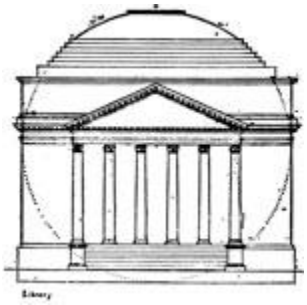

TELEVISING OLD FILMS — SOME NEW LEGAL QUESTIONS ABOUT PERFORMERS' AND PROPRIETORS' RIGHTS

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MAY motion pictures intended for theatrical exhibition be telecast without express consent of the performers?[1] The problem is virginal. The field is uncharted.

ECONOMICS AND PRACTICAL BACKGROUND OF THE PROBLEM

Commercial television is an important industry. It is becoming more so. In 1942 there were only nine commercial television stations licensed in the United States.[2] By 1948 the number had increased to 108. From May, 1948 to April, 1952, there has been a freeze on the construction of additional stations. On April 14, 1952, the Federal Communications Commission announced lifting of the freeze and provided channels for a total of 2,053 television stations, including 242 channels for educational purposes.[3] There are close to 17 million TV sets in use at this time.[4] Over 5 million were added last year alone.

Billions of dollars have been and will be spent in furtherance of technological advances. In 1951, the broadcast revenues of the TV industry were more than double the total for 1950, and seven times that of 1949. The total TV broadcast income for 1951 has been preliminarily reported at $43,600,000, which compares with a loss of $9,200,000 in 1950, and a loss of $25,300,000 in 1949.[5] (All figures are before federal income taxes.) In 1951, for the first time, the

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1. The words "performer," "artist," "actor," and "actress" are used interchangeably in this article.

2. See Norman v. Century Athletic Club, 69 A.2d 466, 468 (Md. 1949).

3. Jurisdiction to grant licenses to operate television stations is vested in the Federal Communications Commission, created under the Federal Communications Act. 47 USC § 151 (Supp. 1951).

4. Estimated Sets in Use, 16,184,846. Broadcasting Telecasting, Mar. 10, 1952, p. 66, col. 4.

5. All of the figures on revenues and income are from *1951 Television Financial Data* issued March 6, 1952, by the F.C.C. (Public Notice No. 73830).

networks drew a greater proportion of their total revenues and income from TV than from AM (popularly called radio broadcasting).[6] At this time the 108 stations presently operative are estimated to cover an area in which almost 70 per cent of the population resides.

It is contemplated that 50 to 90 percent of TV programming will be on film just as radio now uses 70 percent "canned" music. (Radio has been able to get by only by reason of this economic factor).

TV stations are currently using some form of film (old feature pictures, kinescopes, commercials, industrial films supplied free by corporations, etc.) to fill from 50 to 80 percent of their time; even this is inadequate to keep all stations on the air for more than a limited number of hours each day.

Old motion picture feature films are being telecast at such a rate that in a few years nothing but current products will remain. Some stations use up to two dozen motion pictures weekly, which is three times as fast as the studios turn out new pictures.

The major producers of motion pictures have heretofore refused to permit any of their large inventories of films to be shown on television. This is probably because it would adversely affect the interests of theatrical exhibitors who are their primary customers.[7] To the independent producer or his successor in interest, however, television presents another source of income for films which, in most instances, are not susceptible to re-issue.

The motion picture producers have taken the position that unless limited by contractual provision, they have the unrestricted right as to all films produced by them to use, sell, or license others to use them, upon any terms and for any purpose they wish, including television. The actors, on the other hand, contend that their services may be sold for either a general or limited use, and that since television is a new medium and the use of motion pictures on television is a different use from that contemplated when they were employed

6. *Ibid.* The networks reported 132.2 million in revenues from TV as against 100.4 million from radio operations. The networks' income from radio of 10.4 million in 1951 was a sharp drop from the 1950 figure of 18.7 million. The network TV income in 1951 of 12.4 million represents a striking gain compared to the network TV losses of previous years.

7. There are over 20,000 motion picture theaters and drive-ins in the United States, according to the latest census report of the Department of Commerce, but many have closed due to poor business, which may be due to television competition. A producer can obtain from $5,000 to $50,000 per picture in the present market for television broadcast rights.

for such pictures, the actors should receive additional compensation for television presentations of their performances.[8] It may be urged by the producer that the photoplay in which the actor appeared is a proper subject for copyright in and of itself;[9] that the actor is an employee for hire;[10] and that the picture and its copyright belong to the producer to whom the services were so rendered.[11]

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8. Producer-Screen Actors' Guild Revised Basic Agreement of 1948, Paragraph 6. The Screen Actors' Guild was first organized in 1933. The first "Basic Agreement" was made in 1937 and there has been but slight change since. The Guild is affiliated with the American Federation of Labor. It speaks for all motion picture actors. The "Basic Agreement" of August 1, 1948, provides that the contract between the Screen Actors' Guild and any producer may be cancelled by the Guild if during the period from August 1, 1948, to December 31, 1950, inclusive (now extended to June 1, 1958 by current contract agreed upon and awaiting draft and execution), any such producer televises or licenses the television of any motion picture film made during that period, excepting motion pictures made exclusively for television or television in theaters or places where admission is charged, or unless the picture is in the nature of a trailer. The terms of the basic agreement referred to apply to all producers, each of whom is required to execute a counterpart thereof, failing which, the actors will not render their services to such producer. It is interesting to note that an agreement has been negotiated (but not yet signed), whereunder Monogram Pictures Corporation, a signatory to the Revised Basic Agreement, will pay from its proceeds of the televising of its pictures (produced and released since August 1, 1948) a sum ranging from 12½ per cent to 15 per cent of its proceeds of such television thereof for payment to the actors who appeared therein.

9. 17 U.S.C. §§ 4, 5(1), and 202.13 (Supp. 1951). *See* Jerome v. 20th Century Fox Film Corp., 62 F. Supp. 300, 301 (S.D.N.Y. 1945), *aff'd*, 165 F.2d 784 (2d Cir. 1948); Vitaphone Corp. v. Hutchinson Amusement Co., 28 F. Supp. 526, 529 (D. Mass. 1939); Patterson v. Century Productions, Inc., 93 F.2d 489, 493 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theater Co., 3 F. Supp. 66 (D. Mass. 1933); Pathe Exchange, Inc. v. International Alliance of Theatrical Stage Employees, 3 F. Supp. 63 (S.D.N.Y. 1932).

10. See § 26 of the Copyright Law, 17 U.S.C. § 26 (Supp. 1951), which provides: "In the interpretation and construction of this title . . . the word 'author' shall include an employer in the case of works made for hire." See also, Vitaphone Corp. v. Hutchinson Amusement Co., *supra* note 9; Tobani v. Carl Fischer, Inc., 98 F.2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); Grant v. Kellogg Co., 58 F. Supp. 48 (S.D.N.Y. 1944), *aff'd*, 154 F.2d 59 (2d Cir. 1946); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir. 1944), *cert. denied*, 323 U.S. 735 (1944). This does not mean that an actor, by reason of his employment as an actor, would be disentitled to compensation for a contribution to the screenplay, or services other than as an actor.

11. *Supra*, notes 9 and 10. Also see, Fairbanks v. Winik, 119 Misc. 809, 810, 198 N.Y. Supp. 299, 300 (Sup. Ct. 1922), in which the court said:

> Further, the plaintiff was in law but an employee of the corporation whose property the pictures became, and his contract was one of service identical with that of other actors who took a part in the portrayal of the scenes . . . .

This case was reversed upon the express contractual obligations upon which the con-

As the writer will show, the rights of an actor depend primarily upon the provisions of his employment contract. It may be urged by the actor that a contract should be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting;[12] that commercial television as it exists today was unknown at the time many of these contracts were written;[13] that television is a means of advertising for the benefit of a sponsor rather than theatrical exhibition;[14] that use of the artist's name, voice, or likeness in or out of the picture is granted solely to advertise or publicize the picture itself, and not the product of another.[15]

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tract was originally conditioned, 206 App. Div. 449, 201 N.Y. Supp. 487 (1st Dept. 1923); *see* Lillie v. Warner Bros. Pictures, Inc., 139 Cal. App. 724, 728, 34 P.2d 835, 837 (1934), in which the court refers to the producers' property right and ownership of the picture, saying:

> . . . This ownership included the right to use the picture publicly in any form of exhibition, except as such right is limited by the terms of the contract . . . .

And see the following cases which seem to indicate that a copyright owner may deal with a film as he desires. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Murphy v. Warner Bros. Pictures, Inc., 112 F.2d 746, 748 (9th Cir. 1940).

12. See CAL. CIV. CODE § 1636 (1949); Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 552 (9th Cir. 1949), and cases therein cited; Norman v. Century Athletic Club, Inc., *supra* note 2. An ambiguity in an employment contract drafted by a producer must be construed strictly against the producer. *See* RKO Radio Pictures, Inc. v. Sheridan, 195 F.2d 167, 169 (9th Cir. 1952).

13. *Cf.* Norman v. Century Athletic Club, Inc., *supra*, note 12, in which the court held that a lease of a boxing arena which gave the lessee the privilege of "broadcasting" the boxing bouts did not include the right to transmit by television, the court saying at 69 A.2d 469: ". . . it would not necessarily follow that because the parties bargained for the actuality of radio rights, they also intended to bargain for the unknown possibilities of commercially non-existing television rights." *But see* Philadelphia Retail Liquor Dealers Ass'n v. Pennsylvania Liquor Control Board, 360 Pa. 269, 274, 62 A.2d 53, 55 (1948).

14. There is no authority or analogy. This is a basic claim by the actors and the Screen Actors' Guild, who take the position that television follows the pattern of radio broadcasting, which serves solely as an advertising purpose for the sponsor as distinguished from being produced for the intended purpose of theatrical exhibition to the public.

15. Roy Rogers v. Republic Productions, Inc., 41 T.M. Rep. 1073, 1078 (S.D. Cal. 1951). This case was decided on the extended language in the contract between Rogers and Republic. The opinion of Judge Hall was orally rendered from the Bench. The writer is informed that an appeal is pending therefrom. A similar case, Gene Autry v. Republic Productions, Inc., was decided on May 13, 1952 (S.D. Cal.). Judge Harrison held that Republic's unrestricted ownership rights entitled them to authorize their exhibition on home TV receivers. He further said:

> . . . It is my view that television of motion pictures is a form of entertainment and not "commercial advertising." . . . I find that the contracts place no restrictions upon Republic in the use of said films and . . . that their contemplated use does not constitute unfair competition.

However, more than mere interpretation of contract is involved. If the courts should hold that the employer did not acquire the right to telecast the film by reason of the actor's employment per se, and if the actor has not granted away his performing rights by contract, the question of the extent to which these rights are possessed or retained by him, and under what theory of law he may protect them, must still be answered.

A. *Does the movie producer have a contractual right to permit the showing on television of motion pictures in which the actor appeared?*

(1) Where the employment contract includes a clause expressly granting to the producer the right to use and exploit the acts, poses, plays, and appearances of the actor or referring to television as a permissible means of transmission or exhibition? Such a clause is contained in the contracts of over 7,000 of the 7,800 motion picture actors over whom the Screen Actors' Guild exercises its jurisdiction.[16] It would appear that no consent would be required of the actor to the use of his performance in a film broadcast by television, where the employment contract contains such a clause and where the contract does not contain any restriction or other provision to the contrary.

(2) Where the employment contract includes a clause granting to the producer all rights of every kind in and to all results and proceeds of the services rendered by the artist? This is commonly called an "all-rights" clause. If one follows the views advocated by some of the authorities (see discussion, *infra*) that an artist has a property right in his unique interpretation of a dramatic or musical

16. Paragraph 21 of the SAG Minimum Contract for Free Lance Players. This clause is contained in the contracts of all motion picture actors, excepting such actors who work on a day-to-day basis or whose weekly salary is $1,250 per week or less, and who are guaranteed less than $20,000 per picture. The only persons who do not have a similar clause are actors who are paid more than the aforementioned sum under "deal contract" or who are under term contract to studios for not less than 10 out of 13 weeks. The latter are called term contracts. It is estimated by the Screen Actors' Guild that there are less than 700 actors who are not subject to the use of the aforementioned free lance contract. Most employment contracts provide for "screen credit." In television, where time is important and shortening of "credits" is economically desirable, the artist would nevertheless be entitled to damages for failure to give him screen credit. Paramount Pictures, Inc. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937). And see Cagney v. Warner Bros. Pictures, Inc., unreported but briefly discussed by the writer in 1937 FILM DAILY YEARBOOK OF MOTION PICTURES at page 738.

work, it is nevertheless clear that the artist, by contractual provision, may grant television rights to the producer. The question posed is whether such an "all-rights" clause confers upon the movie producer any television rights that the actor may have. Due to the paucity of decisions in point, reliance must be had upon analogies in the field of stage and screen law.

Where contracts have been broadly worded in their grant of dramatic rights to literary properties, the courts have often held that movie rights were also conferred.[17] Thus, it may seem that the producer will prevail where the grant of rights is very broad and is not limited by other language in the contract.

When the language of the contract is less sweeping, courts have often held that movie rights were not transferred.[18]

(3) Where the contract expressly grants or withholds from the producer the right to use the name, voice and/or likeness of the artist for advertising, commercial and/or publicity purposes (so-called "commercial tie-ups" clause) to exploit products other than the motion picture itself?

The use of commercial tie-ups grew with the motion picture industry. Publicity and advertising lie at the very core of the public

17. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951); Lipzin v. Gordin, 166 N.Y. Supp. 792 (Sup. Ct. 1915). Showing a liberal interpretation regarding "talkie rights" see *e.g.*, Photo-Drama Motion Picture Co. v. Social Uplift Film Corp., 220 Fed. 448 (2d Cir. 1915); Noble v. One Sixty Commonwealth Avenue, Inc., 19 F. Supp. 671 (D. Mass. 1937); L. C. Page & Co., Inc. v. Fox Film Corp., 83 F.2d 196 (2d Cir. 1936); Cinema Corp. of America v. De Mille, 149 Misc. 358, 267 N.Y. Supp. 327 (Sup. Ct. 1933); Hart v. Fox, 166 N.Y. Supp. 793 (Sup. Ct. 1917). See WARNER, RADIO & TELEVISION LAW § 202a n. 1 (1948).

18. Manners v. Morosco, 252 U.S. 317 (1920); Klein v. Beach, 239 Fed. 108 (2d Cir. 1917) (holding that no movie rights were conferred. However the court refused to imply a negative covenant since the contract was signed after movies were well established), see Note, 33 A.L.R. 311 (1924); Harper Bros. v. Klaw, 232 Fed. 609 (D.C.N.Y. 1916) (holding no movie rights conferred, but implying a negative covenant by the owner of the copyright not to derogate from dramatic rights granted to defendant by giving movie rights to another); Underhill v. Schenck, 238 N.Y. 7, 143 N.E. 773 (1924). See 9 AIR L. REV. 285, 292 (1938) (implied negative covenants); Frohman v. Fitch, 164 App. Div. 231, 149 N.Y. Supp. 633 (1st Dep't 1914). *But cf.* Hollywood Plays, Inc. v. Columbia Pictures, Inc., 274 App. Div. 912, 77 N.Y.S.2d 568 (1st Dep't 1948), *rev'd on other grounds*, 299 N.Y. 61, 85 N.E.2d 865, *rehearing denied*, 299 N.Y. 683, 87 N.E.2d 70 (1949) (Court said telegram stating "acceptance your offer purchase World Picture rights" included radio and television rights.) And *cf.* Roy Rogers v. Republic Productions, Inc., *supra*, note 15, where the court said ". . . that the parties intended that the term 'photoplays' should include the right to televise the photoplays."

acceptation of movies. Interest must be created therein. Large publicity departments are maintained. Advertising and publicity are costly. Long before commercial television was envisioned, the publicity men conceived the idea of tying in announcement of their motion pictures with commercial advertisements of other products. It was advantageous for an advertiser of, for example, a brand of soap or cosmetics, to show a photograph of a star expressly or impliedly endorsing its products, together with appropriate reference to her forthcoming film. This was of mutual benefit. It is this use of a star's name or likeness which is meant (in the writer's opinion) when one speaks of a "commercial tie-up." The use of advertising in motion picture theatres is an established business.[19]

The reader's attention is directed to the only reported case on this subject. In *Roy Rogers* v. *Republic Productions, Inc.*,[20] the contract contained both an "all-rights" clause and a "commercial tie-ups" clause. The court found that the "commercial tie-ups" clause limited the "all-rights" clause in the contract, that Rogers retained the advertising rights thereunder, and Republic could not license a television showing for profit of a film in which Rogers had appeared, except to advertise the picture itself.[21]

(4) Where the contract of employment does not contain an "all-rights" or "commercial tie-ups" clause? One group of cases embracing analogous situations holds that no television rights are thereby granted.[22]

In the entertainment field some courts, however, have found an implied right to present the performer on television despite the absence of any controlling language in the contract of employment.[23]

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19. Motion Picture Advertising Service Co. v. Federal Trade Commission, 194 F.2d 633 (5th Cir. 1952).

20. See note 15 *supra*.

21. *Cf.* Note, 101 A.L.R. 492 (1936), concerning the validity and effect of a contract purporting to grant the exclusive right to use one's name and likeness for advertising purposes. *Cf.* Lengyel Perfume, Inc. v. Paramount Productions, Inc., N.Y.L.J. (Sup. Ct., Feb. 21, 1936), discussed by Herbert T. Silverberg, in 1937 FILM DAILY YEAR BOOK OF MOTION PICTURES at page 742.

22. Norman v. Century Athletic Club, *supra*, note 2; Weiss v. Hollywood Film Enterprises, Inc., 17 U.S.L. WEEK 2608 (Cal., June 10, 1949); *cf.* Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950).

23. Chavez v. Hollywood Post No. 43, 16 U.S.L. WEEK 2362 (Cal., Jan. 1948), *see* 15 A.L.R.2d 785, 794 (1951) and 14 A.L.R.2d 750, 769 (1950); Peterson v. KMTR Radio Corp., 18 U.S.L. WEEK 2044 (Cal., July 7, 1949) (set out in full in LOS ANGELES DAILY JOURNAL REPORTS, No. 6, p. 182 (October, 1950); Willis, *Television and the Law*, 25 FLA. L.J. 163, 164 (1951), 30 MICH. STATE B.J. 5 (1951). See also WARNER, RADIO

Assuming that the contract does not contain language which resolves our inquiry either affirmatively or negatively, and that no television rights are impliedly assigned by the artist, we are relegated to a consideration of the non-contractual aspects of the problem.

B. *Does an actor have a property right in his interpretation of a dramatic or musical work so as to claim an infringement thereof when the movie producer authorizes a TV showing of the picture which contains his performance without his consent?*

May an actor secure a statutory copyright of his performance? Section 4 of the Copyright Act expressly states: "The works for which copyright may be secured under this Title shall include all the *writings* of an author." (Emphasis added). Section 5 lists the classification of works which may be registered in the Copyright Office. In 1912, Classes 5(l) and 5(m) were added by amendment, so that today motion picture photoplays and motion pictures other than photoplays may be registered (by the producer). However, under present law an artist or performer may not secure a statutory copyright of his *interpretation* of a dramatic or musical work.[24]

The court, in *Waring* v. *WDAS Broadcasting Station, Inc.*, said:

> . . . The statute (copyright) does not recognize any right of a performing artist in his interpretative rendition of a musical com-

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AND TELEVISION LAW § 211b, n. 44 (1948); *cf.* RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787, 792 (S.D.N.Y. 1939); Brown v. Molle Co., 20 F. Supp. 135 (S.D.N.Y. 1937); Ingram v. Bowers, 57 F.2d 65 (2d Cir. 1932); Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S.2d 553 (1951); Phillips v. WGN, Inc., 307 Ill. App. 1, 29 N.E.2d 849 (1940).

24. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 437, 194 Atl. 631, 633 (1937); Fairbanks v. Winick, *supra*, note 11; Revel v. Pritchard, N.Y.L.J. (Sup. Ct., May 3, 1936), discussed by the writer in the 1937 FILM DAILY YEAR BOOK OF MOTION PICTURES at page 740; Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 198 (1950); Traicoff, *Rights of the Performing Artist in His Interpretation and Performance*, 11 AIR L. REV. 225, 249 (1940); Rea, *Rights of Recording Orchestras Against Radio Stations Using Records for Broadcast Purposes*, 2 WASH. & LEE L. REV. 85, 86 (1940); Bass, *Interpretative Rights of Performing Artists*, 42 DICK. L. REV. 57, 61 (1938); Caldwell, *International Protection of Broadcasts Against Commercial Uses of Their Programs*, 2 J. RADIO L. 479, 508 (1932). It should be noted that the dance notation score of Honya Holm's choreography for *Kiss Me Kate* was recently registered as a dramatic composition by the Copyright Office. Generally, a performer (as distinguished from an author) may not secure a statutory copyright of his interpretation of a dramatic or musical work. Not one country in the Pan-American Union provides for statutory copyright of a performer's interpretation. See *Copyright Protection in the Americas*, published by the Pan-American Union in 1950.

> position or in the acting of a play composed by another. It is to the common law, therefore, that the performer must turn, and the question arises as to whether an actor or a musician has any property right at common law in his performance.[25]

It is well established that there exists a common law of copyright, quite independent of the copyright statute.[26]

May an actor claim such a property right in his interpretation of a work? Could John Barrymore have claimed a common law property right in his memorable interpretation of Shakespeare's Hamlet? Or is the performing right of an actor a moral right at best?

This question may not yet be considered definitely resolved by the authorities. They are in conflict. The controversy has flared anew with several decisions in the thirties and the editorial comment which has followed in their wake.

In the *Waring* case adverted to above, Fred Waring, famous arranger and conductor, sued to enjoin a radio station from broadcasting phonograph records of musical compositions played by his orchestra. RCA Victor had made the records, which, when sold to defendant, bore the restrictive notice "Not Licensed for Radio Broadcast." Despite notice of the restrictive legend, defendant did broadcast the records and announced them as Fred Waring recordings. An injunction was granted, a majority of the Pennsylvania Supreme Court holding, *inter alia*, that the performing artist has a property right in his performance which is in the nature of a common law copyright.

Mr. Justice Stern, writing the majority opinion, said:

> Does the performer's interpretation of a musical composition constitute a product of such novel and artistic creation as to invest him with a property right therein? It may be said that the ordinary musician does nothing more than render articulate the silent composition of the author. But it must be clear that such actors, for example, as David Garrick, Mrs. Siddons, Rachel Booth, Coquelin, Sarah Bernhardt, and Sir Henry Irving, or such vocal and instru-

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25. 327 Pa. 433, 437, 194 Atl. 631, 633 (1937).

26. Ferris v. Frohman, 238 Ill. 430, 87 N.E. 327 (1909), *aff'd*, 223 U.S. 424 (1912); Aronson v. Baker, 43 N.J. Eq. 365, 12 Atl. 177 (Ch. 1888); Warner, *Protection of the Content of Radio and Television Programs By Common Law Copyright*, 3 VAND. L. REV. 209 (1950); WITTENBERG, THE PROTECTION AND MARKETING OF LITERARY PROPERTY 3 (1943). In the United States, unlike England, the Federal Copyright Statute does not abrogate the common law copyright. Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (S.D. Cal. 1936); see also 17 USC § 2 (Supp. 1951).

> mental artists as Jenny Lind, Melba, Caruso, Paderewski, Kreisler, and Toscanini, by their interpretations, definitely added something to the work of authors and composers which not only gained for themselves enduring fame, but enabled them to enjoy the financial rewards from the public, in recognition of their unique genius. Indeed, the large compensation frequently paid to such artists is testimony in itself of the distinctive and creative nature of their performances. The law has never considered it necessary, for the establishment of property rights in intellectual or artistic productions, that the entire ultimate product should be the work of a single creator. Such rights may be acquired by one who perfects the original work or substantially adds to it in some manner.[27]

In a later case, in the Federal District Court of North Carolina,[28] Waring was again successful in obtaining an injunction against the dissemination over a radio station of his orchestra's electrical transcriptions, which bore the notice that the records were to be played only on The Ford Motor Program. The court found a protectible property right in the rendition. These decisions have evoked much comment from legal writers.[29] The statement by George Traicoff, writing in 1940, " . . . whether an interpretation can be protected even at common law as a species of literary property . . . is a matter not free from doubt,"[30] is still true today.

On the one hand, we have the two *Waring* cases upholding such a common law property right in the performing artist.[31] On the other

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27. 327 Pa. 433, 439, 194 Atl. 631, 634 (1937).

28. Waring v. Dunlea, 26 F. Supp. 338 (E.D.N.C. 1939). At 340 the court said:

> A dramatic performance gives life to the story, and is the property of the interpreter. The great singers and actors of this day give something to the composition that is particularly theirs, and to say that they could not limit its use is to deny them the right to distribute their art, as they see fit, when they see fit . . . They have an exclusive right in their property and thus have a right to prohibit its unauthorized public performance.

29. To cite but a few of the many discussions of the *Waring* cases: Baer, *Performers' Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N.C.L. Rev. 202 (1941); Traicoff, *Rights of the Performing Artist in His Interpretation and Performance*, 11 Air L. Rev. 225 (1940); Callmann, *Copyright and Unfair Competition*, 2 La. L. Rev. 648, 659 (1940); Bass, *Interpretative Rights of Performing Artists*, 42 Dick. L. Rev. 57, 59 (1938); Note, 2 Wash. & Lee L. Rev. 85 (1940); 38 Col. L. Rev. 181 (1938); 51 Harv. L. Rev. 171 (1937); 86 U. of Pa. L. Rev. 217 (1937).

30. Traicoff, *supra* note 29, at 250.

31. 1 Callmann, Unfair Competition and Trade-Marks 282 (2d ed. 1950); Homburg, Legal Rights of Performing Artists (1934), Addendum by Maurice J. Speiser, p. 147; Warner, *Protection of the Content of Radio and Television Programs by Common Law*

hand, there is considerable authority for the proposition that an actor or musician has no common law property interest in his performance and interpretation of a work.[32]

The problems which may arise if a property right in one's interpretation is recognized have been discussed by several writers.[33] A practical objection by the producer to the recognition of such a right would be the necessity for obtaining consent of all the actors who had not expressly consented. It would not necessarily follow that consent would be required only from the *leading* artist or artists, for if an actor has a property right, such a right should not be limited to the stars. To locate every actor, regardless of stature, long after the services had been performed, would be a difficult chore for the copy-

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Copyright, 3 VAND. L. REV. 209, 223 (1950); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 856 (1948); Oberst, *Use of the Doctrine of Unfair Competition to Supplement Copyright in the Protection of Literary and Musical Property*, 27 KY. L.J. 271, 282 (1941); Baer, *supra* note 29, at 204; Callmann, *supra* note 29, at 659-662; Shelton, *The Protection of the Interpretative Rights of A Musical Artist Afforded By the Law of Literary Property Or the Doctrine of Unfair Competition*, 1 COPYRIGHT LAW SYMPOSIUM 173, 178 (1939); Bass, *supra* note 29, at 61; *but cf.* Savage v. Hoffman, 159 Fed. 584 (C.C.S.D.N.Y. 1908) (*semble*); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577, 579 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914); RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787, 791 (S.D.N.Y. 1939), *rev'd*, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940) (holding on this point questioned by Hand, J., in the circuit court opinion); Peterson v. KMTR, 18 U.S.L. WEEK 2044 (Cal. Super. Ct. 1949); Blanc v. Lantz, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949); Chaplin v. Amador, 93 Cal. App. 358, 269 Pac. 544 (1928); Warner, *Unfair Competition and the Protection of Radio and Television Programs* II, 1950 WASH. U.L.Q. 498, 533-534 (1950); Rubin v. American Sportsmen Television Equity Society, 102 Cal. App.2d 288, 227 P.2d 303 (1951); *cf.* WARNER, RADIO AND TELEVISION LAW (1948) at 1155 and 1171.

32. RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940), *reversing* 28 F. Supp. 787 (S.D.N.Y. 1939) (Judge Hand expressed doubt as to the existence of any such property interest); 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, 7 *et seq.* (1938); HOMBURG, LEGAL RIGHTS OF PERFORMING ARTISTS (1934), Addendum by Maurice J. Speiser, p. 152; Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 198 (1950) stating: "The majority of the courts dealing with the question have refused to admit 'performers' rights.'"; Traicoff, *supra* note 29, at 250 (doubting the existence of a property right in an interpretation); *cf.* Pforzheimer, *Copyright Protection For the Performing Artist In His Interpretive Rendition*, 1 COPYRIGHT LAW SYMPOSIUM 9, 14, 28 (1939); 20 ORE. L. REV. 372, 377 (1941); Note, 2 WASH. & LEE L. REV. 85, 104 (1940).

33. WARNER, RADIO AND TELEVISION LAW, 1156 (1948); Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 518 (1950); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1319-1320 (1940); Pforzheimer, *Copyright Protection For the Performing Artist In His Interpretive Rendition*, 1 COPYRIGHT LAW SYMPOSIUM 9, 31 (1939). See also Peterson v. KTMR Radio Corp., 18 U.S.L. WEEK 2044 (Cal. July 7, 1949); Chavez v. Hollywood Post No. 43, 16 U.S.L. WEEK 2362 (Cal. Jan. 1948).

right proprietor of the film. Further, there is the problem of a conflict between the rights of the performer and the rights of the author.[34]

If, however, we assume the existence of such a common law property right in a performer, is such a right preserved after the actor's performance? The concept of publication in the law of statutory and common law copyright is of such complexity that entire chapters have been devoted to the subject.[35] The writer will seek only to explain briefly the nature of the problem presented.

Common law copyright does not afford its possessor complete protection, because of the doctrine of publication. A general publication has been described as such a dissemination or use of a product as shows an intention to dedicate it to the public.[36] A general publication, implying as it does an abandonment and dedication of the work to the public, forfeits the property right.

Where, on the other hand, we find a publication which reveals the contents under conditions expressly or impliedly precluding its dedication to the public, there is but a "limited" or "qualified" publication, and the owner retains his property right.[37] The courts have found a "limited" publication, and thus retention of common law rights, in the public performance of a musical composition,[38] of a play,[39] broadcasting of a dramatic composition over the radio,[40] and theatrical exhibition of a motion picture photoplay.[41] They have also found for

34. That the actor's rights are derivative and subordinated to the author's, see LADAS, *supra* note 32, at 461.

35. *E.g.*, WARNER, RADIO AND TELEVISION LAW § 211b (1948); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY c. 5 (1944); AMDUR, COPYRIGHT LAW AND PRACTICE c. 10 (1936).

36. *See* Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904); Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209, 227-231 (1950); see Bass, *supra* note 29, at 61.

37. Cullen, *The Meaning and Effect of Publication*, 14 DETROIT L. REV. 222 (1951); Bass, *supra* note 29, at 61; Note, 2 WASH. & LEE L. REV. 85, 89 (1940).

38. McCarthy & Fisher v. White, 259 Fed. 364 (S.D.N.Y. 1919).

39. Ferris v. Frohman, 223 U.S. 424 (1912).

40. Uproar Co. v. NBC, 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir. 1936); Stanley v. CBS, Inc., 35 Cal.2d 653, 221 P.2d 73 (1950). Note also the statement by Warner, *Legal Protection of Program Ideas*, 36 VA. L. REV. 289, 294 (1950): "The rendition of a performance before a radio microphone and television camera 'is not an abandonment of ownership of the literary property or a dedication of it to the public at large.'"

41. Patterson v. Century Productions, Inc., 19 F. Supp 30 (S.D.N.Y.), *aff'd*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); De Mille Co. v. Casey, 121 Misc. 78, 201 N.Y. Supp. 20 (Sup. Ct. 1923); *Cf.* Universal Film Mfg. Co. v. Copperman, 212 Fed. 301 (S.D.N.Y.), *aff'd*, 218 Fed. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914);

and against such "limited" publication and retention of rights in the making and sale of phonograph records.[42]

In *Blanc* v. *Lantz*,[43] the court repudiated the doctrine of the *Patterson* and *De Mille* cases[44] and held that Mel Blanc's common law property rights in the Woodie Woodpecker musical laugh were extinguished by the distribution and exhibition in theaters of cartoons incorporating the laugh. The court so ruled upon (1) its interpretation of the California Civil Code,[45] and (2) its view that the public policy against perpetual monopolies in intellectual property, embodied in the copyright clause of the United States Constitution, applies also to common law copyright. This finding of a general publication has been attacked by a prolific writer in the field.[46] This critic of the *Blanc* decision states that it is contrary to the great body of decisional law and that, unless reversed, signals the "initial stage of the demise of common-law copyright."[47] It is also of interest to note his opinion that: " . . . a telecast to the general public does not constitute a general publication with a consequent loss of common property rights."[48]

Thus, if a property right is found in the actor's interpretation, how may it be enforced?

Remedies For Enforcement of Property Rights

A. *Common Law Copyright.*

The elements of a cause of action for infringement of common law copyright are: (a) ownership by the plaintiff of a protectible

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Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 Vand. L. Rev. 209, 234 (1950); Bass, *supra* note 29, at 63.

42. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937). *Contra:* RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940); Shapiro Bernstein & Co. v. Miracle Recording Co., 91 F. Supp. 473 (N.D. Ill. 1950).

43. 83 U.S. Pat. Q. 137 (Cal. Super. 1949).

44. *Supra* note 41.

45. Cal. Civ. Code §§ 980, 983 (1949). On these sections, see Note, 38 Calif. L. Rev. 332 (1950).

46. Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 Vand. L. Rev. 209, 237 (1950).

47. *Id.* at 240.

48. *Id.* at 233. But note that there are no reported decisions yet to the effect that television constitutes publication. And *cf.* Shapiro Bernstein & Co. v. Miracle Recording Co., 91 F. Supp. 473 (N.D. Ill. 1950).

property interest; (b) unauthorized copying of the material by the defendant; (c) damages resulting from such copying.[49] Assuming compliance with the first two requisites, what of the requirement that damage be shown?

In the *Roy Rogers* case[50] the court awarded Rogers an injunction against television of motion pictures in which he had appeared, but denied damages because the proof thereof was nebulous and uncertain. However, liberality of the court toward plaintiffs' endeavors to establish damages is indicated in other decisions.[51]

It is well settled that common law copyright is governed by the same remedies accorded other personal property, and thus an injunction will lie to prevent deprivation of the property right.[52] The protection accorded the common law copyright has even been held to permit an action for conversion of such a property interest.[53] Thus, it would appear that if a property right in the actor's interpretation is found to exist, and not held lost by publication, ample means exist for its protection. If an absolute property right, either statutory or common law, is not found to exist in the actor's interpretation, is there any other way by which he may secure relief?

B. *Unfair Competition.*

The subject of unfair competition has been exhaustively expounded by the courts and law review and text writers.[54] The elements of a

49. For a detailed discussion of these elements see Warner, *Unfair Competition and the Protection of Radio and Television Programs* 1950 WASH. U.L.Q. 297, 303, *et seq.* (1950).

50. Roy Rogers v. Republic Productions, Inc., 41 T.M. REP. 1073 (S.D. Cal. 1951).

51. Stanley v. Columbia Broadcasting System, Inc., 35 Cal.2d 653, 221 P.2d 73 (1950); Golding v. RKO Pictures, Inc., 82 U.S. PAT. Q. 136 (Cal. Super. 1949). But see, criticizing these decisions, Note, 24 So. CALIF. L. REV. 65 (1950). See also De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945).

52. *E.g.*, Chappell & Co. v. Fields, 210 Fed. 864 (2d Cir. 1914); National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294 (7th Cir. 1902); Thomas v. Lennon, 14 Fed. 849 (C.C.D. Mass. 1883).

53. Taft v. Smith Gray & Co., 76 Misc. 283, 134 N.Y. Supp. 1011 (Sup. Ct. 1912).

54. The cases are discussed, *infra*. A few of the many law review treatments of the problem are to be found in: Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 859 (1948); Baer, *supra* note 29, at 207; Callmann, *supra* note 29, at 648; Chaffee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940); Traicoff, *supra* note 29, at 238. See also Note, 19 A.L.R. 949 (1922); Shelton, *The Protection of the Interpretative Rights of A Musical Artist Afforded By The Law of Literary Property On the Doctrine of Unfair Competition*, 1938 COPYRIGHT LAW SYMPOSIUM 173, 189 (1939); Bass, *supra* note 29, at 64. Texts on the subject include CALLMANN, THE LAW OF

cause of action for unfair competition are: (1) A property or quasi-property right.[55] In this connection, it is of interest to recall one view that "a performer can make a persuasive case for a quasi-property right in a telecast, if his compensation will be increased by the sale of television rights and he receives a percentage thereof."[56] (2) Competition. This is usually stated to be a requisite of an unfair competition action; yet the courts are divided as to the existence of such a requirement.[57] (3) Damages. The courts have tended to gloss over this requirement.[58]

Unfair competition is a species of fraud or deceit.[59] In its inception the tort was confined to cases involving the "passing off" of one's goods as those of another.[60] Cases at the beginning of the century echoed the dogma that unfair competition embraced only "palming off" of one's goods as those of another.[61] But since the famous deci-

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UNFAIR COMPETITION AND TRADEMARKS (2d ed. 1950); NIMS, UNFAIR COMPETITION AND TRADEMARKS (4th ed. 1947).

55. *See* International News Service v. Associated Press, 248 U.S. 215, 240 (1918); R. H. Macy Co. v. Macy's, Inc., 39 F.2d 186, 187 (N.D. Okla. 1930); WARNER, RADIO AND TELEVISION LAW 1169 (1948). But see 1 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS 39 (2d ed. 1950).

56. See note 31 *supra;* see also note 15 *supra.*

57. Requiring competition: Carroll v. Duluth Superior Milling Co., 232 Fed. 675 (8th Cir. 1916); Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 (7th Cir. 1912); National Exhibition Co. v. Teleflash, Inc., 24 F. Supp. 488 (S.D.N.Y. 1936); Scutt v. Bassett, 86 Cal. App.2d 373, 194 P.2d 781 (1948); Alhambra Transfer & Storage Co. v. Muse, 41 Cal. App.2d 92, 106 P.2d 63 (1940). The newer view would not require direct, or market competition, emphasizing fraud and deceit upon the public and the misappropriation of trade expectancy: Sunbeam Corp. v. Sunbeam Furniture Corp., 88 F. Supp. 852 (S.D. Cal. 1950); Brooks Bros. v. Brooks Clothing of Calif., Ltd., 60 F. Supp. 442 (S.D. Cal. 1945); Jerome v. Twentieth Century-Fox Film Corp., 58 F. Supp. 13, 15 (S.D.N.Y. 1944); Bamberger Broadcasting Service v. Orloff, 44 F. Supp. 904 (S.D.N.Y. 1942); Prouty v. NBC, Inc., 26 F. Supp. 265 (D. Mass. 1939); Wood v. Peffer, 55 Cal. App.2d 116, 130 P.2d 220 (1942); Academy of Motion Pictures v. Benson, 15 Cal.2d 685, 104 P.2d 650 (1940); Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938). See, on the requirement of competition, 1 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS § 5.1 (2d ed. 1950) (requiring competition except in the secondary meaning trademark cases).

58. Warner, *Unfair Competition and the Protection of Radio and Television Programs,* 1950 WASH. U.L.Q. 297, 305 (1950).

59. *Id.* at 304 *et seq.*

60. RESTATEMENT, TORTS Introductory Note to § 711 (1938). *See* the discussion by Chief Justice Hughes in Schecter Poultry Corp. v. United States, 295 U.S. 495, 531-532 (1935); WARNER, RADIO AND TELEVISION LAW 1166 (1948); Chafee, *Unfair Competition,* 53 HARV. L. REV. 1289, 1310 (1940). See, as a good example of a "passing off" case in the artistic field, Chaplin v. Amador, 93 Cal. App. 358, 269 Pac. 544 (1928).

61. *E.g.,* Elgin National Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901);

sion in *International News Service* v. *Associated Press*,[62] involving news piracy, unfair competition has been extended in certain factual situations beyond the "passing off" cases to include misappropriation and diversion of the plaintiff's trade expectancy.[63] In *Waring* v. *WDAS Broadcasting Station, Inc.*,[64] renewed impetus was given to the extension of this business tort. After finding a property, or quasi-property right in the artist's interpretation, the court, in applying the law of unfair competition to the unauthorized use of plaintiff's recorded performance, found a misappropriation by the defendant of the product of Waring's labor and talent and thus brought the case within the *Associated Press* case doctrine.[65]

Just three years after the decision in the *Waring* case, Judge Learned Hand reached an opposite conclusion on substantially similar facts. In *RCA Manufacturing Co.* v. *Whiteman*,[66] the court held that Paul Whiteman could not enjoin the unauthorized playing of a phonograph record bearing a restrictive legend which embodied his performance. A cause of action for unfair competition is predicated upon an invasion of a property or quasi-property right. The court denied that Whiteman had such a cause of action, since, assuming for purposes of argument the original existence in him of a common law property right, a general publication had occurred upon sale of the records, thus destroying any property right.[67] The *Whiteman*

Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398 (8th Cir. 1913); and, into the third decade, see General Banking Co. v. Gorman, 3 F.2d 891 (1st Cir. 1925).

62. 248 U.S. 215 (1918).

63. *E.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495, 532 (1935); Motor Improvements, Inc. v. A. C. Spark Plug Co., 80 F.2d 385 (6th Cir. 1936); Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927); Jerome v. Twentieth Century-Fox Film Corp., 58 F. Supp. 13 (S.D.N.Y. 1944); Vortex Mfg. Co. v. Ply-Rite Contracting Co., 33 F.2d 302 (D. Md. 1929); Madison Square Garden v. Universal Pictures Corporation, 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938).

64. 327 Pa. 433, 194 Atl. 631 (1937).

65. Some of the many law review discussions of the *Waring* case are to be found in Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 200 (1950); Shelton, *The Protection of the Interpretative Rights of A Musical Artist Afforded by the Law of Literary Property or the Doctrine of Unfair Competition*, 1 COPYRIGHT LAW SYMPOSIUM 173, 183 (1939); 24 VA. L. REV. 333 (1938); 26 GEO. L.J. 504 (1938); 6 GEO. WASH. L. REV. 237 (1938); 23 WASH. U.L.Q. 283 (1938). See criticism of the case in 1 CALLMAN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 283 *et. seq.* (2d ed. 1950); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1319 (1940).

66. 28 F. Supp. 787 (S.D.N.Y. 1939).

67. The decision inspired much law review discussion. See, *e.g.*, WARNER, RADIO AND TELEVISION LAW 1168 (1948); Solinger, *Unauthorized Uses of Television Broad-*

decision is a reflection of the tendency of the courts to confine the *Associated Press* doctrine to the facts of that case.[68] Several writers would relegate the actor to enforcement of any property right he may have by means other than the doctrine of unfair competition.[69] The issue, however, cannot be said to be finally settled by the authorities.[70]

C. *Equitable Servitudes.*

If it be decided that no relief is available to the actor by an application of the doctrine of unfair competition, may he impose an equitable servitude upon his performance? If this were upheld, he would thereby be able to regulate presentation of his interpretations to audiences.

An equitable servitude is a restriction imposed by the transferor upon the use of property by the immediate transferee and subsequent transferees taking with notice of the restriction.[71] Such a limitation upon the use of land has long been sanctioned by the law.[72] Attempts to impose similar restrictions upon the use of personal property, how-

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casts, 48 COL. L. REV. 848, 869 (1948); 9 DUKE B.A.J. 57 (1941); 26 IOWA L. REV. 384 (1941); 26 WASH. U.L.Q. 272 (1941); 9 FORD. L. REV. 425 (1940). See also Note, 2 WASH & LEE L. REV. 85, 99 (1940). And see Shapiro Bernstein & Co. v. Miracle Recording Co., 91 F. Supp. 473 (N.D. Ill. 1950).

68. See, *e.g.*, Mosler Safe Co. v. Ely-Norris Safe Co., 273 U.S. 132 (1927), *reversing* 7 F.2d 603 (2d Cir. 1925); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929); Raenore Novelties, Inc. v. Superb Stitching Co., Inc., 47 N.Y.S.2d 831 (Sup. Ct. 1944); Soft-Lite Lens Co. v. Ritholz, 301 Ill. App. 100, 21 N.E.2d 835 (1939); Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1314 (1940); Traicoff, *The Rights of the Performing Artist in his Interpretation and Performance*, 11 AIR L. REV. 225, 240 (1940); 26 IOWA L. REV. 384, 389 (1941); 9 FORD. L. REV. 425, 427 (1940).

69. Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 297, 310 (1950); Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 200 (1950); Baer, *Performers' Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N.C.L. REV. 202, 210 (1941); Chafee, *supra* note 68, at 1315 *et seq.*

70. *Cf.* Rogers v. Republic Productions, Inc., 41 T.M. REP. 1073 (S.D. Cal. 1951); see *Autry* case, *supra* note 15; 1 CALLMAN, UNFAIR COMPETITION AND TRADEMARKS 285 (2d ed. 1950); 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 500 (1938); Note, 20 ORE. L. REV. 372, 376 (1941); Note, 2 WASH. & LEE L. REV. 85, 104 (1940). Seemingly, all authorities would agree upon the result in Chaplin v. Amador, 93 Cal. App. 358, 269 Pac. 544 (1928).

71. Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 953 (1928); Note, 2 WASH. & LEE L. REV. 85, 91 (1940).

72. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848); 3 TIFFANY, REAL PROPERTY § 858 (3d ed. 1939); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 870 (1943).

ever, generally have been unsuccessful.[73] A common reason given for the courts' refusal to enforce equitable servitudes on chattels has been the restraint of trade involved, which is deemed obnoxious to public policy.[74]

Any discussion of equitable servitudes as applied to chattels must, of necessity, revolve about the *Waring* and *Whiteman* cases, which arose in the 1930's. The records in the *Waring* case[75] bore the label: "Not Licensed for Radio Broadcast." The court, in upholding their restriction, said:

> Where public policy or some other determinative consideration is not involved, why should the law adopt an immutable principle that no restrictions, reservations, or limitations can ever be allowed to accompany the sale of an article of personal property? . . . There is no reason, however, why an ancient generalization of law should be held invariably to apply to cases in which modern conditions of commerce and industry and the nature of new scientific inventions makes restrictions highly desirable. . . .[76]

On almost identical facts, the opposite view was taken by Judge Hand in *RCA Manufacturing Company, Inc.* v. *Whiteman.* Speaking for the circuit court of appeals, he said in dismissing the complaint:

> . . . Restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they are "repugnant" to the transfer of title. If "the common-law property" in the rendition be gone, then anybody may copy it who chances to hear it, and may use it as he pleases. It would be the height of "unreasonableness" to forbid any uses to the owner of the record which were open to anyone who might choose to copy the rendition from the record. To revert to the illustration of a musical score, it would be absurd to forbid the broadcast for profit

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73. Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 204 (1950); Solinger, *supra* note 72, at 870 (giving extensive citations); Note, 2 WASH. & LEE L. REV. 85, 92 (1940). *Cf.* Loew's, Inc. v. Wolff, 101 F. Supp. 981, 986 (S.D. Cal. 1951).

74. *E.g.*, Strauss v. Victor Talking Machine Co., 243 U.S. 490 (1917); Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911); Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914); Wagner v. Conried, 125 Fed. 798 (C.C.S.D.N.Y. 1903); Chafee, *supra* note 71, at 956.

75. Discussion for purposes of convenience is here limited to Waring v. WDAS Broadcasting Station, Inc. The decision was the same in Waring v. Dunlea.

76. Waring v. WDAS Broadcasting Station, 327 Pa. 433, 445, 194 Atl. 631, 637 (1937).

> of its record, if any hearer might copy it and broadcast the copy. Thus, even if Whiteman and RCA Manufacturing Company, Inc., have a "common-law property" which performance does not end, it is immaterial, unless the right to copy the rendition from the records was preserved through the notice of the restriction.
>
> . . . Certainly when the "common-law property" is in a work which the Copyright Act . . . covers, there can be no doubt; Congress has created the monopoly in exchange for a dedication, and when the monopoly expires the dedication must be complete. If the records were registrable under the act, the restriction would therefore certainly not limit the dedication. The fact that they are not within the act should make no difference. . . . Any relief which justice demands must be found in extending statutory copyright to such works, not in recognizing perpetual monopolies, however limited their scope.[77]

The *Whiteman* case was cited with approval in *Shapiro, Bernstein & Co., Inc.* v. *Miracle Record Co., Inc.*, in which the court said:

> It is my opinion that when Lewis permitted his composition to be produced on phonograph records and permitted those records to be sold to the general public, the common law property in the musical composition did not survive the sale of the phonograph records, and the public sale of those records was a dedication of the musical composition to the public. . . . [78]

Of course, if a property right in the actor's performance exists, and no general publication is found to have occurred, there is no need to assert an equitable servitude. The validity of such a restriction is, however, of utmost significance when, as in the *Whiteman* cases, common law property rights are held to have been lost by a general publication.[79]

Professor Chafee, writing the landmark article on the subject in 1928, stated: " . . . In short, the advocate of equitable servitudes must rest upon principle rather than upon authority. . . . "[80] The *Whiteman* decision and several commentators would indicate that his words are as true today.[81] It should be noted, however, that the United States

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77. 114 F.2d 86, 89 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

78. 91 F. Supp. 473, 475 (N.D. Ill. 1950).

79. WARNER, RADIO AND TELEVISION LAW § 211c (1948); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848, 870 (1948).

80. Chafee, *supra* note 71, at 1008.

81. *E.g.*, Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B.J. 193, 206 (1950); Solinger, *supra* note 79, at 870; Note, 2 WASH. & LEE L. REV. 85, 98

Supreme Court has reversed its former ruling and has upheld the constitutionality of state resale price maintenance laws (the so-called "Fair Trade Acts").[82] Professor Chafee, in his article, discussed resale price maintenance as an equitable servitude, and saw little possibility of enforcement of such contracts by the courts.[83] Perhaps the decision in the *Old Dearborn* case may signal a judicial tendency toward the recognition of other types of equitable servitudes on chattels. Such a servitude, if recognized, would probably have its genesis in a contractual provision that all motion pictures in which the actor appears are to bear a notice that their use is expressly prohibited on television unless his authorization is obtained.[84]

A court, to enforce such an equitable servitude imposed upon an actor's performance, would have to overcome a judicial attitude evidenced by a long line of precedents. In view of the change in the law concerning resale price maintenance, new developments in the field may be forthcoming.

Personal Rights

If no property right in the actor's performance is found to exist, may the actor nonetheless enjoin television showings of old motion pictures in which he appeared, as an invasion of his personal rights?

A. *The Actor's Moral Rights.*

The doctrine of the "moral right" (*le droit moral*) of an author is firmly entrenched abroad.[85] The doctrine has been defined as:

(1940). Many writers are sympathetic to the recognition of such restrictions, but find little case authority in the United States to support their imposition.

82. Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936). *But cf.* the recent limitation as to nonsigners in Schwegemann Bros. v. Calvert Distillers Corp., 341 U.S. 384, *rehearing denied*, 341 U.S. 956 (1951).

83. Chafee, *supra* note 71, at 987.

84. Similar announcements are made daily over television networks prohibiting any showing of the programs in places where an admission is charged. Injunctions were awarded against infractions of such restrictive announcements in Louis v. Richman, Equity No. 1803 (Pa. C.P. June, 1948); Louis v. Friedman, Equity No. 1804 (Pa. C.P. June, 1948); Louis v. California Productions (N.Y. Sup. Ct. June, 1948); 20th Century Sporting Club, Inc. v. Mass. Charitable Mechanic Association, Equity No. 60230 (Mass. Super. Ct. June, 1948). None of the courts rendered a written opinion explaining its ruling. On these restrictive announcements, see note 79, *supra*.

85. Katz, *Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 So. Calif. L. Rev. 375 (1951); Roeder, *Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 555 (1940); Note, 2 Ala. L. Rev. 267, 269 (1950).

> . . . the right of the author to create, or not to create, to present the creation to the public in a form of his choice, or to withhold it, to dispose of this form as he alone desires, and to demand that his personality be respected in so far as it relates to his status as an author. . . . [86]

Continental jurisprudence has broken down a performer's rights under the doctrine into: (a) the right of authorization–a right to regulate the media of reproduction of the performance; (b) the moral right of the performer–protection of his reputation by giving him stage and screen credit, etc., and by prohibiting injurious alteration or defective reproduction of the interpretation; (c) the pecuniary right–which entails recognition of a right in the artist to receive compensation for each medium by which his performance is reproduced, *i.e.*, movies, radio, television, etc.[87]

The doctrine of moral right per se has never been accepted by American courts.[88] For many years, proponents of the doctrine in the United States have strived unsuccessfully to secure passage of amendments to our copyright laws which would afford protection to the interpretative rights of performing artists.[89] The United States has not joined the International Copyright Union. Had we done so, certain moral rights of the author would have been protected. Article 6-bis(1) of the Berne Convention of the Union (revised in Rome in 1928) states:

> Independently of the patrimonial right of the author, and even after the assignment of the said rights, the author retains the right to claim the paternity of the work, as well as the right to object

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86. Katz, *supra* note 85, at 391. For a complete discussion of the elements of the doctrine, see Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 501 *et seq.* (1950).

87. These rights of the performer are discussed in Warner, *supra* note 86, at 505 *et seq.* See also Roeder, *Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558 *et seq.* (1940). On the right of the artist to receive compensation for each additional medium, see 1 LADAS, *op. cit. supra* note 70, at 496.

88. Katz, *supra* note 85, at 375; Perkins, *Artist's Right to Protect Destruction of His Work After Sale*, 1951 WASH. U.L.Q. 124, 125 (1951); Lee, *Moral Right Doctrine: Protection of the Artist's Interest in his Creation After Sale*, 2 ALA. L. REV. 267, 272 (1950); Note, 49 COL. L. REV. 132, 133 (1949).

89. Katz, *supra* note 85, at 419; Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 504 (1950); Pforzheimer, *Copyright Protection for the Performing Artist in His Interpretative Rendition*, 1 COPYRIGHT LAW SYMPOSIUM 9 (1939).

> to every defamation, mutilation, or other modification of the said work, which may be prejudicial to his honor or to his reputation.

The right of authorization of an author was recognized and protected by the Brussels Convention of the Union.[90] It has been observed, however, that the Convention, in conferring the right of authorization and the pecuniary right upon the author, excludes from its protection all those who are only "creators in the second degree, such as performing artists, producers of phonograph records, and radio broadcasters."[91] Yet, legislation exists in many countries recognizing rights in individual interpretations of literary, artistic, and musical compositions akin to those of authors, and affording such artists protection similar to that accorded authors.

While no American court has yet accepted the doctrine of moral right as such, certain of its aspects have been recognized under various theories. Thus, injunctions have been granted against the publication of literary work which falsely ascribes paternity to the complainant.[92] Relief has often been premised in such cases upon the existence of a business libel.[93] In addition, in extreme cases, pro-

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90. See *The Revision of the Berne Convention in Brussels,* I UNESCO COPYRIGHT BULLETIN No. 2 Art. 11-bis (1948). Also, see the preliminary draft of an international convention adopted in Rome on Nov. 17, 1951, for the protection of performers, manufacturers of phonograph records, and broadcasting organizations. It will probably be submitted to an international convention for adoption of an International Copyright Convention, which conference has been called to meet in Geneva from Aug. 15 to Sept. 6, 1952. IV UNESCO COPYRIGHT BULLETIN No. 4 (1951). Space limitations prohibit analysis of this draft, but its importance cannot be overemphasized.

91. Homburg, *Radio Broadcasting and the International Protection of Intellectual Rights,* 10 FED. COMM. B.J. 59, 61 (1949). It is of interest to note that the preliminary draft of a Universal Copyright Convention, composed of 30 international copyright specialists representing 24 countries, refers to authors and other copyright proprietors and significantly makes no express mention of performers as such. IV UNESCO COPYRIGHT BULLETIN No. 3 (1951). And see 1 LADAS, *op. cit. supra* note 70, at 461 *et seq.* It is of interest to note, according to Ladas, that under the Polish law of 1926 and the Portuguese law of 1927 the producer is recognized as "author" of the film; under the Czechoslovakian law of 1926, the stage director is the "author"; under the Italian law of 1925 the scenario writer and the film's artistic director are the "authors". In England, however, the producer is deemed the owner of the copyright. In the United States, the film copyright belongs to the producer as the employer of those working in such other capacities.

92. *E.g.,* Drummond v. Altemus, 60 Fed. 338 (C.C.E.D. Pa. 1894); Clemens v. Belford, Clark & Co., 14 Fed. 728 (C.C.N.D. Ill. 1883); D'Oyly Carte v. Ford, 15 Fed. 439 (C.C.D. Md. 1883); Harte v. De Witt, reported in 1 CENT. L.J. 360 (N.Y. Sup. Ct. 1874).

93. Perkins, *supra* note 88, at 126; Roeder, *supra* note 87, at 566; 4 VAND. L. REV.

tection has been accorded by recourse to the doctrine of unfair competition,[94] and occasionally by adverting to the right of privacy.[95] In the main, relief has been denied to persons asserting injuries cognizable under the moral right doctrine.[96]

The doctrine has found little favor with the courts due to a judicial fear of its derogating from present copyright law.[97] Recognition by our law of the principle of the right of repentance—one element of *le droit moral*—would protect the actor seeking to enjoin an unauthorized showing on television of an older motion picture in which he had performed. Under this concept, the artist may prevent publication of his work if a subsequent change in his principles or style causes the work to fall beneath his standards.[98] Since the right of repentance is not recognized in the United States where there has been no mutilation or defamation of his interpretation, present authority affords the actor little hope of relief under the moral rights doctrine.[99]

180, 181 (1950); 49 COL. L. REV. 132, 133 (1949). For a discussion of "Trade Libel," see PROSSER, TORTS 1036 *et seq.* (1941).

94. Prouty v. NBC, Inc., 26 F. Supp. 265 (D. Mass. 1939); Chaplin v. Amador, 93 Cal. App. 358, 269 Pac. 544 (1928).

95. Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); Ellis v. Hurst, 66 Misc. 235, 121 N.Y. Supp. 438 (Sup. Ct. 1910). *Cf.* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890): "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." And *cf.* CAL. CIV. CODE § 985 (1949): "Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law."

96. *E.g.*, Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949), 1951 WASH. U.L.Q. 124 (1951), 2 ALA. L. REV. 267 (1950); 4 VAND. L. REV. 180 (1950); Meliodon v. Philadelphia School Dist., 328 Pa. 457, 195 Atl. 905 (1938). But *cf.* Dodge v. Allied Arts Co. (Unreported N.Y. Sup. Ct. 1903), discussed in BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 494 (1944).

97. Katz, *supra* note 85, at 410.

98. One can well feel for a star who switches on a television set and sees herself in a film of 1935 vintage. At this time she is a better actress, her hairdo is more fashionable, and her clothes are not dated. *Cf.*, HOMBURG, LEGAL RIGHTS OF PERFORMING ARTISTS 99 (1934):

> We have lately attended some retroactive showings of films dating back only twenty years. The most tragic situations provoke laughter, due as much to the gestures as to the *décor* and costumes which no longer fit in with the conception that the present public has of the theater.

And see Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 501 (1950).

99. The fundamental characteristic of the moral right is its non-assignability. This is contrary to the freedom of contract which is so zealously guarded in American

B. *The Right of Privacy.*

The right of privacy, a personal,[100] rather than a property right,[101] has been defined as "the right to be let alone."[102] "Remedies have been afforded for the protection of that right."[103]

What we know today as the right of privacy has been recognized and enforced by the courts under the various garbs of libel,[104] injury to reputation,[105] contract,[106] etc. The landmark article in the field is, of course, that written by Messrs. Warren and Brandeis in 1890.[107]

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jurisprudence today. On the effective cutting or transposing of old motion pictures, see Lillie v. Warner Bros. Pictures, 139 Cal. App. 724, 34 P.2d 835 (1934); Fairbanks v. Winik, 119 Misc. 809, 198 N.Y. Supp. 299 (Sup. Ct. 1922). Also, see Madison Square Garden v. Universal Pictures Corporation, 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938); Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938); Franklin v. Columbia Pictures Corp., 246 App. Div. 35, 284 N.Y. Supp. 96, *aff'd*, 271 N.Y. 554, 2 N.E.2d 691 (1936).

100. *See* Gill v. Curtis Publishing Co., 239 P.2d 630 (Cal. 1952); Gautier v. Pro-Football, Inc., 278 App. Div. 431, 445, 106 N.Y.S.2d 553, 560 (1st Dep't 1951); Melvin v. Reid, 112 Cal. App. 285, 290, 297 Pac. 91, 93 (1931).

101. In Peterson v. KMTR Radio Corp., 18 U.S.L. WEEK 2044 (Cal. July 7, 1949) the court said:

> The California courts have recognized that the right of privacy is a property right for the infringement of which damages will lie. (Metter v. Los Angeles Examiner, 35 Cal. App. (2) 304; Melvin v. Reid, 112 Cal. App. 285; 21 Cal. Jur. Supp. 524.)

The cases and text cited by the court in the *Peterson* case for the proposition are expressly to the contrary. See Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 309, 95 P.2d 491, 495 (1939), and Melvin v. Reid, 112 Cal. App. 285, 290, 297 Pac. 91, 93 (1931) in which latter case the court said:

> . . .
> 2. It is an incident of the person and not of property—a tort for which a right of recovery is given in some jurisdictions.
> 3. It is a purely personal action and does not survive, but dies with the person.

102. Gill v. Curtis Publishing Co., *supra* note 100, at 632, and cases there cited. Also *see* Donahue v. Warner Bros. Pictures, 194 F.2d 6, 10 (10th Cir. 1952).

103. Gill v. Curtis Publishing Co., *supra* note 100, at 632. Also, Mau v. Rio Grande Oil Company, Inc., 28 F. Supp. 845 (N.D. Cal. 1939); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942); Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929).

104. Martin v. F. I. Y. Theater Co., 26 Ohio L. Abstr. 67 (Com. Pl. Ct. 1938); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

105. Melvin v. Reid, *supra* note 104.

106. McCreery v. Miller's Groceteria, 99 Colo. 499, 64 P.2d 803 (1936); Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932).

107. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For later treatment of the topic, see *e.g.*, Wilcox, *The Right of Privacy—The Scope of the Right*, 24 NOTRE DAME LAW. 383 (1949); Nizer, *The Right of Privacy*, 39 MICH. L.

The authors found that there existed a large body of precedents which could be explained only by the recognition of a personal right of privacy, and delimited what they conceived the scope and the import of the right to be. Their early treatment has served as the predicate for all subsequent discussions of the right.[108]

In one of the earliest cases arising in the United States after the Warren and Brandeis article, a New York court denied the existence of the right of privacy, finding no legal precedent to support its recognition.[109] This decision was reversed by the Legislature at its next session, so as to grant limited recognition to the right in New York.[110] Utah[111] and Virginia[112] have statutes similar to that of New York.

Today the right of privacy is recognized by case law[113] or by statute[114] in a majority of the United States, as well as in the Restate-

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REV. 526 (1941); Unterberger, *The Right of Privacy*, 5 Mo. L. REV. 343 (1940); Kacedan, *The Right of Privacy*, 12 B.U.L. REV. 353 (1932). And *see* Leverton v. Curtis Publishing Co., 192 F.2d 974, 975 (3rd Cir. 1951). Also Feinberg, *Recent Developments in the Law of Privacy*, 48 COL. L. REV. 713 (1948); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101 (1929); Buxton, *The Right of Privacy*, 35 LAW NOTES 25 (1931). See Notes, 15 A.L.R.2d 766 (1951); 168 A.L.R. 456 (1947); 138 A.L.R. 63 (1942).

108. Nizer, *supra* note 107; Note, 5 Mo. L. REV. 343, 344 (1940).

109. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

110. N.Y. CIVIL RIGHTS LAW §§ 50, 51.

111. UTAH CODE ANN. §§ 103, 104, 107, 108, 109 (1943); construed in Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952).

112. VA. CODE ANN. § 8-650 (1950); see Note, 38 VA. L. REV. 117 (1952).

113. Alabama: Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Arizona: Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); California: Gill v. Curtis Publishing Co., *supra* note 100; Florida: Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1945); Georgia: Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Indiana: State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Kansas: Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Kentucky: Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929); Louisiana: Itzkovich v. Whitaker, 115 La. 479, 39 So. 499 (1905); Michigan: Pallas v. Crowley Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); Missouri: Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); North Carolina: Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Nevada: Norman v. Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); New Jersey: McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (1945); Oregon: Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); South Carolina: Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169 (1940).

All of the foregoing cases are cited in the case of Gill v. Curtis Publishing Co., *supra* note 100, at 632. In addition, there have been cases in Alaska, Colorado, District of Columbia, Illinois, and Pennsylvania which are cited in Note, 38 VA. L. REV. 117 (1952).

114. See notes 110, 111, and 112 *supra*.

ment of Torts.[115] The right is now firmly established in California.[116] In *Waring* v. *WDAS Broadcasting Station, Inc.*, Judge Maxey, in a concurring opinion, based his decision upon a violation of Waring's right of privacy.[117] Commentators have criticized the opinion as being an undue extension of the right.[118]

In view of the fact that a few jurisdictions have expressly repudiated the right of privacy,[119] an interesting conflict of laws question is presented when a television broadcast, embodying an unauthorized performance, is beamed interstate. Does a cause of action arise in each of the states recognizing the right in which the show is seen (assuming for a moment that the right would be recognized in the situation presented), or only in the state from which the broadcast emanated?[120] The generally accepted conflict of laws rule applicable to torts is that the place of wrong is in the state where the last event necessary to make a tort-feasor liable for an alleged tort takes place.[121] Is the last event the showing of the televised picture in each

115. RESTATEMENT, TORTS § 867 (1939).

116. Mau v. Rio Grande Oil Company, 28 F. Supp. 845 (N.D. Cal. 1939); Gill v. Curtis Publishing Co., *supra* note 100; Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

117. 327 Pa. 433, 455, 194 Atl. 631, 642 (1937). *But see* Lillie v. Warner Bros. Pictures, Inc., 139 Cal. App. 724, 728, 34 P.2d 835, 837 (1934), in which a divided court said:

> . . . It seems clearly to follow that the exhibition of the scene as a short would not be a tortious invasion of the plaintiff's right of privacy. If wrong at all, it necessarily was only a breach of the contract.

118. For such comment on the *Waring* case, see the following: WARNER, RADIO AND TELEVISION LAW 1176 (1948); Warner, *Legal Protection of the Content of Radio and Television Programs*, 36 IOWA L. REV. 14, 21 (1950); Countryman, *The Organized Musicians*, 16 U. OF CHI. L. REV. 239, 255 (1949); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N.C.L. REV. 202, 210 (1941); *cf.* Judge Hand in RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940): "It scarcely seems necessary to discuss the strange assertion that to broadcast the records in some way, invades somebody's 'right of privacy', presumably Whiteman's."

119. Rhode Island: Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909); Washington: Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915); *cf.* Lewis v. Physicians and Dentists Credit Bureau, Inc., 27 Wash.2d 267, 177 P.2d 896 (1947); Wisconsin: Prest v. Stein, 220 Wis. 354, 265 N.W. 85 (1936). The latter two jurisdictions said that its recognition must come, if at all, from the legislature.

120. In Leverton v. Curtis Publishing Co., 192 F.2d 974, 975 (3d Cir. 1951), Judge Goodrich ruefully said that if all the questions which could be pointed up by such a situation were to be answered, we should find ourselves in a forest from which it would be hard to escape.

121. GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS §§ 377, 378 (1934).

state where the image is seen and heard?[122] Or is it only in the state from which it originally emanates? Or is it in the state where the plaintiffs have personally seen the televised picture?[123] Or is it the place where plaintiffs reside? The problem must ultimately be answered.[124]

In *Donahue* v. *Warner Bros. Pictures, Inc.*,[125] the wife and two daughters of Jack Donahue, a deceased dancer, were residents of California. They instituted suit in Utah against the producer, distributor, and Utah exhibitor of a motion picture entitled "Look for the Silver Lining," which depicted the career and used the name of Donahue for the leading male star without the plaintiffs' consent.

The closely divided circuit court of appeals held, in effect, that Utah had the power to forbid appropriation in that state of the name or picture of a person for purposes of trade, and to provide a remedy in its courts without regard to whether a like appropriation had previously occurred in another state where no remedy was available. The dissent argued that plaintiffs resided in California; had never resided in Utah; first saw the picture in California; never saw the picture in the State of Utah; and did not know it had been shown there until informed thereof by their counsel. Regarding the law applicable to the determination of damages for injury to their feelings, the dissent said:

> Since the injuries to plaintiffs' feelings occurred in California and they suffered no injury to their feelings in Utah, under the common-law conflict of laws rule . . . the place of the wrong was in California, and the substantive right of the plaintiffs, as heirs of Jack Donahue, to recover damages for the injuries to their feelings would be determined by the law of California.[126]

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122. Cf. RCA Mfg. Co. v. Whiteman, *supra* note 118, at 89: ". . . since the broadcasting will reach receiving sets in that state, it will constitute a tort committed there . . . ."

123. *See* Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952) (dissenting opinion).

124. The problem is posed but not answered by the court in Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951); *cf.* Hartmann v. Time, Inc., 166 F.2d 127, 133 (3rd Cir. 1948). In the *Hartmann* case, the court held that actions for libel were transitory in their nature and could be sued upon wherever publication occurred. For a critical discussion of this and the interstate problem see Note, 60 HARV. L. REV. 941 (1947). See also Baer, *supra* note 118, at n. 4.

125. 194 F.2d 6 (10th Cir. 1952).

126. *Id.* at 24. The dissent further argued:

> Damages for injuries to the plaintiffs' feelings resulting from the exhibition of the motion picture outside the State of Utah were clearly not recoverable by

In *Gautier* v. *Pro-Football, Inc.*,[127] an animal trainer presented an act at a ball park between the halves of a professional football game. This act was televised in Washington, D. C., and viewed in New York. Suit was brought in New York by the animal trainer for violation of his right of privacy under the New York statute. The court apparently took it for granted that the action could be brought in New York and held that the New York law applied.

Certain limitations upon the right, stemming from the Warren and Brandeis article,[128] are recognized today.

(1) The first limitation is found in matters of public interest. In considering whether to give relief for an alleged invasion of the right, the courts balance the interests involved.

(a) News. In the words of one court:

> There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of general or public interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence.[129]

In some jurisdictions, the concept of "news" has been greatly extended.[130]

(b) Personalities in the Public Eye. Apart from a possible overlapping with the "news" category of cases, it is recognized today, as an independent limitation, that people who have in the words of Warren and Brandeis: "renounced the right to live their lives screened from public observation,"[131] have lost the right to complain of certain invasions of their privacy. Quoting again from the same article:

> To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his right, while

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the heirs of Jack Donahue, since only Utah and Virginia recognize the right of heirs of a deceased person to recover for the invasion of the right of privacy of their ancestor—and the Virginia statute gives such right of action only to heirs who are residents of Virginia.

127. 278 App. Div. 431, 106 N.Y.S.2d 553 (1st Dep't 1951).

128. Warren and Brandeis, *supra* note 107, at 214 *et seq.*

129. Jones v. Herald Coast Co., 230 Ky. 227, 229, 18 S.W.2d 972, 973 (1929).

130. *E.g.*, Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (E.D.N.Y. 1936); Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937); Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911).

131. Warren and Brandeis, *supra* note 107, at 215.

> to state and comment on the same characteristics found in a would-be Congressman could not be regarded as beyond the pale of propriety.[132]

Thus, in such a situation, the courts have found no actionable invasion of the right of an explorer,[133] an actress,[134] a motion picture star,[135] a professional dancer,[136] an orchestra leader,[136a] and a professional football player.[137] Even public figures do not waive their right completely, and courts have experienced much difficulty in deciding whether a given publication has exceeded the bounds of propriety.[138] Each case must ultimately rest upon its own facts as to whether or not an invasion of the right has occurred.[139]

(2) Waiver by Consent—Express or Implied. The maxim *volenti non fit injuria* has often been applied in the right of privacy field to defeat recovery.[140] Here, as in other phases of tort law, the consent may be express or implied.[141] The most difficult problem posed to the courts has been determining the extent of the waiver. Waiver

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132. *Ibid.* See concurring opinion of Huxman, J., in Donahue v. Warner Bros. Pictures, Inc., *supra* note 123.

133. Smith v. Suratt, 7 Alaska 416 (1926).

134. Martin v. F. I. Y. Theater Co., 26 Ohio L. Abstr. 67 (Com. Pl. Ct. 1938); Lillie v. Warner Bros. Pictures, Inc., 139 Cal. App. 724, 324 P.2d 835 (1934).

135. Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (W.D. Okla. 1938), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939); Bordeaux v. Mitchum, Los Angeles Sup. Ct. No. 551, 563 (1949).

136. Gavrilov v. Duell, Sloane & Pearce, Inc., 84 N.Y.S.2d 320 (Sup. Ct. 1948).

136a. RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940).

137. O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942), 21 TEXAS L. REV. 103 (1942). See, *e.g.*, Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940) (former child prodigy). See Note, 24 NOTRE DAME LAW. 383, 393 (1949). Also see Colyer v. Richard K. Fox Publishing Co., 162 App. Div. 297, 146 N.Y. Supp. 999 (2d Dep't 1914) (professional high diver); Krieger v. Popular Publications, Inc., 167 Misc. 5, 3 N.Y.S.2d 480 (1938); Virden, *Right of Privacy*, 15 Mo. L. REV. 104, 106 (1950); Warren and Brandeis, *supra* note 107, at 216.

138. See Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952); Stryker v. Republic Pictures Corp., 108 Cal. App.2d 214, 238 P.2d 670 (Cal. 1951).

139. See cases cited and discussed in Gill v. Curtis Publishing Co., 239 P.2d 630 (Cal. 1952).

140. Warren and Brandeis, *supra* note 107, at 218. See, on consent, White v. William G. White, Inc., 160 App. Div. 709, 145 N.Y. Supp. 743 (1st Dep't 1914); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

141. Metter v. Los Angeles Examiner, 35 Cal. App.2d 304, 95 P.2d 491 (1939); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911). For an interesting aspect of this question, *cf.* the *Sally Rand* case, discussed in Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 556 (1941).

for one purpose may not constitute waiver for a different purpose.[142]

In the one known case involving attempted revocation of consent, the court held that a voluntary permission to use one's name or likeness is a mere revocable license, which may be withdrawn at any time.[143] The decision has been criticized for not applying an estoppel where the defendant, in reliance upon the consent, had expended considerable money over a period of 20 years in popularizing the product.[144]

Several cases have arisen comparatively recently involving the performer's right of privacy as affected by television. In a series of decisions in 1948, the promoters, fighters, broadcasting stations, network and sponsors of the Louis-Walcott championship fight in New York City were granted injunctions against the unauthorized exhibition for profit by a motion picture theater owner, ballroom operators, and a hotel owner of televised pictures of the fight.[145] One allegation in the complaints was that defendants' action constituted an invasion of plaintiffs' right of privacy. None of the courts rendered a written opinion and one may only theorize as to the basis for the decisions. Since Louis and Walcott consented to appear before the television cameras, and since the purpose of these actions was to enjoin only unauthorized showing of the televised fight, which would result in a financial or commercial benefit to the exhibitor, it would seem that the authorities on waiver by consent would apply, and no invasion of the right could be asserted.

In *Chavez* v. *Hollywood Post No. 43, American Legion,*[146] a professional boxer alleging a violation of his right of privacy sued to enjoin the television of a match in which he was to engage. The

142. Peterson v. KMTR Radio Corp., 18 U.S.L. WEEK 2044 (U.S. July 26, 1949); McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Sinclair v. Postal Tel. & Cable Co., 72 N.Y.S.2d 841 (Sup. Ct. 1935); Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481 (1st Dep't 1920); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Stepner, *The Right of Privacy—A Compilation,* 3 JOHN MARSHALL L.Q. 265, 276 (1937); Note, 24 NOTRE DAME LAW. 383, 390 (1949); Note, 14 A.L.R. 2d 750, 765 (1950).

143. Garden v. Parfumerie Rigaud, 151 Misc. 692, 271 N.Y. Supp. 187 (Sup. Ct. 1933).

144. Nizer, *The Right of Privacy,* 39 MICH. L. REV. 526, 558 (1941); see, 138 A.L.R. 22, 58 (1942).

145. See note 84 *supra.* See also the pamphlet published 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.*

146. 16 U.S.L. WEEK 2362 (Cal. Feb. 3, 1948).

court denied an injunction. It held that plaintiff had waived his right of privacy by agreeing to participate in the match, and that the promoter of the fight was within his rights in selling the broadcasting rights.[147]

In *Peterson* v. *KMTR Radio Corp.*,[148] plaintiffs were well known aquatic stars. They performed at a benefit show for charity. Their contract of employment with the promoter made no mention of television. Defendant took motion pictures and televised the show without plaintiffs' knowledge or consent. Plaintiffs sued defendant upon the theory of an invasion of their right of privacy.[149] The court sustained demurrers without leave to amend, holding that plaintiffs had waived their right of privacy by putting on the performance. The court said that plaintiffs could not successfully assert invasion of their right of privacy by the broadcasting of their performance through the medium of television or motion pictures. Commenting that a performer contracts to put on a "live" performance, and that movies and television merely permit more people to see the performance, the court stated that:

> A performer or participant in a public, semi-public or private show or event where other persons attend thereby waives his right of privacy so far as that performance or event is concerned.[150]

In *Gautier* v. *Pro-Football, Inc.*, mentioned above, the animal act was presented pursuant to a contract which did not expressly grant any rights of television. The game was sponsored by a tobacco company which advertised cigarettes during the telecast, and the telecast was made over plaintiff trainer's specific objection. He sued

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147. See on this case: Peterson v. KMTR Radio Corp., 18 U.S.L. WEEK 2044 (U.S. July 7, 1949); Willis, *Television and the Law*, 30 MICH. STATE B.J. 5, 7 (1951); Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 517 (1950); 25 FLA. L.J. 163, 164 (1951); Note, 15 A.L.R. 2d 750, 794 (1951). Note that, as to the waiver, plaintiff had not yet even appeared before the television camera.

148. *Supra* note 147.

149. Plaintiffs also filed one count in quantum meruit for services rendered, and another for unfair competition. For comments on the *Peterson* case, see Willis, *Television and the Law*, 30 MICH. STATE B.J. 5, 7 (1951); Warner, *Legal Protection of the Content of Radio and Television Programs*, 36 IOWA L. REV. 14, 21 (1950); Warner, *Unfair Competition and the Protection of Radio and Television Programs*, 1950 WASH. U.L.Q. 498, 517 *et seq.* (1950); 25 FLA. L.J. 163, 164 (1951). See Note, 10 FED. COMM. B.J. 36 (1949).

150. Peterson v. KMTR Radio Corp., 18 U.S.L. WEEK 2044 (Cal. July 7, 1949).

under the Right of Privacy section of the New York Civil Rights Law.[151] The lower court held for plaintiff, finding the television showing to have been an unauthorized use of the plaintiff's name and picture for purposes of trade, and therefore actionable under the statute. Upon appeal the Appellate Division held that the television showing was not for purposes of advertising or trade and reversed the judgment. In reversing, the court said:

> The unique economic necessities of radio and television, however, require that, in large part, programs appear under the sponsorship of commercial advertisers. To hold that the mere fact of sponsorship makes the unauthorized use of an individual's name or picture on radio or television a use "for advertising purposes" would materially weaken the informative and educational potentials of these still developing media. We hold, therefore, that in the absence of exploitation of a name or picture in the commercial announcement or in direct connection with the product itself, there is no use "for advertising purposes." See *King* v. *Winchell*, 248 App. Div. 809, 290 N.Y.S. 558. As the record makes clear that there was here no such exploitation of plaintiff's name or picture, plaintiff cannot recover under this aspect of the Civil Rights Law.[152]

The court went on to say:

> There was no substantial invasion of plaintiff's "right to be let alone," in telecasting an act voluntarily performed by plaintiff for pay before 35,000 spectators.[153]

The court distinguished the case from the cases in which there was dramatization or fictionalization and from cases in which the dialogue accompanying the animal act was merely descriptive and reportorial, and pointed out that the plaintiff's act was televised exactly as it was publicly exhibited, without variation, unembroidered and unalloyed.

The court said the statute provided primarily a recovery for injury to the person, not to his property or business, and was grounded on mental strain and distress, humiliation, and disturbance of peace of mind suffered by the individual affected; and that it was the injury

151. N.Y. Civil Rights Law § 51.

152. Gautier v. Pro-Football, Inc., 278 App. Div. 431, 439, 106 N.Y.S.2d 553, 557 (1st Dep't 1951).

153. *Id.* at 445, 106 N.Y.S.2d at 560.

to the person, not to the property, which established a cause of action, although damages might include recovery for a so-called "property" interest inherent and interwoven in his personality. The court further said:

> There is no right of privacy, under our statute, applicable to a business or to a public dramatization or exhibition. It is the individual, not his business, which is protected against unlawful intrusion . . . . So in the instant case what has been injured is not the personality of the plaintiff, but solely, if at all, the value of his act for television purposes or otherwise. Section 51 of the Civil Rights Law was not enacted to fill gaps in our copyright statute, or to supplement causes of action based on contracts, express or implied, or to extend the law relating to unfair competition or to the appropriation of another's business or enterprise.[154]

The *Gautier* case has been the subject of much law review discussion to date.[155]

In *Sharkey* v. *National Broadcasting Co., Inc.*,[156] Jack Sharkey, former heavyweight champion of the world, sued a television company and the commercial sponsor of the show, "Greatest Fights of the Century," for their televising of a motion picture of a fight in which he had participated many years before. The court denied a motion to dismiss the complaint, and held it stated a cause of action under Section 51 of the New York Civil Rights Law, and that the plaintiff, by appearing in the movie, had not waived his right of privacy.[157]

In summary, the authorities are in dispute as to the existence of a cause of action for invasion of the right of privacy where the actor's performance is televised without his consent. Several courts and writers have taken the view that any such right is lost by virtue of the performance.[158] In addition, there is considerable authority for

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154. *Ibid.*

155. On the lower court's decision, see Willis, *Television and the Law*, 25 FLA. L.J. 163, 167 (1951); 37 VA. L. REV. 335 (1951); 20 U. OF CIN. L. REV. 425 (1951).

156. 93 F. Supp. 986 (S.D.N.Y. 1950).

157. *Cf.* Lillie v. Warner Bros. Pictures, Inc., 139 Cal. App. 724, 34 P.2d 835 (1934) (holding no invasion of the right where a producer showed several scenes from a picture in which plaintiff had appeared).

158. See Gautier v. Pro-Football, Inc., *supra* note 152. Peterson v. KMTR Radio Corp., *supra* note 148; Chavez v. Hollywood Post No. 43, American Legion, *supra* note 146; *cf.* Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Country-

the proposition that by reason of being a public figure, an actor cannot claim an invasion of his right of privacy, at least so long as the publication in question pertains to his or her professional career.[159]

On the other hand, one is confronted by the *Sharkey* case, which seems to permit assertion of the right despite performance, and despite the public nature of the performer involved.[160] The case arose under the New York statute, and it should be noted that a recent California decision[161] points out that California has no counterpart of the New York act, and declines to apply cases arising under that statute.

The right of privacy is a comparatively recent development, and the field is uncertain. Television will intensify the problem. The answers thereto will help to more clearly determine the area.

C. *California Civil Code, Section 49.*

Section 49 of the California Civil Code provides: "The rights of personal relations forbid (c) any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation."[162] This code section is but an enactment of the common law.[163] New York apparently also recognizes such a cause of action in the master.[164]

In *Darmour Productions Corp.* v. *Baruch Corp.*,[165] the California court held that a complaint alleging defendants' negligent injuring of

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man, *The Organized Musicians,* 16 U. OF CHI. L. REV. 239, 255 (1948); Warren and Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193, 198 (1890).

159. RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940); Paramount Pictures, Inc. v. Leader Press, Inc., *supra* note 135; Bordeaux v. Mitchum, *supra* note 135; Gavrilov v. Duell, Sloane & Pearce, Inc., *supra* note 136; Martin v. F. I. Y. Theater Co., *supra* note 134; RESTATEMENT, TORTS § 867, comment *c* (1939); Warner, *Unfair Competition and the Protection of Radio and Television Programs,* 1950 WASH. U.L.Q. 498, 500 (1950); Warner, *Legal Protection of the Content of Radio and Television Programs,* 36 IOWA L. REV. 14, 23 (1950); Baer, *supra* note 118, at 210; Handler, *The Right of Privacy and Some of Its Recent Developments,* 44 DICK. L. REV. 39, 44 (1939); 20 U. OF CIN. L. REV. 425, 427 (1951).

160. *Cf.* the Louis-Walcott fight litigation, *supra* note 84.

161. *See* Stryker v. Republic Pictures Corp., 108 Cal. App.2d 214. 219, 238 P.2d 670, 673 (1951).

162. CAL. CIV. CODE § 49 (Deering 1949).

163. United States v. Standard Oil Co., 60 F. Supp. 807 (S.D. Cal. 1945), *rev'd on other grounds,* 153 F.2d 958 (9th Cir. 1946), *aff'd,* 332 U.S. 301 (1947), 23 CALIF. L. REV. 420, 424 (1935). *Cf.* CAL. LABOR CODE § 3852 (Deering 1943).

164. *See* Tid v. Skinner, 225 N.Y. 422, 433, 122 N.E. 247, 251 (1919).

165. 135 Cal. App. 351, 27 P.2d 664 (1933); Notes, 28 CALIF. L. REV. 442, 444 (1940); 23 CALIF. L. REV. 420 (1935).

one of plaintiff's movie stars, resulting in plaintiff's being deprived of her services, stated a cause of action under Civil Code section 49. In a later case, however, the section was held inapplicable to an attempted suit by the United States Government against a tort-feasor who negligently injured a soldier, as federal and not state law was controlling.[166]

The importance of the section for our purposes is this: Does Civil Code section 49(c) confer a right of action upon the sponsor of a television program starring an actor, against exhibitors on television of an old, inferior motion picture in which the actor appeared? If the section is applicable, it would be on the theory that the television exhibition of the old picture in competition with the contemporary series affects the actor's ability to serve his master (the television sponsor).

The significance of section 49 lies in the fact that Hollywood and New York are the heart of the film and television industries. Under conflict of laws principles, the law which governs tort liability is that of locus in which the last event necessary to make the actor liable for the alleged wrong occurred. If the showing is viewed as being the delict to the employer, California or New York law would govern. If, on the other hand, existence of a tort is to be governed by the law of each state in which the picture is viewed, one would be forced to examine the law of the state in question to determine whether a cause of action could be alleged.

If we assume for purposes of analysis that California or New York law governs our inquiry, the question remains whether the sponsor has a right of action in the situation presented. It should first be noted that if such a right in the sponsor exists, proof of damages to enforce the right would seem to be a nearly insuperable obstacle. Unless sales fall off appreciably, how may the sponsor demonstrate cognizable injury? While mere difficulty of proof does not preclude existence of a cause of action, it does, as a practical matter, discourage prosecution of an action.

As to the more basic question of whether a cause of action exists in the sponsor: (1) In view of the *Darmour* case, it would not seem an undue extension of the law to find the existence of a master-servant relation between the actor and the sponsor; (2) We are,

166. Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947).

however, faced by the problem of whether an injury has, in fact, been done the employee. The term "injury" denotes a legal wrong to the employee, and in view of the earlier discussion of the actor's right of privacy, a court might hold television of the old movie to be *damnum absque injuria* to the employee, and hence to his employer. If an invasion of the actor's rights is found to exist, the master-servant relation is established, and injury to the sponsor can be proved, it would seem that recovery should be allowed. The writer sees little possibility, however, of the theory being successfully invoked at this time in the situation under discussion.

Conclusion

The writer has purposely avoided a detailed discussion of the case of *Rogers* v. *Republic Productions, Inc.* The case, though apposite, involves particular language in a performer's contract. Further, the case is pending on appeal, and the writer feels an ethical interdiction against undue comment thereon, especially because it has been the purpose of this article to discuss general principles of law applicable to the rights of the actor and telecaster and only incidentally to discuss specific contractual provisions.

It is clear that the actor may, by an explicit contractual provision, grant to the producer all television rights which he may have. A grant of the right to use all of the acts, poses, plays, and appearances is such a provision, especially where the contract expressly defines photoplays to include motion pictures exhibited with television devices. It is likewise clear that the actor may, by an explicit contractual provision, withhold or prohibit the right to televise the film. A clause withholding or prohibiting the right to "commercial tie-ups" does not of itself inhibit the proprietor of the film from licensing it for television broadcast. If the contract is silent on the point, some courts may find an implied assignment of television rights by the artist. When the contract is silent, and no implied assignment is found, property questions arise.

Clearly, that which is to be telecast is the artist's interpretation of the part. There is a split of authority in the United States as to the existence of a common law property right in such an interpretation (if the courts should rule that the right to telecast the film containing the artist's interpretation is included in the proprietor's rights under copyright therein, the question becomes academic). If the copyright proprietor does not possess the exclusive right of presentation on tele-

vision under the Copyright Act, and if such a property right is found to exist, exhibition of the movie on TV would not be such a general publication as to cause loss of the right. If such an absolute property right be found, an action for injunctive relief, damages, or possibly even an action for conversion would lie to enforce it. If no absolute property right exists, it is unsettled whether an actor, claiming a quasi-property right, may sue on an unfair competition theory. Several writers disapprove of such an application of the unfair competition concept, but contrary authority exists. At the present time, an actor probably may not prevail upon the theory of having impressed an equitable servitude upon his performance.

Most American courts would probably not afford the actor protection under the "moral right" doctrine today in the situation posed in this article. The right of privacy offers the actor more hope, as demonstrated by the *Sharkey* case. The authorities are in dispute here also, but many courts would preclude recovery upon a consent ground. It would seem anomalous to the writer to permit the actor to assert rights based upon an invasion of his personality where he has consented to photography of his performance and where the producer is legally entitled to reissue the old movies for showing in movie houses. The principle expressed in California Civil Code, section 49(c) will probably not be applied to a sponsor's claim of injury by a showing of old movies, and if applied, proof of damages would seem to be a nearly insuperable obstacle.

It would appear to the writer that where a producer owns the motion picture and television rights to a literary property and produces a motion picture based thereon and employs the services of actors, such producer may copyright the completed motion picture containing the services of such actors, and the proprietor may license the broadcast thereof by television without the consent of the performer, unless there is an express provision to the contrary in the employment contract between such producer and such performer.

Further judicial thought may create a new jural concept, to wit, that the product of an artist's labor is a thing of economic value, and that its use in a new and additional medium warrants additional compensation. However, in the present state of the law the actor must look for his protection to his contract, legislation, or collective bargaining.