Cleveland State Law Review

Volume 20 | Issue 1 Article

1971

Common Law Copyright, and Conversation

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ASSUME THAT "A" IS A WELL KNOWN AUTHOR and literary figure and that "B" is an author in his own right, but far less known than "A". "A" and "B" meet socially and engage in a stimulating conversation wherein thoughts and ideas are freely expressed and conclusions drawn. Sometime thereafter, "B" publishes excerpts from this conversation and "A" strongly desires to prevent such from being published and receiving publicity. To prevent publication of their conversation, "A" could proceed against "B" under several different causes of action. He could possibly allege breach of a fiduciary relationship, breach of implied contract, invasion of privacy, unfair competition, or breach of common law copyright. The last cause of action, common law copyright, is the subject of this paper.

Common law copyright is a phrase used to designate the property rights in intellectual productions conferred by the common law.[1] Commonly referred to as the "right of first publication,"[2] it enables the author to exercise complete control over the first publication of his work.[3] In this respect it is an absolute property right[4] existing separately and independently of federal copyright law.[5]

Conversation is defined as an exchange of observations, opinions and ideas.[6] It means familiar intercourse, an exchange of thoughts and sentiments,[7] and implies mutuality.[8] Two or more people must participate and there must be an exchange of words.[9]

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1 18 C.J.S., Copyright § 2 (1939).

2 Wheaton v. Peters, 33 U.S. 591 (1834); Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E. 2d 725 (1949).

3 Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 296 N.Y.S. 2d 771 (1969).

4 Supreme Records v. Decca Records, 90 F. Supp. 904 (S.D. Cal. 1950); Werkmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904).

5 Congress is given authority under U.S. Const. art. 1, § 8 to regulate all aspects of copyright law. Congress has specifically declined to regulate common law copyright.

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefor." 17 U.S.C. § 2.

6 Webster's New International Dictionary (3rd ed. 1963).

7 In Re Fenton's Will, 97 Iowa 192, 66 N.W. 99 (1896).

8 Jackson v. Ely, 57 Ohio St. 450, 49 N.E. 792 (1897).

9 United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).

Elements of Common Law Copyright

One logical way to determine if conversation can be the subject of common law copyright is to analyze the elements of common law copyright in order to determine if *conversation,* as previously defined, is applicable to each common law copyright element. This is not easily done because the common law is an ever changing body of law, which affects the subject matter constituting common law copyright.[10] For example, as noted above, common law copyright is a property right.[11] This right may be transferred in the same manner as any property right[12] and, on death, common law copyright descends in the same manner as personal property.[13] Actions founded on common law copyrights sound in conversion.[14] In these respects, common law copyright is like any other property right.

In early property law, for recovery of goods to be had under conversion, the goods had to be identified by a proprietary mark.[15] This proprietary mark requirement must be maintained today under federal copyright law to sustain an action for copyright infringement.[16] The proprietary mark concept was applied to common law copyright. The copyright had to be in a tangible form, which supplied the means for which the idea expressed was identified.[17] Hence, the practical difficulty in the enforcement and protection of such ideas is somewhat overcome by this tangible form requirement.

However, the tangible form requirement has since been rejected by the great weight of authority.[18] It is sufficient if the means through which the idea is expressed can be identified.[19] Yet a recent leading

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[10] Ligget & Meyers Tobacco Co. v. Meyer, 101 Ind. App. 420, 430, 194 N.E. 206, 210 (1935). Cited with approval in Belt v. Hamilton National Bank, 108 F. Supp. 689, 691 (D.C.D.C. 1952).

[11] Cases cited *supra* n. 3 and 4.

[12] Atlantic Monthly Co. v. Post Pub. Co., 27 F. 2d 556 (D.C. Mass. 1928).

[13] Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).

[14] Pearson v. Dodd, 410 F. 2d 701 (D.C. Cir. 1969); but see King Bros. Productions Inc. v. RKO Teleradio Pictures, Inc., 208 F. Supp. 271 (S.D.N.Y. 1962) holding that such taking is not "conversion" in the strict sense of the term and Herwitz v. National Broadcasting Co., 210 F. Supp. 231 (S.D.N.Y. 1962) holding such taking is tort commonly called plagiarism.

[15] Comment, 24 S. Cal. L. Rev. 65 (1950).

[16] 17 U.S.C. §§ 10, 19.

[17] Werkmeister v. American Lithographic Co., 134 F. 321 (2d Cir. 1904); see *supra,* n. 5.

[18] Dymow v. Bolton, 11 F. 2d 690 (2d Cir. 1926); O'Brien v. RKO Radio Pictures Inc., 68 F. Supp. 13 (S.D.N.Y. 1946); Bowen v. Yankee Network, 46 F. Supp. 62 (D. Mass. 1942); Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930); Stone v. Ligget & Meyers Tobacco Co., 260 App. Div. 450, 23 N.Y.S. 2d 210 (1940); Dane v. M & H Co., 136 U.S.P.Q. 426 (N.Y. Sup. Ct. 1963); 18 C.J.S. Copyright § 8 (1939); Nimmer, Copyright, § 11.1 (Bender, 1964, Supp. 1970).

[19] White-Smith Music Pub. Co. v. Appollo Co., 209 U.S. 1 (1907); Holmes v. Hurst, 174 U.S. 82 (1898); Belt v. Hamilton National Bank, *supra* n. 10.

decision in this area has indicated that if conversational dialogue was to be the subject matter of common law copyright, it would have to be so identified by "prefatory words or inferred from circumstances in which the dialogue took place." [20] The reasoning has been criticized by[21] some authorities.

Another element in determining the subject of common law copyright is the requirement that the idea expressed be concrete.[22] This is a converse restatement of the fundamental concept that mere ideas are not the proper subject matter of common law copyright because ideas are "free as air." [23] "Concrete" is the opposite of "abstract" and synonymous with "tangible." [24] Hence, the confusion arises again with the tangible form requirement. (Note that if the expressed idea is concrete, it should be identifiable.) Some courts have held that oral statements can be concrete.[25]

A third element, arising from the basic definition of common law copyright, is that the subject of the copyright must not be published.[26] There are two different views determining when publication occurs.[27] One theory draws a distinction between a general publication and a limited publication holding that a limited publication does not destroy the common law copyright.[28] The second theory holds that publication does not occur unless there is a distribution of tangible copies of the

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[20] Hemingway v. Random House, Inc., *supra* n. 3.

[21] Williams, The Protectibility of Spontaneous Oral Conversations Via Common Law Copyright, 13 Idea 263 (1969); Nimmer, *op. cit. supra* n. 18.

[22] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F. 2d 487 (2d Cir. 1960); Nichols v. Universal Pictures Corp., 45 F. 2d 119 (2d Cir. 1930); Sloan v. Mud Products, Inc., 114 F. Supp. 916 (N.D. Okla. 1953); Palmer v. DeWitt, 47 N.Y. 532 (1872); Dane v. M & H Co., *supra* n. 18.

[23] International News Service v. Associated Press, 248 U.S. 215, 251 (1918); Holmes v. Hurst, *supra* n. 19; Fendler v. Morosco, *supra* n. 18; Werkmeister v. American Lithographic Co., *supra* n. 17.

[24] Nimmer, *op. cit. supra,* n. 18.

[25] Lennon v. Pulsebeat News, Inc., 143 U.S.P.Q. 309 (Sup. Ct. 1964) holding oral statements in an interview are common law copyright; Columbia Broadcasting System v. Documentaries, Inc., 42 Misc. 2d 723, 248 N.Y.S. 2d 809 (S. Ct. 1964) holding statements made in live radio broadcast are subject of common law copyright; Universal Film Mfg. Co. v. Copperman, 218 F. 577 (2d Cir. 1914) holding common law copyright in words expressed in play; Hemingway v. Random House, Inc., *supra* n. 3, holding conversation may be common law copyright. *See also* Jenkins v. News Syndicate Co., 128 Misc. 284, 219 N.Y.S. 196 (S. Ct. 1926); Davies v. Krasna, 54 Cal. Rptr. 37 (Cal. App. 1966); Dane v. M & H Co., *supra* n. 18; Comment, 52 Iowa L. Rev. 105 (1966).

[26] *See* White v. Kimmell, 94 F. Supp. 502 (S.D. Cal. 1950) and cases cited therein.

[27] Williams v. Weisser, 78 Cal. Rptr. 542 (Ct. App. 1969).

[28] Nutt v. National Institute Inc. for the Improvement of Memory, 31 F. 2d 236 (2d Cir. 1929); Werkmeister v. American Lithographic Co., *supra* n. 17.

work.[29] Under either theory, it is clear that in the usual oral conversation sense, a publication has not occurred.[30]

The fourth and final element of common law copyright is that the work must be original. This requirement is derived from the fact that copyright protection will be afforded only to authors.[31] By definition an author is a creator, originator of the work.[32] It necessarily follows, therefore, that the work must be original.[33]

While oral statements in themselves can be original,[34] a unique situation is presented with respect to conversation. Conversation involves an interplay of ideas. One of the participants in the conversation may make a statement. It is in itself original but is "triggered" or contributed to by other statements (perhaps also original ones) made by the other participants in the conversation.[35] Because only the author, the originator of the statement, can claim a copyright therein, perhaps both or all of the participants in the conversation may claim ownership as co-authors or joint inventors.

A joint work occurs where two or more people collaborate in devising and putting into form the subject matter of the work in question.[36] It is not necessary that there be a preconceived common design,[37] nor that the contribution made by the parties be equal in quantity or quality.[38] Suggestions which assist in working out the main idea, or an in-

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[29] Ferris v. Frohman, 223 U.S. 424 (1912).

[30] Oral delivery of lecture does not constitute publication. McDearmott Commission Co. v. Board of Trade, 146 F. 961 (8th Cir. 1906); Bartlett v. Crittenden, 2 F. Cas. 967 (No. 1,076) (C.C. Ohio 1849); Columbia Broadcasting System, Inc. v. Documentaries Unlimited Inc., *supra* n. 25. Therefore oral statements made in conversation will not constitute publication.

[31] Federal copyright law gives protection only to the author. 17 U.S.C. § 9. The same is true in common law copyright. Supreme Records v. Decca Records, *supra* n. 4; Gladys Music, Inc., v. Arch Music Co., 150 U.S.P.Q. 26 (S.D.N.Y. 1966).

[32] Remick Music Corp. v. Interstate Hotel Co. of Nebr., 58 F. Supp. 523 (D.C. Nebr. 1944).

[33] Originality is one of law in the first instance and if there is evidence to submit to the jury then it is one of fact for jury. Stevens v. Continental Can Co., 308 F. 2d 100 (6th Cir. 1962); Silver v. Television City, Inc., 148 U.S.P.Q. 167 (Pa. Super. Ct. 1965).

[34] See cases cited *supra* n. 25.

[35] Hemingway v. Random House, Inc., 279 N.Y.S. 2d 51, 59, 153 U.S.P.Q. 871, 875 (Sup. Ct. Sp. Term 1967).

> "Conversations . . . are inevitably the product of interaction between the parties; they are not individual intellectual productions."

[36] Altoona Publix Theatres v. American Tri-Ergon Corp., 72 F. 2d 53 (3rd Cir. 1934); Shreckhise v. Ritchie, 67 F. Supp. 926 (D.C. Va. 1946); Bourne v. Jones, 114 F. Supp. 413 (S.D. Fla. 1951), aff'd 207 F. 2d 173 (5th Cir. 1953) cert. denied, 346 U.S. 897 (1953).

[37] Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 140 F. 2d 266 (2d Cir. 1944); Shapiro, Bernstein & Co. Inc. v. Jerry Vogel Music Co. Inc., 161 F. 2d 406 (2d Cir. 1946); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. Inc., 221 F. 2d 569 (2d Cir. 1955), modified on rehearing 223 F. 2d 252 (2d Cir. 1955).

[38] Shapiro, Bernstein & Co. Inc. v. Jerry Vogel Music Co. Inc., 221 F. 2d 569, *supra* n. 37; DeLaski & Thropp v. Wm. Thropp & Sons Co., 218 F. 458 (N.J. 1914) *aff'd* 226 F. 941 (3rd Cir. 1915); Sweet Music Inc. v. Melrose Music Corp., 189 F. Supp. 655 (S.D. Cal. 1960).

dependent part thereof which contributes to the whole, make the work joint.[39] As long as the final work is the result of mutual counsel, mutual suggestions, and mutual effort, it is a joint work.[40] During a conversation, it may very likely happen that the effect of "one suggesting one thing and the other another"[41] may result in a whole expression which would then be the subject of a joint common law copyright.

Further developing this principle of joint inventorship applied to conversation, the following situations should be considered:

1.) Where both parties contribute original statements going to the essence of the subject of the conversation, both are co-authors.

2.) Where the contributing parties' statements are not in themselves original, such statements cannot be the subject of copyright. However, they can serve as stimuli[42] to the other parties' original statements, and both collaborating parties are joint authors.[43]

3.) The next situation occurs when both parties contribute original statements, but one party's statements do not contribute to or form the basis for the other party's statements in the conversation. This situation exists in patent law where one inventor's contributions form the subject of one claim in the patent and the other inventor's contributions form the subject of another claim in the patent. In such case, both inventors are sole inventors and the patent is not a joint invention.[44] However, in copyright law, the party contributing statements not going to the essence of the conversation may nevertheless claim a copyright therein as a composite work.[45]

Basically, a composite work occurs where the respective contributions of each party are distinguishable, are capable of supporting a copyright in themselves and, the parties are not deemed

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[39] George v. Perkings, 1 F. 2d 978 (8th Cir. 1924); DeLaski & Thropp v. Wm. Thropp & Sons Co., *supra* n. 38.

[40] Multi-volume: 2 Rivise and Caesar, Interference Law and Practice, § 323 (1943).

[41] Worden v. Fisher, 11 F. 505 (E.D. Mich. 1882).

[42] Estate of Hemingway v. Random House, Inc., 49 Misc. 2d 726, 268 N.Y.S. 2d 531, 537 (1968).

"Conversation is a media of expression of unique character. Because of its several nature any conversational exchange necessarily reflects the various participants thereto not only with respect to the direct contribution of each but also insofar as each party acts as a catalyst in evoking the thoughts and expressions of the other. The articulations of each are to some extent indelibly colored by the intangible influence of the subjective responses engendered by the particular other."

[43] Nimmer, *op. cit. supra,* at § 74 (1970).

[44] DeLaski & Thropp v. Wm. Thropp & Sons Co., *supra* n. 38.

[45] An argument may be made at this time, that the publishing party has made sufficient contribution to the work, as by arranging the work into a coherent format, which will justify original authorship. The answer is that such argument will afford no defense to the fact that the publishing party misappropriated the ideas of another. Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F. 2d 893, 898 (8th Cir. 1946); Nimmer on Copyright, § 44 (1970).

joint authors.[46] The notable difference between a composite work and a joint work occurs in the rights which each author has in the work. Unlike a joint work, a composite work cannot be published or copyrighted without the consent of the other author.[47]

4.) The last situation which can exist during conversation results when one party's statements do not contribute to the essence of the conversation and are not original. When this occurs, it should be clear that the party who contributes nothing original or worthwhile to the conversation will not be entitled to any copyright contained therein. Such a situation should be easily detectible. It is doubtful whether any meaningful conversation could exist in these circumstances.

Public Policy Considerations

Another method which may be employed in determining if conversation may be the subject matter of common law copyright is to ascertain the effect of public policy considerations on this matter.

The purpose of common law copyright is to encourage men of creative ability to express their creativity by affording protection to their creative expressions and guaranteeing to them the right of first publication.[48] The public will ultimately be benefited because they will have a right to the author's works when such are published. Hence, the purpose of common law copyright is complementary to federal copyright law which grants a limited monopoly to the author upon the premise that the public will be benefited from the author's labors when the monopoly expires.[49] This purpose is frustrated when the author retains a perpetual monopoly of his expressions by refusing to divulge them to the public.[50]

Constitutional considerations of this subject indicate that the first amendment guarantee of the freedom of speech applies not only to prohibitions of restraint on voluntary public expressions of ideas but also extends to the concomitant freedom not to speak publicly.[51] The result of imposing the sanctions of the first amendment will thus protect the speaker's right of privacy. However, the predecessor to the right of privacy was common law copyright.[52] Today the right of privacy

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[46] Szekely v. Eagle Lion Films, 242 F. 2d 266 (2d Cir. 1957); Markham v. A. E. Borden Co., 206 F. 2d 199 (1st Cir. 1953). For distinctions between composite work and joint work *see also,* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F. 2d 160 *supra* n. 37; Edward B. Marks Music Corp. v. Jerry Vogel Music Co., *supra* n. 37.

[47] Yale University Press v. Row, Peterson & Co., 40 F. 2d 290 (S.D.N.Y. 1930); King Features Syndicate v. Boure, Register of Copyrights, 48 U.S.P.Q. 237 (D.D.C. 1940).

[48] Holmes v. Hurst, *supra* n. 19; Guthrie v. Curlett, 36 F. 2d 694 (2d Cir. 1929); Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W. 2d 643 (1943).

[49] Fox Film Corp. v. Dozal, 286 U.S. 123 (1932); Mazer v. Stein, 347 U.S. 201 (1954).

[50] Columbia Broadcasting System, Inc. v. De Costa, 377 F. 2d 315 (1st Cir. 1967).

[51] Hemingway v. Random House, Inc., *supra* n. 3; *see also,* Recent Developments, 67 Colum. L. Rev. 366 (1967).

[52] Williams, *op. cit. supra,* n. 21.

is well defined. Suffice it to say that where a well known person is concerned,[53] or where the matter deals with the public interest,[54] the right of privacy is substantially less than that afforded the ordinary person.

Practical considerations dictate that the subject of this paper will only arise in situations where a well known person is involved. In such situations, common law copyright should not be used to guarantee the right of privacy under first amendment freedom of speech considerations because the right of privacy has been developed today under its own law and this law should be controlling on the subject.

Conclusion

The foregoing may be summarized by concluding that a strict analysis of the elements constituting common law copyright will not preclude conversation from achieving a copyright status although public policy considerations will. These two forces are not irreconcilable. As noted above, in the four suggested possible modes of conversation which can achieve common law copyright status, only one mode can result in a copyright which belongs absolutely to only one party to the conversation. It is submitted that the courts could readily distinguish this conversational mode from the rest.

Two of the conversational modes suggested will result in co-authorship of the copyright. Co-authors of a literary work are considered as tenants in common.[55] A co-author cannot be liable for copyright infringement.[56] Although he may not assign the joint work, he can, nevertheless, grant non-exclusive licenses for it.[57] Upon granting a license, the co-author is liable to the other joint owners of the work for their ratable share.[58] An accounting is imposed on the co-owner on the theory of a constructive trust.[59]

The third mode of conversation, noted above, will result in a composite work. Under the composite work theory, an implied trust is also created for the benefit of the contributing authors.[60] However, a com-

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[53] Time Inc. v. Hill, 385 U.S. 374 (1967).

[54] New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Pickering v. Board of Education, 391 U.S. 563 (1968).

[55] Silverman v. Sunrise Pictures Corp., 273 F. 909 (2d Cir. 1921); Denker v. Twentieth Century-Fox Film Corp., 10 N.Y. 2d 339, 223 N.Y.S. 2d 193 (1961).

[56] Richmond v. Weiner, 353 F. 2d 41 (9th Cir. 1965).

[57] Meredith v. Smith, 145 F. 2d 620 (9th Cir. 1944); Klein v. Beach, 232 F. 240 (S.D.N.Y. 1916) *aff'd* 239 F. 108 (2d Cir. 1917).

[58] Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., *supra* n. 37; Crosney v. Edward Small Productions Inc., 52 F. Supp. 559 (S.D.N.Y. 1942).

[59] Shapiro, Bernstein and Co. v. Jerry Vogel Music Co., *supra* n. 37.

[60] Quinn-Brown Pub. Corp. v. Chilton Co., 15 F. Supp. 213 (S.D.N.Y. 1936); Atlantic Monthly Co. v. Post Pub. Co., 27 F. 2d 556 (D. Mass. 1928).

posite work cannot be the subject of copyright unless the contributing author gives his assent.[61] It is therefore suggested that this consent be implied from the very act, itself, of two people engaging in conversation. If a party to the conversation did not wish his statements to be used by the other parties, the burden would be placed on him to so indicate his intention to the other parties.[62]

The result would be an equitable one. The public would not be denied the ultimate enjoyment of the work. Any assertions by the contributing party relating to the right of privacy would be governed by considerations other than common law copyright. However, the publishing party would be under a duty to account to the other parties, thereby preventing unjust enrichment. The requirements of common law copyright being met, the status of copyright would be afforded the conversation.

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[61] See cases cited *supra* n. 45.

[62] Hemingway v. Random House, Inc., *supra* n. 3, the suggestion made by the court that the speaker who desired a common law copyright in his statements indicate so by prefatory words may be more relevant in this context.