ESTATE OF ERNEST HEMINGWAY et al., Appts.,
v
RANDOM HOUSE, Inc., et al., Respts.

New York Court of Appeals — December 12, 1968
23 NY2d 341, 296 NYS2d 771, 244 NE2d 250, 32 ALR3d 605

SUMMARY OF DECISION

Plaintiffs, the estate of a literary figure of world renown and his widow, brought an action seeking an injunction and damages against the writer and the publisher of a book about the deceased. Plaintiffs' motion for a preliminary injunction was denied and the book was published. Subsequently, in the Supreme Court, Special Term, New York County, Mitchell D. Schweitzer and Francis T. Murphy, Jr., JJ., defendants' motions for summary judgment were granted dismissing all causes of action and the orders were affirmed by the Supreme Court, Appellate Division, First Judicial Department. The book in question contained lengthy quotations from the deceased's conversations as noted or remembered by the writer. Plaintiffs alleged that the book consisted mainly of literary matter composed by the deceased in which he had a common-law copyright. Other causes of action were based on theories of unfair competition, violation of a fiduciary relationship, and invasion of the widow's right to privacy.

On appeal by plaintiffs, the orders of the trial court were affirmed by the Court of Appeals of New York, which, in an opinion by Fuld, C. J., held, inter alia, that the requisite conditions of common-law copyright were not shown. The court discussed, but did not decide, the question whether in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized.

HEADNOTES

Classified to ALR Digests

Literary Property § 1 — common-law copyright

1. Common-law copyright, the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the

SUBJECT OF ANNOTATION

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Common-law copyright in the spoken word

public, enables the author to exercise control over the first publication of his work or to prevent publication entirely—hence its other name, the right of first publication.
[Annotated]

Literary Property § 2 — personal letters

2. Although the paper on which a personal letter is written belongs to the recipient, it is the author who has the right to publish it or to prevent its publication.
[Annotated]

Literary Property § 3 — addresses, lectures, and plays — publication

3. The public delivery of an address or lecture or the performance of a play is not deemed a publication, and accordingly, it does not deprive the author of his common-law copyright in the contents.
[Annotated]

Constitutional Law § 791 — freedom of the press — private conversations

4. The indispensable right of the press to report on what people have done, or on what has happened to them or on what they have said in public, does not necessarily imply an unbounded freedom to publish whatever they may have said in private conversation, any more than it implies a freedom to copy and publish what people may have put down in private writings.

Copyright § 1; Literary Property § 1 — basis and purpose of common-law and statutory copyright

5. Copyright, both common-law and statutory, rests on the assumption that there are forms of expression, limited in kind to be sure, which should not be divulged to the public without the consent of their author; its purpose, far from being restrictive, is to encourage and protect intellectual labor.
[Annotated]

Constitutional Law § 791 — public expression of ideas

6. The essential thrust of the first amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet; and the concomitant freedom not to speak publicly serves the same ultimate end as freedom of speech in its affirmative aspect.

Literary Property § 1 — common-law copyright — conversations

7. In an action by the estate of a famous author and his widow against the publisher and writer of a book about the author, the trial court properly dismissed a cause of action alleging common-law copyright as to the deceased author's conversational remarks, where the deceased never suggested to defendant writer or to anyone else that he regarded his conversational remarks to be literary creations or that he was of a mind to restrict defendant's use of the notes and recordings which the deceased knew him to be accumulating, where it had become a continuing practice, during the deceased's lifetime, for defendant to write articles about him consisting largely of quotations from the deceased's conversation, all of which was approved by the deceased, and where the deceased's words and conduct left no doubt of his willingness to permit defendant to draw freely on their conversation in writing about him and to publish such material.
[Annotated]

Trademarks, Tradenames, and Unfair Trade Practices § 30 — unfair competition — literary works

8. In an action by the estate of a famous author and his widow against the publisher and writer of a book about the author, recovery on a theory of unfair competition was precluded where plaintiffs' affidavits in opposition to defendants' motion for summary judgment showed no competition of any kind, unfair or otherwise, where there was not a word of proof in support of plaintiffs' allegation that defendants' book unfairly competed with other literary matter created and written by the deceased, and where the affidavits disclosed nothing which resembled the "palming off" or other deceitful practice which must be present before an otherwise lawful use of literary material may be stamped as unfair competition.

Literary Property § 1 — breach of confidential relationship

9. In an action by the estate of a famous author and his widow against the publisher and writer of a book about the author, the

trial court properly dismissed a cause of action alleging breach of a confidential relationship between the deceased and defendant writer, where, even assuming that plaintiffs' allegations and proofs pointed to the existence of a confidential relationship between the deceased and defendant for some purposes, there was no indication that that relationship envisaged or had, as its subject matter, the conversations or other material which found their way into the book, where any such confidential relationship extended only to the negotiation and carrying out of projects for the adaptation of the deceased's published books and stories for motion pictures and television, and where there was no showing of any kind that such adaptations were based on the deceased's conversations.

Privacy § 4 — violation of right — publication of biography

10. In an action against the writer and publisher of a book about a well-known deceased author, the trial court correctly dismissed a cause of action by the author's widow for intrusion on her statutory right of privacy, where plaintiff was not only the widow of a literary figure of world renown, a Nobel Laureate, but had herself encouraged public attention to her status by writing articles for popular magazines dealing with her husband and with events in their lives together, and where no issue was presented as to the existence in the book of misstatements, inaccuracies, or untruths.

Privacy § 2 — violation of statutory right — public figures

11. In the light of constitutional guaranties of free speech, a civil rights statute proscribing the use of a person's name for advertising or trade purposes may not be applied to afford recovery to a public figure or in matters of public interest in the absence of proof that the defendant published the item with knowledge of its falsity or in reckless disregard of the truth.

Privacy § 2 — violation of right — intimate revelations

12. In an action against the writer and publisher of a book about a well-known deceased author, no basis was shown for plaintiff widow's contention in connection with her claim of violation of the right of privacy that a description in the book of her feelings and conduct during the time of her husband's mental illness constituted so intimate and so unwarranted a revelation as to outrage the community's notions of decency, where defendant writer's sympathetic report of plaintiff's role in her husband's anguished last months was not an impermissible revelation or otherwise offensive to any notion of decency, and where the brief disclosures to which plaintiff pointed had their proper place in a biographical account of the dissolution and death of a gifted writer.

Privacy § 2 — violation of right — advertising

13. In an action against the writer and publisher of a book about a well-known deceased author, circulation by defendant publisher of galley proofs to book reviewers in advance of publication could not be considered as advertising within the meaning of a statute proscribing the use of a person's name for such purpose without consent; the main purpose and function of book reviewing is to introduce the author's work into the stream of public information, the free flow of which is safeguarded by the First and Fourteenth Amendments.

BRIEFS OF COUNSEL

Joseph Calderon and **Bergerman & Hourwich**, both of New York City, for appellants:

Plaintiffs own the common-law copyright in the literary material incorporated in the book "Papa Hemingway," which was created and expressed orally by the late Ernest Hemingway. Palmer v DeWitt, 47 NY 532; Fendler v Morosco, 253 NY 281; Chamberlain v Feldman, 300 NY 135; Taft v Smith, Gray & Co. 76 Misc 283; Nutt v National Institute, Inc. for the Improvement of Memory, 31 F2d 236; Public Affairs Asso., Inc. v Rickover, 284 F2d 262, revd on other grounds, 369 US 111; Jenkins v News Syndicate Co., Inc. 128 Misc 284; Fisher v Star Co. 231 NY 414; Lennon v Pulsebeat News, Inc. New York LJ, July 23, 1964, p. 7 (Sup Ct, NY Co) 143 USPQ

Briefs of Counsel—Cont'd

309; Fendler v Morosco, 253 NY 281; Smith v Little, Brown & Co. 360 F2d 928; 18 Am Jur 2d, Copyright and Literary Property § 6; Nimmer, Copyright (1964) § 11.1, 11.2; 67 Columbia L Rev 366.

Literary property is extended the same legal protection as other forms of property. Palmer v DeWitt, 47 NY 532; Fendler v Morosco, 253 NY 281; Chamberlain v Feldman, 300 NY 135.

The creator's rights in literary matter has been protected even where the content was communicated orally to the defendant and defendant later reduced the oral communication to the writing that was published. Jenkins v News Syndicate Co., Inc. 128 Misc 284.

The author's ownership of the production of his brain is as distinctive as that of the creator of corporeal property. 18 Am Jur 2d, Copyright and Literary Property § 6.

The doctrine of fair use permits only an incidental use and not a substantial or unreasonable use. Lennon v Pulsebeat News, Inc. New York Law Journal, July 23, 1964, p. 7 (Sup Ct NY Co), 143 USPQ 309; Fendler v Morosco, 253 NY 281.

The claim based upon misappropriation of literary property is supported by the legal principle denominated unfair competition. International News Service v Associated Press, 248 US 215; Flamingo Telefilm Sales, Inc. v United Artists Corp. 22 App Div 778.

On the issue of the right, as between the parties, to the economic gain obtained from the commercial publication of literary material, the law protects the property rights of the author's heirs in the literary creation of the decedent. Chamberlain v Feldman, 300 NY 135.

The book combines the literary creation of Ernest Hemingway and defendant author and is their joint literary property with rights of co-ownership in plaintiff appellants. Underhill v Schenck, 238 NY 7; Maurel v Smith, 220 F 195, affd 271 F 211; Edward B. Marks Corp. v Jerry Vogel Music Co. 140 F2d 266; G. Ricordi & Co. v Columbia Graphophone Co. 258 F 72; Nimmer, Copyright (1966) §§ 67–75; Ball, Copyright and Literary Property (1949) § 221.

The legal interest of a co-owner is protected by requiring an accounting of the profit realized from any license granted to a third party. Underhill v Schenck, 238 NY 7.

Fiduciary relationships may arise from situations where the parties are involved in mutually exploiting property for their joint profit. Meinhard v Salmon, 249 NY 458.

The law creates a fiduciary duty in one to whom literary property is communicated and submitted under circumstances involving mutual trust and confidence. Underhill v Schenck, 238 NY 7; Kirke La Shelle Co. v Armstrong Co. 263 NY 79.

The use of plaintiff widow's name, her conversations, and incidents drawn from her private life and experiences, in the book is for advertising and trade purposes, in violation of her right of privacy protected by NY Civil Rights Law § 51. Spahn v Messner, Inc. 18 NY2d 324, remanded 387 US 239, rearg 21 NY2d 124; Flores v Mosler Safe Co. 7 NY2d 276; Hill v Hayes, 18 App Div 2d 485, 491; Sutton v Hearst Corp. 277 App Div 155; Garner v Triangle Publications, Inc. 97 F Supp 546.

Being a public figure does not automatically destroy a person's right of privacy. Sutton v Hearst Corp. 277 App Div 155; Garner v Triangle Publications, Inc. 97 F Supp 546.

Whether newsworthy material was involved in the present case cannot be determined on the present record as a matter of law. Compare Youssoupoff v Columbia Broadcasting System, Inc. 19 App Div 865.

Horace S. Manges, Marshall C. Berger, and **Weil, Gotshal & Manges,** all of New York City, for Random House, Inc., respondent:

Attempts to protect, by an action for unfair competition, rights which can be protected by copyright, whether they are statutory or common-law, must fail. Desclee & Cie. v Nemmers, 190 F Supp 381; G. Ricordi & Co. v Haendler, 194 F2d 914; Continental Casualty Co. v Beardsley, 151 F Supp 28, affd in pertinent part on the op of the court below, 253 F2d 702, cert den 358 US 816; Hebrew Publishing Co. v Scharfstein, 288 NY 374; Shostakovich v Twentieth Century-Fox Film Corp. 196

Briefs of Counsel—Cont'd

Misc 67, affd 275 App Div 692; Sears, Roebuck & Co. v Stiffel Co. 376 US 225; Compco Corp. v Day-Brite Lighting, Inc. 376 US 234; Cable Vision, Inc. v KUTV, Inc. 335 F2d 348; Flamingo Telefilm Sales, Inc. v United Artists Corp. 22 AD2d 778; Columbia Broadcasting System, Inc. v DeCosta, 377 F2d 315.

The courts will not extend the law of unfair competition when such extension would result in serious social cost. University of Notre Dame v Twentieth Century-Fox Film Corp. 22 AD2d 452, affd 15 NY2d 940; Societe Comptoir v Alexander's Department Stores, 299 F2d 33.

Plaintiff widow has no cause of action for invasion of her right of privacy. Sidis v F–R Pub. Corp. 113 F2d 806, cert den 311 US 711; Koussevitzky v Allen, Towne & Heath, Inc. 188 Misc 479, affd 272 App Div 759; Spahn v Messner, Inc. 18 NY2d 324; Time, Inc. v Hill, 385 US 374; Goelet v Confidential, Inc. 5 AD2d 226; Oma v Hillman Periodicals, 281 App Div 240; University of Notre Dame v Twentieth Century-Fox Film Corp. 22 AD2d 452, affd 15 NY2d 940; Stillman v Paramount Pictures Corp. 2 AD2d 18, affd 5 NY2d 994; Damron v Doubleday Doran & Co. 133 Misc 302, affd 226 App Div 796.

Plaintiff widow erroneously assumes that the restrictions on the right of privacy of public figures apply only to current events. Dallesandro v Holt & Co. 4 AD2d 470; Sidis v F–R Pub. Corp. 113 F2d 806, cert den 311 US 711.

Mervin Rosenman, Philip L. Hummer, and **Simon J. Hauser,** all of New York City, for A. E. Hotchner, respondent:

Common-law copyright should not be extended to conversations between friends. Appellants' contentions are adverse to the public interest, destructive of fundamental constitutional guaranties, and contrary to the doctrine of common-law copyright. University of Notre Dame Du Lac v Twentieth Century-Fox Film Corp. 22 AD 2d 452, affd 15 NY2d 940; Rosemont Enterprises, Inc. v Random House, Inc. 366 F2d 303; Harris v Miller, 50 US PQ 306; Palmer v DeWitt, 47 NY 532; Williamson v New York Central R. R. 258 App Div 226; Stone v Liggett & Myers Tobacco Co. 260 App Div 450; O'Brien v RKO Radio Pictures, Inc. 68 F Supp 13; Bowen v Yankee Network, Inc. 46 F Supp 62.

Respondent author's reconstruction of his conversations with Hemingway was the literary expression of respondent, not Hemingway. Harris v Miller, 50 US PQ 306.

Absent a breach of confidential or fiduciary relationship, ideas not embodied in concrete form are unprotectable by common-law copyright or otherwise. Palmer v DeWitt, 47 NY 532.

Respondents are entitled to summary judgment dismissing the third cause of action where there was no proof of (1) a confidential relationship or joint venture or (2) a breach of such a relationship.

OPINION OF THE COURT

Fuld, Ch. J.

On this appeal—involving an action brought by the estate of the late Ernest Hemingway and his widow against the publisher and author of a book, entitled "Papa Hemingway"—we are called upon to decide, primarily, whether conversations of a gifted and highly regarded writer may become the subject of common-law copyright, even though the speaker himself has not reduced his words to writing.

Hemingway died in 1961. During the last 13 years of his life, a close friendship existed between him and A. E. Hotchner, a younger and far less well-known writer. Hotchner, who met Hemingway in the course of writing articles about him, became a favored drinking and traveling companion of the famous author, a frequent visitor to his home and the adapter of some

of his works for motion pictures and television. During these years, Hemingway's conversation with Hotchner, in which others sometimes took part, was filled with anecdote, reminiscence, literary opinion and revealing comment about actual persons on whom some of Hemingway's fictional characters were based. Hotchner made careful notes of these conversations soon after they occurred, occasionally recording them on a portable tape recorded.

During Hemingway's lifetime, Hotchner wrote and published several articles about his friend in which he quoted some of this talk at length. Hemingway, far from objecting to this practice, approved of it. Indeed, the record reveals that other writers also quoted Hemingway's conversation without any objection from him, even when he was displeased with the articles themselves.

After Hemingway's death, Hotchner wrote "Papa Hemingway," drawing upon his notes and his recollections, and in 1966 it was published by the defendant Random House. Subtitled "a personal memoir", it is a serious and revealing biographical portrait of the world-renowned writer. Woven through the narrative, and giving the book much of its interest and character, are lengthy quotations from Hemingway's talk, as noted or remembered by Hotchner. Included also are two chapters on Hemingway's final illness and suicide in which Hotchner, writing of his friend with obvious feeling and sympathy, refers to events, and even to medical information, to which he was privy as an intimate of the family. Hemingway's widow, Mary, is mentioned frequently in the book, and is sometimes quoted, but only incidentally.

The complaint, which seeks an injunction and damages, alleges four causes of action. The first three, in which the Estate of Hemingway and his widow join as plaintiffs, are, briefly stated, (1) that "Papa Hemingway" consists, in the main, of literary matter composed by Hemingway in which he had a common-law copyright; (2) that publication would constitute an unauthorized appropriation of Hemingway's work and would compete unfairly with his other literary creations; and (3) that Hotchner wrongfully used material which was imparted to him in the course of a confidential and fiduciary relationship with Hemingway. In the fourth cause of action, Mary Hemingway asserts that the book invades the right to privacy to which she herself is entitled under section 51 of the Civil Rights Law, Consol Laws, c 6.

The plaintiffs moved for a preliminary injunction. The motion was denied (49 Misc 2d 726, 268 NYS2d 531, affd 25 AD2d 719, 269 NYS2d 366), and the book was thereafter published. After its publication, the defendants sought and were granted summary judgment dismissing all four causes of action. The Appellate Division unanimously affirmed the resulting orders and granted the plaintiffs leave to appeal to this court.

Turning to the first cause of action, we agree with the disposition made below but on a ground more narrow than that articulated by the court at Special Term. It is the position of the plaintiffs (under this count) that Hemingway was entitled to a common-law copyright on the theory that his

directly quoted comment, anecdote and opinion were his "literary creations", his "literary property", and that the defendant Hotchner's note-taking only performed the mechanics of recordation. And, in a somewhat different vein, the plaintiffs argue that "[w]hat for Hemingway was oral one day would be or could become his written manuscript the next day", that his speech, constituting not just a statement of his ideas but the very form in which he conceived and expressed them, was as much the subject of common-law copyright as what he might himself have committed to paper.

[1] Common-law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely—hence, its other name, the "right of first publication". (Chamberlain v Feldman, 300 NY 135, 139, 89 NE2d 863, 864.)[1] No cases deal directly with the question whether it extends to conversational speech and we begin, therefore, with a brief review of some relevant concepts in this area of law.

It must be acknowledged—as the defendants point out—that nearly a century ago our court stated that common-law copyright extended to " '[e]very new and innocent product of mental labor which has been *embodied in writing, or some other material form*' ". (Palmer v De Witt, 47 NY 532, 537; emphasis supplied.) And, more recently, it has been said that "an author has no property right in his ideas unless . . . given embodiment in a tangible form." (O'Brien v RKO Radio Pictures, D.C., 68 F Supp 13, 14.) However, as a noted scholar in the field has observed, "the underlying rationale for common law copyright (i. e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form" (Nimmer, Copyright, § 11.1, p 40). The principle that it is not the tangible embodiment of the author's work but the creation of the work itself which is protected finds recognition in a number of ways in copyright law.

[2, 3] One example, with some relevance to the problem before us, is the treatment which the law has accorded to personal letters—a kind of half-conversation in written form. Although the paper upon which the letter is written belongs to the recipient, it is the author who has the right to publish them or to prevent their publication. (See Baker v Libbie, 210 Mass 599, 605, 606, 97 NE 109, 37 LRA, NS, 944.) In the words of the Massachusetts court in the Baker case (210 Mass, at pp 605–606, 97 NE at p 111), the author's right "is an interest in the intangible and impalpable thought and the particular verbal garments in which it has been clothed." Nor has speech itself been entirely without protection against reproduction for publication. The public

1. Although common-law copyright in an unpublished work lasts indefinitely, it is extinguished immediately upon publication of the work by the author. He must then rely, for his protection, upon Federal statutory copyright. (See Nimmer, Copyright, § 11, pp 38–42 and ch 4, p 183 et seq.) Section 2 of the Copyright Act (US Code, tit 17) expressly preserves common-law rights in *unpublished* works against any implication that the field is pre-empted by the Federal statute.

delivery of an address or a lecture or the performance of a play is not deemed a "publication," and, accordingly, it does not deprive the author of his common-law copyright in its contents. (See Ferris v Frohman, 223 US 424, 32 S Ct 263, 56 L Ed 492; King v Mister Maestro, Inc., 224 F Supp 101, 106; Palmer v De Witt, 47 NY 532, 543, supra; see, also, Nimmer, Copyright, § 53, p 208.)

Letters, however—like plays and public addresses, written or not—have distinct, identifiable boundaries and they are, in most cases, only occasional products. Whatever difficulties attend the formulation of suitable rules for the enforcement of rights in such works (see, e. g., Note, Personal Letters: In Need of a Law of Their Own, 44 Iowa L Rev 705), they are relatively manageable. However, conversational speech, the distinctive behavior of man, is quite another matter, and subjecting any part of it to the restraints of common-law copyright presents unique problems.

[4] One such problem—and it was stressed by the court at Special Term (Schweitzer, J.)[2]—is that of avoiding undue restraints on the freedoms of speech and press and, in particular, on the writers of history and of biographical works of the genre of Boswell's "Life of Johnson". The safeguarding of essential freedoms in this area is, though, not without its complications. The indispensable right of the press to report on what people have *done*, or on what has *happened* to them or on what they have *said in public* (see Time, Inc. v Hill, 385 US 374, 87 S Ct 534, 17 L Ed 2d 456; Curtis Pub. Co. v Butts, 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094; Associated Press v Walker, 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094) does not necessarily imply an unbounded freedom to publish whatever they may have *said in private conversation*, any more than it implies a freedom to copy and publish what people may have put down in *private writings*.

[5, 6] Copyright, both common-law and statutory, rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor. (See Note, Copyright: Right to Common Law Copyright in Conversation of a Decedent, 67 Col L Rev 366, 367, commenting on the decision denying the plaintiffs before us a preliminary injunction, 49 Misc 2d 726, 268 NYS2d 531.) The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

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2. Another problem—also remarked by the court—is the difficulty of measuring the relative self-sufficiency of any one party's contributions to a conversation, although it may be, in the case of some kinds of dialogue or interview, that the difficulty would not be greater than in deciding other questions of degree, such as plagiarism. (See, e.g., Nichols v Universal Pictures Corp. CC, 45 F2d 119.)

The rules of common-law copyright assure this freedom in the case of written material. However, speech is now easily captured by electronic devices and, consequently, we should be wary about excluding all possibility of protecting a speaker's right to decide when his words, uttered in private dialogue, may or may not be published at large. Conceivably, there may be limited and special situations in which an interlocutor brings forth oral statements from another party which both understand to be the unique intellectual product of the principal speaker, a product which would qualify for common-law copyright if such statements were in writing. Concerning such problems, we express no opinion; we do no more than raise the questions, leaving them open for future consideration in cases which may present them more sharply than this one does.

[7] On the appeal before us, the plaintiffs' claim to common-law copyright may be disposed of more simply and on a more narrow ground.

The defendant Hotchner asserts—without contradiction in the papers before us—that Hemingway never suggested to him or to anyone else that he regarded his conversational remarks to be "literary creations" or that he was of a mind to restrict Hotchner's use of the notes and recordings which Hemingway knew him to be accumulating. On the contrary, as we have already observed, it had become a continuing practice, during Hemingway's lifetime, for Hotchner to write articles about Hemingway, consisting largely of quotations from the latter's conversation—and of all of this Hemingway approved. In these circumstances, authority to publish must be implied, thus negativing the reservation of any common-law copyright.

Assuming, without deciding, that in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication. In the conventional common-law copyright situation, this indication is afforded by the creation of the manuscript itself. It would have to be evidenced in some other way if protection were ever to be accorded to some forms of conversational dialogue.

Such an indication is, of course, possible in the case of speech. It might, for example, be found in prefatory words or inferred from the circumstances in which the dialogue takes place.[3] Another way of formulating such a rule might be to say that, although, in the case of most intellectual products, the courts are reluctant to find that an author has "published," so as to lose his common-law copyright (see Nimmer, Copyright, § 58.2, pp 226–228), in the

3. This was the situation in Jenkins v News Syndicate Co. 128 Misc 284, 219 NYS 196. The plaintiff alleged that she had had a conference with a newspaper editor in which she described in detail the proposed content of some articles she was requested to write. Later, she decided not to write them and the newspaper thereupon published an "interview" with her, precisely quoting much of her conversation with the editor. The court held that she had stated a cause of action for damages on the theory of common-law copyright.

case of conversational speech—because of its unique nature—there should be a presumption that the speaker has not reserved any common-law rights unless the contrary strongly appears. However, we need not carry such speculation further in the present case since the requisite conditions are plainly absent here.

For present purposes, it is enough to observe that Hemingway's words and conduct, far from making any such reservation, left no doubt of his willingness to permit Hotchner to draw freely on their conversation in writing about him and to publish such material. What we have said disposes of the plaintiffs' claim both to exclusive and to joint copyright and we need not consider this aspect of the case any further. It follows, therefore, that the courts below were eminently correct in dismissing the first cause of action.

[8] The second count does no more than put another label on the same allegations as those upon which the first was based. As Justice Schweitzer expressed the thought at Special Term, "[t]he reasoning which denies [the plaintiffs] protection or recovery on theories of common-law copyright also operates to deny recovery on any theory of unfair competition." (53 Misc 2d 462, 472, 279 NYS2d 51, 62.) In point of fact, there is no competition of *any* kind, unfair or otherwise, shown by the plaintiffs' affidavits. Hotchner was not competing with Hemingway; the latter's acquiescence in Hotchner's practice of writing about him disposes of any such suggestion. There is not a word of proof, nor could there be, that, as alleged, the Hotchner book "unfairly compete[d] with other literary matter . . . created and written" by Hemingway. Moreover, the affidavits disclose nothing which resembles the "palming off" or other deceitful practice which must be present before an otherwise lawful use of literary material might be stamped as unfair competition. (See Hebrew Pub. Co. v Scharfstein, 288 NY 374, 43 NE2d 449; Flamingo Telefilm Sales v United Artists Corp., 22 AD2d 778, 779, 254 NYS2d 36, 37.) Since State law is sufficient to bar the plaintiffs' claim under the second cause of action, we have no need to consider the contention of the defendant Random House that the decisions in Sears, Roebuck & Co. v Stiffel Co., 376 US 225, 84 S Ct 784, 11 L Ed 2d 661 and Compco Corp. v Day-Brite Light, 376 US 234, 84 S Ct 779, 11 L Ed 2d 669 apply to preclude the plaintiffs' reliance on a State remedy for unfair competition. (See, also, Cable Vision v KUTV, Inc., 9 Cir, 335 F2d 348, 354.)

[9] In their third cause of action, the plaintiffs incorporate all of the allegations of the first, adding to them the charge that the use of Hemingway's conversations was a breach of a confidential relationship between him and Hotchner. In fact, on this appeal, they claim that the third cause "rests" on the first. Since we have already found the first to be insufficient, we might well dispose of the third without further comment. However, the court at Special Term stated that the disposition of the third count rests not on the question whether the plaintiffs enjoy a common-law property right but solely on the existence of the alleged relationship and concluded that there was "not a scintilla of proof" to support the plaintiffs' allegations. Accordingly, we consider the case, briefly, on that theory.

If the fate of the third cause of action turned on the mere *existence* of a special relationship of trust between the two men, we would have some doubt that the issue could be disposed of without a trial. However, although there is some uncertainty and conflict in the evidence on this issue, there can be no question that the courts below were right in dismissing this cause of action. Even if it were to be assumed that the plaintiffs' allegations and proofs pointed to the existence of a confidential relationship between Hemingway and Hotchner for some purposes, there is no indication that that relationship envisaged or had, as its subject matter, the conversations or other material which found their way into "Papa Hemingway." The confidential relationship, if it did exist, extended only to the negotiation and carrying out of projects for the adaptation of Hemingway's published books and stories for motion pictures and television. Neither the allegations of the complaint nor the averments in the affidavits go beyond this. There is no showing of any kind that the adaptations were based on Hemingway's conversations; they were drawn from distinct and completed works to which Hemingway held the copyright. Thus, there is nothing in the affidavits from which a restriction on Hotchner's right to quote Hemingway's conversation may be deduced.

The plaintiffs' reliance on such decisions as Underhill v Schenck, 238 NY 7, 143 NE 773, 33 ALR 303 and Kirke La Shelle Co. v Armstrong Co., 263 NY 79, 188 NE 163, is misplaced. In these cases, involving literary property —as in Meinhard v Salmon, 249 NY 458, 164 NE 545, 62 ALR 1, involving real property—liability was imposed for faithless dealing in connection with the very subject matter which had originally brought the parties together and which formed the basis of their fiduciary relationship. Quite obviously, the case before us presents no such situation.

[10, 11] The fourth count—in which only Hemingway's widow asserts a cause of action—is grounded on the claim that the Hotchner book intrudes upon her privacy in violation of section 51 of the Civil Rights Law.[4] The decisions in Time, Inc. v Hill, 385 US 374, 87 S Ct 534, 17 L Ed 2d 456, supra and Spahn v Julian Messner, Inc., 21 NY2d 124, 286 NYS2d 832, 233 NE2d 840, dispose of the point and confirm the correctness of the dismissal of this cause of action. Both of those cases establish that, in the light of constitutional guarantees of free speech, section 51 may not be applied to afford recovery to a public figure or in matters of public interest—to quote from Hill, 385 US at p 388, 87 S Ct at p 542, 17 L Ed 2d at p 467—"in the absence of proof that the defendant published the [item] with knowledge of its falsity or in reckless disregard of the truth." (See, also, Spahn, 21 NY2d, at p 127, 286 NYS2d at p 834, 233 NE2d at p 842.) That Mrs. Hemingway is a public figure and newsworthy, within the meaning of these cases, may not be disputed.

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4. Section 51 of the Civil Rights Law reads, in part, as follows: "Any person whose name . . . is used within this state for advertising purposes or for the purposes of trade without [his] written consent . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name . . . to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use".

Not only is she the widow of a literary figure of world renown, a Nobel Laureate, but she herself has encouraged public attention to her status by writing articles for the popular magazines dealing with her husband and with events in their lives together. As the court aptly noted in Goelet v Confidential, Inc., 5 AD2d 226, 228, 171 NYS2d 223, 225, "[o]nce a person has sought publicity he cannot at his whim withdraw the events of his life from public scrutiny".

With respect to the required proof of falsification, under the doctrine of the Hill and Spahn cases, we need but note that, despite a passing reference to the subject in an affidavit, no serious attempt was made to support such a claim. There was no allegation in the complaint of any misstatement knowingly or recklessly made, and in the proceedings below—as the court at Special Term (Murphy, J.) observed—counsel for the plaintiff appears to have "conceded" that no issue was presented as to the existence of "misstatements, inaccuracies or untruths." Our study of the papers before us confirms this conclusion.

[12] Nor is there basis for the plaintiff's further contention that, falsity aside, the description of her feelings and conduct during the time of her husband's mental illness constitutes " 'so intimate and so unwarranted' " a revelation " 'as to outrage the community's notions of decency' " and allow an action for damages. (Time, Inc. v Hill, 385 US 374, 383, 87 S Ct 534, 539, n 7, supra.) It is enough to say that Hotchner's sympathetic report of Mrs. Hemingway's role in her husband's anguished last months may not be treated as an impermissible revelation or as otherwise offensive to any notion of decency. The brief disclosures to which the plaintiff points have their proper place in a biographical account of the dissolution and death of a gifted writer.

[13] The plaintiff also urges that section 51 creates a right of action not merely for the invasion of privacy "for the purposes of trade"—the aspect of the statute involved in Hill and Spahn—but also for "advertising purposes", and she goes on to contend that the circulation of galley proofs of the book by Random House to the book reviewers of 16 journals and newspapers amounted to an advertisement of the book in advance of its publication.[5] The statute does, as we noted in Flores v Mosler Safe Co., 7 NY2d 276, 284, 196 NYS2d 975, 981, 164 NE2d 853, 857, render a use for " 'advertising purposes' a separate and distinct violation" but it is self-evident, we suggest, that the circulation of proofs of a book to reviewers may not be considered advertisement within the meaning of section 51. The main purpose and function of book reviewing is to introduce the author's work into the stream of public information, the free flow of which is safeguarded by the First and Fourteenth Amendments. A publisher, in circulating a book for review, risks unfavorable comment as well as praise; he places the work in the arena of debate. The same reasons which support the author's freedom to write and publish books

5. Mrs. Hemingway also received a set of galley proofs and, after reading them, asked the author and publisher to delete certain passages. They agreed to all of her requests, except the one treating of Hemingway's illness and death, and the publisher withdrew the original galleys and replaced them with revised copies.

require a similar freedom for their circulation, before publication, for comment by reviewers.[6]

In brief, then, it is our conclusion that, since no triable issues have been raised, the courts below very properly dismissed the complaint.

The orders appealed from should be affirmed, with costs.

Burke, Scileppi, Bergan, Keating, Breitel and **Jasen**, JJ., concur.

Orders affirmed.

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6. We simply note that the other arguments urged upon us have been considered and found to be without substance.