Common-Law Copyright in the USA

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Keywords
common, common-law, conversation, copyright, first publication, fixed, general publication, interview, law, lecture, limited publication, music, performance, perpetual, recording, transfer

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Introduction

The subject of this essay is the murky and poorly articulated common-law copyright in the USA. Even amongst specialists in intellectual property law (i.e., patents, trademarks, copyright, trade secrets) few lawyers understand common-law copyright. Because lawyers who are arguing common-law copyright cases are not doing adequate legal research, these lawyers do not adequately explain common-law copyright to judges, which leads to confusing, conflicting, or erroneous judicial decisions. Worse, some lawyers for plaintiffs do not recognize they have a common-law copyright case, fail to plead common-law copyright, and attempt to get a remedy from some other legal theory that may be a poor fit to the facts of the case.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at http://www.rbs2.com/advice.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Overview

Copyright for published works in the USA has been according to a federal copyright statute, since the first U.S. copyright statute in the year 1790.

Before the Copyright Act of 1976 became effective on 1 Jan 1978, *un*published works were protected by state law, known as common-law copyright. Common-law copyright gave the author two principal legal rights: (1) the right to determine when and where the work would be first published and (2) creating a property right that can be enforced by other legal theories, e.g., unfair competition or unjust enrichment.

My earlier essay, "Ideas Not Copyrightable," http://www.rbs2.com/cidea.pdf (May 2009) explains that during the 1800s, publication of a work donated to the public domain any novel ideas in that work. In the 1900s, judges — and the Copyright Act of 1976 — simply say that copyright does *not* protect ideas. The two views give the same result.

Publication (technically a "general publication"[1]) automatically terminated the common-law copyright. When the owner of a common-law copyright (typically the author) decided to publish the work, the publisher included a copyright notice on every copy and registered a statutory copyright on the published work by submitting two copies to the Library of Congress and paying the fee. Registering a statutory copyright on the published work continued copyright protection — the common-law copyright was permanently extinguished upon publication, and the federal statutory copyright began with registration and affixing a copyright notice to all published copies.

Alternatively, the owner of a common-law copyright on an *un*published work could voluntarily register an unpublished work under § 11 of the Copyright Act of 1909, later 17 U.S.C. § 12 ("works not reproduced for sale"). Such registration would permanently extinguish the common-law copyright, and substitute the then 28-year statutory copyright (renewable for a second term of 28 years) for the perpetual protection of common-law copyright.

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[1] A "general publication" terminates common-law copyright, but a "limited publication" does *not* terminate common-law copyright. See the discussion that begins on page 10, below.

One work was *never* simultaneously protected by both common-law copyright and statutory copyright.[2] Acceptance of federal statutory copyright permanently extinguished the common-law copyright on that work.[3] Publication without the formalities of federal statutory copyright extinguished forever both the common-law copyright and the statutory copyright: (1) publication extinguished common-law copyright, and (2) either failure to include a copyright notice on published copies, failure to deposit two copies at the Copyright Office, or failure to register the copyright extinguished the federal statutory copyright.

Infringement of a common-law copyright was typically litigated in state court, but — if some rules of civil procedure were satisfied — a common-law copyright could also be litigated in federal court. In contrast, infringement of a federal statutory copyright is *always* litigated in federal court. 28 U.S.C § 1338(a).

after 1 Jan 1978

The Copyright Act of 1976 automatically applies to *all* "original works of authorship [that are] fixed in any tangible medium of expression". 17 U.S.C. § 102(a) (effective 1 Jan 1978). The word *fixed* means written on paper, recorded on magnetic tape or disk, recorded on photographic film, recorded in a digital data file in any format on any medium, etc. The concept of *fixed* creates a boundary between (1) ephemeral or transient expression (e.g., a performance, lecture, speech) and (2) a permanent and stable record of the expression (e.g., book, periodical, vinyl gramophone record, compact disk, computer file, etc.)

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[2] *Caliga v. Inter Ocean Newspaper Co.,* 157 F. 186, 188-189 (7thCir. 1907) ("Thus the benefits of the statute are substituted for the imperfect benefits of the common-law ownership by his surrender of the perpetual right to withhold from publication. These rights are separate and not coexistent. The common-law right ends when the statutory right begins. *Holmes v. Hurst,* 174 U.S. 82, 85, 19 Sup.Ct. 606, 43 L.Ed. 904; *Bobbs-Merrill Co. v. Straus,* 147 Fed. 15, 18; DRONE ON COPYRIGHT, 100."), *aff'd,* 215 U.S. 182, 188 (1909) ("Statutory copyright is not to be confounded with the common-law right.").

Shoptalk, Ltd. v. Concorde-New Horizons Corp., 168 F.3d 586, 590 (2dCir. 1999) (Citing: "Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 ... (1908) (common-law and statutory 'rights do not co-exist in the same composition; when the statutory right begins the common-law right ends'); *Roy Export,* 672 F.2d [1095] at 1101, n.13 [(2dCir. 1982)] ('... a single work cannot be protected from copying under both federal and state law at the same time....'); *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.,* 155 N.Y. 241 [at 247], 49 N.E. 872 (1898) ('No proposition is better settled than that a statutory copyright operates to divest a party of the common law right.')."), *cert. den.,* 527 U.S. 1038 (1999).

See also *DeSilva Construction v. Herrald,* 213 F.Supp. 184, 194 (M.D.Fla. 1962) ("The common law copyright and the statutory copyright cannot coexist.").

[3] See, e.g., *Bobbs-Merrill Co. v. Straus,* 147 F. 15, 19 (2dCir. 1906); *Loew's Inc. v. Superior Court of Los Angeles County,* 115 P.2d 983, 986 (Cal. 1941) (citing five cases).

On 1 Jan 1978, all common-law copyrights in *un*published, but fixed, works were automatically converted by operation of law to federal statutory copyrights. These converted copyrights then expire at the *latest* of:
(1) the normal duration under 17 U.S.C. § 302,
(2) 31 Dec 2002 under 17 U.S.C. § 303(a), or
(3) if published during 1978-2002, expires on 31 Dec 2047 under 17 U.S.C. § 303(a).

After the Copyright Act of 1976 became effective on 1 Jan 1978, only *un*fixed works were protected by common-law copyright under state law. 17 U.S.C § 301(b)(1).

The distinction between *un*published and published works disappeared when the Copyright Act of 1976 became effective.

History

The phrase "common-law copyright" was rarely used in judicial opinions during the 1800s. Amongst the few uses are *Wheaton v. Peters,* 29 F.Cas. 862, 871 (C.C.Pa. 1832); *Oertel v. Jacoby,* 44 How. Pr. 179 (N.Y.Sup. 1872) (only in Defendant's Brief to the court); *Press Pub. Co. v. Monroe,* 73 F. 196, 199 (2dCir. 1896); *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.,* 49 N.E. 872, 876 (N.Y. 1898). The phrase "common-law copyright" began to be commonly used in 1896.

However, the legal rights in what is now known as common-law copyright are much older, and can be traced back to Blackstone. Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2, Chapter 26, ¶8, pages 405-406 (1st ed. 1765). See my essay, "Moral Rights of Authors in the USA," http://www.rbs2.com/moral.pdf (April 2012).

Law *Before* Copyright Act of 1976

A. right of first publication

The most important legal right in common-law copyright — some say the *only* legal right — is the right of the owner of the common-law copyright to determine when and where to publish the work. The following long string cite is authority for the right of first publication:

- *Folsom v. Marsh,* 9 F.Cas. 342, 346 (C.C.Mass. 1841) (Story, J.) ("... the author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit.")

- *Palmer v De Witt,* 47 N.Y. 532, 536 (N.Y. 1872) ("The author of a literary work or composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication.");

- *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.,* 49 N.E. 872, 876 (N.Y. 1898) ("... if a book be ... published, [then] what is known as the common-law copyright, or right of first publication, is gone.");[4]

- *Bobbs-Merrill Co. v. Straus,* 147 F. 15, 18 (2dCir. 1906) ("The owner of the common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication."), *aff'd,* 210 U.S. 339, 346 (1908) ("At common law an author had a property in his manuscript, and might have redress against anyone who undertook to realize a profit from its publication without authority of the author. *Wheaton v. Peters,* [33 U.S. 591 (U.S. 1834)]");

- *Loew's Inc. v. Superior Court of Los Angeles County,* 115 P.2d 983, 984 (Cal. 1941) ("There is no doubt that apart from statute the law recognizes certain rights of property in the original intellectual products of an author, which are entitled to the same protection as rights in any other species of property; that the author has the right of first publication and that such right is transferable. [citing five cases]");

- *Pushman v. New York Graphic Society, Inc.,* 39 N.E.2d 249, 250 (N.Y. 1942) ("This common law copyright is sometimes called the right of first publication.");

- *Chamberlain v. Feldman,* 89 N.E.2d 863, 865 (N.Y. 1949) ("The common-law copyright, or right of first publication, is a right different from that of ownership of the physical paper; ....");

- *Stanley v. Columbia Broadcasting System,* 221 P.2d 73, 77 (Cal. 1950) (Quoting 18 C.J.S., Copyright and Literary Property, § 2, page 38, et seq.: "... the common law confers on the owner of an intellectual production the exclusive right to make first publication of it, that is, the right to copy it in the first instance....");

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[4] Quoted with approval in *Werckmeister v. American Lithographic Co.,* 134 F. 321, 327 (2dCir. 1904); *Vernon Abstract Co. v. Waggoner Title Co.,* 107 S.W. 919, 922 (Tex.Civ.App. 1908).

- *Smith v. Paul,* 345 P.2d 546, 554 (Cal.App. 1959) ("Common law copyright is usually referred to as the right of first publication for once a work is published the owner's common law protection is gone, and anyone may copy the work.[5] *Werckmeister v. American Lithographic Co.,* 134 F. 321, 324 [(2dCir. 1904)]; *Stanley v. Columbia Broadcasting System,* supra, 35 Cal.2d 653, 661, 221 P.2d 73.");

- *A. J. Sandy, Inc. v. Junior City, Inc.,* 234 N.Y.S.2d 508, 510 (N.Y.A.D. 1962) ("Before entering upon a discussion of the various causes it is well to have clearly before us what is meant by the term 'common-law copyright'. The term has been defined as the property in intellectual productions conferred by the common law, that is, the exclusive right to make first publication of it, or the right to copy it in the first instance. 18 C.J.S. Copyright and Literary Property § 2. It has been termed the right of first publication (*Palmer v. DeWitt,* 47 N.Y. 532, 537), or the exclusive privilege of first publishing any original material product of intellectual labor.");

- *DeSilva Const. Corp. v. Herrald,* 213 F.Supp. 184, 194 (M.D.Fla. 1962) ("Since the only right the author has under the common law copyright is the right of first publication, common law copyrights are lost through publication; and if the right of the author is not preserved promptly by a proper compliance with the statute whereby the statutory copyright is secured, all rights are lost through publication. *Caliga v. Inter Ocean Newspaper Co.,* 215 U.S. 182, 188, 30 S.Ct. 38, 54 L.Ed. 150; *Bobbs-Merrill v. Straus,* 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086, *affirming* 2 Cir., 147 F. 15; *Mifflin v. Dutton,* 190 U.S. 265, 23 S.Ct. 771, 47 L.Ed. 1043.");

- *Estate of Hemingway v. Random House, Inc.,* 279 N.Y.S.2d 51, 54-55 (Sup.Ct. 1967) ("Common law copyright is that right which an author has in his unpublished literary creations — a kind of property right — whose extent is to give him control over the first publication of his work, or to prevent its publication. It is often referred to in short as 'the right of first publication'. *Chamberlain v. Feldman,* 300 N.Y. 135, 89 N.E.2d 863 (1949); *Pushman v. New York Graphic Society,* 287 N.Y. 302, 305, 39 N.E.2d 249, 250 (1942)."), *aff'd without opinion,* 285 N.Y.2d 568 (N.Y.A.D. 1967), *aff'd,* 244 N.E.2d 250, 254 (N.Y. 1968) ("Common-law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely — hence, its other name, the 'right of first publication'. *Chamberlain v. Feldman,* 300 N.Y. 135, 139, 89 N.E.2d 863, 864");

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[5] Note by Standler: "anyone may copy the work" assumes that a statutory copyright on the published work was *not* registered.

- *Williams v. Weisser,* 78 Cal.Rptr. 542, 552 (Cal.App. 1969) ("A common law copyright is, after all, mainly a right of first publication. (*Stanley v. Columbia Broadcasting System,* 35 Cal.2d 653, 661, 221 P.2d 73, 23 A.L.R.2d 216.)");

- *Birnbaum v. U.S.,* 588 F.2d 319, 326-327 (2dCir. 1978) ("But the common law copyright is, in essence, a right of first publication, 1 NIMMER ON COPYRIGHT §§ 4.02, 4.03 & 4.07 (1978); *Estate of Hemingway v. Random House,* 53 Misc.2d 462, 464, 279 N.Y.S.2d 51, 54-55 (Sup.Ct.), *aff'd by order,* 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dept. 1967), *aff'd on other grounds,* 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968), which of necessity includes the right to suppress any publication by injunction. [footnote omitted] Hence, although one may enjoin the publication of letters to effectuate their suppression, the damage remedy (defamation aside) would lie only if there were a spoliation of the right to a first publication which actually destroyed the value of the owner's right to seek a statutory copyright. See *Szekely v. Eagle Lion Films,* 140 F.Supp. 843, 849 (S.D.N.Y. 1956), *aff'd,* 242 F.2d 266 (2dCir. [1957]), *cert. denied,* 354 U.S. 922, 77 S.Ct. 1382, 1 L.Ed.2d 1437 (1957).");

In 1985, an intermediate appellate court in Florida summarized common-law copyright:

> "Common law copyright has been defined as 'that right which an author has in his unpublished literary creations — a kind of property right — whose extent is to give him control over the first publication of his work, or to prevent its publication.' " *Frederick Chusid & Co. v. Marshall Leeman & Co.,* 326 F.Supp. 1043, 1064 (S.D.N.Y. 1971) (quoting *Estate of Hemingway v. Random House, Inc.,* 53 Misc.2d 462, 464, 279 N.Y.S.2d 51, 54 (Sup.Ct.), *aff'd without opinion,* 29 A.D.2d 633, 285 N.Y.2d 568 (1967), *aff'd,* 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968)). It is frequently referred to as the right of first publication. *Frederick Chusid & Co.,* 326 F.Supp. at 1064; see, e.g., *Samet & Wells, Inc. v. Shalom Toy Co.,* 429 F.Supp. 895, 903 (E.D.N.Y. 1977), *aff'd without opinion,* 578 F.2d 1369 (2dCir. 1978). In fact, it has been stated that "the *only* right [an] author has under the common law copyright is the right of first publication." *DeSilva Construction Corp. v. Herrald,* 213 F.Supp. 184, 194 (M.D.Fla. 1962) (emphasis supplied); *International Tape Manufacturers Ass'n v. Gerstein,* 344 F.Supp. 38, 56 (S.D.Fla. 1972) (quoting *DeSilva Construction Corp.,* 213 F.Supp. at 194), *vacated on other grounds,* 494 F.2d 25 (5thCir. 1974).

Van Dusen v. Southeast First Nat. Bank of Miami, 478 So.2d 82, 87 (Fla.App. 1985).

- *Batjac Productions Inc. v. GoodTimes Home Video Corp.,* 160 F.3d 1223, 1225, n.1 (9thCir. 1998) ("Unlike federal statutory protection, common law copyrights do not protect authors from subsequent copying of their work once published, but instead provide only limited protection for the first publication.").

My earlier essay "Moral Rights of Authors in the USA," http://www.rbs2.com/moral.pdf (April 2012) contains an independent list of citations to the legal right of first publication. The earlier list simply cites the rule, while the list here emphasizes cases that mention "common-law copyright" in the same sentence as the rule about first publication.

B. common-law copyright is perpetual

Common-law copyright is perpetual, unlike statutory copyright that is for a limited number of years. An appellate court in California summarized the law:

> A statutory copyright exists only for the statutory term and only in a work that has been "published" within the meaning of the statute. A common law copyright is perpetual and exists only in a work that has not been "published" within the meaning of the statute. The two rights do not coexist in the same work; the common law right ends when the statutory right begins (*Stanley v. Columbia Broadcasting System,* 35 Cal.2d 653, 660-661, 221 P.2d 73; see also S. Katz, Copyright Protection in Architectural Plans, Drawings & Designs, 19 LAW AND CONTEMPORARY PROBLEMS, 224, 227-228; Drone, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879) p. 100).

Zachary v. Western Publishing Co., 143 Cal.Rptr. 34, 37, n.7 (Cal.App. 1977).

See also

- *Bobbs-Merrill Co. v. Straus,* 147 F. 15, 18 (2dCir. 1906) ("The owner of the common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, ..."), *affirmed,* 210 U.S. 339, 347 (1908) (Quoting p. 100 of Drone on COPYRIGHT (1879) that common-law copyright is perpetual.);

- *Edgar H. Wood Associates, Inc. v. Skene,* 197 N.E.2d 886, 890 (Mass. 1964) ("Common law copyright protection is perpetual; statutory copyright protection is terms of years." Quoting Katz, Copyright Protection of Architectural Plans, Drawings, and Designs, 19 LAW AND CONTEMPORARY PROBLEMS, 224, 227–228.).

The perpetual common-law copyright on unpublished manuscripts bothers some people, who want to see these works enter the public domain. But ownership of personal property of all kinds is conventionally perpetual. When the owner dies, someone inherits each item of personal property and continues the perpetual ownership.

C. transfer of common-law copyright

Ownership of a copyright on a work is distinct from ownership of the work (e.g., original painting or photograph) or ownership of a copy of the work (e.g., book, magazine, newspaper). For example, an artist could sell a painting, but retain the common-law copyright on the painting.

The highest state court in New York explained:

> There is no doubt that in New York State the separate common law copyright or control of the right to reproduce belongs to the artist or author until disposed of by him and will be protected by the courts. *Oertel v. Wood,* 40 How.Prac. 10; *Howitt v. Street & Smith Publications, Inc.,* 276 N.Y. 345, 350, 12 N.E.2d 435. Such is the holding of the case of *Werckmeister v. Springer Lithographing Co.,* C.C., 63 F. 808, at page 811, which says that the painting itself

> may be transferred without a transfer of the common law rights of publishing or restricting publication, and that the ownership of the painting itself does not necessarily carry with it the common law copyright. The same thing is held in *Caliga v. Inter-Ocean Newspaper Co.,* 7 Cir., 157 F. 186, 188, *affirmed* 215 U.S. 182, 30 S.Ct. 38, 54 L.Ed. 150.

Pushman v. New York Graphic Society, Inc., 39 N.E.2d 249, 250-251 (N.Y. 1942). Quoted in *Chamberlain v. Feldman,* 84 N.Y.S.2d 713, 715 (N.Y.A.D. 1948), *aff'd,* 89 N.E.2d 863 (N.Y. 1949).

The distinction between ownership of manuscript paper and ownership of a copyright has been essential in deciding several famous cases. See, e.g.,

- *Folsom v. Marsh,* 9 F.Cas. 342, 347 (C.C.Mass. 1841) (Story, J.) ("... the government purchased the manuscripts [of President Washington], subject to the copyright already acquired by the plaintiffs [heir and assigns of Washington] in the publication thereof. The vendor took them subject to that copyright, and could convey no title which he did not himself possess, or beyond what he possessed. Nor is there any pretence to say that he either did convey, or intended to convey, to the government, the property in these manuscripts, except subject to the copyright already acquired.");

- *Baker v. Libbie,* 97 N.E. 109 (Mass. 1912) (Defendant owned paper on which Baker had written letters to her cousin, but Baker's heirs owned the common-law copyright in those unpublished letters. Injunction against publication by Defendant of Baker's letters.);

- *Chamberlain v. Feldman,* 84 N.Y.S.2d 713 (N.Y.A.D. 1948), *aff'd,* 89 N.E.2d 863, 865 (N.Y. 1949) (Defendant owned paper on which Samuel Clemens (aka Mark Twain) had written an unpublished story in 1876, but estate of Clemens owned the common-law copyright in that unpublished story. Injunction against publication by Defendant.).

D. "general publication" terminates common-law copyright

Remember that this rule that a "general publication" terminates common-law copyright *only* applies to works created *before* 1 Jan 1978 and litigated under state common law. A "general publication" terminates common-law copyright:

> ... , if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 49 N.E. 872, 876 (N.Y. 1898). Quoted in *Werckmeister v. American Lithographic Co.,* 134 F. 321, 327 (2dCir. 1904); *Vernon Abstract Co. v. Waggone Title Co.,* 107 S.W. 919, 922 (Tex.Civ.App. 1908).

Because this rule is now rarely applied in courts in the USA,[6] it is not worth my time to conduct detailed legal research on this rule. Instead, let me quote a recent (1977) judicial opinion from California that summarizes the common law about publication terminating common-law copyright. In a California case when the Copyright Act of 1909 was in effect, Zachary obtained a federal design patent on his novel kite. The California intermediate appellate court held that the federal design patent was *not* a publication that ended Zachary's common-law copyright. Thus, Zachary could sue the publisher of a book that contained an unauthorized copy of the description and drawings in Zachary's patent. The final result of this case is not reported in Westlaw.

> We also note that since the common law definition of "publication" is different from the lay connotation of the term, considerable confusion has resulted (see A. Katz, The Publication of Intellectual Productions A Common Sense Approach, 30 SO.CAL.L.REV. 48). **....** Although the cases are not always consistent, it is clear that in the common law sense "publication" has two dimensions: (1) "general" vs. "limited" publication, and (2) "investive" vs. "divestive" publication.
>
> As to the first, not every printing, display or performance of a work results in the loss of a common law copyright. Only a "general" publication extinguishes the exclusive ownership right; a "limited" publication does not [citing three cases]. The United States Supreme Court has defined a "general publication" as ". . . 'such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property' " (*American Tobacco Co. v. Werckmeister,* supra, 207 U.S. at pp. 299-300, 28 S.Ct. p. 77; accord: *Smith v. Paul,* [345 P.2d 546 (Cal.App. 1959)]; *Read v. Turner,* supra; *Carpenter Foundation v. Oakes,* supra; *Shanahan v. Macco Constr. Co.,* 224 Cal.App.2d 327, 36 Cal.Rptr. 584; *White v. Kimmell,* D.C., 94 F.Supp. 502, *reversed on other grounds,* 9 Cir., 193 F.2d 744, *cert. den.* 343 U.S. 957, 72 S.Ct. 1052, 96 L.Ed. 1357). Conversely, a "limited" publication is "one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public" (*Werckmeister v. American Lithographic Co.,* 2 Cir., 134 F. 321, 324; accord: *Smith v. Paul,* supra; *Read v. Turner,* supra; *Carpenter Foundation v. Oakes,* supra).
>
> In ascertaining whether a publication is general or limited, the U.S. Supreme Court's *Werckmeister* test looks to the totality of the circumstances and considers factors such as the objective intention of the owner as manifested by his conduct (i. e., whether the owner intends that the subject of the copyright may be used by the general public), the character of the communication or exhibition effecting the publication, the nature of the right protected, and the nature of the subject of the copyright as related to the method of communication (*Read v. Turner,* supra, 239 Cal.App.2d at p. 511, 48 Cal.Rptr. 919). [footnote omitted]
>
> Our analysis of the authorities that apply principles of limited and general publication shows that the nature of the communication, rather than the extent of dissemination, primarily determines whether a general or limited publication occurs. Thus, for example, a professor's delivery of a particular lecture to hundreds of students does not result in a general publication because the material is intended for the students' instructional use (see *Williams v. Weisser,* 273 Cal.App.2d 726, 78 Cal.Rptr. 542). Similarly, the public performance of a play does not constitute a "general publication" that extinguishes a common law property right (*Ferris v. Frohman,* 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492), nor does the exhibition of a painting to

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[6] This rule applies only to works created before 1 Jan 1978, which is 35 years ago when I wrote the first draft of this essay in June 2013. There are few unpublished works more than 35 years old whose common-law copyright are being infringed *and* have a market value worth litigating.

> the general public (if an admission fee is required and patrons are prohibited from copying the painting) (*Werckmeister v. American Lithographic Co.,* supra), or an audition performance of a radio program before an audience in a broadcasting studio (*Stanley v. Columbia Broadcasting System,* supra, 35 Cal.2d 653, 221 P.2d 73). On the other hand, the sale of a single copy of a work may constitute a general publication (*Gottsberger v . Aldine Book Pub. Co.* (Mass. 1887) 33 F. 381).
>
> The second dimension of the legal definition of "publication" is the distinction between an "investive" and "divestive" publication, that was first suggested in *American Visuals Corporation v. Holland* (C.A. 2 Cir. 1956) 239 F.2d 740, in order to reconcile a number of conflicting cases. Justice Frank noted that the cases used a more stringent standard of publication when the owner of a common law copyright may be divested of his interest, and used a less stringent standard where the owner seeks to be invested with federal statutory copyright protection, and concluded that the courts so treated the concept of "publication" as to prevent piracy.
>
> The investive/divestive aspect of the definition of publication was approved and extended in *Hirshon v. United Artists Corporation* (1957) 100 U.S.App.D.C. 217, 243 F.2d 640. Justice Bazelon noted, at page 645, that "*it takes more in the way of publication to invalidate any copyright, whether statutory or common law, than to validate it.*" (Emphasis partially added.)

Zachary v. Western Publishing Co., 143 Cal.Rptr. 34, 40-41 (Cal.App. 1977).

"limited publication" does *not* terminate common-law copyright

The rule that any publication permanently extinguished a common-law copyright was too harsh,[7] so judges in the late 1800s began to distinguish between (1) a "limited publication" that did *not* extinguish common-law copyright and (2) a "general publication" that extinguished common-law copyright. See, e.g.,

- *Keene v. Kimball,* 82 Mass. 545, 550 (Mass. 1860) ("An unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, except so far as protection is continued by the statutes of copyright. But there may be a limited publication, by communication of the contents of the work by reading, representation, or restricted private circulation, which will not abridge the right of the author to the control of his work, any farther than necessarily results from the nature and extent of this limited use which he has made, or allowed to be made of it.");

- *Parton v. Prang,* 18 F.Cas. 1273, 1277 (D.Mass. 1872) (using phrase "limited publication" once);

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[7] Melville B. Nimmer, "Copyright Publication," 56 COLUMBIA LAW REVIEW 185, 200 (Feb 1956) and followed in, e.g., *American Vitagraph v. Levy,* 659 F.2d 1023, 1026-27 (9thCir. 1981); *Brown v. Tabb,* 714 F.2d 1088, 1091 (11thCir. 1983); *Academy of Motion Picture Arts and Sciences v. Creative House Promotions,* 944 F.2d 1446, 1452 (9thCir. 1991). *Brown* is cited in *Warner Bros. Entertainment, Inc. v. X One X Productions,* 644 F.3d 584, 593 (8thCir. 2011).

- *Bobbs-Merrill Co. v. Straus,* 147 F. 15, 18 (2dCir. 1906) ("This communication of contents under restriction, known as a restricted or limited publication, is illustrated by lectures to classes of students, dramatic performances before a select audience, exhibitions of paintings in private galleries, private circulation of copies of manuscript, etc. *Werckmeister v. American Lithographic Co.,* [134 F. 321, 324 (2dCir. 1904)]"), *aff'd,* 210 U.S. 339 (1908);

- *American Tobacco Co. v. Werckmeister,* 207 U.S. 284, 299 (1907) ("... it is only in cases where what is known as a general publication is shown, as distinguished from a limited publication under conditions which exclude the presumption that it was intended to be dedicated to the public, that the owner of the right of copyright is deprived of the benefit of the statutory provision.");

- *Edgar H. Wood Associates, Inc. v. Skene,* 197 N.E.2d 886, 892 (Mass. 1964);

- *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.,* 194 F.3d 1211, 1218 (11thCir. 1999) ("The court [in *Burke v. NBC,* 598 F.2d 688 (1stCir. 1979)] defined a general publication as occurring when a work is made available to the public at large without regard to who they are or what they propose to do with it, see *id.* at 691; noted that courts have hesitated to find a general publication which divests a common law copyright, see *id.;* and noted the settled law that a mere performance or exhibition of a work is not a general publication. See *id.*").

An architect who files a copy of his building plans with a city building inspector was a "limited publication" that continues common-law copyright — *not* a "general publication" that would end the architect's common-law copyright.
- *Smith v. Paul,* 345 P.2d 546 (Cal.App. 1959);
- *Edgar H. Wood Associates, Inc. v. Skene,* 197 N.E.2d 886 (Mass. 1964);
- *Krahmer v. Luing,* 317 A.2d 96 (N.J.Super.Ch. 1974);
- *Masterson v. McCroskie,* 573 P.2d 547, 549-550 (Colo. 1978);
- *MacMillan v I.V.O.W.,* 495 F.Supp. 1134, 1145 (D.Vt. 1980) (distribution of plans to potential contractors is not a general publication).

See also *Read v. Turner,* 48 Cal.Rptr. 919, 923-925 (Cal.App. 1966).

By analogy, other disclosures required by law are presumedly also a "limited publication" so common-law copyright continues on the disclosed material. For example, in *Zachary v. Western Publishing Co.,* 143 Cal.Rptr. 34 (Cal.App. 1977) publication of a description and drawings in a U.S. Patent did *not* extinguish the common-law copyright in the description and drawings.

public performance is limited publication

A public performance is a "limited publication" that does *not* terminate common-law copyright, as show by the following string of citations:

- *Boucicault v. Fox,* 5 Blatchf. 87, 3 F.Cas. 977, 981 (S.D.N.Y. 1862) ("The plaintiff, then, being the original author of this play, his performance of it in public, or the performance of it by the company at the Winter Garden, with his consent, for a compensation to him, cannot be regarded as any evidence of his abandonment of the manuscript to the public or to the profession of players. **....** There can be no evidence of abandonment to the public of any rights growing out of the authorship of a manuscript, drawn from the mere fact that the manuscript has, by the consent and procurement of the author, been read in public by him, or another, or recited, or represented, by the elaborate performances and showy decorations of the stage.");

- *Werckmeister v. American Lithographic Co.,* 134 F. 321, 325 (2dCir. 1904) ("The exhibition or private circulation of the original or of printed copies is not a publication, unless it amounts to a general offer to the public. **....** On this capacity for public representation, as distinguished from the publication of other literary productions, the courts have founded the rule that such public exhibition is not a general publication. By admission to such exhibition the general public acquire no right to reproduce the composition, either by taking notes or by the exercise of the memory.");

- *American Tobacco Co. v. Werckmeister,* 207 U.S. 284, 299 (1907) ("The subject was considered and the cases reviewed in the analogous case of *Werckmeister v. American Lithographic Co.* 68 L.R.A. 591, 134 Fed. 321, in a full and comprehensive opinion by the late Circuit Judge Townsend, which leaves little to be added to the discussion.");

- *Ferris v. Frohman,* 223 U.S. 424, 435 (1912) ("The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use. [citing six cases and Justice Story's EQUITY JURISPRUDENCE § 950]");

- *McCarthy & Fischer v. White,* 259 F. 364, 364 (S.D.N.Y. 1919) ("well settled" that public performance of musical composition is *not* a general publication that will extinguish common-law copyright, citing five cases);

- *Uproar Co. v. National Broadcasting Co.,* 8 F.Supp. 358, 362 (D.Mass. 1934) ("[T]he rendering of the performance before the microphone cannot be held to be an abandonment of ownership to it by the proprietors or a dedication of it to the public at large."), *modified,* 81 F.2d 373 (1stCir. 1935), *cert. denied,* 298 U.S. 670 (1936);[8]

- *Hemingway's Estate v. Random House, Inc.,* 244 N.E.2d 250, 254 (N.Y. 1968) ("The public delivery of an address or a lecture or the performance of a play is not deemed a 'publication,' and, accordingly, it does not deprive the author of his common-law copyright in its contents. See *Ferris v. Frohman,* 223 U.S. 424[, 435 (1912)]; *King v. Mister Maestro, Inc.,* 224 F.Supp. 101, 106 [(S.D.N.Y. 1963)]; *Palmer v. De Witt,* 47 N.Y. 532, 543, supra; see, also, Nimmer, COPYRIGHT, § 53, p. 208.");

- *Burke v. National Broadcasting Co., Inc.,* 598 F.2d 688, 691 (2dCir. 1979) ("Mere performance or exhibition of a work results, at common law, in no publication at all. *Ferris v. Frohman,* 223 U.S. 424, 435 ... (1912); *American Tobacco,* 207 U.S. [284] at 300 ... [(1907)]."), *cert. den.* 444 U.S. 869 (1979).

This rule that performance is a "limited publication" is especially important for common-law copyright of performances of music.

delivery of lecture or speech is limited publication

Lectures by teachers or professionals — as well as public speeches — are a limited publication, which does *not* extinguish common-law copyright.

- *Bartlett v. Crittenden,* 2 F.Cas. 967, 971 (C.C.Ohio 1849) (Defendant was former student of Plaintiff-teacher. Defendant published at least 92 pages of Plaintiff's manuscript. "The manuscript of Bartlett was used in his school at Cincinnati, and in the school at St. Louis, for the purpose of imparting instruction to the pupils, and it does not appear, from the evidence that copies were required or permitted to be taken of it for any other purpose." Injunction granted to prohibit further publication by Defendants. *Bartlett* stands for proposition that lectures are a limited publication that does not extinguish common-law copyright.);

- *New Jersey State Dental Soc. v. Dentacura Co.,* 41 A. 672 (N.J.Ch. 1898), *aff'd per curiam,* 43 A. 1098 (N.J.Err. & App. 1899) (Presenting paper at meeting of professional society was *not* a publication that would extinguish the common-law copyright on the paper.);

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[8] *Uproar* was quoted with approval in *Silverman v. CBS Inc.,* 632 F.Supp. 1344, 1350 (S.D.N.Y. 1986) ("... radio broadcasts of the Amos 'n' Andy shows were not publications...."), *aff'd in part,* 870 F.2d 40 (2dCir. 1989), *cert. den.,* 492 U.S. 907 (1989).

- *Werckmeister v. American Lithographic Co.,* 134 F. 321, 326 (2dCir. 1904) (dictum: "Thus, the oral lecture to a class of students is not published even by permission to the individuals of such class to make copies for their own use, because this is in accord with the purposes of instruction and does not otherwise injuriously affect the right of the author.");

- *Bobbs-Merrill Co. v. Straus,* 147 F. 15, 18 (2dCir. 1906) ("This communication of contents under restriction, known as a restricted or limited publication, is illustrated by lectures to classes of students, dramatic performances before a select audience, exhibitions of paintings in private galleries, private circulation of copies of manuscript, etc."), *aff'd,* 210 U.S. 339 (1908);

- *Nutt v. National Inst. Incorporated for the Improvement of Memory,* 31 F.2d 236, 238 (2dCir. 1929) ("The author of a literary composition, as a lecture, may profit from public delivery; but that does not constitute the kind of publication which deprives him of the protection of the copyright statute.... [citing three authorities] **....** Common-law rights are not lost by a limited publication as distinguished from the general publication, and the delivery of these lectures before audiences prior to copyrighting was limited publication.");

- *Williams v. Weisser,* 78 Cal.Rptr. 542 (Cal.App. 1969) (UCLA professor's lectures to students);

- *King v. Mister Maestro, Inc.,* 224 F.Supp. 101, 106 (S.D.N.Y. 1963) (Under Copyright Act of 1909: "The copyright statute itself plainly shows that 'oral delivery' of an address is not a dedication to the public.");

- *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.,* 194 F.3d 1211, 1217 (11thCir. 1999) ("A performance, no matter how broad the audience, is not a publication; to hold otherwise would be to upset a long line of precedent. This conclusion is not altered by the fact that the Speech was broadcast live to a broad radio and television audience and was the subject of extensive contemporaneous news coverage. We follow the above cited case law indicating that release to the news media for contemporary coverage of a newsworthy event is only a limited publication.").

E. no preemption by Copyright Act of 1909

The Copyright Act of 1909, the federal copyright statute before the Copyright Act of 1976, said:

> Nothing in this title [i.e., 17 U.S.C.] 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 (enacted 1909, repealed effective 1 Jan 1978).

Law *After* Copyright Act of 1976

The Copyright Act of 1978 became effective on 1 Jan 1978. The rules of common-law copyright expressed in judicial opinions issued before 1 Jan 1978 are still valid after that date, with two exceptions. First, since 1 Jan 1978, common-law copyright now only protects *un*fixed works. Second, the rule that "publication" terminates common-law copyright is obsolete for works created after 1 Jan 1978, because any fixation — whether in *un*published or published format — now automatically begins statutory copyright.

Common-law copyrights on unpublished works fixed before 1 Jan 1978 were automatically converted to federal statutory copyrights by the Copyright Act of 1976. Although 17 U.S.C. § 301 does *not* mention common-law copyright, § 303 provides that none of the converted copyrights will expire before 31 Dec 2002, and the legislative history (quoted at page 19, below) clearly mentions automatic conversion of common-law copyrights of works fixed before 1 Jan 1978 to statutory copyrights.

- *DeCarlo v. Archie Comic Publications, Inc.,* 11 Fed.Appx. 26, 29 (2dCir. 2001) ("The Act also extinguished all common law copyright in unpublished works, although it grandfathered in copyright protection for unpublished works created before January 1, 1978. 17 U.S.C. § 301.").

- *Silverman v. CBS Inc.,* 632 F.Supp. 1344, 1349 (S.D.N.Y. 1986) ("Under the 1976 Act, all common law copyrights were converted to statutory copyrights as of January 1, 1978. They now expire at a fixed time [specified in 17 U.S.C. § 302], but no earlier than December 31, 2002. 17 U.S.C. § 303").

In that way, the Copyright Act of 1976 abolished common-law copyright for unpublished works that had been fixed in a tangible medium of expression, although 17 U.S.C. § 301 is neither clear nor easy to understand. The following cases clearly state the abolition of common-law copyright for fixed works:

- *Burke v. National Broadcasting Co., Inc.,* 598 F.2d 688, 691, n.2 (1stCir. 1979) ("Under the Copyright Act of 1976, 17 U.S.C. §§ 101-810, common law copyright is abolished. The Act does not affect rights with respect to causes of action that arose before January 1, 1978, however. 17 U.S.C. §§ 301(a), (b) (2)."), *cert. den.* 444 U.S. 869 (1979);

- *Russell v. Price,* 612 F.2d 1123, 1129, n.17 (9thCir. 1979) ("Common-law copyright is no longer recognized under the new Act, 17 U.S.C. § 301 (1978), although one existing prior to January 1, 1978 may continue to receive lengthy protection.");

- *Strout Realty, Inc. v. Country 22 Real Estate Corp.,* 493 F.Supp. 997, 999 (W.D.Mo. 1980) ("The plain meaning of [17 U.S.C.] § 301 is that the 1976 Act abolished common-law copyright by preemption.");

- *Meltzer v. Zoller,* 520 F.Supp. 847, 854, n.17 (D.N.J. 1981) ("This reading [in *Burke,* supra] is consistent with § 301(a), the plain meaning of which is that the 1976 Act abolished by preemption common law copyright in all works eligible for copyright protection, regardless of whether the work was created before or after January 1, 1978.");

- *American Vitagraph, Inc. v. Levy,* 659 F.2d 1023, 1024, n.1 (9thCir. 1981) (identical to *Burke,* supra);

- *Harris Custom Builders, Inc. v. Hoffmeyer,* 92 F.3d 517, 520 (7thCir. 1996) ("Harris is right that the 1976 Act virtually abolished common law copyright so that now all copyrights are 'statutory,' (see 1 NIMMER ON COPYRIGHT § 4.01), ...").

preemption by Copyright Act of 1976

The Copyright Act of 1976, in remarkably poorly written text, says:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--
>
> > (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
> >
> > (2) any cause of action arising from undertakings commenced before January 1, 1978;
> >
> > (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or
> >
> > (4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).
>
> (c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.
>
> ....

17 U.S.C. § 301 (enacted 1976; amended 1988, 1990, 1998; current June 2013).
In 1998, § 301(c) was amended to change the end date of common-law copyright on sound recordings from the year 2047 to the year 2067.

legislative history

The legislative history is much clearer than the statute itself:

> Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

House Report Nr. 94-1476, reprinted in 1976 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 5659, 5745.
Notice that the statute itself says nothing about common-law copyright, although a major goal of the Copyright Act of 1976 was to abolish common-law copyrights on unpublished works.

The legislative history explains:

> 3. Enactment of section 301 would also implement the "limited times" provision of the Constitution [U.S. Constitution, Art. 1, § 8, cl. 8], which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by

> making unpublished, undisseminated manuscripts available for publication after a reasonable period.
>
> ....
>
> Under section 301, the statute would apply to all works created after its effective date [Jan. 1, 1978], whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute [Jan. 1, 1978] and still under common law protection, section 303 of the statute would provide protection from that date on, and would guarantee a minimum period of statutory copyright.

House Report Nr. 94-1476, reprinted in 1976 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 5659, 5746.

Note that the "limited times" in the U.S. Constitution *only* applies to a federal copyright statute. If an author chose not to publish his work, then ownership of the common-law copyright for that work (like other personal property) descends to his/her heirs. There is nothing strange about common-law copyright being perpetual, ownership of property is typically perpetual until the owner decides to sell or transfer ownership. In contrast, the Copyright Act of 1976 applied socialist principles and caused copyright on unpublished works to expire, to enrich the public domain (i.e., "aid scholarship and the dissemination of historical materials"). In practice, the long term of copyright (i.e., now lifetime of author plus 70 years or until 31 Dec 2002, whichever is longer) supposedly gave common-law copyright owners plenty of time to either publish their work or to sell the copyright on the unpublished work.

The statute, § 301(b), clearly says *un*fixed works are *not* preempted by the Copyright Act of 1976, and therefore presumedly still protected by common-law copyright. The legislative history discusses this issue:

> On the other hand, section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statute or common law until fixed in tangible form.

House Report Nr. 94-1476, reprinted in 1976 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 5659, 5747.

Another clear statement that the Copyright Act of 1976 converts all common-law copyright on *un*published fixed works is found in the legislative history of 17 U.S.C. § 303 on expiration dates for converted statutory copyrights:

> Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country.

> The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.
>
> Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. **....**
>
> **....** Section 303 provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.

House Report Nr. 94-1476, reprinted in 1976 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 5659, 5754-5755.

unfixed works

Note that common-law copyright for works *not* fixed in a tangible medium of expression continues in the Copyright Act of 1967, 17 U.S.C. § 301(b). The U.S. Court of Appeals for the Seventh Circuit explained:

> It is, of course, true that unrecorded performances per se are not fixed in tangible form. Among the many such works not fixed in tangible form are "choreography that has never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down." House Report at 131, reprinted in 1976 U.S.CODE CONG. & AD.NEWS at 5747. Because such works are not fixed in tangible form, rights in such works are not subject to preemption under §301(a). Indeed, § 301(b), which represents the obverse of § 301(a), expressly allows the states to confer common law copyright protection upon such works, *id.;* see also NIMMER §§ 1.08[C], 2.03 [B], and protection has been afforded to unfixed works by some states. See, e.g., Cal.Civil Code § 980 (West 1982 & 1986 Supp.) (protecting "any original work of authorship that is not fixed in any tangible medium of expression"); cf. *Estate of Hemingway v. Random House, Inc.,* 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968) (common law copyright might be recognized in contents of an unrecorded conversation).

Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 675 (7thCir. 1986), *cert. den.,* 480 U.S. 941 (1987). Note that a public performance does *not* divest the performer(s) — or author(s) of the performed *un*published work — of their common-law copyright, as shown beginning at page 14, above.

- *Jarvis v. A & M Records,* 827 F.Supp. 282, 297 (D.N.J. 1993) ("The Copyright Act does not preempt claims based on the appropriation of unfixed, non-copyrightable items such as a plaintiff's voice or likeness. *Midler v. Ford Motor Company,* 849 F.2d 460, 462 (9thCir. 1988), *cert. denied* 503 U.S. 951 ... (1992).").

California Statute

California has codified its common-law copyright:

> (a)(1) The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device.
>
> (a)(2) The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.
>
> (b) The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession.

California Civil Code § 980 (enacted 1872, amended in 1947, 1949, and 1982. Still current June 2013.). The 1982 amendment made the California law comply with the federal Copyright Act of 1976, before the 1998 amendment to the federal statute changed the year 2047 to the year 2067.

California statute gives common-law copyright to letters and other private writings.

> Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

California Civil Code § 985 (enacted 1872. Still current June 2013.).
Because letters and other private writings are fixed on paper (or now fixed in electronic form, such as e-mail or instant messenger format), such writings are automatically copyrighted under the federal Copyright Act of 1976. Therefore California Civil Code § 985 conflicts with the federal Copyright Act of 1976, and the California statute is preempted by the federal statute.

Note that California also has a criminal statute punishing people who infringe common-law copyrights in sound recordings. California Penal Code § 653h (enacted 1968, amended many times, still in effect July 2013).

Are Conversations or Interviews Copyrightable?

Before 1 Jan 1978, are unpublished handwritten notes of a conversation or interview with a famous person protected by common-law copyright? After 1 Jan 1978, there are two questions: (1) are the handwritten notes copyrightable subject matter? and (2) would an unfixed — i.e., *un*recorded and without handwritten notes — conversation or interview be protected by common-law copyright? There are only a few judicial opinions on these questions, and no firm answers.

- *Harris v Miller,* 50 U.S.P.Q. 306 (S.D.N.Y. 1941) ("The use of quotation marks to set out the conversations Harris, the biographer, had with his subject, Wilde, does not put that matter in public domain. It is apparent no stenographer was present and that the statement of the conversations is the biographer's version, the result of his literary effort." Judge found infringement of statutory copyright by defendant.);

- *Noble v. Columbia Broadcasting System,* 270 F.2d 938 (D.C.Cir. 1959) (no common-law copyright protection for the disclosure of an idea for a television program);

- *Rosemont Enterprises, Inc. v. Random House, Inc.,* 256 F.Supp. 55, 61 (S.D.N.Y. 1966) (interviewer and his assignees own statutory copyright on interviews, preliminary injunction issued), *rev'd,* 366 F.2d 303 (2dCir. 1966) (injunction vacated), *cert. den.,* 385 U.S. 1009 (1967);

- *Hemingway's Estate v. Random House, Inc.,* 268 N.Y.S.2d 531, 537 (N.Y.Sup. 1966) ("In light of the interaction which renders conversation indivisible, it is difficult to see how conversation can be held to constitute the sort of individual intellectual production to which protection is afforded by way of a common law copyright." Injunction **before** publication of book denied.), *aff'd without opinion,* 269 N.Y.S.2d 366 (N.Y.A.D. 1966);

- *Estate of Hemingway v. Random House, Inc.,* 279 N.Y.S.2d 51 (N.Y.Sup. 1967), *aff'd without opinion,* 285 N.Y.S.2d 568 (N.Y.A.D. 1967), *aff'd,* 244 N.E.2d 250, 253-254 (N.Y. 1968) (Defendant wanted to publish conversations with Hemingway, estate claimed common-law copyright protection on Hemingway's words, court held at pp. 255-256 that Hemingway approved of D's publication of his words.);

- *Quinto v. Legal Times of Washington, Inc.,* 506 F.Supp. 554, 559 (D.D.C. 1981) (interviewer owns statutory copyright in compilation of quotations from interviews);

- *Falwell v. Penthouse International, Ltd.,* 521 F.Supp. 1204, 1207 (W.D.Va. 1981) ("The existence of common law copyright protection for the spoken word has not been established by any court");

- *Swatch Group Management Services Ltd. v. Bloomberg L.P.,* 808 F.Supp.2d 634, 638, n.7 (S.D.N.Y. 2011) (Plaintiff's audio recording of international conference call involving securities analysts was protected by statutory copyright. In rejecting D's motion to dismiss, the court did not reach the question of whether D had infringed the copyright by providing a transcript of the call to D's subscribers.), 861 F.Supp.2d 336 (S.D.N.Y. 2012) (Judge held that D made fair use of copyrighted material.).

Music Recorded Before 15 Feb 1972

Performances of music and other sounds fixed (i.e., recorded) before 15 Feb 1972 (i.e., the effective date that sound recordings were first protected under federal statutory copyright[9]) remain protected by state common-law copyright until 15 Feb 2067. 17 U.S.C. § 301(c).

The topic of *un*authorized recordings of a performance is discussed in my separate essay at: http://www.rbs2.com/cpermission.pdf .

In what is probably the most important common-law copyright case in the USA since the year 2000, the highest court in New York state upheld common-law copyright on musical performances recorded in the 1930s. Yehudi Menuhin's performance of two violin concerti recorded in 1931-32 were released by EMI Records in the UK and Capitol Records in the USA. The copyrights in the UK expired in 1981-82, so the works were in the public domain in the UK. In 1999, Naxos began to sell copies of these historic recordings on compact disks in both the UK and the USA. Naxos was lawful in the UK, but *not* in the USA. *Capitol Records, Inc. v. Naxos of America, Inc.,* 274 F.Supp.2d 472 (S.D.N.Y. 2003), *on appeal,* 372 F.3d 471 (2dCir. 2004) (certified questions to New York state court), 830 N.E.2d 250 (N.Y. 2005) (answered certified questions).

sale of recordings does *not* extinguish common-law copyright

A company that records a performance with the permission of the performers, and then sells copies of the performance (e.g., on gramophone records or cassette tapes) does *not* forfeit the common-law copyright on the performance by the sale of recordings. See, e.g.,

- *Waring v. WDAS Broadcasting Station,* 194 A. 631, 636 (Pa. 1937) (Court enjoined radio station from playing gramophone records of which plaintiff was conductor.);

- *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.,* 101 N.Y.S.2d 483, 494-495 (N.Y.Sup. 1950) ("In the light of these cases the performance of operas by Metropolitan Opera and their broadcast over the network of American Broadcasting cannot be deemed a general publication or abandonment so as to divest Metropolitan Opera of all of its rights to the broadcast performances."), *aff'd per curiam,* 107 N.Y.S.2d 795 (N.Y.A.D. 1951);

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[9] Sound Recording Act of 1971, 85 STATUTES-AT-LARGE 391.

- *Capitol Records v. Mercury Records Corp.,* 221 F.2d 657, 663 (2dCir. 1955) (New York law: "We believe that the inescapable result of that case [*Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.,* 101 N.Y.S.2d 483 (N.Y.Sup. 1950), *aff'd,* 107 N.Y.S.2d 795 (N.Y.A.D. 1951)] is that, where the originator, or the assignee of the originator, of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records.");

- *Rosette v. Rainbo Record Mfg. Corp.,* 354 F.Supp. 1183, 1190 (S.D.N.Y. 1973) ("The Copyright Act [of 1909] does not define publication and it is true that generally a performance of an unpublished musical manuscript is not a publication. *Frohman,* [223 U.S. 424 (1912)]. This accords with the expressed view of the Copyright Bar and the music industry that making a record of an unpublished composition is not a 'publication.' Their reliance is on accepted doctrines of copyright law."), *aff'd per curiam,* 546 F.2d 461 (2dCir. 1976);

- *A & M Records v. M.V.C. Distributing,* 574 F.2d 312, 314 (6thCir. 1978);

- *CBS, Inc. v. Garrod,* 622 F.Supp. 532, 534-535 (M.D.Fla. 1985), *aff'd without opinion,* 803 F.2d 1183 (11thCir. 1986);

- *Tempo Music v. Famous Music,* 838 F.Supp. 162, 171 (S.D.N.Y. 1993);

- *Capitol Records v. Naxos,* 830 N.E.2d 250, 264 (N.Y. 2005) (citing five cases in New York state).

The reasoning is that the performer(s) owns the common-law copyright on the performance, and the sale of the recording only gives the purchaser ownership of the medium (e.g., vinyl record or cassette tape) plus the right to listen to the performance. The same rule applies to computer software: the purchaser *does not own* the software, but only owns the medium on which the software was distributed (e.g., floppy disk, compact disk) and has a license to *use* the software on a specified number of computers. Unlike the situation with published books, there was no federal statutory copyright for sound recordings before the year 1972, so analogies with unpublished manuscripts vs. published books fail.

Certainly, if the composer registers a statutory copyright on the sheet music, the sale of recordings of that music will *not* extinguish the statutory copyright on the sheet music.[10] A pirated or bootleg recording will then infringe the statutory copyright on the sheet music.

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[10] Melville B. Nimmer, "Copyright Publication," 56 Columbia Law Review 185, 191 (Feb 1956) (citing two cases in federal trial courts).

pirated/bootleg recordings of music

A "pirated" recording is an *un*authorized copy of an authorized recording (e.g., the defendant copies a commercially produced vinyl record, cassette tape, or compact disk). A "bootleg" recording is an *un*authorized copy of an unpublished performance (e.g., the defendant sneaks a miniature tape recorder into a performance, or records a radio broadcast of a live performance, etc.).[11] The manufacturers of these unauthorized recordings were successful sued under several different theories, principally unfair competition. The legal theory of common-law copyright did *not* remedy *un*authorized copying, because common-law copyright was mostly confined to the right of first publication, and sale of records is *not* a general publication. Nonetheless, the existence of a common-law copyright in a performance gives a property right that can be enforced by other legal theories. A partial list of cases follows:

- *Victor Talking Mach. Co. v. Armstrong,* 132 F. 711 (S.D.N.Y. 1904) (unfair competition);

- *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.,* 101 N.Y.S.2d 483 (N.Y.Sup. 1950), *aff'd per curiam,* 107 N.Y.S.2d 795 (N.Y.A.D. 1951) (Defendant copied radio broadcasts of Met Opera and then issued phonograph records of those performances. Columbia Records had an exclusive contract with Met Opera to produce and sell authorized recordings.);

- *Capitol Records v. Mercury Records Corp.,* 109 F.Supp. 330 (S.D.N.Y. 1952), *aff'd,* 221 F.2d 657 (2dCir. 1955) (Capitol had a license to sell recordings by Telefunken GmbH in the USA, while Mercury had a license to sell those recordings in Czechoslovakia. Mercury began selling the records in the USA and Capitol sued for unfair competition and common-law copyright infringement. Capitol won.);

- *Gieseking v. Urania Records, Inc.,* 155 N.Y.S.2d 171 (N.Y.Sup. 1956) (Urania released gramophone records of Gieseking's performance without permission of Gieseking: plaintiff stated cause of action for unfair competition, and unauthorized use of plaintiff's name to sell a product in violation of New York statute.);

- *Shapiro, Bernstein & Co. v. Remington Records, Inc.,* 265 F.2d 263 (2dCir. 1959) (Four music publishers sued a manufacturer of sound recordings for failure to pay compulsory license fees. At 273: "We will not permit commercial piracy to produce illegal gains immune from recovery. While the law cannot prevent all sin and wrongdoing[,] it can take some of the profit out of it.")

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[11] See, e.g., *Dowling v. U.S.,* 473 U.S. 207, 209, n.2 (1985).

- *Shapiro, Bernstein & Co. v. Goody,* 248 F.2d 260 (2dCir. 1957), *cert. den.,* 355 U.S. 952 (1958) (Plaintiff owned federal statutory copyright on sheet music, sued sellers of unauthorized recordings. The recordings were made by tape recording radio broadcasts.);

- *Capitol Records, Inc. v. Greatest Records, Inc.,* 252 N.Y.S.2d 553 (N.Y.S.Ct. 1964);

- *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,* 256 F.Supp. 399 (S.D.N.Y. 1966) (Defendant who owned "fly-by-night company" that issued gramophone records that infringed copyrighted sheet music absconded, so plaintiffs sued the company's advertising agency and company's distributor for infringement.);

- *Capitol Records, Inc., v. Erickson,* 82 Cal.Rptr. 798 (Cal.App. 1969) (unfair competition under California law), *cert. den.,* 398 U.S. 960 (1970);

- *Duchess Music Corp. v. Stern,* 458 F.2d 1305 (9thCir. 1972), *cert. denied,* 409 U.S. 847 (1972) (Owners of copyrights on sheet music sued pirates who made unauthorized cassette tapes from authorized gramophone records.);

- *Mercury Record Productions, Inc. v. Economic Consultants, Inc.,* 218 N.W.2d 705 (Wisc. 1974) (unfair competition remedied misappropriation of plaintiff's time, skill, and expense), *cert. den.,* 420 U.S. 914 (1975).

- *Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.,* 341 A.2d 348 (N.J.Super. May 1975) (unfair competition under New Jersey state law);

- *Gai Audio of New York, Inc. v. Columbia Broadcasting System, Inc.,* 340 A.2d 736 (Maryl.App. June 1975) (unfair competition under Maryland law);

- *A & M Records, Inc. v. M.V.C. Distributing Corp.,* 574 F.2d 312 (6thCir. 1978) (unfair competition under Michigan state law);

- *CBS, Inc. v. Garrod,* 622 F.Supp. 532 (M.D.Fla. 1985) (unfair competition under Florida state law), *aff'd without opinion,* 803 F.2d 1183 (11thCir. 1986);

- *Firma Melodiya v. ZYX Music GmbH,* 882 F.Supp. 1306, 1316 (S.D.N.Y. 1995) (common law copyright infringement and unfair competition, plaintiff's motion for preliminary injunction granted).

One should not need a lawyer — and certainly not need a judge — to say "do *not* copy and sell other people's intellectual property". But this long list of cases stands for the proposition that some americans will do anything to make money, including blatant and repulsive unfair competition with the lawful owner of the property. The company that made an authorized

recording paid royalties to the copyright owner of the sheet music, paid the performers, paid expenses of making and editing the recording of the performance, advertised the recording — all of these legitimate expenses were usurped by a pirate who simply copied the authorized recording.[12]

Conclusion

The Copyright Act of 1976 converted to federal statutory copyright all common-law copyrights on unpublished works that have been fixed, except for music recorded before 15 Feb 1972.

Common-law copyright continues to protect works that are *un*fixed in any tangible medium of expression. Such unfixed works include:

- *any* performance of music for which there is no audio recording authorized by the performers(s).[13] This includes performances of improvised music for which there is no sheet music.
- lectures for which the lecturer has no detailed written notes *and* no audio recording authorized by the lecturer,
- conversations and interviews for which there is no audio recording authorized by the interviewee,
- Zacchini's "human cannonball" circus act, described in 433 U.S. 562 (1977).[14]

In this way, common-law copyright continues to protect a small set of works that are excluded from other forms of intellectual property.

Bibliography

I was surprised to find that there are no books on the subject of common-law copyright and few articles in law reviews on common-law copyright. The authority for this essay is the cases and statutes cited above. However, the following articles may be helpful in understanding the legal history.

Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," 29 WAYNE LAW REVIEW 1119 (Spring 1983).

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[12] See, e.g., *Capitol Records, Inc., v. Erickson,* 82 Cal.Rptr. 798, 799-800, 805-806 (Cal.App. 1969).

[13] See the definition of "fixed" in 17 U.S.C. § 101 and my discussion of the *Zacchini* case in my separate essay at: http://www.rbs2.com/cpermission.pdf . In this context, the author is the performer, lecturer, interviewee, etc. Any *un*authorized recording is a violation of the author's legal rights.

[14] I discussed the *Zacchini* case in my separate essay at: http://www.rbs2.com/cpermission.pdf .

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