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## Case Notes

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## CASE NOTES

**Copyrights—Indivisibility of Copyright Rule Held Inapplicable Where Author Is Plaintiff.**—In 1945, plaintiffs' testator, David Goodis, arranged with the publishing firm of Julian Messner, Inc. for his book *Dark Passage* to be published the following year. Subsequently, he sold exclusive movie rights in his novel to Warner Brothers. The agreement with Warner Brothers was embodied in a standard form contract, but contained several "specially negotiated" clauses which covered television and radio performance rights. Goodis then made a third agreement, this time with the Curtis Publishing Co., to publish the novel in eight installments in *The Saturday Evening Post* just prior to the publication of *Dark Passage* in book form. Every issue contained a copyright notice in the name of *The Saturday Evening Post*.<sup>1</sup> No notice was given in Goodis' name. Following its publication in book form, Warner Brothers produced *Dark Passage* as a movie, which was shown in theaters and on television. Warner Brothers then assigned its contract rights to defendant United Artists, which produced a film series based on *Dark Passage* entitled "The Fugitive," which was shown weekly on television by defendant American Broadcasting Co.<sup>2</sup> In 1965 Goodis brought an action for copyright infringement.<sup>3</sup> The district court held that Goodis' granting permission to *The Saturday Evening Post* to publish a serialization of his novel, without selling to the magazine all his rights in the book, followed by the publishing of the serialized novel in the periodical, resulted in the dedication of all of Goodis' rights in *Dark Passage* to the public domain.<sup>4</sup> The United States Court of Appeals for the Second Circuit reversed and remanded, concluding unanimously that the publisher's copyright notice in the magazine sufficed to acquire a valid copyright for the author.<sup>5</sup> The court stressed the importance of its initial determination that the author, in granting *The Saturday Evening Post* a license to publish the serialization of his novel, did not intend to abandon his work to the public domain.<sup>6</sup> *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

The importance of *Goodis* lies in its modification of the "judge-made" doctrine<sup>7</sup> called "'indivisibility of copyright' which rejects partial assign-

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1. 17 U.S.C. § 3 (1964): "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

2. See generally Newsweek, April 26, 1965, at 94.

3. Goodis died while the action was pending and his executors were substituted as plaintiffs in 1967. *Goodis v. United Artists Television, Inc.* 278 F. Supp. 122, 123 (S.D.N.Y. 1968), rev'd, 425 F.2d 397 (2d Cir. 1970).

4. Id. at 125.

5. *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 399 (2d Cir. 1970).

6. Id. at 400.

7. Id.

ments of copyrights."<sup>8</sup> A proprietor or assignee of a copyright must possess "nothing less than *all* the rights in a copyrighted work" for his copyright to be valid and fully protected.<sup>9</sup> The theory of indivisibility of copyright has been summarized as follows: "Copyright is indivisible, and unless an assignment conveys all of the copyright and the rights incident thereto, it will be treated not as an assignment of the copyright, but rather as a license."<sup>10</sup> The distinction between an assignment and a license is important because "assignment changes the legal ownership of the copyright, while the license merely makes the doing of certain things by the licensee lawful. . . . The ordinary rule of law is that a licensee cannot sue, in his own name, for violation by another of the rights which he has been permitted to exercise."<sup>11</sup> A licensee may only sue an infringer on the rights to which he has a license,<sup>12</sup> and then he is required to join the owner (proprietor) of the copyright as co-plaintiff.<sup>13</sup> The proprietor of the copyright can, however, be forced by an exclusive licensee to become a party-plaintiff.<sup>14</sup> One of the practical results of the

8. *Id.* In England the indivisibility theory found its historical roots in *Jeffreys v. Boosey*, 10 Eng. Rep. 681 (1854), and, in the United States, in *Waterman v. Mackenzie*, 138 U.S. 252 (1891). See *M. Nimmer, Nimmer on Copyright* §§ 119-119.2, at 510-13 (1970).

9. *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 400 (2d Cir. 1970) (emphasis added).

10. *P. Wittenberg, The Protection of Literary Property* 88 (1968). Another definition that has been suggested states that "[w]ith respect to a particular work embodied in concrete form, or separable part of such work, there is, at any one time, in any particular jurisdiction, only a single incorporeal legal title or property known as the copyright, which encompasses all of the authorial rights recognized by the law of the particular jurisdiction with respect thereto." *Henn, "Magazine Rights"—A Division of Indivisible Copyright*, 40 *Cornell L.Q.* 411, 417-18 (1955) (footnotes omitted).

11. *R. De Wolf, An Outline of Copyright Law* 76 (1925); see *New Fiction Publ. Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915). *Contra*, *Hill v. Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914). See also *Hirshon v. United Artists Corp.*, 243 F.2d 640, 643 (D.C. Cir. 1957); *Rohmer v. Commissioner*, 153 F.2d 61, 63 (2d Cir.), cert. denied, 328 U.S. 862 (1946); *Goldsmith v. Commissioner*, 143 F.2d 466, 467 (2d Cir.), cert. denied, 323 U.S. 774 (1944); *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9, 11 (2d Cir. 1922), cert. denied, 262 U.S. 755 (1923); *Misbourne Pictures Ltd. v. Johnson*, 90 F. Supp. 978 (S.D.N.Y. 1950), *aff'd*, 189 F.2d 774 (2d Cir. 1951).

12. *Tully v. Triangle Film Corp.*, 229 F. 297, 298-99 (S.D.N.Y. 1916); *M. Nimmer*, *supra* note 8, § 132, at 581.

13. *Independent Wireless Tel. Co. v. Radio Corp. of America*, 269 U.S. 459, 468 (1926); *Buck v. Elm Lodge, Inc.*, 83 F.2d 201 (2d Cir. 1936); *Field v. True Comics, Inc.*, 89 F. Supp. 611 (S.D.N.Y. 1950); *Local Trademarks, Inc. v. Powers*, 56 F. Supp. 751, 752 (E.D. Pa. 1944); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), *aff'd mem.*, 2 F.2d 1020 (4th Cir. 1924).

14. See *Independent Wireless Tel. Co. v. Radio Corp. of America*, 269 U.S. 459, 466 (1926); *Paul E. Hawkinson Co. v. Carnell*, 112 F.2d 396, 398 (3d Cir. 1940); *L.C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196, 197 (2d Cir. 1936); *Western Elec. Co. v. Patent Reproducer Corp.*, 42 F.2d 116, 118 (2d Cir.), cert. denied, 282 U.S. 873 (1930); *Field v. True Comics, Inc.*, 89 F. Supp. 611, 613 (S.D.N.Y. 1950); *Hoffman v. Santly-Joy, Inc.*, 51 F. Supp. 779 (S.D.N.Y. 1943); *M. Nimmer*, *supra* note 8, at 581.

application of the theory of indivisibility is that the proprietor of the copyright can sue the infringer without notifying the licensee that he is doing so and without sharing the damages with the licensee, even though the latter may have suffered economically as a result of the infringement.<sup>15</sup>

Originally, the indivisibility theory grew out of the fact that the copyright protected one right only—that of preventing an infringer from printing another's manuscript without his permission.<sup>16</sup> However, as business practices changed and the forms of entertainment became more varied, the average copyright became a "bundle of rights."<sup>17</sup> It became more profitable for an author to accept the best offer for each right, e.g., motion picture rights, dramatic rights, serialization rights, recording rights, adaptation rights, television rights, and book publication rights.<sup>18</sup> The amendments to the American Copyright Act,<sup>19</sup> which was enacted in 1831, reflect this development of a single right into a combination of rights.<sup>20</sup> However, courts narrowly interpreted the wording of the statute to mean that only the purchaser of *all* the rights in one work may secure a valid copyright.<sup>21</sup> The words in the statute relied upon by the courts which have established the indivisibility rule, provide that a copyright can be secured by "the author or proprietor" or by his "ex-

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15. See *M. Nimmer*, supra note 8, § 119.31, at 517, citing *Widenski v. Shapiro*, *Bernstein & Co.*, 147 F.2d 909 (1st Cir. 1945).

16. *Henn*, supra note 10, at 411-16.

17. Comment, *Indivisibility of Copyright—An Obsolete Doctrine*, 37 *U. Colo. L. Rev.* 95 (1964).

18. See *R. De Wolf*, supra note 11, at 77-78; *B. Ringer & P. Gitlin*, *Copyrights* 16-17 (1963); Comment, supra note 17, at 97. If the right granted resulted in the creation of a second work by the licensee, the licensee could get a fully protective copyright for himself as proprietor of the new work. He can then bring an action for himself as proprietor of the new work without joining the grantor of the right as co-plaintiff. See Comment, supra note 17, at 97 n.24. An example of this would be a license granted to a movie producer by an author of a novel to make a film adaptation of his book. The movie producer could obtain a copyright of the film as proprietor of it.

19. Act of March 4, 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. §§ 1-216 (1964)); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

20. The Copyright Act of 1831 gave the author the right to print, reprint, publish, and vend books, maps, charts and musical compositions. In 1856, the law was amended to protect the author's dramatic rights. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. In 1870, the author's right to translate and dramatize his own work was recognized. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198. In 1897, the right to present a musical composition from the work was recognized. Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481. The Copyright Act of 1909, 17 U.S.C. §§ 1-216 (1964), added several additional rights, including the right to make records. From a single recognized right, therefore, the Copyright Act recognized several rights, all with considerable monetary value to a successful author wishing to sell one of those rights. See Comment, supra note 17, at 96-97.

21. See, e.g., *Miffiin v. R.H. White Co.*, 190 U.S. 260 (1903); *Public Ledger Co. v. New York Times Co.*, 275 F. 562 (S.D.N.Y. 1921), *aff'd*, 279 F. 747 (2d Cir.), *cert. denied*, 258 U.S. 627 (1922); *New Fiction Publ. Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915).

ecutors, administrators, or assigns."<sup>22</sup> These courts have held the word "proprietor" to include "assignee" but not "licensee."<sup>23</sup> The Copyright Act of 1909, which provided that the court has "power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws,"<sup>24</sup> had been interpreted by one circuit in a leading case to mean that "any party aggrieved" referred only to an "author or proprietor,"<sup>25</sup> and "any right" means only those rights embodied in a single indivisible copyright.<sup>26</sup>

The courts gradually began to recognize the potentially harsh effects of a strict application of the indivisibility rule. In two leading cases which upheld the indivisibility rule, *New Fiction Publishing Co. v. Star Co.*<sup>27</sup> and *Goldwyn Pictures Corp. v. Howells Sales Corp.*<sup>28</sup> the plaintiffs were not the authors of the works involved but were owners of part of the rights to the work. In each of these cases, however, the court indicated, in dicta, that the result might have been different had the author been the plaintiff.<sup>29</sup>

The doctrine of indivisibility of copyright was questioned by the Court of Appeals for the Second Circuit in *Houghton Mifflin Co. v. Stackpole Sons, Inc.*<sup>30</sup> In *Houghton*, an injunction was granted to the plaintiff, who was the publisher of Hitler's *Mein Kampf*, and who claimed that the copyright had

22. 17 U.S.C. § 9 (1964).

23. See cases cited note 21 supra.

24. Act of March 4, 1909, ch. 320, § 36, 35 Stat. 1084, as amended, 17 U.S.C. § 112 (1964). The statute now reads: "Any court . . . shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court . . . may deem reasonable." Note that the statute still contains the words "any party aggrieved." 17 U.S.C. § 112 (1964).

25. *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9 (2d Cir. 1922), cert. denied, 262 U.S. 755 (1923).

26. *Id.* The statutory interpretation is explained at length by Professor Nimmer: "Since the Copyright Act speaks of a single 'copyright' [17 U.S.C. § 10 (1964)] to which the author of a work is entitled, and refers in the singular to 'the copyright proprietor,' [17 U.S.C. §§ 1-3, 7-10, 12, 14, 19, 21-22, 24-26, 28, 101, 107, 109, 214-15 (1964)] it is inferred that the bundle of rights which accrue to a copyright owner are 'indivisible,' that is, incapable of assignment in parts." M. Nimmer, supra note 8, § 119.1, at 510; see *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, (E.D.S.C.), aff'd mem., 2 F.2d 1020 (4th Cir. 1924); *New Fiction Publ. Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915).

27. 220 F. 994 (S.D.N.Y. 1915).

28. 282 F. 9 (2d Cir. 1922), cert. denied, 262 U.S. 755 (1923).

29. In *New Fiction*, the district court had stated that "[i]t will be understood that I am not passing on the question which would be presented if Goodman were a party plaintiff." 220 F. at 997. The court in *Goldwyn* said: "[W]e express no opinion in respect of what the legal status of plaintiff would be if Mrs. Gunter [the author] were joined as party plaintiff, or if plaintiff should hereafter become a copyright proprietor . . ." 282 F. at 12.

30. 104 F.2d 306 (2d Cir.), cert. denied, 308 U.S. 597 (1939). The indivisibility theory has been rejected several times recently. See note 71 infra. Courts have also made efforts to avoid its strict application if the result would be too harsh. See note 47 infra.

been assigned to it by the book's German publishers. The defendant was publishing *Mein Kampf*, claiming that the work had fallen into the public domain.<sup>31</sup> In the course of its opinion, the court, in dicta, stated that: "The desirability of recognizing partial assignments, as is usual in other forms of property, would seem apparent; but perhaps under the statute we are held to the view that 'the author's rights may not be divided except as the statute recognizes a division.'"<sup>32</sup>

In *Goodis* the district court accepted the defendants' argument that the copyright notice in the name of *The Saturday Evening Post* could not protect Goodis' rights in *Dark Passage*.<sup>33</sup> The court held that Curtis could not have been a proprietor or an assignee because Goodis had already sold exclusive rights to Warner Brothers.<sup>34</sup> Therefore, Curtis did not hold all the rights in Goodis' work and could only have been a licensee.<sup>35</sup> Thus, under the indivisibility rule, Curtis' copyright of the entire magazine could not protect Goodis' rights in his novel.<sup>36</sup> Compliance with the copyright statute is required before or simultaneous with the material's first publication.<sup>37</sup> If the proprietor of the work fails to ensure such compliance his work falls into the public domain<sup>38</sup> and his right to copyright the work is irretrievably lost. Being unprotected on its first publication, *Dark Passage* was regarded as being "thrown into the public domain as it appeared, installment by installment, in the 'Saturday Evening Post.'"<sup>39</sup> In coming to this conclusion, the district court relied on the case of *Morse v. Fields*.<sup>40</sup> In *Morse*, the court agreed with the

31. 104 F.2d at 307. There are four ways in which a work may fall into the public domain, which means that it is then "available to everyone for use without permission or payment . . . ."

"(1) When the copyright owner has authorized publication of the work without the statutory copyright notice, has failed to comply with certain other formal requirements [17 U.S.C. §§ 14, 16-18, 22-23 (1964)] or has expressly abandoned his copyright.

"(2) When the first 28-year term of copyright expires without renewal, or when the maximum term of 56 years expires [17 U.S.C. § 24 (1964)] . . . ."

"(3) When a work has been published that was written by a foreign author and does not qualify for protection under the statute because of its author's citizenship or domicile, or its place of first publication [17 U.S.C. § 9 (1964)]."

"(4) When the work does not contain sufficient original material of creative authorship to constitute the 'writing of an author.'" B. Ringer & P. Gitlin, *supra* note 18, at 12-13.

32. 104 F.2d at 312, citing *Public Ledger Co. v. New York Times Co.*, 275 F. 562, 564 (S.D.N.Y. 1921), *aff'd*, 279 F. 747 (2d Cir.), *cert. denied*, 258 U.S. 627 (1922).

33. 278 F. Supp. at 125.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; see 17 U.S.C. §§ 10-14 (1964) for requirements of compliance with the Act.

38. See note 31 *supra*.

39. 425 F.2d at 399; see *Henn*, *supra* note 10, at 428. 17 U.S.C. § 8 (1964) provides in part: "No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States . . . ."

40. 127 F. Supp. 63 (S.D.N.Y. 1954).

plaintiff's theory that a general copyright in one issue of a magazine does not protect the rights in an individual article unless the rights to the article had been assigned to the publisher by the author before the publisher copyrighted the whole issue.<sup>41</sup> The reason for this was said by the court to be that only a "proprietor" of a work can copyright it, that a person to whom the rights to the work are assigned is designated a "proprietor," and that a mere "licensee" cannot copyright a work.<sup>42</sup>

The court of appeals in *Goodis* rejected the district court's application of the indivisibility rule.<sup>43</sup> The most often cited policy reason for requiring that the prospective plaintiff own no less than *all* the rights in a particular work is the avoidance of several infringement actions, each begun by the holder of one right in the work, against a single defendant, without joining as co-plaintiff the author or proprietor of the copyrighted work.<sup>44</sup>

The court, by looking to the purposes of the indivisibility rule, differentiated "between applying the indivisibility doctrine to cases where the issue is standing to sue for infringement and cases where the issue is protection of the author's interest . . ."<sup>45</sup> The court of appeals might continue to apply the indivisibility rule in the former situation, but not in the latter.<sup>46</sup> The court indicated that it took this position because it wished to remedy the inherently unjust situation that would have resulted had it found that *Goodis'* rights in his work were lost to him forever because of a technical error committed in the course of obtaining copyright.<sup>47</sup>

We are loath to bring about the unnecessarily harsh result of thrusting the author's product into the public domain when, as here, everyone interested in *Dark Passage*

41. *Id.* at 64-65.

42. *Id.*

43. 425 F.2d at 401.

44. *Id.*, citing *New Fiction Publ. Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915). See generally *H. Warner, Radio and Television Rights* § 53 (1953).

45. 425 F.2d at 401; see *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968).

46. 425 F.2d at 400-01. The court "express[ed] no opinion on whether a publisher in *Curtis'* position could maintain an infringement action without joining the author." *Id.* at 401.

47. "Courts have been understandably reluctant to invoke the doctrine of indivisibility where the author or proprietor of the work is the plaintiff and the result would be to deprive the plaintiff of the fruits of his creative effort." *Id.* at 400. Courts have espoused various theories in such cases in order to find for plaintiff-author and thus avoid such obviously unjust results as occurred in *Holmes v. Hurst*, 174 U.S. 82 (1899), a case in which Oliver Wendell Holmes lost his common law copyright to "Autocrat of the Breakfast Table," and *Miffin v. R.H. White Co.*, 190 U.S. 260 (1903), in which the same author lost his copyright to "Professor at the Breakfast Table." Both works were published in several installments in the "Atlantic Monthly" without a proper copyright, before the works had been published in a copyrighted book. Another case which is often cited as a too rigid adherence to statutory copyright requirements is *Stowe v. Thomas*, 23 F. Cas. 201 (No. 13,514) (C.C.E.D. Pa. 1853). For cases avoiding a strict interpretation of the copyright law, see *Bisel v. Ladner*, 1 F.2d 436 (3d Cir. 1924); *Maurel v. Smith*, 271 F. 211 (2d Cir. 1921); *T.B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42 (2d Cir.), vacated on other grounds, 231 F. 645 (2d Cir. 1916); *Quinn-Brown Publ. Corp. v. Chilton Co.*, 15 F. Supp. 213 (S.D.N.Y. 1936).

could see Curtis' copyright notice and could not have believed there was any intention by Goodis to surrender the fruits of his labor.<sup>48</sup>

The court stated that the decisions in *New Fiction* and *Goldwyn* did not present a barrier to its conclusions, pointing out that both decisions specifically did not rule on the applicability of the indivisibility rule in a case where the author was the plaintiff.<sup>49</sup>

The court also cited as support for its holding, "modern business practices"<sup>50</sup> and the "liberalizing spirit"<sup>51</sup> embodied in the Copyright Act of 1909.<sup>52</sup> Under the Copyright Act of 1831,<sup>53</sup> an author obtained a copyright before publication by placing with the district court in the district where he was domiciled a copy of the title of the work he had authored.<sup>54</sup> Under the Copyright Act of 1909,<sup>55</sup> an author obtained copyright by publishing the work along with a notice of his interest in it.<sup>56</sup> The court regarded this alteration as "critical,"<sup>57</sup> explaining that, under the 1831 law, it was reasonable to require that only an author or a proprietor could obtain a copyright because the author or proprietor would usually have exclusive possession of the work before publication, and the copyright had to be secured before publication.<sup>58</sup> Under the 1909 statute, however, copyright is obtained with the first publication of the work.<sup>59</sup> Thus, where before 1909, the author obtained the copyright himself, after 1909 the author would depend on the publisher to secure the copyright. The result was that "[s]uddenly the author who might previously have obtained copyright before publication had to guard against any legal infirmity surrounding first publication which might throw his work into the public domain."<sup>60</sup> To deprive the author of his rights in the work

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48. 425 F.2d at 400.

49. See note 29 supra.

50. 425 F.2d at 403. It is often mentioned that the conception of the number of rights which are protected by a copyright has been changed by modern business practices, which change is not reflected in the Copyright Act of 1909. See notes 18 & 20 supra.

51. 425 F.2d at 402; see note 20 supra.

52. 425 F.2d at 401-03; see Act of March 4, 1909, ch. 320, 35 Stat. 1075 (codified as amended, at 17 U.S.C. §§ 1-216 (1964)).

53. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

54. Act of Feb. 3, 1831, ch. 16, § 4, 4 Stat. 436; see 425 F.2d at 401.

55. See note 52 supra.

56. 17 U.S.C. § 10 (1964).

57. 425 F.2d at 401.

58. *Id.*

59. 17 U.S.C. § 10 (1964).

60. 425 F.2d at 401. This theory of indivisibility held pitfalls for the authors unversed in copyright law. As Professor Henn stated: "The difficulty today is not that magazine copyright law is indefinite, but that few realize how specific and technical such law is." Henn, *supra* note 10, at 411.

Insofar as the publisher is concerned, all the contents, including the articles written by various authors, are protected by a single registered copyright notice in the magazine along with the author's name and the title of the piece which he has contributed to the issue. Copyright for the author will be obtained only if the article is published with a notice



for his pre-1909 failure to fulfill his responsibility to copyright the work himself could be deemed fair. But to deprive the author of his rights in the work for the publisher's error cannot be so easily justified.<sup>61</sup>

The court noted that its holding, not the district court's holding, is in conformity with the provisions of the proposed revision of the Copyright Act.<sup>62</sup> The revised statute would provide that the author of a published magazine article holds a copyright in the article distinct from the copyright of the publisher<sup>63</sup> but that first publication in a magazine under a copyright notice in the name of the publisher secures for the author a copyright in his article.<sup>64</sup>

The court considered the copyright notice in *The Saturday Evening Post* to have been a "perfectly adequate"<sup>65</sup> warning to the public that the material was copyrighted by someone, that its author did not intend it to be in the public domain, and that the copyright could not be infringed upon without penalty.<sup>66</sup> The court concluded that "[a]lthough placing a special notice in the author's own name on each installment appearing in the magazine would be a more careful practice than we find here, we do not think that failure to do so, by itself, should cause an author to suffer forfeiture."<sup>67</sup>

The result in *Goodis* indicates a realistic willingness on the part of the Second Circuit to limit an antiquated doctrine which has exhausted its purpose,<sup>68</sup> and to conform decisions in this area to the necessities of the modern business world. As the *Goodis* court noted, Congress may soon pass a bill which would be in accord with its holding.<sup>69</sup> The indivisibility of copyright doctrine, besides the unjust results it has produced, has created many problems

bearing the name of the copyright proprietor. 17 U.S.C. § 10 (1964); see R. De Wolf, supra note 11, at 88.

61. 425 F.2d at 401-03.

62. *Id.* at 402-03; see House Comm. on the Judiciary, H.R. Rep. No. 83, 90th Cong., 1st Sess. 2-3 (1967). See also the Hearings on H.R. 4347 Before a Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess., sec. 8, pts. 1-3 (1966).

63. S. 597, 90th Cong., 1st Sess. § 201(c)-(d) (1967).

64. *Id.* § 403(a).

65. 425 F.2d at 403. The court concluded that the district court's granting of summary judgment to defendants was erroneous. The court of appeals was reluctant to take so broad an interpretation of the contract as to permit Warner Brothers to take characters from *Dark Passage* and use them in any story line in which Warner Brothers chose to portray *Goodis*' characters. The court of appeals expressed a concern about the pirating of characters by persons other than the author and their use by such persons in works unauthorized by the author. The court considered this a particularly important point because of *Goodis*' possible plans to use his popular characters in sequels to *Dark Passage*. The court of appeals therefore stated that it wished more information about the intent of the parties, and the "general custom and expectations of authors and of members of the publishing, broadcasting, and film vocations." *Id.* at 406.

66. *Id.* at 403.

67. *Id.*

68. See text accompanying notes 8 & 43 supra.

69. See note 62 supra.

in the areas of copyright recordation and taxes.<sup>70</sup> The rule has been rejected recently in tax cases<sup>71</sup> and has been criticized by legal writers as obsolete.<sup>72</sup> A doctrine so striking in its artificiality, so plainly anachronistic, is properly limited in application to cases where the plaintiff is not the author.

**Jurisdiction—Long-Arm Statute—Participation in New York Auction via Interstate Telephone Call by Non-domiciliary Held to Constitute “Transaction of Business” Within Meaning of CPLR Section 302(a).**—Defendant, a California domiciliary, requested and received a catalogue from plaintiff, a New York auctioneer. At defendant’s request, plaintiff established an open telephone line on the day of the auction between defendant, in Los Angeles, and plaintiff’s galleries in New York City. During the auction plaintiff’s employee apprised defendant of the bidding activity in New York and relayed defendant’s bids to the auction floor. Through the employee, the defendant successfully bid for two paintings for an aggregate price of \$96,000. When the defendant refused to pay the sales price, plaintiff commenced an action in New York by personally serving the defendant in California under New York’s long-arm statute.<sup>1</sup> Defendant moved to dismiss the complaint under rule 3211(a)(8) of the Civil Practice Law and Rules, alleging a lack of personal jurisdiction. The supreme court granted the motion to dismiss and the appellate division affirmed, holding that the defendant had not transacted business in the state, either personally or through an agent, within the meaning of Civil Practice Law and Rules section 302(a)(1).<sup>2</sup> The court of appeals reversed, holding alternatively that the defendant had either personally *or* through an agent transacted business in New York and was therefore subject to in personam jurisdiction in the state. *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

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70. See Comment, *supra* note 17, at 100-03. There is a Treasury ruling which rejects the theory of indivisibility of copyright for income tax purposes. See Rev. Rul. 409, 1954-2 Cum. Bull. 174.

71. E.g., *Goldsmith v. Commissioner*, 143 F.2d 466 (2d Cir.), cert. denied, 323 U.S. 774 (1944); *Gershwin v. United States*, 153 F. Supp. 477 (Ct. Cl. 1957); *Herwig v. United States*, 105 F. Supp. 384, 389 (Ct. Cl. 1952); *Joseph A. Fields*, 14 T.C. 1202 (1950), *aff’d*, 189 F.2d 950 (2d Cir. 1951).

72. See, e.g., note 17 *supra*.

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1. N.Y. C.P.L.R. § 302(a) (McKinney Supp. 1970) provides in part: “As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

“1. transacts any business within the state . . . .”

2. *Parke-Bernet Galleries, Inc. v. Franklyn*, 31 App. Div. 2d 276, 297 N.Y.S.2d 151 (1st Dep’t 1969), *rev’d*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

In 1877, *Pennoyer v. Neff*<sup>3</sup> established the principle that before a court could determine the personal liabilities or obligations of a defendant, he must first be brought within its jurisdiction by service within the state, or by voluntary submission to in personam jurisdiction.<sup>4</sup> A judgment entered by a court lacking jurisdiction was void as violative of the due process clause of the fourteenth amendment.<sup>5</sup>

The narrow territorial limitations imposed on the jurisdiction of state courts by the *Pennoyer* doctrine proved insufficient to meet the needs of a growing and mobile population. As a result, the *Pennoyer* doctrine was expanded where some reasonable basis—such as the constructive presence of the defendant within the state<sup>6</sup> or an act which implied consent to the jurisdiction of the forum<sup>7</sup>—could be found. Thus, doing business within the state<sup>8</sup> was included under the “constructive presence” doctrine, to confer jurisdiction for all causes of action, while non-resident motorist statutes were upheld on an “implied consent” theory.<sup>9</sup> However, it became increasingly clear that, in many instances, the courts were relying on pure fictions to predicate jurisdiction over non-domiciliaries.<sup>10</sup>

In *International Shoe Co. v. Washington*<sup>11</sup> the Supreme Court swept aside these fictions and prescribed a new standard for jurisdiction. Mr. Justice Stone, writing for the majority, stated that due process only requires “that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>12</sup> The “minimum contacts” test is not simply mechanical. It depends “upon the quality and nature of the activity in relation to the fair and

3. 95 U.S. 714 (1877).

4. *Id.* at 733.

5. *Id.*

6. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

7. *Hess v. Pawloski*, 274 U.S. 352, 356 (1927); *Wilson v. Seligman*, 144 U.S. 41, 45 (1892); see *Kane v. New Jersey*, 242 U.S. 160 (1916).

8. *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917); *Simon v. Southern Ry.*, 236 U.S. 115 (1915); *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8 (1907); *Mutual Life Ins. Co. v. Spratley*, 172 U.S. 602 (1899); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

9. In *Hess v. Pawloski*, 274 U.S. 352 (1927), defendant, a resident of Pennsylvania, was involved in an automobile accident while driving in the state of Massachusetts. Massachusetts' non-resident motorist statute stated that use of the state's highways by a non-resident motorist was equivalent to an appointment of the registrar to accept process in any action arising out of an accident or collision in Massachusetts. The Supreme Court held that “[t]he State's power to regulate the use of its highways extends to their use by non-residents as well as by residents,” and a state may validly require defendant to impliedly consent to jurisdiction as a prerequisite to driving on its roads. *Id.* at 356 (citation omitted).

10. See Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 573 (1958); Note, *Jurisdiction in New York: A Proposed Reform*, 69 Colum. L. Rev. 1412, 1413-15 (1969).

11. 326 U.S. 310 (1945).

12. *Id.* at 316 (citations omitted).

orderly administration of the laws which it was the purpose of the due process clause to insure."<sup>13</sup> The Court did set some outer limits on the scope of jurisdiction. A nonresident having no contact with the forum was not subject to service outside the state, while a non-resident deliberately conducting business within the jurisdiction was.<sup>14</sup>

The first major interpretation of the "minimum contacts" test, *McGee v. International Life Ins. Co.*,<sup>15</sup> upheld a California court's assertion of jurisdiction over a Texas insurance company in an action based upon an insurance contract mailed to a California resident. The Texas company had never solicited nor done any business in California apart from the single policy sued upon. Mr. Justice Black, however, found these facts sufficient to predicate California jurisdiction: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."<sup>16</sup> In determining that the contract had a substantial connection with California, the Court noted that the contract was delivered in California, the premiums were paid from California and the insured was a resident of California when he died.<sup>17</sup> Moreover, it found "that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."<sup>18</sup>

The same Court in a subsequent decision, *Hanson v. Denckla*,<sup>19</sup> reminded the states that the liberal approach taken in *McGee* did not signify the end of all constitutional restrictions on a state's power to subject non-residents to the jurisdiction of its courts.<sup>20</sup> In *Hanson*, jurisdiction over a non-resident trustee was denied where the sole contact with the forum state was correspondence between the trustee and the settlor of the estate who had moved to the forum state after the establishment of the trust. Holding that the defendant did not have sufficient minimum contacts with the forum state to predicate in personam jurisdiction, the Court, in a 5-4 decision, pointed out that due process still required that the defendant perform some purposeful act within the forum state which would subject him to its laws.<sup>21</sup>

The New York long-arm statute was originally modeled on the Illinois act,<sup>22</sup>

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13. *Id.* at 319.

14. *Id.* at 317-18; see McLaughlin, Practice Commentary to N.Y. C.P.L.R. § 302 (McKinney 1963).

15. 355 U.S. 220 (1957).

16. *Id.* at 223 (citations omitted).

17. *Id.* at 221-22.

18. *Id.* at 223. This statement could be construed as a deviation from the "fair play to defendant" concept enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

19. 357 U.S. 235 (1958).

20. "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Id.* at 251 (citation omitted).

21. *Id.* at 253; see McLaughlin, 1965 Supplementary Practice Commentary to N.Y. C.P.L.R. § 302 (McKinney Supp. 1970).

22. Second Preliminary Report of the Advisory Committee on Practice and Procedure,

and was designed "to take advantage of the constitutional power of the state of New York to subject non-residents to personal jurisdiction when they commit acts within the state."<sup>23</sup> The New York Court of Appeals, however, has added the following caveat:

[D]efendants, as a rule, should be subject to suit where they are normally found, that is, at their pre-eminent headquarters, or where they conduct substantial general business activities. Only in a rare case should they be compelled to answer a suit in a jurisdiction with which they have the barest of contact . . . .<sup>24</sup>

Theoretically, a single transaction from which the cause of action arises is all that is necessary to furnish a basis for personal jurisdiction over a non-domiciliary.<sup>25</sup> In this respect, the "transacts any business" criterion is far less demanding than the "doing business" standard imposed under prior law.<sup>26</sup>

There is no easy test to determine what activity is sufficient to satisfy the "transacts any business" standard; each case must be decided on its facts.<sup>27</sup> In commercial cases, however, the court of appeals "has indicated a tendency to expand New York's jurisdiction and has been more liberal than lower courts."<sup>28</sup> Commercial cases, unfortunately, are by no means pristine models of certitude. For example, mere execution of a contract within or without the state is not determinative of the existence of jurisdiction,<sup>29</sup> though "the statutory test may be satisfied by a showing of other purposeful acts performed by the appellant in this State in relation to the contract, albeit preliminary or subsequent to its execution."<sup>30</sup>

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1958 N.Y. Legis. Doc. No. 13, at 39. Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd 1968) provides in part: "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

"(a) The transaction of any business within this State . . . ."

See also Ark. Stat. Ann. § 27-339.1 (Supp. 1969); Fla. Stat. Ann. § 48.181 (1969).

23. Second Preliminary Report of the Advisory Committee on Practice and Procedure, *supra* note 22.

24. *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 383, 229 N.E.2d 604, 607-08, 283 N.Y.S.2d 34, 38 (1967) (citation omitted); see *Wing v. Challenge Mach. Co.*, 23 F.R.D. 669, 672 (S.D. Ill. 1959).

25. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 456, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 18, cert. denied, 382 U.S. 905 (1965) (*Estwing Mfg. Co. v. Singer*).

26. 1 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 302.06 (1970); *McLaughlin, Practice Commentary to N.Y. C.P.L.R. § 302*, at 431 (McKinney 1963).

27. *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 381-82, 229 N.E.2d 604, 607, 283 N.Y.S.2d 34, 37 (1967).

28. 1 J. Weinstein, H. Korn & A. Miller, *supra* note 26, ¶ 302.06a, at 3-65; see *Electronic Devices, Inc. v. Mark Rodgers Assocs.*, 60 Misc. 2d 322, 323-24, 303 N.Y.S.2d 158, 160-61 (*Yonkers City Ct.* 1969), *aff'd mem.*, 63 Misc. 2d 243, 311 N.Y.S.2d 413 (App. T. 1970).

29. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 456-57, 467, 209 N.E.2d 68, 75, 81-82, 261 N.Y.S.2d 8, 18, 26, cert. denied, 382 U.S. 905 (1965) (*Estwing Mfg. Co. v. Singer*); see *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y.2d 13, 17, 228 N.E.2d 367, 369, 281 N.Y.S.2d 299, 301 (1967).

30. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457,

An interesting situation arises when the contract and negotiations occur without the state, yet performance is to occur within New York and such performance is not rendered.<sup>31</sup> The court of appeals has stated, although not in a contract case, that

[t]he failure of a man to do anything at all when he is physically in one State is not an "act" done or "committed" in another State. His decision not to act and his not acting are both personal events occurring in the physical situs. That they may have consequences elsewhere does not alter their personal localization as acts.<sup>32</sup>

One would have to be present "to omit the act."<sup>33</sup> In the converse situation, *i.e.*, where the contract is negotiated and executed within the state and performance is to be rendered without, personal jurisdiction has been upheld.<sup>34</sup> The mere shipment of goods into the state,<sup>35</sup> like the mere solicitation of business for an out of state concern<sup>36</sup> would not satisfy the statutory requisite; yet "[i]t now seems to be settled that advertising in New York, coupled with the shipment of goods into this State, constitutes the transaction of business within the State under CPLR 302 (subd. [a], par. 1) . . . ."<sup>37</sup>

A problem which is presented is whether an interstate telephone call constitutes the transaction of business within the state in which the call is received. In one case, where the defendant foreign corporation operated a hotel in New

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209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 18, cert. denied, 382 U.S. 905 (1965) (*Estwing Mfg. Co. v. Singer*) (footnote omitted).

31. See N.Y. Bus. Corp. Law § 1314(b)(1) (McKinney Supp. 1970), which deals with the existence of subject matter jurisdiction in similar circumstances.

32. *Platt Corp. v. Platt*, 17 N.Y.2d 234, 237, 217 N.E.2d 134, 135, 270 N.Y.S.2d 408, 410 (1966).

33. *Id.* In *Wirth v. Prenyl, S.A.*, 29 App. Div. 2d 373, 288 N.Y.S.2d 377 (1st Dep't 1968), promissory notes were executed outside of the country but made payable in New York. The court held that there was no transaction of business in the state; accord, *Hubbard, Westervelt & Mottelay, Inc. v. Harsh Building Co.*, 28 App. Div. 2d 295, 284 N.Y.S.2d 879 (1st Dep't 1967) (similar facts). Contra, *G. Benedict Corp. v. Epstein*, 47 Misc. 2d 316, 262 N.Y.S.2d 726 (Sup. Ct. 1965) (similar facts). See also *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 101 (E.D.N.Y. 1968).

34. *Patrick Ellam, Inc. v. Nieves*, 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963).

35. *Kramer v. Vogl*, 17 N.Y.2d 27, 31-32, 215 N.E.2d 159, 161-62, 267 N.Y.S.2d 900, 903-04 (1966); see *Potter's Photographic Applications Co. v. Ealing*, 292 F. Supp. 92, 101 (E.D. N.Y. 1968). But see *Wilsey v. Gavitt*, 49 Misc. 2d 744, 268 N.Y.S.2d 692 (Sup. Ct. 1966) (Defendant shipped "hundreds" of its products into the state).

36. *A. Millner Co. v. Noudar, Lda.*, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966); *Rose v. Sans Souci Hotel, Inc.*, 51 Misc. 2d 1099, 274 N.Y.S.2d 1000 (Sup. Ct. 1966). But where the defendant or his agents come into the jurisdiction to solicit business, the minimum contacts may have been established. *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472 (7th Cir. 1959), cert. denied, 361 U.S. 959 (1960); *Buckley v. Redi-Bolt, Inc.*, 49 Misc. 2d 864, 268 N.Y.S.2d 653 (Sup. Ct. 1966); *Iroquois Gas Corp. v. Collins*, 42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964), *aff'd mem.*, 23 App. Div. 2d 823, 258 N.Y.S.2d 376 (4th Dep't 1965).

37. *Naples v. Janesville Apparel Co.*, 29 App. Div. 2d 971, 972, 289 N.Y.S.2d 268, 271 (2d Dep't 1968) (citations omitted) (dissenting opinion); see *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 466-67, 209 N.E.2d 68, 81, 261 N.Y.S.2d 8, 26 (*Singer v. Walker*), cert. denied, 382 U.S. 905 (1965) (*Estwing Mfg. Co. v. Singer*).

Jersey, advertised in New York publications and maintained a local New York phone number for direct calling to its out of state office, it was held not to have "the minimum contacts in New York required for acquisition of jurisdiction over it in personam . . ." <sup>38</sup> On the other hand, a more recent case, stated that the maintenance of such a direct line combined with "a substantial business with New York residents" *would* constitute the necessary minimum contacts. <sup>39</sup> Clearly, however, the mere ordering of goods over the phone, <sup>40</sup> like the mere mailing of a contract offer into the state, <sup>41</sup> would not confer jurisdiction under section 302.

The New York long-arm statute provides that a non-resident need not have been physically present in the state; jurisdiction over a defendant may be predicated upon the acts of his agent. The term "agent" has been strictly construed, *i.e.*, a true, common law agency relationship must exist. <sup>42</sup> A non-resident principal will not be held to have transacted business within the state if such business was done by an independent contractor. <sup>43</sup>

The agency requirement, in a long-arm case, is subject to another limitation in a suit by the agent against his non-resident principal. If the agent wishes to predicate long-arm jurisdiction on his own actions within the state, his true agency must have been exclusive. <sup>44</sup> This exclusive agency rule is not applicable to a situation where a third party sues a non-resident principal relying on the agent's acts within the state. <sup>45</sup>

The *Parke-Bernet* court found that the defendant, Franklyn, had "projected himself into the auction room in order to compete with the other prospec-

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38. *Greenberg v. R.S.P. Realty Corp.*, 22 App. Div. 2d 690, 253 N.Y.S.2d 344 (2d Dep't 1964) (citations omitted) (mem.).

39. *Bard v. Steele*, 28 App. Div. 2d 193, 195, 283 N.Y.S.2d 930, 933 (3d Dep't 1967).

40. *M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc.*, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967), aff'g mem. 26 App. Div. 2d 52, 270 N.Y.S.2d 672 (1st Dep't 1966); *Schroeder v. Loomis*, 46 Misc. 2d 184, 259 N.Y.S.2d 42 (Sup. Ct. 1965); see *Desert Palace, Inc. v. Salisbury*, 401 F.2d 320 (7th Cir. 1968).

41. *A Millner Co. v. Noudar, Lda.*, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966). Insurance Contracts are treated differently. See N.Y. Ins. Law § 59-a (McKinney 1966).

42. *Glassman v. Hyder*, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

43. *Kirkland v. Sapphire Int'l Touring, Ltd.* 262 F. Supp. 309 (S.D.N.Y. 1966); *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y.2d 13, 228 N.E.2d 367, 281 N.Y.S.2d 299 (1967); *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

44. *Orient Mid-East Lines, Inc. v. Bowen, Inc.*, 297 F. Supp. 1149 (S.D.N.Y. 1969); *A. Millner Co. v. Noudar, Lda.*, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966); *Hertz, Newmark & Warner v. Fischman*, 53 Misc. 2d 418, 279 N.Y.S.2d 97 (N.Y.C. Civ. Ct. 1967).

45. *Orient Mid-East Lines, Inc. v. Bowen, Inc.*, 297 F. Supp. 1149, 1152 (S.D.N.Y. 1969). In *Parke-Bernet Galleries, Inc. v. Franklyn*, the plaintiff was a third party who asked the court to assert in personam jurisdiction over the defendant by virtue of the defendant's having transacted business in New York through an agent. These facts clearly take this case out of the application of the exclusive agency rule. See *Schneider v. J. & C. Carpet Co.*, 23 App. Div. 2d 103, 258 N.Y.S.2d 717 (1965).

tive purchasers who were there,"<sup>46</sup> and that "[t]his activity far exceeded the simple placing of an order by telephone."<sup>47</sup> The telephone call, even though not over a permanent direct line, was put through for the sole purpose of enabling the defendant to actively participate in the auction. In short, it was a deliberate, purposeful attempt by one not present in the jurisdiction to inject his presence into the sale and to effectuate a purchase.<sup>48</sup> This activity "affected not only the plaintiff but all those who were in the auction room."<sup>49</sup>

In an alternative holding, the court stated: "[E]ven if we were to decide that the defendant's *personal* participation in the auction did not amount to the transaction of business here, there is substantial ground for concluding . . . that Nash, who, of course, was physically present in the New York auction room, was engaged as the defendant's agent at the time."<sup>50</sup> The court found that Nash, an employee of the auctioneer had been "loaned" to Franklyn for the duration of the sale and that his sole function was to serve as the link between Franklyn and the auctioneer.<sup>51</sup>

The only feasible way in which the defendant could have effectively participated in the bidding was to have had control over and to have given directions to one who was present at the auction. The defendant chose not to send someone to New York for this purpose. Instead, the auctioneer furnished one of his employees to act as the liaison between Franklyn and the auction floor. Nash had to have been under the control of the defendant; had Nash been subject to the directions of the plaintiff, his loyalties would have collided. Nash was therefore a true agent of Franklyn.<sup>52</sup>

In *Parke-Bernet*, there was a definite transaction of business by the defendant, either in person or through an agent. The statement that Franklyn had "projected himself into the auction room"<sup>53</sup> does, however, pose some interesting questions. For example, if three parties actively negotiate and execute a con-

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46. 26 N.Y.2d at 18, 256 N.E.2d at 508, 308 N.Y.S.2d at 340.

47. *Id.* (citations omitted).

48. *Id.*

49. *Id.*, 256 N.E.2d at 508, 308 N.Y.S.2d at 341.

50. *Id.*, 256 N.E.2d at 509, 308 N.Y.S.2d at 341 (citation omitted).

51. *Id.* at 18-19, 256 N.E.2d at 509, 308 N.Y.S.2d at 341. The loaned servant rule was first enunciated in New York in *Hartell v. Simonson & Son Co.*, 218 N.Y. 345, 113 N.E. 255 (1916): "A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower . . ." *Id.* at 349, 113 N.E. at 256.

52. The appellate division, in an opinion by Justice Tilzer, expressed its belief that Nash "was not shown to have been acting for the defendant alone, solely in his interests and subservient to his wishes." 31 App. Div. 2d 276, 278, 297 N.Y.S.2d 151, 153 (1st Dep't 1969) (citation omitted), *rev'd*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970). The appellate division also considered the auctioneer to be the agent of the seller. *Id.* However, as Justice McNally correctly pointed out in his dissenting opinion, Nash was not the auctioneer but the plaintiff's employee. *Id.* at 280, 297 N.Y.S.2d at 155. Justice McNally believed that Nash was the ad hoc employee of defendant Franklyn. *Id.*; see *McLaughlin*, *Civil Practice*, 1969 *Survey of New York Law*, 21 *Syracuse L. Rev.* 709, 721-22 (1969).

53. 26 N.Y.2d at 18, 256 N.E.2d at 508, 308 N.Y.S.2d at 340.



tract on a tri-state telephone hookup, can either party be considered to have injected himself into the jurisdiction of any other party for the purpose of a suit based upon the resultant contract? It surely can be said that the statements and proposals of such a party "affected" the other contractors.

Since the court found that a true agency existed between Franklyn and the plaintiff's employee, it was not compelled to directly confront the agent—dependent contractor dilemma. However, the extent to which the court went to find a true agency relationship indicates that the agent versus independent contractor distinction is still valid, at least in long-arm suits. But logically it should make no difference whether an agent or an independent contractor is involved, rather the question should be whether the non-resident defendant transacted any business either in person or through another.<sup>54</sup>

**Torts—Libel—Statute of Limitations under Uniform Single Publication Act Runs from Date of Any Publication Defamed Person Chooses as Representing Cause of Action.**—Plaintiff filed suit against National Enquirer, Best Medium Publishing Company, and United News Company, claiming damages resulting from an allegedly defamatory article appearing in the issue of *The National Enquirer* dated March 29, 1964. The printing of this issue had commenced on March 10, 1964, in Tenafly, New Jersey. On that date, copies were delivered to terminals in New York City for transportation to wholesalers throughout the country. On March 12, 1964, copies were delivered to approximately 4,000 newsstands in the New York metropolitan area, and over 200,000 copies were placed on public sale. Copies of this issue did not go on sale at newsstands in Philadelphia until March 14, 1964. This action, which came within the Pennsylvania one year statute of limitations for libel,<sup>1</sup> was commenced on March 15, 1965.<sup>2</sup> The trial court granted defendants' motion for summary judgment on the ground that the one year statute of limitations barred the action. The Pennsylvania Supreme Court reversed, holding that the plaintiff may choose any publication as the single publication which represents his cause of action under the Pennsylvania Uniform Single Publication Act.<sup>3</sup> *Dominiak v. National Enquirer*, 439 Pa. 222, 266 A.2d 626 (1970).

Under the traditional common law rule, every publication of a libel created a separate and distinct cause of action upon which the defamed person could

54. In *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967), the court of appeals indicated that a true agency relationship may not have to exist, at least in a "doing business" case. *Id.* at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

1. Pa. Stat. Ann. tit. 12, §§ 31-32 (1953).

2. Since March 14, 1965, was a Sunday, the Pennsylvania Statutory Construction Act, Pa. Stat. Ann. tit. 46, § 538 (1969), would permit filing of the action on March 15, 1965, if March 14, 1964, were the date on which the one year statute of limitations commenced to run.

3. Pa. Stat. Ann. tit. 12, § 2090.1 (1967).

bring an action and recover damages.<sup>4</sup> The often cited case of *Duke of Brunswick v. Harmer*<sup>5</sup> allowed recovery where a single copy of a newspaper was sold more than 17 years after the original printing and distribution. The rule which was stated in this case is known as the "multi-publication rule."<sup>6</sup> The development of mass printing and distribution methods in the twentieth century led to the rejection of the multi-publication rule by many jurisdictions,<sup>7</sup> and the adoption by those courts of the single publication rule.<sup>8</sup> This doctrine states that "any single integrated publication, such as one edition of a newspaper or magazine, or one broadcast, is treated as a unit, giving rise to only one cause of action."<sup>9</sup> The single publication rule amounts to a redefinition of the publication element of a cause of action in libel.<sup>10</sup> Under the traditional definition, publication occurs each time the libelous statement is communicated to a third person.<sup>11</sup> Consequently, every time a different person reads a defamatory article in a newspaper, the plaintiff has a separate cause of action.<sup>12</sup> The new definition states not only that the composition, printing and distribution of a magazine or newspaper is one act of publication,<sup>13</sup> but also that the entire retail distribution

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4. "Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous book or paper or magazine is sold, a new publication has taken place which, if the libel is false and unprivileged, will support a separate action for damages against the seller." Restatement of Torts § 578, comment b at 200 (1938); accord, *W. Odgers & R. Ritson, Libel and Slander* 493 (6th ed. 1929).

5. 117 Eng. Rep. 75 (Q.B. 1849).

6. See Annot., 58 A.L.R.2d 650 (1958). The enunciation of the multi-publication rule in *Duke of Brunswick v. Harmer* was foreshadowed in a criminal case, *Rex v. Carlile*, 106 Eng. Rep. 624 (K.B. 1819), where it was held that separate publications of the same material would support separate counts of criminal libel.

7. See *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), cert. denied, 338 U.S. 858 (1949); *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961); *Ogden v. Association of the United States Army*, 177 F. Supp. 498 (D.D.C. 1959); 48 Colum. L. Rev. 932 (1948); 59 Harv. L. Rev. 136 (1945). But see *Winrod v. McFadden Publications, Inc.*, 62 F. Supp. 249 (N.D. Ill. 1945); *Age-Herald Publishing Co. v. Waterman*, 188 Ala. 272, 66 So. 16 (1913); *Renfro Drug Co. v. Lawson*, 138 Tex. 434, 160 S.W.2d 246 (1942).

8. *Cannon v. Time, Inc.*, 39 F. Supp. 660 (S.D.N.Y. 1939); *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D.N.Y. 1939); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948); *Wolfson v. Syracuse Newspapers, Inc.*, 254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dep't 1938), aff'd mem., 279 N.Y. 716, 18 N.E.2d 676 (1939).

9. Uniform Single Publication Act, 9C Uniform Laws Ann. 171 (Commissioners' Prefatory Note). See *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir.), cert. denied, 338 U.S. 858 (1949); *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961); *Ogden v. Association of the United States Army*, 177 F. Supp. 498 (D.D.C. 1959); cases cited note 8 supra.

10. 59 Harv. L. Rev. 136 (1945).

11. *W. Prosser, Torts* § 108, at 787 (3d ed. 1964).

12. See *Duke of Brunswick v. Harmer*, 117 Eng. Rep. 75 (Q.B. 1849).

13. *Winrod v. McFadden Publications, Inc.*, 62 F. Supp. 249, 250 (N.D. Ill. 1945); see *Akin v. Time, Inc.*, 250 F. Supp. 306 (N.D. Ala. 1966); *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946), modified, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334

process is a continuation of that single publication.<sup>14</sup> No subsequent individual sale will create a separate cause of action or start the statute of limitations running anew, even though copies may remain on sale for days or even weeks,<sup>15</sup> and the publisher may mail replacement copies to subscribers, or single copies on request.<sup>16</sup>

In 1952, the Conference of Commissioners on Uniform State Laws and the American Bar Association recommended for adoption the Uniform Single Publication Act,<sup>17</sup> which was subsequently adopted by seven states<sup>18</sup> and the Panama Canal Zone.<sup>19</sup> The purpose of the Uniform Act is to "adopt the [single publication] rule as it has been developed at common law in the states which have accepted it."<sup>20</sup> Section 1 of the Uniform Act provides that "[n]o person shall have more than one cause of action for damages for libel or . . . any other tort founded upon any single publication . . . such as any one edition of a newspaper . . ." <sup>21</sup> Section 3 states that the Act "shall be so interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions which enact it."<sup>22</sup> Despite this attempt to produce uniformity, the interpretations given the Act by the only two states which have thus far construed it in relation to the statute of limitations are completely at odds.<sup>23</sup>

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U.S. 838 (1948). Delivery to common carriers for shipment has generally not been held to be publication so as to start the statute of limitations running. *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727 (2d Cir. 1963); *Osmers v. Parade Publications, Inc.*, 234 F. Supp. 924 (S.D.N.Y. 1964); *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961); *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967). But see *Backus v. Look, Inc.*, 39 F. Supp. 662 (S.D.N.Y. 1941).

14. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); 59 Harv. L. Rev. 136 (1945); see *Cannon v. Time, Inc.*, 39 F. Supp. 660 (S.D.N.Y. 1939); *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D.N.Y. 1939); *Wolfson v. Syracuse Newspapers, Inc.*, 254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dep't 1938), aff'd mem., 279 N.Y. 716, 18 N.E.2d 676 (1939).

15. *Ogden v. Association of the United States Army*, 177 F. Supp. 498 (D.D.C. 1959); *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn. 1953); *McGlue v. Weekly Publications, Inc.*, 63 F. Supp. 744 (D. Mass. 1946). But see *Winrod v. McFadden Publications*, 62 F. Supp. 249 (N.D. Ill. 1945).

16. *Polchlopek v. American News Co.*, 73 F. Supp. 309 (D. Mass. 1947); *Backus v. Look, Inc.*, 39 F. Supp. 662 (S.D.N.Y. 1941).

17. Uniform Single Publication Act §§ 1-6.

18. *Ariz. Rev. Stat. Ann.* § 12-651 (1956); *Cal. Civ. Code* § 3425.1 (West 1970); *Idaho Code Ann.* § 6-702 (Supp. 1969); *Ill. Rev. Stat. ch. 126*, § 11 (1969); *N.M. Stat. Ann.* § 40-27-30 (1953); *N.D. Cent. Code* § 14-02-10 (1960); *Pa. Stat. Ann. tit. 12*, § 2090.1 (1967).

19. *C.Z. Code tit. 4*, § 4891 (1963).

20. Commissioners' Prefatory Note, *supra* note 9. The court in *Hartmann v. Time, Inc.*, 166 F.2d 127, 134 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948), concluded that although there were no cases precisely on point, the Pennsylvania courts would follow the single publication rule.

21. Uniform Single Publication Act § 1.

22. *Id.* § 3.

23. Compare *Belli v. Roberts Bros. Furs*, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (Dist. Ct. App. 1966), with *Dominiak v. National Enquirer*, 439 Pa. 222, 266 A.2d 626 (1970).

*Belli v. Roberts Brothers Furs*,<sup>24</sup> decided under the California Uniform Single Publication Act,<sup>25</sup> held that a single issue of a newspaper, although consisting of several editions, is legally one publication which gives rise to but one cause of action for libel.<sup>26</sup> Such cause of action accrues at the time of first publication.<sup>27</sup> Where the proposed Uniform Act uses the word "edition" in section 1, however, the California Uniform Act substitutes the word "issue."<sup>28</sup> In *Belli*, the California Supreme Court interpreted this change to indicate that the legislature intended section 1 of the Uniform Act to mean that a single issue includes all editions.<sup>29</sup> Therefore, in a single integrated publication, or issue, the cause of action accrues upon the first general distribution, and the statute of limitations runs from that date.<sup>30</sup> This interpretation of the Uniform Act is in accord with the interpretation of the common law single publication rule in those states where that rule has been followed.<sup>31</sup>

The holding in *Dominiak* is directly opposed to that of *Belli*<sup>32</sup> and to those cases decided under the common law single publication rule.<sup>33</sup> Since the *Belli* decision rested solely upon the interpretation of legislative intent manifested by the substitution of the word "issue" for "edition,"<sup>34</sup> its reasoning is not apposite to *Dominiak* because the Pennsylvania statute retains the wording suggested by the Commissioners. On the other hand, since the purpose of the Uniform Act is merely to codify the single publication rule as it has been developed by the courts,<sup>35</sup> the cases decided under the common law provide an appropriate standard for comparison.

The majority in *Dominiak* proceeded upon the assumption that "neither the wording of the statute nor the policy behind it requires a holding that the period of limitations begins to run from the time of the first publication."<sup>36</sup> It argued that such a rule, while protecting the interest of defendants through the operation of the statute of limitations, creates too great a potential for abuse by unscrupulous publishers.<sup>37</sup> By allowing the plaintiff to choose any publication as the single publication which represents his cause of action, the purpose of the Uniform Act, which is to protect the defendant from an endless running of

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24. 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (Dist. Ct. App. 1966).

25. Cal. Civ. Code § 3425.1-5 (West 1970).

26. 240 Cal. App. 2d at 289, 49 Cal. Rptr. at 629.

27. *Id.*

28. "No person shall have more than one cause of action for damages for libel or . . . any other tort founded upon any single publication . . . such as any one issue of a newspaper . . ." Cal. Civ. Code § 3425.3 (West 1970). See text accompanying note 21 *supra*.

29. 240 Cal. App. 2d at 288-89, 49 Cal. Rptr. at 628.

30. *Id.* at 289, 49 Cal. Rptr. at 629.

31. See cases cited notes 8 & 9 *supra*.

32. The *Dominiak* opinion mentioned, but did not discuss the *Belli* decision. 439 Pa. at 226, 266 A.2d at 629.

33. See cases cited notes 8 & 9 *supra*.

34. 240 Cal. App. 2d at 288, 49 Cal. Rptr. at 627.

35. Commissioners' Prefatory Note, *supra* note 9.

36. 439 Pa. at 226-27, 266 A.2d at 629.

37. *Id.* at 228, 266 A.2d at 629.

the statute of limitations,<sup>38</sup> will nonetheless be effectuated.<sup>39</sup> This is accomplished because only those damages can be recovered which result from publications occurring within the statutory period of one year from the time of the actionable publication.<sup>40</sup> Thereafter, once the statutory period has passed from the date of one publication, recovery for damages resulting from that publication is forever barred.

In concurring, Justice Roberts argued that the statute of limitations begins to run from the time that publication first reaches the allegedly defamed person's "community."<sup>41</sup> The individual's community would vary in size depending on the "scope of his public stature."<sup>42</sup> Thus, a private citizen's community might not extend beyond his home state, whereas a public figure's might include the entire nation.<sup>43</sup> Any publication which was too small or too distant to damage the individual's reputation in his community would not start the statute of limitations running.<sup>44</sup>

Justice Pomeroy's concurring opinion suggested taking the first publication of the alleged defamation in the forum state as the single publication which starts the statute running.<sup>45</sup> While this would supply an unambiguous, readily ascertainable criterion, it would create an injustice in the case of a plaintiff who did not sue on a small distribution on the libelous statement in a far corner of the state, only to discover that the statute of limitations had run by the time the publication appeared in his area and he had suffered damage.<sup>46</sup>

The holding of the court in *Dominick*, by interpreting the Pennsylvania Uniform Single Publication Act so as to allow the defamed individual to choose any publication as the one representing his single cause of action, does not allow the Uniform Act to function adequately in relation to the statute of limitations. The statute of limitations "is a statute of repose"<sup>47</sup> designed to relieve the courts as well as the defendant from litigating stale claims long after memories have faded, evidence has been lost, and witnesses have become unavailable.<sup>48</sup> The situation in *Duke of Brunswick v. Harmer*,<sup>49</sup> involving an allegedly libelous statement nearly 18 years old, presents an extreme example of the type of situation that the statute of limitations is designed to avoid. The

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38. *Mattox v. News Syndicate Co.*, 176 F.2d 897, 905 (2d Cir.), cert. denied, 338 U.S. 858 (1949); Annot., 1 A.L.R.2d 384, 400 (1948).

39. 439 Pa. at 227, 266 A.2d at 629.

40. *Id.*

41. *Id.* at 230, 266 A.2d at 630.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 231, 266 A.2d at 631.

46. See *Tocco v. Time, Inc.*, 195 F. Supp. 410, 414 (E.D. Mich. 1961); 62 Harv. L. Rev. 1041, 1043 (1949); cf. 439 Pa. at 228, 266 A.2d at 629.

47. *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993, 995 (S.D.N.Y. 1939); *Wolfson v. Syracuse Newspapers, Inc.*, 254 App. Div. 211, 213, 4 N.Y.S.2d 640, 642 (4th Dep't 1938), aff'd mem., 279 N.Y. 716, 18 N.E.2d 676 (1939).

48. *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948).

49. 117 Eng. Rep. 75 (Q.B. 1849).

*Dominiak* rule does not permit the statute of limitations to run on the cause of action as long as copies of the edition containing the defamatory article are available for sale, for each new sale constitutes another publication on which the plaintiff may rest his claim.

While the Uniform Act does not state that the single publication is necessarily the first general distribution or public sale,<sup>50</sup> this is implicit when the words "single publication" are given the meaning which has evolved in the cases which follow the common law single publication rule.<sup>51</sup> Most of these cases approach the problem in terms of when the cause of action accrues so as to start the statute of limitations running.<sup>52</sup> With but a few exceptions,<sup>53</sup> these cases have held that the cause of action accrues on the date that copies are first placed on sale to the general public.<sup>54</sup> The cases are unanimous in holding that "the cause of action accrues, for the purpose of the statute of limitations, upon the first publication . . ."<sup>55</sup>

By holding that any single publication is actionable, the majority has actually reverted to the traditional multi-publication rule<sup>56</sup> while applying the Uniform Single Publication Act. The only difference is that an action once brought would end all litigation, since only one cause of action for damages is allowed.<sup>57</sup> But unless and until that cause of action is brought, the statute of limitations will start to run again with every sale. The majority in *Dominiak* failed to recognize that the single publication concept is less a rule than a redefinition of "publication," at least as it applies to defamatory statements circulated in the mass

50. Uniform Single Publication Act § 1.

51. See cases cited notes 8 & 9 supra; Annot., 1 A.L.R.2d 384 (1948).

52. See cases cited notes 8 & 9 supra.

53. A few cases have held that publication is complete when copies are placed with a common carrier for delivery to wholesale distributors. *Tocco v. Time, Inc.*, 195 F. Supp. 410 (E.D. Mich. 1961); *Backus v. Look, Inc.*, 39 F. Supp. 662 (S.D.N.Y. 1941); *National Cancer Hosp. of America v. Confidential, Inc.*, 151 N.Y.S.2d 443 (Sup. Ct. 1956).

54. E.g., *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946), modified, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948); *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D.N.Y. 1939); *Belli v. Roberts Bros. Furs*, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (Dist. Ct. App. 1966); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967).

55. *Hartmann v. Time, Inc.*, 64 F. Supp. 671, 679 (E.D. Pa. 1946), modified, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948); accord, *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948); see *Tonsmeire v. Tonsmeire*, 285 Ala. 454, 233 So. 2d 465 (1970). For a discussion of date of publication problems arising in regard to conflict of laws, see *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947); Annot., 58 A.L.R.2d 650 (1958); 48 Colum. L. Rev. 932 (1948). For a discussion regarding venue problems, see *Hartmann v. Time, Inc.*, supra; *Age-Herald Pub. Co., v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1903); *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967). For an excellent summary of problems related to date of publication generally, see 62 Harv. L. Rev. 1041 (1949).

56. See authorities cited note 6 supra.

57. 439 Pa. 222, 266 A.2d 626; see Pa. Stat. Ann. tit. 12, § 2090.1 (1970).

media.<sup>58</sup> By construing the single publication rule, as codified in the Uniform Single Publication Act, to mean simply that there can be only one cause of action, but that the cause of action can be based on any publication, the Pennsylvania Supreme Court has ignored the entire line of common law decisions<sup>60</sup> in which the single publication doctrine was evolved.

The single publication rule as applied by the common law cases may deprive a plaintiff of his cause of action if he has relied on the date printed on the cover of the publication<sup>60</sup> or the date of distribution in his area<sup>61</sup> as the time from which to measure the statute of limitations. The results in these cases, however unfortunate, do not counterbalance the positive effects of the rule, which are to establish a definite, clearly identifiable date of publication, and to bring the statute of limitations into operation. The rule of the *Dominiak* case, while changing the seemingly unfair results mentioned above, does not permit the statute of limitations to function in this type of case because it prevents the establishment of the date from which to measure it by leaving the choice of the controlling publication date to the plaintiff. Thus while the common law single publication rule is consistent with the policy of the statute of limitations, the *Dominiak* holding prevents the statute of limitations from operating at all under the Pennsylvania Uniform Publication Act.

**Torts—Nuisance—Air Pollution—Permanent Damages Awarded in Lieu of Injunction.**—The New York Supreme Court determined that defendant cement company's plant damaged plaintiffs' properties and created a nuisance by its release of dirt, smoke, and vibrations. Temporary damages<sup>1</sup> were awarded, but an injunction was denied in view of defendant's large investment in its plant, its contribution to the local economy, and its financial aid to education through the payment of school and property taxes.<sup>2</sup> The total damages to the plaintiffs were found to be \$535 per month.<sup>3</sup> In addition, the supreme court set permanent damages totaling \$185,000 for all the plaintiffs in the event that any or all of them should agree with the defendant to accept such damages with

58. 59 Harv. L. Rev. 136 (1945). The older rule still applies to letters, writings and other personal publications. See Annot., 1 A.L.R.2d 384, 400 (1948).

59. See cases cited notes 8 & 9 supra.

60. *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946), modified, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948); *Wintrod v. McFadden Publications, Inc.*, 62 F. Supp. 249 (N.D. Ill. 1945); *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D.N.Y. 1939).

61. *Akin v. Time, Inc.*, 250 F. Supp. 306 (N.D. Ala. 1966); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344 (1943).

1. Temporary damages may be awarded "[w]hen an injury is intermittent, and able to be stopped, as in the case of occasional trespasses on land . . ." H. Oleck, *Damages to Persons and Property* § 61, at 34 (rev. ed. 1961). See generally C. McCormick, *Damages* § 127 (1935).

2. *Boomer v. Atlantic Cement Co.*, 55 Misc. 2d 1023, 1025, 287 N.Y.S.2d 112, 114 (Sup. Ct. 1967), aff'd, 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (3d Dep't 1968), rev'd, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

3. 55 Misc. 2d at 1025-26, 287 N.Y.S.2d at 115.

the provision that no subsequent action would be brought by the plaintiff or plaintiffs against the defendant.<sup>4</sup> The appellate division affirmed the lower court's decision<sup>5</sup> and the plaintiffs appealed. The New York Court of Appeals reversed and remitted the cases to the supreme court directing it to grant an injunction which would be vacated upon the payment by the defendant of permanent damages.<sup>6</sup> *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

The term "nuisance" does not readily lend itself to an accurate and comprehensive definition.<sup>7</sup> The vagueness and uncertainty surrounding the term are due to the fact that it "has come by a series of historical accidents to cover the invasion of different kinds of interests, and . . . to refer to various kinds of conduct on the part of the defendant."<sup>8</sup> As the law of "nuisance" developed, two separate principles or types of nuisance emerged:<sup>9</sup> (a) private nuisance, which is the unreasonable use of one's property which substantially interferes with another's use of his property,<sup>10</sup> and (b) public nuisance, which is an unreasonable interference "with the general well-being, health or property rights of neighbors or of people generally."<sup>11</sup> While the definitions of nuisance are many and varied, it is generally agreed that it is the invasion of a legal right.<sup>12</sup>

4. *Id.* at 1026, 287 N.Y.S.2d at 115-16.

5. *Boomer v. Atlantic Cement Co.*, 30 App. Div. 480, 294 N.Y.S.2d 452 (3d Dep't 1968), *rev'd*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

6. "Permanent damages" are those awarded when the cause or injury is frozen and will always remain as a diminution of the value . . . of the injured property . . ." H. Oleck, *Damages to Persons and Property* § 49, at 32 (rev. ed. 1961). See generally C. McCormick, *Damages* § 127 (1935).

7. Accordingly, the first "significant attempt to determine some definite limits to the types of tort liability" associated with the term nuisance was by the American Law Institute in the *Restatement of Torts* § 822 (1939). W. Prosser, *Torts* § 87, at 592 (3d ed. 1964).

8. W. Prosser, *supra* note 7, at 593.

9. *Id.*

10. *Heeg v. Licht*, 80 N.Y. 579, 582 (1880); see *Blessington v. McCrory Stores Corp.*, 198 Misc. 291, 95 N.Y.S.2d 414 (Sup. Ct. 1950), *aff'd mem.*, 279 App. Div. 806, 109 N.Y.S.2d 719, 279 App. Div. 807, 110 N.Y.S.2d 456 (2d Dep't 1952), *aff'd*, 305 N.Y. 140, 111 N.E.2d 421 (1953). See generally W. Prosser, *Torts* § 90 (3d ed. 1964). In discussing the proposition that one is required to make a reasonable use of his property, the court in *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 25 N.E. 246 (1890), said: "[A] reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood." *Id.* at 24, 25 N.E. at 247.

11. *Town of Mt. Pleasant v. Van Tassel*, 7 Misc. 2d 643, 645, 166 N.Y.S.2d 458, 462 (Sup. Ct. 1957), *aff'd mem.*, 6 App. Div. 2d 880, 177 N.Y.S.2d 1010 (2d Dep't 1958). The most significant difference between public and private nuisance is that the correction of a private nuisance is through civil action taken by the injured person, whereas a public nuisance may only be corrected by public authority. However, one who suffers injury "beyond that of the general inconvenience to the public at large" may recover damages or obtain an injunction. *Graceland Corp. v. Consolidated Laundries Corp.*, 7 App. Div. 2d 89, 91, 180 N.Y.S.2d 644, 646 (1st Dep't 1958), *aff'd mem.*, 6 N.Y.2d 900, 160 N.E.2d 926, 190 N.Y.S.2d 708 (1959); see *Callahan v. Gilman*, 107 N.Y. 360, 14 N.E. 264 (1887). See generally W. Prosser, *Torts* § 89 (3d ed. 1964).

12. *Kay v. Pearliris Realty Corp.*, 106 N.Y.S.2d 443, 444 (Sup. Ct. 1951). "[Nuisance]



Once it has been found that a nuisance does in fact exist, the issue to be resolved is the type of relief that is to be granted. Generally speaking, two types of relief are available: a suit in equity for abatement, or an action at law for damages.<sup>13</sup>

The New York courts have long recognized the right of citizens to remain free from the effects of air and water pollution and have awarded injunctions to abate such pollution where it amounted to a nuisance.<sup>14</sup> In the 1872 case of *Hutchins v. Smith*<sup>15</sup> it was found that in burning stone into lime, defendant caused dust, gas, and smoke to enter plaintiff's premises resulting in an interference with the enjoyment of his property. Such interference amounted to a nuisance for which the plaintiff was awarded a perpetual injunction enjoining the defendant's maintenance thereof.<sup>16</sup> In discussing what constitutes a nuisance, the court, quoting *Catlin v. Valentine*,<sup>17</sup> said: "'[I]t is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which renders the *enjoyment of life* and property uncomfortable.'" <sup>18</sup>

In 1876, the New York Court of Appeals in *Campbell v. Seaman*<sup>19</sup> considered the question of a nuisance caused by brick burning.<sup>20</sup> The most important issue in this case was whether the court should restrain the nuisance or allow plaintiff to recover damages. In examining this question the court noted that in the past the writ of injunction had been rarely granted in nuisance actions until the

denotes the wrongful invasion of a legal right or interest. It comprehends not only such invasion of property but of personal legal rights and privileges generally." *Sweet v. State*, 195 Misc. 494, 500, 89 N.Y.S.2d 506, 514 (Ct. Cl. 1949).

13. 42 N.Y. Jur. Nuisances § 44 (1965). By statute in New York, the plaintiff will be entitled to a judgment for damages or abatement or both if the court concludes that his rights have been invaded by a nuisance caused by defendant. N.Y. Real Prop. Actions Law § 841 (McKinney 1963).

14. English courts also recognized the problem of air pollution at a very early date. In 1610, the Kings Bench granted an injunction against the maintenance of a hogsty which corrupted the air. *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1610).

15. 63 Barb. 251 (N.Y. Sup. Ct. 1872).

16. *Id.* at 259.

17. 9 Paige 575, 576 (N.Y. Ch. 1842).

18. 63 Barb. at 255. In answer to defendant's contention that his trade was a lawful one, the court followed the rule used in the English cases—that any lawful business may be a nuisance if conducted in a manner which renders another man's property less enjoyable. *Id.* at 256. See, e.g., *People v. Transit Dev. Co.*, 131 App. Div. 174, 115 N.Y.S. 297 (2d Dep't 1909); *Bloss v. Village of Canastota*, 35 Misc. 2d 829, 232 N.Y.S.2d 166 (Sup. Ct. 1962).

19. 63 N.Y. 568 (1876).

20. In a similar case, *Mulligan v. Elias*, 12 Abb. Pr. (n.s.) 259 (Brooklyn City Ct. 1872), the court restrained a chemical plant from operating in such a manner as to emit a sulphurous gas which destroyed the vegetation on plaintiff's premises and irritated the throats of those who breathed it, adding that it was no answer to the complaint for defendant to show that the fumes tended to neutralize a malaria existing in the area. *Id.* at 268-69.

plaintiff's right had been established in a court of law,<sup>21</sup> but stated that a suit at law was no longer necessary and "the right to an injunction . . . [was] just as fixed and certain as the right to any other provisional remedy."<sup>22</sup> Furthermore, the writ of injunction could be demanded in order "to prevent irreparable injury, interminable litigation and a multiplicity of suits."<sup>23</sup>

The court also decided that it was not necessary to show that the nuisance was continuous and the injury more than occasional since the nuisance had occurred often enough to cause considerable damage.<sup>24</sup> Nor was it material that the defendant operated the brick yard prior to plaintiff's use of his lands.<sup>25</sup> Accordingly, "[o]ne cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected."<sup>26</sup> Noting that courts will sometimes refuse to issue an injunction where the damage to the plaintiff is small and the damage to the defendant would be large should the nuisance be enjoined, the court concluded that such was not the situation before it; plaintiff's damages were substantial and the issuance of the injunction was proper.<sup>27</sup>

By the turn of the century it had been established that the fact that the polluter was a large business enterprise would not affect the law relating to the ownership and use of property. In *Strobel v. Kerr Salt Co.*,<sup>28</sup> which involved the pollution of a stream by a salt manufacturer, the court of appeals held that it would not permit substantial injury to be inflicted upon neighboring property for the purpose of enabling a large industry to develop.<sup>29</sup> Reversing the lower court's denial of injunctive relief and ordering a new trial, the court noted, "the fact that [a large manufacturer] has invested much money and employs many men in carrying on a lawful and useful business . . . does not change the rule . . . ."<sup>30</sup>

21. 63 N.Y. at 582. See generally *Huckenstine's Appeal*, 70 Pa. 102 (1872).

22. 63 N.Y. at 582.

23. *Id.*; see, e.g., *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 321, 58 N.E. 142, 147 (1900); see also *Little Falls Fibre Co. v. Henry Ford & Son, Inc.*, 249 N.Y. 495, 164 N.E. 558 (1928), *aff'd*, 280 U.S. 369 (1930).

24. 63 N.Y. at 583.

25. *Id.* at 584.

26. *Id.* It is interesting to note that the court took into consideration the aesthetic values which might be lost if an injunction were not granted: "Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. . . . [T]he law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health." *Id.* at 583.

27. *Id.* at 586; see, e.g., *Howland v. Union Bag & Paper Corp.*, 156 Misc. 507, 282 N.Y.S. 357 (Sup. Ct. 1935).

28. 164 N.Y. 303, 58 N.E. 142 (1900).

29. *Id.* at 322, 58 N.E. at 148. See also *Wheatley v. Chrisman*, 24 Pa. 298 (1855), where the court said: "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." *Id.* at 302.

30. 164 N.Y. at 322, 58 N.E. at 148. "An equity court is not bound to issue an injunc-

In 1904, in *Friedman v. Columbia Machine Works & Malleable Iron Co.*,<sup>31</sup> the question of money damages as opposed to injunctive relief was squarely met by the appellate division. Upon defendant's suggestion that the plaintiff only be allowed money damages, the court stated that "the recovery of daily damages is not an adequate remedy for one whose rights of property are continually invaded."<sup>32</sup>

Shortly after *Friedman*, the leading case of *Whalen v. Union Bag & Paper Co.*<sup>33</sup> was decided. The plaintiff, a lower riparian owner, sought to have the defendant pulp mill enjoined from discharging its liquid effluent into the creek which passed through the plaintiff's land. Plaintiff's injury caused by the pollution was set at \$100 per year by the appellate division.<sup>34</sup> In deciding the case, the court of appeals noted that it was difficult to lay down a rule with respect to the determination of when an injunction should issue, especially where the injury to the plaintiff was small compared with the large loss to the defendant which would result from an injunction.<sup>35</sup> The court also noted that the setting aside by the appellate division of the injunction granted by the trial court was induced by this consideration.<sup>36</sup> By rejecting a course of action calling for a balancing of injuries,<sup>37</sup> the court reinstated the injunction declaring that:

Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving

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tion when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right.

"When, however, the damages are substantial, the fact that an injunction would interfere with great industries, the development of natural resources, or with the plans of a great city for drainage, is not a sufficient reason for relaxing the ordinary rules governing the rights of riparian owners of land." *Warren v. City of Gloversville*, 81 App. Div. 291, 293, 80 N.Y.S. 912, 913-14 (3d Dep't 1903) (citations omitted). See also *Kennedy v. Hoog, Inc.*, 48 Misc. 2d 107, 111, 264 N.Y.S.2d 606, 613 (Sup. Ct. 1965), aff'd mem. in part, rev'd mem. in part on other grounds sub nom. *Kennedy v. Moog Servocontrols, Inc.*, 26 App. Div. 2d 768, 271 N.Y.S.2d 928 (4th Dep't 1966), aff'd mem., 21 N.Y.2d 966, 237 N.E.2d 356, 290 N.Y.S. 2d 193 (1968).

31. 99 App. Div. 504, 91 N.Y.S. 129 (2d Dep't 1904).

32. *Id.* at 506, 91 N.Y.S. at 130. Since the court found that the complaint was purely equitable in nature, the defense that the plaintiff had an adequate remedy at law was held to be insufficient. *Id.* at 506-07, 91 N.Y.S. at 130-31.

33. 208 N.Y. 1, 101 N.E. 805 (1913).

34. *Whalen v. Union Bag & Paper Co.*, 145 App. Div. 1, 3, 129 N.Y.S. 391, 393 (3d Dep't 1911) (per curiam), rev'd in part, 208 N.Y. 1, 101 N.E. 805 (1913). In *Whalen*, the court of appeals considered damages of \$100 per year to be substantial. 208 N.Y. at 4-5, 101 N.E. at 806. The *Boomer* court, by implication, also regarded this sum as substantial damages. 26 N.Y.2d at 224, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

35. 208 N.Y. at 4, 101 N.E. at 805-06.

36. *Id.* at 4, 101 N.E. at 805.

37. *Id.* This practice has been referred to as a balancing of conveniences. *G. Clark, Equity* § 215 (1954).

it to those already rich. It is always to be remembered in such cases that "denying the injunction puts the hardship on the party in whose favor the legal right exists instead of on the wrongdoer."<sup>38</sup>

The recent case of *Caliendo v. McFarland*<sup>39</sup> perhaps best typifies the consistency which the courts have exhibited in following *Whalen*. Upon granting an injunction to restrain members of a labor union from pursuing a course of conduct which contravened the union's constitution and by-laws, the court noted that "given a substantial . . . right, equity will zealously protect it against invasion, and the absence of material injury to the one seeking to enforce such a right, or the amount of inconvenience or monetary loss to the other party will have little weight in the settlement of the issue . . ." <sup>40</sup> The court added that equity will not be swayed by a balancing of injuries where the legal right involved is substantial.<sup>41</sup>

In *Boomer* the New York Court of Appeals acknowledged that the defendant cement plant was an obvious source of air pollution<sup>42</sup> and that such pollution resulted in a nuisance substantially damaging the plaintiffs.<sup>43</sup> The court also recognized the great public concern over air pollution but limited itself to resolving only the case before it, declining to become involved with broader public issues.<sup>44</sup> The majority believed that much more research was needed to ameliorate the present pollution problem, and that it was not the judiciary's place to spur such research;<sup>45</sup> furthermore, air pollution involved an area beyond the realm of one private suit.<sup>46</sup>

The court of appeals noted that the trial court based its denial of the injunction on the "large disparity in economic consequences of the nuisance and of the injunction."<sup>47</sup> This reasoning, the court continued, could not "be sustained without overruling a doctrine which has been consistently reaffirmed in several

38. 208 N.Y. at 5, 101 N.E. at 806 (citation omitted). This principle has since become well established in New York law. See, e.g., *Spadafora v. Nolan Corp.*, 66 N.Y.S.2d 127, 129 (Sup. Ct. 1946). In *Hard v. Blue Points Co.*, 170 App. Div. 524, 525, 156 N.Y.S. 465, 466 (2d Dep't 1915), the court held that "[t]he fact that defendant has large capital here invested, so that it will sustain loss by having to withdraw its encroachment, does not justify the trespass or warrant withholding an injunction." (citation omitted).

39. 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958). As suggested by this case, the principle announced in *Whalen* is so well-imbedded in New York law that it is not limited to cases involving nuisances.

40. *Id.* at 191, 175 N.Y.S.2d at 877 (citations omitted).

41. *Id.*, 175 N.Y.S.2d at 878.

42. 26 N.Y.2d at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

43. *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

44. According to Judge Bergan who wrote the majority opinion: "A court performs its essential function when it decides the rights of parties before it . . . . It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court." *Id.* at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

45. *Id.* at 223, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

46. *Id.*

47. *Id.*, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

leading cases . . . and which has never been disavowed here . . . ."<sup>48</sup> But, to follow the rule of those cases literally would mean closing down the plant immediately.<sup>49</sup> Realizing that the defendant's investment in the plant amounted to more than \$45,000,000 with an employment of more than 300 people, the court considered this to be too drastic a remedy.<sup>50</sup> It was the court's belief that justice would be done by awarding permanent damages to the plaintiffs and granting an injunction until such payment was made.<sup>51</sup> A major factor in selecting this remedy was that it would terminate the lawsuit, for both plaintiffs and their grantees would be precluded from future recovery because the defendant would have obtained, by the payment of permanent damages, a "servitude on the land."<sup>52</sup>

The court chose not to select a frequently used equitable remedy—an injunction to take effect at a future date<sup>53</sup>—even though this type of relief has often been granted in order to afford defendants the opportunity to remedy existing nuisances.<sup>54</sup> This solution was disposed of by concluding that technological breakthroughs with respect to controlling pollution were unlikely to be developed within a short period of time, for example, 18 months, and that the parties would be back in court again.<sup>55</sup> Furthermore, "[i]f at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles."<sup>56</sup>

In holding that the immediate closing of the plant would be too drastic a remedy,<sup>57</sup> the court seems to have taken into consideration the large number of

48. *Id.*

49. *Id.* at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

50. *Id.*

51. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

52. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. For an explanation of this concept by Justice Douglas see *United States v. Causby*, 328 U.S. 256, 261-63 (1946).

53. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316-17; see, e.g., *Schwarzenbach v. Oneonta Light & Power Co.*, 207 N.Y. 671, 100 N.E. 1134 (1912) (mem.). Note that this is the type of relief suggested by Judge Jasen in his dissenting opinion. 26 N.Y.2d at 231, 257 N.E.2d at 877, 309 N.Y.S.2d at 322.

54. *Sammons v. City of Gloversville*, 175 N.Y. 346, 67 N.E. 622 (1903) (injunction suspended for one year); *Western N.Y. Water Co. v. City of Niagara Falls*, 91 Misc. 73, 154 N.Y.S. 1046 (Sup. Ct. 1915), *aff'd mem.*, 176 App. Div. 944, 162 N.Y.S. 1149 (4th Dep't 1917), *aff'd mem.*, 226 N.Y. 671, 123 N.E. 894 (1919) (injunction suspended for six months). See also *Garvey v. Long Island R.R.*, 159 N.Y. 323, 54 N.E. 57 (1899).

55. 26 N.Y.2d at 225-26, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

56. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

57. It should be noted that in a number of lower court cases damages were awarded along with an injunction which was to be vacated upon payment of the damages by the defendant to the plaintiff. Unlike *Boomer*, however, the immediate and unequivocal closing of the defendants' plants was considered to be an improper remedy in view of the fact that it would foreclose an important public purpose. E.g., *Slobodkina v. Village of Great Neck*, 285 App. Div. 908, 138 N.Y.S.2d 28 (2d Dep't 1955) (mem.) (village sewage disposal plant); *Weinberg v. Rodgers & Hagerty, Inc.*, 100 Misc. 329, 165 N.Y.S. 483 (Sup. Ct.), *aff'd mem.*, 179 App. Div. 906, 165 N.Y.S. 1118 (2d Dep't 1917) (construction of subway). See also *Kraatz v. Certain-Teed Prods. Corp.*, 20 N.Y.S.2d 13 (Sup. Ct. 1940), appeal dismissed

people employed by the defendant<sup>58</sup> and, in this respect, its reasoning appears to be inconsistent with the earlier portion of its opinion in that it did not limit its decision to only the parties before it.<sup>59</sup> In addition, the court's belief that the risk of being required to pay permanent damages to injured landowners is by itself an effective spur to research for pollution control<sup>60</sup> seems to ignore the fact that, in most instances, it is generally less expensive to pay damage claims than to install pollution control devices.<sup>61</sup>

It is interesting to note that the cases which the court cited to support its award of permanent damages (thereby imposing a servitude upon the land) are not analogous to the situation in *Boomer*.<sup>62</sup> These decisions were made on the ground of public interest<sup>63</sup> in the continued operation of the particular plants. In short, the plaintiffs' properties in these cases were subjected to the nuisances because the defendants' operations were necessary for the public good. In applying this "public interest" standard to a private cement company, the court in *Boomer* seems to have ignored the fact that such a servitude should only be placed on land *by and for the public*, not by and for a private person or corporation.<sup>64</sup> As Judge Jasen pointed out in his dissenting opinion:

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mem., 4 App. Div. 2d 826, 166 N.Y.S.2d 489 (4th Dep't 1957); *De Muro v. Havranek*, 153 Misc. 787, 275 N.Y.S. 186 (Sup. Ct. 1934). In a court of appeals case, the lower court was directed to find permanent damages which were to be awarded to the plaintiff in the event that the defendant could not find the means to avoid polluting a river. An injunction was withheld (unless the defendant failed to pay the damages) because an essential municipal activity was involved. *Squaw Island Freight Term. Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E.2d 10 (1937).

58. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

59. See note 44 *supra* and text accompanying notes 44 & 50 *supra*.

60. 26 N.Y.2d at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

61. See, e.g., *Reynolds Metals Co. v. Lampert*, 324 F.2d 465, 466 (9th Cir. 1963), cert. denied, 376 U.S. 910 (1964), where the manager of defendant's aluminum production plant, when questioned as to his reasons for not employing more effective fluoride controls, remarked: "It is cheaper to pay claims than it is to control fluorides." See also Schmitz, *Pollution, Law, Science, and Damage Awards*, 18 *Clev.-Mar. L. Rev.* 454, 460 (1969). The Supreme Court in *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339 (1933), although denying the injunction, noted that the permanent damages payable to the plaintiff "would obviously be small as compared with the cost of installing an auxiliary plant" to reduce the effluent flowing onto plaintiff's land. The injunction was denied because an important public interest would be prejudiced if the injunction were granted and because the plaintiff's injury was "wholly financial." *Id.*

62. See Judge Jasen's dissenting opinion, 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321.

63. *Northern Ind. Pub. Serv. Co. v. W.J. & M.S. Vesey*, 210 Ind. 338, 200 N.E. 620 (1936) (gas manufacturing plant); *Kentucky-Ohio Gas Co. v. Bowling*, 264 Ky. 470, 95 S.W.2d 1 (1936) (power plant and pumping station of a gas supplier); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936) (operation of a dam to supply the inhabitants of a village with water); *Pappenheim v. Metropolitan El. Ry.*, 128 N.Y. 436, 28 N.E. 518 (1891) (elevated railroad); *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931) (operation of a city system of storm sewers).

64. *New York City Housing Authority v. Muller*, 270 N.Y. 333, 343, 1 N.E.2d 153,

This kind of inverse condemnation . . . may not be invoked by a private person or corporation for private gain or advantage. [It] should only be permitted when the public is primarily served in the taking or impairment of property. . . . The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.<sup>65</sup>

In view of the present pollution problem, the one optimistic point of the court's decision is its statement that "[t]he limitation of relief granted is a limitation only within the four corners of these actions . . .,"<sup>66</sup> adding that public agencies are not foreclosed from seeking proper relief.<sup>67</sup> This language seems to indicate the court's desire to mitigate the possible effects of its decision and to place the major burden of enforcing pollution abatement solely on government agencies rather than on the private citizen.<sup>68</sup> However, this is a small consolation to the plaintiffs who can no longer fully enjoy their properties.<sup>69</sup>

In *Boomer*, the New York Court of Appeals was faced with a situation upon which the case law was very lucid. By virtue of the doctrine set forth in *Whalen*, an unconditional injunction should have been granted. But to do so, the court reasoned, would have unfairly placed the burden of solving the air pollution problem on one cement plant. Thus faced with both the restraint of stare decisis and its resultant harshness in the present situation, the court chose to compromise.<sup>70</sup> While the effect of the *Boomer* decision on *Whalen* is unclear,<sup>71</sup>

156 (1936); *Pocantico Water Works Co. v. Bird*, 130 N.Y. 249, 258-59, 29 N.E. 246, 248 (1891); see *Fifth Ave. Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342, 347, 183 N.E.2d 684, 686, 229 N.Y.S.2d 400, 403 (1962); U.S. Const. amend. V; N.Y. Const. art. I, § 7.

65. 26 N.Y.2d at 230-31, 257 N.E.2d at 876, 309 N.Y.S.2d at 321 (citations omitted). Judge Jasen further noted the significance of the fact that the New York State Constitution provides for private property taken for public use (art. I, § 7, subd. [a]), but contains no provisions for taking property for a private use. 26 N.Y.2d at 231, 257 N.E.2d at 876-77, 309 N.Y.S.2d at 321-22.

66. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

67. *Id.*

68. Recently, the Michigan State Legislature passed into law an act, effective October 1, 1970, which provides, inter alia, that any person may maintain an action for declaratory and equitable relief against the state or any person or entity in order to protect the air, water and other natural resources from pollution. The act further provides for temporary and permanent equitable relief, or the imposition of conditions requiring the defendant to protect the environment. Mich. Comp. Laws Ann. §§ 691.1201-07 (Supp. 1971).

69. The importance of being able to enjoy one's home was pointed out in *Miranda v. Buffalo Gen. Elec. Co.*, 140 Misc. 267, 251 N.Y.S. 510 (Sup. Ct. 1931): "The rights of plaintiffs to the peace and quiet of their established homes are not trifling, inconsequential, technical nor insubstantial privileges." *Id.* at 269, 251 N.Y.S. at 512.

70. Implicit in the court's opinion seems to be the desire not only to avoid a harsh result in *Boomer* but also to avoid setting forth a decision which could be used as an instrument by neighboring land owners to close down cement plants throughout the state.

71. See, e.g., Roberts, *The Right to a Decent Environment*; E = MC<sup>2</sup>: Environment Equals Man Times Courts Redoubling Their Efforts, Symposium: Law and the Environment, 55 Cornell L. Rev. 674, 702 (1970), where the author is of the opinion that *Whalen* has

it seems that the court at least made an attempt not to destroy the well-established doctrine announced there;<sup>72</sup> nevertheless, it would appear that the court has departed from *Whalen* and in the process has weakened the status of that case. However, the rule in *Boomer* would seem to be limited to those cases where, as here, the pollution cannot be abated by the most advanced pollution control devices<sup>73</sup> as opposed to situations where some corrective remedy is available even though it may be costly to the defendant.

Despite the limitations placed on the decision, the court has hindered the fight against the ever increasing destruction of the environment. As Judge Jasen aptly pointed out in his dissenting opinion, the court is "compounding the magnitude of a very serious problem"<sup>74</sup> and is "licensing a continuing wrong."<sup>75</sup> In view of the slow bureaucratic movements of government regulatory agencies, if similarly situated plaintiffs are to be precluded by this decision from obtaining unconditional injunctions, the incentive for pollution abatement research would seem to be diminished. In light of the present environmental crisis, a better and more responsive decision in *Boomer* would have been achieved by the issuance of a permanent injunction to take effect at a future date in order to afford the defendant plant the opportunity to abate the nuisance. This course of action would have been consistent with *Whalen* and still would have avoided the harsh remedy of an immediate shutdown. At the same time, greater pressure would have been placed upon the defendant to find a method to prevent further air pollution.

**Selective Service—Conscientious Objector—Registrant Need Not Show Religious Training and Belief in order to Qualify for the Exemption.—** Petitioner, a non-religious conscientious objector, applied on clearly secular grounds for the statutory exemption<sup>1</sup> from service in the armed forces. On the basis of his own testimony, petitioner's appeal board denied his request and classified him 1-A.<sup>2</sup> Petitioner was drafted, but refused to submit to induction into the armed forces. He was convicted of violating the Universal

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been overruled by the decision in *Boomer*. Judge Jasen also implies in his dissenting opinion that *Whalen* has been overruled: "I see grave dangers in overruling our long-established rule of granting an injunction . . ." 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 320.

72. See text accompanying note 38 supra.

73. The trial court in *Boomer* stated that the cement company had taken "every available and possible precaution to protect the plaintiffs from dust." 55 Misc. 2d at 1024, 287 N.Y.S.2d at 113.

74. 26 N.Y.2d at 229, 257 N.E.2d at 875, 309 N.Y.S.2d at 320.

75. *Id.* at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321.

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1. Universal Military Training and Service Act § 6(j), 50 U.S.C. App. § 456(j) (1964), as amended (Supp. V, 1970).

2. *Welsh v. United States*, 404 F.2d 1078, 1080 (9th Cir. 1968), rev'd, 398 U.S. 333 (1970).



Military Training and Service Act, Section 12(a)<sup>3</sup> and received a three year sentence. The conviction was affirmed by the Court of Appeals for the Ninth Circuit which found that petitioner had no religious basis for his conscientious objector's claim and that a religious basis was essential to the validity of the claim.<sup>4</sup> The United States Supreme Court reversed, interpreting the conscientious objector provision as exempting from military service all objectors whose beliefs, stemming from the registrant's moral, ethical *or* religious conviction, were of such intensity that they could not, as a matter of conscience, engage in war. *Welsh v. United States*, 398 U.S. 333 (1970).

The conscientious objector exemption in Section 6(j) of the Universal Military Training and Service Act embodies a policy which, in the United States, is as old as conscription itself.<sup>5</sup> In considering the background of *Welsh*, however, it is only necessary to trace the exemption from 1940, when Section 5(g) of the Selective Service Act of 1940,<sup>6</sup> Section 6(j)'s immediate predecessor, was enacted. Prior to 1940, federal conscientious objector legislation had invariably required membership in a pacifist sect.<sup>7</sup> The Selective Service Act of 1940 broadened the scope of the exemption by eliminating this requirement and exempting any claimant who could establish his eligibility "by reason of religious training and belief."<sup>8</sup>

3. 50 U.S.C. App. § 462(a) (1964).

4. 404 F.2d at 1081-82.

5. See Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo. L.J. 252, 256-63 (1963) [hereinafter cited as Conklin].

6. Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889.

7. See Conklin 260. There is substantial legislative precedent for exemptions for conscientious objectors which dates from the pre-Revolutionary period. The Continental Congress passed such a resolution in 1775 and the exemption had previously been enacted into various state and colonial statutes. The policy was continued through the Civil War in state statutes until finally preempted by the Federal Draft Act in 1864. Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 9, which exempted members of religious sects opposed to the bearing of arms. The Draft Act of 1917, Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78, exempted objectors who were affiliated with a "well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form . . ." Although the Act was phrased in terms of religious objectors, the Secretary of War directed local boards to consider personal scruples against war as sufficient to entitle the objector to the exemption. *United States v. Seeger*, 380 U.S. 163, 171 (1965); see Conklin 256-63. The constitutionality of the Draft Act and its conscientious objector provision was sustained in the *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918). The Court also held that Congress may compel individuals to perform military service in valid exercise of the War power implemented through the "necessary and proper" clause. *Id.* at 377-78. The Court rather tersely dismissed petitioners' constitutional objection to the conscientious objector provision, which was based on the first amendment, stating: "[W]e think its unsoundness is too apparent to require us to do more." *Id.* at 390.

8. Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889. The Act provided: "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." *Id.* It is interesting to note that various religious and civic organizations denounced the

There was a significant conflict within the circuits regarding the interpretation of the phrase. The Second Circuit, in *United States v. Kauten*,<sup>9</sup> opted, in dicta, for an expansive reading of this language, and suggested that eligibility for the exemption was purely a function of intensity of belief.<sup>10</sup> The Ninth Circuit rejected this broad interpretation in *Berman v. United States*,<sup>11</sup> construing the phrase so as to distinguish an intensely held secular scruple against war from one based on the objector's belief in a relational duty to his God.<sup>12</sup> The *Berman* majority expressly excluded even the highest and most deeply held secular conviction from qualifying for the exemption because, without reference to a diety, it cannot be termed "religious" as that word is used in the statute.<sup>13</sup>

Congress was aware of the *Berman-Kauten* controversy when drafting the Selective Service Act of 1948.<sup>14</sup> Section 6(j) of the Act read:

Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, *by reason of religious training and belief*, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.<sup>15</sup>

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narrow language of the bill at House and Senate hearings on the legislation. The ACLU proposed that the bill be amended as follows: "Nothing contained in this Act shall be construed to require any person to be subject to training . . . who is conscientiously opposed to participation in war in any form . . ." Hearings on H.R. 10132 Before the House Comm. on Military Affairs, 76th Cong., 3d Sess. 191 (1940) [hereinafter cited as ACLU Proposal]. See generally Conklin 269-70.

9. 133 F.2d 703 (2d Cir. 1943). This expansive interpretation was upheld in two later Second Circuit cases. *United States ex rel. Reel v. Badt*, 141 F.2d 845, 847 (2d Cir. 1944), petition for cert. dismissed, 328 U.S. 817 (1946); *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 523-24 (2d Cir. 1943).

10. See 133 F.2d at 708.

11. 156 F.2d 377 (9th Cir.), cert. denied, 329 U.S. 795 (1946).

12. *Id.* at 380. The *Berman* Court, (*id.* at 381), referred to Chief Justice Hughes' dissenting opinion in *United States v. McIntosh*, 283 U.S. 605 (1931), overruled on other grounds, *Girouard v. United States*, 328 U.S. 61, 69 (1946), which stated: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U.S. at 633-34.

13. 156 F.2d at 381. The dissent in *Berman* opted for an expansive nontheistic interpretation of the "religious training and belief" requirement of § 5(g). *Id.* at 382.

14. Act of June 24, 1948, ch. 625, 62 Stat. 604, as amended 50 U.S.C. App. §§ 451-73 (1964), as amended (Supp. V, 1970).

15. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612-13, as amended 50 U.S.C. § 456(j) (1964), as amended (Supp. V, 1970) (emphasis added). It should be noted that the 1967 amendment to the Act, subsequent to the Court's decision in *United States v. Seeger*, 380 U.S. 163 (1965), deleted reference to a "Supreme Being," but continued to provide that "religious training and belief" does not include "essentially political, sociological or philosophical views, or a merely personal moral code."

It is inferable, at least, that Congress chose the *Berman* reading of the 1940 statute.<sup>16</sup> The phrase "by reason of religious training and belief," construed as in *Berman*, was able to withstand constitutional attack in the Second,<sup>17</sup> Third,<sup>18</sup> and Ninth<sup>19</sup> Circuits, but seemed somewhat vulnerable in light of more recent first amendment decisions of the Supreme Court.<sup>20</sup> In *Torcaso v. Watkins*,<sup>21</sup> for example, the Constitution of the State of Maryland forbade the exacting of all religious oaths except those which affirmed the declarant's belief in God. Petitioner refused to declare his belief in God, a requisite to his taking the office of notary public, and was denied the appointment. The Court, in voiding the Maryland oath requirement, stated:

[N]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.<sup>22</sup>

The first amendment problems implicit in a literal interpretation of Section 6(j) are compounded by certain Due Process difficulties under the fifth amendment. The Court of Appeals for the Second Circuit, in deciding *United States v. Seeger*,<sup>23</sup> wrote that the exemption was violative of Due Process in that it established an "impermissible classification"<sup>24</sup> by discriminating between theistic and nontheistic forms of belief.

The Supreme Court, in *United States v. Seeger*,<sup>25</sup> resolved the constitutional problems surrounding the *Berman* position by stating that the essential holdings of *Berman* and *Kauten* were in substantial agreement since both held that the exemption must be denied to those whose beliefs are "political, social

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16. S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948). "This section . . . reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman*, 156 F. (2d) 377, certiorari denied, 329 U.S. 795.)"

17. *United States v. Bendik*, 220 F.2d 249, 251-52 (2d Cir. 1955).

18. *United States v. De Lime*, 223 F.2d 96, 100 (3d Cir. 1955).

19. *Etcheverry v. United States*, 320 F.2d 873, 874 (9th Cir.), cert. denied, 375 U.S. 930 (1963); *Clark v. United States*, 236 F.2d 13, 23-24 (9th Cir.), cert. denied, 352 U.S. 882 (1956); *George v. United States*, 196 F.2d 445, 452 (9th Cir.), cert. denied, 344 U.S. 843 (1952).

20. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

21. 367 U.S. 488 (1961); see Conklin 276-81.

22. 367 U.S. at 495 (footnotes omitted). The Court acknowledged the existence of certain nontheistic religions in this country: Buddhism, Taoism, Ethical Culture and Secular Humanism. *Id.* at 495 n.11.

23. 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

24. *Id.* at 854.

25. 380 U.S. 163 (1965).

or philosophical in nature, rather than religious.<sup>26</sup> The Court, relying on Senate Committee language to the effect that the 1948 Act reenacted the 1940 provision with only minor "technical amendments," then substituted the *Kauten* reading of Section 6(j) for the Congressionally sanctioned *Berman* reading of the provision.<sup>27</sup> The *Seeger* Court expanded the original *Berman* connotation of the term "religious" to encompass grounds for objection that could "fairly be said to be 'religious.'"<sup>28</sup> The Court said that the "Supreme Being" clause<sup>29</sup> was to be broadly interpreted in relation to the "religious training and belief" clause as being "no more than a clarification"<sup>30</sup> so that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."<sup>31</sup> Under this test, the *Seeger* Court excluded only those whose convictions stemmed from a "merely personal moral code"<sup>32</sup> and atheists whose scruples were derived from political, social or philosophical grounds.<sup>33</sup>

It was not until *Welsh v. United States*<sup>34</sup> came before the Supreme Court that the basic difficulty with the exemption was confronted, *i.e.*, that the sin-

26. *Id.* at 178.

27. *Id.* at 178-79. The Court noted that the Senate Committee cited to *Berman* in its report, which seemingly indicated Congress' approval of that case's interpretation of the phrase "by reason of religious training and belief." *Id.*; see S. Rep. No. 1268, 80th Cong., 2d Sess. 14 (1948). The Court circumvented this obstacle by implicitly accepting the *Kauten* approach and stating: "[R]ather than citing *Berman* for what it said 'religious belief' was, Congress cited it for what it said 'religious belief' was not." 380 U.S. at 178.

28. 380 U.S. at 180 (emphasis added). The *Seeger* Court resorted to the writings of Paul Tillich, *Systematic Theology* (1957), and Bishop John Robinson, *Honest to God* (1963), to support its contentions. 380 U.S. at 180-81.

29. 50 U.S.C. App. § 456(j) (1964), as amended (Supp. V, 1970); see text accompanying note 15 *supra*.

30. 380 U.S. at 179.

31. *Id.* at 176.

32. *Id.* at 173, 186. The Court held that in order to be denied an exemption, the registrant's "merely personal moral code" had to be "in no way related to a Supreme Being." *Id.* at 186.

33. *Id.* at 173; The Supreme Court, 1964 Term, 79 Harv. L. Rev. 56, 115 (1965);

34. *Fordham L. Rev.* 129, 133 (1965). *Seeger* thus eliminated the danger of a classification favoring theistic religion over nontheistic religion and ensured equal protection for all religionists no matter what their particular belief. That this equal protection did not extend to sincere non-religious objectors was not a concern of the *Seeger* Court. That Court was careful to limit itself to the facts at hand, where none of the individuals involved could be called atheists, *i.e.*, their beliefs could "fairly be called religious." 380 U.S. at 173-74, 193 (Douglas, J., concurring). The Court did not construe the statute *vis-à-vis* religionists and atheists (*i.e.*, non-religious objectors) but between beliefs which, although divergent as to the nature of a Supreme Being and that Being's attributes, could be brought within the ambit of the Court's definition of "religious." *Welsh v. United States*, 398 U.S. 333, 353 n.7 (1970) (Harlan, J., concurring).

34. 398 U.S. 333 (1970).

cere *non-religious* objector remained vulnerable to conscription.<sup>35</sup> Justice Black, with three Justices concurring in his opinion,<sup>36</sup> resorted to statutory interpretation to save Section 6(j) from the Establishment Clause.<sup>37</sup> The Court observed that an individual's objection to war in any form, although purely moral and ethical in derivation and content, may impose upon him a duty of conscience, occupying in the life of that individual "a place parallel to that fulfilled by . . . God" in conventional religionists.<sup>38</sup> Citing the *Seeger* parallism test, Justice Black extended *Seeger*, holding that: "Because his beliefs *function as a religion* in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions."<sup>39</sup> Justice Black exempted as "religious" even those "who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection . . . is founded to a substantial extent upon considerations of public policy."<sup>40</sup> The test now required only a certain intensity of conviction, and excluded the lukewarm, opportune and none else.<sup>41</sup>

In his concurring opinion, Justice Harlan chose to confront the constitutional problems presented by the *Berman* position regarding Section 6(j), challenging what he considered the evasiveness of Justice Black's interpretation of the exemption and the dissent's protestations of the *Berman* position's validity. He first rejected Justice Black's interpretation of "religious training and belief."<sup>42</sup> In Harlan's opinion, the basic question was "whether Welsh's opposition to war is founded on 'religious training and belief' and hence belief in relation to a 'Supreme Being' as *Congress* used those words."<sup>43</sup> Admitting these terms to be plastic<sup>44</sup> in connotation, Justice Harlan nonetheless indicated that, judging from legislative history and usage, these words "fall short of enacting a broad policy of exempting from military service all individuals

35. See Justice Harlan's concurring opinion, 398 U.S. at 344-67. See also *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943); ACLU Proposal 191.

36. Justices Brennan, Marshall and Douglas concurred in Justice Black's opinion. Justice Harlan concurred only in the result, differing radically with Justice Black's analysis. Justice White's dissent drew the support of Chief Justice Burger and Justice Stewart. Justice Blackmun did not participate in the decision. The result was a 5-3 decision for the reversal of petitioner's conviction.

37. 398 U.S. at 343-44 (Black, J.); see *id.* at 345-47 (Harlan, J., concurring).

38. *Id.* at 340.

39. *Id.* (emphasis added).

40. *Id.* at 342.

41. *Id.* at 342-43. Once a registrant shows the requisite degree of "sincere belief," it follows a fortiori that his views cannot be "essentially political, sociological, or philosophical" and certainly not "a 'merely personal moral code.'" *Id.* at 343.

42. *Id.* at 345-46.

43. *Id.* at 346.

44. See *id.* at 352.

who in good faith oppose all war."<sup>45</sup> In Harlan's view, the statute is a child of *Berman*, and as such, at most, exempts only religious objectors, while equally sincere nonreligionists are subject to conscription.<sup>46</sup> This was the plain intent of Congress,<sup>47</sup> and therefore the exemption is at cross purposes with the Establishment Clause as not being "wholly 'neutral.'"<sup>48</sup> Congress need not exempt at all, but once having done so, it cannot draw invidious distinctions between religious belief, theistic or nontheistic, on one hand and purely secular conviction on the other.<sup>49</sup>

Justice Harlan proceeded to show by "equal protection mode of analysis"<sup>50</sup> that, because of this establishment, the statute fails to include nonreligious objectors within its scope, and is thus underinclusive and constitutionally infirm.<sup>51</sup> He would cure this defect by extending the statute's coverage to include the aggrieved petitioner and his fellows, thus preserving the exemption and providing Welsh with a remedy—the reversal of his conviction.<sup>52</sup>

Justice Harlan supported this position with the severability clause appended to the 1948 Act,<sup>53</sup> which he considered to be a legislative authorization to the

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45. *Id.* at 347. The result of Justice Black's interpretation, according to Justice Harlan, was a completely transformed statute without reference to the distinction between a religiously derived belief and one which is secular in nature, a meaning contrary to a plain reading of the statute. *Id.* at 351-54. The semantic agility of Justice Black's opinion is attributable, he noted further, to "a groping to preserve the conscientious objector exemption at all cost." *Id.* at 354.

46. *Id.* at 349-50.

47. *Id.* at 354, 359.

48. *Id.* at 356.

49. *Id.* Justice Black was, according to Justice Harlan, keenly aware of these considerations, and his construction has so emasculated the provision that it is constitutional in application, but not by its own terms. Such an interpretation is, in Harlan's view, contrary to settled law. *Id.* at 355. Justice Harlan quoted Justice Cardozo: "'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. . . .' But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." *Id.* at 355, quoting from *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (citation omitted); see *Ashwander v. TVA*, 297 U.S. 288 (1936). But see *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Yates v. United States*, 354 U.S. 298 (1957).

50. 398 U.S. at 357; see *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

51. 398 U.S. at 362.

52. *Id.* at 362-63.

53. *Id.* at 364; Act of June 19, 1951, ch. 144, § 5, 65 Stat. 88. The section reads: "If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act . . . shall not be affected thereby." See *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); *Champlin Ref. Co. v. Corporation*

courts to preserve the remains of infirm legislation where feasible.<sup>54</sup> He also noted that the extension was in the spirit of the time-honored practice of exempting such objectors from duty in the armed services, a tradition which, he felt, should not be lightly regarded.<sup>55</sup>

Justice White, writing for the dissenters, would have affirmed the trial court's conviction of the petitioner on the ground that his claim did not conform to the legislative standard in Section 6(j) of the 1948 Act.<sup>56</sup> The dissenters agreed with Justice Harlan that the legislative history of the section showed that it was the intent of Congress to exempt only religious objectors as that term is conventionally understood.<sup>57</sup> However, the dissent disagreed with Justice Harlan's analysis and would have upheld the constitutionality of the exemption. Justice White assailed the petitioner's standing to raise the constitutional question.<sup>58</sup> He argued that, even if the exemption were invalid, why should such invalidity create a draft immunity for the petitioner, from whom the statute expressly withheld the exemption?<sup>59</sup> Justice White went on to view the section as a valid attempt by Congress to avoid certain Free Exercise difficulties<sup>60</sup> implicit in forcing religious objectors to engage in combat in defiance of their religious scruples.<sup>61</sup> Recognizing, further, that the exemption presents aspects of an establishment of all religion over non-religious belief,<sup>62</sup> Justice White asked, in effect, which policy shall prevail: the prevention of establishment of religion or the provision for its free exercise?<sup>63</sup>

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Comm'n, 286 U.S. 210, 234 (1932). See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *National Life Ins. Co. v. United States*, 277 U.S. 508 (1928).

54. 398 U.S. at 364-65.

55. *Id.* at 365-66.

56. *Id.* at 368.

57. *Id.*

58. *Id.*

59. *Id.* at 368-69. The dissent quotes from *United States v. Raines*, 362 U.S. 17 (1960), to support its contention: "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 21, quoted in 398 U.S. at 368-69. Note however that Justice White assumed that the denial of the exemption to petitioner was constitutional. But petitioner is a member of the very class injured by the exemption through a denial of equal protection. It would seem that under this standard, the only persons who would have standing would be religious objectors who would be eligible for the exemption under the statute. It is unlikely that such persons would challenge the constitutionality of a statute which grants them their exemption.

60. 398 U.S. at 369-71.

61. *Id.* at 369-70.

62. *Id.* at 370.

63. *Id.* at 370-72.

He suggested that a statute is violative of the Establishment Clause only when its sole purpose is, in fact, religious establishment.<sup>64</sup> Justice White stated that the exemption in Section 6(j) is no more of an unconstitutional establishment than those sustained in *Sherbert v. Verner*<sup>65</sup> and *Follett v. Town of McCormick*<sup>66</sup> where Free Exercise policies were controlling considerations.<sup>67</sup> It was appropriate, according to Justice White, even if not constitutionally necessary, for Congress, in the exercise of its power to raise armies, implemented through the "necessary and proper" clause,<sup>68</sup> to take account of Free Exercise policies and exempt "religious" objectors.<sup>69</sup> The Court, suggested White, without derogating its power as final arbiter of the Constitution, must respect the judgment of Congress in these matters, so long as it can "perceive a basis upon which the Congress might resolve the conflict as it did."<sup>70</sup>

Justice Black's analysis is logically consistent, given the expansive connotation it attributes to the phrase "by reason of religious training and belief." But this is not entirely accurate as is cogently demonstrated by Justice Harlan. It seems that Justice Black has engaged in semantics in order to reach the desired result—the preservation of the conscientious objector exemption and its extension to all non-religious objectors. Justice Harlan's analysis is more direct in that he confronts the constitutional problems presented and attempts to resolve them. His resort, however, to contrivance—equal protection analysis and the extension remedy—to preserve and extend the exemption is as inadequate a solution as that proposed by Black and his adherents. The ultimate result is the same—a statute which does not mean what it purports to say. The relative ease with which both opinions transform the section is dangerous precedent. The dissent is superficially appealing, but fails to recognize that Free Exercise values need not necessarily conflict with the Establishment Clause, especially in a case such as this. By avoiding all religious classification and adopting a sincerity test as the sole criterion for exemption, the conflict is resolved. This is Justice Black's test and that ap-

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64. *Id.* at 369.

65. 374 U.S. 398 (1963). A state statute required claimants for unemployment compensation to be able to work and to be available for work and to accept suitable work when offered by the state employment office or an employer. The statute also exempted religionists from having to accept work on Sunday, the conventional Sabbath. Petitioner, a Seventh-Day Adventist, was held to be exempt from having to accept work on Saturday, the Adventist Sabbath.

66. 321 U.S. 573 (1944). A flat tax levied on all book sellers was held invalid when applied to a seller of religious publications as an unwarranted interference with the free exercise of religion.

67. 398 U.S. at 370.

68. U.S. Const. art. I, § 8.

69. 398 U.S. at 371.

70. *Id.*, quoting from *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).



proved as well by Justice Harlan. It could well form the basis for future legislation.<sup>71</sup>

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71. The Welsh decision is inconclusive as to the future, especially in regard to the selective objector cases, *United States v. Gillette*, 420 F.2d 298 (2d Cir.), cert. granted, 399 U.S. 925 (1970); *Negre v. Larsen*, 418 F.2d 908 (9th Cir. 1969), cert. granted, 399 U.S. 925 (1970). These cases came before the Court in the October 1970 Term and involve objection to participation in a particular war (Viet Nam). The cases have a different statutory nexus than Welsh in that their solution seems to lie in an interpretation of the phrase "is conscientiously opposed to participation in war in any form," rather than the phrase "by reason of religious training and belief." 50 U.S.C. App. § 456(j) (Supp. V, 1970). Only the broadest interpretation of the entire provision affords any common ground between Welsh and the selective objector cases. See *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), appeal dismissed, 399 U.S. 267 (1970).