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THE COMMON-LAW COPYRIGHT AND ITS LIMITATIONS

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Copyright is the law's recognition of an author's rights in the product of his own artistic creation. This intangible right can be secured by statute or by the application of the common law. At the offset, it should be pointed out that this article is only interested in the latter, the common-law rights of the author.

The common-law theory of copyright takes the author as the principle object of protection. This theory is so popular in Europe that the term "droits des auteurs" (rights of authors), is used instead of copyright.[1] In the United States this common-law right is usually referred to as the right of first publication. The justification for this common-law right lies in the theory that the claim of the artistic creator to an unpublished manuscript is based upon the production and labor of the author and his right to share in the profits resulting from dissemination of his labor.[2]

The Court stated in *King Features v. Fleischer*:[3]

> "To what is the artist or author entitled as his conception and what if such original conception has been appropriated? He is entitled to any lawful use of his property whereby he may get a profit out of it. Falk v. Donaldson, 57 Fed. 30. It is the commercial value of his property that he is protected for, to encourage the arts by securing to him the monopoly in the sale of the object of the attraction. Gamber v. Ball. CB (NS) 306."

This right of first publication was recognized and protected by Congress when, under proper constitutional power,[4] they enacted the Copyright Statute which states in Section 2:[5]

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefor."

The existence of the common-law right is of great importance to the author of literary property. It gives him a property right in his creation that accrues automatically by the very act of writing. The form of literary property which is covered by the common law is the right to control the public use of a manuscript up to the moment when it is first generally published. It is the sole right of the author to decide by whom, when, where, and in what form, his manuscript shall be published for the first time, to

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[1] Shafter, Alfred M., *Shafter Musical Copyright* (1939), p. 119.
[2] Pushman v. New York, 39 N. E. 2d 249 (1942).
[3] 229 F. 533 (Copyright Office Bulletin No. 20,360) (1925).
[4] U. S. Const., Art. 1, Sec. 8.
[5] Title 17, U. S. C., Sec. 2.

restrain others from publishing it without his permission and from using it without his authority, and to recover damages from those publishing it without his permission or using it without his authority. The idea of the common-law property right should be kept distinguished from the other form of literary property right which is statutory and gives the right of monopoly after the first general publication.[6]

This property right has been defined as an intangible, absolute right which is purely incorporeal and is attendant with considerations entirely different from any involved in other rights.[7]

Mr. Justice Holmes said of copyright property:[8]

> "The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo* so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and thereafter, I may remark in passing, it is one which can hardly be conceived except as a product of statute, as the authorities now agree. . . . "

In the above case Mr. Justice Holmes was speaking of the statutory concept of copyright property. The common-law right, on the other hand, is not the product of statute and, as we shall see, may endure indefinitely. However, the common-law right can also be said to be *in vacuo,* just as the statutory copyright, and may achieve all the things Mr. Justice Holmes said could not have been achieved but for statute.

The Courts have recognized a difference between the property of a creator in his idea and that of his manuscript, paper and ink.[9] In *Stephens v. Cady,* the Court stated:[10]

> "But since the literary property in a manuscript is and always has been separate from the actual manuscript itself, that is, something in the nature of a chose in action, the right to publish may not be inferred from the mere possession of the manuscript. . . . As above stated, literary rights have always been held to be separa-

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[6] Shaw, Ralph R., *Literary Property in the United States* (1950), pp. 12, 26; Golding v. RKO, 193 P. 2d 153 (1948).

[7] 34 Am. Jur. 402 (1941).

[8] White-Smith v. Appolo, 209 U. S. 19 (1908).

[9] Brunner v. Stix, 181 S. W. 2d 643 (1944).

[10] 55 U. S. 528, 14 L. Ed. 528 (1852).

able from the manuscript itself. . . . There is no question but that it is a different and independent right from the usual right of ownership of an article of personal property."

The Court, in *Local Trademarks v. Price*,[11] said that a copyright was in the nature of a privilege or franchise in distinguishing between the idea of a personal property right and that of a literary property right and stated:

> "A copyright is an intangible, incorporeal right in the nature of a privilege or franchise and is independent of any material substance such as the manuscript or plate used for printing. It is entirely disconnected therefrom.
>
> "The principle is clearly stated by the Court in Werckmeister v. American Lithographic Co., C.C., 142 F. 827, 830, thus: 'The author of a painting, when it is finished, before publication, owns a material piece of property, consisting of the canvas and the paint upon it. He also owns an incorporeal right connected with it; that is, the right to make a copy of it. These two kinds of property, although growing out of the same intellectual production are in their nature essentially and inherently distinct. . . . '"

WHAT THE COMMON-LAW COPYRIGHT PROTECTS

Copyright, whether statutory or common law, protects only the expression of an idea and is only concerned with its form of presentation. It does not protect the idea itself or the facts contained therein. The Court pointed this out in *Brunner v. Stix, supra*,[12] in stating:

> "There is a distinction between the property of a creator in his idea and his property in the manuscript setting forth his idea (property in a personal chattel), as well as his right to prevent others from reproducing his expressions of his ideas—the present day common-law right to make original publication and statutory authority to multiply copies for a limited time to the exclusion of others. Common law and statutory copyright . . . are monopolistic in nature. Generally speaking, one's common-law monopolistic right to publish a literary work ceases upon publication and statutory copyright continues the monopolistic right to multiply copies thereafter for a limited period. . . . Copyright protects the expression of an idea. It does not protect the idea."

The basis to understanding literary property is the fact that the only thing protected is a particular form of presentation. And even that is not protected in the same degree that patents protect inventions. To obtain a patent, an inventor must show

[11] 170 F. 2d 715 (1948).
[12] *Id.* at p. 3.

sufficient novelty in execution of the method or mechanism which he wishes to protect to support his claim of originality. Once his patent is granted, anyone else who hits upon the same idea and the same or a similar method of carrying out that idea will be stopped, during the life of the prior patent, from making or using or selling his invention.

None of this is true with respect to literary property. Literary property rights are granted without examination for novelty. In copyright, if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result and no infringement will exist.[13]

It is obvious that if an author could have a monopoly on his ideas and materials used in his creation and could prevent their use by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted.

The purpose of copyright and how far its protection should extend is shown by the Court's ruling in *Holmes v. Hurst*:[14]

> "The object of copyright is to promote science and the useful arts. If an author by originating a new arrangement and form of expression of certain ideas or conceptions could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation; and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted. A poem consists of words, expressing conceptions of words or lines of thought, but copyright in the poem gives no monopoly in the separate words or in the ideas, conceptions, or facts expressed or described by the words. A copyright extends only to the arrangement of words. A copyright does not give a monopoly in any incident in a play. Other authors have a right to exploit the facts, experiences, field of thought, and general ideas, provided they do not substantially copy a concrete form in which the circumstances and ideas have been developed, arranged and put into shape."

One of the advantages and attributes of common-law copyright is that it is perpetual as compared with statutory copyright, which is limited to a 26 year term and renewable for an additional 26 years. The common-law copyright may last theoretically forever, the lifetime of the creator, his heirs, or whom he assigns or otherwise transfers it to, although it may be lost at any time by a general publication or abandonment.[15]

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[13] Shaw, *op cit. supra*, note 6 at p. 2; Dymow v. Bolton, 11 F. 2d 691 (Copyright Office Bulletin 20, 201) (1926).

[14] 174 U. S. 82; 19 Sup. Ct. 606 (1899).

[15] Willemberg, Philip, *Literary Property* (1937); Werckmeister v. American Lithographic Co., 134 F. 323; 68 L. R. A. 591 (1904).

TRANSFERABILITY OF COPYRIGHT

Although the common-law copyright has been said to be entirely different from that of any other property right, the creator or owner of a common-law copyright may sell, transfer or assign his property right or any portions thereof in the same manner as he would any other property right. The sales may be absolute or conditional and may be oral or written.

The property right may also be bequeathed by will or may pass to the personal representative of the owner upon the death of the owner.[16]

LIMITATIONS OF THE COMMON-LAW COPYRIGHT

Although the common-law copyright gives protection to the uninformed creator, perhaps when it is needed most, by the very act of creating any writing, the common-law copyright has certain and sometimes disastrous limitations. Where the creator may unknowingly acquire the protection of the common-law copyright he may unknowingly lose this protection.

THE EFFECT OF STATUTORY TO COMMON-LAW RIGHTS

It is a general rule that the common-law copyright and the statutory copyright cannot co-exist in the same composition. The acquisition of the statutory copyright destroys the common-law right, the author is deemed to have accepted the statutory right in place of his common-law right.[17]

In *Societe Des Films, Menchem v. Vitagraph Co. of America,* the Court stated:[18]

> "The author of an unpublished dramatic composition has a right of election to content himself with common-law copyright or to substitute therefor the right afforded by copyright statute to exclusive representation by complying with statutory provisions.
>
> "A common-law and statutory copyright may not exist concurrently but statutory copyright divests ownership of his common-law right."

GENERAL PUBLICATION

One of the most common ways to terminate a common-law literary property right is by abandonment or dedication to the public. A general publication is dedication to public use. Also, one of the basic problems confronting common-law copyrights is the question of publication and what constitutes publication in a given situation.

General publication consists of selling, offering for sale, or dedication to the public by general distribution one or more copies of the work in question.[19]

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[16] 18 Corpus Juris Secundum, p. 141 (1939).

[17] Tompkins v. Hallick, 133 Mass. 32 (1882); Bobbs-Merrill v. Straus, 210 U. S. 346 (1907).

[18] 251 F. 258, 163 C.C.A. 414.

[19] Wincan, Richard, *How to Secure a Copyright* (1950).

While some courts have held that intent is necessary before the author is deemed to have dedicated to the public, other courts have held that intent is immaterial.

In *Holmes v. Hurst, supra,*[20] the United States Supreme Court ruled:

> "If an author permits his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public, and this too irrespective of his actual intention not to make such abandonment."

While it is not clear whether actual intent is needed on the part of the author to constitute dedication to the public, probably the better rule is that intent may be assumed by the author's acts. This rule was followed in the *Werckmeister* case where the Court said:[21]

> "A general publication consists of such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public as implies an abandonment of the right of copyright or its dedication to the public."

In a more recent interesting case[22] plaintiffs alleged the defendants unlawfully appropriated plans for a residential building and the plans were common-law property of the plaintiff.

The facts showed that the plaintiff had previously built a house in accordance with the plans in question and that the house was held open to inspection by the public.

The Court held that holding a house open for public inspection was a publication of the plans and stated:

> "The creator of a unique intellectual production, such as a picture, a book, a play, a compilation of facts or an architectural plan, has a property right in the thing created. This property right attaches to the incorporeal idea which has taken definite form in the mind of the creator, as distinguished from the paper upon which it is portrayed or the material of which it is physically composed. It is recognized at common law. No copyright statute is required in order for the creator of a unique intellectual product to protect such property from unauthorized invasion, appropriation or conversion. The property right is based upon the established principle that every man is entitled to the fruits of his own effort, mental as well as physical.
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> "The property right above mentioned needs no statutory enactment for its protection so long as the creator,

[20] 174 U. S. 85, 19 Sup. Ct. 606 (1899).
[21] *Id.* at p. 6.
[22] Kurfiss v. Cowherd, 233 Mo. App. 397, 405 (1938).

> and therefore the owner of the product retains control of it, or until he voluntarily dedicates it to all the world; but if the owner releases it for general and unrestricted publication he can no longer reap benefits from its use except he may have it copyrighted under the statute. . . ."

While the courts have not been definite as to what constitutes a general publication, the main question seems to be whether there was a publication to the members of the *general* public. In the following cases the author was deemed to have publicated to the general public: by delivery of copies to the Secretary of State, by a gratuitous presentation of a book to public libraries, appearance of a pamphlet in a public hotel, and by filing of the author's work in a public office.

PARTIAL PUBLICATION

Probably, part of the courts' difficulty in determining what is publication or dedication to the public is the distinction they place on general and limited publication. While we have seen that a general publication to the public will terminate an author's common-law copyright, the courts have held that a limited publication is entitled to the common law protection.

In *Berry v. Hoffman*,[24] the Court stated:

> "Every communication of knowledge of the contents of a literary composition is in a sense a publication. However, the cases dealing with copyright early recognized a distinction between a general publication and a limited publication. When the communication is to a select number upon conditions express or implied, that it is not intended to be thereafter common property, the publication is then said to be limited.
>
> "The test is whether there is or is not such a surrender as permits the absolute and unqalified enjoyment of the subject matter by the public or the members thereof to whom it may be committed."

It appears that when a literary work is published or exhibited for a limited and particular purpose or to a limited number of persons it does not become public property and the author retains ownership of the work.

The courts have held that the delivering of lectures before audiences, exhibitions of paintings in private galleries, and the private circulation of manuscripts is only partial or limited publication and not abandonment to the public use.[25]

It therefore appears that by careful restrictions an author may publicate and keep his common-law protection, but where the line is to be drawn between a limited and general publication ap-

[24] 125 Pa. Superior Ct. 261, 189 Atl. 516 (1937).

[25] Nutt v. National Institute, Inc., 31 Fed. 2d 236 (Copyright Office Bulletin No. 20, 1935) p. 516; Werckmeister v. American Lithographic Co., 134 F. 323; 68 L. R. A. 591 (1904).

parently depends on a given situation and a given court with no set rules.

PERFORMANCE

The courts have further confused the question of what is publication by drawing a further distinction between publication and performance. The courts have ruled that to reproduce copies of a play to the public is publication but if you only perform your works or play before the public you have not published.[26]

In *Brown v. Ferris* [27] the Court stated the general rule as to performance by stating:

> "The law on the question seems well settled that the publication of a literary work by an author is dedication of same to the public; it becomes public property unless, of course, he reserves such rights as the law allows him by copyright. There is, however, a different rule governing literary production. . . . In McCarthy & Fisher v. While, 259 Fed. 364, Judge A. Hand says, 'The defendants insist that the presentation of the song by Holly in vaudeville prior to the date of the copyright was a complete dedication to the public. It is, however, well settled that a public performance of a dramatic or musical composition is not an abandonment of the composition to the public.' "

It therefore appears from the foregoing cases that by performing his works an author may make commercial use of his work and make it known to the public without terminating his common-law copyright.

LACHES

Although it may be called publication or abandonment, it appears that an author may lose his common-law copyright on the theory of laches or negligence.

Laches occurs when the author or composer is aware that his works are being published or used by someone else, and remains inactive and does nothing to assert his rights for an extended period of time.

Some of the cases have endeavored to include this type of situation under the heading of publication and go on the theory that the author, by his unprotesting silence, has impliedly acquiesed on consent to the publication by others of his creation.

But the more logical course would be to declare the author, by virtue of his neglect, or laches, as having forfeited his rights, and as having barred himself from suing for relief ordinarily had under his common-law protection. His right remains but his remedy is gone.[28]

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[26] Thompkins v. Halleck, *supra*, at p. 7.
[27] 204 N. Y. Supp. 190 (1924) (Copyright Office Bulletin No. 20, 94) (1935).
[28] Shafter, *op. cit. supra*, note 1 at p. 1.

BURDEN OF PROOF

Although, theoretically, the creator of literary property has a property right by the very act of creating, the problems of proof can be very great.

We have many cases in American history where the inspired creator has suddenly jotted down his creation on scratch paper or used any materials that were in his reach. If later, the question of ownership or the time of the creation were to be questioned the creator may have a next to impossible task as to the proof. The difficulty of proof was evidenced by the *George* case [29] where the author of *"The Wreck of the Old 97"* was finally able to prove his ownership of this song against the R. C. A. Victor Company by the testimony of his neighbors who had heard him and his daughter play it years before it was recorded, and also, by an old copy unearthed in a dusty trunk.

The courts have clearly placed the burden of proof on the party who seeks to enforce a common-law copyright. In the *George* case [30] the Court stated:

> "When the supposed party sues for a violation of a copyright the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author should be proved."

There are some authors and vaudeville organizations which provide for the deposit and registration of songs, scripts and other matters of a similar nature. As far as local or state governmental agencies are concerned, California is the only known state providing for state registration of manuscripts.[31]

It would appear that the common-law copyright can only reach its full purpose and be of the greatest benefit to the owners of unpublished works by the use of State or Federal agencies that would provide for the registration of these unpublished works. This would give the owner of the unpublished works a means of proving ownership and provide for the fullest protection under our common-law copyright rights.

[29] Victor Talking Machine Co. v. George, 69 Fed. 2d 871 (1934) (Copyright Office Bulletin No. 20, p. 754).
[30] *Ibid.*
[31] Shafter, Alfred M., *Shafter Musical Copyright* (1939), p. 112.