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Common Law Copyright in Spontaneous Oral Conversation

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COMMON LAW COPYRIGHT IN SPONTANEOUS ORAL CONVERSATION

INTRODUCTION: COMMON LAW COPYRIGHTS

Common law copyright, as a literary property distinct from statutory copyright, dates from the sixteenth century,[1] and is an incorporeal right.[2] Thus, the ownership of literary property may be vested in one person while its incorporeal embodiment may be held by another. Perhaps the best illustration of these dual property rights is the distinction between the rights of a writer and those of the recipient of a letter. While the physical ownership of the paper on which the message is written is in the recipient, the absolute right to publish the contents ordinarily remains in the writer.[3]

Generally the common law copyright accrues to the originator or author of an intellectual creation.[4] Literary property rights, however, may be transferred by any method by which personal property is transferable, including sale.[5] On the death of its creator, the common law copyright descends to his personal representative or next of kin in the same manner as personal property [6]

The fundamental property right granted the creator by the common law is the exclusive use and control of his literary creation before publication.[7] This absolute monopoly precludes others from publishing or

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* Entered in the Nathan Barkan ASCAP COPYRIGHT LAW COMPETITION, August, 1969.

1. E. S. DRONE, A TREATISE ON THE LAW OF PROPERTY 54 (1879); *see also* H. G. BALL, THE LAW OF LITERARY PROPERTY § 4 (1944). Although common law copyright exists independent of statute, its development has received specific statutory recognition in 17 U.S.C. § 2 (1964), which reads:

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 Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

2. Werckmeister v. American Lithographic Co., 134 F 321, 323-24 (2d Cir. 1904); Pushman v. New York Graphic Soc'y, Inc., 287 N.Y. 302, 307, 39 N.E.2d 249, 250 (1942); H. BALL, *supra* note 1, at § 8.

3. Grigsby v. Breckinridge, 65 Ky (2 Bush) 480, 92 Am. Dec. 509 (1867); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); *see generally* H. BALL, *supra* note 1, at § 225.

4. Werckmeister v. American Lithographic Co., 134 F 321, 324 (2d Cir. 1904); Tomkins v. Halleck, 133 Mass. 32 (1882).

5. Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556, 558 (D.C. Mass. 1928); Pushman v. New York Graphic Soc'y, Inc., 287 N.Y. 302, 39 N.E.2d 249 (1942).

6. Baker v. Libbie, 210 Mass. 599, 97 N.E. 109, 112 (1912); Palmer v. DeWitt, 47 N.Y. 532 (1872).

7. Frohman v. Ferris, 238 Ill. 430, 87 N.E. 327, 328 (1909), *aff'd* 223 U.S. 424 (1912); Palmer v. DeWitt, 47 N.Y. 532 (1872); *see generally* H. BALL, *supra* note 1, at § 15.

reproducing the work by any method,[8] and may be enforced by injunction[9] or an action for damages.[10] It is for the author to determine when and how his creation is to be published, or if it is to be published at all.[11] This bundle of rights, however, is terminated by general publication, and the literary creation becomes the property of the general public.[12] Common law literary rights are also destroyed by the acquisition of a statutory copyright, since the two cannot exist simultaneously in the same literary production.[13]

Unlike statutory copyright, common law copyright is of potentially indefinite duration since it continues until lost by general publication or otherwise abandoned. Since the author is given exclusive control of his creation until general publication, this right is often referred to as "copyright before publication" [14] or the "right of first publication." [15]

Common law property rights exist as the product of man's creative

8. R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940).

9. Grigsby v. Breckinridge, 65 Ky (2 Bush) 480, 92 Am. Dec. 509 (1867)

10. *See, e.g.*, Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (Ct. App. 1935).

11. Frohman v. Ferris, 238 Ill. 430, 87 N.E. 327 (1909); Grigsby v. Breckinridge, 65 Ky (2 Bush) 480, 92 Am. Dec. 509 (1867); Palmer v. DeWitt, 47 N.Y. 532 (1872)

12. Associated Press v. International News Serv., 245 F 244, 250 (2d Cir. 1917), *aff'd* 248 U.S. 215 (1918); Palmer v. DeWitt, 47 N.Y. 532 (1872)

Common law copyrights, however, are not abandoned by a limited rather than a general publication. Where the publication is limited to a selected group of persons, and its use restricted, there has been no general publication. American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Hirshon v. United Artists Corp., 243 F.2d 640, 645 (D.C. Cir. 1957).

> When a literary work is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others. An author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an intent to dedicate it to the public. An unqualified publication by printing and offering for sale is such a dedication. Palmer v. DeWitt, 47 N.Y. 532, 543 (1872).

See also Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 200 (1956).

13. Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182 (1909); Warner Bros. Pictures v. Columbia Broadcasting Sys., 102 F Supp. 141 (S.D. Cal. 1951).

Because common law copyright is destroyed by publication, statutory copyright creates a new property right by providing protection for a specific period of time after publication. The two are, therefore, complementary *See* H. BALL, *supra* note 1, at § 10.

Common law copyright protection is also extinguished by conduct indicating abandonment. Boucicault v. Wood, 3 F Cas. 988 (No. 1693) (C.C.N.D. Ill. 1867).

14. *See, e.g.*, Palmer v. DeWitt, 47 N.Y. 532, 537 (1872).

15. *Id.*, Pushman v. New York Graphic Soc'y, Inc., 287 N.Y. 302, 307, 39 N.E.2d 249, 250 (1942).

mind, regardless of their expressed form.[16] The author may claim an intellectual product as his own in whatever form it can be identified as his creation. Complete originality, however, is not necessary in order to make an intellectual creation the subject of literary property, so long as it is original in its construction.[17] Nor is artistic quality or literary merit essential for obtaining literary protection.[18]

There seems to be little restriction on the variety of literary creations subject to common law copyright protection, assuming that such a creation is neither immoral nor contrary to public policy.[19] Such protection is generally accorded all literary, dramatic, or musical productions.[20] Specific examples include letters,[21] works of art,[22] photographs,[23] the collection of news,[24] and lectures.[25]

A great weight of authority, however, has consistently refused any form of copyright protection in abstract ideas.[26] The opinion of Mr. Justice Brandeis, that "the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use"[27] has been widely echoed by the courts.

16. White v. Kimmell, 94 F Supp. 502, 504 (S.D. Cal. 1950). "Every new and innocent product of mental labor, which has been embodied in writing, or some other material form is the exclusive property of its author." Aronson v. Baker, 43 N.J. Eq. 365, 12 A. 177, 178 (Ch. 1888).

17. Schwarz v. Universal Pictures Co., 85 F Supp. 270 (S.D. Cal. 1945); Aronson v. Baker, 43 N.J. Eq. 365, 12 A. 177 (Ch. 1888). *See generally* H. BALL, *supra* note 1, at §§ 46-48.

18. Dieckhaus v. Twentieth Century-Fox Film Corp., 54 F Supp. 425 (E.D. Mo. 1944), *rev'd on other grounds*, 153 F.2d 893 (8th Cir.), *cert. denied*, 329 U.S. 716 (1946); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).

19. Keene v. Kimball, 82 Mass. (16 Gray) 545, 549 (1860).

20. Stevens v. Continental Can Co., 308 F.2d 100, 103-04 (6th Cir. 1962), *cert. denied*, 374 U.S. 810 (1963); Frohman v. Ferris, 238 Ill. 430, 87 N.E. 327 (1909); Tomkins v. Halleck, 133 Mass. 32 (1882); Palmer v. DeWitt, 47 N.Y. 532 (1872).

21. Grigsby v. Breckinridge, 65 Ky (2 Bush) 480, 92 Am. Dec. 509 (1867); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); *see generally* H. BALL, *supra* note 1, at § 225.

22. American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Stevens v. Continental Can Co., 308 F.2d 100 (6th Cir. 1962)

23. Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182 (1909).

24. International News Serv. v. Associated Press, 248 U.S. 215 (1918).

25. McDermott Commission Co. v. Board of Trade, 146 F 961, 963 (8th Cir. 1906)

26. *See, e.g.*, Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960); Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257 (1956); Thomas v. R.J. Reynolds Tobacco Co., 350 Pa. 262, 38 A.2d 61 (1944); *see generally* P. WITTENBERG, THE LAW OF LITERARY PROPERTY 178-82 (1957); Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119 (1954)

27. International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (dissenting opinion).

An idea is usually not regarded as property, because all sentient beings

While the courts have refused protection to the originator of an idea in actions based upon the property concepts inherent in common law copyright, relief has often been granted under the theories of express contract,[28] contract implied-in-law,[29] contract implied-in-fact,[30] and breach of confidential relationship.[31] In the typical case based upon contract implied-in-law, the plaintiff has disclosed his idea to the defendant, and the defendant has received such benefit therefrom that the law implies an obligation to pay.[32]

Even where courts have granted protection to the originator of an idea under a contract theory, they have often required that the idea be first reduced to a "concrete" or tangible form.[33] Similarly, there is some authority[34] requiring that any literary creation be reduced to writing or other material form before it is accorded common law copyright protection. Of course, no copyright protection is given by the common law even to abstract ideas reduced to writing, but rather to the manner of expression of that idea.[35]

> may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons. Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257, 265 (1956).

Cf. the opinion by Judge Irving Lehman: "There may be literary property in a particular combination of ideas or in the form in which the ideas are embodied. There can be none in the ideas." Fendler v. Morosco, 253 N.Y. 281, 287, 171 N.E. 56, 58 (1930).

28. *See, e.g.*, Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (1953); Brunner v. Stix, 352 Mo. 1225, 181 S.W.2d 643 (1944).

29. *See, e.g.*, Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631 (2d Cir. 1946); Belt v. Hamilton Nat'l Bank, 168 F Supp. 689 (D.D.C. 1952); Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P.2d 1053 (1936).

30. *See, e.g.*, Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (1953); Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N.Y.S.2d 404 (1941).

31. *See e.g.*, Radium Remedies Co. v. Weiss, 173 Minn. 342, 217 N.W 339 (1928); Sachs v. Cluett-Peabody & Co., 265 App. Div. 497, 39 N.Y.S.2d 853 (1943); *cf.* Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N.Y.S.2d 404 (1941).

32. Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (1953). *See, e.g.*, Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631 (2d Cir. 1946).

33. *See, e.g.*, Belt v. Hamilton Nat'l Bank, 108 F Supp, 689 (D.D.C. 1952); Stanley v. Columbia Broadcasting Sys., 35 Cal. 2d 653, 221 P.2d 73 (1950); Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643 (1944); Thomas v. R. J. Reynolds Tobacco Co., 350 Pa. 262, 38 A.2d 61 (1944) For a discussion of what form an idea must take to fulfill the requirement of "concreteness," *see* Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119, 140-44 (1954).

34. Thompson v. Famous Players-Lasky Corp., 3 F.2d 707 (N.D. Ga. 1925); Palmer v. DeWitt, 47 N.Y. 532, 537 (1872).

35. Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930); *accord*, Schonwald v. F Burkhart Mfg. Co., 356, Mo. 435, 202 S.W.2d 7 (1947)

Assuming that this tangibility requirement is uniformly applied to the law of copyright before publication, there is little doubt that spontaneous oral conversation cannot be the subject of such protection.[36] Until recently, the courts have rarely been confronted with this issue. The recent decision in *Estate of Hemingway v. Random House, Inc.*,[37] however, discusses this and other objections to making oral conversations the subject of literary ownership.

Estate of Hemingway v Random House, Inc.

Following the death of Ernest Hemingway in 1961, a dispute arose over the ownership of the content of conversations which A. E. Hotchner had had with Hemingway Defendant Hotchner had been a close friend of Ernest Hemingway during the last thirteen years of Hemingway's life. During this period, Hotchner, himself an author and playwright of some note, had been a frequent visitor and traveling companion of Hemingway, had written several articles about Hemingway, and had adapted several of Hemingway's works for motion pictures and television. Conversations between Hemingway and the defendant were filled with reminiscense, anecdote, and literary opinion, and Hotchner had made accurate notes of each conversation soon afterward, often employing a tape recorder during the conversations.

Several years after Hemingway's death, Hotchner wrote a book entitled *Papa Hemingway· A Personal Memoir*, which was published by the co-defendant, Random House, Inc. The book is drawn primarily from the author's notes and recollections and may be described as a biographical portrait of the last decade of Hemingway's life. Throughout the narration, the author includes extensive quotation from his conversations with Hemingway [38]

Ernest Hemingway's wife, the plaintiff in this action, contended that "all of the material incorporated in the book which is based upon the language, expressions, comments and communications of Ernest Hemingway, is subject to a common law copyright . . which right

36. See notes 43-49 *infra* and accompanying text for a discussion of the tangibility requirement as applied to spontaneous oral conversations.

37. 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct.), *aff'd. mem.*, 25 App. Div. 2d 719, 269 N.Y.S.2d 366 (1966); 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct.), *aff'd. mem.*, 29 App. Div. 2d 633, 285 N.Y.S.2d 568 (1967), *aff'd.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

38. The statement of facts is taken primarily from 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771.

belongs solely to his estate." [39] This claim was based on the theory that the quotations from the conversations of Hemingway were his literary creation and property, and that the defendant's note-taking only performed the mechanics of recordation.

> [Hemingway's] speech, constituting not just a statement of his ideas but the very form in which he conceived and expressed them, was as much the subject of common law copyright as what he might himself have committed to paper.[40]

The New York Supreme Court twice rejected the plaintiff's claim of literary property in her decedent's conversations, or in any spontaneous oral conversations.[41] While affirming the lower court's decision, the New York Court of Appeals indicated that there might be a proper case in which common law copyright protection would be given to spontaneous oral converations.[42] The purpose here is to review the various considerations involved in determining how far common law protection might extend to oral conversations.

The Tangibility Requirement

Perhaps the most obvious objection to property rights in one's oral conversation is the intangible nature of the speech involved. The same reasoning which has been applied to the case of abstract ideas, discussed earlier, might also be applied to oral conversation:

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39. 49 Misc. 2d at —, 268 N.Y.S.2d at 534.

Plaintiff also contended (1) that the defendant's book would unfairly compete with the literary works of Ernest Hemingway; (2) that the defendant acquired his notes while in a position of trust and confidence; and (3) that the references to the plaintiff contained in the book violate her statutory right of privacy under § 51 of the New York Civil Rights Law. *Id.*

The New York Court of Appeals disposed of these contentions by concluding (1) that the defendant's book did not compete at all with Ernest Hemingway's works; (2) that if there were a confidential relationship, it did not relate to the conversations published; and (3) that Mrs. Hemingway is a public figure. 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771.

40. 23 N.Y.2d at 345, 244 N.E.2d at 254, 296 N.Y.S.2d at 776.

41. 49 Misc. 2d 726, 268 N.Y.S.2d 531 (1966); 53 Misc. 2d 462, 279 N.Y.S.2d 51 (1967). In the earlier case, the plaintiff sought to enjoin publication of the defendant's book, while in the later case, plaintiff brought an action for recovery. The first case is noted in 67 COLUM. L. REV. 366 (1967); 52 IOWA L. REV. 105 (1966); 39 U. COLO. L. REV. 143 (1966).

42. 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771.

> A distinction exists between physical and mental efforts in that the former produces corporeal and the latter incorporeal results An idea, sometimes likened to ferae naturae, does not have physical attributes and escapes the creator's dominion when uttered.[43]

The lower court ruled in the *Hemingway* case that there can be no property rights in conversation even though it may be preserved through the use of recording devices,[44] but the court did not base this conclusion on the argument that recording alone is insufficient to fulfill any requirement of tangibility Failing to rest their decision on such a requirement, the lower court argued, rather, that to restrict the use of oral conversations to non-verbatim accounts would only create inaccuracy and encourage fictionalization. The use of recording devices, therefore, should not be discouraged by granting common law copyright protection only to recorded versions.[45]

Indeed, the New York Court of Appeals has apparently concluded that it is not the fact that a conversation is intangible that prevents it from receiving copyright protection.[46] The *creation* of a literary work, the court reasons, is given copyright protection rather than its tangible embodiment.[47] The court has wisely chosen to follow the argument of a leading authority in the field of copyrights that, "the underlying rationale for common law copyright (i. e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form." [48]

The court also has refused to grant protection to oral conversation based upon the plaintiff's analogy to the common law copyright protec-

43. Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643, 646 (1944); *cf.* Schonwald v. F Burkhart Mfg. Co., 356 Mo. 435, 202 S.W.2d 7, 12 (1947).

44. 53 Misc. 2d at —, 279 N.Y.S.2d at 60-61.

45. *Id.*

46. 23 N.Y.2d at 346, 244 N.E.2d at 254, 296 N.Y.S.2d at 776-77

47. *Id.*

48. M. NIMMER, COPYRIGHT § 11.1 (1966).

> The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206 (1890).

tion given to personal letters.[49] While the court characterizes personal letters as "a kind of half-conversation in written form," [50] it recognizes that conversational speech is a separate and distinctive form of human behavior, and therefore presents unique considerations. Frequently, different motivations prompt these two forms of communication just as the mannerisms of expression often differ between the two. The analogy is thus an unsatisfactory one and was properly rejected by the court.

The Reciprocal Nature of Speech

One of the lower court's primary considerations in the *Hemingway* case was the reciprocal nature of the oral conversations involved:

> Conversation is a media of expression of unique character. Because of its several nature any conversational exchange necessarily reflects the various participants thereto not only with respect to the direct contributions of each but also insofar as each party acts as a catalyst in evoking the thoughts and expressions of the other. The articulations of each are to some extent indelibly colored by the intangible influence of the subjective responses engendered by the particular other. Conversations cannot be catalogued as merely the cumulative product of separate and unrelated individual efforts, but, on the contrary, it is rather a synthesized whole that is indivisibly welded by the interaction of the parties involved.[51]

The plaintiff replied that Hemingway's contributions to the conversations with the defendant were self-sufficient literary products. The court rejected this contention also, arguing that it would lead to the problem of measuring the relative self-sufficiency of each parties' contributions to the conversations.[52] Because the contributions of each participant cannot be clearly segregated from the thought processes of the other, the court concluded that copyright protection should not be granted to either party.

This conclusion has been properly criticized for failing to recognize the originality of each participant's contribution prerequisite to copyright protection.[53] While the contribution of each party is influenced by

49. 23 N.Y.2d at 346-47, 244 N.E.2d at 254, 296 N.Y.S.2d at 777

50. 23 N.Y.2d at 346, 244 N.E.2d at 254, 296 N.Y.S.2d at 777

51. 49 Misc. 2d at –, 268 N.Y.S.2d at 536-37.

52. 53 Misc. 2d at –, 279 N.Y.S.2d at 59.

53. 67 COLUM. L. REV. 366, 367 (1967).

the thoughts of the other, this quality does not differentiate conversation from any form of written communication which is the subject of literary protection. The development of most literary productions is indelibly colored by the thoughts and ideas of one's contemporaries and predecessors. Complete originality is not a prerequisite to copyright protection. Therefore, a mere compilation of the creations of others may be entitled to separate copyright protection.[54]

The court is on somewhat firmer ground in pointing out the problem of measuring the relative self-sufficiency of each parties' contributions to the conversation. While this is by no means a new inquiry in the area of copyright infringement, it is certainly the more difficult of resolution in the case of oral conversation. This is a problem of evidence only, however, the burden of which falls on the party asserting the infringement. To assert this problem as a basis upon which to reject literary protection of oral conversations is to revert to the requirement of tangibility which the court has already rejected.

The Organization and Coherence of Speech

By way of defense, Hotchner asserted that the portions of Hemingway's conversation quoted were his own version based upon the notes which he kept, and not necessarily verbatim accounts.[55] The court also points out that the quoted portions of Hemingway's conversation are given organization and coherence by the defendant. The random and disconnected nature of conversation is given meaning through the arrangemnet given them in the defendant's book.[56] Therefore, copyright protection for the reported conversations rightfully belong to the defendant author rather than to the plaintiff.[57]

Although there may be some merit to the court's argument in de-

54. Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257 (1956); Stanley v. Columbia Broadcasting Sys., 35 Cal.2d 653, 221 P.2d 73 (1950).

55. 49 Misc. 2d at —, 268 N.Y.S.2d at 536. The defendant also claimed that substantially all verbatim quotations gathered from tape recordings and letters were deleted from the galley proofs, leaving only the defendant's renditions of Hemingway's conversation gathered from his note-taking. *Id.*

56. *Id.* at —, 268 N.Y.S.2d at 537.

57. *Cf.* Harris v. Miller, 50 U.S.P.Q. 306 (S.D.N.Y. 1941). In this case, the plaintiff had written a book in which he recreated conversations which he had had with Oscar Wilde. The defendant wrote a play making use of the quoted dialogue, claiming that they could not be the subject of statutory copyright. The court held that plaintiff was entitled to copyright protection for the quoted dialogue, pointing out that they were the plaintiff's own version and were, hence, his own original literary products.

termining the outcome of this particular case, this consideration is of little help in resolving the issue as originally framed by the court—whether a person's participation in spontaneous oral conversation may be a literary creation subject to a common law copyright. One writer has also criticized the court's argument for failing to recognize that the misappropriation of the words of another cannot be defended by asserting that the wrongdoer has also made contributions to a literary creation.[58]

In emphasizing that the quotations from the conversations of Hemingway are not necessarily verbatim, but rather the defendant's rendition, the lower court seemingly contradicted one of its earlier agruments against restricting reportage to only non-verbatim accounts. Such a result would, as previously discussed, serve to encourage fictionalization. Therefore, in copyright protection no distinction should be made between verbatim accounts of a conversation and an author's rendition based upon later notes.

Undue Restraint Upon the Freedom of Speech

The most important argument advanced by the lower court concerns the social cost of applying common law copyright as a limitation on speech—an area pregnant with legal and social implications. "The intellectual benefits derived from access to the intimate articulations and experiences of figures of note and achievement are emphatically demonstrated by the enduring fame and inspirational stimulus of the works of recorders such as Plutarch, Boswell, and Carlyle." [59] Citing a "basic tradition" that "what any man says or does may be reported, quoted or written about in the interest of maintaining the freedom of access to all kinds of information," [60] the court felt that recognizing literary property in oral conversation would have a revolutionary effect upon freedom of speech and press.[61]

This reasoning is criticized as failing to recognize that freedom of speech encompasses the freedom to express oneself in privacy,[62] and

58. 67 COLUM. L. REV. 366, 368 (1967).

59. 49 Misc. 2d at —, 268 N.Y.S.2d at 536. The court continues by stressing the necessity of free exchange and dissemination of information in maintaining an informed citizenry. *Id.*

60. 53 Misc. 2d at —, 279 N.Y.S.2d at 60.

61. *Id.* The court does, however, recognize restriction upon this freedom in favor of the individual's "right to be free from malicious falsehood or invasion of privacy" *Id.*

62. 67 COLUM. L. REV. 366, 367 (1967).

that to allow general publication of remarks intended for only a few is violative of the first amendment. The New York Court of Appeals, in restricting the breadth of the lower court's ruling, expressed a similar opinion:

> The indispensable right of the press to report on what people have *said in public* does not necessarily imply an unbounded freedom to publish whatever they may have *said in private conversation*, any more than it implies a freedom to copy and publish what people may have put down in *private writings*.[63]

The Court of Appeals refused to base its decision upon such a consideration, however, expressly suggesting that common law copyright in one's oral statements might conceivably exist in a proper case.[64] Although it is obvious that some form of protection is needed in the case of conversation intended only for a few, the means suggested by the Court of Appeals is improper. Common law copyright is directed toward the protection of a *property* interest in the creator of a literary production. Other, more appropriate means of protection are, in many instances, available for the protection of a *personal* right. The principle of privacy is such a right.[65] Even though the right of privacy may not encompass the present problem, a proper expansion of this right would be a more appropriate relief than an extension of the concept of common law copyright. Other remedies, such as actions for libel, slander, or breach of confidence, might be used where appropriate.

Conclusion

While the New York Court of Appeals affirmed the decision of the lower court, the court avoided basing its decision on any of the considerations raised in the lower court.

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63. 23 N.Y.2d at 347, 244 N.E.2d at 255, 296 N.Y.S.2d at 778.

64. *Id.* at 348, 244 N.E.2d at 255, 296 N.Y.S.2d at 778.

65. *See* Warren & Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890). This article represents an important milestone in the development of the right of privacy Although not of this century, the article anticipates the present problem:

> The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. *Id.* at 198-99.

See generally M. Ernst & A. Schwartz, Privacy: The Right To Be Let Alone (1962)

Over the years of their intimacy, Hemingway imposed no restriction upon the usage of the notes and recordings he knew the defendant was making of their conversations. Indeed, the defendant and other writers had, during Hemingway's lifetime, made free use of quotations from Hemingway's conversations in articles they had written. Hemingway made no protest about these practices, even though he occasionally disliked the article published.[66]

Drawing from these facts, the Court of Appeals chose to base its decision upon an authority implied by the actions of Hemingway to freely publish his contributions to the conversations had with the defendant. The court, therefore, did not offer a final resolution of the issue of whether a spontaneous oral conversation may be the subject of a common law copyright.

While the present decision fails to dispose of the central problem, the court speculates on the extent of the common law copyright in oral dialogue, assuming that such a literary property exists.[67] The court suggested that it should, "at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication." [68] Such an indication of dominion could be made by the speaker in his prefatory remarks, or the circumstances under which the conversation is made.[69]

The Court of Appeals, however, never established the *need* for the common law copyright protection in which it speculates. The vehicle to be used for protecting the *property* rights in oral conversation may already exist. Just as a cause of action for the misappropriation of abstract ideas may be based upon the theories of express contract, contract implied-in-law, contract implied-in-fact, and breach of confidential

66. 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771.

67. *Id.* at 349, 244 N.E.2d at 256, 296 N.Y.S.2d at 779.

68. *Id.*

69. In support of this last "speculation," the New York Court of Appeals cites the earlier decision in Jenkins v. News Syndicate Co., 128 Misc. 284, 219 N.Y.S. 193 (Sup. Ct. 1926). In that case, the plaintiff verbally disclosed in detail the content of several articles which she negotiated to write for the defendant newspaper. After the defendant decided not to write the articles, the newspaper published an account of the interview with the plaintiff, including an accurate reproduction of the articles proposed. Although the court, in the Jenkins case, recognized a "common law property" in the plaintiff's verbal account of her proposed articles, the decision is equally based upon a theory of implied contract. See note 73 *infra*, and accompanying text.

relationship, so also may one's property rights be protected in oral conversation. Similarly, the vehicle to be used for protecting one's *personal* rights in oral conversation may already exist. In short, until the need for copyright protection can be shown, it is merely useless speculation to attempt to determine the extent of literary property in conversation.

The informal nature of oral conversation is another important consideration which has been only touched upon as yet. It cannot be doubted that the vast majority of oral conversation could never have been intended by its speaker to have been the subject of literary property. In those rare occasions where the speaker may have assumed some form of literary protection, he cannot rely upon that intangible utterance alone for preservation. Undoubtedly, such a person must commit his words to preservation via writing or other recordation. Indeed, refusing literary protection to the mere spoken word may serve to encourage the preservation of one's literary product, while extinguishing the requirement of preservation could, conceivably, result in its permanent loss.

The literary development of a communication will also vary sharply between common conversation and that intended for preservation. While the oral dialogue of a few may be as highly developed an any manuscript, literary protection cannot be extended to only those few, but must be extended to all.[70]

Probably the best legal treatment of oral conversation would be the same now accorded abstract ideas. In absence of the protection of express or implied contract, the originator of an abstract idea loses all property rights in that idea upon disclosure to another. Of course, he may choose not to disclose his idea until it is embodied in such a form that the law grants protection. Similarly, the participant in an oral dialogue may easily avail his literary products of copyright protection by embodiment in a protected form of communication.

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70. 53 Misc. 2d at ., 279 N.Y.S.2d at 60.