

## Situs of Intangible Property in Conflict of Laws

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specified by the executor, to vote for the testator's widow as a director of a corporation. Before the executor had specified the form of the agreement, one legatee died. Although the legatee had not yet agreed in writing, he had given the executor his oral assent to be bound. The court ruled that the legacy should be paid to the estate of the legatee because the condition had been substantially performed and this performance would effectuate the will of the testator. It should be noted that in this case there was never any laxity on the legatee's part. The same result could have been reached by treating the condition as one which was at all times impossible of complete performance.

### Conclusion

The divergence in treatment of realty and personalty is a relic of the practice, hundreds of years ago, of administering legacies and devises in different courts.<sup>61</sup> The *in terrorem* anomaly developed as a result of that same dichotomy of jurisdiction. Certainly there is neither purpose nor justification for their existence today. Although there has been some tendency in recent years toward eliminating them,<sup>62</sup> progress must necessarily be slow in eradicating usages so long established in the law.



### SITUS OF INTANGIBLE PROPERTY IN CONFLICT OF LAWS

It is an apparent anomaly to discuss the situs of intangible property. Can there be any "proprietary right, which is not the object of corporeal substance"?<sup>1</sup> Intangibles, having no physical existence, occupy no space and therefore can have no *actual* location. In conflict of laws problems, however, situs of property often must be

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<sup>61</sup> See Browder, *Conditions And Limitations In Restraint Of Marriage*, 39 MICH. L. REV. 1288, 1290-91 (1941).

<sup>62</sup> Matter of Liberman, 279 N.Y. 458, 468-69, 18 N.E.2d 658, 662 (1939) (dictum); see, e.g., *In re Blind's Will*, 138 N.Y.S.2d 210 (Surr. Ct. 1954). In the *Blind* case, a daughter was to inherit the remainder of property only if she became a widow or divorced from her then husband, otherwise she was to get only the income from the property. The court held the condition void as against public policy as tending to induce divorce. The court further ruled that the daughter was to get the property, both real and personal, in fee simple absolute. This, of course, is a departure from the rule that where an illegal condition is attached to realty, both conditions and devise are void. See note 25 *supra*.

<sup>1</sup> *Millar v. Taylor*, 4 Burr. 2303, 2362, 98 Eng. Rep. 201, 233 (K.B. 1769); see 13 ILL. L. REV. 708, 711-12 (1919).

determined in order to confer jurisdiction over a cause of action<sup>2</sup> upon a court, or to control the choice of law which will resolve an action.<sup>3</sup> Since situs can be essential, intangibles have been artificially located. The application of these fictions has resulted in divergent, and often conflicting, theories of determining situs. A survey of the rules governing the situs of various intangibles will illustrate their ethereal nature.

#### INTANGIBLES BY OPERATION OF LAW

Obligations and interests arising out of legal relations among persons are denominated intangible property created by operation of law.<sup>4</sup> A debt, for example, is such property. Although some may deny that they are capable of having a situs,<sup>5</sup> courts have nevertheless assigned a situs to debts. For taxation purposes, the situs of the debt may be the domicile of the creditor.<sup>6</sup> In the administration of an estate, the situs is the domicile of the debtor.<sup>7</sup> Since an insurer's promise is in the nature of a debt,<sup>8</sup> the situs of this obligation is generally considered to be at the residence of the debtor.<sup>9</sup> A garnishment presents a further complication<sup>10</sup> in that it involves two obligations and three parties. This situation arises when *D*, an absent non-resident, is indebted to *C*. *D* has a claim against *G*. Can *C* satisfy his claim against *D* by proceeding against *G* in *D*'s continued absence? This question presents a problem as to the situs of the original debt. It was not clarified when the Supreme Court rejected a contention that the debt continued to be located with the debtor<sup>11</sup> and held that the situs of the debt<sup>12</sup> was wherever the garnishee could be found.<sup>13</sup> A bond certificate is of great advantage in determining the situs of

<sup>2</sup> See Beale, *The Situs Of Things*, 28 YALE L.J. 525 (1919); 32 COLUM. L. REV. 1441 (1932).

<sup>3</sup> See Briggs, *The Jurisdiction—Choice-Of-Law Relation In Conflicts Rules*, 61 HARV. L. REV. 1165, 1177, 1201 (1948).

<sup>4</sup> See RESTATEMENT, CONFLICT OF LAWS § 213 (1934).

<sup>5</sup> See Note, 39 HARV. L. REV. 485, 486 (1926).

<sup>6</sup> 1 BEALE, CONFLICT OF LAWS 301-02 (1935).

<sup>7</sup> *Wyman v. Halstead*, 109 U.S. 654, 656 (1884) (dictum).

<sup>8</sup> See *Liberty v. Kinney*, 242 Iowa 656, 47 N.W.2d 835 (1951).

<sup>9</sup> See, e.g., *Furst v. Brady*, 375 Ill. 425, 31 N.E.2d 606 (1940); *Gordon v. Shea*, 300 Mass. 95, 14 N.E.2d 105 (1938); *Robinson v. Dana's Estate*, 87 N.H. 114, 174 Atl. 772 (1934).

<sup>10</sup> See Beale, *The Exercise Of Jurisdiction In Rem To Compel Payment Of A Debt*, 27 HARV. L. REV. 107, 118 (1913).

<sup>11</sup> *Harris v. Balk*, 198 U.S. 215 (1905).

<sup>12</sup> See RESTATEMENT, CONFLICT OF LAWS § 108 (1934). The explicit problem of situs is avoided, but the view of the instant case is adopted—jurisdiction over the garnishee controls.

<sup>13</sup> It should be noted that this ruling places a harsh burden upon the principal debtor. Notice of the pending action is required to be given by the garnishee to the debtor. See *Harris v. Balk*, *supra* note 11 at 227. However, the debtor still must travel to the forum to defend or be bound by the possibly indifferent defense of the garnishee.

this type of debt. It may be considered "a matrix-like container for the property."<sup>14</sup> Thus, its situs is identified with the location of the bond.<sup>15</sup> While it has been said that the domicile of the obligor<sup>16</sup> or the domicile of the holder<sup>17</sup> may control its situs, the physical presence of the bond would appear to furnish the most orderly medium of establishing jurisdiction.<sup>18</sup> Other commercial paper may be regarded as property separate and apart from the obligations they represent.<sup>19</sup> Thus, so far as negotiable instruments are concerned, the location of the paper itself is the situs of the property.<sup>20</sup> The Restatement, though avoiding mention of "situs," supports this view.<sup>21</sup>

Stock, representing a right to property, constitutes intangible personal property.<sup>22</sup> Its situs has been variously held to be at the domicile of the owner<sup>23</sup> and at the place where the certificate is found.<sup>24</sup> However, the more authoritative rule would seem to be that the domicile of the corporation is the basis of situs.<sup>25</sup>

The situs of intangibles by operation of law also assumes importance when it is necessary to determine the jurisdiction of a state for the purpose of administering a decedent's property.<sup>26</sup> Once jurisdiction is established, the applicable law of succession must be chosen.

<sup>14</sup> First Trust Co. v. Matheson, 187 Minn. 468, 246 N.W. 1, 3 (1932).

<sup>15</sup> Gilmore v. Robillard, 44 F.2d 295 (9th Cir. 1930). *But see* Cities Service Co. v. McGrath, 342 U.S. 330 (1952), where it was held that the obligations represented by bearer bonds issued by a United States corporation, but located abroad, were subject to American seizure. Such an action, however, was authorized under the "war powers" and does not necessarily contradict the traditional conflicts rule. See Dean, *Conflict Of Laws*, 1952 ANN. SURVEY AM. L. 38, 57, 28 N.Y.U.L. REV. 36, 55 (1953).

<sup>16</sup> The Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209 (1930) (dictum).

<sup>17</sup> See Andrews, *Situs Of Intangibles In Suits Against Nonresident Claimants*, 49 YALE L.J. 241, 242 (1939).

<sup>18</sup> *Id.* at 244.

<sup>19</sup> *Id.* at 246.

<sup>20</sup> See Manning v. Berdan, 132 Fed. 382, 386 (C.C.D. N.J. 1904); FALCONBRIDGE, CONFLICT OF LAWS 489-90 (2d ed. 1954).

<sup>21</sup> "A negotiable instrument is a document embodying a right; and the state which has jurisdiction of the document has jurisdiction of the right." RESTATEMENT, CONFLICT OF LAWS §52, comment *a* (1934).

<sup>22</sup> See Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900).

<sup>23</sup> See Kilgour v. New Orleans Gas Light Co., 14 Fed. Cas. 468, No. 7764 (C.C.D. La. 1875); Beverly Beach Properties, Inc. v. Nelson, 68 So. 2d 604 (Fla. 1953) (dictum), *cert. denied*, 348 U.S. 816 (1954).

<sup>24</sup> See Bowles v. R.G. Dun-Bradstreet Corp., 25 Del. Ch. 32, 12 A.2d 392 (Ch. 1940). It is interesting to note that the national adoption of the Uniform Stock Transfer Act may well herald the victory of the view that situs is where the certificate is. See Baker, *In The Administration Of Intangibles: Missouri's Section 466.010 In Perspective*, 19 Mo. L. Rev. 1, 27-29 (1954).

<sup>25</sup> See, *e.g.*, Doherty v. McDowell, 276 Fed. 728 (D. Me. 1921); Lockwood v. United States Steel Corp., 209 N.Y. 375, 103 N.E. 697 (1913); Iron City Sav. Bank v. Isaacsen, 158 Va. 609, 164 S.E. 520 (1932).

<sup>26</sup> See Dean, *Conflict Of Laws*, 1948 ANN. SURVEY AM. L. 41, 55; Simmons, *Conflict of Laws and Constitutional Law in Respect to Intangibles*, 26 CALIF. L. REV. 91, 94 (1937).

It is the general rule that the law of the decedent's domicile controls the distribution of property.<sup>27</sup> However, in a recent New York case there was a departure from this rule.<sup>28</sup> An intestate who had deposits in New York banks died without heirs or next of kin, while domiciled in California. The Appellate Division reversed the Surrogate's decision<sup>29</sup> that the property be transmitted to California to be administered according to that state's laws. In holding that the property should escheat to New York, it was said that the state "recognizes *no situs* but its own, and lays claim to such property."<sup>30</sup>

Confusion in determining the situs of intangibles by operation of law is superficially solved by the Restatement.<sup>31</sup> The controlling law is there said to be "the law of the state which created the original intangible thing and interest therein."<sup>32</sup> While this criterion solves the situs problem, it presents the equally vexing questions of when and where the "creation" takes place.

### REAL INTANGIBLES

Intangible property which has an existence in fact, such as the good-will of a business or a trade name,<sup>33</sup> may be termed "real intangibles."<sup>34</sup> The increasing importance and influence of industrialization has made the legal protection of real intangibles necessary. The spread of commerce necessitates uniform treatment. Just as there is no uniformity in the treatment of situs in intangibles by operation of law, the situs of real intangibles is equally unsettled. An examination of the law will demonstrate, however, that the prime issue is not which of several rules should be applied to determine situs but, rather, whether situs need be determined at all.

### *Copyright*

There is considerable doubt as to whether or not copyrights are property. Many of the elements of property, such as the right to perpetual ownership or acquisition by prescription or adverse posses-

<sup>27</sup> See GOODRICH, CONFLICT OF LAWS § 165 (3d ed. 1949).

<sup>28</sup> See Matter of Menschfreund, 283 App. Div. 463, 128 N.Y.S.2d 738 (1st Dep't 1954).

<sup>29</sup> Matter of Brown, 204 Misc. 661, 124 N.Y.S.2d 793 (Surr. Ct. 1953).

<sup>30</sup> Matter of Menschfreund, *supra* note 28 at 468, 128 N.Y.S.2d at 746. In Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951), the dissent stated that intangibles (corporate stock) could be claimed by several states for escheat: state of incorporation, owner's domicile, or the state of obligor's main place of business. See Dean, *Conflict Of Laws*, 1951 ANN. SURVEY AM. L. 43, 69.

<sup>31</sup> RESTATEMENT, CONFLICT OF LAWS § 213 (1934).

<sup>32</sup> *Ibid.*

<sup>33</sup> See RESTATEMENT, CONFLICT OF LAWS § 212, comment *a* (1934).

<sup>34</sup> See 1 BEALE, CONFLICT OF LAWS § 51.1 (1935).

sion, are not applicable to copyrights.<sup>35</sup> However, in the United States,<sup>36</sup> England<sup>37</sup> and France,<sup>38</sup> copyrights are considered to be property. Whether property or not, they exist only by virtue of statute.<sup>39</sup> While it is unsettled whether there was an English common-law copyright prior to the Statute of Anne,<sup>40</sup> it is certain that the enactment of that law made copyrights exclusively statutory.<sup>41</sup> The framers of the Constitution, conscious of the dangers of conflicting state laws,<sup>42</sup> authorized federal control<sup>43</sup> and that exclusive control has been exercised.<sup>44</sup> Thus the conflicts problem in this field is solely international; as a general rule, copyrights are governed by the law of the place where protection is sought.

The case of *Houghton Mifflin Co. v. Stackpole Sons, Inc.*<sup>45</sup> illustrates the intangible nature of copyrights and their dependence upon statute for existence. The United States copyright statute in effect at the time,<sup>46</sup> provided that a citizen of a foreign state was protected if domiciled in the United States or if the foreign state afforded reciprocity to American copyrights. An alien, Adolf Hitler, wrote and registered *Mein Kampf* while a stateless person. The court held that copyright protection is extended to all authors except citizens of unreciprocating states; thus, a stateless alien is protected. It is well settled that stateless persons have no protectible rights in international law.<sup>47</sup> Since a stateless person has no domicile whose laws can create a right, such an alien can have no protection. It is apparent that if

<sup>35</sup> See I LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* § 4 (1938).

<sup>36</sup> *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948) (dictum); *People v. McGraw Elec. Co.*, 375 Ill. 241, 30 N.E.2d 903, 905 (1940) (dictum); *cf. In re Armour's Estate*, 11 N.J. 257, 94 A.2d 286, 294 (1952) (dictum).

<sup>37</sup> See *Donaldson v. Beckett*, 2 Brown 129, 1 Eng. Rep. 837 (H.L. 1774); *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

<sup>38</sup> See I LADAS, *op. cit. supra* note 35.

<sup>39</sup> *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909) (dictum); *Banks v. Manchester*, 128 U.S. 244, 252 (1888) (dictum); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 223, 232 (1834) (dictum).

<sup>40</sup> 8 ANNE c. 19 (1709). This first copyright statute was later repealed. 4 HALSBURY, *STATUTES OF ENGLAND* 769 (2d ed. 1948).

<sup>41</sup> *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (dictum); see *Donaldson v. Beckett*, *supra* note 37.

<sup>42</sup> "The States cannot separately make effectual provision for either [patents or copyrights] . . ." *THE FEDERALIST* No. 43, at 267 (Lodge ed. 1888) (Madison).

<sup>43</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>44</sup> 28 U.S.C. § 1338(a) (1952); *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523, 544 (D. Neb. 1944) (dictum), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947).

<sup>45</sup> 104 F.2d 306 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939), 13 So. CALIF. L. REV. 356 (1940).

<sup>46</sup> 35 STAT. 1077 (1909).

<sup>47</sup> 1 OPPENHEIM, *INTERNATIONAL LAW* § 312 (7th ed., Lauterpacht 1948). Stateless aliens, however, could be beneficiaries of express treaties or international protection. *Id.* § 291.

protection is given, the situs of the copyright exists independently of the domicile or the location of the owner and the place of creation. Situs, therefore, is established at the place where the protection is sought.

Historically, there has been a great divergence between the rights of alien and native authors. The thirteen original states protected only citizens or residents,<sup>48</sup> and the first federal statute retained this preferential treatment.<sup>49</sup> This policy encouraged piracy of alien works; it was not until the end of the nineteenth century that this inequity was remedied by protecting citizens of a reciprocating foreign country.<sup>50</sup> The recent adoption of the Universal Copyright Convention provides a more complete solution. The "national treatment principle" which is thereby adopted<sup>51</sup> is a combination of the Berne Treaty theory that a work is governed by the publishing country, and the American concept that the nationality of the author controls.<sup>52</sup> The single standard of protection now available provides ". . . minimum requirements which will afford equal treatment to an author of one member state seeking protection in the other member states."<sup>53</sup> Foreign and domestic authors are granted identical treatment within the boundaries of a signatory state.<sup>54</sup> Since the Convention was not self-executing,<sup>55</sup> Congress, after ratification of the treaty by the Senate,<sup>56</sup> found it necessary to revise the copyright statutes. Upon enactment of such legislation<sup>57</sup> no conflict between American law and the provisions of the Universal Copyright Convention remained.<sup>58</sup> Although only eighteen countries now adhere to the convention,<sup>59</sup> the right of other nations to accede<sup>60</sup> demonstrates the possibility that the conflict of laws problem as to copyrights may be rendered entirely moot.

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<sup>48</sup> See Sherman, *The Universal Copyright Convention: Its Effect On United States Law*, 55 COLUM. L. REV. 1137, 1139 (1955).

<sup>49</sup> 1 STAT. 124 (1790).

<sup>50</sup> 26 STAT. 1110 (1891).

<sup>51</sup> "Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory." Universal Copyright Convention art. II, § 1.

<sup>52</sup> Kaminstein, (C): *Key to Universal Copyright Protection (Article III: Formalities)*, in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 23, 24 (1955).

<sup>53</sup> Tannenbaum, *The Principle of 'National Treatment' and Works Protected: Articles I and II*, in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 13, 16 (1955).

<sup>54</sup> See *c John Doe 1955*, 2 U.N. REV. 25, 27 (1956).

<sup>55</sup> Universal Copyright Convention art. X, § 1.

<sup>56</sup> See 100 CONG. REC. 8495 (daily ed. June 25, 1954).

<sup>57</sup> See 17 U.S.C. §§ 9, 16, 19 (Supp. II 1955).

<sup>58</sup> See Sherman, *The Universal Copyright Convention: Its Effect On United States Law*, 55 COLUM. L. REV. 1137, 1150 (1955).

<sup>59</sup> See Derenberg, *Copyright Law*, 31 N.Y.U.L. REV. 334, 335 (1956).

<sup>60</sup> Universal Copyright Convention art. VIII, § 2.

*Literary Property*

"Literary property at common law embraces prints, pictures, paintings, photographs, pictorial illustrations, statuary and other artistic productions, as well as musical, dramatic and literary compositions, and other written or printed manuscripts. . . ." <sup>61</sup> It is an owner's common-law right <sup>62</sup> in an intellectual endeavor to exclude others <sup>63</sup> and enjoy its use and profits. <sup>64</sup> While copyrights are exclusively statutory in nature, literary property exists independently of any statute. <sup>65</sup> This property right in unpublished products <sup>66</sup> terminates upon publication, <sup>67</sup> in spite of the fact that there may have been a right to copyright. <sup>68</sup> Compliance with the statute supplants the common-law protection. <sup>69</sup> Literary property is intangible <sup>70</sup> and has a distinct existence separate and apart from the physical medium which records it. <sup>71</sup>

The recent case of *Capitol Records, Inc. v. Mercury Records Corp.* <sup>72</sup> presents the conflicts problem. Capitol Records sought a declaratory judgment as to rights in recordings which were acquired from a German corporation which owned the original property rights. Mercury obtained identical recordings from the Czechoslovakian alien property custodian who had confiscated them in Germany. The court determined that the particular performance could not be copyrighted

<sup>61</sup> BALL, COPYRIGHT AND LITERARY PROPERTY 472 (1944); see *Frohman v. Ferris*, 238 Ill. 430, 87 N.E. 327 (1909), *aff'd*, 223 U.S. 424 (1912).

<sup>62</sup> See Schulman, *International Copyright In The United States: A Critical Analysis*, 19 LAW & CONTEMP. PROB. 141, 145 (1954).

<sup>63</sup> *Keene v. Wheatley*, 14 Fed. Cas. No. 7644, at 191-92 (C.C.E.D. Pa. 1861) (dictum); *Woolsey v. Judd*, 11 How. Pr. 49, 55-56 (N.Y. Super. Ct. 1855) (dictum).

<sup>64</sup> *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 324 (2d Cir. 1904) (dictum).

<sup>65</sup> *Holmes v. Hurst*, 174 U.S. 82, 84 (1899) (dictum); *Krafft v. Cohen*, 117 F.2d 579, 580 (3d Cir. 1941) (dictum).

<sup>66</sup> *Press Pub. Co. v. Monroe*, 73 Fed. 196 (2d Cir. 1896); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (dictum).

<sup>67</sup> See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Grandma Moses Properties, Inc. v. This Week Magazine*, 117 F. Supp. 348 (S.D.N.Y. 1953); *The Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898).

<sup>68</sup> See *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

<sup>69</sup> *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909) (dictum); *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.*, 220 Fed. 448, 450 (2d Cir. 1915) (dictum); *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577, 580 (2d Cir.) (dictum), *cert. denied*, 235 U.S. 704 (1914).

<sup>70</sup> See Walden, *Common Law Rights in Literary Property*, 37 J. PAT. OFF. Soc'y 642, 659 (1955).

<sup>71</sup> See SPRING, RISKS & RIGHTS IN PUBLISHING TELEVISION RADIO MOTION PICTURES ADVERTISING AND THE THEATER 75 (1st ed. 1952).

<sup>72</sup> 221 F.2d 657 (2d Cir. 1955). For a detailed consideration of the case's relationship to copyright law, see Kaplan, *Performer's Right And Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409 (1956).

under federal law because the composition was in the public domain. Neither German or Czechoslovakian law was applied by the court because it would then "be faced with dealing with property interests unknown to our law."<sup>73</sup> Rather, being pragmatic, the court decided that it would ". . . be much more convenient to determine the effect of each act by the law of the place where the right of property is sought to be exercised."<sup>74</sup> This rule, though analogous to the doctrine of *lex fori*,<sup>75</sup> is most likely an implied adoption of the doctrine that the situs of the property establishes the determining law.<sup>76</sup> It would seem to be consistent with the Restatement's test that the controlling law is the law of the place where the property is found.<sup>77</sup> It is thus seen that literary property may be situated without the creator's domicile. Accordingly, it would be immaterial that the law of the place where the res is created does not recognize rights in literary property. Moreover, recognition of the right may take place in a legal system differing from that of the author's domicile or location. Furthermore, since the domicile of the plaintiff, Capitol, was not discussed, it is apparent that the domicile of the owner is immaterial. Thus the doctrine that intangible property has a situs at the domicile of the owner<sup>78</sup> was impliedly rejected. It follows from this process of elimination that literary property has a separate, independent situs. Other leading cases compel such a conclusion. In *Ferris v. Frohman*,<sup>79</sup> American recognition of literary property rights in a play of English authorship was sought. The play had been publicly performed in England, thereby destroying the rights attending literary property. The court found, however, that the literary property, extinct in England, was still extant in the United States. It had a situs apart from the author's domicile. In *Roberts v. Petrova*,<sup>80</sup> it was held that the abrogation, by statute, of all literary property rights in England did not eliminate the existence of those rights elsewhere. Again, they had an independent situs.

The Restatement view that "the original creation of property in an intangible thing which exists in fact apart from law is governed by the law of the state in which it exists,"<sup>81</sup> explains the result in the *Capitol Records* case. It would, however, seem to be of doubtful utility in the solution of future problems. The fact that situs is where the

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<sup>73</sup> *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 662 (2d Cir. 1955).

<sup>74</sup> *Ibid.*

<sup>75</sup> This doctrine is traditionally thought, however, to deal with questions of choice of remedy. See GOODRICH, *CONFLICT OF LAWS* § 82 (3d ed. 1949).

<sup>76</sup> See FALCONBRIDGE, *CONFLICT OF LAWS* 442-43 (2d ed. 1954).

<sup>77</sup> See RESTATEMENT, *CONFLICT OF LAWS* § 212 (1934).

<sup>78</sup> See 1 BEALE, *CONFLICT OF LAWS* § 51.1 (1935); cf. STORY, *CONFLICT OF LAWS* 311 (1834).

<sup>79</sup> 223 U.S. 424 (1912).

<sup>80</sup> 126 Misc. 86, 213 N.Y. Supp. 434 (Sup. Ct. 1925), *aff'd mem.*, 219 App. Div. 772, 219 N.Y. Supp. 903 (1st Dep't 1927).

<sup>81</sup> RESTATEMENT, *CONFLICT OF LAWS* § 212 (1934).

property "exists" would indicate that it will have multiple *siti* in interstate businesses. The majority in the *Capitol Records* case recognized that the rule there propounded was necessary in the absence of a uniform international law of literary property.<sup>82</sup> The Universal Copyright Convention requires the adoption of statutory protection for rights in literary property;<sup>83</sup> American conformity to this mandate<sup>84</sup> will insure needed uniformity.

### *Ideas*

The highly competitive pictorial industries—motion pictures, television and advertising—have increased the legal significance of ideas.<sup>85</sup> Until recently, the law had not fully protected rights in ideas.<sup>86</sup> Several theories, however, have been propounded to effectuate legal protection. For example, the remedies relative to the creation of a confidential relationship,<sup>87</sup> an implied contract,<sup>88</sup> quasi-contract,<sup>89</sup> or an express contract<sup>90</sup> have all been employed to protect the originators of ideas. It should be noted that the chances of success in an action on a contract have been considerably lessened by the theory that certain ideas do not constitute consideration sufficient to support a

<sup>82</sup> See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

<sup>83</sup> Article I of the Universal Copyright Convention calls for protection of the rights of authors; Article II refers to "unpublished works"; and Article X notes that "each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention."

<sup>84</sup> See Dubin, *The Universal Copyright Convention*, 42 CALIF. L. REV. 89, 105 (1954); Wasserstrom, *Some Reflections on Articles VII, IX, X, XV, and XX of the Universal Copyright Convention*, in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 63, 69 (1955).

<sup>85</sup> See Warner, *Legal Protection Of Program Ideas*, 36 VA. L. REV. 289 (1950); Note, 16 U. CHI. L. REV. 323 (1949); 14 OHIO ST. L.J. 113 (1953).

<sup>86</sup> See *Bristol v. Equitable Life Assurance Soc'y*, 132 N.Y. 264, 30 N.E. 506 (1892); *Haskins v. Ryan*, 71 N.J. Eq. 575, 64 Atl. 436 (Ch. 1906), *aff'd per curiam*, 75 N.J. Eq. 622, 73 Atl. 1118 (Ct. Err. & App. 1909); *WALSH, EQUITY* 219, 225 (1930).

<sup>87</sup> See, e.g., *Booth v. Stutz Motor Car Co.*, 56 F.2d 962 (7th Cir. 1932); *Shellmar Products Co. v. Allen-Qualley Co.*, 36 F.2d 623 (7th Cir. 1929); *Jones v. Ulrich*, 342 Ill. App. 16, 95 N.E.2d 113 (1950). The unequal positions of originator and manufacturer create this fiduciary relationship even in cases not involving employer and employee. See *Sachs v. Cluett, Peabody & Co.*, 265 App. Div. 497, 39 N.Y.S.2d 853 (1st Dep't 1943), *aff'd mem.*, 291 N.Y. 772, 53 N.E.2d 241 (1944).

<sup>88</sup> See *Kurlan v. C.B.S.*, 40 Cal. 2d 799, 256 P.2d 962 (1953); *Stanley v. C.B.S.*, 35 Cal. App. 2d 35, 221 P.2d 73 (1950).

<sup>89</sup> See *Nash v. Alaska Airlines, Inc.*, 94 F. Supp. 428 (S.D.N.Y. 1950); *Liggett & Meyer Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935). *But see Grombach Productions, Inc. v. Waring*, 293 N.Y. 609, 59 N.E.2d 425 (1944).

<sup>90</sup> See *Cole v. Phillips H. Lord, Inc.*, 262 App. Div. 116, 28 N.Y.S.2d 404 (1st Dep't 1941); *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225, 181 S.W.2d 643 (1944).

contract.<sup>91</sup> Application of the property concept to ideas would provide protection against all the world,<sup>92</sup> whereas there is only limited protection for contractual rights.<sup>93</sup> In the case of *Hamilton Nat'l Bank v. Belt*,<sup>94</sup> the originator of an idea for a radio program disclosed the plan to a sponsor, who appropriated it. In allowing recovery, the court held that an idea which is novel, original and concrete is property. This requirement that an idea be more than merely abstract<sup>95</sup> is of significance in determining the situs of an idea. Although the full meaning of "concreteness" is unsettled,<sup>96</sup> a survey of applicable New York decisions reveals that a reduction of an idea to paper is vital to a finding of concreteness.<sup>97</sup> This requisite would also seem to be determinative of situs. Though assignment of a situs is fictional, it would be logical to ally the idea with the physical property which evidences it.

The conflicting theories in various jurisdictions regarding protection of ideas highlight the need for uniformity. The fact that some states distinguish between ideas which are literary in nature<sup>98</sup> and ideas involving business or scientific techniques<sup>99</sup> illustrates the con-

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<sup>91</sup> See, e.g., *Masline v. New York, N.H. & H. R.R.*, 95 Conn. 702, 112 Atl. 639 (1921). *Contra*, *American Mint Corp. v. Ex-Lax, Inc.*, 263 App. Div. 89, 31 N.Y.S.2d 708 (1st Dep't 1941).

<sup>92</sup> *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion).

<sup>93</sup> Recent California cases have apparently adopted the property theory. See, e.g., *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. App. 2d 690, 221 P.2d 95 (1950); *Kovacs v. Mutual Broadcasting System*, 35 Cal. App. 2d 56, 221 P.2d 108 (1950). More recently, this theory has been considered abrogated in that state on the basis of statutory interpretation. See *Weitzenkorn v. Lesser*, 40 Cal. App. 2d 778, 256 P.2d 947 (1953); *Nimmer, The Law Of Ideas*, 27 So. CALIF. L. REV. 119, 121 (1954).

<sup>94</sup> 210 F.2d 706 (D.C. Cir. 1953).

<sup>95</sup> *Bowen v. Yankee Network, Inc.*, 46 F. Supp. 62, 63 (D. Mass. 1942) (dictum); *How J. Ryan & Assoc. v. Century Brewing Ass'n*, 185 Wash. 60, 55 P.2d 1053, 1054 (1936) (dictum).

<sup>96</sup> See *Nimmer, supra* note 93, at 140.

<sup>97</sup> See, e.g., *O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13 (S.D.N.Y. 1946); *Ketcham v. New York World's Fair 1939, Inc.*, 34 F. Supp. 657 (E.D.N.Y. 1940), *aff'd per curiam*, 119 F.2d 422 (2d Cir. 1941); *Rodriguez v. Western Union Tel. Co.*, 259 App. Div. 224, 18 N.Y.S.2d 759 (1st Dep't 1940) (per curiam), *aff'd mem.*, 285 N.Y. 667, 34 N.E.2d 375 (1941); *Williamson v. New York Cent. R.R.*, 258 App. Div. 226, 16 N.Y.S.2d 217 (2d Dep't 1939) (per curiam); *Alberts v. Remington Rand, Inc.*, 175 Misc. 486, 23 N.Y.S.2d 892 (Sup. Ct. 1940); *Larkin v. Pennsylvania R.R.*, 125 Misc. 238, 210 N.Y. Supp. 374 (Sup. Ct. 1925), *aff'd mem.*, 216 App. Div. 832, 215 N.Y. Supp. 875 (1st Dep't 1926), *aff'd mem.*, 245 N.Y. 578, 157 N.E. 864 (1927); *Bailey v. Haberle Congress Brewing Co.*, 193 Misc. 723, 85 N.Y.S.2d 51 (Syracuse Munic. Ct. 1948).

<sup>98</sup> See, e.g., *Hamilton Nat'l Bank v. Belt*, 210 F.2d 706 (D.C. Cir. 1953) (radio program); *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. App. 2d 690, 221 P.2d 95 (1950) (motion picture).

<sup>99</sup> These ideas may not be protected. See *Brown Instrument Co. v. Warner*, 161 F.2d 910 (D.C. Cir.), *cert. denied*, 332 U.S. 801 (1947) (temperature recorder chart); *Affiliated Enterprises, Inc. v. Gruber*, 86 F.2d 958 (1st Cir.

fusion. Since ideas are analogous to literary property,<sup>100</sup> it is suggested that the conflict rules pertaining to literary property be applied to ideas.

### *Competition*

The concept of intangible property situs in the field of competition—trademarks, unfair competition and good-will<sup>101</sup>—has to a large extent been ignored or avoided. Because most interference with competition is in the realm of torts, the doctrine of *lex loci delicti* is applicable.<sup>102</sup> In addition, the advent of federal control<sup>103</sup> has served to eliminate much interstate conflict. However, the concept of situs remains important in determining the choice of law that will indicate the extent of a right or liability. *Soci t  Vinicole De Champagne v. Mumm Champagne & Importation Co.*<sup>104</sup> involved a German firm, engaged in making wine in France, which was confiscated<sup>105</sup> during wartime and sold to the plaintiff. In upholding the plaintiff's contention that it had acquired a property interest in the good-will of the

1936) (theater bank night); *Lewis v. Kroger Co.*, 109 F. Supp. 484 (S.D. W.Va. 1952) (contest).

<sup>100</sup> See SPRING, RISKS & RIGHTS IN PUBLISHING TELEVISION RADIO MOTION PICTURES ADVERTISING AND THE THEATER 255 (1st ed. 1952).

<sup>101</sup> The scope of this note does not include a textual treatment of the unique subject of patents. It is recognized that patents are property. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908); *United States v. American Bell Tel. Co.*, 167 U.S. 224 (1897); 35 U.S.C. § 261 (1952). The nature of patents is analogous in many respects to that of other treated intangibles. Patent infringement may constitute unfair competition. See 1 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS § 16.1 (2d ed. 1950). Like copyrights, patents are federally controlled under constitutional authority. U. S. CONST. art. 1, § 8, cl. 8. And, like literary property, patents had a common-law existence. See ELLIS, PATENT ASSIGNMENTS §§ 2, 3 (3d ed. 1955). However, patents have often been considered to possess a nature more like realty than personality. See *Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co.*, 266 U.S. 342 (1924). In the final analysis, patents are unlike other forms of property. See *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24 (1923). Patents are "... still a novelty in the law. The wisdom of the common law gives neither maxims nor precedents to guide, and the American cases which deal with it, though numerous enough, run in a narrow, statutory groove. Though the most intangible form of property, it still, in many characteristics, is closer in analogy to real than to personal estate." *Solomons v. United States*, 21 Ct. Cl. 479, 483 (1886), *aff'd*, 137 U.S. 342 (1890).

<sup>102</sup> See BEALE, CONFLICT OF LAWS § 378.2 (1935); *cf.* *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>103</sup> *E.g.*, The McGuire Act, 66 STAT. 632, 15 U.S.C. § 45 (1952). For an excellent appraisal of the conflict of laws problem with regard to the enforcement of fair trade laws, see Comment, 22 U. CHI. L. REV. 525 (1955).

<sup>104</sup> 10 F. Supp. 289 (S.D.N.Y. 1935).

<sup>105</sup> The problem of confiscation of property outside of a national jurisdiction is a subject of great concern in international law. For an exhaustive survey of the field, see RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW (1951); *Re, Judicial Developments In Sovereign Immunity And Foreign Confiscations*, 1 N.Y.L. FORUM 160 (1955).

business, the court ruled that the situs of the intangible was entirely within France. The situs of good-will was thus identified with the location of the business.

Since trademarks and the concept of unfair competition are parallel in nature<sup>106</sup> it would seem that parallel conflicts rules should be applied.<sup>107</sup> It is to be noted, however, that the uniformity imposed by the federal trademark law<sup>108</sup> avoids the necessity of considering situs. Internationally, the domicile of the owner of the trademark may be determinative of both situs and the controlling law, regardless of the law of the place of infringement.<sup>109</sup> Such a conclusion is not settled, and this rule may actually only demonstrate the view that a nation has power to control the conduct of native businessmen abroad.<sup>110</sup> Another view of the situs of trademarks may be seen in a case which involved the liquidation of French monks' property, which included a liqueur-producing process.<sup>111</sup> The Supreme Court held that the confiscation had no effect on trademarks which were registered and *situated* in the United States. Recently, in *Zwack v. Kraus Bros. & Co.*,<sup>112</sup> it was held that trademarks of a nationalized Hungarian partnership were property *located* in the United States, thus the foreign confiscatory law was inapplicable to the domestic res. On the basis of these decisions, it may well be that trademarks are intangible property having situs outside of the owner's domicile.<sup>113</sup>

Unfair competition may be regulated federally, to some extent, under the doctrine of "pendent jurisdiction." For example, an action which involves both trademark infringement and unfair competition, which is faulty on the trademark theory, is retained by federal courts.<sup>114</sup> Although jurisdiction is retained, the majority of federal

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<sup>106</sup> See 1 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS § 4.1 (2d ed. 1950).

<sup>107</sup> See Comment, *The Federal Law of Unfair Competition*, 28 ROCKY MT. L. REV. 111 (1955).

<sup>108</sup> Lanham Trade-Mark Act, 60 STAT. 427 (1946), 15 U.S.C. § 1051 (1952).

<sup>109</sup> See *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). A "national treatment principle," much like that afforded copyrights in the Universal Copyright Convention, is embodied in the Lanham Trade-Mark Act. See 4 CALLMANN, *op. cit. supra* note 106, § 99.2(a).

<sup>110</sup> See Wengler, *Laws Concerning Unfair Competition and the Conflict of Laws*, 4 AM. J. COMP. L. 167, 175 (1955).

<sup>111</sup> *Baglin v. Cusenier Co.*, 221 U.S. 580 (1911).

<sup>112</sup> 133 F. Supp. 929 (S.D.N.Y. 1955).

<sup>113</sup> The problem of situs would be avoided if trademarks were accorded full protection outside of the jurisdiction of creation. Such protection has been granted between states. See, e.g., *Derringer v. Plate*, 29 Cal. 293 (1865); *State v. Gibbs*, 56 Mo. 133 (1874). Internationally, the conflicts problem is often resolved by a nation requiring a foreign trademark to be registered at the domicile before allowing local registration. See Wengler, *supra* note 110, at 174 n.23.

<sup>114</sup> *Cf. Hurn v. Oursler*, 289 U.S. 238 (1933). "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws." 28 U.S.C. § 1338(b) (1952). See also Schreyer

courts reject the rule that federal law is applicable<sup>115</sup> and hold that state law is controlling.<sup>116</sup> Under this majority view the situs of the property right against unfair competition is of major importance. It would seem that the trademark concept of an independent situs should be applied in unfair competition cases, at least until unfair competition is federally treated.<sup>117</sup>

### *Conclusion*

There does not seem to be a basis for serious dissent to uniform protection of intangible property rights. Protection of intangibles as property has a sound foundation in natural justice, and expanding commerce necessitates uniformity in treatment. The obvious solution is universal uniformity achieved through international legislation. In that connection, the Universal Copyright Convention could serve as a model for the attainment of such an objective. Until practical political objections can be overcome, however, a norm for the solution of conflict of laws problems must be adopted. Situs is a norm, if situs is universally applied with consistency. A recapitulation of the laws governing real intangible property will show that intangibles are closely allied with tangible, readily-located property; a copyright is allied with a book it protects, good-will with a business and an idea with its concrete plan. Perhaps the situs of a real intangible can be considered to be the situs of its natural, physical ally. It is only in reliance on tangibles that the disharmonizing fiction of intangible situs can be limited if not eliminated.



## THE EXCLUSIONARY RULE — "FEDERAL" OR "NATIONAL"?

### *Introduction*

In *Rea v. United States*,<sup>1</sup> the defendant had been indicted in a federal district court for the unlawful acquisition of marihuana.<sup>2</sup>

v. Casco Products Corp., 190 F.2d 921 (2d Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

<sup>115</sup> See *Bulova Watch Co. v. Stolzberg*, 69 F. Supp. 543 (D. Mass. 1947).

<sup>116</sup> *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F.2d 618 (1st Cir. 1944); see *Swarthmore Classics, Inc. v. Swarthmore Junior*, 81 F. Supp. 917 (S.D.N.Y. 1949); *Folmer Graflex Corp. v. Graphic Photo Service*, 44 F. Supp. 429 (D. Mass. 1940).

<sup>117</sup> Such federal control is advocated in Note, 60 HARV. L. REV. 1315, 1323 (1947).

<sup>1</sup> 350 U.S. 214 (1956).

<sup>2</sup> 53 STAT. 281 (1939), 26 U.S.C. § 2593(a) (1952).