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A RECENT FEDERAL DISTRICT COURT CASE, *Grove Press, Inc. v. Collector's Publication, Inc.*,[1] illustrates another attempt by our judiciary to find its way out of the immense entanglement of copyright infringement in statutory law and unfair competition in common law besetting properties in the public domain. Two 1964 United States Supreme Court decisions[2] have further complicated the positions of both creators and judiciary.

Consider that you had been fortunate enough to locate one of the three remaining original copies of a racy nineteenth century European novel; had purchased the rights to put your staff to work in Germany copying and updating it editorially; invested an additional $23,000.00 in printing type and plates; applied for and received a United States derivative copyright on your changed version; and finally published your book. Just when you had settled back comfortably to recover your investment and let the profits roll in, you learn that someone else has simply photographed your version and is about to market it at one-half the price.

These are substantially the facts in the *Grove Press* case involving "My Secret Life," a rather explicit sexual autobiography of a nineteenth century English gentleman. Surprisingly, the court found relief to be in unfair competition in spite of the *prima facie* case[3] created by plaintiff's possession of a Certificate of Copyright Registration.[4] The 1967 *Grove* decision provided the impetus for this essay on the present confusing laws governing unfair competition in intellectual products that have become a part of the public domain.

Public domain is the other side of the coin of *copyright* in the fields of literature, drama, music and art.[5] It lacks the private property element granted under copyright in that there is no legal right to exclude

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1 246 F.Supp. 603 (C.D. Cal. 1967).

2 Sears, Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Daybright Lighting, Inc., 376 U.S. 234 (1964).

3 Drop Dead Co. v. S. C. Johnson & Sons, Inc., 326 F.2d 87 (9th Cir. 1963).

4 *Supra* note 1 at 606. The court said, "Since the new matter in the Grove edition was trivial, the Grove edition is uncopyrightable as a derivative work or otherwise. In reaching this conclusion the Court has recognized that a Certificate of Copyright Registration is prima facie evidence of the facts stated therein, 17 U.S.C. § 209, but this presumption has been sufficiently dispelled."

5 Krasililowsky, Observations on Public Domain, 14 Bull. Cr. Soc. 205 (1967).

others from enjoying it, and is "free as the air to common use." [6] Whether a work is in the public domain by reason of expiration, abandonment, or non-copyrightability, the effect is the same; it may be made and sold by whoever chooses to do so, and the right to share in its goodwill is possessed by all.[7]

Statutory and Common Law Aspects

Save for the limited protection accorded creators of literary or intellectual works under the Federal Copyright Act,[8] and its exceptions, anyone may freely and with impunity avail himself of such works to any extent he may desire and for any purpose whatever, subject only to the qualification that he does not steal goodwill or deceive others into thinking such creations represent his own work.

The copyright clause of the Constitution secures to authors the exclusive right to their "writings." [9] This term is not limited to actual scripts but includes all tangible expressions of intellectual creation.[10] Works of art (*i.e.*, sculptures and paintings) are, therefore, assumed to be within the constitutional protection.[11] Interestingly, phonographic recordings have not been included under the statutory "writings" umbrella.[12]

The common law recognizes a property right in the products of man's creative mind, regardless of the form in which the products may take expression.[13] The common law right to literary property precedes the constitutional protection and was not in any way affected by enactment of the copyright laws,[14] with the exception that upon publication or upon availing himself of the copyright laws one loses the corresponding common law rights.[15] When a work is sold or otherwise made available to the public without restriction to use or class of users it is classified as a general publication.[16] Limited publication is a communication of the work, restricted both as to persons and purpose, under cir-

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[6] Dissent of Justice Brandeis, International News Service v. Associated Press, 248 U.S. 215 (1918).

[7] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).

[8] U.S. Const. art 1, § 8 cl 8; 17 U.S.C. § 1 et seq.

[9] U.S. Const. art 1, § 8 cl. 8.

[10] Nimmer, Copyright § 8.2 (1963).

[11] Nimmer, *op. cit. supra* note 10.

[12] See, generally, Nimmer, Copyright Publication, 56 Colum. L. Rev. 185 (1956).

[13] Kimmel v. White, 343 U.S. 957 (1952).

[14] Ibid.

[15] Id.

[16] *Supra* note 12.

cumstances showing no dedication to the public.[17] Only a general publication results in the loss of common law copyright.[18]

Title 17 of the United States Code contains the statutory law applicable to cases involving intellectual products of the public domain.[19] Most frequently applied are sections 8 and 7, which read, in part, as follows:

> *Section 8.* No copyright shall subsist in the original text of any work which is in the public domain or in any work which was published in this country or any foreign country prior to July 1, 1909 and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint in the whole or in part thereof . . .[20]
>
> *Section 7.* Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain . . . or work republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title, but the publication of any such new works shall not . . . be construed to imply an exclusive right to such use of the original works. . .[21]

The degree of protection afforded is measured by what is actually copyrightable, and, hence, when one takes matter in the public domain and adds material which is the result of his own efforts, the copyright which he takes out is valid as to the new and original matter only and does not remove from the public domain that which the author by his own act has dedicated to the public.[22]

The Federal District Courts are given exclusive original jurisdiction of all civil actions arising under the copyright laws of the United States and of all civil actions asserting a claim of unfair competition when joined with a substantial and related claim under the copyright laws.[23] However, failure to establish infringement of copyright in a suit for injunction, damages and an accounting does not deprive the federal court of jurisdiction to determine the merits of a claim that the acts complained of also constitute unfair competition.[24]

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[17] White v. Kimmel, 193 F.2d 744 (9th Cir. 1952), cert. den. 343 U.S. 957 (1952).

[18] Wm. A. Meir Glass Co. v. Anchor Hocking Glass Corp., 95 F.Supp 264 (W.D. Pa. 1951).

[19] 17 U.S.C. § 1-216 (1958).

[20] Ibid. § 8.

[21] Id. § 7.

[22] Axelbank v. Rony, 277 F.2d 314 (9th Cir. 1960); American Code Co. v. Benarize, 282 F. 829 (2d Cir. 1922); Kipling v. G. P. Putnam's Sons, 120 F. 631 (2d Cir. 1903).

[23] 28 U.S.C. § 1338(b).

[24] Hurn v. Oursler, 289 U.S. 238 (1933).

The Conflict

The right to prevent unauthorized copying *per se* is based on federal statutes, while the right to prevent or recover damages for the unfairly competing sale of the copies is a common law right generally assumed to owe its existence to the respective states.[25] Immediately jurisdictional questions arise, as well as the question of which law should be applied by the federal courts, with respect to unfair competition when there has been a joinder of copyright infringement and unfair competition claims into a single cause of action within the jurisdiction of the federal court system.

Let's look, for example, at a 1965 case involving the best-selling novel "Candy." [26] The plaintiffs, publishers and author, brought out a hard-cover English language edition in France but neglected to apply for an *ad interim* copyright in the United States. Subsequently plaintiffs did produce and publish a revised version which they copyrighted here. A short while later defendants published a paperback edition of the original "Candy" and plaintiffs brought a joinder action for copyright infringement and unfair competition. A New York federal court, after finding plaintiff's copyright invalid for technical reasons, determined that the defendants did not copy (an infringement term) nor appropriate (an unfair competition term) the plaintiff's version of "Candy" but had utilized an independent public domain source to complete its edition.

Compare this with the opinion in which Judge Hill, having found the Grove version of "My Secret Life" uncopyrightable, stated the rule as follows: "In view of plaintiff's expenditure of substantial sums in setting type and engraving plates, it would constitute unfair competition for defendants to appropriate the value and benefit of such expenditures to themselves by photographing and reproducing plaintiff's book through the offset-lithography process, thereby cutting their own costs and obtaining an unfair competitive advantage." [27]

From these instances of uncopyrighted and uncopyrightable novels in the public domain, shouldn't defendant's paperback of "Candy," have been found as grandiose an act of appropriation and as morally wrong as defendant's photographed version of "My Secret Life"? Moreover, the "Candy" decision provided us with a look at another inequity in our laws of this area—the United States non-recognition of the moral right, or *droit* moral—a compound of the personal rights an author has

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[25] For an enlightening comparison in this area, see McGuire, Common Law Overtones of Statutory Copyright: An Inquiry into the Status of a Federal Common Law of Unfair Competition, 13 ASCAP Copyright Law Symposium 33 (1964).

[26] G. P. Putnam's Sons v. Lancer Books, Inc., 239 F.Supp. 782 (S.D.N.Y. 1965).

[27] *Supra* note 1 at 607.

in his work.[28] The interest of the author or artist in the integrity of his work and in preventing uses inconsistent with his standards or reputation are not recognized by the federal statute[29] which was enacted to implement the constitutional mandate "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [30] Moral rights spring not from liberty or equality but from dignity, a third quality marking man's noblest state. Paradoxically, they are not constitutionally acknowledged in a country dedicated to the belief in the worth of the individual.[31]

Another right not given recognition in the United States is *droit de suite*—the right of an artist "to share in the money which changes hands upon sales of his work subsequent to the one by which he parted with it." [32] This right is recognized in France, Belgium, Uruguay and Italy,[33] and in a proposed German law.[34] Under the Berne Convention it is protected on a reciprocal basis.[35] Protection will probably be afforded to American artists in the countries which recognize *droit de suite* and which are members of the Universal Copyright Convention.[36]

Effects of Two 1964 Cases

Obviously the "Candy" opinion was influenced by the famous 1964 United States Supreme Court companion decisions, *Sears, Roebuck & Co. v. Stiffel Co.*[37] and *Compco Corp. v. Day Bright Lighting, Inc.*[38] *Sears* and *Compco* hold generally that if an item is not protected by either patent or copyright anyone may copy it with impunity, and State laws of unfair competition are inadequate to protect against copying. These cases made clear that public interest in free competition outweighs the interest which gave rise to the law of unfair competition.[39]

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[28] Kury, Protection for Creators in the United States and Abroad, 13 ASCAP Copyright Law Symposium 1 (1964); also see Katz, The Doctrine of Moral Right and American Copyright Law: A Proposal, 4 ASCAP Copyright Law Symposium 79 (1952).

[29] Kury, *op. cit. supra* note 28, at 2; *supra* note 28.

[30] U.S. Const. art 1 § 8.

[31] Kury, *op. cit. supra* note 28, at 31; *infra,* note 78.

[32] UNESCO, Study of Comparative Copyright Law, 2-3 UNESCO Copyright Bull. 136 (1949).

[33] Ibid.

[34] Hauser, The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law, 11 ASCAP Copyright Law Symposium 1 (1962).

[35] Id. at 17-19.

[36] Kury, *op. cit. supra* note 28, at 10, *supra* n. 28.

[37] 376 U.S. 225 (1964).

[38] 376 U.S. 234 (1964).

[39] Treece, Protectability of Product Differentiation: Is and Aught Compared, 18 Rutgers L. Rev. 1019 (1964).

The rationale behind the constitutional and statutory limitations upon patent and copyright protection is that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest progress.[40]

The *Sears* case involved pole lamps, and *Compco* concerning ceiling lighting fixtures. However, since they were decided on the same day, and the facts and decisions are so similar, they are seemingly spoken of as one case. Sears manufactured a pole lamp almost identical to Stiffel's and sold it for much less. An Illinois District Court found plaintiff's patent invalid because there was no evidence of a genuine invention or discovery, but, nevertheless, enjoined Sears from selling pole lamps identical or confusingly similar to Stiffel's, after finding that Sears had caused confusion by producing a copy of plaintiff's lamp almost identical to the original both in appearance and in functional detail. The Seventh Circuit affirmed,[41] with the reasoning that to prove a case of unfair competition under Illinois law there was no need to show that Sears had been palming off its lamps as Stiffel's lamps, but rather Stiffel had only to show that the two articles were so alike that customers could not identify the manufacturers. Unexpectedly, the Supreme Court reversed, with a federal pre-emption rationale, that because of Federal patent laws, a State may not, when an article is unpatented and uncopyrighted, prohibit the copying of the article itself, and that where the pole lamp sold by Sears was not entitled to the protection of either a design or mechanical patent, Sears had the right to copy the design and sell lamps almost identical to those sold by Stiffel. The Court stated, ". . . it (the state) cannot, under some other law, such as forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." [42]

Professor Nimmer, in his oft-quoted treatise, gives his analysis of the final *Sears* and *Compco* decisions as follows: "These cases seem to establish that non-patentable lamps may not be protected against copying under state law of unfair competition since by withholding federal protection under the patent and copyright law Congress has expressed a policy to permit copying, which under the Supremacy Clause may not be subverted by contrary state laws. *Sears* and *Compco* do no invalidate a state law of unfair competition based on (1) deceptive or fraudulent practices as in palming off or (2) the use of identical product of another." [43]

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[40] Stern and Hoffman, Public Inquiry and the Public Intent: Secondary Meaning in the Law of Unfair Competition, 110 U. Pa. L. Rev. 935 (1962).

[41] 313 F.2d 115 (7th Cir. 1963).

[42] 376 U.S. at 231 (1964).

[43] Nimmer, Copyright 145 (1963).

Sears and *Compco* have thrown the law of unfair competition into its present unstable and uncertain condition; however, in an examination of cases decided since 1964 it appears that the Courts are most unwilling to extend the doctrine even slightly; the tendency, in fact has been to keep the rule within as narrow bounds as possible.

In *Greater Recording Co., Inc. v. Stambler,*[44] the plaintiff brought an action for unfair competition, alleging that defendant had pirated a phonograph record produced and distributed by him. Through electronic and mechanical means defendants had dubbed off the sound from plaintiff's record and affixed the identical sounds to a master and released the records embodying plaintiff's sounds under his own label. Defendant moved for dismissal based upon the *Sears* and *Compco* holdings. The motion to dismiss was denied. The Court said that the plaintiff was seeking protection "against unlawful misappropriation of property" [45] and denied the motion in all respects.

Similarly, in *Flamingo Telefilm Sales, Inc. v. United Artists Corp.,*[46] plaintiff brought an action for damages based upon the exhibition by defendants of a motion picture on television into which was alleged incorporation of a substantial segment of plaintiff's motion picture which had not been copyrighted. Here, too, defendants moved for dismissal based upon the *Sears* and *Compco* holdings. The Court denied the motion, stating:

> Whether his cause be denominated as sounding in "unfair competition" or "intentional interference with economic or contractual relations," this Court cannot, in view of the background of jurisprudence and decisional law in this area, hold that these recent decisions (*Sears* and *Compco*) which involved distinguishable factual situations wiped clear the slate of precedent and empowered the unauthorized appropriation of artistic performances to the profit of others.[47]

In distinguishing *Sears* and *Compco*, the Court pointed out that in those cases "the Court was concerned with the *copying* of an unpatented and uncopyrighted product. This is to be distinguished from the instant case, where the complaint, essentially, is of an *appropriation* of the very item licensed." [48]

International News Service Case

Property rights in intellectual products have long been recognized in this country. The landmark case in this area is *International News*

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[44] 144 U.S.P.Q. 547 (N.Y. Sup. Ct. 1965).

[45] Id.

[46] 141 U.S.P.Q. 461 (N.Y. Sup. Ct. 1964), rev'd on other grounds, 254 N.Y.S.2d 36 (1964).

[47] Id. at 462.

[48] Id.

Service v. Associated Press,[49] the gist of which was extremely well stated in the Court's reference to it in the *Axelbank v. Rony* opinion: "Appropriation of another's work product, even if the work product is uncopyrightable, can nevertheless be a form of unfair competition with the original creator of that product." [50]

The parties in *International News Service* case were competitors in the gathering and distribution of news. The French government had denied access to war news to International News Service agents who, thereafter, ingeniously copied the news from AP bulletin boards and bribed AP employees to obtain it. The International News Service then sold the pirated news to AP's western seaboard member papers. The Court, notwithstanding publication by AP, found this to be unfair competition, explaining that although a news article in a newspaper may be copyrighted, news, as such, is not copyrightable. But, more significantly, they found that one who gathers news at pain and expense, for the purpose of gain, may be said to have *quasi-property* right in the results of his enterprise as against a rival in the same business. The appropriation of those results at the expense and damage of the one and for the profit of the other is unfair competition against which equity will afford relief. To constitute unfair competition under the factual circumstances of the *International News Service* case, it was essential that there be present an appropriation of another's work product—the so-called "free ride doctrine." In other words, there has been a free ride on the product rather than the reputation of the creator.

Professor Zacariah Chaffee, Jr., in a repeatedly cited and extremely interesting article,[51] termed the INS activities "upsidedown passing off," for INS was not passing off its news as if it originally came from the AP, but rather that INS was supplying AP news as if it were its own. This "upsidedown passing off" idea has since become known as the Misappropriation Doctrine. Chief Justice Hughes said in 1938 with reference to the *International News Service* case: "Unfair competition as known to the common law is a limited concept. Primarily and strictly it relates to the palming off of one's goods as those of a rival trader . . . In recent years, its scope has been extended. It has been held to apply to misappropriation, as well as misrepresentation, to the selling of another's goods as one's own—to misappropriate on of what equitably belongs to a competitor." [52]

In a 1965 case, *Pottstown Daily News Publishing Co. v. Pottstown Broadcast Co.*,[53] an action was brought for violation of federal copyright

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[49] 248 U.S. 215 (1918).

[50] Axelbank v. Rony, 277 F.2d 314 (9th Cir. 1960).

[51] Chaffee, Unfair Competition, 53 Harv. L. Rev. 1289-1315 (1940).

[52] A.L.A. Schecter Poultry Corp. v. U.S., 295 U.S. 495 at 531-32 (1935).

[53] 247 F.Supp. 581 (E.D.Pa. 1965).

laws and unfair competition based upon defendant broadcasting company's appropriation of plaintiff's 3 A.M. local news for broadcast at 6 A.M. The Court found that defendant's unauthorized use of local news items gathered by the plaintiff through specialized methods and trained personnel would constitute a violation of a property right and unfair competition completely contrary to the *Sears* and *Compco* decisions which disallow all such protection for proprietary interests. Further, the court found that the state courts have jurisdiction over causes of action for invasion of a property right or unfair competition even if tied in with a substantially related infringement claim over which federal courts have jurisdiction.[54] Here, "piracy" was involved, and this can be remedied in the state courts.

While it has been said that the *INS* property rights rationale on unfair competition is no longer valid because of the doctrine of *Sears* and *Compco*,[55] surely a great deal of resistance has arisen, and in cases of outright appropriation, or misappropriation, INS principles seem to have survived *Sears* and *Compco*.[56] Oftentimes, the resistance appears to be pure valor as in the *Flamingo* case.[57] In the *Pottstown Daily News Publishing Co.* case the court also bravely tried to distinguish the *INS* doctrine from the impact of *Sears* and *Compco* saying: "Men of conscience would hardly condone such an inequitable result and we, as a court of conscience, will not subscribe to such a conclusion unless the Supreme Court enlightens us with a clear ruling on this specific problem." [58]

Repeatedly we have encountered the words "copy" and "appropriate" and the efforts of the various courts to establish a reasonable line of demarcation using "copy" in the clear infringement situation and "appropriate" whenever they thought a finding in unfair competition to be the answer. Many feel that one of the most deplorable results of *Sears* and *Compco* is their seeming endorsement of a lowered standard of commercial morality, a laxness in sticking to clean "rules of the business

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[54] Contra, 28 U.S.C. § 1338(b).

[55] CBS, Inc. v. DeCosta, Capital Cities Broadcasting Corp. v. Same, CBS Films, Inc. v. Same, 153 U.S.P.Q. 649 (1st Cir. 1967). J. Coffin, ". . . The leading case affording a remedy for mere copying, International News Service v. Associated Press, 1918 . . . is no longer authoritative . . . it has been clearly overruled by the Supreme Court's recent decisions in Sears . . . and Compco . . .."; Treece, Patent Policy and Preemption: The Stiffel and Compco Cases, 32 U.Chi. L. Rev. 80, 95 (1964) "Compco and Stiffel can be regarded as marking the (misappropriation) doctrine's final demise."

[56] *Supra* note 1; Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2 Cir. 1951), N.Y. World's Fair 1954-65 Corp. v. Colcurpicture Publishers, Inc., 141 U.S.P.Q. 939 (N.Y. S. Ct. 1964), aff'd mem. 21 App.Div.2d 896, 251 N.Y.S.2d 885 (2d Dept. 1964); KMLA Broadcasting Corp. v. 20th Century Fox, Cigarette Vendors Corp., 264 F.Supp. 35 (C.D. Cal. 1967).

[57] *Supra* note 46.

[58] *Supra* note 53.

game." [59] But what significant difference is there, from the moral viewpoint, between one who copies and one who appropriates? Aren't the courts continuing to grope in their efforts to make the differentiation in terminology and subsequent treatment? Indeed, in recent cases aren't we again involved with property rights despite *Sears* and *Compco's* denial of protection to such interests?

For example, in *Cable Vision, Inc. v. KUTV, Inc.*,[60] defendant counter-claimed that plaintiff's community antenna system was interfering with its exclusive contractual right to telecast certain television programs and was likewise indulging in acts of unfair competition. Plaintiff's community antenna received identical programs broadcast by other and more distant stations and distributed them within the area of defendant's signal. Defendant did not claim copyright on the programs involved. A preliminary injunction was granted defendant, from which the plaintiff appealed. The Ninth Circuit reversed the holding that *Sears* and *Compco* precluded any relief unless defendant could demonstrate an interest protected by virtue of the copyright laws in network TV programs or bring themselves within contemplation of some other recognized exception to policy promoting free access to all matter in the public domain. The court, however, made this significant observation: "Anyone may freely and with impunity avail himself of such (uncopyrighted) works to any extent he may desire and for any purpose whatever, subject only to the qualification that he does not steal goodwill, or perhaps more accurately stated, deceive others into thinking the creations represent his own work." [61]

100 Years of Vacillation

In 1940 Rudolf Callmann wrote, referring to a line of trade directory cases[62] decided in the 1860's:

> The common element in the above unfair competition cases is the appropriation of competitor's work, which is adapted to serve the defendant's need and then turned against its author in the economic struggle. The unfair use, evident in the string of English cases, cannot be prevented by the copyright law if the catalogue or directory is not of artistic originality unless we wish to create a copyright regardless of any value or artistic merit of the works subject to it. Where the unfairness of the use consists of the appropriation of another's labor and money, the outcome of the litigation should not

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[59] Statement of Sidney A. Diamond at Hearing on HR 4651 before the sub-committee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong. 1st Sess. (1963).

[60] 335 F.2d 348 (9 Cir. 1964).

[61] Id. at 351.

[62] Kelly v. Morris, L.R.I. Eq. 697 (1866); Morris v. Ashbie, L.R. 7 Eq. 34 (1868); Morris v. Wright L.R. 5 Ch. Ap. 279 (1870); Pike v. Nicholas, L.R. 5 Ch. Ap. 251 (1869).

> depend upon whether or not the form of the catalogue or directory is sufficiently ingenious to receive copyright protection.[63]

In other words, intellectual products in the public domain were not provided sufficient protection against unsavory competitive practices by the copyright laws of 1860, 1940, or 1958.

This remains true in 1968. As late as 1967 the judge in *Grove Press*[64] discovered that the situation had not improved, and that it was still necessary to resort to common law relief in unfair competition, concluding: "Unfair appropriation of the property of a competitor is unfair competition and redressable in a situation of this kind despite the holding in *Sears, Roebuck & Co. v. Stiffel;*[65] *Compco Corp. v. Day-Bright Lighting, Inc.;*[66] *Greater Recording Co. v. Stambler;*[67] *Flamingo Telefilm Sales Inc. v. United Artists Corp.,*[68] and *Cable Vision, Inc. v. KUTV, Inc.*"[69]

Twenty-eight years ago Professor Chaffee suggested three possible concepts the courts might consider in dealing with unfair competition. These were his theories of:

> Conservatism—Unfair competition should be stopped where it is.
>
> Conquest —Opposite of Conservatism advocating that the time is now ripe to extend unfair competition over all its popular means, namely, every unfairness by a competitor.
>
> Exploration —A middle road wherein the courts should, instead of rushing blindly into a great unmapped territory, feel their way cautiously out beyond the passing off cases and block out a few kinds of standardized wrongs.[70]

In their application to situations involving literary properties of the public domain, the courts have, without a doubt, been travelling Professor Chaffee's trail of Exploration and are finding the path delicately arduous, often deciding to go back and around rather than cross the *Sears* and *Compco* chasms of controversy. They are plodding on, however, and in a span of 100 years have blocked out only the Misappropriation Doctrine and the established *palming off* theory. It's quite apparent that the going is complicated and slow.

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[63] Callman, Copyright and Unfair Competition, 2 La. L. Rev. 648 (1940).

[64] *Supra* note 1.

[65] 376 U.S. 225 (1964).

[66] 376 U.S. 234 (1964).

[67] 144 U.S.P.Q. 547 (N.Y. S. Ct. 1965).

[68] 141 U.S.P.Q. 461 (N.Y. S. Ct. 1964) (rev'd. on other grounds 254 N.Y.S.2d 36, 1964).

[69] 335 F.2d 348, 351 (9th Cir. 1964).

[70] See, generally, Chaffee, Jr., Unfair Competition, 53 Har. L. Rev. 1289 (1940).

Interestingly, the "My Secret Life" decision revealed delicately balanced, yet increased exploration by our courts into this area. After enjoining defendant's first edition as unfair appropriation of the property of a competitor,[71] in the same opinion Judge Hill continued to zealously guard public domain material by denying plaintiff's request for an injunction against defendant's second version of "My Secret Life" which had been prepared from the original text recreated with the aid of plaintiff's edition.[72] The Judge's skillful conclusion that plaintiff's forty thousand changes in the original manuscript were trivial,[73] thereby invalidating the plaintiff's Certificate of Copyright,[74] was also a slap at incompatible sections of the Copyright Law.[75] But, despite the Judge's valiant dissection, very little definitive law resulted.

Pursuit of Chaffee's *exploration* theory has found our judiciary undertaking the gigantic task of court direction of business activities by determinations that certain trade practices are unfair. Undoubtedly, they have been forced to delve into areas where they are thoroughly novice and unfamiliar. How can our judges be expected to possess expertise on the diverse fine points of an "Acy-Ducy" game,[76] piracy of television programs,[77] mezzo-tint engravings of old masters,[78] and fabric designs?[79] The court systems have realized the extent of the task being asked of them, coupled with the lack of clear law on unfair competition involvement in artistic and intellectual products, and for this reason have been treading with extreme caution. Should they condone, or enjoin, certain competitive practices, they would virtually be creating monopolies of their own which, properly, they are reluctant to do.

Momentous and Solomon-like decisions have been required of judges, especially those in the entertainment centers of the Second and Ninth Circuits from which most of these public domain literary works in unfair competition actions seem to stem. Are they, in working with a bare minimum of conflicting standards, considered more qualified than

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[71] 264 F.Supp. at 607.

[72] Ibid.

[73] Id. at 605.

[74] Id. at 606; *supra* note 63, bearing out Callman's prediction of inadequate copyright protection.

[75] 17 U.S.C. § 209; 17 U.S.C. § 7; Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizable as his own. Originality in this concept means little more than a prohibition of actual copying. No matter how poor artistically the 'author's' addition, it is enough if it be his own."

[76] Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2d Cir. 1945).

[77] Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964).

[78] Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

[79] Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930).

Congress to reconcile freedom of competition and morality with the Federal Copyright Act?

Current Congressional Attention

Congress, thankfully, is also working on this labyrinth in an effort to provide some assistance to the courts. In the 90th Congress there are pending several bills involving complete revisions of the Patent,[80] Trademark (generally regarded as a branch of the broad law of unfair competition) [81] and Copyright Laws[82] as well as a proposed Federal Unfair Competition Statute.[83] Bills covering the general revision of the Copyright Law have already been passed by the House, and the Senate has almost concluded hearings on this legislation.[84] However, on November 2, 1967, the House Judiciary Committee found it necessary to approve a Senate-passed temporary measure to extend expiring copyrights through 1968 while Congress completed action on the long range reform bills.[85]

In the Copyright Law revision area one of the major changes is extension of the term of a copyright from the present twenty-eight years (renewable for another twenty-eight) to the period of the life of the author plus fifty years, a term common in international copyright law. This development would have warmed the hearts of such authors as Noah Webster,[86] Samuel Clemens,[87] and Edna Ferber,[88] all of whom spent considerable time and money vociferously advocating just such an extension to protect their moral rights and *droit de suite* as creators. Another proposed change would bring unpublished as well as published works under the Federal Copyright Act. There are also under consideration provisions to provide protection in the CATV as well as computer storage and retrieval fields.

An effort was made in the Proposed Unfair Competition Act of 1966[89] to reconcile the *Sears* and *Compco* impass with *INS*. Policy Four of the bill reads: "In the light of *Compco* and *Sears* to affirm the power

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[80] S. 1042; H.R. 5924; H.R. 6043; H.R. 6975, 90th Congress at 1st Session (1967).

[81] S. 1154, 90th Congress, 1st Session (1967).

[82] H.R. 11947; H.R. 12354, 88th Congress 2d Session (1964).

[83] McClellan S. 3681, 89th Congress 2d Session (1966).

[84] Neuhauser, Sweeping Changes in Patent, Trademark and Copyright Law Pending in Congress. 34 D.C.B.J. 19 (Aug. 1967).

[85] UPI Washington; Cleveland Plain Dealer.

[86] Letters of Noah Webster (to Senator Daniel Webster) (Library Publishing Co., New York, 1926).

[87] Samuel Longhorne Clemens (Mark Twain), 180 No. American Review 1 (1905); Hudson, Mark Twain and the Copyright Dilemma, 52 A.B.A.J. 56 (Jan. 1966).

[88] Edna Ferber, A Kind of Magic (Doubleday, New York, 1963).

[89] McClellan S. 3681, 89th Congress, 2d Session (1964); Arnold, A Federal Unfair Competition Law, 57 Trademark Rep. 87 (Feb. 1967).

of the courts to evolve unfair competition law; and to do this by drawing from the treaty power, from treaties, and from the commerce clause of the United States Constitution." [90] By proper employment of the commerce clause and the treaty power of the Constitution, the authority stripped from the courts by *Sears* and *Compco* would be returned again, allowing them to develop all areas of unfair competition law.

Subsection (5) gives the federal courts blanket jurisdiction, by stating: "Any act in Commerce which results or is likely to result in misappropriation of quasi-property of another, not otherwise protected by Federal statute . . ." [91] This is an admittedly direct effort to enact into law the Supreme Court's INS decision which has been common law for nearly fifty years, and with which we have the benefit of long experience as to what courts do with the vague and undefined expression "misappropriation of quasi-property." The legislators apparently feel that *INS* has stood the test of time well, with the courts rarely going astray in applying its principles.

The American Bar Association, United States Trademark Association, and the National Coordinating Committee (thirty-six legal and business groups including the first three above) all worked together to cause the introduction of S. 1154, the Proposed Unfair Competition Act of 1967 in the 90th Congress and gave it full support.[92]

Conclusion

In legislating to clarify these overlapping areas of statutory and common law, Congress has accepted a job rightfully theirs and long overdue. It may be said with certainty that the resultant federal law will be far from perfect since the equation of free enterprise with fair competitive practices is virtually impossible. The Congressmen seem, however, completely aware of the spectre of excessive governmental interference in business as well as the other pitfalls and limitations involved in achieving the passage of equitable and operative new laws. When the pending, or subsequent bills, are finally signed into law, the judiciary shall hopefully have a set of workable guidelines designed to raise the morality standards for all business dealings, provide a modicum greater protection for creators and artists to whom our culture has been entrusted, and negate any future debilitating effects of the *Sears* and *Compco* holdings. Furthermore, they may even hold the future prospect of welcomed federal assistance through affected administrative agencies, such as the Federal Trade Commission or a federal prosecuting attorney at least in cases involving interstate commerce alleging acts of unfair competition involving intellectual products of the public domain.

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[90] McClellan S. 3681, 89th Congress 2d Session (1966) Re-introduced as McClellan S. 1154, 90th Congress, 1st Session (1967).

[91] Ibid.

[92] *Supra* note 84.