

RIGHTS IN NEW MEDIA

THEODORE R. KUPFERMAN*

The copyright law in the United States¹ has not kept pace with technological developments in the field of literary property. Methods of evidencing or reproducing the writings of an author² now include, among others, radio, television,³ several speeds of recordings,⁴ transcriptions, microfilm, and, most recently, magnetic tape to be used in place of film in a new era of electronic photography.⁵

The twentieth century has wrought vast changes in the culture of the community and not the least has occurred in the fields of communication and entertainment, where, necessarily, the "writings" of an author are a staple.

It was in 1912 that the last registration categories were added to the Copyright Law, for "Motion-picture photoplays" and "Motion pictures other than photoplays."⁶ While the Act makes it clear that these category specifications are not exclusive,⁷ the fact is that recognition of scientific advances is slow in coming, with the resultant uncertainty as to their treatment under the law.

This paper will merely point up some of these problems.

*B.S.S. 1940, College of the City of New York; LL.B. 1943, Columbia University. Editor, *Columbia Law Review*, 1942-1943. General Attorney and Vice President of Cinerama Productions Corp.; formerly a member of legal departments of National Broadcasting Company and Warner Brother Pictures, Inc.; formerly Law Secretary to the Presiding Justice of the Appellate Division, First Department of the Supreme Court of New York; former Chairman, Copyright Committee, Federal Bar Association of New York, New Jersey and Connecticut; Secretary, The Copyright Society of the U.S.A. Author of *Copyright—Co-owners*, 19 *ST. JOHN'S L. REV.* 95 (1945), and Note, *Renewal of Copyright*, 44 *COL. L. REV.* 712 (1944); Arranger and Editor, 1953 *COPYRIGHT PROBLEMS ANALYZED* (Commerce Clearing House, 1953).

¹The Copyright Act now in force stems from the Act of March 4, 1909, effective July 1, 1909, 35 *STAT.* 1075-1088. It was codified without substantive change by the Act of July 30, 1947, 61 *STAT.* 652. There have been amendments from time to time. See Title 17, U. S. C. (Supp. 1952).

²The constitutional basis for copyright protection is in the following provision: "The Congress shall have power . . . to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U. S. CONST. Art. I, §8, cl. 8. On the history of this constitutional provision, see HAMILTON, *PATENTS AND FREE ENTERPRISE* 11-27 (TNEC Monograph 31, 1941). The statutory enactment pursuant to the Constitution is: "The works for which copyright may be secured under this title shall include all the writings of an author." 17 U. S. C. §4 (Supp. 1952).

³See generally, HARRY P. WARNER, *RADIO AND TELEVISION RIGHTS* (1953); Note, *Legal Aspects of Television*, 15 *A. L. R.* 2d 785 (1951); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 *COL. L. REV.* 848 (1948).

⁴*Granz v. Harris*, 198 F. 2d 585 (2d Cir. 1952).

⁵On Dec. 1, 1953, Radio Corporation of America demonstrated at its Princeton, N. J., laboratories magnetic tape reproductions on a television screen, both in black and white and color, of live action in the same manner that ordinary photographic film might have reproduced the live action. *Variety*, Dec. 2, 1953, p. 1, col. 1.

⁶Act of Aug. 24, 1912, 37 *STAT.* 488, added categories (l) and (m) to Section 5, the registration classification section of the Act.

⁷"The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title. . . ." 17 U. S. C. §5 (Supp. 1952).

RECORDING RIGHTS

In 1908, the Supreme Court decided⁸ that perforated piano rolls and phonograph records were not "copies" of musical compositions and, therefore, not an infringement of the rights in the compositions, but merely part of the mechanism for their reproduction in sound. The Act of 1909 then made special provision for mechanical reproductions of music in the so-called 2 cent compulsory license provision of Section 1(e).⁹

Over the years, the problem has arisen as to what is a mechanical reproduction under Section 1(e).

The integration of a song in a motion picture sound track is called "synchronization" and the practice has been to consider this a separate right and to pay for this privilege without regard to Section 1(e). But there is confusion as to whether "synchronization" is not really "recording." A United States District Court judge decided that synchronization was not mechanical reproduction,¹⁰ yet, in other cases, the same judge used the language ". . . so-called synchronization (recording) rights . . ."¹¹ and "A member of ASCAP . . . licensed a motion picture producer to record, *i.e.*, to synchronize his musical compositions on the film. . ."¹²

This seems to imply that the two words recording and synchronization are interchangeable in meaning. This confusion¹³ has been continued on a higher plane in the decision of the Court of Appeals for the Second Circuit in *Foreign and Domestic Music Corp. v. Licht*.¹⁴ It indicated that a sound track is an infringement of Section 1(e), but that it is only the producer and/or the seller of the motion picture who is an infringer. The purchaser or the exhibitor of the motion picture is not an infringer and can exhibit the motion picture, which includes the performance of the song, subject only to the right of public performance.¹⁵

⁸ *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U. S. 1 (1908). See HERBERT A. HOWELL, *THE COPYRIGHT LAW* 148 (3d ed. 1952).

⁹ 17 U. S. C. §1(e) (Supp. 1952).

¹⁰ *Jerome v. Twentieth Century-Fox Film Corporation*, 67 F. Supp. 736 (S. D. N. Y. 1946) (Judge Liebman), *aff'd per curiam*, 165 F. 2d 785 (2d Cir. 1948).

¹¹ *Encore Music Publications v. London Film Productions*, 89 U. S. P. Q. 501, 502 (S. D. N. Y. 1951). The statement was made in a short opinion on a procedural motion (which was granted) to require separate counts against each of the defendants who included the producer, distributor, and exhibitors. At another place in the opinion, it is stated "[parts of plaintiff's musical composition were] reproduced on the sound track . . . and [that defendant] infringed the plaintiff's copyright (recording rights) by the production of the motion picture." *Id.* at 502.

¹² *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F. Supp. 888, 892 (S. D. N. Y. 1948). In this case, which was an antitrust suit against ASCAP, the performing rights society, it was held that it was a violation of the antitrust laws for the society to force a theatre exhibitor to acquire a public performing license for music in a motion picture where the "synchronization" rights were already cleared for the integration of the music in the motion picture. For the antitrust aspects of this case, see 17 U. OF CHI. L. REV. 183 (1949) and see the same case on rehearing, 80 F. Supp. 900 (S. D. N. Y. 1948). For a discussion of ASCAP's antitrust problems and the subsequent history of this case, see Finkelstein, *Public Performance Rights in Music and Performance Right Societies*, 7 COPYRIGHT PROBLEMS ANALYZED 69, 83 (1952).

¹³ See discussion in Burton, *Business Practices in the Copyright Field*, 7 COPYRIGHT PROBLEMS ANALYZED 87, 113-114 (1952).

¹⁴ 196 F. 2d 627 (2d Cir. 1952).

¹⁵ As the exhibitor-defendant held a public performing license, the decision was for the defendant.

One authority has stated that this case clearly establishes the Section 1(e) derivation of film synchronization in the 2 cent compulsory license sense.¹⁶ But while the court there said:¹⁷

. . . on whose "sound track" the four songs had been recorded—"synchronized" . . . and again:¹⁸

. . . to impose upon the "sound track" of a film those marks which will reproduce the words and music of a copyrighted song is to infringe the copyright; it falls exactly within §1(e). . . .

the question of what rights derive from Section 1(e) status was left obscured.

The court went on to say in conjunction with its Section 1(e) observations:¹⁹

. . . and it must be remembered that copyright, as its name implies, means making a copy of the protected "work. . . ."

without using the word "copy" in the *White-Smith* case (*supra* note 8) sense, but rather, in avoidance of that question, to show that an exhibitor of the motion picture did not copy by mere exhibition.

It may very well be, in accordance with the now established custom, that the 2 cent compulsory licensing provision of Section 1(e) applies only, as the section states, to "the parts of instruments serving to reproduce mechanically the musical work," as such mechanical reproduction was known in 1909,²⁰ which would not include a "sound track," and that this restriction does not apply to the copyright protection afforded to any other "form of record in which the thought of an author may be recorded. . . ."

TRANSCRIPTIONS

Another aspect of this reproduction problem is the transcription or the long-playing record and its counterpart, the tape recording. The practice has also been to consider these different from standard recordings and to pay special fees where music is involved.²¹

As with "synchronization," there had been no special recognition of the word "transcription" in the Copyright Law until in 1952²² an amendment to Section

¹⁶ See Dubin, *Copyright Aspects of Sound Recordings*, 26 SO. CALIF. L. REV. 139, 148 (1953).

¹⁷ *Foreign and Domestic Music Corp. v. Licht*, 196 F. 2d 627, at 628 (2d Cir. 1952).

¹⁸ *Id.* at 629.

¹⁹ *Ibid.*

²⁰ Ordinary recordings are not accepted for copyright registration in the Copyright Office, because not "copies." See *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86, 89 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940). Motion picture prints are accepted. Recently a United States District Court Judge decided that the public sale of records of a song prior to copyright constituted a dedication of the song to the public. *Shapiro, Bernstein & Co., Inc. v. Miracle Record Company*, 91 F. Supp. 473 (N. D. Ill. 1950), discussed in McDonald, *Law of Broadcasting*, 7 COPYRIGHT PROBLEMS ANALYZED 31, 45 (1952). As copyright is obtained by publication plus proper copyright notice, it is argued, in opposition to this decision, that an action which cannot invest copyright should not divest copyright in as much as a record is not such a "copy" of the work as could be registered.

²¹ See discussion in McDonald, *The Law of Broadcasting*, 7 COPYRIGHT PROBLEMS ANALYZED 31, 36-37, 49-50 (1952).

²² Act of July 17, 1952 (66 STAT. 752), effective Jan. 1, 1953.

1(c) introduced the latter word into that subdivision and thus pointed up the fact that the word had been in the prior law since 1909 in Section 1(d).

The purpose of this amendment was to extend the protection of the Copyright Law to the public performance and recording of non-dramatic works.²³ In 1934, in the case of *Alfred Kreymborg v. Durante and NBC*,²⁴ it had been established that there was no right of public performance for a poem, and this applied as well to other non-dramatic works such as a book,²⁵ although the right to deliver a lecture or sermon or the like was expressly protected. Similarly, there was no recording right for any non-dramatic work, although Section 1(d) did protect against the making of a "transcription or record" of a dramatic work.

Does the recent enactment using the word "transcription" emphasize the fact that there may be a difference between it and a recording,²⁶ thus adding to the confusion?

When the word transcription was used in connection with Section 1(d) in the original 1909 Copyright Act, aside from being a possible synonym for recording, it undoubtedly referred to a stenographic transcript. The Committee Report on that Copyright Act discusses the right of an author to allow only public presentations or performances and to refrain from reproducing copies for sale and mentions the possibility of a stenographer taking down the words at a performance.²⁷ The 1952 amendment of Section 1(c) is phrased in the terms of the following subsection (d), but the potential meaning of the word "transcription" is now much greater.

The Committee Report on this 1952 bill, while conscious of the fact that there was no intention in granting unrestricted recording rights to non-dramatic works to change the law with respect to the 2 cent compulsory licensing provision on recording musical compositions—even where a poem becomes part of a musical composition—does not consider the problem of the meaning of the word "transcription."²⁸

The recent case of *Granz v. Harris*²⁹ stresses the convertability of the content of these means of reproduction. The plaintiff had turned over to defendant for record sales, master phonographs,³⁰ in 78 rpm (revolutions per minute)—the old-fashioned record speed—of selections from "Jazz at the Philharmonic," pursuant to

²³ *Hearings before the Committee on the Judiciary on H. R. 3589*, 82d Cong., 1st Sess. 17 *et seq.* (1951).

²⁴ 21 U. S. P. Q. 557 (S. D. N. Y. 1934). See generally on poetry rights prior to the amendment to Sec. 1(c), Tannenbaum, *Practical Problems in Copyright*, 7 COPYRIGHT PROBLEMS ANALYZED 7, 9 (1952); Note, *Literary or Artistic Property Rights*, 23 A. L. R. 2d 244, 270 (1952).

²⁵ See discussion in NICHOLSON, *A MANUAL OF COPYRIGHT PRACTICE 150-152* (1945).

²⁶ In *Waring v. Dunlea*, the court, in holding that a station could not play without restriction an electrical transcription which the plaintiff had made for a specific radio program, used the words transcription and record interchangeably. 26 F. Supp. 338 (E. D. N. Car. 1939). On the main question in the case, compare *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940).

²⁷ H. R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909).

²⁸ H. R. REP. No. 1160, 82d Cong., 1st Sess. 3 (1951); CONFERENCE REP. No. 2486, 82d Cong., 2d Sess. (1952).

²⁹ 198 F. 2d 585 (2d Cir. 1952).

³⁰ The sale of matrices sometimes crosses national lines. *Capitol Records, Inc. v. Mercury Record Corp.*, 95 U. S. P. Q. 177 (S. D. N. Y. 1952) (Czechoslovakia and/or Germany to United States).

a contract of sale requiring, among other things, a credit line "Presented by Norman Granz." These were 12 inch records. Defendant converted to 10 inch long playing 33 $\frac{1}{3}$ rpm records³¹ and sold them as well as selling 10 inch 78 rpm records. Obviously, in the 78 rpm speed, a shorter record meant deletions. Did the conversions and/or deletions constitute a breach of contract? The court held that, unless plaintiff waived his rights (a matter of proof on a new trial), in as much as plaintiff by contract was to have his name used in conjunction with the records,³² he was entitled to have the same content and, therefore, while there could be conversions, there could not be deletions.³³

WHICH STATUTORY DAMAGE PROVISION?

Returning to Section 1(c) of the Copyright Law, there is an interesting sidelight in the fact that just as the draftsmen of the 1909 Act may not have contemplated motion pictures or transcriptions, so the framers of the new Section 1(c), despite thoughtful consideration of their problem, did not contemplate one other facet of its application, which is of interest to us in our consideration of the use of literary property in connection with modern devices.

The broadcasters had objected to the amendment unless an additional limitation of liability was imposed in an innocent and unintentional infringement situation;³⁴ this as contrasted with the statutory damage provisions of Section 101.³⁵ The limitation was inserted in Section 1(c).³⁶

One of the incidents of the modern technology is the increasing number of ideas for all kinds of literary and related endeavors, and especially for radio and television use, procreated in the minds of the general public.³⁷ They continually, prior to submitting the idea for use, seek some form of protection, real or fancied, in the form of registration. Mailing to oneself in a registered letter in order to establish an outside date of origination and the content at the time of origination, no longer seems to satisfy the desire for protection.³⁸

³¹ At one time, only the electrical transcriptions for radio programs used this speed. They are now a popular item for home use.

³² If the plaintiff's name was not used, then the changes could have been made, since "moral rights" are not recognized in this country. 198 F. 2d at 588. Granz could have asked that his name be removed from the altered records. *Curwood v. Affiliated Distributors*, 283 Fed. 219 (S. D. N. Y. 1922).

³³ Compare with *Albert Ettore v. Philco Broadcasting Co. et al*, File 12982, Eastern District, Pennsylvania. Here a prize fighter complains of defamation because an abbreviated film version of one of his fights is shown on television with the eliminations allegedly leaving a film showing him in a bad light as a fighter. The result awaits trial.

³⁴ H. R. REP. NO. 1160, 82d Cong., 1st Sess. 3-4 (1951).

³⁵ 17 U. S. C. §101 (Supp. 1952).

³⁶ "The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of \$100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen. . . ." 17 U. S. C. A. §1(c) (1952).

³⁷ See discussion in Solinger, *Idea-Piracy Claims—or Advertiser, Beware!*, 1953 COPYRIGHT PROBLEMS ANALYZED 121 *et seq.*; Tyre, *Protection of Ideas (Radio, Television, and Movies)*, CONFERENCE ON THE ARTS PUBLISHING AND THE LAW 93 *et seq.* (U. of Chi. 1952).

³⁸ *Cf. Dieckhaus v. Twentieth-Century Fox Film Corp.*, 54 F. Supp. 425 (E. D. Mo. 1944), *reversed on other grounds*, 153 F. 2d 893 (8th Cir. 1946), *cert. denied*, 329 U. S. 716 (1946). This was an infringement suit, won by the plaintiff in the lower court and reversed on appeal, where the plaintiff

Registration in the Copyright Office for an unpublished work is available only for a lecture, dramatic or musical composition, photograph, motion picture, work of art or drawing.³⁹ Obviously, the only generally possible categories for a radio or television program idea are "dramatic" or "lecture."⁴⁰ When the ideas are not done in dramatic style, registration, if at all, is as a lecture. When suit is brought for broadcast of the idea, will the limitation of liability provision of Section 1(c) apply as against the statutory damage provisions of Section 101?

UNFAIR COMPETITION

Disc jockeys, glorified announcers who play records of musical compositions interspersed with the comments and "chatter" of various kinds, are a phenomenon of the recent past on radio.

The right to play these records on radio, despite the objections of the performer thereon and the manufacturer thereof, was sustained in *RCA Mfg. Co. v. White-man*.⁴¹ Further, the radio station undoubtedly has a public performing license so the basic copyright is not infringed.⁴² However, suppose that the announcer prefers to transcribe his whole program rather than to broadcast "live," and so a transcription is made (with appropriate clearance from the copyright owner of the music) not only of his remarks but also of the records; is it unfair competition for the contents of the record, itself an article of commerce, to be rerecorded?

Another way of posing the same problem is to play a record as background music in connection with a live television show from which a kinescope is made. A kinescope, simply stated, is a recording on film, taken off the television screen or receiving tube, of the broadcast sound and live action.⁴³ The kinescope is then broadcast by television stations, which did not broadcast the "live" program.⁴⁴ Naturally, now included in this kinescope sound track is the original recording, which, assuming a television public performing license,⁴⁵ the station had a right to play, as such; but does the station have the right to rerecord it for this additional use? The right,

had submitted two copies of her unpublished novel for copyright registration, which submission was rejected by the Copyright Office because it was not published and not within the unpublished registration categories. Thereafter, she mailed a copy of the manuscript to herself in a sealed package.

³⁹ 17 U. S. C. §12 (Supp. 1952).

⁴⁰ The Copyright Office has a Circular, No. 57A, which discusses the unpublished registration possibilities in this area. This circular is mailed upon inquiry. The circular begins: "We regret that it is *not* possible to register titles, ideas, or outlines for radio or television programs. It *is* possible to register unpublished material for such programs in Class C, 'lectures, sermons, or addresses prepared for oral delivery,' or in Class D, 'dramatic compositions.'"

⁴¹ 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940). *Contra*: *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

⁴² This will cover the right of public performance, but if the work is a dramatic work such as a musical comedy on records, the public performance license alone will not suffice and dramatic rights also must be cleared.

⁴³ *Kupferman and O'Brien, Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L. Q. 273, 297 (1951).

⁴⁴ McDonald, *The Law of Broadcasting*, 7 COPYRIGHT PROBLEMS ANALYZED, 31, 37 (1952).

⁴⁵ The current television performing licenses issued by ASCAP and BMI (Broadcast Music, Inc.) cover the right also to integrate the music into a kinescope, which kinescope may be used only within a 60 day period to complete the network broadcasts on stations which have not shown the original "live" program. Is this a "synchronization" (recording) right rather than a public performance right?

if any, that has been infringed is that of the recording company and/or its performer. Is there such a right or is this a permissible "conversion" under the *Granz v. Harris* case, *supra*?

The recent case of *Metropolitan Opera Association and American Broadcasting Company v. Wagner-Nichols*⁴⁶ involved the situation of the defendant recording the Metropolitan Opera radio broadcasts off the air for sale on records. The plaintiffs were the broadcaster, the opera company which controlled the original performance, and a record company which had an exclusive arrangement with the opera company to make and sell records of its performances. The defendant was enjoined *pendente lite* from continuing to record off the air, the old *International News Service v. Associated Press*⁴⁷ case being cited as authority that the defendant's acts constituted unfair competition and "misappropriation of the work, skill, expenditure and good will of plaintiffs. . . ."⁴⁸

More recently, a newspaper's cause of action against a competitive radio station for broadcasting Associated Press news from the newspaper, was sustained.⁴⁹

On the other hand, where a radio station had obtained exclusive U. S. radio broadcasting rights to certain racing events although the station had only a 40 mile range, it was unsuccessful in restraining another radio station more than 1000 miles away from broadcasting similar race information, which its agent relayed by long distance telephone after hearing the first station's broadcast. The basis of the decision was the difference in competitive area and the fact that after publication by broadcast, the material, being uncopyrighted, became available to all.⁵⁰

How then should you treat the problem recently posed in "Editor and Publisher" of a newspaper which, in its own office, photographs its news events from the on-the-spot live television coverage as shown on the television screen,⁵¹ when it is clear that broadcasting and publishing are definitely competitive media⁵² and part of the same "press whose freedom is guaranteed by the First Amendment"?⁵³

In *G. Ricordi Co. v. Haendler*,⁵⁴ the Court of Appeals for the Second Circuit had before it the question of whether there was a cause of action in unfair competition where the defendant sold a book containing the libretto and score of Verdi's opera *Falstaff*, all of which had been photographed from plaintiff's work. It was un-

⁴⁶ 199 Misc. 786, 101 N. Y. S. 2d 483 (Sup. Ct. 1950), *aff'd per curiam*, 279 App. Div. 632, 107 N. Y. S. 2d 795 (1st Dep't 1951), *leave to appeal denied*, 279 App. Div. 790, 110 N. Y. S. 2d 282 (1952).

⁴⁷ 248 U. S. 215 (1918).

⁴⁸ 279 App. Div. 632, 107 N. Y. S. 2d 795, 797.

⁴⁹ *Veatch v. Wagner*, 109 F. Supp. 537 (D. C. Alaska, 1953).

⁵⁰ *Loeb v. Turner*, 257 S. W. 2d 800 (Tex. Civ. App. 1953).

⁵¹ See *Photography*, in *Editor & Publisher*, Feb. 2, 1952, p. 41. Consider the suggestion that the new magnetic tape for film be used to "make a personal recording of a favorite television program." RCA News Letter No. 52, Dec. 2, 1953, p. 2.

⁵² *Lorain Journal v. United States*, 342 U. S. 143 (1951) (newspaper held in violation of antitrust laws in attempting to prevent advertisers from using radio station covering same general area).

⁵³ See *United States v. Paramount, Inc.*, 334 U. S. 131, 166 (1948).

⁵⁴ 194 F. 2d 914 (2d Cir. 1952), noted in 101 U. OF PA. L. REV. 150 (1952). A similar holding in the New York Court of Appeals is *Hebrew Publishing Co. v. Scharfstein*, 288 N. Y. 374, 43 N. E. 2d 449 (1942).

disputed that the opera material was in the public domain, but the plaintiff had set it up in special typography and claimed the reproduction thereof as the basis for the unfair competition. The Court stated that the *Associated Press* case was, in accordance with its previous opinions,⁵⁵ to be confined to its facts, and, as there could be no protection for the basic work after expiration of the copyright, the printing process, which could not be disassociated from the work, could not be protected either.

The Court expressly overruled *Fonotipia Limited v. Bradley*⁵⁶ (which, on the unfair competition doctrine of "misappropriation" rather than "passing off" or deceit, had enjoined the copying of records manufactured by the plaintiff), saying as to that case and the problem in general.⁵⁷

We do not mean that the defendant could under no circumstances be guilty of "unfair competition" in his use of the "work"; but it would have to be by some conduct other than copying it. Since he confined himself to that and gave notice that it was his product, the Copyright Act protected him. This reasoning applies as well to any rights which may be supposed to flow from the doctrine of *International News Service v. Associated Press*. . . .

This language would seem to indicate a difference of opinion with the attitude expressed in the *Metropolitan Opera* case.⁵⁸ While the lower court there indicated a basis for the decision not only in misappropriation but also on the ground of deception in that people might be misled into believing that the Metropolitan Opera had cooperated with the defendant in the production of the records,⁵⁹ the Appellate Division determination rests on misappropriation.⁶⁰

COMMUNITY ANTENNA SYSTEMS

There are certain areas in the United States like Palm Springs, California, where the terrain is such that television reception is either poor or impossible, because of natural barriers. There are also other areas which are too far distant from a television transmitter for a clear picture to be obtained.⁶¹

Certain enterprising groups in these areas have arranged for antennas to receive broadcast television programs at a point where reception is good and to transmit the programs to the communities where such good reception is desired but for one reason or another not possible.

⁵⁵ See *Cheney Bros. v. Doris Silk Corp.*, 35 F. 2d 279, 281 (2d Cir. 1929); *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940).

⁵⁶ 171 Fed. 951 (E. D. N. Y. 1909).

⁵⁷ *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914, at 916. Conduct which might be unfair competition was mentioned in *RCA Mfg. Co. v. Whiteman*, *supra* note 55, at 90:

"Nor need we say that insofar as radio announcers declare, directly or indirectly, that the broadcast of a Whiteman record is the broadcast of a Whiteman performance, that conduct is a tort which Whiteman could enjoin. That would indeed be 'unfair competition.'"

⁵⁸ The lower court opinion in the *Metropolitan Opera* case, *supra* note 46, is cited in a note in *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914, 915 n. 1.

⁵⁹ 199 Misc. at 792, 101 N. Y. S. 2d at 489.

⁶⁰ See notes 46 and 48, *supra*.

⁶¹ In general on this question, see *Broadcasting*, June 16, 1952, p. 84; and *Martin Codel's Television Digest*, June 14, 1952, p. 3.

From the antenna point of reception to the home where the family television receiver is located, there is usually a "closed circuit" connection.

A system of closed circuit reception is the now familiar novelty for sports and other spectacles⁶² in theatres and other public places where admission is charged.

As these programs are sent over specially wired lines, there is no broadcast involved, whether to home or theatre, although there have been requests for television broadcast channels for "subscription television" systems whereby special programs would be broadcast to homes but could not be received without the payment of a fee.⁶³

Considering, for our purpose, only the situation of the Community Antenna system as applied to programs already broadcast on standard television transmitters (as against the situation where specific arrangements are made for special programs),⁶⁴ it would seem that, legal technicalities aside, there should be no basic objection to such action.

However, complications do arise. As expenditures are necessary in making and maintaining the necessary physical plant and service, there is usually a flat fee arrangement plus a continuing monthly charge for the service, which consists generally of installation and connection to each home which affiliates with the service. Is this monthly charge a true maintenance of equipment charge or is it a charge for providing programs, in which latter case the owners of the rights in the programs may feel aggrieved?

In connection with the question of whether the Federal Communications Commission might take jurisdiction of these systems as common carriers,⁶⁵ the problem was raised on an application for microwave frequency⁶⁶ of a community antenna system, as to whether the operation was as "a common carrier of communications" or as a "vendor of program material."⁶⁷

The Commission announced that it had no objection to the operation of "Passive Antenna Systems," which merely reflect the broadcast signal, provided they neither increase the signal strength nor cause interference with any licensed radio or television station.⁶⁸

⁶² Variety, the amusement trade publication, in its issue of Jan. 27, 1954, p. 1, col. 5, reports that arrangements have been made for the opening nights of the Metropolitan Opera to be telecast in theatres all over the United States, with an admission charge.

⁶³ There are various ways of preventing reception without payment, such as the picture being "scrambled" until payment is made into a coin box. One of the systems for subscription television, Telemeter, had a test on a closed circuit system to home television receivers in Palm Springs recently. See Leonard Spinrad's Motion Picture Newsletter, Dec. 7, 1953, p. 2.

⁶⁴ There are many possible uses for closed circuit transmission. The New York City Police Department has announced that it is experimenting with the idea of televising the daily police line-up of criminal suspects on a closed circuit to each local police precinct station house. N. Y. Herald-Tribune, Jan. 29, 1954, p. 1, col. 1.

⁶⁵ See 47 U. S. C. §201 *et seq.*, and definitions in 47 U. S. C. §153(a) and (b) (Supp. 1952).

⁶⁶ J. E. Belknap & Associates, Poplar Bluff, Mo. See Federal Communications Release, July 17, 1952, F. C. C. 52-732.

⁶⁷ Release of June 24, 1953, F. C. C. 53-766.

⁶⁸ Use of Passive Antenna Systems to Divert or Reflect Signals for Broadcasting Stations. Release of Dec. 3, 1953, F. C. C. 53-1591.

This points up the competitive problem where the systems, by transmitting either by broadcast or closed circuit methods the programs of one or more distant broadcast television stations, might rival existing broadcast television stations in the area or deter the building of new ones.

We are back with the "unfair competition" problem previously discussed in other phases of this paper, if the community antenna system tampers with the "commercials" of the sponsor of the program originating at the distant broadcast station and substitutes its own advertising or that of other sponsors.

On the copyright aspect, the case of *Buck v. Jewell-La Salle Realty Co.*⁶⁹ would seem to be in point in its analysis of transmission and reception in radio broadcasting,⁷⁰ where a protectable copyright is involved.

The suit was by ASCAP against a broadcaster and a hotel. The hotel received regular radio programs on a master receiving set, wired to each of the public and private rooms. ASCAP notified the broadcaster and the hotel that a public performance license for its music was required, and upon their failure to obtain one, the suit was brought for an infringement. As to the hotel, which is in a position similar to that of the Community Antenna system, the question was whether a performance of the composition took place by virtue of its radio receiving set and loudspeakers and headphones.

The hotel was held to be an infringer.

Recently this question of the rights involved in community antenna operation was raised in Canada and now awaits a decision after trial,⁷¹ although the status of the property right in dispute is not clear.

The defendant is a closed circuit operation for home television reception, the

⁶⁹ 283 U. S. 191 (1931).

⁷⁰ "The defendant contends that there was no performance because the reception of a radio broadcast is no different from listening to a distant rendition of the same program. We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission, there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. This music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether.' These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loud-speaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting apparatus, by the audible sound waves, is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance. . . . In addition, the ordinary receiving set, and the distributing apparatus here employed by the hotel company are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers." 283 U. S. at 199-201.

⁷¹ *Canadian Admiral Corporation, Ltd. v. Rediffusion, Inc.*, Exchequer Court of Canada, No. 67452. Complaint filed Oct. 24, 1952.

Canadian terminology for which is "rediffusion." The plaintiff, a television manufacturer, obtained exclusive rights to certain live and film telecasts of rugby football in which the Alouettes of Montreal participated. The rights granted specified reception through the ether (standard broadcast) and wire service or rediffusion. There were live broadcasts of "at home" games and broadcasts by film of "away" games.

The defendant not only transmitted these games on its closed circuit system as received from plaintiff's broadcasts, but advertised that it was unnecessary to buy standard broadcast television receiver sets (which plaintiff manufactures) on the ground that closed circuit system reception, on a much more simple set, was of better quality.

The plaintiff claimed copyright in the sports events under the following provision of the Canadian Copyright Act:⁷²

- (u) "Every original literary, dramatic, musical and artistic work" shall include every original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science. . . .

The plaintiff rested its cause of action on infringement of copyright.

This is indeed a novel approach. Aside from the question of who should own the copyright, if any, Fox in his work on *The Canadian Law of Copyright* seems to indicate that an "exhibition" or "spectacle" lacking story element would not be a true dramatic work for copyright protection.⁷³

The recent *Report of the Copyright Committee*⁷⁴ in Great Britain stated:⁷⁵

That the concept of copyright should not be extended to confer a right to prevent or control the copying or recording of a spectacle or performance.

As to "live" "spectacles," at least, our protection has been by way of unfair competition.⁷⁶

CONCLUSION

We have considered a small fraction of the current problems in the application of our intellectual property concepts to new media.

It should be obvious from the foregoing that as new techniques and methods of communication develop, the problems in the conflicts of claims of right must necessarily increase and that the solutions of the past do not necessarily point the way to the future. It is a simple matter to recommend legislative consideration; the

⁷² The Copyright Act, REV. STAT. CANADA 1927, c. 32, §2(u), as amended by 1931 Acts, c. 8, §2.

⁷³ HAROLD G. FOX, *THE CANADIAN LAW OF COPYRIGHT* 127 (1944).

⁷⁴ CMD. No. 8662, presented by the President of the Board of Trade to Parliament by Command of Her Majesty, October, 1952.

⁷⁵ CMD. No. 8662, at 120 (No. 33).

⁷⁶ Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 872 (1948).

Supreme Court did so in 1908 in *White-Smith v. Apollo*,⁷⁷ but the result was not without perplexity.

While one may not necessarily agree with the conclusions contained therein, the analysis given to these modern problems in Great Britain by the *Report of the Copyright Committee*⁷⁸ leads to the conclusion that a similar investigation of all facets of these questions would increase our ability to consider possible results and to advise clients.

⁷⁷ 209 U. S. at 18.

⁷⁸ CMD. No. 8662 (1952).