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doing business within her borders. Apparently there had been no denial of due process of law.⁵⁷ The objection that the defendants had been denied equal protection of the laws could not be raised for the statute assures equality of protection for those similarly situated.⁵⁸ It cannot be said that the statute abridges the defendants' privileges and immunities as citizens of another state or the United States. That guarantee was designed to prevent an unjust discrimination against the citizens of another state; it was not designed to obtain a more favorable treatment.⁵⁹ Here Texas imposes the same conditions upon the non-residents as she does upon her own citizens.

From such an analysis it is concluded that the Supreme Court should make complete its departure from the principle of the *Flexner* case, and determine that a state may impute to a non-resident consent to jurisdiction from the circumstance of his doing business within that state. As was pointed out, the basis for this conclusion is two fold: the necessity for a reasonable control over business in the interests of the citizens of the state; and the fact that so to hold would not deny the non-resident any of his constitutional guarantees. The policy of extending substituted service of process is as strong in the case of the non-resident business man as it is in the case of the non-resident motorist.

EMERY COX, JR.

RIGHTS OF RECORDING ORCHESTRAS AGAINST RADIO STATIONS USING RECORDS FOR BROADCAST PURPOSES

A new conflict, between artists recording their performances for phonographs and radio stations using those records for broadcasts, presents problems, the ultimate solution of which will test the ability of equity to adapt itself and its principles to the needs and conditions of the times.

⁵⁷"The essential elements of due process of law are notice and opportunity to defend." *Simon v. Craft*, 182 U. S. 427, 436, 21 S. Ct. 836, 839, 45 L. ed. 1165 (1901). See also *Wuchter v. Pizzutti*, 276 U. S. 13, 24, 48 S. Ct. 259, 262, 72 L. ed. 446, 57 A. L. R. 1230, 1236 (1928) to the effect that there has been "... a general trend of authority towards sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

⁵⁸*Davidson v. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 (1932), 91 A. L. R. 1308 (1934).

⁵⁹See: *Culp, Process in Actions Against Non-Residents Doing Business Within a State* (1934) 32 Mich. L. Rev. 909 at 931.

Well-known orchestras have their renditions of particular musical compositions recorded, and the records of these performances are then sold to music dealers to be re-sold to the general public. Upon each record appears a notice to the effect that the records are manufactured under a patented process and are licensed only for non-commercial use in homes. Radio stations then purchase these records and broadcast them over the air, telling the listening public, at the time of broadcasting that records are being heard. On these facts two orchestras have brought actions to restrain such broadcasts. In *R. C. A. Mfg. Co. v. Whiteman*,¹ the Circuit Court of Appeals for the Second Circuit refused an injunction. In *Waring v. WDAS Broadcasting Station, Inc.*² the Supreme Court of Pennsylvania granted an injunction.

Three problems, which will form the basis of this discussion, arise from these facts. First, what is the extent and operation of the property right in literary and artistic works as to distinctive renditions of copyrighted music? Second, what is the power of a vendor to restrict the use of chattels in the hands of subsequent purchasers with notice of the restriction? Third, what constitutes unfair competition? This latter problem again thrusts upon a court of equity the duty of determining what is sound public policy, reconciling that policy with the interests of business, and finally, reconciling the interests of two businesses, each to the other.

I. *Literary Property at Common Law*

The first question is whether the law recognizes any property right in the performance of a musical composition. It is settled that such a performance is not subject to copyright.³ But it is equally well settled, in the United States, that the copyright statutes have in no way abrogated the common law property right in literary or artistic works.⁴ Indeed, this right is recognized and continued in force by express provision in the copyright acts.⁵ Such statutes merely extend an additional protection to particular classes of literary property. An author may, if

¹114 F. (2d) 86 (C. C. A. 2d, 1940).

²327 Pa. 433, 191 Atl. 631 (1937).

³37 Stat. 488 (1912), 17 U. S. C. § 5 (1934). In 1935 Fred Waring applied for a copyright on "Waring interpretations." The application was rejected on the ground that the statutes recognized no right of a performing artist in his performance. *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 191 Atl. 631, 633, footnote 2 (1937).

⁴*Wheaton and Donaldson v. Peters and Grigg*, 8 Pet. 591 (U. S. 1834); *Echevarria v. Warner Bros. Pictures*, 12 F. Supp. 632 (D. C. Cal. 1936); *Kurfiss v. Cowherd*, 121 S. W. (2d) 282 (Mo. App. 1938).

⁵35 Stat. 1076 (1909), 17 U. S. C. § 2 (1934).

he chooses, ignore the copyright statutes and rely on his common law rights.⁶

The common law copyright is defined as an absolute and exclusive incorporeal right to the composition prior to publication, and this right differs in no respect from other forms of personal property in the protection which the common law gives it.⁷ Furthermore, this right to the literary production is separate and distinct from the physical substance on which it is embodied.⁸ Productions which may be the legitimate subjects of the common law copyright include not only books, plays, musical scores, etc., but also pictures,⁹ and paintings.¹⁰

Under the general rule it is not necessary for the existence of a literary property right that the production be solely the work of the person claiming property in it.¹¹ But in holding that this property right could exist in the performance of a musical composition¹² the Pennsylvania court was forced to extend this rule.¹³ It was stated that great artists, by their *interpretations*, sufficiently add to the work of authors to create a property right for themselves in the *interpretations*. The use of the word *interpretations* by the court is unfortunate. If it is meant that the performer interprets the music by substantially adding to, or altering the order of, the notes as written, then obviously there is a new composition which is literary property and may be protected at

⁶This is contrary to the rule in Great Britain, where it is held that the copyright statutes have abolished the common law right as to such classes of property as are included within the acts. *Donaldson v. Beckett*, 4 Burr. 2408, 1 Eng. Rep. 837 (H. L. 1774), interpreting Stat. 8 Anne, c. 19 (1709); *Roberts v. Petrova*, 126 Misc. 86, 213 N. Y. Supp. 434 (1925).

⁷*Caliga v. Inter-Ocean Newspaper Co.*, 157 Fed. 186 (C. C. A. 7th, 1907), aff'd, 215 U. S. 182, 30 S. Ct. 38, 54 L. ed. 150 (1909); *Waring v. WDAS*, 327 Pa. 433, 194 Atl. 631 (1937).

⁸*Clay County Abstract Co. v. McKay*, 226 Ala. 394, 147 So. 407 (1933).

⁹*Prince Albert v. Strange*, 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1848).

¹⁰*Werckmeister v. American Tobacco Co.*, 207 U. S. 375, 28 S. Ct. 124, 52 L. ed. 254 (1907).

¹¹*Fleron v. Lackaye*, 14 N. Y. Supp. 292 (N. Y. Super. 1891) (one who made a translation of the work of another held to have an independent property in the translation); *Walter v. Lane*, (1900) A. C. 539 (H. L.) (one who reported the text of an address with a description of the meeting held to have a property right distinct from and additional to that of the speaker); *Wood v. Boosey*, 2 L. R. Q. B. 340 (1876) (one who arranged the score of an opera for the piano held to have created an independent musical composition in which there was a right of property); *Contra: The Mikado Case*, 25 Fed. 183 (C. C. S. D. N. Y. 1885).

¹²*Cf. Musical Performers' Protective Ass'n v. British International Pictures*, 46 T. L. R. 485 (K. B. 1930).

¹³The Circuit Court of Appeals, in the *Whiteman* case, assumed for the purposes of the case that the common law copyright extended to the performances of an orchestra.

common law or under the copyright statutes. But if the word interpretations, as used in the case, means simply the performer's own conception of how the notes, *as written*, should be expressed, then it is difficult to see how there can be created a property right within any previously recognized test of literary property. The court argued that the musical composition is incomplete, and that the performer consummates the work by playing it; and that if, in so doing, he creates something of novel intellectual or artistic value, he has participated in the creation of a product in which he is entitled to property. To show that the performance in question was of intellectual or artistic value, the court relied on the large compensation¹⁴ paid to the orchestra for its personal radio performances. But this reasoning fails. First, it is untenable to hold that only those highly paid performers have a property right in their performances;¹⁵ and second, the mere fact that one does something of intellectual or artistic value, while it may entitle him to some form of legal protection, does not give a property right. In order that there be a property right, there must be a subject matter to which the right can attach. There must be something which others are capable of usurping. There is no such subject matter here since no one else is capable of doing exactly the same thing.¹⁶

Assuming, *arguendo*, that there is a property right in the performance of a musical composition, it is necessary to determine whether that right has been abandoned. The essence of the common law copyright under the American rule is the exclusive right to the first publication. Once there has been a publication, the common law copyright is terminated.¹⁷ But two types of publication must be differentiated: a

¹⁴Fred Waring's Pennsylvanians, Inc. were paid, at this time, \$13,500 for a single performance over the radio.

¹⁵The court expressly refused to decide whether a property right would inhere in an ordinary performance. To the effect that the performance need not be of unusual merit, see *Yale Univ. Press v. Row Peterson & Co.*, 40 F. (2d) 290 (S. D. N. Y. 1930).

¹⁶The owner of the production rights in a play cannot enjoin an imitation of the actors. Such imitations, while they may resemble the original performance are not identical with it. "The manner and method of every dancer and actor is individual and utterly unlike the railroad scene which was held the subject of literary property in *Daly v. Palmer*, 6 Blatchf. 256 (C. C. S. D. N. Y. 1868)." *Savage v. Hoffman*, 159 Fed. 584 (C. C. S. D. N. Y. 1908).

¹⁷The common law rule in Great Britain is *contra*. *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K. B. 1769) holds that the English common law gave a perpetual property right to the author regardless of publication. It is to be noted in this connection that while the American copyright statutes broaden the common law copyright, under the English rule of *Millar v. Taylor*, *supra*, the English copyright acts restrict the common law copyright.

limited publication, which, in legal effect, is no publication at all; and a general publication.

A limited publication is one which communicates a knowledge of the contents under conditions expressly or impliedly precluding a dedication to the public.¹⁸ A general publication is a dedication to the public. From the latter an abandonment of the incorporeal hereditament is implied; from the former is implied the reservation of its enjoyment. The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom the work may be communicated.¹⁹ But the difficulty is encountered in applying this test. Into which category the conduct falls will depend on the subject matter,²⁰ the character of the communication, circulation or exhibition,²¹ the nature of the rights protected,²² and the intention of the owner. As to

¹⁸Kurfiss v. Cowherd, 121 S. W. (2d) 282 (Mo. App. 1938).

¹⁹Werckmeister v. American Lithograph Co., 134 Fed. 321 (C. C. A. 2d, 1904).

²⁰Compare Kurfiss v. Cowherd, 121 S. W. (2d) 282 (Mo. App. 1938) (use of architectural plans in the construction of a house for public exhibition held to be a general publication, the court stating that a limited publication is under restrictions as to class or to some particular occasion or definite purpose and implying that the erection of a house for the sole purpose of entering it into competition for a prize was not a restriction to a particular occasion or definite purpose), with Werckmeister v. American Tobacco Co., 207 U. S. 375, 28 S. Ct. 124, 52 L. ed. 254 (1907) (exhibition of a painting in a public gallery for three months, it being tacitly understood that no copying would be done in the gallery, held not to be a general publication.)

²¹Bobbs-Merrill v. Straus, 147 Fed. 15 (C. C. A. 2d, 1906) (unrestricted sale of one copy is a general publication); Jewelers' Mercantile Agency v. Jeweler's Weekly Publishing Co., 155 N. Y. 241, 49 N. E. 872 (1898) (printing and offering for sale is a general publication); Van Veen v. Franklin Knitting Mills, 145 Misc. 451, 260 N. Y. Supp. 163 (1932) (there has been a general publication whenever an indefinite portion of the public has been given access). Compare Prince Albert v. Strange, 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1848) (plaintiff had plates manufactured from which his sketches were printed and circulated among his friends. Defendant printed sketches from the plates which had been sold to him in breach of trust. Held: Plaintiff had made only a limited publication and was entitled to a perpetual injunction restraining defendant from printing sketches, and ordering the plates destroyed without a trial of defendant's title in them). See Nutt v. National Institute Inc. for the Improvement of Memory, 31 F. (2d) 236, (C. C. A. 1st, 1929) (delivery of lectures to paying audience not a dedication to the public).

²²Thus the public performance of a play is not an abandonment of it to the public use and any subsequent unlicensed performance may be enjoined. Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263, 56 L. ed. 492 (1912); Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939). Cf. Affiliated Enterprises v. Gruber, 86 F. (2d) 958, 961 (C. C. A. 1st, 1936) (plaintiff licensing his "bank night" plan to theatres, held unable to enjoin defendant from licensing a similar plan, the court stating that "while the plaintiff restricts operating under the system to its licensees, by its very nature, in order for it to operate, knowledge must be thrown open to the public, and any property right . . . was lost as early, at least, as the first public exhibition. . . .")

this latter factor, while the expressed intention is a material circumstance,²³ it will not always control,²⁴ since the actual intention will be deduced from the circumstances of the particular case and not from the subjective attitude of the owner.²⁵

It has been argued that the imposition of restrictions, as in the principal cases, is in itself enough to prevent a general publication, on the theory that such restrictions are objective evidence of an intention to make only a limited publication. But the courts refuse to accept this contention. It is well settled that the intention of the owner is only one factor to be considered, and that when the other factors²⁶ clearly point to a general publication they will outweigh any contrary intention of the owner, all his rights will cease, and any further attempt to control the property will be nugatory.²⁷

²³*Berry v. Hoffman*, 125 Pa. Super. 261, 189 Atl. 516 (1937); *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937).

²⁴*Holmes v. Hurst*, 80 Fed. 514 (C. C. A. 2d, 1897), *aff'd.*, 174 U. S. 82, 19 S. Ct. 606, 43 L. ed. 904 (1899) (where an author allows his writing to be printed and put on sale, it cannot be said that there is no publication of what is printed because the author intended to combine this with other writing and apply for a copyright.)

²⁵*Kurfiss v. Cowherd*, 121 S. W. (2d) 282, 287 (Mo. App. 1938): ". . . while the intention of the author must be taken into consideration, yet that intention will be determined, not by what he says, but by what he does."

²⁶Perhaps one such factor is the degree of control the owner is capable of exercising. This is suggested in the *Waring* case, 327 Pa. 433, 194 Atl. 631, 638 (1937): "Moreover, it [the restriction on use] does not limit the use of the records in private homes or even public halls where a breach could not readily be detected or enjoined. . . ."

²⁷*Wagner v. Conreid*, 125 Fed. 798, 801 (C. C. S. D. N. Y. 1903): ". . . but it is the well settled law of this country that if the publication is complete such notice [attempt to restrict the use of an opera score] is ineffective to reserve the very right which such publication dedicates to the public." The court in this case was unimpressed by the fact that the method of restriction employed here [notice on the title page] was legally effective in Germany, the country of publication. *Accord*, *Savage v. Hoffman*, 159 Fed. 584, (C. C. S. D. N. Y. 1908); *Van Veen v. Franklin Knitting Mills*, 145 Misc. 451, 260 N. Y. Supp. 163 (1932) (painter held to have published his work by allowing a magazine to reproduce the painting, even though the latter agreed to allow no further reproductions and did so in breach of the contract). *Larrowe-Loisette v. O'Laughlin*, 88 Fed. 896 (C. C. S. D. N. Y. 1898) (sales of memory training books for several years under a contract by which the purchaser agreed not to communicate the contents to anyone held to be such publication that subsequent attempt to copyright was defeated). *Cf. Uproar Co. v. National Broadcasting Co.*, 81 F. (2d) 373 (C. C. A. 1st, 1936), *cert. denied*, 298 U. S. 670, 56 S. Ct. 835, 80 L. ed. 1393 (1936) (general right of the author to publish a radio script held to be restricted by an implied covenant in the author's contract with a radio advertiser, by which he gave the latter the right to use the script on his program); *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N. Y. 241, 49 N. E. 872 (1898) (purported leases of reference books containing credit information, under agreements that the information would be kept confidential, held to be such a publication that the

Therefore, in both the principal cases it appears that a general publication has taken place, since the only evidence to the contrary is the attempted restriction. The *Whiteman* case held that there had been a general publication, merely citing what the court called "the leading case."²⁸ The *Waring* case, however, seems to hold that there was only a limited publication. Apparently the Pennsylvania court felt that the restrictions were sufficient in themselves to prevent a general publication. But this is not clear, since the court, mistakenly, it would seem, fails to differentiate the question of publication from that of restrictions on chattels as such. It is stated that the authorities holding that once a general publication occurs it cannot be limited by restrictions and reservations rest on an "assumed doctrine" that restrictions and servitudes cannot be judicially recognized when attached to the sale of chattels. Nevertheless, let us concede, by way of argument, that such restrictions do not prevent a general publication. Thus, whether they will have any effect at all will depend upon the law applicable to such reservations with respect to chattels in general.

II. *Equitable Servitudes on Chattels*

The obvious and most efficacious method²⁹ of restricting chattels in the hands of subsequent purchasers is on analogy to the principle of *Tulk v. Moxhay*³⁰ appertaining in cases concerning land. The general rule is that the transfer of an entire interest in real or personal property abrogates all right and interest of the grantor in that property. But with respect to realty, courts of equity have allowed an exception to this rule, in the form of what are called equitable servitudes. Under this principle the grantor may, within limits, restrict the use of land in the hands of the immediate and subsequent grantees who take with notice of the restriction. Among others, there are two very important

defendant would not be enjoined from using the information in his own credit rating books). Accord, *Rigney v. Dutton*, 77 Fed. 176 (C. C. S. D. N. Y. 1896). Cf. *Chicago Board of Trade v. Christie Grain and Stock Co.*, 198 U. S. 236, 25 S. Ct. 637, 49 L. ed. 1031 (1905) (plaintiff furnished price quotations to its subscribers by telegraph. Defendant secured these quotations and published them for its own benefit. Held: Defendant enjoined from getting at and using the knowledge by inducing a breach of trust. Plaintiff does not lose its right by communicating the quotations to persons, even if many, in confidential relations to itself. The publications that took place were publications in breach of trust and do not affect plaintiff's rights.)

²⁸*Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N. Y. 211, 49 N. E. 872 (1898).

²⁹Another method often employed is the sub-contractual device. On this subject, see Chaffee, *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 945, 951.

³⁰Ph. 774, 41 Eng. Rep. 1143 (1848).

limitations on the operation of this principle. First, it is necessary that the equitable servitude be imposed for the benefit of some land retained by the grantor.³¹ Second, the restriction must involve a negative rather than an affirmative act on the part of the grantee.³²

With respect to chattels this equitable exception to the common law rule has never become general. It is customarily stated that the policy of the law requires free use and alienability of property. This policy is considered more fundamental in cases involving chattels, since chattels are generally transferred more freely and frequently.³³ Furthermore, attempts to impose servitudes on chattels usually involve purely collateral agreements, and it is rarely possible to find specific property of the grantor which is intended to be benefited.³⁴ Such collateral servitudes have generally been for the purpose of protecting the business of the vendor, and take the form of territorial restrictions, limiting the use or resale of the chattel to particular areas, or re-sale price restrictions. Courts look with disfavor on these devices as being in restraint of trade. From this position it is but a step to a general holding disallowing all attempted restrictions.

Nevertheless, there have been some successful attempts to apply the doctrine of equitable servitudes to chattels. In *De Mattos v. Gibson*,³⁵ the Court of Chancery in Great Britain enunciated as dictum a general rule which appeared to be an extension of the *Tulk v. Moxhay* principle to personal property:

"Reason and justice seem to prescribe that . . . as a general rule, where a man . . . acquires property from another with

³¹*Orenberg v. Johnston*, 269 Mass. 312, 168 N. E. 794 (1929); *Radio Corp. of America v. De Forest Radio T. & T. Co.*, 97 N. J. Eq. 37, 127 Atl. 678 (1925); *London County Council v. Allen*, L. R., [1914] 3 K. B. 642 (C. A.); *Cities Service Oil Co., Ltd. v. Pauley*, [1931] Ont. L. R. 685. Contra: *Van Sant v. Rose* 260 Ill. 401, 103 N. E. 194 (1913); *Huber v. Guglielmi*, 29 Ohio App. 290 (1928).

³²*Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913); *Haywood v. Brunswick Permanent Benefit Bldg. Society*, L. R. 8 Q. B. D. 403 (1881). Contra: *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 41 N. E. 441 (1895). The authorities on this question are collected in Notes, (1926) 41 A. L. R. 1363 and (1927) 51 A. L. R. 1326.

³³Co. Litt. § 360: "If a man be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void because his whole interest and property is out of him so as he hath no possibility of reverter and it is against trade and traffic and bargaining and contracting between man and man."

³⁴It has long been settled that where the vendor of a business covenants not to compete, such a covenant runs with the business and is enforceable against the vendor by subsequent purchasers from the vendee. It can be argued, on analogy to this, that there is more than a purely personal benefit to the vendor. See *Landrille v. La Bruna*, 111 N. J. Eq. 4, 160 Atl. 834 (1932); Note (1923) 27 A. L. R. 754.

³⁵*De G. & J.* 276, 282, 45 Eng. Rep. 108, 110 (1859).

knowledge of a previous contract . . . made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person . . . use or employ the property in a manner not allowable to the giver or seller. This rule [is] applicable alike . . . to movable and immovable property. . . .

This rule was applied in 1880 in *Werderman v. Societe Generale D'Electricite*.³⁶ There had been a sale of a patent, and the vendee, as part of the consideration, had agreed to pay the vendor five per centum of all the net profits arising from the use of the patent. By the decision, this agreement was enforced against a sub-purchaser who had notice of it at the time of the sub-sale.³⁷ The court held that:

"the parties intended certain liabilities to attach to the patent itself. . . . It is part of the bargain that the patent shall be worked in a particular way and the profits disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability."³⁸

But in *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*,³⁹ on similar facts, enforcement against a sub-purchaser was refused. The court distinguished the *Werderman* case on the ground that in that case there had been a charge on the patent itself. It was stated that the latter case merely held a sub-purchaser bound by a charge on the property which he took with notice of the charge, and that it did not impose an obligation to perform a contract to which the sub-purchaser was not a party.⁴⁰

Again in 1907, the Court of Chancery⁴¹ allowed the recovery of royalties on a patent from a sub-purchaser, who took with notice of the agreement to pay royalties made by the sub-vendor. The court said:

"The obligation to fulfill the terms of the agreement, being with regard to the assignees not personal, but attached to the property which they acquired with notice of the terms upon which it was held by their assignor, disables them from holding the property without fulfilling the terms. . . . Such an interest

³⁶19 Ch. Div. 246, 252 (1880).

³⁷It is to be noted that in this case the court enforced against a sub-purchaser an affirmative agreement to pay money. Cf. *London & S. W. Ry. v. Gomm*, 20 Ch. Div. 562 (1882).

³⁸Italics supplied.

³⁹[1902] 1 Ch. 146.

⁴⁰The court here relied on *Cox v. Bishop*, 8 De G. M. & G. 815, 44 Eng. Rep. 604 (1857). In that case an equitable assignee of mines under a lease containing a rent clause and covenants was held not liable for the rent since there was no contract between him and the lessor.

⁴¹*Dansk Rekyllrifel Syndikat Aktieselskab v. Snell*, [1902] 2 Ch. 127, 136.

of the vendor, if not properly described as a vendor's lien, is closely analogous to it. The question involved is whether . . . it was intended that the vendor should retain a charge upon the property or that he should part with the property completely, looking solely to the personal liability of the purchaser to pay the consideration."

In *Barker v. Stickney*⁴² an attempt was made to clarify and state the applicable rules. Without discussion, and apparently for lack of a better word, the court speaks of the vendor's interest as a lien, although it is obvious that there is no lien within the ordinary meaning of the term, either at law or in equity. An author assigned and unpublished book by deed. The assignee agreed to pay the assignor a royalty on the price of the copies sold, to sell only at agreed prices, and to assign the book only to a successor in business and subject to the terms of the deed. The court refused to enforce the terms of the deed against the subsequent purchaser, setting out the following rules: (1) the terms of the assignment may expressly or impliedly negative any lien in the assignor. (2) Prima facie, no vendor's lien exists if the assignment contains express words that the whole interest is transferred, or if it is stated that the assignee is to be the sole owner. To destroy this prima facie presumption, the other terms must show with actual clearness an intention to reserve a lien. (3) No lien exists by a mere reservation of future royalties or by a mere provision that later assignees shall be obligated. (4) If there is a lien, express or implied, the subsequent assignee, taking with notice, is subject to the lien. In the Court of Appeal it was stated that the law was well settled⁴³ to the effect that purchasers are not bound by mere notice of stipulations made by the original vendor unless they themselves were parties to the contract in which the stipulations were made.

Finally, the Privy Council, in *National Phonograph Co. v. Menck*,⁴⁴ further clarified the rule and distinguished between patented and unpatented articles. It was held that, as a general rule, the owner of chattels may use and dispose of them as he sees fit. While he may be restricted by contract, he is not bound in his simple capacity as owner and "it is out of the question to suggest that restrictive conditions run with the goods. . . . It would be contrary to the public interest and to the security of trade, as well as to the familiar rights attaching to or-

⁴²[1918] 2 K. B. 356; [1919] 1 K. B. 121 (C. A.).

⁴³*Taddy v. Sterious*, [1904] 1 Ch. 354; *Mc Gruther v. Pitcher*, [1904] 2 Ch. 306; *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847.

⁴⁴[1911] A. C. 336, 347 (P. C.)

dinary ownership, if any other principle applied." The court stated that the patent statutes subject the general rule to the qualification that the person buying the patented article and knowing of the conditions imposed at the time of the first sale holds the property subject to those conditions. Lord Shaw was of the opinion that since the patentee might prevent any dealing in the patented article he might do the lesser thing and impose his own conditions on such dealing as he permitted. This was said not to depend on any condition running with the article or attaching to it, but only upon the limits of the license which the patentee granted when he first parted with the goods.

Adding to the confusion of the seeker for a rationale, one of the more recent cases⁴⁵ on the subject goes back to *De Mattos v. Gibson*, cites *Tulk v. Moxhay*, and enforces a restriction. In this case, as in *De Mattos v. Gibson*, there was a sale of a ship under charter. In restraining the purchaser, who took with notice of the charter, from employing the ship in any way inconsistent with it, Lord Shaw stated that:

"In the opinion of their Lordships the case of *De Mattos v. Gibson* still remains, notwithstanding many observations and much criticism of it in subsequent cases, of outstanding authority."

and again:

"In the opinion of the Board these views, [those of *Tulk v. Moxhay*] much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a court of conscience, one who obtains a conveyance or grant subject to a condition from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this; and a court of equity will grant an injunction against it."⁴⁶

In the United States there has been much the same confusion in this phase of the law. In *New York Bank Note Co. v. Hamilton Bank Note Co.*⁴⁷ the plaintiff entered into a contract with a manufacturer

⁴⁵Lord Strathcona Steamship Co. v. Dominion Coal Co., [1926] A. C. 108, 118, 119 (P. C.). Accord, *Great Lakes and St. Lawrence Transport Co. v. Scranton Coal Co.*, 239 Fed. 603 (C. C. A. 7th, 1917).

⁴⁶Compare the language of Lord Shaw here with his remark in *National Phonograph Co. v. Menck*, [1911] A. C. 336, 347 (P. C.): "It is out of the question that restrictive covenants run with the goods. . . . It would be contrary to the public interest and to the security of trade, as well as to the familiar rights attaching to ordinary ownership, if any other principle applied."

⁴⁷28 App. Div. 411, 418, 50 N. Y. Supp. 1093 (1898), rev'd on other grounds, 180 N. Y. 280, 73 N. E. 48 (1905).

whereby the latter agreed not to sell a particular type of printing press to anyone without plaintiff's consent. A machine was sold to defendant in violation of this agreement. On the petition of plaintiff, the defendant was enjoined from using the machine, the court saying:

"If a person purchase from another a printing press having knowledge of the existence of a contract between the vendor and a third person, whereby the vendor has agreed not to sell . . . except under certain restrictions, such third person is entitled to enforce his contract against the vendee. . . . Contracts prohibiting the use of personal property in a particular way are valid."

But as authority for the application of the equitable servitude principle to chattels this case is weakened when it is noticed that the restriction here ran against the vendor, not the vendee. Consequently, it appears that the case does not fall within the principle of *Tulk v. Moxhay*. It is more nearly a case in which plaintiff is simply protecting his contract right to receive himself, or to determine who shall receive, the total output of the manufacturer. Equity can look upon what ought to be done as done, treat plaintiff as the equitable owner of these machines and enjoin defendant from attempting to assert a right which it knows to be in conflict with a prior right of plaintiff.⁴⁸

⁴⁸Accord, *MacDonald Ltd. v. Eyles*, [1921] 1 Ch. 631. An author contracted with plaintiff, giving the latter an option to publish the next three novels she should write. She then gave a rival firm the right to publish her forthcoming novel. It was held that plaintiff was entitled to an injunction restraining the disposal or publication of the book until plaintiff had had a chance to exercise the option. It was said that plaintiff had an interest in the copyright similar to an option to purchase land, and was simply protecting his property interest against another who alleged purchase from a common vendor. But cf. *Daly v. Walrath*, 40 App. Div. 220, 57 N. Y. Supp. 1125 (1899). A sold a play to B, making the latter the sole and exclusive owner of the stage rights in the United States, England, Canada, and Australia, agreeing to keep the work in manuscript form and not to allow it to appear in the book trade. A breached the contract by allowing publication in Germany. It was held that such publication destroyed the literary property in both book and performing rights, and that B could not enjoin a stranger to the contract from producing the play in the United States. This case can be distinguished from *New York Bank Note Co. v. Hamilton Bank Note Co.*, 28 App. Div. 411, 50 N. Y. Supp. 1093 (1898), in that the vendee could have protected himself by a copyright, and the fact that the publication had already taken place and the public at large given access. To the effect that courts will refuse to allow such restrictions to be applied to literary works which can be copyrighted, see *Savage v. Hoffman*, 159 Fed. 584 (C. C. S. D. N. Y. 1908); *Wagner v. Conreid*, 125 Fed. 798, (C. C. S. D. N. Y. 1908). But cf. *De Mille Co. v. Casey*, 201 N. Y. Supp. 20 (N. Y. Super. 1923) (owner of a moving picture film who leases the right to exhibit for a particular time, does not dedicate it to the public and any act of the licensee in publishing or copyrighting cannot deprive owner of his common law rights).

But in *Murphy v. Christian Press Ass'n*⁴⁹ something very close to an equitable servitude was enforced. The plaintiff sold several sets of electrotpe plates to be used in the printing of books owned by the plaintiff. The vendee agreed not to resell for publication without the consent of the plaintiff and further agreed to maintain a minimum retail price. A sub-vendee, with notice of the contract, was enjoined from selling below the minimum price. The court declared:

"The agreement of defendant's predecessor in title, though technically a personal one, related to the use of its property . . . and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine where the agreement relates to real estate. We can see no reason why the rule should not apply in the case of personal property, nor are we wanting in authority to sustain the proposition." [citing *Hamilton Bank Note Co.* case, discussed above].

The United States Supreme Court early recognized the right to impose such restrictions on patented articles,⁵⁰ but has since apparently reversed this position,⁵¹ even to the extent of holding such restrictions

⁴⁹38 App. Div. 426, 56 N. Y. Supp. 597 (1899). *Accord*, *P. Lorillard Co. v. Weingarten*, 280 Fed. 238, 240 (W. D. N. Y. 1922) (territorial restriction enforced, the court saying, "equity will enforce a restrictive covenant if it is reasonable and made within proper limitations."); *Standard American Publishing Co. v. Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. Supp. 55 (1898). See *In Re Waterson, Berlin & Snyder Co.*, 48 F. (2d) 704 (C. C. A. 2d, 1931); *Noble v. One Sixty Commonwealth Avenue, Inc.*, 19 F. Supp. 671 (D. C. Mass. 1937). *Contra*: *United States v. General Electric Co.*, 272 U. S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926) (price restriction); *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (C. C. A. 2d, 1914) (territorial restriction); *D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 38 (C. C. A. 6th, 1907) (price restriction); *In re Consolidated Factors Corp.*, 46 F. (2d) 561 (S. D. N. Y. 1931); *Kelly v. Central Hanover Bank and Trust Co.*, 11 F. Supp. 497 (S. D. N. Y. 1935); remanded with direction to consider the question of knowledge of the restriction on the part of defendant, 85 F. (2d) 61 (C. C. A. 2d, 1936); *Chicago Daily News v. Koehler*, 360 Ill. 351, 196 N. E. 445 (1935) (resale restriction); *Garst v. Hall & Lyons Co.*, 179 Mass. 588, 61 N. E. 219 (1901) (price restriction); *National Skee Ball Co. v. Seyfried*, 110 N. J. Eq. 18, 158 Atl. 736 (1932) (territorial restriction). See *Bobbs-Merrill v. Straus*, 147 Fed. 15 (C. C. A. 2d, 1906) (attempt to make a violation of resale price restriction an infringement of the copyright held by vendor).

⁵⁰*Mitchell v. Hawley*, 16 Wall. 544, 21 L. ed. 322 (U. S. 1872); *Littlefield v. Perry*, 88 U. S. 205, 22 L. ed. 577 (1874); *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 S. Ct. 364, 56 L. ed. 645 (1912); *Hatch v. Adams*, 22 Fed. 434 (C. C. E. D. Pa. 1884).

⁵¹*Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 S. Ct. 738, 39 L. ed. 848 (1895); *Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. ed. 502 (1911); *Bauer v. O'Donnell*, 229 U. S. 1, 33 S. Ct. 616, 57 L. ed. 1041 (1913); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 37 S. Ct. 416, 61 L. ed. 871 (1917) [expressly overrules *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 S. Ct. 364, 56 L. ed. 645 (1912), which allowed the vendor of a patented mimeograph to prescribe that sub-purchasers use only the unpatented ink of the vendor with the

invalid as against the immediate vendee.⁵² In spite of cases to the contrary, most courts are so fundamentally opposed to servitudes on chattels that statutes expressly permitting them have been held unconstitutional.⁵³

The *Waring* case has given new life to a doctrine that seemed to be passing rapidly into obscurity. In reviving it the Pennsylvania court took the position that an ancient generalization of law should not be held invariably to apply to cases in which modern conditions of business and science make restrictions highly desirable. As the court stated, "mere aphorisms should not be permitted to fetter the law in furthering proper social and economic purposes." Strangely enough, the *Waring* case carries the servitude principle beyond any previous point. It is to be recalled that *Waring*, in the principal case, never owned the chattel on which the restriction was imposed. The manufacturer of the record was the original owner and the one who imposed the servitude, albeit for the benefit of *Waring* as well as itself.

Mr. Chaffee, in an exhaustive article,⁵⁴ shows that the basis for the extension of the principle of equitable servitudes to chattels is encompassed within the present conceptions of equity jurisprudence. Whether we are yet ready, or soon will be ready, to extend and establish the doctrine, it would be dangerous to prophesy, particularly in view of the *Whiteman* case, where the refusal to so extend testifies to the strength of the opposition.

machine]; *Jackson v. Vaughan*, 73 Fed. 837 (C. C. N. D. Cal. 1896); *Autograph Register Co., v. Sturgis Register Co.*, 110 F. (2d) 883 (C. C. A. 6th, 1940).

⁵²*Boston Store v. American Gramophone Co.*, 246 U. S. 8, 38 S. Ct. 257, 62 L. ed. 551 (1917); *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 S. Ct. 412, 61 L. ed. 866 (1917).

⁵³*Johnson & Johnson et al., v. Weissbard et al.*, 120 N. J. Eq. 314, 184 Atl. 783 (1936). N. J. Stat. (Annual 1935) §§ 217-13 to 217-17 empowered the manufacturer, producer, or owner of an article bearing a trademark to enter into contracts fixing retail prices and required all retailers learning of the contract to observe the established price. It was held that this was an unconstitutional delegation of power to individuals without definite policy or rule of action, and further, that the statute deprived retailers of liberty and property without due process of law, since the statute included commodities not affected with the public interest. *Accord*, *Double-day, Doran & Co., Inc. v. R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409 (1936) [expressly overruled in *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937)]. *Contra*: *Max Factor v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936).

⁵⁴Chaffee, *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 945.

III. *Unfair Competition*

In both the principal cases it was claimed that the practices engaged in by the respective defendants were sufficient to make out a case of unfair competition, in that defendants were misappropriating for profit the products of plaintiffs. The Pennsylvania court, in the *Waring* case, held that there was unfair competition. The Circuit Court of Appeals, in the *Whiteman* case, held that there was not. The court, in the Pennsylvania case, with one justice dissenting on this point, was of the opinion that the circumstances involved brought the case within the doctrine enunciated and applied in *International News Service v. Associated Press*.⁵⁵ But in the federal case the court took the position that, although the language of the court in the *Associated Press* case was broad enough to cover the case in point, it had not intended to state a rule which should be applicable to situations not substantially similar to those then at bar.⁵⁶

The earlier cases⁵⁷ confined the doctrine of unfair competition to those instances in which the conduct of the defendant amounted to some fraud or deceit on the public, and some recent authority still so states the doctrine.⁵⁸ However, there has been a decided tendency, in many cases, to break from this limitation, to widen the scope of protection in the field of unfair competition, and to allow an injunction if it is shown that the unfair practices of one person, firm, or corporation will injure another.⁵⁹

A group of cases known as the "ticket scalper" cases⁶⁰ is generally said to be an early extension of the unfair competition doctrine. But it appears that they are actually a broader application of a principle, which while analogous in some respects to unfair competition, cannot be said to be an extension of it. In these cases it was uniformly held that a railroad might enjoin the sale by ticket scalpers of the unused portions of reduced fare, non-transferable, round trip tickets. The basis of these cases was said by the Supreme Court of the United States.

⁵⁵248 U. S. 215, 39 S. Ct. 68, 63 L. ed. 211 (1918).

⁵⁶The Court cited as authority for this *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279 (C. C. A. 2d, 1929).

⁵⁷*Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365 (1901).

⁵⁸*Queen Mfg. Co. v. Ginsberg & Bros. Inc.*, 25 F. (2d) 284 (C. C. A. 8th, 1928).

⁵⁹*Ralston Purina Co. v. Saniwax Paper Co.*, 26 F. (2d) 941 (W. D. Mich. 1928); *Checker Cab Mfg. Corp. v. Sweeney*, 119 Misc. 780, 197 N. Y. Supp. 284 (1922).

⁶⁰*Bitterman v. L. & N. R. R.*, 207 U. S. 205, 28 S. Ct. 91, 52 L. ed. 171 (1907); *Nashville, C. & St. L. Ry. v. Mc Connell*, 82 Fed. 65 (C. C. M. D. Tenn. 1897); *Illinois Central R. R. v. Caffrey*, 128 Fed. 770 (C. C. E. D. Mo. 1904); *Pennsylvania R. R. v. Bay*, 150 Fed. 770 (C. C. N. D. Ill. 1906).

to be encompassed within the doctrine of *Angle v. The Ry.*,⁶¹ viz., the malicious interference with contractual relations by a stranger to the contract. At about the same time the "trading stamp" cases⁶² were decided on substantially the same principle.

Perhaps the first extension of the doctrine of unfair competition, as such, came in *Fonotopia Ltd. v. Bradley*.⁶³ Defendant manufactured phonograph records from the matrices of the plaintiff's records, and put them in the retail trade at half the price, representing to the public that they were duplicates of those of plaintiff and as good in every respect. In granting an injunction against the continued sale of these duplicate records by defendant, the court noted that:

"No case cited and decided strictly upon the question of unfair competition . . . has ever granted relief in instances outside of imitation or deception, and where the public would be likely to be misled by the points of similarity involved; but equity has granted relief in certain typical lines of cases where the doctrine of unfair competition seems to have been the guide, but where the basis upon which the relief was granted was the unfair taking of the complainant's property, rather than the deception of the purchaser. . . . The principle involved is far reaching in that it carries the scope of equitable jurisdiction into matters frequently considered to be purely the result of business competition. . . . The jurisdiction of a court of equity has always been invoked to prevent the continuance of injury to property . . . and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly in certain kinds of cases, be protected by legislation, but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply."

In 1918 the Supreme Court of the United States gave its sanction to this new phase of the unfair competition doctrine. In *International News Service v. Associated Press*⁶⁴ defendant news agency was enjoined from transmitting to its subscribing newspapers in western areas un-

⁶¹151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55 (1894).

⁶²*Sperry and Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800 (C. C. R. I. 1904); *Sperry and Hutchinson v. Louis Weber & Co.*, 161 Fed. 219 (C. C. N. D. Ill. 1908). In these cases plaintiff, who had issued trading stamps redeemable in merchandise was permitted to enjoin defendants from interfering with the relationship between plaintiff and its subscribing merchants by exchanging defendant's stamps for those of plaintiff and reselling plaintiff's at a lower price.

⁶³171 Fed. 951, 961, 962 (C. C. E. D. N. Y. 1909).

⁶⁴248 U. S. 215, 39 S. Ct. 68, 63 L. ed. 211 (1918).

copyrighted news which had been gathered by plaintiff news agency and had been published in newspapers and on bulletin boards in eastern cities. Defendant argued that all property rights in the news were abandoned by the general publication in the east. In answer to this the court held that the question of unfair competition did not depend on any general right of property and was not foreclosed by showing that, as against the public, plaintiff had no right. "Regarding the news . . . as but the material out of which both parties are seeking to make profits . . . it must be regarded as quasi property irrespective of the rights of either as against the public." In reply to the contention that there was no unfair competition because defendant frankly admitted the source of its news items, the court refused to concede that the doctrine was confined to cases in which there was *misrepresentation* to the public, holding that the *misappropriation* of plaintiff's goods was the essence of the action.

It is obvious that the facts in the principal cases are not sufficient to make a case of unfair competition under the older rule requiring that there be misrepresentation by the defendant. But, as the *Whiteman* case implies, it is clearly possible to bring them within the expanded concept of unfair competition requiring only misappropriation by the defendant.

It is first necessary to determine whether plaintiffs and defendants here are actually competing. It is true that there is not any direct market competition between similar products, which is the usual case. But there is an attempt to secure a profit from the same product, namely the musical performances of plaintiffs' orchestras. This is sufficient to make out a case if it can be shown that defendants are adopting methods which unfairly hinder plaintiffs in selling their services.⁶⁵ That defendants are attempting to profit from the broadcasting of the records cannot be doubted, and it is no answer to show that the records are broadcast gratuitously to the public, or that no advertising accompanies them.⁶⁶

⁶⁵*Beechnut Packing Co. v. P. Lorillard Co.*, 273 U. S. 629, 47 S. Ct. 481, 71 L. ed. 810 (1927); *Checker Cab Mfg. Co. v. Sweeney*, 119 Misc. 780, 197 N. Y. Supp. 284 (1922).

⁶⁶*Herbert v. Shanley*, 242 U. S. 591, 593, 37 S. Ct. 232, 233, 61 L. ed. 511 (1917); *Associated Press v. KVOS, Inc.*, 80 F. (2d) 575, 582 (C. C. A. 9th, 1935). The *Shanley* case held that the playing of music in a public restaurant at meal times was playing for profit. "If music did not pay it would be given up, if it pays it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough." The *KVOS* case held that the gratuitous broadcasting of news bulletins was an engagement for profit, paraphrasing the above quotation from the

The second, and more difficult question, is whether the practices of defendants can be properly brought within the expanded conception of unfair competition, as expressed in the *Associated Press* case. It is not to be denied that, apart from the subject matter, the cases are distinguishable. First, there is not the direct competition present in the *Associated Press* case. But that this factor is of no significance is evident from the discussion above and the cases cited therein.

Secondly, it is to be noted that in the *Associated Press* case plaintiff had only one method of dealing with its product, that is by sale to its subscribing newspapers. It was this single method of profit that the acts of defendant were calculated to injure. On the other hand, in the principal cases, plaintiffs have at least two ways of profiting from their performances, that is, the two involved here: the manufacture of records and personal performance over the radio. But to deny relief on this ground is, in effect, to force plaintiffs to elect between two possible courses of action, to choose one and forego the other. Certainly it does not behoove a court of conscience to prescribe such conduct, in the absence of strong considerations in public policy, which do not exist here.⁶⁷ Conceding a public interest in continued and frequent radio performances of such musical productions by plaintiffs, such a public interest cannot be said to exceed that involved in the rapid circulation of news. Yet, in the *Associated Press* case this public interest was held not jeopardized by an injunction, Mr. Justice Brandeis alone dissenting.⁶⁸ Furthermore, it is doubtful if there will be any fewer recorded performances broadcast, since such broadcasts through records licensed by the plaintiffs for that purpose would still remain substantially less expensive than personal performances of even ordinary and unknown orchestras. It will be claimed that plaintiffs are not being forced to

Shanley case. "If the news distribution pays it pays out of the advertisers' pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

⁶⁷See the dissent of Justice Holmes in *Dr. Miles Medical Co. v. Park*, 220 U. S. 373, 411, 31 S. Ct. 376, 386, 55 L. ed. 502: "I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."

⁶⁸In *Associated Press v. KVOS, Inc.*, 80 F. (2d) 575, 581 (C. C. A. 9th, 1935), the court, in discussing this question, said that the more rapid circulation of news by radio was not sufficiently affected with the public interest to justify defendant in appropriating plaintiffs' news from broadcast. "Under our capitalistic system . . . news distribution as a public function will be in large part by businessmen acting under the inducement of the profit motive. The public therefore has an interest in protecting the business of news gathering and disseminating agencies against the impairment of their efficiency, by the inevitable reduction of their business income through the misappropriating of news. . . ."

make an election since defendants paid for the records used in the broadcasts. But the payment made is so small⁶⁹ that it is not at all commensurate with the benefit secured by defendants; nor is it likely that the revenue accruing to plaintiffs from the sale of these records to defendants begins to approach the corresponding decline in the value of plaintiffs' personal radio performances.⁷⁰

Thirdly, it is to be noted that, while in the *Associated Press* case it was only necessary to enjoin the use of plaintiff's news for a few hours in order to give it complete protection, in these cases it will be necessary to enjoin the broadcasting of the records in question indefinitely, since it is clear that so long as plaintiffs are engaged in their businesses, their performances have commercial value to them.⁷¹ But the essence of the wrong on the part of defendants is the misappropriation of something of commercial value to plaintiffs. To make the granting or withholding of redress for this wrong depend on the length of time the product is valuable to the injured party is an exercise of equitable discretion that is unsupportable. If a court of equity is to do equity in this type of situation it must shape its decision to the needs of the particular business seeking its aid.

It is submitted that the *Waring* case, holding the practices of defendant to be unfair competition, is correct. But the *Whiteman* case unduly restricts the broad rule laid down in the *Associated Press* case, and although there is some evidence that the Supreme Court itself would so restrict the rule,⁷² such a narrowing of the principle is a mistake. In *Cheney v. Doris Silk Corp.*⁷³ the Circuit Court of Appeals, speaking of the *Associated Press* case, said that "there are cases when the occasion is at once the justification for, and the limit of, what is

⁶⁹The records in question in the *Waring* case were bought by defendant for 75 cents per record. It does not appear from the *Whiteman* case what price was paid for the records in question there. At the present time the retail price of such records ranges between 35 and 50 cents per record.

⁷⁰In the *Waring* case the Chancellor found that the broadcasting of these records diminished the commercial value of the orchestra's performances. In the *Whiteman* case the question of damage was not discussed.

⁷¹There is no difficulty in finding a property interest to form the basis for equitable jurisdiction as equity treats any civil right of a pecuniary nature as a property right. In re Debs, 158 U. S. 564, 593, 15 S. Ct. 900, 909, 39 L. ed. 1092, 1105 (1895).

⁷²In *Reichelderfer v. Quinn*, 287 U. S. 315, 319, 53 S. Ct. 177, 179, 77 L. ed. 331 (1932) the court, speaking on a different subject, said: "Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights. Compare *International News Service v. Associated Press* 248 U. S. 215, 63 L. Ed. 211, 20 A. L. R. 293, 39 S. Ct. 68, with *Cheney Bros. v. Doris Silk Corp.* (C. C. A. 2d) 35 F. (2d) 279."

⁷³35 F. (2d) 279, 280 (C. C. A. 2d, 1929).

decided. This appears to us such an instance. . . ." It is true that the law speaks in general terms and that cases arise in which extraordinary circumstances and excessive hardship lead a court of equity to grant relief. In such a case, the court properly may refuse to extend or even apply the rule of such a decision to other and different situations. But the *Associated Press* case was not one of these. There is nothing in either the facts or the opinion of that case from which an intent to formulate a strictly circumscribed rule can be deduced. Indeed, the decision was simply a logical and needed extension of a doctrine that has consistently changed, and must continue to change with the business practices and ethics which it is designed to supplement.

Conclusion

Notwithstanding the decision of the *Waring* case it is clear that present conceptions of the law of literary property are in accord with the *Whiteman* case to the effect that there is no common law literary property in performances of musical works. Furthermore, it is doubtful if there is any inclination on the part of the courts to extend the common law right, or on the part of the Congress to extend the statutory right, to such performances. Apart from more basic considerations of law and policy, the difficulty of determining the uniqueness of each performer's interpretation of a musical score is a burden too great for either a court or an administrator of a copyright statute to bear successfully.

The facts in the principal decisions place the argument for the extension of the equitable servitude principle to chattels in a much more favorable light than is often the case. Here, there is no attempt to maintain prices, to hinder direct competition between similar goods, or to restrain the right of alienation. It is thought that considerations such as these have been primarily responsible for the failure to extend a principle which has long been accepted and approved with respect to real property. Therefore, it appears that the *Waring* case is on firm ground in allowing the imposition of a servitude. However, the importance of the case must not be overemphasized, since the *Whiteman* case, decided three years later and on the same facts, retreats again to the entrenchments of American tradition and authority.

It is believed that the doctrine of unfair competition presents the best possible solution. This doctrine, although not new, is unsettled and expanding and will probably remain so until sound public policy,

which is intimately linked with it, becomes satisfactorily defined. As long as the principle of unfair competition is unsettled, the maxim of stare decisis can have little weight, with the result that courts should have less hesitancy in applying unfair competition principles to new situations. Furthermore, it will be necessary for the plaintiff in every case to show actual damage or at least the serious threat of actual damage before any relief can be procured on the grounds of unfair competition. This feature distinguishes relief on the basis of unfair competition from relief on the basis of a literary property right or an equitable servitude. On those bases it would seem that if there is a right, the court would have to enforce it, regardless of damage, on analogy to ordinary contract and property interests. Thus, the granting of relief on the theory of unfair competition has the additional recommendation that it lies within the power of the court to examine each case more carefully and grant or withhold relief without being fettered with a pre-established interest in the plaintiff.⁷⁴

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⁷⁴In the *Waring* case one justice took the position that the defendant was invading the plaintiff's right of privacy. While this right is gaining some recognition, it is difficult to see how it can apply in cases where the interest which plaintiff seeks to protect is the business of performing for the public at large. On this subject, see Warren and Brandeis, *The Right to Privacy* (1890) 4 *Harv. L. Rev.* 193.