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TRADE RESTRAINTS- EQUITABLE SERVITUDE ON CHATTELS - RADIO BROADCAST OF ELECTRICAL TRANSCRIPTIONS

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TRADE RESTRAINTS — EQUITABLE SERVITUDE ON CHATTELS — RADIO BROADCAST OF ELECTRICAL TRANSCRIPTIONS — A popular orchestra leader made certain electrical transcriptions (not records) of unique interpretations of different musical numbers which were distributed, for a consideration, for radio broadcast on the Ford Motor Program. A notice appears on the transcription that it is to be used only by a distributee station and then only on the Ford Program. Defendant, who is not a distributee, broadcast one of these transcriptions without the plaintiff's consent. Plaintiff sued to enjoin rendition of the transcriptions. *Held*, that the injunction should be granted because there was a proprietary interest in the plaintiff's rendition of these musical numbers, and because there was a restriction on the use of the transcriptions in the nature of an equitable servitude. *Waring v. Dunlea*, (D. C. N. C. 1939) 26 F. Supp. 338.

The result reached in this decision might conceivably have been based upon any one or more of four legal concepts, namely (1) recognition at common law of a property right in intellectual and artistic creations; (2) equitable servitude on chattels; (3) unfair competition; (4) right of privacy. The court in the instant case, however, chose to base its decision only upon the first two. At common law an artist has a property right in his creations until he has so disseminated his product that a publication has taken place.[1] This proprietary

[1] Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263 (1911) (play); Prince Albert v. Strange, 2 De G. & S. 652, 64 Eng. Rep. 293 (1848) (etchings); Mikado Case, (C. C. N. Y. 1885) 25 F. 183 (musical compositions); Universal Film Co. v. Copperman, (C. C. A. 2d, 1914) 218 F. 577 (photoplay); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937) (recordings).

right has not been abrogated by the advent of copyright statutes.[2] By holding that a performer has a proprietary interest in his *performance*, the courts have extended somewhat the common-law concept of literary and artistic property.[3] But this extension seems commendable, since by means of motion pictures and other recording devices the performance of an actor or a musician can be as accurately reproduced today as the play or musical score on which the performance is based. Nor does the fact that the performance is based on the artistic creation of another destroy the right.[4] The performer by his interpretations definitely adds to the work of the author and composer something which is distinctive and for which the public is willing to pay. Looking to the objective character of the dissemination and to the proprietor's intent in regard to the relinquishment of his property rights, it seems there was no publication. Performance is not necessarily a publication, for the courts distinguish between a limited and a general publication. In the instant case the performance was limited, for it was not a complete surrender of the artistic creation to the unqualified enjoyment of the general public.[5] In allowing the imposition of an equitable serviture by the notice printed on the transcriptions, the court gives new life to this evanescent concept.[6] Equitable servitudes on land have long been recognized,[7] but such restrictions on chattels have not fared so well.[8]

[2] 35 Stat. L. 1076 (1909), 17 U. S. C. (1934), § 2; Wheaton v. Peters, 8 Pet. (33 U. S.) 591 (1834).

[3] There is no common-law property right in the *method* of performance, on the theory that while such imitations may resemble the original they are not identical. Savage v. Hoffman, (C. C. N. Y. 1908) 159 F. 584; Bloom & Hamlin v. Nixon, (C. C. Pa. 1903) 125 F. 977; Chappell & Co. v. Fields, (C. C. A. 2d, 1914) 210 F. 864. But see Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937).

[4] Walter v. Lane, [1900] A. C. 539 (one who had reported for the Times a public address had property rights distinct from those of the speaker); Fleron v. Lackaye, 14 N. Y. S. 292 (Super. Ct. 1891) (property right in translation of a novel); Aronson v. Baker, 43 N. J. Eq. 365 (1887) (dramatic work composed of selections from literary compositions which are public property).

[5] The production of a play, Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263 (1911); the delivery of a lecture, Nutt v. National Institute, Inc., for the Improvement of Memory, (C. C. A. 2d, 1929) 31 F. (2d) 236; the playing of a musical composition, McCarthy & Fischer, Inc. v. White, (D. C. N. Y. 1919) 259 F. 364; a performance on the radio, Uproar Co. v. National Broadcasting Co., (D. C. Mass. 1934) 8 F. Supp. 358—do not constitute publication. But see Larrowe-Loisette v. v. O'Laughlin, (C. C. N. Y. 1898) 88 F. 896; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N. Y. 241, 49 N. E. 872 (1898).

[6] See Chafee, "Equitable Servitudes on Chattels," 41 HARV. L. REV. 945 (1928); Wade, "Restrictions on User," 44 L. Q. REV. 51 (1928).

[7] Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848).

[8] Actually there are very few judicial decisions squarely holding in favor of an equitable servitude on chattels. In England: De Mattos v. Gibson, 4 De G. & J. 276 at 282, 45 Eng. Rep. 108 at 110 (1858); London & S. W. Ry. v. Gomm, 20 Ch. D. 562 at 583 (1882); also dictum in Lord Strathcona Steamship Co. v. Dominion Coal Co., [1926] A. C. 108. In America: P. Lorillard Co. v. Weingarden, (D. C. N. Y. 1922) 280 F. 238; Murphy v. Christian Press Assn. Pub. Co., 38 App. Div.

Attempts at price maintenance against sub-purchasers of chattels have been rejected.[9] Likewise, territorial restrictions,[10] restrictions on use, and tying clauses [11] have seldom been given effect. However, since the restriction on use here is not an unreasonable restraint of trade and since it has the effect of encouraging creative work to the benefit of the general public, allowance of an equitable servitude seems desirable. There is, however, some technical difficulty with this concept in the principal case because plaintiff never had legal title to the chattel, i.e., the transcriptions. Never having had legal title, how could plaintiff impose an equitable servitude upon that title? The court could have used the theory of unfair competition as the ground for its decision. Under the modern concept of the "free ride" on another's productive efforts, deception and actual competition are no longer necessary.[12] The decision in the principal case is not based on the right of privacy.[13] Rejection of this possible basis for the decision seems wise in view of the fact that the legal concept of privacy is yet in its formative stage.[14] Such an untoward extension of this concept as would be necessary in the principal case would be apt to have an adverse effect upon its future development, and this would be unfortunate since it is a useful instrument.

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426, 56 N. Y. S. 597 (1899); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937).

Many of the decisions cited in favor of equitable servitudes on chattels are really based upon purely contract principles or upon the tort of Lumley v. Gye, 3 El. & Bl. 114, 118 Eng. Rep. 1083 (1854).

[9] In England: Taddy & Co. v. Sterious & Co., [1904] 1 Ch. 354; National Phonograph Co. v. Menck, [1911] A. C. 336. In America: Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 S. Ct. 722 (1908); Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911). A few state decisions are contra. See 32 A. L. R. 1087 (1924).

[10] Pratt v. Marean, 25 Ill. App. 516 (1888).

[11] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 S. Ct. 416 (1917); Straus v. Victor Talking Mach. Co., 243 U. S. 490, 37 S. Ct. 412 (1917).

[12] In general, see Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?" 33 MICH. L. REV. 321 (1935); Fathchild, "Static and Dynamic Concepts of the Law of Unfair Competition," 1 Mo. L. REV. 299 (1936); also 37 MICH. L. REV. 988 (1939).

International News Service v. Associated Press, 248 U. S. 215, 39 S. Ct. 68 (1918); Associated Press v. KVOS, (C. C. A. 9th, 1935) 80 F. (2d) 575; Pittsburgh Athletic Club v. KQV Broadcasting Co., (D. C. Pa. 1938) 24 F. Supp. 490; Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937).

[13] The right of privacy is still an inchoate field of law. See Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890). But it is fast gaining recognition. See Kunz v. Allen, 102 Kan. 883, 122 P. 532 (1918); Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931); Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 A. 392 (1907). But see, Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442 (1902); Henry v. Cherry & Webb, 30 R. I. 13, 73 A. 97 (1909).

[14] Justice Maxey in his concurring opinion in Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937), bases relief on the right of privacy, but this seems like an unwarranted extension of the doctrine.