.Y., May 13, 1937 (unreported).

[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-termed 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.

PAGE

SECTION 710. Introduction 1249
711. Jurisdiction to Regulate Television..... 1250
712. Specific Application of Act of 1934 to Television.... 1251
713. Censorship of Televised Programs..... 1252
714. Defamatory Televised Broadcasts..... 1253
715. Invasions of Rights of Privacy by Televised Broadcasts 1254
716. Same: Unauthorized Use of Artist's Performance.... 1257
717. Press-Radio Relation: Unfair Competition..... 1258
718. Negative Covenants Between Artists and Producers as Affected by Television..... 1259
719. Copyright Problems..... 1259

§ 710. Introduction.

There are numerous situations which will inevitably arise when television assumes commercial proportions.[1] 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:[2]

> " '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]

[2] 48 STAT. 1065 (1934), 47 U.S. C.A. § 153(b) (1937).

[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,*[4] the United States Supreme Court broadly defined the jurisdiction of Congress to regulate communications by radio. Mr. Justice Stone said:[5]

> "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.[6]

§ 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,[7] which prohibits the broadcast of obscene and indecent programs, refers specifically to the utterance of obscene, indecent or profane

[4] 297 U.S. 650, 56 Sup. Ct. 608, 80 L.Ed. 956 (1936).

[5] *Id.,* at 655, 56 Sup. Ct. 610, 80 L.Ed. 958 (1936).

[6] See Chapter XI. *supra.*

[7] 48 STAT. 1091 (1934), 47 U.S. C.A. § 326 (1937).

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).

[9] 48 STAT. 1088 (1934); 47 U.S.C.A. § 315 (1937).

[10] *Id.,* at § 316.

[11] 48 STAT. 1091 (1934), 47 U.S.C.A. § 326 (1937).

[12] See Chapter XXXVII. *supra.*

as constitutional the censorship of motion pictures by the states,[13] 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.[14] Despite this

[13] Mutual Film Corp *v.* Industrial Comm. of Ohio, 236 U.S. 230, 35 Sup. Ct. 387, 59 L.Ed. 552 (1915).

[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 [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 *per se,* its use in connection with defamatory utterances in a televised program is actionable.[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.[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.[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.[19]

§ 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,[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-

[15] See Chapter XXIX. *supra.*

[16] *Cf.* De Sando *v.* N. Y. Herald Co., 88 App. Div. 492, 85 N.Y. Supp. 111 (1903).

[17] *Cf.* Peck *v.* Tribune Co., 214 U.S. 185, 25 Sup. Ct. 554, 53 L.Ed. 960 (1909).

[18] *Cf.* Van Wiginton *v.* Pulitzer Pub. Co., 218 Fed. 795 (C.C.A. 8th, 1914).

[19] *Cf.* Burton *v.* Crowell Pub. Co., 82 F.(2d) 154 (C.C.A. 2d, 1936).

[20] See Chapter XXVIII. *supra.*

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[21] and under the statutes.[22]

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.[23] 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.[24] 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

[21] *California,* Melvin *v.* Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); *Georgia,* Bazemore *v.* Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); *Louisiana,* Deon *v.* Kirby Lumber Co., 162 La. 671, 111 So. 55 (1927); Itzkowitch *v.* Whitaker, 115 La. 479, 39 So. 499 (1905) *aff'd.* 117 La. 708, 42 So. 228 (1906); *Missouri,* Munden *v.* Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Kansas,* Kunz *v.* Allen, 102 Kans. 883, 172 Pac. 532 (1918); *Kentucky,* Rhodes *v.* Graham, 238 Ky. 225, 37 S.W. (2d) 46 (1931); Brents *v.* Morgan, 221 Ky. 765, 299 S.W. 967 (1928); Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S.W. 364 (1909); *Pennsylvania,* Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (concurring opinion of Maxey, J.).

[22] New York Civil Rights Law, Laws of 1903, c. 132, § 2, p. 308; CONSOL. LAWS OF 1909, c. 14, §§ 50, 51; Laws of 1911, c. 226, p. 504; CAHILL'S CONSOL. LAWS OF N. Y., c. 7, art. 5, §§ 50, 51; amended by Laws of 1921, c. 501; VIRGINIA CODE OF 1924, § 5782.

[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[25] or under the statutes.[26]

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.[27] 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.[28]

Where a commercial telecast program reproduces the likeness of a person who was interviewed in a public place as part of an advertisement,[29] 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.[30]

If the person whose likeness is reproduced in a televised program is merely one of a large group whose likenesses

[25] *Cf.* Melvin *v.* Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Corliss *v.* E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass., 1894).

[26] Chaplin *v.* Pictorial Review Corp., decided March 2, 1927, S.D. N.Y. (unreported); Ruth *v.* Educational Films, decided Sept. 15, 1920, Supreme Court N. Y. Co. (unreported); Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919); Jeffries *v.* N. Y. Eve. Journal Pub. Co., 67 Misc. 570, 124 N.Y.Supp. 780 (1910).

[27] Thayer *v.* Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Wendell *v.* Conduit Mach. Co., 74 Misc. 201, 133 N.Y.Supp. 758 (1911).

[28] *Cf.* Fuchs *v.* Seiden Sound System, Inc., Supreme Court, N. Y. Co., N.Y.L.J., Oct. 23, 1937, p. 1305, col. 6 (unreported).

[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.*

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.[31]

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.[32]

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.[33]

§ 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.[34] Just as an artist is actionably wronged when a phonograph record containing his renditions is broadcast without his consent,[35] 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,[36] or has specifically

[31] Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919).

[32] Garden *v.* Parfumerie Rigaud, Inc., 151 Misc. 692, 271 N.Y.Supp. 187 (1933).

[33] Humiston *v.* Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.Supp. 752 (1919).

[34] Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

[35] *Ibid.*

[36] See Fuchs *v.* Seiden Sound System, Inc., Supreme Court, N. Y. Co., N.Y.L.J., Oct. 23, 1937, p. 1305, col. 6 (unreported).

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*,[37] 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.

§ 717. Press-Radio Relation: Unfair Competition.

The appropriation of news from the daily papers by the broadcast stations has been enjoined as unfair competition.[38] 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-

[37] 119 Misc. 809, 198 N.Y.Supp. 299 (1922).

[38] Associated Press *v.* KVOS, Inc., 9 F.Supp. 279 (W.D. Wash., 1934), *revd.* 80 F.(2d) 575 (C.C.A. 9th, 1935), *dism. for want of jurisdiction* 299 U.S. 269, 57 Sup. Ct. 197, 81 L.Ed. 183 (1936). See Associated Press *v.* International News Service, Inc., 248 U.S. 215, 39 Sup. Ct. 68, 63 L.Ed. 211 (1915).

mitting the identical program will be enjoined as unfair competition.[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.[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.[40] It is reasonable to assume that if the relation between the artist and the producer contemplated television appearances, the agreement would so specify.[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

[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 *supra*.

[39] See Columbia Pict. Corp. *v.* Jean Arthur, Calif. Super. Ct., L. A. Co., No. 412824, Sept. 10, 1937 (unreported).

[40] See § 421 *supra*.

[41] See N. Y. TIMES, Nov. 14, 1937, § 10, p. 12.

registered for copyright protection. Television performances in written form may be considered the writings of an author [42] 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 [43] of his work as well as to control the public performance [44] and mechanical reproduction thereof.[45] 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.[46]

[42] 35 STAT. 1076 (1909), 17 U.S.C.A. § 4 (1937).

[43] See § 601 *supra*.

[44] See § 610 *supra*.

[45] See § 652 *supra*.

[46] See Uproar Co. *v.* National Broadcasting Co., 8 F.Supp. 358 (D. Mass., 1934); Waring *v.* WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937). See § 582 *supra*.

APPENDIX TO VOLUME II

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INDEX TO COPYRIGHT LAW.

[The references in the following index are made to sections except where the contrary is indicated.]

Abridgements may be copyrighted (sec. 6).
Actions. *See* copyright suits.
Ad interim copyright. *See* Interim copyright.
Adapt musical work, exclusive right to (sec. 1 b).
Adaptations may be copyrighted (sec. 6).
Address (Oral):
  May be copyrighted (sec. 5 c).
  Right to deliver for profit (sec. 1 c).
  Damages for infringement of (sec. 25 b).
Address of claimant (sec. 55).
Administrators of author or proprietor may obtain copyright (sec. 8).
Affidavit of American manufacture:
  Required (sec. 16).
  Shall state date of printing or of publication (sec. 16).
  Shall state place where type was set (sec. 16).
  To be acknowledged in certificate of registration (sec. 55).
  Penalty for false (sec. 17).
Alaska, courts having jurisdiction in copyright suits (sec. 34).
Alien author may secure copyright (sec. 8 a).
American manufacture:
  Affidavit required (sec. 16).
  Exceptions to (sec. 15).
  Required for books and periodicals (sec. 15).
  Required for lithographs and photo-engravings (sec. 15).
Annual report of Register of Copyrights (sec. 51).
Anonymous works, term of copyright in (sec. 23).
Appeal allowed in copyright cases (sec. 38).
Application:
  For registration of copyright (sec. 5).
  For renewal of copyright (secs. 23, 24).
Argentina (pages 1320–2).
Arrange musical work, exclusive right to (secs. 1 b, 1 e).
Arrangements may be copyrighted (sec. 6).
Art, works of. *See* Fine arts, works of the.
Articles subject to copyright protection (sec. 5).
Assignment of copyright (secs. 41–46).
  By instrument in writing (sec. 42).
  Certified copy may be had on payment of fee (sec. 45).
  Failure to record (sec. 44).
  Fee for comparing copy of (sec. 61).
  Fee for copy of (sec. 61).
  Fee for recording (sec. 61).
  Foreign, must be acknowledged before United States officer (sec. 43).
  —— must be recorded within six months (sec. 44).
  Must be recorded (sec. 44).
  Name of assignee may be substituted in notice (sec. 46).
  Not involved in sale of material object (sec. 41).
Assigns of author or proprietor may obtain copyright (sec. 8).
Assistant Register of Copyrights:
  Appointment of (sec. 48).
  Duties of, defined (sec. 48).
  Salary of, $3,000 (sec. 48).
Assumed name, work published under. *See* Pseudonymous works.
Australia (page 1321).
Austria (pages 1319–21).
Author:
  Common law right of (sec. 2).
  May obtain copyright (sec. 8).
  May secure extension of existing copyrights (sec. 24).
  May secure renewal of copyright for contributions to periodical and composite works (sec. 23).
  Nationality of (sec. 55).
  Shall include employer in case of works made for hire (sec. 62).
Authorized copies prohibited importation if not manufactured in U. S. (sec. 31).
Bands, infringement of musical copyright by use of (sec. 25 e).
Belgium (pages 1319–21).

Bequest, copyright subject to (sec. 42).
Binding of book:
Affidavit of American, required (sec. 16).
Must be performed within United States (sec. 15).
Blind, works for the:
May be imported (sec. 31 a).
Need not be manufactured in United States (sec. 15).
Bond of Register of Copyrights (sec. 50).
Books:
May be copyrighted (sec. 5 a).
Deposit of copies (sec. 12).
Fee for registration (sec. 61).
For educational institutions or societies may be imported (sec. 31 d).
For individual use may be imported (sec. 31 d).
For use of United States may be imported (sec. 31 d).
In foreign languages, of which only translations are copyrighted, may be imported (sec. 31 c).
Must be manufactured in the United States (sec. 15).
Notice of copyright, forms prescribed (sec. 18).
—— on title-page or page following (sec. 19).
—— not required for ad interim protection (sec. 9).
Of persons from foreign countries may be imported (sec. 31 d).
One registration sufficient for several volumes if deposited at same time (sec. 61).
Published abroad in the English language may secure interim protection (sec. 21).
Right to translate (sec. 1 b).
Brazil (page 1320).
Canada (pages 1319–21).
Cantatas, performance for charitable or educational purposes permitted (sec. 28).
Catalogue of copyright entries:
Distribution of (sec. 57).
Indexed catalogues to be printed for each class (sec. 56).
Manuscript cards for, may be destroyed (sec. 56).
Notice of destruction of copyright deposits (sec. 60).
Superintendent of Public Documents to receive subscriptions (sec. 57).
To be admitted as prima facie evidence (sec. 56).
To be printed by Register of Copyrights (sec. 56).
Certificate of registration:
Claimant of copyright entitled to (sec. 55).
Fee for additional, $1 (sec. 61).
Form to be prepared by Register of Copyrights (sec. 55).
To be admitted as prima facie evidence (sec. 55).
To be issued upon registration and deposit (sec. 10).
To state receipt of affidavit (sec. 55).
Chile (pages 1319–21).
Children of author may secure renewal of copyright (secs. 23, 24).
China (page 1319).
Claimant of copyright entitled to certificate of registration (sec. 55).
Classification, error in, does not invalidate copyright (sec. 5).
Coin-operated machines, reproduction of music upon (sec. 1 e).
Colombia (page 1320).
Common-law right of author or proprietor (sec. 2).
Compilations may be copyrighted (secs. 5 a, 6).
Complete, exclusive right to, model or design for work of art (sec. 1 b).
Component parts of copyrighted works protected (sec. 3).
Composer, foreign, when protected (sec. 1 e).
Composite works:
May be copyrighted (sec. 5 a).
All parts protected (sec. 3).
Author may secure renewal of copyright for contributions to (sec. 23).
Proprietor may secure renewal of copyright (secs. 23, 24).
Constitutional provision (page 1275).
Contribution to periodical. *See* Periodical contribution.
Copy, exclusive right to (sec. 1 a).
Copyright:
Claim of (sec. 12).
Distinct from property in material object (sec. 41).
May be assigned, granted, mortgaged, or bequeathed (sec. 42).
Not annulled by publication as a document (sec. 7).

Copyright deposits:
May be kept in Library of Congress (sec. 59).
May be sold or exchanged or transferred to other governmental libraries (sec. 59).
May be destroyed after notice (sec. 60).
Copyright fees. *See* Fees.
Copyright notice. *See* Notice of copyright.
Copyright Office (secs. 47–61).
Control and preservation of records (sec. 47).
Record books to be kept in (sec. 54).
Records and deposits may be inspected (sec. 58).
Seal (sec. 52).
Copyright records:
Control and preservation of (sec. 47).
Copies may be taken (sec. 58).
Inspection of (sec. 58).
Copyright suits (secs. 34–40).
Appeal allowed (sec. 38).
Causes of action under previous laws not affected (sec. 63).
Deposit of copies condition precedent to (sec. 12).
Full costs allowed (sec. 40).
Injunction may be granted (sec. 36).
Jurisdiction of courts in (secs. 26, 34, 35).
May be instituted where defendant is an inhabitant (sec. 35).
Proceedings for injunction, damages, etc., may be united in one action (sec. 27).
Supreme Court rules for practice and procedure (pages 1314–17).
Three years limitation of action (sec. 39).
Copyright work:
Exclusive right to deliver (sec. 1 c).
—— to perform (sec. 1 d).
—— to print, etc. (sec. 1 a).
—— to translate, etc. (sec. 1 b).
Copyrightable component parts (sec. 3).
Corporate body, work copyrighted by (sec. 23).
Costa Rica (pages 1319–20).
Costs allowed in copyright suits (sec. 40).
Countries having copyright relations with United States (pages 1319–21).
Country of author (sec. 55).
Country of export, copies may be returned to (sec. 32).
Courts, jurisdiction of, in copyright cases (secs. 26, 34, 35).
Criminal proceeding must be commenced within three years (sec. 39).
Cuba (pages 1319–21).
Cyclopædic works:
May be copyrighted (sec. 5 a).
Author may secure renewal of copyright for contributions to (sec. 23).
Proprietor may secure renewal of copyright (sec. 23).
Cylinders, infringement of musical copyright by use of (sec. 25 e).
Czechoslovakia (page 1320).
Damages:
For infringement of copyright (sec. 25 b).
For failure to notify proprietor of mechanical reproduction (sec. 25 e).
Royalty in lieu of profits and, in case of mechanical music-producing machines (sec. 25 e).
See also Penalties.
Danzig (Free City of) (pages 1321–22).
Date of publication, definition of (sec. 62).
Defendant, suit may be instituted where he is an inhabitant (sec. 35).
Definition:
Of "Author" (sec. 62).
Of "Date of publication" (sec. 62).
Deliver, right to, lecture, sermon, address (sec. 1 c).
Denmark (pages 1319–21).
Deposit of copies:
Book—must be produced in United States (sec. 12).
Condition precedent to suit for infringement (sec. 12).
Date to be included in certificate of registration (sec. 55).
Entry to be made in record books (sec. 54).
Failure to deposit involves forfeiture of copyright, etc. (sec. 13).
Motion picture and motion picture photoplay (sec. 11).
Periodical—must be from type set in United States (sec. 12).
Periodical contribution (sec. 12).
Receipt from postmaster (sec. 14).
Receipt from copyright office (sec. 55).

Deposit of copies—Continued.
Registration upon (sec. 10).
One copy of foreign book in English language for interim copyright (sec. 21).
One copy of foreign work (sec. 12).
Two copies of best edition required (sec. 12).
Unpublished works, one copy required (secs. 11, 12).
Deposits, copyright. *See* Copyright deposits.
Designs for works of art:
May be copyrighted (sec. 5 g).
Notice of copyright (sec. 18).
Right to complete, execute, and finish (sec. 1 b).
Destruction:
Of infringing copies, plates, etc. (sec. 25 d).
Of unlawfully imported copies (sec. 32).
Dialects, right to translate into other (sec. 1 b).
Directories may be copyrighted (sec. 5 a).
Disks, infringement of musical copyright by use of (sec. 25 e).
District of Columbia, supreme court of, jurisdiction in copyright suits (sec. 34).
Documents, public, not copyrightable (sec. 7).
Domicile of author (secs. 8, 55).
Dominican Republic (page 1320).
Dramatic composition:
May be copyrighted (sec. 5 d).
Damages for infringement of (sec. 25 b).
Notice of copyright, forms prescribed (sec. 18).
Right to convert into (sec. 1 b).
Right to exhibit (sec. 1 d).
Right to make transcription of (sec. 1 d).
Right to perform or represent (sec. 1 d).
Right to vend manuscript or record thereof (sec. 1 d).
Unpublished, deposit of one copy required (sec. 11).
Dramatico-musical compositions:
May be copyrighted (sec. 5 d).
Damages for infringement of (sec. 25 b).
Unpublished, may be registered (sec. 11).
Dramatization may be copyrighted (sec. 6).
Dramatize, right to (sec. 1 b).
Drawings:
May be copyrighted (sec. 5 i).
Notice of copyright (sec. 18).
Duration of copyright (secs. 23–24).
Ecuador (page 1320).
Editions, new (sec. 6).
Educational institutions, importation of books for (sec. 31).
Employer considered as author in case of works made for hire (sec. 62).
Enacting clause (sec. 64).
English language, books in, published abroad (secs. 15, 21).
Engravings. *See* Prints; Photo-engravings.
Entry. *See* Registration.
Evidence, prima facie:
Catalogue of copyright entries (sec. 56).
Certificate of registration (sec. 55).
Certificate of foreign assignment (sec. 43).
Exceptions:
To manufacturing clause (sec. 15).
To prohibition of importation (sec. 31).
Exchange of copyright deposits (sec. 59).
Execute, exclusive right to, model or design for work of art (sec. 1 b).
Executors of author:
May secure copyright (sec. 8).
May secure extension of existing copyright (sec. 24).
May secure renewal of copyright (sec. 23).
Exhibit, right to, drama (sec. 1 d).
Extension of existing copyright (sec. 24).
Fee for recording (sec. 61).
See also Terms of copyright.
Failure to deposit copies involves forfeiture of copyright, etc. 13).
False affidavit of American manufacture, penalty (sec. 17).
False notice of copyright:
Importation of raticles bearing, prohibited (sec. 30).
Penalty for (sec. 29).
Fees:
For registration, with certificate, $2 (sec. 61).
For additional certificate, $1 (sec. 61).

Fees—Continued.
For recording photographs, $1 (sec. 61).
For recording assignment (sec. 61).
For copy of assignment (sec. 61).
For comparing copy of assignment, $2 (sec. 61).
For recording transfer of proprietorship (sec. 61).
For recording renewal of copyright, $1 (sec. 61).
For recording notice of user of work for mechanical reproduction (sec. 61).
For search, $1 an hour (sec. 61).
Deposit of (sec. 49).
Monthly report on (sec. 49).
Fine arts, works of the:
May be copyrighted (sec. 5 g).
Notice of copyright (sec. 18).
Right to complete models or designs for (sec. 1 b).
Unpublished, deposit of reproduction required (sec. 11).
Finish, exclusive right to, model or design for work of art (sec. 1 b).
Finland (pages 1320–1).
Foreign assignment must be acknowledged before U. S. officer (sec. 43).
Foreign author or proprietor may secure copyright (sec. 8).
Foreign books in English language (secs. 15, 21).
Foreign books in foreign languages need not be type-set in United States (sec. 15).
May be imported (sec. 31 c).
Foreign works, deposit of one copy required (sec. 12).
Foreign works, mechanical reproduction of, reciprocal rights (sec. 1 e).
Forfeiture of copyright:
For failure to deposit copies (sec. 13).
For false affidavit of American manufacture (sec. 17).
Forfeiture of unlawfully imported copies (sec. 32).
Formalities: Deposit, registration, notice (secs. 9–22).
France (pages 1319–21).
Free transmission of copyright material (sec. 14).
Gazetteers may be copyrighted (sec. 5 a).
Germany (pages 1319–21).
Government publications not copyrightable (sec. 7).
Governmental libraries, transfer of copyright deposits to (sec. 59).
Great Britain (pages 1319–21).
Greece (pages 1320–22).
Guatemala (pages 1319–21).
Haiti (page 1320).
Hawaii, courts having jurisdiction in copyright cases (sec. 34).
Hire, works made for (sec. 62).
Honduras (pages 1319–20).
Hungary (pages 1320–21).
Illustrations:
May be copyrighted (sec. 5 k).
In books must be manufactured in United States (sec. 15).
Importation:
Forfeiture in case of illegal (sec. 32).
See also Prohibition of importation.
Imprisonment for infringement of copyright (sec. 28).
Index of copyright registrations (sec. 56).
Infringement of copyright:
Accidental omission of notice of copyright (sec. 20).
By mechanical reproduction of music (sec. 25 e).
Deposit of copies condition precedent to suit for (sec. 12).
Dramatic and musical compositions (sec. 25 b).
Innocent infringer (sec. 20).
Lecture, etc. (sec. 25 b).
Motion pictures (sec. 25 b).
Painting, statue, etc. (sec. 25 b).
Photograph, damages (sec. 25 b).
Proceedings for injunction, etc., may be united in one action (sec. 27).
Remedies for (sec. 25).
Willful, misdemeanor (sec. 28).
See also Copyright suits.
Injunction:
Certified copies of papers filed (sec. 37).
For infringement of copyright (sec. 25 a).
In case of mechanical reproduction of music (sec. 25 e).
May be granted by circuit and district courts (sec. 36).
Proceedings for, damages, etc., may be united in one action (sec. 27).
Where notice of copyright has been omitted (sec. 20).

Inspection of Copyright Office records (sec. 58).
Instruments for mechanical reproduction of music (secs. 1 e, 25 e).
Interim copyright:
Books seeking, need not be manufactured in United States (sec. 15).
Deposit of book published abroad in English language (sec. 21).
Extension of, for United States edition (sec. 22).
Notice of copyright not required in books for (sec. 9).
Request for (sec. 21).
Term of (sec. 21).
International copyright:
Foreign author or proprietor (sec. 8).
Interim copyright for English book published abroad (sec. 21).
Mechanical musical instruments (sec. 1 e).
Proclamations (pages 1319–22).
Interpretation:
"Author" (sec. 62).
"Date of publication" (sec. 62).
Irish Free State (pages 1320–1).
Italy (pages 1319–21).
Japan (pages 1319–20).
Jurisdiction of courts in copyright cases (secs. 26, 34, 35).
Korea (page 1320).
Labels and prints.
Languages, right to translate into other (sec. 1 b).
Lecture (Oral):
May be copyrighted (sec. 5 c).
Damages for infringement of (sec. 25 b).
Right to deliver for profit (sec. 1 c).
Unpublished, one copy must be deposited (sec. 11).
Librarian of Congress:
Annual report of Register of Copy rights to (sec. 51).
Monthly report of copyright fees to (sec. 49).
To appoint Register and Assistant Register of Copyrights (sec. 48).
To determine disposition of copyright deposits (secs. 59, 60).
Library of Congress:
Deposits to be kept in (sec. 59).
May recover twice the retail price of work if not deposited (sec. 13).
License for mechanical reproduction of music (secs. 1 e, 25 e).
Limitation of action, three years, for criminal proceedings (sec. 39).
Literary works. *See* Books.
Lithographic process:
Must be performed within United States (sec. 15).
Affidavit required (sec. 16).
Lithographs:
Must be manufactured in United States (sec. 15).
Representing foreign subjects excepted in manufacturing clause (sec. 15).
Luxemburg (page 1320).
Magazine. *See* Periodical.
Mails, free transmission through the (sec. 14).
Manufacturing clause:
Affidavit required under (sec. 16).
—— to be recorded in certificate of registration (sec. 55).
Books and periodicals (sec. 15).
Exceptions (sec. 15).
Foreign books excepted (sec. 15).
Importation of books not produced in accordance with, prohibited (sec. 31).
Lithographs and photo-engravings (sec. 15).
Manuscript:
Of unpublished work not to be destroyed without notice to proprietor (sec. 60).
Right to vend, of drama (sec. 1 d).
See also Unpublished works.
Map:
May be copyrighted (sec. 5 f).
Notice of copyright (sec. 18).
Masses, performance for charitable or educational purposes permitted (sec. 28).
Material object, sale of, does not imply transfer of copyright (sec. 41).
Matrices for unlawful copies (secs. 25 d, 27).
Mechanical reproduction of music (sec. 1 e).
Failure to file notice in copyright office (sec. 1 e).
Failure to serve notice of intended use (sec. 25 e).
Failure to pay royalties (sec. 1 e).
Fee for recording notice of user of work (sec. 61).
Foreign authors, reciprocal rights (sec. 1 e).
Infringement of copyright by (sec. 25 e).

Mechanical reproduction of music—Continued.
Monthly report on parts manufactured (sec. 1 e).
Notice of intention to use (sec. 25 e).
Notice of license to use (sec. 1 e).
Proclamations affecting (pages 1319–22).
Recovery of royalty (sec. 25 e).
Royalty provision (sec. 1 e).
Upon coin-operated machines (sec. 1 e).
Works copyrighted after July 1, 1909 (sec. 1 e).
Melody of a musical composition, right to make arrangement or setting (sec. 1 e).
Mexico (pages 1319–20).
Misdemeanor (sec. 28).
Model for work of art:
May be copyrighted (sec. 5 g).
Notice of copyright (sec. 18).
Right to complete, execute, and finish (sec. 1 b).
Molds for unlawful copies (secs. 25 d, 27).
Mortgage, copyright subject to (sec. 42).
Motion picture and motion-picture photoplay.
May be copyrighted (sec. 5).
Unpublished, may be copyrighted (sec. 11).
Infringement of (sec. 25 b).
Musical composition:
May be copyrighted (sec. 5 e).
Damages for infringement of (sec. 25 b).
Exclusive right to arrange, etc. (sec. 1 b).
Foreign, mechanical reproduction (sec. 1 e).
Infringement by mechanical reproduction of (sec. 25 e).
Mechanical reproduction of, royalty (sec. 1 e).
Notice to copyright, forms prescribed (sec. 18).
—— on title-page or first page of music (sec. 19).
Notice of intention to reproduce mechanically (sec. 25 e).
Only those copyrighted after July 1, 1909, controlled for mechanical reproduction (sec. 1 e).
Performance of choral works for charitable or educational purposes permitted (sec. 28).
Right to make any arrangement (sec. 1 e).
Right to make record of (sec. 1 e).
Right to perform (sec. 1 e).
Right to use in any system of notation (sec. 1 e).
Unpublished, deposit of one copy required (sec. 11).
Name of assignee (sec. 46).
Name of author (sec. 21).
Name of claimant (sec. 55).
Nationality of author (sec. 55).
Nature and extent of copyright (secs. 1–3).
Netherlands (pages 1320–21).
New editions (sec. 6).
New Zealand (pages 1320–1).
Newspaper reproduction of photograph, damages for (sec. 25 b).
Newspapers:
May be copyrighted (sec. 5 b).
May be imported (sec. 31 b).
One notice of copyright in each number to suffice (sec. 19).
Next of kin may secure renewal of copyright (secs. 23, 24).
Nicaragua (pages 1319–21).
Nondramatic work:
Right to dramatize (sec. 1 b).
Right to convert drama into (sec. 1 b).
Norway (pages 1319–20).
Notation, any system for musical composition (sec. 1 e).
Notice of copyright:
Assignee may substitute name for assignor (sec. 46).
Forms prescribed (sec. 18).
Importation of articles bearing false, prohibited (sec. 30).
May be in form prescribed by act of 1874 (sec. 18).
Name of proprietor (sec. 18).
Not required for ad interim protection (sec. 9).
Omission of, does not invalidate copyright (sec. 20).
On title-page or page following (sec. 19).
One notice in each volume or number of a periodical to suffice (sec. 19).
Penalty for false (sec. 29).
Penalty for removal of (sec. 29).
Publication with, initiates copyright (sec. 9).
Required on copies published or sold in the United States (sec. 9).

Notice of user of musical work for mechanical reproduction:
To be filed in Copyright Office (sec. 1 e).
Failure to file in Copyright Office (sec. 1 e).
Fee for recording (sec. 61).
Novel, right to convert drama into (sec. 1 b).
Oral delivery, lectures, etc., prepared for (sec. 5 c).
Oratorios, performance for charitable or educational purposes permitted (sec. 28).
Painting:
Damages for infringement of (sec. 25 b).
See also Fine arts, works of the.
Palestine (pages 1320–22).
Pan American Conventions:
1902 (page 1319).
1910 (page 1320).
Panama (page 1320).
Paraguay (page 1320).
Parts of copyrighted works protected (sec. 3).
Penalties:
For willful infringement—
Fine of $100 to $1,000 (sec. 28).
Imprisonment (sec. 28).
For failure to deposit copies (sec. 13).
For false affidavit of American manufacture (sec. 17).
For false notice of copyright (sec. 29).
For fraudulent removal of notice of copyright (sec. 29).
See also Damages.
Perform, right to:
Drama (sec. 1 d).
Musical composition (sec. 1 e).
Performance of oratorios, etc., for charitable or educational purposes permitted (sec. 28).
Periodical:
May be copyrighted (sec. 5 b).
Copyright in separate articles (sec. 3).
Deposit of copies (sec. 12).
Foreign, may be imported (sec. 31 b).
Must be manufactured in United States (sec. 15).
Notice of copyright (sec. 19).
One notice of copyright sufficient (sec. 19).
Proprietor may secure renewal of copyright (sec. 23).
Two copies of American type-set edition required (sec. 12).
Periodical contribution:
Author of, may secure renewal of copyright (sec. 23).
Deposit of one copy of issue required (sec. 12).
Person, any, entitled thereto, may obtain copyright (sec. 1).
Peru (page 1320).
Philippine Islands, courts having jurisdiction in copyright suits (sec. 34).
Photo-engraving process:
Must be performed within United States (sec. 15).
Affidavit required (sec. 16).
Photo-engravings:
Must be manufactured in United States (sec. 15).
Representing foreign subjects excepted in manufacturing clause (sec. 15).
Photograph:
May be copyrighted (sec. 5 j).
Damages for infringement of, by newspaper reproduction (sec. 25 b).
Fee for registration of (sec. 61).
Notice of copyright (sec. 18).
Unpublished, deposit of one print required (sec. 11).
Photoplay:
May be copyrighted (sec. 5).
See also Motion picture.
Pictorial illustrations:
May be copyrighted (sec. 5 k).
Notice of copyright (sec. 18).
Piratical copies, prohibition of importation of (secs. 30, 31).
See also Infringement of copyright.
Plaintiff may recover royalty in lieu of profits and damages (sec. 25 e).
Plastic works:
May be copyrighted (sec. 5 i).
Notice of copyright (sec. 18).
Unpublished, deposit of reproduction required (sec. 11).
Plates:
Must be made from type set in United States (sec. 15).
For unlawful copies (secs. 25 d, 27).
Play. *See* Dramatic composition.
Poland (page 1321).
Porto Rico, courts having jurisdiction in copyright suits (sec. 34).
Portugal (page 1319).
Posthumous works, proprietor may secure renewal of copyright (sec. 23).

Postmaster:
Shall give receipt for articles deposited in the mails (sec. 14).
Shall mail deposits without cost (sec. 14).
Postmaster-General to make rules and regulations to prevent unlawful importation (sec. 33).
Practice, rules by the Supreme Court (sec. 25).
Presidential proclamations (pages 1319–22).
Prima facie evidence. *See* Evidence.
Print, exclusive right to (sec. 1 a).
Print:
May be copyrighted (sec. 5 k).
Notice of copyright (sec. 18).
Label and (Pat. Off. reg.).
Printing of book:
Must be performed within United States (sec. 15).
Affidavit required (sec. 16).
Procedure, rules by Supreme Court (sec. 25).
Proceedings for injunction, damages, etc., may be united in one action (sec. 27).
Proclamations, Presidential, for international copyright (sec. 8).
Produce, right to, drama (sec. 1 d).
Profit, for:
Delivery of lecture (sec. 1 e).
Performance (sec. 1 e).
Infringement (sec. 28).
Profits:
May be recovered in case of infringement (sec. 25 b).
Royalty in lieu of, in case of mechanical music-producing machines (sec. 25 e).
Prohibition of importation:
Books in foreign languages of which only translations are copyrighted, permitted importation (sec. 31 e).
Exceptions to (sec. 31).
Notice of illegal importation to be given to Treasury or Post-Office Department (sec. 33).
Of articles bearing false notice (sec. 30).
Of authorized copies, printed abroad (sec. 31).
Of foreign reprints of book by American author (sec. 31).
Of piratical copies (secs. 30, 31).
Return of copies of authorized editions to country of export (sec. 32).
Secretary of the Treasury and Postmaster-General to make rules (sec. 33).
Proprietor, copyright:
May obtain copyright (sec. 8).
May secure renewal of copyright (secs. 23, 24).
Must notify Treasury or Post-Office Department of illegal importation (sec. 33).
Proprietor of unpublished work, common-law right of (sec. 2).
Proprietorship, fee for recording transfer of (sec. 61).
Pseudonymous works, term of copyright in (sec. 23).
Public documents not copyrightable (sec. 7).
Public domain, works in, original text not copyrightable (sec. 7).
Publication:
By U. S. Government does not affect copyright (sec. 7).
Date of, definition (sec. 62).
With notice initiates copyright (sec. 9).
Publish, exclusive right to (sec. 1 a).
Receipt for copies:
From copyright office (sec. 55).
From postmaster (sec. 14).
Reciprocity provisions (sec. 8 b).
Mechanical reproduction of music (sec. 1 e).
Record books, copyright, to be kept by Register of Copyrights (sec. 54).
Record of copyright. *See* Registration.
Record, right to make:
Of drama (sec. 1 d).
Of musical work (sec. 1 e).
Records, copyright. *See* Copyright records.
Register of Copyrights:
Annual report (sec. 51).
Appointment of (sec. 48).
Assistant Register of Copyrights (sec. 48).
Bond of (sec. 50).
May require deposit of copies (sec. 13).
Monthly report of fees (sec. 49).
Salary of (sec. 48).
To control and preserve copyright records (sec. 47).
To determine price of catalogues of copyright entries (sec. 57).
To issue certificate of registration (sec. 10).
To make rules and regulations (sec. 53).
To prepare form for certificate of registration (sec. 55).

Register of Copyrights—Continued.
To print catalogue of copyright entries (sec. 56).
To provide and keep record books (sec. 54).
To record assignments (sec. 45).
To register articles deposited (sec. 54).
Registration of copyright claim (sec. 10).
Application for (sec. 5).
Certificate shall be admitted as prima facie evidence (sec. 55).
Claimant of copyright entitled to certificate of (sec. 55).
Condition precedent to suit for infringement (sec. 12).
Fees for (sec. 61).
For renewal (secs. 23, 24).
Of unpublished works (sec. 11).
Of work in several volumes (sec. 61).
Prima facie evidence, catalogue of copyright entries (sec. 56).
Register of copyrights to make rules for (sec. 53).
Remedies for infringement (secs. 25–28).
Renewal of copyright:
Author, if living, or his widow, children, executors, or next of kin (sec. 23).
Author may secure, of existing copyrights (sec. 24).
Author of contributions to periodical or composite work may secure (sec. 23).
Fee for recording, $1 (sec. 61).
Proprietor of posthumous or composite works (sec. 23).
Registration during last year of original term (sec. 23).
Term, 28 years (sec. 23).
Repealing clause (sec. 63).
Report:
Annual, of all copyright business (sec. 51).
Monthly, on copyright fees (sec. 49).
Represent, right to, drama (sec. 1 d).
Reprint, exclusive right to (sec. 1 a).
Reproduce, right to, drama (sec. 1 d).
Reproductions of works of art:
May be copyrighted (sec. 5 h).
Notice of copyright (sec. 18).
Reservation of copyright. *See* Interim copyright.
Residence. *See* Domicile.
Rights of persons entitled to copyright (secs. 1–3).
Rolls, infringement of musical copyright by use of (sec. 25 e).
Royalty for use of music:
Provision for (sec. 1 e).
Failure to pay (sec. 1 e).
Recovery of (sec. 25 e).
Rules and regulations:
For practice and procedure (sec. 25).
For prohibition of importation (sec. 33).
For registration of claims (sec. 53).
Rumania (page 1321).
Sale of copyright deposits (sec. 59).
Sale of work distinct from assignment of copyright (sec. 41).
Salvador (page 1319).
Schools, importation of books for (sec. 31).
Scientific drawings or plastic works:
May be copyrighted (sec. 5 i).
Notice of copyright (sec. 18).
Sculpture, damages for infringement of (sec. 25 b).
Seal of copyright office (sec. 52).
Search, fee for (sec. 61).
Secretary of the Treasury:
May order destruction of unlawfully imported articles (sec. 32).
To make rules and regulations relating to importation (sec. 33).
Seizure of unlawfully imported copies (sec. 32).
Sermon (Oral):
May be copyrighted (sec. 5 c).
Damages for infringement of (sec. 25 b).
Right to deliver for profit (sec. 1 c).
Siam (page 1320).
Societies, importation of books for (sec. 31).
South Africa (page 1321).
Spain (pages 1319–22).
Statue:
Damages for infringement of (sec. 25 b).
See also Fine arts, works of the.
Subject-matter of copyright (secs. 4–7).
Suits. *See* Copyright suits.
Superintendent of public documents to receive subscriptions to Catalogue of copyright entries (sec. 57).

Supreme Court of the United States, rules and regulations for practice and procedure (sec. 25).
Sweden (pages 1320–1).
Switzerland (pages 1319–21).
Technical drawings or plastic works:
  May be copyrighted (sec. 5 i).
  Notice of copyright (sec. 18).
Terms of copyright:
  First term of 28 years (sec. 23).
  Renewal term of 28 years (sec. 23).
  Ad interim term (sec. 21).
  —— extension of term for United States edition (sec. 22).
  Extension to full existing term (sec. 24).
Transfer of copyright (secs. 41–46).
Transfer of copyright deposits to other governmental libraries (sec. 59).
Transfer of proprietorship, fee for recording (sec. 61).
Translate, exclusive right to (sec. 1 b).
Translations may be copyrighted (sec. 6).
Treasury. *See* Secretary of the Treasury.
Tunis (page 1320).
Type set within the United States:
  Plates to be made from (sec. 15).
  Affidavit required (sec. 16).
Unpublished work:
  Common law right (sec. 2).
  Fee for recording (sec. 61).
  May be copyrighted (sec. 11).
Uruguay (page 1320).
Vend, exclusive right to (sec. 1 a).
  Manuscript of drama (sec. 1 d).
Version, right to make other (sec. 1 b).
Virgin Islands (sec. 18).
Volumes of a book deposited at one time, one fee sufficient (sec. 61).
Who may obtain copyright (sec. 8).
Widow or widower may secure renewal of copyright (secs. 23, 24).
Works:
  Made for hire (sec. 62).
  Republished with new matter may be copyrighted (sec. 6).
  Subject-matter of copyright (sec. 5).
Writ of error allowed in copyright cases (sec. 38).
Writings of an author subject-matter of copyright (sec. 4).

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.

March 4, 1909. An act to amend and consolidate the acts respecting copyright. (35 Stat. L., pt. 1, pp. 1075–1088.) See pages 7–28.

August 24, 1912. 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 4, 1909. [To protect motion pictures and motion-picture photoplays.] (37 Stat. L., pt. 1, pp. 488–490.) See page 1304 *infra.*

March 2, 1913. An act to amend section fifty-five of "An act to amend and consolidate the acts respecting copyright," approved March 4, 1909. [To provide for additional facts in certificate of copyright registration.] (37 Stat. L., pt. 1, pp. 724–725.) See page 1308 *infra.*

March 28, 1914. An act to amend section twelve of the act entitled "An act to amend and consolidate the acts respecting copyright," approved March 4, 1909. [To require deposit of only one copy of work of foreign author published abroad.] (38 Stat. L., pt. 1, p. 311.) See page 1309 *infra.*

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.*

July 3, 1926. An act to amend section fifteen of "An act to amend and consolidate the acts respecting copyright," approved March 4, 1909. [To secure protection for published books not printed from type set or produced by lithographic or photo-engraving process.] (44 Stat. L., pt. 2, p. 818.) See page 1311 *infra.*

May 23, 1928. An act to amend sections 57 and 61 of "An act to amend and consolidate the acts respecting copyright"

approved March 4, 1909. [Increases copyright fees and the subscription price of the Catalogue of Copyright Entries.] (45 Stat. L., pt. 1, pp. 713–714.) See page 1312 *infra.*

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 preson 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 performance 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 instruments 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 reproductions,* 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 proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor 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., 242 Fed. Rep. 1002–1003.

articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *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.

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.

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.

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.

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 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;*[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;*[1] 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,*[2] 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 Congrses 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.

Printed from type set within the United States.—Book in foreign language excepted.—Lithographic or photo-engraving process.—Printing and binding of the book.—Illustrations in a book.—Separate lithographs and photo-engravings.—Books for blind excepted.

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, 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.

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[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.

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[1] Section 21 as amended by the Act of Dec. 18, 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, cyclopædic, 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 cyclopædic 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 noticed 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;

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[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 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,*[1] 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.

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[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.

Disposal 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.*[1] 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 proprietor ship 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.

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[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."

ACTS AMENDATORY OF THE COPYRIGHT ACT, APPROVED MARCH 4, 1909.

[NOTE.—The new matter in these amendatory Acts is printed in italics.]

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) Printsand 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) Whereenever 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 copyrght 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]

In "The Statutes at Large." Vol. 37, part 1. 8°. Washington, 1913, pp. 488–490.

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.—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]

In "The Statutes at Large." Vol. 37, part 1. 8°. Washington, 1913, pp. 724–725.

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]

In "The Statutes at Large." Vol. 38, part 1. 8°. Washington, 1915.

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]

AN ACT To amend section 15 of an Act entitled "An Act to amend and consolidate the Acts respecting copyright," [approved] March 4, 1909.

Act of July 3, 1926.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 15 of an Act entitled "An Act to amend and consolidate the acts respecting copyright," [approved] March 4, 1909, be amended to read as follows:

"SEC. 15. That of the printed book or periodical specified in section 5, 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, 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.*

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,*

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 delivering 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 leaving 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.

11.

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.

12.

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

13.

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.

Form No. 17.

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.)

May 8, 1893—Denmark. (Stat. L., vol. 28, p. 1219.)

July 20, 1893—Portugal. (Stat. L., vol. 28, p. 1222.)

July 10, 1895—Spain. (Stat. L., vol. 29, p. 871.)

February 27, 1896—Mexico. (Stat. L., vol. 29, p. 877.)

May 25, 1896—Chile. (Stat. L., vol. 29, p. 880.)

April 11, 1899—Spain. (Treaty of peace, Art. XIII.) (Stat. L., vol. 30, pp. 1754, 1760–1761, 1762.)

October 19, 1899—Costa Rica. (Stat. L., vol. 31, pp. 1955–1956.)

November 20, 1899—Netherlands and possessions. (Stat. L., vol. 31, p. 1961.)

November 17, 1903—Cuba. (Stat. L., vol. 33, pt. 2, p. 2324.)

January 13, 1904—China. (Treaty of October 8, 1903, Art. XI.) (Stat. L., vol. 33, pt. 2, pp. 2208, 2213–2214.)

July 1, 1905—Norway. (Stat. L., vol. 34, pt. 3, pp. 3111–3112.)

May 17, 1906—Japan. (Treaty of November 10, 1905.) (Stat. L., vol. 34, pt. 3, pp. 2890–2891.)

September 20, 1907—Austria. (Stat. L., vol. 35, pt. 2, p. 2155.)

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.)

(Stat. L., vol. 35, pt. 2, pp. 1934–1946. English, French, and Spanish texts.)

August 11, 1908—Japan. (Treaty of May 19, 1908, for protection in China.) (Stat. L., vol. 35, pt. 2, pp. 2044–2046.)

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.)

June 29, 1910—Luxemburg. (Stat. L., vol. 36, pt. 2, p. 2716.)

May 26, 1911—Sweden. (Effective June 1, 1911.) (Stat. L., vol. 37, pt. 2, pp. 1682–1683.)

October 4, 1912—Tunis. (Stat. L., vol. 37, pt. 2, p. 1765.)

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).

December 8, 1910—Germany. (Stat. L., vol. 36, pt. 2, pp. 2761–2762.)

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.)

November 27, 1911—Cuba. (Stat. L., vol. 37, pt. 2, pp. 1721–1722.)

October 15, 1912—Hungary. (See above.)

January 1, 1915—Great Britain. (British order in council issued Feb. 3, 1915, effective Jan. 1, 1915.) (Stat. L., vol. 38, pt. 2, pp. 2044–2045.)

May 1, 1915—Italy. (Sat. L., vol. 39, pt. 2, pp. 1725–1726.)

February 9, 1917—New Zealand (effective Dec. 1, 1916). (Stat. L., vol. 39, pt. 2, pp. 1815–1816.)

April 3, 1918—Australia, and the territories of Papua and Norfolk Island (effective Mar. 15, 1918). (Stat. L., vol. 40, pt. 2, pp. 1764–1766.)

May 24, 1918—France. (Stat. L., vol. 40, pt. 2, pp. 1784–1785.)

February 27, 1920—Sweden (effective Feb. 1, 1920). (Stat. L., vol. 41, pt. 2, pp. 1787–1788.)

December 9, 1920—Denmark. (Stat. L., vol. 41, pt. 2, pp. 1810–1812.)

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.)

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.

In "The Statutes at Large of the United States of America, from March, 1909, to March, 1911." Vol. 36, part 2. 8 vo. Washington 1911, pp. 2685–2686.

BERNE CONVENTION.

International Copyright Union.

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.

Translations 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.

countries the exclusive right of making or authorizing the translation of their works during the whole duration of the right in the original work. But the exclusive right of translation shall cease to exist when the author shall not have made use of it within a period of ten years from the first publication of the original work, by publishing or causing to be published in one of the countries of the Union, a translation in the language for which protection shall be claimed.''

ARTICLE VII.

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*.

ARTICLE VIII.

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-feuilletons'), 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.

formably 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."

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:

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.

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

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 plenipotentiaries 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.

DECLARATION interpreting certain Provisions of the Convention of Berne of September 9, 1886, and of the Additional Act, signed at Paris, May 4, 1896.

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

Convention Creating an International Union for the Protection of Literary and Artistic Works, Signed at Berlin, November 13, 1908.

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.

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.

The contracting countries are pledged to secure protection in the case of the works mentioned above.

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

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 muscial 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 annonymous or pseudonymous works considered as represenative 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

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
2d class.....20 units
3d 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 abovementioned 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 renouncement 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.

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.

* Article 7 provides for a general term of protection for life and fifty years.

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" ("oeuvres publiées") must be understood, according to the present Convention, works which have been issued ("oeuvres 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 oeuvres literaires 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 is 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:

1st	class.....	25 units
2nd	class.....	20 units
3rd	class.....	15 units
4th	class.....	10 units
5th	class.....	5 units
6th	class.....	3 units

(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

will attend the meetings of the Conferences and take part in the discussions without a deliberative voice.

(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.

INDEX

INDEX

(References are to Sections)

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719

A

Acceptance of License SECTIONS

Estoppel resulting from 11

Access

How proven 614

Whether essential to copyright infringement 614

Act of God

Effect in contract between artist and producer 378

Act of 1909 (Copyright)

Compulsory licensing provisions 655

Constitutionality 657

When effective 656

Constitutionality of § 11 595

Copyright protection afforded 586

When works unpublished 594

Deposits of copies required 590

Distinguished from British Act 660

Formalities required by 589

Mechanical reproduction under 662

No protection prior to 653

Rights under 654

Not retroactive 665

Persons entitled to copyright under 587

Publication essential 593

Renewal of copyright under 676

Scripts analyzed under 640

Suggested amendments to 684

Act of 1912 (Radio)

Application for license under 26

Applicant must be citizen 26

Basis of jurisdiction 1

Constitutionality of 4

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Act of 1912 (Radio)—Continued

Due process under 10
Exclusive of intrastate radio communication 25
Interstate Commerce Commission, jurisdiction under 211
Licenses under 26, 211
Mandamus to compel issuance 27
Necessity for regulation 30
Plenary power of Congress over radiotelegraphy 1
Powers of Secretary of Commerce 25, 26, 27, 28, 29, 30
Public utilities aspect of 211
Purpose to foster radiotelegraphy 25
Regulation under 211
Revocation of license for cause only 29
Secretary of Commerce, discretion to make general regulations .. 27
Inability to cope with wave-length interference 37
Shortcomings of 30
Unlawful deprivation 10, 12

Act of 1927 (Radio)

Administrative provisions 31
Appeals under 155, 156, 157, 158, 159, 161, 162, 172, 173
Application for license 40
General right to hearing on 63
Authority of Secretary of Commerce 31, 32
Avoidance of wave-length interference 37
Basis of jurisdiction 2
Congressional jurisdiction of intrastate radio broadcasting ... 2, 8
Conflicts between licensees 39
Constitutionality of 4
Construction permit applications 43
Control over intrastate interference 8
Davis Amendment 42
Frequency provisions 33
General powers of Federal Radio Commission 46
To hold hearings 62
Hearings 62, 64, 68
Licensing provisions 33, 37, 39, 40, 41, 43, 44, 214
Modification by Act of 1934 52
No vested interest in wave-lengths 39
Origin 211
Permits to construct stations 43
Public utilities aspects 212
Purposes of 33
Restrictions on granting licenses 44

Act of 1927 (Radio)—Continued

Review of findings of Commission 172
Revocation of license 45
Right to hearings regarding construction permits 69
Validity of delegation of power 14

Act of 1929

Appeals to United States Supreme Court 161

Act of 1934 (Communications Act)

Appeal provisions 160, 163, 164, 170, 171, 173, 174, 175, 176, 177, 182
Broadcast of lottery information prohibited.....53, 496, 497, 498, 499
Common carriers, broadcast stations not 217
Control over intrastate interference 8
Co-operation with state boards 79
Criminal proceedings, penalties 179
Disobedience of witness, penalty 180
Effect on facilities contracts 250
Geographical zones abolished 51
Hearings, right to 102
History of content control provisions.....560, 561
In general 47
Joint hearings 81
Jurisdictional basis 3
License provisions 52, 247
Limitations on freedom of speech 563
Mandamus 178
Modifications of Act of 1927 52
New provisions 53
Power of courts to review 170
Purpose of 48
Rebroadcast 53
Records, transfer from Radio to Communications Commission .. 83
Re-enactment of standard of public interest 52
Regulatory scope 47
Rehearings 50
Requirements as to announcement of sponsored program 252
Restrictions on broadcasts 53
Revocation of license 52
Setting aside orders of Commission 182
Studios, control of Federal Communications Commission over .. 53
Suspension of orders 182

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Act of 1934 (Communications Act)—Continued
Television, subject to 712
Validity as delegation of legislative power 13

Actors, see Artists

Additional Evidence
May be required of any party 148
After hearing, of party 149

Addresses
Public, delivery of copy may be required by station 611

Administrative Boards
Statutory delegation of power to 183, 184, 185

Administrative Regulations
Answers to appearances 97
To notice of violation 95
Appeals, determined on substantial evidence 174
Parties on, designation 175
Aggrieved may appeal 176
Adverse interest 176
Interveners 177
Original parties 178
Remedy exclusive 171
To Court of Appeals, Dist. of Col. 164
Under Act of 1927 ..... 155, 161
Amendment of 1930 ..... 156, 157, 158, 159, 162
Act of 1934 ..... 160, 163
Appearances 96
Applications, amendment of 57
Contents of 56
For approval of assignment 59
For approval of transfer of control 59
For instruments of authorization 55
Recital of financial qualifications 60
Arguments to be oral 127
Books of Federal Communications Commission 83
Briefs, time for filing 129
Burden of proof, when on appellant 173
When on applicant 151, 152, 153
When on protestant 154
Conclusiveness of determinations of Commission 167
Continuances 132

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Administrative Regulations—Continued

Depositions, by order of Commission 120
On notice 122
Order to take 121
Procedure 123
Taken outside the United States 124
Who may take 119
Effective date of orders 165
Evidence, affidavits alone insufficient 144
Applicability of general rules of 136
Cumulative to be avoided 143
Exclusion of oral declarations 142
Of unsworn documents 142
Exhibits required in duplicate 140
Generally 133
Government reports and records in 138
Immaterial matter 139
Limitation on disregarding rules of 134
Must be relevant 147
Not bound by strict rules 135
Of records of other proceedings 141
On informal hearings 146
Extensions 132
Federal Communications Commission may make 101
General regulations, when legislative 101
When quasi-judicial 101
Hearings, closing 150
Inquiry on Commission's own motion 130
Necessity for 100
Oral, required 131
Of application after grant without under Act of 1927 67
Granted conditionally without, right to 107
Granted in part without 108
Miscellaneous applications 109
On revocation of license 106
Where granted in part 66
Where license modified on renewal 105
Opening at 150
Right after effective date of order 104
In general 65
Change of frequency 102
Conditional grant without 107
Contest between stations 111

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Administrative Regulations—Continued
Hours of operation ... 102
Rehearing contest between stations ... 112
Discretionary ... 112
Under Act of 1934 ... 102
Issuance of renewal modifying license ... 109
On power ... 102
Testimony at ... 105
When less than quorum or before examiner ... 126
Who may hold ... 115
Mixed questions of fact and law ... 169
Orders, initiating revocation of license ... 98
To show cause, modification of license ... 99
Petition to intervene ... 93
Pleadings, amendment ... 90
Before Federal Communications Commission ... 88
Subscription ... 89
Verification ... 89
Postponements ... 132
Power of courts to review decisions ... 166
Under Act of 1934 ... 170
Privilege against self-incrimination ... 145
Protests ... 94
Question presented must be justiciable ... 168
Rehearing, contents of petition ... 113
Limitation on hearing ... 114
Renewals ... 58
Report of examiner, weight ... 128
Requirement of due process ... 167
Of evidence after hearing ... 148, 149
Review of Commission's findings ... 172
Right to appeal statutory ... 171
Service of papers ... 91
Subpoenas, issuance ... 117
Return ... 118
Service ... 118
To compel testimony ... 116
Technical qualifications in application ... 61
Withdrawal of application ... 57

Admission
To broadcast theater ... 241

Advantage to Buyer False
Broadcast restrained by Federal Communications Commission ... 557

Adverse Possession

Of literary works 643

Advertisers

Contracts for facilities, affected by operation of law 250
Duration period of broadcast subject to 254
Nature of 247, 248
Parties to 255
Rates 256
Right to refund for interruption 279
Sponsored program to be announced as such 252
Station rules and regulations, affecting 254
Where facilities available, network or system 249, 296
Duty to advertising agency 346
Electrical transcription supplied by, relation to station 229
In general 334
Liability, contracts with advertising agency 343
Lottery program broadcast 497
Torts 349
Defamation 481
Personal injury 244
Listening public, obligation to 269
Ratification of unauthorized acts of agent 344
Trade marks, basis of protection 517
Exploitation of 519

Advertising

Appropriation of, as unfair competition 535
As interstate commerce 540
False, not unfair competition at common law 538
Restraint of, by Federal Trade Commission 540
When actionable 538
Whether competitive misrepresentations are unfair competition 538
Federal regulation of 558, 559
Injunction, where artist violates exclusive use of photograph clause 402
Power of state to prohibit, of intoxicants, etc. 565
Previous appropriation by unfair competition 535
Unconstitutionality of gross receipt and privilege taxes on 204
Unlicensed insurance companies, regulatory state statutes 192, 193

Advertising Agencies

Agency a question of fact 337
How determined 339, 340, 341, 342

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Advertising Agencies—Continued

Apparent authority 342
As independent contractor.....339, 348
Compensation of 346
How paid 257
Dual agency 345
Duty to advertiser..... 345
Fiduciary relation to advertiser..... 345
Function of 335, 336
Indemnity 346
Liability for breach of facilities contract..... 276
To third party as principal..... 342
By express agreement..... 342
Principal undisclosed 342
Warranty of authority..... 342
Where no principal advertiser..... 342
Torts 349
Ordinarily not a broker..... 338
Powers of 347
Principal and agency relation..... 341
Ratification of unauthorized acts by advertiser..... 344
Reimbursement for expenses..... 346
Relation with advertiser.....339, 340
Specialized services rendered by..... 334
Specific authority not necessary..... 342
Status 335

Affidavits

Insufficient as sole proof under administrative regulations.... 144

Agencies, see also Advertising Agencies

Creation of 426
Defined 337, 424
Duration of, between artist and representative..... 427
Of manager and personal representative of artist..... 424
Ratification of 434
Term of 428
To accept service of process..... 489

Aggrieved Party

Rights to hearing upon grant of application..... 107

Agreements

Between advertiser and advertising agency.....334–348
Artist and manager or representative.....422–428

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Agreements—Continued
Artist and producer....350–364
Author and producer....404–421
Station and advertiser....247–281
System and constituent station....288–294

Aisles
Of broadcast theater, local regulation of.... 239

Alien
Local copyright protection of works of.... 691

Allocation of Frequencies
Cairo conferences of 1938.... 24A
Davis amendment (repealed) of wave-length zones.... 42
Standard of fairness and equity of Federal Communications Commission.... 18

All Union Shop
As aim of strike or picketing.... 301

Alterations
Of broadcast studios and theaters.... 236

Amendment
Of application for authority.... 57
Pleading.... 90
Of Act of 1930
Appeals under....156, 162
Allowed for refusal of construction permit.... 157
Suspension of license.... 159
Not allowed for refusal to approve assignment.... 158

American
Communications Association.... 297
Federation of Labor.... 297
Of Musicians....297, 299
Radio Artists.... 297
Guild of Radio Announcers and Producers.... 297
Society of Composers, Authors & Publishers....297, 597

"Amos and Andy"
Unfair simulation restrained.... 520

Anne, Statute of.... 577

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Announcement
Of sponsored program, as such ... 252
Recording, as such ... 253

Announcers
American Guild of, and Producers ... 297

Annulment
Any order of Commission by party under Act of 1934 ... 182

Answer
To appearance ... 97
Notice of violation ... 95

Antenna
Municipal regulation of height of ... 197

Anticipatory Breach
Of contract between artist and producer ... 382

Anti-Lottery Laws
Under Act of 1934 ... 496
Jurisdiction of determination ... 498
Liability for violation ... 497

Anti-Trust Laws
Application of, by Federal Communications Commission ... 36

Apparent Authority
Of representative binds artist ... 435

Appeals
Under Act of 1927, from Federal Radio Commission,
Actions appealable, assignment of station license not ... 158
Refusal of construction permit ... 155, 156, 157
Refusal of station license ... 155
Refusal of renewal of station license ... 155
Refusal to modify station license ... 155
Suspension of station license ... 159
Burden of proof on appellant ... 173
Persons entitled, aggrieved or adversely affected ... 156
Question on findings, if manifestly against evidence ... 172
Review by courts, administrative ... 161
To United States Supreme Court ... 161
Not allowed before amendment ... 161
No provision for administrative review ... 162
When appeal allowed ... 162

Appeals—Continued
Under Act of 1934, from Federal Communications Commission,
Actions appealable, assignment of station license not..... 160
Refusal of construction permit..... 160
Refusal of station license..... 160
Refusal of renewal of station license..... 160
Refusal to modify station license..... 160
Burden of proof on appellant..... 173
Findings, reversible if arbitrary or capricious..... 170
Not reviewable if supported by substantial evidence.. 170
Intervention, persons entitled.....164, 177
Procedure..... 164
Justiciable question raised..... 170
Law questions only reviewable..... 170
Nature of review.....163, 170, 173
Parties on, aggrieved or adversely affected..... 175
Applicant..... 160
Licensees competing for advertising revenue..... 176
Party must have been in original proceeding..... 177
Party who sought to be in original proceeding..... 177
Procedure..... 164
Notice of appeal, filing, service..... 164
Notice to Commission, service of..... 164
Prerequisites, filing time limited..... 164
Record on appeal, contents..... 164
Filing time limited..... 164
Stay of enforcement of order, petition for..... 164
Purpose of..... 177
Questions on.....173, 174
Remedy exclusive.....160, 171, 182
Review of determinations of Commission..... 167
Due process..... 167
Facts..... 168
Findings in exercise of executive power conclusive.... 166
Findings in exercise of legislative power conclusive.... 166
Judicial only..... 170
Jurisdiction to make order..... 166
Justiciable question to be presented..... 168
Law and facts, mixed questions..... 169
Orders, finality of, allowed..... 168

Appearance
Answers to..... 97
How made..... 96

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Application
Anti-trust Laws under Act of 1927 36
For approval assignment of permit or license 59
Construction permit, burden of proof 152
Instruments of authorization,
Amendment of, subscription 89
Restrictions on right 57
Time to make 57
Without prejudice 57
Assignment of station license 158
Denial, default in appearing at hearing 109
Execution by real party in interest 55
Financial qualifications and data 60
Renewal applications 58
Repetitions, prohibited within certain periods 56
Requirements of, applicant's qualifications 56, 60, 61
Must be in writing 55
Must set forth ownership 55
Must specify frequency 56
Must specify technical data 61
Other additional matters, power, time 56
Separate, for each authorization 55
Proviso 55
Special authorizations, procedure 110
Subscription by several parties permissible 89
By applicant 89
Attorney, when may 89
Corporate officer 89
Verbal declaration of third persons insufficient 60
Verification required 55, 89
When deemed filed 111
Withdrawals 57, 89
License, under Act of 1927 40
Modification of permit to construct 160
Modification of station license 160
Renewal, log must be annexed 271
Grant, deemed refusal to renew 104
Condition inserted in license 105
Of privileges 67, 108
On condition, protest withdrawn 107
Without hearing 67, 107
Who may protest 67, 107
Suspension where protest filed 67, 107

Application—Continued
Where conflicting application amended to eliminate conflict . . . 109
Without hearing . . . 67, 107
When conditional . . . 107
Hearings, right to . . . 62, 63, 64
After grant without . . . 67
When grant in part . . . 66
When necessary, if party aggrieved or adversely affected . . . 68, 109
Not where no appearance . . . 109
Where public interest to be determined . . . 68, 103, 109
Rules of evidence . . . 136, 137
Television, Act of 1934 applicable to . . . 717
Transfer of control of licensee corporation . . . 59
Workmen's Compensation statute to station employees . . . 325

Applicant
Bears burden of proof . . . 151
Qualifications for license . . . 41
Financial ability to construct and operate in public interest . . . 60
To render satisfactory service . . . 60
Insolvency disqualifies . . . 60
Subscription only by . . . 89
When permissible by attorney . . . 89

Appropriation
Of broadcast program by other broadcaster as unfair competition . . . 445
By press as unfair competition . . . 444
Common law intellectual property,
False broadcast advertising as unfair competition . . . 538
No property in mere ideas . . . 531
Property in literary expression of ideas . . . 534
Protection original ideas by contract . . . 533, 534
Restraint of "off-the-air" recording . . . 537
Unauthorized use of phonograph records . . . 536
Of news as unfair competition . . . 443
Of wave-lengths . . . 9

Approval
Of assignment, refusal not appealable . . . 158
Transfer of authorization . . . 59
Of control of licensee corporation . . . 59
Program of station necessary . . . 58

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Arbitration
Clause for, does not bar negative injunction..... 398

Area of Broadcast
Precludes common carrier status..... 216

Argentine
Adherence to Montevideo Copyright Convention..... 702

Argument
On exceptions to examiner's report..... 127

Arizona
Gross receipts and privilege tax of, deemed unconstitutional... 204

Arrangement
Of work not included in compulsory license..... 666

Artists
Agreement with manager or representative,
Agency of 424
Apparent authority binding..... 435
Authority to execute for..... 436
Booking agency contrasted..... 423
Creation of agency..... 426
Duration of 427
Duties of representative..... 431
Diligence, skill, loyalty..... 431
To representative 432
Failure to secure engagements for, effect..... 431
Formation of agency..... 426
Function of representative..... 422
Principal and agent relation..... 424
Ratification of unauthorized acts..... 434
Revocation of authority, absolute power of..... 429
For cause 430
Liability for when before termination of contract..... 429
Statutory provisions governing..... 425
Termination of 428
Validity of, necessary between parties..... 426
Agreement with producer..... 382
Addition of broadcast stations to original schedule..... 354
Anticipatory breach by producer..... 382
Arbitration provision 378

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Artists—Continued

Breach, failure of artist to appear 353
Broadcast coverage of program 354
Cause of action for breach 381
Compensation, on artist's default 380
Right to 379
Damages for producer's breach, action before termination of contract 384
Certainty, rule of 383
Direct and proximate, liable for 383
Liquidated 387
Not to be penalty 387
Reasonable forecast of 387
Measure of 384
Mitigation, duty on artist 385
Nominal 383
Notice of discharge as liquidation of 386
Profits, award of 383
Definiteness essential 351
Discharge of artist, burden of proof 365
Condonation 376
Justifiable grounds, breach of reasonable regulations 366
Disobedience 367
Failure to attend rehearsals 374
Illness 370
Immoral conduct 373
Incompetence 369
Indecent language 373
Insolence 372
Insubordination 372
Intoxication 371
Refusal to play role 367
Refusal to wear costume 368
Unfaithfulness 372
Waiver of 376
Notice of 375
Duration, definiteness 361
Of broadcast performance 352
Contract 361
Engagement 361
Duty to employ 356
Failure to secure time, no excuse of performance 377

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Artists—Continued

General relations 350, 351
Impossibility of performance..... 378
Effect of Act of God..... 378
Force majeure 378
Injunctive relief against artist for breach..... 388
Assignee may not have..... 399
Beyond term of employment, if reasonable..... 401
Continuance of performance by producer after..... 395
Lack of mutuality bars..... 400
Not barred by arbitration clause..... 398
Not if infant artist..... 390
Not if liquidated damages provided..... 392
Performance necessary before..... 394
Reasonableness of negative covenant..... 390
When pendente lite..... 396
Where exclusive right to use photograph..... 402
Where remedy inadequate at law..... 391
Interpretation and construction of..... 359
Usage and custom..... 360
Line charges, liability for..... 353
Mutuality 351, 364
Negative covenants against artist..... 389
Express or implied essential..... 389
Implied not to act in derogation of producer's rights.. 403
Non-performance by producer..... 377
Notice as liquidation of damages..... 386
Program credit 352
Reduction of broadcast stations..... 354
Remedy of
For partial breach..... 381
Prevention of performance..... 381
Renewal 362
Repeat broadcasts 355
Rights of producer when dispute between artist and manager 437
Services, scope of, in contract.....352, 353
Satisfactory performance required..... 364
Sunday broadcast 358
Unique 393
Termination, by producer..... 363
Death of artist..... 363
Employment at will..... 363

Artists—Continued
In accordance with contract 363
Serious illness of artist 363
When two weeks' notice required 363
Total breach by producer, one action only 381
Travelling expense provision 353
Understudies, provision for 357
Assigned role, may refuse to play 367
Booking agency for 423
Compensation by producer 379
Amount 379
Salary due before default, may sue for 380
When payable 379
Competency, audition as standard 369
Costumes, breach by failure to buy 366
Refusal to wear 368
Deceptive imitation of, by impersonation as unfair competition 523
Definition of 350
Duration of engagement 361
Duty to producer, obedience to all reasonable rules 366
General classification 422
Imitation by impersonation of, as defamatory 523
Independent contractor, when artist is 321
Mitigation of damages, artist's duty to 385
Not protected in style, method or type of performance 522
Obligation of producer to furnish work 356
Property of, in recorded interpretive renditions 536
Protection against unauthorized appropriation 574
Renewal of engagement by producer 362
Restrictions for, of "off-the-air" recording 537
Unauthorized broadcast of phonograph records 536
Right to refuse material 573
Specific performance, not ordered 388
Television, negative covenants 718
Unauthorized use of performance for 716
Use of name of, appropriation of professional by another 523
Competitive use of real name 524
Trade name, professional as 522
Real name as 524
When use professional name may be restrained 522
Who included 350
Workmen's Compensation Acts, applicability 320, 321

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Assignments
Distinguished from license 406
Of contract for scripts 648
Facilities contracts 273
Literary work
Constructive trust, when imposed 407
Essential to pass intangible property rights 579
Future works 407
Nature of 406
Transfer of 406
When already created 407
Negative covenant, not subject to injunction 399
Permit or license, application for approval 59
Refusal to approve not appealable 158
Renewal where right was given by 678

Associated Actors and Artistes of America 297

Assumed Names
Use of 460

Attorney
Subscription by 89

Audience
At broadcast, rights and status 243, 244
Failure of advertiser to fulfill obligation to 269
Station not insurer of safety of 243

Audition
Standard of artist's compensation established by 369

Austria
Adherence to Montevideo Copyright Convention 702
Public reception of broadcast, whether infringement 707

Author
Agreement for broadcast program scripts 406
For series of scripts 414
Breach by producer 414
American Society of Composers, Authors and Publishers 297, 597
As employee,
Of producer, whether he is 405
Proprietor of literary works 405, 643
Rights as, copyright 643
Status 643

Author—Continued

As independent contractor 405
Copyright 643
Status 405, 643
Bankruptcy
Effect on contract of 648
Terminates contract for creative work 412
Billing, right to 647
By-line, right to 647
Conversion of script, recovery for 420
Copyright, agreement with proprietor 407
Assignment of right to renew 678
Renewal where all do not perfect 681
Where several 679
Where employed by original owner 687
Right to secure, whether available 407
Rights under Act of 1909 587
Sole and exclusive right to first publication 579
Failure to deliver script on time as breach of contract 413
Generally 404
League of America 297
License agreement with 406
Breach of 418
Distinguished from assignment 406
Termination of 412
Liquidated damage provision 416
Name, agreement to use, enforcement 409
Assumed, rights in 409
Right of author to demand use of 409
To prevent use of 409
Right of producer to use author's 409
Use of 409
Negative injunction
Against breach by author 415
Production of script, may author compel 411
Program credit, right to 647
Reasonable time for delivery of script 413
Remedies
Action for reasonable value of services 419
Equitable relief, not where liquidated damages 415, 416
For conversion of script 420
Destruction of script 420
Loss of script 420

Author—Continued
Producer's breach 419
Script delivered late 413
Rescission for fraud by producer 417
Unauthorized use by producer 418
Restraint, mention of another as creator of adapted work .. 647
Distortion of work mentioning author 647
Use of name on work not written by 647
Reversion to author for producer's breach 419
Rights, on outright sale 411
Ownership in script 408
Purchaser of, with knowledge 405
Radio rights in non-broadcast works 421
Where script based on non-broadcast work 421
Where script deviated from or distorted 410

Authority
Delegation to individual, commission or board 76
Of advertising agency need not be specific 342
Artist's representative 433
Interstate Commerce Commission to make findings 213
Revocation by artist as to representative 429
For cause 430
To use state books by Federal Communications Commission ... 82

Automatic Copyright
Formalities under conventions for 697

Authorization
Application for instrument of 55
Amendment of 57
Contents of 56
Renewal of 58
Withdrawal of 57

B

"Bank Night" 502

Bankruptcy
Effect on facilities contract 275
Performance of contract 648
Terminates contract to create work 412

Berlin Conventions
For copyright, 1908 ... 694
Of 1903 ... 19
Of 1906 ... 20
Primary objectives ... 20
Ratification ... 21
Service regulations ... 20

Berne Convention
For copyright protection ... 693, 694
Protecting of citizens of member countries ... 695
Of non-member countries ... 696

Billing
Author's right to ... 647

Boards
Delegation of authority to by Federal Communications Commission ... 76
Desirability of ... 77
Review of actions of ... 78

Bolivia
Adherence to Montevideo Copyright Convention ... 702

"Bonus" Stations ... 299

Booking Agencies
Act as brokers ... 424
Contrasted with artist's representative ... 423
Statutory regulation of ... 425

Books
Authority of Federal Communications Commission to use state ... 82

Boycott
Labor union right of ... 300

Branding
Federal Trade Commission restriction on false ... 557

Breach of Contract
Anticipatory by producer ... 382
By artist's failure to appear ... 353
Author, equitable relief ... 415
Liquidated damages ... 416
Producer, author's relief ... 419
For series of scripts ... 414

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Breach of Contract—Continued
Of artist's contract, cause of action 381
Injunction 388
Of facilities contract, damages 277
Effect 276
Of license, agreement of author 418
On ticket 241
Negative injunction against 415
Reversion to author by 419
Total, one action only 381

Briefs
Service required 129
Time of filing 129
Limited 128
Who may file 129

British Copyright Act
Distinguished from U. S. Act of 1909 660
Mechanical reproduction and compulsory license under ..... 65[illegible]

Broadcasting
Advertising,
As interstate commerce 540
Conduct of not normally involved 200
Essentially business 215
False restrained by Federal Trade Commission 540
Federal regulation of 558, 559
Power of states to prohibit 565
Unconstitutionality of gross receipt and privilege taxes ... 204
Unlicensed insurance company under state regulation .. 192, 193
As commerce, profit motive not essential 6, 183
Contests and lotteries,
Anti-lottery provisions of Act of 1934 496
Construction of 500
Jurisdiction to determine 498
Liability for violation 497
"Best" contest as lottery 505
Checker problem not lottery 509
Difference between Act of 1934 and Postal statute 499
Gift enterprises as lottery 508
Guessing contests as lottery 506
Illegal dissemination on lottery 511
Prohibited 53

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcasting—Continued
In general 495
Lottery defined 501
Element of chance 504
Of consideration 502, 503
Voluntary contests 507
Prize as essential of lottery 510
Word building contest not lottery 509
Defamation,
Actionable at common law 485
Defined 466
Distinguished from libel and slander 467
Jurisdiction of courts 484
Of Federal courts 490
Parties 487
Agent to accept service 489
Recommendations 491
Over crimes, broadcast outside state 492
Jurisdiction of defendant 493
Extradition 494
Interstate rendition 494
When without the state 487
Liability for 469
Of advertiser 481
Speaker 470
Station 471, 472, 473, 474
When by employee 475
Extemporaneous 479
In script 476, 477
Originating in another station 480
Must relate to party specifically 482
Privilege and fair comment 483
Statutory provisions 486
Theoretical classification of 468
Utterance without submission 478
Facilities, state participation in 79
Frequencies,
Allocation of by treaty 22, 23, 24, 24A
Right to hearing on change of 102
Specification in application for authorization 57
News programs,
Appropriation by competing station, whether unfair competition 442, 443, 445, 446, 535A

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcasting—Continued
By press, whether unfair competition 444
Of news reports by, whether unfair competition 443
By agreement 447
Constitutionality of proposed legislation 450
Control of station by newspaper 449
Copyright protection, practical impossibility 444
Defamation in 448
Direct broadcast of news, right to 446
Agreements granting 447
Events on private confined areas 446
On public property 446
On unconfined areas 446
Interference by station with exclusive right of other 442, 447
History of 438
Litigation by press against stations 439, 442
News possesses quasi-property characteristics 442, 443
News services 441
Press-Radio Bureau plan 440
Establishment of 440
Press-Radio relations, conflict between 438
Control of stations by newspapers 449
Statutory reforms proposed 450
Constitutionality of 450
Litigation between press and stations 439
Rebroadcasting, whether unfair competition 445
Programs, control of contents,
By broadcast station 570
By producer and others 572
Commercial program 571
Constitutional guarantee of freedom of speech 562
Congressional limitation under Act of 1934 563
Federal regulation of political programs 566
Indirect control of Federal Communications Commission .. 564
Private 569
Provisions of Act of 1934 560
History of 561
Provisions against obscene, indecent and profane language .. 567
Prohibition of lottery information 568
Proposed legislation 573
State control under police power 565

Broadcasting—Continued
Programs, protection of title,
Against use in motion picture, play or novel..... 528
General practice 525
Of work in public domain..... 529
Of theme music..... 530
When contained in trade mark or trade name..... 526
When has secondary meaning..... 527
Programs, protection of trade mark, infringement,
Basis of protection of broadcast advertising marks..... 517
Of technical trade marks..... 518
Of trade names..... 520
Definition of trade marks and trade names..... 514
Distinction between 515
Elements of unfair competition..... 513
Exploitation of advertiser's trade mark or sponsor's program 519
Function of trade mark and trade name..... 516
Regulation of trade competition..... 512
Test of unfair competition in simulating trade name..... 521
Reception, interference with,
Statutory provisions in Maine..... 188
Michigan 185
Oregon, apparatus in interstate commerce excepted... 188
Vermont 188
Regulation of,
Congressional power,
Delegation of 13, 14, 15
Not unlawful deprivation..... 12
Plenary over mingled interstate and intrastate operations 7, 183
Where intrastate interferes.....8, 205
Relation to fifth amendment..... 10
Supremacy of 183, 319
Under treaty making power..... 9
Federal Communications Commission,
Broadcast division,
Abolished 75
Delegation of work..... 50
Effect and enforcement..... 50
Establishment 75
Former control 50

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcasting—Continued
Jurisdiction 75
Majority action 50
Rehearing 50
Powers of 50
Sufficiency of standards.....16, 17, 18
Federal legislation,
Act of 1912..... 25
Powers of Secretary of Commerce.....25, 26, 27
28, 29, 30
Act of 1927.....31, 32
Purposes of 33
Act of 1934..... 47
Modification of Act of 1927..... 52
New provisions of 53
Purposes of 48
Application anti-trust laws..... 36
Repeal of Davis Amendment..... 54
Restrictions on lotteries..... 53
On rebroadcasts 53
Ship Act of 1910..... 25
Interstate commerce, is.....4, 5, 183, 200, 203, 209, 319
Receiving set as instrumentality of..... 210
Reception essential element..... 210
Intrastate commerce, commercial programs are..... 203
Jurisdictional basis 1, 2, 3, 4
Municipal ordinances,
Antenna, height of..... 197
Classification of 196
Constitutional limitations 196, 197, 198, 199
Transmitter, location of..... 197
Zoning 197
Only one national system of..... 183
Public utilities aspects.....211, 212
Not common carriers..... 217
Qualifications, implications as..... 218
State power,
Not in conflict with Federal..... 183
Over local matters only.....183, 319
State statutes,
Administrative boards established..... 184
Michigan 184, 185
New Jersey 184, 185, 186

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcasting—Continued
Classification of 183
Origin and background..... 183
Unlicensed insurance company advertising.....
192, 193, 194, 195
California 194
Idaho 192
Kentucky 192
Louisiana 193
Maryland 193
Massachusetts 194
New York 192
Pennsylvania 193
Validity of 189, 190, 191, 195, 199
West Virginia 192
Taxation by state,
Constitutional limitations on..... 200
Corporation organization taxes, liability and limitation 201
Facilities, sales tax inapplicable to..... 208
Foreign corporations, privilege tax, limitations on.... 201
Gross receipts tax, invalidity of..... 200
Immunity from, not as Federal instrumentality.. 200
License requirement invalid..... 198
Occupation privilege or license tax (excise),
Broadcast stations may not be levied upon..... 202
Defined 201
Discrimination between interstate and intrastate commerce 202, 203
Gross receipts, measured by..... 203
Arizona 204
Deemed unconstitutional 204
Interstate commerce excluded..... 202
Privilege to engage in radio broadcast, tax invalid 200, 210
Protection Congressional power basis of rule.... 205
Regulation and control of business primary object 201
Property in state, allowance of tax.....206, 210
Measure of tax..... 206
Property without state, not taxable..... 207
Exception, stations 207

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcasting—Continued
Receiving sets, tax on ownership unconstitutional.... 209
Nature of 210
Police power does not prevent this result..... 210
Sales tax not applicable..... 208
Right of privacy,
Generally 451
Interviews with members of public..... 462
Liability for invasion of..... 464
Nature of right..... 452
New York doctrine..... 455
Under Civil Rights Law..... 456
Persons entitled to..... 453
Persons not applicable to..... 463
Recognition of right at common law..... 454
Recommendations 465
Recording as invasion of..... 461
Use of assumed names..... 460
Of name in commercial program other than news program 457, 458
In news broadcast..... 459

Broadcast Stations
General operations and status,
Adjunct of particular business, must not be..... 219
As affected with public interest..... 217
Common carriers, expressly not by Act of 1934.....217, 250 256, 472
Not at common law.....215, 216
Not held out as..... 215
Need not accept programs from all..... 250
Statutory exception 250
Obligations not performable otherwise..... 214
Physical limitations produce this result..... 216
Public utility characteristics, qualified..... 218
Construction of, must be authorized by Federal Communications Commission 238
Instrumentalities, are not Federal..... 200
Location of, must be authorized by Federal Communications Commission 238
Not insurers of safety of audience..... 243
Personnel of, injuries to..... 326
When independent contractors..... 321

Broadcast Stations—Continued
Point-to-point communication distinguished from operations of 216
Private enterprises, operated as 220
Property loss or damage, liability for 245
Property of advertiser in possession of, must be turned over 270
Rates, charges, etc.,
Costs of production, when absorbed by 256
Discounts permitted 256
Discrimination allowed 256
Gross and net rates 340
Interstate Commerce Commission jurisdiction of 213
Payment, may be contingent 256
Mode of 256
When excused 276
When made 257
Telephone line charges may be included 247
Uniform may be required by agreement with system . . . 289
Deviation from, effect 289
Need not maintain 250, 256
Required for political programs 566
Reduction of stations engaged 354
Sunday broadcasts, legal 246
States may not prohibit 246
Labor relations,
All-union or closed shop 301
As aim of strike or picketing 301
Legality of 300
Not restraint of trade 300
American Federation of Musicians, contract with 299
Collective bargaining, stations must engage in 315
Company unions 297
Contract between station and union 299
Standard provisions 299
Craft unions 297
Enforcement of union by-laws 302, 305
By expulsion 303
Fine 303
Picketing 304
Strike 304
Resulting in secondary boycott 306
Industrial unions 297

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcast Stations—Continued
"Inside" unions 297
National Labor Relations Act applicable..... 308
Employees protected by..... 309
Organization of employees, status..... 297
Picketing suppliers or customer unfair..... 307
Preferential shop lawful..... 300
Recording music turntable operator, jurisdictional dispute 299
Right to organize..... 298
Rights of labor..... 300
Unfair labor practices...310, 311, 312, 313, 314, 315, 316, 317
Unions in the field..... 297
Program operations of,
Candidates for public office, equal opportunity must be afforded 566
Discrimination barred 250
Character of, provided in facilities contract..... 258
Commercial programs 232
Announcement as such required.....221, 252
Distinguished from sustaining..... 232
When deemed 220, 221
Co-operative 285
Copyright, infringement of..... 222
Absence of control of system does not excuse..... 293
Coverage under artist's contract..... 354
Defamation, absolute liability of, for..... 294
Dependence on creative works..... 574
Electrical transcriptions 226
Contents 227
Ownership of matrices..... 231
When manufactured for..... 230
When supplied by advertiser..... 229
Identification announcements 251
Period portion reserved for use..... 251
Required 251
May be in contract..... 290
May be restricted..... 290
When made 251
Interruption or other interference..... 279
Advertiser's right to refund..... 279
Legality of Sunday programs..... 246
Liability for lottery program..... 497

Broadcast Stations—Continued

Non-simultaneous broadcast 287
Offensive material, right to delete..... 259
Reasonable exercise 259
Phonograph records, unlawful appropriation of rights of artist 225
Copyright property in..... 225
Power to impose standards..... 570
Production of, station may be booking agent or manager.. 232
Producer, whether station is..... 267
May be 222, 232
Program material, disapproval of station final..... 258
Prior approval of, when necessary..... 258
Public convenience, interest or necessity, adherence to..220, 292
Not subject to delegacy..... 292
Rebroadcast, not without consent..... 286
Recorded programs, announcement of required..... 253
When made 253
Relation of station to transcription library service..... 228
Remote broadcasts 224
Responsibility for 250
Spot broadcast, proof of not required of station..... 271
Substituted supervening public program, advertiser entitled to remainder of period..... 265
Comparable subsequent period, advertiser entitled to.. 265
May substitute for commercial..... 266
Notice to advertiser, reasonable..... 265
Refund to advertiser..... 265
Supervision retained by station.....247, 250
Sustaining, contents of..... 222
Clearance from owners of script..... 222
Musical compositions 223
Payment 220
Phonograph records, may be copyright infringement.. 224
Remote broadcasts of..... 224
Expense, who bears..... 224
Affect nature of..... 224
Substantial similarity to station's program required.. 267
When deemed 220
Studios and theaters,
Alteration work, burden on lessee..... 236
Must comply with municipal regulations..... 236

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcast Stations—Continued
Admission,
Anyone may be excluded except for race, creed or color 241, 242
Breach of condition on ticket 241
Of contract to refuse admittance 241
Excluding ticket holder, station may 241
Terms to be regulated 241
Tickets,
Conditions may be attached 241
Distribution may be gratis 241
Price in discretion of station 241
Re-sale may be prohibited 241
Revocable license only 241
Sale may be refused to anyone 241
Sold, may be 241
Audience,
Are invitees 243
Duty of station towards 243
Standard of care 243
Liability for personal injuries based on negligence . . . 243
Test of 244
Ejection for cause 241
Inspection required 243
Lease, Federal regulations may become part of 236
Use should be expressed 236
Terminable where failure to secure license, may be . . . 236
Operation of, is private business 241
Regulation (local) 237
Aisles 239
Arbitrary, must not be 237
Construction, methods of 238
Exits 239
Fire protection 239
Jurisdiction to make 237
Police power is basis 237
License may be required 240
Tax may be imposed 240
Local aspect, must relate to 237
Location, zoning may not prescribe 238
Materials, quality and type 238
Passageways 239
Police protection 239

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Broadcast Stations—Continued
Reasonableness of 237
Repugnant to enabling act, must not be..... 237
Seating may be regulated..... 238
Structural changes, not without lessor's permission..... 236
Sunday operation, state may prohibit..... 246
Types of studios..... 235

Broadcast Time
Period or duration..... 251

Broker
Advertising agency ordinarily not..... 338
Defined 338

Buenos Aires Copyright Convention..... 702

Burden of Proof
On appellant on appeal from Federal Communications Commission 173
Applicant 151, 173
For construction permit..... 152
Grant in public interest..... 61
Renewal 153
Artist, discharge by producer..... 365
Protestant 154

Business
Broadcasting essentially advertising..... 215
Private, operation as..... 241

By-Laws
Of unions, enforcement of.....302, 305
By fine 303
Expulsion 303
Picketing 304
Strike 304
Result, secondary boycott..... 306

By-Line
Right of author to..... 647

C

Cairo
Telecommunications Conferences of 1938..... 24A
Frequencies and allocation of..... 24A

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

California
Copyright statute 597
Regulation of advertising of unlicensed insurance companies.. 194

Canada
Formalities essential to copyright protection..... 697

Candidates for Public Office
Discrimination not allowed..... 250
Equal broadcast opportunity, to be afforded..... 566
Records required by Commission..... 566

Capricious Determinations
Of Federal Communications Commission reversible on appeal.. 167

Care
Standard required by station theater to audience..... 243

"Cartoon" Contest
As lottery 505

Casual Employees
Applicability of Workmen's Compensation Acts..... 324
Extension of statutes to excepted employments..... 324
Subject to Social Security Act..... 333

Cause
Ejection from theater for..... 241
Of action, by artist for breach of contract..... 381
Revocation of representative's authority for..... 430

Cease and Desist Order
Validity of 547

Censorship, Prohibition of
Background of 561
Effect of constitutional guarantee of freedom of speech..... 562
Federal Trade Commission, control of advertising..... 564
Indirect by Federal Communications Commission of program contest 564
Of political broadcast prohibited..... 566
Television 713
Power of state to impose..... 565
Against obscene, profane, indecent language..... 567
Statutes in Michigan, New Jersey, and New York..... 565
Proposed legislation 573

Censorship—Continued
Under Act of 1934, prohibited 560
Lottery information banned 568
Obscene, profane, indecent language banned 567

Certificate
Issuance under Copyright Act of 1909 591

Chain-Break
Agreement re, between system and constituent station 290
Period for identification of system 290

Chain Broadcasting System
Bonus stations 289
Columbia Broadcasting System 284
Copyright infringement, liability for 293
Defamation, liability for 294
Definition of 283
Independent contractor 283
Mutual Broadcasting System 284
National Broadcasting System 284
Network, definition 283
Distinguished from system 283
Program operations of 283
Where offensive, constituent may refuse to broadcast .. 283
Regional 284
Types 283
Non-simultaneous broadcasts 287
Program operations of 292
Editorial selection, benefit to constituent station 292
Offensive program may be refused by constituent station 283
Violations of standards fall on constituent station 292
Sales representative distinguished from 283
Time periods diminished by time for identification 290
Types 282, 283
Uniform card rates, may require constituents to maintain 289

Chance
Element in constituting lottery 504

Change of Frequency
Right to hearing on 102

Character of Program
Provisions in facilities contract 258
Under system broadcast 292

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Checker Problem
Not a lottery 509

China
Aliens, special period of copyright protection 691
General copyright treaty with United States 704

Citizenship
As affecting right in literary property 579
To renew copyright 688

Civil Rights Laws
Application to broadcast theaters 242

Classification
Of artists 422
Defamation 468
Statutory regulations of states 183

Clayton Anti-Trust Act 546

Clearance
From owners of interests in scripts 222
Necessary on sustaining programs 222

Clear Channel Broadcast Operation
Super power, use thereof 24

Closed Shop
As aim of strike or picketing 301
Lawful 300
Not restraint of trade 300

Closing
At hearing 150

Collective Bargaining
Station must engage in with employees 315

Co-Author
When fails to renew copyright 683

Color
Admission to theater cannot be denied for reasons of 242

Columbia Broadcasting System 284

Commerce

Broadcasting is 6, 183
Mandamus to compel Secretary of Commerce to issue license.. 27
Power of Congress to regulate..... 5
Profit motive not essential..... 6

Commerce Clause

As basis for radio transmission control..... 1

Commercial Programs

As intrastate commerce..... 203
Control of program content..... 571
Defined 232
Program operations 232
Requirement of announcement as such.....221, 252
Supervening public program.....265, 266
Sustaining program distinguished..... 232
Use of name in, right of privacy..... 458
When deemed 220, 221

Commingling

Interstate and intrastate operations..... 7

Commissioner

Delegation of authority to, by Federal Communications Commission 76
Disabilities of 77
Rehearings on order, decision or report of..... 50
Right to, in discretion..... 112

Commissions

Payable on facilities contracts..... 256

"Commodities Clause" 450

Common Carriers

Broadcast stations are not.....215, 216, 217, 250, 256, 472
Could not perform obligations under license otherwise.... 214
Do not hold themselves out as..... 215
Expressly not under Act of 1934..... 217
Need not accept programs from all..... 250
Statutory exception 250
Physical limitations produce result..... 216
Statutory origin of question..... 212
Point-to-point radio operators are.....211, 212

Common Law

Broadcast station not common carrier at.....215, 216
Defamation actionable at..... 485
Personal injury to personnel actionable at..... 326
Right of privacy actionable at..... 454
Rights to literary property,
Abolished in England by Act of 1911..... 579
Act of 1909 does not abolish or annul..... 579
Adverse possession, effect of..... 643
Citizenship of author immaterial..... 579
Copyright distinguished 579
Damages for conversion of manuscript..... 622
For infringement 622
Divestment of, by publication of creative works..... 580
Exclusive rights to first publication..... 579
To make any use thereof..... 584
To mechanical reproduction..... 584
To prevent copying..... 579
To translation 603
Extant in United States..... 579
Extent of protection..... 584
Independent of statute..... 579
Infringement of 616
By broadcast of letters..... 645
Of telegram 646
Where action brought..... 619
Not coextensive with statutory copyright..... 577
Pass by assignment..... 579
Perpetual unless work published..... 579
Protects creative works..... 579
Public performance not divestment..... 582
Publication destroys 579
Place of, immaterial..... 580
Limited or restricted does not..... 580
Without author's authority, does not..... 580
Sale, absolute, destroys..... 579
Superseded by compliance with statute.....578, 579, 594
Where intellectual property appropriated,
False broadcast advertising restrained..... 538
Interference with exclusive right restrained..... 535
No property in mere ideas..... 531
Off-the-air recording restrained..... 537
Prevention as unfair competition..... 535

Common Law—Continued
Property in literary expression of ideas..... 534
Protection of original ideas by contract.....533, 534

Common Sources
When not basis of infringement..... 614

Communications Act of 1934
Appeal provisions 160, 163, 164, 170, 171, 173
174, 175, 176, 177, 182
Broadcast of lottery information prohibited.....53, 496, 497, 498
Common carriers, broadcast stations not..... 217
Control over intrastate interference..... 8
Co-operation with state boards..... 179
Criminal proceedings, penalties..... 179
Disobedience of witness, penalty..... 180
Effect on facilities contracts..... 250
Geographical zones abolished..... 51
Hearings, right to..... 102
History of content control provisions.....560, 561
In general 47
Joint hearings 81
Jurisdictional basis 3
License provisions 53, 247
Limitations on freedom of speech..... 563
Mandamus 178
Modifications of Act of 1927..... 52
New provisions 53
Power of courts to review..... 170
Purpose of 48
Rebroadcast 53
Records, transfer from Radio to Communications Commission.. 83
Re-enactment of standard of public interest..... 52
Regulatory scope 47
Rehearings 50
Requirement of announcement of sponsored programs..... 252
Restrictions on broadcasts..... 53
Revocation of license..... 52
Setting aside orders of Commission..... 182
Studios, control over by Commission..... 53
Suspension of orders..... 182
Television, subject to..... 712
Validity as delegation of legislative power..... 13

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Communications Association, American 297

Communications Commission, see also Federal Communications Commission

Appeals from,
- Actions appealable 160
- Burden of proof 173
- Findings 170
- Intervention 164, 177
- Legal and justiciable questions only 170
- Nature of review 163, 170, 173
- Parties 160, 176, 177
- Procedure 164
- Purpose 177
- Questions on 173, 174
- Remedy exclusive 160, 171, 182
- Review of determination of Commission 166, 167, 168, 169

Appearances 87
Boards of employees 76, 78
Composition of, eligibility requirements 49
Delegation of work 76
Depositions 119, 120, 121, 122, 123, 124
Disqualification of commissioner 87
Divisions 49, 70, 71, 72, 73, 74, 75, 76, 78
Duties 61, 83
Effect and enforcement of action of commissioner or board 50
Examiners 115
False broadcast advertising, indirect regulation by 559
Findings 170
Individual commissioner 76
Inquiry on its own motion 130
Joint boards 80, 81
May delegate any work 50, 76
Orders 165, 181, 182
Pleadings 94
Powers 53, 55, 61, 81, 82, 100, 101, 110, 112, 115, 116, 130, 135, 498, 560, 567
Public proceedings required 87
Quorum 87
Records 83
Regulatory jurisdiction 47, 70
Seal 83

Communications Commission—Continued
Service of papers 91
Similarity to Interstate Commerce Commission 70
Subpoenas 116, 117, 118

Company Unions 297

Compelling Production
Author may, as to script 411

Compensation
Of advertising agency 346
Deduction from advertiser's remittance 257
Remittance by station 257
Of artist by producer 379
Amount 379
Salary due prior to default of, may sue for 380
When payable 379
Of salesman after termination of employment 234

Competency
Of artist, audition a standard of 369

Competition, see also Unfair Competition
Preservation by Federal Communications Commission 36
Regulation of trade 512

Competitive Misrepresentations
Whether unfair competition 538

Complaints
Jurisdiction of, on radio advertising 545
Proceedings on, by Federal Trade Commission 544

Composers, American Society of Etc. 297, 597

Composite Works
Copyright renewal of 680

Compositions, see also Musical Compositions
Musical, on sustaining programs 223

Compulsory License Provisions, Under Act of 1909
Application to phonograph records 664
To piano rolls 664
Constitutionality of 595, 657

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Compulsory License Provisions—Continued
Not to right of arrangement of work 666
Dramatico-musical works 658
Electrical transcriptions 662
Except uses 663
Off-the-air recording 673
When effective 655

Conclusiveness
Of determinations of Commission 166
Powers of courts to review 166

Conditions
Breach of, on ticket, refusal of admission 241
Grant on, party aggrieved, right to hearing 107
Inserted in license, effect 105
Precedent to operation of station 214
Under copyright law 598

Condonation
Of grounds justifying discharge 376
Long duration of false advertising not 552

Conduct
Of Federal Communications Commission proceedings 87

Conferences
Berlin (1903) radio-telegraph 19
Cairo (1938), frequencies and allocations 24A
London (1912) 21
North American at Havana (1938) 24

Conflict
Between licensees, prior use of wave-length 28
Priority use held not to give priority of right 39
State regulation, with Federal, invalidity 183
Jurisdiction, how resolved 190

Congressional Powers
Completeness of 8
Jurisdiction to regulate intrastate broadcasting 2, 8
Plenary, over radiotelegraphy 1
Over mingled interstate and intrastate operations 7, 183
Regulation as commerce and interstate 5
Not unlawful deprivation 12
Under treaty making powers 9

Congressional Powers—Continued
Reservations by, of London Conference of 1912..... 21
Taxation of radio broadcasting..... 200

Consent
Of originating station to rebroadcast necessary..... 286

Constitutionality
Act of 1909, § 11..... 595
Compulsory licensing provisions.....655, 657
Act of 1912..... 4
Act of 1927..... 4
Effect of guarantee of freedom of speech..... 562
Limitations on taxation by states..... 200
Municipal powers, limitations on.....196, 197, 198, 199
Of proposed legislation where newspaper controls station..... 450
Provision under treaties..... 9
Refusal to renew license..... 10
State taxation of broadcasting..... 200
Under Fifth Amendment..... 10

Construction
Anti-lottery legislation 500
Methods of, local regulation of.....237, 238, 239

Construction Permits
Actions appealable under Act of 1927.....155, 157
Not appealable 156
Under Act of 1934..... 160
Applications for, contents..... 43
Burden of proof..... 152
Grant of license..... 43
Not transferable 43
Right to hearing..... 69
Terms 43

Constructive Trust
When imposed upon assignment of literary work..... 407

Consideration
Element of lottery..... 502
Package tops, etc. 503

Constituent Stations
Agreement with system.....288, 290
Program operations, editorial selection..... 292
Mechanical co-operation by..... 291
Offensive program, may refuse to broadcast..... 283

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Constituent Stations—Continued
Rights of 107
Uniform card rates, system may require..... 289
Violations of operating standards fall on..... 292

Containers
Simulation of restrained by Federal Trade Commission..... 557

Contempt
Punishment for failure to answer subpoena..... 116

Contents
Of appeal record..... 164
Application for instrument of authorization..... 56
Petition for rehearing..... 113
Scripts under Act of 1909..... 640

Contest
Between stations, right to hearing..... 111

Contest Programs, Whether Lotteries
"Best" 505
"Cartoon" 505
Checker problem not..... 509
Function 495, 503
Gift enterprises 508
"Guessing" 506
Liability when, basis of determination..... 497
Who liable 497
"Quiz" 511
"Voting" 507
Whether consideration present to constitute..... 503
Word building 509

Continuance
Of actions, suits and proceedings before Federal Radio Commission 84, 85, 86
How obtained under administrative regulations..... 132

Continuity
Copyright ownership of..... 642
Protection of 641
Distinguished from script..... 638

Contracts, see also Agreements
Anticipatory breach 382
American Federation of Musicians labor contract..... 299

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Contracts—Continued
Divisibility 379
Facilities contracts
Assignment of 273
Bankruptcy of party, effect 275
Breach of 258, 264, 265, 269, 271
Liability for 276
Waiver of 276
Damages for breach of 277
Mitigation of 265
Death of party, effect 275
Exclusive, not unless so provided 263
Failure to broadcast, liability 264
Formation 232
Incompetency of party, effect 275
Nature of 247
Non-performance 274, 279, 280
Obligations, scope of 247, 270, 272
Parties to 255
Provisions for compensation 267
Indemnity 259, 260, 266
Liability for negligence 262
Miscellaneous 232, 261, 262, 265, 272
Offensive program material 259
Operation of law 250
Program material approval 258
Recorded program material 261, 272
Rules and regulations 254
Services by stations, miscellaneous 268, 272
Terms as to announcements 272
Tickets 262
Time of broadcast 263
Warranties 272
Renewal 274
Specific performance 278
Spot broadcast 249, 271
System facilities and provisions 249, 288, 289, 290 291, 292, 295, 296
Termination 274, 275
Writing, necessity of 248
Failure to deliver script on time 413
Interpretation and construction 359
Usage and custom, evidence of admissible 360

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Contracts—Continued
Revocation of authority of artist's personal representative, liability ... 429
Specific performance ... 388
Standard provisions of labor contracts ... 299

Control
Station by newspaper ... 449
Transfer of, of licensee corporation ... 59

Control of Program Content
By producer ... 572
By station ... 570
Commercial program ... 571
Constitutional guarantee of freedom of speech ... 562
Congressional limitation, Act of 1934 ... 563
Divestment of, by license transfer ... 472
Federal Communications Commission, indirect by ... 564
Federal regulation of political programs ... 566
Federal Trade Commission, control of advertising content ... 564
Of sustaining programs ... 222, 223
Private ... 569
Prohibition against lottery information ... 568
Obscene, indecent and profane language ... 567
Proposed legislation ... 573
State control under police power ... 565
When operated by newspaper ... 449

Control of Radio Transmission, Basis of ... 1

Convenience
Standard of Federal Communications Commission ... 35

Conversion
Of dramatic work into non-dramatic ... 606
Manuscript, damages for ... 622
Script, recovery for author ... 420

Conventions
Berne, copyright protection ... 694, 695, 696
Berlin, copyright ... 694
Of 1906, radio ... 20, 21
Madrid telecommunication, 1932 ... 23
Montevideo Copyright ... 702
Mechanical reproduction under ... 669

Conventions—Continued

Perfection of rights under 700
Protection, automatic 697, 698
Washington, radio-telegraphy, 1927 22

Co-operative Broadcast Program 285

Copy

Perforated player-piano roll held not 628, 653
What is 653

Copying

Common law protection against 576
Statutory protection against 576
Traditional concern of copyright statutes 577

Copyright Law

Act of 1790 585
Of 1831 585
Of 1856 ..... 585, 610
Of 1891 585
Of 1909, all writings of author protected 586
Legislative history, amendments 585
Nature, declaratory of constitutional power 586
Adaptations of works in public domain under 596
Extent of protection 596
Arrangements of works in public domain under 596
Automatic copyright, desirability of 709
Cartoons, unauthorized dramatization not 605
Certificate of, issuance under 591
Prima facie evidence of facts stated 591
Sufficiency as proof of validity 591
Classification of registration, not definitive 612
Coextensive with new and original matter 586
Common law rights in literary property distinguished 579
Composite works, what are 680
Concepts underlying work not protected 576
Conditions precedent to grant 598
Congressional powers over 598
Constitution is basis of 595, 598
Continuity of protection 641, 642
Copying of copyrighted work prohibited 576
Of whole or substantial part prohibited 576
Creature of Federal statutes 654

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Copyright Law—Continued
English rights,
Common law rights in literary property abolished..... 579
Compulsory mechanical reproduction license..... 659
Duration of protection..... 690
U. S. provision distinguished..... 660
Profit as essential of infringement by public performances 634
Public reception broadcast deemed..... 707
Statutory right only..... 598
Translation, exclusive right of granted..... 603
Unauthorized public performance as infringement..... 634
Exclusive character of, may not be infringed..... 598
Exclusive rights of copyright owner..... 604
Adaptation and transposition..... 607
Arrangement of musical composition..... 607
Compulsory license provision, not applicable.....663, 666
Performing right not included..... 666
Conversion non-dramatic work into dramatic..... 606
Dramatization of non-dramatic works..... 605
Making extractions from copyrighted work..... 609
Other versions of..... 604
Mechanical reproduction of..... 652
Compulsory license provision not applicable..... 658
Limitation thereon 654
Perform, exhibit, present, produce or reproduce..... 610
Perform publicly, musical composition..... 610
Printing, publishing and multiplying copies..... 601
Public delivery of lecture, sermon, address, etc. 610, 611
Public performance of dramatic works..... 613
Of dramatico-musical works..... 613
Translation of work into other languages..... 603
Vending of manuscript of copyrighted dramatic work..... 610
Vending or otherwise distributing copies..... 602
Expiration of, effect..... 596
Foreign copyright protection,
Aliens, duration of term granted..... 691
Protection afforded 693
Broadcast deemed infringement..... 705
Polish and Soviet exceptions..... 705
Duration or term..... 690
Extent of 689
Interpretive performance by artist, whether included..... 703
Mechanical reproduction, how protected..... 692
Whether infringement 706

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Copyright Law—Continued
Public reception of broadcast, whether infringement..... 707
Recommendations 709
Form, arrangement, sequence or expression of author's idea protected only 599
Of intellectual labors only..... 576
Formalities,
Canadian requirements 697
Deposit of copies,
Addressed to Register of Copyrights..... 590
Best edition then published required..... 590
Mailing is sufficient..... 590
Penalties for failure..... 590
Physically complete copies required..... 590
Prompt deposit required..... 590
Required of unpublished works.....589, 591
Two complete copies required..... 590
When only one.....590, 594
When alien author, requirements..... 590
When timely 590
Where work contributed to periodical..... 590
Notice of copyright,
Affixed to work..... 589
Form prescribed by statute..... 589
Name of copyright owner essential..... 589
Non-complaince, effect of, on..... 589
Publication with notice of copyright,
Essential for protection..... 589
Prior to Act of 1909..... 589
Subsequent to Act of 1909..... 589
Registration,
Remade of unpublished works later reproduced for sale 594
Registration and deposit,
Essential to base infringement..... 589
Registration of claim,
Does not vest copyright..... 591
Who entitled to..... 591
When unpublished work..... 594
General U. S. copyright treaties..... 704
Governmental publications not protected..... 644
Historical view 577
Legislative history 585

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Copyright Law—Continued
Idea not copyrightable 615
Immoral or indecent works not protected 586
Incidents of, special rights 600, 610
Infringement,
Access, whether essential 614
Actions, conditions precedent 589, 590, 591
General equity rules apply 619
Parties, co-authors 685
Equitable owners 588
Legal owners 588
Where brought 619
Arrangement after revocation of license 608
Breach of license agreement may be 418
Broadcast of letter 645
Broadcast stations, by 222
Of phonograph records 224
On sustaining programs 222
With mechanical reproduction 222
Public performance 222
Burden of proof of originality 599
Common sources used resulting in similar works, not 614
Conversion of non-dramatic works into dramatic 606
Copying essential 614
Directly not necessary 614
From memory sufficient 614
Counsel fee awards in 623
Criminal proceedings for 649
Criticism, when is 604
Damages for 621
Defenses,
Absence of control of system not 293
Assignment unrecorded not 587
Benefit of plaintiff not 614
Colorable change not 614
Difference of medium or materials not 614
Fair use as 618
Minor addition or omission, not 614
Taken out by employee instead of employer not 587
Extraction of substantial portion of musical composition 609
Imitation or parody of whole work is 618
Independent creative effort resulting in similar work not 614

Copyright Law—Continued
Individual treatment of same subject resulting in similar work not . . . 614
Infringer, who is,
Advertiser . . . 260
Employer of independent contracting musicians . . . 627
Station . . . 260
Intention immaterial . . . 617
Unnecessary . . . 630
In general . . . 614
International broadcast programs as . . . 708
Jurisdiction, exclusive in Federal courts . . . 619
Allegation of, necessary . . . 619
Jurisdictional factors . . . 619
Laches . . . 620
Liability for . . . 293
Limitation of actions, statutes of . . . 620
Mere similarity not necessary . . . 614
Other version made unauthorizedly . . . 604
Substantial portion must be taken . . . 604
Plural liability for . . . 630
Poem, whether broadcast rendition is . . . 612
Public performance for profit of devices manufactured under compulsory mechanical reproduction license . . . 667
Public reception of broadcast . . . 630
Reprinting of illustrations to novel not . . . 681
Substantial portion must be appropriated . . . 614, 615
What constitutes . . . 615
Of musical composition . . . 609
Synopsis but not abridgment fair use . . . 618
Theme expression appropriation is . . . 615
Unauthorized arrangement of musical composition . . . 607, 608
Non-dramatic work . . . 605
Unauthorized manufacture of mechanical reproduction . . . 656
Unauthorized publication of broadcast program contents . . . 601
What work need not be copied . . . 615
International copyright protection,
Adherence of U. S. to conventions . . . 709
Automatic copyright . . . 697
Berlin Convention enactment . . . 697
Formalities provided against, nationalistic . . . 697
Basic principle . . . 694, 695
Domestic registration formalities . . . 697

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Copyright Law—Continued

Duration or term 698
Historical background 693, 694
Le droit morale 701
U. S. reservations 701
Mechanical reproductions under 699
Mere offers of sale, sufficiency of, to secure 698
Performing right exclusive to author 700
Protection secured by U. S. citizens 696
Publication first in member country, effect 696
In non-member country, effect 695
Works included 695
Joinder of licensee on renewal, when demurrable 685
Lyrics alone, not as musical compositions 625
Manufacturing provisions, Act of 1909 590
Nature of grant of 598
Of term 600
News programs, practical impossibility of protection of 444
Not coextensive with common law rights 576
Originality, subject of protection 586, 599
Pan-American protection 702
Automatic copyright under 702
Berne Convention principles followed 702
Buenos Aires Convention 702
Havana Convention 702
Mechanical reproduction under 702
Mexico City Convention 702
Montevideo Convention 702
Performance by broadcast, whether included 702
Rio de Janeiro Convention 702
Perpetual, prohibited by Constitution 595
Persons entitled,
Alien domiciled in U. S. 587
Non-resident not 579
Where reciprocity exists 587
Author 587
Grantee of 642
Co-authors, each is 587
Librettist of operetta not 587
Employer of author 587
Executors, administrators and assigns 587
Inseparable work by citizen and ineligible alien 579
Proprietor 587

Copyright Law—Continued

Plot not 615
Private monopoly for specific term 598
Program title not 527
Publication essential to secure 593
Common law rights survive if none 593
Divestment of 593
Simultaneous publication required 579
Purpose of grant of 598
Rationale of 598
Reciprocal relations of U. S. 704
Reservation of rights by author 642
Renewal of,
Amendments to statutes recommended 684
Application, when made 676
Default in application, effect 676
Equitable assignment of right to 678
Failure of co-author to renew 681
Musical compositions 682
Failure to secure, effect 596
History of 675
Nature of right 677
New grant of 688
Persons entitled,
Administrator not 677
Assignee not 677
Author 596, 676, 680
Children of author 676
Co-authors 679
Employee-author not 687
Employer for hire 676
Executors 596, 676, 686
Next of kin of author 596, 676, 686
Non-citizen whether 688
Producer when employer of author 405
Proprietor not claiming by license or assignment 676
Of composite work 676, 680
On posthumous work 676
Surviving spouse 596, 676
Renewing co-author, legal title of 682
Whether trustee for non-renewing co-author 682, 683
Term or duration 676
Timely registration required 676

Copyright Law—Continued

When rights to, exercised 686
Where inchoate right to, assigned 678
Where two or more authors 679
Work registered prior to 1909 renewable 676
Right new and created by Congress 598
Right to secure, assignable 407
Transferable 642
Rights under, limited to term 596
"Similar production" defined 611
Single, covers work by several authors 679
State statutes dealing with 597
California and New York 597
Subject matter of 586
Tangible expression of ideas protected 576
Term or duration 592
Date of first publication determinative 592, 594
Limited number of years 579
Must be limited 595
Power of Congress to change 598
Works for distribution, not sale 594
Two or more authors, tenants in common 679
United States,
No property in 598
Signatory to conventions 704
Treaties 704
Universality of 689
Unpublished works, copyright in 594, 595
Constitutionality of, § 11 595
Vests upon publication with notice of 589
Whether common law rights displaced by compliance with statute 578, 579
Whether Congress can limit rights under 598
Whether entirely dependent on statute 598

Corporations, Broadcast Station

Ineligible for license under Act of 1934
Where alien stock ownership exceeds one-fifth of issue 52
Liability of, for state organization taxes 201
License application by 59
Subscription of applications by 89

Costs

Certain of production, when absorbed by station 256

Costumes
Breach of agreement to buy, effect 366
Refusal to wear, effect 368

Counsel Fees
Discretionary award, in infringement action 623

Courts
Proceedings on appeal 164
Jurisdiction of defamation 484
Power to review acts of Commission 166
Under Act of 1934 170

Coverage of Broadcast
Contract provisions, artist and producer 357

Covenants, see also Negative Covenants
Implied, not to act in derogation producer's rights 403

Craft Unions
Broadcast station labor relations with 297

Creation
Of agency 426

Creative Works
Bankruptcy terminates contract for 412
Dependence of stations on 574
Use in broadcast programs 574
Basic concepts protected 576
Common law rights, how lost 576, 578, 579
Distribution of copies 575
Dramatic programs as 574
Historical review 577, 578
How used 575
License required 575
Performance not publication 582
Protection against appropriation 576
Against copying 576
Public domain, effect falling into 596
Publication when effected 581
Remedies for unfair competition 576
Transfer of possession, effect 579
What is included as 574

Credit
Right of author to program 647

Creed

Admission to theater not barred by reason of..... 242

Crimes

Jurisdiction where broadcast outside state.....492, 493, 494

Criminal Proceedings

For infringement of copyright..... 649
Under Act of 1934..... 179

Criticism

Whether copyright infringement..... 604

Cross Examination

Right of, as due process..... 167

Cumulative Evidence

To be avoided..... 142

Customers

Of unfair employers, picketing of, unfair..... 307

D

Damages

For breach of contract,
- Action before expiration of contract term.....277, 384
- Certainty, rule of.....277, 383
- Facilities contract, measure of recovery, breach by advertiser..... 277
- Consequential damages, liable for those in contemplation of parties..... 277
- Direct and proximate, defendant's liability for all.....277, 383
- For breach by producer, artist's measure of recovery..... 384
- Liquidated damage provisions..... 387
  - Actual must be certain and easy of ascertainment..277, 387
  - Between artist and producer.....277, 387
  - Obviously excessive, must not be..... 277
  - Penalty, must not be.....277, 387
  - Preferable to provide for..... 416
  - Reasonable forecast of probable required.....277, 387
  - Unenforceable where actual readily ascertainable..... 277
- Mitigation of, duty on artist of.....384, 385

Damages—Continued
Nominal, in any case 277
Least amount awarded 383
To recover more, must prove actual damage 383
Notice of discharge as liquidation of 386
Profits, award of, breach by producer 383
For conversion of manuscript 622
For infringement of copyright 621
For negligence, personal injury 244
Property loss or damage 245

Danzig
Infringement, public reception of broadcast 630

Date
Grant of order after date order effective not due process 104
Order other than for payment of money, when effective 104

Davis Amendment 42, 54, 168
Modification in Act of 1934 54
Repeal 54
Validity of delegation of power 14

Death
Of artist as termination of contract 363
Under facilities contract, effect 275

Deceptive Imitation
Of artist, by impersonation, as unfair competition 523

Decisions
Of Commission, power of courts to review 166
Rehearing on, made by commissioner or board 50

Declarations
Excluded if oral under rules of evidence 142

Declaratory Power
Copyright Act of 1919 is, of Constitution 586

Defamation by Broadcast Program
Actionable independently of libel and slander 485
Agreement between station and system, liability for, under 294
All participants liable 481
Classification of 468
Defenses, fair comment 483
Privilege 484

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Defamation by Broadcast Program—Continued

Deviation from literary work as libel 410
Distinguished from libel and slander 467
Distortion of literary work as libel 410
Fair comment 483
Due care, desirability of as standard of liability 485
Duty of station to prevent 474
Extemporaneous remarks in deviation from script held slander .. 468
Whether liability should be absolute 477, 480
Federal legislation, desirability of 486
Historical basis of distinction between libel and slander and .. 467
Imitation of artist by impersonation as 523
Is *sui generis* 466
Joint tort-feasors, who are 469
Jurisdiction over defendants,
Difficulty of service of process 484
Appointment of agent to accept 489
Extradition of criminally liable person 494
Federal court jurisdiction extension as 491, 492
Requirement of appointment of agent for service as .. 492
Transmission from without state where cause of action accrues 487
Where crime is committed 492
Who is liable criminally 493
When personal is essential for imposition of liability 488
Liability absolute on stations 294
If it should be 448
Libel is absolute 477
Of advertiser 481
Of station, defendant on publication 471
For broadcast of news, editorial comment 448
For defamatory script previously submitted to 476
For dramatization of news 448
For extemporaneous deviation from script submitted .. 477
Whether absolute 479
For script not previously submitted 478
For station employees defamatory act 475
Not analogous to telephone company's liability 472
Similar to newspaper's liability 448, 474
When transmitted by network or system 480
Where knowledge possessed by it 476
Libel by conduct 468
Matter must specifically relate to plaintiff 482

Defamation by Broadcast Program—Continued

Mutilation of original work by arrangement of musical composition ... 608
Newspaper's liability absolute ... 474
Not analogous to telegraph company liability ... 473
Privileged matter ... 483
Publication of news not ... 448
Reading aloud as libel ... 468
Slander *per se*, absolute liability ... 477
Speaker absolutely liable for ... 470
State statutes on subject ... 486
Sustaining program, station primarily liable for ... 222
Theories of ... 468
Whether libel or slander ... 466, 467, 468
Literary criticism is ... 483
When published by station ... 466, 487

Defaults

Of artist under contract with producer, effect on compensation ... 380
Salary due prior to ... 380
Upon application for renewal, effect ... 676

Defective Condition of Theater

Liability for personal injury, notice of, required ... 243

Defenses to Infringement Actions

Absence of control over broadcast program not ... 293
Assignment unrecorded, not ... 587
Benefit to plaintiff, not ... 614
Colorable change, not ... 614
Difference of medium or materials, not ... 614
Fair use as ... 618
Independent contractor, not ... 627, 628
Minor addition or omission, not ... 614
That copyright by employee instead of employer for hire, not ... 587

Definiteness

Essential in artist's contract with producer ... 351
Requisite in ... 361

Definitions of

✓ Agency ... 337, 424
✓ Artist ... 350
Broker ... 338
Commercial broadcast program ... 232

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Definitions of—Continued

✓Fiduciary 431
Frequencies 24
Employment 331
Independent contractor 348, 643
Libel 467
License tax 201
Line recording 230
Lotteries 501
Manuscript 581
Mechanical reproduction 661
Musical composition 653
Network 283
Occupation tax 201
Off-the-air recording 230
✓Publication 580
Similar production 611
Slander 467
Sustaining broadcast program 220
System 283
Theatrical employment agency 425
Trade-mark 514
Trade name 514

Delegation of Authority

By Commissions to Broadcast Division, of work, business or functions 50
Federal Communications Commission to Boards or Commissioners 76
Restrictions on 76
Validity of power of 14
By Congress as to broadcasting 13, 14, 15
Power by statute, to administrative boards 184
Validity of legislative power for, under Act of 1927 14
Act of 1934 . . . . . 13, 15
Davis Amendment 14

Delegation of Broadcast Time

Refusal to renew license for 52

Delegation of Editorial Selection

By constituent station to system 292

Deletion of Offensive Program Material

Right of station 259
Reasonable exercise requisite 259

Delivery of Script

Reasonable time for, by author 413
Remedy at law 413

Demand for Use of Name

By author, right to 409

Denial

Of application, default in appearance by applicant 109
Of due process, request for oral hearing not granted 131
Of facilities by station upheld 10

Denmark

Infringement, public reception of broadcast 630

Deposit of Copies Under Copyright Law

Address to Register of Copyrights 590
Best edition then published required 590
Certificate issued on compliance with registration and 591
Mailing is sufficient 590
Penalties for failure to deposit 590
Physically complete copies required 590
Promptness required 590
Registration under Act of 1909, § 11, required 589
Two complete copies required 590
Timeliness 590
Unpublished works, further deposit upon publication 594
One copy only required 594
Where alien author first published in foreign country, one copy of best foreign edition required 590
Where work is contribution to periodical, one copy of issue sufficient 590

Depositions

By Commission, when may be taken 119
Parties, when may be taken 119
Filing required, time and effect of 123
May be taken outside United States 124
Not part of record 123
Offer of in evidence required 123

Depositions—Continued
On notice 122
Order to take 121
Contents required 121
Notice to all parties required 121
Time limited 121
Request for 121
Contents required 120
Filing and timeliness 120
Subscription 120
Verification 120
Written 120
Party at instance of, notice required 122
Contents of notice 122
Procedure in taking 123
Objections to form of question 123
Subscription required 123
Why may take 119

Deprivation of Property Rights
Congressional regulation of broadcasting not unlawful 12
Estoppel to set up unlawful, of property rights 11
Refusal to allow operation, not 10
Refusal to renew license not 10

Designation
Of parties on appeal 175

Desist Orders
Of Federal Trade Commission, effect 545
Validity of 547

Destruction
Of common law rights in literary property, unauthorized publication not 580
Of script, remedy 420

Determination
Of appeal, on substantial evidence 174
Commissions, conclusiveness 167
Review of, power of courts 167
To ascertain compliance with due process 167
When arbitrary or capricious, reversible 167
Term of copyright protection 592, 594
When exercise of executive power, conclusiveness of findings 166
Under Act of 1934 170

Deviation
From literary work, as libel....410, 650
Script by producer.... 410
Effect.... 650
Extemporaneous remarks in, slander.... 468
When previously submitted.... 477
Whether liability should be absolute....477, 480

Difficulty of Service of Process
In defamation actions.... 484
Appointment of agent for service as solution.... 489

Diligence
Required of representative to artist.... 431

Diminution
Of broadcast time by identification announcement.... 251

Director
Testimony heard by.... 126

Disability
Of Commissioner.... 77

Disapproval of Program Material
By station is final.... 258

Discharge of Artist by Producer
Burden of proof on artist.... 365
Justifiable
Assault of another member of cast.... 372
Assigned role, whether refusal to take is.... 367
Breach of reasonable rules and regulations.... 366
Costume, refusal to wear.... 368
Disloyalty....367, 372
Failure to buy costumes as breach of reasonable rule.... 366
Illness.... 376
Immoral conduct.... 373
Incompetence.... 369
Insolence.... 372
Insubordination....367, 372
Intoxication.... 371
Issuing publicity of breach of reasonable rule.... 366
Obscene or indecent language.... 373
Rehearsals, failure to appear at.... 374
Tardiness.... 366
Unfaithfulness.... 372

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Discharge of Artist by Producer—Continued
Waiver or condonation of grounds, what constitutes..... 376
Wilful breach of reasonable rule..... 366
Notice by producer required..... 375
Liquidation of damages by..... 386
Prima facie case of wrongful discharge..... 365
Wrongful for refusal to play in obscene, lewd or seditious program..... 367

Discounts
In facilities contracts between station and advertiser..... 256

Discretion
Of Commissioner to grant rehearing..... 112
Of Secretary of Commerce to make general regulations..... 27
Station to arrange price of tickets to broadcast theater.... 241

Discrimination
Between interstate and intrastate commerce, state taxation..202, 203
Unlawful as between political candidates to broadcast programs..... 250
For admission to broadcast theater..... 242

Disloyalty
Justifiable discharge of artist for.....367, 372

Disobedience
Justifiable discharge of artist for..... 367
Of witness under Act of 1934, penalty..... 180

Disqualification
Of individual Commissioner for pecuniary interest..... 87

Dispute
Between artist and representative, rights of producer..... 437
Stations..... 290
In labor relations..... 299

Disregard of Rules of Evidence
Limitation on..... 134

Dissemination of Lottery Information
Broadcast of, illegal..... 511

Distortion
Of literary work as libel, defamation.....410, 650
Script by producer.....410, 650
Effect..... 650
Of work, mention of author's name restrainable..... 647

Distress Signals
Priority of 21, 23

Distribution
Exclusive right under copyright law 602
Of creative works used in broadcast programs 575
Tickets to broadcast theater may be gratis 241
Terms may be attached 241
Works reproduced for, only 594

Divestment
Of common law rights in literary property 582
Public performance not 582
Transfer of control of program, constitutes, of license 247
When refusal to renew license, constitutes, of licensee's control of program 52

Divisibility of Contracts 379

Divisions
Abolition of broadcast division 50
Rehearing on order 50
Of Federal Communications Commission,
Actions of, force and effect 73
How made, evidenced and enforced 73
Majority vote necessary 73
Subject to rehearing 73, 78
Commission chairmen member of each 71
Delegation of work, business or function to 71
Effect of orders 73
Established 71
Jurisdictional conflicts between, how resolved 75
May divide commission into three divisions 49, 70
No divestment of Commission's power 74
Officers 71
Orders of, how evidenced 73
Of reference, effective at once 71
Effective until otherwise ordered 71
Subject to amendment, modification, addition or rescission 71
Powers of 73
Complete over matters assigned 73
Delegation of matters to board or commissioner 76
Same as Commission 73
Subject to duties and obligations of Commission 73

Divisions—Continued

Purpose ... 71
Revision and re-instatement meritorious ... 72
System retained by, with modification ... 72
Who may serve ... 71

Doctrine

Of police power, application ... 183

Documents

Excluded if unsworn ... 142

Domestic Corporations

Fulfilment of copyright requirements by members ... 697
Ineligible under Act of 1927 where one-fifth voting stock held by alien interest ... 44

Dramatic Works

Adaption for broadcast ... 575
Broadcast performance is public performance ... 613
Conversion into non-dramatic works ... 606
Creative works, as ... 574
Exclusive rights of copyright owner ... 610
To public performance ... 613
How presented ... 574
How used in broadcast programs ... 575
Important source of program material ... 574
What included ... 574

Dramatico-Musical Works

Compulsory mechanical reproduction license provision not applicable ... 658
"Grand Rights" ... 624, 625
Infringement of copyright in ... 625
Profit not essential ... 625
Non-dramatic performance of, possible ... 625
Performance publicly, exclusive right of copyright owner ... 613
Registration, effect of ... 613
"Small Rights" ... 624, 625
Song, whether is ... 625

Dramatization

Of news, liability of station for defamation ... 448
Of non-dramatic works, under copyright ... 605
Unauthorized may not be made ... 605

Drugs
Power of state to prohibit advertising of..... 565

Dual Advertising Agency 345

Due Care
Desirability of, as standard of liability for defamation by broadcast program 485

Due Process
Evidence, right to present required by..... 167
Ex parte findings, order on, not..... 153
Grant of hearing after effective date of order not..... 104
In general 167
Hearing required by..... 167
Oral required by..... 131
Review to ascertain compliance with..... 167
Right of cross-examination required by..... 167

Duplicate Exhibits
Required to be in evidence..... 140

Duration
Of agency of artist's representative..... 427
Broadcast period 251
Diminution by identification announcement..... 251
Subject to facilities contract..... 251
Common law rights in literary property, perpetual unless publication 579
Copyright protection 592, 690
Automatic 698
First publication, date of, determines.....592, 594
Foreign, to aliens..... 691
In works reproduced for distribution, not sale..... 594
International 698
Must be for limited..... 595
Power of Congress to change..... 598
Renewal of 676
Under Act of 1909..... 592
Unpublished works 594, 595
Engagement of artist..... 361
Definiteness required 361
Performance, contract provision..... 352
Simulation 295
Wrongful practice, no condonation by..... 552
False advertising, long continued, not condonation... 552

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Duty of

Advertiser to advertising agency 346
Advertising agency to advertiser 345
Artist to personal representative 432
To producer, to mitigate damages 385
To obey all reasonable rules and regulations 366
Divisions of Federal Communications Commission, subject to all, of Commission 73
Federal Communications Commission,
To fix location of stations 61
Prescribe nature of service to be rendered 61
Prevent interference 61
Report in writing of investigations 83
Joint boards 80
Producer to employ artist 356
Representative to artist, diligence, skill and loyalty, implied ... 431
Station to prevent defamation by broadcast 474
Theaters of broadcast station to audience 243

E

Edition

Best then published required for deposit under copyright law .. 590

Editorial Comment

Liability of station for defamation in news broadcast of 448

Editorial Selection by Broadcast Station

Advertising matter may be regulated by 571
Common carrier status incompatible with 214
Constituent of chain possesses power of 292
Necessary delegation of, to system 292
Constitutional guarantee of freedom of speech does not prohibit 562
Generally 569
May delete offensive commercial program 571
Of political broadcast prohibited 566
Phonograph records, broadcast may be prohibited 571
Power of persons other than station to exercise 572
Of station to exercise 570
Prohibited as to political speeches 562
Proposed legislation 573
Restrictions must be reasonable 570
System must exercise power for benefit of constituent stations .. 292

Effect
Of action of Broadcast division, or board or commissioner of Federal Communications Commission 50
Death on facilities contracts 275
Default on artist's compensation 380
In an application for copyright renewal 676
Distortion of script by producer 650
Filing depositions 123
Later reproduction for sale of unpublished works, *quaere* .. 595
Registration of dramatico-musical works 613

Effective Date
Of order, right to hearing after 104
When other than for payment of money 165

Efficient Allocation 54

Ejectment
From broadcast station theater for cause 241

Election
Of representative, labor relations with station 316

Electrical Transcriptions
Compulsory license provisions whether applicable 662, 663
Contents, copyrighted material, license necessary to include ... 227
Generally 227
Performing artists possess rights therein 227
Copyright infringement, unauthorized manufacture of is 227
Cost of manufacture, advertiser liable 261
Instantaneous recording of 230
Libraries, manufacturing royalties 668
"Line" recording 230
Manufacture for or by station 230
Manufacturing royalties 668
Master matrix, lien of manufacturer 231
Extent, waiver 231
None where supplied by producer 231
Ownership of 231
"Off-the-air" recording 230
Performance of is not publication 582
Performing license royalties 668
Possession by station, qualified and limited 228
Produced by station, liability for infringement 230
Purposes, broadcast only 226

Electrical Transcriptions—Continued

Royalties on 668
Sale, not usually subject of legal..... 228
Sources of supply and manufacture..... 226
Studio recording 230
Supplied by advertiser, bailment created..... 229
Breach of contract by unauthorized broadcast of..... 229
Conversion for failure or refusal to return..... 229
Owned by advertiser whether broadcast or not..... 229
Relation to statute..... 229
Rescission, return of mandatory on..... 229
Replevin to regain possession of..... 229
Returnable on demand..... 229
Sale, reasonable fitness for use, implied warranty..... 228
Re-recording, right of may be included..... 228
Transfers only physical property..... 228
Intellectual property in, not defeasible..... 228
Transfer for limited use only..... 229
Unlawful appropriation of program by, liability for..... 230
Use in radio broadcasting..... 668
License necessary 228
Limited by 228
What are 668

Employees

Author as,
Employer is proprietor of literary works.....405, 643
Not entitled to copyright renewal..... 687
Rights of purchaser with knowledge..... 405
Rights as 643
Whether is 643
"Casual," applicability of Workmen's Compensation Acts to... 324
Collective bargaining, broadcast station must engage in..... 315
Liability for defamation by act of station..... 475
For negligence of..... 243
Protected by National Labor Relations Act..... 309
Whether author independent contractor or..... 405

Employer

For hire, entitled to copyright renewal..... 676
Infringement, by employer of independent contracting musicians 627
Of author, entitled to copyright..... 587
Producer as, entitled to copyright renewal..... 405

Employer—Continued

Social Security Act, when exempt from 330
Sponsor as principal 322
Unfair labor practices of, under National Labor Relations Act 307, 311

Employment

At will, termination of, artist and producer 363
Of artist, duty of producer 356
Social Security tax levied on 332
When exempt 329

Employment Agreement, Facilities Salesmen

Accounts solicited by salesman 233
Compensation after termination of 234
Damages for breach, measure of 233
Mitigation, duty of salesman 233
Unjustifiable discharge 233
Duration 233
Rescission, reasonable value recoverable 234
Salary or commissions 233
Territory covered by salesman 233
Unenforceable, where performance not possible within one year .. 234

Enabling Act

Repugnancy of local regulation of theater, must not be 237

Endorsements

Use of 555

Enforcement

Agreement to use name, by author 409
Of action of Broadcast Division 50
Of individual commissioner or board 50
Under Act of 1934,
Any order of Commission by any person 182
Appeal, stay of enforcement of order pending 164
Secured by petition 164
By criminal proceedings, grounds 179, 181, 182
Penalties 179
Venue 178
Mandamus 178
Union by-laws 302, 303, 304, 305, 306

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Engagement
Duration of artist's, by producer 361
In business of broadcasting, state taxation of, invalid 200, 210
Renewal of artist's, by producer 362
Termination of artist's, by producer 363

Enjoining
Of orders of Federal Communications Commission 182

England, Copyright Law of
Common law rights in literary property abolished 579
Compulsory mechanical reproduction license under Act of 1911 659
U. S. provision distinguished 660
Duration of protection of mechanical reproduction 690
Infringement, profit not essential 634
Public reception deemed 630, 707
Statutory right only 598
Translation, exclusive right of, granted in 603
Unauthorized public performance of musical composition is infringement 634

Enterprises
Broadcast stations operated as private 220

Equal Opportunity
Must be granted candidates for public office 566

Equitable Allocation 54
Sufficiency of standard for performance of administrative functions 18

Equitable Assignment
Of right of copyright renewal 678

Equitable Owner
May join legal owner in infringement action 588
May sue for infringement 588
Who is 588

Equitable Relief
Where author breaches his agreement 415
Liquidated damages, effect 416

Equity Rules
General, applicable to infringement actions 619

Essentials to Secure Copyright

Deposit of copies....589, 590, 591
Publication.... 593
Simultaneous required.... 579
Without compliance with statute, destroys common law rights.... 593
Registration under Act of 1909.... 589
Whether, to prove access, in infringement.... 614

Establishment

Of administrative boards by state statute.... 184
Under New Jersey Act....184, 186
Analysis of.... 186
Under Michigan Act.... 184
Analysis of.... 185
Confined to intrastate broadcasting.... 185
Zones established.... 185
Of Broadcast Division.... 75
Of Divisions of Federal Communications Commission.... 71

Estoppel

To set up unlawful deprivation.... 11

Evidence

Affidavits alone insufficient.... 144
Application of rules of.... 136
Burden of proof....151, 152, 153, 154
Closing at hearing.... 150
Cumulative to be avoided....142, 143
Determination of appeal as substantial.... 174
Exclusion of oral declarations.... 142
Of unsworn documents.... 142
Exhibits to be submitted in duplicate.... 140
General rules of.... 133
Government reports and records in.... 138
Immaterial matter.... 139
Limitation on disregard of rules of.... 134
Must be relevant.... 147
Not bound by strict rules of.... 135
Of records in other proceedings.... 141
Usage, artist's contract with producer.... 360
On informal hearings.... 146
Opening at hearings.... 150
Prima facie, of facts stated in copyright certificate.... 591

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Evidence—Continued
Privilege against self-incrimination, extent 145
Record of hearing, pending application 137
Of other proceedings 141
Requirement of additional, by party 148
After hearing, of party 149
Right to present, due process requires 167
Station list 137
Sufficiency of, of validity of copyright 591

Examiners of Federal Communications Commission
Powers of,
To administer oaths 115
Examine witnesses 115
Hear oral arguments on exceptions to report 127
Hear testimony 126
Hold hearings 115
When not permitted 115
Issue subpoenas 117
Weight of report 128

Exceptions
To examiner's report, oral argument on 127

Excepted Employment
Extension of statutes to 324

Excessive Damages
Liquidated, must not be obviously 277

Excise Taxes
By state, on broadcasting 201
Not on business of broadcasting 202
Statutory basis, unconstitutionality 205

Exclusive Provisions
In facilities contracts 263

Exclusiveness
Of remedy by appeal 171

Exclusion
By broadcast station theater,
May be against anyone 241
Of ticket holder 241
Of evidence 142

Exclusive Rights

Common law, in literary property,
Make any use included 584
Mechanical reproduction 584
Prevent copying 579
To first publication 579
Translation 603
Copyright,
Author's, of first publication 579
International protection to 700
Owner's in copyrighted work 604
Adaption and transposition 607
Arrangement of musical composition 607
Compulsory license provision not applicable..663, 666
Performing right not included 666
Conversion of non-dramatic work into dramatic 606
Distribution 602
Dramatization of non-dramatic works 605
Making extractions 609
Making other versions 604
Mechanical reproduction 652
Compulsory license provision not applicable 658
Limitation on 654
Performance, exhibition, presentation, production or reproduction of dramatic work 610
Performance publicly of dramatico-musical work 613
Of musical composition 610
Printing, publishing and multiplying 601
Public delivery of lecture, sermon, address, etc. ...610, 611
Public performance of dramatic works 613
Translation 603
Vending of manuscript of dramatic work 610
Vending or distributing copies 602
Whether Congress can limit or condition 598
Interference with as unfair competition 535
Use of artist's photograph for advertising, injunction 402

Exclusive Remedy

Appeals from Federal Communications Commission..160, 171, 182

Excuse

Of non-performance of facilities contract by advertiser 281
By station 279

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Execution
Of agreement, by representative for artist, effect and authority for 436
Instrument of authorization, by real party in interest.... 55

Executive Power
Conclusiveness of findings in exercise of..... 166

Executors
When entitled to copyright.....587, 676, 686
To copyright renewal..... 596

Exemption
Under Social Security Act.....329, 330

Exempt Time 289

Exercise
Of editorial selection by broadcast station..... 570
By person other than station..... 572
System 292
Right to renew copyright..... 686
Regulatory power, reasonableness of..... 12

Exhibit
Exhibit of dramatic work, exclusive right of copyright owner.. 616
Requirement of putting in evidence in duplicate..... 140

Exits
Of broadcast theaters, local regulation of..... 239

***Ex Parte* Findings**
Order based on, not due process..... 153

Expenses of Remote Broadcast
Borne by person in control of originating source..... 224
Nature of program, as affecting..... 224

Expiration
Action for, breach of contract, damages.....277, 384
Of copyright, effect..... 596

Exploitation
Of broadcast advertiser's trademark on producer..... 519

Expulsion
As means of enforcement of union by-law..... 303

Express Negative Covenant
Agreement of artist and producer, essential to obtain injunction ... 389

Express Provision
In lease to permit broadcasting ... 236

Extemporaneous
Deviation from script, station's liability for defamation ... 479
Program, station's liability for dafamation ... 479
Remarks, station's liability for defamation ... 468, 477, 480

Extension
Of statutes to excepted employment ... 324
Of time,
Under Act of 1927, grounds ... 43
Under administrative regulations ... 132
How obtained ... 132

Extent
Of copyright protection, as to works in public domain ... 596
Federal control over intrastate commerce ... 2
Lien of manufacturer of master matrix ... 231
Privilege against self-incrimination ... 145

Extractions
Exclusive right of copyright owner to make ... 609

Extradition
In case of crimes ... 494
Defamation ... 494

F

Facilities
Denial of, to station to operate ... 10
Failure of station to make available to advertiser ... 265
State sales tax not applicable to sale of ... 208
Taxes, state or local, invalid on ... 208
Studio, between station and advertiser ... 262

Facilities Contracts
Assignments ... 273
Bankruptcy of party, effect ... 275

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Facilities Contracts—Continued
Breach by advertiser, failure to broadcast 264
Interruption of broadcast 265
Liability for 276
Limitation may be provided 265
Prize, failure to award 269
Station liability, discontinuance of broadcast 265
Substitution of improper announcement 258
Unjustified editorial selection 571
Waiver 276
Commissions 256
Damages for breach,
Action prior to expiration of 277
Certainty 277
Consequential, in contemplation of parties 277
Direct and proximate, liable for all 277
Liquidated 277
Measure of, breach by advertiser 277
Mitigation of, by station 265
Nominal 277
Death of party, effect 275
Discounts 256
Exclusive, not unless so provided 263
Failure of advertiser to broadcast, rights of station 264
Formation, advertising agency usually represents advertiser ... 232
Sales representative the station 232
Incompetency, judicially declared, effect 275
Interpretation, whether station is producer 267
Nature, for services only 247
Sale, not a contract of 247
Non-performance, excuses 279, 280, 284
Acts of God 279
Causes beyond control 274
Labor trouble 274
Mechanical difficulties 274
Operation of law 274
Public interest, program not in 279
Revocation of or refusal to renew license 279
Strikes are not in absence express provision 279
Obligations,
Scope, broadcast time 247
Incidental facilities 247
Not to reveal mailing list 270

Facilities Contracts—Continued
Provide scripts 247
Supervision of production..... 247
Talent, providing 247, 272
Telephone line charges, payment..... 247
Parties 255
Provisions,
Inclusion by operation of law,
Decisions of Commission..... 250
Law must be validly enacted..... 250
Regulations of Commission..... 250
May be included,
Competitor's programs, not to broadcast within certain time 263
Imposition of negligence liability on sponsor..... 262
Number and duration of commercial announcements... 272
Off-the-air recordings, right of station to make..... 272
Rules and regulations of station, compliance with.... 254
Warranty of truth of advertising matter..... 272
Should include,
Compensation to station..... 267
Cost of printing tickets..... 262
Indemnity agreements by advertiser.....259, 260, 266
Offensive program material, deletion..... 259
Personal messages prohibited..... 272
Recorded material, may prohibit..... 261
Services to be rendered sponsor.....232, 262
Miscellaneous 268, 272
Studios, use and size..... 262
Subject to modification to insure standards..... 265
Transcription costs, payment..... 261
Rates 256
Renewal, should be subject of express agreement..... 274
Specific performance 278
Spot broadcast, proof by affidavit of..... 271
Standard conditions 249
System contracting with advertisers..... 249
Breach 296
Non-performance, excuse for..... 296
Provisions 296
System, relations with station,
Additional compensation, cut-in and station-break period.. 290
"Bonus" stations 289

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Facilities Contracts—Continued
Breach, misuse of identification period ... 290
Character of programs, limitations on ... 292
Duration of contract ... 295
Guarantee of fixed income to station ... 289
Merchandising co-operation by constituent station ... 291
Promises in consideration of availability of station facilities ... 288
Provisions,
May prohibit, off-the-air recording ... 288
Rebroadcasting ... 288
Should include, express exemption of time reserved to constituent station ... 289
Renewal ... 295
Station facilities made available to system ... 288
Termination ... 295
Termination of, generally ... 274
By bankruptcy ... 275
Changing rates, advertisers right to cancel for ... 274
Death of party ... 275
Incompetency of party ... 275
Labor difficulties ... 274
License, coextensive existence required ... 274
Rescission, mutual ... 274
Time of payment ... 257
Writing, necessity for ... 248

Facilities Salesmen
Breach of facilities contract by station, not liable for ... 276
Compensation of after termination of contract ... 234
Dependent on agreement ... 234
Payment, time of, matter of contract ... 257
Employment agreement
Accounts solicited by ... 233
Breach, damages for, measure ... 233
Mitigation, duty of ... 233
Unjustifiable discharge ... 233
Compensation, commission or salary ... 233
Duration ... 233
Rescission, recovery on ... 234
Territory covered ... 233
Unenforceable if not performable in one year ... 234
Relation to station ... 233

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Facilities Salesmen—Continued
Unearned advances, not recoverable 234
Warranty of authority, salesman liable for breach 276

Failure to Disclose Goods Second Hand
As false and misleading advertising 557

Fair Allocation 18, 54

Fair Comment
Defense to defamation action 483

Fair Trade Acts 602

Fair Use
As defense to copyright infringement 618
Synopsis but not abridgment is 618

False Broadcast Advertising
Not unfair competition at common law 538
Restrainable by Federal Trade Commission 540
Must affect specific public interest 550
Only if so in fact 553
Though public gain 551
When actionable 538

False Statements
By applicant, revocation of operating license 45
Restraint by Federal Trade Commission of,
False branding 557
Misleading broadcast 549
Of financial condition 557
Geographical location 557
Price 557

Federal Communications Commission
Anti-trust laws applied by 36
Appeals from,
Actions appealable 155, 156, 157, 160, 164
Burden of proof 173
Notice of appeal 164
Procedure 164
Remedy exclusive 166
Review of determinations of 166, 168, 169, 170
Appearances 87

Federal Communications Commission—Continued

Boards of employees,
Actions . . . 76
Subject to rehearing . . . 78
Commission may delegate work, business or functions to . . . 76
Disability of member . . . 76
Duties and obligations . . . 76
Order of reference to . . . 76
Powers . . . 76
Secretary and seal . . . 76
Censorship, indirect of program content . . . 564
Competition, preserved by . . . 36
Composition of, eligibility . . . 49
Delegation of work, business or functions, restrictions on . . . 76
Divisions, Broadcast, abolished . . . 71
Established by . . . 71
Actions of . . . 73
Subject to rehearing . . . 73, 78
What may be delegated . . . 71
Commission chairman, membership in each . . . 71
Jurisdictional conflicts, how resolved . . . 75
May divide, into three divisions . . . 49, 70
No divestment of Commission's power . . . 74
Officers . . . 71
Order of reference . . . 71
Powers . . . 73
Purpose . . . 71
Revision and reinstatement . . . 72
Who may serve . . . 71
Duties,
Fix location of individual stations . . . 61
Prescribe nature of service to be rendered . . . 61
Prevent interference . . . 61
Report in writing of investigations . . . 83
Effect and enforcement of action by Commissioner or Board . . . 50
Examiners,
Powers of, administer oaths . . . 115
Examine witnesses . . . 115
Hold hearings . . . 115
False broadcast advertising, regulation of . . . 559
Findings, supported by substantial evidence, final . . . 170
Hearings, right to . . . 102, 103, 104, 105, 106, 107, 108, 109, 111, 113, 114

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Federal Communications Commission—Continued
Individual Commissioner,
Actions 76, 78
Delegation of work, business or function to 76
Duties and obligations 76
Order of reference to 76
Powers 76
Secretary and seal 76
Inquiry on its own motion 130
Joint boards,
Actions 80
Any matter referable to 79
Duties and liabilities 80
Members, selection of 79
Powers 80
Procedure 81
May delegate work, business or function to Commissioner or Examiner 50, 76
Orders, effective date of 165
Enforcement of, for payment of money 181
Other than for payment of money 181
Remedy against, who entitled, procedure 182
Pecuniary interest of Commissioner as disqualification 87
Pleadings 94
Power, assignment of frequencies 61
Books and papers, compel production 115, 116
Censorship, none 560
Control of studios in U. S. transmitting to foreign stations for rebroadcast in U. S. 53
Determine hours of operation of station 61
Power to be used 61
Whether program a lottery 498
Encouragement of larger and more effective use of radio .. 53
Grant rehearings 112
Hold joint hearings with state commissions 81
Inquiry by own motion 130
Legislative distinguished 100
Make regulations 101
Make rules for conduct of hearings 135
May modify license or construction permit 53
None to determine if crime committed 498
Prescribe contents of application 55
Quasi-judicial distinguished 100

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Federal Communications Commission—Continued
Regulate kind of apparatus used 61
Require painting or illumination of radio towers 53
Special authorizations 110
Suspend license for obscene broadcast 567
To use books, services and records of state commissions ... 82
Vested with all former powers of Secretary of Commerce .. 53
Witnesses, may compel attendance of 115, 116
Public proceedings required 87
Quorum 87
Rebroadcast, restrictions on 53
Records 83
Inspection 83
Publication 83
Regulatory jurisdiction, scope 47, 70
Seal, judicially noticed 83
Service of papers, proof 91
Structure, similar to Interstate Commerce Commission 70
Standards of 15, 18
Sufficiency of 16, 17, 18
Studios, control over 53
Subpoenas, enforcement 116
Issuance 117
Service of, proof 118

Federal Control of Radio Transmission
Basis, Act of 1927 2
Ship Act of 1910 1
Under commerce 1, 2
Treaty enforcement 1

Federal Employers Liability Act 318

Federal Instrumentality
Broadcast stations not 200

Federal Legislation
Anti-trust laws applicable 36
By Act of 1912 25
Act of 1927 ..... 31, 32
Purposes 33
Act of 1934 47
Ship Act of 1910 25
Desirability of, as to defamation 486

Federal Legislation—Continued
Relation to Fifth Amendment 10
State statutes, invalid if conflicting 183

Federal Maritime Compensation Act 318

Federal Radio Commission
Application of anti-trust laws 36
Appeals from 162, 172
Actions 84
Composition and eligibility 34
Corrective measures by 214
Creation of 31
General powers 46
Hearings 63, 64, 65, 67, 68, 69
Jurisdiction to regulate broadcasting 34
Licenses, powers 35
Restrictions on grants of 44
Revocation 45
Term of, definite 38
Transferability of 44
Types 212
Powers 62
Proceedings continued under Federal Communications Commission 85
Suits against, continued 86

Federal Regulation of Advertising
By Federal Communications Commission 559
Jurisdiction 540
By Federal Trade Commission
Jurisdiction 545
Powers 542
Procedure on formal complaints 543, 544
Restraint of, upon advertiser 549, 550, 551, 556
Supervision 541
Under Federal Trade Commission Act 546
Condonation, not by long duration of practice 552
In general 539
"Puffing" not restrained 553
Restraining advertising, only when false in fact 553
When not 554
Types of 557
Value of cease and desist order 547

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Federal Regulation of Advertising—Continued
"Unfair methods of competition," scope 548
Use of endorsements and testimonials 555

Federal Trade Commission
Cease and desist order, enforcement, jurisdiction 547
Control of advertising content of program 564
False broadcast advertising, regulation,
Gain to public no bar 551
Injury to competitor essential 549
Long duration no bar 552
Misrepresentations, of content 554
Of gain to purchaser 556
Must be false in fact 553
Nature of, restrained 549
Proceeding must be in public interest 547
Procedure of Commission 541, 542
Cease and desist orders 544
Formal complaints 543, 544
Hearings 544
Stipulation procedure 543
Types restrained 550
Unfair method of competition 548
Condemnation of practice 547
Use of testimonials without disclosing paid for 555
Federal Trade Commission Act 539, 546
Judicial review of, limitation 547
Scope of 540
Of products sold in interstate commerce 540
In intrastate commerce 540
Parties subject 540
Restraint of unfair methods of competition 540
Jurisdiction distinguished from that of Federal Communications Commission 540
Special Board of Investigation 541, 542, 543
Statutory provisions governing 546

Federation of Labor, American 297

Federation of Musicians, American 297, 299

Federation of Radio Artists, American 297

Fictitious Prices
Restraint of, by Federal Trade Commission 557

Fiduciary
Advertising agency of artist as 345
Broadcast station, when is 270
Definition of 431

Fifth Amendment
Regulatory provisions held not violation of 10

Filing
Of briefs, time limited 128
Who may 129
Of depositions, time limited, effect 123
Of instruments of authorization, with field office 111

Financial Qualifications
Of applicant for instrument of authorization 60

Fine
Enforcement of union by-law by 303

Findings
Authority of Interstate Commerce Commission on operations of station 213
Ex parte, order on not due process 153
Review under Act of 1927 172

Fire Protection
Inspection of broadcast theater, local regulation of 239

First Publication
Date of determines duration of copyright 592, 594

Fitness for Use
Implied warranty of, reasonable in sale of electrical transcriptions 228

Form of Question
Objections to in taking depositions 123

Formalities to Copyright Protection
Automatic copyright 698
Canada, essentials 697
Deposit of copies of published works 590
Unpublished works 594
Notice of copyright 589
Publication of 589

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Formalities to Copyright Protection—Continued
Registration 589
Of claim does not vest copyright 591
Of unpublished works 594

Formation
Of agency agreement, artist and representative 426

Force Majeure
Impossibility of performance of contract by 378

Foreign Copyright Protection
Aliens, duration of term granted 691
Protection afforded 693
Broadcast of mechanical reproduction, whether infringement 706
Broadcast performance, deemed infringement 705
Polish exception 705
Soviet Union exception 705
Duration or term 690
Extent of 689
Interpretative performance by artist, whether included 703
Mechanical reproductions, how protected 692
Public reception, whether deemed infringement 707
Relation of foreign countries with U. S. 704

Foreign Corporation
State privilege taxation, limitation on 201

Forfeiture
Clause in construction permit 43
Not enforced, delay beyond control of grantee 43

France
Adherence to Montevideo Copyright Convention 702
Infringement, public reception of broadcast 630

Franchise
Right under not vested 12

Freedom of Speech
Congressional limitation on, Act of 1934 563
Constitutional guarantee of 562

Free Lance Artist 422

Frequencies

Allocation by treaty.....22, 23, 24, 24A
Available for use only..... 33
Classification and definition..... 24
Instruments of authorization, application must specify one..56, 57
Under Act of 1927.....37, 40
Necessity for license to use..... 33
Not subject to ownership..... 33
Right to hearings on change of..... 102

Functions

Delegation of, to Broadcast Division..... 50
Of advertising agency.....335, 336
Content of programs.....495, 503
Representatives of artists..... 422
Trade mark and trade name..... 516

Future Conditions

Sufficiency of standards of Commission..... 16

Future Works, Assignment of

Literary property of, no compulsion of author to create..... 407

G

Gain to Public

No bar to regulation of false broadcast advertising..... 551

General

Conditions, sufficiency of standards of Commission..... 16
Copyright treaties of U. S. 704
Equity rules applicable to copyright infringement..... 619
Powers of Federal Radio Commission..... 46
Radio regulations of Madrid Convention..... 23
Regulations of Secretary of Commerce under Act of 1912..... 27
Relations of artist and producer..... 350
Rules of evidence..... 133

Geographical

Location false, restrained by Federal Trade Commission..... 557
Zones under Act of 1934..... 51

Germany

Adherence to Montevideo Copyright Convention..... 702
Infringement, public reception of broadcast..... 630

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Gift Enterprises
In contest programs, whether lotteries 508

Government
Agencies, scripts of, not copyrightable by 644
Conduct of broadcasting business normally not function 200
Publications, not copyrightable 644
Reports and records, placing in evidence 138

Grand Rights
Distinguished from small rights 625
In dramatico-musical works 624, 625

Grant
Of application in public interest,
Burden of proof 61
Hearings 66
Without 67, 107, 108
When conditional 67, 107, 108
Of copyright,
Nature of 598
New 688
Purpose of 698
Of licenses for construction,
By Secretary of Commerce 26
Conditional 43, 44
Public interest 43
Restrictions of Federal Radio Commission 44
Under Act of 1934 52
Of right to hearing,
When conditional 107
When discretionary, rehearing 112
When necessary 109
When not due process 104
Of renewal of license,
When grant deemed refusal to renew 105
Transfer of interfering station to same frequency 104

Grantee
Of construction permit, no forfeiture where delay beyond control of 43
Right of person who is author's, to copyright 642

Gratis
Distribution of tickets to broadcast theater may be 241

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Gross Receipts Taxes
Unconstitutionality of, levied under state law on broadcasting 200, 203, 204
Arizona statute 204

Guarantee
Against unfair labor practices by National Labor Relations Act 311
Of fixed income to station by system 289
Of freedom of speech, by Constitution 562
Editorial selection not prohibited 562
Effect of 562

Guild of Radio Announcers and Producers, American ... 297

"Guessing" Contests
On programs, whether lotteries 506

Guatemala
Duration of copyright 690

H

Havana Copyright Convention 702

Havana North American Conference
Allocation of frequencies 23
Ratification 24

Hearings
Applicant must have opportunity to be heard 63
Application for instruments of authorizaiton,
Denial, no appearance or default 109
Special, no provision for 110
Where necessary to determine public interest 68, 103, 109
Unless no appearance 109
Burden of proof,
Applicant has, for construction permit 152
For foreign transmitter's studio 152
Renewal of instrument of authoriztaion 153
Determined by issues 153
When on protestant 154
By examiner 15, 126, 127
By less than quorum 126
Due process,
Grant of, after effective date of order, not 104

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Hearings—Continued

Hearing required by 167
Oral hearing denied though requested 131
Required where hearing ordered 131
Continuances and extensions,
Discretionary with Commission 132
Granted on good cause shown 132
Grounds for 132
Evidence not relevant 147
Request for, contents required 132
Diligence must be shown 132
Form of 132
Disqualification of commissioner 125
Federal Communications Commission 70
Powers, joint hearings with state commissions 81
Federal Radio Commission,
Applications designated under Act of 1927 68
Powers 62
Federal Trade Commission, procedure 544
Grant of application,
In part, with 66, 108
Without 67, 107
Protest filed against applicant 67
Under Act of 1927 67
Where conflict eliminated by amendment 109
Without, conditionally 67, 107
Aggrieved party's right 107
Final where no protest 107
Where protest withdrawn 107
Suspended where protest filed 67, 107
Informal, purpose and procedure 146
Issues, on applications for renewal or modification 153
Limited by protest 67
Order of revocation 153
Specific, notice required of 147
Legislative distinguished 100
Limitation on repeated applications 114
Miscellaneous applications designated for 68, 109
Modification of authorization, on 63
Modified renewal license 103, 105
Necessity for, generally 100
For oral 131
Notice of 63

Hearings—Continued
On Commission's own motion 130
Revocation of license 64
Under Act of 1934 106
Opening and closing 150
Oral, must be 131
Parties 175
Presentation, order of 150
Procedure 63, 103
Postponements, when granted 132
Quasi-judicial, distinguished 100
Rehearings,
Grant of 112
Matters considered 112
Petition for, contents 113
Time limited 113
Power of Commission after 112
Request for, time limited 112
Who may apply 112
Renewal applications for authorization 63
Renewal of copyright 676
Request for, contents 108
Required by Rules of Practice of Federal Radio Commission .. 65
Right to generally 63, 100, 105
Act of 1927 69
Act of 1934 102
By Federal Communications Commission,
Frequency changed by regulation 102
Grant of privileges 108
Hours of operation 102
Partial grant 108
Power changed by regulation 102
By Federal Radio Commission,
General powers to grant 69
Grant of privileges 66, 108
Partial grant of application 66, 108
Grant of application for renewal deemed refusal 104
Person adversely affected by grant of application 67, 94
107, 111
Aggrieved party 107
Refusal of application to renew 105
Same frequency requested by two or more applicants 111

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Hearings—Continued
Rules of evidence,
Commission not bound by strict....133, 135
Cross-examination, right of.... 134
Cumulative avoided 143
Disregard of, discretionary....133, 134
Exhibits, duplicate offer required.... 140
Form of 144
Affidavits 144
Immateriality 139
Relevancy 147
Hearsay admissible 134
Offer necessary 137
When unnecessary 137
Oral declarations, inadmissible.... 142
Party entitled to knowledge of, admitted evidence.... 134
Right of inspection of evidence.... 134
Rebuttal 134
Record of other proceedings.... 141
Reports, government 138
Self-incrimination, privilege against.... 145
Immunity granted 145
Perjury 145
Prosecution 145
Refusal to testify.... 145
U. S. courts govern unless modified by rule.... 136
Unsworn documents inadmissible.... 142
Testimony at 125
By director 126
Federal Radio Commission,
By whom taken.... 125
En banc 125
Report of,
By examiner, weight.... 128
Exceptions to 126, 127
When by less than quorum.... 126
When informal 146
Who may hold.... 115

Hearsay Evidence
Admissible on hearing.... 134

Height of Antenna
Regulation by municipal ordinance.... 197

History of
Berlin Convention of 1906 ... 20
Cairo Conference of 1938 ... 249
Copyright ... 577
Legislation on ... 585
Renewal of ... 675
Defamation, libel and slander ... 467
International regulation of telecommunication ... 19
London Conference of 1912 ... 21
Madrid Telecommunication Convention of 1932 ... 23
North American Conference at Havana, of 1938 ... 24
Washington Radio-telegraphy Convention of 1927 ... 22

Holmes, Oliver Wendell, J. ... 207

Hours of Operation
Rights under Act of 1934 ... 102

Hungary
Unauthorized broadcast of licensed phonograph record not infringement under copyright law of ... 706

I

Ideas
Advertising, appropriation as unfair competition ... 535
Mere, not copyrightable ... 576, 615
No property in ... 531
Not protected by patent ... 531
Property in, development towards protection ... 534
Protection, contractual ... 533, 534
Originality and novelty essential ... 533
When expression of, only ... 532
Publication destroys ... 532
Tangible expression of, copyrightable ... 576

Identification Announcements
Diminution of broadcast time by ... 251
Portion of period reserved ... 251
Required, when made ... 251
System's, may be required ... 290
Chain-break period ... 290

Illegal Information
Dissemintaion as to lotteries ... 511

Illness
Justifiable discharge of artist for..... 370
Termination of artist's contract by..... 363

Imitative Impersonation
When deceptive, as unfair competition..... 523

Immateriality
Under rules of evidence..... 139

Immoral Conduct
Justifiable discharge of artist for..... 373

Immoral Works
Not copyrightable 586

Immunity
Privilege against self-incrimination..... 145
Radio broadcasting, from state taxation..... 200

Impairment of Contract
Congressional regulation not..... 12

Impersonation of Artist
As defamation 523

Implied Covenant of Artist
Not to act in derogation of producer's rights..... 403

Implied Warranty
Fitness for use of electrical transcriptions..... 228

Impossibility of Performance
Contract between artist and producer..... 378
Act of God or *Force Majeure*..... 378

Inadmissibility
Of oral declarations in evidence..... 142

Incidental Facilities
Under facilities contracts..... 247

Incidents
Of copyrights, enumeration of.....600, 610

Incompatibility
Editorial selection and common carrier status..... 214

Incompetency
Justifiable discharge of artist for 369
Termination facilities contract for 275

Indecent Language
Justifiable discharge of artist for use in program 373
Validity of prohibition 567

Indemnity
By advertising agency 346
Facilities contract provisions 259, 266
Liability for copyright infringement 260

Independent Contractor
Advertising agency, when 339, 348
For sport broadcast facilities 339
Artist, when 321
Author, when 405, 643
Definition of 348, 643
Employee of station, when 321
Distinguished 321
No defense to infringement, musicians were 627, 628
System as 283
Test of 405, 643

India
Public reception of broadcast deemed infringement 707

Indirect Censorship
By Federal Communications Commission of program content .. 564

Individual Commissioner
Actions 76
Delegation of work, business or functions 76
Disqualification 87
Duties and obligations 76
Order of reference to 76
Powers of 76
Secretary and seal 76
Subject to rehearing 78

Industrial Unions
Labor relations with station 297

Infants
Avoidance of contracts by 397
Injunction does not lie against infant artist 397

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Informal Hearings
Purposes, procedure 146

Information
Regarding lotteries prohibited.....53, 568

Infringement
Of common law rights in literary property..... 616
Broadcast of letter..... 645
Of telegram 646
Where action brought..... 619
Of copyright,
Absence of control of system program no excuse..... 293
Access, whether essential to prove..... 614
Actions for, by whom.....588, 685
General equity rules applicable..... 619
Registration and deposit of copies, prerequisite.... 589
590, 591
Where brought 619
Arrangement after revocation of license..... 608
Benefit of plaintiff, no defense..... 614
Breach of license agreement may be..... 418
Broadcast of letters..... 645
Of telegram 646
Broadcast station liability for sustaining programs...222, 632
Burden of proof..... 599
Colorable change no defense..... 614
Common sources resulting in similar works not..... 614
Conversion of non-dramatic work into dramatic..... 606
Copying essential to constitute..... 614
Criminal proceedings for..... 649
Criticism, whether is..... 604
Damages for 621
Difference of medium or materials, no defense..... 614
Exclusive character of, may not be, by Congress..... 598
Extraction of substantial portion of musical composition by performing licensee 609
Fair use, as a defense..... 618
Imitation or parody of whole work is..... 618
Independent creative effort resulting in similar work, not.. 614
Individual treatment resulting in similar work, not..... 614
Infringer, who is..... 260
Intention immaterial 617
Unnecessary 630

Infringement—Continued

International broadcast program as..... 708
Jurisdiction, exclusive in U. S. courts..... 619
Laches..... 620
Liability for.....260, 293
Limitations of actions, statutes..... 620
Mere similarity not necessarily..... 614
Minor addition or omission, no defense..... 614
No defense, copyright taken out by employee instead of employer for hire..... 587
That assignment of copyright not recorded..... 587
Not by non-profit stations..... 633
Other version made unauthorizedly..... 604
Performance, when public..... 634
Phonograph record broadcast may be..... 234
Place not important..... 635
Plural liability not prohibited..... 630
Poem, whether broadcast rendition is..... 612
Profit not essential..... 625
Public performance for profit of manufactured devices under compulsory license..... 667
Public reception of broadcast..... 630
In England..... 707
Rebroadcast..... 629
Reprinting of illustrations to novel not..... 681
Substantial portion must be appropriated.....609, 614, 615
Synopsis, but not abridgement, fair use..... 618
Theme expression, appropriation is..... 615
Unauthorized arrangement of musical composition....607, 608
Dramatization..... 605
Manufacture of mechanical reproduction..... 656
Manufacture of transcription..... 227
Production by station of electrical transcriptions..... 230
Publication of program contents..... 601
Whole work need not be copied..... 615
Of trade marks and trade names.....512, 515, 535

Injunctions

Negative, against artist,
Arbitration clause, no bar..... 398
Assignee of producer, not entitled..... 399
Basis, damages at law inadequate.....388, 391
Injury irreparable..... 388
Uniqueness of artist's services..... 388

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Injunctions—Continued
Continuance of performance by producer required after... 395
Denial where no obligation to furnish work..... 356
Grant of right to use photograph to another, when not restrainable..... 402
Implied covenant not to act in derogation of producer's rights..... 403
Infant, not subject..... 397
Inadequate remedy at law essential..... 391
Liquidated damage clause, when a bar..... 392
Mutuality of contract requisite.....364, 400
Negative covenant essential..... 389
Origin..... 388
Performance by producer necessary..... 394
Permitted beyond term of employment if reasonable..... 401
Preliminary injunction may issue..... 396
Purpose..... 388
Specific performance, will not be ordered..... 388
Uniqueness of services essential..... 393

Inquiry
On Federal Communications Commission's motion..... 130
Power and procedure..... 130

Injury
By false broadcast advertising..... 549
Negligence.....321, 323, 324, 325, 326
Of professional reputation protected..... 523
Workmen's Compensation, liability under, for.....318, 319

Inseparable Work
Created by citizen and ineligible alien, copyright..... 579

Insertion of Condition
In license, deemed refusal to renew..... 105

"Inside" Unions
Labor relations with station..... 297

Insolence
Justifiable discharge of artist for..... 372

Inspection
Of records of Commission..... 83
Theaters..... 243
Upon hearings, right to..... 134

Instantaneous Recording
Distinguished from off-the-air, line and studio recording..... 671
Of electrical transcriptions..... 230

Instrumentality, Federal
Broadcast station, not..... 200

Instruments of Authorization, Application for
Amendments..... 89
Contents.....55, 56
Burden of proof on applicant..... 153
Denial..... 109
Execution by real party in interest..... 55
Financial data required..... 60
License, refusal to renew..... 61
Must specify one frequency.....56, 57
Qualifications, financial ability..... 60
Verbal declarations of third persons insufficient..... 60
When deemed filed..... 111

Insubordination
Justifiable discharge of artist for.....367, 372

Insufficiency of Showing
Affidavits alone..... 144
Where finances come solely from third persons on application for instrument of authorization..... 60

Insurance Companies
State regulations against advertising by unauthorized..... 192

Intangible Property
Of station, value not apportioned..... 207

Intellectual Labors
Copyright protection of form and sequence of expression..... 576

Intellectual Property
In electrical transcription not defeasible..... 228

Intention
Immaterial to infringement..... 617

Interest
Adversely affected, appeal allowable..... 176
In corporation, one-fifth voting stock alien held, ineligible under Act of 1927..... 44

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Interest—Continued
Station program must adhere to public....220, 292
Clearance from owner of, in sustaining program.... 222
Standard of, of Commission.... 17

Interference
By conflicting wave-lengths, Secretary of Commerce unable to cope with.... 37
Federal Communications Commission,
Duty to prevent.... 61
Grant to station of same frequency deemed refusal to renew license of another.... 104
Powers of Congress....8, 205
State statutes regulating, as to reception,
Maine.... 188
Michigan.... 185
Oregon.... 188
Vermont.... 188
Unfair labor practices as, with employer's rights.... 311
Unfair competition, restraint as, with exclusive rights.... 535

International Alliance of Stage and Theatrical Employees.... 297

International Broadcast Program
Copyright infringement by.... 708

International Brotherhood of Electrical Workers.... 297

International Copyright Protection
Adherence of U. S. to Conventions.... 709
Automatic copyright.... 697
Basic principle....694, 695
Domestic registration formalities.... 697
Duration or term.... 698
Historical background....693, 694
Le droit morale.... 701
Mechanical reproduction.... 699
Mere offer of sale, if sufficient to secure.... 696
Performing right exclusive to author.... 700
Protection secured by U. S. citizens.... 696
Publication first in member country by non-member's citizen, effect.... 696
Publication in non-member country, effect.... 695
Works included.... 695

International Copyright Union 694

International Radiotelegraph Conventions
Berlin 25
London 25

International Regulation of Telecommunication
Conferences and conventions 20, 21, 22, 23, 24, 24A
History of 19
Regional agreements on service matters 22, 23

Interpretation
Of contracts, artist and producer 359
Usage and custom 360
Of facilities contracts 267

Interpretative Artists
Copyright protection of 703

Interpretative Renditions
Artist's property in recorded 536

Interruption of Broadcast
Breach of facilities contract 265
Right of advertiser to refund 279

Interstate Commerce
Broadcasting is 4, 5, 183, 200, 203, 209, 319
Advertising as 540
Mingled with intrastate operation 7
Power of Congress to regulate 5, 7
Plenary 7, 183
Profit motive not essential 6
Radio regulated as 1, 2
Receiving set, instrumentality in 210
Reception, essential element 210
Taxation by states, exclusion 4, 202, 203, 204
Of property in state, income of 206
Arizona Act 204

Interstate Commerce Commission 70, 72
Authority to regulate, by public carriers 25
Jurisdiction, under Act of 1927 .....212, 213
Point-to-point communication 211

Interstate Rendition
When crime committed 494

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Interviews
With members of public 462

Intrastate Commerce
Commercial programs are 203
Control, when interference 8
Extent of Federal 2
Express exclusion from Act of 1912 25
Power of Congress when mingled with interstate commerce 7
State regulation, Michigan Act 185

Intervention on Appeal
Persons entitled 164, 177
Procedure 164

Intoxicants
Justifiable discharge of artist for use of 371
Power of state to prohibit advertising of 565

Invasion of Right of Privacy
By recording 461
Television 715
Liability for 464

Investment
Not vested under regulatory act 12

Investigation
By Federal Communications Commission 70, 83
Federal Radio Commission 62
Federal Trade Commission 541, 542, 543

Invoice
For spot broadcasts must accord with log 271

Invitees
Theater's duty towards 243

Issue
Of copyright certificate 591
License, right to hearing 103
Subpoena 117

Issues
Burden of proof of, on hearing 153

Italy
Adherence to Montevideo Copyright Convention 702

J

Japan
Formalities essential to copyright protection 697
General U. S. copyright treaty with 704
Phonograph record broadcast not infringement 706

Joint Boards
Of Federal Communications Commission under Act of 1934,
Actions, force and effect 80
Any matter may be referred to 79
Duties and liabilities 80
Membership 79
Powers 80
Procedure 81

Joint Hearings
Authorized by Act of 1934 81
With state commissions, powers 81

Joint Tort Feasors
In defamation, who are 469

Judicial Enforcement
By contempt 180
In criminal proceedings,
Grounds 179, 181, 182
Penalties 179
Venue 179
Mandamus 178
Of orders of commission 181, 182

Judicial Notice
Of seal of Federal Communications Commission 83

Judicial Review
Appeals from Federal Communications Commission 170
Justiciable question must be presented 168

Jurisdiction
Appellate 166
Basis,
Under Act of 1910 1
Act of 1912 1
Act of 1927 2
Act of 1934 3

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Jurisdiction—Continued
Broadcast regulation
As interstate commerce ... 183
Doctrine of police power ... 183
In general ... 183
Power of Congress ... 183
Relation of state and Federal power ... 183
State statutes delegating power to administrative boards with license requirement ... 184
Commissions,
Federal Communications ... 47, 70, 540
Federal Radio ... 34
Of Broadcast Division ... 75, 299
Interstate Commerce ... 211, 212, 213
Federal Trade ... 540, 547
Conflicts
How resolved ... 75, 190
Copyright ... 619
Criminal ... 492, 493, 494
Defamation ... 484, 487, 488, 489, 491, 492, 493
Federal ... 1, 3
Congress ... 2, 8
Courts ... 491, 545, 619
Lottery information ... 496, 498
Local and municipal ... 196, 197, 199, 237
State,
Insurance company advertising ... 192, 193, 194
Interference with reception ... 188
Subject matter ... 189
Validity ... 195
Taxation,
Congressional power ... 200
Constitutional limitations on states ... 200
State,
Corporate taxes ... 201
Excise taxes, unconstitutionality ... 205
Generally ... 200
Gross receipts, unconstitutionality ... 203, 204
Invalidity ... 198, 208, 210
Intangible property, values ... 207
May not place excise on broadcasting business ... 202
On property all in state ... 206
Television regulation ... 711

Justification
Of presentation of question ... 168

Justifiable Discharge of Artist
Assault on member of cast ... 372
Breach of reasonable rules and regulations ... 366
Disloyalty ... 367, 372
Failure to attend rehearsals ... 374
Buy new costumes ... 366
Incompetency ... 369
Insolence ... 372
Insubordination ... 367, 372
Intoxication ... 371
Refusal play role assigned ... 367
Wear costume ... 368
Tardiness ... 366
Unfaithfulness ... 372
Waiver or condonation ... 376

K

Kentucky
Statute against advertising by unlicensed insurance companies .. 192

Knowledge
Of evidence before commission, party entitled to have ... 134
Purchaser with, of work, rights of author ... 405

Korea
U. S. general copyright treaty with ... 704

L

Labor, American Federation of ... 297

Labor Difficulties
Cancellation of facilities contract for ... 274
Express provision necessary ... 274

Labor Intellectual
Copyright protects form or sequence of expression only ... 576

Labor Relations, with Broadcast Station
All-union shop, not restraint of trade ... 300
American Federation of Musicians, contract with ... 299

Vol. 1, §§ 1–333--Vol. 2, §§ 334–719 SECTIONS

Labor Relations—Continued
Collective bargaining, required 315
Contract with labor organization, standard provisions 299
Craft unions 297
Industrial unions 297
"Inside" unions 297
Organization of employees, status of 297
Preferential shop, lawful 300
Recorded music turntable operators union 299
Unions in the field 297

Labor Unions
By-laws, enforcement of,
Coercive, intimidating, fraudulent or defamatory methods unlawful 303
Fine, imposition of, validity 383
Forbidding members to work for offending employer 305
Members, when must not work for employer 302
Methods of 302
Obligation to obey, under 302
Secondary boycott, invalidity 306
Strike or picketing, lawfulness 304
Sympathetic strikes, validity 306
Validity, basis of 302
Rights of,
Boycott 300
Primary lawful 300
Secondary illegal 300
Picketing 300
Of advertisers unlawful 307
Peaceable only 300
Strike, for all-union shop legality 300
Fine of non-member, may not, to enforce 305
Generally 300
Preferential shop, may, for 300
Purposes, what are lawful 300

Laches
On infringement of copyright 620

Law
Questions of only, review 168, 170
When of fact and, review 169

League, Author's, of America 297

Leasing
Of broadcast theater 236
Provision expressing broadcast use..... 236
Termination, failure to secure license..... 236

Lecture
Exclusive copyright right to public delivery of.....610, 611

Le Droit Morale
Under international copyright protection..... 701

Legal Characteristics
Of advertising agency..... 339

Legal Owner
May be held as copyright infringer, when..... 588

Legal Sale
Electrical transcription not usually subject of..... 228

Legality of Sunday Broadcasts
Under police power of states..... 246

Legislation
Federal,
Act of 1912 25
Powers of Secretary of Commerce...25, 26, 27, 28, 29, 30
Act of 1927 .....31, 32, 36
Purposes. 33
Act of 1934 47
Purposes. 48
And fifth amendment 10
Conflicts, state laws with..... 183
Copyright, Act of 1909..... 585
Desirability of over defamation..... 486
Ship Act of 1910..... 25
Proposed,
Censorship. 573
Control of program content..... 573
Editorial selection. 573
Where newspaper controls station, constitutionality..... 450

Legislative History of U. S. Copyright Protection
Act of 1909, copyright.....585, 586
Amendments to 585
Prior to 586

Legislative Powers
Of Federal Communications Commission, distinguished..... 100
Hearings, distinguished 100
Validity of delegation under Act of 1927..... 14
Under Act of 1934.....13, 15

Legislative Regulation
By Federal Communications Commission..... 101

Length
Of broadcast period, contract between,
system and constituent station..... 290
Under facilities contracts 251

Lessee of Broadcast Theater
Burden on, of alteration work..... 236
Of structural changes..... 236

Less than Quorum of Commission
Hearings by. 126

Letters
Broadcast of. 645
Property rights in..... 645
When protected. 645

Levy
Social Security Tax, on employment..... 332

Lewd Performance
Discharge wrongful when artist refuses to play in..... 367

Liability
Conversion of electrical transcriptions by station, supplied
by advertiser 229
Unlawful appropriation 230
Breach of facilities contract,
Advertising agency not..... 276
To third party as principal..... 342
Express agreement for..... 342
Principal undisclosed. 342
Warranty of authority, breach..... 342
Copyright infringement, by system..... 293
In facilities contract, provision for..... 260
Plural in system broadcast 293
Not prohibited 630

Liability—Continued

Defamation by broadcast program,
Absolute, of station ... 294
Advertiser's ... 481
All participants share in tort ... 481
Defamatory script previously submitted to station ... 476
Dramatization of news ... 448
Due care, desirability of standard of ... 485
Editorial comment ... 448
Extemporaneous remarks ... 477, 479, 480
For defamatory act of employee ... 475
Extradition for criminal ... 494
Libel, absolute ... 477
Not analagous to telegraph company liability ... 473
Nor telephone company's ... 472
Publication, dependence of, on ... 471
Script not previously submitted ... 478
Similar to newspaper's ... 448, 474
Slander *per se*, absolute ... 477
Speaker, absolute ... 476
Sustaining program, station has primary ... 222
System, agreement with station ... 294
Whether should be absolute on news broadcast ... 448
When transmitted by network or system ... 480
Where knowledge possessed by station ... 476
Facilities contract,
Breach of ... 276
Failure of advertiser to broadcast ... 264
Indemnity provisions ... 260
Joint boards,
Duty and ... 80
Lottery program broadcast ... 497
Personal injury,
Of station, to audience ... 243
Taxation, station, for corporation organization ... 201
Torts ... 349

Libel

By conduct, as defamation ... 468
Defamation distinguished ... 467
Whether defamation ... 466, 467, 468
Historical distinction between, and defamation ... 467
Reading aloud as ... 468
Where deviation or distortion of literary work ... 410, 650

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Library
Relation of station to transcription, service..... 228
Royalties on manufacture of electrical transcriptions..... 668

Librettist
Of operetta not entitled to copyright..... 587

Licensees, See Licenses

Licenses
Act of 1912,
Application for. 26
Conflict between licensees.....28, 39
Grant by Secretary of Commerce..... 26
Mandamus to compel..... 27
Revocation for cause only..... 29
Text of. 26
Act of 1927,
Application for, contents.....37, 43
Qualifications. 41
Writing, signature and oath..... 40
Grant, conditions of..... 43
Conditions precedent. 214
Issued for limited period only..... 33
Obligations of licensee under..... 214
Revocation, grounds. 45
Breach of law, license or treaty..... 45
Discrimination in service or rates..... 45
Failure to comply with license..... 45
To provide reasonable facilities..... 45
False statements. 45
Where application reveals facts warranting..... 45
Transfer of, not to alien..... 44
Not without permission..... 44
Vests no rights beyond its terms and authorization..... 39
Act of 1934,
Appeals under. 176
Matters appealable. 160
Bar of corporation for alien stockholders..... 52
Refusal to grant..... 52
Grounds under Act of 1927 re-enacted..... 52
Monopolistic practices. 52
When mandatory. 52
Where licensee's control of program divested.....52, 106
For delegation of time.....52, 106

Licenses—Continued
Revocation of,
Hearing on. 106
Monopolistic practices. 52
Where program control divested. 247
Transfer of. 52, 106
Broadcast stations not common carriers. 214
Copyright,
Infringement, arrangement after revocation of. 608
Breach of license agreement may be. 418
Joinder of licensee of co-author in action by co-author against another. 685
Creative works used in broadcasts,
Requirement of, to use. 575
Compulsory mechanical reproduction. 658
Electrical transcriptions,
Necessity for 227
Performing license 668
Use. 228
Whether compulsory license provision applicable. 662, 663
Federal Communications Commission,
Power to modify. 53
To suspend for obscenity. 567
Federal Radio Commission,
Powers. 35
Public interest, convenience or necessity. 35
Types issued. 212
Hearing, necessity. 68, 109
Literary property,
Assignment distinguished. 406
Bankruptcy, effect upon. 648
Breach of. 418, 648
Nature of. 406
Personal contract. 648
Personal right. 406
Sub-license, when permitted. 406
Termination. 412
Where copyright renewed. 685
Whether broadcast rights included. 421
Modification,
Application for. 160
Order of. 182
Show cause order. 99

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Licenses—Continued

Renewal,
Denial, grounds. 276
Log must be annexed..... 271
Persons entitled. 676
Where nonconformity to regulations or engineering standards. 61
Taxes, by states,
Arizona statute, unconstitutionality..... 204
Broadcasting business, discrimination not possible....202, 203
Broadcast stations, may not be levied on..... 202
Congressional protection. 205
Defined. 201
Interstate commerce excluded from..... 202
Regulation and control, primary object..... 201
Requirement of, invalid..... 198
Theaters of broadcast stations,
Local, may be required..... 240
Revocable, only. 241
Tax may be imposed..... 240

Lien

On master matrix..... 231
Extent and waiver..... 231

Limitations

Breach of facilities contracts, liability..... 265
Character of system programs in..... 292
Briefs,
On time of filing..... 128
Effect. 123
Constitutional, on state taxation of broadcasting..... 200
Regulation by municipal power.....196, 197, 198, 199
Copyright,
Of infringement actions, statutes of..... 620
Rights under. 596
Term or duration. 579, 595
Electrical transcriptions,
Of use, transfer for..... 229
Possession of, by station..... 228
Evidence on disregard of rules of..... 134
Freedom of speech..... 563
Hearings,
Application for repeal..... 114

Limitations—Continued
Issues, by protest 67
Where no request for 67, 108
Judicial review, on substantial evidence 547
Powers of Secretary of Commerce, on 27
Taxation by state statute 200
On corporation taxes 201

Line Charges
Between artist and producer, who liable 353
Telephone, obligations under facilities contracts 247

"Line" Recording
Defined 230
Electrical transcriptions 230
Off-the-air recording distinguished 671

Liquidated Damages
Actual damage must be uncertain and difficult to ascertain 277
No injunction where 392
Obviously excessive must not be 277
Penalty, must not constitute 277, 387
Provisions in contract for 387
Preferable 416
Reasonable forecast of probable damage 277
Unenforceable where actual damage readily ascertainable 277

Listening Public
Obligation to, failure to award offered prize 269
Prize offer, failure to award, obligation to audience 269

Literary Criticism
Whether it is defamation 483

Literary Expression
Of ideas, property in 532, 534

Literary Property, Common Law Rights in
Abolished in England by Act of 1911 579
Absolute and unconditional sale passes manuscript 579
Assignment of 406, 407
Adverse possession, effect 643
Citizenship of author immaterial 579
Copyright Act of 1909 does not abolish 579
Copyright distinguished 579

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Literary Property—Continued
Damages for infringement of 622
Exclusive right of mechanical reproduction included 584
Of translation included 603
To first publication included 579
To prevent copying included 579
Use included 584
Extant in U. S. 579
Extent of 584
Independent of statute 579
Infringement of 616
Actions, where brought 619
Broadcast of letters 645
Of telegram 646
Not coextensive with statutory copyright 577
Party by assignment 579
Perpetual unless work published 579
Public performance not divestment 582
Publication destroys 579
Place of, immaterial 580
Superseded by compliance with statute 578, 579, 594

Litigation
By press against news program 439

Local Copyright Protection
Works of aliens 691

Local Regulation of Broadcast Theaters 237
Aisles 239
Arbitrary, must not be 237
Construction, methods of, may be prescribed 238
Exists 239
Fire protection 239
Jurisdiction to regulate 237
Police power as basis 237
Local aspects of operations must relate to 237
Location, giving laws may not prescribe 238
Passageways 239
Reasonable, must be 237
Repugnant to enabling act, must not be 237
Seating, may have 238

Local Licensing
Of broadcast theaters. 240

Local Taxation
On sales of broadcast facilities, invalid. 208

Local Time
Agreement for, between system and constituent station. 289

Location
False geographical in advertising restrained. 557
Of exits of theater, court regulation. 239
Of individual station, duty of Commission to fix. 61
Transmitter, local regulation of. 197

Log, Station
Contents. 271
Invoices for spot broadcasts must accord with. 271
Necessary part of application to renew license. 271
Must be annexed. 271
Prima facie proof of broadcast. 271
Required. 271

London Convention of 1912
Intercommunication of radio—telegraph. 21
Message rate provisions. 21
Objections. 21
Ratification. 21
Scope. 21
Service regulations. 21

Long Duration
Of unlawful practice, not condemnation. 552

Long Wave Broadcasting
Allocation of frequencies. 24A

Loss
Of property, liability of broadcast theater. 245
Script, remedy. 420

Lotteries
Basis of liability for. 497
Broadcast of, prohibited. 250
Information concerning prohibited. 53
Liability for. 497
Validity of ban. 568

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Lotteries—Continued
"Cartoon" contests, whether they are..... 505
Definition of. 501
Essential elements. 501
Chance. 504
"Best" contest. 505
Checker problem. 509
Gift enterprises. 508
"Guessing" contests 506
"Quiz" contests. 511
"Voting" contests. 507
Word building contests..... 509
Consideration. 502
Package tops, etc. 503
Whether must be present..... 503
Passing of value necessary..... 502
Prize. 510
Provision against, in Act of 1934.....496, 497, 499
Construction of, strict.....500, 502
Powers of Federal Communications Commission..... 498
State regulation of information concerning..... 568
Violation, jurisdiction over under Act of 1934..... 498
Penalty for. 497

Louisiana
Statute controlling advertising by unlicensed insurance companies. 193

Loyalty
Required of representative to artist..... 431

Lyrics
Alone, not copyrightable as musical composition..... 625
License provisions for mechanical reproduction do not include.. 664
Protected independently of music..... 625
Alone not copyrightable..... 625

M

Madrid Telecommunication Convention of 1932
Frequencies, allocation of..... 23
General radio regulations..... 23
Objections. 23
Prior treaties abrogated by..... 23

Mailing
Copyright formality, deposit of copies by..... 590
Report of testimony at hearing, required..... 126

Mailing List
Station must not reveal to advertiser's competitor..... 270

Maine
Regulation of interference with reception..... 188

Maintenance
Of station, application for instrument of authorization must show financial ability for..... 60

Majority Vote
Necessary to control actions, hearings and determinations....50, 73

Manager of Artist, See Also Representative
Agency of..... 424
Creation of..... 426
In general..... 423
Station by acting as..... 232
Statutes regulating..... 425

Mandamus
Under Act of 1912..... 27
Act of 1934..... 178

Manufacture
Copyright provisions of Act of 1909, on..... 590
Infringement of devices by public performance under compulsory mechanical reproduction license..... 667
Unauthorized, of mechanical reproduction..... 656
Of transcriptions..... 227
Of electrical transcriptions,
Cost, advertiser liable..... 261
Of master matrix of manufacturer..... 231
Royalties..... 668
Sources of supply and..... 226

Manuscript
Coversion of, damages for..... 622
Definition of..... 581
Sale, absolute and unconditional, passes rights..... 579

"March of Time"
Unfair simulation restrained..... 520

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Marconi 19

Maritime Compensation Act, Federal 318

Maritime Provisions
Of Berlin Convention of 1906..... 20

Marks of Advertisers
Basis of protection of..... 517

Marshall, John 5

Maryland
Regulation of advertising by unlicensed insurance companies.. 193

Massachusetts
Regulation of advertising by unlicensed insurance companies.. 194

Material for Program
Artist's right to refuse certain..... 573
Deletion, right of station, reasonable exercise..... 259
Disapproval of station, final..... 258
Infringement, difference of, no defense..... 614

Materials
In theaters, quality and type, local regulation..... 238

Measure of Damages
Breach of contract, artist and producer..... 384
Facilities contract. 277

Mechanical Difficulties
Express provision in facilities contract..... 274

Mechanical Reproductions
Authorization of manufacture necessary..... 575
Compulsory license provision, Act of 1909,
Dramatico-musical works not subject to..... 658
Dramatics works not subject to..... 650
English Act of 1911.....659, 660, 690
Off-the-air recordings not subject to..... 673
Performance of phonograph records not included..... 674
Sound on film devices, subject to..... 669
Whether applicable to other then piano rolls and phonograph records. 662
Copyright protection,
Exclusive right of copyright owner.....652, 654
Foreign. 706

Mechanical Reproductions—Continued
International. 699
Liability under. 672
Pan-American Convention 702
Reciprocal relations of U. S. 704
Sustaining programs, infringement by. 222
Definition. 661
Limited distribution for performance, not publication. 580
Means of. 652
No right of, prior to 1909. 653
Not a copy. 653
Off-the-air recordings for public performance. 670
Instantaneous and studio recordings distinguished. 671
Sound on film devices. 669
Manufacturing royalties. 669

Medium
Difference of, no defense to copyright infringement. 614

Medley Arrangement
Of musical compositions. 608
When a distortion. 608

Members
Of joint boards of Commission, selection. 79
Public,
Interviewing, right of privacy. 462
Unions, by-laws governing. 302

Memory
Copying from, sufficient to infringe copyright. 614

Mention of Author's Name
Distortion of work, use of with, restrained. 647

Merchandising Co-operation
By constituent station under facilities contract. 291

Mere Similarity
Not necessarily copyright infringement. 614

Messages
Abstention of U. S. from London Convention rate. 21
Personal, prohibition of in facilities contract. 272

Methods
Of construction of theaters, local regulation 238
Enforcement of union by-laws 302
Performance of artist, not protected in style 522

Mexico
Duration of copyright protection in 690

Mexico City Copyright Convention 702

Michigan
Administrative boards established 184, 185
Censorship, power of state to enforce 565
Invalidity of regulatory statute 185
Zones established 185

Minor Addition
No defense to copyright infringement 614

Miscellaneous
Applications designated for hearing by Federal Communications Commission 109
Under Act of 1927 68
Service provisions of facilities contract 268, 272

Misrepresentations in Broadcast Advertising
Competitive, whether unfair competition 538
Regulation by Federal Trade Commission,
Of contents, ingredients 554
Gain to purchaser 556
Must affect specific public interest 550
Prospective profits misstated 557
Public gain false 551
Restraint of 549

Misuse
By station of identification period 290

Mitigation of Damages
Artist's duty to 385
By station, facilities contract 265
Employment agreement, duty of facilities salesman 233

Mixed Questions of Fact and Law
How disposed of 169

Modification
Of application for instrument of authorization.....63, 160
For renewal. 153
Of facilities contracts 265
Of license of station.....99, 155, 160
Powers of, Federal Communications Commission..... 53
Statutory by Act of 1934, of Act of 1927..... 52
Of Davis Amendment..... 54

Money
Effective date of order other than for payment of money..... 165

Monopolistic Practices
Refusal of license for guilt..... 52

Monopoly (Private)
Copyright, for specific term..... 598

Montevideo Copyright Convention
Pan-American protection convention..... 702
Adherence by Argentine
Austria. 702
Bolivia. 702
France. 702
Germany. 702
Italy. 702

Motion of Commission
Hearings on own..... 130

Motion Picture
Broadcast program protection of title of..... 528

Multiplying Copies
Exclusive copyright privilege of owner..... 601

Municipal Regulations
Alterations must comply with..... 236
Antenna, height of 197
Classification of. 196
Jurisdiction. 196
Prescription of physical character and locations of stations.... 197
Taxation by, invalidity..... 198
Transmitter, location of..... 197
Validity over subject matter..... 199
Zoning. 197

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Musical Compositions

Arrangements,
"Build-ups". 607
Exclusive right of copyright owner to make. 607
Licensed by copyright owner to make. 607
"Medley" conbinations in 608
Mutilation of original work by licensee in. 608
Revocation of license for. 607, 608
Restrainable by copyright owner. 607
Right to make not included in performing license. 609
Nor under compulsory licensing provisions. 666
Separate copyright not required for. 607
"Special". 607
"Stock". 607
Unauthorized, as infringements. 607
What are. 666
Compulsory license under Act of 1909. 655
Applicability to devices, other than piano rolls and phonograph records. 662
For public performance for profit. 662, 667
Constitutionality of. 657
English provision distinguished. 660
Nature of. 655
No retroactive effect. 665
Origin 656
Phonograph records, applicability. 664
Public performance for profit not included. 667
Rights included in. 664
Sound on film devices, applicability to manufacture of. . . 669
When effective. 656
Copyright protection
Exclusive rights,
Arrangement. 607
Compulsory license not applicable. 663, 666
Performing right not included. 666
Public Performance. 610
Failure of co-author to renew. 682
Infringement. 607, 608, 609
Definition of. 653
Dramatic performance, possible. 625
Dramatization of. 625
Controlled by copyright owner. 605

Musical Compositions—Continued
Extractions from, exclusive in copyright owner..... 609
Infringement by. 609
"Grand rights" 624, 625
Compulsory license provisions applicable..... 663
How used in broadcast programs..... 574
Dramatic performance. 575, 624
Lyrics may be used alone..... 575
With other compositions..... 575
Non-dramatic performance 575, 624
Important source of program material.....574, 624
Lyrics and music need not be appropriated together to constitute infringement. 625
Lyrics, not included in mechanical reproduction license provisions. 664
Protected independently of music..... 625
Alone not copyrightable..... 625
Performance publicly for profit, exclusive right of copyright owner. 610
Performing rights, license..... 223
Restrictions and terms..... 223
Right granted station rather than sponsor or producer.... 223
Studio audience. 223
"Production members", copyright registration of..... 613
Registration, effect of. 613
Restricted list for broadcast use,
Notice required. 223
Permission to perform may be secured..... 223
Contingent on credit in announcement, may be..... 223
Violation of, infringement..... 223
Use of certain, on..... 223
"Small rights" 624, 625
Song, when dramatico-musical composition..... 625
Sustaining programs, contents..... 223
Test of infringement..... 609
Words and music protected severally by copyright renewal... 682

Musicians
American Federation of.....297, 299
Infringement by performing, who are.....627, 628

Mutilation
Of original work by arrangement, when defamation..... 608

Mutual Agreement
Artist and producer, formation 351
Facilities contracts, termination, rescission 274

Mutual Broadcasting System 284

Mutuality
Contract between artist and producer 364

N

Name
Appropriation of artist's professional, by another 523
Competitive use of artist's real 524
Real name of artist as trade 524
Right of author to demand use of 409
Where mere use of professional, restrainable 522
Who is employer of personnel of, band 322

National Association of Broadcasters 339

National Association of Performing Artists 297

National Broadcasting Company 284

National Labor Relations Act and Board
Broadcast station within scope of 308
Commerce regulated by, defined 308
Enforcement of 317
Establishment of National Labor Relations Board 308
Powers of 316
Procedure under 310, 316, 317
Purpose of 308, 309
Strike, does not bar the right to 309
Unfair labor practices under 311, 312, 313, 314, 315
Action by Board 310

Nature
Of advertising restrained by Federal Trade Commission 549
Assignment of literary property 406
Broadcast precludes common carrier status 216
Compulsory license under Act of 1909 655
Copyright grant by U. S. 598
Term 600

Nature—Continued

Facilities contracts. 247
Review, appeal from Federal Communications Commission. 163, 170, 173
Right of privacy in broadcasting. 452
Renewal of copyright. 677
Services to be rendered. 61
State taxation on receiving sets. 210
Sustaining program. 224

Negative Covenants

Affected by television. 718
Essential, to obtain injunction. 389
Inadequate remedy at law. 391
Reasonableness to obtain injunction. 390

Negative Injunction, for Breach of Contract

Against breach by author. 415
Arbitration no bar to. 398
Assignee of producer not entitled. 399
Basis of issuance. 388, 391
Continuance of performance by producer required. 395
Denial where no obligation to furnish work. 356
Grant of right to use photograph, not restrainable. 402
Implied negative covenant not to act in derogation of producer's rights,
Restrainable 403
Inadequacy of remedy at law. 391
Infant, not subject to, for breach of contract. 397
Liquidated damage provision bars. 392
Mutuality requisite. 364, 400
Negative covenant essential. 389
Must be reasonable. 390
Origin. 388
Purpose. 388
Performance by producer requisite. 394
Preliminary, may be issued. 396
Specific performance, not directed. 388
Uniqueness of services of artist essential. 393
When enforced. 401

Negligence

Liability, of station for, personal injuries. 243

Network
Defined. . . . 283
Specific instances. . . . 284
System distinguished. . . . 283

New Costumes
Artist's breach of agreement to buy . . . 366

New Jersey
Administrative boards by statute of . . . 186
Enforcement. . . . 186
Necessary provisions. . . . 186
Validity of. . . . 187
Censorship, power of, to impose . . . 565

New Matter
Copyright coextensive with . . . 586
Originality only, subject to copyright . . . 586, 599

New Provisions
Of Act of 1934 . . . 53

New York
Censorship, power of, to impose . . . 565
Doctrine of protection of right of privacy . . . 455, 456
Regulation of unlicensed insurance company advertising . . . 192

News
Publication of, as defamation . . . 448

Newspapers
Liability for defamation, absolute . . . 474
Of station similar . . . 448, 474

News Programs
Appropriation by competing station, unfair competition . . . 443, 445, 446, 535A
By press, unfair competition . . . 444
Direct broadcast of, right to . . . 446
Agreements granting . . . 447
Events occurring in private areas . . . 446
On public property . . . 446
Unconfined areas. . . . 446
History of. . . . 438
Interference with exclusive right to, by station . . . 442, 447
News possesses quasi-property characteristics . . . 442, 443

News Programs—Continued
Press-Radio relations 438
Bureau established. 440
Control of stations by newspapers..... 449
Proposed statutory reforms..... 450
Rebroadcasting, whether unfair competition..... 445

News Service 441
Press-Radio bureau 440

Next of Kin
Rights to renew copyright, entitled to..... 596
Of author. 676, 686

Nominal Damages
May be awarded, in any case..... 277
Least amount. 383

Non-Broadcast Work
Rights of author of..... 421

Non-Dramatic Works
Dramatic works, connection with..... 606
Dramatization of, exclusive right of copyright owner..... 605
Infringement of copyright by conversion..... 606
Performance of, possible..... 625

Non-Citizen
Whether entitled to copyright renewal..... 688

Non-Members of Copyright Conventions
Copyright protection of citizens of..... 696
International copyright protection, effect of publication..... 695

Non-Member of Labor Union
Fine of, may not stress to enforce..... 305

Non-Performance
By advertiser, excuse 281
Producer. 279, 377
Under facilities contracts,
Causes beyond control of station..... 274
Express contract provisions.....274, 279
Excuse for. 279
Grounds for. 279, 280
System, excuse for..... 296

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Non-Profit Stations
Broadcast not infringement..... 633

Non-Resident Alien
Not entitled to copyright..... 579
Where reciprocal copyright privilege exists..... 587

Non-Resident Employer
Union by-law governing working for..... 302

Non-Simultaneous Broadcasts
Chain broadcasting 287
Group broadcast. 287

Non-Union Persons
Validity of by-law against working with members..... 302

North American Conference of 1938
Allocation of frequencies..... 23
History of. 24
Ratification. 24

Notice
Of appeal, procedure, service..... 164
Copyright, formalities. 589
Vests on publication with..... 589
Depositions, taking, practice.....121, 122
Discharge of artist by producer.....375, 383, 386
Hearings. 63, 103, 147
Seal of Commission, judicial..... 83
Violation. 95

Novels
Broadcast reading or delivery, whether infringement..... 610
Dramatization, controlled by copyright owner..... 605
How used in broadcast programs..... 575
Infringement, reprinting illustrations to, not..... 681

Novelty
Essential to protection of ideas..... 533

O

Obedience
Required of artist of all reasonable rules..... 366

Obligation

Of advertiser to audience 269
Artist to producer to furnish work 356
Broadcast stations not that of common carrier 214
Federal Communications Commission, board of employers 76
Individual commissioner 76
Labor unions, members to obey by-laws 302
Licensees under Act of 1927 214
Station with and to advertisers,
Failure to fulfill, to audience 269
Incidental facilities, to provide 247
Proof of broadcast 271
Provisions for, optional 263
Scope of 247
Specific 270
Supervision of production 247
Talent, to provide 247, 272

Objectives of Convention

Berlin 20
London 21
Madrid 23

Objections

To form of question on deposition 123

Obscenity

Justifiable discharge of artist for use of 373
Prohibition against, in broadcast 250, 563, 567

Occupation Taxes

Arizona statute, unconstitutionality 204
Broadcasting business, discrimination not possible 202, 203
May not be levied on 202
Defined 201
Interstate commerce excluded 202
Protection of congressional power, real basis 205
Regulation and control of business, primary object of 201

Offensive Programs

Deletion of material by station 259
Editorial selection 571
Refusal to broadcast, in public interest 283

Offer
Necessary as to depositions 123
Rules of, evidence require 137
When unnecessary 137
Substitute period of broadcast on interruption of program ... 265

Officers
Of divisions of Federal Communications Commission 71

Off-the-Air Recording
Appropriation restrained 537
Compulsory license provision not applicable 673
Defined 230
Distinguished from "time," "instantaneous" and "studio" recordings 671
Of electrical transcriptions 230
Provisions for included in facilities contracts 288
Public performances under copyright 670
Right of station to make 272
When recording restrained 537

Old Age Pensions
Social Security Act provisions 331

"Old Maestro"
Unfair simulation restrained 520, 521

Omission
No defense to copyright infringement 614

Opening
Of hearings 150

Operation
Audition precedent, grant of license 214
Denial of facilities for 10
Deprivation of rights, refusal of, not 10
Hours of, change by regulation 102
Private enterprise, broadcast station, as 220
Programs, of broadcast station,
Commercial program 232
Candidates for public office, equal opportunity 566
Point-to-point communication distinguished 216
Violation of standards of 292
System program 292

Operation—Continued
Provisions for, in facilities contracts,
By operation of law.... 250
Express.... 274
Recommended.... 265
Public interest, must be, in.... 292
Station, authority of Commission.... 213
Frequencies of station....37, 40
Must show adequate finances for.... 60
Regulation of, local....237, 246

Operators
Of broadcast theater, liability for personal injury.... 243
Point-to-point radio....211, 212
Recorded music.... 299

Operetta
Librettist not entitled to copyright.... 587

Opportunity
Of applicant to be heard.... 63

Oral Argument
Exceptions to.... 127
Failure to request.... 127
Required unless....115, 127
Notice of.... 127
Request for....115, 127
When discretionary in Commission.... 127

Oral Declarations
Exclusive of, from evidence.... 142

Oral Hearing
Due process requires.... 131

Ordinances
Validity of, local....198, 199

Orders
Due process, not when *ex parte*.... 153
Effective date of.... 165
Cease and desist, validity of.... 547
Divisions of Federal Communications Commission, effect.... 73
Enforcement of.... 182
Finality of....168, 169

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Orders—Continued
For depositions, contents....120, 121
Grant of hearing after effective date not due process.... 104
Hearings, order of presentation.... 150
Other than for payment of recovery.... 181
Reference....71, 76
Remedy against.... 182
Revocation of license of station....64, 98, 106
Enforcement of and remedy against.... 182
Show cause.... 99
Stay of enforcement of.... 164

Oregon
Regulation by statute of interference with reception.... 188

Organization
Of Federal Communications Commission.... 34
Of station employers.... 297
Taxes on corporations, liability of stations for.... 201

Origin
Act of 1927.... 211
Compulsory license under Act of 1909.... 656
Injunctive relief against artist.... 380
State regulation of broadcasting.... 183

Original Ideas
Copyright protection of....533, 534

Original Proceeding
Parties to.... 177

Original Matter
Copyright coextensive with.... 586

Original Work
Defamation by mutilation of.... 608

Originality
Basis of copyright protection.... 599
Burden of proof.... 599
Essential to protection.... 533
Only, subject of copyright....586, 599
Protection only for.... 599
Subject of copyright only.... 586
Substantial basis of copyright protection.... 599
What is.... 599

Originating Station
Rebroadcast prohibited without consent of..... 286

Other Proceedings
Records of, in evidence..... 141

Other Version
When unauthorized, infringement of copyright..... 604

Ottawa North American Conference of 1929 22

Outright Sale
Of script, relation of parties..... 411

Owner
Action for infringement, when legal, may be sued..... 588
Exclusive rights of copyright of..... 600
Adaption and transposition. 607
Dramatization of non-dramatic works 605
Extractions. 609
Make other versions..... 604
Performance publicly. 613
Public performance of dramatic works..... 613
Translation. 603
Vending of manuscript of dramatic work..... 610
Of interest in script, necessity of clearance from, on sustaining program 222
On commercial program..... 222

Ownership
Corporations stock, when works alien stock..... 52
Frequencies, not subject of..... 33
Of electrical transcriptions..... 229

P

Package Tops, Etc.
Whether consideration essential to lottery..... 503

Pan-American Copyright Protection
Automatic. 702
Berne Convention principle following..... 702
Buenos Aires Convention..... 702
Havana Convention 702
Montevideo Convention. 702
Performance by broadcast, whether included..... 702
Rio de Janeiro Convention..... 702

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Papers
Service of. 91

Paraguay
Adherence to Montevideo Copyright Convention. 702

Parody
Of whole work is copyright infringement. 618

Partial Breach
By producer, remedy of artist. 381

Partial Grant of Application
Right to hearing on. 66, 108

Parties
Advertising agency, liability to third, as principal. 342
Application for instrument of authorization, subscription by. . . 89
Appeals, who are, on. 175
Artist and producer, valid agreement between, necessary. 426
Copyright infringement, who are. 588
Co-authors must join. 588
Legal owners. 588
Equitable owner may join. 588
Defamation, jurisdiction over. 487, 488
Depositions by, practice. 119, 122, 123
Order to take, notice. 121
Facilities contracts, who are. 255
Disabilities of. 275
Filing and service of papers by, before Commission. 91
Hearings. 175
Evidence, rules of. 134, 148, 149
Exceptions to report, service on. 126

Partnership
Jurisdiction over, by Federal Trade Commission. 540

Passageways
Of broadcast theaters, local regulation of. 239

Past Conduct
Of licensee, relevant on inquiry concerning operation in public interest. 219

Payment
Of advertising agency. 257
Artist. 379
Facilities salesman. 257

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Payment—Continued
Order for other than, of money 181
Provision for cost of transcription in facilities contract 261

Pecuniary Interest
As disqualifying individual commissioner 87

Penalties
Criminal proceedings, enforcement of 179
Failure to file copies for copyright 590
Liquidated damage must not constitute 277, 387
When lottery provisions of Act of 1934 violated 497

Pendency of Application
Date determination, contest 111

Pendente Lite
Injunction, may issue 396

Pennsylvania
Statute regulating advertising by unlicensed insurance companies 193

Pensions, Old Age
Provisions of Social Security Act 331

Perforated Player Piano Roll
Not a copy 628, 653

Performance
Artist,
Continuance of producer's after breach of contract by 395
Contract of, impossibility 378
Prevention by producer 381
Duration of broadcast 352
Negative injunction, necessity of, by producer 394
Property rights of, in 225
Protection against unauthorized appropriation of 574
Not protected in style, method or type of 522
Specific, not ordered 388
Common law rights in literary property, public, not divestment .. 582
Copyright of 610
Exclusive rights of owner of, publicly 610
Foreign, when deemed infringement 705
Infringement of, by 630, 667, 707

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Performance—Continued
Dramatic,
Broadcast of, is public..... 613
Exclusive right of copyright owner.....610, 613
Question of fact..... 625
Profit not essential to constitute infringement by..... 625
What is..... 625
Dramatico-musical work,
Possible to give non-dramatic..... 625
Electrical transcriptions,
Not publication by..... 582
Generally..... 610
"Grand rights"..... 624, 625
Distinguished from "small rights"..... 625
License for,
Applies to arrangements only..... 607
Consent of copyright owner necessary..... 609
Musical compositions,
Dramatic, possible..... 625
How used in broadcast programs.....575, 624
Publicly for profit..... 610
Compulsory license provisions.....662, 667
Non-dramatic, what is..... 625
Not a publication..... 582
Place where infringement by, unimportant..... 635
Public,
Broadcast is..... 613
Occurs at place of reception of program..... 575
Publication, performance not of,
Broadcast script.....532, 582
Electrical transcription..... 582
Mechanical reproduction..... 582
Musical composition.....532, 582
Recording..... 532
Publicly for profit,
Liability for infringement..... 626
Non-profit station, whether programs are broadcast..... 633
Rebroadcast of unauthorized performance.....628, 629
Whether infringement..... 629
Reception by hotel in public lobby and rooms is..... 630
In connection with commercial establishment is..... 630
Restaurant, without admission charge is..... 626
Specific admsision charge not necessary..... 631

Performance—Continued
Sponsored program is ... 628
Studio audience, before is ... 636
Sustaining program held to be ... 628, 632
Test of ... 626
Unauthorized reception, infringement ... 630
What constitutes profit ... 631
When occurs ... 634
Whether broadcast of musical work is ... 628, 629, 631, 632, 633, 636
Work need not be written for profit ... 626
Public reception of broadcast, whether infringement ... 707
"Small rights," distinguished from "grand rights" ... 625
State statutes prohibiting group collection of license fees for ... 597
Unauthorized broadcast, of copyrighted musical works, infringement ... 626

Performing
Artists,
National association of ... 297
Rights in electrical transcriptions ... 227
Phonograph records ... 225, 536
Musicians,
Infringement of copyright ... 627, 628
Rights,
Exclusive, of copyright owner ... 666
Infringement of ... 223
License of, to when granted ... 223
Arrangement not included ... 609

Period, Broadcast Time
Broadcast time,
Diminution by identification announcement ... 251
Duration ... 251
Licenses, issued for limited, only ... 33
Mitigation of damages by station by substituting another ... 265
Order of reference to Board, effective ... 76
Special, of protection for aliens under copyright ... 691

Periodicals
Deposit of copies for copyright, work contribution to ... 590

Perjury
Immunity of self-incrimination not extended to ... 145

Permanent Engagement

Validity of labor union by-law against transfer member..... 302

Permission

For structural changes in theater..... 236
To perform musical compositions on restricted list..... 223
Contingent on credit in announcement..... 223
Transfer of license under Act of 1927..... 44

Permits, Construction

Appeals from refusal of.....156, 157, 160
Applications for, contents..... 43
Hearings on. 152
Not transferable under Act of 1927..... 43
Performance of terms and conditions..... 43
Powers of Federal Communications Commission to modify.... 53
Refusal of, under Act of 1927..... 155
Standard of public interest, convenience and necessity..... 43
Terms of. 43

Perpetual Rights

In literary property under common law..... 579
Prohibited by Constitution as to copyright..... 595

Personal

Contract, license of literary property..... 648
Liability for injury.....243, 244
Messages, prohibition of..... 272
Right of privacy..... 453

Personal Representative (of Artists)

Agency agreement between, formality..... 426
Apparent authority. 435
Execution of agreement for artist..... 436
Booking agency contrasted..... 423
Compensation. 432
Duties to artist..... 431
To representative. 432
Failure to secure engagements, as breach..... 431
Fiduciary relation 431
Functions of. 422
Powers of. 433
Relationship, principal and agent..... 427
Duration of. 427
Ratification of unauthorized acts..... 434

Personal Representative—Continued
Reimbursement of. 432
Right of indemnity of. 432
Whether occupational license required. 425

Personnel
Of "name" band, who is employer of. 322
When independent contractors. 321

Persons Entitled to
Appeal from Federal Communications Commission,
Applicants. 160
Interveners. 164, 177
Party to original proceeding. 177
Those aggrieved or adversely affffected. 160
Copyright. 156
Alien's rights. 579, 587
Author. 587
Co-authors but not librettist. 587
Employer for hire. 676
Employer of author. 587
Executors, administrators and assigns. 587
Grantee of author. 642
Proprietor. 587
When inseparable work of citizen and ineligible alien. . . . 579
Copyright renewal,
Administrator, not. 677
Assignee of copyright, not. 677
Author. 596, 676, 680
Children of author. 676
Co-author's, each. 679
Employee-author, not. 687
Executors. 596, 676, 686
Next of kin. 596, 676, 686
Non-citizen, whether. 688
Producer, when employer of author. 405
Proprietor, when. 676
Editorial selection, other than station. 572
Facilities contracts, provisions for liability for personal injury to, who. 262
Remedy against order of Commission. 182
Right to hearings. 67, 94, 107, 111

Peru
Adherence to Montevideo Copyright Convention. 702

Petition
To intervene. 93
Rehear. 50
Show cause, procedure 113

Phonograph Records
Appropriation as unfair competition 536
Broadcast performance of 225
Not infringement, in Hungary and Japan 706
Compulsory license under Act of 1919, applicability 664
Not within mechanical reproduction 667
Limited distribution not publication 580
May be prohibited by station 571
Mechanical reproduction, infringement by 667
Property rights of performing artist 225
Sale for home use not publication 536
Sustaining program, broadcast may be infringement 224
Unauthorized broadcast as unfair competition 536

Photograph
Grant of use of, when breach not restrainable 402

Photostat
Reproduction of copies by, whether publication 581

Physical Character
Of station, municipal ordinance regulating 197

Physical Property
Sale of electrical transcription passes only 228

Physically Complete Copies
Copyright formalities require deposit of 590

Piano Rolls
Compulsory license Act of 1909, not applicable 662
Applicability to manufacture of 664

Picketing
Aim of. 301
Enforcement of union by-law by 304
Must be peaceable 300
Right of, by labor union 300

Place
Of infringement, not important 635
Publication, immaterial. 580

Plaintiff

Benefit of, no defense to infringement..... 614
Defamation must specifically relate to..... 482

Play

Performance of, not publication..... 582
Protection against use of title..... 528

Play-by-Play Description

Direct broadcast of, not publication..... 532

Pleadings

Amendments..... 90
At hearings..... 90
Discretionary..... 90
Time, as of course, limited..... 90
Answers to appearances,
Prerequisite to hearing..... 97
Answers to notices of violations, context..... 95
Time limited..... 95
Appearances,
Context required..... 96
Must respond to each issue..... 96
Not evidence of facts stated..... 96
Subscription and verification required..... 96
When required..... 96
Consolidation by Commission..... 94
Kinds..... 88
Petitions to intervene,
Filing, time limited..... 93
Showing of substantial interest..... 93
Subscription and verification of..... 93
Protests,
Dismissal on motion..... 154
Limit issues triable at hearing.....67, 94
Proof of service required..... 94
Subscription and verification required..... 94
State interest of protestant and facts..... 94
Service of..... 91
Subscription of..... 89
Verification of..... 89

Plenary Power

Of Congress where interstate and intrastate commerce commingled.....7, 183

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Plural Liability
For copyright infringement not prohibited..... 630
Where system broadcast..... 293

Plot
Not copyrightable..... 615

Poems
Dramatization, controlled by copyright owner..... 605
Infringement by broadcast rendition..... 612

Point-to-Point Operation
As common carrier.....211, 212
Distinguished from broadcasting..... 216
Licensing by Secretary of Commerce under Act of 1912..... 211
Rates, etc., jurisdiction of..... 211

Police Power
Constitutional exercise by states over purely local matters..... 565
Doctrine of, as to broadcasting..... 183
Jurisdictional basis, over local dealers..... 237
Police protection of broadcast theater..... 239
To control property under state law..... 565
Unconstitutional state taxation not obviated by..... 210
Validity of state statutes..... 183

Polish Exception
Foreign copyright infringer..... 705

Political Broadcasts
Censorship prohibited..... 566
Editorial selection prohibited..... 562
Federal regulation..... 566

Portion Reserved
In broadcast time for identification announcement..... 251

Possession
Adverse, as to common law rights in literary property..... 643
Exclusive rights of, by proprietors of creative works..... 576
Effect of transfer of..... 579
Electrical transcriptions, by broadcast station..... 228
Of master matrix, lien on..... 231
Replevin of..... 229
Of construction permit, condition of license..... 43

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Postal Anti-Lottery Statute
Distinguished from Act of 1934 499
Statute provisions. 496, 499, 502

Postponements
How and when obtained 132

Power
Application for instrument of authorization must set forth.... 56

Powers
Advertising agency's. 347
Broadcast station's, to impose program standards..... 570
Editorial selection. 292, 572
Censorship, state's to impose.....565, 567
Declaratory of constitutional, legislative history..... 586
Congressional,
Legislative history. 586
Over commerce and interstate. 5
Completeness. 8
Delegation. 13, 14, 15
To boards. 184
Intrastate commingled 7
Over copyright. 598
Plenary. 1, 8, 205
Regulation of broadcasting..... 183
Taxation. 200
Treaty making. 9
Courts', to review,
Decisions of commissions..... 166
Due process. 167
Finality of orders of commissions.....168, 169
Orders other than for payment of money..... 181
Under Act of 1934..... 170
Federal Communication Commissions,
Administer oaths. 62
After rehearings. 112
Appoint examiners. 62
Assign frequencies. 61
Censorship, power negatived by statute..... 560
Compel production of books, papers and documents..62, 115, 116
Control studios transmitting to foreign stations..... 53
Determine hours of station operation..... 61
Power to be used by station..... 61
Whether program is a lottery..... 498

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Powers—Continued
Encourage use of radio 53
Hold joint hearings with state commissions 81
Inquiry on own motion 130
Licensing 35
Make regulations 101, 102
Rules for conduct of hearings 135
Modify licenses on permits 53
None to determine if crime committed 498
Of boards of employees 76
Divisions 73
Delegation of work to 76
Examiners 115
Power changed by regulation of, hearings on 102, 106
Individual commissioner 76
Joint boards 80
Prescribe contents of application 55
Quasi-judical distinguished 100
Regulate kind of apparatus used 61
Require painting or illuminating of radio towers 53
Special authorizations 110
Summon witnesses 62
Suspend licenses for obscenity 567
Use books, services and records of state commissions 82
Vested with former, of Secretary of Commerce 53
Witnesses, compel attendance and testimony 115, 116
Federal Radio Commission's,
General 46
Hold hearings 62
National Labor Relations Board's 316
Personal representative's (of artist) 429, 433
Secretary of Commerce under Act of 1912 ..... 25, 26, 27, 28, 29, 30
State's to regulate 565, 568
Validity of delegation, under Act of 1927 14
Under Davis Amendment 14

Practice
Rules of Federal Radio Commission, hearings 65

Precedent Conditions
Imposed by Congress on copyright 598
To infringement of copyright 589, 590, 591

Preferential Shop
Legality of strike for 300

Preliminary Negative Injunction
May be issued. 396

Premises
Theaters, liability for personal injuries. 244

Prerequisite to Hearing
Answers to appearances. 97

Prescription
Of copyright formalities. 589
Facts and information in application. 55
Nature of service to be rendered. 61
Regulation of theaters. 238

Presentation
Exclusive right of copyright owner. 610
Of evidence required by due process. 167
Entire, of case by affidavits not allowed. 144
Order of. 150
Where program, interrupted, mitigation by station. 265

Preservation of Competition
License renewed where no unlawful monopoly. 36

Press
Appropriation of new program content by, unfair competition. . 444

Press-Radio Bureau
Conflict between press and radio. 438
News service. 440
Plan. 439, 440, 441
Relations, establishment. 440
Statutory reforms proposed, station control by newspapers. . 449, 450

Prevention of Broadcast
Facilities contract provisions. 274

Prevention of Copying
Included in common law rights in literary property. 579

Prevention of Interference
Duty of Federal Communications Commission. 61

Prevention of Use
Of author's name, right to. 409

Previously Submitted Script
Liability of station for defamation 476
When extemporaneous deviation 477
When not submitted 478

Price of Studio or Theatre Tickets
Discretionary with station 241

Prima Facie Proof
Of broadcast, by station log 271
Certificate of copyright by facts therein 591
Wrongful discharge of artist 365

Primary Boycott
Lawful 300

Primary Object
Of state taxation of broadcasting to control and regulate business 201

Principal and Agent
Relation of artist and representative one of 424
Valid agreement necessary 426

Printer's Proof
Whether it is publication 581

Printing
Is not publication 580
Without cancelation is not 581
Right of copyright owner, exclusively 601
Tickets under facilities contract, who bears cost 262

Priority
Of distress signals 21, 23
Time granted for broadcast, Michigan statute 185
Use of wave-length, Act of 1912 28
Right to, Act of 1927 39

Privacy, Right of
Common law development of 451, 452, 454
New York statutory doctrine 455, 456
Virginia enactment 456
Employee not entitled to in scope of employment 453
Extension recommended 465
Interviews with members of public in broadcast 462

Privacy—Continued

Nature of. . . . 452
Public character not entitled to. . . . 463
Television as means of invasion of. . . . 715
Use of assumed names in broadcast. . . . 460
Of name in broadcast. . . . 457, 458
In commercial program. . . . 458
News program. . . . 459
By commentator. . . . 459
When dramatized. . . . 459
Use of recording in broadcast. . . . 461
Violation of, in sustaining program. . . . 222
Where recognized. . . . 457
Who entitled to. . . . 453, 463
Who liable for invasion of. . . . 464

Private Business

Operation of broadcast theater as. . . . 241

Private Confined Area

Direct broadcast of news events occurring in. . . . 446

Private Enterprise

Operation of broadcast station as. . . . 220

Private Monopoly

Copyright is for specific term. . . . 598

Privilege

Against self-incrimination 145
Defamation 483
By publication of news, not. . . . 448
Taxes, by state or broadcasting, invalid. . . . 200, 210
On foreign corporations, limitation on. . . . 201
Receiving sets, nature of. . . . 210

Privileges

Grant of, right to hearings. . . . 66, 108

Prize

Essential element of lottery. . . . 510
Failure of advertiser to award, breach of contract. . . . 269
Obligation to listening public. . . . 269

Probable Damage

Reasonable forecast required 277

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Problem

In checkers, whether contains element of chance 509

Procedure

On appeals under Act of 1934 164
Facts and grounds of decision, filing 164
Intervention on 164
Notice of appeal, filing, service 164
Persons entitled to appeal 177
Record on appeal, filing 164
Stay of enforcement of order on 164
On application for instrument of authorization 110
On copyright infringement, criminal proceedings 649
On hearings 139, 146
On taking depositions 123

Proceedings by

Federal Communications Commission 181
Hearings 153
Inquiry on own motion 130
Joint boards 81
Orders not for payment of money 181
Remedy against 182
Pecuniary interest of commissioner 87
Subpoenas 116
Federal Radio Commission 85
Federal Trade Commission, against false broadcast advertising 541, 542, 543, 544
Cease and desist orders 544
Must be in public interest 547
Stipulation 543
National Labor Relations Board 310, 316, 317

Producer

And artist,
Addition of stations to group scheduled 354
Contract between,
Breach of 353
Anticipatory 382
Total 381
Compensation 379
Suit for, due before default by artist 380
Customer, failure of artist to by, breach 366

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Producer—Continued
Damages,
Liquidated 386, 387
Nominal 383
Definitness essential 351, 361
Discharge by, burden of proof 365
Justifiable 366
Notice of 375
Duration of agreement 361
Broadcast performance 352
Formation, mutuality 351, 364
Implied covenants 403
Impossibility of performance 378
Interpretation and construction 359
Usage and custom 360
Line charges, liability for 353
Negative injunction against artist . . 388, 391, 394, 395, 399
Non-performance by 377
Obligation of, to furnish work 356
Partial breach, remedy of artist 381
Performance prevented by 381
Program credit 352
Renewal of engagement 362
Termination 363
Personal service relation 350
And author,
Agreement for series of scripts, breach by 414
Liability of, for breach 419
Name, right to use 409
Production of script whether author can compel 411
Rescission for fraud 417
Death as termination of agreement or license 363, 412
Deviation or distortion of script, when restrainable 416
Function of 350
Is gratuitous bailee of work submitted to him 420
Not when licensed to him 420
Liability for personal injuries to invitees 244
Not agent of artist 350
Possesses right to secure copyright on work of author 405
Rescission of license for unauthorized use 418
Reversion for breach by, enforceable 419
Right to use author's name 409
Rights, dispute between author and representative 437

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Producer—Continued
Rules and regulations of, must be reasonable..... 366
Sub-license of broadcast performance..... 648
When may 406
Waiver or condemnation by, of discharge..... 376
Where employer of author..... 643
Whether author is employee of..... 405
Who may be 350

Producers, American Guild of Radio Announcers and ... 297

Production
Of books and papers, power of Commissions.....62, 115, 116
Of script, may compel author..... 411
Supervision of, under facilities contract..... 247

"Production" Numbers
Copyright registration of 613
Royalties for recording electrical transcriptions of..... 668

Professional Name
Appropriation by other than artist..... 523
Whether mere use restrainable..... 522

Profits
Award of, as damages..... 383
Not essential to constitute infringement..... 625
Nor to constitute publication..... 580

Program, Radio Broadcasting
Censorship, indirect by Federal Communications Commission.. 564
Control of advertising by Federal Trade Commission.... 564
Contests, whether lotteries..... 503
"Best" 505
"Cartoon" 505
Gift enterprises 508
Function of 495, 503
Liability when lottery 497
"Quiz" 511
"Voting" 507
Word building 509
Divestment of control as transfer..... 247
Copyright infringement 601, 708
Creative works used in..... 574
Basic concepts not protected..... 576

Program—Continued
Common law protection 576, 579
Lent on compliance with statute..... 578
Distribution of copies 575
How used 575
License required 575
Protection against appropriation 576
Copying 576
Public domain, effect of falling in..... 596
Remedies available 576
Credit, right to author..... 647
Defamation by,
Actionable independently of libel and slander..... 485
Due care, desirability of standard of..... 485
Duty of station to prevent..... 474
Extemporaneous remarks 477, 480
Federal legislation desirable 486
Jurisdiction of 484, 488, 489, 491, 492, 493, 494
Liabilities for 448, 471, 475, 476, 477, 479, 481
Not analogous to telegraph or telephone company liability 472, 473
State statutes on 486
Dramatic works, how used 575
Editorial selection, deletion 571
Facilities contracts,
Breach, discontinuance of 265
Failure of advertiser to submit, conformable to station standards 264
Provisions, deletion offensive matter..... 259
May prohibit recorded material 261
Submission for approval 258
What should be included.....265, 267
System requirements 292
Federal Communications Commission, power to determine if lottery 498
Musical compositions, how used.....574, 624
News,
Appropriation by competing station.....443, 445, 446, 535A
Copyright protection impractical..... 444
Direct broadcast of, right to..... 446
Agreement for 447
Interference of station with exclusive right of other.. 447
Quasi-property characteristics 442, 443
Press-Radio Bureau 440, 450

Vol. 1, §§ 1-333—Vol. 2, §§ 334-719 SECTIONS

Program—Continued

Novels, how used 575
Operations of stations,
Commercial,
Announcement as such required 221, 252
When program deemed 220, 221
Identification announcements 251, 290
Infringement of copyright 293
Liability for lottery program..... 497
Non-simultaneous group broadcast..... 287
Prior approval of station necessary..... 258
Public convenience, interest or necessity, must adhere to.. 220, 292
Recorded, announcements as required..... 253
Responsibility for 250
Spot broadcasts 271
Substituted supervening public program.....265, 266
Sustaining. 220, 267
Phonograph records, use of..... 225
Production of.
Booking agent, station may be..... 232
Producer, whether station is..... 267
Station may be 222, 232
Sustaining,
Contents 222
Liability for 222
Public performance, unauthorized 222
Remote broadcasts, expenses 224
Televised 719
Title, not protected by copyright..... 527

Prohibition

Against advertising intoxicants, tobacco and drugs by state.. 565
Editorial selection, guarantee of freedom of speech not, of.... 562
As to political speeches..... 562
Of censorship 500, 566
Group collection of license fees..... 597
Lottery information 53, 250
Obscenity, indecency, profanity of language..... 567
Off-the-air recording, may be..... 288
Perpetual copyright 595
Plural liability for infringement, not 630
Rebroadcasting 288

Prohibition—Continued
Sunday broadcast, state may not make 246
Operation of theater 246
Ticket re-sale 241
Tobacco, drug and intoxicants, advertising of, by state 565

Prompt Deposit
Of copies, a copyright formality 590

Promises in Facilities Contracts
Between system and broadcast station 288

Proof
Of access 614
Broadcast, spot 271
Certificate of copyright 591
Grant of application 61
Service of papers 91
Subpoena 118

Property
Advertiser's must be turned over by station 270
Artist's in recorded interpretative renditions 536
Ideas 531, 532, 534
Literary,
Assignment of 406, 407, 579
Common law rights,
Adverse possession, effect of 643
Citizenship immaterial 579
Damages for conversion 622
Infringement 622
Exclusive rights 579, 584, 603
Extent of 584
Infringement of 616, 619, 645, 646
Pass by assignment 579
Publication destroys 579, 580
Under Act of 1909, preserved 579
Superseded by compliance with 578, 579, 594
Employer is proprietor 405, 643
Licensing,
Bankruptcy of producer, effect 648
Breach by producer 418, 648
Nature 406
Not assignable 406
Personal contract 648

Property—Continued
Personal right, grant of 406
Sub-license by producer 406
Termination 412
Where copyright renewed 685
Loss or damage, liability for 245
Performing artists, in performance 225
Sale of physical only, in electrical transcriptions 228
Rights in letters 645
State taxation of 206, 207, 210
United States government, copyright of 598

Proprietor
Equivalent to assign 587
Person entitled to copyright, when 587, 676
Publication destroys exclusive rights of 576
Resale price on copyrighted works may not be restricted by 602

Proposed Legislation
On censorship and editorial selection 573

Protection of
Artist, against unauthorized appropriation 574
Not in style, method or type of performance 522
Copyright,
Adaptations and arrangements 596
Canadian formalities 697
Concepts underlying work not under 576
Continuity 641
Copying 576
Foreign 689, 690, 692, 693, 703, 705
Form and sequence of expression 576, 599
International 701, 709
Japan, formalities 697
Mexico, duration 690
Originality only 599
Pan-American 702
Tangible expression of ideas 576
Federal Trade Commission, against false advertising 549
Ideas 532, 533, 534
Lyrics 625
Musical compositions 682

Protest

Burden of proof on protestant 154
By one adversely affected by conditional grant without hearing 67, 107
Dismissal, motion for 154
Final where none filed in limited time 107
Where withdrawn 107
Hearings, where not held 67
Limited by issues 67, 94
Proof of service of 94
Statement of protestant's interest 94
Suspension of grant, when filed 67, 107

Protestant, See Protest

Provisions

Artist, liquidated damages 392
Author, preferable in contract 416
Facilities contracts,
Breach 276
By operation of law 250
Indemnities 259, 260, 266
May be included 254, 263, 272
Non-performance, excuse for 274
Personal injury, liability for 262
Scope of obligations 247
Should be included 232, 261, 262, 272
Subject to modification 265
System and advertiser 289, 296
Labor relations, standard 299
Lease of theater 236
Statutory on,
Anti-lottery 496, 497, 499, 500, 502, 511
Censorship 561
Compulsory licensing 657, 662, 663, 664
Copyright 590
Governing Federal Trade Commission 546
New, in Act of 1934 53

Proximate Damages

Liability for breach of contract 277, 383

Public Apology

For interruption of broadcast 265

Publication

Actual dissemination without restriction constitutes..... 581
Constitutes dedication to public of work..... 576
Defined 580
Exclusive right of copyright owner..... 601
Copyright, essential to secure.....579, 589, 593, 601
Formality required 594
International protection 695, 696
Vesting 589
Destroys property in expression of ideas..... 532
Place of, immaterial..... 580
What does not 580
Intention essential to effectuate..... 581
Limited, what constitutes 581
Of records of Federal Communications Commission..... 83
News, sale of newspaper in general..... 442
Profit not essential to constitute..... 580
Sale of copies, whether necessary..... 581
Text of 581
What is not,
Broadcast performance of script.....532, 582
Deposit in a public office, not *ipso facto*..... 593
Dramatic work, public performance..... 532
Electrical transcriptions, performance of..... 582
Lecture, delivery of 532, 582
Limited distribution of phonograph records..... 580
Mechanical reproductions, performance of..... 582
Motion picture, exhibition of 532, 582
Musical composition, performance of.....532, 582
Painting, exhibition of 582
Play-by-play description 532
Play, performance of 582
Printing 580
Without circulation 581
Publishing 580
Recording of performance 532
Limited distribution of 580
Script, exhibition of 532
Sermon, delivery of 532
Telegraphic transmission 646
Of manuscript 581
Typewriting of copies for special purpose..... 581

Publication—Continued
What may be,
Leasing 580, 581
Loan 580, 581
When effected 581
Whether it is,
Act of assignee 583
Gratuitous distribution 581
Lithographic reproduction 581
Mimeographing copies 581
Photostat reproduction of copies 581
Printer's proof 581

Public Carriers
Authority to regulate radio communication by 25

Public Delivery
Of lecture, sermon, address and the like, exclusive right of copyright owner 610, 611

Public Domain
Arrangement and adaptation of works in, copyrightable 596
Effect of work falling into 596
When falls into 532

Public Interest, Convenience and Necessity
Construction permits and licenses under Act of 1927, when in . . 43, 212, 214
False broadcast advertising, regulation in 547
Hearings on 68, 103, 109
Not too indefinite a standard of 14
Operation of station must be in 292
Past conduct of licensee relevant 219
Program operations, may refuse to broadcast if program not in 283
Provision for, in facilities contract 279
Re-enactment of standard of Act of 1927 by Act of 1934 52
Standard required for construction permit 43
Sufficiency standard of performance of administrative function 17

Public Office
Equal program facilities for candidates for 566

Public Proceedings
Required of Federal Communications Commission 87

Public Property
News broadcast of events occurring on..... 446

Public Performance
Broadcast performance of dramatic works is..... 613
Divestment of common literary property by..... 582
Exclusive rights of copyright owner.....610, 667
Non-profit stations, whether program a broadcast..... 633
Not a publication 582
Occurs at place of reception..... 575
When for profit,
Liability for infringement 626
Musical compositions, compulsory licensing, when applicable 662, 667
Re-broadcast 628, 629
Reception by hotel, in public and in guest's room..... 630
For commercial broadcast 630
Restaurant performance. 626
Specific admission charge not necessary..... 631
Sponsored program is 628
Studio audience performance is..... 636
Sustaining program is 628, 632
Test of 626
Unauthorized reception, infringement..... 630
What constitutes profit 631
Whether broadcast of musical work is.....628, 629, 631, 632, 633, 636
When occurs 634
Work need not be written for profit..... 626

Public Reception
Deemed infringement 707
Of broadcast performance 630

Publishers' National Radio Committee 438, 440

Q

Qualification
Financial of applicant for instrument of authorization..41, 56, 60
Technical in application..... 61

Qualified Possession
Of electrical transcriptions by station..... 228

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Quasi-Judicial
Hearings distinguished 100

Quasi-Property
Characteristics of news program.....442, 443

Questions
For the court or jury.....366, 547
Of fact, not reviewable..... 168
Uniqueness of artist's services..... 393
Whether dramatic performance 625
Law, under Act of 1934, review..... 170
On appeals,
Whether findings supported by evidence or not..172, 173, 174
Question justifiable on 168, 170

"Quiz" Contest
Whether a lottery 511

Quorum
What constitutes, of Federal Communications Commission.... 87
When less than, hearings by..... 126
Findings, recommendation and report required..... 126

R

Race
No discrimination allowed by theaters for..... 242

Radio Announcers and Producers, American Guild of.. 297

Radio Artists, American Federation of 297

Radio Broadcasting
As advertising medium 334
Congressional power over.....183, 218, 319
Only one national system of..... 183
State regulation, conflict with..... 183
Electrical transcriptions, use in..... 668
Interstate commerce, is 4, 5, 83, 200, 203, 209, 319
Receiving set as instrumentality of..... 210
Reception is 210
Intrastate commerce, commercial is..... 203
Ordinances regulating,
Antenna, height of..... 197

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Radio Broadcasting—Continued
Constitutional limitations 196, 197, 198, 199
Classification of 196
Location of transmitter 197
State statutes regulating,
Advertising by unlicensed insurance companies..192, 193, 194
Administrative boards 184
Michigan Act 184, 185
New Jersey Act 184, 186, 187
Pennsylvania Act 193
Classification of 183
Origin and background 183
State taxation,
Constitutional limitations 200
Corporation organization taxes 201
Immunity not based on ground station Federal instrumentality 200
Gross receipts taxes 200
Arizona Act, unconstitutionality 204
License taxes,
Broadcasting business, no discrimination possible..202, 203
Defined 201
Interstate commerce excluded..... 202
Protection of constitutional power basis against levy.. 205
On property in state allowed.....206, 210
Outside not allowed, exception..... 207
On receiving sets, unconstitutional 209, 210

Radio Commission, Federal
Actions 84
Appeals 155, 161, 162
Composition and eligibility requirements..... 34
Corrective measures by 214
Hearings by 69, 125
Jurisdiction to regulate broadcasting..... 34
Licensing powers 35, 46, 62, 212
Proceedings of, continued by Federal Communications Commission 85
Suits against, continued 86

Radio Communications
Authority of Interstate Commerce Commission..... 25
Intrastate excluded from Act of 1912..... 25
Preservation of competition 36

Radio Communication Operators
License of point-to-point, by Secretary of Commerce..... 211

Radio Corporation of America 36

Radio-Telegraph
Conference of Berlin 19, 25
Of London 21, 25

Radio Towers
Requirements as to painting and illumination..... 53

Radio Transmission
Jurisdiction of Interstate Commerce Commission..... 213

Radio Writers' Guild 297

Rates
Changing, cancellation of contract for..... 274
Cost of certain production absorbed by station..... 256
Discounts permitted 256
Discrimination allowed 256
When license revoked for..... 45
Gross and net..... 340
Interstate Commerce Commission, jurisdiction over..... 213
When point-to-point 211
Message rate of London conference, U. S. abstention..... 21
Payment of,
Contingent, may be..... 256
Excused where mechanical difficulties 276
Mode of 256
When made 257
Telephone line charges may be included..... 247
Uniform may be required..... 289
For political programs 566
Need not maintain 250, 256

Ratification
By advertiser 344
Artist 434
Of Berlin convention 21
Havana North American Conference..... 24
London Convention 21

Rationale
Of copyright 598

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Reading
Aloud as libel 468
Of novel on broadcast program, whether infringement..... 610

Real Name
Competitive use of 524
Use as trade name..... 524

Real Party in Interest
Execution of instruments of authorization by..... 55

Reasonable Exercise
Of station's right to delete offensive program material..... 259

Reasonable
Fitness, warranty of, on sale of electrical transcriptions..... 228
Forecast of probable damage 277
Negative covenant must be..... 390
Rates under Act of 1927..... 45
Regulation of theatre, local..... 237
Rule, breach of as justifying, discharge..... 366
Time to deliver script..... 413
Value of services, action for.....234, 419

Rebroadcast
Forbidden without express authorization..... 53
Prohibited without consent of originating station..... 286
Whether unfair competition..... 445

Rebuttal
Right of party to..... 134

Receiving
Applicant must designate wave-lengths..... 26

Receiving Set
As instrumentality of interstate commerce..... 210
Nature of tax on privilege of owning..... 210

Reception
Essential element of interstate commerce..... 210
Infringement, by public 630
Interference with, state statutes on..... 188

Reciprocal Relations
Of copyright protection.....587, 704

Recommendation

Required of examiner 126
When Commission hears with less than quorum..... 126
When subpoena to be issued..... 117

Record

Of Federal Communications Commission..... 83
Power to use state..... 82
Publication 83
Right to inspect 83
Of other proceedings, in evidence..... 141
Phonograph,
Compulsory license provisions 662, 667, 674
May prohibit broadcast as editorial selection..... 571
Sale for home use not publication..... 536
Unauthorized broadcast, not infringement, Hungary..... 706
Use on sustaining program may be..... 224

Recorded Programs

Announcement of, required 253
May be prohibited by facilities contract..... 261

Recording

Instantaneous 230
Limited distribution of not publication..... 580
Line 230
"Off-the-air" 230, 670, 671, 673
Studio 230

Recovery

Measure of, producer's breach..... 384
Of script, converted..... 420
When nominal damages only..... 383

Reference

Order of, to Division, when effective..... 71
To individual commissioner, effective period..... 76
Joint Board, any matter..... 79

Refusal

Appeals from 155, 156, 157, 160
Of application, right to hearing..... 105
When grant deemed..... 104
Hearing 104
License or renewal thereof.....52, 61
Material, refusal of artist to use..... 573

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Refusal—Continued
When artist's, to wear costume justifies discharge..... 368
Whether discharge justifiable, for refusal to play role.... 367
To return electrical transcriptions supplied by advertiser..... 229
Sell theater tickets to anyone..... 241
Testify, privilege against self-incrimination..... 145

Regional Agreement
On service matters, international regulations.....22, 23

Regional Networks
Chain broadcasting 284

Registration of Copyrights
Dramatico-musical works, effect..... 613
Formalities 591
Deposit of copies 589, 590, 591, 594
Musical compositions, effect..... 613
Prerequisite to infringement action.....589, 590, 591
"Production numbers" 613
Program-titles not 518
The Register, duties of..... 591
Powers of 590
Timeliness required 676
Who entitled to 591
Works registered before 1909, renewal..... 676

Registration Systems
Program keys..... 518

Regulations
Administrative of Federal Communications Commission,
Burden on protestant 154
Continuances 132
Depositions, taking of 119, 120, 121, 122, 123, 124
Evidentiary 136, 137, 138, 140, 141, 142, 143, 144, 146, 147
Extensions 132
Hearings 65, 66, 67, 100, 105, 106, 107, 108, 109, 110, 115, 130, 131, 150
Petition to rehear 103, 114
Right to 102, 103, 104, 111, 112
Mixed questions of fact and law..... 169
Order initiating revocation of license..... 98

Regulations—Continued

Pleadings 88, 89, 90, 93, 94
Postponements 132
Privilege against self-incrimination 145
Question presented must be justiciable 168
Requirement of due process 167
Review of findings 172
Service of papers 91
Subpoenas 116, 117, 118
Technical qualifications in application 61
Testimony at hearings 125, 126
Weight of examiner's report 128
Withdrawal of application 57
Between artist and producer,
Obedience when reasonable 366
Justifiable discharge for breach 366
Question for court or jury 366
Broadcast station theatres,
By local authorities 237, 238, 239
Jurisdiction 237
Licensing requirements 240
Licensing tax 240
Local aspects, must relate to 237
Police power, as basis 237
Repugnance to enabling act, must not be 237
Commerce, defined National Labor Relations Act 308
Congressional,
Admits of only one national system of 183
Conflict, state regulation with 183
Jurisdiction of intrastate broadcasting 2, 8
Supreme 183, 319
Facilities contract provisions 254
General under Madrid Convention 23
Instruments of authorization, under 61
Service, under Berlin Convnetion 20
London Convention 21
Subject matter of state statutes,
Advertising by unlicensed insurance companies . . 192, 193, 194
Administrative boards established by 184
Michigan 184, 185
New Jersey 184, 186, 187
Classification 183

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Regulations—Continued
Origin and background 183
Power of 565
Validity, effect of police power..... 183
Under Federal Communications Commission,
False broadcast advertising 559
Hearings on frequency changes..... 102
Jurisdiction, scope 47, 70
Powers 61, 101, 135
Under Federal Radio Commission,
Jurisdiction 34, 102
Under Federal Trade Commission,
Of false broadcast advertising.....547, 548, 549, 550, 551, 554, 555, 556
Under Interstate Commerce Commission..... 25
Under ordinances, municipal 196, 197, 198, 199

Rehearing
Actions subject to 73, 78
Grant of request for..... 112
Matters considered 112
Of orders under Act of 1934..... 50
When of Broadcast Division 50
Petition for 113
Powers to grant..... 112
Rehearing on petition for..... 50
Request for, time limited..... 112
Who may apply..... 112

Rehearsals
Justifiable discharge for artist's failure to appear..... 374

Reimbursement
Of advertising agency for expenses..... 346
Personal representative of artist..... 432

Relation, Station and Labor
All-union shop 300
National Labor Relations Act applies..... 308
Organization of station employees..... 297
Strike, effect 309
Unfair labor practices.....310, 311, 312, 313, 314, 315
Unions in the field..... 297

Relevancy
Of evidence at hearings 147
Grounds for continuances and extensions 147
Rules of evidence require 147

Remarks
Extemporaneous deviation, defamation by 468, 477, 480

Remedies 477, 480
Appeals 160, 171, 182
Between artist and producer 381, 391
License modification, enforcement of 182
Unfair competition, available 576

Remittance
To advertising agency, how effected 257

Remote Broadcasts
Of sustaining programs 224

Rendition
Of duties, by Federal Communications Commission 61
Poem, whether infringement of copyright 612
Services under facilities contract 247

Renewal
Of applications for instruments of authorization 58
Burden of proof 153
Hearing on 63, 153
Issues 153
Of contract, artist and producer 362
Of copyright,
Application, when made 676
Effect of default 676
Equitable assignment of right to 678
Failure of co-author to reserve 681, 682
To secure, effect 596
Historically 675
New grant of 688
Persons entitled,
Administrator, not 677
Assignee of, not 677
Author 596, 676, 680
Children of author 676
Co-authors 679

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Renewal—Continued
Employee-author not 687
Employer for hire..... 676
Executor 596, 676, 686
Next of kin..... 596
Of author 676, 686
Non-citizen, whether 688
Producer, when employer of author..... 408
Proprietor, not assignee or licensee..... 676
Renewing co-author, whether trustee.....682, 683
Term or duration 686
When right to, exercised..... 686
When inchoate right of, assigned..... 678
When two or more authors..... 679
Of facilities contracts 274, 295
Of license,
Denial 276
Failure to apply for..... 295
Log must be annexed..... 271
Preservation of competition..... 155
Refusal under Act of 1927..... 155
Under Act of 1934..... 160

Repeal
Davis Amendment of 1930..... 54

Reports
Duty of Federal Communications Commission, written..... 83
Examiner's,
Oral argument on, discretionary..... 127
Request for, time limited..... 127
Failure to, effect 127
Service, proof of 127
When required 115, 127
Weight of 128
When required 126
Of hearings,
Less than quorum of Commission..... 126
Rules of evidence on admission of..... 138
Testimony at, exceptions to..... 126
Service of 126

Representative (and Artist)
Agreement of agency 426
Apparent authority 435

Representative—Continued
Authority to execute agreement for artist..... 436
Booking agency contrasted 423
Compensation of 432
Duties of artist 432
To artist 431
Failure to secure engagements..... 431
Formation, relative to facilities contracts..... 232
Function of 422
Is fiduciary 431
Powers of 433
Principal and agent relation.....424, 427
Ratification by artist..... 434
Right of indemnity 432
Revocation of authority..... 430
Whether occupation license required..... 425

Reprinting
Of illustrations in novel, not infringement..... 681

Reproduction
Exclusive rights of copyright owner..... 610
For distribution, not for sale..... 594
Lithographic, whether publication..... 581
Mechanical,
Authorization of manufacture necessary..... 575
Compulsory license provisions 658, 659, 664
Inapplicable to dramatic works..... 650
Copyright liability 672
Definition of 661
English provisions 660, 690
Exclusive rights of copyright owner.....652, 654
Foreign copyright protection 692, 706
Infringement of copyright, when.....656, 667
Liability where sustaining program..... 222
International copyright protection..... 699
Limited distribution for performance, not publication..... 580
Means of 652
No right to, prior to 1909..... 653
Not a copy 653
Performance is not publication..... 582
Protection under Pan-American Convention..... 702
Sound on film devices..... 669

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Reproduction—Continued
Unpublished works, effect of later 595
Where of works, not for sale, copyright in 594, 595

Request
For continuance and extension 132
Issuance of subpoena, in writing only 117
Oral argument 127, 131
Order to take deposition 120
Hearing, when several applicants make, for same frequency 111

Requirements
Agency to accept service of process 492
Appearances 96
Application for license 40, 43
Composition and eligibility of Federal Radio Commission 34
Copyright formalities 579, 589, 594
Due process 167
Evidentiary 140, 143
Facilities contracts, termination 274
Findings 126
Log, to be kept by station 271
Notice, contract, artist and producer, of discharge 363, 364, 375
Notice, on appeal from Commission 164
Use of musical compositions on restricted list 223
Oral argument 115, 127
Pleadings 95
Recommendations by Commission or examiner 126
Service of notice of appeal 164
On parties, report of hearing 126
Subscription and verification 94

Re-recording
Right may be included in sale of electrical transcriptions 228

Rescission
Of agreement of author for fraud 417
License for unauthorized use, by producer 418
Of employment agreement, facilities salesman 234
Return of electrical transcriptions, when mandatory on 229
Termination of facilities contract, mutual 274

Reservation
Of rights of author 407, 642

Res Ipsa Loquitur
Applicability to broadcast theater 243

Response
In pleadings, required to each issue..... 96

Restatement
Of conflict of laws..... 487

Restraint
Arrangement of musical composition by copyright owner..... 607
False broadcast advertising 540, 555
Mention of another as creator of adapted work..... 647
Of name of author, work distorted..... 647
Unfair methods of competition..... 540
Unfair simulation 520, 521
Use of name with work not written by author..... 647
Whether mere use of professional name by another may be.... 522

Restricted List
Permission to perform may be secured..... 223
Use of, musical compositions, for broadcast..... 223
Violation of, constitutes infringement..... 223

Restrictions
In applications for instruments of authorization..... 57
Must be reasonable on editorial selection..... 570
On delegation of work by Commission..... 76
On performing right in license..... 223
Resale price may not have..... 602

Responsibility
Of broadcast station for program operations.....247, 250

Retroactive Effect
Of compulsory license provision of Act of 1909..... 665

Return
Of electrical transcriptions, on demand..... 229

Reversibility
Of arbitrary or capricious determinations.....167, 170

Reversion
To author for producer's breach, enforceable..... 419

Review
Due process, compliance with..... 167
Judicial only 170
Limited to whether determination on substantial evidence.. 547

Review—Continued

Of court 161, 166
Administrative matters 161
Executive power 166
Justiciable question must be presented..... 168
Findings, when not..... 170
Nature of, on appeal.....163, 170, 173
Orders, finality of 168
Questions of fact, not..... 168
Of law 170
Mixed 169

Revocation

Artist's contract with representative..... 429
Of license,
Admission to theater..... 241
Copyright 607, 608
Non-performance of facilities contract, excuse for..... 279
Order of,
Effect 64, 98, 106
Enforcement, remedy against..... 182
Foreign transmitter's studio in U. S..... 106
Ineffectual until fifteen days after service.....98, 106
Hearings on 64, 98, 106
Notice of 64, 98, 106
Under Act of 1912, for cause only..... 29
Act of 1927, applicant's false statements..... 45
Breach of law 45
Discrimination 45
Failure to comply with..... 45
Where licensee's statement of facts warrants..... 45
Act of 1934..... 52

Rights

Author's, as employee..... 643
In assumed name..... 409
To billing 647
Demand use of his name..... 409
Prevent use of his name..... 409
Program credit 647
Broadcast of news, direct..... 446
Agreements granting. 447
Common law, in literary property,
Absolute and conditional sale of manuscript passes..... 579

Rights—Continued
Exclusive, first publication 579
Make any use of 584
Mechanical reproduction 584
Prevent copying 579
Translation 603
Infringement of 616
Perpetual in duration unless published 579
Destruction of exclusive, by publication 576
Facilities contract provisions covering 272
"Grand" 624
Distinguished from "small" 625
Hearings,
Applications 63, 69
Cross-examination on 134
General 100
Inspection of evidence 134
Partial grant of application 66, 108
Regulation, change of frequency 102
Hours of operation 102
When person adversely affected by grant, without ..67, 94, 107, 111
Infants, of avoidance of contracts 397
Labor unions,
Boycott, primary, not secondary 300
Picketing, peaceable only 300
Strike 300
Letters, property 645
License, no vested, beyond term of 39
Performing rights 223
Performing artist's, in electrical transcriptions 227
Phonograph records 225
To refuse material for program 573
Privacy,
Common law development 451, 452, 454, 455
Employee, when not entitled 453
Extension recommended 465
Interviews with members of public 462
Nature of 452
Personal, only 453
Public character not entitled to 463
Statutory enactments 456
Television as means of invasion of 715

Rights—Continued
Use of name in commercial broadcast program.....457, 458
News program 459
When assumed name..... 460
Where recognized 457
Who entitled to 453, 463
Who liable for invasion of..... 464
Producer's,
Sublicensing 648
Use of author's name by..... 409
Where dispute between artist and representative..... 437
"Small," distinguished from "grand"..... 625
Under copyright law,
Administrative determination of, not made..... 591
Arrangements, status 609
Compulsory licensing provisions.....664, 666
English 598
Exclusive, of copyright owner..... 604
Adaptation and transposition..... 607
Arrangement of musical composition.....607, 663, 666
Extraction 609
Dramatization 605
Making other versions..... 604
Performance 610, 613
Printing and multiplying copies..... 601
Public delivery 610, 611
Performance 613
Publishing 601
Translation 603
Vending manuscript 610
Whether Congress can limit or condition..... 598
Incidents of 600, 610
New and created by Congress..... 598
Not coextensive with common law..... 576
Performance, license 609
Publication essential to secure..... 593
Renewal, nature of..... 677
Right to secure.....405, 407, 642
Term of, limited..... 596

Rio de Janeiro Copyright Convention..... 702

Role
Artist may refuse to play assigned..... 367

Rolls, Piano
Compulsory license provision, not applicable to..... 662

Rome Copyright Convention..... 694

Royalties
Manufacturing upon electrical transcription libraries..... 668
Performing license for electrical transcriptions..... 668

Rules
Artist's duty to obey producer's reasonable..... 366
Justifiable discharge, for breach..... 366
Facilities contracts, provisions as to station..... 254
Evidentiary,
Commission not bound by strict.....133, 135
Disregard of 133, 134
Limitation on 134
Form of 144
Hearsay held admissible..... 134
May require additional of party.....148, 149
Offer, when necessary..... 137
Relevancy 147
Reports of government, admission..... 138
Right to rebuttal..... 134
Self-incrimination privilege against..... 145
United States courts govern unless modified by..... 136
Unsworn documents, inadmissible..... 142
Hearings required by..... 65
Power of Federal Communications Commission to make..... 135
Producer's, reasonableness question for court or jury..... 366

S

Seal
Of commissioner or board..... 76

Safety
Of audience, station not insurer..... 243

Salary
Artist may sue for, due prior to default..... 380

Sale
Electrical transcriptions not usually subject of legal..... 228
Re-recording right may be included..... 228
Tickets to broadcast theater..... 241
What constitutes publication.....536, 581

Salesman, Facilities

Breach of facilities contract, not liable for..... 276
Compensation; after termination of contract..... 234
Dependent on agreement..... 234
Employment agreement 233
Damages for breach..... 233
Duration 233
Not a sale..... 247
Rescission 234
Salary, compensation or commission..... 233
Time of, matter of contract..... 257
Territory covered 233
Unearned advances, when recoverable..... 234
When unenforceable..... 234
Warranty of authority..... 276
Relation to station..... 233

Sales Representative

Distinguished from system..... 283
Usually represents station..... 232

Sales Tax

State, not applicable to sale of facilities..... 208

Scope

Of regulatory jurisdiction of Commission.....47, 70
London Convention of 1912..... 21
Obligations under facilities contract..... 247

Scripts (Broadcast Program)

Based on non-broadcast works, rights of author..... 421
Classification 639
Common law protection..... 640
Continuity distinguished from..... 638
Conversion of 420
Conversion into other literary form.....606, 642
Copyrightable, whether 640
Defamation, liability of station.....476, 477, 478
Delivery 413
Deviation, when restrainable.....410, 650
Distortion, restrainable 650
Dramatic, copyrightable 640
Infringing, performance of..... 649
Dramatico-musical, infringing performance of..... 649
Dramatization, sole right of author..... 650
Failure to deliver at specified time..... 413

Scripts (Broadcast Program)—Continued
Generally 637
Governmental, not copyrightable 644
Mechanical reproduction, proprietor has sole right 651
Obligation to provide under facilities contract 247
Ownership of rights in 408
Performance of, when infringement 649
Production of 411
Sub-license of 406
Transfer, what constitutes 642
Unpublished, protected as such 640

Secondary Boycott
Invalidity to enforce union by law 306

Secondary Meaning
Of theme music 530
Of trade names 520, 527

Secretary and Seal
Of board of Federal Communications Commission 76
Individual commissioner of 76

Secretary of Commerce
Mandamus under Act of 1912 27
Power to make general regulations 27
Unable to cope with wave-length interference 37
Under Act of 1927, authority 31, 32

Seditious Program
Discharge of artist for refusal to play in, wrongful 367

Selection, Editorial
Common carrier status incompatible with 214
Constituent of chain has power to delegate, to system 292
Deletion of offensive commercial program 571
Prohibited as to political speeches 562
Unjustified exercise, breach of facilities contract 571

Self-incrimination
Common law rule 145
Disobedience of subpoena, not excused by 145
Immunity against prosecution 145
Extent 145
Perjury not included 145
Time claimed 145
Refusal to testify, no excuse 145

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Separate Application
For each authorization sought 55

Separate Copyright
Not required for arrangements of musical composition 607

Sequence
Of idea or intellectual labors protected 576, 599

Series of Scripts
Breach of agreement for 414

Sermon
Delivery publicly, exclusive right of copyright owner 610, 611
Not publication 532

Service
By Commission, notice of appeal 164
Of briefs 129
Process, in defamation 484, 489, 491, 492
On parties, report of hearing 126

Services
Author's, action for reasonable value 419
Facilities contract provisions 232, 262
Miscellaneous, provisions in facilities contract 268, 272
News, Press-Radio Bureau 440, 441
Of papers 91
Personal, producer and artist 350
Rendered by theatrical employment agency 425

Sherman Anti-Trust Act 546

Ship Act of 1910
Earliest radio legislation 25

Shop
All-union or closed 300
Rights rule 643

Show Cause Orders
Content 99
Time limited 99
When issued 99

Siam
U. S. general copyright treaty with 704

Signals
Of distress, priority of....21, 23

Signatory
U. S. to Buenos Aires Convention.... 704
To Mexico Copyright Convention.... 704

Signature
By applicant, of application.... 40

Similarity
Mere, not necessarily infringement.... 614

Similar Work
Common sources resulting in, not infringement.... 614
Independent creative effort resulting in, not infringement.... 614
Individual treatment resulting in, not infringement.... 614

Simultaneous Transmission
Methods of interconnection of stations.... 282

Single Copyright
Covers work by several authors.... 679

Slander
Defamation distinguished from.... 467
Liability, independent of....477, 485
Whether is slander....466, 467, 468

Slogans
When protected 535

"Small Rights"
"Grand rights" distinguished.... 625
What are 624

Social Security Taxes
Classes 327
Casual employments excluded.... 333
Co-operative bands, who liable.... 332
Imposed on employment only.... 332
Independent contract excluded.... 332
Name bands, who liable.... 332
No-name bands who liable.... 332
Old age pension taxes, station liable.... 331
State may impose on broadcast stations.... 327
Unemployment insurance taxes....328, 329, 330

Society of European Stage Authors and Composers 293

Song
When dramatico-musical composition..... 625

Song Writers' Protective Association..... 297

Sound on Film Devices
Compulsory licensing, applicable..... 669
Mechanical reproductions, manufacturing royalties..... 669

Sources
Common, resulting in similar work, not infringement..... 614

Soviet Union
Exception, foreign copyright protection..... 705

Spain
Adherence to Montevideo Copyright Convention..... 702

Speaker
Absolute liability for broadcast defamation..... 470

"Special" Arrangements
Of musical compositions 607

Special Authorizations
Powers of Federal Communications Commission..... 110
Procedure to obtain..... 110

Special Board of Investigation
Of Federal Trade Commission.....541, 542, 543

Special Period of Protection
Of aliens under copyright provisions, China..... 691

Special Purpose
Typing copies for, not publication..... 581

Specialized Services
Rendered by advertising agency..... 334

Specific
Admission charge not necessary to constitute performance for profit 631
Performance, facilities contracts..... 278
When not directed..... 388
Reference to part of report, objected to..... 126
Rights under copyright, enumerated.....600, 610

Specification
Of frequency in application for instrument of authorization..56, 57
Of time and place, in notice of hearing..... 63

Speech, Freedom of
Effect of on censorship..... 562

Sponsored Program
Is performance publicly for profit..... 628

Sponsor's Trade-Mark or Name
Protection of, in program title..... 526

Spot Broadcast
Invoice must accord with log..... 271
Proof of, station not required to render..... 271
Standard conditions of, in facilities contracts..... 249

Spouse, Surviving
Person entitled to copyright renewal.....596, 676

Standard
Conditions of spot broadcast contracts..... 249
Competency of artist..... 369
Due care, liability for defamation..... 485
For grant of construction permit..... 43
Of performance of administrative functions..... 16
Provisions of facilities contracts..... 265
Public convenience, interest and necessity.....17, 35

State Regulation
Censorship, prohibition of obscene, profane or indecent language 567
Power to impose..... 565
Of local matters only.....183, 319
Over lottery information and gift enterprises..... 568
Sunday broadcasts, may not prohibit..... 246

State Statutes, Subject Matter of
Advertising by unlicensed insurance companies...192, 193, 194, 195
Administrative boards established 184, 185
Michigan 184, 185
New Jersey 184, 186, 187
Censorship 565
Classification 183
Copyright 597
Defamation by broadcast program..... 486

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

State Statutes—Continued

Interference with reception 188
Origin and background 183
Prohibiting group collection of license fees for performance ... 597
Validity 183, 189, 190, 191, 195

State Taxation

Constitutional limitations 200
Corporation organization taxes 201
Foreign corporation privilege taxes 201
Gross receipts taxes, invalidity 200
Immunity, basis of 200
License requirements, invalidity 198
Arizona, unconstitutionality 204
License on occupation taxes 201, 202, 203, 205
On privilege to engage in broadcasting business, invalid ... 200, 210
On property in state, allowed 206, 210
Property without state 207
Receiving sets 210
Unconstitutionality 209, 210
Sales, not applicable to sale of facilities 208

Stations, Broadcast

Adjunct of particular business, must not be 219
Conflicts between licensees 28, 39, 43
Construction permits for 37, 40, 43, 214
Copyright infringement, liability for 222, 260
Defamation by broadcast program,
Duty to prevent 474
Liability for 294, 448, 471, 472, 475, 476, 477, 478, 479, 480
Editorial selection, power of 214, 292, 576
Limitations 562
Facilities contracts,
Breach of 264, 265
Damages, measure of 265, 277
Failure of advertiser to broadcast 264
Formation 232
Non-performance of station 274, 279
Obligations, specific 270
Provisions of 258, 259, 267, 288
Termination 274

Stations—Continued

Federal Communications Commission,
Duty to fix location of ... 61
Powers ... 53, 61
Independent contractors, when employees of ... 321
Instrumentality, not Federal ... 200
Labor relations ... 297, 300, 315
Within scope of National Labor Relations Act ... 308
Log of, contents ... 271
Prima facie proof of broadcast ... 271
Not insurers of safety of audience ... 243
Private enterprises, operated as ... 220
Program operations,
Announcements required of commercial ... 221, 252
Commercial and sustaining, distinguished ... 232
Co-operative broadcast programs ... 285
Commercial, when deemed ... 220, 221
Copyright infringement ... 293
Deletion of offensive material ... 259
Identification announcements required ... 251, 290
Interruption, suspension or partial interference, rights of advertiser ... 279
Lottery information, liability for ... 497
Non-simultaneous group broadcasts ... 287
Power to impose standards ... 570
Production of ... 222, 232, 267
Program material ... 258
Public convenience, interest and necessity, must adhere to 220, 292
Rebroadcasting, limitation on ... 53, 286
Recorded programs, announcement required ... 253
Spot broadcasts ... 271
Substituted supervening public programs ... 265, 266
Sustaining programs ... 220, 222, 223, 267
Property of advertiser, return to ... 270
Rates, in general ... 256
Gross and net ... 340
Jurisdiction of Interstate Commerce Commission ... 213
Payment ... 256, 257, 276
Telephone line charges ... 247
Uniformity ... 250, 256, 266, 289
Simultaneous transmission, methods of ... 282

Stations—Continued
Sunday broadcasts, legality ... 246
System and,
"Bonus" stations ... 289
Facilities contract provision ... 288, 289, 290, 292, 295
Merchandising co-operation ... 291
Theaters of,
Admission ... 241
Alteration work ... 236
Duty to audience ... 243
Liability for personal injuries ... 243
Ejection from, for cause ... 241
Inspection ... 243
Lease of ... 236
Private business, operation is ... 241
Regulation of, local ... 237, 238, 239, 240
Structural changes ... 236
Sunday operation, may be prohibited ... 246
Types of studios ... 235

Stationers' Company ... 577

Statute
Of Anne ... 577
Limitations, infringement action ... 620

Statutory
Definition of theatrical employment agency ... 425
Exception, station need not accept program from all ... 250
Provision prohibiting censorship, background ... 561
Reforms proposed, press-radio relations ... 450
Registration of trade-marks ... 518, 519, 527

Stone, Harlan Fiske, J. ... 4, 6

"Stock" Arrangements
Of musical compositions ... 607

Stock Control
Transfer of license, may not be by transfer of ... 52

Strikes
Generally ... 279, 300, 305

Studios
Performance before audience at ... 223, 636
Powers of Federal Communications Commission ... 53

Studios—Continued

Recording 230
Use and size 262

Sub-License

By producer, when permitted 406
Breach of 648

Subpoenas

Enforcement, procedure for 116
Contempt 116
Issuance 117
Service of 118
Proof and return of 118

Subscription

Of amendments 89
Appearances 96
Applications for instruments of authorization 89
Deposition 123
Pleadings 89, 93
Protests 94

Subject Matter

Of copyright 586
Originality only 586

Substantial Evidence

Findings of Commission must be supported by 170

Substantive Basis

Of copyright protection, originality 599

Suits

Against Federal Radio Commission continued 86

Summon Witnesses

Powers of Federal Radio Commission 62

Sunday Broadcast

Performances not objectionable 246, 358

Superpower

Use of 24

Supervening Public Programs

Advertiser's right when occupies less time than replaced program 265
Refund to advertisers 265
May substitute for commercial program 266
Comparable subsequent period, advertiser entitled to 265
Notice, advertiser entitled to reasonable 265

Supervision

Of production, facilities contract provision 247

Supreme Court of United States

Appeals to 161, 162

Supremity

Of Congressional power to regulate broadcasting 183, 319

Suspension

Of license 67, 107, 567
Program, advertiser's right to refund 279

Sustaining Programs

Contents of 222, 223
Copyright infringement by 222
Payment for 220
Phonograph records on 224
Performance publicly for profit, as 628, 632
Station primarily liable for 222
Substantial similarity to station's program required 267
When deemed 220

Sympathetic Strikes

Validity as means of enforcing by-law 306

Symphonic Works

Are dramatico-musical works 625

Synopsis

Is fair use 618

System, and Broadcast Station

Chain broadcasting,
"Bonus" stations 289
Copyright infringement, liability for 293
Defamation, liability for 294

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

System—Continued
Independent contractor 283
Network distinguished 283
Program operations 292
Time periods diminished for announcements..... 290
Uniform card rates, may require..... 289
Violations of operations standard fall on constituent station 292
Facilities contract provisions..... 296
Advertiser with 249
Breaches 290, 295, 296
Character of system programs..... 292
Compensation, cut-in and station-peak period..... 290
Duration 295
Guarantee of fixed station income..... 289
Merchandising co-operation by constituent station..... 291
Non-performance, excuse for..... 296
Promises in consideration of availability of facilities..... 288
Station facilities available to system..... 288
Termination 295

Systems, Private Registration
Program keys 518

Style
Artist not protected in, of performance..... 522

T

Talent
Obligation to provide, under facilities contract.....247, 272

Tardiness
Justifiable discharge of artist for..... 366

Taxation
Constitutional limitations on state..... 200
Corporation organization, by state..... 201
Foreign corporation privilege, by state..... 201
Gross receipts, invalid by state..... 200
Arizona statute 200, 204
Immunity from state, basis of..... 200
License requirement, state, invalid..... 198
Occupation or license, by state,
Broadcast stations, may not levy on..... 202

Taxation—Continued
Broadcasting business, discrimination not possible....202, 203
Defined 201
Interstate commerce excluded from..... 202
Protection of congressional power..... 205
Regulation and control of business, primary object..... 201
Privilege to engage in business, state may not levy.....200, 210
Property within state, state may tax.....206, 210
Without state, may not..... 207
Receiving set, tax on privilege of owning,
Nature of 210
Unconstitutional 209, 210
Sales tax not applicable to sale of facilities..... 208
Social security taxes,
Casual employment excluded..... 333
Classes 327
Co-operative bands, who liable..... 332
Imposed on employment only..... 332
Independent contractors excluded 332
Name bands, who liable..... 332
No-name bands, who liable..... 332
Old age pensions,
Broadcast stations liable..... 331
Employee must contribute..... 331
Employment defined 331
Rates 331
State may impose on broadcast stations..... 327
Unemployment insurance taxes..... 328
Employer liable only 328
Exempt employments 329
Exemption for contribution to state fund..... 330

Technical Data
Requirements in applications for instruments of authorization.. 61

Telecommunications
Cairo Conference of 1938..... 24A
Madrid Convention of 1932..... 23
Regional agreements on service matters.....22, 23

Telegrams
Broadcast of, as infringement..... 646
Transmission of manuscript by, not publication.....581, 646

Telegraph Division
Of Federal Communications Commission..... 71

Telephone Division
Of Federal Communications Commission..... 71

Telephone Line Charges
Scope of facilities contract obligation to pay..... 247

Television
Allocation of frequencies to..... 24A
Appropriation of news..... 717
Censorship of programs..... 713
Copyright protection problems..... 719
Defamation by 714
Generally 710
Invasion of right of privacy by..... 715
Jurisdiction to regulate, exclusively Federal..... 711
Program not, publication..... 719
Unauthorized use of artists performed by..... 716
Of photograph for commercial purpose..... 715
Whether artist's contract includes appearance in..... 718
Whether equal facilities must be given political candidates.... 712
Whether obscene telecasts banned..... 712
Whether telecast lotteries banned..... 712

Term
Of copyright 579, 592, 594, 595, 596, 600, 691
Employment of artist..... 401
License of performing rights, generally..... 223

Terms
Of construction permits..... 43
Grant of privileges, other than requested.....66, 108

Termination
Of contracts, artist and producer,
Death 363
Employment at will..... 363
Engagement 363
Illness of artist..... 363
Two weeks notice, when required..... 363
Of facilities contracts,
Bankruptcy 275
Change of rates as giving right to cancel..... 274
Incompetency 275

Termination—Continued

Labor difficulties. . . . 274
License, must be co-extensive. . . . 274
Rescission, mutual 274
System and station. . . . 295
Of license to literary property. . . . 412

Test

Artist as independent contractor. . . . 321
Independent contractor 405, 643
Infringement 521, 609
Liability for workmen's compensation. . . . 320
Publication 581

Testimonials

Whether restrainable by Federal Trade Commission. . . . 555

Testimony

At hearings before Federal Radio Commission. . . . 125
Report of, mailing required. . . . 126
Weight of examiner's report of. . . . 128

Text

Of licenses under Act of 1921. . . . 26

Theaters of Broadcast Stations

Admission 241
Breach of condition on ticket. . . . 241
Conditions may be attached. . . . 241
Distribution may be gratis. . . . 241
Price, discretionary 241
Re-sale may be prohibited. . . . 241
Terms of, may be regulated. . . . 241
Alterations, must comply with local regulations. . . . 236
Audience, duty toward. . . . 243
Liability for personal injury to. . . . 243, 244
Ejection, for cause. . . . 241
Inspection of 243
Lease of 236
Private business, operation is. . . . 241
Regulation of, local. . . . 237
Arbitrary, must not be. . . . 237
Construction methods may be prescribed. . . . 238
Fire protection 239
Jurisdiction 237

Theaters of Broadcast Stations—Continued

License may be required 240
Tax may be imposed 240
Local aspects of 237
Materials, quality and type subject of 238
Repugnant to enabling act, must not be 237
Seating, may be 238
Zoning, may not prescribe 238
Structural changes, permission for 236
Sunday operation, state may prohibit 246

Theatrical Employment Agency

Statutory definition of 425
Unlicensed, cannot sue for services 425

Theme Music

Effect of license by copyright owner 530
Infringement of 615
Program keys 525
Reminiscent expression, as 526
Secondary meaning, acquirement of 530
Unfair competitive use restrainable 530

Theories

Of broadcast defamation 468

Third Persons

Advertising agency liability to, warrant of authority 342
Insufficiency of application, financing by 60
When verbal declarations of, by 60
Provisions in facilities contracts for injury to 262

Tickets

Cost of printing provision in facilities contract 262
Sale by broadcast theater 241

Time

Diminution of, by identification announcement 251
Under system chain broadcasting 290
Duration of broadcast 251
Claim made of privilege against self-incrimination 145
Extension of, grounds 43
Limited, amendment of application 57, 107
Briefs, filing of 128
Depositions, filing of 123
Modification of license, order to show cause 99

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Time—Continued
Pleadings, amendment of course 90
Answers to notice of violations 95
Petition to intervene 93
Sought, in application for instrument of authorization 56

Timeliness
Copyright formalities 590
Renewal 676

Titles, Program
Appropriation of 528
Arbitrary and fanciful, protected 527
Containing sponsor's trade-mark or trade name, protected 526
Copyright does not protect 527
Descriptive, not protected 527
Function 526
No protection as trade-mark 518
Not registerable under statute 518
Prior appropriation and user, essential to protection 527
Private registration systems 518
Public domain works, whether protection to 529
Trade-mark registration, does not protect 527
Unfair competition, basis of protection 527

Tort
All participants in defamation liable 481
By impersonating agent, defamation 523
Joint tortfeasors, defamation 469
Liability of advertising agency for 349

Towers, Radio
Powers of Federal Communications Commission 53

Trade Commission, Federal
False broadcast advertising, regulation of 547, 548, 549, 550, 551, 554, 556
Jurisdiction 540
Special board of investigation of 541, 542, 543
Statutory provisions governing 539, 546

Trade-Marks
Actions for infringement 515
Affixation to associated commodity required 515, 519
Basis of protection of 517
Defined 514

Trade-Marks—Continued

Trade names distinguished 515
Functions of 516
Infringement, when treble damages 519
Innocent, restrainable 519
What constitutes 519
Purposes of 516
Reminiscent expressions associated with program not 518
Remedy against simulation 519
Statutory registration, advantages of 519
Facility in securing federal jurisdiction 519
Not essential to validity of 519
Prima facie evidence of ownership 519
Proceedings to test validity of mark prior to 519
Program keys not protected by 518
Titles not protected by 527
Substantive rights not conferred by 519

Trade Names

Affixation not required for infringement 515
Basis of protection 517, 520
Broadcast trade names protected 520
Direct and actual competition not necessary 528
Functions 516
Professional names protected as 522
Appropriation of 522, 523
Competitive use of real names 524
Whether passing off is necessary 522
Wrongful affixation 523
Program keys, private registration systems 518
Purposes 516
Real name of artist as 524
Remedy, action for unfair competition 515
Secondary meaning, basis of protection 527
Doctrine of 520
Professional names protected 520
Test of infringement 521
Trade-mark distinguished 515
Use of real name, protection against 524

Transfer

Of applicant for instrument of authorization 59
Construction permit 43
Copyright, of right to secure 642

Transfer—Continued
Licenses, what constitutes....52, 106, 247
When may not be.... 44, 52
Possession of creative works on program.... 579
Property rights in literary property.... 406

Translation
Exclusive right of copyright or common law owner.... 603

Transmission
Jurisdiction, defamation from outside state.... 487
Where crime is committed.... 492
Telegraphic, of manuscript not publication.... 581
War powers of president over station.... 563

Transmitter
Local regulation of location of.... 197
Refusal to renew, engineering standards not met.... 61

Transportation Act of 1920.... 17

Transcript of Testimony
Requirement, hearing by examiner.... 126

Transcriptions, Electrical
Compulsory license provisions, applicability....662, 663
Contents of 227
Cost of manufacture, advertiser liable.... 261
Facilities contract provisions.... 261
Libraries of, manufacturing royalties.... 668
Master matrix, lien on.... 231
Performing license royalties.... 668
Possession by station, nature.... 228
Sale, what is subject of.... 228
Sources of supply and manufacture.... 226
Studio recording 230
Supply of, by advertiser, contract status.... 229
Unlawful appropriation 230
Use in broadcasting.... 668
License necessary 228
What are 668

Treaties
Congressional power to regulate by.... 9
Frequency allocation 23, 24, 24A
General copyright treaties of U. S.... 704

Treble Damages
When recoverable for infringement..... 519

Trust, Constructive
When inferred on assignment of literary work..... 407

Truth
Warranty of, of advertising matter..... 272

Types
Of broadcast station studios..... 235
Chain broadcasting 282, 283
Licenses 212
Networks 283

U

Unauthorized Acts, Protection Against
Appropriation from artist..... 574
Arrangements 607
Dramatization 605
Performance 626
Publication 601
Public performance for profit..... 630

Unearned Advances
When recoverable from facilities salesman..... 234

Understudies 357

Undisclosed Principal
Liability of advertising agency..... 342

Unenforceability
Of employment when not performable in year..... 234

Unfair Competition, Law of
Applicability to radio broadcasting..... 512
Appropriation by impersonation..... 522
Off-the-air recording 537
Sustaining program 513, 535A
Of advertisement 535
Phonograph records 513, 536
Whether by competing station is.....443, 444, 445, 446, 535A
Broadcast advertising simulation without affixation of trademark 519

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

Unfair Competition—Continued
Competitive misrepresentation, whether 538
Deceptive imitation or impersonation 523
Elements of 513
Confusion of public 513
Deception of public 513
Divergence of trade 513
Misrepresentation 513
False advertising, whether it is 538
Ideas, appropriation of, as 535
Illustrative cases 513
Interference with exclusive right to program 535A
Misappropriation 513
Misrepresentation, competitive, whether 538
Rebroadcasting, whether it is 445
Remedies available against 576
Titles of programs, basis of protection 527
Use of theme music restrainable 530

Unfaithfulness
Justifiable discharge of artist for 372

Uniform
Card rates 289
Extradition Act 494
Rates of stations required 566
Need not maintain 250, 256
Uniform, by agreement 289

Unions
Company 297
Enforcement of by-laws 303
Fine 303
Forbidding members to work for offending employer 305
Member not to work where less than certain number employed 302
Where non-resident employer not paying certain rates 302
Methods of 302
Sympathetic strikes 306
Validity, basis of 302
Rights of,
Boycott 300
Picketing 300

Unions—Continued
Strike, generally. . . .300, 305
For all-union shop.... 300
Preferential shop 300

Uniqueness of Artists
Basis of negative injunction....388, 393

Universality
Of copyright 689

Unlawful Deprivation
Estoppel to set up.... 11
Of property 12, 39
In performance 225
None, where complainant operated station before Act of 1927 10
Where authorization refused station in operation.... 10
Where license renewal refused under Act of 1927..10, 12

Unlimited Power of Attorney
As transfer of rights in license....52, 106

Unpublished Works
Copyright in 594, 595
How obtained, formalities.... 594

Use
Availability of frequencies for.... 33
Competitive, of artist's real name.... 524
Fitness for, electrical transcriptions.... 228
Musical compositions of, on restricted list.... 223
Of name of author, enforcement.... 409
In commercial programs....458, 459
Right of privacy in, of name....457, 458, 459
Recording 461
Of producer to, name of author.... 409

United States
Constitution, first amendment.... 562
Fifth amendment 10
Citizenship, required under Act of 1912 to obtain license..... 26
Copyright conventions, as signatory to.... 704
International protection, adherence to Conventions by.. 701, 709
Jurisdiction, exclusive in courts of.... 619
Legislative history 585, 586

Vol. 1, §§ 1–333—Vol. 2, §§ 334–719 SECTIONS

United States—Continued
Nature of grant of, by 598
No property in, by 598
Public reception of broadcast performance in 630
Reciprocal relations of 704
Radio-telegraph communication with Italy 22
Supreme Court of, appeals to 161, 162

Uruguay
Adherence to Montevideo Copyright Convention 702

V

Validity of
Censorship of obscenity, profanity and indecency 567
Delegation of power under Act of 1927 14
Labor union by-laws 306
Lottery information prohibition 568
Municipal regulation 199
State regulation 183
State statutes 189, 190, 191, 195

Value
Whether passing of, necessary element of lottery 502

Vending Copies or Manuscript
Exclusive right of copyright owner 602, 610

Venue
Criminal proceedings 179
Orders for other than the payment of money 181

Verification of
Applications for instruments of verification 55, 89
Pleadings 89, 96

Vermont
Regulation of interference with reception 188

Versions
Exclusive right of copyright owner to make 604

Vesting
Of copyright on publication with notice 589
Rights under license, none beyond terms 89

Violations
Of operating standards 292
Provisions against lotteries 497
Right of privacy, sustaining program 222

"Voting" Contests
Whether contain element of chance..... 507

W

Waiver
Of grounds of justifiable discharge..... 376
Lien on master matrix..... 231

Warranty
Of authority of advertising agency..... 276
Of facilities salesman..... 276

Wave-Lengths
In application, under Act of 1912..... 26
When conflict between licenses as to.....28, 39

Washington Radio-Telegraph Convention of 1927
Allocation of frequencies..... 22
Article X 22
Article XIV 22, 23
Service regulations 22

West Virginia
Regulation of advertising by unlicensed insurance companies.. 192

Wheeler, Senator Burton 450

White, Senator Wallace H., Jr...... 24A

Wilful Breach
Justifiable discharge of artist for..... 366

Withdrawal
Of application for instrument of authorization..... 57

Witnesses
Failure to appear, penalty for..... 180
Power of Commission to compel attendance of.....115, 116
Examiners to examine 115

Word Building Contests
Whether contain element of chance..... 509

Words and Music
Several protection by single copyright..... 682

Workmen's Compensation Acts
Artists, applicable to.....320, 321
Broadcast stations, state may legislate over.....319, 320, 325

Workmen's Compensation Acts—Continued
"Casual" employees, applicability to 324
Character of employments covered..... 320
Clerical employment, exclusion of..... 324
Common law modified by..... 318
Excepted employments may be brought under..... 324
Employees only, included..... 321
Hazardous employments included..... 320
Independent contractor excluded..... 321
Injuries, which covered..... 324
Interstate commerce, state statutes excluding employments in.. 319
Musicians, whether entitled..... 320
Non-hazardous employments excluded..... 320
Number of employees, liability dependent upon.....320, 321
Payments, methods of..... 323
Pay rate, liability dependent upon..... 324
Principal employer liable for..... 322
Who is 322
Program sponsor, whether liable for..... 322
Singers, whether entitled to..... 320

Work of Commission or Division
Delegation of 50, 76

Works
Composite 680
Creative, what included..... 574
Copyright, formalities 589
Infringement 614, 615, 618
What copyrightable 594, 595
Dramatic 575, 606, 613
Future, assignability 407
Symphonic 625

Written
Applications must be..... 55
Facilities contracts, necessity of..... 248
Reports of investigations, required..... 83

Wrongful Discharge of Artist
Prima facie case of..... 365
Refusal to play in obscene, lewd or seditious program..... 367

Z

Zoning
Municipal ordinances to regulate..... 197

7945CK LBC 510
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