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UNFAIR COMPETITION AND THE PROTECTION OF RADIO AND TELEVISION PROGRAMS I*

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INTRODUCTION

The issue tendered by this work is whether the courts may and will protect the form or sequence of ideas—the new collocation of visible and audible lines, colors, sounds and words —via the doctrines of unfair competition.[1]

Both common law and statutory copyright have been and are employed to protect program content.[2] For the most part, they furnish adequate protection to the creators (copyright proprietors) and disseminators (broadcast or television stations) of program materials. But there are certain deficiencies in common law and statutory copyright which preclude the full measure of protection desired by creators and disseminators.

Common law copyright, which may be defined as an original intellectual production,[3] comprehends such diverse items as a radio script,[4] motion picture scenario,[5] combination of ideas

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1. White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1 (1908).

2. *E.g.* Palmer v. DeWitt, 47 N.Y. 532 (1872); Aronson v. Baker, 43 N.J. Eq. 365, 12 Atl. 177 (1888); Ferris v. Frohman, 238 Ill. 430, 87 N.E. 827; *aff'd*, 223 U.S. 424 (1912); Becker v. Loew's Inc., 133 F.2d 889 (7th Cir. 1943), *cert. denied*, 319 U.S. 772 (1944); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947). See Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209 (1950).

3. Ketcham v. New York World's Fair 1939, Inc., 34 F. Supp. 657, 658 (E.D. N.Y. 1940).

4. Uproar Co. v. Nat'l Broadcasting Co., 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936); Stanley v. Columbia Broadcasting System, Inc., 82 U.S.P.Q. 123 (Cal. 1949); Yadkoe v. Fields, 66 Cal. App.2d 150, 151 P.2d 906 (1944).

5. Golding v. R.K.O. Pictures, Inc., 82 U.S.P.Q. 136 (Cal. 1949);

evolved into a radio program,[6] musical rendition by an orchestra,[7] performance by an actor or singer,[8] musical laugh[9] and a telecast.[10] Common law copyright does not furnish full and complete protection because of the doctrine of publication.[11] The latter is a technical legal concept whereby common law rights are frequently lost because a proprietor unknowingly dedicates his work to the public. Thus, common law copyright becomes common property and may be used or copied by anyone.[12]

Statutory copyright, which is restricted to the "writings"[13] of an author, furnishes better protection to its limited subject matter than common law copyright. However, noncompliance with the statutory formalities of the Copyright Code may result in a loss of the benefits conferred by the statute upon

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Barsha v. Metro-Goldwyn-Mayer Corp., 32 Cal. App.2d 556, 90 P.2d 371 (1939); Thompson v. Famous Players-Lasky Corp., 3 F.2d 707 (N.D. Ga. 1925).

6. Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N.Y.S.2d 404 (1st Dep't 1941); Stanley v. Columbia Broadcasting System, Inc., 82 U.S. P.Q. 123 (Cal. 1949); *cf.* Grombach Productions, Inc. v. Waring, 293 N.Y. 609, 59 N.E. 2d 425 (1944).

7. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); *cf.* R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1941).

8. Waring v. Dunlea, 26 F. Supp. 338 (E.D. N.C. 1939); Savage v. Hoffman, 159 Fed. 584 (C.C.S.D.N.Y. 1908); *cf.* Long v. Decca Records, Inc., 76 N.Y.S.2d 133 (Sup. Ct. 1947).

9. Blanc v. Lantz, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949).

10. Louis v. Walcott Litigation, published in pamphlet form by the National Broadcasting Company, entitled, PROCEEDINGS IN PHILADELPHIA ACTIONS IN C.P. NO. 1, JUNE TERM, 1948, TO ENJOIN COMMERCIAL USES OF THE TELEVISION BROADCAST OF THE LOUIS-WALCOTT FIGHT. This litigation consists of the following cases: Louis *et al.* v. Richman, tr/as Broadwood Hotel, Equity No. 1803, Pa. C.P. June, 1948; Louis v. Friedman, tr/as Lawndale Theatre, Equity No. 1804, Pa. Ct., June, 1948; Louis v. California Productions *et al.*, N.Y. Sup. Ct., June, 1948; Twentieth Century Sporting Club, Inc. *et al.* v. Massachusetts Charitable Ass'n., Equity No. 60,230, Mass. Super. Ct. June, 1948.

11. The doctrine of "publication" is discussed in WARNER, RADIO & TELEVISION LAW § 211b (1949), and in Warner, *supra* note 2, at 225.

12. *Cf.* R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1941); Fashion Originators Guild v. Federal Trade Commission, 114 F.2d. 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941); Moore v. Ford Motor Co., 43 F.2d 685 (2d Cir. 1930); Kraft v. Cohen, 32 F. Supp. 321 (E.D. Pa. 1940), *rev'd on other grounds*, 117 F.2d 579 (3d Cir. 1941).

13. 35 STAT. 1076 (1909), 17 U.S.C. § 4 (1946), as amended, 61 STAT. 652 (1947), 17 U.S.C. §4 (Supp. 1949): "The works for which copyright may be secured under this title shall include all the writings of an author."

the copyright proprietor. Although the statutory formalities of notice and registration have been eased and simplified, applicants frequently fail to comply with the minimum requisite of the Copyright Code.[14]

From a practical point of view the great bulk of intellectual property produced in the United States is not copyrighted.[15] And it is this type of literary material—news and sports programs, advertising continuities[16] and the like—which seeks to invoke the doctrines of unfair competition to protect program content.

A related problem and one which has arisen with the invention and development of phonograph records and transcriptions, motion pictures, radio and now television, are the interpretive rights asserted by performers in intellectual prop-

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14. *Cf.* Group Publishers, Inc. v. Winchell *et al.*, 86 F. Supp. 573, 577 (S.D. N.Y. 1949): "Strict compliance with the statutory requirements is essential to the perfection of the copyright itself and failure fully to conform to the form of notice prescribed by the act results in abandonment of the right and a dedication of one's work to the public." See also Block v. Plant *et al*, 87 F. Supp. 49 (N.D. Ill. 1949).

15. S. B. WARNER, U.S. COPYRIGHT ACT: ANTI-MONOPOLY PROVISIONS NEED SOME REVISIONS (1949): "Almost all the publications of the American book trade are copyrighted each year, as are also nearly all motion pictures and published music, together with many thousands of pieces of unpublished music. The Copyright Act forbids the copyrighting of publications of the United States Government. Very few State, county or municipal publications are copyrighted. Less than one-half of one per cent of the newspapers are copyrighted, though many columnists and comic strip writers copyright their products separately, so that they will be protected even when appearing in an uncopyrighted newspaper. N. W. Ayer & Son's *Directory of Newspapers and Periodicals* for 1948 lists 20,246 newspapers and periodicals as published in 1947, but this directory purports to cover only part of the field. The total number of newspapers and periodicals is much greater, probably well over a hundred thousand. The number copyrighted in 1947 was approximately 4200. Of course, the few thousands of foreign works copyrighted each year are but an infinitesimal fraction of the number published.

"In the absence of figures of literary output for the United States or for the world, the number of copies of works received each year by the Library of Congress probably gives the best available indication of at least that part of the output which influences American culture. In comparing these figures with the number of copyrighted works, it must be remembered that the Library of Congress receives many duplicates and books published in former years, and that only about half of the copyright registrations are considered of sufficient cultural significance to be turned over to the Library. In 1947 the Copyright Office registered 230,215 works and the Library of Congress received 6,789,169 items." [Footnotes omitted]

16. Although copyright protection is available for advertising material, it is seldom employed: see Borden, *Copyright of Advertising*, 35 KY. L. J. 205 (1947); Note, 45 HARV. L. REV. 542 (1932); *cf.* Savord, *The Extent of Copyright Protection for Advertising*, 16 NOTRE DAME LAW. 298 (1941); Freeland, *Copyright Protection of Advertising*, 27 KY. L. J. 391 (1939).

erty.[17] The process of recording by preserving in tangible and durable form the once ephemeral interpretations of artists enables such interpretive performances to be reproduced for a variety of uses. In addition, motion pictures and sound and visual broadcasting have enlarged the range of such performances well beyond the concert hall or the theatre.[18]

The foregoing problem must be viewed from the broad perspectives of the scope and protection furnished by common law copyright, statutory copyright, and unfair competition. Subsequent sections in this chapter will disclose the inadequacies of common law and statutory copyright. Thus, the issue is narrowed. May the doctrines of unfair competition be invoked to protect interpretive performing rights or do the recognition of these rights require legislative remedies?

A word of caution is appropriate at this time. The extension and application of the law of unfair competition to protect word or program content is a recent development in our jurisprudence. From a text book point of view, the courts are preventing a competitor from misappropriating that which equitably belongs to another.[19] This legal principle, when applied to intellectual property, results in the protection of word and program content.

The majority of both federal and state courts would refuse to extend the law of unfair competition to protect word or program content. This can be attributed to the following: common law and statutory copyright furnish adequate protection to program content, and the extension of the law of unfair competition would foster monopolies in ideas, thus curtailing freedom of expression.[20]

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17. *Cf.* Traicoff, *Rights of the Performing Artist in His Interpretation and Performance*, 11 AIR L. REV. 225 (1940).

18. See report of I.L.O., *Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sounds*, Geneva, 1949.

19. International News Service v. Associated Press, 248 U.S. 215 (1918); CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS § 60 (1945).

20. See Chaffee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940); Handler, *Unfair Competition*, 21 Iowa L. Rev. 175 (1936); ZLINKOFF, MONOPOLY VS. COMPETITION: SIGNIFICANT TRENDS IN PATENTS, ANTI-TRUST, TRADE-MARK, AND UNFAIR COMPETITION SUITS (1944); Judge Wyzanski in Triangle Publications vs. New England Newspaper Pub. Co., 46 F. Supp. 198, 204 (D.C. Mass. 1942): "I could hardly be unmindful of the probability that a majority of the present justices of the Supreme Court of the United States would follow the dissenting opinion of Mr. Justice Brandeis in the International News case, . . . because they share his view that monopolies should not be readily extended, and his faith that legislative reme-

Those decisions which protect program content would expand the law of unfair competition to complement the inadequacies of common law and statutory copyright.

UNFAIR COMPETITION AND COPYRIGHT LAW

The law of unfair competition employed to protect program content had its genesis in *International News Service* v. *The Associated Press*.[21] Prior cases dealing with unfair competition confined this doctrine to situations in which a defendant attempted to pass off his goods as those of the plaintiff.[22] In the *Associated Press* case, agents of the defendant copied news from bulletin boards and early editions of the Associated Press and transmitted these items to their western subscribers for afternoon publication. The news was not protected by copyright. This was not the standardized passing-off case since the defendant did not pass off its news as coming from the plaintiff. It has been characterized as "upsidedown passing off"[23] since defendant supplied this news as if it were his own. The Supreme Court, in enjoining the defendant, expanded the scope of unfair competition to prohibit the "misappropriation of what equitably belongs to a competitor." Defendant's conduct was actionable because: a person cannot "reap where he has not sown" and cannot appropriate to himself "the harvest of those who have sown" "precisely at the point where the profit is to be reaped".[24] Thus the misappropriation theory of the *Associated Press* case was employed to enjoin imitation or copying of plaintiff's news dispatches.[25]

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dies are to be preferred to judicial innovations for problems where adjustment of many competing interests is necessary."

21. 248 U.S. 215 (1918).

22. Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U.S. 598 (1888); Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896); Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901); Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938); Champion Spark Plug Co. v. Sanders *et al.*, 331 U.S. 125 (1947); Thum Co. v. Dickinson, 245 Fed. 609 (6th Cir. 1917); Peters Milling Co. v. International Sugar Feed No. 2 Co., 262 Fed. 336 (6th Cir. 1919); Pyle National Co. v. Oliver Electric Mfg. Co., 281 Fed. 632 (8th Cir.), *cert. denied*, 260 U. S. 736 (1922); Ely Norris Safe Co. v. Mosler Safe Co., 62 F.2d 524 (2d Cir.), *cert. denied*, 289 U.S. 756 (1933); Socony-Vacuum Oil Co. v. Rosen, 108 F.2d 632 (6th Cir. 1940); see NIMS, UNFAIR COMPETITION AND TRADE-MARKS 1 (1947).

23. Chaffee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1311 (1940).

24. International News Service v. Associated Press, 248 U.S. 215, 239 (1918).

25. For an excellent discussion and advocacy of the "misappropriation

The relationships between common law and statutory copyright have been explored elsewhere.[26] In this discussion we shall consider common law and statutory copyright as an integrated branch of the law, furnishing substantially the same protection to intellectual property.

The various rights inherent in common law copyright and conferred by statutory copyright may be reduced to a common denominator—the power to prevent others from reproducing the work.[27] Thus the copyright proprietor may enjoin the tortsfeasor who imitates or copies his work.[28]

It would appear that unfair competition and copyright law furnish the same protection. Several decisions would appear to synthesize the law of copyright into the realm of unfair competition.[29] This suggests an inquiry into the jurisdictional bases of an unfair competition action and a copyright infringement suit.[30]

Common law copyright may be described as an original unpublished intellectual production;[31] its statutory counterpart relates to written matter which has been published.[32] Unfair

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theory" see Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595 (1942); CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 722 (1945).

26. Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209, 218 (1950).

27. R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1941): "Copyright in any form, whether statutory or at common-law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work."

28. *Cf.* Callmann, *Copyright and Competition*, 2 LA. L. REV. 648 (1940); CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 210 (1945).

29. *E.g.* West Publishing Co. v. Edward Thompson Co., 169 Fed. 833, 853 (C.C.E.D. N.Y. 1909): "Actual copying, or such paraphrasing as to be equivalent to copying, was at first considered to be the only form of infringing use of copyrighted material. But the great diversity of printed publications, and the many phases of literary activity, especially when applied to minor pursuits, ultimately forced the construction of the copyright statute, in which the basis of injury is found in the unfair use of the material of the work in making up a book of similar nature, as well as in a direct copying or paraphrasing of the words therein contained. This extension of the law of copyright brings the case closely into the realm of unfair competition. But, while a likeness may be traced in the principles upon which this class of actions is founded, yet in application and in scope a sharp line of distinction can be drawn." See Colliery Engineering Co. v. Ewald, 126 Fed. 843 (C.C. S.D. N.Y. 1903); and see CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 210 (1945).

30. *Ibid.*

31. Ketcham v. New York World's Fair 1939, Inc., 34 F. Supp. 657 (E.D. N.Y.), *aff'd*, 119 F.2d 422 (2d Cir. 1940).

32. Palmer v. DeWitt, 47 N.Y. 532, 536 (1872): "The right of an author

competition, except as it is affected by legislative enactments in connection with patents, trade-marks, *etc.*, is a common law concept and is concerned with any article of trade, including literary material, and with its words, letters, composition and the like.[33]

The jurisdictional prerequisites for a cause of action to recover for infringement of common law copyright consist of the following:

(a) ownership by the plaintiff of a protectible property interest;
(b) unauthorized copying of the material by defendant;
(c) damages resulting from such copying.[34]

To sustain a cause of action based on infringement of statutory copyright, plaintiff must show:

(a) ownership of statutory copyright. This is evidenced by a certificate of registration from the Register of Copyrights;[35]
(b) the misappropriation of a substantial and material part of the copyrighted work;[36]
(c) no proof of profits and actual damages if the court in its discretion awards fixed and arbitrary damages prescribed by the Copyright Code.[37]

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or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of the statute. This is the right secured by the copyright laws of the different governments." See also: Caliga v. Inter-Ocean Newspapers, 215 U.S. 182, 188 (1909); American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

33. NIMS, UNFAIR COMPETITION AND TRADE-MARKS 889 (4th ed. 1947): "The right secured by the copyright laws is the right to use a literary composition—the product of the mind and the genius of the author—not the name or title given to it. The right protected in cases involving the infringement of a trade-mark or trade name is the right to use a symbol which indicates origin and represents good will."

34. Golding v. R.K.O. Pictures, Inc., 82 U.S.P.Q. 136 (Cal. 1949); Stanley v. Columbia Broadcasting System, Inc., 82 U.S.P.Q. 123 (Cal. 1949); Dieckhaus v. Twentieth Century Fox Film Corp., 54 F. Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir.) *cert. denied*, 329 U.S. 716 (1946); DeAcosta v. Brown, 146 F.2d 408 (2d Cir.), *cert. denied*, 325 U.S. 862 (1944).

35. Freudenthal v. Hebrew Publishing Co., 44 F. Supp. 754 (S.D. N.Y. 1942); Marks Music Corp. v. Stasny Music Corp. *et al.*, 1 F.R.D. 720 (S.D. N.Y. 1941).

36. Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir. 1933), *cert. dismissed*, 54 Sup. Ct. 94 (1934); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); MacDonald v. Du Maurier, 75 F. Supp. 655 (S.D. N.Y. 1948); Heim v. Universal Pictures, 154 F.2d 480 (2d Cir. 1946); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

37. 61 STAT. 652 (1947), 17 U.S.C § 101 (Supp. 1948).

The jurisdictional prerequisites of an unfair competition action may be briefly described:

(a) A property or quasi-property right. In the *Associated Press* case, the quasi-property right was described as the result of "organization and . . . . . (the) expenditure of money, skill and effort," required for the collection and transmission of news.[38] A quasi-property right exists in a telecast since the latter requires the expenditure of money, effort and technical skills.

(b) Competition. The courts are by no means in agreement on the question of whether competition is a jurisdictional prerequisite in an unfair competition case. Some fairly recent cases have stated that "the phrase 'unfair competition' presupposes competition of some sort; in the absence of competition the doctrine cannot be invoked."[39] However, the modern trend of decisions dispenses with direct or "market" competition as an essential element of an unfair competition action. This is illustrated by the "non-competing goods" cases wherein it has been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court.[40] Thus the title of a radio program which has acquired a secondary meaning will be protected against the use of the same words as the title of a magazine.[41] Similarly, a manufacturer of work shirts was enjoined for using the expression "Amos n' Andy" by the well-known radio and television comedians of the same name.[42] This

38. 248 U.S. 215, 238 (1918).

39. Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 (7th Cir. 1912); Carroll v. Duluth Superior Milling Co., 232 Fed. 675 (8th Cir. 1916); Matzer v. Vinikow, 17 F.2d 58 (9th Cir. 1927); Note, 148 A.L.R. 12 (1944).

40. Yale Electric Corp. v. Robertson, 26 F.2d 972 (2d Cir. 1938); Vogue Company v. Thompson-Hudson Co., 300 Fed. 509 (6th Cir. 1924), *cert. denied*, 273 U.S. 701 (1926); Safeway Stores, Inc. v. Dunnel, 172 F.2d 649 (9th Cir. 1949); Sunbeam Corporation v. Sunbeam Lighting Co., 83 F. Supp. 429 (S.D. Cal. 1949); see Callmann, *Trade-Mark Infringement and Unfair Competition*, 14 LAW & CONTEMP. PROB. 185 (1949); Derenberg, *The Patent Office as Guardian of the Public Interest in Trade-Mark Registration Proceedings*, 14 LAW & CONTEMP. PROB.. 288, 291 n. 9 (1949).

41. Golenpaul v. Rosett, 174 Misc. 114, 18 N.Y.S. 2d 889 (Sup. Ct. 1940): "Information Please", the title of a radio program, protected against use as the title of a magazine. For a discussion of the cases dealing with the protection of radio service marks *via* the doctrines of unfair competition, see Warner, *Unfair Competition and the Protection of Radio and Television Service Marks*—U. OF PITT. L. REV.—(1950)

42. Feldman v. Amos & Andy, 68 F.2d 746 (C.C. P.A. 1934).

judicial approach which dispenses with direct or market competition, is premised on the philosophy that the rules of unfair competition are based not only upon the protection of a property right in complainants, but also upon the rights of the public to protection from fraud and deceit.[43]

(c) Damages. The courts appear to gloss over this requirement, confusing it with competition,[44] the pecuniary value of plaintiff's right,[45] or that defendant will reap financial benefits from plaintiff's efforts.[46] One or two cases have suggested that damages are no longer jurisdictional; the deception and confusion caused the public are sufficient to sustain an unfair competition action.[47] It is believed, however, that damages expressed in terms of pecuniary or other injury to a complainant is a jurisdictional prerequisite to an unfair competition suit.[48]

The similarities between a common law or statutory copyright infringement suit and one of unfair competition are apparent, particularly if the courts dispense with direct or market competition. Thus if the misappropriation theory of the *Associated Press* case is employed to protect the content of a radio or television program, the same jurisdictional elements are present as in the case of common law or statutory

43. Stork Restaurant, Inc. v. Sahati, 166 F.2d 348, 355 (9th Cir. 1948): "A very recent statement of the doctrine is to be found in Hanson v. Triangle. Publications, 163 F.2d 74, 78 (8th Cir. 1947), *cert. denied*, 68 S. Ct. 387 (1948): '. . . there can be unfair competition although the businesses involved are not directly competitive. Under present general law, the use of another's mark or name, even in a non-competitive field, where the object of the user is to trade on the other's reputation and good will, *or where that necessarily will be the result*, may constitute unfair competition . . . '"; Brooks Brothers v. Brooks Clothing of California, Ltd., 60 F. Supp. 442 (S.D. Cal. 1945); Bamberger Broadcasting Co. v. Orloff, 44 F. Supp. 904 (S.D. N.Y. 1942); Vickers, Inc. v. Fallon, 48 F. Supp. 221 (E.D. Mich. 1943); Standard Oil of New Mexico v. Standard Oil of California, 56 F.2d 973 (10th Cir. 1932); Kotabs v. Kotex Co., 50 F.2d 810 (3d Cir.), *cert. denied*, 284 U.S. 665 (1931); Safeway Stores Inc. v. Dunnel, 172 F.2d 649 (9th Cir. 1949).

44. *E.g.* Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

45. Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938).

46. Twentieth Century Sporting Club, Inc. v. Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct. 1937).

47. Stork Restaurant, Inc. v. Sahati, 166 F.2d 348 (9th Cir. 1948); Triangle Publications v. Rohrlich, 73 F. Supp. 74 (S.D. N.Y. 1947), *modified in part*, 167 F.2d 969 (2d Cir. 1948); Stork Restaurant v. Marcus, 36 F. Supp. 90 (E.D. Pa. 1941).

48. In KVOS v. Associated Press, 299 U.S. 269 (1936), the Supreme Court dismissed a news piracy case because plaintiff had failed to show damages exceeding $3,000.

copyright. To be sure, the proprietor who claims infringement of his copyright must show that his work is original.

> It is not essential that any production to be original or new within the meaning of the law of copyright shall be different from another . . . the true test of originality is whether the production is the result of independent labor or of copying.[49]

Thus the protectible property interest of common law copyright measured by the concept of originality, *viz.*, whether the defendant has independently worked out his compilation, artistic reproduction or advertising scheme is equivalent to the quasi-property interest of unfair competition, spelled out in the *Associated Press* case.[50]

Despite the foregoing similarities, it is doubtful whether the courts will and should permit the law of unfair competition to be used as a complete substitute for copyright protection. It is believed that the law of unfair competition should be employed to protect program content only when common law or statutory copyright cannot furnish protection.

This approach is illustrated by the radio and television service mark cases wherein titles of radio programs,[51] plays[52] and motion pictures[53] which have acquired a secondary meaning are protected by the law of unfair competition because the title of a work is not copyrightable.[54] Another illustration which

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49. Golding v. R.K.O. Pictures, Inc., 82 U.S.P.Q. 136, 140 (Cal. 1949), citing DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879).

50. *Cf.* CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 217 (1945).

51. Time, Inc. v. Barshay, 27 F. Supp. 870 (S.D. N.Y. 1939); Golenpaul v. Rosett, 174 Misc. 114, 18 N.Y.S.2d 889 (Sup. Ct. 1940); Town Hall, Inc. v. Franklin, 174 Misc. 17, 19 N.Y.S.2d 670 (Sup. Ct. 1940); Town Hall, Inc. v. Associated Town Halls, Inc., 44 F. Supp. 315 (D.C. Del. 1941). And see Warner, *Unfair Competition and the Protection of Radio and Television Service Marks*—U. OF PITT. L. REV.—(1950).

52. Frohman v. Payton, 34 Misc. 275, 68 N.Y. Supp. 849 (Sup. Ct. 1901); Klaw v. General Film Co., 154 N.Y. Supp. 988 (Sup. Ct. 1915); National Pictures Theatres v. Foundation Film Corp., 266 Fed. 208 (2d Cir. 1920); Hemingway v. Film Alliance, Inc., 174 Misc. 725, 21 N.Y.S.2d 827 (Sup. Ct. 1940).

53. Warner Bros. v. Majestic Pictures Corp., 70 F.2d 310 (2d Cir. 1934); Amusement Securities Corp. v. Academy Distributing Corp., 162 Misc. 608, 294 N.Y. Supp. 279 (Sup. Ct. 1936), *aff'd*, 250 App. Div. 710, 294 N.Y. Supp. 305 (1st Dep't 1937), *aff'd*, 277 N.Y. 557, 13 N.E.2d 471 (1938).

54. Arnstein v. Porter, 154 F.2d 464, 474 (2d Cir. 1946); Newcomb v. Young, 43 F. Supp. 744 (S.D. N.Y. 1942); Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398 (8th Cir.), *appeal dismissed*, 231 U.S. 348, *cert. denied*, 231 U.S. 468 (1913); Jollie v. Jacques, 13 Fed. Cas. 910 No. 7,437 (C.C.

warrants careful scrutiny is news and sports programs. The courts have employed the misappropriation theory of the *Associated Press* case to enjoin piracy of news[55] and sports[56] programs. This is premised on the theory that the substance of information concerning public events cannot be copyrighted. News is public property "free as the air to common use."[57] In addition, it has been suggested that facts and news are not susceptible of copyright protection since they lack originality and intellectual achievement.[58]

But a substantial and serious question will be tendered the courts as to whether news and sports telecasts are not eligible for protection under common law or statutory copyright. Any news or sports telecast is within the definition of common law copyright, which has been described as an original unpublished intellectual production.[59] This is evidenced by the technical skills, money, organization and effort required to produce a television show.[60] The common law copyright would not become common property and dedicated to the general public since a telecast is a limited publication.[61] Similarly, a news or sports telecast is eligible for registration under the Copyright Code, only if it is preserved on film.[62] Although the Copyright Code prescribes certain formalities before registration can be effected,

S.D.N.Y. 1850); NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 272 (4th ed. 1947).

55. Associated Press v. Sioux Falls Broadcast Ass'n., 2 CCH TRADE REG. REP., ¶ 7052 (1933); Associated Press v. KVOS Inc., 80 F.2d 575 (9th Cir. 1935), *dismissed for want of jurisdiction*, 299 U.S. 269 (1936). See the discussion of the "news" cases, section III, *passim*.

56. Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938); Rudolph Mayer Pictures, Inc. v. Pathé News Inc., 235 App. Div. 774, 255 N.Y. Supp. 1016 (1st Dep't 1932); Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); Southwestern Broadcasting Co. *et al.* v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex. Civ. App. 1947). See the discussion of the "sports" cases, section IV, *passim*.

57. Mr. Justice Brandeis, dissenting in International News Service v. Associated Press, 248 U.S. 215, 248, 250, 262 (1918).

58. WEIL, COPYRIGHT LAW 314 (1917); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY, 123-124, 240 (1944).

59. Ketcham v. New York World's Fair, Inc., 34 F. Supp. 657 (E.D. N.Y. 1939), *aff'd*, 119 F.2d 422 (2d Cir. 1940).

60. Warner, *supra*, note 2.

61. *Ibid. Cf.* Blanc v. Lantz *et al.*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949).

62. COPYRIGHT CODE, 61 STAT. 652 (1947), 17 U.S.C. § 5(m) (Supp. 1949) authorizes the registration of "motion pictures other than photoplays." Section 202.14 of the Regulations of the Copyright Office recites that this class includes "non-dramatic motion pictures, such as newsreels, musical shorts, etc." 37 CODE FED. REGS. § 202.14 (1949).

it is conceivable that publication with notice would suffice for copyright protection.[63] Deposit of the work accompanied by statutory fees with the Register of Copyrights may be effectuated at a later date.[64]

The foregoing discussion suggests that common law or statutory copyright may be employed to protect the content of televised news and sports programs, hence there would be no need to invoke the misappropriation theory of the *Associated Press* case. This approach is particularly desirable in those jurisdictions which refuse to apply and follow the doctrine of the *Associated Press* case.

The suggestion that the law of unfair competition be permitted to complement common law or statutory copyright only when copyright law is inadequate is illustrated by *Triangle Publications Inc.*, et al. v. *The New England Newspaper Publishing Co.*[65] Plaintiff published daily and monthly "race result charts." This chart furnished the following information: the track where the race was run; the condition of the track; the distance; the horses racing; the weights they carried; the jockeys; the post position of the horses; their relative position at the start of the race, at the finish and at four intermediate stages of the race; the distances separating the horses at the six stages of the race; the time of the race; and several staccato sentences commenting in race track parlance on the showing of the horses in that race. Plaintiff secured this information from every licensed track in North America at a cost of more than half a million dollars annually. This information was copyrighted. Defendants published daily newspapers which incidentally carried information about horse-racing; they did not compile race result charts of their own but used plaintiffs'. Defendants first published in narrative form their so-called "Last Performances" of race horses. This information was obtained from plaintiffs' monthly periodicals. Thereafter, the defendants abandoned narrative accounts and published in tabular form the "Past Performances" of horses. These tabular past performances were similar to plaintiffs'.

63. 35 STAT. 1077, 1078 (1909), 17 U.S.C. §§ 9, 10 and 12 as amended 61 STAT. 652 (1947), 17 U.S.C. §§ 10, 11 and 13 (Supp. 1949).

64. *Ibid.* and *cf.* Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939).

65. 46 F. Supp. 198, 54 U.S.P.Q. 198 (D.C. Mass. 1942).

The Court held that the defendants' activities in copying the "symbols, notations and cryptic expressions" of plaintiffs' charts constituted an infringement of plaintiffs' copyright. The infringements went beyond a reasonable and fair use of another's compilation.

The more important question was whether defendants infringed plaintiffs' copyright when they used the indices and charts in plaintiffs' monthly periodicals solely to find a clue as to where and when a horse raced, and then used that clue for the purpose of locating and copying from defendants' own material on race results. This, said the court,

> is nothing which properly can be called copying. . . . None of plaintiffs' work is reproduced or cribbed. To be sure, defendants, by using plaintiffs' indices and charts, get the benefit of their competitors' labor and shorten their own. Yet this, as Dun's case[66] shows, is not infringement, and plaintiffs' complaint, if well founded, sounds in tort on a count for unfair competition.[67]

This decision illustrates the use which may be made of the law of unfair competition to complement the deficiencies of copyright law. Unfortunately, the court was precluded from applying the misappropriation theory of the *Associated Press* case because under the teachings of *Erie Railroad Company* v. *Tompkins*,[68] the local law of Massachusetts was controlling.[69] Under Massachusetts law (which has been changed by legislative enactment[70]) it was not unfair competition to use information assembled by a competitor.[71]

The suggestion that the law of unfair competition be applicable to protect word or program content only if copyright

66. Dun v. Lumbermen's Credit Ass'n., 209 U.S. 20 (1906).

67. Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198, 203 (D.C. Mass. 1942).

68. 304 U.S. 64 (1938).

69. Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198, 203 (D.C. Mass. 1942); California Wine & Liquor Corp. v. William Zakov & Sons, 297 Mass, 373, 8 N.E.2d 812 (1937).

70. Mass. Gen. Laws, c. 110, § 7 A, approved May 2, 1947 and discussed in Food Fair Stores, Inc. v. Food Fair, Inc., 79 U.S.P.Q. 114 (D.C. Mass. 1948).

71. The final decree in Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198 (D.C. Mass. 1942) enjoined the defendant from using plaintiff's books for the limited purpose of getting clues to defendant's own material. This was because of defendant's prior record of infringement.

law does not furnish adequate protection is premised on the following philosophic bases:

For the most part word or program content is susceptible of common law and statutory protection. The courts do not impose a stringent test of originality for common law or statutory copyright. Originality is present whether the work involves old or new material or both, as long as it is the result of independent labor.[72] This means that the great bulk of material used on radio and television can invoke the benefits of copyright law and there would be no need to resort to the law of unfair competition since the former furnishes adequate protection. Thus, in the "advertising" cases, discussed *passim*,[73] litigants petition the courts via unfair competition to protect advertising content. The courts refuse to substitute the misappropriation theory of the *Associated Press* case for copyright law. The courts have been extremely liberal in finding intellectual, literary and artistic merit in advertising which warrants copyright protection.[74] To be sure, not all of the subject matter which involves intellectual effort is susceptible of copyright protection. For example, phonograph records available for purchase by the general public are not eligible for common law or statutory copyright.[75] The law of unfair competition cannot be employed to protect the performances of musicians and singers preserved on phonograph records, because to do so would result in the recognition of moral rights *(le droit moral)* which is alien to our jurisprudence.[76] If the interpretive rights of

72. Golding v. R.K.O. Pictures Inc., 82 U.S.P.Q. 136 (Cal. 1949); Stephens v. Howell Sales Co., 16 F.2d 805 (S.D. N.Y. 1926); West Publishing Co. v. Edward Thompson Co., 169 Fed. 833 (E.D. N.Y. 1909), *modified*, 176 Fed. 833 (2d Cir. 1910); Boucicault v. Fox, 3 Fed. Cas. 977, No. 1,691 (C.C. S.D. N.Y. 1862).

73. See section VIII, *infra*.

74. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903): "A picture is none the less a picture and none the less a subject of copyright that is used for an advertisement. . . . It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." For an excellent resumé of the law relating to copyright of advertising material, see Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir.), *cert. denied*, 287 U.S. 666 (1932).

75. R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1941). *Contra:* Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (1937). The "phonograph record" cases are discussed in detail, Section V, *passim*.

76. *Ibid.* The doctrine of moral right was repudiated in Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

performing artists are to be protected, their recognition can be and should be effectuated only by legislative remedies.[77]

Courts are loath to substitute the misappropriation theory of the *Associated Press* case for copyright law because they are reluctant to establish monopolies in words, phrases and ideas and thus remove them from public circulation. Mr. Justice Brandeis aptly phrased this philosophy in his persuasive dissenting opinion in the *Associated Press* case:

> But the fact that a product of the mind has cost its producer money and labor and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes.[78]

Both common law and statutory copyright are monopolistic privileges which preclude others from reproducing the copyrighted work. Both the common law and the legislature have prescribed the limitations and conditions under which this monopoly may operate. The law of unfair competition when applied to intellectual property lacks the background and experience of common law copyright. In addition, there would be no conditions and restrictions on the monopoly established by the misappropriation theory. Finally, the extension of the law of unfair competition to such intellectual property as phonograph records cannot be effectuated by the courts. The substantial and conflicting interests of performers, record manufacturers and users can be resolved only by the legislature.

Thus, the public policy which abhors monopolies aided by the pragmatic experience of the courts precludes the wholesale

77. *Ibid.*
78. International News Service v. Associated Press, 248 U.S. 215, 248 (1918).

substitution of common law and statutory copyright by the law of unfair competition. It is submitted that the law of unfair competition should be invoked to protect intellectual property when the latter is outside the protective scope of common law and statutory copyright. Thus unfair competition complements statutory copyright; it cannot and should not be employed where the copyright law provides a remedy.

NEWS PROGRAMS

The Press and Radio

The newspaper industry has played a prominent role in the development of radio.[79] The early history of broadcasting discloses newspaper-ownership of stations, *viz.*, The St. Louis Post-Dispatch, The Chicago Daily News, the Detroit News, *etc.* Newspapers at the outset considered broadcast stations as an extension of their normal journalistic functions. Thus, the Detroit News advised its readers that it would operate a station to further reliable methods of communication as a natural step in the advancement of journalism and to increase the service of the newspaper to the public.[80]

As long as broadcasting confined itself to entertainment and did not directly compete with the press, the newspaper industry promoted public acceptance of the radio industry. But the advent and growth of the sponsored program in the middle and late twenties disputed this amicable relationship. Firstly, sponsored programs curtailed the newspaper industry's advertising revenues.[81] More important, the commercialization of

79. CASEY, THE HISTORICAL RELATIONSHIP OF THE PRESS AND RADIO, excerpts of his testimony published by the Newspaper-Radio Committee in FREEDOM OF THE PRESS, 6 ff. (1942); Streibert and Lewis, *Radio as a News Medium*, 213 ANNALS 54 (1941); Whittemore, *Radio's Fight for News*, 81 NEW REPUBLIC 354 (1935); Keating, *Pirates of the Air*, 169 HARPERS 463 (1934); Pew, *Free as the Air*, 3 TODAY 8 (1935); *Dill, Radio and the Press: A Contrary View*, 177 ANNALS 170 (1935); Shapiro, *The Press, the Radio and the Law*, 6 AIR L. REV. 128 (1935).

80. CASEY, *op. cit. supra* note 79, at 13-14.

81. Streibert and Lewis, *supra* note 79, at 58: "The hostility between the press and radio which has existed in the past was caused probably much more by advertising competition than by a competitive service rendered to the public. As expenditures for advertising in newspapers declined sharply from 1929, radio advertising rose steadily. While newspaper advertising expenditures dropped from a high of $800,000,000 in 1929 to between $450,000,000 and $500,000,000 in the period of 1932-1934, radio doubled its 1929 volume of $40,000,000. It was apparent, however, by 1939, that radio had not necessarily taken all its volume from newspapers or any other single

news broadcasts competed directly with the primary function of newspapers—the furnishing of news.

> Now of course, our history shows minority disagreements in connection with radio-newspaper relations. You will find that the general manager of the Associated Press, as early as 1922, was directed to caution his members that broadcasting by wireless of news of the Associated Press, which includes both news delivered by the corporation to its members and news gathered by the daily newspaper itself, was an infraction of the by-laws and that warning was renewed in 1922.[82]

From 1922 to the early nineteen-thirties the newspaper industry viewed with increasing alarm the growth and development of the radio industry and the practices of stations which pirated news. Thus the Pennsylvania Publishers Association condemned in strong terms the piracy of news broadcasts:

> Some broadcasting stations are already calling themselves newspapers of the air, filching local and press association news from the newspapers without either consent or credit and selling time to advertisers on the strength of broadcasting the news that they purloined.[83]

In 1932 the depression, the rising competition for advertising, the pirating of news and other factors prompted the American Newspaper Publishers' Association to organize the Publishers' National Radio Committee to study broadcasting encroachments on the newspaper field. The latter recommended the deletion of radio program listings as news features from the daily newspapers. In addition, the Associated Press agreed not to furnish its news to radio stations.[84] Before these proposals became effective, NBC and CBS appealed to the Publishers' National Radio Committee and the Press-Radio Plan was born in 1933.[85] During 1933 the Associated Press instituted several suits against radio stations to enjoin the piracy of news stories which appeared in local member papers.[86] Although

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medium. In fact, the gross radio-time sales of $170,000,000 in 1939 fell far short of making up the difference between the $525,000,000 newspaper volume of 1939 and the previous peak in 1929 of $800,000,000."

82. CASEY, *op. cit. supra* note 79, at 16.

83. *Id.* at 18.

84. Keating, *supra* note 79; Shapiro, *supra* note 79.

85. In September, 1933, C.B.S. organized its own news-gathering agency. It established offices in the principal cities of the world and acquired access to several of the smaller press services. N.B.C. developed a similar service. See Streibert and Lewis, *supra* note 79, at 54.

86. Associated Press v. Sioux Falls Broadcast Ass'n., 2 CCH TRADE REG.

injunctions were issued in these test cases, smaller stations continued to broadcast newspaper reports, being careful to change the wording of the news scripts in order that no evidence of direct appropriation be found. Despite this litigation, the publishers realized that the public demanded news broadcasts and that such programs would be sponsored. The broadcasting industry was likewise aware of the need for news programs either from independent sources or by agreement with the publishers.[87]

The foregoing prompted the so-called Press-Radio Plan of 1933. This plan approved by the networks and certain of the affiliated network and independent stations limited news broadcasts to only two periods during the day under certain stipulated conditions. The news-gathering agencies established a bureau which furnished news bulletins to the stations. These bulletins were supplied to the stations as sustaining programs; they were restricted in their wordage and could only be broadcast several hours after newspapers containing the same news had been distributed.[88]

The Press-Radio Plan with minor modifications was in effect for several years. It was subsequently abandoned when the news services, recognizing that the broadcast industry would be a lucrative source of revenue, began furnishing news to stations.[89] In March, 1939, a further breakdown of the remaining restrictions occurred when the Associated Press decided to make its news service available to the networks for non-commercial and non-sponsored purposes and to provide its news to stations for commercial sponsorship by arrangement with member newspapers of the Associated Press. In 1940, the Asso-

REP. 1, ¶ 7052 (1933); Associated Press v. KVOS, 9 F. Supp. 279 (W.D. Wash. 1934), *reversed*, 80 F.2d 575 (9th Cir. 1935), *dismissed for want of jurisdiction*, 299 U.S. 269 (1936). These cases are discussed in detail in the next section.

87. See Whittemore, *supra* note 79; CASEY, *op. cit. supra* note 79, at 18.

88. The Press-Radio plan is discussed in detail by Shapiro, *supra* note 79, at 134. Trans-Radio Press was one of the agencies organized to cure the alleged defects in the Press-Radio plan. In November, 1934, Trans-Radio secured a major outlet in New York City when WOR started Trans-Radio news broadcasts. See Streibert & Lewis, *supra* note 79, at 54.

89. Streibert and Lewis, *supra* note 79, at 55: "In 1935, the International News Service and the United Press Association resumed service to networks and actively solicited the business of individual stations. Shortly thereafter most of the network affiliated stations and many of the non-network stations became subscribers to one of the three services available."

ciated Press began permitting sponsorship of its news on the networks; the only restriction then remaining was that exercised by member stations with respect to individual stations.[90] Today, Press Association, the subsidiary of Associated Press which services radio stations, is available to all stations on a commercial basis.

Protection of the Content of News Programs

In the *Associated Press* case the Supreme Court protected the word content of news dispatches by enjoining International News from copying the bulletins of the Associated Press. The defendant was precluded from using pirated news stories for as long a time as they had commercial value, *viz.*, for twenty-four hours after their publication.[91]

The doctrine of the *Associated Press* case has been applied to prevent the appropriation of news broadcasts by radio stations. For example, a federal court enjoined a radio station from appropriating news from complainant's members until after the expiration of twenty-four hours, the time required to complete distribution of newspapers to subscribers. The court held that complainant and its members have "what a court of equity will treat as a property right in news gathered and disseminated by complainant and also so-called local news gathered by members of complainant and which members of complainant are obligated to transmit to complainant."[92] This was a sufficient property interest to restrain unfair competitive practices.

The *KVOS* case reached the same conclusion.

> KVOS' 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 both from the advertising service and from the subscriptions of its readers. The papers are unconscionably injured in performing a public function as well as in conducting a legitimate business.[93]

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90. *Id.* at 55.
91. International News Service v. Associated Press, 248 U.S. 215 (1918).
92. Associated Press v. Sioux Falls Broadcast Ass'n., 2 CCH TRADE REG. REP. ¶ 7052 (1933).
93. Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 1935), *reversing*, 9 F. Supp. 279 (W.D. Wash. 1934), noted in 44 YALE L. J. 877, 879 (1935);

The Supreme Court dismissed the complaint in the *KVOS* case because plaintiff had failed to establish that the jurisdictional amount of $3,000 was in controversy.[94]

An Alaskan case which warrants discussion is *Smith* v. *Suratt*.[95] Pathè News Service had financed an Arctic expedition. One of the defendants, International News Service, announced that it would follow the expedition, take motion pictures at various places and sell them before Pathè News could develop and place its pictures on the market. The court refused to enjoin the defendant, claiming that the *Associated Press* case was inapplicable. This decision has been characterized as "poorly presented, due to haste and it proved puzzling to the court, especially in its procedural aspect."[96]

Despite *Smith* v. *Suratt*, the federal court will enjoin the misappropriation of news by broadcast stations. The next question tendered is whether a radio station may invoke the *Associated Press* case to enjoin misappropriation of its news broadcasts by newspapers. This question has not as yet been presented to any American court; it was tendered in a German decision. Plaintiff, a broadcast station, sought to enjoin a newspaper from appropriating its broadcast report of the landing of the dirigible, Graf Zeppelin. Immediately after the broadcast report, defendant published an extra featuring this news; the extra was gratuitiously distributed and posted. The

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2 U. OF CHI. L. REV. 656 (1935); 19 MARQ. L. REV. 204 (1935); 15 B. U. L. REV. 864 (1935); 35 COL. L. REV. 304 (1935); 23 GEO. L. J. 890 (1935); 30 ILL. L. REV. 113 (1935); 19 MINN. L. REV. 822 (1935). The District Court (9 F. Supp. 279) refused to enjoin the station on the theory that the press and broadcast station were not competitors. "On the question of unfair competition, 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. In that case a majority of the court held there was unfair competition between plaintiff and defendant, both of whom were news agencies engaged for profit in gathering and distributing news reports to their respective contract members. In the case at bar, the defendant is not in any way pirating the news reports furnished by the complainant for the purpose of selling them or distributing them for profit to radio news broadcasters or other news publishers. . . . 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 newspaper competitors for business profits in the dissemination of news." The news program involved was a sustaining feature of the station's service. The court referred to the Sioux Falls decision, but refused to follow its conclusion.

94. Associated Press v. KVOS, 299 U.S. 269 (1936).

95. 7 Alaska 416 (4th Div. 1926).

96. CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 736 (1945).

Supreme Court of Germany affirmed two lower courts and refused to enjoin defendant from publishing news received from plaintiff's broadcast station.[97]

The opinion was primarily concerned with the question of whether defendant's conduct constituted unfair competition within the meaning of the German statute on the subject. The latter provided: "Whoever in commercial intercourse for purposes of commerce engages in dealings which offend against honest practice may be sued for injunction and damage." The court considered defendant's contention that one of the necessary elements of an offense under the German statute *i.e.*, the existence of competition between the parties was lacking, since radio stations and newspapers were not in competition with each other. The court rejected this contention because the litigants under the facts of the case were "possible" competitors.

Defendant's second contention was that its conduct was not an offense against honest practice. This contention was upheld:

> Here is involved merely the utilization of a single news report of factual content, with, it is true, an unusual claim on public interest, which by its nature represents no value of certain duration. In its utilization the defendant has made use only of the rapidity of radio. The news report as such (that is, its contents) was not a production of the broadcasting company, nor a creation of its individual labor; a few hours later, following the widest dissemination through newspapers and extras, it was the common property of the entire German people.

The refusal of the court to enjoin the piracy of a broadcast report by a newspaper was attributable to the German Copyright Statute which did not protect news reports and permitted their free utilization by third parties.[98]

97. Judgment of the Reichsgericht, German Supreme Court, April 29, 1930 (II 355/1929), reported in 3 Archiv. 425, and discussed in detail by Caldwell, *Piracy of Broadcast Programs*, 30 COL. L. REV. 1087, 1096 (1930): "In another case which arose in Germany, the broadcasting station at Berlin broadcast at noon the market quotations of the central market at Berlin. A country evening newspaper which, unless it obtained the quotations at its own expense by telephone, would be limited to the previous day's quotations, received them from the broadcasting station, publishd them the same day, and thus anticipated competing newspapers. The broadcasting company brought suit against the newspaper publisher, but the case did not go to judgment, because the defendant made a satisfactory settlement with the plaintiff."

98. Caldwell, *Piracy of Broadcast Programs*, 8 COL. L. REV. 1087, 1107 (1930).

It is believed that the *Associated Press* and related cases would enjoin a newspaper's appropriation of a broadcast report.

Finally, a broadcast station could enjoin the piracy of its news programs by another broadcast station.[99] Such piracy would be considered as unfair competition within the prohibitions spelled out by the Supreme Court in the *Associated Press* case.

The primary limitation imposed on the courts in preventing the misappropriation of news programs is that the substance of information concerning public events or news is public property. The latter is as free as the air, available for common use.[100] In *International News Service* v. *Associated Press,* defendant stressed the argument that there could be no misappropriation of news matters which were *publici juris.* The Supreme Court disposed of this contention by finding a quasi-property right in the "organization and . . . (the) expenditure of money, skill and effort required in the acquisition and distribution of news."[101]

It is believed that television news programs require an equal if not a greater organization, monies, skills and effort than radio programs. Those courts which apply the misappropriation theory of the *Associated Press* case will have no difficulty in employing the law of unfair competition to protect television news programs. It is likewise possible that those courts which have been reluctant to apply the doctrines of the *Associated Press* case, may employ its teachings if only for the reason that television news programs require the expenditure of substantial monies, skill and effort.[102]

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99. In Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938), the court enjoined an unauthorized broadcast of a baseball game. Plaintiffs had engaged the facilities of two stations whereby the latter had the exclusive right to broadcast a play-by-play description of the game. The defendant independently broadcast its own play-by-play description of the game by the use of paid observers from points outside the baseball park. The court held that plaintiff "has a property right in such news, and the right to control the use thereof for a reasonable time following the games"; 20th Century Sporting Club v. Trans-Radio Press Service, Inc., 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct. 1937); Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941).

100. International News Service v. Associated Press, 248 U.S. 215, 238 (1918); WEIL, COPYRIGHT LAW 314 (1917); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 123-124 (1944).

101. International News Service v. Associated Press, 248 U.S. 215, 238 (1918).

102. WARNER, RADIO & TELEVISION LAW §§ 211a-211b (1949).

SPORTS PROGRAMS

The law of unfair competition has been employed to protect the content of sports programs. This is illustrated by the *Pittsburgh Athletic Company* and related cases.[103] Plaintiffs had engaged the facilities of stations KDKA and WWSW whereby the latter had the exclusive right to broadcast the play-by-play description of the baseball games of the Pittsburgh Pirates. The defendant, station KQV, independently broadcast its own play-by-play description of the game by the use of paid observers from points outside the ball park as a sustaining feature of its program operation. The court enjoined the defendant from broadcasting play-by-play descriptions of the game:

> The plaintiffs and the defendant are using baseball news as material for profit. The Athletic Company has, at great expense, acquired and maintains a baseball park, pays the players who participate in the game and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcast rights to companies which value them as affording advertising mediums for their merchandise. This right the defendant interferes with when it uses the broadcasting facilities for giving out the identical news obtained by its paid observers stationed at points outside Forbes Field for the purpose of securing information which it cannot otherwise acquire. This, in our judgment amounts to unfair competition and a violation of the property rights of the plaintiffs. 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 period of time.[104]

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103. Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938), noted in 9 AIR L. REV. 402 (1938); 27 GEO. L. J. 381 (1939); 37 MICH. L. REV. 988 (1939); 23 MINN. L. REV. 395 (1939). Rudolph Mayer Pictures, Inc. v. Pathé News, Inc., 235 App. Div. 774, 255 N.Y. Supp. 1016 (1st Dep't 1932); *cf.* Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, 97 F.2d 223 (7th Cir. 1938); Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); Southwestern Broadcasting Co. *et al.* v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex. Civ. App. 1947). *Contra:* National Exhibition Co. v. Teleflash, 24 F. Supp. 488 (S.D. N.Y. 1936); Victoria Park Racing and Recreation Grounds Co. v. Taylor, 37 N.S.W. St. R. 322 (1936), noted in 9 AIR L. REV. 217 (1938); 51 HARV. L. REV. 755 (1938); 5 U. OF CHI. L. REV. 320 (1938). Sports & Gen. Press Agency Co. v. "Our Dogs" Pub. Co., [1917] 2 K.B. 125.

104. Pittsburgh Athletic Club. v. KQV Broadcasting Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938).

In *Twentieth Century Sporting, Inc.* v. *Transradio Press Service,* NBC had acquired the sole and exclusive rights to broadcast a round-by-round ringside description of a prize fight. Defendant notified its customers it would furnish a "running account of the fight while it is in progress" by obtaining tips "from the ringside broadcast as to the facts of the progress of the fight," and by authenticating them by "independent investigation by news-gathering representatives of defendants located at vantage points outside the stadium but within view of the bout." The New York Supreme Court enjoined the defendant because "any rebroadcasting of the plaintiff's account of the exhibition, whether by paraphrasing or by adaption of its text would fall within the prohibitions laid down by the United States Supreme Court" in the *Associated Press* case.[105] If the defendant picks up the plaintiff's description of a baseball game and rebroadcasts it to his customers by wire, plaintiff may enjoin such conduct not only on the grounds of unfair competition, but also because defendant's activities contravene the Communication Act of 1934.[106]

In the recent television litigation resulting from the Louis-Walcott fight,[107] the lower courts of New York, Pennsylvania and Massachusetts enjoined the retelecasts of the fight. None of the courts furnished written opinions explaining the bases or reasons for the issuance of injunctions. An examination of the complaints in all four cases indicates that one of the grounds for relief was unfair competition. The proceedings in the Pennsylvania suit which were published suggest that the court furnish relief because defendants were engaged in unfair competition with plaintiffs.[108]

The significance of the Louis-Walcott litigation is this: that

105. Twentieth Century Sporting Club v. Transradio Press Service, 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct. 1937).

106. Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941). Section 325(a) of the Communications Act of 1934, discussed in WARNER, RADIO & TELEVISION LAW § 32d (1949), prohibits any broadcasting station from rebroadcasting the programs of another broadcasting station "without the express authority of the originating station." 48 STAT. 1091 (1934), 47 U.S.C. § 325(a) (1946).

107. This litigation is discussed in detail in section I, note 10, *supra* and WARNER, RADIO AND TELEVISION LAW § 210a (1949).

108. PROCEEDINGS IN PHILADELPHIA ACTIONS IN C.P. No. 1 JUNE TERM, 1948, TO ENJOIN COMMERCIAL USES OF THE TELEVISION BROADCAST OF THE LOUIS-WALCOTT FIGHT," at 48 ff.

the law of unfair competition may have been employed by at least one court to protect the content of television programs.

One additional phase of this problem warrants further discussion. We have stated elsewhere that the substance of information concerning public events is common property, available to all.[109] What constitutes news is not susceptible of definition, although Mr. Justice Brandeis has referred to it as "a report of recent occurrences."[110]

The issue thus tendered is whether a sports event is news in the sense that it is common property which may be freely utilized by third persons. In several cases the courts have suggested that a distinction be drawn between a play-by-play description and the results of an athletic event. A running account of a sports event would not be news, hence there is an exclusive property right which cannot be appropriated.[111] The results of a sports event, as well as the pictures and names of those attending are news, and hence are public property.[112]

> It has been suggested[113] that the solution to the question of whether a sports event shall be considered news may be found in the fusing of two concepts: the idea of unfair competition and a right of privacy in the enjoyment of property and business interests.[114] In other words, if the

109. WEIL, COPYRIGHT LAW 314 (1917); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 123-124 (1944); WARNER, RADIO & TELEVISION LAW § 212 (1949).

110. International News Service v. Associated Press, 248 U.S. 215 (1918); Sweenek v. Pathé News, Inc., 16 F. Supp. 746, 747 (E.D. N.Y. 1936).

111. Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 858 (1948): "*In Rudolph Mayer Pictures, Inc. v. Pathé News, Inc.*, [235 App. Div. 774, 255 N.Y. Supp. 1016 (1st Dep't 1932)], a promoter of a prize fight and a purchaser of the exclusive motion picture rights to the fight obtained an injunction against the sale and exhibition of an unauthorized newsreel. The defendant alleged, in an affidavit opposing the motion for a temporary injunction, that it did not record the entire event but 'only enough to convey to the public, by an actual reproduction of the events, the news that the fight took place and that it ended in a draw.' The plaintiffs, on the other hand, insisted that the court must distinguish between 'public events and private events affected with a public interest.' There were no written opinions, but the fact that the court granted the injunction over defendant's contention that its pictures were news indicates that at least one court may have accepted the view that a running account of the event is not news even though the result of the event may be." [Footnotes omitted]

112. *Cf.* Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919); See also WARNER, RADIO & TELEVISION LAW § 223a (1949).

113. Note, *Unfair Competition and Exclusive Broadcasts of Sporting Events*, 48 YALE L. J. 288 (1938).

114. *Id.* at 299; *cf.* Hickman v. Maisey, [1900] 1 Q.B. 752.

plaintiff is making a profit out of the event itself as distinguished from an account of it, and if the event takes place on private property,[115] the privacy of which must be invaded by defendant in order to obtain his account of the event, the event is not news.[116]

Still another approach is to make a case by case analysis of the nature of each event with reference only to its public importance, rather than to adapt an inelastic definition of what is news. This appears what the courts did in at least two cases when they permitted photographs to be taken of events of great public importance; one a traditional wine growers festival in Switzerland, held on private property; and the other a polar expedition, traveling on public property.[117]

This much is clear from the American cases:

> The right to broadcast a description of the action of an athletic contest is a valuable right. It should be protected by injunction. . . . With the coming into general use of television, it may be that more revenue might be realized from this right than from admission fees.[118]

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115. The telecast of a parade on the public streets would be *publici juris*, open to all. But an athletic event in a restricted enclosure such as a stadium, football field, ball-park, theater, *etc.*, is not *publici juris* and the promoter of such an event may have an exclusive property right in the play-by-play description of the contest or show. In the case of a prize fight in an enclosed area, the promoter incurs substantial expenditures and efforts in arranging the fight. He also charges admission fees for the members of the public to view the fight. Since the promoter is not a common carrier he may exclude members of the press. *Cf.* Woolcott v. Schubert, 217 N.Y. 212, 111 N.E. 829 (1916); Sports & Gen. Press Agency Co. v. "Our Dogs" Pub. Co., [1916] 2 K.B. 880, *aff'd*, [1917] 2 K.B. 125.

116. Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 858-9 (1948).

117. *Ibid.*

118. Southwestern Broadcasting Co. *et al.* v. Oil Center Broadcasting Co., 210 S.W.2d 230, 232-3 (Tex. Civ. App. 1947). *Contra:* In Sports & Gen. Press Agency Co. v. "Our Dogs" Pub. Co., [1916] 2 K.B. 880, *aff'd*, [1917] 2 K.B. 125, plaintiff, assignee of the right to photograph a dog show, was refused injunction against defendant who had also taken pictures of the show and was publishing them. The court stated that the proprietors of the show could exclude people or permit them to enter on condition that they agree not to take photographs of the show. No such condition was imposed on the public. The court intimated that if the defendant photographed the show from a position outside the physical enclosure without interfering with the physical property of the plaintiff, the latter could not enjoin the defendant. In Victoria Park Racing & Recreation Grounds Co. v. Taylor, 37 N.S.W. St. R. 322 (1936), plaintiff owned a race track; he admitted spectators only on condition that they did not disclose the results during the day of the races. Plaintiff refused to sell broadcasting rights. Defendants, one of whom was a broadcasting company, built a platform on adjoining land and from it broadcast, simultaneously with the races, a description of them with the results. Plaintiff's suit for injunction was dismissed on the grounds that he had no property right in the description of

The law of unfair competition has been and will be employed to protect a play-by-play description of an athletic event. However, the results of such an event, because it is news, is public property.[119]

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the race and that the defendant's activities did not constitute a nuisance or a restrainable tort. The American courts which have considered this problem have refused to follow the British courts.

119. See the German case, Judgment of the Kammergericht, Court of Appeals (Berlin) June 7, 1928 (10 U. 4658/28) reported in (1928) 1 Archiv. 655 and reported by Caldwell, *Piracy of Broadcast Programs*, 30 COL. L. REV. 1087, 1103-1105 (1930), wherein a radio station enjoined the defendant from reproducing on phonograph records the last round of a boxing bout as broadcast by plaintiff and its employees. The court furnished relief on the ground of unfair competition. This decision is discussed in detail in WARNER, RADIO & TELEVISION LAW § 215 n.1 (1949).