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Copyright--The Doctrine of Limited Publication

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Separate trials for the issues of liability and damages in personal injury cases is an excellent method for alleviating court congestion. The use of such a proceeding should be left to the sound discretion of the trial judge, but should not be resorted to in those cases in which such severance would deprive the litigants of any substantive or procedural rights or when the issues are inextricably interwoven.[33]

SHELDON M. EISNER

COPYRIGHT — THE DOCTRINE OF LIMITED PUBLICATION

Public Affairs Associates, Incorporated v. Rickover, 284 F.2d 262 (D.C. Cir. 1960)

Public Affairs Associates, a publishing house, requested copies of Admiral H. G. Rickover's public addresses for the purpose of publishing them in collected book form. The admiral sent them his speeches and informed the publisher that he himself was currently contemplating publishing a similar collection, that the addresses were under the protection of common-law copyright, and that an unpermitted publication would constitute an actionable infringement of that copyright.

Public Affairs Associates filed for a declaratory judgment to establish the fact that the printed speeches had become public property, and could not be monopolized by an individual. It was contended that the use of government secretaries, materials, and copying machines rendered the speeches publications of the United States and that the copyright statutes specifically exclude government publications from protection.[1] It was further argued that since rather extensive distribution of the speeches had been made to interested parties, a general publication had taken place, and that this constituted an irrevocable dedication to the public domain. The lower court regarded summarily the issue of general publication, and dismissed it. The opinion emphasized that the speeches were not in any way connected with Admiral Rickover's function as a government official, and that it was not in the public interest "to hamper

subsequent case has been reported, the author assumes that the parties have settled on the issue of damages.

33. "The rule is limited to personal injury and other civil cases wherein the issue of liability is separate from and independent of the issue of damages." O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 587 (N.D. Ill. 1960). There are some cases in which damages must be proved in order to establish liability, as in antitrust suits, see McClain v. Socony-Vacuum Oil Co., 10 F.R.D. 261 (S.D. Mo. 1950), and suits predicated upon fraud, see United States ex rel. Rodrigeuz v. Weekly Publications, Inc., 9 F.R.D. 179 (S.D.N.Y. 1949). There are also suits in which the law requires damages to be assessed in accordance with the degree of defendant's liability, as in cases under certain federal tort statutes and cases in states which apply the comparative negligence principle. The rule, therefore, leaves the separation of issues wholly within the discretion of the trial judges.

the intellectual growth of anyone or to interfere with the development of his ideas merely because the person who is uttering them happens to be employed by the government."[2]

The court of appeals affirmed the holding that the lectures were not government publications, but reversed the decision on the ground that a general publication had occurred, divesting Admiral Rickover of any property rights to which he had been previously entitled.[3]

General publication consists of such unrestricted communication of a literary work as implies abandonment of property rights and a dedication of the work to the public domain.[4] Prior to publication, an author is entitled to ownership and control of his productions; but once abandonment has occurred, the author becomes permanently divested of his work, and the public may utilize the abandoned material without restraint.[5] Copyright is legal protection by which an author may widely communicate his literary works, and yet preserve for a limited time the entire control of reproduction.[6] The doctrine of general publication, tempered by copyright, reconciles two seemingly conflicting social purposes: the author is encouraged to write through protection of his works from public usurpation,[7] and innocent persons are placed on notice as to what is copyrighted and are thereby protected from the penalties for infringement.[8]

A person may publish and distribute a literary work while retaining the exclusive right to reproduce it; but he must place notice upon the publication to indicate that it is copyrighted.[9] It is this notice which is the essence of statutory copyright. Registration, deposits, and other formalities perfect the copyright, and expand the author's rights, but all that is necessary to receive the general protection of law is notice.[10] In

1. 17 U.S.C. § 8 (1958).

2. Public Affairs Associates, Inc. v. Rickover, 177 F. Supp. 601, 604 (D.D.C. 1959).

3. Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960).

4. International News Service v. Associated Press, 248 U.S. 215 (1918); Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); Grandma Moses Properties v. This Week Magazine, 117 F. Supp. 348 (S.D.N.Y. 1953); Wagner v. Conried, 125 Fed. 798 (S.D.N.Y. 1903); Hirsch v. Twentieth Century-Fox Film Corp., 207 Misc. 750, 144 N.Y.S. 2d 38 (Sup. Ct. 1955).

5. Werckmeister v. American Lithographic Co., 134 Fed. 321, 326 (2d Cir. 1904).

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

7. U.S. CONST. art. I, § 8; Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

8. Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), *cert. denied,* 331 U.S. 820 (1947); Stecher Lithographic Co. v. Dunston Lithographic Co., 233 Fed. 601 (W.D.N.Y. 1916).

9. 17 U.S.C. § 10 (1958).

10. Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, *rehearing denied,* 306 U.S. 668 (1939); Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54 (1st Cir. 1896); Davenport Quigley Expedition v. Century Productions, 18 F. Supp. 974 (S.D.N.Y. 1937).

the absence of such notification, an author is entitled to common-law protection,[11] and only so long as his work is kept from the public eye can he retain complete ownership and control.[12]

The principle of general publication, if indiscriminately applied, could result at times in hardship and unjust losses of literary property. The courts have recognized this, and have evolved the rule of limited publication, to remedy the harshness of abandonment.[13] When an author limits the distribution of his literary property both as to persons and as to purpose, the common-law protection is not lost, for there has been no general publication.[14]

Thus, where an author gave copies of her manuscript to a few selected people for the sole purpose of receiving their criticism, she did not forfeit her property.[15] On the other hand, where copies of a booklet were mailed to 200 insurance companies, and a large number of copies were left on tables in the lobby of a hotel where an insurance agents' convention was being held, abandonment occurred and the author lost his common-law protection.[16]

In determining whether a particular publication constitutes abandonment, the courts have attempted to deal with the question of the author's intent. Thus, it has been held that abandonment must be evidenced by some overt act, indicative of the author's purpose to surrender his rights and to dedicate his work freely to the public at large.[17] Such reasoning is, of course, circular. The fact that there has been abandonment under law must be deemed to presuppose subjective intent to abandon.[18] Any other supposition would be unreasonable, since abandonment and dedication would thereby never occur.[19]

Admiral Rickover printed copies of his lectures without statutory notice and sent them to all and any interested parties. The fact that he did not subjectively intend to dedicate the lectures to the public at large

11. 17 U.S.C. § 2 (1958): "Nothing in this title shall be construed to annul or limit the rights of an 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."

12. See, *e.g.*, Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Holmes v. Hearst, 174 U.S. 82 (1899).

13. Comment, 7 BAYLOR L. REV. 442, 445 (1955).

14. Press Publishing Co. v. Monroe, 164 U.S. 105 (1896); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952), *cert. denied*, 343 U.S. 957 (1952).

15. 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).

16. American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956).

17. Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960); National Comics Publications v. Fawcett Publications, 191 F. 2d 594 (2d Cir. 1951).

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

19. Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. SOC'Y. 642, 643-644 (1955).

was of no bearing, and the court held that this was a general and not a limited publication. A dissent in the *Public Affairs* case compared the question before the court with that involved in *Chicago Record-Herald Company v. Tribune Association.*[20] In that case a Western newspaper, taking advantage of the differences in time, pirated news verbatim from the plaintiff's publication. It was held that news itself is not subject to protection; however, the manner of expression, arrangement, and literary flavor, remains the distinct property of the author.

While it is true that in the *Public Affairs* case the statutory form of notice[21] was not strictly complied with, Admiral Rickover's letter put the plaintiff on actual notice. There was no problem of protecting the innocent infringer.[22] Prior to the bringing of this action Public Affairs Associates had performed no affirmative act in the production of its proposed publication, but was merely trying to divest Admiral Rickover of what he had previously believed to be his own property. It has been proposed that if the purpose of Congress in allowing a writer to own a monopoly in his literary productions was to promote the public welfare by encouraging creativity, special consideration should be given in favor of men in the public eye.[23]

In a case essentially similar to this one, manuscripts on spiritual communication were refused common-law protection, partly because the frivolity of the subject matter did not warrant it.[24] Rickover's speeches were, on the contrary, not frivolous. They dealt with essential military and educational reform. These were subjects about which the entire nation was deeply concerned.[25] It could be argued that in view of the timeliness and importance of Rickover's lectures, "limited as to person" should include the entire nation, and "limited as to purpose" should include the broad general purpose of essential educational and military reform, thereby giving him the protection of limited publication.[26]

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20. 275 Fed. 797 (7th Cir. 1921).
21. 17 U.S.C. § 19 (1958).
22. See Schellberg v. Empringham, 36 F.2d 991 (S.D.N.Y. 1929): Author neglected to place statutory copyright on pamphlets which he passed out to patients. Held: since defendant had been told these were copyrighted, he was liable in action for infringement.
23. Note, 73 HARV. L. REV. 1219 (1960).
24. White v. Kimmell, 193 F.2d 744 (9th Cir. 1950).
25. The lectures in question covered the period from 1955 to 1959. At the same time a public controversy over educational reform was raised by FLESCH, WHY JOHNNY CAN'T READ (1955). Rickover is still one of the most controversial dissenters in this nation-wide re-evaluation of our educational system.
26. Rickover has, since the institution of this case, published some of his speeches in book form, and has received statutory protection of that book, RICKOVER, EDUCATION AND FREEDOM (1959).