WHEN DOES A PROFESSOR LOSE HIS COMMON LAW RIGHTS IN HIS LECTURE?

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I. INTRODUCTION

Even without the aid of the Copyright Code,[1] a professor normally acquires rights against anyone who publishes his lecture without his permission.[2] These common law rights sometimes are lost, however, by his very efforts to use his lecture to advantage.[3] It is the purpose of this paper to consider the principles which determine the extent to which a professor may enjoy the benefits of his lecture without losing his common law rights in it.

A. Lecture As Intellectual Property

Whether a lecture is delivered extemporaneously, or is read from a manuscript, or exists only in writing, a lecturer's rights in his work are a form of intellectual property.[4] This is true regardless of the merit of the work.[5]

Intellectual property arises not only from forms of intellectual work which are expressed in words, such as novels, dramas, poems, texts, speeches and lec-

[1]17 U.S.C. (1952).

[2]Abernethy v. Hutchinson, 3 L.J. (Ch.) 209 (1825); Nicols v. Pitman, 26 Ch. Div. 374, (1884); Caird v. Sime, 12 A.C. 326 (1887); Sherrill v. Grieves, 57 Washington (D.C.) Reporter 286 (1929); Nutt v. National Institute Inc., 31 F. 2d 236 (2d Cir. 1929); Accord, Donaldson v. Becket, 4 Burr. 2408 (1774); Ferris v. Frohman, 223 U.S. 424 (1912).

[3]Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898). Accord, Holmes v. Hurst, 174 U.S. 82 (1899); White v. Kimmell, 193 Fed. 2d 744 (9th Cir. 1952); Continental Casualty Co. v. Beardsley, 253 F. 2d 702 (2d Cir. 1958).

[4]Warren and Brandeis, "Right of Privacy," 4 *Harv. L. Rev.* 195 (1890). A lecturer's interest in his lecture often is referred to as his "literary property." Not only is "literary property" used in its derivative sense to refer to rights in a lecture in written form, but also it sometimes is used to refer to a lecturer's rights arising solely from the oral delivery of a lecture. E.g., Oertel v. Wood, 40 How. Pr. (N.Y.) 10 (Sup. Ct. 1870).

[5]Prince Albert v. Strange, 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (Ch. 1848), aff'd 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849). Warren & Brandeis, "Right of Privacy," 4 *Harv. L. Rev.* 195 (1890). (passim)

See also Justice Maxey's concurring opinion in Waring v. WDAS Broadcasting Co., 327 Pa. 443, 463, 194 Atl. 631 (1937), wherein he said "Whether a 'star' is brilliant or dim, equity should prevent unauthorized persons from 'hitching their (creaking) wagons to it.'"

The basic requirement is that the work be "original" and not copied. "When a man, by the exercise of his rational powers, has produced an original work, he clearly has a right to dispose of that identical work as he pleases; any attempt to take it from him or to vary the disposition he has made of it is an invasion of his right. . . . " 2 *Blackstone's Commentaries* 405-406 (Lewis's Edition 1902).

tures, but also from such forms as painting, sculpture and music.[6] As a general rule, the same broad principles govern all of the various forms of intellectual property, and precedents set in cases involving one form usually carry substantial weight when courts consider others. This is highly significant in the present discussion because there are relatively few cases which deal directly with a professor's lectures, and relevant legal principles often must be sought in cases treating other types of intellectual property.

All intellectual property, whether protected by statute or not, originates in the application of legal principles developed at common law.[7] So long as any kind of intellectual property owes its existence solely to these principles, and does not depend upon statutory protection, it is referred to as common law intellectual property.[8] It is with the common law rights in intellectual property that this paper is primarily concerned.

It has been suggested that the common law right in intellectual property is but an aspect of the individual's right of privacy.[9] Almost two hundred years ago, in the case of *Millar v. Taylor,*[10] the court, in holding that the plaintiff's common law rights in his book had been violated, stated, "It is certain that every man has a right to keep his own sentiments if he pleases; he certainly has a right to judge whether he will make them public, or commit them only to his friends. . . ." The close relationship between intellectual property and the right of privacy also was indicated in the celebrated case of *Prince Albert v. Strange*[11] in which the plaintiff sought to enjoin the publication of a descriptive account of certain drawings and etchings which he and his wife, Queen Victoria, had prepared for their own personal use and enjoyment. In granting the injunction the court stated that, "The author of manuscripts, whether he is famous or obscure, high or low, has a right to say of them, if innocent, whether interesting or dull, light or heavy, salable or unsalable, [they cannot], without his consent, be published." Paradoxically, while recognizing its close affinity to the right of privacy, courts usually have referred to the common law right

[6] 13 C.J., "Copyright and Literary Property" §3 (1917). "The common law has long recognized a property right in the products of man's creative mind, regardless of the form in which they took expression." White v. Kimmell, 94 F. Supp. 502, 504 (S.D. Cal. 1950).

[7] See 17 U.S.C. §2 (1952).

[8] Sometimes it is referred to in various other ways such as "common law literary property," "common law right in literary property," or "common law copyright." For the purposes of this discussion, the important thing is that it be distinguished from rights which may arise by virtue of the Copyright Code.

[9] "The legal doctrines relating to infractions of what is ordinarily termed the common law right in intellectual and artistic property are, it is believed, but instances and applications of a general right of privacy. . . . " Brandeis and Warren, "Right of Privacy," 4 *Harv. L. Rev.* 195 (1890).

Intellectual property offers protection against a person's being embarrassed or disgraced as well as against being deprived of a profit. Oertel v. Wood, 40 How. Pr. (N.Y.) 10 (Sup. Ct. 1870).

"It is conceivable that an artist like Paderewski and some obscure pianist might be equally averse to having their musical renditions broadcast. Such broadcasting would trench upon their right of privacy and each would be equally entitled to have the right protected against invasion." Waring v. WDAS Broadcasting Co., 327 Pa. 433, 194 Atl. 631 (1937) (Maxey, J., concurring).

[10] 4 Burr. 2303, 2379 (1769).

[11] 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (Ch. 1848), affirmed on appeal, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).

in intellectual works as property and have endowed it with most of the attributes of property.[12]

Regardless of whether it is viewed as an aspect of the right of privacy, or as property, the principal significance of common law intellectual property is that it entitles a person to the first publication of his work and gives him the right to bar others from publishing it until he has done so.[13] So long as his common law rights in his lecture continue, a professor is entitled to enjoin others from delivering it[14] and he is entitled also to enjoin others from reproducing and selling it in written form.[15]

Common law intellectual property may endure forever.[16] It terminates abruptly, however, upon the first publication of a work with the consent of its author.[17] This fundamental proposition lies at the very heart of the problem which is being considered.

B. Role of Statutory Protection

If, at the time of the first publication of a work, an author has satisfied the requirements of the Copyright Code,[18] the question of when the common

[12]Like most property it can be transferred by sale, gift, will, or intestacy. Unlike most forms of property, however, it cannot, without its owner's consent, be seized by creditors. Bartlett v. Crittenden, 5 McLean 32 (1849). Perhaps the most commonly recognized attribute of property is the legal right to exclude others from enjoying it. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[13]Although the precise limits of the right have never been defined it is certain that it extends beyond barring others from publishing a work. This is particularly true if the right is viewed as a "right of privacy." Plaintiff's right which was invaded was his right to (sic) privacy, which is broader than a mere right of property. A man may object to any invasion of his right to privacy or to its unlimited invasion." (Waring v. WDAS Broadcasting Co., 327 Pa. 433, 194 Atl. 631, (1937). (Maxey, J., concurring; emphasis added.)

See also, American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

[14]Nutt v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929). Accord, Macklin v. Richardson, Ambler 694 (1770); Tompkins v. Halleck, 133 Mass. 32 (1882); Ferris v. Frohman, 223 U.S. 424 (1912).

[15]Abernethy v. Hutchinson, 3 L.J. Rep. 209 (1825 Ch.); Nicols v. Pitman, 26 Ch. Div. 374 (1884); Caird v. Sime, 12 A.C. 326 (1887); Sherrill v. Grieves, 57 Wash. Rep. (D.C.) 286 (1929).

[16]"There is no requirement that unpublished manuscripts be registered, . . . and, as a result, such unpublished material may be withheld from public view in perpetuity by the author and his descendants, no matter how great the public interest in the manuscript." Ferris v. Frohman, 223 U.S. 424, 435 (1912). As the result of this principle, many a literary rose has been destined to waste its blush. In Thompson v. Stanhope, Ambler 737 (1774), this principle was relied on in enjoining the widow of Lord Chesterfield's natural son from publishing letters which the son had received from Lord Chesterfield, and in Phillip v. Pennell, 2 Ch. 577 (1906) it was relied on in enjoining Whistler's authorized biographers from publishing letters which Whistler had written to friends.

The Copyright Code provides that "Nothing in this title shall be construed to annul or limit the rights of the author or proprietor of an unpublished work, at common law or in equity, to prevent copying, publication, or use of such unpublished work, without his consent, and to obtain damages therefor." 17 U.S.C. §2 (1952).

[17]Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Holmes v. Hurst, 174 U.S. 82 (1899); Jeffreys v. Boosey, 4 H.L.C. 815; Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898); Wagner v. Conreid, 125 Fed. 798 (S.D.N.Y. 1903); Fashion Originators' Guild of America v. F.T.C., 144 F. 2d 80 (2d Cir. 1940), aff'd, 312 U.S. 457 (1941).

[18]These requirements are described briefly at page 70 and 79-80 infra.

law rights in an intellectual work terminates is of relatively little importance because, by the very act of publication, he not only loses his common law rights but also gains his "copyright," which is the right granted by statute to bar others from exploiting his work *after* he has published it.[19]

If an author permits his work to be published without his having complied with the requirements of the Copyright Code, however, the work is thrown into the public domain and the author no longer is entitled to assert any special rights in his work, either on the basis of common law intellectual property or on the basis of statutory copyright.[20]

Despite the availability of statutory protection as a replacement for the common law intellectual property which is lost upon the first publication, a professor rarely gives any serious thought to compliance with the statute until a publication has occurred and he has lost his common law rights.[21] At this point, it is too late to obtain the protection of the statute. It is the purpose of this paper to discuss the principles which determine when this point is reached.

II. PUBLICATION

In a broad sense, every communication of an intellectual work is a publication;[22] but obviously not every communication is sufficient to cause the loss of the common law rights in a work. With this in mind, the courts early[23] made a distinction between a "general" publication, which results in the loss of the common law rights, and a "limited" publication, which does not. Usually, when the term "publication" is used without qualification in the law relating to intellectual property, a general, rather than a limited, publication is meant.[24]

Although the courts have made numerous attempts to state the criteria for determining whether a communication of an intellectual work constitutes a general, or a limited, publication, up to this time they have not succeeded in providing any test which is useful in all cases.

A leading case dealing with the question of publication is *Werckmeister v. American Lithographic Co.*[25] In this case the plaintiff sought to enjoin the publication of copies of a copyrighted painting owned by him. The defendant contended that prior to the time when the plaintiff complied with the require-

[19]"Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it." Wheaton v. Peters, 33 U.S. (Pet.) 591 (1834). "The right to make copies before publication and the right to make first publication are common law rights. The right to multiply copies after publication to the exclusion of others is the creature of statute." Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904). An interesting discussion of the history of the relationship between the common law right in intellectual property and statutory copyright is contained in Ball, *Copyright and Literary Property* (1944).

[20]E.g., Holmes v. Hurst, 174 U.S. 82 (1899); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[21]As a practical matter, only a very small fraction of the intellectual property produced in the United States is copyrighted. See, Warner, *RADIO AND TELEVISION RIGHTS*, §10 (1953).

[22]Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

[23]E.g., Macklin v. Richardson, Ambler 694 (1770).

[24]Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

[25]134 Fed. 321 (2d Cir. 1904).

ments of the copyright statute, his common law rights in the work had bee destroyed by its being exhibited in the Royal Academy in London, and that th work therefore was not protected by the copyright statute. In opposing this con tention, the plaintiff proved that the public, other than members of the Academ and exhibitors and their families, were not entitled to admission except upo the payment of an entrance fee, and that no permission had been granted t copy the work. The court conceded that the statutory copyright could be vali only if the common law intellectual property in the work had not been destroye by a general publication prior to the time the copyright statute had been complie with. It held, however, that there had been only a limited publication.

It supported this conclusion by stating several broad principles which fre quently have been cited with approval by other courts and authorities. "A genera publication," it said, "consists in such a disclosure, circulation, exhibition, o distribution of the subject of copyright, tendered or given to one or more mem bers of the public, as *implies an abandonment of the* right of copyright *or it dedication* to the public."[26] In contrast, it said, "A limited publication of a subject of copyright is one which communicates a knowledge of its content under conditions expressly or *impliedly precluding its dedication* to the public."[27]

As satisfying as these statements may be if one is seeking only a panorama of the subject, they offer little guidance when concrete cases are being con sidered. The principal reason for this is the use of the terms "implies" and "impliedly" which frequently have caused difficulty when they have appeared in legal opinions. Standing alone or together, the terms "abandon" and "dedicate" might offer sufficient guidance to be useful. Each of these terms usually signi fies an actual intention to give up legal rights.[28] But an attempt to determine whether or not the communication of a work "implies" such an intention or whether or not there are conditions "impliedly" precluding such an intention is certain to raise this fundamental question: Is determining the nature of a publication simply a matter of determining the actual intention of the party communicating his work or will the courts "imply" the presence or lack of intention on the basis of objective factors without reference to his actual in tention?

The answer is that sometimes the courts are guided by what they find to be the actual intention of the party communicating his work and sometimes they are not.[29] When the evidence is clear that a person communicated his work with an actual intention to relinquish his common law rights, it is difficult to conceive of a court's failing to hold that a general publication has occurred. On the other hand, the fact that it clearly appears that the party communicating his work did not intend to give up his rights does not necessarily lead to the conclusion that only a limited publication has occurred. As the following dis cussion will show, in some situations objective factors are deemed to be of suf-

[26]Id. at 326. (Emphasis added.)
[27]Id. at 324. (Emphasis added.)
[28]Black, *Law Dictionary* (4th ed. 1951).
[29]But see American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299-300 (1907).

ficient weight to justify a holding that a general publication has occurred despite the owner's obvious intention to retain all of his rights in his work.[30]

III. PUBLICATION OF A LECTURE IN WRTTEN FORM

In the vast majority of cases, a professor will attempt to derive advantage from his lecture by delivering it orally. Sometimes he will use it in written form as well. A general publication may occur in either way.[31] Whichever way it occurs, it normally deprives him not only of his right to bar others from delivering his lecture orally,[32] but also of his right to bar others from exploiting it in written form.[33] Although the legal consequences are the same in either case, determining what constitutes a general publication of a lecture by communicating it in written form is a very different problem from determining what constitutes a general publication by delivering it orally.

A. Treated As A Book

Where a lecture is communicated in writing, the problem is the same as it is in the case of an ordinary book or other writing.[34] This is true without regard to the length of the lecture and without regard to whether it has been reproduced by printing, mimeographing, or any other means.[35]

B. Must Be Voluntary Transfer

A general publication of a written work cannot occur unless its owner voluntarily transfers it or his rights to it or authorizes someone else to do so. One who wrongfully acquires a copy of a work cannot deprive the owner of his common law rights in it merely by taking steps which normally would constitute a general publication of it.[36]

[30]E.g., Holmes v. Hurst, 174 U.S. 82 (1899); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898); Continental Casualty Co. v. Beardsley, 253 F. 2d 702 (2d Cir. 1958); Fashion Originators' Guild of America v. F.T.C., 144 F. 2d 80 (2d Cir. 1940), affirmed, 312 U.S. 457 (1941); Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898).

"It is of course true that publication of a copyrightable work puts that work in the public domain except so far as it may be protected by copyright. That has been the unquestioned law since 1774; and courts have often spoken of it as a 'dedication' by its author or proprietor. That, however, is a misnomer, for 'dedication,' like 'abandonment,' presupposes an intentional surrender. . . . " National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 598 (2d Cir. 1951).

[31]Abernethy v. Hutchinson, 3 L.J. (Ch.) 209 (1825); Nicols v. Pitman, 26 Ch. Div. 374 (1884); Caird v. Sime, 12 A.C. 326 (1887); Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898).

[32]Wagner v. Conreid, 125 Fed. 798 (S.D. N.Y. 1903); Nutt v. National Institute, Inc., 31 F. 2d 236 (2d Cir. 1929).

[33]Holmes v. Hurst, 174 U.S. 82 (1899); Abernethy v. Hutchison, L.J. (Ch.) 209 (1825); Macklin v. Richardson, Ambler 694 (1770).

[34]Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898).

[35]Holmes v. Hurst, 174 U.S. 82 (1899); Macmillan Co. v. King, 223 Fed. 862 (D.C. Mass. 1914).

[36]Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

C. Delivery To A Single Individual

Of course, not every voluntary transfer of the possession of a written book is sufficient to constitute a general publication of it.

When a written work is delivered to only one individual, it is sufficient to avoid the effect of a general publication that the delivery be made for a limited purpose and that the recipient, himself, does not acquire the right to distribute or sell the work.[37] Thus, there would be only a limited publication if a professor were to deliver a copy of his work to his secretary or to a printer[38] with instructions to have it reproduced or if he were to lend or give a copy of his work to a friend for the latter's personal use and enjoyment.[39] In cases of this nature, the limitations need not be expressly stated since the courts will find them from the very nature of the transactions.[40]

D. Distributing Copies Among Several Persons

When copies of a writing are distributed among several persons, rather than being delivered to only one individual, it is not sufficient to constitute a limited publication that the delivery be for a limited purpose and that the recipients not obtain the right to distribute or sell copies of the work. It must appear, in addition, that the persons receiving the copies comprise a definitely selected group.[41]

1. Passing Out Copies Gratuitously

Consequently, a professor who engages in the practice of passing out copies of his lecture would lose his common law rights to it if it appears that a mere request is all that is necessary for anyone to obtain a copy.[42] It would not constitute a general publication, however, if he were to give or lend copies of his lecture to his friends for their own enjoyment, provided they were not authorized to make or sell copies of the work.[43]

2. Distributing Copies Among Students

Similarly, only a limited publication would occur were a professor to distribute copies of his lecture among his students for the purpose of helping them with their assignments.

In *Bartlett v. Crittenden,*[44] the plaintiff, a teacher, conceived of a bookkeeping system and reduced it to writing on cards which he permitted his students to copy in order to help them with their work. The defendant, while a student at plaintiff's school, copied these cards and, without obtaining the plain-

[37]E.g., Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E. 2d 863 (1949).
[38]Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).
[39]Prince Albert v. Strange, 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (Ch. 1848), aff'd 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).
[40]Ibid.
[41]White v. Kimmell, 193 F. 2d 744, 747 (2d Cir. 1952), cert. denied, 343 U.S. 957 (1952); D'Ole v. Kansas City Star Co., 94 Fed. 840 (C.C. Mo. 1899).
[42]Ibid.
[43]Prince Albert v. Strange, 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (Ch. 1848), aff'd 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).
[44]4 McLean 300, 303 (1847), aff'd 5 McLean 32 (1849).

tiff's permission, included his copies in a book which he published. When the plaintiff sued to enjoin him, the defendant contended that the plaintiff had abandoned his work to the public by permitting students to copy the cards. The court disagreed with this contention and pointed out that the right to copy was limited to the students and the purpose for which they were permitted to copy was limited to helping them with their work. In holding that only a limited publication had occurred the court declared, "The students of Bartlett who made these copies have a right to them and to their use as originally intended. They have no right to a use which was not in the contemplation of the complainant and themselves when the (complainant's) consent was given."

Similarly, it was held in the case of *Sherrill v. Grieves*[45] that it did not constitute a general publication for an instructor at an Army school at Fort Leavenworth to permit the Army to print and distribute among the students at the school a substantial part of a book for which he later took steps to obtain the protection of the copyright statute.

3. Distribution for Comment and Criticism

Although there are no cases directly on the point, it is generally agreed that, since both the purpose and the class to whom the work is distributed are limited, a professor does not lose his common law rights in his lecture merely by distributing copies of it among persons in his field of interest for the purpose of obtaining their comments and criticisms.[46] This principle does not apply, however, where the primary purpose of the distribution is to disseminate the work as widely as possible and the desire to obtain comments and criticisms is merely incidental.[47]

4. Submitting Work To Publisher

It appears to be well established that a professor would not lose his common law rights in his lecture merely by submitting it in written form to a publisher in the hope of selling his rights in it.

One of the cases supporting this conclusion is *Chamberlain v. Feldman*,[48] in which one of Mark Twain's manuscripts played a central role. In 1876 the author submitted the manuscript to the editor of *The Atlantic Monthly*, but negotiations for its publication in the magazine were unsuccessful. It does not appear that Mark Twain ever demanded or obtained the return of the manuscript. In fact, there appears to be no further record of it until it was purchased by the defendant in 1945, some thirty-five years after Mark Twain's death, from a person whose possession of it was never explained. The plaintiff, who had become the owner of all literary property owned by Mark Twain at his death, brought an action to enjoin the defendant from publishing the work. The defendant argued that, by leaving the manuscript with the publisher, Mark Twain had given up all of his rights in the work. The court disagreed and

[45]57 Wash. (D.C.) Rep. 286 (1929).

[46]Accord, Prince Albert v. Strange, 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (Ch. 1848), aff'd, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).

[47]Continental Casualty Co. v. Beardsley, 151 F. Supp. 28, 41 (S.D. N.Y. 1957) aff'd 253 F. 2d 702 (2d Cir. 1958).

[48]300 N.Y. 135, 89 N.E. 2d 863 (1949).

stated that, even assuming that the author had given up all of his rights in the physical manuscript, "the control of the right to reproduce belongs to the author until disposed of by him." The conclusion that a professor would not lose his common law rights to his lecture merely by submitting it to a publisher also is supported by the case of *Press Publishing Co. v. Monroe.*[49] In this case, a poet, at the invitation of the Literary Committee in charge of the dedicatory exercises of the Chicago World's Fair, delivered to the members of the Committee for their consideration copies of an ode which she had composed. The court held that such a delivery of copies of a literary composition is not a general publication and could not prejudice the owner's rights.

In *Berry v. Hoffman,*[50] the court went even further. Here the court held that placing a manuscript in the hands of the publisher under an agreement whereby the latter was to print and sell copies of it did not, of itself, constitute a general publication of the work. In this case the publisher was adjudicated a bankrupt before the work had been printed and sold, and the author was permitted to reclaim his work and to enjoin the purchaser of the publisher's assets from printing and selling copies of it.

5. General Distribution

Perhaps the clearest cases of the general publication of a written work are those in which the owner of the work renders it accessible to or distributes it among large numbers of persons in the general public. Thus, it undoubtedly would be held to be a general publication if a professor were to place copies of his lecture in a public library,[51] even though it would not be were he to place copies in his school library for the use of his students.[52]

6. Effect Of A General Distribution With Intent To Retain Rights

If the owner of a written work permits it to be distributed generally the distribution is not saved from being held a general publication by the fact that he intended to retain his common law rights.

In *White v. Kimmell*[53] an author requested his secretary to mimeograph copies of his book and distribute them among any persons who asked for them. After she had done this, the defendant published the book without the author's consent. In the ensuing lawsuit, the defendant argued that the author's common law rights had been lost as the result of the general distribution of the book. In opposing this argument it was contended that the author had not intended to relinquish his common law rights when he authorized the distribution. In holding that a general publication had occurred, the court stated that when the question of the publication of a writing is under consideration a person is

[49]73 Fed. 196, appeal dismissed 164 U.S. 105 (1896). Accord, Ilyin v. Avon Publications, Inc., 144 F. Supp. 368 (S.D. N.Y. 1958). (Distributing mimeographed copies of play for purpose of inducing producers to produce work held not a general publication.)

[50]125 Pa. Super. 261, 189 Atl. 516 (1937).

[51]Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898) (dicta).

[52]Bartlett v. Crittenden, 5 McLean 32 (1849).

[53]193 F. 2d 744 (2d Cir. 1952), cert. denied, 343 U.S. 957 (1952).

charged with what he does rather than what he intends to be the legal consequences of what he does and that, regardless of what the author had intended, he had authorized the general distribution of his work and this was sufficient to deprive him of his common law rights.

The principle that the courts, in determining whether or not there has been a general publication, will look to what a person does rather than what he intends to be the legal consequences of what he does was vividly demonstrated in the case of *Holmes v. Hurst*.[54] When Dr. Oliver Wendell Holmes wrote, "The Autocrat of the Breakfast Table," he permitted it to appear in twelve successive issues of *The Atlantic Monthly* without taking any steps to obtain statutory copyright protection. Shortly thereafter, he arranged for the publication of his work in book form and took all of the steps normally required to comply with the copyright statute. Later, Hurst compiled the twelve articles into a book which he sold under the original title. The book truthfully stated that it was taken from the twelve issues of *The Atlantic Monthly*. When the executor of the author's estate sued, alleging infringement of Dr. Holmes' book, the defendant contended that permitting the work to appear in *The Atlantic Monthly* constituted a general publication which threw it into the public domain where anyone was free to exploit it. On behalf of the author, it was contended that he never had intended to abandon or dedicate his work to the public; that, on the contrary he always had intended to publish the articles later in one book. The Supreme Court felt that the author's intention made no difference and held for the defendant, stating that "If an author permits his intellectual production to be published serially or collectively his right to copyright is lost . . . and this is true irrespective of his actual intention not to make such abandonment."[55]

In addition to supporting the conclusion that an author's intent to the contrary will not avoid a holding that there has been a general publication, the *Holmes* case furnishes a negative answer to the professor who wonders whether he is safe in distributing separate chapters of his work as he completes them, meanwhile postponing until his work is complete the matter of complying with the Copyright Code. It also indicates the unsoundness of assuming that statutory protection will be obtained for contributors by the publisher of a periodical. Too many authors learn too late that only a fraction of the periodicals published are protected by copyright.

7. Sale of Copies

In most cases wherein a professor loses his common law rights in his lecture, he does so by permitting his work to be sold,[56] through the college bookstore or otherwise. It has been held that the public sale of even a single copy of a book constitutes a general publication of it.[57] In fact, merely offering

[54]174 U.S. 82 (1899).

[55]Id. at 89.

[56]Accord, e.g., Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.; RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 194), cert. denied 311 U.S. 712 (1940).

[57]Gottsberger v. Aldine Book Pub. Co., 33 Fed. 381 (C.C. Mass. 1887). Accord, Grandma Moses Properties v. This Week Magazine, 117 F. Supp. 348 (S.D. N.Y. 1953).

copies for sale appears to constitute a general publication.[58] It is doubtful that this result would be changed by the fact that the college bookstore or other agency has a policy of selling only to students. If such a case should arise it seems likely that a court would take judicial notice of the fact that such a policy usually is disregarded and that sales at a college bookstore are made across the counter without any need for a purchaser to offer any credentials to establish his status as a student. Furthermore, to hold that such sales do not constitute a general publication would be contrary to the broad policy of the Copyright Code, which is intended to exact as the price for a monopoly of a limited duration the dedication of the work to the public at the expiration of that period.[59]

8. Sale With Notice of Restriction on Use

According to the majority view, this result would not be changed if each copy of the work sold contained a notice to the effect that it was to be used only by the purchaser and was not to be copied, distributed or sold by him.[60] Contrary to their usual policy of giving effect to the understanding of the parties to a contract, most courts, when called upon to determine whether the purchaser of a writing is bound by restrictions on the use of the writing, disregard the intentions of the parties and hold that there are no restrictions except those which might arise from statute.[61] Here again, the dominant factor is the basic policy of the Copyright Code which is intended to place a definite limit on the time during which a person may exploit his work for profit before yielding it to the public domain.[62] Another factor is the deeply rooted principle of the common law which holds that restrictions on the use of chattels are invalid unless they can be justified by some sound reason.[63] Most courts do not view a desire to circumvent the copyright statute as a sound reason.

Support for the position that it would be futile to attempt to avoid a general publication by placing restrictions on the sale of a written lecture is found in the case of *Larrowe-Loisette v. O'Loughlin*.[64] In this case, Loisette, the author of a system of memory training which he taught by oral lectures, lectures in pamphlet form, and correspondence, sold some of the pamphlets to members of the public. The pamphlets bore the statements, "These papers are not to be shown to anyone" and "Printed solely for the pupils of A. Loisette." There-

[58]Wall v. Gordon, 12 Abb. Prac. (N.S.) 349 (N.Y. 1872). Although the Copyright Code does not define "publication," it does state that the time when the copyright term begins "shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his auth. . . ." 17 U.S.C. §26 (1952).

[59]E.g., Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[60]Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898). Accord, RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), cert. denied 311 U.S. 712 (1940).

[61]Ibid.

[62]Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C.C. N.Y. 1898); Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1898).

[63]RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), cert. denied 311 U.S. 712 (1940); Chaffee, "Equitable Servitudes on Chattels," 41 Harv. L. Rev. 945 (1928).

[64]88 Fed. 896 (C.C. N.Y. 1898).

after, the defendant, who appears to have procured one of the pamphlets from one of Loisette's pupils, began to publish it without Loisette's consent. In the ensuing suit, the defendant contended that the pamphlets had been published by virtue of the sale and that he had a right to use them. The plaintiff contended that there had not been a general publication because of the notice contained in the pamphlets. The court disagreed with the plaintiff and held for the defendant, stating that "The books were sold absolutely; no restriction being placed upon the title . . . . I think this distribution amounted to a general publication . . . . To hold that a person may offer a book to every person in the world who will buy it and pay a certain price for it with an agreement not to show it to any person, and that this course of instruction might be continued for many years, and then a copyright secured for a legal term, would be a large advance upon, and a wide departure from any decisions which have been cited in this case."[65]

9. Loan, Lease or Similar Device

It also seems unlikely that a professor who seeks direct financial advantage from his written lecture can avoid the loss of his common law rights merely by adopting some legal device other than a sale.

An attempt to circumvent the rule that the sale of a written work constitutes a general publication was ingenious but unsuccessful in the case of *Ladd v. Oxnard*.[66] Here books were delivered to "subscribers" upon a stipulation that they were merely loaned, and not sold, and could be retaken by the lender, if found in any hands other than the subscriber's. When the lender later sued an alleged infringer, the latter argued that this amounted to a general publication. The court agreed with the defendant and stated, "So far as concerns the interests of the public, and the general policy of the copyright statute, the case stands in all respects practically the same as though complainant's (book) had been sold by unrestricted titles; and there is no substantial reason why, if the complainants had not obtained copyrights, they should now be protected against infringers." In *Jewelers' Mercantile Agency v. Jewelers' Pub. Co.*,[67] the attempt to avoid a general publication by "leasing" a book also was unsuccessful.

[65]Some support for the conclusion that the sale of a book would not constitute a general publication if the book contained a proper notice to the effect that it was to be used solely by the student and was not to be transferred by him is found in the case of Waring v. WDAS Broadcasting Co., 327 Pa. 433, 193 Atl. 631 (1937). In this case it was held that the sale of a record which contained a notice that it was not to be used for commercial purposes did not constitute a general publication and that a radio station would be enjoined from playing the record without the permission of the owner of the intellectual property in it. However, this case appears to be distinguishable from the case of a writing containing a similar notice. The court in the Waring case pointed out that unless the restriction in that case were given effect, the plaintiff would have been completely without any legal means of barring others from exploiting his work because the interest which plaintiff asserted was not one for which he might obtain legal protection under the copyright statutes. In the case of a written copy of a lecture, this reasoning would not apply, since the Copyright Code affords a means of obtaining adequate protection to anyone who wishes to bar others from exploiting his written work after its first publication.

[66]75 Fed. 703, 731 (C.C. Mass. 1896).

[67]155 N.Y. 241, 49 N.E. 872 (1898).

10. Statutory Protection

As the foregoing discussion shows, a professor who wishes to reap a direct financial return from his written lectures, or who plans to distribute his written lectures publicly for any other reason, may consider it desirable to secure the protection of the Copyright Code rather than rely solely on his common law rights.

If so, he can obtain statutory protection of his written work with relative ease. All that he need do in order to secure statutory copyright in place of the common law rights which he loses on the first publication of his work is to make certain that, at the time of first publication as well as thereafter, each copy of his work which is offered for sale, sold, or otherwise publicly distributed, contains a proper notice of his claim of copyright either on the title page or on the page immediately following.[68] This notice may take any of several forms. In general, the notice must contain three things: first, the word "copyright," or its abbreviation, "copyr.," or its symbol, which is the letter "C" enclosed in a circle; second, the year in which the work is first offered for sale, or is sold, or is publicly distributed, and; third, his name.[69] If he wishes to secure copyright in countries which are members of the Universal Copyright Convention he must use the symbol.[70] If he takes these precautions he will lose his common law rights upon the first general publication of his work but will secure copyright in its place.

Although statutory copyright is secured upon the first publication of his work with proper notice, a copyright owner cannot effectively assert this right against an infringer in court until an additional step is taken. To acquire the right to sue, he must register his copyright with the Register of Copyrights.[71] This is done by mailing to the Register of Copyrights, Library of Congress, Washington 25, D.C., two copies of the lecture as published with notice, an application Form A, duly executed, and a fee of $4.00. To be effective, the registration must take place *after,* and not before the lecture is published in written form.[72]

IV. PUBLICATION BY THE ORAL DELIVERY OF A LECTURE

Too few cases have dealt with the question of what constitutes the general publication of a lecture by oral delivery to justify anyone's discussing the subject with the same degree of assurance he may reasonably feel when discussing what constitutes the general publication of a lecture in written form. However, it is generally agreed that, despite the fact that the courts were slower to recognize that a professor might acquire intellectual property on the basis of the oral delivery of a lecture than on the basis of a lecture which had been reduced to writing, once this was recognized, a variety of forces operated within the common law system to make of it a more durable kind of property than the prop-

[68] 17 U.S.C. §10 (1952).
[69] 17 U.S.C. §19 (1954).
[70] 17 U.S.C. §9 (1954).
[71] 17 U.S.C. §13 (1952). See, Washingtonion Publishing Co. v. Pearson, 306 U.S. 31 (1939).
[72] 17 U.S.C. §10 (1952).

erty which he acquired in his written lecture. As the following will show, despite moments if uncertainty, it is now well established that a professor enjoys far more freedom to deliver his lecture orally without fear of losing his common law rights in it than he enjoys when he uses his work in written form.

A. The English Cases

The legal principles which govern the oral publication of a professor's lecture first evolved from three nineteenth century English cases which have been cited with approval on numerous occasions by the courts of this country.

1. Abernethy V. Hutchinson

The first of these cases was *Abernethy v. Hutchinson,*[73] which came before the English Court of Chancery in 1825, when Lord Eldon was Chancellor. Abernethy, a distinguished English surgeon attached to St. Barthelomew's Hospital, on October 4, 1824, began the delivery of a course of lectures on the principles of surgery in the hospital theatre. To obtain the privilege of attending, students were required to pay Abernethy a fee and sign an enrollment book. Before the third lecture had been delivered, Abernethy learned that a leading medical journal, *The Lancet,* had published his first lecture in its entirety in his very words and, moreover, had announced that it planned to publish each of his remaining lectures regularly in the same manner. At the third lecture, Abernethy expressed his disapproval of the publication and, believing that his lectures were being taken down in shorthand by some person in his class, called upon such person to disclose himself. In addition, he offered to return the money paid for attendance, either there, or in some manner least offensive to such person. No one came forward.

Finding his efforts to settle the matter amicably to be futile, and observing that *The Lancet* was painfully true to its word that it would publish the remaining lectures regularly, Abernethy instructed his solicitor to commence legal proceedings. As the result, a bill was filed alleging the foregoing facts and praying that the court order the publishers of *The Lancet* to refrain from continuing to publish the lectures.

When the case first came on for argument before Lord Eldon, the principal contention of the defendant's barrister was that it never had been decided that a man could have any right of property in ideas and language not reduced to writing. The Lord Chancellor appeared to be impressed by this argument, for he adjourned the proceedings to a later time, stating that "In the meantime, Mr. Abernethy may, if he thinks proper, produce his manuscripts . . . ."[74] Lord Eldon appeared to be impressed also by the defendants' failure to explain how they acquired the lectures, for he added, "and, on the other hand the defendants will judge for themselves whether they will or not . . . inform me how they became possessed of the means of publishing this work."

The defendants did not respond to this invitation. Nor did Abernethy produce his manuscripts. However, he did submit an affidavit in which he stated that "previously to the delivery of such lectures, he had from time to time

[73] 3 L.J. (Ch.) 209 (1825).
[74] Id. at 216.

committed to writing notes . . . which had been increased and transposed until a great mass of writing had been collected . . . that at the time of said lecture he did not read or refer to any writing before him, but delivered such lectures orally, and from recollection of such notes . . . ."[75]

Although Lord Eldon was sympathetic with Abernethy's failure to produce his notes, he felt that he must treat the lectures as having been delivered orally, and suggested that he would have to deny relief unless the bill were amended to allege either an express or an implied contract or trust binding the students not to publish the lectures.

Taking the cue, Abernethy's barrister amended the bill to allege that, "no person had a right to attend the lectures, except those who were admitted to that privilege by the lecturer; . . . that there was an implied contract between the plaintiff and those who attended his lectures, that none of them should publish his lectures, or any part thereof; that the defendants had been furnished with the copy of the lectures which they printed, through the medium of some person who had attended the lectures under Mr. Abernethy's permission."[76]

The bill, as amended, having been verified by Abernethy, Lord Eldon held in his favor, emphasizing, however, that he did so, "without deciding the question of literary property, but merely excluding it."[77] Also, Lord Eldon recognized that where a lecture is delivered extemporaneously and is not written down anywhere, it might be difficult to determine whether a defendant has copied it. He felt, however, that it did not follow that it was the right of the person who heard a lecture to publish it. On the contrary, he was clearly of the opinion that, "when persons were admitted as pupils, or otherwise, to hear these lectures, although they were orally delivered, and although they might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purpose of their own information, and could not publish for profit . . . ."[78]

Lord Eldon recognized, of course, that this was not simply a dispute between Abernethy and one of his students, for the defendants were third parties and there was no evidence showing how they had obtained possession of the lectures. With these facts in mind, he added, "Although there was not sufficient to establish an implied contract between the plaintiff and the defendants, yet it must be decided that, as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit there was sufficient to authorize the Court to say that the defendants should not publish."[79]

Although it is clear that Lord Eldon thought that there was a contract between Abernethy and his students binding the latter not to publish the lectures, it is not clear whether Lord Eldon felt that such a contract was a *sine* the absence of any contract, a professor would be accorded the right to bar his *qua non* of a professor's right to bar his students and others from publishing

[75]Ibid.
[76]Id. at 218.
[77]Id. at 218.
[78]Id. at 219.
[79]Ibid.

his lectures after he had delivered them orally. Uncertainty as to whether, in the absence of any contract, a professor would be accorded the right to bar his students and others from reproducing and selling lectures which he had delivered orally was to continue for some years.

2. Nicols V. Pitman

The next English case bearing on the question of what constitutes the oral publication of a lecture by a professor was *Nicols v. Pitman*.[80] Actually this case did not involve a professor in the usual sense, nor did the members of his audience consist of students in the usual sense. In 1882, Nicols, a lecturer on various scientific subjects, delivered a lecture entitled "The Dog as the Friend of Man" at the Working Men's College. Admission to the College was by tickets issued gratuitously by the committee of the College. Mr. Pitman, himself the originator and author of a system of shorthand, was present and took notes of the lecture in shorthand. Later he published the lecture in shorthand chararters in a periodical entitled the *Phonographic Lecturer* which was intended solely for the aid of students of shorthand to whom it was sold at a slight profit. Nicols sued for an injunction against Pitman's continuing to print and publish the lecture. Relying on the *Abernethy* case, Nicols alleged that there had been an implied contract between him and each of the persons who attended the lecture binding each of them not to publish the lecture without his permission.

The defendant argued that the plaintiff had lost his rights in his lecture by a general publication. Seeking to distinguish the case from the *Abernethy* case, he contended that there was no contract between him and the plaintiff binding him not to publish. In support of this contention he testified that he had taken his notes openly while sitting in the first row and that Nicols had not objected. He also testified that he had taken down and had published in a similar manner the lectures of a number of other lecturers and that the plaintiff was the first to deny that he had a right to publish.

Judge Kay, who decided the case, agreed that there were some differences between it and the *Abernethy* case. Nonetheless, he concluded that there had been only a limited publication of the lecture by Nicols and that Pitman therefore had no right to publish it. It is not clear, however, whether, on the other hand, he thought that there was in fact a contract between the plaintiff and the defendant binding the latter not to publish the lecture, or whether, on the other hand, he agreed with the defendant that there was no such contract, but felt that it made no difference.

3. Caird V. Sime

Whatever doubt continued to exist following the *Nicols* case regarding the need for proving a contract between a professor and his students in order to establish that the publication of a lecture was limited, rather than general, was dispelled in the case of *Caird v. Sime*[81] which came before the House of Lords a few years after the *Nicols* case was decided. The case of *Caird v. Sime* also is significant because, of all the cases which have considered the relation-

[80] 26 Ch. Div. 374 (1884).
[81] 12 A.C. 326 (1887).

ship between a lecturer and his listeners, it stands out as the one which arose under circumstances most similar to those likely to prevail at institutions of higher learning in this country.

Dr. Caird was professor of moral philosophy at the University of Glasgow, where he delivered a series of oral lectures to his classes. One of his students took down the lectures in shorthand and passed them to a local bookseller. The latter printed them in pamphlets entitled "Aids to the Study of Moral Philosophy," which he sold to students. Dr. Caird brought an action to enjoin him from continuing to do so. The trial court granted the injunction. Defendant appealed to the Second Division of the Court of Session where a divided court held in his favor. Dr. Caird then appealed to the House of Lords, where it was held, two judges to one, that he was entitled to his injunction.

Basically, the position of the defendant was that there had been a general publication of Dr. Caird's lectures and that they were therefore within the public domain and available to anyone who chose to exploit them. He supported his position with two principal contentions.

The first was that the case was distinguishable from the *Abernethy* and *Nicols* cases in that there was no basis for finding a contractual relationship between the professor and his students because, as was stated by Lord Fitzgerald, the dissenting judge in the House of Lords, "The public lecturer at a University has no authority of his own to impose conditions on his pupils of those entitled to attend his lectures."[82]

Lord Watson, who along with Lord Halsbury represented the majority, was inclined to agree that Dr. Caird had no right to impose conditions on his hearers, but he did not think that was sufficient to distinguish the case from the *Abernethy* case. He stated that "What Lord Eldon held was, that the restriction of the hearer's right to use the lectures arose from the relation established by contract between them and Mr. Abernethy. In that case the restriction necessarily became an implied term of the contract; but the condition is the legal consequence of the relation in which the parties stand to each other and must receive effect, *whenever a similar relation exists, whether it be established by* contract or in any other way."[83]

Thus, in a few words, Lord Watson laid to rest the idea that a contract was the real basis for the professor's right to bar his students and others from publishing his oral lectures and, at the same time, determined that the professor's right was actually grounded on the relationship between a professor and his students.

At first glance, this holding may seem to be important only to professors on faculties of colleges and universities which are supported by public funds. Actually, it is equally important to professors at private institutions. The basic distinction the defendant had sought to draw was between professors who enter into contractual relations with their students and those who do not. He argued that only the former have the right to bar students and others from publishing their lectures. It scarcely need be pointed out that under our modern system of higher education a professor rarely enters into contractual relations with his

[82]Id. at 333.
[83]Id. at 348. (Emphasis added.)

students. Consequently, it is essential that the professor's right to bar the publication of his lectures arise, as the court held, from the student-professor relation, and not be contingent upon his ability to prove a contract with his student, as the defendant had contended.

The defendant's second major contention in *Caird v. Sime* was closely related to the first. It was that, even assuming that no contract was required in order to give rise to the professor's right to bar students from publishing his lectures under ordinary circumstances, a professor at a public university is bound to give public lectures which, by the very act of delivery, are published and pass into the public domain, leaving the professor no special rights with respect to them. In supporting this contention, Lord Fitzgerald, the dissenting judge, stated that "A public lecture, delivered publicly at a university by one of its professors in the performance of his public duty which he has undertaken, becomes by the act of delivery published to the nation, and may be likened to a gift from the university or the professor to the nation."[84] He also felt that it was essential to the public safety that a professor's lectures delivered at a public university be deemed to have fallen into the public domain, for, as he stated, "If a lecturer can prevent all other publication of his lectures than that which takes place in his classroom, the nation may be left in Cimmerian darkness as to the teachings of its youth in its great universities."[85]

In answering the contention that the lectures delivered by Dr. Caird to his students were "public," Lord Watson, for the majority, pointed out that it was necessary for students to satisfy a number of requirements in order to qualify for admission to the University of Glasgow. Then he added, "I do not think that the students of moral philosophy in the University of Glasgow . . . either are, or can with propriety be said to represent the general public. Of course, they are, each of them, members of the public; but they do not attend the professor's lectures in that capacity. The relation of the professor to his pupils is simply that of teacher and pupil; his duty is, not to address the public at large, but to instruct his students and their right is to profit by his instructions, and not to report or publish his lectures."[86]

Nor did Lord Halsbury and Lord Watson, who made up the majority, share Lord Fitzgerald's fear that barring students and others from publishing a professor's lectures might leave the nation in "Cimmerian darkness" as to the teaching of its youth at its great universities. In the words of Lord Watson, "Experience has shown that the public who are interested in it are not ignorant of the character of university teaching."[87]

Also, the majority considered the result reached in the case to be in accord with sound educational policy. Lord Watson expressed this by saying "I certainly do not appreciate the advantage to the public of furnishing (which is the professed object of the respondent) the appellant's students with a 'crib,' an aid to knowledge forbidden in well regulated educational instititions, which . . . supersedes the necessity of intellectual effort and neutralizes the benefit of

[84]Id. at 357.
[85]Id. at 354.
[86]Id. at 348.
[87]Id. at 345.

the professor's tuition."[88] Lord Halsbury felt that it might be "contrary to both the spirit and meaning of what is called a lecture that students should be supplied with some mode of answering questions . . . without some process of mental digestion which is intended to form the substance of the teaching."[89]

Finally, the majority felt that the result which had been reached was completely consistent with the relationship which exists between a university and its professor. This was expressed by Lord Halsbury in these words "I am not aware of any university regulation, or any bargain with its professors, which either expressly or impliedly enforces on the professors the making public of their literary compositions, or whatever else these compositions may be . . . . The fact of his being a public official lays the appellant under an obligation to the state as well as to those who pay for their instruction, to teach efficiently, and to the best of their abilities; but it does not affect the nature of his obligations, and cannot alter the relation between him and his students."[90]

B. The American Cases

Although there are no American cases which deal directly with the question of what constitutes a general publication of an oral lecture at a typical American college or university, it is as certain as things possibly can be in the law that, should the question ever arise, the professor's position would be at least as strong as it was held to be in the case of *Caird v. Sime.* This conclusion is supported by a considerable amount of dicta,[91] by the fact that *Caird v. Sime* has been cited and quoted with approval by the courts in this country on numerous occasions,[92] and by the further fact that its principles appear never to have been questioned by any court on this side of the Atlantic. The American cases, in addition, appear to assure a professor a relatively high degree of freedom in delivering his lecture beyond the confines of the campus without fear of losing his common law rights by virtue of a general publication.

The American case which is most likely to be cited in any future litigation involving the question of what constitutes the general publication of a professor's lecture is *Nutt v. National Institute, Inc.*[93] Here the plaintiff was a corporation to which had been assigned all of the rights in a series of lectures on the subject of memory training. The assignor, its president, had delivered these lectures orally to classes of students who had paid him for the privilege of attending. Subsequently, he had taken steps to secure copyright protection for his lectures in book form. The defendant later copied these lectures and delivered them orally in a course in memory training which he conducted. When the plaintiff sued for the infringement of the alleged statutory copyright, the defendant argued that the lectures were not entitled to the protection of the

[88]Id. at 345-46.
[89]Id. at 338.
[90]Id. at 339.
[91]E.g., Ferris v. Frohman, 223 U.S. 424 (1912); Werckmeister v. American Lithographic Co., 134 Fed. 321, 325-26 (2d Cir. 1904); Oertel v. Wood, 40 How. Pr. (N.Y.) 10, 18 (Sup. Ct. 1870); Tompkins v. Halleck, 133 Mass 32, 44 (1882).
[92]E.g., McDermott Commission Co. v. Board of Trade, 146 Fed. 961 (8th Cir. 1906); New Jersey State Dental Society v. Dentacura Co., 57 N.J. Eq. 593, 41 Atl. 672, aff'd per curiam 58 N.J. Eq. 582, 43 Atl. 1098 (1899).
[93]31 F. 2d 236 (2d Cir. 1929).

statute because the common law rights in them had been lost by their being delivered orally to the assignor's classes prior to the time the effort was made to comply with the copyright statute.

The court disagreed with the defendant. In holding that there had been only a limited publication of the lectures, the court stated, "The author of a literary work, such 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 statutes by later application. Even where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish that which they have not obtained the right to sell. Common law rights are not lost by a limited publication, as distinguished from a general publication, and the delivery of these lectures before audiences prior to copyrighting was a limited publication. The copyright statute does not change earlier decisions."[94] Although the court did not expressly mention the nineteenth-century English cases, it appears to have had them in mind for there were no earlier American cases dealing with the question of what constitutes the general publication of an oral lecture.

The *Nutt* case clearly established that the delivery of a lecture is not made a general publication by the fact that admission to the class is open to all members of the public who are willing and able to pay a specified admission fee or by virtue of the fact that no formal credit is granted upon completion of the course. This may be significant to those professors who include among their collateral assignments lectures delivered to students taking non-credit courses, such as "cram" courses for students preparing to take professional examinations. Of course, this conclusion also is supported by the *Abernethy* case.

All of the cases discussed thus far in which it has been held that the oral delivery of a lecture constituted only a limited publication have been cases of which it might be said that there existed the relationship of professor and student, but it never has been said by any court that such a relationship is essential to a finding that the delivery of a lecture amounts to only a limited publication. On the contrary, it appears that such a relationship is not essential to a limited publication.

In *New Jersey State Dental Society v. Dentacura Co.*[95] a report of a committee of an incorporated dental society, in the nature of an original essay, was read to the annual meeting of the society. A representative of a dental supply company who was permitted to be present at the meeting printed excerpts from the report without being authorized to do so. When the society brought an action to enjoin publication of the excerpts, the defendant argued that the reading of the report constituted a general publication because a number of outsiders were present at the meeting with the approval of the Society.

Although the court recognized that the delivery of a lecture to a public audience might constitute a general publication, it held that a general publication had not occurred in the case before it. It supported its conclusion with a well reasoned opinion in which it said, "The report was read not to and for the

[94]Id. at 238.
[95]57 N.J. Eq. 593, 41 Atl. 672, aff'd per curiam 58 N.J. Eq. 582, 43 Atl. 1098 (1899).

benefit of the public generally, but to and for the benefit of the society . . . . It was a professional essay intended primarily for professional men. Now to assert that the mere reading of this report to the society . . . in the presence of certain outsiders was a dedication . . . to the public seemes to me to be unreasonable."[96] It is interesting to note that in distinguishing situations which might give rise to the general publication of a lecture by oral delivery from those which give rise to only a limited publication the court quoted with approval and at length from the case of *Caird v. Sime.*

Although the *Dental Society* case involved a report, rather than a lecture in the usual sense, the two types of work are so nearly alike as to be the same in the eyes of a court for the purpose of determining what constitutees a general publication. Accordingly, it supports the proposition that a professor would not lose his common law rights in his lecture by reading it before a professional society or any other limited group; and this result is not changed by the fact that, as is often the case, outsiders are permitted to be present.

Assuming that the relation of professor and student is lacking, might there still be only a limited publication if a lecture is delivered, not to a select group, but rather to a group comprising any member of the general public who are willing and able to pay for the privilege of attending? There appear to be no cases directly on the point, but there is support for the conclusion that the delivery of a lecture to such a group would be only a limited publication. This support is found in cases involving not lectures but rather plays,[97] a form of literary work which the courts have considered to be closely analogous to lectures, the performance of the play corresponding to the oral delivery of a lecture.

In *Tompkins v. Halleck*,[98] plaintiff was the owner of a play which never had been published in written form, but which had been presented orally to paying audiences on a number of occasions. Two persons attended several of these performances and committed the play to memory. They then reduced it to writing and sold the resulting copy to the defendant, who presented performances of the play to paying audiences. When plaintiff sued, defendant contended that the plaintiff's presentation of the play before paying audiences drawn from the general public amounted to a general publication. The court held that only a limited publication had occurred. This holding has been followed by the leading courts of this country, including the Supreme Court of the United States.[99] It is interesting to note that the *Abernethy* case was one of the decisions relied upon most heavily by the court.

Would a professor lose his common law rights in his lecture if he went a step further and delivered it to an audience which did not consist of students, and was not limited to the members of any group, not even to those willing and able to pay for admission? There appear to be no cases directly in point. However, it seems to have been assumed by all of the courts which have considered the question that the delivery of an oral lecture under these circumstances

[96]Id. at 597.
[97]E.g., Tompkins v. Halleck, 133 Mass. 32 (1892); Ferris v. Frohman, 223 U.S. 424 (1912).
[98]133 Mass. 32 (1882).
[99]Ferris v. Frohman, 223 U.S. 424 (1912).

would constitute a general publication. In the case of *Caird v. Sime,*[100] previously discussed, although Lord Watson concluded that only a limited publication of Dr. Caird's lecture had occurred, he was careful to add: "I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons or selection or restriction of his hearers has . . . abandoned his (lectures) to the use of the public at large or, in other words, has himself published them." In the same case, Lord Chancellor Halsbury made the following statement, which was quoted with approval in the *Dental Society* case: "Whether the limitation of the right arises from an implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person speaks a speech to which the world is invited, either expressly or impliedly, to listen . . . the mode and manner of publication negatives, as it appears to me, any limitation."[101]

Does the "mode and manner" of publication negative any limitation if a lecture is delivered via radio or television? If it is sound to rely on the analogy between a lecture and the script of a comedian,[102] or between a lecture and a dramatic musical composition,[103] or between a lecture and the format of a radio program,[104] one might reasonably conclude that the delivery of a lecture over radio or television to the largest possible audience does not constitute a general publication. The rationale appears to be that, on the basis of custom and usage, a radio performance or telecast is restricted to the public in their homes.[105]

As the foregoing discussion shows, under normal circumstances there is very little likelihood that common law rights in a lecture will be lost as the result of its being delivered orally. In fact, it appears that the oral delivery of a lecture would constitute a general publication in only two relatively unusual situations.

The first would arise if a professor actually intended to relinquish his common law rights. It is difficult to conceive of this situation, except in the case of a professor who is so dedicated that his primary concern is to have his message communicated as widely as possible and who therefore is willing to give up his rights so as to facilitate its dissemination.

The second situation might arise where, although a professor is in fact interested in preserving his common law rights, the circumstances are such that his listeners are justified in assuming that he intended to relinquish his rights. As a practical matter this situation must be exceedingly rare.

STATUTORY PROTECTION

Nevertheless, if a professor feels that, contrary to his actual intentions, the circumstances are such that he may appear to intend to relinquish his rights in his lecture, he may wish to consider the advisability of taking the steps necessary

[100]12 A.C. 326, 334 (1887).
[101]Id. at 338.
[102]Uproar Co. v. National Broadcasting Co., 81 F. 2d 373 (1st Cir. 1936), cert. denied, 298 U.S. 670 (1936).
[103]Metropolitan Opera Ass'n v. Wagner Nichols Record Co., 199 Misc. 786, 101 N.Y.S. 2d 483, aff'd per curiam, 279 App. Div. 632, 107 N.Y.S. 2d 795 (1951).
[104]Stanley v. Columbia Broadcasting System Inc., 35 Cal. 2d 653, 221 P. 2d 73 (1950).
[105]Warner, Radio and Television Rights §31 (1953).

to secure the protection of the Copyright Code. This he may do very easily by registering his claim to copyright in his lecture as a work prepared for oral delivery.[106] Registration is accomplished by mailing to the Register of Copyrights, Library of Congress, Washington 25, D.C., one complete copy of the lecture, an executed copy of Form C, and a fee of $4.00. If a professor who has registered his lecture as a work prepared for oral delivery later decides to publish it in written form, in order to preserve his rights he must register it as a book, taking the same precautions and following the same procedure that would have been appropriate if he had not registered it as a work prepared for oral delivery.[107]

CONCLUSION

A professor is allowed broad freedom in his choice of the ways in which he may communicate his work without fear that he will lose his common law rights in it by virtue of a general publication. Regardless of whether he exploits his work in written form or orally, there are many areas where he may travel with complete safety.

If he uses his work in written form, he safely may deliver copies to his friends for their enjoyment, pass out copies to his students to help them with their work, distribute copies among those in his field with a request for comments and criticisms, submit copies to prospective publishers, and, in general, transfer copies of his work in any other way which either expressly or impliedly indicates that the transfer is for a limited purpose to a limited group who are not given the right to reproduce or distribute the work. He is likely to lose his common law rights in his work, however, if he delivers copies of it to any unrestricted groups of persons who might be properly called the "public." This is true without regard to whether or not he attempts to place any restrictions on their use of it. He also will lose his common law rights if he delivers copies of his work to a restricted group without any express or implied limitation on the use they are to make of it. This is true even though actually he does not intend to give up his common law rights and even though he is not seeking any direct financial gain in distributing his work. Where he is seeking a direct financial gain, moreover, even an expressed attempt to restrict the use to which copies are to be put is likely to be held ineffective to prevent the transfer from operating as a general publication. This is true regardless of whether he seeks the direct financial gain by selling copies of his work or by some other legal device.

If a professor limits his use of his lecture to delivering it orally, there is very little likelihood that he will lose his common law rights in it by a general publication. He may safely deliver it to his students, regardless of whether they agree not to publish it, regardless of whether they pay for the privilege of attending, and regardless of whether it is delivered at a public or at a private institution. He may deliver it to select audiences even though outsiders are permitted to be present. He may deliver it to audiences whose only qualifications are that they

[106] 17 U.S.C. §12 (1952).
[107] Ibid. See page 70 supra for procedure to be followed in registering work as a book.

are willing and able to pay for admission. He even may deliver it to radio and television audiences. In fact, if a professor limits his use of his lecture to delivering it orally, he incurs almost no risk of losing his common law rights in it except in the extraordinary circumstances where he either intends to give up these rights or where he creates the appearance that he has this intent.

When a professor does approach the point where he feels that he may lose his common law rights in his lecture by virtue of a general publication, he is called upon to decide whether the stakes are high enough[108] to warrant his putting forth the slight extra effort and incurring the small additional expense necessary to bring his work under the aegis of the Copyright Code. It is fundamental that if he wishes to enjoy this protection he must lay the groundwork before, and not after, he has lost his rights to it by publishing it generally, either orally or in writing.

[108]In placing a value on his work, a professor may wish to consider not only the potential value of his work in written form, but also its potential value when delivered orally, particularly when performed for radio and television audiences. This latter value may become most important if these public media ever take full advantage of their opportunities to participate more fully in the process of higher education.