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COPYRIGHT OF ADVERTISING

MARY GARNER BORDEN*

Undoubtedly advertising is taking its place in the realm of "big business". It has now become an integral part of our commercial system, as a necessary adjunct to production and distribution. The amount expended for advertising runs well into the millions of dollars yearly, and we are daily confronted with the evidence of this enormous expenditure in newspapers and magazines, ear cards and billboards, and of course on the radio. The slogans of advertisers have become a part of our daily conversation, and the characters depicted in series of advertisements have become as familiar as the daily comics. It is the purpose of this paper to discuss the protection offered the "idea men" behind each advertising campaign, the writers of advertising copy, and the commercial artists and photographers, under copyright law.

The idea of a property right in a literary work is not new but dates from the invention of printing around 1472. As writings began to gain widespread circulation, the need arose for protection from unauthorized copying. At first, however, protection after publication was given only to printers and booksellers, and not to authors. The property right of an author in his writings was first recognized in 1709 with the passage in England of the Statute of Anne, which was the foundation of our present copyright system. Successive statutes extended the term "author" to include the artist, the photographer, and the composer of music. The idea of copyright as it then stood in England was embodied in the Constitution of the United States, which provides in Article 1, Section 8: "The Congress shall have the power . . . to promote the progress of science and the useful arts, by securing, for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."

Advertising was slow to take its place as one of the "useful arts" referred to in the Constitution. For instance, in 1880 copyright was denied a paint advertisement, consisting of a

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card of sample colors and lettering, because the Court felt that the exclusive right to an advertisement could not be acquired. As late as 1922 this attitude toward advertising was reflected in a dissenting opinion, in which the judge expressed his desire to dismiss the whole matter before the Court as no more than "a trivial pother between advertisers" and "essentially no more than an advertising row of no importance." This historical reluctance to recognize a property right in advertisements has probably been due to the fact that the gigantic industry concerned with the formulation and dissemination of advertising is of very modern origin. There was little need for protection of an advertisement as a literary or artistic creation in the days when no great value was placed upon it by the creator. Though his property right existed, theft of this property did not even approach petty larceny, and was understandably beneath the concern of the law.

By 1903, however, the situation had changed sufficiently to permit advertising to enter the realm of useful arts. It is interesting to note that the first case in which an advertisement was afforded copyright protection had to do with a circus poster. The poster was held to be a proper subject of copyright on the ground that it was a pictorial illustration. In an opinion by Justice Holmes, the Supreme Court said: "A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement." Following this decision copyright protection was afforded to a periodical publication illustrating dress fashions, and to a catalogue containing illustrations of statuary for sale. Successive cases well illustrate the extent to which the Courts have gone in literal interpretation of the famous statement of Justice Holmes to the effect that "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious

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1 Ehret v. Pierce, 10 Fed. 553 (1880).
3 Id. at 97.
5 Id. at 251.
7 Da Prato Statuary Co. v. Guiliani Statuary Co., 189 Fed. 90 (1911).
limits." In the light of this view, the classification "pictorial illustrations" has been broadened to include pictures of brass trimmings for electric light fixtures, chromes or lithographs of vegetables, and pictures of orthopedic devices. There is little doubt that the pictures of noted artists such as Grant Wood, Rockwell Kent, Vertes, or Salvadore Dali appearing in advertisements today are as fully protected under copyright law as are the pictures of less skillful commercial artists and of photographers.

Thus we see that commercial art was brought within the purview of the Constitution, but there remains the problem of copyright protection for the format of an advertisement. None of the earlier cases gave any rights at all in the words used, their particular arrangement, or the size and color of the type. It was not until 1932 that recognition was given to the property rights of the authors of advertising copy in the products of their efforts. In the case of Ansehl v. Puritan Pharmaceutical Co. the plaintiff sued for infringement of his copyrighted advertisement of cosmetics. It was a full page spread in a newspaper, containing a picture of various products manufactured by the plaintiff, and a coupon which entitled the reader to take advantage of a "special offer" described in the written portion. The advertisement of the defendant was similar in all respects, with the exception of the difference in the brand of cosmetics pictured in the illustration, and slight paraphrasing of the words in plaintiff's ad; the arrangement, the size type, and the idea of a "special offer", complete with coupon, were the same. The court upheld plaintiff's exclusive right to the layout of his advertisement under the copyright law, and enjoined infringement by the defendant. The test for infringement was laid down, as dicta, in an earlier case, where the court said that there would be infringement if "the advertisements of the defendant company were so similar in appearance and wording

\[\text{\textsuperscript{a}}\text{Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 251 (1903).}\]
\[\text{\textsuperscript{b}}\text{White Manufacturing Co. v. Shapiro, 227 Fed. 957 (1915).}\]
\[\text{\textsuperscript{c}}\text{Stecher Lithographing Co. v. Dunston Lithographing Co., 233 Fed. 601 (1916).}\]
\[\text{\textsuperscript{d}}\text{Campbell v. Wireback, 269 Fed. 372 (1920).}\]
\[\text{\textsuperscript{e}}\text{International Heating Co. v. Oliver Oil Gas Burner and Machine Co., 288 Fed. 708 (1923).}\]
to plaintiff's that the ordinary person reading those of the defendant would be deceived and believe that he was reading the advertisements of the plaintiff."

Ample protection is afforded under copyright law, as we have seen, to the illustrations of commercial artists and the copy of advertising writers. The same protection is not afforded the "idea men" who conceive the basic plans behind each large-scale advertising scheme. It is a well-established principle that ideas as such cannot be the subject of copyright. The tangible expression of the idea, such as a book or a picture, may be copyrighted, but the copyright protection does not extend to the basic idea explained or portrayed therein. This principle is illustrated by the case involving the "bank night" scheme of motion picture advertisement. The originator of the scheme copyrighted the advertisements and the explanatory literature which he sold to movie houses. The Court refused relief for infringement of copyright against one who merely copied the basic idea of the scheme, without directly copying the advertisements or the literature. There seems to be sound reason for this distinction. Ideas are intangible things; more than one person may have the same idea, and until it is in tangible form it is impossible to determine with any certainty just which person conceived the idea first. Then, too, there is the public interest involved. In the case of advertising ideas, the reason is not so clear as in the case of a mathematical system, or a chemical process, for example. In the latter instances it is clear that the progress of scientific advancement might be seriously impeded if scientific knowledge could be bought and sold like peanuts or apartment buildings. So is there public interest involved in the case of advertising schemes. Every man, be he scientist or advertising man, should be free to think as he pleases, and it is only when those thoughts are embodied into some product of his labor, or the labor of others that a property right should arise, and then only in the product and not in the thoughts. The only real protection a man may afford his ideas is to keep them to

14 Id at 711.
16 Affiliated Enterprises v. Gruber, 86 F. 2d 958 (1936).
himself until he is ready to put them to use in some tangible form. Once disclosed, all legal rights in the idea are lost, and no statutory protection is afforded by copyright law.\textsuperscript{17}

However, there are two instances, outside the realm of copyright, in which protection has been afforded to an idea after disclosure. One means is to protect the idea by contract. The originator of an idea may agree to disclose it for a price, and if the contract of sale has been completed and the idea disclosed, the seller must pay the agreed price. In one case the Court went so far as to find an implied contract, arising from the conduct of the parties.\textsuperscript{18} In that case an advertising scheme consisting of a slogan and suggested illustrations was submitted to a tobacco company. The Court found that there was no actual acceptance of the offer, but the tobacco company later used substantially the same idea in their advertising. The originator of the idea collected $9,000 from the tobacco company. The Court said that his idea was novel and new and that it was embodied in concrete form. There seems to be little distinction between the idea embodied in the bank night case and the idea contained in the advertising scheme in this case. The difference probably lies in the relation of the parties, upon which relation has arisen another basis for protection afforded ideas outside the realm of copyright.

In the case of \textit{International News Service v. Associated Press},\textsuperscript{19} protection was given to one news service against pirating of their uncopyrighted news items by another news service, on the basis of unfair competition. The reasoning was based on the "free ride" doctrine, that one should not be allowed to reap where he has not sown. The crux of the case, however, lay in the relation of the parties, as competitors in the same field of endeavor. A later case\textsuperscript{20} refused to apply the "free ride" doctrine to the case of news pirated from one of the news services by a radio station, on the grounds that the newspapers and the radio station were not in competition with one another. It may be that this decision in the news service case is peculiarly ap-

\textsuperscript{17}Bristol v. Equitable Life Assurance Soc. of U. S., 132 N. Y. 264, 30 N. E. 506 (1892); Moore v. Ford Motor Co., 43 F. 2d 685 (1930).
\textsuperscript{19}248 U.S. 215 (1918).
\textsuperscript{20}Associated Press v. KVOS, 80 F. 2d 575 (1935).
Applicable to that type of business and would not apply to other businesses. Later decisions on similar fact situations indicate the reluctance to apply the "free ride" doctrine to other fields of endeavor.\textsuperscript{21} In the case of \textit{Grant v. Kellogg Co.},\textsuperscript{22} for instance, an artist was hired to make advertising drawings for Rice Krispies cereal. He conceived some distinctive gnomes named "Snap", "Crackle", and "Pop", which were used in all the pictures drawn to advertise the breakfast cereal. After some disagreement with the Kellogg Co., another artist was hired to draw the gnomes for the advertising, and the original artist sued for infringement of the distinctive characters. Relief was refused, on the ground that the artist had no property right in the idea or conception but only in the executed pictures. It would seem that the relation of the parties here would be sufficiently close to find some breach of trust, but the "free ride" doctrine was not applied. A different result was reached in the case of \textit{King Features Syndicate v. Fleischer},\textsuperscript{23} which did not involve advertising ideas. In that case the plaintiff copyrighted a book of cartoons, picturing a character called Barney Google and his horse Spark Plug. The defendant manufactured a toy horse, copied from plaintiff's picture of Spark Plug, and advertised the toy under the name "Spark Plug" or "Sparky". Plaintiff was granted relief for infringement of his copyright. The Court said: "The artist's concept of humor was embodied in the copyrightable form . . . ; its essence was the concept of humor which that form embodied."\textsuperscript{24} A like result was reached in the case of \textit{Fleischer Studios, Inc. v. Freundlich, Inc.},\textsuperscript{25} which involved the infringement of plaintiff's copyrighted cartoon "Betty Boop" by a doll bearing the same name. There seems to be no apparent reason for the distinction between ideas embodied in comic strip characters and ideas embodied in advertisements, except for the historical reluctance to recognize property rights in advertising.

In radio the problem of advertising is somewhat different. As far as the sponsor is concerned, the program which he presents for the entertainment or edification of the listening public

\begin{itemize}
  \item \textsuperscript{21} Meyer v. Hurwitz, 5 F. 2d 370 (1925).
  \item \textsuperscript{22} 58 Fed. Supp. 48 (1944).
  \item \textsuperscript{23} 299 Fed. 533 (1924).
  \item \textsuperscript{24} Id. at 538.
  \item \textsuperscript{25} 5 Fed. Supp. 808 (1924), aff. 72 F. 2d 276.
\end{itemize}
is as much a part of his advertising as the commercials which go along with it. The program and the commercials stand in much the same relation as the picture and the reading matter on a billboard, and are likewise difficult to consider separately. In addition, radio commercials are of such ephemeral nature that they require little protection. Even though it might be considered desirable it is doubtful that a valid copyright could be secured for radio commercials in any case. In the Copyright Act of 1909, as amended in 1912 (17 U.S.C.A.), it is provided, in Section 9: "That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act..." It has been held that radio production of original scripts does not constitute publication, and that the author has not lost any common law copyright which he may have in such material by its use on the air. In that case, however, the comedian Ed Wynn was enjoined from publishing scripts which he wrote for the Texaco radio show, even though he retained his common law copyright in them after broadcast. The decision was based on unfair competition. Use of advertising matter on the radio is analogous to the use of dramatic material or comedy dialogue, and its use probably would not constitute publication under the requirements of the Copyright Law. Thus it would be fully protected by common law copyright against copying or pirating.

Today advertising is given limited but probably adequate protection under the laws of copyright. Necessary supplemental relief is often granted in an action based on contract or on unfair competition. The fact remains, however, that copyright protection is not often sought for advertisements. In a recent issue of Good Housekeeping magazine, for example, only 24 out of a total of 366 ads appearing in the issue were copyrighted. Apparently imitation is not considered a formidable threat nor a serious offense, but may actually result in more good than harm to the originator. The old adage, "Imitation is the sincerest form of flattery" seems to apply particularly in the field of advertising.

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