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Copyrights: Abandonment by Publication

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COPYRIGHTS: ABANDONMENT BY PUBLICATION

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> The doctrine that an author has a right of property in his ideas and is entitled to demand for them the same perpetual protection which the law accords to the proprietor of personal property generally, finds no recognition either in the common law or in the statutes of any civilized country. When he has embodied his thoughts in manuscript, the latter is his exclusive property having the characteristics of transfer and succession common to personal property. Being his property, the author may exercise full dominion over it. He may publish it to the world or not, at his option.[1]

There are no property rights in an idea.[2] It is the physical manifestation of ideas which is property, not the ideas themselves. There are, as a matter of fact, two separate and distinct types of property rights in such property.[3] The manuscript is tangible property which is capable of being owned and sold just as any personalty and as the paper itself before any written word was placed on it. The second right is an intangible right, separate and apart from the paper, the manifestation of thought. This second right is the exclusive right to reproduce or copy the manifestation.

The Supreme Court explained the distinction between the intangible right to copy and the rights of ownership of the tangible object produced in *Bobbs-Merrill Co. v. Straus*.[4] The Court held that the copyright is an exclusive right to multiply copies for the benefit of the creator or his assigns disconnected from, although dependent on, physical existence. It is an incorporeal right to print and publish. It is not a right to perpetually own the copies made with authority of the author or his assignee. Once this tangible property is sold the originator has no control over the item, although he remains the sole owner of the intangible right to copy.[5]

These two distinct rights are originally in one person, the author, but the rights later may and usually do exist in different persons at the same time, *i.e.*, the author and the owner of a copy. Indeed if this were not true then the person who owned a writing, either the original manuscript or a copy, by virtue of having title

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1 Carter v. Bailey, 64 Me. 458, 461, 18 Am. Rep. 273, 274 (1874).

2 Dunham v. General Mills, 116 F.Supp. 152 (D. Mass. 1953); Carter v. Bailey, *supra* note 1; Palmer v. De Witt, 47 N.Y. 532, 7 Am.Rep. 480 (1872).

3 Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Stephens v. Cady, 14 How. (55 U.S.) 528 (1852); Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904).

4 *Supra* note 3.

5 *Id.* at 347. The Court quoted Stephens v. Cady, 14 How. (55 U.S.) 528, 530 (1852); "The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish. . . . " The sole right to vend is not to be construed as to give the author after he has sold a copy the right to control the price of resale. The author has lost his property right in the physical item sold. It is the right to make copies which is protected. The book itself is the property of the buyer.

to the tangible personalty could copy it. The *raison d'etre* of copyright law is to allow the author to dispose of the tangible property but to retain the intangible right to copy exclusively and thus encourage the arts by allowing the author to profit by selling copies of his work.

It is the intangible right to prevent others from copying with which the law of copyrights, either common law or statutory, concerns itself, and it is this right that will be involved whenever the terms literary property rights or intellectual property rights are used. Once the thought is made manifest, the particular manifestation is, under common law doctrine, the sole and complete property of the artist.[6] This is what is sometimes called a common law copyright; it is akin to and based upon personal property rights. In *Wheaton v. Peters*,[7] the Supreme Court said: "That an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted."[8] This was restated with approval by the Supreme Court in *Bobbs-Merrill Co. v. Straus*.[9]

Indeed the right of an author to control the reproduction and publication of any work, at least until such time as he first publishes it or authorizes its publication, has never been seriously doubted. This common law protection of the right to copy comes into existence when a manifestation of an idea is created and remains perpetually in existence until publication is made.[10] This common law right is now recognized by statute.[11] The question has more forcefully arisen as to an author's rights in literary property after publication.

Most authors write for the express purpose of having their work published, although it is true there have been some authors who did not have this goal in mind but penned their work for amusement, or for close friends. If an author's right to control or

6 Little v. Hall, 18 How. (59 U.S.) 165 (1856); Grant v. Kellogg, 154 F.2d 59 (2d Cir. 1946); 58 F.Supp. 48 (S.D.N.Y. 1944).

7 8 Pet. (33 U.S.) 591 (1834).

8 *Id.* at 657.

9 210 U.S. 339, 346 (1908).

10 Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904). The decision in this case was cited with approval and made the basis for the decision of the Supreme Court in American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

11 17 U.S.C. §2 (1947) which reads: "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."

prevent copying terminates upon first publication the author has lost a valuable asset, *i.e.*, his literary property rights. The framers of the Constitution realized this. Thus, the Constitution expressly provides that the Congress shall be empowered: "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."[12]

Congress exercised this power in 1790 by enacting a copyright law.[13] The Supreme Court first interpreted this statute in 1834 in the case of *Wheaton v. Peters*[14] and discussed the author's literary property rights at length. The Court held that the copyright clause of the Constitution did not merely permit Congress to enact laws which would be declaratory of existing rights, but permitted Congress to enact laws which would create new legal rights, pursuant to the object of the copyright clause. Copyright after publication originates under the act of Congress, and therefore, each requirement of the statute must be complied with to perfect the copyright.

The *Wheaton v. Peters*[15] case is somewhat confusing since it held that the right to copyright protection after publication is purely statutory, springing directly from the Constitution. The reason for this holding, the Court seemed to say, is that there is no federal common law. (This reasoning was not adopted as a rule of law until the famous case of *Erie v. Tompkins*[16] in 1938.) Yet the Court also said by way of dictum in the *Wheaton* case that prepublication rights of authors exists at common law and that these rights would be recognized. The inconsistencies in dictum and the reasoning of the Court in this case were pointed to in a later Supreme Court decision, *Holmes v. Hurst*.[17] In this case the Court traced the development of copyright law:

> The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill-defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of this common law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623, and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation, and imprisonment without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state—although Parliament made some efforts to restrain the licentiousness of the press—until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from fourteen to twenty-eight years. Notwith-

12 U.S. Const. art. I, § 8, cl. 8.
13 Howell, The Copyright Law 4-6 (3d ed. 1952).
14 *Supra* note 7.
15 *Ibid.*
16 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
17 174 U.S. 82 (1899).

> standing this act, however, the chancery court continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed as late as 1769 by the court of King's bench in the very carefully considered case of *Millar v. Taylor,* 4 Burr. 2303, in which the right of the author of "Thomson's Seasons" to a monopoly of this work was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldson v. Becket,* 4 Burr. 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldson v. Becket* was followed by this court in *Wheaton v. Peters,* 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute.[18]

It is equally well settled that neither the Constitution nor the statute affects the author's common law rights prior to publication, but the Supreme Court in *Bobbs-Merrill Co. v. Straus*[19] quoted with approval Drone on Copyright, page 100: "[W]hen a work is published in print, the owner's common-law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured."[20]

It is evident that the concept of "publication" is a critical one in copyright law, because at the time of publication common law rights cease and a dedication to the public is made unless the statutory requirements are met and statutory rights arise, in which case common law rights are relinquished at the time statutory rights are claimed. It has been said:

> The word "publication" has no definite and fixed meaning. "The word is legally very old, and of no one certain meaning.*** The thought, however, running through all the uses of the word is an advising of the public, a making known of something to them for a purpose." Associated Press v. International News Service, 2 Cir., 245 F. 244, 250, 2 A.L.R. 317.[21]

And this is true even though the present statute defines "date of publication":

> In the interpretation and construction of this title "the date of publication" shall in the *case of a work of which copies are reproduced for sale or distribution* be held to be

18 *Id.* at 84-85.
19 Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).
20 *Id.* at 347.
21 Marx v. United States, 96 F.2d 204, 206 (9th Cir. 1938). The court went on to say that the 29 years of copyright protection in cases of copyrighted material not intended for reproduction for sale starts running at the date of deposit. This holding is now codified as 17 U.S.C. § 12 (1947).

> 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. . . .[22]

It must be noted that although the statute defines "date of publication" it does not define date of publication of those copyrighted items not to be reproduced for sale. Judge Augustus Hand stated in interpreting this section (which was then section 62 of the Copyright Law) in *Cardinal Film Corp. v. Beck*[23] that it "was an enactment to fix the date from which the copyright term should begin to run, and not a general definition of what constituted publication."[24]

It is plain that what constitutes an act of publication is not clearly legislatively defined, but the legislature has merely made a declaration as to when the statutory period of protection begins in respect to those copyrighted works intended to be reproduced for sale. In all other cases the word "publication" is defined by judicial interpretation.

The publication of a literary work without compliance with the statutory requirements necessary to acquire a copyright is a dedication to the public of the particular work and this results in the loss of all exclusive rights to copy. The work enters the public domain and may be freely copied or reproduced. This is true since statutory copyright protection does not grant the author any rights to reproduce but is a limitation on the rights of others to copy. The

22 17 U.S.C. § 26 (1947). (Emphasis supplied.)
23 248 Fed. 368 (S.D.N.Y. 1918).
24 *Ibid.*

author has the legal right by statute to restrain others from copying.[25]

The procedure by which one obtains a copyright is not complicated, but many authors fail to take the required steps to protect their literary productions until it is too late and the literary property is deemed to be abandoned.[26]

The general rule seems to be that a publication sufficient to terminate common law rights is a general publication and not a restricted dissemination of the work. The Supreme Court has held in *American Tobacco Co. v. Werckmeister*[27] 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."[28] In this case it was held that there was no such general publication of a painting when it was exhibited, without notice of copyright in an art gallery where the public was admitted for a fee and members free and where by the laws of the gallery no one was allowed to copy or take notes of paintings exhibited. Since there was no general publication the artist's common law literary property protection was not abandoned.

It is important to note in the above definition that the intent of the author to abandon is immaterial. This concept was reiterated by the Supreme Court in *Holmes v. Hurst*[29] when the Court held that if an author allows his intellectual production to be published without complying with the statute, his right exclusively to copy is lost irrespective of his intent not to abandon.

The interesting and often cited case of *F. W. Dodge Co. v. Construction Information Co.*[30] gives an insight into where the courts may draw the line between a general publication which will terminate the common law rights to copyright and a private disclosure which will keep these rights intact. The F. W. Dodge Company was engaged in the business of compiling and distributing to customers information concerning contemplated construction projects. The information was distributed to customers under contracts in which the customers agreed to keep the information confidential. The defendants procured this information, copied it and sold copies to their customers. The Court decided that the plaintiffs had a property right in the compilations of data which, whether subject to copyright or not, would be protected and that the dissemination of information in this manner was not a general publication which would end the common law copyrights.

Earlier the case of *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*[31] presented a similar factual situation. In this case the compiler of information rented books containing business information to any who wished to rent. The leasing contract provided that the information was to be confidential. The court said that this amounted to a general publication. The mere fact that the book was leased rather than sold outright to those members of the public

25 State v. State Journal Co., 75 Neb. 275, 106 N.W. 434 (1905).
26 The learned author, Dr. Oliver Wendel Holmes, made this mistake when he first published his now famous work, "An Autocrat at the Breakfast Table." Holmes v. Hurst, 174 U.S. 82 (1899).
27 207 U.S. 284 (1907).
28 *Id.* at 299.
29 174 U.S. 82 (1899).
30 183 Mass. 62, 66 N.E. 204 (1903).
31 155 N.Y. 241, 49 N.E. 872 (1898).

who wished to lease such work did not change the character of the publication from a general one to a limited dissemination.

> [O]ur examination leads us to the conclusion that the present state of the law is that, if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone.[32]

This case is weakened as precedent by the fact that the plaintiff had deposited two copies at the Library of Congress. The court in the majority opinion takes pain to point out that this alone would be a publication, while three judges concurred, specially limiting the grounds for reversal to the fact that the depositing of two copies of the publication in the Library of Congress was publication.

It can be seen that there is an important distinction to be drawn between a general publication and a limited distribution. If a general publication has been made, common law rights to copy are lost; if such a publication has not been made, the common law rights are not lost. Whether the court will determine that such a publication has been made in a particular case is difficult to predict with certainty since each case will turn on its own facts.

Into the apparently well settled law came the troublesome case of *International News Service v. Associated Press*.[33] The plaintiff was a news wire service; the defendant was a competitor in the same business. The defendant pirated the plaintiff's stories and issued them as its own to its own customers. The pirated news stories were obtained from four sources: (1) employees of plaintiff who were bribed, (2) members of the plaintiff's news wire association who were induced to divulge the stories, (3) the defendant who copied news stories from bulletin boards where they were posted, and (4) the defendant who copied stories from early morning editions on the east coast and telegraphed these stories to the west coast for publication there. Neither the newspapers from which the stories were pirated nor the stories themselves were copyrighted. The plaintiff realizing he could assert no statutory copyright, brought an equitable action to restrain the defendant's acts on the basis of unfair competition.

The circuit court of appeals said that there were valuable property rights in the news gathered but no literary property rights as such. The east coast newspapers which were members of the Associated Press system printed their stories with its permission. The court held, however, that these member newspapers had no right to abandon by publication the Associated Press' property right in the news. Quoting from *Werckmeister v. American Lithographic Co.*, the court said: "The nature of the property in question [a painting] in large measure determines the extent of public right."[34] The court went on to say: "And it was held that unless there was an 'abandonment of copyright or dedication to the public,' the owner of a thing capable of copyright could 'expressly or by implication confine the enjoyment of such subject to some occasion

32 *Id.* at 876.
33 248 U.S. 215 (1918), *affirming* 245 Fed. 244 (2d Cir. 1917).
34 245 Fed. 244, 251 (2d Cir. 1917).

or definite purpose.' "[35] This is undoubtedly correct, but the intent of the author, as has been pointed out, is immaterial. The question is whether there has been a general publication so that the public would be justified in believing there has been such a dedication. The court went on to hold that the piracy by the defendant was a tort in the nature of unfair competition and injunction was ordered.

On certiorari, the Supreme Court,[36] after a short discussion of literary property and the effect of the copyright statute, decided the case solely on the grounds of unfair competition, stating:

> [W]hen the rights or privileges of the one are liable to conflict with those of the other each party is under a duty

35 *Ibid.*
36 248 U.S. 215 (1918).

so to conduct its own business as not unnecessarily or unfairly to injure that of the other. [Citations omitted.]

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public, but their rights as between themselves. See *Morison v. Moat,* 9 Hare, 241, 258, 68 Eng. Reprint, 492. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right [Citations omitted.]; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. [Citations omitted.] It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.[37]

Using this reasoning as the basis for its opinion, the Supreme Court affirmed the circuit court of appeals holding to enjoin the piracy and to afford reasonable protection of the complainant's newspapers from such piracy.

Mr. Justice Brandeis in his dissent recognized the "injustice" that would be involved in allowing the piracy, but stated that the Court was "making new law." He succinctly points out that the publication by the east coast papers is a general publication and thus destroys common law copyrights in spite of the intent of the plaintiff. It is difficult to comprehend the distinction between the type of piracy involved in this case and that involved in a case where an author neglects or omits to copyright his book prior to a general publication and another prints that book thus depriving the author of his rewards. The piracy here was enjoined as unfair competition, but Hurst was not prevented from pirating Dr. Holmes' book "Autocrat at the Breakfast Table" a few years earlier,[38] be-

[37] *Id.* at 235-37.
[38] *Supra* note 26.

cause it had been printed serially in a magazine and no copyright had been obtained. There seems to be no valid distinction. Nor does it justify the distinction to say that because International News Service is a competitor of the Associated Press it is therefore not a member of the general public.

Whether the distinction is valid or not, the publishers of newspapers, even though they do not copyright their paper, seem to have a special dispensation and are protected from having news stories pirated for a reasonable length of time by others whose piratical activities would impair the worth of the news item to those who originally obtained the information and wrote the story.

This special right seems to be a slender reed on which to support a case, even though the federal courts have adhered to this expansion of the definition of unfair competition from misrepresentation to include misappropriation,[39] and one court has said:

> The right to equitable relief is not confined to cases in which one man is selling his goods as those of another. International News Service v. Associated Press, 248 U.S. 215, 241, 39 Sup. Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. What in that case, upon a different state of facts, was said of the respondent, is applicable to defendant's conduct here, for it, too, "amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point when the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not."[40]

The Supreme Court reaffirmed this expansion by alluding to the *Associated Press* case in *Schechter Poultry Corp. v. United States*,[41] commonly known as the *Sick Chicken* case. In deciding that the N.R.A. was unconstitutional, the Court had to determine the meaning of "fair competition" as used in the act and thus entered into a discussion of unfair competition as known to the common law. The Court said:

> "Unfair competition" as known to the common law is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. [Citations omitted.] In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to selling of another's goods as one's own —to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U.S. 215, 241, 242.[42]

In spite of the importance of the holding of the *Associated Press* case it has seldom been cited by the Supreme Court.[43] The Court has not reaffirmed its holding in the *Associated Press* case, for the purpose of protecting literary property after a general publication on the ground that copying was unfair competition, even when it

39 Coca Cola v. Old Dominion Beverage Corp., 271 Fed. 600 (4th Cir. 1921), *cert. denied*, 256 U.S. 703 (1921).
40 *Id.* at 604.
41 295 U.S. 495 (1935).
42 *Id.* at 531.
43 Shepard's Citator lists ten United States Supreme Court cases which cite the *Associated Press* case.

could have taken the opportunity to do so.[44] The lower federal courts have been equally wary of applying this doctrine if to do so would broaden its scope in the slightest. This can be seen in the case of *Public Ledger v. New York Times*.[45] In a bill in equity charging the New York Times with unfair competition, the Public Ledger alleged that it had a contract with the London Times. The London Times was to supply the Public Ledger with a copy of important news items. This service was to be extended exclusively to the Public Ledger. The plaintiff under his contract could publish or sell these stories to other newspapers as he deemed advantageous. One story was late in arriving. Due to this delay, the New York Times was able to acquire a copy of this story as it appeared in the London Times, and printed it before the Ledger. The New York Times credited its source stating that the publication was with the permission of the London Times. Judge Learned Hand held that the bill should not be dismissed since unfair competition did exist if the New York Times did in fact assert in writing that it had the London Times' permission to use the copy. But Judge Hand expressly stated that the doctrine of *International News Service v. Associated Press* did not apply.[46]

Judge Learned Hand gave no reason for his statement that *International News Service v. Associated Press* was not in point. Indeed one would be hard pressed for logical reasons to so hold. Perhaps the cases are distinguishable on their facts, and perhaps a group of newspapers acting collectively should be treated differently from a single newspaper acting under contract with another non-competing newspaper.

The *Associated Press* case could have been used as precedent to change the entire field of statutory copyright by the logical expansion of this doctrine to protect all types of literary property after a general publication for a reasonable length of time on the grounds of unfair competition. This was not done. As recently as

44 KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936). In this case a radio station broadcast news items read from the local paper. Some of these news articles were stories supplied by the Associated Press. The Supreme Court ordered the case dismissed on jurisdictional grounds stating that the amount in controversy was not sufficient. The Court said by way of dicta that it probably did not have jurisdiction in the *Associated Press* case either but in that case the question of jurisdiction was not raised.

45 275 Fed. 562 (S.D.N.Y. 1921).

46 The case was appealed to the Circuit Court of Appeals, Second Circuit, 279 Fed. 749 (2d Cir. 1922). The decision in this court concerned only the question of the plaintiff's right to statutory copyright. The court held that since the plaintiff was neither the creator, nor his assign, he had no right to copyright the stories.

1960 the test of "general publication" was used to decide that Admiral Rickover had dedicated some speeches to the public.[47] This dedication occurred when Admiral Rickover sent copies of the speeches he had delivered to friends, persons interested in his topics, and newspapers for their use. The court held that by so doing, the Admiral had abandoned his common law rights and since he had not at that time obtained statutory copyrights he could not later apply for such rights.

The procedure that must be followed to obtain a statutory copyright is relatively simple and the courts have been, at least recently, more liberal in their construction of the statute. Nevertheless, notice of copyright in the first publication is deemed essential to the procurement of a valid statutory copyright. In 1938 the Supreme Court said in the case of *Washingtonian Publishing Co. v. Pearson*:[48]

> The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; "to afford greater encouragement to the production of literary works of lasting benefit to the world."
>
> Under the old Act deposit of the work was essential to the existence of copyright. This requirement caused serious difficulties and unfortunate losses. . . . The present statute (§9) declares—"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 [§18]; . . ." And respondents rightly say "It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright."[49]

The Court then holds that the statutory penalty[50] for failure to deposit copies of the work with the registry of copyright as required by section 13 of the statute,[51] is the only penalty for failure to deposit.

It must be noted that the Court takes care to point out, in the instant case, that the notice was published as required by the statute. The liberal interpretation which the copyright statute received in regard to the requirement of deposit of copies is not and has not been extended to the requirement of notice which is rigorously enforced. Notice is the only method of preventing the members of the public from reaching the conclusion that the author has abandoned all of his literary property rights, and it is essential to the establishment of valid statutory copyright protection.[52] The statute describing the method of notification must be strictly complied with if the notice is to be effective and the copyright valid. Actually, such compliance with the statute gives notice that the author is relinquishing his common law literary property rights and is claim-

47 Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *cert. granted*, 365 U.S. 841 (1961).
48 306 U.S. 30 (1939).
49 *Id.* at 36-37.
50 17 U.S.C. § 14 (1947).
51 17 U.S.C. § 13 (1947).
52 Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939).

ing statutory rights. If proper notice is not given when a general publication is made it is conclusively presumed that the author has abandoned his literary property rights.

The Supreme Court has said: "[T]he object of the [copyright] statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."[53]

In the case of *Shelberg v. Eppingham*,[54] the court held that the fact that copies of a previously copyrighted literary work had come into a copier's possession which were not marked with the required notice was not a good defense in an infringement action when the pirate had actual notice of the copyright. Yet in the *Thrift Plan* case,[55] the defense that the copyright notice was not in the required place, but was printed instead on the last page, was good. In this copyright infringement action, such notice did not meet the statutory requirement and even though there was a strong probability that the pirate knew of the copyright, actual knowledge was not proven and the action failed.

The denial of protection to an author for his literary property rights simply because he neglects or omits to include notice that he wishes to have his property protected, or because he puts such notice in the wrong place is ridiculous. To give newspapers a special dispensation from this requirement of publishing a notice, as the Supreme Court did in the *Associated Press* case,[56] is equally ridiculous, for it draws a distinction where none should exist. Yet to expand the scope of the *Associated Press* case would be to fly in the face of precedent and statute. It is time that the copyright laws be revised once more.

Abandonment of the valuable rights of an author in his literary property should not be conclusively presumed by the fact that the author has made a general publication and has failed to print a notice of copyright. Abandonment of these rights should not be presumed. It is more logical to assume that a man does not wish to abandon valuable rights than that he does. There are few, if any, other areas of law where intent to abandon is not important, even decisive, in determining whether or not there is an abandonment. Intent to abandon cannot logically be inferred from the fact of publication. The opposite conclusion is the more logical, yet legally such intent is presumed.

Abandonment should be made an affirmative defense in an action for piracy and the person asserting such a defense should have the burden of proving such abandonment, and intent should be made an element of abandonment. The fact of publication in itself should be notice that the author intends to use his intellectual property to earn a livelihood, and the pirate who attempts to live on the fruits of another's brain should be forced to legally justify his actions, or be restrained from copying.

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53 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).

54 36 F.2d 991 (S.D.N.Y. 1929).

55 United Thrift Plan, Inc. v. National Thrift Plan, Inc., 34 F.2d 300 (E.D.N.Y. 1929).

56 Supra note 36.