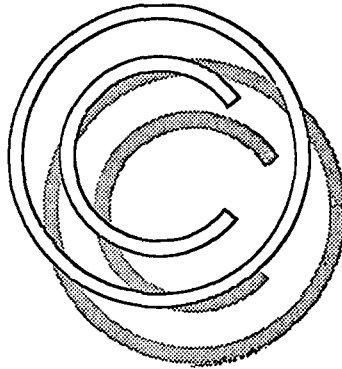

BULLETIN
OF THE
COPYRIGHT SOCIETY
OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 13, No. 1

OCTOBER, 1965

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President
EDWARD A. SARGOY

Vice-Presidents
SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary
ALAN LATMAN

Assistant Secretary
MORTON D. GOLDBERG

Treasurer
EDWARD M. CRAMER

Assistant Treasurer
STANLEY ROTHENBERG

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
PROFESSOR RALPH S. BROWN, Yale Law School
GEORGE D. CARY, Washington, D. C.
SIDNEY A. DIAMOND, New York City
ARTHUR L. FISHBEIN, New York City
PROFESSOR HARRY G. HENN, Cornell Law School
DANIEL HUTTENBRAUCK, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ROBERT H. MONTGOMERY, Jr., New York City
HARRY R. OLSSON, Jr., New York City
HAROLD ORENSTEIN, New York City
AVERILL C. PASAROW, Beverly Hills, Calif.
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
LAWRENCE H. REED, New York City
SAUL N. RITTENBERG, Culver City, Calif.
HARRY N. ROSENFELD, Washington, D. C.
SIDNEY SCHREIBER, New York City
JOHN SCHULMAN, New York City
CHARLES B. SETON, New York City
FRIEDA M. TANNENBAUM, New York City
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York City
RICHARD WINCOR, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011
Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1965 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

PAGE

Announcements

Copyright Fees

Copyright Law Revision—Part 5

PART I. ARTICLES.

THE AMERICAN BAR ASSOCIATION COPYRIGHT SYMPOSIUM,

Copyright Law Revision. Miami, Florida, August 10, 1965,

Introduction 1

A Single Federal Copyright System Franklin Waldheim 2

Notice and Formalities Franklin Waldheim 4

Subject Matter of Copyright; Exclusive Rights; Infringe-
ment and Remedies Morton David Goldberg 7

Phonorecords and Sound Recordings Sidney A. Diamond 20

Duration Sidney A. Diamond 25

Copyright Ownership, Transfer and Termination; Exemp-
tion and Fair Use Irwin Karp 31

A Patent Lawyer Looks at the Copyright System
John T. Love 43

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and Territories 48

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U. S. Courts

1. Federal Court Decisions 49

2. State Court Decisions 60

B. Decisions of Foreign Courts

Royalties for Record Play on Radio

Three Cases in Britain, Sweden and Denmark
Stephen M. Stewart 61

PART V. BIBLIOGRAPHY.

A. Books and Treatises

1. United States Publications	69
2. Foreign Publications	69

B. Law Review Articles

1. United States	70
2. Foreign	
1. English	73
2. English, French and Spanish	76
3. French	76
4. German	77
5. Italian	79
6. Swedish with English summary	80

C. Articles Pertaining to Copyright from
Trade Magazines

1. United States	80
2. England	93
3. South Africa	95

NEWS BRIEFS	95

THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 12 BULL. CR. SOC. page no., Item (1965) .

IMPORTANT ANNOUNCEMENT—COPYRIGHT FEES

President Johnson has signed Public Law 89-297, which amends the copyright law by providing for an increase in certain copyright fees, effective November 26, 1965. The new fee schedule is as follows:

<i>Item</i>	<i>New fees</i>
—All registrations (except renewals)	\$ 6.00
—All renewals	4.00
—Additional certificates	2.00
—Other certifications	3.00
—Assignments, etc. (containing not more than 6 pages and not more than 1 title)	5.00
—Each additional page or title	0.50
—Notice of use (containing not more than 5 titles)	3.00
—Each additional title	0.50
—Notice of intention to use (containing not more than 5 titles)	3.00
—Each additional title	0.50
—Searches (hourly fee)	5.00

The registration fee for commercial prints and labels remains unchanged at \$6.00. Also, the fee for the additional pages and titles in connection with the recordation of documents and notices of use has remained \$0.50. In the case of the recordation of notices of intention to use, the copyright law previously prescribed no fee.

COPYRIGHT LAW REVISION

Announcement from the Copyright Office

Part 5 of the series of House Committee Prints on *Copyright Law Revision* completes the record of the program conducted by the Copyright Office before the preparation and introduction in Congress on February 4, 1965, of the bill for the general revision of the copyright law (H.R. 4347 and S. 1006, 89th Congress) on which Congressional hearings were later held. Part 5 contains the text of an earlier draft bill (H.R. 11947 and S. 3008, 88th Congress) which was introduced in July 1964 for purposes of discussion, together with the transcripts of a two-day meeting of an advisory panel convened by the Register of Copyrights in August 1964, and written comments received by the Copyright Office, on that draft bill. Copies of Part 5 are available from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C., 20402, at \$1.00 per copy.

In addition, a limited supply of the other volumes in the COPYRIGHT LAW REVISION series is still available and may be obtained from the Superintendent of Documents. The volumes are:

Part 1—Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961). 160 pp. \$.45

Part 2—Discussions and Comments on Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (February 1963). 419 pp. \$1.25

Part 3—Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft (September 1964). 457 pp. \$1.25

Part 4—Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law (December 1964). 477 pp. \$1.25

Part 6—Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law. (May 1965). 163 pp. \$1.00

PART I.

ARTICLES

1. THE AMERICAN BAR ASSOCIATION COPYRIGHT SYMPOSIUM

(Miami, Florida, August 10, 1965)

The Subject: "Copyright Law Revision"

Moderator: Spencer C. Olin, Chairman, Copyright Division

Panelists: Dan Lacy, of the American Book Publishers Council
Franklin Waldheim, East Coast Counsel, Walt Disney
Productions, Inc.
Morton D. Goldberg, member of the firm of Ginsberg,
Schwab & Goldberg
Sidney A. Diamond, Vice President, The Copyright Society
of the U.S.A.; Kaye, Scholer, Fierman, Hays & Handler
Irwin Karp, Hays, St. John, Abramson & Heilbron
John T. Love, Gradolph, Love & Rogers

The Symposium was planned to discuss section by section the revisions which had been made in H.R. 12354, the General Copyright Revision Bill, introduced August 12, 1964, as now incorporated in the bill pending in the 89th Congress, H.R. 4347, introduced February 4, 1965. With the exception of Mr. Love, who presented the overall view of a patent lawyer on copyright law revision, each panelist spoke on several sectional changes and there are two papers each by Messrs. Waldheim, Goldberg, Diamond and Karp. Mr. Lacy's address with regard to "Practical Reasons for a New Law" and the Manufacturing Clause is not published herein.

It is our privilege to publish, with the permission of the authors and the American Bar Association, Section on Patent, Trademark and Copyright Law, Spencer C. Olin, chairman, Copyright Division, and Tom Arnold, chairman, Committee 304, the eight papers which follow.

2. A SINGLE FEDERAL COPYRIGHT SYSTEM

By FRANKLIN WALDHEIM

This country appears to be the only one which has a dual system of copyright protection. As we all know, from the time of creation of a work until its publication there exists a common law copyright (sometimes more accurately called a right of first publication) which is enforceable under the applicable laws of the various States. This common law right ceases upon publication of the work at which time there comes into existence, if the copyright law is complied with, the statutory copyright provided by federal law.

The many new media, provided by modern technology, for the dissemination of copyrighted works have outmoded the old concepts of the common law copyright. It is now possible to exhibit and perform copyrighted works to millions of people through television without effecting a traditional publication of the work—and thus, in spite of unlimited dissemination, the common law copyright may be permanently retained. In the field of phonograph records, there has been confusion as to whether or not the manufacture and sale of the records constitute a sufficient publication to *divest* the common law copyright and whether the same acts constitute a sufficient publication to *invest* the statutory copyright.

There has, therefore, been a strong body of opinion in favor of establishing a single system of copyright which applies both to published and unpublished works. This has been accomplished in the pending bill by Section 301 (a) which provides that all rights in the nature of copyright, in works created before or after the effective date of the act and published or unpublished, are covered exclusively by this act. Under this section no person is entitled to copyright or any equivalent right under the common law or statutes of any State. I should perhaps here point out that this section applies only to works coming within the subject matter of copyright. Therefore, a work not fixed in a tangible medium of expression (as a work recorded only in the author's mind) will still enjoy common law protection even though performed—provided the performance is *not* recorded.

Subdivision (b) of the same section preserves rights or remedies under State laws with respect to unpublished material that does not come (as just illustrated) within the subject matter of copyright, with respect to causes of action arising from undertakings commenced before the effective date of the act and with respect to activities violating rights

outside the general scope of copyright such as breaches of contract or of trust, invasion of privacy, defamation, and deceptive trade practices.

This will mean, of course, that all the writings of an author, even though never published nor intended to be published, will be protected by a statutory copyright only until the end of the copyright term—and the only way in which the author can defeat the ultimate publication of his work is to destroy the manuscript. It is realized that some disadvantages may attach to giving the public the ultimate right to publish writings which an author does not wish to reveal—but it is believed that these disadvantages are outweighed by the public's benefit in having ultimate access to all writings and in defeating the power to exploit and disseminate works while retaining a perpetual copyright. This bill will give to the federal courts exclusive jurisdiction over copyright cases and will end a system under which a common law copyright can be subject to judicial interpretation under the varying laws of each of the fifty States.

The more complicated our technology becomes, the more need there is for simplicity in our fundamental concepts.

3.

NOTICE AND FORMALITIES

By FRANKLIN WALDHEIM

The copyright notice, which has been a condition of copyright protection in this country since 1802, continues to be essential under the present bill—but with some relaxations of the penalties attaching to its omission. Section 401 provides for the notice (on all copies publicly distributed from which the work can be *visually* perceived) whenever a protected work is published in the United States or elsewhere. The insertion of the words “or elsewhere” imposes the obligation to place the copyright notice on all works even though they are published abroad. There have been expressions of concern that the notice should be required as to works published abroad because of the difficulty which our citizens may encounter in assuring themselves of the inclusion of the notice in foreign countries.

The elements comprising the copyright notice are substantially the same as those under the present law but the year date is now required for all categories of works. The bill provides that the notice shall be affixed to the copies “in such manner and location as to give reasonable notice of the claim of copyright”. This is similar to the language used in the Universal Copyright Convention.

Since sound recordings are protected under the new bill, provision has been made for a copyright notice on all publicly distributed phonorecords of the sound recording. The elements of the copyright notice are similar to those in the notice for other categories of works except that it is to contain the letter “P”, instead of “C”, in a circle.

Section 403 deals with contributions to collective works. The contribution may bear its own notice—in the absence of which it will be covered by the single notice applicable to the collective work as a whole. In the latter circumstance, if the person named in the notice is not the copyright owner of the contribution, the contribution will be treated as a work in which the wrong person is named in the notice (a circumstance considered further on).

Section 404 relaxes to some degree the forfeiture of copyright which prevails under the present law when the copyright notice is omitted. This section provides that the omission does not invalidate the copyright provided that one of the following conditions is complied with: (1) that the notice has been omitted from no more than a relatively small number of copies distributed to the public or (2) that registration has been made within five years after publication and a reasonable effort is made to add the notice to all copies distributed in the United States after the omission has been discovered. There is a body of

opinion that these conditions should not be attached—and that the subsection should merely provide that omission of the notice does not invalidate the copyright.

The section provides protection for innocent infringers who have been misled by the omission of the notice. Such persons incur no liability for damages or profits if they prove that they were so misled and that they undertook the infringement before receiving actual notice that the work had been registered. In such a case the court may require, as a condition for enjoining completion of the undertaking, that the infringer be reimbursed for any reasonable expenditures incurred by him; and the court may require, as a condition for permitting the infringer to complete his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

Section 405 deals with errors in the copyright notice. Where the person named in the notice is not the copyright owner, an infringer has a defense if he began the undertaking in good faith under the authority of the person named in the notice; provided that the real owner's name was not recorded in the Copyright Office by registration or other document before the infringement was begun. The person incorrectly named in the notice is liable to the copyright owner for receipts from transfers or licenses made by him under the copyright.

If the year date in the notice is earlier than the year in which publication first occurred, the duration of the copyright (where it is computed from the year of first publication) must be computed from the year in the notice. The error would thus cut down the copyright term. Where the year date is more than one year later than the year of first publication, the work is considered to have been published without a notice. Where there is no name or date that could reasonably be considered a part of the notice, the work is likewise considered to have been published without a notice.

Section 406 provides for deposit of copies of the copyrighted work in the Copyright Office but provides that the deposit is not a condition of copyright protection. Where a deposit is not made after a demand by the Register, the person on whom the demand is made is liable to a fine and the cost of the copies demanded.

Section 205 provides for recording in the Copyright Office any document pertaining to a copyright. Recordation constitutes constructive notice of the facts stated in the recorded document provided that the document specifically identifies the work and that the copyright in the work has been registered.

The transferee of a copyright may not institute an infringement action until the instrument of transfer has been recorded. Where there

are conflicting transfers, the earlier one prevails if it is recorded within a specified time after execution or before the later transfer is recorded. Otherwise the later transfer prevails if it was taken in good faith, for value and without notice of the earlier transfer.

This section also provides that a non-exclusive license, whether or not recorded, prevails over a subsequent transfer of copyright ownership and, if taken in good faith and without notice, it prevails over a prior unrecorded transfer.

Sections 407 to 411 provide for registration—but registration is not a condition of copyright protection. At any time during the subsistence of copyright in the work, the owner of the copyright or of any exclusive right in the work may register a copyright claim by deposit of the required copies with the prescribed application and fee. The application must contain the items of information specified in the act plus such other information as the Register may prescribe. When the Register determines that the material deposited is copyrightable and that the requirements have been met, he shall issue a Certificate of Registration containing the information given in the application. In any judicial proceedings this certificate, if made within five years after first publication of the work, constitutes *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. Otherwise, the evidentiary weight accorded to the certificate is within the discretion of the court.

No action for infringement of copyright may be instituted until registration has been made. If, however, the formalities for registration have been properly complied with and registration has been refused, the applicant may institute an action for infringement if a copy of the complaint is served on the Register who may then become a party to the action with respect to the issue of registrability of the copyright.

An important provision is contained in Section 411 that there shall be no award of statutory damages or of attorney's fees for any infringement of copyright in an unpublished work commenced before registration of the work or for any infringement commenced after publication of the work and before registration (unless such registration is made within three months after first publication). The denial of statutory damages and attorney's fees, because of failure to register, is believed to serve as another incentive to copyright owners to register their copyright claims.

Sections 701 through 708 provide for Copyright Office practice—the disposition of copies deposited, the opening of records to public inspection, the furnishing of copies, the publishing of catalogs of registrations and the fees of the Copyright Office.

4. SUBJECT MATTER OF COPYRIGHT; EXCLUSIVE RIGHTS; INFRINGEMENT AND REMEDIES*

By MORTON DAVID GOLDBERG

PART I. SUBJECT MATTER OF COPYRIGHT; EXCLUSIVE RIGHTS

(Sections 102-106, 111)

Summary

These sections of the pending revision bill¹ deal generally with the prerequisites for copyright protection and the basic exclusive rights which this protection affords.

Section 102 defines what a copyrightable work is, and lists the categories of works included in the definition.

Section 103 clarifies what copyright in a compilation or derivative work does and does not include.

Appropriate national origin is spelled out in Sec. 104 as a criterion for the protection of published works, with unpublished works being protected irrespective of their nationality.

Section 105 defines works of the United States Government and excludes them from copyright protection.

And then we have perhaps the keystone section of the bill, Sec. 106, which sets out the basic exclusive rights in copyrighted works. That section is followed by Sections 107 through 110, on "fair use" and other limitations on the exclusive rights. The limitations sections and Sections 112 and 113 (the scope of rights in sound recordings, and the compulsory license for non-dramatic musical works) will be discussed by others later this morning.

The last of the first group of sections which I shall discuss is Section 111, which seeks to clarify the right to reproduce pictorial, graphic and sculptural works in or on useful articles.

* Copyright © 1965 Morton David Goldberg. All Rights Reserved.

1. The bill has been introduced not only as H.R. 4347, but also in identical versions as H.R. 5680, H.R. 6831, H.R. 6835 and S. 1006 (all 89th Cong., 1st Sess.).

For a detailed explanation of the provisions of the pending bills, see COPYRIGHT LAW REVISION, Part 6 (Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill), Washington, House Committee on the Judiciary, 89th Cong., 1st Sess., May 1965. xxvi, 338 pp.

Section 102. Subject matter of copyright: In general

This section says that

"[c]opyright protection subsists, in accordance with this title, in *original works of authorship fixed in any tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ." ²

The section then goes on to illustrate the categories of copyrightable works, including—for the first time in our copyright law—sound recordings.

Under this section, if a work is to be copyrightable, it must be *original*, it must have an *author*, and *it must be fixed in a tangible medium*. However, in reliance on a broad interpretation of the phrase "writings" in the Constitution,³ it would not be necessary that the work be directly intelligible to the human senses. The requirement would be only that it be intelligible *with the aid of a machine or device*. This means that a sound recording on a disk, or a computer program on magnetic tape or punched cards, would constitute a sufficient fixation of the work (an interpretation perhaps not possible under the present statute).

For a full realization of the scope of the categories of works listed under Section 102, it is necessary to refer to the definitions under Section 101. For example, by reason of the broad definition of "literary works" in Section 101, copyright protection would extend not merely to the literary works we find embodied in the traditional form of books or periodicals but also to any

" . . . works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . . in which they are embodied."

"Literary works" thus include computer programs on cards or tape.

Likewise, "sound recordings" are defined under Section 101 as works resulting from the fixation of sounds in any material object, such as a disk or tape. The material object in which a sound recording is fixed,

2. Italics in quotations from the pending bill are supplied by the present writer.

3. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U. S. Const. Art. I, §8.

by the way, is designated under Section 101 as a "phonorecord": the "sound recording" is the work and the "phonorecord" is the object in which the work is fixed (in the same way that a "literary work" may be fixed in a "book").

Section 103. Subject matter of copyright: Compilations and derivative works

"Compilation" and "derivative work" are defined under Section 101. The terms are related. A "compilation," however, emphasizes primarily the collection and assembling of pre-existing materials, regardless of whether the pre-existing materials are copyrightable (e.g., either an anthology of the copyrightable poems of Robert Frost or a telephone directory of uncopyrightable names and numbers). A "derivative work," on the other hand, emphasizes the making of a new version of a pre-existing *copyrightable* work, regardless of whether the pre-existing work is in the public domain (e.g., either a *My Fair Lady*, derived from a copyrighted *Pygmalion*, or a *West Side Story* derived from a public domain *Romeo and Juliet*).

Section 103 is essentially a clarification of existing law. Sub-section (a) provides that where copyright subsists in the pre-existing material, that portion of the compilation or derivative work which uses the copyrighted material is itself copyrightable only where the pre-existing material has been used lawfully (for example, with the consent of the copyright owner or under the doctrine of fair use).

Also as under present law, sub-section (b) provides that the copyright in a compilation or derivative work extends only to what the new author contributes; and the new copyright neither gives the new author any exclusive right in the pre-existing material nor enlarges the copyright in that earlier material.

Section 104. Subject matter of copyright; National origin

Under present law, unpublished works of foreign authors are given common law protection regardless of the nationality of the author.⁴ Published works of foreign authors are now protected under Section 9 of the present Act (1) if the author is domiciled here upon first publication of the work, (2) if he is a citizen or domiciliary of a member country of the Buenos Aires Convention or a national of a member

4. Also, see Art. II ¶2 of the Universal Copyright Convention: "Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals."

country of the Universal Copyright Convention, or (3) if the work is first published in a UCC member country.

In addition, the published works of nationals of approximately forty countries are protected here by specific Presidential proclamations.⁵ Such a proclamation is based on a determination that the foreign country affords to Americans either "national treatment" (the same protection to Americans as to its own citizens) or "reciprocal treatment" (protection equal to that which the United States gives to citizens of the foreign country). Many of the so-called "proclaimed countries" are also members of the Buenos Aires or Universal Copyright Conventions.

We presently have no copyright relations with the Soviet Union and extend no copyright protection to the published works of Soviet nationals as such.

Section 104 of the bill would continue the present protection of foreign unpublished works regardless of the author's nationality or domicile and the protection of foreign published works where the country of origin is covered by a treaty or Presidential proclamation. However, the section would broaden considerably the authority of the President to extend protection by proclamation, even in the absence of national treatment or reciprocity. Whenever he finds it to be in the national interest, the President would be permitted to extend protection to published works of citizens or domiciliaries of a designated foreign nation or works first published there. He would also have authority to revise or revoke any such proclamation.

Section 105. Subject matter of copyright: United States Government works

This section continues the present prohibition against copyright in published works of the Government,⁶ and extends the ban to the Government's unpublished works. Works of the United States Government are defined in Section 105 (b) as works

" . . . prepared by an officer or employee of the United States Government within the scope of his official duties or employment."

In other words, the Government would not acquire any *exclusive* rights in works prepared by such Government officers or employees. However, I call your attention to the existing Section 1498 (b) of

5. 17 U.S.C. §9.

6. 17 U.S.C. §8.

Title 28, U.S.C., the effect of which is to give the Government a royalty-free, non-exclusive license to use

“ . . . any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used. . . .”

Section 106. Exclusive rights in copyrighted works.

Before describing the exclusive rights granted under Section 106, it might be helpful to mention first the exclusive rights given a copyright owner under present law.⁷ In general, these rights are the right—

- (1) to make and publish copies of the work;
- (2) to make new versions of the work if it is literary, dramatic or musical;
- (3) to execute a work of art from a model or design thereof;
- (4) to perform a nondramatic musical work in public “for profit” (subject to the juke-box exemption), but whether or not “for profit” if the work is dramatico-musical;
- (5) to perform a literary work in public (“for profit” if the work is nondramatic, and whether or not “for profit” if the work is dramatic); and
- (6) to reproduce a literary, dramatic or musical work in a transcription or recording (subject to the compulsory license for recordings of music).

Under present law, certain rights are given to the copyright owner only where the right is to be exercised “for profit.” The bill takes the opposite tack and grants the right, but then subjects it in later sections to specified limitations. As Section 106(a) states specifically, the exclusive rights are “subject to Sections 107 through 114,” where the limitations are set out. These limitations, which will be discussed later this morning, are exercises of the rights which are not deemed copyright infringements even though not authorized by the copyright owner.

7. 17 U.S.C. §1.

The exclusive rights, then, under Section 106 are these:

Section 106 (a) (1) —“to *reproduce* the copyrighted work in copies or phonorecords;”

(For example, making a paperback edition from a hardcover edition of a book, making the first hardcover edition itself, or “dubbing” one phonograph record from another)

Section 106 (a) (2) —“to *prepare derivative works* based upon the copyrighted work;”

(as indicated in the definition of a “derivative work” under Section 101, this would include making a translation, musical arrangement or motion picture version of the copyrighted work)

Section 106 (a) (3) —“to *distribute* copies or phonorecords of the copyrighted work to the public . . . ;”

(For example, selling books or phonograph records, or leasing motion pictures or computer programs)

Section 106 (a) (4) —for most works except—significantly—sound recordings, the right “to *perform* the copyrighted work *publicly*;”

(This would include performing a play or ballet in a public theatre or projecting a motion picture in such a place)

Section 106 (a) (5) —for most works, the right “to *exhibit* the copyrighted work *publicly*.”

The broad definitions of “perform,” “exhibit” and “publicly” under Section 106 (b) and the definitions of “device,” “process” and “transmit” under Section 101 are most significant. The net effect is that the rights of public performance and exhibition include not only the performance or exhibition of a work for those in the immediate presence but also the further communication by means of both open- and closed- circuit broadcasting, wired transmissions, community antenna television systems, and by devices and processes not yet invented.

Section 111. Scope of exclusive rights in pictorial, graphic, and sculptural works

This section makes clear that the right to reproduce a pictorial, graphic or sculptural work includes the right to reproduce it in a useful article. A “useful article” is defined under Section 111 (b) as

“ . . . an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. . . .”

Section 111 would give the copyright owner of a painting the exclusive right to reproduce it in a textile fabric and the copyright owner of a sculpture the exclusive right to use that sculpture as a lamp base. At the same time the section would deny the copyright owner of a scale model of an automobile the exclusive right—by reason of that copyrighted model—to manufacture automobiles of that design, and would deny the copyright owner of a picture of a dress the exclusive right—by reason of that copyrighted picture—to manufacture that dress.

The protection of the designs of useful articles as such is better achieved under a statute such as that proposed in the pending design bills.⁸ For this reason, the section would carve out from the copyright law the protection of the design of useful articles as such. The intent of the section is to make clear that present law in this area is not to be changed.

PART II. COPYRIGHT INFRINGEMENT AND REMEDIES

(Sections 501-508)

Summary

These sections of the bill define civil and criminal infringement, and set out the remedies and penalties for infringement and certain procedural aspects of infringement actions.

Section 501 defines infringement as a violation of the rights under Sections 106 through 114 or the importation restrictions of Section 602. It also spells out broad powers of the court with respect to notification and joinder of parties in infringement actions.

The injunctive remedy is provided in Section 502 and, in Section 503, the remedies of impounding and other disposition of infringing articles.

Section 504 provides for the alternative remedies of either (1) the copyright owner's actual damages plus any additional profits of the infringer or (2) statutory damages.

The discretionary award of costs and attorney's fees is provided for in Section 505.

8. H.R. 450, H.R. 3366 and S. 1237 (89th Cong., 1st Sess.).

Section 506 sets out criminal penalties for willful infringement for profit, fraudulent affixation or removal of copyright notice and false representations made in statements and applications filed in the Copyright Office.

Section 507 provides the civil and criminal statutes of limitation.

Section 508 would require the clerks of the courts to transmit copies of orders and judgments to the Copyright Office, together with other information concerning the actions.

Section 501. Infringement of Copyright

In sub-section (a), there is an implicit reference to Sections 113(b) (2) and 113(c) (4) and an explicit reference to Section 602. These references are significant.

The provisions of Section 113 which are referred to substantially enlarge the remedies of the copyright owner of a nondramatic musical work against two kinds of infringers: (1) the one who has made or distributed phonorecords without any license and (2) the one who has acted under a compulsory license but has defaulted on payments.

In the first instance, all making and distribution of phonorecords would constitute infringing acts under Section 501. In the second instance, the making and distribution of all phonorecords for which royalties have not been paid would constitute infringing acts under Section 501. And, in either instance, Section 504 would make available to the copyright owner the full remedies of damages and profits for all such infringements.

Under the present Act,⁹ by way of contrast, the copyright owner who sues a record maker without either a compulsory or negotiated license is limited to the statutory royalty of two cents per record plus a further award of not more than six cents per record as damages. The same limited remedies apply under the present statute in an action against one relying on the compulsory license who defaults in payments to the copyright owner.¹⁰

Section 501, when read with Section 602, would appear to enact a new remedy for the copyright proprietor. Under present law, the importation of *piratical* copies of a work is prohibited,¹¹ but there is no clear prohibition against the unauthorized importation of copies lawfully made abroad and the unauthorized distribution of such copies

9. 17 U.S.C. §101(e).

10. 17 U.S.C. §1(e).

11. 17 U.S.C. §106.

in this country. In other words, the present Act does not specifically prevent an authorized foreign licensee from shipping into this country (for distribution here) copies which he has been authorized to make solely for distribution abroad.

Section 602 would permit the Bureau of Customs to stop importation only of *piratical* copies and phonorecords. But Sections 501 (a) and 602 together would make the importer of *either* of these categories of copies or phonorecords a copyright infringer, and would make their American distribution a specific infringement of the exclusive right of distribution.

Subsection (b) of Section 501 is designed to implement a system of divisible copyright¹² by permitting either the legal or the beneficial owner of any copyright right to institute suit. Before suit could be instituted, however, the plaintiff would have to comply with the provisions of Sections 205 (d) and 410. The later section requires generally that the underlying claim to copyright be registered prior to the institution of suit; and the former section requires that the transferee of a copyright right must record the transfer in the Copyright Office before bringing suit.

Section 501 (b) then goes on to provide the courts with broad powers concerning notification and joinder of parties in interest, supplementing the provisions of Rule 17-25 of the Federal Rules of Civil Procedure. The aim is to avoid prejudice either to the owners of other interests under the copyright or to a defendant who might otherwise be subject to multiple suits by reason of the same infringement. The section provides for notice of the action to those with an interest in the copyright, permitting the intervention of such persons, and requiring, in the discretion of the court, that they be joined in the action.

Section 502. Remedies for infringement: Injunctions

With an important exception, Section 502 merely restates existing law with respect to the injunctive power of the courts in copyright infringement actions.

The exception is found in the reference to Section 404 (b) of the bill, which deals with the effect on innocent infringers of omission of the copyright notice. Section 404 (b) empowers the court, in its discretion, to condition an injunction against such an innocent infringer on the plaintiff's reimbursement of any reasonable expenditure incurred by the infringer. That section also gives the court discretion

12. See §201(d)(2) of the bill.

to permit the infringer to complete his undertaking on condition that the infringer pay the copyright owner a reasonable license fee to be fixed by the court.

The present Act contains no specific provision with respect to injunctions in infringement actions against the Government. Section 1498 of Title 28, U.S.C., however, provides that in such an action the copyright owner's exclusive remedy is the recovery of damages. The explicit reference to that provision in Section 502(a) of the bill makes clear that the bill would not grant the injunctive remedy in actions against the Government.

Section 503. Remedies for infringement: Impounding and disposition of infringing articles

This section relates to the impounding, destruction or other disposition of copies or phonorecords "made or used" in a copyright infringement and the impounding, etc. of the articles by means of which such infringing copies or phonorecords may be reproduced. The phrase, "made or used," means that impounding, destruction or other disposition may be ordered with respect to copies or phonorecords made lawfully but used unlawfully. A good example of this would be bootlegged prints of motion pictures, prints made originally for the copyright owner but subsequently lost or stolen and which find their way into the hands of those who use them without the consent of the copyright owner.

Under Subsection (a) of Section 503, impounding of the copies, phonorecords or accessory articles may be ordered at any time while an infringement action is pending. Under Subsection (b), the destruction or other disposition may be ordered only as part of a final judgment or decree.

Under the literal wording of Section 101(d) of the present statute, destruction is the only disposition permitted for the infringing materials. The bill, however, would give the court discretion to effect instead any other disposition which appears appropriate, including, for example, turning over the infringing materials to the plaintiff.

Section 504. Remedies for infringement: Damages and profits

Subsection (a) states as the guiding principle of this section that the infringer is liable to the copyright owner for either (1) the total of his actual damages and any additional profits of the infringer or (2) statutory damages.

Subsection (b), relating to actual damages and profits, would clarify an uncertainty in the present law. It states that the plaintiff may

recover both his actual damages and the defendant's profits, to the extent that these profits are not taken into account in computing the plaintiff's actual damages. The plaintiff may have suffered losses not related to the defendant's profits, and the defendant may have received profits which have not been considered in calculating the amount of the plaintiff's damages. In such circumstances, the plaintiff's recovery would be cumulative and not alternative.

In those instances where the defendant's profits are included in the calculation of the plaintiff's recovery, the plaintiff would not recover any of the defendant's profits attributable to factors other than the defendant's use of the plaintiff's work. There would be an apportionment between the defendant's profits resulting from the infringing use and his profits resulting otherwise.

As under present law,¹³ the plaintiff, in showing the defendant's profits, would be required to prove only the defendant's gross revenue, and the defendant would be required to prove his deductible expenses. A new feature which the bill would introduce would be the explicit requirement that the defendant have the burden of establishing also the elements of profit attributable to factors other than the use of the plaintiff's work.

The provision for statutory damages is contained in Subsection (c). As under the provision of the present statute,¹⁴ minimum and maximum figures are prescribed for the amount of statutory damages which the court, in its discretion, may fix. The bill would make it clear that a copyright owner has a specific right to elect statutory damages rather than an award of actual damages and profits.

Under the present statute, the range, with certain exceptions, is \$250 to \$5,000. The bill would make this range \$250 to \$10,000, but with several important qualifications and exceptions:

First, in an action founded upon multiple infringements of a single work, the copyright owner would be entitled to receive for all the infringements only a single award of statutory damages against a single defendant—or even against numerous defendants if those defendants are joint tortfeasors. And when Section 504 (c) refers to infringements of “one work,” it makes explicit that for the purposes of that subsection, all the parts of a compilation or derivative work constitute only one work and not multiple works.

13. 17 U.S.C. §101(b).

14. *Ibid.*

Second, where the copyright owner proves that the infringement was committed willfully after service of a written notice to desist, the court would have discretion to increase the maximum award of statutory damages up to \$20,000 instead of the ordinary maximum of \$10,000.

Third, the bill would permit the court to reduce the minimum award of statutory damages down to \$100 where the infringer sustains the burden of proving that he was not aware and had no reason to believe that he was infringing.

Fourth, by reason of Section 411, if the infringement begins before the copyright claim has been registered, and the copyright owner's work at that time is still unpublished, no statutory damages can be awarded for that infringement. If the copyright owner's work has been published before the infringement begins, but the copyright claim has not been registered, he has a grace period of three months from his first publication in which to register and avoid losing his right to statutory damages.

Section 505. Remedies for infringement: Costs and attorney's fees

This section would make clear that the award of costs, and reasonable attorney's fees as part of costs, is to be left to the discretion of the court. The provisions of Section 411 making registration a prerequisite to statutory damages also make it a prerequisite to an award of attorney's fees.

Section 506. Criminal offenses

This section continues the prohibitions of the present statute against criminal infringement, fraudulent copyright notice and fraudulent removal of copyright notice. It would, however, increase the penalties substantially.

For example, a recidivist under Section 506(a), the criminal infringement provision, can be fined up to \$10,000 and be imprisoned for up to three years for each repetition of the offense.

Section 1001 of Title 18, U.S.C., makes it an offense to file false statements with Government agencies. But on the theory that the Copyright Act itself should make the public aware of the point, Section 506(d) of the bill would make it an offense to falsely represent a material fact in a registration application or a statement filed with an application.

Section 507. Limitations on Actions

This section would continue the three-year civil and criminal statute of limitations contained in Section 115 of the present Act.

Section 508. Notification of filing and determination of actions

For the assistance of both the Copyright Office and the bar in keeping track of the development of the copyright law, this section would require the clerks of the United States courts to transmit certain information to the Copyright Office for its public records. The information would include designation of the parties and of the copyrighted works in any actions brought, as well as copies of the orders, judgments and opinions of the court.

5. PHONORECORDS AND SOUND RECORDINGS

By SIDNEY A. DIAMOND

One of the innovations of the copyright revision bill is the recognition that it gives to sound recordings. The 1909 Act does contain some references to the mechanical reproduction of musical works, but the phonograph record industry was still in its infancy when that statute was passed, and in 1909 Congress was concerned principally with perforated rolls for player pianos.

Of course, there have been major improvements in technology since that time. We now have not only electrical recording, long-playing records and stereophonic sound but also magnetic tapes. Moreover, sound recording is not limited to music alone; we have recorded performances of dramas, poetry and other spoken works; and we also have a new generation of authors some of whom create their works by dictating into a recording machine.

The revision bill deals with these various technological developments from different points of view. In the first place, a sound recording is recognized as one of the ways by which a literary or musical work can be fixed in tangible form, thus constituting a "writing" in the constitutional sense and automatically bringing the work under statutory copyright protection.

Secondly, the bill recognizes a sound recording as a separate work entitled to copyright protection of its own. In order to discuss this point, we must take into account the new terminology of the bill. The Register of Copyrights has coined a word, "phonorecords," which are defined as the "material objects" in which sounds are fixed. For example, the familiar disc record or pre-recorded tape that is available for sale to the general public technically would be known as a phonorecord under the bill.

Phonorecords are the material objects themselves and must be distinguished from the sound recordings embodied in them—just as a book is one particular form of material embodiment of a literary work. The term "sound recordings" is defined in the bill as "works that result from the fixation of a series of musical, spoken, or other sounds." Putting it another way, a sound recording is a performance of a musical or literary work that has been fixed in a material object—a phonorecord—from which it can be reproduced. The performance itself, having no physical embodiment, could not constitute a "writing" under the Constitution and is not subject to copyright protection for that reason. But when the sounds constituting the performance are recorded, that

work is created just as if it were a story that had been written down on the typewriter.

Perhaps the best analogy is the motion picture. The screenplay or scenario is a literary work. When actors perform this work before a camera, a motion picture is created and that is a separate work on its own. To be sure, it is a "derivative work," based upon the screenplay. However, they clearly are distinguishable from each other; the screenplay consists of words on paper while the motion picture consists of photographs on film—a photographed performance.

Similarly, the typical sound recording is a derivative work. If it embodies a musical composition, that is a separately copyrightable creation which consists of notes on paper. A number of different orchestras under different conductors could take that same score and perform it in different ways. If each of these performances is recorded, it would be a separate sound recording and protected by an independent copyright under the new statute.

Naturally, like any other derivative work, a sound recording requires a license if the underlying work is in copyright. The use of the sound recording then is subject to the basic control of the copyright proprietor of the recorded work. On the other hand, the sound recording may be of a musical work that is in the public domain, just as a dramatist may take a literary work on which the copyright has expired and freely write a play based upon it. In both cases, the derivative work is entitled to its own copyright.

The genesis for the statutory copyright protection of sound recordings is an unfortunate history of unauthorized duplication of phonograph records, including documented instances of counterfeiting the entire product—label and jacket included. The Register's 1961 report suggested some protection under copyright principles for sound recordings, but detailed recommendations were deferred pending further study.

In the intervening period between the release of the Register's report in 1961 and the preparation of the bill for introduction into Congress, this topic was discussed in considerable detail as part of the overall revision program. As a result, the Register determined to include in the bill a provision establishing a limited form of copyright protection for sound recordings as such.

Under the bill, sound recordings are treated as separate, independently copyrightable works. However, this copyright is quite narrow in scope.

The bill states specifically that copyright in a sound recording "is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds

fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." This means that what in the trade is sometimes called a "mirror record" can be made without infringing the copyright in the sound recording. The only act that is prohibited is the taking of the actual sound recording itself and duplicating it by some electrical or mechanical process. If a second phonograph record company, for example, wishes to assemble its own orchestra and mimic the sound of an existing phonograph record, the bill provides that this independent recreation of substantially the same sound does not infringe the copyright in the original sound recording. Moreover, the bill specifically excludes any right of public performance for sound recordings.

Another important aspect of sound recordings dealt with in the copyright revision bill is the so-called compulsory license provision. This has been carried over from the present statute with several significant modifications.

Let me hasten to explain that this is not the kind of compulsory license which some antitrust decrees have required with respect to patents. The compulsory license provision of the Copyright Act is limited in scope. It relates only to nondramatic musical compositions and has no application to books or any other kind of copyrighted material. Furthermore, it does not apply to all nondramatic music; the right to obtain a license does not go into effect until after the copyright owner himself either has made phonograph records of the musical composition or licensed somebody else to do so.

In practice, these provisions have created the framework within which the phonograph record industry on the one hand and the publishing companies, who typically are the copyright proprietors of musical compositions, on the other hand, work out their day-to-day arrangements. It is very rare that the provisions of the compulsory license clause of the Copyright Act actually are invoked, but everybody of course knows that they exist and licenses therefore are freely granted—generally on terms that eliminate some of the formalities that would have to be followed if the record manufacturer used the statutory procedure.

The Register's 1961 report called for the elimination of the compulsory license provision altogether. This recommendation was opposed vigorously by the phonograph record industry, which took the position that various objections which had been raised could be cured without destroying the basic principle of free access to musical material for

recording purposes on which the industry had been operating for so many years. The sentiment for outright repeal of the clause evidently slackened, and the bill now before Congress continues the compulsory license system with a number of changes that enlarge the rights of the copyright proprietor of the recorded work. For example, the present law has a very narrow limit on liability for copyright infringement of a musical work by means of phonograph records. The revision bill eliminates this special limit and would make the unauthorized user of a copyrighted work on phonorecords fully liable in damages like any other infringer.

The revision bill clarifies an open point under the present statute by providing that the compulsory license is available only if the licensee's "primary purpose in making phonorecords is to distribute them to the public for private use."

The troublesome question under existing law of the extent to which the phonograph record manufacturer has the right to arrange or adapt the underlying musical composition for recording purposes is dealt with specifically; the bill permits arrangements by the licensee which do not change the "basic melody or fundamental character of the work." And no such arrangement prepared for recording purposes by the record manufacturer is entitled to protection as a derivative work in the absence of express consent from the copyright proprietor of the musical composition.

Perhaps the most important change made by the bill in the existing compulsory license provision is an increase in the statutory royalty rate. This presently stands at two cents per record for each composition embodied in the record. A custom has developed in the industry since the introduction of the long-playing record to contract for the payment of a higher royalty for long works, such as symphonies, concertos, etc., which are in copyright, at the rate of one-quarter cent per minute of playing time or fraction thereof.

The bill provides a rate of three cents per work embodied in each phonorecord, or one cent per minute of playing time or fraction thereof, whichever is higher. At the recent hearings before the House Subcommittee, the Record Industry Association of America took the position that the proposed increase was not justifiable on an economic basis. Perhaps it should be noted that one of the alternatives proposed in the Register's preliminary draft bill was a royalty based on a percentage of the retail list price of the record. At any rate, this is a matter of dollars and cents which is still very much in the area of controversy and it obviously would not be fruitful to discuss this particular issue here any further.

One final reference to sound recordings in the bill deals with the so-called juke box exemption. Under the present statute, the performance of a musical composition by means of a coin-operated machine is not considered a public performance for profit—and therefore is not an infringement of the copyright in the musical composition—unless admission is charged to the place where the machine is located. Although juke boxes as we know them today were not in existence when the Copyright Act was passed in 1909, a juke box clearly is a coin-operated machine and copyright proprietors of musical compositions for years have been trying to get this provision removed from the statute. The American Bar Association has been on record against the juke box exemption since 1953. The bill now before Congress would have the effect of repealing this exemption of juke boxes from the payment of performance royalties.

6.

DURATION

By SIDNEY A. DIAMOND

With the introduction into the revision program of a single system of statutory copyright protection for all works, whether published or unpublished, it became necessary to adjust the provisions for the beginning and ending of the term of copyright in order to avoid incongruities.

Under the present statute, the term of copyright is 28 years, commencing upon the first publication of the work or, in a few special categories, upon the registration of the work in the Copyright Office in unpublished form. This statutory copyright is renewable for one additional 28-year term, if the proper person files a renewal application at the proper time, for a maximum total of 56 years.

Unpublished works that are not brought under the statute either by publication or by registration are protected under the common law, and common-law protection lasts in perpetuity. This is no idle right, because the performance of a work is not considered "publication" for copyright law purposes, no matter how large the audience nor how often it is performed. Works such as plays and musical compositions therefore can be exploited without loss of common-law protection for whatever length of time they continue to have commercial value—and we know from experience that the commercial life of dramatic and musical works frequently is very much longer than 56 years.

The Register's 1961 report dealt with the question of duration from the standpoint that the term of copyright should be long enough to assure protection during the lifetime of the author and to provide for his dependents during a reasonable period after his death. Based on studies of average life expectancies, which have increased substantially since the present Copyright Act was passed in 1909, the Register proposed an increase in the maximum period of protection from 56 to 76 years. This would have been accomplished by retaining the present 28-year initial term, but extending the renewal term to 48 years instead of 28.

Under this proposal, the term of copyright would have commenced at the time of "public dissemination"—a new concept in the law. Public dissemination was defined as any of the following four events: publication of copies of the work; registration of the work in unpublished form; public performance of the work; or public distribution of sound recordings embodying the work,

The debates and written comments on this 28-plus-48 recommendation of the Register were very largely adverse. Many observers felt that it would be extremely difficult at some indefinite future time to identify what the "work" was and then establish the date when its first "public dissemination" had occurred. When you consider the example of a new play that may be changed every night during its try-out tour, you can understand how the question of just what passed into the public domain approximately 76 years later might create some serious practical problems.

Considerable disappointment also was expressed over the fact that the Register's 1961 report recommended keeping the cumbersome renewal system that has led to much litigation under the present statute. Although some of the technicalities would have been eased under the Register's proposal, the fact remained that there still would be two terms of copyright rather than a single one. Moreover, even a 76-year maximum term would not accomplish the avowed objective for a young author who survived to a ripe, but perhaps unproductive, old age. And on the other hand, the same 76-year maximum term would grant the elderly author's descendants much more than the theoretical objective—he might publish a best-seller at age 75 and die the following year. As we shall see, this would provide a term of copyright protection 25 years *longer* than the same work would have under the revision bill.

There is an opposing point of view on the present system of one term plus an optional renewal. Advocates of this system are in favor of having works fall into the public domain at the earliest possible time so that they can be used without any necessity for copyright clearance or for the payment of compensation. They point out that many copyrights are not renewed under the existing statute, and urge that a copyright proprietor should continue to have the right to decide not to renew after the first 28 years, thus making the work available to the general public.

The rebuttal to this argument is that copyrights which are not renewed by their proprietors appear to fall into two classes: they consist either of a vast assortment of trivia, such as commercial catalogues and advertising circulars, that have no further value either to their original proprietors or to the general public; or they are works that the owners would have renewed except that they missed the date for getting the application form on file, or made some technical error in the complicated renewal procedure that caused an inadvertent loss of copyright protection for the second term. The first class of unrenewed works

is worthless; and the second class consists of works that fell into the public domain against the desires of the copyright owners.

The Register's preliminary draft bill eliminated the renewal provisions. Also, since the draft was based on a single system of copyright, the troublesome concept of public dissemination as the fixed point for the commencement of the term necessarily was dropped.

The Register suggested two alternatives for the duration of copyright. Under Alternative A, copyright protection would commence upon the creation of the work, that is, its fixation in tangible form—because otherwise, of course, it would not be a "writing" in the Constitutional sense. The term of copyright would be 75 years either from first publication or from registration in unpublished form. If the work was neither published nor registered, the copyright term would expire 100 years after the date of creation. Alternative B provided for a term of copyright consisting of the lifetime of the author plus 50 years after his death.

The proposal for a term of life plus 50 years met with considerable support. Indeed, this had been suggested by many interested parties from the very beginning of the revision program.

The system of life plus a fixed term of years after the death of the author has many practical features to recommend it. In the first place, it obviously is much simpler than a two-term system with a renewal requirement. Moreover, the entire body of work of an author will fall into the public domain at the same time, thus simplifying the task of anyone checking to determine whether or not a particular work is in the public domain.

The revision bill introduced into Congress provides for life plus 50 years. Since the one key date under this system would be that of the author's death, the bill also provides that the Copyright Office shall maintain records of information concerning the dates of author's deaths. It also establishes a presumption that will cut off the term after a maximum of 100 years if a prospective user is unable to determine the date when a particular author died.

One of the reasons which the Register found most compelling in reaching his decision to propose a term of life plus 50 years is that this would bring the law of the United States into harmony with that prevailing in practically every other country of the world. This kind of harmony becomes more and more a practical necessity in the light of technological developments like the Early Bird satellite. It already has become commonplace for broadcasts originating in Europe to be received simultaneously in the United States and vice versa. If a literary work incorporated in such a broadcast is in the public domain in the

United States because more than 56 years have expired since the date of first publication, but is still in copyright in the countries of Europe because the author died less than 50 years ago, the broadcaster in the United States perhaps unwittingly has caused valid European copyrights to be infringed. The problems of international copyright clearance are bound to grow as the art of communication by satellite continues to develop, but this is merely one extreme example of the kind of difficulty that arises because of the fundamental difference between the present U.S. statute with its fixed term of years starting on the date of publication, and the life plus 50 years system which has been the standard in the vast majority of other countries for a long time.

It should be clearly understood that, by suggesting the life plus 50 years system, neither the Register of Copyrights nor the numerous lawyers and industry representatives in the United States who urged this approach, have succumbed to foreign ideologies. The revision bill merely borrows the basic features of a system that has been proven by actual experience to be a practical and workable method of dealing with the problem of copyright duration.

More fundamentally, the life plus 50 years term really is the other side of the coin of the single national system of copyright. When the distinction between published and unpublished works is obliterated, as in the present bill, the question of when copyright protection *begins* no longer has any particular importance; the significant question is when the term of protection *ends*. Under the bill, copyright coverage would start automatically as the work is created, and (with rare exceptions) there would be no need to inquire into the precise date when creation occurred. The important fact is the end of the term, and the bill proposes to fix it by reference to a single specific and definite date, the date of the author's death.

Perhaps it is particularly natural for this audience to question why there should be any extension of the term of copyright. Compared to the 17-year non-renewable term of a patent, even the present system of a 28-year copyright term plus a possible renewal for an additional 28 years may seem quite lengthy. This question raises the basic philosophical differences between patents and copyrights, a subject which obviously cannot be explored in depth here. However, let me sketch it briefly.

The reason why a longer term for a copyright than for a patent does no violence to the public interest lies in the different nature of the scope of the protection which is afforded by a copyright as compared with a patent. Primarily, the kind of monopoly represented by a copyright is relatively weak because a copyright, as the word implies,

can be infringed only by copying. Putting it another way, the independent creation of even an identical work is not an infringement of copyright. That is why a key element of proof in every copyright infringement case is evidence of access to the work that allegedly has been infringed. With respect to a patent, on the other hand, the essential question is one of priority; if someone independently, by sheer coincidence, creates an invention that is already patented by somebody else, the latecomer is an infringer.

Furthermore, a copyright protects merely the form of expression in which the author has clothed his ideas; it can be infringed only by copying a substantial portion of those actual words. The intellectual contribution that is contained in the literary work is free for anyone to borrow or comment upon without violating the copyright.

If an engineer, for example, were to describe a new product or process in words, he could secure a copyright under present law by publishing the description as a book with appropriate attention to the required formalities. Nobody else could reproduce those words as such without infringing the author's copyright. But anyone could use the process or manufacture the product described in the copyrighted book—unless, of course, the engineer also had obtained patent protection for it.

Accordingly, there is a difference between the bargain the inventor makes with the Government for a patent and the bargain the author makes with the Government for a copyright, even though both rights find their source in a single sentence of the Constitution which contains the phrase "for limited times." The point is that what is excluded temporarily from the public domain by a copyright is much less than what is excluded temporarily from the public domain by a patent. It is in this fundamental difference that the justification, if any justification is needed, can be found for granting a longer term of protection to the author than to the inventor. And it also must be remembered that the revision bill would make a substantial *reduction* in the terms of unpublished works that are protected in perpetuity under present law.

The term of life plus 50 years which we have been discussing does not fit all possible situations. The copyright revision bill covers various other types of cases which limitations of time will permit me only to mention.

When two or more authors collaborate on a joint work, the term of copyright expires 50 years after the death of the second author to die—the *second*, not the *last*—which makes a difference if there are more than two.

With respect to anonymous works, pseudonymous works and the commercially important class of works made by employees for hire, the bill provides that the term of copyright shall be 75 years from first publication or 100 years from creation, whichever expires first.

The bill also contains detailed transitional provisions dealing with works presently protected either at common law or under the existing statute, in an effort to equalize the duration of copyright for all.

To summarize, the revision bill provides basically that the term of copyright for all of the works of an author, whether published or unpublished, shall endure from the time they are first created by fixing them in tangible form until the expiration of 50 years following the date of the author's death. This is logically consistent with the provision for a single national copyright system, which eliminates the existing distinctions between common law protection under state law and statutory protection under federal legislation.

7. COPYRIGHT OWNERSHIP, TRANSFER AND TERMINATION; EXEMPTION AND FAIR USE

By IRWIN KARP

PART I. COPYRIGHT OWNERSHIP, TRANSFER AND TERMINATION

For a more comprehensive discussion of these aspects of the Bill than you will find in the comments which follow, may I refer you to the very thorough and excellent Report prepared by the Register of Copyrights for Subcommittee No. 3 of the House Judiciary Committee. I commend it to you as a comprehensive analysis of the Bill (Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the United States Copyright Law; 1965 Revision Bill, May 1965).

Ownership of Copyright

General Provisions

Under the present law, the statutory copyright in a work belongs to its author or proprietor, or to the author's executors, administrators or assigns (17 U.S.C. 9). In case of "works made for hire," the word "author" is defined to include the "employer" of the person or persons who wrote the work (Sec. 26).

The Revision Bill retains this basic treatment of ownership. Copyright would vest initially in the author of a work (Sec. 201 (a)); it could be assigned or bequeathed by the author, or passed by intestate succession (Sec. 201 (d)); and in the case of a work made for hire, the employer would be considered the author (Sec. 201 (b)).

Joint Works

Under the present law, the co-authors of a joint work are co-owners of the copyright. The bill retains this provision (Sec. 201 (a)) but adds a definition of a joint work. The bill states (Sec. 101) that a joint work is one prepared by co-authors with the intention that their contributions be merged into inseparable parts of a unitary whole (e.g., the contributions of co-authors of a novel or play); or with the intention that they be merged into interdependent parts of a unitary

whole (e.g., the music and the lyrics of a song). The purpose of the definition is to avoid the merging of rights in separate writings which were later brought together into a composite work, without the intention of the authors. Whether a joint work is created is significant because each of the co-owners, as tenants in common, has the right to license the use of the whole work, with a duty only of accounting to the others.

One of the important consequences of co-authorship involves the term of copyright. The bill provides that the copyright on a joint work shall endure until fifty years after the death of the second of the authors to die—unlike the provision in most other countries where the term continues until fifty years after the death of the last of the authors to die. Hence it would be possible that the copyright in a work consisting of the contributions of more than two authors could terminate during the lifetime of one or more, or much less than fifty years after his death. Authors and users organizations have urged that the provision be changed to follow the system used elsewhere.

Works Made for Hire

The Revision Bill retains the provision that an employer for whom a work is made for hire is deemed its "author" for purposes of the statute. However, it adds a two-part definition of the phrase (Sec. 101). The first part states that a work made for hire is one "prepared by an employee within the scope of his employment." This is essentially the present meaning of the phrase, covering writing done by employees working for motion picture companies, newspapers and the like.

The second part of the definition assimilates into the category of works made for hire certain types of works written on special order or commission—if the parties agree in writing that they shall be so considered. These are: contributions to collective works (such as encyclopaedias), parts of a motion picture, translations and supplementary works. Such works are not presently considered as "made for hire." ("Supplementary works" are defined in Sec. 101 to mean secondary material prepared as an adjunct to the work of another author—e.g., illustrations for a text, footnotes, prefaces, or indexes.)

Publishers contended that it would not be feasible to measure copyright on encyclopaedias and similar works by the lives of the individual authors who contributed to them; and that they should be permitted to make contracts which would avoid termination of transfers of rights in such contributions and in supplementary material. They also urged that there were substantial economic distinctions in the position of

writers who contributed to such works, and the authors of novels, poetry, music and other independent and self-contained works. Therefore, they asked that such works be assimilated into the category of works made for hire. If this is done, the term of copyright on the entire work would be 100 years from creation or 75 years from publication, whichever expires first (Sec. 302 (a)), rather than life plus 50 years on each contribution. And, as works made for hire, such works would not be subject to the right of the individual writers to terminate long-term transfers after 35 years.

The definition enabling these types of works made on special order or commission to be considered works made for hire is a compromise. Authors objected to an unlimited provision. They noted that novels, biographies, music and other independent and self-contained works were often published under contracts made in advance of writing, which provided for advance payments, and might be construed as special order or commission arrangements. And, that authors would be easily subjected to pressure, in such situations, to consent to a "work for hire status," thus losing protection for life plus fifty years and the protection of the termination clause.

The compromise was the definition in the bill. Authors and publishers organizations have also agreed that the category of works which could be treated, by contract, as made for hire should also include text material and other types of supplementary materials.

Under the bill, it is presumed that all of the rights in a work made for hire are owned by the employer or other person for whom it is prepared. But parties by express agreement may provide otherwise. However, they cannot agree that the employee shall be deemed the "author." Organizations of writers and composers who work for hire, primarily in motion pictures, radio and television, object to this. They contend that if their collective bargaining agreements should provide that the employee-writer shall be deemed the author of his contribution—e.g., his motion picture script—the Act should recognize this arrangement. Otherwise, they note, copyright on his contribution is not measured by his life and 50 years and he is deprived of the right of termination. Employers support the bill's treatment of this situation.

Collective Works

The bill provides (Sec. 201 (c)) that the copyright in each contribution to a collective work—e.g., each story, poem or article published in a magazine—shall belong to the author of the contribution. Only one copyright notice—for the magazine as a whole—would be

required. If a contribution were written for hire, or if all rights in a contribution were expressly transferred to the publisher, the copyright would belong to him. In the absence of any express transfer of rights in such contributions, it would be presumed that the publisher of the collective work only acquired the right to publish the contribution in that work, or revisions of it or in later collective works in the same series. Thus, there would be no question that the author of a novel or story that was first published in a magazine retained ownership of the right to publish it in book form, and ownership of motion picture, television, and other rights. This is consistent with prevailing trade practice.

Transfer of Ownership

Copyright ownership could be transferred, in whole or in part, by sale, gift, bequest or intestate succession; a copyright could be mortgaged, hypothecated, licensed, assigned or otherwise disposed of (Sec. 201 (d) ; and definition of "transfer" in Sec. 101).

Divisibility of Copyright

A copyright is a bundle of exclusive rights to make various uses of a work. In theory, under the present law, a copyright is an indivisible whole. In practice, it has been recognized as divisible. For tax purposes, each of the rights secured by the statute is recognized as a separate item of property. And the exclusive assignee of a right may sue for infringement, joining the copyright owner if he refuses to intervene voluntarily.

The bill codifies this status of divisibility, specifying that any of the exclusive rights granted by the Act may be transferred separately, and that the transferee is entitled to all of the protection and remedies afforded the copyright owner—with respect to the exclusive right he has acquired.

Ownership of Material Object as Distinguished From Ownership of Copyright

The bill provides, as does the present law, that transfer of a material object embodying a copyrighted work does not convey any rights in the work; and, conversely, that a transfer of a copyright does not convey rights in any such material object. Thus, the sale of a copy of a book or recording of a composition does not convey any right to perform or present the work (Sec. 202).

*Termination of Transfers and Licenses Granted by the Author**The Renewal Clause*

Under certain circumstances, the present Copyright Act automatically cuts off long-term copyright assignments made during the original copyright term. Even though the author may have transferred his rights for the 56 years of copyright, the transfer lapses by operation of the renewal clause. The renewal copyright goes to the author, or his wife and children, or his executor, or next of kin (in that order of survival)—unencumbered by the previous assignment.

Where the author dies before the renewal year, the cut-off is absolute. If he lives to renew, the assignment is not *per se* unenforceable, but may be challenged if obtained in inequitable circumstances or in violation of other laws.

The renewal clause was retained in the 1909 Act to safeguard the author against being compelled to permanently surrender control of his copyright during the first term. It was intended to enable him to lease rights in his work for a reasonable period, while reserving control over the rights for the second part of the copyright, so that he could later make licenses for uses in that period on terms that would reflect the value of his work, and market conditions, at that time.

The Termination Clause as a Substitute for Renewal

The Revision Bill would eliminate the renewal system and establish a single term of copyright. In place of the renewal clause, it would provide essentially the same safeguards under a section permitting an author to terminate a long-term transfer after 35 years.

The Arguments

Initially, users attacked the termination clause as paternalistic and an invasion of "freedom of contract." Authors' representatives noted that the same charges had been made, and rejected, for the last fifty years against Minimum Wage Laws, the Sherman Act, the Clayton Act, the Robinson-Patman Act, and other statutes that pose greater restraints over the types of contracts that people can make with each other. They pointed out that the termination section (like the renewal section) simply provides that a user cannot demand that an author tie-in a transfer of future rights in his work when he grants the right to make a present use; and that the clause—like these other statutes—prevents the use of superior bargaining power to exact unfair

terms. Authors argued that it is only through the user's exercise of superior power that authors are compelled to assign rights in perpetuity. They contended that such long-term assignments are unreasonable, unnecessary and unfair; and deprive authors and their families of income from the use of their work during the second half of the copyright.

The Compromise

The termination clause is a compromise. Users had demanded elimination of the safeguard. Authors had staunchly supported a much more comprehensive clause in an earlier draft of the bill which would have permitted termination after 25 years.

Operation of the Clause

The termination clause would not apply to works made for hire; or to bequests by the author, or transfers by his heirs. Also, it would not prevent the continued use of any derivative work after termination. For example, an author might terminate a long-term assignment of the right to make motion pictures based on his novel. This would not prevent the motion picture company from continuing to exhibit the film—but the author or his family would recover the right to license new motion picture versions, or make other uses that might be barred to him under the original perpetual assignment. Under the present law, operation of the renewal clause cuts off all rights of the assignee—a motion picture company could not continue to exhibit such a film unless it made a new contract with the owners of the renewal copyright.

Termination could be invoked with respect to any transfer by the author of exclusive or non-exclusive rights.

Termination would not be automatic. Notice would have to be given. Only the author—or if he had died, his widow or his children (including grandchildren)—could exercise the right of termination. If none of them survived, the assignment would continue. This is a more restricted right than is given under the renewal clause today; an author's executor or next of kin obtains the renewal copyright (cutting off long-term assignments) if the author, his widow and children are not alive in the renewal year.

The notice of termination must be given not less than two nor more than ten years before the effective date of termination of the transfer. The effective date may occur at any time during the period of five years beginning at the end of thirty-five years from the date of execution of the transfer. However, if the transfer covered the right of first publication of a work, the five-year period would begin at

the end of 35 years from the date of its first publication or at the end of 40 years from the date of execution of the transfer, whichever term ends sooner. Authors and users organizations have agreed to recommend a modification of this provision—namely, that in every case, the five-year period should begin at the end of 35 years from first publication of the work under the transfer, or 40 years from the date of execution, whichever is sooner.

The section would require that if the author had died the notice of termination must be given by his widow and all of his children. Authors' organizations have complained that this requirement of unanimity (a departure from the present law) could frustrate the effect of the clause. Abstention by a single child, whether procured by payment or due to absence from the country, or other causes, would prevent the widow and other children from exercising their rights. Here, again, authors' and publishers' organizations have agreed to a compromise. They recommend the clause be revised to permit termination by a majority of the children, and the widow if she is living. Further, that any subsequent grant of the reverted rights must be made in the same manner.

PART II. EXEMPTIONS AND FAIR USE

The Consitution provides that Congress may secure to the Author the "*exclusive right*" in his work. But the present Copyright Act does not adhere to this mandate. Exemptions are written into the law which permit certain performances and exhibitions of a copyrighted work to be made without the consent, or compensation, of the copyright owner. Some are specific—e.g., the "juke box" exemption which permits the unauthorized performance of musical compositions on coin-operated phonograph machines. Others arise out of the qualifications placed on rights granted to the author. For example, the right to perform (or read) musical compositions and non-dramatic literary works is limited to the right of "public performance for profit"—permitting unauthorized public performances which are not "for profit." The most important basic right which is granted without qualification is the right "to print, reprint, publish, copy, and vend" a copyrighted work.

The Revision Bill adopts a new approach to the problem of exempt uses. It grants exclusive rights without limitation (Sec. 106) and then spells out those types of performances and exhibitions which would be exempt from copyright control (Sec. 109). The "juke box"

exemption is eliminated. The exclusive right to print, copy, publish and vend a copyrighted work is preserved without exception.

The Educational Exemption

Sec. 109 (1) permits, without authorization of the copyright owner, the "performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to classroom instruction."

The clause would preserve the privileges which teachers and educational institutions now have to perform and exhibit copyrighted works, without authorization, in teaching activities.

The Copyright Office report makes it clear that such uses may only be made by the teacher and/or the pupils of a class and that the audience may only be composed of members of that class. The report further indicates that it is not intended that the exemption apply to profit-making educational institutions or to performances for which admission fees were charged (other than regular tuition fees). It recommends that the sub-section be amended to include these limitations.

Educational Broadcasting

The exemption discussed above does not cover radio or television broadcasting. That is dealt with in the sub-paragraph (2) of Sec. 109. This exemption permits:

"performance of a non-dramatic literary or musical work, or exhibition of a work, in a transmission (broadcast) if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a non-profit educational institution."

The Register's report makes it clear that the exemption does not cover the performance of dramatic or dramatico-musical works, or motion pictures; and that a non-dramatic literary work can only be read, and may not be dramatized, in the course of an exempt broadcast. It recommends that the word "exhibit" be changed to display, to make clear that the exemption applies only to a "nonsequential" display of an object embodying a work, and not to exhibiting a motion picture or television recording of a dramatic or dramatico-musical work. The report also suggests that consideration be given to limiting broadcasts

under the section to those works made "without any purpose of direct or indirect commercial advantage" so that it would not extend to commercial broadcasters who cannot, today, broadcast copyrighted works on an "educational program" without the owner's consent—even though the program is "sustaining" and may be intended primarily for classroom use.

The language of Section 109(2), and the Register's report, make it clear that the exemption would not apply to all programs broadcast by non-profit "educational stations." The nature of the program would be decisive—it must be primarily for reception in classrooms or similar places devoted to educational instruction; and it must be a regular part of the systematic instructional activities of a non-profit educational institution.

The present law exempts non-profit broadcasting of performances of non-dramatic literary and musical works. But it does not permit the recording of such a performance without the copyright owner's consent. Consequently, the opportunity of open-circuit, non-profit broadcasters to use copyrighted works without permission is substantially limited. As a practical matter, many programs can only be produced if they can be recorded—to be replayed on the same station and exchanged among several stations in a tape-linked network. Since the Revision Bill would give a broad exemption to make ephemeral recordings of performances for broadcasting purposes (without the copyright owner's consent), non-profit broadcasters would, in reality, have a far broader exemption than they possess under the present for-profit limitation—if the exemption of 109(2) covered all non-profit broadcasting, rather than instructional programs designed for classroom teaching.

In this connection, it is important to note, as the Register's report does, that much "educational" broadcasting reaches a large public audience and that a good deal of its programming is indistinguishable—as entertainment, recreation and education—from that of commercial broadcasting. A copyrighted musical composition is no less educational when broadcast on a commercial station than on an "educational" one; and no less entertainment when broadcast on an educational station than on a commercial outlet. Ultimately, many works may reach the public through so-called educational—i.e., non-profit broadcasting. As the Register stated:

"It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities."

Religious Services

Section 109(3) would permit the performance of non-dramatic literary and musical works, and exhibition of works, in the course of services at a place of worship or other religious assembly.

The Register's report indicates that it was not the intention to permit the performance of secular operas or musical plays (not now allowed); and that the phrase "dramatico-musical works" should be specifically limited to those "of a religious nature."

Other Non-Profit Performances

Section 109(4) would permit non-profit performances of non-dramatic literary and musical works in the presence of an audience, if certain conditions are met. These are more circumscribed than the requirements imposed today under the "for profit" limitation on the right of public performance of these types of works. In addition to requiring that the performance be "without any purpose of direct or indirect commercial advantage," the section requires that no fee or other compensation be paid to the performers, promoters or organizers; and that no admission be charged—or, if there is, that the net proceeds be used entirely for educational, religious or charitable purposes.

Retransmission—Community Antenna and Other Systems

The Bill (Sec. 109(5)) would exempt non-profit retransmissions of broadcasts, where no fee was charged and the retransmitted program is not altered or supplemented.

The exemption does not cover commercial community antenna systems. The Register's report notes that these constitute a public performance of copyrighted works; that they produce a profit for their operators; that fairness warrants that the copyright owner be compensated; and that without compensation the value of the copyright can be diluted.

Retransmission Exclusively to Private Rooms of Hotels

Section 109(6) would exempt such retransmissions if they are made without charge and without change in program content.

Reception of Transmission in Public Places

Section 109(7) would exempt receptions of broadcasts in a public place if accomplished by a set commonly used in private homes, unless

a direct charge is made or the transmission is further transmitted to the public.

Ephemeral Recordings

Section 110 would permit any organization lawfully entitled to broadcast a performance or exhibition of a copyrighted work to make one copy or phonorecord of the work for its transmissions and its archives, provided that it is only used for transmissions for six months from the date it was made, and thereafter destroyed or preserved in its archives.

Representatives of publishers', composers' and authors' organizations have urged that the clause is too broad and should be restricted.

Fair Use

Section 107 states:

"Notwithstanding the provisions of Section 106, the fair use of a copyrighted work is not an infringement of copyright."

The purpose of the Section is to recognize in the statute the judicially developed doctrine of fair use. The application of the doctrine would be left, as now, to decision of the courts in light of the specific circumstances of particular cases. The preliminary draft of the bill had included a general statement of the factors that should be considered in determining whether an unauthorized use of a copyrighted work was a fair use. There was considerable opposition on the ground that the doctrine has developed from judicial precedent (which the general statement of factors sought to summarize) and that by its nature it must remain a flexible concept, to be applied by courts on a case by case basis. For example, there is no precise standard which can be applied "across-the-board" to determine whether the unauthorized quotation of a portion of a copyrighted work in another work is or is not a fair use. Several circumstances must be considered; their weight varies from one set of facts to another.

As the Register's report notes, certain educational organizations have urged that a specific exemption be written into the bill "permitting any teacher or other person or organization engaged in non-profit educational activities to make a single copy or record of an entire work (for every teacher using it) and a reasonable number of copies of 'excerpts or quotations' (from any work), for use in connection with those activities." [Parenthetical comments are mine.]

The Register's report also notes that:

"These proposals were opposed very strongly by authors, publishers, and other copyright owners on the ground that in the short run the reproduction of copies under this proposal would severely diminish the market for their works, and that the ultimate result would be to destroy the economic incentive for the creation and publication of the very works on which education depends for its existence. It was suggested that a clearinghouse for educational materials, through which it would be possible to avoid problems of clearances, is a practical possibility for the near future."

Since I have been in the thick of this controversy, as counsel for certain authors' organizations, I am reluctant to embark on what might be a partisan discussion of the proposal. Therefore, I will simply quote the Register's conclusions on this point, set forth at page 42 of his report. He said:

"There is hardly any public need today that is more urgent than education, but we are convinced that this need would be ill-served if educators, by making copies of the materials they need, cut off a large part of the revenue to authors and publishers that induces the creation and publication of those materials. We believe that a statutory recognition of fair use would be sufficient to serve the reasonable needs of education with respect to the copying of short extracts from copyrighted works, and that the problem of obtaining clearances for copying larger portions or entire works could best be solved through a clearinghouse arrangement, worked out between the educational groups and the author-publisher interests."

8. A PATENT LAWYER LOOKS AT THE COPYRIGHT SYSTEM

By JOHN T. LOVE*

Upon looking along this dais today, I find that I am in an especially erudite company. I am very happy that when Spence Olin asked me to talk to you about how a patent lawyer looks at the copyright system he didn't give you any idea that my talk would be based upon an expert understanding of the law. Many of you have now read the various reports issued by the Register of Copyrights. Some of you have participated in the deliberations and the exchanges which are reported in these documents. You, not I, are the experts.

We who practice in the field of copyright and in the wilderness of invention have a common anchorage in the Constitution of the United States which gives us an affinity which some of us have always thought existed with our brethren who practice in the field of trademark and unfair competition law. Our common ground is Article I, Section 8, Clause 8, of the Constitution which provides that Congress shall have the power "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As patent lawyers we have been inclined to quote and have quoted to us this particular paragraph of the Constitution in a greatly abbreviated and an emasculated fashion as "promoting the progress of the useful arts by securing to inventors the exclusive right to their respective discoveries." Constitutionally, trademark and unfair competition people must rely upon the Commerce clause of the Constitution to justify the jurisdiction of the Federal Government over the right to register trademarks and regulate their use in interstate commerce or in commerce which affects interstate commerce.

The Copyright Act of 1909, the fourth Code on this topic, as I imperfectly understand it, gives certain jurisdictional aspects of the right of copyright and the protection of that right to the Federal Government, but it left some of those aspects to common law. Looking back on 1909 from our 1965 position, we should consider that law to be the height of legislative abnegation. However, in 1909 it probably was highly salutary. Congress had brought into being in 1905 what was considered to be a very modern and very forthright Trademark

* Former Chairman, Patent, Trademark and Copyright Section, American Bar Association, 1959-60.

Registration Act. It replaced the old acts which had run into so much court trouble in the latter part of the 19th Century. The 1905 Act was based upon the idea that Congress had only a limited jurisdiction, and that the primary jurisdiction, in many instances, lay with the States and was based upon the common law which had been developed by those States as derived from the old English common law.

However, in 1909 the Congress, with one eye on the common law and States' rights, passed a vital act giving authors exclusive rights for limited times to their respective writings for the purpose of promoting the progress of science and whatever other arts might prove to be useful. As it exists today there are a number of things in this statute that bother authors, innovators, publishers, record makers, and perhaps others, to such an extent that we are now actively considering a wholesale revision of the existing statute.

Too often I have had to face the problem, as voiced to me in office conferences and over the telephone, as to "how do I go about getting a copyright on my trademark" or "get a copyright on my invention" or "get a copyright on this idea that I came up with last night." After I have found what the situation is, I have—very gently—pointed out to my prospective client the differences among patents, copyrights, and trademarks. Sometimes even to sophisticated businessmen these differences are incomprehensible, particularly when we realize that the basis for copyright and patent lies in Section 8 of Article I of the Constitution. Why aren't they the same?

I think that the nature of the "beast" is determined by the way it is protected.

A patentable invention must be something that is not obvious to a person having ordinary skill in the art to which the invention pertains at the time the invention is made. Something that is subject to copyright protection doesn't have to be novel; it doesn't have to be the work of a genius; it doesn't have to have any of these attributes of invention; all it has to be is the original work of the author, regardless of how good or how bad it may be. If it is good, it is probably subject to copying; if it is bad, it is ignored.

You may have an innocent infringer of a patent; you may have an innocent infringer of a trademark; but you cannot have an innocent infringer of a copyright. A copyright is to protect the author and those who are in privity with him with the right to prevent others from copying the initial and original work of that author, regardless of how good or how bad it may be, by any of the mediums which are available today.

The Constitution provides this protection for a "limited time" and the Congress in its wisdom has at this time ordained that a patent shall have a limited time of 17 years from the date of issue. Problems have arisen from time to time concerning the delay in prosecution of patent applications in the Patent Office. These delays have plagued the Commissioners as long as I have been a member of this Section, but nonetheless the inventors seem to hold on to their 17 year term from the date of issue. Thus, infringement may take place at any time after issue. Timewise, some of the most notorious patents in the time of prosecution in the Patent Office involved adding and calculating machines, which were involved in several interferences. Some of those applications spent so many years in the Patent Office that at the time the patents issued most of the commercial companies infringed one or more of the claims of different patents and were required to pay royalties.

The present Copyright Law specifies that the original term of copyright shall be 28 years with the right in the author or his heirs for a renewal period of 28 years. On this point I am being extremely simple as there are exceptions and differences. Thus a copyright has an effective term of 56 years. Our term is quite limited when considered against terms of protection afforded by most of the other major nations in the world. Most of them provide a copyright term at least as long as the life of the author plus a fixed term after his death. That may be longer than the 56 years which we have. On the other hand it may be somewhat shorter provided he dies early in the term.

The pending legislation provides that the duration of copyright shall be for the life of the author plus 50 years after his death. This is not an excessive term when we consider other limitations on his rights. He has only the right to protect himself against unauthorized copying, except for "fair use" and certain other specified exemptions, which will have been touched upon by one of my more expert compatriots on this panel. There can be no innocent infringement. You and I can both photograph exactly the same scene at exactly the same time and produce substantially the same picture. Both of us can obtain a copyright protection for our efforts. Neither is an infringement of the other. Thus a copyright has a very limited field of protection as compared to the protection for inventions and trademarks. This matter of a long period of time for copyright as compared to patent rights should be weighed against the type of protection which is granted, and we should not react emotionally to the possibility of a lengthening of the copyright term.

I am reminded that one of the oldest currently used trademarks,

namely, "American Family" was originally used in the United States prior to 1850. That is well over 100 years ago, and no competitor in his right mind would think of putting out a soap or detergent today bearing the mark "American Family." Thus, trademarks may have far longer life than copyrights, but their life span is based upon other considerations. I think, therefore, that the considerations which are available in each of these various fields must be taken into account in determining whether a term is reasonable or unreasonable within the provision of "limited time" as set forth in Article I, Section 8, of the Constitution.

Another bone of contention is the matter of compulsory license for phonograph records. We who have been involved primarily with patents and inventions during our professional life have fought compulsory licenses in any form whatsoever. In the Register's report of 1961 a recommendation was made that this provision in the 1909 law be dropped. During the subsequent meetings of those possessing expertise in the field of copyright, which have been faithfully reported in the Reports of the Register, the value of the compulsory license from an author to a recording producer was emphasized, and on the basis of this voluminous testimony the Register conceded that this type of protection was needed by the purveyors of copyrighted material and was also to the benefit of the authors. Parenthetically, I might say that while I don't like to be a prophet of doom, I believe that eventually we will get some form of compulsory license in the patent laws in this country. Perhaps I won't live long enough to see it, but I probably will.

One thing which constantly bothers me, and it bothered me as late as last month, is the fact that there is no protection in the present law for an author of an unpublished work which classifies itself as a book. I have repeatedly had to advise such authors, and believe me, in advising them I have read scads of bad poetry and horrible short stories, that there is no basis on which they may protect themselves, except the common law which is subject to the vagaries of state interpretation. In attempting to sell such material, the law underlying confidential relationship is available. Many people think that merely because they have written a book, story, poem, sermon, or the like they are entitled to have the work protected by copyright. Under the proposed law these unpublished works may be subject to copyright. This is as it should be, and I think that it is a very great step in a forward direction.

I do not know whether I have been persuasively illuminating in the few comments that I have been able to make here today. There are some things that should be done in the field of copyright protection

which are being done by the proposed legislation. These are in the area of a reasonable term which protects the people who are vitally interested in copyright, namely, the authors and their families; the idea of giving to authors of musical compositions the right to make certain that they continue to obtain a fair and decent return for their compositions; and to give to the neophyte an idea that the thing he has written, the thing he has composed, the thing that he views as his pride and joy, is certainly the same thing as an invention and that he is entitled to have some right of protection and a copyright certificate that he can show. An inventor has the right to protect an invention which may be wholly commercially worthless but yet the Patent Office will duly process it. I believe that the Copyright Office can do no less.

It is with a note of sadness and of accomplishment that I am reminded in addressing the Section today that five years ago, when I was your chairman, Arthur Fisher, who was then the Register of Copyrights, last addressed you and did so, as I found out later, under the greatest of personal inconvenience and as all of us know, he died a very few months thereafter. We should be thankful that our present Register, Abraham Kaminstein, continues in the same tradition of direction and leadership as Arthur did. The pending legislation is a tribute to both of these men.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

9. UNITED STATES. *Laws, statutes, etc.*

Public law 89-142, 89th Congress, H.J.Res. 431, August 28, 1965. Joint Resolution extending the duration of copyright protection in certain cases. 1 p. (89th Cong., 1st Sess.)

This extension will continue, until December 31, 1967, second-term copyrights that would otherwise expire before that date, and includes any copyright term affected by the previous interim law, Pub. L. No. 87-668. The result of these two interim laws is that all copyrights of which the 56-year total of the original and renewal terms would have expired between September 19, 1962 and December 31, 1967 are continued until the latter date.

10. U. S. CONGRESS. HOUSE. *Committee on the Judiciary.*

Extending the duration of copyright protection in certain cases. Report to accompany H.J.Res. 431, submitted by Mr. Willis, May 25, 1965, and committed to the Committee of the Whole House on the State of the Union. 6 p. (89th Cong., 1st Sess., H.Rept. No. 369.) See Item 9, *supra*.

11. U. S. CONGRESS. SENATE. *Committee on the Judiciary.*

Extending the duration of copyright protection in certain cases. Report to accompany H.J.Res. 431, submitted by Mr. McClellan, from the Committee on the Judiciary, August 10, 1965. 3 p. (89th Cong., 1st Sess., S.Rept. 548.) See Item 9, *supra*.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY****A. DECISIONS OF U.S. COURTS****1. Federal Court Decisions**

12. *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir., April 30, 1965) (Schnackenberg, J.) Certiorari denied, October 18, 1965.

Appeal from dismissal of complaint in action for invasion of privacy by the widow and administratrix of his estate and the children of the late Alphonse (Al) Capone. On the television program series, "The Untouchables," and also on other shows "more than one hundred fictitious murders, machine gunnings, beatings and other crimes of violence" were depicted by Desilu over a period of six years, and "were falsely attributed" to Al Capone. The court below held that no cause of action was stated.

Held, affirmed.

I. Applying the law of Illinois in this diversity action, the court held that there is no right of privacy as to a deceased person. The court said:

Most prominently emphasized by plaintiffs in argument is the assertion by the widow and the son of Al Capone, deceased, of an invasion of their right of privacy by defendants, resulting from the latter's "commercial exploitation" of decedent in commercially televised fictional broadcasts after his death. Plaintiffs do not claim that they were referred to or shown in any of said broadcasts.

From these controlling facts we turn to the Illinois law. In *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E. 2d 64 (1960), at 333, the court said:

"The legal question before us is, shall the right of privacy be extended to provide damages for the *anguish* of a mother, caused by a publication concerning the murder of her son, *although she herself was not featured or substantially publicized*. . . ." (Emphasis added.)

The court held that the right of privacy of plaintiff should not be extended to cover the asserted claim, although in that case plaintiff was referred to at least once in the alleged offensive publication. . . . To the same effect is *Insull v. N.Y. World-Tel. Corp.*, 172 F. Supp. 615, affirmed, 7 Cir., 273 F.2d 16 (1959), cert. den. 362 U.S. 942.

The same reasoning appears in *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P. 2d 659 (1958), where the surviving sisters of a deceased boxer sued for invasion of their right of privacy by an article published by defendant. The article referred to the deceased brother as "a dope-sodden derelict". The court, at 622, stated,

"The authorities appear to be uniform that the right of privacy cannot be asserted by anyone other than him whose privacy is invaded. The publication did not invade plaintiffs' privacy in any respect. . . ."

We hold that these authorities justified the action of the district court and, in so holding, we reject as irrelevant the contention that plaintiff Albert Capone, son of Al Capone, claimed special damages.

In counts I, II, III and IV, the administratrix of Capone's estate relies on an alleged appropriation of decedent's name, likeness and personality in the telecasting of events in his life. Recovery is sought for unjust enrichment of defendants at expense of plaintiff.

Plaintiffs have been misled by their own quotation of the court's language in *Eich v. Perk Dog Food Co.*, 347 Ill. App. 293, 299-300, 106 N.E. 2d 742, 745, including the following:

" . . . Relying on property rights, courts have given damages for mental suffering caused by tampering with corpses of deceased relatives . . . "

. . . . Undoubtedly, the next of kin have a right of burial of the body of a deceased person and for an invasion of that right courts will grant relief. But that right is not involved or claimed by plaintiffs here; they rely on the law pertaining to their claimed right of privacy.

Accordingly, we hold that what plaintiffs call the "dead body cases" do not apply in the case at bar. . . . [We] agree with the district court that all of the relief sought by the several plaintiffs is essentially for a claimed invasion of a right of privacy. . . . It is anomalous to speak of the privacy of a deceased person. The telecasts did not mention any plaintiff here and hence the privacy of no plaintiff was invaded by defendants. . . . What a man does while

alive becomes a part of history which survives his death. Comment, fictionalization and even distortion of a dead man's career do not invade the privacy of his offspring, relatives or friends, if they are not even mentioned therein. If the law is to be otherwise, it should be attained by legislative enactments, as, according to plaintiff's brief, has been done in Virginia, Utah and Oklahoma.

II. Concurring in the result and in the court's interpretation of Illinois law, Judge Duffy stated that he believed that defendant's actions did constitute a reprehensible invasion of privacy. Judge Duffy said:

Until the spring of 1959, when the course of conduct of certain defendants commenced, Mae Capone, widow of Al Capone, and his son, Albert, usually called "Sonny", were leading a peaceful life in comparative obscurity. . . .

As a direct consequence of the commercial exploitation of the name and likeness of the deceased husband and father, in a series of television dramas which were broadcast over nation-wide networks for six consecutive years, the peaceful lives of the widow and son were shattered. . . .

Plaintiffs argue that the magnitude of the commercial exploitation of the name, likeness and personality of Capone by Desilu makes this a case of first impression. Plaintiffs point out that Desilu depicted more than one hundred fictitious murders, machine gunnings, beatings and other crimes of violence which were falsely attributed to Al Capone, and that for approximately six years, the widow and son were mentally tortured week after week.

The defendants have been profiting, not from Al Capone's life of crime, but from the commercial exploitation of publicity values inherent in his name, likeness and personality as portrayed in the telecasting of a series of wholly fictional crimes.

I think the right of privacy of Mae Capone and Sonny Capone was invaded by Desilu and other defendants whose conduct as hereinbefore described is, in my mind, reprehensible. . . .

However, in this diversity case we must decide whether Illinois courts would hold that a remedy exists under Illinois law for the violation of the privacy of the widow and son of Capone. I conclude that they would not.

13. *Gordon v. Vincent Youmans, Inc.*, 245 F. Supp. 607, 145 USPQ 681 (S.D.N.Y., April 23, 1965) (Bonsal, J.)

Action for declaratory judgment as to part ownership of the copyright in "Time on My Hands." Mack Gordon, in collaboration with another,

wrote the lyrics for "Time on My Hands" and Vincent Youmans wrote the music. In August, 1930, Mack Gordon and defendant Vincent Youmans, Inc. entered into an agreement whereby Gordon assigned to defendant all rights in any songs which he might write, including his rights to copyright renewal. In November, 1930, "Time on My Hands" was copyrighted by Vincent Youmans, Inc. In 1931, defendant executed and delivered to Gordon a general release covering all prior contracts, agreements and promises. On the day Gordon received this release, he assigned his rights to 19 songs, not including "Time on My Hands," to Miller Music Corp., a co-defendant here. Subsequently, Vincent Youmans, Inc. assigned its rights in "Time on My Hands" to Miller Music Corp. The original copyright term expired in 1958, while Gordon was still alive. Plaintiff was the heir, under Gordon's will, of 50% of all of Gordon's rights in musical compositions, specifically including any right Gordon may have had in the copyright renewal of "Time on My Hands." Plaintiff moved for partial summary judgment.

Held, judgment for plaintiff.

The court held that plaintiff is the owner of a 50% interest in one-third of the renewal copyright in the song.

I. The court held that as the net result of the contracts entered into, Gordon owned rights to the renewal copyright as co-author when he died (and left 50% of his interest to plaintiff). The court said:

... it is clear that whatever rights of Mack Gordon's defendant Vincent Youmans, Inc. had to the composition were returned to Mack Gordon by the general release of March 11, 1931, and that Gordon's rights in this composition were not assigned to the defendant Miller Music Corp. by the agreement entered into on the same day. Moreover, at the time of the agreement of September 10, 1931 under which Vincent Youmans, Inc. purported to assign to Miller Music Corp. its rights in the composition, it had no rights of Gordon's to assign.

It follows that Mack Gordon was entitled to the renewal of the copyright before the expiration of its first 28-year renewal term.

II. It was held that Miller Music Corp., as assignee from Vincent Youmans, Inc., had authority to renew the copyright on behalf of co-owner Youmans, and that in so renewing, it held the renewal copyright as constructive trustee on behalf of the other co-owners. The court said:

... It may be argued that since Mack Gordon failed to renew the copyright within the period permitted by the statute, and since

Miller Music Corp. had no right to renew the copyright as to Mack Gordon, that all renewal rights lapsed and the composition went into the public domain. 17 U.S.C. §24. However, in the assignment of September 10, 1931, Vincent Youmans, Inc. (Vincent Youmans, president) assigned all its interest in the composition to Miller Music Corp. and no issue has been raised that the corporation did not acquire whatever rights Youmans had individually. The assignment, therefore, although invalid as an assignment of Gordon's rights, was valid as to Youman's rights, and it follows that Miller Music Corp. had authority to renew on behalf of Youmans, one of the co-owners of the composition. *Tobias v. Joy Music, Inc.*, 204 F. Supp. 556, 133 USPQ 181 (S.D.N.Y. 1962). In renewing the copyright Miller Music Corp. held the renewal copyright as constructive trustee on behalf of the other co-owners, including Mack Gordon. *Silverman v. Sunrise Pictures, Corp.*, 273 F. 909 (2d Cir. 1921), modified 290 F. 804 (2d Cir. 1923); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266, 60 USPQ 257 (2d Cir. 1944) . . .

14. *Ross Products, Inc. v. New York Merchandise Co., Inc.*, 242 F. Supp. 878, 146 U.S.P.Q. 107 (S.D.N.Y., June 24, 1965) (Feinberg, J.)

Action for copyright infringement. Plaintiff's vinyl inflatable figure of a baseball catcher, on which it obtained a United States copyright registration, had been sold and displayed in Japan without copyright notice prior to its publication and registration in the United States. The figure was copied by defendant. Plaintiff's motion for a preliminary injunction was denied by Judge Tenney in May, 1964, 233 F. Supp. 260, 141 USPQ 652, 11 BULL. CR. SOC. 432, Item No. 294, on the ground that there had been publication of the figure in Japan without proper copyright notice. Plaintiff and defendant both moved for summary judgment.

Held, both motions denied.

The court held that there were triable issues of fact which precluded summary judgment.

I. Defendant argued that the plaintiff, in stating the date and place of first publication of its figure as "November 15, 1963" and "United States of America" in its application for United States copyright registration, ignoring the alleged prior publication in Japan, made misleading misstatements to the Copyright Office, and that the copyright was, therefore, invalid. Plaintiff denied that the sales and

exhibition of the figure in Japan amounted to publication, and also denied bad faith in connection with the registration application. The court held that whether plaintiff made its statement as to date and place of publication in good faith was an issue of fact "crucial" to plaintiff's right to relief. The court said:

While there are recent indications that the courts are quite lenient in overlooking factual misstatements in copyright applications, nevertheless, the opinions emphasize that the errors involved were honest, innocent and not intended to be misleading. See, e.g., *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F. 2d 706, 708 (6th Cir. 1956), cert. denied, 353 U.S. 949 (1957), 25 Geo. Wash. L. Rev. 714 (1957); *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374, 379 (S.D.N.Y. 1952), . . . The factual issue of whether plaintiff in *good faith* failed to indicate prior publication in Japan is, therefore, crucial in determining its right to the equitable relief it seeks from this court. Since this issue is in dispute, summary judgment is inappropriate.

The court also held that plaintiff's contention that there was no publication, as a matter of law, in Japan did not remove the factual issue of good faith. It was held that while there is "room for argument that the Japanese exhibition and sale did not constitute sufficient publication to divest copyright, there can be no doubt that it was sufficient to invest copyright." The court went on to say:

Since the application for copyright obviously is concerned only with the latter type of publication, plaintiff cannot, on a motion for summary judgment, assert this possible legal issue as a roadblock to an inquiry into its good faith.

II. The court stated that since "there is a genuine issue as to at least one extremely material fact", it would not be necessary to deal with the other issues raised by the parties. It did comment, however, on the contention by plaintiff that there was a Japanese co-author of its figurine and that publication by the Japanese co-author in Japan would not place the figure in public domain. The court said:

. . . In its cross-motion for summary judgment, plaintiff, for the first time, claims co-authorship of the toy catcher by a Japanese citizen, although no such position was taken when it moved in April 1964 for a preliminary injunction. The first display or sale, whether technically a "publication" or not, occurred in Japan. This contention may well be crucial on the issue of whether American

copyright protection was thereby lost, since plaintiff's position is that "publication" by a Japanese co-author of the toy in Japan would not, under the applicable law, place it in the public domain.

15. *Edgar Rice Burroughs, Inc. v. Charlton Publications, Inc.*, 243 F. Supp. 731, 145 USPQ 655 (S.D.N.Y., Feb. 10, 1965) (Sugarman, J.)

Motion to dismiss a part of plaintiff's complaint.

Held, motion denied.

The court held that plaintiff's allegation, in the fourth count of its complaint, that defendant's publications misrepresented defendant's "Tarzan" and "Tarzan" stories as the work of Edgar Rice Burroughs and as connected with plaintiff "would sustain a grant of relief to the plaintiff." The court said.

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, upon which movants rely on this motion to dismiss the fourth count of the complaint, recognize that a state may, in appropriate circumstances require that precautionary steps be taken to prevent customers from being misled or confused as to the source of the goods.

The fourth count inter alia charges that defendants' publications were "calculated to and did represent, suggest and imply falsely and fraudulently (a) that the character and characterization of "Tarzan" and the stories in which said character appeared were, or included, the literary efforts of Edgar Rice Burroughs or (b) plaintiffs' association, sponsorship or connection with defendants' said publications . . ." thereby "deceiving, misleading and confusing the public".

A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.

16. *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 145 USPQ 603 (S.D.N.Y., May 24, 1965) (Feinberg, J.)

Motion for preliminary injunction in action for copyright infringement. Plaintiffs alleged that their song "Supercalafabalisticesperaladojus" was infringed by defendants' song, "Supercalifragilisticexpialidocious", which was sung by defendant Julie Andrews in the motion

picture, "Mary Poppins." ("All variants of this tongue-twister will hereinafter be referred to collectively as 'the word'.")

Held, preliminary injunction denied.

The court found that plaintiffs had demonstrated neither of the essential elements to the granting of a preliminary injunction—a likelihood of final success in the infringement action, and a likelihood of irreparable injury if the injunction were not granted.

I. The court held that the two works were "so dissimilar that plaintiffs will probably not be able to prove copying." The court found the tunes to be unlike and also found "for the purpose of this preliminary motion only" that "the word" was in public domain prior to the publications of plaintiffs' song. The court said:

I have listened to phonograph records of both works, and, in my opinion as an average observer . . . there is no discernible similarity between the music of both songs.

An affidavit by a musical expert, submitted by defendants, supports this conclusion. . . .

As far as the lyrics are concerned, both songs use some spelling of "the word." Of course, even if defendants copied only "the word," they conceivably might still be liable for infringement. See *Orgel v. Clark Boardman Co.*, 301 F. 2d 119 (2d Cir.), cert. denied, 371 U.S. 817 (1962); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F. 2d 594, 603 (2d Cir. 1951), modified on other grounds, 198 F. 2d 927 (2d Cir. 1952); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 360-61 (9th Cir. 1947). Plaintiff Young claims to have coined "the word" when he was a child in Lawrence, Massachusetts in 1921, but asserts that it was "not known to the public until the publication of 'plaintiffs' song'." However, defendants have submitted several affidavits of presumably disinterested persons who swear that variants of "the word" were known to and used by them many years prior to 1949, when plaintiffs claim to have written their song. On the basis of the record before me, and for the purpose of this preliminary motion only, I find that "the word" was known to and used by members of the public for many years prior to 1951, the date when plaintiffs allegedly published their song. The significance of this is not that defendants are immunized from infringement liability if they, in fact, copied from plaintiffs; a copier can hardly escape liability merely by asserting his right to appropriate the underlying ideas or public domain aspects of the copyrighted

work. *Toksvig v. Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th Cir. 1950). Rather, the fact that "the word" was known to the public, coupled with affidavits by the defendant composers that they knew of "the word" before plaintiffs composed their song, effectively negates, for purposes of this motion, the inference of copying which plaintiffs would have me draw merely from the highly questionable allegations of access plus the fact that "the word" appears in both songs. See *Caldwell-Clements, Inc. v. Cowan Publishing Corp.*, 130 F. Supp. 326, 328 (S.D.N.Y. 1955).

II. The court also held that the granting of a preliminary injunction would harm defendants far more than denying it could harm plaintiffs, and that a likelihood of irreparable injury to plaintiffs had not been shown. The court said:

Plaintiffs, in their moving papers, allege the possibility of irreparable injury, but the facts, as developed in the affidavits, do not support such an allegation. Plaintiffs' song has not yielded any royalties in any form for the past several years and, for all practical purposes, the company owning it has gone out of business; the two works, therefore, are not in competition. Moreover, in the unlikely event that plaintiffs prevail on the main action, it is quite clear that defendants have adequate financial resources to satisfy any conceivable judgment.

Additionally, the court of appeals, in a copyright action, has recognized that "where damages will adequately compensate a complainant and where granting an injunction might work injury to the defendant out of proportion to that resulting to the complainant from its refusal, a preliminary injunction may be denied." *L. C. Page & Co. v. Fox Film Corp.*, 83 F. 2d 196, 200 (2d Cir. 1936). . . . The motion picture "Mary Poppins," as of April 20, 1965, was being exhibited in 462 theaters, with 2,600 additional theaters scheduled to exhibit the picture during the next several months . . . Sales by defendants and their licensees of phonograph records and sheet music of the song are presently at their peak. It is, therefore, obvious from these facts and from the relative financial circumstances of the parties that an improvident granting of a temporary injunction would irretrievably injure defendants far more than an erroneous failure to grant a preliminary injunction can hurt plaintiffs.

17. *Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587, 147 U.S.P.Q. 38 (S.D.N.Y., Sept. 14, 1965) (Levet, J.)

Action for copyright infringement. Plaintiff's copyrighted hand puppets of a mouse, a pig and a rooster, were purchased by CBS at a retail store and were used on the "Captain Kangaroo" show on two occasions. Both shows were broadcast live; a kinescope was made of one, but the kinescope was "never used for any commercial purpose."

Held, judgment for defendants.

The court held that neither the live broadcasts showing plaintiff's puppets nor the "projected kinescope recording" were "copies", and that the use of the hand puppets on the show was a fair use.

I. The court held that neither the evanescent live television broadcasts nor the kinescope were copies of the hand puppets within the meaning of the Copyright Act, because they were so different in nature from the copyrighted originals. The court said:

In this action it is clear that defendants have not manufactured, sold or even used an article simulating any one of plaintiff's copyrighted puppets. Rather, the defendants used genuine puppets in a television show. The plaintiff claims this use as an infringement of her copyright.

The specific question, therefore, is whether that use constituted a copying. The commonly accepted definition of "a copy" appears in the old English case, *West v. Francis*, 5 Barn. & Ald. 743, which was cited with approval by the Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908): "A copy is that which is so near to the original as to give to every person seeking it the idea created by the original." Certainly no three dimensional objects were reproduced. Was the presentation on the television program, by an image reproduction of a transitory and impermanent nature, a copying of the puppets? . . . Weil, author of *American Copyright Law*, well stated:

"It would seem that a copy involves the conception that it must have some degree of permanency or the maxim de minimis would apply. Thus, while the making of a single copy may be infringement, if this copy were destroyed almost as soon as made, as, for example, if a vaudeville artist drew with colored chalks, or if a verse were cast upon a screen through a stereopticon, it may be doubted whether such a temporary production could fairly be called a copy." (p. 406)

It is obvious that a copyright of a work of art may be infringed by reproduction of the *object* itself. *Home Art Inc. v. Glensder Textile Corp.*, 81 F. Supp. 551 (S.D.N.Y. 1948) (oil painting reproduced in scarf); *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949) (painting reproduced by publication without consent in a magazine). *Tiffany Productions, Inc. v. Dewing*, 50 F. 2d 911 (D.Md. 1931) (projection of photoplay on screen without copyright owner's permission. See also *Patterson v. Century Productions, Inc.*, 93 F. 2d 489 (2d Cir. 1937)). This, however, is not the nature of the "copying" here alleged. Here the puppets were not reproduced.

The evanescent reproduction of a hand puppet on a television screen or on the projected kinescope recording of it is so different in nature from the copyrighted hand puppet that I conclude it is not a copy. I find no violation of plaintiff's copyright here under the circumstances of this case. There was no copying of the copyrighted puppets.

II. The court held that the incidental use of the hand puppets on the television program was a fair use in that it was reasonable, being the type of use a hand puppet is designed for, and non-competitive to the sale of plaintiff's puppets. The court said:

Nevertheless, even if we were to assume that the projection on television of the hand puppets was an infringement, the defense of fair use is applicable. . . .

The puppets were sold by plaintiff without any contractual limitations as to use. See *Buck v. Swanson*, 33 F. Supp. 377, 387 (D. Neb. 1939). The use complained of here was of the type for which the puppets were intended and was reasonable. It can hardly be contended, for example, that if a copyright owner of a film sells the film without a stipulated condition as to its use that the purchaser is forbidden to *exhibit* the film merely because it is copyrighted. See *Westway Theatre v. Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D.Md. 1940), *aff'd* 113 F.2d 932 (4th Cir. 1940).

Commentators agree that among the most important factors bearing on whether a use is a fair one, perhaps *the* most important, is whether the use tends to interfere with the sale of the copyrighted article. Nimmer, *Copyright*, §145 at 646 (1963); Latman, *Howell's Copyright Law* 152 (rev. ed. 1962). . . . Here, if anything, the exhibition on television would stimulate sales of the hand puppets rather than prejudice them. Further, the "copies" com-

plained of here could not be used as a substitute for the original work. *Shapiro, Bernstein & Co., Inc. v. P. F. Collier & Son Co.*, 26 USPQ 40, 43 (S.D.N.Y. 1943). In addition, these hand puppets were not the principal attraction on the television programs. Rather their use was incidental. See *Karll v. Curtis Publishing Co.*, 39 F. Supp. 836 (E.D. Wis. 1941). Nor can any intent to pirate be found here. *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S.D.N.Y. 1940).

I conclude that the use of the hand puppets on the *Captain Kangaroo Show* was fair.

2. State Court Decisions

Also of Interest:

18. *David v. Paramount Pictures Corp.*, 24 App. Div. 2d 555 (App. Div., 1st Dept., June 15, 1965). *For decision below, see* 11 BULL. CR. Soc. 444, Item No. 301 (1964).

Judgment dismissing complaint in unfair competition action, involving the song "Moon River", affirmed without opinion.

19. *Ford v. Camay Record Corp.*, 153 N.Y.L.J. 113, p. 16, col. 5 (June 14, 1965) (Sup. N.Y. Co.) (Geller, J.)

Action for injunctive relief and damages under §51 of the New York Civil Rights Law (invasion of privacy) and for unfair competition. Tennessee Ernie Ford charged that his name and picture were used by defendant without authority on a phonograph album jacket. The album contained performances by Ford from old "telescriptions."

Held, judgment for plaintiff.

Defendant was collaterally estopped from showing that it had succeeded to the contractual rights of Snader Telescriptions Corporation (the original owner of the "telescriptions") to use Ford's name and likeness. See *Ford v. Camay Record Corp.*, N.Y.L.J. 15, Sept. 23, 1964 (Sup. N.Y.), 11 BULL. CR. Soc. 140, Item No. 31, and 152 N.Y.L.J. 117, p. 15, col. 5 (Dec. 17, 1964) (Sup. N.Y. Co.).

20. *Revere v. Forum Record*, 154 N.Y.L.J. 51, p. 16 col. 8 (Sept. 13, 1965) (Sup., N.Y. Co.) (Klein, J.)

It was held that a recording company which refused to record the minimum number of sides called for in its contract with a recording artist was only obligated to pay the "agreed non-returnable advance" for the unrecorded side.

2. FOREIGN NATIONS

21. ROYALTIES FOR RECORD PLAY ON THE RADIO

(Three Cases in Britain, Sweden and Denmark)

By STEPHEN M. STEWART*

1. *The European Scene.*

To appreciate the questions tried by the courts in these cases, one must bear in mind that the pattern of broadcasting in Europe is different from that in the United States. The broadcasting corporations are nearly all public services. They are sustained by the license fees paid by the owners of receivers of radio and television sets. There are fewer programs and these resemble, if anything, the major networks in the United States. In some countries, the programs contain "commercials"; e.g. Italy or Austria, but in the three countries in which these cases arise, i.e., the United Kingdom, Sweden and Denmark, there is no commercial broadcasting.

Since the last war, the radio has made increased use of records, mainly for two reasons:

- a) Because the public increasingly demanded to hear the latest hits in the "pop" field and the performances of well-known orchestras and singers in the field of serious music; and
- b) Because the cost of broadcasting a record is only a small fraction of the cost of a live performance.

The broadcasting corporations and the record companies were therefore obliged to come to terms on the broadcasting of recorded music on a fairly large scale.

2. *Great Britain.*

Isle of Man Broadcasting Co. Ltd. v. Phonographic Performance Ltd. (British Broadcasting Corporation and Musicians' Union intervening), Performing Right Tribunal No. PRT 18/64. Given at Douglas, Isle of Man, May 29, 1965.

* Director-General, International Federation of the Phonograph Industry, London.

The Copyright Act 1956 provides for a copyright in records which entitles the maker of the record to allow or forbid:

- a) Making a record embodying the recording;
- b) Causing the recording to be heard in public;
- c) Broadcasting the recording.¹

A "maker" must be a qualified person. A qualified person is defined in Section 1 (5) of the Act as, broadly speaking, a British subject or in the case of a body corporate, a company incorporated in the United Kingdom, or in any country to which the provisions extend. They have in fact been extended to all members of the Berne Union and the U.C.C. by Order in Council² as far as copying of records is concerned and to a number of countries listed in the Order in Council as far as the broadcasting and public performance right is concerned, the latter being countries who themselves give such protection to records made in the United Kingdom.

In pursuance of this right the record industry has for thirty years made contracts, usually of several years duration, with the BBC (British Broadcasting Corporation) dealing with the use of their records in sound broadcasting and later television services.

In October, 1964, Manx Radio (Isle of Man Broadcasting Company Ltd.) was formed and given a license by the Postmaster-General and a concession by the Government of the Isle of Man to operate a commercial broadcasting station in the Isle of Man.

The Isle of Man, a very small island off the northwest coast of England, is self-governing in the sense that it has its own Parliament and its own courts and is not part of the United Kingdom. The Manx Parliament had adopted the U.K. Copyright Act 1956, but the constitutional peculiarity is important as, in the United Kingdom, the BBC has a monopoly of sound broadcasting (in the field of television the BBC has one competitor in ITV, a commercial organization) and would not be permitted under its license to broadcast "commercials". This new station on an off-shore island is therefore the first and only commercial sound radio station in the British Isles. It applied to Phonographic Performance Ltd., which is the licensing body for the record industry, for a license to broadcast records as their entire program content, apart from news and a few local items. The licensing body

1. Copyright Act, 1956 4 & 5 Eliza. 2 Ch. 74 Section 12.

2. Copyright (International Conventions) Order 1964. S.I. 1964 No. 690.

refused this application, but offered Radio Manx a license for one-fifth of their total broadcasting time. This figure was arrived at by calculating the approximate record content in the programs of the BBC and the reason given by the licensing body was that it would be unfair to allow this new station a larger share of record broadcasting than the BBC enjoys on the mainland. The charge made by the licensing body was 8% of 85% of the gross advertising revenue (the 15% deduction is that customary for agency charges). Radio Manx rejected this offer and made an application to the Performing Right Tribunal as they were entitled to do under Section 27 of the Copyright Act. This Section gives any person who is aggrieved by the refusal of the licensing body the right to apply to the Tribunal. In this case Radio Manx complained under Section 27 (3) (b) that the "charges, terms and conditions, subject to which the licensing body proposed that the license should be granted are unreasonable".

Their main attack was on the issue of "needle-time" and they argued that they could not make the station pay unless the bulk of their programs (approximately 90%) consisted of records. The licensing body representing the record companies argued that their rights should not be severely curtailed in order to enable a commercial company to make a profit out of the playing of their records, thereby reducing the sales of at least the current hits in the "pop" field.

The BBC and the Musicians' Union applied for and were admitted as interested parties; the BBC on the score that an all-record program station would be an unfair competition to the BBC, and the Musicians' Union on the score that the large scale broadcasting of recorded music deprived live musicians of opportunities of employment. Both the record companies and the interested parties argued that Radio Manx could broadcast a lot of live programs of a non-musical kind (local news, interviews with local people, market reports, discussion programs, etc.), although it was admitted that in the case of a small island the employment of live musicians was probably only practical to a small extent.

The Tribunal found that it was reasonable to extend the needle time of Radio Manx to 42 hours a week, i.e., six hours a day out of a total broadcasting time of twelve hours a day. The Tribunal found the charge of 8% of 85% of the gross advertising revenue reasonable, but staggered the payment beginning with 5% in the current year and reaching the 8% in 1968. The third term of the license offered by the licensing body was not contested by Radio Manx, namely that they should not play any record more than twice in a period of 24 hours or more than ten times in any week.

The Tribunal in a long and reasoned judgment underlined the differences between a tiny island and the United Kingdom, and a small station like Radio Manx, relying entirely for its income on its advertising revenue, and the BBC, a public corporation with substantial resources. The judgment also points out that the BBC had three channels and as the total record broadcasting time was calculated for the total of these three channels, they could, and to a certain extent do, so arrange their programs as to give their "Music Program" a 40% record content at the expense of the other two programs. It emphasizes the fact which was admitted that there were hardly any live musicians on the island and they would thus have to be imported from the mainland. The situation might be quite different, says the judgment, if a similar case ever arose on the mainland.

The Tribunal also emphasized that the Government of the Isle of Man, having given a concession to Radio Manx, had expressed the wish to have a radio station of its own and that this wish should be respected as far as this was possible, giving due weight to the rights of other interests.

The Tribunal found that the record companies had failed to prove that the broadcasting of Radio Manx would do damage "to their sales on the Isle of Man." On the other hand, they dismissed the argument of Radio Manx that they should pay a lower rate of remuneration because the authors' society had accepted a lower rate of payment for the authors of the works broadcast. They pointed to the great value of the records to Radio Manx which they themselves had constantly emphasized in their argument and found the charges fair and reasonable.

It remains to be seen whether Radio Manx can survive and be viable commercially and whether they can find live items for the other half of their programs to sustain the interest of their listeners. The judgment confines itself to the circumstances adjudicated on, i.e., a small off-shore island station whose broadcasts cannot be heard on the mainland and can therefore hardly be regarded as a precedent should commercial broadcasting ever be introduced in the United Kingdom. It is, however, interesting to note two things in the findings of the Tribunal: a) That they found a charge of 8% of the net income of the station reasonable, although this exceeds the payments made to the authors' society; and b) Although the case for Manx Radio on the question of "needle-time" was probably as strong as a case for a local and commercial station can be in view of the small population and restricted resources the Tribunal would not agree to a pattern of broadcasting described as "musical wallpaper", consisting almost entirely of records.

3. Sweden.

The Swedish Group of the International Federation of the Phonographic Industry v. Sveriges Radio, Judgment No. DT 24/1965 of the Stockholm Rådhusrät. Given in Stockholm on April 28, 1965.

The law regarding the playing of records on the radio is governed by Section 47 of the Swedish Copyright Act.³ This paragraph provides that if a sound recording is used in a radio or television broadcast, a compensation shall be paid both to the record producer and to the performer whose performance is recorded. The paragraph also provides that the performer's remuneration should be claimed through the record producer. This means in practice that if the radio and television authorities on the one hand and the record industry and the performers on the other hand cannot agree on the amount of remuneration to be paid, the record industry has to produce a claim on its own behalf and on behalf of the performers and as no tribunal is stipulated by the Act such claim has to be presented to the ordinary courts. Sveriges Radio, having a monopoly of broadcasting in Sweden and being a Government-controlled public corporation, is thought to have taken the view that this being the first case since the introduction of the new Copyright Act it would be right and proper if the courts were to decide the amount of the remuneration. There was no disagreement between the record industry and the radio on the other terms of a contract to be made between them and the amount of the remuneration was therefore the only issue before the court.

As the record companies and the performing artists' union had agreed to share the remuneration in equal parts, the court was also not called upon to decide the distribution of the remuneration between the parties.

There are three elementary differences between the claim in England and the claims in Sweden (and Denmark):

- a) As the Swedish law only gives a right to remuneration whereas the English law gives a complete copyright, the Swedish Radio enjoys something akin to a compulsory license so that they can use as much "needle-time" as they like, provided they pay for it. Thus, the question of "needle-time" did not arise.

3. Laws 729 and 730 of 1960, 74 D.A. 156, 163 (1961).

- b) The record industry dealing with a public corporation as opposed to a commercial company did not ask for a percentage of the radio's income but for a rate per minute of "needle-time" used. Both plaintiffs considered the radio's user excessive (it is approximately 18 hours per day) and sought to discourage this excessive user by a progressive tariff of charges.
- c) The British Copyright Act bases the protection of a record on publication as one of the points of attachment, which includes simultaneous publication, i.e. publication within 30 days in a country of the Berne Union and this results in practically the whole repertoire of the record industry being protected. In Sweden, on the other hand, protection is based on fixation, i.e., the country where the original recording is made. The Swedish law thus only protects Swedish recordings but Sweden was the first country to join the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961) and will thus protect the records first fixed in any other country which has ratified this Convention and gives reciprocal rights. The result of this is that at the time of judgment only part of the record industry's repertoire used by the radio was protected (recordings made in France, Germany or the United States formed the bulk of the unprotected repertoire). The claim was thus based on a payment per minute of protected "needle-time".

The judgment awarded the plaintiffs a remuneration of two million kroner for a protected needle time of 135,000 minutes, an average of 15 kroner per minute (approximately \$3). This compares with an average payment of 30 kroner asked for by the plaintiffs and an average payment of 3 kroner offered by the radio. The court did not grant the progressive tariff because it found that substantial damage had not been proved. The judgment states that if the losses occurred by the reduced sales could be proved to be caused by record broadcasting, such losses would be a factor which should be taken into consideration in assessing the remuneration, but they found that such causation had not been proved. The court based their judgment solely on the fact that the radio uses the performance of the artists and the technical and artistic efforts of the record producers to a large extent and should therefore in fairness pay a reasonable amount for such use to both parties.

4. *Denmark.*

GRAMEX v. Danmarks Radio, Decision of the Board for Remuneration for Use of Literary and Artistic Works. Given in Copenhagen on May 19, 1965.

Section 47 of the Danish Copyright Act 1961,⁴ which deals with the use of sound recordings in radio and television broadcasts is similar to the corresponding section of the Swedish Act in that it gives both the record producer and the performing artist a right to remuneration. The performers' rights to remuneration can be claimed through the record producer as in Sweden or through a joint organization of record producers and performing artists. The second alternative was chosen by the claimants and GRAMEX is the organization formed by the record producers and performers and approved by the Minister of Education. The Danish Act provides, however, for a special tribunal to hear claims arising out of this section and the tribunal was constituted by a judge of the Supreme Court who presided, an eminent member of the Danish Bar and a professor of law. The judgment follows the reasoning of the Swedish judgment fairly closely and awards a payment to the joint claimants of ten Danish kroner per minute. This payment is subject to the scale of increases agreed for all payments made by the Government after 1st April 1961 and does in fact amount at the date of judgment to approximately 15 kroner per minute (approximately \$2).

The number of subscribers in Denmark is approximately 1½ millions; in Sweden approximately 4 millions. The proportion of repertoire protected in Denmark at the time of the judgment was approximately 20%; in Sweden approximately 35%. If these factors are taken into account the amounts awarded per million listeners for the protected part of the repertoire are similar, thus giving effect to the existing close connections between the Scandinavian countries and to the virtual identity of the two laws.

Whereas the Swedish radio appealed against the judgment to the Swedish Court of Appeals, the Danish radio and the record industry accepted the judgment of the tribunal as final.

Behind the legal and financial matters canvassed in these actions lie questions of a cultural and social nature which go much deeper. What kind of broadcasting does a country want? Lord Reith, who, as Director General of the BBC, probably more than any other man fashioned British radio, regarded broadcasting as an art. This art is still

4. Laws 157 and 158 of May 31, 1961, 75 D.A. 142 (1962)

practiced by the BBC and by several other broadcasting organizations. On the other end of the scale, broadcasting stations which emit "pop" music from records round the clock, interspersed with advertisements, are sometimes little more than juke boxes with a transmitter. Between these two extremes lies a wide spectrum of possibilities. Where each station will eventually find its place in that spectrum may have some effect on the considerable contribution which records and radio can jointly make to the appreciation of music and the cultural values of a nation.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

22. CHERNOFF, GEORGE *and* HERSHEL SARBIN. *Photography and the law*. New York, Amphoto [1965]. 128 p.

A revised edition of a handbook, first published in 1958, for amateur and professional photographers on the legal aspects of photography. See 5 BULL. CR. SOC. 311, Item 393 (1958).

23. RINGER, BARBARA A. *and* PAUL GITLIN. *Copyrights*. Rev. ed. [New York] Practising Law Institute, 1965. 187 p.

The latest revision of a handbook on U. S. copyright law and practice for "those members of the legal profession who need quick, reliable orientation in the subject covered." See 11 BULL. CR. SOC. 57, Item 22 (1963).

2. Foreign Publications

24. CARTER RUCK, P. F., *and* E. P. SKONE JAMES. *Copyright; modern law and practice*. Edited by F. E. Skone James. London, Faber and Faber [1965]. 639 p.

A comprehensive reference work on the U. K. Copyright law. Extensive appendices include texts of statutes, international conventions, and specimen agreements between authors and publishers.

25. SCHULZE, ERICH. *Urheberrecht in der Musik*. 3., neubearb. Aufl. Berlin, De Gruyter, 1965. 474 p.

The third edition of a comprehensive work, by the general director of the West German performing rights society, GEMA, on the protection of music in West Germany, with particular emphasis on GEMA's contributions toward such protection. This edition reflects West German and international copyright developments from the publication of the second edition in 1956 up to June 1, 1965. The introduction includes a brief comment on the new West

German copyright law which was enacted after the present edition had been printed.

B. LAW REVIEW ARTICLES

1. United States

26. AITKEN, WYLIE A. Product simulation: the death knell for the misappropriation theory—the *Stiffel* and *Compco* cases. (48 *Marquette Law Review* 596-605, no. 4, Spring 1965.)

A case note which concludes, in part, that “[t]he decisions can be explained as being consistent with traditional notions of protection against ‘passing off,’ while impliedly rejecting the free ride or misappropriation doctrine.”

27. COLE, JOHN P., JR. Community antenna television, the broadcaster establishment, and the federal regulator. (14 *The American University Law Review* 124-145, no. 2, June 1965.)

Devoted primarily to a consideration of “the present legal posture of community antenna television only in its more direct relationships to the federal government, particularly the Federal Communications Commission; and secondly . . . [to] evolving a prognosis of what the future reasonably holds in this most significant respect.” Brief mention is made of the copyright issue with an opinion expressed that rulings by the courts on this issue, adverse to CATV interest, would not “result in fatal, critical, or even severe injury to the community antenna industry.”

28. Copyright law: broadcast of phonograph records held a “public performance for profit” in violation of section 1(e) even though made in connection with sale of the records. (49 *Minnesota Law Review* 584-588, no. 3, Jan. 1965.)

A case note on *Chappell & Co. v. Middletown Farmers Mkt. & Auction Co.*, 334 F.2d 303, 11 BULL. CR. SOC. 421, Item 287 (3d Cir. 1964).

29. Copyright law: existence of a second legitimate use held ineffective to cure an infringing public performance for profit. (1965 *Duke Law Journal* 404-411, no. 2, Spring 1965.)

A note, which “has been entered in the Nathan Burkan memorial competition,” on *Chappell & Co. v. Middletown Farmers*

Market & Auction Co., 334 F.2d 303, 11 BULL. CR. SOC. 421, Item 287 (3d Cir. 1964).

30. EPSTEIN, ROBERT S. World's Fair photography rights protected. (17 *Stanford Law Review* 965-969, no. 5, May 1965.)

A critical note on the decision in *New York World's Fair 1964-1965 Corp. v. Colourpicture Publishers, Inc.*, 21 App. Div.2d 896, 251 N.Y.S. 2d 885, 12 BULL. CR. SOC. 136, Item 27 (1964).

31. GAMBONI, CIRO A. Unfair competition protection after *Sears and Compco*. (40 *New York University Law Review* 101-153, no. 1, Jan. 1965.)

An analysis of the impact of *Sears and Compco* decisions.

32. HILL, JAMES. Scope of protection for computer programs under the Copyright Act. (14 *De Paul Law Review* 360-370, no. 2, Spring-Summer 1965.)

A comment which was submitted to the 1965 Nathan Burkan Memorial Competition at the De Paul University College of Law.

33. HUDON, EDWARD G. The Copyright Period: Weighing Personal Against Public Interest. (49 *American Bar Association Journal* 759-763, no. 8, August 1963.)

An assistant librarian of the Supreme Court Library examines the history of copyright.

34. KELLMAN, LEON. Life plus fifty in American copyright law. (51 *American Bar Association Journal* 721-724, no. 8, Aug. 1965.)

A case is made for the adoption of the provisions of the current general revision bill, H.R. 4347, that would change the present law to provide for a copyright duration of the lifetime of the author plus fifty years.

35. KENNEDY, ROBERT P. The right to privacy in the name, reputation and personality of a deceased relative. (40 *Notre Dame Lawyer* 324-329, no. 3, Apr. 1965.)

"The question examined in this article is whether or not any right to privacy exists in the name, reputation, and life history of

a deceased which can be exercised by his legal representative or next of kin."

36. NUGENT, WILLIAM C., II. A copyright quandary: parody, burlesque and the fair use doctrine. (29 *Albany Law Review* 312-320, no. 2, June 1965.)

A comment, submitted in substantially the same form to the Nathan Burkan Memorial Competition, which examines the limits of permissible taking in the field of parody and burlesque.

37. O'SHEA, JOHN DONALD. Community antenna television: reaction of the industry. (40 *Notre Dame Lawyer* 311-323, no. 3, Apr. 1965.)

A note which is concerned with the question whether "a CATV [can] appropriate and sell a television station's broadcast signal without obtaining that station's consent, and without paying compensation."

38. PAPACONSTANTINO, HELEN. Legal protection for titles of literary works: a comparative study. (4 *Columbia Journal of Transnational Law* 28-46, no. 1, 1965.)

"The protection of titles—i.e., the designations under which literary and other works are presented to the public—is the subject of . . . [this] contributoin. French and German law are emphasized, but not to the exclusion of references to the law of other countries."

39. SHAPIRO, NORMAN R. Copyright aspects of trademarks (Canada). (55 *The Trademark Reporter* 518-537, no. 7, July 1965.)

An opinion is expressed that while "there is no copyright in trademarks consisting merely of a word, words, a letter, letters, a numeral, numerals or a combination of any or all of the foregoing, in common or ordinary print or simple script form . . . it is desirable to take the position in Canada with respect to trademarks containing artistic features, in whole or in part, and with respect to labels and other printed matter containing artistic features, that copyright subsists in them."

40. SPIEGEL, IRWIN O. Credit for Sale. (40 *The Los Angeles Bar Bulletin* 427-430, July 1965.)

Colvig v. RKO General, Inc. and failure to give credit of authorship in connection with a motion picture or television program are discussed in the light of English precedents.

41. SPIEGEL, IRWIN O. Beatles Beware! (39 *The Los Angeles Bar Bulletin* 245-247, May 1964.)

A comment on *Sears and Compco*.

42. TAUBMAN, JOSEPH. [Review of] This business of music by Sidney Shemel and M. William Krasilovsky . . . New York . . . 1964 . . . (50 *Cornell Law Quarterly* 571-574, no. 3, Spring 1965.)

The reviewer concludes that "[t]he authors have effectively related this imperfect, in many ways 'caricaturish'—to coin a word—business of music to the laws governing and regulating them."

43. Uniform Deceptive Trade Practices Act: effect of *Sears and Compco*. (50 *Iowa Law Review* 836-855, no. 3, Spring 1965. Also appears in 55 *Trademark Reporter* 267-288, no. 4, Apr. 1965.)

"This note will analyze the extent to which state regulation of product simulation is still permissible and the validity of the provisions of the Uniform Deceptive Trade Practices Act in light of the new limitations on state action enunciated by the Supreme Court."

44. UREY, DAVID S. Product simulation—Before and after the *Stiffel* case. (9 *Idea, the Patent, Trademark, and Copyright Journal of Research and Education* 131-151, vol. 9, no. 1, Spring 1965.)

An attempt "to analyze the rights of the parties where there is no valid design patent, with particular emphasis on the doctrine of 'secondary meaning.'"

45. WILLIAMS, DAVID R. Trade regulation—unfair competition—imitation of products. (16 *Western Reserve Law Review* 425-431, no. 2, Mar. 1965.)

A note on the *Sears and Compco* cases.

2. Foreign

1. English

46. ARE, MARIO. On the access to manuscripts of musical works. (1 *Copyright* 122-127, no. 6, June 1965.)

Another contribution to the controversy concerning alterations in various published editions of musical works and the lack of

access to the original manuscripts of such works, with special attention to the applicable provisions of the Italian copyright law.

47. DESJEUX, XAVIER. "The narrow gate": commentary on Article 16, paragraph 1 (a) of the Rome Convention of October 26, 1961. (1 *Copyright* 151-157, no. 7, July 1965.)

A discussion of the meaning of Article 16, paragraph 1 (a) of the Rome Convention on Neighboring Rights granting to the member states the power to make reservations with regard to Article 12 of the Convention which deals with the right of the performing artists and record manufacturers to receive remuneration in the event of secondary uses of commercial records.

48. EUROPEAN BROADCASTING UNION. Observations of the EBU on the texts and new version of the Berne Convention proposed by the Swedish/BIRPI Study Group. (*EBU Review* 54-68, no. 91B, May 1965.)

"This is the memorandum submitted by the EBU on the proposals for the revision of the Berne Convention which were prepared by the Swedish/BIRPI Study Group and which will be discussed by a governmental expert committee convened by the BIRPI in Geneva from 5th-14th July 1965."

49. MASOUEY, CLAUDE. Copyright in Africa. (*EBU Review* 41-45, no. 92B, July 1965.)

An article on the development of copyright legislation in the newly independent states of Africa, with particular emphasis on an analysis of the Draft African Model Copyright Law.

50. MOUCHET, CARLOS. Letter from Argentina. (1 *Copyright* 158-161, no. 7, July 1965.)

Contains the text of a memorandum submitted to the Pan-American Council of CISAC, and deals with the question whether or not it is desirable that the Argentine authors societies take steps to promote the accession of Argentina to the Berne Convention in the light of the possible modification of art. 14 of the Convention at the 1967 Stockholm Conference.

51. NOVOTNY, JIRI. Letter from Czechoslovakia. (1 *Copyright* 117-118, no. 5, May 1965.)

A brief summary of the new draft copyright law of the Czechoslovak Socialist Republic. The draft, which has been already amended twice by the various committees of the National Assembly, has been referred back to the Government and will be submitted to the legislature for the third time.

52. PALAGYI, ROBERT. Letter from Hungary. (1 *Copyright* 127-143, no. 6, June 1965.)

A survey of recent legislative and judicial developments in Hungary in the field of copyright and related subjects.

53. RECHT, PIERRE. Should the Berne Convention include a definition of the right of reproduction? A study of articles 9 and 10. (1 *Copyright* 82-89, no. 4, Apr. 1965.)

A criticism of the proposal, recommended by the joint group of Swedish experts, and BIRPI representatives, that the new revised Berne Convention include a provision defining the right of reproduction.

54. STRASCHNOV, GEORGES. The Zambian copyright act. (1 *Copyright* 112-116, no. 5, May 1965.)

A summary of the Zambian copyright act which entered into force on March 1, 1965. See 12 BULL. CR. SOC. 372, Item 283 (1965).

55. WAGNER, EGON. Report from the Federal Republic of Germany. (*EBU Review* 69-73, no. 91B, May 1965.)

Includes a discussion of a recent decision of the West German Federal Supreme Court in an action brought by a music publisher against a record manufacturer. The principal holding was that "[t]he transfer of mechanical rights is not subject to an *ergo omnes* restriction to the effect that the rights transferred can only be exercised on the condition that music material available on hire from the publisher shall be used or that at least a payment equal to the hire fee shall be made to the publisher."

56. ZINI LAMBERTI, CARLO. Considerations on certain aspects of the "de facto" monopoly in the field of music publishing. (1 *Copyright* 148-151, no. 7, July 1965.)

Another contribution to the "great debate" about the availability of music scores and the textual inaccuracies of the available scores. See, e.g., 8 BULL. CR. SOC. 81, Item 71 (1960), 12 BULL. CR. SOC. 257, Items 202 and 204 (1965).

2. English, French and Spanish

57. DESBOIS, HENRI. La loi française du 8 juillet 1964 relative à l'application du principe de réciprocité en matière de protection du droit d'auteur. (*Revue Internationale du Droit d'Auteur* 22-103, no. 45, Jan. 1965.)

A criticism, in English, French and Spanish, of the recently enacted amendment to the French copyright law providing for protection of foreign works on the basis of reciprocity.

58. TOURNIER, ALPHONSE. Cinéma et télévision. (*Revue Internationale du Droit d'Auteur* 4-21, no. 45, Jan. 1965.)

At head of title: La Conférence de révision de Stockholm. A critical comment, in English, French and Spanish, on the revisions of art. 2(1) of the Berne Copyright Convention—in regard to cinematographic works as subject matter of protection—as proposed by the Swedish/BIRPI Study Group for submission to the Stockholm Conference.

59. WYSTRAM, HUGO. Le droit d'auteur en Suède et en France; comparaison des législations récentes. (*Revue Internationale du Droit d'Auteur* 104-191, no. 45, Jan. 1965.)

A comparative study, in English, French and Spanish, of the Swedish and French copyright laws.

3. French

60. ISACKER, FRANS VAN. La révision de la Convention de Berne à Stockholm en 1967 et les problèmes de cinématographie et de télévision. (*Interauteurs* 13-22, no. 158, 1st quarter 1965.)

A study of certain problems relating to cinematography and television to be discussed at the forthcoming Stockholm revision conference.

61. MASOUE, CLAUDE. L'avenir de la propriété intellectuelle. (*Interauteurs* 125-135, no. 159, 2d quarter 1965.)

Some reflections on the future of the Berne and Paris Conventions and their organizational structure.

62. NAWROCKI, BOLESŁAW. Quelques observations à propos de l'étude de M. R. S. Savelson intitulée "La musique électronique et la législation sur le droit d'auteur." (*Interauteurs* 38-61, no. 158, 1st quarter 1965.)

A critical comment on an article by R. S. Savelson which first appeared in 11 BULL. CR. SOC. 144, Item 65 (1964) under the title "Electronic Music and the Copyright Law."

63. RECHT, PIERRE. Faut-il introduire une définition du droit de reproduction dans la Convention de Berne? Etude sur les articles 9 et 10. (*Interauteurs* 23-37, no. 158, 1st quarter 1965.)

An English version appeared in 1 *Copyright* 82-89, no. 4 (Apr. 1965). See Item 53, *supra*.

64. STREULI, ADOLF. Quelques considérations en vue de la révision de la Convention de Berne pour la protection des oeuvres littéraires et artistiques, Stockholm 1967. (*Schweizerische Mitteilungen über gewerblichen Rechtsschutz und Urheberrecht* 24-43, no. 1, May 1965.)

A discussion, in the light of the 1967 Stockholm conference, of some of the amendments of the Berne Convention proposed by the Swedish-BIRPI Study Group, with special reference to those aimed at facilitating the adherence of new member countries.

4. German

65. DEUTSCH, VOLKER. Noch einmal: Die Verbindung von Text und Musik—eine Erwiderung. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 294-295, no. 6, June 1965.)

A reply to Mr. Gast, offered in rebuttal. See Item 66, *infra*.

66. GAST, PETER. Zur Schaffung neuer Texte zur vorhandener Musik. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 292-294, no. 6, June 1965.)

A refutation of the thesis, expounded by Volker Deutsch in an article published in 67 *GRUR* 7-10, no. 1 (Jan. 1965), to the effect

that anyone may supply an existing musical work with a new text, and may exploit the newly created joint work. See 12 BULL. CR. Soc. 258, Item 207 (1965).

67. KNAP, KAREL. Neues Urheberrechtsgesetz in der RSFSR. (43 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 113-122, no. 1/2/3/4, Dec. 15, 1964.)

A summary of the copyright law of the Russian Socialist Federated Soviet Republic (RSFSR), which entered into force as Part IV of the Civil Code of that republic on October 1, 1964. See 12 BULL. CR. Soc. 372, Item 281 (1965).

68. KUPKE, DIETMAR. Fragen der aktuellen Berichterstattung durch Film und Fernsehen. (9 *Film und Recht* 83-90, no. 5, May 15, 1965.)

An article which is concerned with copyright protection and related legal problems in connection with the reporting of current events by means of motion pictures and television under the law of the Federal Republic of Germany, with special reference to the provisions of the news reel law of April 30, 1936 (Wochenschaugesetz).

69. LEINVEBER, GERHARD. Rechtsprobleme um die zukünftige gesetzliche Regelung des Rechts der Verwertungsgesellschaften: Kritik am Regierungsentwurf 1962, Bundestagdrucksache IV/271. (43 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 260-281, no. 5/6, Dec. 28, 1964.)

A criticism of the 1962 West German Government draft law on performing rights societies, preceded by a brief historical outline of their development in Germany since 1903.

70. LIDLE, GÜNTER. Das Geschmacksmuster zwischen den technischen Schutzrechten und dem Urheberrecht aus der Sicht der Praxis. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 223-227, no. 5, May 1965.)

A discussion of the protection of designs as industrial property and as works of art, with a conclusion that, on the basis of recent decisions of West German courts, it might be advisable to seek copyright protection even in those cases where protection is also available under the laws of patents and utility models.

71. REICHEL, WERNER. Persönlichkeitsrecht und Verlagsrechtsreform —eine Erwiderung. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 227-230, no. 5, May 1965.)

A refutation of the views expressed by Gerhard Leinveber in his article, "Persönlichkeitsrecht und Verlagsrechtsreform," which appeared in 66 *Gewerblicher Rechtsschutz und Urheberrecht* 645-650, no. 12 (Dec. 1964). See 12 BULL. CR. SOC. 259, Item 210 (1965).

72. STROTH, R. R. Veröffentlichung von Originalwerk und Bearbeitung im internationalen Urheberrecht: eine Erwiderung auf Prof. Eugen Ulmer "Originalwerk und Bearbeitung im internationalen Urheberrecht" (Festschrift für Bappert, Seite 283ff. und in GRUR Ausl. 1964, 613ff.) (43 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 92-103, no. 1/2/3/4, Dec. 15, 1964.)

A critique of the opinion expressed by Professor Ulmer, in his contribution to the *Festschrift* published in honor of Walter Bappert, to the effect that publication of an adaptation represents simultaneously a publication of those creative elements of the original work which are contained in the adaptation. See 12 BULL. CR. SOC. 253 and 259, Items 184 and 212 (1965).

5. Italian

73. FRAGOLA, AUGUSTO. Per una più efficace tutela dei diritti degli autori cinematografici. (14 *Rassegna di Diritto Cinematografico, Teatrale e della Radiotelevisione* 5, no. 1, Jan.-Feb. 1965.)

A plea for the revision of the Berne Convention at the forthcoming Stockholm conference to provide more effective protection for the authors of cinematographic works.

74. MASOUE, CLAUDE. L'avvenire della proprietà intellettuale. (35 *Diritto di Autore* 467-481, no. 4, Oct.-Dec. 1964.)

Some reflections on the future of the Berne Copyright Convention, with suggestions for revision to be considered at the Stockholm Conference in 1967. An Italian translation of an article published in 159 *Interauteurs* 125-135, 2d quarter 1965. See Item 61, *supra*.

6. Swedish with English Summary

75. HESSER, TORWALD. Det immateriella rättsskyddet och u-länderna. *NIR* 153-168, 2d half, 1965.)

"... [This] article [in Swedish with an English summary] gives an introduction, intended for Scandinavian readers, to the subject of intellectual property in connection with the developing countries. It places special emphasis on the question that can be expected to be brought up at the diplomatic conference on intellectual property to be held in Stockholm in 1967."

76. UGGLA, C. BIRPI som hoppades bli WIPO-OMPI får nöja sig med IPO-OPI. (*NIR* 182-188, 2d half, 1965.)

"[A]n account [in Swedish with an English summary] . . . of a meeting in Geneva, March 22-April 2, 1965, of a Committee of Experts on the Administrative Structure of the International Co-operation in the field of Intellectual Property."

C. ARTICLES PERTAINING TO COPYRIGHT
FROM TRADE MAGAZINES

1. United States

77. ABPC seminar: tax implications for book publishers. (186 *Publishers' Weekly* 27-30, no. 21, Nov. 23, 1964.)

A summary of the discussions at a seminar held in October 1964 by the American Book Publishers Council, and conducted by J. K. Lasser & Co., on the tax aspects of the book publishing business, with a section on how publishers can "keep authors happy tax-wise."

78. ABPC votes opposition to manufacturing clause. Copyright resolution unanimous; renewed market research interest; Harwood elected council president. (185 *Publishers' Weekly* 34-35, no. 22, June 1, 1964.)

An article on the 1964 annual meeting of the American Book Publishers Council at which a resolution was passed opposing "without qualification" any provision in the copyright statute

which would make domestic book manufacture a condition of copyright for works by American authors.

79. American Book-Stratford states copyright position. (186 *Publishers' Weekly* 43-44, no. 25, Dec. 28, 1964.)

A statement released by the president of the American Book-Stratford Press setting forth its position, "contrary in some respects to that taken by the Book Manufacturers' Institute," on the manufacturing clause of the new copyright revision bill. The statement "concludes with a warning against the threat to copyright proprietors and printers that is posed by the new copying machines."

80. ATPI resolves: eliminate the manufacturing clause. (185 *Publishers' Weekly* 27-28, no. 19, May 11, 1964.)

An article on a resolution, passed unanimously by the American Textbook Publishers Association at the final general session on May 1st of its 22d annual meeting in Absecon, N. J., urging elimination of the manufacturing clause with respect to works of U. S. authorship.

81. BALDWIN, MARK. Design piracy—bills, bills, bills. (108 *Women's Wear Daily* 1, 111, no. 2, Jan. 3, 1964.)

A somewhat critical article on the design bill, S.776, (88th Cong., 1st Sess.)

82. BANZHAF, JOHN F., III. Copyrighted computer programs: some questions and answers. (*Computers and Automation* 22-25, July 1965.)

An attempt to answer some of the questions in connection with copyright protection for computer programs.

83. BANZHAF, JOHN F., III. Legal Protection for Computer Programs. (*Data Processing* 8, July 1964.)

Based on the paper submitted to the Copyright Office presenting Mr. Banzhaf's argument for the registration of computer programs.

84. BENJAMIN, CURTIS G. Relating to ETV. (187 *Publishers' Weekly* 15-17, no. 14, Apr. 5, 1965.)

An article by the chairman of the board of the McGraw-Hill Book Company, in which he "relates his firm's long and frustrating

experience in attempting to relate to educational television," with special reference to fees.

85. BLUNDELL, WILLIAM E. Television tempest: cable TV systems spurt, prompt clash with local stations. Broadcasters charge CATV cuts into ad revenues, ask FCC to regulate its growth. Ten outlets in Logansport. (164 *The Wall Street Journal* 1, 17, no. 118, Dec. 15, 1964.)

An informative article on the growth of cable television (CATV), its penetration into urban areas, and charges, *inter alia*, "that it is stunting the growth of ultra-high frequency television." Includes an item on two pending copyright infringement actions against CATV operators, namely, *United Artists Corp. v. Fortnightly Corp.* and *Columbia Broadcasting System, Inc. v. Tele-Prompter Corp.*

86. Bowker initiates "rights" service to encourage book programs on ETV. (89 *Library Journal* 1708-1709, no. 8, Apr. 15, 1964.)

A brief article on an experimental attempt, by the R. R. Bowker Co., to act as an intermediary for the clearing of rights to books, particularly children's books, for use as program material by educational television stations.

87. Broadcast Music, Inc., accused of monopoly in popular music field. Justice unit suit on performance licenses asks for divestiture of shares by 517 broadcasters. (164 *The Wall Street Journal* 17, no. 116, Dec. 11, 1964.)

An article on the Justice Department's civil antitrust action recently instituted against BMI for an alleged violation of the Sherman Antitrust Act by an attempt "to monopolize both the business of acquiring performance rights to music from composers, publishers and authors and the business of granting licenses to broadcasters for performing such music."

88. CATV: how it can affect advertising. (290 *Printers' Ink* 33-34, 36, 38-41, no. 11, May 28, 1965.)

Includes a discussion of some of the problems facing community antenna systems with respect to F.C.C. regulation and payment of royalties for "picking a station's programming out of the air."

89. CATV: static in the system. (96 *Forbes* 39-43, no. 3, Aug. 1, 1965.)

An article on some of the economic aspects of the community antenna television industry and on the problems it faces "in the courts and from the FCC." The conclusion is reached that with the "enormous profits they now make," CATV systems can survive both the regulations and court-ordered payments of royalties "for the broadcasts they pluck from the air."

90. CBS sues to set copyright rules for TV programs; suit against TelePrompTer aims at right of all CATV systems to use signals. Duplication of services cited. (164 *The Wall Street Journal* 2, no. 117, Dec. 14, 1964.)

An article on a copyright infringement action recently instituted in the U.S. District Court for the Southern District of New York by the Columbia Broadcasting System against TelePrompTer, one of the largest CATV operators in the country. "Industry sources indicated that the suit wasn't particularly aimed at TelePrompTer but at the right of all CATV systems to take signals from the air and relay them to homes without paying to program owners."

91. CHILDS, JAMES B. "Disappeared in the wings of oblivion"; the story of the United States House of Representatives printed documents at the first session of the First Congress, New York, 1789. (58 *The Papers of the Bibliographical Society* 91-132, no. 2, April-June 1964.)

"The task here is to bring together so far as possible from 'the wings of oblivion' the fugitive and anonymous appearing House documents printed in foolscap folio." Among the list of bills of the First Congress, printed copies of which have never been located, appears the first federal "Patent and Copyright Bill" (H.R. 10) with bibliographic annotations. According to the annotations, the preparation of the bill was attributed to Noah Webster, Jr., by Evans in his *American Bibliography*, vol. 7 (1912), but this attribution does not appear to have been confirmed in any definitive source. Dr. Childs conjectures that the personal copyright library of Thorvald Solberg, first Register of Copyrights, which was destroyed by fire on December 6, 1918, contained a printed copy of the bill.

92. Chinese reprinters and world copyright practice; copyright: a Chinese view [by] I-Cheng Loh, and a U. S. publisher's reply [by] Curtis G. Benjamin. (185 *Publishers' Weekly* 22-29, no. 13, Mar. 30, 1964.)

Mr. Loh presents the position of the Chinese Republic in regard to copyright protection and Mr. Benjamin analyzes Mr. Loh's arguments and the present copyright situation in Taiwan.

93. Copyright—Canadian, U. S. and International. (187 *Publishers' Weekly* 71-73, no. 25, June 21, 1965.)

A summary of an address, delivered by Mr. Marsh Jeanneret, Director of the University of Toronto Press, at a luncheon of the Canadian Booksellers Association on May 18, 1965, in which he described the present status of Canadian copyright law revision, explained the points of concern to Canadians in the American copyright law revision bill before Congress, and the purposes of the newly established Canadian Copyright Institute.

94. Copyright implications in the new science of data storage and retrieval. (186 *Publishers' Weekly* 20-23, no. 22, Nov. 30, 1964.)

A summary of the proceedings of a conference sponsored by the Copyright Committee of the American Textbook Publishers Institute, held in New York, November 4-5, 1964, at which various problems involving computer techniques were discussed, and at which a proposal was again made for the creation of a body, similar to ASCAP, which would grant blanket permissions for photocopying and other uses of copyrighted materials, collect fees for such uses, and distribute royalties to authors and publishers.

95. Copyright revisions: educational publishers' stake. (185 *Publishers' Weekly* 33-37, no. 20, May 18, 1964.)

A brief summary of the addresses of the principal speakers at sessions on copyright law revision, held during the annual meeting of the American Textbook Publishers Institute at Absecon, N. J., April 29 to May 1, 1964.

96. Copyright revision threatens use of A-V materials. (36 *American School & University* 18, no. 1, Sept. 1963.)

A brief article on steps being taken by the National Education Association to forestall any possible changes in the copyright law which would restrict the availability of materials for free educational use.

97. CORDTZ, DAN. In the French style: high fashion yields Paris great prestige but scanty profits. Sidelines help keep Dior out of red; designers grumble about some copies in U.S. Low necklines and high cost. (164 *The Wall Street Journal* 1, 8, no. 15, July 21, 1964.)

An article chiefly on the economic aspects of the French "haute couture" business, with some reference to design policy.

98. COX, HENRY BARTHOLOMEW. Private letters and the public domain. (28 *The American Archivist* 381-388, no. 3, July 1965.)

Includes a discussion of copyright problems, with some reference to copyright revision, in connection with controlling access to manuscripts and making such materials available by means of microfilm or other copies.

99. DALLOS, ROBERT E. Pirate radio stations anchored off England sell ads, anger BBC. Kraft Foods welcomes outlets for commercials. Will U. K. cut off ships' fuel, food? (163 *The Wall Street Journal* 1, no. 123, June 22, 1964.)

An article describing the operations of unofficial, seaborne broadcasting stations, anchored off the British coast, which beam recorded music and commercials at mainland radio sets, and the reactions of the British Postmaster General, Reginald Bevins, to such operations.

100. DEMPSEY, DAVID. The publishing scene. (47 *Saturday Review* 39-40, no. 38, Sept. 19, 1964; 34-35, no. 42, Oct. 17, 1964.) Contents: [1] Copyrighting writing on the wall. [2] Copyrights: Chapter II.

A two-part article on the copyright law revision problems created by computerized information storage and retrieval and reprography.

101. Fair use. (*Scholarly Books in America* 8-10, June 1963.) "Resolution on Permissions": pp. 9-10.

Questions and answers explaining the operation of the fair use doctrine in regard to quoting from copyrighted works. These are followed by the text of a resolution, signed by forty-seven members of the Association of American University Presses, in which they allow certain kinds of quotations to be made from their publications without specific permission.

102. FINKELSTEIN, HERMAN. What's wrong with our copyright laws? (234 *Variety* 58, no. 5, March 25, 1964.)

A brief article on ASCAP's role in enforcing the legal rights of its members, with a plea for liberalization of the copyright laws.

103. FREUDENBERG, MAXWELL C. Copyright law and the military author. (15 *Air University Review* 23-34, no. 1, Nov.-Dec. 1963.)

General information on the United States copyright law and the pertinent military regulations written for the guidance of the military author.

104. GOLDBERG, GEORGE. Copyrights, computers and the old piano roll. (*New York Herald Tribune* sect. 1, p. 31, Apr. 5, 1964.)

A provocative article on the copyrightability of computer products, with special reference to tapes.

105. Hearings reveal main issues in copyright revision. (188 *Publishers' Weekly* 18-23, no. 4, July 26, 1965.)

An outline of the six principal issues—term of copyright; education and the question of "fair use"; the manufacturing clause; the status of juke boxes; community-antenna television; and the compulsory license rate for phonograph records—deduced from the first six weeks of the hearings on the general revision bill.

106. IPA Congress hits U. S. on copyright and foreign policies. (187 *Publishers' Weekly* 141-143, no. 23, June 7, 1965.)

Includes a summary of an address by Sir Stanley Unwin, during a discussion on international copyright, attacking the American manufacturing clause. The address was delivered on June 2, 1965, during the opening session of the 17th Congress of the International Publishers Association in Washington, D. C.

107. JAMES, EDWIN H. The growing snarl in wired TV. (22 *Television* 42-45, 69-70, no. 9, Sept. 1965.)

A discussion of the controversy over "the degrees of control that various broadcasting interests want the federal government to impose on community antenna television systems."

108. Joint Libraries Committee on Copyright. The library position on copyright law revision. (90 *Library Journal* 3403-3405, no. 15, Sept. 1, 1965.)

"A slightly edited version of the statement presented on June 3 to a subcommittee of the House Judiciary Committee by Rutherford D. Rogers, director of the Stanford University Libraries, on behalf of the Joint Libraries Committee on Copyright, of which he is chairman."

109. KARP, IRWIN. Can Omnibus Copyright Pass Congress? (237 *Variety* 183, no. 7, Jan. 6, 1965.)

A review by the counsel to the Authors League of America, Inc. of the progress toward revision of the Copyright Act.

110. KENT, CECIL C. Creative Canada. A series of seven articles. *Industrial Canada*, 1964. (Canadian Manufacturers Association, Toronto, 1964.) 21 pp.

No. 7 in this series, by a foremost patent, trademark and copyright expert of Canada, discusses The Law of Copyright.

111. KOEPKE, JOHN C. Implications of the copyright law on the dissemination of scientific and technical information. (54 *Special Libraries* 553-556, no. 9, Nov. 1963.)

A brief summary of "the goals, methods and results" of the special study by George Fry and Associates entitled, "Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields," published at 11 BULL. CR. SOC. 69-124, Item 61 (1963).

112. KRISTOL, IRVING. Of copyrights and commissars. (48 *The New Leader* 12-13, no. 8, Apr. 12, 1965.)

A warning that the possible adherence of the Soviet Union to the Universal Copyright Convention would have unfavorable consequences for the American intellectual and publishing communities, and for "the most enterprising (and therefore least orthodox) Russian writers."

113. KRUSE, PAUL. Piracy and the *Britannica*: unauthorized reprintings of the ninth edition. (33 *The Library Quarterly* 313-328, no. 4, Oct. 1963.)

"A chapter in the history of literary piracy," adapted from the author's unpublished doctoral dissertation (University of Chicago), "The Story of the *Encyclopaedia Britannica*, 1768-1943."

114. LACY, DAN. Copyright revision and the scholar. [Chicago, 1965]. [4] p. Reprinted from the January 1965 issue of *Scholarly Books in America*.

A brief analysis of provisions of the 1964 copyright revision bill which are of interest to scholars. The conclusion is reached that "with the exception of the manufacturing clause, the interests of scholarly authors have been reasonably provided for in the proposed new legislation."

115. LACY, DAN. Federal foundations for arts & humanities. (187 *Publishers' Weekly* 14-18, no. 13, Mar. 29, 1965.)

"[A] condensation of testimony which Mr. Lacy [managing director of the American Book Publishers Council] gave on March 5. before a special subcommittee of the Senate Committee on Labor and Public Affairs in support of the legislation to establish the foundations, S. 315 and S. 316." The testimony includes references to educational broadcasting and the manufacturing clause as factors in copyright law revision, and the tax treatment of authors with respect to capital gains for royalties.

116. LANDAU, JACK C. Some wrongs need righting in the copyright law: bill before Congress would strengthen outdated rules. (*The Washington Post* E3, Mar. 28, 1965.)

An article on the pending copyright general revision bill. The text of the article also appears in 111 *Cong. Rec.* A1670 (daily ed. Apr. 6, 1965), where it was inserted by Congressman St. Onge, one of the co-sponsors of the bill.

117. LATHAM, PAUL A. Revision of the copyright law. (142 *Science* 148, 150, no. 3589, Oct. 11, 1963.)

A letter to the editor adding "some details" on copyright duration, the subject of a previous letter by Franklin Folsom and a reply thereto by Hayward Cirker. [141 *Science* 483 (Aug. 9,

- 1963)]. The writer opposes the proposed extension of the copyright term as not being in the public interest, particularly with respect to scientists. See 11 BULL. CR. SOC. Items 45, 46 (1963).

118. LAWLOR, REED C. Applications of computers to law; a progress report. (*Data Processing Yearbook* 199-206, 1963-1964, Detroit, 1963.)

A discussion of the role of computers in the future life of the law, and a review of the recent developments in this field, with a brief comment on the revision of the United States copyright law, which the author expects will have "a great impact on the progress and development of computer technology."

119. Legislative outlook: Congress to weigh copyright, tax issues. (79 *Book Production Magazine* 42-48, no. 2, Feb. 1964.)

Contents: Manufacturing clause necessary for survival, by J. E. French. Survey of issue from Publishers' viewpoint, by D. Lacy. Planning can increase tax benefits, by R. J. Englert.

120. LINTON, DAVID. H.R. 4347 and you. (57 *Popular Photography* 51, 92-95, no. 3, Sept. 1965.)

"This article explains the shortcomings of the present law and the potential improvements offered by the new bill, as they apply to photography."

121. MYATT, CARL. New fines would tap pirate booty. (75 *Billboard* 34, no. 47, Nov. 23, 1963.)

A brief article on a bill recently introduced in Hong Kong which would increase considerably the penalties for copyright infringement. According to the article, "a government press release stated heavier punishments were necessary because of the import of sound recordings made in breach of the copyright covering the original works."

122. MUNSTER, J. H., JR., and JUSTIN C. SMITH. The care and feeding of intellectual property: how much legal protection of "property rights" in ideas is desirable? (148 *Science* 739-743, no. 3671, May 7, 1965.)

The authors conclude with some advice on what the researcher can do to protect his ideas.

123. New technology challenges private enterprise publishing. (41 *Book Production Industry* 48-49, no. 4, Apr. 1965.)

A summary of some of the copyright issues discussed at a recent seminar of the American Textbook Publishers Institute, with special reference to new reproduction systems.

124. PILPEL, HARRIET F. Today's Media Pose Problems. (237 *Variety* 7, 42, no. 7, Jan. 6, 1965.)

The right of privacy and how it fares today in the press, advertising and drama.

125. PRESTON, JEAN. Problems in the use of manuscripts. (28 *The American Archivist* 367-379, no. 3, July 1965.)

The present and proposed copyright law are considered inadequate to provide the historian with publication rights to manuscript letters within a reasonable time.

126. Proposed new copyright law—good and bad, The (19 *The Instrumentalist* 74, no. 6, Jan. 1965.)

A brief editorial comment concerned principally with the effect on schools and churches of some of the provisions of the 1964 general revision bill dealing with reproduction and performing rights in music.

127. RINGER, BARBARA A. No place for poetic license: the Copyright Office at LC. (90 *Library Journal* 2958-2963, no. 13, July 1965.)

A thumbnail sketch of the operations of the Copyright Office, including its activities in connection with copyright law revision.

128. SCHMEDEL, SCOTT R. Taped television: home video recorders may have wide impact on leisure-time habits. Fairchild, Cinerama systems store pictures and sound for playback on TV sets. Home movies, rented tapes. (164 *The Wall Street Journal* 1, 12, no. 11, July 15, 1964.)

An informative article on the forthcoming production and distribution of simple and relatively cheap home versions of commercial video tape recorders which can be plugged into television sets for recording both pictures and sound on tape and playing the tape back.

129. SINKANKAS, JOHN. Reprographic copyright. (17 *Cosmos Club Bulletin* 2-3, no. 2, Feb. 1964.)

A member of the Cosmos Club comments briefly, with approval, on an article by Mr. Curtis Benjamin published in the Aug. 1963 issue of the *Library Journal*, under the title, "Book Publishers' Interests in Reprographic Copyright." The writer agrees with the thesis set forth by Mr. Benjamin, in his arguments against copyright revision proposals for freer reproduction of copyrighted material, that authors of scientific and technical books are interested in royalties. See 11 BULL. CR. SOC. 64, Item 44 (1963).

130. SPIVACKE, HAROLD. A national archives of sound recordings? (88 *Library Journal* 3783-3788, no. 18, Oct. 15, 1963.)

The chief of the Music Division of the Library of Congress discourages the establishment of a new institution to serve as a national archives of recordings, but considers an increase in the number and scope of record collections as a job for librarians. He indicates that "whether it be in the new copyright law or in special legislation drafted for the purpose, a legal requirement to deposit records manufactured in the United States is the only way that we can be sure of preserving our productions for future generations."

131. SYLTE, ANN. How much can you quote? (43 *Writer's Digest* 27-29, no. 11, Nov. 1963.)

Advice to writers on the mechanics and legal aspects of quoting from copyrighted works.

132. WALSH, JOHN. Patents and copyrights: Congress moves toward comprehensive policy on federally financed research. (148 *Science* 54-56, no. 3666, Apr. 2, 1965.)

An article on the so-called "Long amendment," which in effect gives the Government title to the results of federally financed research and development. The amendment, which is named after its sponsor, Senator Russell Long of Louisiana, had been incorporated into several enacted bills prior to 1965, and covered only patents. This year the amendment was successfully attached to Public Law 89-4 (the Appalachia Act), and covered copyrights as well as patents. Several bills, to which the amendment was proposed, are pending, including S. 4 (the water pollution bill), which has passed the Senate, but the amendment was stricken

by the House Public Works Committee, "reportedly after a heated discussion."

133. WESSEL, MILTON R. Legal protection of computer programs. (43 *Harvard Business Review* 97-106, no. 2, Mar.-Apr. 1965.)

A discussion of the protection of computer programs by the law of unfair competition, employee restrictive agreements, patent and copyright laws, and joint industry action, with the implications of each for management action, and an evaluation of their utility.

134. What can we expect from a new copyright law? (41 *Book Production Industry* 37, no. 4, Apr. 1965.) Signed: P.D.D.

A brief editorial on the potential impact on copyright of new systems that can bypass conventional publishing, which includes a statement that "facing mammoth investments in new technology, book manufacturers need a strong manufacturing clause as much as any industry ever needed protective measures."

135. WILSON, EDMUND. The cold war and the income tax: an author's angry protest. (3 *Show* 82-85, 123, no. 11, Nov. 1963.)

An article, from a book of the same title, which is an account of the author's "frustrating battle with the Internal Revenue Service over his tax delinquency," and concludes with an indictment of the tax laws, with particular reference to application to writers.

136. ZWERLING, BEN. Toward freer international trade in books. Action might be seen this year. Congress might finally implement the Florence Agreement—after 14 years. (1 *Book Production Industry* 38-39, 57, 61, no. 1, Feb. 1965.)

An article on the prospects for the enactment this year of legislation implementing the Agreement.

2. England

137. Books, authors and politicians: Sir Alan Herbert asks "Who will help us now?" (*The Bookseller* 2060-2061, no. 3074, Nov. 21, 1964.)

A summary of Sir Alan Herbert's article, published in the November 7, 1964 issue of the *Daily Telegraph*, in which the

author expressed his reaction to the defeat of the lending rights proposal in the recently enacted British Public Libraries Act.

138. Bridging the Russian gap. (*The Author* 19-22, Summer 1964.)
Signed: M. E. B.

A brief article on efforts of Western countries to arrange for full reciprocal copyright protection with the U.S.S.R., in which the opinion is expressed that the present Soviet copyright system places greater obstacles than before in the way of Russia's joining an international copyright convention.

139. Copyright protection for books put to industrial use. (*The Bookseller* 1914-1915, no. 3019, Nov. 2, 1963.)

An article about a memorandum prepared by Mr. R. E. Barker, secretary of the British Publishers Association, on the subject of the copyright situation arising from the industrial use of publishers' material. The matter came up as a result of a situation in which a publisher had licensed the industrial use of illustrations from one of its books, and found it had inadvertently lost all copyright protection against unauthorized industrial use of the illustrations by not registering their use under the Registered Designs Act, 1949.

140. Fair dealing and photocopying. (*The Author* 17-18, Winter 1964.)

A brief note on an interpretation of the fair dealing clause in the U.K. copyright statute by the [British] Society of Authors and the Publishers Association which have jointly agreed that "for the purposes of research or private study they would not normally regard it as 'un-fair' if a single photocopy is made from a copyright work of a single extract not exceeding 4,000 words, or a series of extracts (of which none exceeds 3,000 words) to a total of 8,000 words, provided that in no case the total amount copied exceeds ten per cent of the whole work."

141. HERBERT, SIR ALAN. Literature and the State. (*The Bookseller* 16-18, no. 3080, Jan. 2, 1965; 68-75, no. 3081, Jan. 9, 1965.)

The text of a lecture delivered before the Royal Society of Literature, in which criticism is leveled against the British Government's attitude toward authors and publishers, with special reference to the failure of Parliament to include lending right

provisions in the recently enacted Public Libraries and Museums Act.

142. KULLMAN, HARRY. Lessons from Sweden. (*The Author* 3-9, Winter 1964.)

The first in a series of reports on the way that other countries treat their writers. The present article discusses the situation in Sweden where a long-range program, based mainly on public financing, was recently established to aid authors.

143. Libraries Bill: M.P.s discuss authors' and publishers' interests. (*The Bookseller* 1850-1854, no. 3046, May 9, 1964.)

A summary of the debates during the tenth and final sitting, on April 30th, of the Standing Committee of the House of Commons, on the Public Libraries and Museums Bill. Sir Edward Boyle, the Minister of Education, affirmed his belief "that a free library service advanced civilised values in the community, and that it would be a retrograde step to go back on the principle of a free library service for the borrowing of books."

144. M. P.s argue about "free libraries." Should ratepayers or borrowers pay for increased service? (*The Bookseller* 1798-1805, no. 3045, May 2, 1964.)

A summary of the debates of the House of Commons standing committee, during the last week in April, on an amendment to the Public Libraries and Museums Bill, moved by Mr. Robert Cooke (Conservative). The amendment, which would allow libraries to make charges to borrowers, was defeated by five votes to nineteen.

145. Once and for all? (*The Author* 17-19, Spring 1964.)

A summary of a survey conducted by the Childrens Writers Group of the Society of Authors into the publishers' practice of offering outright payments to authors instead of royalties.

146. SEYMOUR-SMITH, MARTIN. What was Shakespeare worth? (*The Author* 2-7, Spring 1964.)

"[A]n article on the economics of authorship in Shakespeare's time."

147. Subsidiary rights and the publisher. (*The Bookseller* 2270-2275, no. 3102, June 5, 1965.)

At head of title: International Publishers Congress.

A summary of a paper presented to the International Publishers Congress by Mr. John Attenborough, President of the British Publishers Association, in which he discusses the growing importance of the exploitation of subsidiary rights and "the need for far more exact definition of an author's and a publisher's interests in the exploitation of all subsidiary rights."

148. Without (for the moment) comment. (*The Author* 29-30, Spring 1964.)

A brief article which criticizes the photocopying practices in certain British libraries, especially the use of "Docustat" copying slot machines, as being incompatible with the conditions laid down in the Copyright (Libraries) Regulations 1957.

3. South Africa

149. ASCHENBORN, H. J. Copyright acts and legal deposit. (31 *South African Libraries* 93-102, no. 3, Jan. 1964.)

A discussion of the problems raised by the legal deposit provisions of the bill for revision of the South African copyright law.

NEWS BRIEFS

150. English Summaries Now Added to Inter-Scandinavian Publication NIR (*Nordiskt Immateriellt Rättsskydd*).

NIR is the Scandinavian journal for the law of patents and designs, copyright, trademarks, trade names, unfair competition and antitrust legislation. It was founded in 1932 and is published by the associations for the protection of industrial property and copyright in Denmark, Finland, Norway, and Sweden. It is thus a product of Scandinavian cooperation and the Scandinavian forum in this field. Gunnar Sterner, a judge of the Stockholm City Court, is the Editor. The editorial office of NIR is at the Institute of Copyright, Patents, and Trademarks of the University of Stockholm.

Beginning in 1965, NIR has been enlarged and given a more international character. All major articles in Danish, Norwegian or Swedish now contain summaries in English and some entire articles will be published also in non-Scandinavian languages, primarily English.

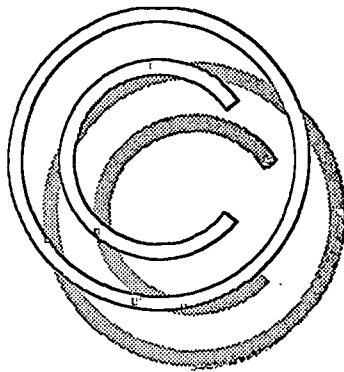
NIR publishes four issues a year, each of about 75 to 100 pages. The annual subscription fee is SKr 25 (= Swedish crowns).

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 13, NO. 2

DECEMBER, 1965

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President
EDWARD A. SARGOY

Vice-Presidents
SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary
ALAN LATMAN

Assistant Secretary
MORTON D. GOLDBERG

Treasurer
EDWARD M. CRAMER

Assistant Treasurer
STANLEY ROTHENBERG

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
PROFESSOR RALPH S. BROWN, Yale Law School
GEORGE D. CARY, Washington, D. C.
SIDNEY A. DIAMOND, New York City
ARTHUR L. FISHBEIN, New York City
PROFESSOR HARRY G. HENN, Cornell Law School
DANIEL HUTTENBRAUCK, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ROBERT H. MONTGOMERY, JR., New York City
HARRY R. OLSSON, JR., New York City
HAROLD ORENSTEIN, New York City
AVERILL C. PASAROW, Beverly Hills, Calif.
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
LAWRENCE H. REED, New York City
SAUL N. RITTENBERG, Culver City, Calif.
HARRY N. ROSENFELD, Washington, D. C.
SIDNEY SCHREIBER, New York City
JOHN SCHULMAN, New York City
CHARLES B. SETON, New York City
FRIEDA M. TANNENBAUM, New York City
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York City
RICHARD WINCOR, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011
Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1965 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

PAGE

PART I. ARTICLES.

CLOSING SESSION OF THE HEARINGS IN THE HOUSE OF REPRESENTATIVES ON THE COPYRIGHT REVISION BILL	
<i>Statement of Abraham L. Kaminstein</i>	97
<i>Statement of Emanuel Celler</i>	113
<i>Closing Remarks before the Committee</i>	118
THE UNITED STATES INCOME TAXATION OF NONRESIDENT ALIEN ENTERTAINERS, COMPOSERS AND PUBLISHERS	
Stanley Hagendorf and Alan H. Bomser	123

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and Territories	132
2. Foreign Nations	132

PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS

134

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U.S. Courts	
1. Federal Court Decisions	135

PART V. BIBLIOGRAPHY.

A. Books and Treatises	
1. United States Publications	153
2. Foreign Publications	153
B. Law Review Articles	
1. United States	153
2. Foreign	
1. English	154
2. English, French and Spanish	156
3. French	157
4. German	157
5. Italian	159
C. Articles Pertaining to Copyright from Trade Magazines	
1. United States	160
2. England	160

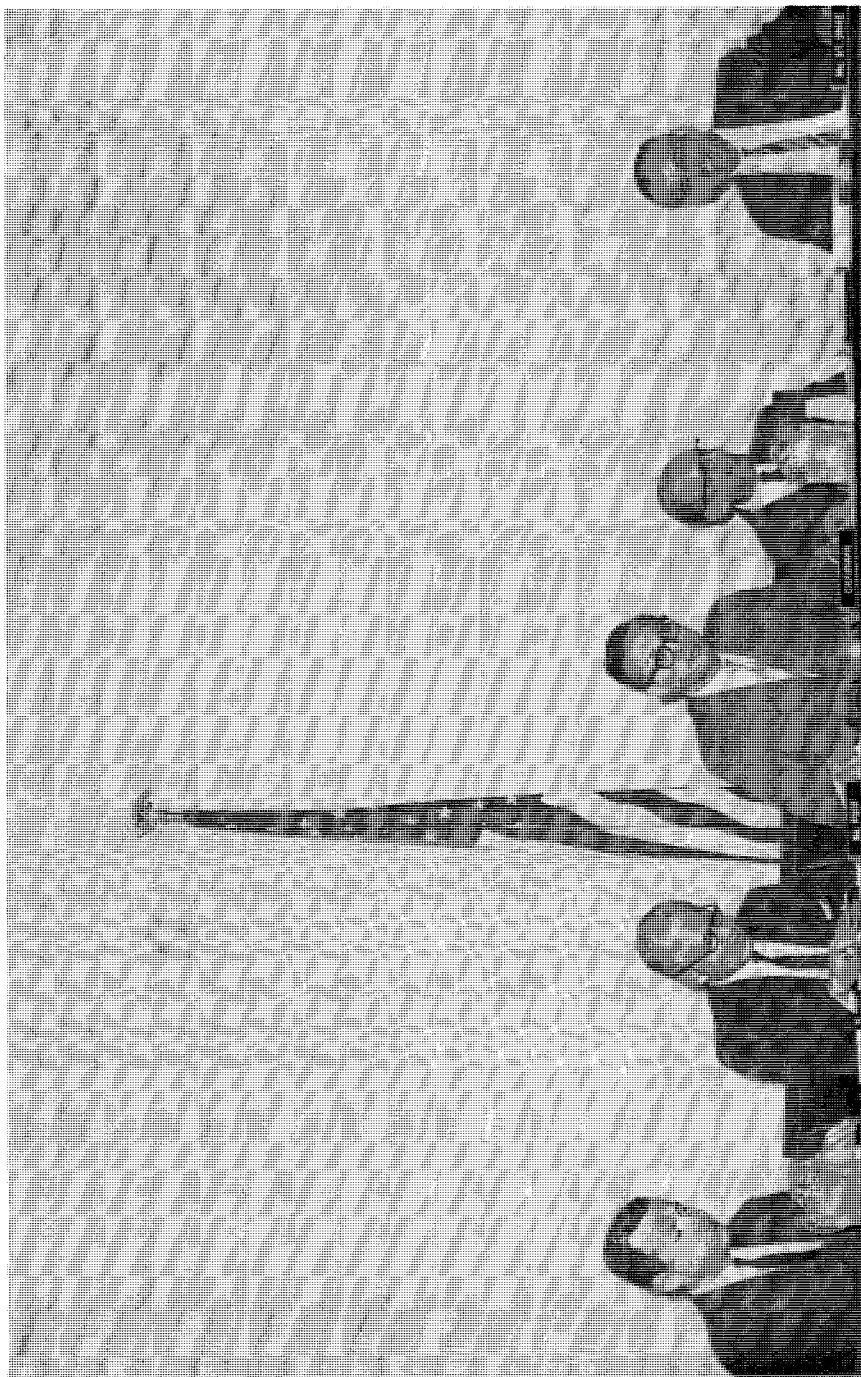
THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 12 BULL. CR. SOC. page no., Item (1965).



SUBCOMMITTEE NO. 3, HOUSE COMMITTEE ON THE JUDICIARY ON H.R. 4347,
THE COPYRIGHT REVISION BILL, September 2, 1965

Reading from the left : Allan Cors, Minority Counsel; Congressman R. H. Poff (R. Va.) ; Congressman Robert Kastennier (D. W.s.), Acting Chairman ; Herbert Fuchs, Majority Counsel ; and Congressman W. L. St. Onge (D. Conn.).

PART I.

ARTICLES

151. CLOSING SESSION OF THE HEARINGS IN THE
HOUSE OF REPRESENTATIVES ON THE
COPYRIGHT REVISION BILL

*Statement of the Register of Copyrights to Subcommittee No. 3,
House Committee on the Judiciary on H.R. 4347, September 2,
1965.*

By ABRAHAM L. KAMINSTEIN

My name is Abraham L. Kaminstein and I am Register of Copyrights. I am honored to appear before your Committee as closing witness in this historic series of hearings. I am accompanied by two associates already familiar to this Committee as the craftsmen principally responsible for drafting the bill, the Assistant Register of Copyrights for Examining, Barbara Ringer, and our General Counsel, Abe Goldman.

For those who find them impressive—and I confess that this includes me—the statistics of these hearings are worth noting for the record: 22 days of testimony over a period of more than three months, from some 163 witnesses, with more than 2,300 pages of oral transcript, plus written statements numbering more than 150 and running to some 1,600 pages. But more remarkable than the size of this massive record is its substantive weight and its relative freedom from bombast and meaningless polemics. The testimony on both sides of even the most sharply disputed issues has been for the most part constructive, temperate, and meaningful. The record of these hearings contains a full and intelligent discussion of the arguments on each of the main points of conflict, as well as comments and suggestions on a number of matters of detail and language which your Committee will wish to consider. All this will be of immense value when the time comes, as it soon must, for the necessary job of redrafting.

Throughout the hearings there have been a number of statements with which I disagree on legal or technical grounds, or which I feel require qualification or fuller explanation. There are also a good many matters of detail which need further analysis in the light of the comments or arguments that have been presented to your Committee. How-

ever, mindful of Voltaire's definition of a bore as a man who tries to say everything, I am going to confine my remarks today to the main issues in dispute—of which, I am sorry to say, there are still plenty. We in the Copyright Office are now in the process of preparing summaries, syntheses, and analyses of all of the testimony and statements presented during these hearings, with the hope that they will be of help to you in the redrafting process. My staff and I are, of course, ready today and in the future to answer questions or to assist the Committee in every possible way.

Right now, if my own experience is any guide, some of the results of the past three months may look to you like a painting viewed too close: little dabs of paint without any clear meaning or relation to one another. What I would like to do is to help you to stand back and to look at the entire bill in the light of these hearings, viewing its composition whole. I think you will find, as I did, that something that may seem overly complex and muddled at close range will appear much simpler, coherent, and workable at the proper distance. And, when the bill is seen in perspective, I am confident that solutions to the remaining problems will begin to emerge.

SUBJECT MATTER OF COPYRIGHT

Sections 102 through 105 deal with the subject matter of copyright, and it is gratifying here, as elsewhere, to realize that the basic approach of the bill has been accepted and that the issues in dispute have been sharply narrowed. This group of sections now appears to present two major questions still to be resolved:

Should protection be granted to unpublished works without regard to the nationality or domicile of the author? All unpublished works, whether of American or foreign origin, are now protected under the common law, and the bill would continue this protection under the statute. I do not believe any convincing reasons have been put forward as to why this protection should be cut off. Moreover, as we pointed out in the *Supplementary Report*, to do so would present inordinate technical difficulties. Citizenship and domicile are things that can change, and there is no point of time at which it would be practical to fix the status of unpublished works. Equally important, under the Universal Copyright Convention the United States is obliged to protect works first published in U.C.C. countries; if unpublished works were to be subjected to citizenship and domicile requirements, it would be necessary to provide a procedure for retrieving a work by a non-U.C.C.

national from the public domain at the time of its first publication in a U.C.C. country. There is no necessity or justification for burdening the provision with these complications.

Should copyright be permitted in United States Government works under exceptional circumstances? A good deal of the heat appears to have gone out of what was once a burning issue, but the question is still one the Congress has been called on by some Government agencies and book publishers to decide. In the *Supplementary Report* we noted that there are undoubtedly a few Government works which would be given broader and more effective dissemination through commercial channels, and that in those cases copyright protection would do no harm and might actually benefit the public. We concluded, however, that there are not enough of these cases to justify setting up the elaborate procedures and safeguards necessary to insure against abuse of the privilege. No factual basis has been furnished at these hearings to make me believe it necessary to change that recommendation.

EXCLUSIVE RIGHTS UNDER COPYRIGHT

It is certainly no secret that the greatest number of problems still to be resolved, and the toughest ones, arise from sections 106 through 114, dealing with the exclusive rights of the copyright owner. In approaching these problems, however, it is important to realize that they are confined to specific substantive issues; there has been general acceptance of the basic structure and approach of the rights sections of the bill, and of a number of provisions that represented points of conflict in the past. In the smoke of battle it may not seem too clear, but a lot of progress has already been made.

Moreover, I do not consider it unfortunate that the revision program has thrown a spotlight on the mutual challenges between the new communication and reproduction devices and the copyright law, and that in doing so it has stirred up a number of sleeping dogs on both sides. The dawning realization of these unprecedented challenges and dangers has provoked a whole series of meaningful and significant debates. While I do regret the oversimplifications and misunderstandings that have marked some of these exchanges, I believe that ultimately the bill will be better because of them.

Before dealing with the eight major controversies arising from the rights sections, I should like to point out the various alternatives that are available for dealing with these controversies. In any situation in

which the rights of copyright owners and the corresponding privileges of users must be balanced, the statute can do one of four things:

1. It can grant the exclusive right with no limitations other than the general limitation of fair use;
2. It can deny the right entirely or deny it in certain specified situations;
3. It can grant the right but make it subject to a compulsory license, enabling a user to utilize a work without the need for advance clearance, upon payment of a statutory royalty but without the danger of liability for statutory damages;
4. It can grant the exclusive right but limit the recovery possible under the remedies sections: the user is induced to obtain an advance license but, if he fails to do so, he is shielded from liability beyond a stated limit.

I believe that the eight problems I am now going to discuss can each be resolved within the framework of one of these four alternative methods.

Fair use and the right of reproduction for educational or research purposes.

This issue is notable not only because its implications for authorship, publishing, education, and scholarship are far-reaching, but also because each side in the controversy performs a vital public service which contributes to the other. There are, I believe, three points here which need to be re-emphasized:

- (1) The bill would in no way whatsoever diminish the privilege that schools now have under the present law with respect to classroom uses of copyrighted material. Anything that can be done under the doctrine of fair use now could be done under the bill, and the bill, even more clearly than the present law, completely exempts performances and exhibitions in classrooms and "in-school" instructional broadcasts.
- (2) The doctrine of fair use, as the courts have evolved it, depends on a number of variable factors, including but by no means confined to the commercial character of the use and the effect on the author's potential market. Assuming that the necessary factors are present, some limited uses for nonprofit educational purposes would undoubtedly be held to constitute fair use under both the present law and the bill, but each situation would have to turn on its own facts.

- (3) While the present law contains a "for profit" limitation with respect to the right of public performance, the right of copying is an absolute right, unqualified by any "for profit" limitation. Any nonprofit copying under the present law would clearly constitute infringement unless the doctrine of fair use were applicable. The bill would not change this situation in any way. I believe that there have been serious misconceptions on this point among the educational community which have clouded and distorted the true issues and have made solutions much more difficult. The Copyright Office is preparing a legal memorandum on this subject which we plan to present to the Committee for its information, and I hope that the representatives of the educational groups will also help to clear up this unfortunate misunderstanding.

On August 19 Mr. Rosenfield presented his analysis of eleven "possible teacher uses in instruction" of a map taken from the front cover of a Sunday newspaper supplement, in terms of whether each use would constitute an infringement under the present law, the bill, and his group's proposals. I believe his analysis was a fair one and, while I do not agree with it in every detail, I am not prepared to challenge its basic conclusions. It does seem to me, however, that the presentation underlines an important point: that some of the things educators are seeking the privilege to do under the bill are things which are infringements of copyright today. It also illustrates the difficulties of generalization here; it seems likely that some of the educators' claims would be different if, instead of appearing in a newspaper, the map were a part of a reference work such as an encyclopedia, if it were sold in the form of slides intended for projection, or if it were sold separately for classroom use by students.

I believe a great deal could be gained if we confront this problem, not on the erroneous assumption that the bill would deprive teachers of privileges they have now, but directly on the issue of whether certain educational and research uses should be freed from the copyright protection existing under the present law. Looked at in this way, the alarm and seriousness with which the authors and publishers have opposed proposals for sweeping educational exemptions are certainly understandable. A report dated February 4, 1965 from the Office of Federal Education Activities, Federal Education Programs Branch, Office of Education, Department of Health, Education and Welfare, states that the estimated obligations of Federal funds "for education and training and for the support of academic science" is more than six billion dollars

for fiscal 1965 and close to nine billion dollars for fiscal 1966. Some of these enormous sums will unquestionably be used to acquire new devices intended for the reproduction of copyrighted works.

Obviously, authors and publishers whose livelihood depends upon the sale of copies to educational markets could be expected to fight any revision bill that could destroy this market by allowing the untrammelled use of copying devices without insuring a fair compensation for that use. At the same time, I believe that both sides could benefit substantially from a bill that would not only permit occasional copying of excerpts for limited classroom distribution without the need of following difficult clearance procedures or the dangers of statutory liability, but that would also induce the establishment of a simple and reasonable system for payment of royalties. I do not think it is too much to hope that both sides will realize the validity of this goal, and will help in working toward its realization.

Computer uses.

Under the bill the reproduction of a copyrighted work for storage or use in a data processing machine, and the "print-out" or reproduction of the work in the form of copies by the machine, would both constitute infringements unless the reproduction were limited enough to constitute fair use. Although these provisions, and especially the one requiring consent for "input," have provoked some concern, I believe that the potential impact of computer uses upon the copyright owner's rights is too great and far-reaching to justify exemptions in these two situations.

It has been pointed out that, instead of printing out the work in copy form, computers now, and increasingly in the future, will display the work temporarily on a television screen or the equivalent. Under the bill this would be an infringement only if the image of the work is transmitted beyond the location of the computer in which the copy is stored; I do not believe that the transitory image of a copyrighted work, taken from an authorized reproduction stored in a computer and consulted at the computer site, should be treated as different from the consultation of a book in a library. The bill would not exempt the ordinary transmission of an image from one place to another, whether by computers or otherwise, but transmission of an image for classroom use would be freed from copyright control. This latter exemption has caused concern among book publishers, and its implications for the future deserve further study.

Educational broadcasting.

Under section 109(4) of the bill, public performances of non-dramatic literary and musical works, "otherwise than in a transmission to the public," would be exempt if there is no commercial motive, if there is no admission charge, and if there is no "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The educational broadcasters have suggested deleting the phrase "otherwise than in a transmission to the public," thus freeing more than "in-school" instructional broadcasting from copyright control. It is not clear to me just how far the proposed exemption is intended to go, however.

If the suggested language is intended to free the broadcasting of any recorded programs for which the "performers, promoters, or organizers" had been paid originally, the effect would be the virtually complete exemption of educational and other nonprofit broadcasting of non-dramatic literary and musical material. For reasons already advanced at some length in the *Supplementary Report* and in Mr. Cary's testimony on the first day of these hearings, I believe that such an exemption is too broad. On the other hand, it is possible that the intention is more limited, and I believe it would be helpful if the proposal could be clarified to answer the following questions:

- Is it intended to exempt the transmission of recorded or live performances by professional performers, announcers, and the like?
- Is it intended to exempt the transmission of recorded programs where "residuals" or "reuse" fees are paid to nonprofessional performers?
- Is it intended to exempt the transmission of recorded programs produced originally by a commercial enterprise?
- Is it intended to exempt the transmission of recorded or live programs produced by the employees of a nonprofit organization whose main function is the production of programs?
- Is it intended to exempt the transmission of recorded or live performances by performers who are paid a salary for full-time activities such as teaching, but whose duties mainly involve appearances in educational broadcasts?

It seems possible that the answers to these questions could point the way to a solution of this problem,

Community antenna systems.

The problem of whether community antenna television systems should be liable for the use of copyrighted material in commercial broadcasts they retransmit is not only one of the most difficult facing your Committee, but it is also greatly complicated by uncertainty as to what the present law on the question is. Although the issue is now before the courts, it seems unlikely that any final resolution of the problem will be reached for several years, and I believe it would be most unfortunate if Congress were to deny copyright owners any rights against CATV systems because of the difficulties in working out the various practical problems.

The recent action of the Federal Communications Commission in taking jurisdiction over community antenna systems for certain purposes has raised speculation as to whether the copyright problem might be solved by requiring the CATV operator to obtain permission from broadcasters to transmit their signals, thus automatically clearing any copyrighted material included in the broadcast. While this possibility has not been debated publicly as far as I know, I am inclined to doubt whether it would meet with much favor from either copyright owners or CATV operators. In any event, since the basic question is one of copyright protection and the right to collect royalties under the copyright law, I see no way to avoid coming to grips with the issue under this bill.

The main conclusions indicated in the *Supplementary Report*—that the copyright owner should be compensated for the use of his works by CATV systems, but that the practical difficulties of advance clearances should be recognized—have been confirmed and reinforced in my mind by the extensive and articulate testimony you have heard on both sides of this question. This suggests that at least one solution might be sought through a special provision limiting or remitting liability for CATV uses under certain conditions.

Ephemeral recordings.

As the *Supplementary Report* explains in some detail, section 110 on "ephemeral recordings" appeared for the first time in the present bill as a response to separate demands from educational broadcasters and commercial broadcasting organizations. No such privilege of making recordings is given to broadcasters in the present statute. Because the provisions of this section are new and untried, you have heard a good deal of opposing testimony, both from copyright owners who feel

it goes too far and from broadcasters who feel it does not go far enough. I look on this as a sorting-out process of a kind we have experienced before in developing this bill.

It seems probable that this section is going to have to be revised, but I also detect a general recognition that the United States should adopt a provision, such as is common in foreign copyright laws, giving broadcasters a limited privilege of recording their own programs. I am confident that the reasonable metes and bounds of this privilege can be worked out.

Rights in sound recordings.

As must be obvious to you, this bill contains a number of what might be called "half-a-loaf" provisions, and section 112 is one of them. By recognizing sound recordings as copyrightable works with rights of reproduction and distribution, but by denying them rights of public performance, the bill reflects—accurately, I think—the present state of thinking on this subject in the United States. I look on this, not as mere expediency, but as a necessary and conscious recognition of what will and will not be accepted in this country today in this evolving field.

Let me say plainly: there is no doubt in my mind that recorded performances represent the "writings of an author" in the Constitutional sense, and are as fully creative and worthy of copyright protection as translations, arrangements, or any other class of derivative works. I also believe that the contributions of the record producer to a great many sound recordings also represent true "authorship" and are just as entitled to protection as motion pictures and photographs. No one should be misled by the fact that in these cases the author expresses himself through sounds rather than words, pictures, or movements of the body. There is a great deal of case law in this field, and it is in full support of the principles embodied in section 112.

Under these circumstances it is hardly surprising that you have heard testimony from representatives of performers and some record companies urging recognition of a performing right in sound recordings. There is much to be said for this point of view, and it is possible that this right will eventually be recognized in the copyright law of the United States as it is now in other countries. But I believe—and this is a conviction based on years of experience with this problem here and abroad—that the chance now of enacting a copyright law in this country that recognizes any rights of public performance in sound recordings is so remote as to be nonexistent. You have seen no towering wave of opposition to these proposals simply because there is a general feeling

that they will not get anywhere; but, if genuine fears were to be aroused on this score, I am sure you would see a wave of protest that would be likely to tear this bill apart.

The compulsory licensing rate.

As I interpret the extensive testimony that has been presented to you on section 113, there appears to have been a general acceptance of the revised compulsory licensing provision on both sides, and the controversy seems to have boiled itself down to the economic issue of the statutory royalty rate. On this point I am most reluctant to take a flat position, or even to express firm opinions, until we have had an opportunity to study thoroughly the mass of data and arguments offered here. For these reasons, I hope you will regard the following observations as tentative:

— My conviction that, in addition to a flat rate per record, there must be an alternative rate based on playing time was strengthened during the hearings. The quarter-cent per minute rate now prevalent in the industry strikes me as much too low, but I was also impressed by the undesirability of establishing a rate that would impose artificial time restrictions on recordings. I am now inclined to think that the one-cent per minute rate provided in the bill is too high, whether the basic rate remains three cents per record or not.

— I agree with the argument that the decline in the value of money since 1909 is not a conclusive answer to whether two cents is a fair rate today. The entire industry has changed so radically in 56 years that, although unlikely, it would not be impossible for a rate of two cents to have been fair then and to remain fair now. What we must do is look carefully and objectively at the situation as it presently exists, bearing in mind that statistics, even the fullest and most accurate, cannot tell the whole story.

— There has been nothing whatever offered during these hearings to change my view that the present statutory rate of two cents per record *manufactured* has operated as an absolute ceiling. While two cents does seem to be the going rate in most cases, it represents records *sold* and does not include the large quantities of club dividends, free records, dealer returns, etc., which would have to be paid for under the statute. Moreover, there still appears to be a substantial number of licenses negotiated at a rate below two cents per record sold—enough to show that a rate below the statutory ceiling can be negotiated when called for by economic factors.

— The whole picture presented at these hearings suggests that the present statutory rate is operating as an artificial ceiling under which the bargaining is necessarily of the take-it-or-leave-it variety. I hold no brief for three cents, and that rate may well be more than the industry can afford to pay in the light of present conditions; at the same time the fact that the going rate has been at the two-cent mark in a growing preponderance of cases implies to me that the present statutory ceiling is keeping the lid on too tight, and that there is not enough range within which anything like real, two-sided negotiations can take place.

The jukebox provision.

We come now to a subject dear to all our hearts: the problem of how to deal with the public performance of copyrighted music on jukeboxes. Having been charged at these hearings with "obvious bias," I suppose I should reply by admitting a strong bias against the complete exemption of jukebox performances under section 1(e) of the present law and by expressing the hope that this bias is very obvious. However, I think that these hearings have carried us beyond the stage of invective and that we are now, at long last, on the threshold of a constructive solution to this difficult problem.

At the hearings on June 9, Mr. Allen stated the basic position of the jukebox operators succinctly and well:

If the automatic phonograph operators are compelled to negotiate with these huge performing rights organizations . . . as would be the case if Section 114 is enacted, they cannot possibly do so on equal terms. . . . It is this "open-end" aspect of the new law, which is inherent in an outright repeal of the present exemption, that causes the operators their greatest concern. Added to this is the danger of statutory damages for unintentional infringement to which the operators would be exposed, which could amount to as much as \$10,000 plus costs for a single violation.

Then, after reviewing the reasons why the operators felt that no added jukebox royalty is justified, Mr. Allen came forward with a concrete proposal:

If, however, this committee and the Congress believe that the operators should pay more, then it is their belief that this should be done through the means now provided in the existing law, that is, by an increase, an add on to the mechanical royalty. This

method has the advantage: (1) that there is a statutory maximum which will protect operators against exorbitant charges; (2) it will obviate the necessity for any bargaining with the performing rights organizations; and (3) the royalties that are paid will most accurately reflect the popularity—the “performance” if you will—of records that are played on these machines.

This alternative proposal is submitted by the operators in all good faith. It is intended to be applicable only to records purchased by them for use on automatic phonographs. . . .

Proposals of this sort have been advanced before, and have been opposed on the ground that they would require record companies to maintain double inventories or to act as involuntary collection agents. I agree that there is no theoretical justification for imposing this burden on record companies, and I doubt whether any such system could be made to work well in practice. On the other hand, I believe that the basic proposal advanced by the jukebox operators would not necessarily have to involve the record manufacturer in the payment procedure. As I suggested at the hearings in the Senate Committee two weeks ago, alternative methods, such as the purchase from a performing rights society or other copyright owner of stamps at a specified rate for affixation on jukebox records or machines, might be worked out under statutory safeguards.

I am fully aware of the practical difficulties a system such as this would present, but I believe that there are similar difficulties inherent in any system that can be devised to meet this problem. I should like to emphasize that, while the Copyright Office is committed to finding a fair and workable solution to the jukebox problem within the context and as a part of the general revision of the copyright law, it is not committed to any particular formula for working out this problem. I should like to urge again that all concerned give the possibility of alternative proposals their careful and openminded consideration.

OWNERSHIP OF COPYRIGHT

The problems I have already discussed involve the first 14 sections of the bill. It is worth noting that at least at present the remaining 51 sections appear to present only five issues worth mentioning here, and of these I consider only two (duration and the manufacturing clause) as of major importance. Most amazing to those of us closely involved in the development of the bill is what has happened with respect to the

so-called "reversion" or "termination of transfers" provision now found in section 203. This, which was once by all odds the most explosively controversial provision in the bill, appears to have largely receded as an issue in general revision.

The one remaining issue on ownership of copyright that should be mentioned here is raised by the proposal advanced on behalf of screen writers and composers which would change the status of "works made for hire" under both the existing law and the bill, and would substitute the equivalent of the "shop right" concept of the patent law. The concept of an employer for hire as "author" is an important one in the present statute, and in our 1961 *Report* we recommended continuation of the present rule that all rights vest in the employer as the most practical solution to the problem. The proposed "work made for hire" provisions, which are based on this premise, represent a carefully worked out compromise whose effects are felt throughout the bill. The suggestions for changing them are put forward by authors who have already achieved some of the goals they are seeking in the bill by means of collective bargaining agreements, and on balance I believe that the arguments in favor of their suggestions are substantially outweighed by the practical difficulties they would present.

FEDERAL PRE-EMPTION AND DURATION OF COPYRIGHT

I consider the provisions of Chapter 3, establishing a single Federal system of copyright and a term of the life of the author plus fifty years, as the most important group of sections in the bill. It is undeniably true, as has been pointed out here, that this represents a major reversal of the recommendations advanced in the *Register's Report* of 1961; but I am now firmly and genuinely convinced of the validity of the arguments supporting the changes in Chapter 3, and I regard them as a fundamental and essential part of the revision program. If I may, I should like briefly to review these arguments for you once more:

(1) Life expectancy has increased by more than twenty years since 1909. More and more authors find their early works falling into the public domain during their life, at the very time when they need them most to provide for their old age and for their dependents.

(2) The most important single concept under the present law, that of "publication," is based primarily on the public distribution

of printed copies. With the development of many new methods for disseminating works to the public, the concept of "publication" has become increasingly obscure and inadequate as the starting point of statutory copyright.

(3) A uniform national term of the life of the author plus fifty years is prevalent throughout the world and, in an age when works travel across boundaries in the twinkling of an eye, it is highly desirable to establish a uniform term internationally.

(4) Life-plus-fifty years is roughly equivalent, on the average, to a term of 75 years from publication, and is not too long in view of the increased longevity of authors. While there may be uncertainty in some cases as to when an author died, computing the term on the basis of the author's death has not been a major problem in other countries, and would be solved for all practical purposes by the system of presumptions established in the bill.

(5) It is important for the revised term provisions to do away with the present system of copyright renewal, which is a nightmare of complexity and which frequently results in the inadvertent loss of protection. A renewal device would be difficult to integrate into a life-plus system, even if its harsher features could be minimized. Leaving aside the legitimate needs of scholarship as put forward by representatives of archivists and historians on June 17, it seems doubtful whether the 85 percent of copyrighted material not now being renewed would represent, in the aggregate, any substantial benefit to the public if placed in the public domain before the end of the term provided in the bill. The Office is now completing a survey of the nature of the material not being renewed, and I hope to present it to the Committee for its information in the near future.

As I have said, I regard the life-plus-fifty provision as one of the foundation stones of the entire structure and content of the bill, and there is no provision on which the support of the proponents of copyright law revision is stronger or more nearly unanimous. For the most part the opposition has appeared to be isolated or of less than primary concern to the opponents. At the same time, I was strongly impressed by the arguments advanced by the Deputy Archivist of the United States and by Professor Julian Boyd on behalf of archivists and historians. Their proposal that libraries, archives, and other repositories be permitted to duplicate manuscripts for the preservation of their own col-

lections and for research use in other archival institutions struck me as reasonable and worthy of adoption.

NOTICE, REGISTRATION, AND REMEDIES

Remembering the stormy battles that raged about them in the past, it is gratifying for me to see how well the provisions on formalities (notice, deposit, and registration) and on remedies for infringement have stood up during these hearings, and to realize how much better they are as a result of being picked apart. An issue has been raised as to whether a notice should be required on copies distributed abroad but, for the reasons set forth in some detail in the *Supplementary Report*, I adhere to the belief that the bill should retain this requirement.

In general, two substantive issues have been raised with respect to the provisions on statutory damages: whether the copyright owner should be given the option of choosing statutory damages even where actual damages and profits can be shown, and whether the court should be allowed discretion to reduce or remit statutory damages in cases of innocent infringement. I believe that the right of the copyright owner to elect minimum statutory damages in cases where infringement has been proved is an important one under the present copyright statute, and that it should be preserved and made clear in the new law. I also have doubts as to the wisdom of allowing the courts unlimited discretion to remit statutory damages as they see fit. As I have already indicated, however, I regard the placing of limitations on remedies in certain situations as a possible solution to some of the disputed issues involving the exclusive rights of the copyright owner.

MANUFACTURING REQUIREMENTS

Finally I come to the painful problem of the manufacturing clause, an economic issue which has burdened our copyright law for three-quarters of a century. Let me say again, as I have said many times before, that in principle I believe that none of the exclusive rights of a copyright owner should be made to depend upon compliance with manufacturing requirements. Recognizing the immense difficulties and bitter conflicts underlying this issue, however, we have gone forward with a provision that would greatly liberalize the requirements now in effect and that would preserve the present language supporting the publishers' practices of printing American editions from imported "reproduction proofs" printed from type composed abroad.

Assessing the extensive and generally quite constructive testimony that was presented to you on August 11 and 12, my impression was that, assuming the validity of the publishers' position on "repro proofs," and leaving aside the burdens and injustices that we know to exist in some individual cases, neither the publishing industry nor the printing industry is hurting too much under the present law. The concern on both sides seems to be with the future: the publishers are concerned lest the continuation of a manufacturing requirement should hamper them in their use of new and improved methods of book manufacture, and conversely the manufacturers and printers are concerned lest repeal of the requirement should open the floodgates to foreign competitors enjoying much lower wage rates. Judged in this light, it would seem that the goal of the bill is not so much to remedy any major economic imbalance now existing between these interests, but to avoid the danger of creating such an imbalance in the future.

At this time I should like to confine my comments to subsection (c) of section 601, which as a matter of language offends me more than any other provision in the bill. This subsection was drafted carefully in an effort to preserve the status quo with respect to composition of type abroad, but to achieve this purpose it has been necessary to use the tortured, ambiguous, and virtually incomprehensible language of section 16 of the present statute. During Mr. Howard's testimony on behalf of the Book Manufacturers Institute I was impressed by the open-minded recognition that the use of foreign reproduction proofs has been "fairly widespread for the past ten years" and by his suggestion that, in order to avoid endangering substantial numbers of copyrights, the Committee consider adopting in its report "a legislative interpretation . . . exempting such reproduction proofs." Although I should prefer a clear-cut statutory provision to accomplish this end, I urge that, at the least, the suggestion of a legislative interpretation be adopted.

Mr. Chairman and members of the Committee, you may know that I was recovering from an illness when these hearings started and was forced to follow the first seven sessions from the transcript. Since June 10, however, I have been fortunate enough to attend every session except the one during which I testified at the opening of the Senate hearings. I should like to say, without belaboring the obvious, that I consider these past weeks one of the most gratifying experiences in my professional life. Thanks to you, and to your extremely able and cooperative counsel, these hearings have been conducted in an atmosphere of constructive objectivity, diligent and penetrating consideration of all sides of the issues, and an obvious determination to seek reasonable solutions and to report the best bill possible. The record of these hearings is certain

to become a landmark in the history of the copyright law and my only regret is that Arthur Fisher, the true guiding spirit behind this bill, could not have lived to attend these hearings.

In the 1961 *Report of the Register* we observed:

Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail. The ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination.

This passage has been quoted in opposition to, and as being inconsistent with, various provisions of the bill. However, I not only stand behind this statement, but I feel very strongly that the bill you have before you is based on the principles expressed in it. The bill contains a number of provisions in which the exclusive rights of the copyright owner are limited, qualified, or denied; where protection is strengthened, it is because we are convinced that this will foster creativity and thereby serve the public interest. To the best of our abilities we have tried to draft, not an "authors' bill," not a "users' bill," but a bill that would serve the ultimate public interest now and for some time to come. It is satisfying to know that our efforts are in the hands of statesmen whose concern for the genuine public interest has been constantly manifested at these hearings.

Statement by the Chairman of the House Committee on the Judiciary.

By EMANUEL CELLER

I had hoped to appear personally before this distinguished subcommittee on the last day of its copyright revision hearings. I wanted to make a few observations about the revision program and the revision bill, and I would do so more as Judiciary Chairman than as author of H. R. 4347.

Since 1946, our Committee on the Judiciary has had primary legislative jurisdiction, under the Rules of the House, of all measures affecting copyrights. Our Committee thus shoulders the solemn responsibility of guarding the intellectual property of authors and composers and making sure, in an increasingly complex society, that American creative talent will continue to receive encouragement in the form of a just return from the commercial exploitation of its works.

We are, in short, directly involved in effectuating the Constitutional purpose "... to promote the progress of science and useful arts, by

securing for limited times for authors and inventors the exclusive right to their respective writings and discoveries". In course of this involvement our Committee has played its part in the current copyright revision program, which began ten years ago with a Congressional appropriation of funds. We published the 1961 Report of the Register on the General Revision of the Copyright Law, as well as a number of succeeding volumes of discussion and comments on the Report and on ensuing draft legislation. This May, also, we published the Supplementary Report of the Register, comprising a painstaking and detailed explanation of the bill before you. As might be expected when one recalls that the Copyright Office is part of the Legislative Branch of the Government, our cooperation with the Office has been close.

Twice since the publication of the Register's 1961 Report, acting through your Subcommittee No. 3, we initiated legislation to prevent the expiration of copyrights under existing law, pending congressional confirmation of a new and longer term as part of the revision. The latter of these extensions was enacted this year and approved by the President only last Saturday. As a result, no existing renewal terms of copyright will expire before December 31, 1967, by which time a copyright revision measure will surely have been enacted. All present indications are that such a measure will provide a substantial increase in copyright term.

Other copyright activity of the Committee in recent years includes the enactment of H. R. 11793, of the 87th Congress, which penalizes traffic in counterfeit phonograph records. Also, in the 88th Congress, the Committee reported favorably to the House my bill (H. R. 7194) to repeal the notorious juke box exemption, a legislative proposal that is repeated in Section 114 of the measure now before you.

This is the background against which I introduced H. R. 4347 at the request of the Librarian of Congress (as I had done late in the 88th Congress with H. R. 11947), in order that the best current thinking of the Register of Copyrights and his staff might achieve legislative status and be subjected to the gauntlet of the legislative process.

An essential, and often a decisive element in that process is the character of the scrutiny that is given a measure at public hearings. Here I must pause to pay my deep respect to the copyright revision panel of Subcommittee No. 3 for the patient persistence you have displayed in the course of the present hearings. In this I am not alone, but would add my voice, in behalf both of the full Committee and myself, to the voices of others in and out of Congress. The conduct of these hearings has been widely applauded. It has even been described as a vindication of our legislative process.

Let me review the magnitude of your accomplishment: You have held 21 days of hearings on a complex and technical subject. You have found time to attend these hearings without skimping your other responsibilities, in a session of Congress unprecedented in its activity and its demands on individual members—a session which has seen the Judiciary Committee involved with much major legislation, including Voting Rights, Immigration, Presidential Inability, and many other matters. You have heard, I am told, more than 150 witnesses, including Members of Congress, representatives of government agencies, and spokesmen of every conceivable interest group concerned with copyright.

You have heard from representatives of football players and archivists, of broadcasters both educational and commercial, of composers of music, of movie producers and record manufacturers and librarians and juke box operators and community antenna interests and publishers, and from teachers who claim to speak with authority because they are also authors, and from authors who make the same claim because they are also teachers, and many others. You have examined these witnesses with great expertness as the hearings progressed. And you have done all this without hope of publicity or political advantage, simply because the work was there to be done—a most impressive performance.

Now, as the hearings close and the measure enters the critical phase of executive sessions, one may ask “How has the bill fared?” My own impression is that it has stood up very well under the searching scrutiny of the panel. Let me illustrate. The guiding premise of the revision program has been that the tremendous changes in technology that have taken place since 1909, which have fostered entire new industries and new methods for the reproduction of literary and artistic works, have rendered the present copyright law obsolete. It is my understanding that this premise was nowhere challenged in the hearings. I would naturally predict that your subcommittee will accept the basic premise and report a bill.

Turning next to the substance of the measure itself, I should suppose that the proposal of a single national system of copyright for all works, both published and unpublished, would meet with your approval. I am told that there may be an amendment to be made on a related point for the accommodation of archival needs, but basically, it would seem, the single system has general acceptance.

The proposal to extend the term of copyright to life of the author plus 50 years seems to me to be eminently wise and I predict that you will favorably report it. Our country has been a laggard in the protection of its authors. Even in 1909, when the present term of 56 years was enacted, all major countries except Holland and the United States

were protecting their authors at least for the duration of their lives. In the United States today, some authors are outliving their copyrights. In other cases, copyright expires shortly after the author's death, thus depriving his family of income from his works. A term of life plus 50 years will insure that the author is compensated for uses of his works during his life, and that his family will receive income from his copyrights for a reasonable period after his death. A "Great Society" can do no less for its creative authors and artists.

Copyright termination calculated from the year of the author's death is easy to administer. All the author's copyrights would go into the public domain at the same time. What is more, it is difficult to see how the public interest can be adversely affected by affording the creators of copyrightable works better protection.

Finally, the life plus 50 year term is in effect in most copyright nations of the world. Once it is recognized that the term of copyright should exceed the life of the author, there is little choice other than for the internationally prevalent term of life plus 50.

I am also favorably impressed with the provisions of the measure, whose purpose is to simplify the notice requirements and to impose fewer technicalities and avoid forfeitures. I refer to sections 404 and 405 of the Bill. Without attempting to describe the precise significance of these provisions, I recommend them to the Subcommittee's favorable attention.

A troublesome issue of many years' standing involves the so-called "manufacturing clause" of the copyright act whereunder works by Americans written in English must be manufactured in the United States if copyright protection is to be achieved. It has long been contended that this is a protectionist measure ill suited to a copyright statute. The Register, himself, in his 1961 Report recommended deletion of the clause. In the present bill, however, he has reversed this stand, confining himself to proposing modifications of the clause that would narrow its scope, primarily because of objections raised by the book manufacturing industry. In my opinion, the Register is to be commended for his flexibility—not chided for vacillation.

It may well be true that the manufacturing clause should be eliminated, and that ultimately it will be. But there is little to be gained from its elimination over the vehement objection of an entire industry and its unions. Technological changes will no doubt render the entire issue moot in a few years. Meanwhile the publishing industry and the authors should content themselves with half a loaf and accept the liberalizing changes contained in the bill. Under these, the manufacturing requirement would cover only predominantly nondramatic literary ma-

terial and would not apply to works any part of which were written by foreign authors. Importation in violation of the clause would not invalidate copyright, but would merely afford a defense to an infringer. Finally, 3500 copies manufactured abroad could be imported, instead of only 1500. I understand that there was universal approval of most of these changes, even by representatives of the unions most set against repeal. The sticking point was the survival of the clause itself. In this case, I predict the measure you report will, like the present bill, contain a manufacturing clause, however much altered and restricted.

The compulsory license for manufacture of phonograph records of copyrighted songs is another provision of the bill as to which controversy has been largely localized. No one any longer seriously objects to the compulsory license (though the Register once recommended its repeal), and the remaining issue is whether the license should cost two cents as at present or three cents as recommended by the Register. Although the matter requires study, I would suppose that some increase will be recommended by the panel, in view of the sharp changes in the price level since 1909 when the two-cent rate was adopted.

Perhaps the most perplexing issue facing you involves the permissible limits of educational copying and the request for exemption of educational television. I am advised that the publishers and authors on the one side and the educational groups on the other have now dug in and are engaged in positional or trench warfare. It seems to me that the Subcommittee, with or without the good offices of the Register, will have to activate these normally symbiotic interests into genuine negotiations for the compromise of their positions. Failing this, the subcommittee must write its own ticket. Here my predictions are negative. I believe that you will neither ignore the need of teachers for access to educational material without undue fuss, nor will you accept the thesis that authors, as a class, must subsidize education. But it is to be hoped that the subcommittee will not have to make the entire decision itself, for the publishers and authors on the one hand and the teachers on the other, both agree that they are indispensable to each other, and the issue seems to me to be eminently negotiable.

The problem of CA/TV (community antenna television) involves the effort of this relatively young industry to obtain an exemption from copyright obligation in its transmission by wire of copyrighted material picked up by it off the air. The Register in his Supplementary Report has stated his belief that no exemption is warranted, but also suggests that copyright owners should come forward with practical suggestions for solving the problem of obtaining advance clearances for all of the copyrighted material contained in a broadcast. Here, again, the problem

before the subcommittee is formidable, but I cannot envision your recommending an outright exemption from copyright liability in this area.

I turn, finally, to a subject which you know has concerned me for many years. I refer to the repeal of the notorious jukebox exemption of the present law. The Register's bill provides for repeal, as did my bill H. R. 7194 of the 88th Congress, which your subcommittee recommended to the full Committee and the full Committee reported to the House.

For all these years it has been my purpose to bring about the repeal of this grossly discriminatory provision under which the accident of coin-operation is made the determinant that alone exempts the public performance of copyrighted music for profit by means of a jukebox, while such performance by any other means whatsoever is subject to the payment of royalties. No purpose would be served by my reviewing this issue at length. The subcommittee well knows that every disinterested witness (most recently the American Bar Association and Professor Nimmer, I believe) has recommended repeal of the existing exemption as unjustified. You also know that despite my personal convictions as to the indefensibility of the present exemption, I have repeatedly stood willing to permit the issue to be compromised on mutually agreeable terms. In past years the jukebox operators have simply declined to negotiate. If they persist in this attitude, the subcommittee will have no alternative but to recommend, as it did in the 88th Congress, the outright repeal of the exemption. On the other hand, recent testimony by the Register before the other body suggests the possibility of at least one solution to this problem as to which the subcommittee may wish to invite the specific comments of the parties.

In closing, I can only express my conviction that the revision project is in the best of hands. With the assistance of the Register and his excellent staff every augury points to the subcommittee reporting a measure for enactment early in the new year.

Closing Remarks before the Committee.

Mr. Kastenmeier. Mr. St. Onge?

Mr. St. Onge. I have no questions, Mr. Chairman, but I want to commend the Register very highly for his statement this morning. I think that it has been very helpful and that the picture of the forest is beginning to emerge, and I look forward to the synthesis and comparisons that his office is preparing. I think they are going to be very helpful to the committee.

Mr. Kaminstein. Thank you, Mr. St. Onge.

Mr. Kastenmeier. Mr. Tenzer?

Mr. Tenzer. As the witness stated, we have had the testimony of 163 witnesses to date, and of course we are delighted to have the views of our distinguished Chairman of our full Committee, and the views of this dedicated Register of Copyrights. But in view of the fact that there is some possibility of accommodation, as has been suggested, between some of the conflicting interests, I would rather reserve my questions to some future time when perhaps we will have the pleasure of having Mr. Kaminstein and his staff again appear before our subcommittee at executive sessions when we may be able to inquire into his views on some of these conflicting interests, and then consider them in the light of accommodations which may have been achieved by January or February.

If that is going to be our procedure, I would reserve any further questions. There was one reference on page 18 of the testimony to a new suggestion made at the Senate hearings. I don't know that we have any information about that suggestion, and I am wondering whether copies of that proposal might be made available to the members of this subcommittee, so that we might be able to review it and have at least some understanding of the alternative proposal which has been made.

Mr. Kaminstein. Thank you, Mr. Tenzer, for the original suggestion. Of course we are available to the committee at any time. As to the proposal on the jukebox, it was not an elaborate, specific proposal. What I was trying to say, and as I have tried to say this morning, is that the proposal advanced by the jukebox operators, while difficult, is not something that should be brushed aside by anybody. It can be made to operate with additional features, but we ought to consider all the alternatives.

Mr. Tenzer. Thank you.

Mr. Kastenmeier. I appreciate your suggestion, which we can take up in executive session, Mr. Tenzer, as to whether we might have Mr. Kaminstein appear at any future date, and the other suggestions you made.

Mr. Poff. Mr. Chairman, I am in my thirteenth year in the Congress, and during the course of that time I have been privileged to participate in many Congressional investigations and hearings, some of which have lasted for as long as two years. But I can say candidly and honestly that this has been the most objective, and instructive, and constructive of any hearing in which I have participated. And I think we

are deeply indebted to all of the witnesses who have approached their advocacy without rancor and bitterness, and particularly indebted to the witnesses who have had the most responsibility for this very difficult and delicate legal craftsmanship.

I pay special tribute to those now in the witness chair and to Mr. Cary, who testified earlier, and in so doing of course I do not intend to endorse nor to criticise anything or all of what you have said. But I do say that it has been most inspiring and stimulating to me, and I would press the point only that all Congressional hearings could be so dispassionate, and learned, and so free of partisan bitterness.

I might close now, Mr. Chairman, by indicating something that maybe should be indicated for the record in further amplification of what I said earlier. The witness has posed certain rhetorical questions which probably should be answered. For that reason I hope, Mr. Chairman, that, while this may be the last day of formal hearings, we will not close the official record at this point. I think the committee may later want to consider the advisability of incorporating in the printed volume definitive responses to some of the questions which remain unanswered at this point.

I say again that this reinforces the point I made earlier that we will not be able to finish this legislation at this session of Congress and still give all concerned the opportunity they need to help us in final draftsmanship.

Thank you.

Mr. Kaminstein. I can't tell you how much I appreciate that and how much is due to the people who have worked with me over the years in preparing this bill.

Mr. Kastenmeier. Mr. Hutchinson.

Mr. Hutchinson. Mr. Chairman, I have nothing further to add, except to express this thought. I am sure it has been expressed before. I am certain that the members of this subcommittee recognized the great help and assistance that the Register and his office have rendered to us in this matter. If it hadn't been for their work over a great many years, these hearings certainly could not have progressed as smoothly and in a dispassionate, informative manner as they have. And I would just like to make that statement on the record, because certainly without the help of the Register's office and the Register, we wouldn't be at the place we are today in this admittedly technical, but also very controversial, subject.

Mr. Kaminstein. Thank you, Mr. Hutchinson. I had had some doubts over the years as to the kind of legislative history we were build-

ing up. When we issued the Report in 1961, we proceeded to panel meetings. I think this is, if not unique, then a somewhat different approach. But I think the long preparation and panel meetings and working with people who are interested in the measure has made it possible to present to you something that is less confusing than it might have been if it were thrown at you originally. And I really would like to thank the committee for the kind of consideration that has been given to this bill.

Mr. Kastenmeier. I appreciate your remarks and those of my colleagues on this subcommittee, and I concur in the hopes expressed by Mr. Poff of Virginia, with reference to the record. The Chair would like to announce that the record will be kept open for submissions, for rhetorical questions, or otherwise, until two weeks from this date. The reason for this is that we may get an early printing because there are many, many people who will want a printed record. The subcommittee may consider after that point whether there are any subsequent submissions which warrant an experimental report from this committee.

May I say in conclusion, then, that one cannot have gone through these hearings without the feeling that they must have some historical importance, not merely for those who are interested specifically in copyright, but indeed for the whole society.

We are, of course, indebted to the witnesses during these months because the hearings started, you will recall, in late May, and we hope that the legislative result of these hearings and our deliberations will meet with the approval of all reasonable men. And we hope that, even though this is a time of transition and change, the bill ultimately produced will have some enduring qualities about it. And if that is the case, it will be due in large measure to the Register of Copyrights and his staff, and to the many witnesses who have appeared before this committee.

We are grateful, then, not only for the contributions made, but also, may I say, for the goodwill expressed toward the committee during all these deliberations by one and all.

Mr. St. Onge. Mr. Chairman, before you pound the gavel, it would not be out of place, I am sure, at the present time to point out that if praise has been heaped on this subcommittee as a result of these hearings, a great deal of it has been due to the way in which the subcommittee has been chaired during these many days of hearings. And I personally want to commend you and say that I think you have done an excellent job as Chairman of the subcommittee.

Mr. Tenzer. And I share those sentiments, Mr. Chairman.

Mr. Poff. And may the minority be registered in accord.

Mr. Hutchinson. We do.

Mr. Kastenmeier. Thank you, gentlemen.

The subcommittee now stands adjourned.

(Whereupon, at 11:45 a.m., the subcommittee adjourned subject to call.)

152. THE UNITED STATES INCOME TAXATION OF NONRESIDENT ALIEN ENTERTAINERS, COMPOSERS AND PUBLISHERS

By STANLEY HAGENDORF *and* ALAN H. BOMSER*

The foreign entertainer performing in the United States, after paying his travel and living expenses, initiation and membership fees in as many as four (4) unions having jurisdiction over his services, and his United States and sometimes foreign agency and management commissions still must look forward to a formidable United States tax bite on his gross income from the United States engagements. This taxation is very different and in many respects more onerous than the taxation of United States residents. However, with proper advance planning he may be able to reduce or completely eliminate his U.S. tax obligation.

Similarly the foreign composer or publisher who grants or licenses U.S. publishing rights in his musical compositions also may be subject to stiff U.S. taxation—particularly if, as he may wish to do for sound business reasons, he grants or licenses such rights to a U.S. entity he owns or controls. Here again, the impact of the U.S. tax, to a large extent, can be controlled by the nonresident alien.

The Scheme of Taxation

A nonresident alien individual is taxed only upon income from sources within the United States. For purposes of taxation such persons are divided into two basic groups—those not engaged in trade or business within the United States and those so engaged.

A nonresident alien individual engaged in a trade or business within the United States is taxed on all his income from sources within the United States at the same tax rate as a resident. He is allowed deductions from his income but “only if and to the extent they are connected with income from sources within the United States. . . .”¹ He cannot file a joint return with his spouse and thereby utilize the income splitting provisions of the Internal Revenue Code of 1954, as amended

© Copyright 1965 by Stanley Hagendorf and Alan H. Bomser. All rights reserved.

* Members of the New York bar. Mr. Hagendorf is former New Decisions editor of *The Journal of Taxation* and the author of a book soon to be published by Prentice-Hall. Mr. Bomser is a member of the firm of Marshall, Vigoda & Bomser.

1. Section 873(a) of the Code.

("the Code").² (However, if the alien resides in a community property country, the income may be split between the alien and his spouse, thereby achieving the same results.³) He cannot utilize the head of household rate nor the income averaging provisions of the Code.⁴ This latter bar prevents him from spreading back his income to previous years and thereby reducing his taxes by means of a lower tax rate.

A nonresident alien individual not engaged in trade or business within the United States is taxed under one of two methods. If his gross annual income from sources within the United States is \$21,200 or less, he is taxed at a flat 30% rate on such gross income. He is allowed no deductions or exemptions whatever. The term "gross income" is limited to include only "interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income. . . ." ⁵ If such annual income is above \$21,200, the alien is taxed at the same graduated rate that a U.S. resident is subject to, but the alien is allowed deductions only if they are connected with United States source income.⁶ In no event however can his tax be less than 30% of U.S. gross taxable income.⁷

The entire tax structure for the taxation of nonresident aliens is subject to income tax treaties between the United States and other countries which exempt from taxation certain types of income.

The Nonresident Entertainer

The foreign entertainer who comes to the United States to perform and then return to a foreign country is classified as a nonresident alien. The test of whether an individual is a resident or a nonresident is one of fact and depends upon his intention with regard to the length and nature of his stay.⁸

In the absence of any treaty, all fees and compensation received by the nonresident entertainer for labor or personal services performed in the United States is considered gross income from United States sources and is subject to the tax.⁹ An exception exists if the entertainer is

2. Section 6013(a)(1).

3. GCM 2892 C.B. 1928 p. 182; Rev. Rule 59-199, 1959-1C.B. 182.

4. Section 1(b)(4)(A); Section 1303(b).

5. Section 871(a). The term also includes certain capital gains such as certain transfers of patent rights, by an individual.

6. Sections 871(b); 873.

7. Section 871(b).

8. Reg. 1.871-2.

9. Section 861(a)(3).

present in the United States for a period not exceeding 90 days during the taxable year, his earnings not exceeding \$3,000, and his services being performed as an employee for or under a contract with, a nonresident alien, foreign partnership, or foreign corporation not doing business in the United States (or a United States corporation if the services are performed for a foreign branch of such corporation).¹⁰ Most nonresident entertainers would not be able to avail themselves of this exception in view of its limited application. For those entertainers who do not anticipate more than \$3,000 in fees for their performances in the United States during a taxable year, a small tax saving is possible by contracting to perform services for a foreign entity, and having the foreign entity contract for the United States performance. It might also be possible to have the foreign entity pay certain of the expenses of the trip directly and thus keep the entertainer's "compensation" below the \$3,000 maximum.¹¹

The entertainer who does not qualify under this limited exception will pay a tax on his compensation from United States sources. Such an individual is classified as engaged in a trade or business within the United States, and as previously discussed, with certain exceptions, is subject to the same tax as residents.¹²

Effect of Treaties

Many income tax treaties between the United States and foreign countries exempt from U.S. income taxation residents and corporations of the contracting countries with respect to specific types of income. The United Kingdom treaty is typical.

There are no provisions in this treaty which exempt the entertainer's earnings from United States income taxation if the entertainer is self employed. However, Article XI provides:

"An individual who is a resident of the United Kingdom shall be exempt from United States tax upon personal (including professional) services performed during the taxable year within the United States if (a) he is present within the United States for a period or periods not exceeding in the aggregate 183 days during such taxable year and (b) such services are performed for or on behalf of a person resident in the United Kingdom."

10. Section 861(a).

11. See V. Treanor, T.C. Memo CCH 18,242, P-N 51, 200; Silverman, 253 F.2d 849 (8th Cir. 1958); S.J. Campbell, T.C. Memo 1961-166; Ray S. Robinson, 44 T.C. No. 2 (1965).

12. Section 871(c).

Originally, public entertainers were excluded from the protection of Article XI. The treaty was modified in 1946 to include public entertainers within the protection of this article.¹³

The term "resident of the United Kingdom" means any person (other than a United States citizen or corporation) who is a resident in the United Kingdom for purposes of the United Kingdom tax and not a resident of the United States for purposes of the United States tax.¹⁴

Thus, an entertainer who is a resident of the United Kingdom, performing in the United States under a contract with a United Kingdom resident, is exempted from United States taxation on his earnings provided he does not remain in the United States for more than 183 days during his tax year.

Utilizing the Treaty Exemption

Can a United Kingdom entertainer who is contemplating performing services in the United States escape taxation by entering into an employment contract with a United Kingdom entity and causing the entity to contract for his services? Such a course can be successful but the route is fraught with hidden tax traps.

If the entertainer forms a corporation, is the sole employee and sole source of income for the corporation, as well as the sole stockholder, the corporation probably will be ignored for tax purposes and the entertainer will be taxed as if he were self employed.¹⁵

On the other hand, if the corporation has a legitimate business purpose, the corporation will be recognized for tax purposes and the entertainer will not be taxed even though the entertainer is the sole or principal stockholder and the sole employee. The corporation however may then have its tax problems.¹⁶

Taxation of the Employee Corporation

The corporation will have United States source income which is subject to United States tax, barring an income tax treaty exemption.

Foreign corporations are taxed generally in the same manner as nonresident alien individuals. If they are not engaged in trade or business in the United States they are taxed at a flat 30% on wages and other fixed or determinable annual or periodical income.¹⁷ There is no

13. Protocol signed June 6, 1948.

14. Art. 11(g).

15. *Ingemar Johansson v. U.S.*, 336 F.2d 809 (5th Cir. 1964).

16. *Ibid.*

17. Section 881(a).

alternate tax in the event the income is in excess of \$21,200. If they are engaged in trade or business in the United States they are taxed in the same manner as domestic corporations. Gross income includes only United States source income and deductions are allowed only if connected with such income. All deductions are disallowed however if a true and accurate return is not filed.¹⁸

The United Kingdom treaty provides in Article 111:

"A United Kingdom enterprise shall not be subject to United States tax in respect of its industrial or commercial profits unless it is engaged in a trade or business in the United States through a permanent establishment situated therein."

The United States income tax regulations provide:¹⁹

"The term 'industrial or commercial profits means profits arising from industrial, commercial, mercantile, manufacturing and like activities of a United Kingdom enterprise. . . . Such term does not include rentals, royalties, interest . . . feed, compensation for personal services.' " . . . It is to be noted that royalty income is exempt under another provision of the United Kingdom Treaty. This exemption will be discussed below.

Under a literal interpretation of the provisions of the Internal Revenue Service regulation quoted above, it would seem that compensation paid to a United Kingdom corporation for the services rendered by a United Kingdom entertainer would not be entitled to the Article 111 exemption. However, Revenue Ruling 54-119, (1954-1 C.B. 158) provides with respect to the Canadian treaty which is substantially identical to the United Kingdom treaty that income of a Canadian corporation deriving from sources within the United States and attributable to the personal appearances in the United States of an entertainer does not constitute compensation for personal services as contemplated by the regulations prescribed under the United States-Canadian Tax Treaty and that such income constitutes industrial and commercial profits which are exempt from tax under the Treaty provided the Canadian corporation has no permanent establishment in the United States. Thus it would appear that a United Kingdom corporation which derives United States income for services of an entertainer would come within the exemption.

18. Section 882.

19. Reg. 507.104(b)(5). See also Reg. 507.105.

If the United Kingdom corporation is not protected by treaty it may not only be subject to the normal tax discussed above, but also a personal holding company tax.

Foreign corporations are subject to the personal holding company provisions of the Code.²⁰ In general these provisions impose an additional 70% tax on "undistributed personal holding company income". A foreign corporation is exempted from these provisions only if all of its stock during the last half of its taxable year is owned by nonresident alien individuals and its gross income from sources within the United States for a three year period is less than 50% of its world wide gross income.²¹

A personal holding company is one in which five or less individuals own more than 50% of the outstanding stock of the company. In addition, 60% of its income must be classified as personal holding company income.²² Personal holding company income includes amounts received under a personal service contract if the contract names the individual who is to perform and that individual owns directly or indirectly 25% or more of the stock of the company.²³

The personal holding company provisions are technical and mechanical and unless the company falls within its specific provisions, no personal holding company tax is levied. A corporation which is aware of the personal holding company provisions can usually avoid tax impact. It is also to be noted that if 50% or more of a foreign corporation's income for a three year period is from United States sources, a pro-rata portion of dividends paid by that corporation is classified as United States source income so that the recipient of such dividends is taxed in the same general manner as if the dividends were received from a United States corporation.²⁴ If the stockholder receives amounts which are not dividends, such amounts are not fixed or determinable annual or periodical income and therefore not subject to tax.

In summary, the foreign entertainer is taxed in several different manners, depending upon the facts involved. It is well recognized in

20. Section 541 et seq.

21. Section 542(c)(10). The Foreign Investors Tax Act of 1965 presently before Congress exempts from the personal holding company tax a foreign corporation if all its stock outstanding during the last half of its taxable year is owned directly or indirectly by foreigners.

22. Section 542.

23. Section 543.

24. Section 861(a)(2)(B). The Foreign Investors Tax Act of 1965 (see Footnote 21) would change the percentage to 80% and would include only United States trade or business income.

the tax law that an individual can arrange his affairs so as to minimize taxes, provided the arrangement is not a mere sham.²⁵

The Nonresident Composer and/or Publisher

The nonresident composer or publisher is taxed in the same manner as other nonresident aliens. The method of taxation depends upon whether or not he or it is engaged in a trade business within the United States. The mere receipt of rentals or royalties for the performance of musical works within the United States does not constitute a United States trade or business. The receipt of such compensation does constitute income from sources within the United States.

Absent an income tax treaty, the typical nonresident composer or publisher therefore will pay a flat 30% tax on royalties received for the performance of his works within the United States. If such income is received by an individual and in excess of \$21,200, he will be taxed as previously discussed.

Most treaties however, including the United Kingdom treaty, exempt from United States taxation royalty income arising from the use of copyrights within the United States. In such event no tax is paid.

However it is often advantageous for the nonresident composer or publisher to license U.S. publishing rights to a United States entity owned or controlled by the nonresident composer or publisher. This may be because of the practice of at least one major U.S. performing rights society of crediting both the U.S. and the foreign publisher for U.S. performances of a musical composition owned by foreign publisher, the U.S. rights in which have been licensed to a U.S. publisher.

If a United States corporation is formed to exploit the United States publishing rights the U.S. corporation will pay the normal corporate income tax on the royalties received. The corporation may also have a personal holding company problem since certain royalty income is personal holding company income.²⁶ All dividends paid out by such a company would be subject to United States tax. If the stock of the United States corporation is owned by a nonresident alien individual, the value of the stock would be subject to United States estate tax if the individual died while owning such stock.²⁷

Can the nonresident alien exploit the United States publishing rights in his musical composition through a United States entity and

25. See *Gregory v. Helvering*, 293 U.S. 465 (1935); *Ingemar Johansson v. U. S.*, *supra*.

26. Section 543(a)(9).

27. Section 2104(a).

still not be subject to United States taxation on the royalties? A properly planned trust, with a United States resident as trustee, can accomplish this result. Such a trust can also provide great flexibility for distributing the royalty income so as to minimize the tax impact in the non-resident's home country.

A trust having a United States trustee is a separate legal United States entity. The trust, except as discussed below, is a separate taxable entity.²⁸ The trust computes its tax, and is allowed deductions, in the same manner as a resident individual, subject however to certain exceptions.²⁹ One exception is that trusts are also allowed deductions for amounts distributed to its beneficiaries during the taxable year to the extent of its distributable net income (generally, its taxable income, i.e. gross income less expenses) so that the tax is levied only upon the net income which is not distributed.³⁰ Thus if a trust distributed all its royalty income in the taxable year it receives such income, it pays no United States tax on such income. Similarly, if the trust has expenses which are deductible it need only distribute an amount equal to its royalty income less expenses, to eliminate the tax.

The trust provisions of the Code also provide for the inclusion of such income distributed, as income of the beneficiary, but all such amounts distributed "shall have the same character in the hands of the beneficiary as in the hands of the trust."³¹ Thus royalty income paid by a trust to a nonresident alien is income to the beneficiary (to the extent of the trust distributable net income) but will retain its character as royalty income in the hands of the nonresident alien and will be exempt from tax if such income is exempt by treaty, upon receipt by the nonresident. Even if the recipient is not a resident of a treaty country, the recipient will have income only to the extent of the trust distributable net income.

This result can be achieved only if the trust is recognized and taxed as such under the Code. The typical trust which will receive such recognition is one where the trustee takes title to property for the purpose of protecting it and conserving it for the beneficiaries.³² A trust created as a device to carry on a profit making business which normally would be carried on through a business organization will not be taxed as a trust, but rather classified as a corporation or partnership.³³ A trust in-

28. Section 641(a).

29. Section 641(b).

30. Section 651(a); 661.

31. Sections 652(b), 662(b).

32. Reg. 301.7701-4(a).

33. Reg. 301.7701-4(b).

strument therefore must be drafted with great care to insure that the trust does not carry on business within the meaning of the Code.

Even assuming that a trust is not classified as a partnership or a corporation, it might still not be classified as a trust. If the grantor retains certain powers or benefits from the trust the trust will not be considered a separate taxable entity, but rather a "grantor trust".³⁴ In such event it is ignored for tax purposes and the income of the trust is deemed received directly by the grantor.³⁵ Taxwise, the royalty income would still be deemed received directly by the nonresident alien and would still remain exempt from tax if royalty income is exempt by treaty. Whether the trust would then be recognized for nontax purposes would depend upon the particular situation. The trustee is still recognized, in many situations, as the legal owner of the property.

The trust can also provide great flexibility. The Trustee can be directed to distribute all the trust income each year to a specific beneficiary, or to a class of beneficiaries, in a particular allocation or an allocation to be determined in the discretion of the trustee.

The trustee might also be given power in his discretion to accumulate income. In such event the trustee must be aware of the tax consequences especially if (1) the trust receives income which is not royalty income or (2) the trustee does not distribute royalty income received during the tax year.

The trust could also be used as an investment vehicle. If the trust generates capital gains the trust can avoid United States income taxation on these gains by distributing them to nonresident alien beneficiaries.³⁶

Other benefits can also accrue from the establishment of a trust. If properly planned, (1) death of the donor would not result in an estate tax,³⁷ (2) there would be no gift tax levied upon the establishment of the trust,³⁸ (3) the property can be protected from creditor claims and (4) the property can be shielded from foreign government blocking or vesting and foreign country laws.

In summary, a nonresident composer or publisher is usually protected from United States income taxation through treaty convention. If it is desirable to exploit the United States publishing rights through a United States entity, it is possible to retain the tax free status through the use of a properly planned trust.

34. Sections 671-677.

35. Section 671.

36. Sections 662(b), 871(a).

37. Sections 2101-2106.

38. Section 2501(a).

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. UNITED STATES OF AMERICA AND TERRITORIES****153. UNITED STATES. CONGRESS. SENATE. *Committee on the Judiciary.***

Copyright Office fees. Report to accompany H.R. 2853, submitted by Mr. Ervin (for Mr. McClellan), October 4 (legislative day, October 1), 1965. 6 p. (89th Cong., 1st Sess., S. Rep. 814).

A favorable report, without amendments, recommending the passage of the bill.

154. UNITED STATES. *Laws, statutes, etc.*

Public Law 89-297, 89th Congress, H.R. 2853, October 27, 1965. An Act to amend title 17, United States Code, with relation to the fees to be charged. Approved October 27, 1965. 1 p. (79 Stat. 1072).

See Item 153, *supra*.

2. FOREIGN NATIONS**155. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.***

Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten, vom 9. September 1965. Sammlung des Bundesrechts, Bundesgesetzbl. III 440-8. (*Bundesgesetzblatt*, Teil I, no. 51, Sept. 16, 1965, pp. 1294-1299.)

The West German law concerning the protection of rights arising under the new Law on Copyrights and Neighboring Rights. By its terms, performing rights societies are placed under government regulation.

156. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) vom 9. September 1965. Sammlung des Bundes-

rechts, Bundesgesetzbl. III 440-1. (*Bundesgesetzblatt*, Teil I, no. 51, Sept. 16, 1965, pp. 1273-1293.)

The West German Law on Copyright and Neighboring Rights of September 9, 1965. Certain provisions, especially the extension of the copyright term from life plus fifty to life plus 70, became effective on September 17, 1965. The remaining provisions become effective on January 1, 1966.

157. KENYA. *Laws, statutes, etc. (Bills).*

The Copyright Bill, 1965. A bill entitled An Act of Parliament to provide that the Copyright Act, 1956, of the United Kingdom shall cease to have effect in Kenya, and to make provision for copyright in literary, musical and artistic works, cinematographic films, sound recordings and broadcasts. (*Kenya Gazette Supplement*, no. 79, Bills no. 22, Oct. 5, 1965, pp. 385-400.)

In an explanatory note at the end of the text appears a statement to the effect that since Kenya is an importing country, the U.K. Act, 1956, which was extended to Kenya in 1963, is inappropriate. It is also pointed out that the Bill "will . . . be following the pattern of legislation adopted by Zambia and Malawi rather than that adopted by Uganda and Ghana, and this will enable Kenya to continue as a member of the Universal Copyright Convention . . . which will ensure protection for the works of local authors and artists abroad."

158. MALAWI. *Laws, statutes, etc.*

The Copyright Act, 1965. (No. 38 of 1965.) (1 *Copyright* 174-178, no. 8, Aug. 1965.)

The copyright law of Malawi, which was published in the Malawi Government Gazette of May 14, 1965, and became effective on May 24, 1965. The law, with some exceptions, is closely patterned on the Zambian Copyright Act.

PART III.**CONVENTIONS, TREATIES AND PROCLAMATIONS**

159. UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY. Conference Diplomatique de Stockholm, 1967 (Droit d'auteur). (Diplomatic Conference of Stockholm, 1967 Copyright). Comite d'Experts Gouvernementaux (Committee of Governmental Experts) 1965. Report of the Debates. Berne Convention. BIRPI publication DA/22/33. Mimeo. 38 pp.
-

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY****A. DECISIONS OF U.S. COURTS****1. Federal Court Decisions**

160. *Flick-Reedy Corp. v. Hydro-Line Manufacturing Co.*, 351 F.2d 546, 146 U.S.P.Q. 694 (7th Cir., Sept. 14, 1965) (Kiley, J.). *For decision below, see* 241 F. Supp. 127, 144 U.S.P.Q. 566, 12 BULL. CR. SOC. 241, Item No. 176 (N.D. Ill. 1964).

Action for copyright infringement and patent infringement. Plaintiff charged that certain pages of defendant's catalog for hydraulic and pneumatic cylinders and related products (which pages contained mathematical and technical data, charts and formulas) infringed plaintiff's copyright in its catalog. The trial court rendered judgment for the defendant on the issue of copyright infringement, holding that the copyright was not valid because the copyrighted material included previously published uncopyrighted material and that the defendant had arrived at its charts, graphs, etc. independently without copying from plaintiff's work.

Held, reversed.

The court held that plaintiff's new arrangement and presentation of public domain material was the proper subject of copyright and that defendant had copied from plaintiff's catalog. The court said:

. . . We think the district court erred in applying the law and in certain of the findings of fact on which its conclusions and the decree of invalidity rested.

In the first place, "abridgements, adaptations, arrangements . . . or works republished with new matter . . ." are subject to copyright by the very terms of the Act, 17 U.S.C. §7; and the court erred in precluding infringement for the reason that some of the material was already in the public domain. The arrangement, expression and manner of presentation of the copyrighted pages, however, was

not in the public domain. Secondly, the question is not whether the computations in the Hydro-Line charts were independently arrived at, but whether the Flick-Reedy expression and presentation of the computations, formulae and explanations were copied by Hydro-Line. On this question we think the district court clearly erred.

In *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905), footnoted by the Supreme Court at page 218 in *Mazer v. Stein*, 347 U.S. 201, 100 USPQ 325, 333 (1954), several general rules of copyright law are set forth, at pages 542-43, which are pertinent here. Applying the rules stated there to the issue before us, we see that Hydro-Line had the same purpose in compiling and publishing its material as Flick-Reedy had, and that it did not merely use the latter's work as a starting point for further development of the ideas expressed. It had no right to avail itself of Flick-Reedy's labor, in rearranging and reexpressing the material, to save itself work or trouble, nor to use its bulletin to interfere seriously with Flick-Reedy's gainful use of its bulletin for prestige and trade in the cylinder market. The question of infringement is whether Hydro-Line's arrangement and expression is its own so as to make its use fair to Flick-Reedy. . . .

Flick-Reedy's certificate of registration is prima facie evidence of the validity of its copyright and Hydro-Line had the burden of overcoming this presumption of validity. 17 U.S.C. §209; *Wihtol v. Wells*, 231 F.2d 550, 553, 109 USPQ 200, 203 (7th Cir. 1956). The district court erred in holding that this burden was met by showing that some of the computations and formulae in Flick-Reedy's bulletin were in the public domain, for the copyright was valid as a revision and new arrangement of such material.

From an examination of the exhibits and the testimony we also conclude that the district court clearly erred in finding no infringement and no substantial copying of the two pages of Flick-Reedy's bulletin in question by Hydro-Line.

The district court erred also in finding that there was no showing that Hydro-Line's publication and distribution of its free sales bulletin will in any way detract from the value of Flick-Reedy's bulletin. The number of pages charged to be infringed is small (only two of thirty-two), but the evidence showed that these were the most important pages from the standpoint of keeping the bulletin in front of potential customers.

161. *Richmond v. Wiener*, 147 U.S.P.Q. 8 (9th Cir., Sept. 9, 1965) (Bowen, J.)

Appeal from judgment for defendant in action for copyright infringement. The trial court tried the issue of copyright ownership separately and held that plaintiff and defendant were joint owners of the copyrights in "Medical Practice Informant" which were registered in plaintiff's name and which plaintiff alleged defendant had infringed.

Held, affirmed.

I. Plaintiff argued that the trial court did not have jurisdiction to try separately the non-federal issue of copyright ownership. The court held, however, that severance of the non-federal issue did not affect jurisdiction where the court did have jurisdiction over the whole case. The court said:

A federal trial court in its discretion may upon its own motion properly separate an issue from others and confine the introduction of evidence to that separated issue alone if the court in the exercise of reasonable discretion thinks that course would save trial time or effort or make the trial of other issues unnecessary. That is true of issues as to which the court would not have jurisdiction but for their relation to other issues within the court's jurisdiction. . . . In this case, the court's jurisdiction to determine the merits of the whole case, including the trial separated non-federal issue as well as the remaining issues within its jurisdiction awaiting disposition, continues undiminished by such severance and separate trial of the copyright ownership issue. Rule 42(b) F.R. Civ. P.; *Moss v. Associated Transport, Inc.*, 33 F.R.D. 335; *Fidelity & Casualty Co. v. Mills*, 5 Cir. 1963, 319 F.2d 63. . . .

II. The court held that there could be no infringement because the plaintiff and defendant were co-authors of "Medical Practice Informant" and therefore joint owners of the copyrights, although the registrations were in plaintiff's name alone. The court said:

" . . . [W]e regard as established, as undoubtedly the Trial Court did, the fact that appellant and appellee co-authored that book and its parts. Since that book and its parts were so jointly conceived, compiled and created by the joint efforts of both appellant and appellee and "equity regards as done that which ought to be done" (19 Am. Jur. 316), appellant although having the copyrights registered in appellant's name only held the same in trust for the joint

venture and appellant and appellee as its two members. Appellee, therefore, was and is at all material times in lawful right a joint owner with appellant of the copyrights covering the book *Medical Practice Informant* and its parts. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 2 Cir., 1944, 140 F.2d 266, 268, 60 USPQ 257, 259. As such owner appellee could not and did not infringe such copyrights and we agree with the Trial Court in so ruling.

162. *Smith v. Little Brown & Co.*, 245 F. Supp. 451, 146 U.S.P.Q. 540 (S.D.N.Y., June 25, 1965) (McClean, J.)

Action for copyright infringement. Plaintiff claimed that "Pirate Queen—The Story of Grania O'Malley", a juvenile novel written by Edith Patterson Meyer and published by defendant, infringed her unpublished novel, "Pirate Queen of Connaught". Plaintiff had submitted five chapters and an outline of her novel to defendant for consideration, but it was rejected. Both works dealt with a historical character named Grania O'Malley about whom little actual fact is known.

Held, judgment for plaintiff.

The court held that copying was established by a sufficient showing of both access and similarity. The court said:

There are certain similarities between "Pirate Queen" and the manuscript entitled "Pirate Queen of Connaught" submitted by plaintiff to Little, Brown and rejected by it some four years earlier. These similarities exist with respect to incidents which concededly have no foundation either in historical fact or in any previously published fiction. Plaintiff claims that these resemblances prove that Mrs. Meyer copied her manuscript. Defendant contends, on the other hand, that any resemblance is purely coincidental. . . .

Where, as here, copying is denied by defendant, it may nevertheless be proved by circumstantial evidence of (a) access on the part of defendant to plaintiff's work, and (b) similarities between the respective works. There is some uncertainty in the cases as to whether "access" means that defendant actually saw plaintiff's work or merely that defendant had an opportunity to see it. The latter view seems preferable to me. See *De Acosta v. Brown*, 146 F.2d 408, 63 USPQ 311 (2d Cir. 1944), cert. denied sub nom *Hearst Magazines v. De Acosta*, 325 U.S. 862, 65 USPQ 588 (1945). . . .

In the present case there was certainly access in that sense. Plaintiff's manuscript was in Little, Brown's office, where Miss Jones [a Little, Brown editor] was employed, from May 3, 1957 to at least

May 14, if not longer. Miss Jones had the opportunity to see it there. Miss Jones thus had access to the manuscript and Mrs. Meyer had access to Miss Jones.

As to similarities between the works, they are in my opinion sufficiently strong to permit, and indeed to compel, the inference of copying. It is difficult to believe that two people, each sitting down to write a book about Grania O'Malley, entirely independent of each other, would each decide to begin the story on Grania's eighteenth birthday, would each recount that Grania went to watch for her father's return from sea, would each conceive the idea of a party upon her father's return, and would each provide a substantially similar account of that party. The difficulty of ascribing this to coincidence becomes insuperable when we add to this parallel the fact that in each book Grania's horse is named Maeve, in each book she is upbraided for clothing not befitting "a woman grown," and that in each book, on her way to watch for her father, she discusses or reflects upon Queen Elizabeth. . . . I am convinced that Mrs. Meyer knew of plaintiff's manuscript and that she knowingly made use of such parts of it as she saw fit. She must either have seen it or have been told about it in great detail. In either case, her unauthorized use of plaintiff's literary property is copying. I so find.

I also find that it was Miss Jones who made that copying possible, that it was she who either showed plaintiff's manuscript to Mrs. Meyer or gave her a detailed account of it. The evidence all points to that conclusion. There is no other probable explanation of how this was accomplished. I conclude, therefore, that plaintiff has established the first element of her case.

As to the second element, different considerations apply. It is apparent that the portion of plaintiff's manuscript which Mrs. Meyer copied constituted only a relatively small part of Mrs. Meyer's book. But that is not the test. The question is whether Mrs. Meyer appropriated a material and substantial portion of plaintiff's work. . . .

The answer to this question is a matter of judgment. Both quantity and quality are to be considered. . . .

As to quantity, it is apparent that not all of plaintiff's work was appropriated. . . . Nevertheless, with the sole exception of plaintiff's Chapter 3, the pattern of events in the five completed chapters of plaintiff's work finds its counterpart, by and large, in Mrs. Meyer's book, disguised and changed in various respects, but still plainly recognizable.

The five completed chapters constitute the bulk of plaintiff's manuscript. . . .

As to quality, I have no doubt that the incidents which have been copied are significant in plaintiff's work. The concept and pattern which has been appropriated . . . is the heart and core of plaintiff's work, and for the most part it is the product of plaintiff's invention. Although history and legend record that Grania was the leader of the O'Malleys, there is no other published account, as far as the evidence shows, of the detailed circumstances under which she attained that position. . . . In my opinion, enough has been copied here to satisfy the rule of substantiality. I so find. *Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501, 114 USPQ 89 (2d Cir. 1957); *De Acosta v. Brown*, supra; *College Entrance Book Co. v. Amsco Book Co., Inc.*, 119 F.2d 874, 49 USPQ 517 (2d Cir. 1941); *Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F.2d 254, 73 USPQ 317 (9th Cir. 1947).

I conclude therefore, that plaintiff has proved the second necessary element of her case.

. . . [I]t is by no means clear that Little, Brown is merely an innocent infringer, for not only did its employee, Miss Jones, participate in the copying, but also it was Miss Jones who, in the course of her employment as editor of Little, Brown's Juvenile Department, had the responsibility for working with Mrs. Meyer on her book and arranging for its publication. Miss Jones' knowledge that the book contained plagiarized material would appear to be binding upon Little, Brown under these circumstances

It is not necessary, however, to rest defendant's liability on that ground, for even if Little, Brown, were completely innocent, and had published a work which none of its employees knew contained material copied from plaintiff's work, it would still be liable to plaintiff for infringement.

163. *Manes Fabrics Co., Inc. v. Miss Celebrity, Inc.*, 246 F. Supp. 975, 147 U.S.P.Q. 63 (S.D.N.Y., Aug. 17, 1965) (Cannella, J.)

Motion for preliminary injunction in action for copyright infringement and unfair competition. Plaintiff Regulated Cottons, Inc. copyrighted a fabric pattern, and its marketing affiliate, plaintiff Manes Fabrics Co., Inc., sold the material exclusively to plaintiff Jack Borgenicht, Inc. Borgenicht used the material to manufacture a particular style of children's dress. Plaintiffs claimed that defendant, also a dress manufacturer, "pirated" the fabric pattern and used it on an inferior grade of cloth to produce a cheaper copy of Borgenicht's dress.

Held, motion denied.

The court held that defendant's fabric pattern was not copied from plaintiffs although the basic idea was similar. The court said:

. . . "Copying" is a concept without statutory definition. *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. at 301, 121 USPQ at 87-88. Those courts which have had occasion to consider the issue distinguish between copying an idea and the expression of that idea. *Condotti, Inc. v. Slifka*, 223 F. Supp. 950, 139 USPQ 340 (S.D.N.Y. 1961). Only the latter constitutes an infringement. *Condotti, Inc. v. Slifka*, supra at 415, 139 USPQ at 375. . . . Even if the defendant has sedulously borrowed each of the plaintiffs' ideas, that alone is not violative of the copyright statute. *Condotti, Inc. v. Slifka*, supra at 415, 139 USPQ at 375. The plaintiff can only prevail if the overall aesthetic impressions created by the designs are substantially the same. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 124 USPQ 154 (2d Cir. 1960); *Comptone Co. v. Rayex Corp.*, 251 F.2d 487, 488, 116 USPQ 105, 106 (2d Cir. 1958). . . .

In the case at bar, the defendant's design is not sufficiently imitative to constitute an infringement. There are obviously certain underlying similarities. Various shades of green, brown and yellow are present in both fabrics. The design of both materials consists essentially of floral bouquets set against a striped background. The width of the stripes and the distance separating the individual stripes appear to be identical. However, the dissimilarities of design are more pronounced . . . The compositions of the flowers are dissimilar in the two fabrics. An inspection of the defendant's fabric also indicates continuous fine black lines around the edges of the pattern's flowers, leaves and stems. . . .

Because of the aforementioned differences, in addition to others not listed, the total impressions created by the two designs are not substantially similar and consequently no confusion on the part of the buying public can be anticipated. The defendant's fabric presents a cluttered impression and is the so called "busy design". This is in distinct contrast to the plaintiff's clear and ordered design. This court, for the purposes of the present motion, finds that the defendant did not "copy" the registered design of the plaintiffs.

164. *Gray v. Eskimo Pie Corporation*, 244 F. Supp. 785, 147 U.S.P.Q. 188 (D. Del., July 12, 1965) (Steel, J.)

Action for trademark infringement, copyright infringement and unfair competition. Plaintiff created a doughnut-shaped ice cream confec-

tion which it called "Snonuts". It was claimed that the copyright in a paper bag for Snonuts was infringed by defendant's wrappers, cartons and advertisements for its similar confection, "Eskimo Donuts"; that the name "Do-Nuts" or "Donuts" infringed plaintiff's trademark and that defendant was guilty of unfair dealing in that it had "stalled" plaintiff, with whom it was negotiating a licensing arrangement for Snonuts, for two years while preparing to manufacture a similar product independently, without entering into any contractual arrangement with plaintiff.

Held, judgment dismissing complaint.

I. *Copyright infringement*. The court held that plaintiff's paper bag was in part a valid subject of copyright, but that the copyrightable portion had been published without proper copyright notice. The court said:

Plaintiff has no valid copyright. . . . While the light and deep blue rectangle and material therein contained which appears on the bag, PX9B, constitute an artistic work which is subject to copyrighting, the other portions of the printed material on the bag do not. This other material simply describes the weight and content of SNONUTS, names plaintiffs as the manufacturer-distributor thereof, states that SNONUTS is plaintiffs' trademark, and describes SNONUTS as "The Ice Cream with the Hole". There is nothing unusual about the lettering which is used. Matters such as these—slogans, names, listing of ingredients or contents, are not subject to copyright. 37 C.F.R. §202(a); *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959).

The light and deep blue rectangle, and material in it, which alone was subject to copyrighting, was used by plaintiffs in the sale of their products in interstate commerce in 1955, both as an insert in a bag and as a label on a carton containing the product. Although only a small quantity of SNONUTS was involved, it was for public sale. This constituted publication, 17 U.S.C. §26, of the only portion of material on the bag which was subject to copyright. However, neither the insert nor the label carried a copyright notice as 17 U.S.C. §19 requires. This publication without the statutory notice placed the material in the public domain. The right to secure copyright could not be revived by the publication of the material with a notice at a later date . . . The certificate of registration which was issued to plaintiffs is not evidence that plaintiffs' commercial label always bore a statutory notice of copyright. *Krafft v. Cohen*, 117 F.2d 579, 581 (3d Cir. 1941).

The court went on to hold that even if plaintiffs' copyright was valid it was not infringed, because defendant had not copied plaintiff's bag. The court said:

But even if plaintiffs' copyright was valid, defendant did not infringe it. The existence of an infringement of a copyright depends upon whether an ordinary reasonable person would fail to differentiate between the work copyrighted and that alleged to infringe it, or would consider them dissimilar by reasonable observation. . . . A visual comparison between plaintiffs' bag and defendant's accused material . . . will demonstrate that the latter is neither a copy of the former nor substantially similar to it.

II. *Trademark infringement.* The court held that "Do-Nuts" did not infringe plaintiffs' trademark, "SNONUTS" and that plaintiff had no common-law or other trademark rights in "Donuts" or "Do-Nuts."

III. *Unfair competition.* The court held that defendant's misrepresentations to plaintiffs with respect to defendant's intention to enter into a licensing arrangement for "Snonuts" with plaintiffs were not actionable, because plaintiffs did not rely on defendant's representations.

165. *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*, 244 F. Supp. 287 (S.D. Fla., July 30, 1965) (Dyer, J.)

Action for unfair competition and for infringement of copyright in fabric patterns.

Held, judgment for plaintiff on issue of copyright infringement; judgment for defendant on issue of unfair competition.

I. The court held that plaintiff's fabric designs were copyrightable, carried proper copyright notice in that there was a notice on the selvage on each repeat of the pattern, and were copied by defendant's designs.

A. The defendant argued that the copyright notice should have been incorporated into the design. The court held, however, that while it was possible to incorporate a copyright notice into a fabric design, it is not ordinarily practicable and in this case was not required. The court said:

While it is not unusual for a dress manufacturer to insert his name into a design, and some well known in the retail trade do it particularly for "snob appeal" ("Mr. Dino," "Pucci," "Vera," etc.), it is not feasible for the *printer or converter* of the cloth to do so. He sells his product by the bolt, or some equivalent, to the *manufacturer* and not the public. The manufacturer wants to promote

his name, not that of the printer who is unknown to the public. It can hardly be seriously contended that "Dino" or "Pucci" (or any other manufacturer) would accept cloth with the name "Key West Hand Print Fabrics, Inc." and a copyright mark worked into the design if they intended to make it into dresses to be sold to the public.

The defendant had the burden of proving that the notice of copyright could have been incorporated in the body of the design instead of the selvage. *Cortley Fabrics Company, Inc. v. Slifka*, 175 F.Supp. 66, 138 USPQ 110, affirmed per curiam, 317 F.2d 924, 138 USPQ 97. This it failed to do; and under such circumstances, the placing of the copyright notice on the selvage has been repeatedly approved. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 124 USPQ 154; *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, supra; *Peter Pan Fabrics, Inc. v. Puritan Dress Co., Inc.*, 207 F.Supp. 563, 133 USPQ 678.

The court also held that exhibition to prospective buyers of a rendering of the fabric designs before they were printed in fabrics, and at a time when they did not yet bear a copyright notice did not constitute a publication and therefore did not affect the copyright and that stating the date of publication on the registration application as December 31, 1962 rather than November, 1962 was a harmless error which did not invalidate the copyright. *Advisors, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706, 111 USPQ 318, cert. den. 1957, 353 U.S. 949, 113 USPQ 550.

It was also decided that the fact that one or more of the copyright notices referred to a new name of the copyright proprietor, which had not yet been officially adopted, did not affect the copyright since there was no possibility that this would mislead anyone. The court pointed out that, in any event, the defendant had actual knowledge of the copyright.

The court, visually comparing plaintiff's and defendant's designs, found that defendant's designs were copied from plaintiff's.

II. On the issue of alleged unfair competition it was held that using infringing material to manufacture dresses did not constitute unfair competition either as to the fabric manufacturer or the dress manufacturer where the source of defendant's designs was plainly indicated.

166. *Shapiro, Bernstein & Co., Inc. v. Bleeker*, 146 U.S.P.Q. 152 (S.D. Calif., June 21, 1965) (Hall, J.)

Action for copyright infringement based on defendant's sale in his music store of a "fake-book" containing the right-hand melody of

1,000 songs, of which 55 were copyrighted melodies owned by plaintiff. In some cases, the entire music and lyrics were printed in the book. Defendant had purchased four copies of the book, of which one copy was sold to plaintiff's agent, one was offered for impounding and two were unaccounted for. On December 19, 1963 Judge Hall denied motions by both parties for summary judgment (224 F. Supp. 595, 140 USPQ 111, 11 BULL. CR. SOC. 202, Item No. 89 (1964)).

Held, judgment for defendant.

I. Plaintiff had sought an injunction against further sales of the "fake-book" and statutory damages of \$250. for each of 12 of the infringed songs. The court, however, denied an injunction on the ground that there was no "threat by defendant to sell or continue to sell any of the copyrighted compositions" and held that since defendant's actual profits were provable, and were de minimis, statutory damages should not be awarded. The court said:

The "in lieu" provision for \$250.00 damages in the Copyright Act is not to be regarded as a penalty. As so well pointed out by Judge Yankwich of this court in *Malsed et al. v. Marshall Field & Co.* (W.D. Wash. 1951), 96 F. Supp. 372, 88 USPQ 552, the "in lieu" sections of the Copyright Act are there to permit a wronged plaintiff to recover where the rules of law render difficult or impossible proof of damages or discovery of profits. If either the profits or damages are ascertainable, the minimum provided for in the "in lieu" provision need not be resorted to. *Sheldon v. Metro-Goldwyn Corp.* (1940), 309 U.S. 390, 44 USPQ 607. It has been said to be the equitable substitute for cases which presented impossibility of proof as to damages and profits. *Douglas v. Cunningham* (1935), 294 U.S. 207, 24 USPQ 153. Where no such difficulty exists, and where, on the contrary, exact proof of profit has been made and no other damages shown for the violation, there is no need to resort to the "in lieu" provision.

The justice and sensibility of the above rules of law become immediately apparent when it is considered that if the plaintiff were awarded \$250.00 each for the plaintiff's 55 copyrighted songs contained in the one book sold to the plaintiff's agent, the plaintiff would get its book back, i.e., its copyrighted compositions, plus \$13,750.00. . . .

The actual profits made here are trivial but are not difficult to ascertain. The defendant paid \$5.90 for the book and sold it for \$25.00. His total profit for the entire book would be \$19.10 with-

out deducting overhead. But since the book contained 1,000 songs, each song contributed .191 cents to the overall profit; hence, the defendant made a profit of 21 plus cents from the sale of the 12 infringed songs.

There is no evidence of any damage to the plaintiff. Indeed, it is difficult to see how the plaintiff could be damaged by the sale because plaintiff's own agent bought the book and thus prevented the circularization of the copyrighted material to the public.

I hold that whatever plaintiff is entitled to recover is de minimis. *Knapp-Monarch Co. v. Casco Products Corp.* (7 Cir. 1965), 342 F.2d 622, 145 USPQ 1.

II. The court awarded counsel fees of \$1,500 to the defendant. The court said:

Defendant offered to stipulate a judgment in the sum of \$50.00. Plaintiff is not entitled to that amount, and under Local Rule 15(c), if a defendant offers a certain sum which is rejected by the plaintiff, and the case thereafter goes to trial with the resulting recovery of only the amount offered by the defendant, or less, then the defendant is the prevailing party, and as such, is entitled to costs.

167. *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 147 U.S.P.Q. 99 (E.D.N.Y., Oct. 4, 1965) (Bartels, J.) *For decision on preliminary injunction, see* 147 U.S.P.Q. 31 (E.D.N.Y., July 21, 1965) (Rosling, J.)

Action for copyright infringement. "Journal du Voleur" ("The Thief's Journal") by Jean Genet was published in French, in France, with appropriate U.C.C. copyright notice in the name of Genet's publisher, Editions Gallimard. The copyright in this edition (sometimes referred to infra as "the underlying work") was conceded to be valid. In 1952, a translation of a five page fragment of "The Thief's Journal," written by Bernard Frechtman, a United States citizen living in France, duly authorized by Genet and his publisher, was published in an American anthology entitled "New World Writing, Second Mentor Selection." Validity of the copyright in these pages was conceded. In 1954 a translation by Frechtman of the entire work was published in France by Olympia Press bearing the following copyright notice: "Copyright 1954 by B. Frechtman and the Olympia Press, Paris." This edition also bore a legend on the back cover that the book was not to be sold in the United States or the United Kingdom. It is conceded that no steps were taken to obtain copyright protection in the United States for this translation or to "comply with the copyright laws." In 1964 Grove Press

published a newly revised translation of "The Thief's Journal," also by Frechtman. Defendants did not challenge the validity of the United States copyright in the 1964 translation. The Grove translation appeared under an exclusive license for the United States and Canada from Genet, and Grove, in turn, granted to Bantam Books, Inc. exclusive paperback rights in the United States and Canada, for which Bantam paid a \$50,000. advance. Defendants then published in the United States a paperback version of "The Thief's Journal by Jean Genet" which defendants admit was produced by photocopying the 1954 Olympia English translation. On the hearing for preliminary injunction, plaintiffs relied primarily on the 1952 copyright on the five page translation-fragment rather than on the copyright in the underlying work. The court held, however, that the five pages had been thrown into public domain in the United States by their inclusion in the 1954 Olympia edition.

Held, judgment for plaintiff.

I. It was held that copyright in the 1952 fragment had been lost by its inclusion in the 1954 Olympia edition. Citing *Bentley v. Tibbels*, 2 Cir. 1915, 223 Fed. 247, which had been relied upon by both plaintiffs and defendants, the court said:

Here, unlike Bentley's publication, neither the Olympia nor the Grove publication contained any notice that the copyrighted N.A.L. excerpt was included anywhere in the respective publications. But even if such notice had been imprinted on the title page of either edition, no one by an inspection of either work could have identified which portion was the N.A.L. excerpt and which was not. The fragment was completely submerged and unidentified in both versions. Thus, if there was any copying of the N.A.L. excerpt from the Olympia and Grove editions, it did not constitute a copyright infringement. In essence, the same conclusion was reached by this Court in denying the plaintiffs' application for a preliminary injunction.

II. The court held that although defendants were free to copy any new matter contained in the 1954 translation, which was in the public domain in the United States for failure to comply with the manufacturing provisions of the U.S. Copyright Act of 1909, copying the translation was an infringement of the copyright in the *underlying* work; it was held that the copyright status of any one or more translations

did not necessarily affect the copyright in the underlying work. The court said:

The Greenleaf edition "follows the original text of The Olympia Press edition, published in Paris" as it was "translated from the French by BERNARD FRECHTMAN". The query is, what did Greenleaf copy when it copied this English translation. Defendants assert that physically all they copied was an uncopyrighted English translation and nothing more, that they did not copy the copyrighted book which was a 1949 French language work, and that when Frechtman failed to obtain copyright protection for his English translation in France of the 1949 French language work, that translation which was with the consent of the author, of necessity included Genet's novel and the novel as thus translated was automatically dedicated to the public. They argue, therefore, that the accused book could not have infringed the 1949 copyright. . . . The Court is thus confronted with the question of whether Frechtman's English translation published abroad without ad interim protection destroyed the author's copyright protection in his literary composition.

Section 7 of the Act, 17 U.S.C.A. §7, reads as follows:

"Compilations or abridgments, adaptations, arrangements, dramatizations, *translations*, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as *new works subject to copyright* under the provisions of this title; *but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof*, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works." (Emphasis supplied)

The above section permits the copyright of a translation of a work in the public domain or of a copyrighted work with the consent of the owner without permitting the publication of such "new work" to affect the validity of the existing copyright upon the matter employed in such translation. If the work translated is in the public domain, of course no consent of the copyright owner is required. The pertinence of the section is only to demonstrate the fact that a translation can be copyrighted separate and apart

from a copyrighted work without affecting the subsisting copyright. The copyright of the translation is not mandatory under the section to preserve the copyright on the underlying work. . . . It is obvious that Greenleaf copied not only the words of Frechtman, the translator, but also the content and meaning of those words as created in Jean Genet's original biographical story. This creation included the entire plot, scenes, characters and dialogue of the novel, i.e., the format and pattern. Greenleaf copied two things, (1) the words and (2) the story. Frechtman's reproduction of the novel in another language was permitted by the author but this did not constitute a consent that reproduction by others could be accomplished without Genet's authority if Frechtman failed to copyright his derivative work. The fact that it was unnecessary for Greenleaf to obtain Frechtman's consent did not automatically make it unnecessary for Greenleaf to obtain the consent of the copyright owner. It is an old story that reproductions of a copyrighted article cannot be made without the consent of the creator. . . . The essence of a novel or any other story for that matter, is the plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation. . . . *Emerson v. Davies*, D. Mass. Cir. 1845, 8 Fed. Cas. 615, 619 (Case No. 4,436). While this does not mean that the abstract idea of the novel or play alone is protected, it does mean that the particular pattern employed in arranging and expressing that idea is entitled to protection. *Eisenschiml v. Fawcett Publications*, 7 Cir. 1957, 246 F.2d 598, 603, cert. denied, 1957, 355 U.S. 907; *Holdredge v. Knight Publishing Corp.*, D.C. Cal. 1963, 214 F. Supp. 921, 923. . . . It may be difficult sometimes to distinguish whether the idea or plot alone is being employed or whether the pattern is being copied, but the line must be drawn. . . . The translation does not insulate the original story from copyright infringement even though the translation itself may be uncopyrighted. Like any other derivative work, the translation is separate and apart from the underlying work and a dedication to the public of the derivative work did not, without more, emancipate the pattern of the underlying work from its copyright. The essence of the matter, as Mr. Justice Holmes observed, is that "we see the event or story lived" and that story is copyrighted. *Kalem Company v. Harper Brothers*, 1911, 222 U.S. 55.

Each party relies heavily upon the case of *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 2 Cir. 1951, 189 F.2d 469, cert. denied, 1951, 342 U.S. 849. It is appropriate therefore to examine its facts. The work involved there was "Madame Butterfly", the original

novel having been written in 1897 by John Luther Long and copyrighted. Thereafter Long licensed David Belasco to write a play based upon the novel under the same name, which was not copyrighted until 1917. In 1901 Long and Belasco granted Ricordi rights to make a Libretto for an opera of Belasco's play "founded on the original theme", written by Long; "the said Libretto and all rights therein, dramatic or otherwise, to be the exclusive property of" Ricordi. Under this grant Puccini composed the opera upon which Ricordi secured both the original and renewal copyright. In 1925 Long obtained a renewal of the copyright on his novel and in 1932 Long's administrator granted Paramount the motion picture rights therein. No renewal was ever obtained of the copyright on Belasco's play. Ricordi claimed to be the exclusive owner of the motion picture rights in the novel, based upon the original agreement with Long and Belasco and his renewal copyright of the opera.

The Court of Appeals in reversing judgment in favor of Ricordi, held that the play was in the public domain and both parties were free to make a motion picture version thereof; that Paramount had the exclusive motion picture rights in the novel and therefore plaintiff could not make general use thereof for a motion picture version of its opera, and that plaintiff had the exclusive motion picture rights in the opera and Paramount could make no use of the opera in a motion picture version of the novel. . . .

* * *

While that case involved a renewal of copyright, the differentiation between dedicating the underlying work and the derivative work to the public is the same in both cases.

Defendants claim that *Ricordi* simply means that the stage play was in the public domain and the screen play was not because it was a new version of the original novel; and similarly in this case, that while the Frechtman translation was in the public domain, no other translation of the 1949 French work could be made without Genet's permission. They argue from this comparison that they had a right to copy the Frechtman translation in the same manner as anyone could copy Belasco's stage play. This is a false and distorted view because it ignores the fact that the only thing placed in the public domain in the *Ricordi* case was the *new matter* in the play upon which the original copyright had expired. The Court held that the "Madame Butterfly" novel could not be employed for any purpose without the consent of the proprietor or

the licensee of the copyright, and that only the new matter that Belasco had added to Long's novel was dedicated. By parallel reasoning, the only *new matter* that Frechtman added to the Genet novel was his translation and only that could have been dedicated to the public. As a practical matter, new matter which a play adds to a novel might be more discernible or separable than new matter which a translation adds to a story. Both, however, represent a change in the mechanism or medium of expressing the same underlying work, and both are derivatives which may be described as new works under Section 7 of the Act. If the derivative, such as the new matter in a play or the new matter added by different mediums of thought conveyance or communication represented by translation, cannot be used without copying part or all of the copyrighted underlying work, then the consent of the proprietor of that copyright must be obtained.

Defendants, however, have not been charged with violating the copyright law by an unauthorized translation of the underlying work. What the defendants did was to copy a translation which they allege was not copyrighted. The fact that the copying of the original story was accomplished indirectly through copying of a translation of the original was nonetheless copying. Unauthorized copying may be effected either directly or indirectly; thus copying from a copy is no less an infringement than copying from the original copyrighted work, *Wihtol v. Crow*, 8 Cir. 1962, 309 F.2d 777. . . .

A postscript should be added. Defendants have placed considerable emphasis upon the fact that the Olympia edition did not obtain *ad interim* protection. While this is true and by hypothesis placed this edition in the public domain, it does not follow that such failure by the publisher or translator should be fatal to the copyright on the pattern of the underlying work unless the author has consented to such dedication. Here it is admitted that Librairie Gallimard and The Olympia Press executed a contract under which Gallimard granted Olympia the right to publish the translation of "The Thief's Journal" in all countries "provided he sells it neither in England nor in the United States (the above edition to carry the notation 'Not to be sold in the USA and the United Kingdom')". Accordingly, a legend was placed on the back cover page on all copies of the Olympia edition reading: "NOT TO BE SOLD IN U.S.A. OR U.K.". There was, in addition, a prominent copyright notice placed upon the Olympia edition which notified the

world that it followed the original and only complete text of the publication in 1949 by Librairie Gallimard.

While this legend and notice might not have been sufficient to protect the translation, it was ample notice that the Olympia edition was only a translation which was not to be sold in the United States and that accordingly there might be a copyright on the underlying work. At all events, the above contract and the legends placed upon the Olympia edition were sufficient to establish that there was no consent on the part of the author to dedicate his underlying work to the public. It cannot therefore be claimed that he abandoned his copyright on the 1949 French edition. To impose upon the author the duty to see that the Olympia edition obtained *ad interim* protection in the United States in order that his own copyright on the pattern of the underlying work might survive, would appear to be imposing upon the author an unnecessarily burdensome requirement. As far as the public is concerned, it was placed upon sufficient notice to inquire as to any copyright on the underlying work. . . .

The conclusion, therefore, is that the defendants' publication and sale within the United States of Frechtman's English translation of "Journal du Voleur" accomplished by photocopying the Olympia edition, constitutes an infringement of Jean Genet's 1949 copyright published by Gallimard and registered under Section 13 of the Act.¹

1. A motion for reconsideration was subsequently denied. (Ed.)

PART V.

BIBLIOGRAPHY**A. BOOKS AND TREATISES****1. United States Publications**

168. SOCIETY OF AUTHORS. Photocopying and the law; a guide for librarians and teachers and other suppliers and users of photocopies of copyright works. [Prepared by the] Society of Authors [and] the Publishers Association. [London, 1965]. 8 p.

A popular pamphlet explaining the provisions of the British copyright statute with respect to photocopying.

2. Foreign Publications

169. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. Lois et traités sur le droit d'auteur. Recueil établi par l'Organisation des Nations Unies pour l'Education, la Science et al Culture et les Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle. Supplément 1964. Paris, Librairie Générale de Droit et de Jurisprudence, 1965. 424 p.

The 1964 supplement to the French edition of CLTW of 1962, which brings the work up to date as of January 1, 1963.

B. LAW REVIEW ARTICLES**1. United States**

170. CRAMER, ALLAN P. International copyright and the Soviet Union. (1965 *Duke Law Journal* 531-545, no. 3, Summer 1965.)

"This article [which was awarded first prize in the 1964 Nathan Burkan Memorial Competition at the University of Connecticut Law School] will consider various reasons for the Soviet Union's position concerning international copyright. In addition, it will outline some attempts which have been made to change the Soviet view and evaluate future prospects for solution of the problem."

171. DULIN, JACQUES M. Statutory design-rights: solution to the unfair competition of piracy. (34 *George Washington Law Review* 110-133, no. 1, Oct. 1965.)

A revised version of an article which appeared in 12 BULL. CR. SOC. 321, Item 276 (1965) under the title "Design protection: walking the pirate plank?"

172. HACKER, ROBERT. To what extent has federal patent and copyright law preempted state protection of trade values?—The *Sears and Compco* cases. (1965 *University of Illinois Law Forum* 83-99, no. 1, Spring 1965.)

"This note will explore the scope of . . . [the] holdings in the area of product simulation and will suggest their possible effect on two related areas of unfair competition law—the protection of packagings and the protection of literary and intellectual works."

173. KESTENBAUM, LIONEL. The *Sears and Compco* cases: a federal right to compete by copying. (51 *American Bar Association Journal* 935-939, no. 10, Oct. 1965.)

"Mr. Kestenbaum explains what the Court held, what the decisions mean as to state-federal relationships and what implications the cases hold for the future," with particular reference to the enactment of further legislation protecting industrial design.

174. MURPHY, ARTHUR A., and MAXWELL C. FREUDENBERG. The case for permitting copyright in works of the United States Government. (9 *IDEA* 239-249, no. 2, Summer, 1965.)

" . . . [T]he authors argue for legislation which would permit Government works to be copyrighted in exceptional circumstances, whether published by the Government or by a private publisher."

2. Foreign

1. English

175. THE FINANCE BILL AND CLOSE COMPANIES. (115 *The Law Journal* 462-463, no. 5189, July 9, 1965.)

Includes a discussion of paragraph 9 (1) (c) of the 10th schedule to the pending Finance bill which provides that "in no circumstances shall any royalty given by a close company for the use

of copyright be allowed as a deduction for corporation tax if the recipient is a participator, *i.e.*, a person having any share or interest in the capital or income of the company, *e.g.*, a shareholder."

176. FRANCON, ANDRE. Letter from France. (1 *Copyright* 208-214, no. 9, Sept. 1965.)

A survey of recent legislative and judicial developments in France in the field of copyright and related matters. Includes an analysis of the French Act of July 8, 1964 which applies principles of reciprocity in copyright protection.

177. GRASSI, ALESSANDRO. A historical remnant in the Italian copyright act. (*EBU Review* 44-46, no. 93B, Sept. 1965.)

A critical note on Section 157 of the Italian copyright law which provides, in part, as follows: "Any person who is entitled to exercise the rights of public performance of a work suitable for such performance, including a cinematographic work or a work of musical composition, may . . . request the Prefect of the province to prohibit any performance for which written proof of his consent is not shown."

178. MENTHA, BENIGNE. Problems of collaboration. (*EBU Review* 47-51, no. 93B, Sept. 1965.)

Some reflections on the technical meaning of literary and artistic collaboration (or joint authorship) in copyright law.

179. MILES, JAMES W. The quest for international uniformity in the law of designs and its relation to the law of copyright. (1 *Copyright* 180-184, no. 8, Aug. 1965.)

First published in 12 BULL. CR. SOC. 219, Item 162 (1965.)

180. PEREZ PASTOR, FRANCISCO. Letter from Spain. (1 *Copyright* 185-186, no. 8, Aug. 1965.)

An outline of "the principal problems arising in Spain in regard to copyright."

181. RADOJKOVIC, ZIVAN. The legal character of "moral" right. (1 *Copyright* 203-208, no. 9, Sept. 1965.)

"The study consists of two parts, the first dealing with the foundation, the second with the character of the 'moral' right [of the author]."

182. STRASCHNOV, GEORGES. A few notes on the Malawi Copyright Act. (1 *Copyright* 179-180, no. 8, Aug. 1965.)

A brief note on a few points in which the recently enacted copyright law of Malawi differs from the Zambian copyright law.

183. WÜRTHERLE, J. The legal conditions of television relays in Czechoslovakia. (*EBU Review* 51-54, no. 93B, Sept. 1965.)

An examination of "the legal situation of Czechoslovak Television, the privileges to which the [Television] Act entitles it and the relation of some of the provisions of this Act to the Copyright Act," with special reference to compulsory licensing.

2. English, French and Spanish

184. MALAPLATE, LEON, and JEAN VILBOIS. La réforme de la structure administrative des Unions de Berne et de Paris et des Bureaux Internationaux Réunis. (*Revue Internationale du Droit d'Auteur* 4-137, no. 46, May 1965.)

An account, in English, French and Spanish, of the proceedings of a meeting of the Committee of Experts concerning the reform of the administrative structure of the Berne and Paris Unions and of BIRPI, which met at Geneva, March 22 – April 2, 1965, and at which the authors of this account were present as observers for CISAC, B.I.E.M. and A.L.A.I. The French version also appears in *Interauteurs* 142-176, no. 159, 2d quarter 1965.

185. MASOUYE, CLAUDE. Les droits des artistes interprètes ou exécutants dans la Convention de Rome. (*Revue Internationale du Droit d'Auteur* 160-193, no. 146, May 1965.)

The English, French and Spanish texts of a lecture on the rights of performing artists under the Rome neighboring rights convention, originally delivered in Spanish at the Sixth Congress of the International Federation of Actors, held in Mexico, October 18-24, 1964.

186. TOURNIER, ALPHONSE. L'article 17 (3) de la Loi française du 11 mars 1957. (*Revue Internationale du Droit d'Auteur* 138-159, no. 46, May 1965.)

An analysis, in English, French and Spanish, of art. 17(3) of the French copyright law, which, in effect, establishes a presumption of the transfer of the exclusive right of cinematographic ex-

plotation from the authors of the cinematographic work, other than the authors of musical compositions, to the producer.

3. French

187. LIPSZYC, DELIA. Qui est l'auteur de l'oeuvre cinématographique? (*Interauteurs* 277-282, no. 160, 3d quarter 1965.)

A brief, comparative discussion of the question of the authorship of a cinematographic work.

188. MOTT, KELSEY M. Analyse du concept de l'unité de l'art dans les systèmes juridiques européens. (*Interauteurs* 251-256, no. 160, 3d quarter 1965.)

A French translation of an article which first appeared in 11 BULL. CR. SOC. 242, Item 117 (1964) under the title "An analysis of the 'unity of art' concept in European legal systems."

189. RADOJKOVIC, ZIVAN. Importance de la consécration juridique du droit moral d'auteur. (*Interauteurs* 283-288, no. 160, 3d quarter 1965.)

A brief article on the Latin and Anglo-Saxon concepts of the moral rights of the author.

190. SANCTIS, VALERIO DE. Organisation mondiale de la propriété intellectuelle. (*Interauteurs* 136-141, no. 159, 2d quarter 1965.)

Some reflections on the draft convention and draft resolution for changing the administrative structure of the Paris and Berne Unions, as they were presented to the Committee of Experts appointed to study such reorganization.

191. SCHULZE, ERICH. Les réformes du droit d'auteur. (*Interauteurs* 241-250, no. 160, 3d quarter 1965.)

The French text of the Third Jean Geiringer Memorial Lecture which appeared in 12 BULL. CR. SOC. 266, Item 220 (1965) under the title "Copyright Reforms."

4. German

192. AXSTER, HERBERT. Albert Osterrieth zum Gedächtnis. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 449-450, no. 9, Sept. 1965.)

A note commemorating the 100th anniversary of the birth of a famous German jurist, who was one of the founders of the theory of intangible property rights.

193. BAUM, ALFRED. Über das Droit moral, seine Ausübung und seine Dauer. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 418-422, no. 8/9, Aug.-Sept. 1965.)

A criticism, illustrated by four examples, of the manner in which moral rights are treated by some authors, who, according to the writer, appear to be more interested in the pecuniary aspects of their moral rights than in their artistic reputations.

194. FABIANI, MARIO. Sind Apparate geistige Schöpfer? (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 422-425, no. 8/9, Aug.-Sept. 1965.)

A discussion of the question whether literary, artistic and musical works produced by electronic devices are creative works.

195. FROMM, FRIEDRICH KARL. Das Namensrecht des Künstlers im Widerstreit zum wettbewerblichen Kennzeichenrecht. (44 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 59-70, Heft 1/2/3/4, June 30, 1965.)

A discussion of the question whether an author has the right to use his own name where such use might result in likelihood of confusion with another, better known, author. Reference is made especially to a recent decision of the Kammergericht in Berlin (1964) with respect to the question whether the son of Edgar Wallace can use his own name, Bryan Edgar Wallace, for his own literary works.

196. KREIGER, ALBRECHT. Neue internationale Organisation für geistiges Eigentum? Die Bestrebungen zur strukturellen Umgestaltung der Pariser und der Berner Union. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 393-406, no. 8/9, Aug.-Sept. 1965.)

A survey of efforts aimed at a new organization for the protection of intellectual property under the Paris and Berne Conventions, preceded by a brief historical introduction.

197. OHLSCHLEGEL, HELMUT. Sollen und können Rechenprogramme geschützt werden? (67 *Gewerblicher Rechtsschutz und Urheberrecht* 465-468, no. 9, Sept. 1965.)

An essay on the protectability of computer programs under patent and copyright law, with special reference to the United

States and West Germany. The proposal is advanced to establish an international center for registration of copyrighted computer programs and the issuance of periodical reports on the registrations.

198. ROEBER, GEORG. Abgrenzungsfragen des allgemeinen Persönlichkeitsrechts unter den Aspekten des neuen Urheberrechtsgesetzes. (9 *Film und Recht* 102-110, no. 6, June 1965.)

Questions concerning the limits of the general right of personality are examined from the point of view of the new German copyright law.

199. ROEBER, GEORG. Strafmassnahmen zur Durchsetzung urheberrechtlicher Ansprüche; veranschaulicht am Beispiel der Verwertungsgesellschaft WORT. (9 *Film und Recht* 156-160, no. 8, Aug. 1965.)

A discussion of the suitability of employing penal law provisions for the collection of royalties, as demonstrated in a method used by the West German authors' society, WORT. The conclusion is reached that copyright belongs to the sphere of civil law, and that penal law provisions should be used with utmost care and only in rare instances.

200. SCHMIEDER, HANS HEINRICH. Der Titel als Werk zweiter Hand; neue Gedanken zum urheberrechtlichen Titelschutz. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 468-472, no. 9, Sept. 1965.)

A case is made for copyright protection of titles in West Germany, especially when the author of a work is not responsible for its title.

5. Italian

201. PASQUERA, FILIPPO. Sulla tutelabilità dei giochi enigmistici e della configurazione esteriore del periodico. (36 *Diritto di Autore* 14-19, no. 1, Jan.-Mar. 1965.)

An examination of the protectability of puzzles and of the external appearance of a periodical under the Italian copyright law.

202. RONGA, GIULIO. La classificazione internazionale dei disegni o modelli industriali. (36 *Diritto di Autore* 1-13, no. 1, Jan.-Mar. 1965.)

A discussion of an appropriate classification for the international registration of designs and industrial models, with special

reference to the fact that, under the legislation of various countries, designs and models can be protected under copyright law (e.g. Belgium), under a cumulative system of protection (France), or as designs or models proper (Italy).

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

203. DEMPSEY, DAVID. The Candy covered copyright. (48 *Saturday Review* 40, 45, no. 40, Oct. 2, 1965.)

An article on the adverse effects of ad interim copyright and the manufacturing clause on American authors.

204. FINKELSTEIN, HERMAN. Copyright problems, copyright revision and protection of intellectual property. ASCAP. Mimeo, 12 pp. (1965.)

Reproduced from *Report of Fifth Annual Conference*, National Association of College and University Attorneys held at Tulane University, New Orleans, June 24-25, 1965, 173-183.

2. England

205. BARKER, RONALD. Photocopying and tape-recording of educational material. (*The Bookseller* 1862-1876, no. 3121, Oct. 16, 1965.)

"This paper, . . . delivered . . . at a meeting of the Educational Group of the International Publishers Association at Frankfurt, examines the considerations underlying the statement on 'Photocopying and the law' which has been jointly issued by the Society of Authors and the Publishers Association."

206. CODE, HOLLAND, R. H. Two new books on copyright. (*The Bookseller* 1946-1947, no. 3122, Oct. 23, 1965.)

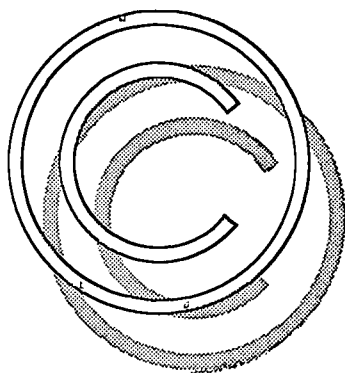
Reviews of the 10th ed. of *The Law of Copyright* by Copinger and Skone James and of *Copyright — Modern Law and Practice* by Carter-Ruck and Skone James.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 13, NO. 3

FEBRUARY, 1966

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

EDWARD A. SARGOY

Vice-Presidents

SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary

ALAN LATMAN

Assistant Secretary

MORTON D. GOLDBERG

Treasurer

EDWARD M. CRAMER

Assistant Treasurer

STANLEY ROTHENBERG

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
PROFESSOR RALPH S. BROWN, Yale Law School
GEORGE D. CARY, Washington, D. C.
SIDNEY A. DIAMOND, New York City
ARTHUR L. FISHBEIN, New York City
PROFESSOR HARRY G. HENN, Cornell Law School
DANIEL HUTTENBRAUCK, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ROBERT H. MONTGOMERY, Jr., New York City
HARRY R. OLSSON, Jr., New York City
HAROLD ORENSTEIN, New York City
AVERILL C. PASAROW, Beverly Hills, Calif.
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
LAWRENCE H. REED, New York City
SAUL N. RITTENBERG, Culver City, Calif.
HARRY N. ROSENFELD, Washington, D. C.
SIDNEY SCHREIBER, New York City
JOHN SCHULMAN, New York City
CHARLES B. SETON, New York City
FRIEDA M. TANNENBAUM, New York City
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York City
RICHARD WINCOR, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1966 by The Copyright Society of the U.S.A.
All rights reserved.

COPYRIGHT LAW REVISION

Announcement from the Copyright Office

The transcript of the *Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Congress, 1st Session, on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, Bills for the General Revision of the Copyright Law, Title 17 of the United States Code*, has now been issued. It is in three parts and contains, in addition to the testimony of witnesses, other statements and materials filed with the Committee as a part of the 22 days of hearings beginning May 26 and ending September 2, 1965.

Part 1 consists of the testimony through June 9, together with a copy of the revision bill (the various bills mentioned above being identical). Part 2 is the testimony from June 10 through June 24. Part 3 contains the remainder of the testimony, an appendix of letters and other statements, as well as a complete combined subject and name index covering all three parts.

Each of the three parts is in a separate volume and may be purchased from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. 20402, at the following prices:

Part 1 (pages 1—658)	\$2.00
Part 2 (pages 659—1381)	\$2.25
Part 3 (pages 1382—2056, including 124-page index)	\$2.00

CONTENTS

PAGE

PART I. ARTICLES.

TAPE OR RED TAPE — CURRENT DEVELOPMENTS IN BACKGROUND MUSIC	Allen H. Arrow	161
TAPE AND CARTRIDGE DEVELOPMENT IN THE PHONOGRAPH RECORD FIELD	William M. Kaplan	167
METHODS OF LAW REFORM IN REGARD TO CURRENT PROBLEMS OF COPYRIGHT AND RELATED MATTERS	J. W. Miles	171

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and Territories	182
2. Foreign Nations	182

PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS

183

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U.S. Courts	
1. Federal Court Decisions	187
2. State Court Decisions	199

PART V. BIBLIOGRAPHY.

A. Books and Treatises	
2. Foreign Publications	208
B. Law Review Articles	
1. United States	208
2. Foreign	
1. English	210
2. English, French and Spanish	211
3. French	211
4. German	212
5. Italian	212
C. Articles Pertaining to Copyright from Trade Magazines	
1. United States	212
2. England	214

THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 13 BULL. CR. SOC. page no., Item (1966).

PART I.

ARTICLES

Note: The protection of rights in the increasingly complicated use of music on recording tape was discussed in two papers by Allen H. Arrow and William M. Kaplan, members of the New York bar and specialists in entertainment law, before the Copyright Luncheon Circle at the Overseas Press Club, New York City, on November 12, 1965. On our request, the substance of this discussion was made available for publication in the following two papers.

207. TAPE OR RED TAPE — *Current Developments*
 in Background Music

By ALLEN H. ARROW*

What is a magnetic recording tape? The technicians would define it as a strip of plastic or paper which has been coated with an iron oxide compound. The coating has the capacity to receive and store audio or video information magnetically and alter to reproduce this information faithfully. Because the process of reproducing the information is magnetic rather than through a physical change in the material, tape is capable of long wear without deterioration. It can store a great deal of information on a relatively small area and, I am told, it can reproduce its information more faithfully with less distortion than other devices. Some tape cartridges can store and reproduce 30 hours of music without repetition and without loss of quality even after years of continuous use.

Since as lawyers we must be concerned with the intangible rights connected with sales and uses of this very tangible tape, it follows that we ought to take a closer look at the material which is generally embodied on a pre-recorded magnetic tape. For purposes of this talk, let's pass over video tape and limit ourselves to audio and more specifically music which seems to generate the most problems.

Functionally speaking, tapes can be said to contain two main categories of music: foreground and background. Foreground music is designed to attract attention, stimulate, entertain and, in general, force the listener to be conscious of its presence. Background music is quite the opposite in its function, since it is designed to supplement, but not interfere with, other activities. It is, therefore, recorded and performed

* Member of the firm of Orenstein, Arrow & Lourie, New York.

on a volume level which will not significantly intrude on the thought processes of the listener.

Bill Kaplan will discuss aspects of the problems of tapes embodying foreground music. I prefer to remain in the background.

Background music on tape is used in a vast number of ways. It can be used industrially, in restaurants, stores, barber shops, building lobbies, elevators, or planes, buses and in short wherever management believes its interests will best be served by its use. It is also becoming more and more commonly used in private homes. It can be transmitted or received by radio or telephone or performed on the premises by means of phonograph records or by means of prerecorded tape.

But, is a tape identical with a phonograph record from the legal standpoint? First, let us think about performers. What is the legal position of the musician or vocalist whose performance is embodied on this tape? The contract negotiated in 1964 between the American Federation of Musicians and the Phonograph Record Industry contains the following definition of a phonograph record:

“Phonograph record or record shall include phonograph records, wire or tape recordings, or other devices reproducing sound.”

The phonograph record industry's agreement with AFTRA does not define a phonograph record.

With this in mind, can you without fear of protest from these unions, make a tape copy of a disc phonograph record embodying performances of musicians or vocalists which were originally rendered for the purpose of usual sale by a phonograph record company? Yes. But can you use this tape to perform background music in a store or office? If you do, you should be prepared to make a substantial payment to the musicians' and vocalists' unions. Section 6(a) of the American Federation of Musicians agreement does permit certain types of dubbing. However, permitted dubbing must be a dubbing “intended to be used for the same purposes to which the records originally produced from such master record were principally devoted”. The AFTRA agreement provides that performances rendered for use in other media may be dubbed, transferred or converted for use as phonograph recordings and vice versa, provided that the AFTRA scale is paid to all who participated in the original recording session. The unions, therefore, make a functional but not a physical distinction as we earlier did between foreground and background music. As a practical matter, a duplicator has the choice of paying the musicians \$5.00 per man per selection and AFTRA scale to the vocalists for the new use, or not to duplicate in

this manner. For this reason, virtually all of the recordings done for background music have been and probably will continue to be made in Europe. I understand that the American Federation of Musicians has renewed its request to Congress to ban the importation of recordings made overseas. If the AFM is successful in obtaining such a ban, it will raise the cost of recordings made in the background music industry, but at this time, it does not appear likely that they will be successful. I should emphasize that under AFM or AFTRA codes music can be recorded expressly for background music purposes, but in that case it may only be used for that purpose.

Taped music is now commonly being used by the airlines. I understand that disc phonograph recordings have been reproduced by the airlines on tape for use in flight. The AFM has not taken a definite position concerning this new use, since the airlines have to a great extent been using recordings which were also made or have since been made to be sold in stores in the form of tape and this use may not, therefore, constitute a dubbing. Whether the union will proceed against the airlines and their suppliers will be determined in the very near future.¹ Whether or not they do, it seems that the phonograph record industry can look for this problem to be raised in its next negotiations with the AFM and AFTRA.

Now, let's put on our copyright lawyers' hats. Is a prerecorded tape a part of an instrument within the meaning of Section 1(e) of our present copyright law? In other words, can a tape manufacturer make use of the compulsory license provision or does the word "mechanical" exclude from the application of this provision recordings which are electronically made and reproduced. If construed literally, it seems that tape manufacturers cannot avail themselves of the compulsory license provision. However, I see no distinction between the electronic recording and reproduction of a tape by an electronically stimulated tape machine and the semi-electronic recording of disc phonograph records and their subsequent semi-electronic reproduction. In all recording sessions held now, the first step is always to record the performance on one or more magnetic tapes. These tapes are subsequently edited, refined and it is not until the final steps of manufacture that the recording is placed on a so-called lacquer master and reduced to mechanical parts. The reproduction of the disc-type phonograph record today is as much electronic as it is mechanical and the days of the Edison phonograph are long gone. No electronic devices were known or contemplated by the drafters of our present copyright law and I believe it would be very dif-

1. As of this date (January 1966), no proceedings have been started.

difficult for a judge to distinguish between electronic reproduction and mechanical reproduction in applying Section 1(e).

It was for this reason that in the draft of the proposed new copyright law, the distinction between disc-type phonograph records and tape recordings, wire recordings or any other kind of recording has been removed. The language of the new bill, borrowing from European doctrine, refers to all of them as "permanent fixations".

It has been suggested by some lawyers that a tape recording made primarily for the purpose of performing music publicly for profit is not subject to Section 1(e) because 1(e) applies only to mechanical reproduction made for home use. This is an interesting theory, but difficult to justify under the existing law and trade practices. Practically every phonograph record manufactured is initially distributed to radio stations in the hope of stimulating performances for profit which in turn will stimulate sales. Would the theory I have just described apply to these records as well?

In this connection a sentence has now been added to the end of proposed Section 113(a)(i) of the copyright revision bill which reads as follows:

"A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use."

The result of this addition would be to create a new right based upon the confusion of two rights of the copyright proprietor, the right of mechanical reproduction and the right of public performance for profit. While background music may be primarily designed to be performed for profit, we also know that it has wide use in homes. How would the new language cover this situation? Would new recordings have to be made separately for private use and public use? The result of this addition would be to place the control of the manufacture of background music recordings or other recordings made to be performed for profit and their subsequent performance in the hands of the party who grants the initial mechanical license instead of maintaining the rights of public performance and mechanical reproduction separate and distinct one from the other.

Since most background music tapes have been designed to be performed publicly for profit, I believe we should have some discussion of problems involved in these performing rights.

Traditionally, background music and service has been leased by most of the companies in the field such as Muzak, Seeburg, Automatic

Canteen and so on. Under this system a dealer places equipment on the premises of the subscriber and maintains the equipment on the premises, furnishing a library of music which varies from time to time. Neither the equipment nor the tape are owned by the subscriber.

The reasons for the predominance of this system are as follows: The subscribers insist on a substantial library so that they are not conscious of repetition of music. There was no machine or tape in existence which could, on a practical basis, perform this amount of music through a self-contained unit. Secondly, subscribers want their equipment services by the licensor since the equipment is usually complicated and frequently needs servicing. Thirdly, the price at which the equipment could be sold was too high for the small businessman and his choice was generally limited either to subscribe to a Muzak, Seeburg or similar service or to install his own phonograph or FM radio and wait for ASCAP or BMI to catch up with him. Under this leasing system the performing rights societies collect performing rights fees either from subscribers or at a so-called wholesale rate from the lessor.

Now something new has been added. 3M Company devised a machine and tape cartridge which is capable of reproducing 26 to 30 hours of music without repetition. The price is fairly reasonable and the equipment can be bought by a great many businessmen who formerly could not afford to subscribe to a leased service. The concept of sale, as opposed to the concept of lease, caused a number of new problems. As a result of these problems, 3M was unable to consummate a satisfactory agreement with ASCAP and elected to deal directly with copyright proprietors to obtain from them the non-exclusive right to perform the music in their repertoires publicly for profit. This was possible under the consent decree of 1950 which prohibited ASCAP from "limiting, restricting or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance". The kind of agreement made is no secret. 3M has agreed to pay to the publishers for each selection per copy of tape sold a 2¢ mechanical royalty and a 3¢ performing fee for a three-year performance license, the term of which begins on the date of sale of the tape to the ultimate purchaser. Since the 3M tape cartridge consists of 700 selections of music, this means that for every tape sold, \$35.00 is divided among the publishers, BMI and SESAC according to the number of titles each controls. It is 3M's belief, which is shared by many, that this kind of administration of their new program will be very profitable for those owners of music rights who have participated in it.

Now this new method of handling performing rights in music is not without problems. In the first place, for the ASCAP publishers,

composers and authors, it represents a departure from the usual manner of administering their performing rights. However, there is precedence for publishers granting public performance rights in the United States in connection with the granting by them of motion picture synchronization licenses.

I would like to touch on a problem of enforcement and policing of the publishers' rights in the event of either misuses by a purchaser of the tape or use by the purchaser after the period for which it has been licensed. 3M has recognized this problem and attempted to deal with it by having each purchaser sign a short agreement prior to the delivery of a machine and/or tape. This agreement is simply an acknowledgement by the purchaser of the copyright proprietors' rights. 3M has agreed to give notice to the purchasers prior to the expiration of the performing rights license period. This notice will inform the purchaser that his rights have expired and that a further license will be necessary for his continued use of the tape. 3M will advise BMI, SESAC and the publishers at the same time, so that the proprietors can enforce their usual rights, if necessary. At the very least, the proprietors and their agents will know the names and addresses of those people who may be violating their rights and will be saved the cost and time of investigation.

The result of this new concept of dealing with background music we hope will be to increase the income of the publishers, composers and authors since sales so far indicate the development of a new market for the use of music by the small establishments.

Now in this day of rapid technological advances when machines are being sold to the public which are capable of reproducing not only audio information, but video information, through the magnetic taping of television programs, the use of tape as a storage device for entertainment will undoubtedly be an increasingly important factor in our lives as listeners and lawyers. The next few years will undoubtedly see the further emergence of tape as an important factor in the entertainment industry and may find us groping with some of the problems I have mentioned today.

208. TAPE AND CARTRIDGE DEVELOPMENT IN THE PHONOGRAPH RECORD FIELD

By WILLIAM M. KAPLAN*

The development of prerecorded tapes, in both reel-to-reel form and cartridge form, has been one of the more interesting aspects of the phonograph record industry during the past few years. My intention today is to discuss this development from the point of view of the record company, and only peripherally from the point of view of the music publisher.

When I was first assigned as attorney for ABC's record companies and read our recording and licensing contracts, I noticed that the phrase "phonograph records" was defined, in general, as "discs of all speeds and sizes and all other devices, whether now known or unknown, for the transmission of sound." As far as I was concerned, any devices other than 78 rpm, 45 rpm and $33\frac{1}{3}$ rpm discs were, for all practical purposes, "unknown" at that time.

Then, in 1960 we granted a license to United Stereo Tapes (Ampex) for the duplication of our recordings on prerecorded reel-to-reel tape for home use. Under this license we receive a royalty on tapes sold by Ampex, based upon the suggested list price of the tapes. We, in turn, pay royalties to the artists concerned. Ampex obtains its own mechanical licenses from publishers and pays mechanical royalties directly under these licenses. As an AFM Music Performance Trust Fund signatory, Ampex also pays the necessary Trust Fund royalties directly. Our Command label entered into another type of arrangement with Ampex, under which the tapes were made by an independent contractor under Command's supervision and sold by Command to Ampex as well as to others for distribution. Under this arrangement, the record company took care of mechanical, Trust Fund and artists' royalties, just as in the case of discs. Recently Command also licensed Ampex to reproduce prerecorded tapes under a non-exclusive, royalty basis.

In 1963, the automobile and home cartridge players made their first substantial appearance on the market, and we were approached by various cartridge manufacturers for licenses. Our first licensees were Revere (Minnesota Mining & Manufacturing) and Autostereo. During 1964 and 1965 licenses were granted by us to many more cartridge duplicators, including Muntz Stereo Pak, Transit Play, International

* General Attorney, ABC-Paramount Records, Inc., a subsidiary of American Broadcasting Companies, Inc.

Tape Cartridge, Automatic Radio and General Recorded Tape. Obviously, we have operated on a non-exclusive basis in the cartridge field, but we have nevertheless succeeded in obtaining substantial annual guarantees and substantial royalty rates from all. The licensing royalty has generally been in the vicinity of 12½% of suggested list price.

Although several of the cartridge licensees have offered very large guarantees for an exclusive contract, we have no present intention of changing our non-exclusive arrangement and putting all of our eggs in one basket.

Even on a licensing basis, with only a royalty income, the reel-to-reel tape and cartridge field has developed into a source of considerable income for record companies, as well as an excellent promotional opportunity. At least several record companies have already entered or are planning to enter the cartridge field on a direct production and distribution basis, as with records. However, since licenses are more apt to be the route being taken now by most record companies, I'd like to touch now upon various facets of a typical licensing agreement.

An annual guaranty against royalties, payable in advance or in periodic installments at the commencement of each quarter or semi-annual period, is usually provided for. The royalty rate is, as already mentioned, somewhat higher than the usual foreign royalty rate, and a minimum unit royalty is usually specified. In other words, it is made clear to the licensee that the licensor must receive *at least* a specified royalty, whatever the suggested list price may be. Since it is quite customary for licensees to issue, in addition to single-album cartridges, cartridges containing the equivalent of two albums at a suggested list price somewhat lower than the aggregate price of two single-album cartridges, the minimum royalty is usually stated in terms of a minimum royalty per album contained in each cartridge. A packaging allowance, in terms of a nominal percentage of suggested list price, may be provided for the benefit of the licensee.

The territory of the license is usually limited to the United States, but this is governed by the terms of the record company's foreign licenses. If the foreign licenses are non-exclusive, or if they cover discs only, then of course the territory of the cartridge license may be broadened if this is desirable.

Our own preference has been for one-year terms, especially because the field and its participants are rather new and still in a state of development and change. After several years' experience has been acquired, it is quite probable that longer terms will be granted, as in the foreign licensing field.

Duplicates of masters are usually provided, at the licensee's expense, although some licensees prefer an arrangement whereby we provide our "safety" copy, which is duplicated by the licensees and immediately returned. In any event, the licensee is required, at the expiration of the term, to return the part furnished to it (if not already returned), to destroy the duplicates made by it for production purposes and to furnish an affidavit of destruction.

The license agreement usually calls for a minimum release by the licensee each year, billing and promotional features, and the use on the cartridges of the record company's trademarks, logotypes and, if possible, the artwork of the albums. Other provisions include the right of the record company to pass on the quality of the licensee's product and the right to purchase cartridges from the licensee for distribution through the record company's own channels.

There are two arrangements which may be made by record companies with respect to the mechanical royalties and Trust Fund royalties. Under one, the licensee is to secure its own mechanical licenses, become a signatory to the AFM Trust Funds and pay all mechanical and Trust Fund royalties directly. The alternative method is to have the licensee pay all such royalties to the record company each quarter, together with the licensing royalties; the record company then pays the mechanical and Trust Fund royalties to the appropriate recipients. While it is recognized that the former method, under which the licensee secures its own mechanical licenses, is the more acceptable procedure, the latter method has been more often adopted by us since we have felt that we have had more control over the regular payment by the licensees of the mechanical and Trust Fund royalties. However, it is expected that this general arrangement will be changed before long, and that our cartridge licensees will assume the responsibility of paying these royalties directly to the publishers and Trust Funds.

There may be some record companies which are hesitant to furnish copies of their recordings to cartridge duplicating companies for fear of losing some control over their product. We feel we have been quite careful and selective in granting cartridge licenses, and that it is preferable to have our recordings available through our licensees on just about all of the various types of cartridges on the market. The promotional value alone, of having so wide and varied a market for our product, is a decided advantage. Moreover, it may be that having our recordings widely available through authorized licensees may be some protection against unauthorized duplications of our recordings on cartridges. In this connection, I might mention an advertisement in a Los Angeles paper which was brought to our attention. The advertiser was a dis-

tributor of the cartridge player manufactured by one of our licensees. Part of the ad read, "Your favorite 45's and LP's recorded on our cartridge tapes while you wait." When we called this matter of unauthorized duplication to the attention of our licensee, the advertiser was threatened with the loss of his distributorship unless the unauthorized copying was stopped. Thus, our licensees, in order to protect their own positions, have assisted us in uncovering and halting this type of unauthorized activity whenever possible. It should be noted that this type of copying, for a fee, from the consumer's own purchased records is one step further from the consumer himself taping his records or broadcasts at home for his own use. This duplication of the customer's records for a fee is, in turn, only a step away from the unauthorized duplication of any and all recordings in the "hit" category for sale in the cartridge market, in the classic bootleg or counterfeit procedure. Accordingly, it is imperative that record companies take all necessary steps, together with publishers, to halt as promptly as possible what is apparently a growing tendency toward unauthorized cartridge duplication, both in the custom "while you wait" area and in the mass production bootleg or counterfeit area.

I will just touch on the Scopitone and Cinebox juke box devices, where recordings are used as accompaniment to films of artists "lip-synching" (mouthing the song in synchronization to the recording). So far, record companies are being offered a very nominal license fee per copy of each film for a license to make duplicates of recordings, but Scopitone and Cinebox undertake to make the necessary arrangements with unions, publishers and artists and make all necessary payments. At the present time we can only consider this field a promotional opportunity rather than a source of income.

I hope that I've given you at least a thumbnail sketch of the tape and cartridge development in the phonograph record field. It certainly seems as if we are now only in the very earliest stage of this development, and that in time to come the cartridge devices which I exhibited before my talk will be as familiar to all of us as the long playing record album is today.

209. METHODS OF LAW REFORM IN REGARD TO
CURRENT PROBLEMS OF COPYRIGHT
AND RELATED MATTERS

*By J. W. MILES**

Copyright is referred to frequently as that field of law covering the protection of intellectual property, that is the creations of the human mind, but this term, intellectual property, has, in recent years, also been used to include industrial property, comprising particularly, patents, industrial designs, and trademarks, and the international conventions concerned with both these generic branches of law have a combined organization at Geneva, now known as BIRPI, the United International Bureaux for the Protection of Intellectual Property.

When these conventions were first formulated, it was thought that their administration and development could be dealt with mainly by periodic diplomatic conferences of revision, which would be sufficient to achieve and maintain uniformity in essential principles in the harmonious development of international trade and commerce. However, changes in the structure and administration are now recognized as necessary and in some respects, overdue.

The importance of these branches of law, industrial property and copyright, and the need for their revision and adjustment to meet modern conditions in national and international trade have resulted in an attempt to coordinate international cooperation in the development of a program to make far-reaching and radical changes affecting the operation and administration of these and related conventions. The object is to promote uniformity among member states in the fields of industrial property, copyright, and neighboring rights through administrative cooperation under the various intellectual property conventions and through other appropriate means.

It is proposed that the existing Berne and Paris Conventions would be merged in a World Intellectual Property Convention with administrative headquarters at Geneva, and equipped to maintain various services in the promotion of the harmonization of the national legislations, and the furnishing of technical and legal assistance to developing countries.¹

This is an ambitious conception and one wonders whether it may not be too much to expect that this new world union can be successfully

* Member of the bar of New Zealand.

1. See *Le Droit d'Auteur* 103 (1965).

formulated at Stockholm next year. Certainly a great deal of preparatory work will be necessary. In the past, it has been found that progress at such international conferences has been limited by (1) lack of time to deal adequately with some of the problems arising out of complicated issues; and (2) the absence of specialized legal experts in some of the delegations, or the lack of their authority to make decisions. The proposed World Union and organization aims to meet these defects in the extension of the functions and capacity of the existing organization at Geneva of the Berne and Paris Conventions.

In regard to the main objective — the reforms and developments necessary to efficiently promote the harmonization of the national legislations — the work on "Methods of Law Reform" at the British Commonwealth Law Conference held at Sydney, Australia, last year, is relevant and timely. Experience seems to show that many of those concerned in the practice of the law have too little time to devote to the research necessary to consider adequately all the factors involved in the development and reform of the law. This is particularly true in the fields of international copyright and industrial property, in regard to which the need for revision of the national legislation and for greater international uniformity are current and, indeed, priority issues in many countries, because of the extent to which the law has become outmoded.

The practicing lawyer is of necessity mainly concerned with the intricacies of the existing national legislation and the case law involved, while many of the international problems require considerable comparative study and research. In these circumstances there is a danger that the national approach may impede progress at the international level.

Emphasis was given to some of these aspects at the Sydney British Commonwealth Law Conference where "The Future Development of Industrial Property Law" and "Copyright and Industrial Designs with particular reference to the International Conventions and Movements towards Uniformity" were included as topics for consideration and discussion.²

Industrial property, copyright, and design law have a general current interest in the United States, as well as in all British Commonwealth countries, not only as member states of the international conventions but also because comparative study and research covering such matters as patents, designs, trademarks, copyright, plagiarism, and unfair trading practices in general, is vitally important in considering the reform

2. Topic No. 3; Committee Session No. 3.

See also "Notes for Guidance for Authors of Papers."

and development of the law, for the main reason that the general principles necessary to be observed in international trade largely also require sanction in the national legislation.

In the matter of law reform both in the United States and in the British Commonwealth, the principles and procedure of the common law from which much of the statutory law has developed require re-examination to ensure that the law will meet modern needs. On the other hand, some of the principles embodied in the Berne and Paris Conventions 75 years ago are still of vital importance today. Put in the simplest terms, the object of these Conventions was to protect these forms of property against dishonest practices in the rapidly increasing national and international trade, which so largely involves this subject matter.³ Ever-increasing advances in science and technology, the interdependence of nations, and the revolutionary developments in transport and electronics have mushroomed the values and importance in trade of industrial property and copyright subject matter. It is of historical interest to mention that it was at the Revision of the Industrial Property Convention at Washington in 1911 that "the suppression of unfair competition" in trade was specifically included as an obligation of all member states of the Industrial Property Convention. The same obligation exists for the United States and all other member states today, and its importance is comparable with the great growth and importance of international trade in the modern world. The basic principle is of course, extremely wide, and an extensive range of specific provisions are necessary in providing legal sanctions for its implementation, but it still remains a guiding principle in the progressive development of the industrial property and copyright conventions, and in particular, in its application in various forms in the national legislation of member states.

Virtually the same principle applies to both the Berne and Universal Copyright Conventions, i.e., that to copy the works of another is dishonest and should be repressed, and in the desirable dissemination of "literary and artistic works" inventions and technology play a vital complementary role and require legal protection for basically the same reasons. Thus, stated positively, the Berne, Universal, and Paris Conventions are necessary to safeguard, promote, and encourage honest principles and practices in national and international trade.

At the revision of the Industrial Property Convention at London in 1934, "acts of unfair competition" were defined as "Any act of competition contrary to honest practices in industrial and commercial mat-

3. See Official Memorial Publications: Berne Bureau, 1934, 1936.

ters" and two examples were specifically enumerated without restricting the wide scope of the term, namely: 1. "All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor; 2. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the commercial activities of a competitor." A further example was added at the Lisbon Industrial Property Conference of Revision in 1958: 3. "Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods." ⁴

It is obvious that care was taken at each of these conferences of Revision, in 1911, 1934, and 1958, not to limit "unfair competition" to "industrial property" and all the examples given could arise in regard to the subject matter of the Berne and Universal Conventions, namely, "literary and artistic property". This emphasizes the complementary nature of industrial property and copyright law and the fact that the international conventions in both of these fields are necessary, in combination, to provide the wide protection required for these forms of property in national and international trade.

This has of course been widely recognized but there have been suggestions that these conventions should not overlap in their provisions and scope. But a restriction would be a great disservice in regard to both conventions and would create insuperable legal and practical difficulties.

Article 10 bis of the Industrial Property Convention itself provides an answer to such a narrow and illogical interpretation in the sanction that it has given for over 75 years to secure and maintain honest practices in trade and commerce in general. A comparative study of the application of this principle and obligation in the national legislations of the member states of the Paris Convention, including the United States and the British Commonwealth, lies at the roots of a number of problems and it is in regard to these that the subject at the Sydney Law Conference, "Methods of Law Reform" is of particular relevance and interest. The need for efficiently organized and permanently functioning law reform bodies, in cooperation with law research organizations, university law schools, and industrial and commercial organizations specifically concerned, is urgent in regard to the conventions covering intellectual property. Unless the methods of law reform are efficient, the results are not likely to be satisfactory.

4. Manual of Industrial Property Conventions, BIRPI (1965).

The observations of Professor D. J. Benjafield in his paper⁵ at the British Commonwealth Law Conference at Sydney give cogent emphasis to this:

Legal men concede that the law is in urgent need of comprehensive overhaul. Reform is required not only because of the confused state of the law but also because in so many respects the law has ceased to serve adequately the demands made upon it by the modern community. . . .

The task of the overhaul of a legal system is beyond the energies of any one body, if it is to be accomplished in a reasonable time, and the encouragement and coordination of many, lawyer and layman alike, is essential.

In regard to law schools, Professor Benjafield's observations are timely and important:

. . . it is essential for vitality and reality in teaching that the teacher should not only be fully aware of what is happening in the legal world, and what demands are being made by clients upon the law, but also that he should be engaging in a critical examination of the law which he teaches, both from the "book" point of view and to determine whether it properly satisfies community demands. Beyond this, it is the legitimate demand of every law teacher that he should have at least some time available for the pursuit of his own research interests and, for this reason as well as in furtherance of teaching, the law schools should seek to build up their library and research facilities and should encourage the development of contact with interested members of other professions and of the community both by individual effort and by setting up cooperative research projects. . . .

Critical research is necessary even in relation to undergraduate teaching, but it is far more so at the post graduate level. . . .

The research necessary for this activity involves expanded library facilities and a central core of research workers. . . .

Not only can a law reform body, in appropriate circumstances, use a law school staff member as a consultant, but there will be many cases where each will find that the other is, in any event, pursuing a similar course through the law.

5. These papers and observations, of course, refer to British Commonwealth law but apply also to the conventions governing intellectual property.

Observations to a similar effect were made in a paper by Professor G. F. Curtis, Dean of the Faculty of Law, at the University of British Columbia:

Facilities for legal research must be greatly augmented if methods of legal reform, either existing or newly created are to be fully effective. . . .

Nothing less than an official body, well financed, well staffed, and having as its mandate the review of the whole of the law and its administration, seems capable of meeting the need. The setting up of such a body will not displace voluntary effort. The practitioner, the scholar, and the departmental official who in the course of their daily round come upon situations calling for statutory change, will continue to be a source of suggestions for such change. . . .

Agencies of special function . . . will also remain necessary. . . . There has been little interest in, or money provided for research in law. For the most part the process of statutory amendment has to operate without this sort of assistance. Much legislative change is patchwork, taking form hastily in response to immediate pressures. It is not preceded by study in depth, either as to the form it should take or the effect it will have on the main body of the law. . . .

The most serious deficiency is that, as matters stand, the amending process is largely episodic in incidence.

Such critical observations have not been made without due credit to the progress that has been made. Professor Benjafield paid tribute to the setting up recently in New South Wales of a permanent, full-time Law Reform Commission with its own staff and research facilities, and Dean Curtis made impressive reference to the conception and operation of the New York Law Revision Commission. The fact that does emerge is that greater efficiency in law reform in general is still necessary.⁶

One of the conclusions that can be drawn from the Sydney Law Conference is that in the field of intellectual property there is much scope for the improved methods of law reform advocated. Because this is rather a specialized field, it is not usually included as a topic at conferences covering the whole field of law, but some of the problems have now such a wide importance and urgency that international cooperation

6. One of the most inspiring factors at the Sydney Law Conference was the practical enthusiasm for law reform shown by Lord Gardiner, Law Chancellor of England.

is being considered more seriously. Comparative study and research on an international basis as incidental to more efficient methods of law reform is necessary to maintain the existing uniformity among the great majority of member states of the industrial property and copyright conventions and to obviate illogical developments of the law at a tangent, which, in effect, condone the dishonest practices these conventions were designed to suppress.

The international obligation to suppress unfair competition is at the root of the design-copyright problem, and the approach from this angle also indicates a practical solution to some of the difficulties in the United States and British Commonwealth countries. It is clear that infringement of copyright and infringement of design protection (where it exists) are each acts of unfair competition as defined by Article 10 bis of the Industrial Property Convention. A preliminary question more relevant to the problem in British Commonwealth countries, as members of both Berne and Paris Conventions, is whether there should be a possibility of either or both forms of protection available in respect of the same subject matter. A comparative study of (a) other national legislation; and (b) the Convention provisions, and their interpretation by other member states, is obviously necessary and of essential importance.

This evidence is very substantially in support of the affirmative point of view that cumulative or alternative protection under the copyright and/or the design law is logical and necessary to meet the needs of industry in regard to the protection of industrial designs,⁷ and applied art.

There are, however, special problems in regard to the solution of this matter in the United States. The interpretation of the Berne Convention is not in issue as the United States is not a member state, and as design protection is based on a system of registration, cumulative protection in the United States would present difficult and unwarranted administrative and judicial problems, which would be accentuated by the fact that the protection of "applied art" under copyright in the United States is more limited than it is in most Berne Convention countries. The solution of the problem in the United States as formulated in the copyright and design bills,⁸ seems to be the most appropriate one in the circumstances. Protection under the proposed design law as an alternative to copyright (where this is available) is a progressive step in providing adequate legal remedies. The doctrine of unfair competition

7. See Bolla, XXIV *Revue Internationale du Droit d'Auteur*, 55.

8. H.R. 3366; H.R. 4347.

can also continue to play a part as an ancillary procedure, not only as a principle of the common law, but also as a specific obligation under the Paris Convention.

From the point of view of jurisprudence, there is no valid basis for objection to a number of complementary and alternative remedies⁹ and this is in fact necessary to meet the wide obligation of Article 10 bis of the Industrial Property Convention. It is submitted that it is not a question of limiting the ambit in these various branches of law so that they do not overlap or "conflict", but rather of providing complementary rights and remedies to give the public and traders the protection that is needed. The statutory right under each branch of law is of course specifically limited but the fact that rights under the copyright, design, trademark, and patent law may exist at the same time in, or in relation to the same subject matter, is of great importance and value in national and international trade.

In regard to copyright and design law in particular, the long experience of European countries that this involves no practical difficulties is convincing, in the application of the principle that copyright in an artistic work is unaffected by its industrial application. It is not in derogation of the validity of this principle that the test or decisions as to what may comprise an artistic work varies in different countries and that individual cases in the same category may be difficult to reconcile. One does not assess the value of the law as a whole by the examples of borderline cases.

A preliminary investigation shows that the wide interpretation given to "artistic work" and the international protection of copyright has, over a long period, provided a satisfactory legal protection for the greater proportion of the total field of industrial designs¹⁰ and that more cooperation in specialized research in regard to the practical scope and value of the copyright protection of "applied art" in Berne Convention countries, and in Europe in particular, would be of great assistance in British Commonwealth countries and also in the United States. This would answer a number of objections to restoring copyright to its full scope in respect of artistic works, in British Commonwealth countries, where it has been argued that copyright protection for "applied art" is not appropriate and would cause confusion and uncertainty.

9. See (1) Report of U.K. Designs Committee 1962, para 49; and (2) Copyright in Industrial Designs, Russell-Clarke, p. 21.

10. See *Le Droit d'Auteur* 1942, p. 53;

Recent examples include Toys, Drinking glasses, Furniture, Dolls, Furnishing fabric, Upholstered chair; See *Le Droit d'Auteur*, 1964, p. 167; Copyright, 1965, p. 73.

In European countries, though cumulative protection is possible, copyright is usually relied on; if design registration were also obtained, an appropriate notification that copyright was also claimed would dispose of any objection of a hidden protection after the expiry of the design protection. The fact that the terms of the protection in each case are not the same merely means that for the period of cumulative protection two remedies are available against dishonest practices, and when one expires, one remedy and procedure only is available.

In Berne Convention countries no registration of copyright is necessary, but this protection without formalities, far from being a disadvantage, is of great practical value to industry in the whole field of copyright and there seems no likelihood of any of these countries reverting to a system of registration even for ephemeral copyright subject matter in regard to which there may be a case for providing a shorter term. Even for a long term, however, there is no restraint of trade because each individual has the freedom and right to create his own "artistic work".

In regard to the United States position, it is submitted it is not necessary or desirable to attempt to generalize a limitation of the scope of the principle in *Mazer v. Stein*¹¹ and say, for example, that the copyrighted photograph of a "useful article" would not protect against the manufacture of that article. Such a statement may be dangerously misleading. In British Commonwealth and other Berne Convention countries there could clearly be circumstances in which the reproduction by photography could amount to an infringement of copyright even though there could also be an independent but much narrower copyright in the photograph itself.

A further clarification of the ambit of the principle in *Mazer v. Stein* may be desirable by the U.S. courts and, in this connection, the well established principle in Europe that copyright covers all artistic works irrespective of their industrial application may be given consideration. Almost all of the "applied art" cases coming before the courts in European countries have been examples of "unfair competition" and the remedy under the copyright law amounts to a recognition that the industrial application of an artistic work is merely an ordinary exercise of the right that copyright confers.

The particular requirements in regard to copyright in the United States create difficulties and restrictions in regard to international uniformity, but this does not mean that progress cannot be made towards this objective, or that the United States cannot play an important part

11. 347 U.S. 201, 100 U.S.P.Q. 325 (1954).

in removing some of the obstacles which have hitherto precluded progress at international meetings designed to serve modern international trade by better and more uniform protection in the copyright-design field. It is not a question of developing principles of the national law but of seeking out principles which will serve the practical needs of international trade, and which merit international recognition. It is a matter of pooling knowledge and experience and evolving principles which will benefit both old and new systems of law. For example the United States design bill has given a lead to British Commonwealth countries in allowing a period of six months after publication for making application for registration of the design. The principle of British Commonwealth design law, of non-publication prior to registration, has been rigidly adhered to notwithstanding the fact that for more than a quarter of a century it has been a major obstacle in precluding industry from obtaining the design protection it has badly needed.

On the other hand, there seems a possibility of too narrow an interpretation of "design" in the United States bill. In British Commonwealth countries "shape or configuration" as well as "pattern or ornament" are capable of constituting subject matter for registration of design. The combination of form and function may be rather elusive to define but it does not need to be either artistic or ornamental—the essential feature is that the form or shape is new or original and does not include a method or principle of construction.

The international aspects of the design-copyright problem are an example of the need for cooperation in international research and for the more efficient methods of law reform advocated at the British Commonwealth Law Conference at Sydney. Much work has been done in the United States over the last five years and the coordination and cooperation of all interested parties have resulted in the great measure of success embodied in the copyright and design bills. Nevertheless, in regard to this particular international problem—the overlap of copyright and industrial design—more research and study on an international basis is necessary and would benefit both the United States and the British Commonwealth.

It is submitted that the wide obligation under Article 10 bis of the Industrial Property Convention emphasizes the practical, logical, and legal need for the complementary combination of the various forms of legal protection, in the public interest, against a variety of forms of dishonest practices in trade. Herein lies a new approach to the international solution of the design copyright problem, in British Commonwealth countries and in the United States. It is not either necessary or desirable to seek a single formula to cover industrial designs by a

sui generis system of law. In the first place the oldest and most valuable form of protection in this field is that of copyright in artistic works which most Berne Convention countries will vigorously defend as a fundamental right of copyright. In the second place the limitations of a registration system incidental to design protection under the industrial property law do not seem to permit of a satisfactory solution to the need for international protection. The new Hague Agreement of 1960 has not altered this situation.

The better, more effective, and generally more satisfactory national and international protection seems to be to restore or retain the existing copyright protection as applied art (which in the United States is represented by the principle in *Mazer v. Stein*) and to supplement this by an improved design law without prejudice to the other remedies which may be available under the national law in honoring the obligation under Article 10 bis of the Industrial Property Convention.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. UNITED STATES OF AMERICA AND TERRITORIES****210. U. S. COPYRIGHT OFFICE.**

Decisions of the United States Courts involving copyright, 1963-1964, compiled and edited by Benjamin W. Rudd. Washington, 1965. 616 p. (Bulletin No. 34).

This bulletin, eighteenth in a series compiled by the Copyright Office for official and public use, contains substantially all federal and state copyright cases, as well as cases involving related subjects in the field of intellectual property, reported during the years 1963 and 1964. The volume is for sale by the Superintendent of Documents, Washington, D. C., 20402, at a price of \$2.75.

2. FOREIGN NATIONS**211. SOUTH AFRICA. *Laws, statutes, etc.***

Act to consolidate and amend the law relating to copyright and matters incidental thereto. No. 63, 1965. (Afrikaans text signed by the State President; assented to 19th May, 1965.) (16 *Government Gazette Extraordinary* 1-86, no. 1128, June 4, 1965.)

The new South African copyright law which is to become effective upon a date to be fixed by the President by proclamation in the Government Gazette. According to a communication received by the State Department from the South African Minister of Foreign Affairs the law became effective on September 11, 1965.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

212. THE STOCKHOLM CONGRESS OF THE ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE (A.L.A.I.): *A Report on Preparations for the 1967 Revision of the Berne Convention.*

The Association Littéraire et Artistique Internationale held its 51st congress from August 23 to 28, 1965, in the Stockholm Concert House. This was the first time that an ALAI congress had been held in a Nordic country. Invitations to the participants were issued by the Swedish Copyright Society, the chairman of which is Professor Seve Ljungman. The discussions were led by Marcel Boutet of France, president of ALAI, assisted by Dr. Jean Vilbois,¹ the permanent secretary. Secretary general of the congress was Dr. Gunnar Karnell, of Stockholm.

ALAI was founded in Paris in 1878, under the chairmanship of Victor Hugo, to safeguard international copyright protection and to spread knowledge about it. At present, copyright associations in twelve countries are affiliated to ALAI (Belgium, France, Greece, Italy, The Netherlands, Portugal, Switzerland, Germany, and the four Nordic countries). There are also individual members in several other countries (Great Britain, the United States, and others). Headquarters remain in France.

ALAI has worked in particular towards the expansion of the Berne Convention and for increased adherence to it. The Convention, which is generally revised at very long intervals, will again be considered at a diplomatic revisory conference to be held in Stockholm in 1967, by invitation of the Swedish Government. Preparatory work for this conference has been going on for a long time and the Swedish Government has, in cooperation with the International Bureau in Geneva (BIRPI), presented a comprehensive conference program. Besides matters concerning the BIRPI organization, film issues and the adaptation of copyright to the interests of the developing countries will be on the agenda. Along

1. A more detailed account of the congress is given by Dr. Vilbois in *Revue Internationale de Droit d'Auteur* (RIDA) 196–216, No. 47 (Sept. 1965); The Resolutions adopted at Stockholm have been published also in *Droit d'Auteur* 238–241 (1965), and in *Interauteurs* 297–301, No. 160 (1965).

with BIEM (Bureau International de l'Edition Mécanique) and CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs), ALAI has — through a special consultative board — also contributed towards the preparatory work.

The congress had assembled a great number of participants including government observers, representatives of international organizations, national groups and associations, as well as private persons, jurists and representatives of the groups whose legal interests ALAI attempts to protect, i.e. writers, composers, artists, and stage directors. BIRPI was represented by its director, Professor G.H.C. Bodenhausen, and by Mr. C. Masouyé, head of the copyright department; the International Patent Institute by its chairman, Mr. G. Finiss; AIPPI by Professor B. Godenhilm, deputy chairman; and the International Chamber of Commerce by Mr. S. Tengelin. Among the many associations following the congress work, BIEM and CISAC should also be mentioned.

All the questions to be dealt with at the Stockholm revisory conference in 1967 were, among other things, discussed at the congress. Copyright specialists from several countries served as general rapporteurs and lecturers.

The working meetings covered surveys of the latest events in copyright legislation in the United States, West Germany, and other countries. Particular interest in this connection was directed toward the new German Copyright Act, passed during the summer, which extends the term of protection from 50 to 70 years after the author's death. A longer term of protection is also put forward in the new draft for the United States, presented to the ALAI congress by Mr. John Schulman of New York, who is a member of the panel of consultants for the new copyright revision bill. The congress, in a special desideratum, generally favored longer terms of protection.

Of the many points made by the congress a few special questions concerning the revision of the Berne Convention will be briefly discussed, namely, the drafting of film rights (1); the proposed new Article 25 bis etc., containing certain provisions to facilitate the accession of the so-called developing countries to the convention (2); and the proposed administrative reform of the Paris and Berne Conventions (3).

The discussion of the first two issues was based on the result of the conference held in Geneva from July 5-14, 1965 by an expert committee, set up by the governments of the member states. The third issue was raised on the basis of the result presented by an

expert committee in Geneva in April 1965. The proposal of the Swedish Government and BIRPI, which was intended to be the last official one before the conference in 1967, had not been finally adjusted when this was written.

(1) The congress opposed every attempt to include in Article 14 a rule of presumption of the transfer of copyright to the film producer. This Article should preferably be kept in its present wording; possibly a rule of interpretation of contracts could be added, provided that it were not drafted as a rule of transfer presumption. The congress here agreed with the proposal made by the French expert delegation in July, namely that so-called pre-existent works (e.g. a novel as a basis of a film) should not be covered by this rule, and, furthermore, that the rule should only be applied on written agreements. The congress would not in any way accept that Article 14 could acknowledge the film producer as the author of the film, nor would it have any kind of legal license in favor of the film producer. As for Article 2, the congress maintained that television production and the like should not be made equal to film works but that in the first paragraph of the Article, the words "television works" should be inserted in order to assure these works the same protection as other works.

(2) The issue concerning the developing countries has been subject to proposals from the consultative commission, which had submitted its comments at different stages of the revisory preparations. With these proposals the congress now agreed that the regulations should be put down in a supplementary protocol, that a time limit should be laid down after which no state would be allowed to join on the special terms, and that the terms should apply for no more than 20 years (10 plus 10) and should only concern translator's rights, radio rights, minimum of term of protection, and the right to use works pedagogically where education and training were concerned. Moreover, such special agreements which do not answer the requirements of Article 20 should not be allowed.

(3) The congress pointed out that the matter of organization demanded further study, and that the complete independence and mutual equality of the Paris and Berne Unions must be preserved. Technical and legal aid to the developing countries, the importance of which the congress emphasized, was to be limited to an advisory rôle on the part of states which were not yet members. The congress requested that national groups of ALAI should work

in their respective countries for the fulfillment of these desired objects.

Finally, the congress made decisions concerning proposed amendments of Articles 9, 10 and 10 bis (the proposal to introduce the right of reproduction and dissemination in the Convention, as well as proposals concerning quotation and accounts of current events), Articles 6 bis and 14 (*droit moral*), Articles 2, 5th paragraph, and 7 (protection of applied art, designs and models), and Articles 11 bis and 13 (legal and compulsory licenses, ephemeral recordings). The space available here does not, however, allow an account of the congress resolutions on these matters.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY****A. DECISIONS OF U.S. COURTS****1. Federal Court Decisions**

213. *H. M. Kolbe Co., Inc. v. Shaff*, 352 F.2d 285, 147 U.S.P.Q. 336 (2d Cir., Oct. 27, 1965) (per curiam). *For decision below, see* 145 U.S.P.Q. 77, 12 BULL. CR. SOC. 382, Item No. 287 (1965).

Appeal from judgment for plaintiff in action for copyright infringement. Plaintiff, who had recovered a judgment against Happy Cottons, Inc. for infringement in a textile design, *H. M. Kolbe v. Armigus Textile Co., Inc.*, 135 U.S.P.Q. 188, 10 BULL. CR. SOC. 119, Item No. 91 (1962), affirmed 315 F.2d 70, 137 U.S.P.Q. 9, 10 BULL. CR. SOC. 261, Item No. 287 (1963), was unable to obtain satisfaction of the judgment. It then proceeded with this action against corporate officers of Happy Cottons, Inc. for the same infringement. The trial court held, on a motion for summary judgment, that the corporate officers who personally participated in the acts of infringement were jointly and severally liable therefor, as joint tortfeasors, with their corporation.

Held, affirmed.

The court's opinion is set forth below in full:

We affirm in open court the injunction granted by Judge Levet. The appeal from the other parts of the order is dismissed. *Reeve Music Co., Inc. v. Crest Records, Inc.*, 2d Cir., 1963, 315 F.2d 70, 99 A.L.R.2d 390, Happy Cottons, Inc., the unsuccessful appellant in that case, became inactive and without assets to satisfy the judgment against it. Accordingly, this new action was brought against Gustave Shaff who is alleged to have been the guiding spirit and the "active, conscious force" behind the infringement by Happy Cottons, Inc. While various contentions of a more or less technical nature are advanced in favor of reversal of the summary judgment granted against appellant, we do not find any of them persuasive. As the order is plainly interlocutory our affirmance is limited to the injunction provisions of the order.

214. *Uneeda Doll Co., Inc. v. P & M Doll Co., Inc.*, 148 U.S.P.Q. 7 (2d Cir., Dec. 15, 1965) (per curiam). For decision below, see 241 F. Supp. 675, 145 U.S.P.Q. 326, 12 BULL. CR. SOC. 299, Item No. 232 (1965).

Appeal from order denying a preliminary injunction in action for copyright infringement. The court below held that only the abstract idea of "a doll on a pole in a display box" was copied, rather than the expression of the idea.

Held, affirmed.

The court, having examined plaintiff's and defendant's dolls and packaging, "found no reason to disturb" the conclusion of the district court that there was no copyright infringement because only an abstract idea had been copied. The court said:

Appellant has copyrights on a doll with one arm around a red and white striped pole and on a display box for the doll. It claims that appellee is infringing plaintiff's copyrights by making and selling a doll in a display box with its arm around a red and white striped pole.

It is well settled that there can be no copyright on an "idea" itself but only on the tangible "expression" of the idea. *Baker v. Selden*, 101 U.S. 99 (1879).

As Judge Learned Hand said in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489, 124 USPQ 154, 155 (2d Cir. 1960):

"Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."

In the present case the learned district judge held "that any copying here was limited to the abstract idea of a doll on a pole in a display box and did not extend to Uneeda's tangible expression of that idea" (241 F. Supp. 675, 677, 145 U.S.P.Q. 326, 327) (S.D.N.Y. 1965).

We have examined the products involved and find no reason to disturb this conclusion.

215. *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 147 U.S.P.Q. 265 (9th Cir., Oct. 26, 1963) (Beeks, J.)

Appeal from judgment dismissing complaint in action for copyright infringement in relation to illustrated hardware store catalogs. The trial

court held that plaintiff's copyright notice did not cover the drawings in its catalogs because plaintiff was not the copyright proprietor as to the drawings, that the drawings were not copyrightable and that the copyright notice was insufficient.

Held, reversed.

I. The court held that because plaintiff commissioned the drawings, plaintiff, rather than the artist (who was an independent contractor and not an employee), must be presumed to be the copyright proprietor in the absence of evidence to the contrary, and that copyright notice in plaintiff's name, therefore, was appropriate. The court said:

The basis of the trial court's holding as to the proprietorship of the copyright to Baxter's drawings is twofold. First, the court apparently indulged in the presumption that since Baxter was an independent contractor and not an employee he was the "copyright proprietor" within the meaning of the statute. Secondly, Baxter executed an assignment in favor of appellant of all right, title and interest in the drawings. The assignment was dated May 24, 1962, less than three months before the commencement of the lawsuit. The court apparently concluded that the assignment demonstrated a prior lack of title in the assignee, Lin-Brook Hardware. Appellant here contends that the assignment was merely a "quit-claim" assignment for the purposes of litigation. . . .

We are of the opinion that the trial court committed error in presuming that Baxter retained the ownership of the copyright to the drawings. On the contrary, we believe that when one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done. *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939); *Grant v. Kellogg Co.*, 58 F. Supp. 48 (S.D.N.Y. 1944); *Dielman v. White*, 102 F. 892 (C.C.D. Mass. 1900). We do not believe that the assignment referred to above, standing alone without any evidence as to the circumstances or intent of its execution is sufficient to rebut this presumption.

II. The court held that the drawings of various items appearing in the hardware catalog were sufficiently original to sustain copyright. The court said:

The trial court's conclusion that the drawings made by Baxter are not copyrightable is also based on two grounds, first, that an illustration in this type of catalog is not copyrightable, and secondly, that Baxter's work showed insufficient "originality" to be copyrightable. The court relied on *Baker v. Selden*, 101 U.S. 99, 25 L.Ed. 841 (1880), and on its discussion of the English case of *Cobbett v. Woodward*, Law Rep. 14 Eq. 407. The gist of *Cobbett v. Woodward* is that a furniture catalog is not copyrightable because it constitutes advertising. Counsel for appellees conceded on oral argument that advertising is copyrightable, as indeed he must in the face of overwhelming authority. . . .

On the issue of originality the trial court seems to have been led astray by the dual meaning of the word. The court cited as an example a drawing of a Texaco oil can and concluded that, "There was nothing original in the drawing or sketch. Any meticulous artist, looking at the can before him, would have drawn it in the same manner, achieving the same result." However, this reasoning would be even more applicable to photographs, which are commonly held to be copyrightable. *Lumiere v. Robertson-Cole Distributing Corp.*, 280 F. 550 (2d Cir. 1937). "Originality" in copyright law is not a question of creativity or novelty, but one of authorship or source of origin. "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary." *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951). To paraphrase the language of the Supreme Court in the *Bleistein* case, appellees were free to copy the original oil can, but they were not free to copy Baxter's copy of the can.

III. The trial court also held that the copyright notices on plaintiff's catalogs were insufficient in that they did not specify which items in the catalogs were copyrighted and that the plaintiff's certificates of registration were improper because they were not specific enough in describing what parts of the catalogs were copyrighted. It was held on appeal, however, that both notice and certificates met statutory requirements. The court said:

The third ground of the trial court's decision was that of insufficient notice of the copyright. This ground is also twofold. First, inasmuch as much of the material in the catalogs was admittedly not copyrightable, the notice of the copyright printed on the cover of the catalogs was insufficient to give notice to the public as

to which of the myriad items in the catalogs were copyrighted. Secondly, the language used in the certificates of copyright was so indefinite and uncertain as to be a failure of notice to the public.

The first basis of the court's conclusion as to notice is contrary to the express language of the statute, 17 U.S.C. §3, and to the holdings of the decided cases. *Markham v. A. E. Borden Co., Inc.*, 206 F. 2d 199 (1st Cir. 1953); *Da Prato Statuary Co. v. Giuliani Statuary Co.*, 189 F. 90 (C.C.D.Minn. 1911); *National Cloak & Suit Co. v. Kaufman*, 189 F. 215 (C.C.M.D.Pa. 1911); *P.I.C. Design Corporation v. Sterling Precision Corp.*, 231 F.Supp. 106 (S.D.N.Y. 1964).

The second ground was that the language of the copyright certificates was too indefinite and uncertain. The certificates stated, "New matter consists of new artistic drawings of merchandise, new textual and pictorial material not previously published and new layouts and revisions." Given the language of 17 U.S.C. §3 . . . , we find that the certificates give all notice the statute requires and the conclusion that the language of the certificates is too indefinite and uncertain is erroneous.

216. *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 147 U.S.P.Q. 409 (S.D.N.Y., Oct. 20, 1965) (Cannella, J.)

Action for declaratory judgment to establish the ownership of the renewal copyrights of 87 songs written by Walter Donaldson. Donaldson wrote these songs during the term of an agreement with defendant corporation whereby he was "to write and compose musical works for the corporation exclusively." The corporation had been formed by Donaldson, Walter Douglas (a music publishing business sales manager) and Mose Gumble (a professional manager) for the purpose of exploiting Donaldson's songs. Each of the three was an owner of one-third of the stock, and contributed his efforts under an agreement with the corporation; the agreements of Douglas and Gumble with the corporation were employment agreements. During the term of Donaldson's agreement with the corporation he delivered the 87 songs in question to the corporation and also did musical work for others, such as Ziegfeld and Fox Film Corporation. Donaldson died in 1948, prior to the expiration of the original copyright term of each of the 87 songs, leaving two daughters, who subsequently assigned their interests in the copyright renewals to plaintiff. The original copyright registrations had been made in the name of defendant as copyright proprietor, Donaldson being listed in each instance as sole author or co-author of the musical composition.

Held, judgment for defendant.

Plaintiff argued that Donaldson wrote the songs in question as an independent contractor and that, as a consequence, his children and/or their successors in interest, rather than the original copyright proprietor, were entitled to renew the copyrights in the songs. The court, however, after examining the circumstances of the formation of defendant corporation, its agreement with Donaldson, and the behavior of the parties to the agreement thereunder, concluded that Donaldson had been an employee for hire and that defendant, as the employer for hire, was entitled to the copyright renewals. The court said:

. . . The principal questions herein are two-fold. They are set forth in the pre-trial order as follows:

(a) Whether or not Walter Donaldson with respect to the compositions written by him for the defendant (known in 1928 as Donaldson, Douglas & Gumble, Inc.) was an employee for hire, as such term is used in the Copyright Act, Title 17 U.S.C. Sec. 24, whether under a contract dated May 15, 1928 between Walter Donaldson and the defendant, or otherwise [or whether Donaldson was an independent contractor].

(b) Whether or not the defendant is the proprietor of said 87 compositions written by Walter Donaldson as works copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) and belong to the defendant as such corporate body.

The first inquiry therefore centers about the question of whether Walter Donaldson was an employee for hire or independent contractor. To determine this question it is necessary to 1) examine the formation of Donaldson, Douglas & Gumble, Inc.; 2) analyze the status of Donaldson as it appears in his agreement with the corporation and 3) examine the conduct of the parties during the life of the agreement.

Donaldson, Douglas & Gumble formed the corporation. Each had special qualities and contributed them to the corporation. There has never been any doubt that Douglas and Gumble were employees of the corporation. They had so stated. In addition their agreements with the corporation were couched in terms of employment and they received a salary. Walter Donaldson's status presents a clouded picture. He was undoubtedly the outstanding member of the company. He was well known in the industry and already

had created a portfolio of songs. What was his intention when he joined together with Douglas and Gumble to form the corporation? The court finds that he deliberately chose to be an employee for hire. The songs herein were written by Donaldson either as sole or co-author for the defendant as employer, under the employment agreement and were works for hire as contemplated under the Copyright Act, 17 U.S.C.A. §24. All of these 87 compositions were duly copyrighted by the defendant in its own name under its former corporate title, Donaldson, Douglas & Gumble, Inc., between May 28, 1929 and April 12, 1933, inclusive, with Donaldson retaining certain royalty rights as specified in the agreement.

It might be argued that Donaldson's relationships with Ziegfeld, Fox and Z & G indicate that he was not an employee for hire, but the court finds that the conduct of Douglas and Gumble in allowing Donaldson to, in effect, breach his exclusive arrangement with the corporation, could be equally consistent with other considerations, e.g., their fondness for Donaldson, the increased prestige to the corporation because of the added prestige of Donaldson, or a so-called farm out. The court holds that the outside employment does not perforce create an independent contractual status on Donaldson.

The money arrangement was heavily weighted in Donaldson's favor but this does not compel the conclusion that he was an independent contractor. Under New York law, the arrangement Donaldson had and which he exploited to the extent that he was overdrawn, in effect amounted to a salary. See *Northwestern Mutual Life Ins. Co. v. Mooney*, 108 N.Y. 118 (1888); *Kane v. Auto Lake Mfg. Co.*, 172 N.Y.S. 275 (1st Dept. 1918). . . .

Without mentioning all the circumstances the court has considered, the court is satisfied from an examination of the total picture of Donaldson's relationship with the corporation that he was an employee for hire within the meaning of that term in the music publishing business. This being so, the defendant employer who had become proprietor of the original copyright of works made for hire, is entitled to the renewal rights. *Shapiro Bernstein & Co. v. Bryan*, 123 F.2d 697, 51 USPQ 422 (2d Cir. 1941); *Fred Fisher Music Co. v. Leo Feist, Inc.*, 55 F. Supp. 359, 61 USPQ 229 (S.D.N.Y. 1944).

Having determined Donaldson to be an employee for hire and that the defendant is entitled to the renewal rights, the court does not deem it necessary to determine the second issue (issue (b) supra).

A declaratory judgment will therefore issue in favor of the

defendant, to the 87 songs in question. The registration by the defendant is found to be the valid and effective registration and that of the plaintiff's predecessors is found to be null and void.

217. *B. Wilmsen, Inc. v. Consolidated Novelty Co., Inc.*, 148 U.S.P.Q. 247 (S.D.N.Y., Nov. 17, 1965) (Cooper, J.)

In action for declaratory judgment to determine validity of copyright in defendant's "Christmas Tree Branch and Leaves," motion for preliminary injunction to compel Collector of Customs to permit entry of plaintiffs' allegedly piratical copies.

Held, preliminary injunction granted.

The court held that preventing or delaying the entry of imported Christmas decorations with the Christmas shipping season "already in progress" would do such substantial damage to plaintiffs and other similarly situated importers that a preliminary injunction was justified if there was a substantial likelihood that plaintiffs would prevail on trial, and that plaintiffs were likely to prove that defendant's "Christmas Tree Branch and Leaves" had been generally published without copyright notice. The court said:

Plaintiffs and defendant Consolidated Novelty Co. Inc. (hereinafter "Consolidated") are each engaged in the business of manufacturing and importing artificial Christmas trees and decorations made from polyethylene. The defendant Joseph P. Kelly, as Collector of Customs for the port of New York, has retained in custody pursuant to 19 C.F.R. §11.20 four shipments of artificial branches and leaves consigned to plaintiffs.

There is no real dispute here that the detained merchandise is an actual copy or substantial reproduction of goods purportedly protected by defendant's copyright. . . .

Unless plaintiff obtains delivery of the confiscated merchandise and similar shipments thereof in the immediate future, they will not be able to meet their commitments for the 1965 Christmas season. . . .

As between plaintiffs (and other importers who might be similarly situated) and defendant Consolidated, this Court is impressed with the fact that a crucial situation is present here (with the Christmas shopping season already in progress) by the continued detention of plaintiffs' Christmas tree branches, and where there is substantial likelihood plaintiffs will ultimately prevail. Time being of the essence, if injunctive relief is warranted, it is now.

The plaintiffs, in contending that detention is unwarranted, urge three grounds as establishing the invalidity of defendant's copyright: (1) the subject thereof is not the proper subject of copyright; (2) Consolidated made fraudulent misrepresentations on its application therefor, and (3) it was first published and sold without notice of copyright thereon. . . .

The bulk of the record in this case consists of assertions in affidavit form. . . . They present a veritable thicket of conflicting averments, the unravelling of which can result only from a full trial of the issues wherein credibility of the evidence can be properly assessed and accorded the weight it deserves. See *Telegraph Delivery Service v. Florists Tel. Service*, 12 F.R.D. 342 (S.D.N.Y. 1952). Without more, the record now before the Court hardly offers the evidentiary foundation for a preliminary injunction on each of the grounds asserted. . . .

Nonetheless, the proof, albeit scant, upon the issue of first publication without notice warrants temporary injunctive relief. In reviewing and evaluating this evidence the Court stresses that it is not, at this stage, sitting as the final arbiter of the ultimate fact of whether there was a first publication without notice. At present, evidence on that score is of much greater convincing power than anything Consolidated has presented to the contrary and manifests a substantial likelihood that plaintiff would prevail on this issue at trial. . . .

The validity of the copyright being drawn substantially in question, this Court finds the Collector of Customs to be without authority under 17 U.S.C. §106 to detain merchandise purportedly copies of goods claimed protected under copyright No. Gp 41064. In making this determination, the Court is constrained to make the preliminary injunction as limited as possible in view of its evidentiary foundation and consistent with the nature of the injury which makes such injunction necessary.

The court's order provided that the Collector of Customs was to release the shipments held in custody, and was not to detain further shipments, through January 3, 1966, on the grounds that they were piratical copies of defendant's "Christmas Tree Branch and Leaves" and that plaintiffs were to file appropriate bonds and maintain and keep available records "as to the distribution of items subject to the restraining provision of this order."

218. *Lapsley v. American Institute of Certified Public Accountants*, 246 F. Supp. 389, 147 U.S.P.Q. 439 (D.D.C., Oct. 18, 1965) (Sirica, J.)

Action for infringement of common law copyright in an unpublished manuscript entitled "Budget Theory and Practice." Plaintiff charged that defendant's two editions of "Budgeting for Profit in Small Business" infringed his manuscript, which had been submitted to plaintiff for possible publication but had been rejected. A motion for a directed verdict for defendant having been denied at the close of plaintiff's case, it was renewed at the close of defendant's case.

Held, judgment for defendant.

The court held that the occurrence of some of the same ideas, words and phrases in each of two works on a technical subject like budgeting did not constitute such substantial similarity as would tend to prove that one of the works was copied from the other. The court said:

Even assuming that the defendant had access to the plaintiff's manuscript, in the opinion of the Court, there has not been a showing of substantial similarity between this work and the defendant's publications. The plaintiff maintains that he originated the concepts or ideas which appear in his manuscript and which also appear in the defendant's publications. While there is evidence that these concepts are, and were, not novel, as a matter of law, plaintiff is not entitled to obtain a copyright of an idea. . . . Many books dealing with the same subject contain similar ideas and concepts and indeed numerous works on accounting and budgeting contain concepts similar to those found in the plaintiff's manuscript. Plaintiff further maintains that the defendant's publications contain words and phrases similar to those used by the plaintiff. This the defendant concedes. However, since all of these works deal with the same topic, it is only natural that such publications would contain similar words and phrases, especially in light of the technical and complicated nature of the subject matter. See *Dorsey v. Old Surety Life Ins. Co.*, 98 F. 2d 872, 119 A.L.R. 1250 (10th Cir. 1938). Every subject, especially a technical one, has its own idiom and words of art, and it is absurd to think that the use in a later publication of words and phrases similar to those found in an earlier copyrighted publication on the same subject matter, necessarily constitutes an infringement of the copyrighted material. The English language is not broad enough so that similarity of phraseology and word usage will not appear in material on the same topic, especially in a technical field. It would be ridiculous to consider

such similarity a copyright infringement. . . . Plaintiff's right is to the *arrangement* of the words he has selected to express his ideas, not to the ideas or the words themselves. . . . It is quite apparent to this Court that although the same words and concepts appear in all the works involved, there is no similarity in their arrangement, and it is similarity in arrangement which is the test. *Miner v. Employers Mut. Liab. Ins. Co.*, 97 U.S. App. D.C. 152, 229 F. 2d 35 (1956).

219. *Manpower, Inc. v. Temporary Help of Harrisburg, Inc.*, 246 F. Supp. 788, 148 U.S.P.Q. 85 (E.D. Pa., Oct. 12, 1965) (Grim, J.)

Action for copyright infringement. Plaintiff and defendant are both in the business of providing temporary help to businesses of all kinds. Plaintiff alleged that defendant had copied vacation schedules prepared by plaintiff for the use of its customers and others in recording vacation times of their workers.

Held, judgment for plaintiff.

It was held that plaintiff had valid copyright in its vacation schedules, that two of them, including art work, were copied by defendant almost without change, and that plaintiff was entitled to damages.

220. *Harm's, Inc. v. Theodosiades*, 246 F. Supp. 799, 148 U.S.P.Q. 65 (E.D. Pa., Oct. 18, 1965) (Grim, J.)

Action for copyright infringement. Plaintiffs alleged that their musical compositions, "Begin the Beguine," "Tenderly," "Ramona" and "You Always Hurt the One You Love" were performed publicly for profit in defendant's "Callahan's Cafe" in Philadelphia, without plaintiffs' permission.

Held, judgment for plaintiffs.

It was held that plaintiffs' copyrights were valid and infringed and that defendant cafe owner was liable for the infringing performances whether or not she paid the performers.

221. *Blumcraft of Pittsburgh v. Newman Bros., Inc.*, 246 F. Supp. 987, 147 U.S.P.Q. 107 (S.D. Ohio, Sept. 23, 1965) (Peck, J.)

Action for infringement of copyright in illustration of metal railings. Plaintiff's and defendant's catalog illustrations were similar in perspective and style of representation but depicted, respectively, plaintiff's and defendant's different metal railings. Both parties moved for summary judgment.

Held, judgment for defendant.

The court held that the style and manner of illustration involved was in the public domain and that copying had not been established. The court said:

... The illustrations in the two catalogs are similar in nature. Each depicts a vertical post in its approximate center, with three handrails on its far side and affixed to it by appropriate fittings. A sense of perspective is established by the fact that the rails are not parallel, having a greater vertical separation on the left than on the right. In each illustration the background is black, and two white lines at the bottom of each indicate a base to which the bottom fitting on the post is affixed. Again a sense of perspective is established by the position of the two white lines, and a projection of them and of the rails would coincide at some point to the right. . . .

Assuming without deciding that plaintiff's illustration is the subject of a valid copyright, we pass to a consideration as to whether the defendant has infringed such copyright. The defendant argues first that there can be no copyright infringement where the illustrations of the parties are clearly of assemblies of their different respective goods, and that there can be no copyright infringement found where resemblances are only in matters in the public domain, or in ideas alone, or only in an incidental feature.

As has been indicated, it is plaintiff's contention that the two specified illustrations promulgated by defendant are copied from one of its own, but extensive discovery proceedings having developed no corroboration plaintiff is in the unenviable position of urging its conclusion solely on the basis of the similarity of the illustrations. . . . Were this case presently submitted on the merits rather than on cross-motions for summary judgment, we would have no hesitation in finding for the defendant solely on the ground of plaintiff's failure of proof in this regard. In such circumstance *Remington Research, Inc. v. Modern Aids, Inc.*, 170 F. Supp. 7 (N.Y. 1959) would have direct application, and no copying having been shown to have occurred, no infringement could be found. . . . However, since the case is not before us on the merits, consideration of further grounds seems appropriate.

Defendant has attempted to avoid the consequences of *Perris v. Hexamer*, 99 U.S. 674, 25 L.Ed. 308 (1878) on the ground that since the maps which were the subject of controversy were of different cities the fact that no infringement was there found gives no

basis for such a result here. However, that argument fails to take into account the conceded fact that the illustrations which are the heart of the present controversy portray, as did the maps, different subject matter, i.e., the respective products of the parties. . . .

As has been pointed out, both illustrations are of handrails shown in perspective view, shown affixed to a supporting post. It has here been shown that defendant has displayed its products by perspective views of one type or another since 1955, and copies of patents obtained by plaintiff which are a part of the present record establish that plaintiff presented therein perspective views of assemblies similar to those here involved. By the publication of these illustrations the plaintiff itself has placed the idea of such a presentation in the public domain. *Korzybski v. Underwood & Underwood, Inc.*, 36 F.2d 727 (2d Cir. 1929). Sweet's (a classified collection of trade catalogs) for 1961, an exhibit herein, clearly demonstrates that perspective views had become a common means of presentation in the handrail industry, and it will be noted that it was at that time that defendant's 1962 catalog was in preparation. Matters in the public domain are not protected by copyright (*Millworth Converting Corp. v. Slifka*, 276 F.2d 443 (2d Cir. 1960)), and therefore basis for liability in a copyright infringement action cannot be found in mere resemblances occasioned by a generally similar perspective presentation.

2. State Court Decisions

222. *Preminger v. Columbia Pictures Corp.*, 148 U.S.P.Q. 398 (Sup., N.Y. Co., Jan. 19, 1966) (Klein, J.)

Action for an injunction to restrain defendants from cutting of or interruption for commercials of the motion picture "Anatomy of a Murder" for purposes of television use. A limited preliminary injunction against cutting the film, but not against interrupting it for commercials, was granted on consent. Plaintiffs' claim for money damages, by virtue of defendants' alleged failure to reissue the film for theatrical exhibition, and their failure to allocate to "Anatomy of a Murder" a sufficient share of the block television sales in which it was included, was subsequently severed on motion from the application for an injunction.

Held, injunction denied.

Plaintiffs argued that a contractual provision giving plaintiff Carlyle Productions, Inc. the right to make "the final cutting and editing of

the picture" prevented defendants from making any cuts or interruptions in the motion picture in connection with its television showings without plaintiffs' approval. The court held, however, that the quoted phrase, read in connection with other clauses of the same contract, and viewed in the light of trade practices, referred only to the cutting and editing which occurs prior to theatrical exhibition and that defendants were therefore free to make and/or authorize such *minor* cuts and such interruptions for commercials as are usual in the showing of theatrical motion pictures on television. The court said:

The plaintiffs plead themselves upon Article VIII of the contract, which provides: . . . that plaintiffs have the right to make the final "cutting and editing" of the picture, giving the defendants the right to make suggestions, only.

This article must be read, however, in juxtaposition with Article X of the contract, which provides as follows:

"... You hereby give and grant to us throughout the entire world the exclusive and irrevocable right during the term herein specified to project, exhibit, reproduce, transmit and perform, and authorize and license others to project, exhibit, reproduce, transmit and perform, the picture and prints thereof by television. . . ."

This Article, it will be noted, which contains the specific grant of television rights, makes no reference to "cutting and editing".

In these circumstances the Court is inclined to the view that the right to the "final" cutting and editing, reserved to the plaintiffs, is limited to the original or theatrical production of the picture and not to showings on television; and that as to such showings, in the absence of specific contractual provision, the parties will be deemed to have adopted the custom prevailing in the trade or industry.

This view is confirmed by the authorities and fortified by the evidence.

We begin with the proposition that the law is not so rigid, even in the absence of contract, as to leave a party without protection against publication of a garbled version of his work. . . . *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1959). . . .

In the case at bar, however, the contract must serve as a guide to the intention of the parties.

Thus, where the parties have particularized the terms of a contract, an apparently inconsistent general statement to a different

effect must yield. *Petty v. Fidelity Union Trust Co.*, 238 App. Div. 96, 99-100 (2d Dept. 1933), *affd.* 262 N.Y. 690 (1933). . . . Therefore the clause in this contract, general in its terms, giving plaintiffs the right to "finally" cut and edit as to the original production of the motion picture, must yield to the specific clause with respect to television showing, which contained no such right.

So it is, too, that in the construction of a contract, weight will be given to the custom prevailing in the trade to which it refers. *Smith et al. v. Clews*, 114 N.Y. 190 (1889).

This brings us to a review of the evidence, on which, of course, the burden of proof rests on the plaintiff . . .

A review of the testimony demonstrates that, at least for the past fifteen years, the right to interrupt the exhibition of a motion picture on television for commercial announcements and to make minor deletions to accommodate time segment requirements or to excise those portions which might be deemed, for various reasons, objectionable, has consistently been considered a normal and essential part of the exhibition of motion pictures on television.

Implicit in the grant of television rights is the privilege to cut and edit. *Autry v. Republic Productions*, 213 F.2d 667, 669 (9th Cir. 1954), *cert. den.* 348 U.S. 858 (1954) .

No proof has been adduced that this cutting and editing would be done in such a manner as to interfere with the picture's story line. . . .

With respect to the expression "final cut", sufficient testimony was adduced to indicate that this phrase, as used in Article VIII of the contract, relates only to a phase in the production of the picture for theatrical showing and has no relation to the interruptions and minor cuts here under discussion. Even plaintiffs' own witnesses identified the "final cutting and editing" of a picture as the last stage in its production *for theatrical exhibition*. (Emphasis supplied.)

Although plaintiffs consistently refer to the practice of interrupting and making minor cuts as "mutilation", their own witnesses have conceded that the minor cuts customarily made in a television exhibition of a picture have such a minimal impact upon its overall effect that these are rarely even noticed.

Undisputed is the fact that not a single television station has ever failed to insist upon the right to interrupt for commercials. Similarly unrefuted is defendants' proof to the effect that no station ever purchased a motion picture without reserving to itself the right to interrupt for commercials and to make minor cuts.

Plaintiff Preminger admitted that when he signed the agreement for "Anatomy of a Murder", he was aware that the practice of the television industry was to interrupt motion pictures for commercials and to make minor cuts. Aware of this practice, plaintiffs at the time the instant contract was signed nevertheless did not specifically provide for conditions other than those known to them to be prevalent in the industry. . . .

Plaintiffs' entry into the instant contract which failed to contain such a clause may be considered by the Court as evidence of the parties' intention. . . .

The criterion for the determination of what the defendants were likely to do with respect to interrupting and cutting the subject film, in the absence of a specific contractual arrangement, was not what plaintiffs might disapprove of or dislike but, rather, what was the normal custom and practice in the industry.

The issues in the case, in the Court's view, are therefore issues of law: i.e. (1) whether plaintiffs may thwart the making of minor cuts or interpolations in the absence of specific contractual provision; the Court finds the answer to this question to be in the negative; and (2) whether, under this contract, in the light of the custom in the trade, plaintiffs left to the stationmasters the right to use their judgment and exercise their discretion, instead of plaintiffs, as to which minor cuts, eliminations, and interpolations are appropriate. In view of the variety of stations, localities, audiences, and commercials, the Court answers this question in the affirmative.

The running time of the full motion picture is 161 minutes. The brochure for WABC-TV advertised the picture to potential sponsors as a 100-minute feature. The stationmaster, however, testified, and the Court credits his testimony, that this was a mistake; that it was never intended to permit any such extensive cutting. This applies as well to the asserted cutting of the picture to 53 minutes. Obviously such cuts would not be minor and indeed could well be described as mutilation. Should such "mutilation" occur in the future, plaintiffs may make application to this Court for injunctive or other relief as they may be advised. *Autry v. Republic Productions*, supra, 213 F.2d 667 at 669. . . . *Granz v. Harris*, supra, 198 F.2d 585.

223. *Pocket Books, Inc. v. Dell Publishing Co., Inc.*, 148 U.S.P.Q. 239 (Sup. N.Y. Co. 1966) (Markowitz, J.)

A motion for a preliminary injunction which would have prevented defendants from publishing and distributing their biography of Grace

Metalious, author of "Peyton Place", under the title "The Girl from 'Peyton Place'" was denied. The court agreed with plaintiff's contention that the words "Peyton Place" had acquired secondary meaning but said that "[a]lthough appropriation must be conceded, such appropriation for the title of a biography of Grace Metalious is not automatically metamorphosed into "misappropriation". The court also held that plaintiffs had not proved "irreparable injury pending the trial" and pointed out that "restraint of a medium of communication involves more than the particular private interests involved."

224. *Silver v. Television City, Inc.*, 215 A.2d 335, 148 U.S.P.Q. 167 (Penna. Super., Dec. 16, 1965) (Montgomery, J.)

Appeal from judgment for plaintiffs in action for defendant's use of plaintiff's program format, "Air Your Gripe" which defendant produced and televised as "Pulse of the People."

Held, affirmed.

I. Defendant argued that the plaintiff's program idea was, as a matter of law, neither new nor novel. The court held, however, that the question of novelty was properly submitted to the jury. The court said:

... The basic idea of "Air Your Gripe" was that people are interested in venting or airing in public their wrath against what they feel are iniquities or injustices. The format or layout of the show began with a solicitation by the station of letters from people who had complaints, "beefs". The people who wrote the most interesting letters would then be invited to appear at the station and broadcast their opinions without interrogation. Thereafter a moderator would review in brief what the person had broadcast. . . .

It is defendant's contention that this idea was not novel but was an audience participation telecast or "letter to the editor" type of program which had been in the public domain for many years. In support of its contention defendant introduced into evidence a publication called "interaction", being a collection of television public affairs programs at the community level. . . . Defendant also offered the testimony of Mr. David Murray and Mr. Nick Parry, two of its staff announcers, concerning similar programs each had seen or participated in prior to the time they had heard of the one offered by plaintiff, and further testimony that "Pulse of the People" had been developed as a result of conferences with the journalism department of Duquesne University. This evidence was

submitted to the jury to aid it in determining whether "Air Your Gripe" was a novel idea. The jury resolved that issue in plaintiff's favor. Defendant now asks us to say, as a matter of law, that it was not novel.

The leading case in Pennsylvania in this field is *Thomas v. R. J. Reynolds Tobacco Company*, 350 Pa. 262, 268, 38 A.2d 61, 64 (1944), to which both sides to this appeal refer. That case recognized that, "Each case of this nature must of necessity depend upon its own facts. A line of demarcation dividing the novel, new and concrete from the abstract is incapable of exact determination. Whether an idea is novel and whether its form is concrete are matters of degree. Whether the issue is one of fact or of law cannot be known in advance of the particular case. Certainly, however, the line must have a sufficiency of breadth to encompass ideas capable of being either. Appellant's idea is not one of these; it is clearly abstract and is neither novel nor new." The facts therein may be briefly stated as follows. Being compelled by the depression to practice economy the plaintiff-appellant therein had discontinued smoking Camel cigarettes and had resorted to cheaper or "Ten Cent" brands and by doing so he became convinced that Camels were not only the best but most economical since they burned approximately twice as long as other brands. This idea was expressed in a letter to the makers of Camels. The defendant-appellee maker offered uncontradicted evidence that prior to the date of the plaintiff's letter scientific tests of the comparative burning time of various cigarettes had been made establishing the fact asserted by plaintiff. The Court in *Thomas v. R. J. Reynolds Tobacco Company*, in affirming the lower court held as a matter of law that the idea offered by Thomas was not novel. . . .

Radio and television programs may be such literary productions as are protected by common law. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P.2d 73 (1950). However, they must evidence the exercise of skill, description and creative effort. . . .

Although the question of originality is one of law in the first instance to determine if there is evidence to submit to the jury, *Thomas v. R. J. Reynolds Tobacco Company*, supra; *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 256 P.2d 947 (1953), the question is generally one of fact for the jury. *Stanley v. Columbia Broadcasting System*, supra; *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 151 P.2d 906 (1944); *Desendorf v. Twentieth Century Fox Film Corporation*, 99

F.2d 850 (9th Cir. 1938); *New York Belting & Packing Company v. New Jersey Spring & Rubber Company*, 137 U.S. 445, 11 S.Ct. 193, 34 L.Ed. 741 (1890).

Defendant contends strenuously that its evidence, uncontradicted, demonstrates that plaintiff's program was not new or novel because audience participation in telecasts and letters-to-the-editor type programs had been in the public domain for many years. We do not agree. Our analysis of "Air Your Gripe" in the light of the record before us leads us to the same conclusion reached by the learned trial judge as well as the court en banc, that this issue was for the jury, and we adopt the analysis of that court.

"From this book ('interaction') defendant endeavored to pick out various programs which were classified as 'letters to the editor' shows and which were felt to prove that the arrangement of ideas incorporated in 'Air Your Gripe' had been well known to the television industry before the first telecast of 'Pulse of the People' was made. No show identical to 'Air Your Gripe' or 'Pulse of the People' was found . . . Plaintiff's combination of solicitation of letters from the television audience, upon any subject which the viewer personally feels strongly about . . . and the eventual television interview conducted without prompting or interrupting questions from the moderator, was distinguishable from any other show produced by defendant at trial. We feel it was for the jury to say if those distinguishing factors were sufficiently new and novel to be entitled to legal protection as a property right." . . .

Herwitz v. National Broadcasting Company, 210 F. Supp. 231, 236 (S.D.N.Y. 1962), is relied on heavily by defendant. Judgment was entered for the defendants in that case because the idea therein was abstract. . . .

II. The court also held that the trial court properly permitted the plaintiff to testify as to the value of his format and that the amount of damages found by the jury was not so unreasonable as to justify a new trial on the issue of damages. The court said:

Generally, an owner of property, real or personal, is competent to testify as to its value. . . . It is only when it plainly appears that the owner has no knowledge of the value he expresses an opinion about that the presumption arising from ownership is overcome and his opinion is inadmissible. . . .

In our present case it must be conceded that plaintiff was experienced in the entertainment field . . . , that he was familiar with television programs, . . . that he was particularly familiar with this program under discussion, having conceived it and prepared the tape, format, and script, that the duration of the program "Pulse of the People" ran once a week for eight months at a cost to defendant of \$7,855.62 to produce, and that such programs have a value as an asset. On the basis of this testimony plaintiff was competent to venture an opinion as to the value of his property for the consideration of the jury . . . The value of some items of personal property is difficult to establish but that does not mean such property is valueless and that damages to it may not be recovered. . . . We are of the opinion that sufficient proof was offered in the present case and we cannot say that the jury's finding of \$7,500 or approximately \$200 per broadcast for the use of plaintiff's program is so unreasonable as to shock our conscience, justifying a new trial on that basis.

Also of Interest:

225. *Spangler Candy Co. v. Crystal Pure Candy Co.*, 147 U.S.P.Q. 434 (7th Cir., Dec. 6, 1965) (Duffy, J.)

Appeal from judgment dismissing complaint in action for trademark infringement and unfair competition. Plaintiff manufactures "Dum-Dums", a brand of lollipops, with a distinctive shape and wrapping. Defendant concededly copied these lollipops and their wrapping for its "Pop-Pops." The court affirmed the judgment below, holding that if there is no patent or copyright protection involved, and in the absence of actual palming off, copying a competitor's product is permissible under the *Sears* and *Compco* cases even though it can be shown that the copying has caused confusion.

226. *Tappan Co. v. General Motors Corp.*, 245 F. Supp. 972, 147 U.S.P.Q. 67 (N.D. Ohio, Apr. 27, 1965) (Green, J.)

Action for infringement of design patents for stoves and for unfair competition. Defendant's motion for summary judgment on the cause of action for unfair competition was granted. The court held that even if it were proved that defendant had copied the design of plaintiff's stoves, and such copying included non-functional design features which had acquired a secondary meaning, no claim for unfair competition was stated. Citing the *Stiffel* and *Compco* cases, the court held that copying the design of another's product is permitted (apart from questions of

copyright or design patent) so long as the copies are so labelled as to be properly identified as to source and are not palmed off as the product of the originator of the design.

227. *Cinerama, Inc. v. Max Howe Motion Pictures*, 147 U.S.P.Q. 497 (Patent Office Trademark Trial and Appeal Board, Dec. 10, 1965) (Leach, Member).

It was held that "Camerama" as a trademark was so similar to "Cinerama" as to cause confusion, and the opposition of Cinerama, Inc. to registration of "Camerama" as a trademark was sustained.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

2. Foreign Publications

228. COPINGER, WALTER ARTHUR. Copinger and Skone James on copyright, including international copyright, with the statutes and orders relating thereto and forms and precedents. 10th ed. by F. E. Skone James and E. P. Skone James. London, Sweet & Maxwell, 1965. 836 p.

The definitive text on the United Kingdom Act brought up to date.

229. LUTZ, MARTIN J. Die Schranken des Urheberrechts nach schweizerischem Recht unter vergleichender Berücksichtigung der europäischen Urheberrechtsgesetze und der deutschen Entwürfe. Zürich, Schulthess, 1964. 262 p. (Zürcher Beiträge zur Rechtswissenschaft, n.F., Heft 246.)

A study of the limitations on copyright under the Swiss copyright statute. Includes a comparative evaluation of the pertinent provisions of copyright laws of selected European countries and of the West German drafts.

B. LAW REVIEW ARTICLES

1. United States

230. CARY, GEORGE D. Copyright revision. (9 *Idea* 147-155, 1965).

A lecture delivered at the Ninth Annual Public Conference sponsored jointly by the Patent, Trademark and Copyright Research Institute of the George Washington University and the Commemorative Committee of the 175th Anniversary of the United States Patent System. The Deputy Register of Copyrights discusses the highlights of the copyright revision bill (H.R. 4347; 89th Cong., 1st sess.) in the light of principles stated in a resolution of the American Patent Law Association in the spring of 1965.

231. DUBIN, JOSEPH S. Intellectual property relations with industrialized nations: copyright aspects. (9 *Idea* 214-222, 1965).

A lecture delivered at the Ninth Annual Public Conference sponsored jointly by the Patent, Trademark and Copyright Research Institute of the George Washington University and the Commemorative Committee of the 175th Anniversary of the United States Patent System. A case is made for an adoption of the principle of strict reciprocity in the copyright relations of the United States with foreign countries.

232. HAMILTON, WILLIAM C. Copyright problems at the Academy. (7 *United States Air Force JAG Law Review* 21-24, no. 6, Nov.-Dec. 1965.)

A discussion of certain copyright problems which arise at the Air Force Academy as an institution of higher learning, mostly involving matters of fair use and Government publications.

233. HUDON, EDWARD G. Mark Twain and the copyright dilemma. (52 *American Bar Association Journal* 56-60, no. 1, Jan. 1966.)

An article on Mark Twain's battles against literary pirates, his efforts to have the term of copyright lengthened, and his "famous controversies with American publishers."

234. LAWLOR, REED C. Bibliography *re* patent and copyright law in relation to computer technology. (*M.U.L.L.* 53-55, June 1965.)

A selective bibliography arranged in chronological order.

235. LINDEN, BELLA L. The law of copyright and unfair competition: the impact of new technology on the dissemination of information. (*M.U.L.L.* 44-52, June 1965.)

"This article deals with copyright and related problems of unfair competition arising from the operation of information storage and retrieval systems. Discussed are: the nature, scope and extent of protection from unauthorized use available to copyright proprietors of a literary work under (a) the existing U.S. Copyright Act; (b) the common law with respect to unpublished works; (c) proposed Copyright Law revisions (HR 4347 and S 1006); and (d) the limitations, if any, on these exclusive rights developed under the judicial doctrine of Fair Use."

236. PATTISHALL, BEVERLY W. The Unfair Commercial Activities Bill. (9 *Idea* 155-161, 1965.)

A brief analytical summary of the Lindsay Bill (H.R. 5514, 89th Cong., 1st sess.), delivered as a lecture at the Ninth Annual Public Conference sponsored jointly by the Patent, Trademark and Copyright Research Institute of the George Washington University and the Commemorative Committee of the 175th Anniversary of the United States Patent System.

237. RICH, GILES S. The design bill. (9 *Idea* 127-134, 1965.)

A brief survey of efforts to obtain more effective design protection legislation in the United States, delivered as an address at the Ninth Annual Public Conference sponsored jointly by the Patent, Trademark and Copyright Research Institute of the George Washington University and the Commemorative Committee of the 175th Anniversary of the United States Patent System.

2. Foreign

1. English

238. HAZAN, VICTOR. Letter from Israel. (1 *Copyright* 244-245, no. 11, Nov. 1965.)

A critical comment on a provision of the newly enacted Israeli Broadcasting Service Law pursuant to which copyright in a work prepared by invitation of the Broadcasting Service will be vested in the Service unless there is an agreement to the contrary.

239. PASQUERA, FILIPPO. Protection which can be afforded to puzzles and the like, and to the external layout of a periodical. (1 *Copyright* 242-244, no. 11, Nov. 1965.)

An English version of an article first published in 36 *Diritto di Autore* 14-19, no. 1, Jan.-Mar. 1965, under the title: Sulla tutelabilità dei giochi enigmistici e delle configurazioni esteriori del periodico. See 13 *BULL. CR. SOC.* 159, Item 201 (Dec. 1965).

240. ZINI LAMBERTI, CARLO. The institution of domainial rights in copyright under Italian legislation. (*EBU Review* 68-73, no. 94B, Nov. 1965.)

A somewhat critical discussion of *domaine public payant* under the Italian copyright law.

2. English, French and Spanish

241. MOREIRA DA SILVA, MARIO. Le droit d'auteur et l'Afrique. (*Revue Internationale du Droit d'Auteur* 4-77, no. 47, Sept. 1965.)

This article, in English, French and Spanish, proposes "to study the juridical situation in which are the authors of literary or artistic works in Africa, both in the field of domestic law and by the light of the international law."

242. RADOJKOVIC, ZIVAN. Le droit à la paternité. (*Revue Internationale du Droit d'Auteur* 168-189, no. 47, Sept. 1965.)

A comparative study, in English, French and Spanish, of the right of an author to appear as the creator of his work, with special reference to the case law of the United Kingdom, United States, Germany, Italy, Yugoslavia, France and Switzerland.

3. French

243. MARRO, JEAN LOUIS. A propos de la revision totale de la législation sur le droit d'auteur. (*Schweizerische Mitteilungen über Gewerblichen Rechtsschutz und Urheberrecht* 227-239, no. 2, Nov. 1965.)

An account, presented to the Swiss Group of the International Literary and Artistic Association (ALAI), of legislative efforts at general revision of the Swiss copyright law, organized into the following three topics: I. History and program of revision. II. Problems of organization of the revision. III. Material aspects of the revision.

244. LIMPERG, THEODOR. Pays-Bas: révision de la loi sur le droit d'auteur de 1912 et ratification de la Convention de Berne révisée à Bruxelles. (*Revue Internationale du Droit d'Auteur* 190-196, no. 47, Sept. 1965.)

A summary of the Dutch draft copyright law and a draft law concerning adherence of the Netherlands to the Berne Copyright Convention, Brussels revision, as they were submitted to the Parliament by royal decrees of November 5 and 10, 1964, respectively.

4. German

245. KNAP, KAREL. Neue Urheberrechtsgesetze in der Tschechoslowakei. (9 *Film und Recht* 142-145, no. 7, July 1965.)

A summary of the new Czechoslovak copyright statute of March 25, 1965 and of the new statute of the same date concerning income tax from literary and artistic activities. Both statutes became effective on July 1, 1965.

246. ROEBER, GEORG. Der Film im neuen Urheberrecht; eine darstellend-kritische Betrachtung. (9 *Film und Recht* 223-238, no. 11, Nov. 1965.)

An analytical and critical summary of the new West German copyright law with respect to motion pictures.

5. Italian

247. KLAVER, FRANCA. Il fenomeno della teledistribuzione. (36 *Il Diritto di Autore* 140-167, no. 2, Apr.-June 1965.)

An account of the growth of community antenna systems in Europe and particularly in the Netherlands, including a discussion of problems of copyright and neighboring rights such systems have created.

248. SANCTIS, VALERIO DE. In tema di opere cinematografiche e di opere televisive. (36 *Il Diritto di Autore* 123-139, no. 2, Apr.-June 1965.)

A discussion of some problems involved in the protection of motion pictures and televised works under the Italian copyright law, with special reference to the absence of specific provisions covering television.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

249. GOSNELL, CHARLES F. The copying grab-bag; observations on the new copyright legislation. (60 *ALA Bulletin* 46-55, no. 1, Jan. 1966.)

"These reflections by [the director of New York University Libraries and] the chairman of the ALA Committee on Copyright

Issues incorporate the substance of some of his testimony before congressional committees which are working on the legislation."

250. MACDOUGALL, A. KENT. Replicas of originals of classic books stir interest of publishers. Copy of 'Alice' manuscript sells well; cost of reproducing fancy editions is reduced. (166 *The Wall Street Journal*, Eastern ed. 1, no. 121, Dec. 21, 1965.)

An article describing the growing popularity of facsimile reprints which are said to be "the coming thing in the book industry." Includes a statement that "copyrights have expired on most of the works, though on some they remain in force and royalties must be paid."

251. 1965 in review: statistics, news and trends in the industry. (189 *Publishers' Weekly* 68-83, no. 3, Jan. 17, 1966.)

"This review of some of the past year's outstanding developments and events in the book industry" includes such topics as censorship and related legal matters, and the program for general revision of the copyright law.

252. REYNOLDS, PAUL R. The author, the publisher and the fifty-fifty split. (189 *Publishers' Weekly* 62-64, no. 2, Jan. 10, 1966.)

An article on a recent decision of George Brockway, president of W. W. Norton & Co. to include an escalator clause in Norton's standard contract providing for a greater than fifty-fifty split of income to authors from paperbacks after the first \$10,000 of paperback revenue collected.

253. SCHORR, BURT. Cable-TV troubles: state, FCC rulings could curb growth of local antenna systems. Connecticut may hold down investment return. Rivals claim copyright violation. 6 million CATV homes in '70? (166 *The Wall Street Journal*, Eastern ed. 1, 12, no. 108, Dec. 2, 1965.)

An article on the growing problems facing the present and the future development of the community antenna systems. Reference is made to the pending *TelePrompTer* copyright infringement action.

254. Some present and future CATV offerings: AP news-wire, bingo, maybe Rose Bowl. (166 *The Wall Street Journal*, Eastern ed. 13, no. 108, Dec. 2, 1965.)

An article indicating various future possibilities in the community antenna system industry.

255. Study under way on copyright and technology. (189 *Publishers' Weekly* 41, no. 1, Jan. 3, 1966.)

A brief article on an evaluative report, with a February release date, sponsored jointly by the American Textbook Publishers Institute and the American Book Publishers Council, on the impact of copyright revision and new copying technology upon publishing industry.

256. TAUBMAN, HOWARD. President and the arts; U. S. continues to marshall top talent for meeting the intellectual challenges. (*The New York Times* 42M, Jan. 19, 1966.)

An article on the Presidential attitude toward appointments to the new National Council on the Humanities. The writer opines that ["I]t will not surprise those who know Mr. Johnson well if he leads the drive to get this new [copyright] legislation through Congress."

2. England

257. Commercial radio: improbable pirates. (217 *The Economist* 1240, no. 6380, Dec. 11, 1965.)

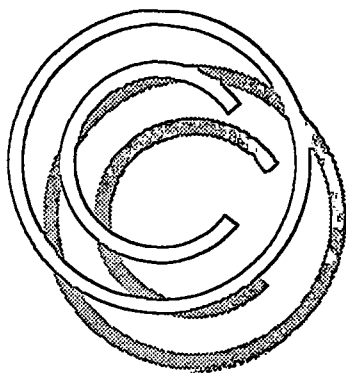
A brief note on the possible legal steps which the Postmaster General could take to prevent the operations of pirate radio transmitters stationed off Britain's coast, with the conclusion that "the main offenders, Radio Caroline and Radio London, are untouchable, transmitting from ships outside the limit."

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 13, NO. 4

APRIL, 1966

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

EDWARD A. SARGOY

Vice-Presidents

SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary

ALAN LATMAN

Assistant Secretary

MORTON D. GOLDBERG

Treasurer

EDWARD M. CRAMER

Assistant Treasurer

STANLEY ROTHENBERG

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
PROFESSOR RALPH S. BROWN, Yale Law School
GEORGE D. CARY, Washington, D. C.
SIDNEY A. DIAMOND, New York City
ARTHUR L. FISHBEIN, New York City
PROFESSOR HARRY G. HENN, Cornell Law School
DANIEL HUTTENBRAUCK, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ROBERT H. MONTGOMERY, Jr., New York City
HARRY R. OLSSON, Jr., New York City
HAROLD ORENSTEIN, New York City
AVERILL C. PASAROW, Beverly Hills, Calif.
SIGRID H. PEDERSEN, New York City
HARRIET F. PILFEL, New York City
LAWRENCE H. REED, New York City
SAUL N. RITTENBERG, Culver City, Calif.
HARRY N. ROSENFIELD, Washington, D. C.
SIDNEY SCHREIBER, New York City
JOHN SCHULMAN, New York City
CHARLES B. SETON, New York City
FRIEDA M. TANNENBAUM, New York City
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York City
RICHARD WINCOR, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1966 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

	PAGE
PART I. ARTICLES.	
UNITED STATES COPYRIGHT PROTECTION AND THE BERNE CON- VENTION George H. C. Bodenhausen	215
CHOREOGRAPHY AND COPYRIGHT Gary D. Ordway	225
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	241
2. Foreign Nations	242
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	245
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts	
1. Federal Court Decisions	246
2. State Court Decisions	253
PART V. BIBLIOGRAPHY.	
A. Books and Treatises	
1. United States Publications	260
2. Foreign Publications	261
B. Law Review Articles	
1. United States	261
2. Foreign	
1. English	263
2. French	264
3. German	264
4. Italian	268
C. Articles Pertaining to Copyright from Trade Magazines	
1. United States	268
2. England	269

THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 13 BULL. CR. SOC. page no., Item (1966).



GEORG H. C. BODENHAUSEN

Director, United International Bureaux for the Protection of Intellectual Property, Geneva, Switzerland; formerly Professor of Law, University of Utrecht, The Netherlands. Professor Bodenhausen delivered the Fourth Annual Lecture in the series of Jean Geiringer Memorial Lectures on International Copyright Law at New York University Law Center on March 16, 1966.

PART I.

ARTICLES

258. UNITED STATES COPYRIGHT PROTECTION AND THE BERNE CONVENTION

*The Fourth Annual Jean Geiringer Memorial Lecture on
International Copyright Law.*

By GEORG H. C. BODENHAUSEN*

I

As has been announced, my topic for this, the Fourth Annual Jean Geiringer Lecture, is: "U.S. Copyright Protection and the Berne Convention". I shall thus be speaking on the *protection of copyright* in one of the most important countries of the world in the field of the production and use of literary and artistic works, in relation to the oldest and *still most important international treaty on copyright*.

It is an honour for me to speak to you on such an important subject and it seems fitting to pay tribute in this way to the late Jean Geiringer, who made such substantial contributions to the development of copyright and its international protection.

The relationship between U.S. copyright protection and the Berne Convention can be considered in several different ways: it may be viewed in an *historical perspective*, in its *present context* or in its *potential for the future*. It will perhaps be obvious to you that I prefer to consider the future. Nevertheless, a few preliminary remarks about the historical setting may serve to illustrate an interesting development.

In this circle of copyright experts, it is hardly necessary to explain that, because of the fact that the copyright laws of individual nations have no extra-territorial operation, some mechanism of international protection is necessary. Nevertheless, such mechanism was adopted late and only very slowly, especially in the United States. In the early 19th century, a small number of bilateral or multilateral copyright treaties were concluded. But it was only in 1886, with the adoption of the Berne Convention, that the international law of copyright became a

* Professor of Law, University of Utrecht, 1946-62; Director, United International Bureaux for the Protection of Intellectual Property at Geneva since January 1963.

reality. In that same year, 1886, the United States was not a party to any multilateral or bilateral copyright treaty, and refused to extend copyright protection to the works of alien authors who were non-residents of the United States. Indeed, it was not until 1891 that the United States took a first halting step into the international copyright community by providing for copyright protection of works of foreign origin under certain stated conditions. As you know, such protection was extended, in essence, only with respect to the works of those countries as to which the President of the United States had issued a proclamation. The effectiveness of even this limited measure was further diluted by the stringent copyright formalities of notice, deposit, registration and domestic manufacture, which were equally applicable to foreign claimants. This system, with slight alterations, was retained by the Act of 1909. Meanwhile, in 1908, the U.S. had joined the Mexico City Convention and, in 1914, the superseding Buenos Aires Convention, which established multilateral copyright relations with most of the Latin American countries, but these Conventions have never been implemented by domestic legislation.

It was not until its participation in the preparation and establishment of the *Universal Copyright Convention* in the early fifties, and its ratification of this Convention in 1955 that the U.S. took the first full step into the international copyright community. However, as you know, the scope of international copyright protection accorded by the Universal Copyright Convention is still very limited.

During all the time of this development of international copyright law with respect to the U.S., the Berne Convention was in existence, had been revised several times and had steadily been increasing the scope of protection and its membership (now 54 States).

The U.S. has, on several occasions, shown a more than superficial interest in joining the Berne Convention. During the nineteen-thirties, Presidents of the United States, on three separate occasions, requested Senate approval for American adherence to the Berne Union, and on all three occasions, the Senate Foreign Relations Committee voted approval of such adherence. Indeed, on one such occasion — April 19, 1935 — the entire Senate formally approved U.S. accession to the Berne Convention, but this approval was rescinded on the following day. This rescission, and the failure of the entire Senate to vote on the other two occasions were all due to the same cause. In each instance, a general revision of your domestic Copyright Act was before Congress, and the Senate thought it wiser to delay action on Berne accession until after domestic revision had been completed. Nevertheless, the U.S. Govern-

ment delegated the late Arthur Fisher, Register of Copyrights, as an observer to the Diplomatic Conference for the revision of the Berne Convention at Brussels in 1948. It may be said that rarely has a more important and a more intelligent and industrious observer attended a revision Conference. His observations certainly contributed to further constructive developments both in the United States and abroad.

These historical remarks, relating in part to the recent past, lead very naturally to a consideration of the *present situation* and the *future* of the relationship between U.S. copyright protection and the Berne Convention.

We all know that a very important bill for the general revision of the U.S. Copyright Act, known as H.R. 4347, was introduced at the last session of Congress and that a revised version of it is about to be introduced in the present session. It appears, if a foreign observer may venture an opinion, that this movement for general revision of your Copyright Act is likely to succeed, at least in a very large measure. Thus, the uncertainty of the internal development, which has formerly prevented any definite action as to accession by the U.S. to the Berne Convention, will probably disappear. Also, the new Act, if it follows H.R. 4347, will approach the Berne Convention far closer than any of the former proposals for copyright revision.

It is also known that a revision of the Berne Convention is scheduled to take place in Stockholm in 1967, and proposals for this revision have been prepared by the Swedish Government. These proposals are already basically known and, although facilitation of the adherence of the United States to Berne has certainly not been one of the underlying motives, the proposals will very probably not create new obstacles to such adherence.

These circumstances may produce mixed feelings of much pleasure and perhaps a little regret. Pleasure because if H.R. 4347 and the Stockholm revision of the Berne Convention are both enacted the two systems will have approached each other so closely that, assuming the U.S. is sufficiently interested in acceding to the Berne Convention, it would be unthinkable that means could not be found to bring about this accession. There may be some regret, however, because if it had been possible to prepare the two revisions in relationship with each other, all remaining problems could have been eliminated.

However, let us be satisfied with the situation as it stands, in which case you will allow me to deal briefly with three questions: (a) *the possible interest of the U.S. in joining the Berne Convention*; (b) *some*

of the obstacles that still would seem to be in the way of such accession; (c) some possible ways and means of overcoming these obstacles.

In order not to take up too much of your time, I shall deal briefly with these subjects but you will find an extensive study of at least two of them in one of the next issues of our periodicals "Copyright" and "Le Droit d'Auteur". This study has been written by Melville B. Nimmer, Professor of Law at the University of California, Los Angeles, who is temporarily a consultant at BIRPI and to whom I am indebted for many suggestions as to the contents of this lecture.

II

(a) What may be the *interest of the United States in joining the Berne Convention* now or in the near future?

As I have previously indicated, on several occasions in the past, the U.S. has been quite close to accession. Still, it must be acknowledged that the situation on those prior occasions was different in that no other world-wide treaty for the international protection of copyright then existed. Now, such a treaty does exist in the form of the Universal Copyright Convention, and the United States, together with 50 other countries, is a member. Is this sufficient to protect U.S. interests, or has the U.S. still something to gain by acceding also to the Berne Convention, and, if so, would these gains justify the effort?

It is not for me to voice an opinion on possible U.S. interests in this matter, but in order to assist you in drawing your own conclusions, I should like to place before you the following considerations.

First, there is the fact that the member States of the Berne Union include some 24 nations which are not, or not yet, members of the Universal Copyright Convention. These include a number of not unimportant users of copyrighted works. The guarantee of copyright protection for American works in these countries can be a matter of considerable significance, but is not assured to-day. It is true that some American works now obtain protection under the Berne Convention by what is commonly called the "backdoor approach", that is, by simultaneous first publication in the U.S. and in a member State of the Berne Union. This approach, however, is neither very convenient and sure nor entirely dignified. It is not convenient and sure because many American authors and publishers are not in a position to undertake the difficulties and the expense of a *bona fide* simultaneous publication. If the simultaneous publication is not *bona fide* but merely *pro forma*, it is open to challenge and such challenges have succeeded in a number of countries on numerous occasions. Even if the simultaneous publica-

tion is *bona fide*, the possibility remains that one or more Berne Union members may elect to avail themselves of the provision of the Convention (Article 6, paragraph 2), which allows the protection accorded to works from non-Berne countries to be restricted. Nor, in any event, is this "backdoor approach" very dignified: on the contrary, it seems ironic, at a time when a considerable part of the world looks to the United States for moral leadership, to find the U.S. requiring its nationals to pass through a backdoor in order to obtain protection without reciprocity.

It would appear, therefore, that there are definite advantages in acceding to the Berne Convention, in terms of creating normal copyright relations with countries which are not members of the Universal Copyright Convention. But even with respect to the countries which do belong to the Universal Copyright Convention, a substantial benefit would accrue to the United States by accession to Berne. This is so because there is a difference between the Berne Convention and the Universal Copyright Convention with regard to the protection of works already existing at the time of accession to the Treaty. The Universal Copyright Convention states (in Article VII) that the Convention shall not apply, and thus protection shall not extend, to works which were already in the public domain *in the country in which protection is claimed* on the date of such country's becoming a member of the Universal Copyright Convention. This is to be contrasted with the Berne Convention (Article 18, paragraph 1) which extends protection, in principle, to all works which, on the effective date of the Convention, were not in the public domain *in the country of origin*, that is, normally, the country in which publication first occurred. The difference can be illustrated by taking the example of the United Kingdom. Upon American accession to Berne, the United Kingdom would be required to protect all American works not in the public domain *in the United States*, whereas under the Universal Copyright Convention, the United Kingdom does not have to protect works which were already in the public domain *in the United Kingdom* before its accession to the Universal Copyright Convention on September 27, 1957. Thus, a vast number of American works (all of those first published only in the United States prior to September 27, 1957) are now unprotected in the United Kingdom. These works could still obtain protection in the United Kingdom by United States accession to the Berne Convention. The situation is comparable in other countries.

But, although the points already mentioned have great practical significance, the main interest of the United States in joining the Berne Convention may lie on another level. If and when your proposed new

Copyright Act is adopted, your nation will stand committed to accord to its authors, and those who claim through them, a very high standard of copyright protection. It can hardly be disputed that it is in the American interest that this same high standard, or one very comparable to it, be accorded to United States works under the copyright laws of other nations of the world. Yet the fact is that such a high standard is not assured by United States membership in the Universal Copyright Convention. The principle of "national treatment", stipulated in that Convention, merely ensures that there shall be no discrimination against foreign nationals. It does not require any minimum standard of protection. The only two minimum requirements contained in the Universal Copyright Convention are both substantially below those to be adopted by your new Copyright Act. These comprise a term for copyright protection consisting of the life of the author plus twenty-five years (as distinguished from life plus fifty years in your Bill), and the author's right of translation. But, while the latter right is exclusive under your proposed new Act, it may be subject, under certain conditions, to a compulsory license under the Universal Copyright Convention. The Berne Convention, on the other hand, in addition to requiring national treatment, contains a number of substantive minima which create a very high standard of protection. Thus, under Berne the minimum term of copyright is, in most cases, life plus fifty years and translation rights are exclusive. In addition, Berne requires or, taking into account the proposals for the Stockholm Conference, will require recognition of exclusive reproduction rights, public performance rights, broadcast rights, recitation rights, adaptation, arrangement and alteration rights, etc. It is true that, in the proposals for the Stockholm Conference, it is suggested that some of these minima should be reduced temporarily in so far as developing countries are concerned. But in all nations of the world which constitute major users of copyrighted works, the minima would remain fully applicable. That it is in the interest of the United States to maintain and foster these minima seems hardly open to question. This interest is at least two-fold. First, it offers U.S. nationals a legal guarantee that those nations which presently observe high standards of protection will not in the future unilaterally reduce such standards. In addition, U.S. membership in the Berne Union would tend to encourage other nations which may not presently recognize high standards of copyright protection to join the Berne Union and thereby raise their standards. The most efficient, if not the only, way the United States can achieve these objectives is in joining the Berne Convention. Furthermore, if the past is any guide, it seems certain that future changes

in copyright concepts to deal with the constantly advancing technology of communications will be largely shaped in the deliberations of the Berne Union. Full participation in such deliberations is certainly in the United States interest.

(b) Assuming that the United States were to find it of sufficient interest to join the Berne Convention and assuming also that both H.R. 4347 and the Stockholm revision of the Berne Convention were successful, *would there still be obstacles to overcome in order to render United States adherence to Berne possible?*

This is a field in which much misunderstanding and some unjustified fears seem to exist, and I can only regret that time does not permit me to deal adequately with this subject. I shall have to limit myself to the following remarks.

First, and by way of an example, it is not at all true, as some may fear, that a provision in the Berne Convention (Article 2, paragraph 2), which prescribes protection of adaptations and arrangements of music, etc., requires the protection of phonograph records *per se*, and not (only) of the work or adaptation embodied in the record, if sufficiently original. Although some member States of the Berne Convention protect records *per se* by copyright, the majority of these States do not, and Article 2(2) of the Convention does not require them to do otherwise. The protection of phonograph records as such is now one of the subjects of another Convention, the Rome Convention of 1961 for the protection of Performers, Producers of Phonograms and Broadcasting Organisations.

Nor is it true, to take another example, that the provision in the Berne Convention on the moral rights of the author (Article 6*bis*) would constitute major difficulties in the United States. It has often been said that the doctrine of moral rights is not recognized under American law. However, it is clear that a great deal of the substance of what are called moral rights has been recognized by American courts under the theories of defamation, right of privacy, unfair competition, etc. Indeed, it seems fair to say that the scope of your recognition of what we call moral rights is at least as great as that accorded in that other great bastion of common law, the United Kingdom. Yet no inconsistency has been found between the United Kingdom's domestic legislation and its obligations under the Berne Convention to recognize the moral rights of the author.

Apparently, the moral rights clause of the Berne Convention is viewed with a suspicious eye, especially by representatives of the motion picture and television interests in the United States. This is under-

standable because these industries generally create derivative works based upon an author's work rather than simply reproduce verbatim the work itself, and therefore these industries must be concerned with the right to make changes in an author's work. Yet, it is precisely the motion picture and television organisations which invariably include in their carefully drafted agreements with authors the right to make extensive changes in the work. The fear seems to be that United States compliance with the moral rights provisions of the Berne Convention would negate the effectiveness of these contractual stipulations because of the doctrine under which moral rights are said to be, by their nature, inalienable. This reasoning cannot, however, be accepted. It is true that, under some statutes and in some jurisdictions, the moral rights of the author are considered to be part of his personality and are therefore regarded as inalienable. However, this doctrine of inalienability of moral rights is not part of the Berne Convention. Although the Convention does require recognition of moral rights to some extent, it leaves the question of alienability to be determined by each member State in the manner it deems best. Therefore, American accession to the Berne Convention would not, in itself, affect the validity and enforceability of those contractual provisions upon which motion picture and television organisations rely with respect to their acquisition of rights from authors.

After these reassuring remarks, it must be acknowledged that, even on the assumption that a Bill substantially identical to H.R. 4347 is enacted, on some points incongruities will continue to exist between U.S. law and the Berne Convention and that solutions will have to be found to eliminate them. However, these incongruities will exist only on points of minor importance and solutions to eliminate them will be comparatively easy to find.

These questions will arise mainly with regard to *formalities* and *duration* of copyright.

The Berne Convention (Article 4, paragraph 2) contains the explicit stipulation that the *enjoyment* and the *exercise* of copyright shall *not be subject to any formality*. Still, according to H.R. 4347, your new Act would contain a *manufacturing clause* and provisions relating to *notice*, *registration* and *recordation*, which do not entirely harmonize with the Convention. With respect to the manufacturing requirement (requiring domestic manufacture of books in the English language) which, in the new Act, would be considerably reduced in import, no major difficulty would seem to exist, because the new Act would exempt from the manufacturing clause authors who are neither citizens nor

domiciliaries of the United States. Since the Convention requirements (including the "no formalities" requirement) are not applicable within Berne Union countries as regards works first published in such countries, in general the manufacturing clause would be applicable only where the Convention is not applicable. Only a peripheral area of conflict would remain, namely, in the case where an American author first publishes his work outside the United States, in a Berne Union country.

A somewhat more serious problem regarding formalities may exist in connection with the new Copyright Act provisions relating to notice, registration and recordation. Although your new law would substantially reduce the stringency of these requirements as compared with your present law, they nevertheless continue to constitute formalities which may be regarded as proscribed by the Berne Convention. For example, although the omission of a copyright notice on published copies of a work will no longer automatically inject the work into the public domain, this will be the effect of such omission if the work has not been registered in your Copyright Office within five years after such publication without notice, or if a reasonable effort is not made to add the notice to all copies that are distributed to the public after the omission has been discovered. Yet neither such a notice requirement nor such a registration requirement comports with the Berne Convention prohibition of all formalities which qualify the enjoyment and exercise of copyright. It may be, however, that the Universal Copyright Convention offers a helpful precedent for the resolving of this conflict. You will recall that under the Universal Copyright Convention, if a work bears a notice consisting of the symbol © accompanied by the name of the copyright proprietor and the year of first publication, this will satisfy the domestic formality requirements of any U.C.C. member with respect to foreign works. Some similar arrangement could be found acceptable by the member States of the Berne Convention.

A second point on which certain incongruities between the U.S. Copyright Act and the Berne Convention may continue to exist is that of the *duration of copyright*, but only with regard to relatively unimportant marginal questions. With respect to the principal provision on duration, all difficulties will disappear if and when the U.S. Copyright Act adopts the term of the life of the author plus fifty years, which term coincides with the minimum term prescribed in Article 7 of the Berne Convention. However, both your proposed new Copyright Act and the Berne Convention contain certain exceptions for special cases and these exceptions do not always follow parallel lines. This is the

case, for instance, with respect to anonymous and pseudonymous works, works made for hire, the presumption as to the author's death, and works of joint authorship. These are truly questions of secondary importance, on some of which your new Copyright Act may still very well differ from H.R. 4347, whereas for others, the will to compromise being prevalent, common solutions may be found without too much difficulty.

(c) This brings me now to some remarks about *possible ways and means of eliminating the remaining differences* between U.S. Copyright law and the Berne Convention, assuming, again, that sufficient interest to do so exists.

Of course, we will only be able to see clearly into these problems when the dust has settled after the adoption of the new U.S. Copyright Act and the Stockholm revision of the Berne Convention.

I shall probably, by that time, not be in my present position any more, but I shall look forward to the day when I shall read, if not in the newspapers then in specialised periodicals, that a Committee of Experts has been convened to study the above problems and to propose the necessary measures to solve them. I have not the slightest doubt that this can be done and, even now, I wish that Committee every success.

I should like to end this lecture with another remark.

The nature of the subject under discussion here has required me to make a number of comparisons between the Universal Copyright Convention and the Berne Convention. Having rather actively participated in the establishment of the Universal Copyright Convention, although in a different capacity than my present one, I will not easily be influenced against it. Indeed, I do not wish to imply even the slightest depreciation of the importance of the Universal Copyright Convention, either as an historical landmark in the development of international copyright law or in its functions today. I would merely suggest that the world is large enough to accommodate both copyright conventions, even if their functions differ. Most of the culturally and industrially developed countries have acceded to both. I leave you to ponder on the question whether at long last the time has come for the United States to assume its full and rightful status in the international copyright community by acceptance of the benefits and obligations not only of the Universal Copyright Convention, but also of the Berne Copyright Convention.

259. CHOREOGRAPHY AND COPYRIGHT*

By GARY D. ORDWAY

The dance is an expression of long standing in the history of man. It originated primarily as a means by which emotions could be expressed through spontaneous bodily movements. As society developed, dancing did also, resulting in organized patterns of dance, such as ritual and folk dances. In recent years, the dance has developed into an art form commonly known as choreography. This art form consists of a specific pattern of body movements, performed by dancers in theatrical presentations, which conveys thought, drama, or emotion to an audience. Through the media of television, theater, and motion pictures choreography has become an integral and valuable part of the entertainment industry.¹

The word "choreography" has been defined by a leading lexicographer as:

1: the art of representing dancing by signs as music is represented by notes 2: dancing; esp: Stage dancing as distinguished from social or ballroom dancing 3: the composition and arrangement of dance movements and patterns (as for a ballet) created usu. to accompany a particular piece of music or to develop a theme or a pantomime; also: a composition created by this art.²

A choreographic work created for theatrical performance is comparable to a play or musical composition since each is art form by which thought, feeling, or emotion is conveyed to an audience. A dance may be an integral part of a drama or a separate independent production involving the use of dance, music, scenery, costumes, sound effects and lighting or of any one of them. This points up an essential distinction between simple dances, such as ballroom and social dances, devised and performed primarily for the enjoyment of the dancers themselves, and those more complex and intricate dances, such as ballet, which are devised and performed by skilled artists for the entertainment of an audience. "Choreographic work", in the context of copyright, refers to

* Honorable Mention, 1965 National Nathan Burkan Memorial Competition. Mr. Ordway's outstanding paper was submitted from Drake University School of Law, where it won the 1965 first prize in the Competition.

1. Sachs, *World History Of The Dance*, Ch. 6 & 7; Kroner & Doner, *The Dance In Television in Sorrell*, *The Dance Has Many Faces* 111 (1951).

2. Websters, *Third New International Dictionary* 399 (1961).

the latter and relates to both the dance itself as conceived by the author and performed for an audience, and the graphic representation of the dance as recorded in some concrete form.

The choreographer, as author of an intricate dance, creates an artistic and intellectual product which should be afforded legal protection as a literary property right.³ In spite of this fact, the legal protection afforded choreography has been slow in development. This article, therefore, will examine the nature and scope of legal protection afforded choreography under the Federal Copyright Act.⁴

Unquestionably the most significant factor restricting development of copyright protection for choreography has been the lack of a sound dance notation system. Attempts to reduce dance movements to a tangible form through systems of notation extend back at least as far as the fifteenth century, but it was not until 1928, when Rudolf Laban first published his system, that a sound and practical system was developed.⁵ The Laban system is now widely used by choreographers and consists of scoring the dance in a manner similar to that used for music through the use of symbols and lines. Another recent development, the motion picture, represents yet another means for recording a dance in graphic form, although this system is little used because of cost and other practical limitations.⁶

Previous to these developments, the creations of a choreographer were preserved largely through the memory of the author. This caused the loss of many great choreographic works when either the author's memory failed or he died without passing the works to another by word of mouth and demonstration.

Attempts were made at describing dances in written text or pictures but these usually proved unsatisfactory because the process was

3. The choreographers' intellectual product would seem to be equal in merit to that of music composers, literary writers, dramatic writers, and creators of works of arts which are allowed copyright registration under 17 U.S.C. §4 (1958). The creative genius of such great choreographers as Kurt Jooss, Sigurd Leeder, Albrecht Knust, Dussia Bereska, Rudolf Laban and George Balanchine cannot be questioned. The music critic B. H. Haggin once wrote of George Balanchine as "an artist of the same magnitude as Picasso, and the only one I can think of now working in any of the arts," adding, "He is, it seems to me, even more disciplined in the exercise of his powers than Picasso: the originality, no matter how astounding, always remains part of the continuous development." *Tope, Balanchine* 8 (1963).

4. 17 U.S.C. §§1-215 (1958).

5. Hutchinson, *The Preservation of the Dance Score Through Notation in Sorrell, The Dance Has Many Faces* 49 (1951).

6. For discussion of the limitations see Hutchinson, *Id.* at 57.

laborious and resulted in inaccurate descriptions of the dance. In view of the absence of a concrete record of the dance movements, it became practically impossible to determine and prove whether a choreographer's works were being pirated by others.

These considerations highlight the value of motion pictures and the Laban system of dance notation to the choreographer. It is largely because of these innovations that copyright protection may now be afforded to choreographic works. Such protection seems proper in view of its increasing importance as a medium of public entertainment.

COMMON LAW COPYRIGHT

A review of the concept of common law copyright indicates that its principles could be used to protect intellectual property rights in unpublished choreographic works.⁷ No case has been found that rules directly on this point,⁸ but the absence of case law can be attributed to the fact that, until recently, no practical method existed for reducing choreographic works to tangible form. Protection in the United States for common law rights in intellectual property is evidenced by Section 2 of the Copyright Act.⁹

It has been held that Section 2 preserves not only the legal and equitable rights at common law of printing and publishing but also the right to "use" unpublished works.¹⁰ This presumably includes the right to exhibit, represent, dramatize, or otherwise use and control the work. As to the rights recognized at common law, the Supreme Court of Illinois held in *Ferris v. Frohman*.¹¹

At common law the author of a literary composition has an absolute property right in his production, which he could not be deprived of so long as it remained unpublished, nor could he be

7. For an excellent discussion of common law property rights as applied to choreographic works see Mirrell, *Legal Protection for Choreography*, 27 N.Y.U.L. Rev. 792, 794-800.

8. Literary property rights in a dance were asserted by the plaintiff in *Savage v. Hoffman*, 159 Fed. 584 (C.C.S.D.N.Y. 1908), but the court failed to answer the question and held that even if such rights existed they did not belong to the plaintiff.

9. 17 U.S.C. §2 (1958) states: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

10. *Harper Bros. v. Donohue*, 144 F. 491 (Cir. N.D. Ill. 1905).

11. 238 Ill. 430, 87 N.E. 327 (1909), *aff'd* 223 U.S. 424 (1912).

compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc.

It should be noted that common law property rights may exist in forms of intellectual creations which are not copyrightable under the Federal Copyright Act.¹² In *White v. Kimmel*,¹³ the court said:

The common law has long recognized a property right in the products of man's creative mind, regardless of the form in which they took expression.¹⁴

There are four basic requirements which must be satisfied before common law protection can be afforded intellectual creations such as choreography: (a) the work must be an original product of the mind,¹⁵ (b) the author's labors must be reduced to tangible form,¹⁶ (c) the work must not be immoral, licentious or generally against public policy,¹⁷ (d) the work must be unpublished.¹⁸

12. Common law protection has been held to exist in recordings, *Granz v. Harris*, 198 F. 2d 585 (2d Cir. 1952); in a color chart, *Ketcham v. N.Y. World's Fair 1939*, 34 F. Supp. 657 (E.D.N.Y. 1940), *aff'd* 119 F. 2d 422 (2d Cir. 1941); and in slogans, *Healey v. Macy and Co.*, 251 App. Div. 440, 297 N.Y.S. 165 (1st Dep., 1937).
13. 94 F. Supp. 502 (S.D. Cal. 1950), *rev'd on the facts*, 193 F.2d 744 (9th Cir. 1952), *cert. den.* 343 U.S. 957 (1952).
14. *Id.* at 504.
15. *Brightly v. Littleton*, 37 Fed. 103 (C.C.E.D. Pa. 1888); *Schwarg v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945). It should be noted that the work need not be original in its entirety, *Aronson v. Baker*, 43 N.J. Eq. 365, 12 Atl. 177 (Ch. Div. 1888). The choreographer uses dance steps and techniques just as a composer uses notes and scales, none of which are original creations of the mind in their own right, but when these elements are arranged and constructed into an intricate dance pattern, the result is an original mental product.
16. *Palmer v. De Witt*, 47 N.Y. 532 (1872). A choreographic work may be reduced to tangible form by use of the Laban System of dance notation.
17. *Chicago Bd. of Trade v. L.A. Kinsey Co.*, 125 Fed. 72 (C.C.D. Ind. 1903), *rev'd on other grounds*, 130 Fed. 507 (7th Cir. 1904), *aff'd*, 198 U.S. 236 (1905); *Broder v. Zeno Mauvais Music Co.*, 88 Fed. 74 (C.C.N.D. Cal. 1898); *Keene v. Kimball*, 16 Gray 545 (Mass. 1860).
18. *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F. 2d 556 (D.C. Mass. 1928); *Black v. Plaut*, 87 F. Supp. 49 (D.C. Ill. 1949). It should be noted that public presentation of a dramatic composition does not constitute publication. *Ferris v. Frohman*, 32 S. Ct. 263, 223 U.S. 424, 56 L. Ed. 492 (Ill. 1912); *Palmer v. DeWitt*, 2 Sweeney 530, 47 N.Y. 532 (N.Y. 1870). An attempt to define the term "publication" with reference to copyright law is beyond the scope of this work. It will suffice to say that publication means dedica-

Thus, there would seem to be no reason why the common law protection generally accorded unpublished works of authorship would not extend to an unpublished choreographic work which satisfies the above requirements.

STATUTORY COPYRIGHT

(A)

Choreography as a Dramatic Composition

Since the primitive beginning of artistic and literary creations, it has been necessary for the author of these intellectual productions to be entitled "to reap the fruits of his labor in every field where he has contributed to the enlightenment and the rational enjoyment of mankind."¹⁹ It was for this reason, primarily, that the Federal Copyright Act²⁰ was enacted.

Of all arts — architecture, sculpture, painting, literature, music and dance — the latter is the most intangible. The first three can be recognized through visible, solid objects which can be seen and touched, while the latter three exist as thoughts which can be recognized only when transmitted from mind to mind. Literature can express concrete ideas whereas choreography or dance is usually limited to the expression of feelings and emotions through rhythmic bodily movements. A particular dance may convey such emotions by telling a story or developing a character, while other dances, such as "modern dances", are usually devoid of any storyline.

The Federal Copyright Act does not specifically mention choreographic works among the categories of copyrightable works set out therein. However, "choreographic works" have been allowed registration under Section 5(d) as a species of "dramatic compositions". The Copyright Office Regulations authorize registration of copyright claims in choreographic works. Section 202.7 of the regulations states:

Choreographic works of a dramatic character, whether the story or theme be expressed by music and action combined or by actions alone, are subject to registration in Class D. However, descriptions of dance steps and other physical gestures, including ballroom and social dances or choreographic works which do not tell a story,

tion of the author's works to the public domain by openly disseminating copies thereof or by abandonment.

19. "Mikado Case", *Carte v. Duff*, 25 Fed. 183 (1885).

20. 17 U.S.C. §§1-215 (1958).

develop a character or emotion, or otherwise convey a dramatic concept or idea are not subject to registration in Class D.²¹

This regulation indicates that the Copyright Office will allow copyright registration of a choreographic work, as a "dramatic composition", if it tells a story, develops a character or emotion, or otherwise conveys a dramatic concept or idea.²²

It is important to note, that although the Copyright Office will allow registration of certain choreographic works, this does not guarantee that the courts will enforce protection against unauthorized use of such works.²³ Because the Federal Copyright Act does not deal specifically with choreography, resolution in each case is dependent on what the court is willing to include within the purview of this statutory phrase "dramatic composition".

Three basic tests have evolved from the cases dealing with "dramatic compositions". The first test is evidenced by the early case of *Daly v. Palmer*,²⁴ where a federal court held that silent action in a

21. 37 C.F.R. chap. 11, as amended, 24 Fed. Reg. 4955 (1959).

22. The Copyright Office has also stated in Information Circular No. 51, which provides general information with regard to registration of choreographic works, as follows: "The Copyright Office, therefore, may consider in Class D claims to copyright in choreographic works of a dramatic character, whether the story or theme be expressed by music and actions combined or by actions alone. * * * Descriptions of dance steps and other physical gestures, including ballroom and other social dances or choreographic works which do not tell a story, develop a character or emotion, or otherwise convey a dramatic concept or idea are not subject to registration in Class D as dramatic or dramatic-musical composition."

23. The copyright act presupposes an original intellectual creation of authorship. The courts determine, in each case, whether the work in question satisfies this prerequisite. Information Circular No. 51 of the Copyright Office states: "The registration by the Copyright Office of a choreographic work in Class D or any other class should not, particularly in the absence of a statutory provision dealing specifically with choreographic works, be taken as an expression of opinion by the Copyright Office as to whether the applicant will or will not be entitled to performance rights in the choreography. The Copyright Office does not undertake to decide questions of extent of rights in particular works, and therefore takes no position as to whether the courts will enforce protection against unauthorized performance of a given work."

24. 6 Fed. Cas. 1132, No. 3,552 (C.C.S.D.N.Y. 1868). Judge Blatchford speaking for the court said at page 1136, "A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public

theatrical performance may constitute a drama. The case is usually cited for the proposition that if the work has capacity for stage presentation or performance, it is a dramatic composition.²⁵

The second and most widely accepted test is whether the work, when presented, tells a story. In *Fuller v. Bemis*,²⁶ the plaintiff had filed a copyright claim in a written description of the movements of a dance to be performed on stage. She sued the defendant for copyright infringement on the grounds of unauthorized public performance of the so-called "umbrella or skirt dance." Plaintiff contended the dance was a "dramatic composition" but the court in denying relief said:

An examination of the description of complainant's dance as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, *telling no story, portraying no character, depicting no emotion*.²⁷ (Emphasis added)

The court went on to say that the dance was devised to convey "no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion."²⁸

In *Kalem Co. v. Harper Bros.*,²⁹ the Court held that the action in a silent motion picture, was a dramatization of the novel "Ben Hur" and subject to legal protection. Justice Holmes for the Court said:

" * * * drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a

representation as if language or dialogue was used in it to convey some of its ideas."

25. Shafter, *Musical Copyright* 55 (Second ed. 1939). See also *Bell v. Mahn*, 121 Pa. St. 225 (1888).

26. 50 Fed. 926 (C.C.S.D.N.Y. 1892). See also Weil, *Copyright Law* 76 (1917); Ball, *Law of Copyright and Literary Property* 363 (1944).

27. 50 Fed. 929.

28. *Id.* at 929. Mirrell, *supra* note 7, at 808, criticizes the decision in *Fuller v. Bemis*, and states: "It is submitted that the court, rather than deny protection to this work on the ground that it had little merit, or that it was immoral, matters for value judgment, adopted a narrow concept of drama and required that it tell a story." He suggests further that the dance was "a risqué piece even for the 'gay nineties'" and that immorality is the true grounds for the courts holding.

29. 222 U.S. 55 (1911).

word. It would be impossible to deny the title of drama to pantomime as played by masters of the art."³⁰

The third and least accepted test is whether the work arouses the emotions. In *Russell v. Smith*,³¹ an English case, it was held that a song performed by a singer while accompanying himself on the piano is a dramatic composition since it arouses the emotions. Although this test may have merit, it has been rejected by the American courts.³²

A review of the foregoing tests indicate that a choreographic work, suited for theatrical performances and which "tells a story," is clearly subject to copyright protection as a "dramatic composition". However, not all works suited for theatrical performance will qualify as such.

In *Martinetti v. Maguire*,³³ the court denied copyright protection to a stage production consisting of scant dialogue accompanied by unconnected ballet and tableaux. It was held that "an exhibition of women lying about loose or otherwise, is not a dramatic composition, and, therefore, not entitled to the protection of the copyright act."³⁴

In *Barns v. Miner*,³⁵ the court held that a stage production consisting of a woman singing songs and reciting dialogue in costume, and with a motion picture showing the woman changing costume during scene changes, was not proper subject for copyright protection.

The two cases most in point on the question of what constitutes a dramatic dance are *Fuller v. Bemis*,³⁶ and *Kalem Co. v. Harper Bros.*³⁷ The *Kalem* decision indicates that action alone which portrays a character or depicts an emotion may qualify as a dramatic composi-

30. *Id.* at 61.

31. 12 Q.B. 267 (1848). See also *Clark v. Bishop*, 25 L.T. 908 (1872) and *Green v. Luby*, 177 Fed. 287 (C.C.S.D.N.Y. 1909).

32. *Nichols v. Universal Pictures Corp.*, 34 F. 2d 145; s.c., 45 F. 2d 119, 282 U.S. 902, 75 L. Ed. 795 (1930-1931). See also *Moses L. Malevinsky in Science of Playwriting*, New York, 1925, p. 50.

33. 16 Fed. Cas. 920, No. 9,173 (S.D. Cal. 1938). At 922 the court described the production as "a mere spectacle. The dialogue is very scant and meaningless, and appears to be mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part of the attraction of the spectacle seems to be an exhibition of women in novel dress or no dress, and in attractive attitudes or action."

34. The holding seems to have been prompted by the questionable moral values implicit in the work, but even so the case may be distinguished on the ground that this was not an original creation of intellectual authorship.

35. 122 Fed. 480 (C.C.S.D.N.Y. 1903).

36. Cf. text accompanying note 26 *supra*.

37. Cf. text accompanying note 29 *supra*.

tion. There is language in the *Fuller* decision which seems to require a storyline before a dance may qualify as a dramatic composition, and this case is usually cited as so holding. But a careful reading of the opinion indicates that this is an unduly restricted construction of the court's holding. The opinion implies that if a dance portrays a character, or depicts an emotion, it may also be considered a dramatic composition.³⁸ It seems proper, therefore, to conclude that a choreographic work which constitutes an original creation of dance movements, to be performed before an audience, conveying some story or depicting a character or emotional concept, would qualify as a dramatic composition.³⁹

But even though choreography may qualify as "dramatic composition", it is equally obvious from the foregoing that not all dance is embraced within that concept.

The traditional ballets which are commonly noted for conveying a storyline would obviously qualify. It is in the area of the "Modern and Abstract" dances, where the dramatic content is questionable, that the real problem area lies. There is little doubt that many such dances would constitute a creative work of authorship. The bodily movements in such dances, however, are primarily intended to convey some esthetic or emotional concept to the audience, although no storyline is readily apparent in their composition. In *Fuller v. Bemis*, the court implied that, if a dance conveyed an emotional concept to the audience, it may qualify as a dramatic composition. Although this conclusion can be reached only by a liberal construction of that case, such a conclusion appears proper in view of the artistic and creative merit inherent in many modern and abstract dances.

38. At 50 Fed. 929, the court said: "It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become subject of copyright." See also textual material to footnote 26, *supra*.

39. Merrill, *supra* note 7, at 804 expresses the fear that in order for a work to be a dramatic composition, it must tell a story. At 809 he states further: "A reevaluation of *Fuller v. Bemis* is called for the next time the question of statutory rights in a dance is before the court. The case is contrary to the mainstream of opinion as represented by *Daly v. Palmer*, it is questionable law on its own facts, and it is contrary to current expanded views as to what constitutes intellectual property and its protection. If the copyright laws of this country are to perform their constitutional function, that is, promote the arts by giving the author a limited monopoly in his works, they cannot rationally be denied efficacy in achieving this for the creative art of choreography."

Mention has been made of the distinction between social or ballroom dances, which are intended to be executed for the personal enjoyment of the dancer, and theatrical or dramatic dances, which are intended to be performed on the stage by skilled or professional dancers. The former would generally be considered too simple to qualify as a creative work of authorship and it would be baseless to contend that such dances are dramatic in any sense of the term. Social or ballroom dances should therefore not qualify as dramatic compositions and copyright protection should be restricted to theatrical or dramatic dances which are intended for performance before an audience.

Even though certain dances are intended for theatrical performance, they may fail to qualify for copyright protection because the sequence of bodily movements are so simple or stereotyped as to possess no substantial element of creative authorship. Ordinary "dance routines" and variety show dances, in which the originality is negligible, would be examples of such stereotyped dances. It must always be remembered that copyright presupposes originality and creative authorship. Therefore, even though a choreographic work may qualify as dramatic in character, it must also constitute an original sequence or series of bodily movements sufficient in merit to qualify as a work of creative authorship.

(B)

Fixation of Choreographic Works

The United States Constitution⁴⁰ empowers Congress to enact copyright legislation to protect the *writings* of authors. As at common law, before copyright protection will be afforded an original creation of authorship, the intellectual product must be reduced to some tangible form. Taken literally, the above constitutional provision would require tangible form to mean written script. However, the term "writing" has been liberally construed and includes three-dimensional objects⁴¹ and motion pictures.

40. Art. 1, Section 8, Clause 8. "The Congress shall have power * * * (8) To promote the Progress of Science and Useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

41. See *Mazer v. Stein*, 347 U.S. 201 (1954), where the court held that statuettes of Bali dancers, which had been registered for copyright, were entitled to copyright protection.

The necessity for fixation in choreographic works is of prime importance, since in the absence of some tangible record of the original dance movements, it would be practically impossible to determine if the dance were being pirated by others. For a choreographic work to be entitled to copyright protection under the Federal statute, either a copy of the work in unpublished form must be deposited in the Copyright Office,⁴² or two copies in published form with notice of copyright must be deposited.⁴³

Information Circular No. 51 of the Copyright Office states, with reference to fixation, that "the copy or copies must constitute the acting form of the work fixed in writing or other conventional signs." The use of the term "acting form" indicates that the fixation must reveal the movements of the dance in sufficient detail to enable performance therefrom. Moreover, a written description of the story or theme of the work, in sufficient detail to demonstrate that the work is a dramatic composition, must also be submitted.⁴⁴

-
42. 17 U.S.C. §12 (1958) states in part: "Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramaticomusical composition; * * * But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale." It is submitted that most choreographic works would be registered in unpublished form since there is little market for the commercial selling of such works. The primary interest is performance from the copy rather than sale of such copies.
43. 17 U.S.C. §10 (1958) states in part: "Any person entitled thereto by this title may secure copyright for his work by publication thereof with notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, * * * " Publication, within the meaning of this section, means the sale or distribution of copies of the work to the public in such a manner so as to destroy the common law rights in the work. The manner for giving proper notice of copyright is set out in 17 U.S.C. §19 (1958).
44. Information Circular No. 51 states: "In addition, whenever the copy or copies submitted are merely diagrammatic of the actions performed, whether in writing or otherwise, there shall also be deposited a description, in writing, of the production as a whole. The story or theme to be performed should be described with sufficient completeness to demonstrate that the work properly falls within the category of a dramatic or dramaticomusical composition." The Circular goes on to say that "text matter concerning choreography or describing a choreographic work, when published

Fixation of choreographic works may generally be achieved in three ways: (a) by a detailed textual description of the dance movements, (b) by making a motion picture of the dance as performed, (c) by dance notation such as the Laban System. As discussed previously, textual descriptions of dance movements have proved to be uneconomical and inaccurate. They fail in most cases to accurately describe the dance as initially created by the author and are therefore a poor method for recording choreographic works.

The motion picture has proved to be a more accurate method for recording dance movements than textual description, but this method also has serious defects. A motion picture can only record the choreographic work as interpreted by the dancer. This allows the insertion of the dancer's style and defects into the original creation as conceived by the choreographer. This method has also proved uneconomical and its usefulness is generally restricted to recording the over-all style of the work and its staging.⁴⁵

Kinetography Laban (the Laban system of dance notation) is unquestionably the most accurate method for recording choreographic works. This system of dance notation can accurately depict all elements of space, time and bodily motions through the use of symbols and lines.

with appropriate statutory notice" may be registered in Class A as a published book; and that "motion pictures which depict ballets and other dance forms may be deposited in Class L or M." It should be noted with reference to the last mentioned classes of registration that the rights accruing therefrom are quite different from the rights in dramatic works. Dramatic compositions are protected from unauthorized public performance, while no such right inheres in non-dramatic literary works. (See 17 U.S.C. §§1(a)-(d)): Thus, a textual description of the history of dancing or a critical analysis of a particular choreographic work would be restricted to the protection accorded non-dramatic literary works when registered in Class A.

45. "While some people advocate the use of films to record ballet, I have found them useful only in indicating the style of the finished product and in suggesting the general over-all visual picture and staging. A film cannot reproduce a dance, step by step, since the lens shoots from but one angle and there is a general confusion of blurred impressions which even constant re-showing can never eliminate." Balanchine, *Preface to Hutchinson, Labanotation* (1954). "A frequent suggestion in our day is to record a dance or ballet by means of filming it, but it would be impossible to reconstruct a ballet from a film; just as impossible as it would be for a conductor without a musical score to rehearse even a simple piece of music with his orchestra from a gramophone record." Cotton, *The New Ballet* 80 (1946).

These symbols can be easily read by skilled dance notators and reinterpreted into dance movements.⁴⁶

Although the system may appear complex and vague to the ordinary person, its principles may be readily understood through diligent study and teachings. In fact, the Laban System of dance notation is now commonly taught in most large dance schools because of the efforts of the Dance Notation Bureau in New York.⁴⁷

It is therefore submitted that the Laban System of dance notation should be used to record all choreographic works which are registered for copyright. Moreover, the use of this accurate system will undoubtedly preclude a court from denying copyright protection on the grounds that the work is not sufficiently fixed in tangible form.

(C)

Rights in Choreographic Works

Although choreographic works are not specifically named in the Federal Copyright Act, it would appear that since they are allowed registration as a specie of dramatic works, they should be accorded the same statutory protection provided for dramatic compositions.

Copyright owners of all classes of registered works are accorded the exclusive right "to print, reprint, publish, copy, and vend" their works.⁴⁸ This right enables the copyright owner of a choreographic work to have exclusive control over the reproduction of his writing,⁴⁹ and to prohibit others from copying it without his consent.⁵⁰

46. Merrill, *supra* note 7, at 793 describes the Laban system as follows: "There is a basic staff which is divided vertically by a center line and then into vertical columns. This staff represents the body; all columns right of the center line are for the use of the right side of the body, and those to the left are for the left side. Each part of the body has its column. The symbols of direction are placed in the appropriate columns. These direction symbols show by their shape the direction, by their shading the level, and by their length the time value of the movement. The Laban notation alphabet includes symbols for the joints (shoulders, knees, elbow, etc.), for various surfaces of the body (palm, face, chest, etc.), signs for touching, clapping, sliding, turning, floor patterns, dynamics, and so on."

47. Hutchinson, *Labanotation* 4 (1954).

48. 17 U.S.C. §1(a) (1958).

49. The term "writing" used in this context refers to the tangible form in which the author's creation is recorded. (i.e. written text, motion pictures, notated text.)

50. *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83 (2d Cir. 1922).

Unquestionably the most important right as far as choreographic works and dramatic compositions are concerned, is the exclusive right "to perform or represent the copyrighted work publicly."⁵¹ This right extends to ALL public performances whereas copyright owners of non-dramatic musical works⁵² and non-dramatic literary works⁵³ have only the exclusive right to public performance "for profit" and public delivery "for profit" respectively.⁵⁴ As indicated previously, a choreographic work must be recorded in a fixed form sufficient to enable performance therefrom. If this requirement is not complied with, the work will qualify only as a non-dramatic literary work. Copyright in this form of work will protect it against public delivery "for profit", but this refers only to the public reading or recitation of the text where some fee is paid by the audience.

Another important right accorded dramatic choreographic works is "to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; * * *" ⁵⁵ This right would entitle the copyright owner to make motion pictures or video tapes of the choreographic work which could be publicly presented in theaters or on television. This right may prove to be of great value in the future with the recent increase in television presentations of choreographic material.

Also important for works of choreography is the right "to vend any manuscript or record" of an unpublished dramatic work.⁵⁶ Rudolf Laban has said: "the endeavor to describe the movements of dance in special symbols has one main purpose. This is the creation of a litera-

51. 17 U.S.C. §1(d) (1958).

52. 17 U.S.C. §1(e) (1958).

53. 17 U.S.C. §1(c) (1958).

54. The reason additional protection is accorded dramatic compositions has been amply stated by Stephen P. Ladas in his work on international copyright. "The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore an unauthorized performance, though gratuitous, will cause the author a monetary loss, by depriving him of a potential audience." Ladas, *The International Protection of Literary and Artistic Property* 783 (1938).

55. 17 U.S.C. §1(d) (1958).

56. 17 U.S.C. §1(d) (1958). This right accrues to unpublished choreographic works which have been registered under 17 U.S.C. 12 (1958) as works not reproduced for sale. If the work has been registered as published, then the same rights accrue to the copyright owner under section 1(a).

ture of movement and dance.”⁵⁷ He indicates that script-dance literature has potential for being utilized in the training of young dancers just as sheet-music is used in the training of musicians. This prediction will undoubtedly manifest itself in the near future in view of the rapid growth in the use of the Laban System of dance notation. When it does the value of the right to vend a choreographic manuscript will be greatly enhanced.

Of minor importance to works of choreography is the right “to convert it into a novel or other non-dramatic work.”⁵⁸ This right would appear to have little use as far as choreographic works are concerned since these generally have minor or elementary storylines.

SUMMARY AND CONCLUSIONS

A review of the foregoing discussion indicates that choreographic works which constitute original creations of authorship, should be afforded copyright protection. Such protection probably may be secured through common law copyright in unpublished works, although no case precedent has been found in support of this view. This is subject to the major disadvantage that dissemination of this material, if only for the purpose of teaching, would constitute publication and would consequently defeat the copyrights.

Copyright protection may also be secured for published or unpublished choreographic works, by registering copies thereof in the Copyright Office as a species of “dramatic composition” in Class (5d) of the Federal Copyright Act. Copies registered for copyright must depict the choreographic work in sufficient detail to enable performance therefrom. The most accurate method for fixing such works in “acting form” is the Laban System of dance notation; however, written textual descriptions or motion pictures may also be used.

The treatment of choreographic works as a species of “dramatic compositions” has served to define and delimit the type of dances which may be registered for copyright. It has also served to define the rights to which a copyright owner of a choreographic work is entitled. However, a serious defect exists in treating choreographic works in this class of composition.

57. Laban, *Forward to Hutchinson*, *supra* note 47. Mr. Laban states further that “The manifestation of human spirituality which has made dance a sister art of poetry and music can survive only if its products are written, printed, and read by a large circle of laymen and performers.”

58. 17 U.S.C. §1(b) (1958).

Case precedent indicates, that in order to qualify as a "dramatic composition" a work must convey some storyline or theme to the audience. Most "modern and abstract" dances lack any storyline or theme. The bodily movements in such dances are primarily intended to convey some esthetic or emotional concept to the audience. Although many of these dances constitute original creations of authorship, their qualification as a dramatic composition is uncertain.

In the interest of clarifying this uncertainty it is submitted that the Federal Copyright Act should be amended to reflect the following proposals:

1. Section 5 should be amended by adding choreographic compositions as a separate class of copyrightable works.
 2. Such choreographic compositions should be limited to those which constitute an original creation of authorship intended for public performance.
 3. These choreographic compositions should be accorded the same rights and protection as those presently accorded dramatic compositions.
-

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

260. UNITED STATES. CONGRESS. HOUSE.

H.R. 13286. A bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes. Introduced by Mr. Staggers, March 3, 1966, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (89th Cong., 2d Sess.)

This bill would, among other things, authorize the F.C.C. to prohibit origination of program or other material by a CATV system, with such limitations or exceptions, if any, as are deemed appropriate. See also Items 262 and 264 *infra*.

261. UNITED STATES. CONGRESS. HOUSE. *Committee on the Judiciary*.

Copyright law revision. Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Eighty-ninth Congress, first session on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, bills for the general revision of the copyright law, title 17 of the United States Code, and for other purposes. May 26, 27, 28, June 2, 3, 4, 9, 10, 16, 17, 23, 24, 30, August 4, 5, 11, 12, 18, 19, 26, September 1 and 2, 1965. Washington, U. S. Govt. Print. Off., 1966. 3 v.

262. UNITED STATES. CONGRESS. SENATE.

S. 3017. A bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes. Introduced by Mr. Magnuson (by request) March 4, 1966, and referred to the Committee on Commerce. 3 p. (89th Cong., 2d Sess.)

A companion bill to H.R. 13286. See Item 260 *supra*.

263. UNITED STATES. CONGRESS. SENATE. *Committee on the Judiciary.*

Design protection. Hearing before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-ninth Congress, first session, pursuant to S. Res. 48 on S. 1237. July 28, 1965. Washington, U. S. Govt. Print. Off., 1966. 73 p.

264. UNITED STATES. CONGRESS. SENATE.

Magnuson, Warren G. Regulation of community antenna television systems. *Congressional Record*, vol. 112, no. 39 (daily ed. Mar. 4, 1966), pp. 4689-4691.

Remarks of Senator Magnuson when he introduced S. 3017 (see Item 262 *supra*). Appended to his remarks is a copy of a letter from the Chairman of the F.C.C. requesting the proposed legislation, together with the explanation of it.

265. UNITED STATES. COPYRIGHT OFFICE.

Sommario del progetto di Legge del 1965. *Il Diritto di Autore*, vol. 36, no. 3 (July-Sept. 1965), pp. 404-418.

An Italian translation of the Summary of the 1965 Bill for the General Revision of the U. S. Copyright Law.

2. FOREIGN NATIONS

266. CZECHOSLOVAK REPUBLIC. *Laws, statutes, etc.*

Gesetz über literarische, wissenschaftliche und künstlerische Werke (Urheberrechtsgesetz). Vom 25. März 1965, Nr. 35 Slg. *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, vol. 44, no. 5/6 (Oct. 1, 1965), pp. 342-357.

A German translation of the new Czechoslovak copyright statute of March 25, 1965, which entered into force on July 1, 1965.

267. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Act concerning the European Agreement of June 22, 1960, on the Protection of Television Broadcasts, of September 15, 1965. (1 *Copyright* 273, no. 12, Dec. 1965.)

An English translation of the law implementing the adherence of the Federal Republic of Germany to the European Agreement on the Protection of Television Broadcasts.

268. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Act concerning the International Convention of October 26, 1961, for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (of September 15, 1965). (1 *Copyright* 274, no. 12, Dec. 1965.)

An English translation of the law implementing the adherence of the Federal Republic of Germany to the Rome Convention on Neighboring Rights.

269. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Act concerning the Text adopted at Brussels on June 26, 1948, of the Berne Convention of September 9, 1886, for the Protection of Literary and Artistic Works (of September 15, 1965). (1 *Copyright* 273, no. 12, Dec. 1965.)

An English translation of the law implementing the adherence of the Federal Republic of Germany to the Brussels text of the Berne Copyright Convention.

270. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Act dealing with Copyright and Related Rights (Copyright Act) (of September 9, 1965). (1 *Copyright* 251-268, no. 12, Dec. 1965.)

An English translation of the new copyright statute of the Federal Republic of Germany. See 13 BULL. CR. SOC. 132, Item 156 (1965).

271. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Act dealing with the Administration of Copyright and Related Rights (of September 9, 1965). (1 *Copyright* 268-272, no. 12, Dec. 1965.)

An English translation of the West German law concerning the protection of rights arising under the new copyright statute. See 13 BULL. CR. SOC. 132, Item 155 (1965).

272. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Gesetz über das Europäische Abkommen vom 22. Juni 1960 zum Schutz von Fernsehsendungen. Vom 15. September 1965. (67 *Blatt für Patent-, Muster- und Zeichenwesen* 376-384, no. 11/12 (Nov.-Dec. 1965).)

The law, effective January 1, 1966, concerning the adherence of the Federal Republic of Germany to the European Agreement on the Protection of Television Broadcasts. The texts of the Agreement, in English, French and German, and of related documents are appended.

273. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Gesetz über die in Brussel am 26. Juni 1948 beschlossene Fassung der Berner Ubereinkunft vom 9. September 1886 zum Schutze von Werken der Literatur and der Kunst. Vom 15. September 1965. (67 *Blatt für Patent-, Muster- und Zeichenwesen* 349-370, no. 11/12, Nov.-Dec. 1965.)

The law concerning the adherence of the Federal Republic of Germany to the Brussels revision of the Berne Copyright Convention. The texts of the Convention, in French, English and German, and of related documents are appended.

274. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Gesetz zu dem Internationalen Abkommen vom 26. Oktober 1961 über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen. Vom 15. September 1965. (67 *Blatt für Patent-, Muster- und Zeichenwesen* 370-375, no. 11/12, Nov.-Dec. 1965.)

The law implementing the adherence of the Federal Republic of Germany to the Rome Convention on Neighboring Rights. The text of the Government report on the draft law and of other related documents is appended.

275. GERMANY (*Federal Republic, 1949-*). *Laws, statutes, etc.*

Legge sul diritto di autore e sui diritti affini del 9 settembre 1965. (36 *Il Diritto di Autore* 357-394, no. 3, July-Sept. 1965.)

An Italian translation of the new copyright statute of the Federal Republic of Germany.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

276. YUGOSLAVIA RATIFIES THE UNIVERSAL COPYRIGHT CONVENTION.

The U. S. Department of State has been officially informed by the Director-General of UNESCO that the instrument of ratification by Yugoslavia of the Universal Copyright Convention and Protocols 1, 2 and 3 annexed thereto was deposited on February 11, 1966.

In accordance with Article IX, paragraph 2 of the Convention, the latter will come into force in respect of Yugoslavia on May 11, 1966, three months after the deposit of the instrument of ratification.

Under paragraph 2 (b) of Protocols 1 and 2, these Protocols will come into force in respect of Yugoslavia on the same date as the Convention. Under paragraph 6 (b) of Protocol 3, the latter came into force in respect of Yugoslavia on the date of deposit of the instrument of ratification.

Yugoslavia is the 52nd country to become a party to the Universal Copyright Convention.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY****A. DECISIONS OF U.S. COURTS****1. Federal Court Decisions**

277. *Opinion of the Comptroller General of the United States*, 147 U.S.P.Q. 230 (Oct. 7, 1965).

A manufacturer of flying helmets protested against the procurement by the Department of the Air Force of helmets allegedly incorporating design features of a headset submitted to the Air Force by plaintiff "for evaluation only" and also supplied by plaintiff to RCA, which had a headset development contract with the Air Force.

In reply, Frank H. Weitzel, the Acting Comptroller General, acknowledged that there were design similarities between the Air Force headset specifications and plaintiff's helmet, but denied that the government had unfairly used a trade secret disclosed to it. The Comptroller General said:

We recognize that, in the absence of a patent or copyright, an individual must rely on secrecy to protect his ideas or the information resulting from his labors. Unlike the holder of a patent or copyright, who is granted a monopoly for a period of time by the Government in return for a public disclosure, the owner of a trade secret must protect himself against disclosure of his secret. While the patent or copyright holder has a statutory right to exclude others from using his idea, the owner of a trade secret has no right to exclude others from using his idea if they acquired the idea by honest means. Protection is granted by the courts only where one is attempting to use or disclose the secret in violation of some general duty of good faith to the owner such as a breach of contract or abuse of confidence. *Junker v. Plummer*, (Mass.) 67 N.E.2d 667, 670, 70 USPQ 332; *Ellis*, *Trade Secrets*, sec. 14.

An individual may reveal his trade secret to the Government in the hope of obtaining the Government as a customer for his product. We have held that, in the interests of preserving the integrity of the Government as a contractor and of avoiding possible legal liability, the Government should recognize an individual's

proprietary rights to information received and should not disclose or use the information for procurement purposes unless it acquires this right from the individual owner. See decisions B-143711, dated December 22, 1960, and May 15, 1961; 41 Comp. Gen. 148, 42 Comp. Gen. 346; 43 Comp. Gen. 193. As indicated, the basis for protecting proprietary information is that the recipient has gained the information through a confidential disclosure. Information gained by the recipient prior to or independently of the disclosure is not protected. *Smoley v. New Jersey Zinc Co.*, 24 F.Supp. 294, 38 USPQ 315 (aff'd, 106 F.2d 314, 42 USPQ 401), *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12.

The record does not show that Air Force used information you supplied to it for the development of the HGU-7/P helmet. The headset suspension system was designed for the Air Force by its helmet contractor, Protection, Incorporated. Air Force did not specify this system under the original contract requirements. The other features of the helmet were apparently chosen by Air Force officials shortly before you submitted your sample helmets for evaluation.

The grooved earcup was developed initially for the Air Force by RCA, and Roanwell developed the drawings and the test units for the headset (including the earcup). You have submitted evidence indicating that your firm originally supplied the earcup design to RCA, in 1957, before the RCA prototype headset was delivered to the Air Force. You contend that notice of your proprietary right to the grooved earcup design was furnished to Air Force by RCA Drawing No. 647825 of your (General Textile Mills) DH-19 helmet. The drawing contains a preliminary sketch of the helmet model. There is no indication on the drawing that the earcup to be attached to the helmet is proprietary to your firm. It seems to us that the RCA drawing was intended to show a possible application for the earcup. Air Force did not furnish this drawing to Roanwell to use in its development work. Assuming, only for purpose of argument, that the earcup design had been proprietary to your firm, the disclosure of your design was not made to Air Force but rather to RCA. This design was embodied in an earcup with a headset which Air Force purchased in good faith from RCA under a development contract. Air Force then used the headset and earcup it purchased outright for further development work. Certainly we are not in a position to adjudicate your rights against private parties and, until such rights as you may have in the matter have been

established in a proper forum, this Office would not be justified in disturbing Air Force's helmet procurement program or in granting relief to your firm.

278. *Northern Music Corp. v. Pacemaker Music Co., Inc.*, 147 U.S.P.Q. 358 (S.D.N.Y., Nov. 5, 1965) (Palmieri, J.). For decision on preliminary injunction, see 147 U.S.P.Q. 357 (S.D.N.Y., July 20, 1964) (Cooper, J.)

Motions by both parties for summary judgment in action for copyright infringement. Plaintiff alleged that its copyright in the musical composition, "Don't Let the Sun Catch You Cryin'" had been infringed by defendant's "Don't Let the Sun Catch You Crying". A preliminary injunction was denied on the bases: 1) that neither actual copying nor access had been shown and that there was little similarity between plaintiff's song and defendant's, except for the title line; and 2) that because of insufficient showing of public familiarity with the plaintiff's song title, no claim of unfair competition was made out.

Held, both motions denied.

The court held that there was not such striking similarity between the two songs that copying could be inferred without proof of access and that there was a sharp issue of fact as to whether the English composer of defendant's song had access to plaintiff's earlier American work. The court said:

The plaintiff has argued with considerable force that both compositions have the same central idea and literary text under the same title, and that the musical phrase underlying the principal lyrical theme "Don't Let the Sun Catch You Cryin'" is substantially the same. And this Court would be free to reach conclusions to this effect despite the prior denial of plaintiff's motion for preliminary injunctive relief. See *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 108 USPQ 274 (2d Cir. 1956). This resolution of the matter is not adopted, however, despite the fact that the parties have made cross motion for summary judgment. . . .

The plaintiff here has contended that a sufficient similarity can be demonstrated. But, even assuming this arguendo, this similarity has not been shown to be so striking that copying can be inferred without proof of access; and there is a sharp issue of fact presented on the papers presently before the Court, with respect to the English composer's access to plaintiff's work. Indeed, defendants assert that Marsden had never been to the United States prior to the writing of the accused work and that the Greene composition had

no popularity in England and was not generally known there. The plaintiff, on the other hand, has alleged that the Greene composition was "continuously owned, published, licensed, marketed and exploited in the United States and various other countries, including England . . ." and they have pointed to admissions by Marsden's music publisher and recording manager that they listened to the Dinah Washington recording of the Greene composition before Marsden's recording was made. It should be added, however, that these admissions may prove to be of questionable significance since all the recordings appear to have been made after Marsden composed his work. Because the issue of access is a crucial factual issue, the case does not lend itself to summary disposition. Once the issue of copying is resolved, the trial court will then have to deal with the question of whether the copying was so material or substantial as to constitute unlawful appropriation. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487, 68 USPQ 303, 310-311 (2d Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468, 68 USPQ 288, 292 (2d Cir. 1946).

279. *Miller Studio, Inc. v. Pacific Import Co., Inc.*, 147 U.S.P.Q. 388 (S.D.N.Y., Nov. 19, 1965) (Levet, J.)

Action for copyright infringement with respect to certain wall plaques. Plaintiff moved for summary judgment.

Held, judgment for plaintiff.

Defendant argued that the fact that its plaques had been purchased in Japan showed that there had been no copying. The court held, however, that since the creative origin of defendant's plaques was not shown, the place of manufacture did not negate the showing of copying. The court said:

Neither does proof appear to substantiate defendant's claim that its plaques were copied from Japanese originals and not from the plaintiff's plaques. The plaintiff is not compelled to negative a claim which has not one iota of substantiation. Where, as here, the defendant has failed to show that the allegedly infringing plaques were obtained from some source other than plaintiff's plaques and, where, as here, the defendant's plaques clearly appear to be copies of plaintiff's plaques, the inference is justified that the alleged infringer copied plaintiff's plaques.

Defendant also argued that plaintiff had not shown what was "actually filed" with the Copyright Office. The court held, however, that the

plaintiff's certificates of registration, which were prima facie evidence of "the facts contained therein" did show what was filed.

The court also rejected defendant's contention that the plaques should have been registered as reproductions of works of art (Class H) rather than as originals (Class G).

280. *Norbay Music, Inc. v. King Records, Inc.*, 249 F. Supp. 285, 148 U.S.P.Q. 420 (S.D.N.Y., Jan. 11, 1966) (Bryan, J.)

Action for statutory damages for production of infringing phonograph records. An authorized Mercury recording of plaintiff's musical composition, "Slow Walk", was released in October, 1956. Shortly thereafter, defendant, without license from plaintiff and without serving upon plaintiff a notice of intention to use the song for recordings, began production of another recording of "Slow Walk." Plaintiff did not file its notice of use pursuant to §1(e) of the Copyright Act until November 26, 1957. In December, 1957 plaintiff made a written demand upon defendant for statutory royalties. Defendant refused to pay and suit was commenced in 1959. Defendant's motion for summary judgment was granted (185 F. Supp. 253, 7 BULL. CR. SOC. 293, Item No. 391 (1960)) on the ground that plaintiff's failure to file its notice of use promptly was a "complete defense" to the infringement action. The Court of Appeals for the Second Circuit reversed (290 F.2d 617, 8 BULL. CR. SOC. 313, Item No. 292 (1961)), holding "that the plaintiff's failure to file a timely notice of use bars suit for acts of infringement occurring prior to the time notice was filed but not for acts occurring afterwards." The case was remanded for a computation of damages. On remand, based on agreement of the parties, statutory royalties (at two cents) were fixed at \$622.24; trial followed on the issues of treble damages and a claim for attorneys' fees, as to which summary judgment had been denied.

Held, judgment for plaintiff for \$1,244.48 in addition to the original \$622.24. There was no award of attorneys' fees.

I. *Treble damages.* The court held that treble damages are punitive and that defendant should not be penalized for seeking clarification of an unsettled question of law. Defendant was held to be justified, so far as punitive damages are concerned, in refusing to serve a "notice of intention to use" on plaintiff when this would have been inconsistent with defendant's "complete defense" of plaintiff's failure to file a notice of use. However, defendant was held to have had no justification in continuing its refusal to serve such notice after the Court of Appeals

rendered its decision. The court said, in awarding double rather than treble damages:

The propriety of supplementing a damage award because of a defendant's failure to file a notice of intention to use the copyrighted composition is a matter of judicial discretion. 17 U.S.C. §101(e). Though the principles governing the exercise of this discretion have not been clearly delineated by the few cases interpreting the provision, the Second Circuit has apparently taken the position that Section 101(e) is "punitive" in nature. *Shapiro Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263 (2d Cir. 1959). . . .

The circumstances of this case disclose no efforts on the part of the defendant to frustrate an assessment of damages. Rather it has openly relied upon what it believed to be a "complete defense." Assuming that the defendant's obligation to file a notice of intention to use arose when the plaintiff filed its notice of use on November 26, 1957, it does not follow that exemplary damages should be imposed for defendant's failure to file prior to the decision of the Court of Appeals.

If defendant had filed before the appeal was decided, the action could have been construed as a concession that it was "relying upon the compulsory license provisions" of the statute, 17 U.S.C. §101(e), and thus was obligated to pay the statutory royalty. So construed, this position obviously would have been directly opposed to defendant's "complete defense" argument which was urged on the appeal. Cf. *Ricordi & Co. v. Columbia Graphophone Co.*, 263 F. 354 (2d Cir. 1920). Under the circumstances it seems to be the better part of discretion to refrain from penalizing the defendant for acting upon a not unreasonable interpretation of the law . . . Though in the future a record manufacturer who appropriates a copyrighted work to his own use without adhering to the requirements of the notice provisions will be hard put to avoid the imposition of treble damages, see *ABC Music Corp. v. Janov*, 186 F. Supp. 443 (S.D. Cal. 1960), in the case at bar the defendant should not be penalized for seeking clarification of an unsettled question of law.

However, after the rendition of the Court of Appeals decision on May 25, 1961, defendant persisted in its failure to file a notice of intention to use until October 25, 1962. There is no conceivable justification for this delay. Since the notice provisions are the "keystone" of the mandatory licensing scheme under the Copyright Law, *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, supra, 265 F.2d at 269, violations should be dealt with strictly. The proof

adduced at the trial, however, does not indicate what damages occurred after the date of the Court of Appeals decision. Accordingly, in the exercise of my discretion to award a further sum not to exceed three times the \$622.24 due as royalties, I set the damages at \$1,244.48, twice the sum of the statutory figure.

II. *Attorneys' fees.* The court held that an award of an attorneys' fee is also punitive and discretionary, and is usually made when the defendant had no solid grounds for its defense. The court said:

Like treble damages, counsel fees may be awarded in the discretion of the court where warranted by the circumstances of the case. 17 U.S.C. §116. According to the Second Circuit, the "provision for attorney's fees . . . has been sparingly used and the amounts awarded modest." *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 122 (2d Cir.), cert. den., 371 U.S. 817, 83 S. Ct. 31, 9 L.Ed. 2d 58 (1962). . . . The punitive aspect of §116 was emphasized in the Report of the Register of Copyrights, General Revision of the United States Copyright Law 109 (1961):

"The discretionary power of the courts to require the losing party to pay 'a reasonable attorney's fee is intended to discourage unfounded suits and frivolous defenses. The courts have generally denied awards of attorney's fees where the losing party had solid grounds for litigating his claim or defense. This discretionary power of the courts is generally regarded as salutary, and we concur in this view."

. . . The cases reveal that a fee allowance is rarely made where there are unsettled issues of law and fact. See, e.g., *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957). . . . The case at bar certainly does not disclose a "highly technical argument" on the part of the defendant, *Mailer v. RKO Teleradio Pictures, Inc.*, 332 F.2d 747, 749-750 (2d Cir. 1964), nor a "lack of substance" to its contention, *Boucher v. DuBoyes, Inc.*, 253 F.2d 948, 950 (2d Cir. 1958) (per curiam) . . . factors which in the past have influenced the Second Circuit to authorize an award of counsel fees. On the contrary, the question raised by the defendant was "without controlling precedent" and was adopted by a Judge of this court in a "reasoned" opinion. 290 F.2d at 618, 620.

In short, by no stretch of the imagination was defendant's "claim . . . so lacking in merit as to present no arguable question

of law", nor was it designed to annoy, "vex or harass" the plaintiff. *Cloth v. Hyman*, 146 F. Supp. 185, 193 (S.D.N.Y. 1956).

281. *Scandia House Enterprises, Inc. v. Dam Things Establishment*, 243 F. Supp. 450, 146 U.S.P.Q. 342 (D.D.C., July 15, 1965) (Jackson, J.)

In action for declaratory judgment that Danish manufacturer's design patent was not infringed by doll sold by its former distributor, defendant counterclaimed for copyright infringement. Defendant had obtained copyright registration in 1964 for two "troll" dolls, alleging a publication date of 1961. The dolls deposited in the Copyright Office had a notice molded into one foot reading: "© 1961-190918-Denmark."

Held, judgment for plaintiff.

I. Defendant argued that its rubber dolls, sold in quantity in the United States, without copyright notice, were made from different molds than the plastic dolls which it began to manufacture in 1961. The court held, however, that there was no significant difference between the rubber dolls and the plastic dolls, and that the dolls, having been published without copyright notice, were in the public domain.

The court found that most of the plastic dolls were also sold, with defendant's consent, without copyright notice, thus repeating the publication without notice. The court rejected defendant's argument that the omission of notices was an inadvertent error because, of millions of dolls, only a few bore a copyright notice.

II. The court also found that the copyright notice was defective for failure to name the copyright proprietor. Defendant argued that the word "Denmark" meant Dam Things Establishment, but the court held that "Denmark" is the name of a country and not an alternative trade name of defendant.

2. State Court Decisions

282. *Estate of Ernest Hemingway v. Random House, Inc.*, 148 U.S.P.Q. 618 (Sup. Ct., N.Y. County, Feb. 25, 1966) (Frank, J.)

In action for invasion of common law copyright, unfair competition and invasion of privacy, motion for preliminary injunction restraining publication of a biography. A. E. Hotchner wrote a biography of the late Ernest Hemingway called "Papa Hemingway" which is a "subjective presentation" based on Hotchner's friendship with Hemingway and contains material quoted from many conversations in which Hotchner

and Hemingway participated. The book also contains a number of references to Mrs. Hemingway.

Held, preliminary injunction denied.

I. *Common law copyright*. It was held that conversations do not constitute the literary property of any one of the participants because they are the product of the joint activities and interaction of all the participants and because they are not fixed in tangible form. The court said:

" . . . [T]here has been no showing by plaintiff that they [revised proofs of "Papa Hemingway"] contain any matter quoted directly from letters sent by Hemingway or that there is more than a de minimis, if at all, infringement of any copyrighted material including the contents of any tape recordings. All that is shown is the inclusion throughout the book, in substantial measure, of conversations in which Hemingway is apparently quoted verbatim, as are defendant Hotchner and various others. Defendant Hotchner contends that such conversations are not necessarily verbatim but are his renditions based upon notes which he kept and recorded during the years of his friendship with Hemingway and his natural talent for remembering such conversations.

We are thus confronted with the novel and provocative question as to whether a person's participation in spontaneous oral conversations with friends over a course of years, in distinction to lecture or prepared dialogues, may be considered a literary work subject to a common law copyright. It appears that this question of possible categorization of ordinary conversation as a literary work or property is one of first impression. While reference to cases dealing with letters or lectures might afford refuge by analogy, the didactics of logic provide a curiously unsatisfying vehicle for resolution of the problem at hand. We are dealing here with a possible limitation upon "speech", an area pregnant with social and historical implications striking at the very fundamentals of our political structure. The free and unfettered exchange of ideas and information of all types has been a hallowed tradition that has served to nourish an informed and alert citizenry. The intellectual benefits derived from access to the intimate articulations and experiences of figures of note and achievement are emphatically demonstrated by the enduring fame and inspirational stimulus of the works of recorders such as Plutarch, Boswell and Carlyle. That the restrictive action here sought would serve in large measure to frustrate

the continued availability of such hitherto permissible material is not without significance. Social cost and the public interest may be considered. (Cf. *University of Notre Dame v. Twentieth Century Fox*, 22 A.D. 2d 452, affd. 15 N.Y. 2d 940.)

Conversation is a media of expression of unique character. Because of its several nature any conversational exchange necessarily reflects the various participants thereto not only with respect to the direct contributions of each but also insofar as each party acts as a catalyst in evoking the thoughts and expressions of the other. The articulations of each are to some extent indelibly colored by the intangible influence of the subjective responses engendered by the particular other. Conversation cannot be catalogued as merely the cumulative product of separate and unrelated individual efforts, but, on the contrary, it is rather a synthesized whole that is indivisibly welded by the interaction of the parties involved. As a participant in the conversations, the defendant Hotchner would be as much an architect thereof as any of the other participants. In this case, where most of the quoted conversations took place between the defendant author and the subject of the work, such conversations necessarily reflect a duality that defies dissection or divisibility. In light of the interaction which renders conversation indivisible, it is difficult to see how conversation can be held to constitute the sort of individual intellectual production to which protection is afforded by way of a common law copyright.

Moreover, while plaintiff emphasized the quantitative extent to which her husband's conversational expressions are used in the book and attempts to spell out therefrom a separate literary property, she overlooks a vital factor. These random and disconnected oral conversations are given some semblance of form only by virtue of their arrangement in the context of the defendant author's literary creation. Standing completely alone they are merely a disoriented conglomeration of unconnected expressions. It is the manner of defendant's incorporation and presentation of these conversational segments that organizes them into a coherent format and renders them meaningful. It is clear, therefore, that plaintiff has failed to establish any right to a common law copyright to any portion of the book in question. . . .

II. *Invasion of Privacy*. It was held that a biography, absent "fabricated or distorted statements", does not constitute an invasion of privacy. The court said:

Ever since its enunciation in the classic article by Brandeis and Warren in 1890, the doctrine of "privacy" has evoked serious judicial attention directed toward some pragmatic adjustment of its status in its inevitable conflict with the competing doctrines of "the right of the public to know" and "the freedom of the press to inform". The individual's security has fared best when pitted against naked commercial assault, and protection is afforded under the statute where the invasion has been solely for "advertising purposes, or for the purposes of trade". A book of biographical import such as is here involved, however, has been held not to fall within such category. Compelling public interest in the free flow of ideas and dissemination of factual information has outweighed considerations of individual privacy in conjunction with factual publications of such type, whether authorized or not, and as to such book the statutory proscription is ordinarily without relevance. (See, *Kous-sevitzsky v. Allen, Towne & Heath*, 188 Misc. 479, affd. 272 App. Div. 759; *Spahn v. Messner, Inc.*, 23 A.D. 2d 216; *Sidis v. F-R Pub. Corp.*, 113 F.2d 806.) Moreover, plaintiff's status as the wife and widow of a man of celebrated prominence who was the recipient of both the Nobel and Pulitzer Prizes during his lifetime and her own activities incidental to such position have thrust her into the category of a newsworthy personality who, as a figure of public interest, is de hors the protection of the statute. . . . While proof of fabricated or distorted statements might provide recourse even in such context (see *Spahn v. Messner, Inc.*, supra; Hofstadter and Horowitz, *The Right of Privacy*, pg. 56), plaintiff's bare allusion to "misstatements of fact" without any further specification or particularization is wholly insufficient for such purpose.

III. It was held that charges of "unfair competition" and "breach of fiduciary duties imposed by a relationship of trust and confidence" had not been proved.

283. *Ferrer v. Columbia Pictures Corp.*, 149 U.S.P.Q. 236 (Sup. Ct., Westchester Co., Feb. 25, 1966) (Fanelli, J.)

Action for infringement of common law copyright. Jose V. Ferrer sought to restrain distribution of the motion picture "The Long Ships" on the ground that defendants had not acquired his rights in the screen play. Ferrer, who was employed as a director in connection with the film, alleged that he had contributed literary material to the "third

draft" of the screenplay. Defendant moved for summary judgment dismissing the complaint.

Held, judgment for defendant.

The court held that plaintiff's contribution to the screenplay, according to his own version of the facts, was as a co-author with writer Jasper Davies. Accordingly, since any one of several joint authors can license use of the joint work, Columbia was free to distribute "The Long Ships" by virtue of an agreement between Davies and producer Warwick Productions, Inc. and Warwick's agreement with Columbia. The Court said:

Movant very properly maintains that the gravamen of plaintiff's cause of action, and the very foundation of his claim, as evidenced by his complaint, bill of particulars and opposing affidavit, is that he was a joint author and that he "*collaborated* with one Jasper Davies in the writing of [the] screenplay entitled 'The Long Ships' and created his own literary material therein. . . . that the defendants acquired the rights of the said Jasper Davies in and to the said screenplay but have failed to acquire the rights of the plaintiff in and to the said screenplay and the literary property created by the plaintiff therein"; and that "Davies was aware of [his] literary contribution so much so as to prompt him to offer [him] billing as co-author" (emphasis supplied). If that be so, then the law dealing with situations such as this and property of this nature warrants the court in directing judgment as a matter of law in favor of movant and against plaintiff dismissing his complaint. The fact that plaintiff and Davies may have collaborated without a so-called "collaboration agreement" is of no consequence. The determination of whether a product is a "joint work" is in no way dependent upon the existence of any expressed "collaboration agreement" (see *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2nd 266, 267). The fact remains that throughout this litigation plaintiff maintains that he and Davies collaborated together in the writing of the screenplay and that they were in fact co-authors.

The law is settled that those in the position of "collaborators" or "joint authors" of a literary work stand in the position of tenants in common with respect to such work, and that either of the collaborators, without the consent of the other, may grant a license to use and deal with the work. A grantee or licensee from a joint author may not be considered an infringer and may not otherwise

be prevented by any other alleged joint author from dealing with the work pursuant to the terms of the license (*Denker v. Twentieth Century-Fox Film Corp.*, 10 N.Y. 2d 339, 344-345; *Nillson v. Lawrence*, 148 App. Div. 678, 679-680; *Harrington v. Muro*, 186 F. Supp. 655, 657, note 4; *Klein v. Beach*, 232 Fed. 240, affd. 239 Fed. 108; *McKay v. Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763). The case of *Szekely v. Eagle Lion Films*, 242 F.2d 266, cited by plaintiff, is factually distinguishable, and under the circumstances, is inapplicable. Here, in the case at bar, it is undisputed, and in fact conceded in the complaint . . . that defendant Warwick, the producer of the motion picture, acquired all the rights of Davies in and to the screenplay upon which the motion picture was based. The written contract between Davies and the producer, annexed to the moving papers, establishes this fact. Similarly, there is no dispute that movant's distribution of the motion picture was predicated upon the full consent and authority therefor given by the producer. Accordingly, movant, by virtue of the consent given by Davies (plaintiff's alleged "collaborator" and co-author) and, in the light of the aforementioned authorities, was free to distribute the motion picture without interference or hindrance by plaintiff.

284. *Henry v. Barrymore Theatre Corp.*, not yet reported (Sup. Ct., N.Y. County, Feb. 23, 1966) (Frank, J.)

Action for invasion of privacy. The play, "A Case of Libel" based on a section of Louis Nizer's book, "My Life in Court," depicted "The celebrated litigation, *Quentin Reynolds v. Westbrook Pegler*. The play, unlike Nizer's book, did not use the real names of the characters. Pegler's lawyer sued for invasion of privacy. Defendant moved for summary judgment dismissing the complaint.

Held, judgment for defendant.

I. The court held that a description of a person or of events in his life does not constitute his "name, picture or portrait" and so does not come within the ambit of the New York statute covering invasion of privacy. The court said:

The question is not whether, in all the circumstances, the Play is of and concerning the plaintiff, but rather whether plaintiff's name, picture or portrait was used without his permission. If they were not so used, we do not reach the question of use for trade purposes. In *Binns v. Vitagraph Co.* (210 N.Y. 51), the question was whether the picture used was a picture of the plaintiff. It was

determined that it was not necessary, to support the claim of violation, that the picture be an exact likeness. At any rate, that case is not authority for the proposition that there is violation in the case of a word picture claimed to portray the plaintiff. That was the case in *Toscani v. Hersey*, 271 App. Div. 445, where "a word portrayal of the events in the life of a living person" was excluded from the application of the statute. The court stated: "... But, in the present case, no living person was named, and no picture or similar likeness of anybody was used. Giving the language used in Section 51 (N.Y. Civil Rights Law) its ordinary meaning, we find that it was not intended to give a living person a cause of action for damages based on the mere portrayal of acts and events concerning a person designated fictitiously in a novel or play merely because the actual experiences of the living person had been similar to the acts and events so narrated. To so construe the statute would broaden its scope far beyond anything warranted by the meaning that would ordinarily be ascribed to the words, 'name, portrait or picture,' especially when they are considered in the light of the history of the statute."

The plaintiff represented Westbrook Pegler, the controversial news columnist, as defense counsel in an action brought against him for libel by the famous war correspondent, Quentin Reynolds. Undoubtedly, the result of that trial was and still is a bitter recollection to the plaintiff. The production of the play and the performances in the same and its long run undoubtedly also tended to rekindle these recollections. This, however, does not give rise to a cause of action.

The same result was reached in *University of Notre Dame DuLac and Theodore M. Hesburgh v. Twentieth Century-Fox Film Corp.*, 44 Misc. 2d 806, reversed 22 A.D. 2d 452, aff'd 15 N.Y. 2d 940.

Nor may plaintiff contend successfully that the surname of Paul Cleary, the name given to defense counsel in the play, may be considered an anagram of his first name so as to justify liability by reason of a representation of his name.

II. The court held that the statute of limitations with respect to an invasion of privacy claim arising out of the play began to run when the play opened in Philadelphia. The action, therefore, was barred because the statute had run before the summons was served.

PART V.

BIBLIOGRAPHY**A. BOOKS AND TREATISES****1. United States Publications**

285. Federal Bar Association of New York, New Jersey and Connecticut. *Committee on the Law of the Theatre*. The business and law of music; a symposium. Edited by Joseph Taubman. New York, Federal Legal Publications [1965]. 111 p.

Contents: Music publishing, by Leon Brettler. Foreign publishing, by Walter Hofer. Phonograph records: Music, domestic phonograph records, by Charles B. Seton. International aspects of the phonograph record industry, by Sidney A. Diamond. Theatre and night clubs: Tin Pan Alley to Shubert Alley, by Paul J. Sherman. Music and the cabaret, restaurant and coffee house, by Maxwell T. Cohen. Music in motion pictures, radio and television: Music and motion pictures, by Sidney Shemel. Music in motion pictures, by Richard Colby. Music in radio and television, by Leon Kellman. Performing rights societies, by Allen Arrow.

286. PATENT LAW ASSOCIATION OF CHICAGO, Copyright Committee. TAX GUIDE. The tax aspects of copyright acquisition, transfer and litigation are covered in the Patent, Trademark and Copyright Tax Guide prepared and published by the Taxation Committee of the Patent Law Association of Chicago. Consisting of 46 pages, the booklet is a simple, practical and useful outline of the law of taxation as related to patent, trademark and copyright matters. Copies are available from the Treasurer of the Association, Mr. Theodore R. Scott, McDougall, Hersh & Scott, 135 South LaSalle Street, Chicago, Illinois 60603 at \$3.00 per copy. Checks should be made payable to the Patent Law Association of Chicago.
287. WHICHER, JOHN F. The creative arts and the judicial process; four variations on a legal theme. New York, Federal Legal Publications, 1965. 252 p.

"Two of the essays in this volume, 'The Case of the Horror Monsters' and 'The Ghost of *Donaldson v. Becket*', were first pub-

lished in 1962 in the Bulletin of the Copyright Society of the U.S.A. 'Originality, Cartography, and Copyright' originally appeared in the April, 1963 issue of the New York University Law Review. 'Moral Rights Revisited,' a substantial revision of a paper first written in 1955, here makes its initial appearance in print."

2. Foreign Publications

288. SANCTIS, VALERIO DE. Contratto di edizione, contratti di rappresentazione e di esecuzione. Milano, A. Giuffrè, 1965. 419 p. (Trattato di diritto civile e commerciale, v. 31, t. 1)

A comprehensive treatise on the legal aspects of publishing contracts and contracts for public performance and representation under the Italian copyright law, with comparative references to the laws of selected foreign countries.

B. LAW REVIEW ARTICLES

1. United States

289. Association of the Bar of the City of New York. The Library: copyright law revision. (21 *The Record* 48-54, no. 1, Jan. 1966.)

"This bibliography attempts to cope with the flood of publication which has accompanied the effort of the past few years to revise the copyright law of the United States. It is not a complete list of everything published but it is designed to give a busy attorney a valid insight into the various facets of this fascinating subject."

290. BEHR, OMRI M. Relay by communications satellites: a special situation in copyright infringement liability. (31 *Journal of Air Law and Commerce* 311-326, no. 4, Autumn 1965.)

"It is the purpose of this article [which won first prize in the 1965 Nathan Burkan Memorial Competition at Seton Hall University School of Law] to consider some of the questions arising from the unlicensed transmission of copyrighted works via communications satellites."

291. CATV: liability for the uncompensated transmission of television programs. (50 *Minnesota Law Review* 349-377, no. 2, Dec. 1965.)

"Community antenna television systems currently transmit television programs to their subscribers without paying compen-

sation either to the program originator or the copyright proprietor. The author of this note examines the legal theses which may require CATV to compensate for the use of television programming. He concludes that while the activities of CATV amount to copyright infringement, a balancing of competing interests requires the substitution of a more flexible device."

292. KATONA, GABRIEL P. Legal protection of computer programs. (47 *Journal of the Patent Office Society* 955-979, no. 12, Dec. 1965.)

This paper, which was awarded first prize in the Nathan Burkan Memorial Competition at the New York University School of Law, is concerned with "the protection of the intellectual property embodied in computer programs." A conclusion is reached that "[i]n the present unsettled situation the best approach seems to be to both apply for patent and register the program for statutory copyright protection as an unpublished work, with due care to prevent issuance of the patent or publication of the program until sufficient case law develops to suggest the appropriate approach."

293. PETERSON, JOHN R. The legislative mandate of *Sears and Compco*: a plea for a federal law of unfair competition. (69 *Dickinson Law Review* 347-378, no. 4, Summer 1965.)

"This article reviews briefly the decisions of the [Supreme] Court in *Sears and Compco* and the historical development of the law of unfair competition. Consideration is then given to several possibilities for legislation on unfair competition at federal and state levels."

294. WHITING, WILLIAM F. Compromise to a correct result: retention and modification of the compulsory license in proposed copyright law revision. (53 *California Law Review* 1520-1543, no. 5, Dec. 1965.)

"This paper has been awarded First Prize in the 1965 Nathan Burkan Memorial Competition at the School of Law, University of California, Berkeley."

295. The Wire mire: the FCC and CATV. (79 *Harvard Law Review* 366-390, no. 2, Dec. 1965.)

A critical discussion of the FCC and its proposals for regulation of community antenna systems. Includes a brief section cap-

tioned "The Application of Copyright Law," which seems opposed to copyright restrictions on CATV, if unregulated.

2. Foreign

1. English

296. ARACAMA ZORRAQUIN, ERNESTO D. The Argentine system of industrial designs. (5 *Industrial Property* 12-15, no. 1, Jan. 1966.)

A summary of the Argentine Decree-Law No. 6673/65, effective August 27, 1965. Under art. 28 of the decree-law, a design which complies with the conditions or requirements of the copyright law may also be protected by that law, but the protection is not cumulative.

297. HILLIG, HANS PETER. The new copyright law in the Federal Republic of Germany from the broadcasting viewpoint. (*E.B.U. Review* 39-52, no. 95B, Jan. 1966.)

"A rapid review of the new Copyright Act, with particular reference to its incidences on broadcasting."

298. Intergovernmental Copyright Committee. *8th Session, Paris, 1965*. [Proceedings of the] Eighth Session of the Intergovernmental Copyright Committee (Paris, November 15-18, 1965.) (2 *Copyright* 17-19, no. 1, Jan. 1966.)

Includes the report and resolutions adopted at the meetings, some of which were held jointly with 12th Session of the Permanent Committee of the International Union.

299. International Copyright Union. *Permanent Committee. 12th Session, Paris, 1965*. [Proceedings of the] Twelfth Session of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) (Paris, November 15 to 18, 1965). (2 *Copyright* 9-16, no. 1, Jan. 1966.)

Includes the report, resolutions and a list of participants at the meetings, some of which were held jointly with the 8th Session of the Intergovernmental Copyright Committee.

300. MASOUYÉ, CLAUDE. The International Union on the Threshold of 1966. (2 *Copyright* 3, 6-8, no. 1, Jan. 1966.)

A review of the principal events of 1965 which are of interest to the International Union.

301. MENTHA, BÉNIGNE. Looking ahead to international copyright year (Stockholm 1967). (*E.B.U. Review* 58-61, no. 95B, Jan. 1966.)

Reflections on the forthcoming Stockholm Conference in 1967 for the revision of the Berne Copyright Convention.

302. ULMER, EUGEN. Letter from Germany: the new German copyright act. (1 *Copyright* 275-286, no. 12, Dec. 1965.)

A summary of the new copyright statute of the Federal Republic of Germany of September 9, 1965.

2. French

303. SCHULZE, ERICH. La réforme du droit d'auteur dans la République Fédérale d'Allemagne. (*Interauteurs* 343-376, no. 161, 4th quarter 1965.)

An analytical summary of the new West German copyright statute, and a criticism of the new Act dealing with the Administration of Copyright and Related Rights.

3. German

304. COHN, KURT. Verletzungen der Urheberrechte und Rechtsschutz des Urhebers. (19 *Neue Justiz* 684-685, no. 21, Nov. 1965.)

A study of the remedies for infringement afforded an author under the new East German copyright law.

305. GERBRANDY, S. Der Entwurf eines einheitlichen Benelux-Gesetzes auf dem Gebiet der Muster und Modelle. (*Gewerblicher Rechtsschutz und Urheberrecht* 545-550, no. 11, Nov. 1965.)

An analysis of a draft uniform law of designs and models for the Benelux countries, and of a treaty upon which the enactment of such a law in the member states must depend. A German translation of the proposed treaty and law appears at pp. 558-572.

306. GLÜCKSMANN, ANSELM. Das Urheberrechtsgesetz und die internationalen urheberrechtlichen Abkommen. (19 *Neue Justiz* 686-693, no. 21, Nov. 1965.)

An investigation of the extent to which the new East German copyright statute contributes to "the development, the promotion and the protection of an international cultural exchange on the basis of reciprocity", and whether it represents a "contribution to the international copyright law development."

307. HARTLIEB, HORST VON. Das neue Urheberrechtsgesetz und die filmrechtlichen Musterverträge. (9 *Film und Recht* 246-251, no. 12, Dec. 1965.)

A discussion of the effect, upon standard contract forms currently in use, of some of the provisions relating to motion pictures in the new West German copyright law.

308. International Association for the Protection of Industrial Property. *German Group*. Die Verwaltungsstruktur für die internationale Zusammenarbeit auf dem Gebiet des geistigen Eigentums. Bericht erstattet im Namen der Deutschen Landesgruppe von Richard Moser von Filseck. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 622-623, no. 12, Dec. 1965.)

The position of the German Group on the BIRPI project of a new world organization for the protection of intellectual property.

309. KAUL, FRIEDRICH KARL. Der Vertrag zur Sendung eines Werkes durch Rundfunk oder Fernsehfunk. (19 *Neue Justiz* 683-684, no. 21, Nov. 1965.)

A discussion of standard contracts for radio or television broadcasts of copyrighted works in the German Democratic Republic.

310. KNAP, KAREL. Die neue tschechoslowakische Urheberrechtsgesetzgebung. (44 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 313-333, no. 5/6, Oct. 1, 1965.)

A summary of the new Czechoslovak copyright statute of March 25, 1965, which entered into force on July 1, 1965.

311. MÜNZER, GEORG. Das Werk und sein Urheber. (19 *Neue Justiz* 670-676, no. 21, Nov. 1965.)

A study of the subject matter of copyright under the new copyright statute of the German Democratic Republic.

312. NATHAN, HANS. Die Rechtsverhältnisse der Urheber und Erfinder im Rechtssystem der DDR. (19 *Neue Justiz* 657-662, no. 21, Nov. 1965.)

A discussion of the place of, and relationship between, the copyright and patent law in the legal system of the German Democratic Republic.

313. PÜSCHEL, HEINZ. Wesenszüge des sozialistischen Urheberrechts der DDR. (19 *Neue Justiz* 662-669, no. 21, Nov. 1965.)

An analysis of the new East German copyright statute of 1965, with particular reference to an evaluation of its role as an instrument of the socialist cultural revolution.

314. PÜSCHEL, HEINZ. Zum neuen Urheberrecht der Deutschen Demokratischen Republik. (14 *Der Neuerer* 572-576, no. 12, 1965.)

A brief commentary on the new East German copyright statute of September 13, 1965, with special reference to the copyrightability of computer programs, protection of works of applied art, and employ-for-hire relationships.

315. RONGA, GIULIO. Die internationale Klassifikation der gewerblichen Muster oder Modelle. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 550-557, no. 11, Nov. 1965.)

"This article contains extracts from an essay written on the same topic, which appeared in the Italian periodical 'Il Diritto di Autore' (No. 1, 1965)." The draft text of an international classification of industrial designs and models is appended. See 13 BULL. CR. SOC. 159, Item 202 (1965).

316. SAUERSTEIN, HANS JOACHIM. Der Verlagsvertrag. (19 *Neue Justiz* 676-680, no. 21, Nov. 1965.)

A discussion of the publishing contract under the new copyright statute of the German Democratic Republic.

317. SCHIEFLER, KURT. Zum neuen Urheberrecht. Bulletin des Presse- und Informationsamtes der Bundesregierung vom 22. September 1965, S. 1262. (67 *Gewerblicher Rechtsschutz und Urheberrecht* 587-590, no. 11, Nov. 1965.)

The highlights of the new copyright laws of the Federal Republic of Germany. Reprinted from the September 22, 1965 issue of the *Bulletin* of the Press and Information Office of the Federal Government.

318. SCHNEIDER, LUDWIG. Zur Problematik privater Aufnahmen auf ephemere Ton- und Bildträger im internationalen Recht. (44 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 296-312, no. 5/6, Oct. 1, 1965.)

A comparative survey of the legal situation concerning tape recording for private use, followed by a proposal for an international agreement which would provide for the payment of a lump sum at the time of first purchase of a tape recorder, with the proceeds flowing to performing rights societies according to an international distribution schedule.

319. STAAT, FRIEDRICH. Der Vertrag über die Verfilmung eines Werkes oder die Vorführung eines Filmwerkes. (19 *Neue Justiz* 680-683, no. 21, Nov. 1965.)

A discussion of legal problems arising under the new East German copyright statute with respect to contracts concerning motion picture versions of copyrighted works, with special reference to questions of adaptations of the original work, production of the motion picture and its exploitation.

320. ULMER, EUGEN. Die Pläne zur Reform der Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 539-544, no. 11, Nov. 1965.)

A discussion of issues facing the 1967 Stockholm Conference for the revision of the Berne Convention.

4. Italian

321. COLLOVA, TADDEO. Diritto d'autore, diritti connessi e utilizzazione a mezzo magnetofono di opere dell'ingegno. (36 *Il Diritto di Autore* 275-319, no. 3, July-Sept. 1965.)

A comparative study of copyright and neighboring rights problems with respect to tape recording for private use.

322. KAMINSTEIN, ABRAHAM L. Programma della revisione generale della legislazione sul copyright dal 1961. (36 *Il Diritto di Autore* 394-404, no. 3, July-Sept. 1965.)

An Italian translation of the Preface from the *Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law*, which appeared as Part 6 in the "Copyright Law Revision" series.

323. SCHULZE, ERICH. La riforma del diritto di autore in Germania. (36 *Il Diritto di Autore* 351-356, no. 3, July-Sept. 1965.)

A brief comparative comment on the new copyright statutes of East and West Germany.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

324. AUTHORS LEAGUE OF AMERICA, INC. A licensing system; a proposal. (91 *Library Journal* 892-893, no. 4, Feb. 15, 1966.)

A description of a clearinghouse system under which "authors and publishers would license the making of copies of material from books and periodicals on a royalty basis."

325. BENJAMIN, CURTIS G. Copyright and Government. "A Sea of Troublesome Questions." (91 *Library Journal* 881-886, no. 4, Feb. 15, 1966.)

A provocative discussion of the problem of copyright in Government publications, with special reference to the revision bill.

326. JANEWAY, ELIZABETH. "The Toad Beneath the Harrow Knows . . ." (91 *Library Journal* 887-891, no. 4, Feb. 15, 1966.)

"An author discusses some aspects of copyright revision, and the potential impact upon writers of the technological revolution that is taking place in publishing and library service."

327. KNOLL, ERWIN. Our 'Model T' copyright law. (34 *The Reporter* 39-41, no. 5 (Mar. 10, 1966.)

An article on the general revision bill, which includes a discussion of the major copyright issues still unresolved, with special reference to the conflicting demands of educators and publishers.

328. TANSELLE, G. THOMAS. The historiography of American literary publishing. (18 *Studies in Bibliography* 3-39, 1965.)

An article on the writing of American literary publishing history which is described as a relatively neglected field. The *Catalog of Copyright Entries* is characterized as a valuable bibliographical tool for the historian of twentieth-century American publishing.

329. Teaching machines: the impact of new devices on educational publishing. (189 *Publishers' Weekly* 103-105, 108, 109, no. 10, Mar. 7, 1966.)

A summary of addresses delivered at the January meeting of the Master Printers Section, Graphic Arts Institute of New England in Boston. One of the major points presented was that photocopying and duplicating machines represented a threat to book publishing "unless copyright protection is provided."

2. Foreign

1. English

330. RIVINGTON, CHRISTOPHER. Libraries and the book trade: stray thoughts on copyright. (179 *British Books* 17-28, no. 4927, Feb. 1966.)

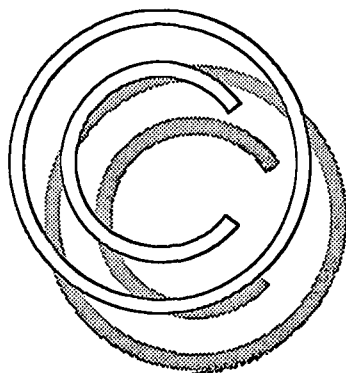
A paper, delivered at a conference of publishers, booksellers and librarians arranged by the School of Librarianship, North-Western Polytechnic. The author, who is director of the publishing firm of Blackie & Son, prefaces a summary of the U.K. Act with a few remarks on the nature of copyright.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 13, NO. 5

JUNE, 1966

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

EDWARD A. SARGOY

Vice-Presidents

ALAN LATMAN
STANLEY ROTHENBERG

Secretary

MORTON D. GOLDBERG

Assistant Secretary

MARGARET NICHOLSON

Treasurer

EDWARD M. CRAMER

Assistant Treasurer

PAUL GITLIN

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

PROF. RALPH S. BROWN, Yale Law School, New Haven.
GEORGE D. CARY, Washington, D. C.
CARLETON G. ELDRIDGE, Jr., New York City
ROBERT V. EVANS, New York City
HERMAN FINKELSTEIN, New York City
ARTHUR L. FISHBEIN, New York City
PROF. HARRY G. HENN, Cornell Law School, Ithaca
DANIEL HUTTENBRAUCK, New York City
PROF. BENJAMIN KAPLAN, Harvard Law School, Cambridge
IRWIN KARP, New York City
THEODORE R. KUPFERMAN, New York City
ISABELLE MARKS, New York City
ROBERT H. MONTGOMERY, Jr., New York City
PROF. MELVILLE B. NIMMER, U. of Cal. Law School, Los Angeles
AVERILL C. PASAROW, Los Angeles
SIGRID H. PEDERSEN, New York City
LAWRENCE H. REED, New York City
BARBARA A. RINGER, Washington, D. C.
SAUL N. RITTENBERG, Culver City, California
HARRY N. ROSENFELD, Washington, D. C.
JOHN SCHULMAN, New York City
FRIEDA M. TANNENBAUM, New York City
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York City
RICHARD WINCOR, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1966 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

	PAGE
PART I. ARTICLES.	
"VERIFYING" FROM PRIOR DIRECTORIES — "FAIR USE" OR THEFT? — <i>Delicate Distinctions in the Protection of Copy- righted Compilations</i> Ira Lurvey	271
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	301
2. Foreign Nations	302
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	303
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts	
1. Federal Court Decisions	306
2. State Court Decisions	347
B. Decisions of Foreign Courts	
1. Argentina	355
PART V. BIBLIOGRAPHY.	
A. Books and Treatises	
1. United States Publications	359
B. Law Review Articles	
1. United States	360
2. Foreign	
1. English	364
2. English, French and Spanish	365
3. French	366
4. German	366
5. Italian	369
6. Swedish	369
C. Articles Pertaining to Copyright from Trade Magazines	
1. United States	369
2. Erratum	370

THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Morton D. Goldberg, *Secretary*; Paul Gitlin, *Assistant Treasurer*; Margaret Nicholson, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 13 BULL. CR. SOC. page no., Item (1966).



The Announcement of the Awards in the 1965 ASCAP Nathan Burkan Memorial Competition: Prof. Walter J. Derenberg (left); Herman Finkelstein, General Counsel, ASCAP (center); and the Dean of New York University School of Law, Miguel A. de Capriles (right), following Mr. Finkelstein's annual lecture to the students of Prof. Derenberg's Advanced Seminar in Literary and Artistic Property. Judges of the 1965 Competition were The Hon. Roger J. Kiley, U.S. Court of Appeals for the Seventh Circuit, and The Hon. Francis Bergan, New York Court of Appeals.

Ciro A. Gamboni, graduate of New York University School of Law, now serving in the Judge Advocate General's Department of the U.S. Army, was awarded the \$1,000 National First Prize for his essay entitled "Unfair Competition Protection After Sears and Compco." The \$500 National Second Prize was awarded to Matthew Nimitz, of the Harvard Law School class of 1965, for his paper entitled "Design Protection"; Mr. Nimitz is presently law clerk to Supreme Court Justice John M. Harlan. Recipient of the \$250 National Third Prize was Michael E. Meccas of Cornell Law School, for his essay entitled "The Effect of the Copyright Act and the Proposed Revision on Educators as Users of Copyrighted Materials." These papers and those awarded honorable mention will be published in the fifteenth ASCAP Copyright Law Symposium.

PART I.

ARTICLES

331. "VERIFYING" FROM PRIOR DIRECTORIES—"FAIR USE" OR THEFT? *Delicate Distinctions in the Protection of Copyrighted Compilations*

By IRA LURVEY*

It is the general rule that while compilations¹ may be copyrighted,² their component parts remain unaltered.³ Since such components usually are in the public domain, there is created a conflict between desires to protect the original compiler and the need for permitting others to restate the same, common facts. Resolving this conflict is "perhaps the most difficult question"⁴ in copyright protection. One "cannot use the labors of a previous compiler, *animo furandi*, and save his own time by copying the results of the previous compiler's study,"⁵ but "everyone concedes a second compiler may check back his independent work upon the original compilation."⁶ The difficulty is in finding the dividing line. In *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, Learned Hand, then a district court judge, raised but left unanswered

* This study, which throws new and valuable light on a difficult subject, is an essay submitted in the 1965 Nathan Burkan Memorial Competition by a senior law student at the University of California School of Law (Berkeley).

1. "Compilation; * * * something that is a product of the putting together of two or more items; as * * * an accumulation of many things, elements, or influences; directories, dictionaries, encyclopedias." *Webster's Third New International Dictionary*, p. 464 (1961).

2. 17 U.S.C. § 5(e) (1958).

3. "The publication of any such new (compilation) shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof; or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works." 17 U.S.C. § 7 (1958).

4. *Emerson v. Davies*, 3 Story 768, Fed. Cas. No. 4,436 (1845).

5. *Banks v. McDivitt*, 13 Blatch, 163, Fed. Cas. No. 961 (1875).

6. *Learned Hand, J., Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921); *aff'd* 281 F.83 (2d Cir. 1922); *cert. denied*, 259 U.S. 581 (1922).

the question whether a later compiler "may use the original compilation after simply verifying its statements, or whether he must disregard the assistance of the original, except in subsequent verification."⁷ It is the conclusion of the analyses to follow, approached from four aspects,⁸ that uncertainty in the area of directory protection is the result of repeated attempts to group all compilations under a single rule—whereas, viewed on their facts, leading cases instead establish a distinct, graduated standard: the more mundane and objective the material being compiled, the less subsequent use permitted of the copyrighted prior compilation.

I. CLASSIC PROTECTION VIA COPYRIGHT

The federal copyright act, pursuant to the constitutional mandate "To promote the Progress of Science and useful Arts,"⁹ lumps together for the purposes of legal protection two otherwise distinct classes of creative efforts.¹⁰ First, there are literary and artistic works—where the author is permitted temporarily to keep as "property" his expression of broad, otherwise public ideas; second, there are "fact works"—maps, news and historical accounts, and directories—where the author's principal contribution is his gathering and intelligible chronicling of existing objective data. Here, the author's individuality is subordinated in commercial value to his time, expense, accuracy, and thoroughness as a compiler. These very interests are the ones most jeopardized by an indiscriminate blending of all writings into one, literature-oriented rule.

A. *Historical Background*

Copyright under the common law, uncertain at best,¹¹ provided only a "right to first publication" for the author and his assigns "in per-

7. 74 F. 932, at 935.

8. The subject will be treated first on the basis of copyright history. We then will seek to show an identical conclusion can be reached through such means as an analysis of "verification," an understanding of the distinctions between subjective and objective compilations, and use of the doctrine of "unfair competition."

9. Art. 1, § 8.

10. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1570 (1963).

11. *Chancellor, Masters & Scholars of the University of Cambridge v. Bryer*, 16 East. 317, 104 Eng. Rep. 1109 (1812).

petuity."¹² This further was narrowed by the Statute of 8 Anne¹³ to 14 years.¹⁴

1. *English Cases*

English cases at first debated the granting of any copyright to compilations. It was argued that where components of a work were public, there was nothing that could be protected.¹⁵ Others, however, sought to extend copyright to all parts of a compilation, considering the right as intended to cover an entity. The inevitable compromise provided that public materials could be reused but a compilation itself would be protected. Map and chart cases, stressing a public need for accuracy, then allowed a subsequent compiler to go undisturbed where he materially corrected or otherwise improved a prior work.¹⁶ That there was no early protection for the *labor* of the prior compiler is evident from *Cary v. Faden*,¹⁷ where an admitted infringer defended by proving the plaintiff had taken in part from a still earlier work. In that event, held the court, all should "try their weight with the public."¹⁸ So harsh an approach soon was modified. Two years later, *Cary v. Longman*¹⁹ prohibited a "servile copy" of a prior work.²⁰ By 1806, only seven years after *Cary v. Faden*, the court was prepared to protect labors of a compiler and, in *Matthewson v. Stockdale*,²¹ held it was these efforts, not

12. *Donaldson v. Beckett*, 4 Burr. 2408 (1774).

13. 8 Anne c. 19 (1710).

14. *Beckford v. Hood*, 7 T.R. 620, 101 Eng. Rep. 1164 (1798). Though the period occasionally has been extended, the limitation per se has not been questioned and is firmly entrenched.

15. Cf. *Matthewson v. Stockdale*, 12 Ves. 270 (1806), infringement of a directory, per Lord Erskine, J: "Thinking it dangerous to carry this doctrine of copyright too far, the turn of my mind would lead me to a different decision of this case from that which, following what I find the (now) established law, I mean to give."

16. *Sayre v. Moore*, 1 East. 361, 102 Eng. Rep. 139 (1785).

17. 5 Ves. 23 (1799).

18. Lord Loughborough, J: "If I was to do strict justice, I should order the defendants to take out of their book all they have taken from the plaintiff and, reciprocally, the plaintiff to take out of his all that he has taken from Patterson. I think the plaintiff may be contended that a bill is not filed against him."

19. 1 East. 358 (1801).

20. "(The issue is) whether the one was a copy of the other; or, the roads, and every memorable place in England, being open to both parties, the one had made use of the other's work as information, which he was to add to or improve."

21. 12 Ves. 270 (1806).

simply the physical compilation, that were the essence of copyright.²² Thus defendant publisher of an East India Directory was held to have infringed a prior work. Lord Erskine laid the burden on defendant to prove no unlawful taking:

Defendant had an opportunity of shewing by his answer that this is not a case for an injunction; as it would not be if I (not only) found the same names, additions and places, in which respect the works must be similar, (but also found) improvements, amendments, and additions. The defendant might have pointed out what the amendments are.

Longman v. Winchester,²³ another directory case, followed with a "fair fruit" test and referred to the map and chart decisions:

To the extent, therefore, in which defendant's publication has been supplied from the (plaintiff's) work, the injunction must go. But I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind; if it is the fair fruit of original labor; the subject being open to all the world.

Wilkins v. Aikin,²⁴ one year later, looked to "a legitimate use"²⁵ of plaintiff's work and again cited map and chart cases. Protection for original compilers then began a slow but steady increase,²⁶ reaching a

22. "[I]f a man has by considerable expense and labour procured with correctness all the names and appointments of the Indian Establishment, he has a copyright in that individual work; which has cost him considerable time and labour; and employed him at a loss in other respects, though there can be no copyright in an Indian Calendar generally."

23. 16 Ves. 269 (1809).

24. 17 Ves. 422 (1810).

25. "Upon inspection of the different works, I observe a considerable portion taken from the plaintiff's that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance."

26. In *Lewis v. Fullarton*, 2 Beav. 6 (1839), Lord Langdale adopted "the common law test" of looking to the motive of the alleged infringer to determine if there was "*ánimus furandi*" — an intention to take for the purpose of saving himself labour; "knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of like description, instead of taking the pains of searching into all the common sources and obtaining your subject-matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very

height in 1866 when *Kelly v. Morris*²⁷ held *no use whatsoever* could be made of plaintiff's London directory by a later competitor. The court looked directly to plaintiff's labor²⁸ and here introduced the concept of "verification."

Generally, (the defendant) is not entitled to take *one word* of the information previously published without *independently* working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that (defendant) can legitimately make of a previous publication is to verify his own calculations and results *when obtained*. (emphasis added)

Accepting *Kelly*, it is difficult to reconcile the next major case in line, *Moffatt and Paige Ltd. v. Gill*,²⁹ which established, in dictum, a "Sheets doctrine":

Though you cannot, where another man has compiled a directory, simply take his sheets and reprint them as your own, you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the results as your own.

Since this doctrine became a cornerstone of American copyright law, it is vital to see whether *Moffatt* can be reconciled with *Kelly*.

1. *Moffatt* made no provision as to when, or from where, "the existing facts" were to be obtained. Therefore it could be implied that

questions he has asked, or adopt them with but a slight degree of colourable variation and thus save yourself pains and labour which he has employed."

In *Jarrold v. Houlston*, 3 K & J 708 (1857), the court held that "if instead of searching into the common sources and obtaining your subject matter from these, you avail yourself of the labour of your predecessor, * * * it is an illegitimate use."

In *M'Neill v. Williams*, 11 Jur. 344 (1847), seven common errors between two works containing 7,000 mathematical computations was sufficient to raise a triable issue and "throw great suspicion on defendant's case."

27. Law Rep. 1 Eq. Ca. 697 (1866).

28. "So in the present case the defendant could not take a single line of the plaintiff's directory for the purpose of saving himself labour and trouble in getting his information."

29. 86 L.T. 465 (1902).

"taking the sheets with you" to check the existing facts still required *first compiling* those existing facts independently.

2. *Moffatt* made no provision for who was to bear the burden of evidence. Therefore it could be implied a defendant must come forward with the extent of *his exploration* of "the existing facts," *regardless* of whether the previous compiler's sheets were carried alongside. The more comparable defendant's labors with those of his predecessor, the less actually "appropriated" of the prior work.

3. On its facts, *Moffatt* belied any loose interpretation of compilation protection. It held *Gill* guilty of "a taking that has been done to such an extent as to put it entirely outside those trivial and casual limitations which do not amount to a breach of copyright."

4. Perhaps most crucial is that *Moffatt* spoke of "*directories*" in its dictum but cited as a lone authority *Pike v. Nicholas*,³⁰ which dealt with an *historical essay*. Subsequent cases never have noted this inconsistency.

2. *American Cases*

In *Wheaton v. Peters*,³¹ Mr. Justice McLean rejected copyright as part of the American common law, though the Constitution³² recognized the right and a copyright act³³ was passed by the first Congress.³⁴ However, that initial act referred only to "map, chart, book or books."³⁵

a. *The Early Decisions*

American courts began with an even less hospitable view than the English of a compiler's protection. *Gray v. Russell*³⁶ held defendant had "no right . . . to sit down and copy the *whole* of the (work) already produced by the skill and labors of the first party, and thus to rob him of *all* the fruit of his industry, skill, and expenditures." (emphasis

30. L.R. 5 Ch. 251 (1870).

31. 33 U.S. 591 (1834).

32. Art. 1 § 8.

33. 1 Stat. 124, c. 15.

34. At the second session, 1790.

35. Cf. § 7 of the present Act, Title 17, U.S.C. § 7: "Copyright on Compilations of Works in Public Domain or of Copyrighted Works; Subsisting Copyrights Not Affected."

36. 1 Story 11, Fed. Cas. No. 3,728 (1839).

added).³⁷ *Emerson v. Davies*,³⁸ per Story, J., said "to constitute a piracy, it must be shown that the original has been either *substantially copied* or has been *so* imitated as to be a mere evasion of the copyright." (emphasis added).³⁹ Subsequent cases then sought a uniform rule applicable to all infringements and, in so doing, increased the standard of protection for compilers. For example, a music case demanded defendant's "own intellectual labor,"⁴⁰ and said this was the basis for road-book and map holdings; and a New York dispute over law codes renewed the concept of a taking "*animo furandi*."⁴¹

By 1887, a decade after England decided *Kelly v. Morris*,⁴² an infringement of a social register in *List Publishing Co. v. Keller*⁴³ established⁴⁴ that a subsequent compiler was totally precluded from use of the previous copyrighted work except "to verify his own calculations and results *when obtained*." (emphasis added).

It is safe to say that the compiler of a general directory is not at liberty to copy any part, however small, of a previous directory, to save himself the trouble of collecting the materials from original sources. Otherwise, as the matter of rival publications of this kind is identical, there would be practically no copyright in such a book.⁴⁵

Even where defendant could show an independent canvass, the question still was one of fact as to whether he had copied from plaintiff.⁴⁶

37. "In some cases, indeed, it may be a very nice question, what amounts to a piracy of a work, or not. * * * The question may naturally turn upon the point not so much of quantity, as of the value of the selected materials." 1 Story at 12.

38. 3 Story 768, Fed. Cas. No. 4,436 (1845).

39. Held: no infringement of a copyrighted arithmetic primer.

40. *Atwill v. Ferrett*, 2 Blatch. 39, Fed. Cas. No. 640 (1846).

41. *Banks v. McDivitt*, 13 Blatch. 163, Fed. Cas. No. 961 (1875).

42. Law. Rep. 1 Eq. Ca. 697 (1866); see n. 27, *supra*, and accompanying text.

43. 30 F. 772 (S.D.N.Y. 1887).

44. The timing with *Kelly* seems only coincidental, since *Kelly* was not cited in *List*.

45. At issue, the court said, was not just use of the previous compiler's listings, but the appropriation of his subjective selection as to which names merited inclusion. Thus even if the copyrighted work *could* be used as a "guide," rather than a post-effort verifier, it still would constitute an infringement on these facts because defendant would have "made use" of plaintiff's intellectual processes of selection. See n. 108, and accompanying text.

46. *Chicago Dollar Directory v. Chicago Directory Co.*, 66 F. 977 (C.C.A. 7, 1895); *American Trotting Register Assoc. v. Gocher*, 70 F. 237 (C.C. Ohio,

Although American courts did not take immediate recognition of *Kelly v. Morris*, they did instantly note *Moffatt and Paige Ltd. v. Gill*.⁴⁷ At first, *Moffatt* was flatly rejected and its results termed "most inequitable."⁴⁸ Within months, however, *Moffatt's* "Sheets" doctrine was adopted by *Edward Thompson Co. v. American Law Book Co.*,⁴⁹ where defendant's legal encyclopedia used plaintiff's index as a guide to public case notes. A lower court had held plaintiff "blazed the way through the wilderness of the (legal) reports" and enjoined defendant from so appropriating,⁵⁰ but the Second Circuit reversed:⁵¹

If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress.

1895). Also see *Trow Directory Printing & Bookbinding Co. v. U.S. Directory Co.*, 122 F. 191 (S.D.N.Y., 1903); "The duplication of erroneous names and addresses . . . present[s] a prima facie case, which call[s] for the fullest explanation. The explanation given . . . does not fairly meet the case. . . . There is much reference in the affidavits to 'original canvass,' but very little to indicate what it is. There is nothing to show sufficiently what individual in the employ of defendant was responsible for reproducing complainant's errors and 'catch names' in defendant's book — no effort even to show how much of defendant's book that individual [employee] contributed."

47. 86 L.T. 465 (1902); see n. 29, *supra*, and accompanying text.

48. "A, we may assume, prepares an entirely new classified business directory of the city of New York wholly from original investigation, and publishes the same. The undertaking is an enormous one, and can be accomplished only by the employment of hundreds of men at the cost of thousands of dollars. B, undertakes thereafter to publish a directory of all the architects in New York. To cull their names out of the world of business activity in such a hive of industry as this by original research would be a task nearly as difficult and costly as the one A undertook. But if [B] could take only the list of architects found in A's book, and then visit the places named therein to 'see whether the existing facts concur with the description,' retaining the name, address, names of partners, etc., where such [verification] was found, and striking them where death, removal, or withdrawal from business had eliminated them, B could prepare a 'Directory of Architects in New York City' at a merely trifling expenditure of time and trouble, because A had already done the work which B thus appropriated. Nevertheless, under *Moffatt v. Gill*, he could do just this without offense." Lacombe, J., in *Colliery Engineer Co. v. Ewald*, 126 F. 843 (S.D.N.Y. 1903).

49. 122 F. 922 (2d Cir. 1903).

50. 121 F. 908 (S.D.N.Y. 1903).

51. Citing *List Publishing Co. v. Keller*, *supra*, n. 43, as supporting such a reversal. It is submitted that, if anything, *List* would stand in direct opposition. See n. 108, *infra*, and accompanying text.

Shortly thereafter, Judge Lacombe, who initially found *Moffatt* so "inequitable,"⁵² now considered himself bound by *Thompson* to accept the "Sheets" doctrine and refused to enjoin an allegedly infringing business directory.⁵³ Judge Lacombe now spoke of *Moffatt's* wisdom.⁵⁴

Thompson and its interpretation of *Moffatt* next were accepted by *West Publishing Co. v. Edward Thompson Co.*,⁵⁵ another law digest dispute.

It does not seem to the court that the owner of a copyright is entitled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor, or of manual handwriting, by cutting or copying the words of the citations from the digests, where no literary ability is appropriated in the arrangement or collection of the cases themselves.⁵⁶

This holding was somewhat narrowed, however, only two years later in *Frank Shepard Co. v. Zachary P. Taylor Publishing Co.*,⁵⁷ wherein *List Publishing Co. v. Keller*⁵⁸ was returned as representing the "well settled" law that a subsequent compiler cannot make "an unfair use" of his predecessor's work. In *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*,⁵⁹ Judge Learned Hand again cited *List* with approval,⁶⁰ but also cited *Sampson & Murdock Co. v. Seavor-Radford*

52. See n. 48, *supra*.

53. *Dun v. International Mercantile Agency*, 127 F. 173 (S.D.N.Y. 1903).

54. "It seems to me there is strong reason for holding that the publisher of a new directory has a right to take an old directory, and be guided by it to the original sources of information, and that if, so guided, he goes to those sources of information and obtains facts, he may publish those facts, even though they consist of names and addresses which are identical with those published by the old directory." But cf. n. 48, *supra*.

55. 169 F. 833 (E.D.N.Y. 1909).

56. "But, as has been said before, (plaintiff) might have grounds for a claim of legal damages, if the other explanations and defenses are held insufficient."

57. 185 F. 941 (W.D.N.Y. 1911).

58. 30 F. 772 (S.D.N.Y. 1887); see n. 43, *supra*, and accompanying text.

59. 274 F. 932 (S.D.N.Y. 1921); *affd.* 281 F. 83 (2d Cir. 1922); cert. denied, 259 U.S. 581 (1922).

60. As, two years later, did *Investment Service Co. v. Fitch Publishing Co.*, 291 F. 1010 (7th Cir. 1923).

Co.,⁶¹ and refused to decide any conflict,⁶² assuming one existed, between *Sampson*, which spoke of previous directories as needing only "verification" by a subsequent compiler; and *Edward Thompson Co. v. American Law Book Co.*,⁶³ which suggested a subsequent compiler must first make an independent canvass which *then* could be "verified" by the previous work.

b. *Modern Holdings*

(1) In General

Subsequent to *Jewelers' Publishing Co.*, the rule appears to have swung back toward increased protection for original compilers, but has not provided either rationale or certainty for this reversal. Primarily, a "counting test" has been adopted as the criterion of infringement. Thus, in a sports record book, 40 exact duplications and 14 common errors constituted infringement,⁶⁴ while 21 percent of common phrases established liability for violating a telegraphic code.⁶⁵ Infringements also were found by common errors in eating guides,⁶⁶ interrelationships of airline schedule tables,⁶⁷ interchanging employees between building trades manuals,⁶⁸ similarity of chain store mailing lists,⁶⁹ and a foreign news analysis, despite its crediting the original source.⁷⁰ Conversely, use of plaintiff's race chart as a "guide" to official information was upheld as "nothing which properly can be called copying,"⁷¹ and

61. 129 F. 761 (D. Mass. 1904).

62. Judge Hand held the component trade-mark drawings making up the *Jewelers' Circular* directory were themselves original enough to gain copyright protection as drawings, thus there was no need to decide how much "guidance" defendant could have obtained from *unprotected* components.

63. 122 F. 922 (2d Cir. 1903).

64. *Menke v. Richfield Oil Corp.*, 14 U.S.P.Q. 296 (S.D.N.Y. 1932).

65. *Hartfield v. Peterson*, 91 F.2d 998 (2d Cir. 1937), per Augustus Hand, J.

66. *Adventures in Good Eating, Inc. v. Best Places To Eat*, 131 F.2d 809 (7th Cir. 1942).

67. *The Official Aviation Guide Co., Inc. v. American Aviation Association, Inc.*, 62 U.S.P.Q. 178 (N.D. Ill. 1944).

68. *Sub-Contractors Register, Inc. v. McGovern's Contractors & Builders' Manual Inc.*, 69 F. Supp. 507 (S.D.N.Y. 1946).

69. *Chain Store Business Guide v. Wexler*, 79 F. Supp. 726 (S.D.N.Y. 1948).

70. *Chicago Record-Herald Co. v. Tribune Association*, 275 F. 797 (7th Cir. 1921).

71. *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942), though injunction granted on other grounds.

defendant's use of a historian's copyrighted research for a subsequent popularized magazine article was found "insignificant."⁷²

(2) Telephone Directory Cases

One group of modern compilation cases, however, has achieved certainty. Lead by *Leon v. Pacific Telephone & Telegraph Co.*,⁷³ listings of telephone subscribers have been given absolute protection. *Leon* disposed of two arguments: first, it decided a telephone directory did merit copyright protection;⁷⁴ secondly, it held *any* subsequent unlicensed use of this material invaded that copyright protection.⁷⁵ The motive for so strong a holding, however, may have been less precedent than public policy:

It is obvious . . . that the business of getting out a directory is an expensive, complicated, well-organized endeavor, requiring skill, ingenuity, and original research.⁷⁶

Yet even the telephone directory cases have their limits. Only the listings themselves are protected with such certainty. The directory as a *physical object* has been allowed to be combined with another person's printed covers,⁷⁷ just as a device for softening the audio may be attached to a telephone's speaker.⁷⁸

72. *Eisenschmiel v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir. 1957).

73. 91 F.2d 484 (9th Cir. 1937).

74. "Little by little, copyright has been extended to the literature of commerce, so that it now includes (everything) it would seem, evincing, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or originator." *National Telephone News Co. v. Western Union Telegraph Co.*, 119 F. 294 (7th Cir. 1902).

75. Even where the second use is one neither attempted by nor competing with the copyright holder of the directory. The court said there always "is the possibility" the directory owner, at some future time, will attempt such a dissimilar use.

76. 91 F.2d at 485-6.

77. "(The court does not want to) lead to an undue extension of the telephone company monopoly. In considering whether in a novel area it is appropriate to grant equitable relief against alleged unfair competition, consideration must also be given to the public interest in preventing the creation or extension of a monopoly." *New England Telephone & Telegraph v. National Merchandising Corp.*, 335 Mass. 658, 141 N.E.2d 702 (1957); contra: *National Telephone Directory Co. v. Dawson Mfg. Co.*, 214 Mo. App. 683, 263 S.W. 483 (1924).

78. *Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956).

B. *Dictum for the Future?*

At least an opening wedge toward extending the absolute protection of the telephone cases to all objective directories may be found in *Seltzer v. Sunbrock*.⁷⁹ There, use of roller derby rules contained in plaintiff's book was allowed defendants' in their exhibition programs because "an impartial reading of plaintiff's books and defendants' programs cannot but lead to the conclusion that defendants derived their materials, innocently, from those well-recognized sources in the public domain." The court distinguished *Leon*, where "there was actually a substantial infringement of a printed directory." Thus it would appear that *Leon* was not limited to *telephone* directories.

II. WHAT DOES "VERIFYING" MEAN?

Assuming one can use a preceding, copyrighted compilation for "verifying," what does "verifying" mean? Generally, to verify is "to prove to be true; . . . to confirm."⁸⁰ As regards a previous compilation, however, does it only require proving *that* compilation correct, or does verifying necessitate *first* completing an *independent* compilation and only then referring to the previous work?

A. Sampson or Thompson: *The Conflict Learned Hand Chose to Avoid.*

In *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*,⁸¹ Judge Learned Hand expressly avoided deciding the possible conflict between *Sampson & Murdock Co. v. Seavor-Radford Co.*⁸² and *Edward Thompson Co. v. American Law Book Co.*⁸³ *Sampson & Murdock* involved competing Boston city directories. Defendant, having made an original canvass, next resorted to plaintiff's previous directory and copied a large number of names defendant had "missed." Defendant's employees then were sent back into the streets to "verify" these names. A Master held this was infringement, but the court refused a temporary injunction because an accounting for potential damages was held sufficient and "there is strong reason for holding that the publisher of a new directory has a right to take an old directory, and be *guided by it* to the original sources of information . . . even if (this information is not more than) names and addresses which are identical with those

79. 22 F.Supp. 621 (S.D. Cal. 1938).

80. *Webster's New International Dictionary, Second Edition*, p. 2832 (1959).

81. *Supra*, n. 59.

82. *Supra*, n. 61.

83. *Supra*, n. 63.

published by the old directory." (emphasis added). In *Edward Thompson*, defendant legal encyclopedia publisher used plaintiff's list of cases as a source of research, checking out and including applicable holdings. An injunction was denied here, too, on numerous grounds.⁸⁴ However the court conceded that "verification" still required an independent initial compilation.⁸⁵

1. *Reconciling Sampson With Thompson*

Accepting *Edward Thompson*, can *Sampson*, only a year later, be reconciled? On its facts, *Sampson's* previous directory was an *old* compilation and out of use. The crux of plaintiff's harm was not appropriation of *that* directory so much as fear of facing the material as competition against *new* directories. *Sampson* thus might be distinguished from use of a *current* work to guide compilation of a *current* competitor. In the latter instance, appropriation is more apparent than where the work taken has become commercially obsolete. Still, this does not seem enough of a distinction to reconcile *Sampson*. Preferable answers might lie in that defendant did expend an appreciable amount of personal effort in *Sampson* and, moreover, the court was unusually occupied with the "Sheets" doctrine of *Moffatt & Paige Ltd. v. Gill*,⁸⁶ which just had been accepted as the American rule in *Edward Thompson Co. v. American Law Book Co.*⁸⁷ and expressly noted as such in *Dun v. International Mercantile Agency*.⁸⁸ Accepting this as *Sampson's* rationale necessitates an analysis of *Moffatt* and a clear understanding of its dictum establishing the "Sheets" doctrine.

84. Not the least of which was that plaintiff was accused of having himself infringed one West. See *West Publishing Co. v. Edward Thompson Co.*, supra, n. 55 (no injunction, though possibly a cause for legal damages) and *Cary v. Faden*, 5 Ves. 23 (1799), noted supra, n. 17.

85. "Counsel for complainant asks: 'Suppose the author of a dictionary of quotations inserts after each quotation, as is customary, the book and page of the original author, will it be contended that the compiler of a subsequent book of quotations could have his clerk copy a list of all the references contained in the first author's book without copying the quotations found at the pages indicated by the references?'

"Assuming that the question is answered in the *negative*, . . . the difficulty with the counsel's hypothesis is that the case stated is not the case made by (instant case's) proofs." (Emphasis added.)

86. 86 L.T. 465 (1902); see n. 47, supra.

87. 122 F. 922.

88. 127 F. 173. Supra n. 53.

2. *Moffatt and The "Sheets" Doctrine*

*Moffatt and Paige Ltd. v. Gill*⁸⁹ involved an annotated examination review book of Shakespeare's "As You Like It." Defendant Gill admitted having read Moffatt's work, but insisted he used other, common sources. A lower court found that though Gill was indebted to Moffatt's work "to a certain extent," no "vital part" had been taken nor was there any intent *animus furandi*. The court, per Collins, M. R., reversed, and held there had been violation of a "trivial and casual" test.⁹⁰ Then, in a rambling dictum,⁹¹ Collins introduced the "Sheets" doctrine,⁹² but held the doctrine *inapplicable* "to a series of quotations."

The aptness of quotation does not depend on the particular page or number of lines in which it is found; and that is all you find if you obey a certain direction to go to a certain place and take it. It does not entitle you to annex the skill and judgment and taste which has dictated the selection.

3. *The Progeny of Moffatt*

Colliery Engineer Co. v. Ewald,⁹³ a 1903 decision by a federal court in Pennsylvania, was the first to cite *Moffatt* and called the "Sheets" doctrine "inequitable."⁹⁴ *Colliery*, though, dealt with infringement of an arithmetic text, a compilation requiring "skill and judgment." Thus, even *accepting Moffatt*, the "Sheets" doctrine would not have applied. *Colliery*, however, was followed quickly by *Edward Thompson Co. v. American Law Book Co.*⁹⁵ which did accept the "Sheets" doctrine and refused an injunction for alleged infringement of a law encyclopedia. Yet, as in *Colliery*, there was no reference to *Moffatt's* explicit preclusion

89. *Supra*, n. 86.

90. "Here there has been taking that has been done to such an extent as to put it entirely outside those trivial and casual limitations which do not amount to a breach of copyright."

91. Much of it devoted to an attack upon examination preparation books in general: "One has before one in the course of this case a process of evolution, with the ultimate goal of a struggle in which the fittest, I suppose will survive — a struggle between the teachers on the one hand, and the examiners on the other."

92. *Supra*, n. 86.

93. 126 F. 843.

94. See n. 48, *supra*, and accompanying text.

95. 121 F. 907; reversed 122 F. 922.

of the doctrine from compilations requiring subjective selection.⁹⁶ *Moffatt* reappeared, the third time that year, in *Dun v. International Mercantile Agency*,⁹⁷ a dispute between competing credit rating books. Judge Lacombe, who decided *Colliery*, now considered *Moffatt* no longer so "inequitable" and held that regardless of the fairness of International Mercantile's use of "hundreds, possibly thousands" of names from plaintiff Dun's directory, "such use of another's compilation was approved in *Moffatt v. Gill* . . . and the opinion of the Court of Appeals of this Circuit in *Edward Thompson Co. v. American Lawbook Co.* expressly approves the doctrine of *Moffatt v. Gill*."⁹⁸

As we have attempted to show, however, this should not have been the outcome. *Moffatt* referred only to *objective* directories and still required the subsequent compiler to "go and see" the original sources, simply "taking the sheets with" him. That is not the same as merely standing by and "verifying" the copyrighted sheets as correct. Support for this restrictive view of *Moffatt's* "Sheets" doctrine can be found shortly after *Edward Thompson, Dun, and Sampson*, in *Hartford Printing Co. v. Hartford Directory & Publishing Co.*,⁹⁹ where defendant subsequent compiler, having made an independent canvass, then examined plaintiff's directory and redispached canvassers to "verify" discrepancies. The *Hartford* court approved *Moffatt* as "such a reasonable rule" but nevertheless was emphatic about the necessity for an *independent* effort by the subsequent compiler.¹⁰⁰ Thus we again witness a balancing of desires to protect efforts of the original compiler with the need for utmost accuracy in public directories. This was the balancing which shaped the earliest copyright cases in respect to maps and charts.

96. The Thompson legal encyclopedia would seem to require clearly as much "judgment and taste" in its compilation as did *Moffatt's* examination book.

97. 127 F. 173.

98. "Propositions which work hardship to the individual are sometimes sustained on grounds of public policy." 127 F. 173 at 174.

99. 146 F. 332 (D. Conn. 1906). *Edward Thompson and Dun* were decided in 1903; *Sampson* was decided in 1904.

100. "If the defendant, *unaided* by the copyrighted matter, made an original, thorough, house-to-house canvass, and *then*, after comparison with said matter, made a careful, thorough search to find the reason for the discrepancies, which such comparison revealed, the case would go with the defendant. . . . In my opinion, the cases, both English and American, come to this: You must not bodily transmit the results of another's labor from his sheets to your own; but, *having made* an honest canvass, you may use his work for the purpose of checking and revising your own, if you will do so honestly, independently, and thoroughly." (Emphasis added.) Platt, J., 146 F. 332 at 334.

B. *Subsequent Verification: Scope of the Allowance*

Assuming the correct rule to be that of *Hartford Printing*¹⁰¹ — i.e., “verification” only permits a checking *back* to the prior copyrighted directory *after* you have compiled your own lists — what *remains* within the allowable scope of verification? So far as purely objective compilations are concerned, it would appear that nothing remains: no practical advantage can be gained from a preceding work confined to a physical gathering of factual components. At most, such prior works may serve as incentives for a later compiler to increase the scope and accuracy of his efforts, and this is the extent of “verifying.” Thus the test for determining whether an objective directory has been infringed is not the number of errors in common between the copyrighted work and the alleged infringement. Rather, the test is an affirmative showing on the part of an alleged infringer that *his* efforts were sufficient, in time and expenditure, to themselves produce the subsequent compilation. True, later comparisons with the previous directory may have caused the subsequent compiler to expand his own canvasses, but, theoretically, he might have done this in any event, motivated by a desire for commercial excellence. Equally important, the need for utmost accuracy in public directories easily balances any slight invasion of a prior compiler’s rights caused by allowing subsequent “verification.” Therefore, nothing can be said to have been “taken” from the original compiler. It is this rationale which seems to underlie the absolute protection afforded telephone directory listings.¹⁰² The protection, however, should be equally given any comparably objective compilation.

III. SUBJECTIVE SELECTION V. OBJECTIVE

There is a vital distinction between compilations involving subjective selection and those requiring only objective gathering. Thus, at the one extreme, an “abridgment” was originally thought not an in-

101. *Supra*, n. 99. Also see *Chain Store Business Guide v. Wexler*, 79 F. Supp. 726 (S.D.N.Y. 1948).

102. In *New England Telephone & Telegraph v. National Merchandising Corp.*, *supra*, n. 77, the court reviewed other rationale occasionally offered in support of telephone directory protection. Included are that the telephone company maintains legal title to the directories (“but the subscriber has present rights of use which are sufficiently close to absolute title so that any claim of the telephone company cannot rest on principles of trespass”); that contract provisions restrict other than company-approved uses for the directories (“but all contract provisions must be approved by state utility commissions”); and that misuse of the directory “interferes with service” (a factual issue rarely sustained).

fringement of the original work so long as the abridgment was more than just a "colorable shortening;"¹⁰³ and a bona fide reviewer is permitted to show, through excerpts, the merit or demerit of the original work.¹⁰⁴

In *Story v. Holcombe*,¹⁰⁵ the distinction was made that use of an equity hornbook was infringement of a copyrighted compilation rather than a permissible abridgment:

A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work: the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book. A fair abridgment, though it may injure the original, is lawful. There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order.

McLean, Cir. J., lamented that compilations and abridgments were being "blended" in the decision:

The same facts and reasoning are applied indiscriminately to both cases; and not infrequently there is a confusion in the argument, which tends more to perplex than to enliven.¹⁰⁶

A. *The Essence of the Labor*

Approached from a parallel path, the distinction between objective and subjective compilations is a distinction based upon *the type of labor* expended. The crux of an objective compiler's efforts is his gathering of the information; the subjective compiler, on the other hand, is principally a selector, and *judgment*, rather than industry, is his prime contribution. Assuming copyright exists to protect an author's labors,¹⁰⁷ a specific accounting of those labors must precede any decision as to whether they have been appropriated.

103. *Gyles v. Wilcox*, 2 Atk. 141, 143 (1740).

104. *Bramwell v. Halcomb*, 3 Mylne & C 737 (1856).

105. 4 McLean 306, Fed. Cas. No. 13,497 (1847).

106. *Id.*

107. Thereby encouraging him to further contribute to the public literature and knowledge.

B. *The Cases and Their Division*

Analysis of the labors involved was controlling in *List Publishing Co. v. Keller*,¹⁰⁸ where infringement of a social register first was examined as to how much the defendant "took", and which held that *regardless* of whether defendant could use the original compilation before or after his own canvass, the gist of the taking was not names per se, but the value of their subjective selection:

Books like the present have a commercial value dependent upon the judgment and knowledge of the author respecting the social standing and society relations of a limited class of the general public.

1. *The Law Reports as a Body of Cases*

A major body of early decisions concerned infringements of legal compilations — annotated law reports, hornbooks and encyclopediae. All represented subjective selection — of the cases used for illustration, of the choice of explanatory notes, of signifying decisions in point — and all were decided on this basis. All looked to the amount of *selection* appropriated by the infringer. For example, *Callaghan v. Meyers*¹⁰⁹ held infringement of plaintiff's Illinois Reports because "there are certain unmistakable indicia that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information." Yet neither *Callaghan* nor cases that followed¹¹⁰ distinguished that it was *selectivity* that was being protected, i.e., not the material itself, or that where "no infringement" was found, the courts actually meant "no selectivity" had been appropriated.¹¹¹ Not only did courts not make this distinction, they consistently cited objective compilation cases — the impartial listings and city directories. The difficulty with such blending is that use of selective compilations as "guides" — acceptable because the essence of selective works is not in their gathering, but in the *choosing* of their components — becomes unacceptable when applied to *objective* compilations, where gathering is the heart of the efforts. To be guided to the sources of *objective* data is to be given

108. 30 F. 772 (S.D.N.Y. 1887); see n. 43, supra, and accompanying text.

109. 128 U.S. 617 (1888).

110. Including *Chils v. Gronlund*, 41 F. 145 (S.D.N.Y. 1890): infringement of a Swedish-English dictionary by "copying plaintiff's arrangement and definitions, which plaintiff had composed."

111. *Mead v. West Publishing Co.*, 80 F. 380 (C.C. Minn. 1896): "The question is whether there has been such an appropriation of the (legal horn-book) work of Mr. Andrews as to injure (him). I do not think so."

the data itself. *Moffat and Paige Ltd. v. Gill*,¹¹² *Edward Thompson Co. v. American Law Book Co.*,¹¹³ and *Dun v. International Mercantile Agency*¹¹⁴ all dealt with subjective compilations and therefore were not proper to serve as keystones for *Sampson & Murdock Co. v. Seavor-Radford Co.*,¹¹⁵ where only a city directory was involved.

2. Modern Holdings

Despite frequent references to prior directories as "guides" which subsequent compilers need only "verify," modern cases appear to accept factual distinctions between subjective and objective compilations, and permit liberal subsequent use only of the former. Telephone directory listing cases are a clear example.¹¹⁶ Also illuminating are cases where, "guide" or not, infringements have been found despite independent canvasses of a city business directory,¹¹⁷ a city residential directory,¹¹⁸ a hotel directory,¹¹⁹ and a chain store directory.¹²⁰ Conversely, where no infringement has been found, it was either because no subjective selectivity had been "copied,"¹²¹ or defendant could affirmatively show independent effort sufficient to have compiled his own objective directory.¹²²

112. 86 L.T. 465; in the very stating of the "Sheets" doctrine, *Moffat*, while referring to "directories," quoted as long authority *Pike v. Nicholas*, L.R. 5 Ch. 251 (1870), a clearly "subjective" case which allowed a subsequent historian to use the sources of a prior history as a "guide."

113. *Supra*, ns. 50 and 95; alleged infringement of a legal encyclopedia.

114. *Supra*, n. 97; business credit rating directories — quite subjective material.

115. 129 F. 761.

116. See *Leon v. Pacific Tel. & Tel. Co.*, n. 73, *supra*, and accompanying text.

117. *Trow Directory Printing & Bookbinding Co. v. U.S. Directory Co.*, 122 F. 191 (S.D.N.Y. 1903).

118. *Hartford Printing Co. v. Hartford Directory & Publishing Co.*, 146 F. 332.

119. *American Travel & Hotel Directory Co., Inc. v. Gehring Publishing Co.*, 45 F.2d 415 (S.D.N.Y. 1925).

120. *Chain Store Business Guide v. Wexler*, 79 F. Supp. 726 (S.D.N.Y. 1948).

121. *Dun v. Lumbermen's Credit Association*, 144 F. 83 (7th Cir. 1906); *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151 (2d Cir. 1916), *how-to-do-it nursing handbook*.

122. *Williams v. Smythe*, 110 F. 961 (M.D. Penn. 1901): "(Each) of the 441 pages shows a material difference from the corresponding page of the plaintiff's (city directory). Names are added and omitted, and corrections made, some of which, to my own knowledge, are mistakes, but all of which go to establish to my satisfaction that defendant has practically compiled, as he declares, from original sources and the charge of piracy is not made out."

IV. "UNFAIR COMPETITION" OR "FAIR USE"?

A. *The Concept Involved*

As applied to copyrighted compilations, the concept of "unfair competition" might best be discussed as an opposite approach to the doctrine of "fair use," long a major factor in literary protection.¹²³

B. *The History*

The doctrine of "fair use" appeared well entrenched a half-century before its thorough review in *Pike v. Nicholas*,¹²⁴ upon which *Moffatt and Paige Ltd. v. Gill*¹²⁵ based the "Sheets" doctrine.¹²⁶ As early as 1807, *Roworth v. Wilkes*,¹²⁷ where plaintiff's book on fencing was liberally used in the fencing section of defendant's encyclopedia, allowed some use of plaintiff's public material,¹²⁸ but placed the burden upon defendant to prove his use had been within that allowed limit.¹²⁹ The term "legitimate use" can be found as early as 1810,¹³⁰ and was viewed as turning on the independent efforts of a subsequent author.¹³¹ This "new work" approach was emphasized in *Mawmen v. Tegg*,¹³² a case of conflicting encyclopaediae, where Lord Eldon noted:

In the case, for instance, of a dictionary, Lord Mansfield expressly says that you are not merely to look at what is published in the one work being part of the other work, but that you are to

123. Possibly less a "doctrine" than an attempt to group certain public policies considered important enough to overcome the individual property rights accorded by copyright. Cf. *Broadway Music Corp. v. F. R. Publishing Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940) with *Henry Holdt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Penn. 1938).

124. L.R. 5 Ch. App. 251 (1869).

125. 86 L.T. 465 (1902).

126. See n. 29, *supra*, and accompanying text.

127. 1 Camp. 94 (1807).

128. "If the similitude can be supposed to have arisen from accident, or necessarily, from the nature of the subject; or from the artist having sketched designs merely from reading the letter-press of the plaintiff's work, the defendant is not answerable."

129. "It is remarkable, however, that (defendant) has given no evidence to explain the similitude or to repel the presumption which that necessarily causes."

130. *Wilkins v. Aiken*, 17 Ves. 424 (1810).

131. "The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work." 17 Ves. at 426.

132. 2 Russ. 385 (1826).

consider whether the matter alleged to have been copied has, upon the whole been used in such a manner as to shew, according to the language of Lord Ellenborough in another case, that the party meant to give to the public what might fairly be called a new work; or whether, on the other hand, in robbing the former author of so much of his work, he acted, as Lord Ellenborough expresses it, "animo furandi."¹³³

Any notion, however, that "fair use" might be a purely quantitative doctrine was dispelled in *Campbell v. Scott*,¹³⁴ where *Roworth v. Wilkes*¹³⁵ was cited with favor:

Roworth was a case in which 75 pages of a treatise consisting of 118 pages were taken and inserted in a very voluminous work, the *Encyclopedia Londinensis*; and, although the matter taken formed but a very small proportion of the work into which it was introduced, the jury found for the plaintiff, who was the author of the treatise.

It remained for *Pike v. Nicholas*,¹³⁶ to give the doctrine its most thorough examination. Pike and Nicholas both entered the 1865 National Eisteddfod Contest with essays on the Celtic origins of the British nation. Neither won, but Pike later published his essay at about the time Nicholas resubmitted his for the 1866 Eisteddfod. Nicholas then also published and Pike charged infringement. Nicholas answered that his work was primarily due to his own efforts and mainly was based on that 1866 contest manuscript, prepared before Nicholas saw Pike's publication. Any resemblance, Nicholas said, arose from "mutual use of the same sources and materials."¹³⁷ However, the Vice-Chancellor, Sir

133. *Id.* at 401.

134. 11 Sim. 31 (1842), in which plaintiff poet gained relief for defendant having included copyrighted poetry within defendant's "anthology."

135. 1 Camp. 94; see n. 127, *supra*, and accompanying text.

136. L.R. 5 Ch. App. 251 (1869).

137. Nicholas said Pike's book was not consulted until Nicholas' manuscript was, in substance, prepared for publication, and (Pike's work was consulted) for the purpose only of comparing the same with his (Nicholas') own manuscript, which was then substantially finished, and that his (Nicholas') manuscript was not substantially added to or altered, after, or in consequence of, his having consulted Pike's book.

W. M. James, granted Pike his injunction and ordered defendant Nicholas to pay damages and costs:

The plaintiff says, "If you did not take all this from my book, tell me where you took it from. Where are the materials from which you elaborated (your version)?" The collection of materials is a thing of time and labour. You cannot walk by instinct to the proper shelf of a library, take down the right book, open it at the right page, and hit on the right passage which somebody else has found before you. The defendant has not a single rough note to produce, no trace of his quarrying in the British Museum, or any other like quarry, for which the stones of the literary edifice were to be built up.

Sir James then attempted to state exactly what use Nicholas *could* have made of Pike's efforts:

Plagiarism does not necessarily amount to a legal invasion of copyright. A man publishing a work gives it to the world, and so far as it adds to the world's knowledge, adds to the materials which any other author has a right to use, and may even be bound not to neglect. The question then is between a legitimate and a piratical use of an author's work. In considering this I have not been unmindful of the small comparative extent of literary composition which is traceable from the one to the other; I have not been unmindful that there was some not immaterial exercise of literary labour and skill in the transfusion. . . . There is no monopoly in the main theory of the plaintiff, or in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations. But the plaintiff has a right to say that no one is to be permitted whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication.¹³⁸

On appeal, the Lord Chancellor, Lord Hatherley, reversed. In so doing, however, he insisted that "their Lordships did not intend to lay down any general principles which were contrary to those laid down

138. L.R. 5 Ch. App. at 255.

by the Vice-Chancellor. Where their Lordships differed from him was merely in the application of those principles to this particular case." 139

Although the defendant might have been led to look more minutely into Pirchard than he otherwise would have done by referring to the plaintiff's work, still the plaintiff could not say, "I, having found these passages in Pirchard, will prohibit all the world, who may find the same passages, from making use of them." The moment he had given that degree of light to the defendant which led (the defendant) to refer to that common source, if the defendant *did really and bona fide look at that common source*, he did all that this Court required him to do. He must not simply copy the passage from the plaintiff's book, but having been put on the track, and having looked at that particular part of the book which the plaintiff led him to, (the defendant) was entitled to make use of every passage from that author which the plaintiff had made use of. (Emphasis added.)¹⁴⁰

From this, *Moffatt and Paige Ltd. v. Gill*¹⁴¹ apparently derived its dictum that "fair use" of a prior "directory" entitled a subsequent compiler, "taking the (prior directory's) sheets with (him), to go and see whether the existing facts concur with the description in the sheets, and if (the subsequent compiler does) that (he) may publish the results as (his) own."¹⁴² That this was intended to permit only the most limited of subsequent usage, however, is evident from *Moffatt's* total reliance

139. "The Vice-Chancellor asked very justly: 'If you did not get this passage from the plaintiff's book, tell me where you got it.' That was a very reasonable question to be asked of the author of a subsequent work which contained the same passage as a prior one. The defendant had satisfactorily explained all the common sources except that passage from Retzius. Therefore, so far, the Vice-Chancellor laid a great deal too much stress upon these similarities, which were numerous but which were well and properly accounted for, considering that there was a common subject propounded, a common mode of treating that subject which was open to both. With regard to all the various passages, with the exception of Retzius, the defendant had been to the common source, had worked out of that common source, had laboured there, and had produced something of his own in addition." *Id.* at 257.

140. *Id.*

141. 86 L.T. 465.

142. See n. 29, *supra*, and accompanying text.

upon *Pike* as authority for the concept and *Pike's* express provision that the subsequent compiler must *first* prepare his *own* work¹⁴³ and then, in verifying, *actually retrace* the steps of the first author.¹⁴⁴ Any additional use would be "misappropriating" the first author's bona fide efforts. Thus we see two sides of the single concept: "fair use" v. "misappropriation."

C. *The American Application*

The first major American exploration of the "fair use" doctrine, *Folsom v. Marsh*,¹⁴⁵ somewhat paralleled the *Roworth v. Wilkes*¹⁴⁶ fencing dispute. Here, instead of Roworth's fencing book incorporated into Wilkes' encyclopedia, a compilation of George Washington's letters was incorporated into a "Life of Washington":

The question then is whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs. It is said that the defendant has selected only such materials as suited his own limited purposes as a biographer. That is doubtless true; and he has produced an exceedingly valuable book. But that is no answer to the difficulty. It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of the copyright is the property of the author;

143. See n. 137, *supra*. *Pike v. Nicholas*, though it found for defendant, gave him only the narrowest of victories. "As to the costs, His Lordship was rejoiced to think that it was in the power of this Court to dismiss this bill, so that, at all events, the defendant would get no costs of any kind, or in any shape. His Lordship thought further that the defendant's evidence in the Court below was not ingenuous; and if the Vice-Chancellor granted an injunction against him, the defendant had only himself to thank for it." Sir G. M. Giffard, Lord Justice, L.R. 5 Ch. App. at 258.

144. *Supra*, n. 138 and n. 140.

145. 2 Story 100, Fed. Cas. No. 4,901 (1841).

146. 1 Camp. 94 (1807); see n. 127, *supra*.

and it is no defense that another person has appropriated a part, and not the whole, of any property.¹⁴⁷

The point was further explored in *Green v. Bishop*¹⁴⁸ and then *Lawrence v. Dana*.¹⁴⁹

Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication.¹⁵⁰

What finally evolved, therefore, was a composite doctrine. To be considered, with varying intensity, are the amounts of copying,¹⁵¹ the

147. Folsom then cited *Lewis v. Fullarton*, 2 Beav. 6 (1839), "in which Lord Langdale, in the case of a topographical dictionary, held that largely copying from the work in another book having a similar object was a violation of that copyright, although the same information might have been, but, in fact, was not, obtained from common sources open to all persons. On that occasion (Lord Langdale) said: 'None are entitled to save themselves trouble and expense, by availing themselves for their own profit, of other men's work, still entitled to the protection of copyright.' And, accordingly, in that case, (Lord Langdale) granted an injunction as to the parts pirated, although it was admitted, on all hands, that there was much original in the new work."

148. Fed. Cas. No. 5,763 (1858): "Great difficulties often times surround the inquiry whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or that the use made of the book or its contents does not exceed what the law permits to another engaged in composing a new work upon the same subject. None of these difficulties arise in the present case, as all the authorities agree that . . . if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that such taking or appropriation is sufficient in point of law to maintain the suit."

149. Fed. Cas. No. 8,136 (1869).

150. ". . . but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appears that the delay has misled the respondent." *Id.*

151. "1. The public are entitled to make any use of a copyrighted book which does not amount to a violation of the exclusive right given by the statute.

nature of the works involved,¹⁵² the purposes of its use,¹⁵³ and the intentions of the user.¹⁵⁴

The question of piracy often depends upon a nice balance . . . ¹⁵⁵

A final delineation might separate current cases between "palming off" and "misappropriation."

"2. Anything less than a substantial copy of the whole or a material part of the book does not violate the exclusive right given by the statute.

"3. Hence, any one may copy less than a material part of a copyrighted book; i.e., he may make a fair use of it." *West Publishing Co. v. Edward Thompson Co.*, 169 F. 833 (E.D.N.Y. 1909).

152. "[T]here is the public interest in having subsequent workers in a field allowed to make use of the accumulated knowledge of the past, especially knowledge of the sources." A text-book differs fundamentally from a compilation, such as a directory or list. The latter simply sets forth names, symbols, or the like; its only usefulness lies in the presentation of facts which any one might have learned by repeating the compiler's industry, and which, having learned, he could present to the public practically in only the one way. The former is the product of intellectual labor and literary skill, results of which are unique each time the subject is handled independently, even though the same materials are dealt with. Moreover, in a text-book there is ordinarily a critical discussion of earlier writers and a re-examination of their sources. Again, the directory or list is intended to be used as a guide to something further and different; it is not itself a contribution to knowledge, which is to be availed of by co-workers in the same field." *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F. 2d 82, 89 (6th Cir. 1928). See n. 105, *supra*, and accompanying text.

153. "The words 'unfair use' [have] a broader meaning with respect to the appropriation of earlier writings by a work covering substantially the same ground, and supplanting the earlier book, than they have in the acquirement of knowledge upon the part of a student of the field treated by the publication." *West Publishing Co. v. Edward Thompson*, *supra*, n. 151.

154. "Evidence of innocent intention may have a bearing upon the question of 'fair use'; and where it appears that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused; but it cannot be admitted that it is a legal defense where it appears that the party setting it up has invaded a copyright." *Cary v. Faden*, 5 Ves. 23 (1799). See n. 17, *supra*, and accompanying text.

155. *Folsom v. Marsh*, 2 Story 100 (1841); see n. 145, *supra*, and accompanying text.

1. "Palming Off"

In *Globe-Werneck Co. v. Brown & Besley*,¹⁵⁶ it was held that whereas a subsequent creator of index sheets might not be infringing on identical, prior sheets, his work still could be enjoined as "being capable of deceiving the public." Similarly, *Colliery Engineer Co. v. United Correspondence Schools Co.*,¹⁵⁷ while speaking in terms of "infringement" of the textbooks at issue, admitted it was strongly motivated by "the fact that defendants' circular of information opens with statements calculated to induce a belief that their school is the same as, or else a successor of, the complainants'." In granting relief in *E. P. Dutton & Co. v. Cupples*,¹⁵⁸ for unfair competition in the "cheaper, inartistic" version of plaintiff's hymn book by defendants, the court held it could not see "any reason why the same rule (of unfair competition) should not be applied to a book that has been applied to a game, or to cigars, or to anything else which is distinguished by a label, or by the distinctive form or style of the package":

The decisive fact is that the defendants are unfairly and fraudulently attempting to trade upon the reputation which plaintiff has built up for its books. The rights to injunctive relief in such a case are too firmly established to require the citation of authorities.

Therefore, even accepting the "Sheets" or "Guide" doctrine as a "first look" concept, the compiler of a directory still can be protected from outright imitators. Where, for example, defendant's internal arrangement and book cover are so similar to plaintiff's as to "confuse and mislead" customers, an injunction will lie, regardless of the infringement issue. *Sub-Contractors Register, Inc. v. McGovern's Contractors & Builders Manual Inc.*¹⁵⁹

156. 121 F. 90 (C.C.A. 7, 1902). See also, *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938).

157. 94 F. 152 (S.D.N.Y. 1899).

158. 117 App. Div. 172, 102 N.Y.S. 309 (1907).

159. 69 F. Supp. 507 (S.D.N.Y. 1946), citing *Farmer v. Kistner*, 33 F. 494: "Where defendant's publication is designed to rival or compete with the plaintiff's market, courts are astute to protect the technical rights of the plaintiff to his composition, and will enjoin an invasion of his general plan and arrangement, though there be no plagiarism of sentences or ideas." Cf. *Social Register Association v. Murphy*, 128 F. 116 (D. R.I. 1904), which held, no "misleading," but there was an infringement of plaintiff's copyright.

2. Misappropriation

Equally pertinent in defense of a compiler's work product is the concept of misappropriation of another's labors. Here, too, we encounter the boundaries of "unfair competition."¹⁶⁰ Further, such boundaries provide additional support for restricting the "Sheets" doctrine to *subsequent* use, since to allow precompilation use of plaintiff's work for an objective directory would be appropriating his labors. Support for this view can be found throughout directory and related cases.¹⁶¹

V. CONCLUSION

The problem as to what "verifying" will permit should not be insoluble. The question well may have been foreclosed even as Judge Learned Hand was by-passing it in 1921.¹⁶² Early English cases looked primarily to defendants' efforts, considering this the best way to both protect plaintiffs' labors and assure the utmost accuracy for public compilations. Subsequent compilers were foreclosed from any taking with intent "*animus furandi*." The landmark case of *Moffatt and Paige Ltd. v. Gill*,¹⁶³ was not contra, having found infringement under its own facts, and resting, as it did, on the precedent of *Pike v. Nicholas*.¹⁶⁴ American case law appears to have misunderstood *Moffatt*, adopting only part of *Moffatt's* "Sheets" doctrine¹⁶⁵ without recognizing the restrictions and distinctions *Moffatt* had suggested.¹⁶⁶ A peak of this misunderstanding was reached in *Sampson & Murdock Co. v. Seavor-Radford*

160. See *International News Service v. Associated Press*, 248 U.S. 215 (1918); but cf. the limiting value placed upon the *INS* decision by Wyzanski, J., in *Triangle Publications Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942).

161. Particularly, *American Trotting Register Association v. Gocher*, 70 F. 237 (C.C. Ohio, 1895): "If (defendant) were permitted to (extract bodily the plaintiff's work), he would avail himself directly of the industry and expense to which the person who copyrighted the work was subjected"; see, also, *Mead v. West Publishing Co.*, 80 F. 380 (C.C. Minn., 1896): "The question, upon the whole case, is whether there has been such an appropriation of the work (of the plaintiff as to injure him)."

162. *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921); affd. 281 F. 83 (3d Cir. 1922); cert. denied, 259 U.S. 581 (1922).

163. 86 LT. 465 (1902).

164. L.R. 5 Ch. App. 251 (1869).

165. *Edward Thompson Co. v. American Lawbook Co.*, 122 F. 922.

166. See ns. 29-30, supra, and accompanying text.

Co.,¹⁶⁷ where it was said in dictum that the subsequent compiler of a city directory could use his predecessor's copyrighted sheets as a "guide" which only needed to be "verified." This ignored the distinction between objective and subjective compilations and has been modified and limited by later dicta¹⁶⁸ and factual holdings.

Assuming some "verifying" is proper, however, such "verifying" still must be limited to only *later* verification, occurring after a subsequent compiler has completed sufficient independent work to produce his own directory. This would seem the position of *Hartford Printing Co. v. Hartford Directory & Publishing Co.*¹⁶⁹ and recognizes the aforementioned distinction between compilations embodying subjective selectivity¹⁷⁰ and those only requiring objective, physical gathering.¹⁷¹ The former, where the essence of a compiler's labor is his intellectual judgment, can, and perhaps must, permit its common components to be available as a "guide" for subsequent users. These subsequent users still would be put to their own judgment as to which components were applicable. Objective compilations require no such deeper labor and permitting their use as "guides" preempts the original compiler of substantial efforts.

Regardless of copyright protection, a compiler still should be protected through the concept of "unfair competition," at least to the extent that subsequent compilers cannot confuse their product with the plaintiff's¹⁷² nor appropriate his efforts for themselves.¹⁷³

Thus the alleged uncertainty as to what protection is afforded compilers of common facts, particularly directories, can be resolved by application of a two-step test:

1. Determine the essence of plaintiff's efforts. Is it his physical gathering of his subjective selection of the component works?
2. Determine to what extent defendant has appropriated these efforts of the plaintiff. Is the appropriation "trivial and casual" ¹⁷⁴ or does it represent an "unfair taking?"

167. 129 F. 761.

168. *Supra* n. 132.

169. 146 F. 332.

170. *Story v. Holcombe*, 4 McLean 306, Fed. Cas. No. 13,497 (1847).

171. *Chain Store Business Guide v. Wexler*, 79 F. Supp. 726 (S.D.N.Y. 1948).

172. *Globe-Wernecke Co. v. Brown & Besley*, 121 F. 90.

173. *American Trotting Register Association v. Gocher*, 70 F. 237.

174. 86 L.T. 465.

In applying this test, similarity of compilations should raise an inference of infringement, rebuttable by defendant's producing evidence of independent effort.

So might we realize Lord Mansfield's admonition, voiced in 1785:

We must take care to guard against two extremes, equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹⁷⁵

175. *Sayre v. Moore*, 1 East. 361, 102 Eng. Rep. 139 (1785).

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

332. U. S. CONGRESS. HOUSE.

H.R. 14903. A bill relating to the tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Introduced by Mr. Kupferman, May 5, 1966, and referred to the Committee on Ways and Means. 5 p. (89th Cong., 2d Sess.)

Identical with H.R. 3430 (Lindsay) and H.R. 8190 (Fulton) of the instant Congress, and with bills introduced in previous Congresses. The bill would provide for taxation, at the capital-gain rate, of sums received as result of transfers of rights in literary property, under certain conditions.

333. U. S. CONGRESS. HOUSE.

H.R. 15004. A bill to amend the Copyright Act by repealing the jukebox exemption, and for other purposes. Introduced by Mr. Rees, May 11, 1966, and referred to the Committee on the Judiciary. 2 p. (89th Cong., 2d Sess.)

Identical with H.R. 18 (Celler) and H.R. 2793 (Corman) of the instant Congress and similar to numerous bills introduced in previous Congresses.

334. U. S. CONGRESS. HOUSE. *Kastenmeier, Robert W.*

CATV and copyright revision. (112 *Congressional Record* 9564-9566, no. 76, daily ed. May 9, 1966.)

Under leave to extend his remarks in the *Record*, the Acting Chairman for Copyright Revision, Subcommittee No. 3 of the House Judiciary Committee inserts an open letter to Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce. The letter deals with the Copyright Subcommittee's proposed solution of the community antenna issue under the pending copyright law revision, and is accompanied by a draft of legislative language that would effectuate the proposal.

335. U. S. CONGRESS. HOUSE. *Kastenmeier, Robert W.*

A Congressman looks at copyright law revision; extension of remarks. (112 *Congressional Record* A2339-A2341, no. 72, daily ed. May 2, 1966.)

Mr. Kastenmeier includes under his remarks in the Appendix of the *Record* an address delivered by Congressman Herbert Tenzer of New York as a featured speaker in a symposium on the law of the artist held at Fordham University Law School on April 26, 1966. Mr. Kastenmeier describes the address as "an able and comprehensive survey of the legislation which Subcommittee No. 3 of the House Committee on the Judiciary is presently considering."

336. U. S. CONGRESS. HOUSE. *Kupferman, Theodore R.*

Tax treatment of transfers of rights to copyrights and literary, musical and artistic compositions. (112 *Congressional Record* 9507-9508, no. 75, daily ed. May 5, 1966.)

Remarks of Congressman Kupferman when he introduced H.R. 14903. See Item 332, *supra*.

2. FOREIGN NATIONS

337. GERMANY (*Democratic Republic, 1949-*) *Laws, statutes, etc.*

Gesetz über das Urheberrecht, vom 13. September 1965. [Gesetzblatt der Deutschen Demokratischen Republik I, Nr. 14 vom 13. September 1965, 209ff.] (68 *Blatt für Patent-, Muster- und Zeichenwesen* 23-32, no. 1, Jan. 1966.)

The copyright statute of the German Democratic Republic which entered into force on January 1, 1966.

338. GERMANY (*Democratic Republic, 1949-*) *Laws, statutes, etc.*

Loi du 13 septembre 1965 sur le droit d'auteur. (*Interauteurs* 127-144, no. 162, 1st quarter 1966.)

French translation of the new East German copyright law.

339. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Loi sur la gestion des droits d'auteur et des droits apparentés. (Du 9 septembre 1965). (*Revue Internationale du Droit d'Auteur* 191-200, no. 48, Jan. 1966.)

French translation of the recently enacted West German law dealing with the administration of copyright and neighboring rights.

340. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Loi sur le droit d'auteur et les droits apparentés. (Loi sur le droit d'auteur). (Du 9 septembre 1965). (*Revue Internationale du Droit d'Auteur* 156-191, no. 48, Jan. 1966.)

French translation of the recently enacted West German law on copyright and neighboring rights.

341. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Verordnung über die Schiedsstelle nach dem Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten, vom 18. Dezember 1965. Sammlung des Bundesrechts, Bundesgesetzbl. III 440-8-1. (68 *Blatt für Patent-, Muster- und Zeichenwesen* 21-23, no. 1, Jan. 1966.)

A decree of the Federal Minister of Justice of the Federal Republic of Germany implementing the provision of Section 14, para. 7 of the Law concerning the Administration of Copyrights and Neighboring Rights of September 9, 1965, with respect to operations of the Arbitration Commission.

342. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Verordnung über die Urheberrolle, vom 18. Dezember 1965. Sammlung des Bundesrechts, Bundesgesetzbl. III 440-1-3. (68 *Blatt für Patent-, Muster, und Zeichenwesen* 21, no. 1, Jan. 1966.)

A decree of the Federal Minister of Justice of the Federal Republic of Germany implementing the provision of Section 138, para. 5 of the Copyright statute of September 9, 1965, concerning the registration, in the "Register of Authors," of the author's real name in the case of an anonymous or pseudonymous work.

343. SOUTH AFRICA. *Laws, statutes, etc.*

The Copyright Act, 1965; an act to consolidate and amend the law relating to copyright and matters incidental thereto. (2 *Copyright* 26-55, no. 2, Feb. 1966.)

The new South African copyright law.

344. SOUTH AFRICA. *Laws, statutes, etc.*

Loi sur le droit d'auteur no. 63, de 1965. (*Interauteurs* 75-127, no. 162, 1st quarter 1966.)

French translation of the South African copyright law of 1965.

345. TUNISIA. *Laws, statutes, etc.*

Loi No. 66-12 du 14 février 1966 relative a la propriété littéraire et artistique. (109 *Journal Officiel de la République Tunisienne* 226-229, no. 8, Feb. 15, 1966.)

The French version of the new Tunisian copyright law of February 14, 1966.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

346. UNIVERSAL COPYRIGHT CONVENTION: *Bechuanaland, Montserrat and St. Lucia.*

The Universal Copyright Convention became effective with respect to the United Kingdom of Great Britain and Northern Ireland on September 27, 1957. Since that time the Government of the United Kingdom has declared, pursuant to Article XIII of the Convention, that the Convention shall also apply to the Isle of Man, Gibraltar, Fiji, Bermuda, the Bahama Islands, the British Virgin Islands, the Falkland Islands and Dependencies, St. Helena and Dependencies, Seychelles, and Mauritius.

The U. S. Department of State has now been officially informed by the Director-General of UNESCO that the Government of the United Kingdom has deposited its notification that the Convention shall apply to Bechuanaland, Montserrat, St. Lucia, and Grenada.

The effective date of the application of the Convention to Bechuanaland, Montserrat, and St. Lucia is May 8, 1966, and the effective date as to Grenada is May 15, 1966.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY****A. DECISIONS OF U.S. COURTS****1. Federal Court Decisions**

347. *United Artists Television, Inc. v. Fortnightly Corporation*, 149 U.S.P.Q. 758 (S.D. N.Y. May 23, 1966) (Herlands, J.). Leave to appeal granted June 24, 1966.

Action for infringement of copyright in motion pictures, broadcast over television, by means of community antenna off-the-air pickup and retransmission by cable to subscribers (CATV).

Held, judgment for plaintiff.

The court held that a CATV transmission is a performance of the broadcast material contained in the television signal so transmitted and, therefore, constitutes a copyright infringement where such material is copyrighted. The court, in a lengthy opinion, carefully reviewed the technical processes involved in defendant's CATV operation and concluded that a community antenna bears a much closer resemblance to a television station than to an ordinary antenna. The court said:

Two preliminary observations will place the issues and the record in sharper focus. The term "community antenna," as used by defendant for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs—operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas.

On June 29, 1965, in Pre-Trial Order Number One, this court ordered that the trial of the action proceed in four designated stages; that the basic issue of copyright infringement be tried first; and that all defenses other than the separate defense . . . [that plaintiff seeks to impose an unlawful charge upon the reception by defendant's subscribers of broadcasts by commercial television] be reserved and tried in subsequent stages.

* * *

For the purpose of the first stage of the trial of this action, the parties have formally assumed the following facts *inter alia*: that plaintiff is the owner of valid copyrights in certain motion pictures; that some of said motion pictures are photoplays (classified as LP's on the copyright certificates) and that others are not photoplays (classified as MP's on the copyright certificates); that these motion pictures were telecast by . . . five television stations in Pittsburgh, Wheeling, and Steubenville, pursuant to license contracts between plaintiff or plaintiff's predecessor in title and said television stations; that the signals of these television stations were received by and made available on defendant's systems; that the five television stations in Pittsburgh, Wheeling and Steubenville did telecast the motion pictures licensed to those stations by plaintiff or plaintiff's predecessor in title; that the AM carrier waves and FM carrier waves into which those motion pictures were transduced in order for them to be telecast¹ were received by defendant's systems; and that audio and video signals representing the intelligence contained in those carrier waves were then made available by defendant to its subscribers.

For the purpose of the first stage of the trial, defendant concedes² that it did not enter into any license agreement with plaintiff with respect to any of the motion pictures in suit which were telecast by the stations in Pittsburgh, Wheeling and Steubenville.

* * *

1. Footnote 5 of Judge Herlands' opinion: "The relevant television technology, critically essential for the resolution of the basic copyright issue, is explained below in the course of this opinion."
2. Footnote 6 of the opinion: "Defendant contends, however, that there is a license implied in law, an issue raised by its third affirmative defense and encompassed in the first stage of the trial by virtue of the pretrial orders herein."

In all of the contracts whereby plaintiff or its predecessor in title licensed the said television stations to exhibit the motion pictures in suit, it was provided, in substance, that the licensor granted a limited license under copyright to exhibit the pictures over the facilities of the television station and for no other use or purpose.

* * *

Defendant and its predecessors promoted, vended and distributed programs to their subscribers. By means of newspapers, radio and by direct mail, they advertised the variety of programs transmitted; that their subscribers had a choice of more than one station at a time; that the choice of all three networks' programs was available only to their subscribers; that only with the cable could clear, steady, vivid, snow-free pictures be obtained; and that certain programs transmitted from Pittsburgh, Wheeling and Steubenville could be seen only on the cable.

Defendant advertised that, without subscribing to its system, homeowners in Clarksburg were "chained to one channel," *i.e.*, they could view only the programs of the one local channel then on the air. Defendant advertised that only as a subscriber to its Fairmont system could a variety of programming and a choice of shows be obtained in Fairmont.

Defendant's activities in promoting and advertising television programs on its cables were similar to the promotional and advertising activities of a television broadcasting station. Moreover, defendant competed with the local television station and vied with programming much in the same way that television broadcasting stations compete with one another by means of the programs they offer.

* * *

Each of defendant's wire television systems requires a permanent staff of highly qualified technicians; intricate and expensive test and maintenance equipment; special tools; continuous preventive maintenance; and an expensive inventory of cable, amplifiers and other spare parts. A system such as each of defendant's systems would require approximately ten to fifteen people to run it.

Each of the systems is designed to receive specific stations and to reject all other stations. The only programs that can be received through defendant's systems are those that the systems are engineering to distribute. Each of the systems is designed and operated to

offer the subscribers a variety of the best programming available, without duplication.

* * *

Defendant took the position that it was an illegal act for anyone to "steal" the signals it transmitted. Defendant initiated a criminal prosecution against a person accused of having "stolen" its signals; and defendant obtained a conviction. Defendant also took the position, expressed in writing, that it was improper for WBOY, the local Clarksburg television station, to engage in "re-broadcasting *programs*" supplied to it by defendant under a subscription contract. (Emphasis added). Defendant's position was that it was improper for anyone to utilize its system for additional television sets for which the subscriber had not obtained authorization.

Defendant's systems preselected the stations whose programs were provided to its subscribers; *and* supplied some of said subscribers with programs contrary to their expressed preference, and in some instances, even contrary to the expressed preference of most of the subscribers.

Origination of television broadcasts

Television programs originate from any one of the following three sources: (a) a live performance in a television studio or other place of origination; (b) a prior recording of a live performance in the form of magnetic video tape; and (c) a motion picture film. Where the television station serves an affiliated network station (as distinguished from an originating station), the telecasts of the network station are a rebroadcast of the video and audio signals usually delivered to it by the television stations by means of the cable services of the telephone company.

* * *

Television programs, in the form of electromagnetic waves, may be transmitted to home television sets by any one of the following means:

(a) in the case of an originating local station, by direct propagation through the air at radio frequency from the transmitting antenna of the originating television station.

(b) In the case of a network broadcast, from the network's originating studio; first, by propagating the video and audio signals and/or corresponding modulated radio frequency carriers

through a system of coaxial cables and microwave links to the network affiliate station; and then, by propagation through the air at radio frequency from the transmitting antenna of such affiliate station.

(c) in the case of a satellite, translator or repeater station, from the originating television station or local station; first, by propagation through the air at radio frequency to the receiving antenna of a satellite, translator or repeater station (a procedure referred to as "off the air pickup"), and then, by propagation at radio frequency through the air from the transmitting antenna of the said satellite, translator or repeater station; and

(d) in the case of a CATV system, by propagation at radio frequency through its coaxial cables of programs picked up off the air from any one of the different types of transmitters described in subdivision (a), (b) and (c) above.

Defendant's systems utilize antennas specially designed and oriented for optimum reception of each of the five channels carried. The electromagnetic waves which have been received on the antennas travel through coaxial cables from the antennas to a building at the base of the antennas, where the electronic equipment referred to as the "head end equipment" is located.

* * *

The preamplifiers, the amplifiers, the "WCON" convertors, the "Teletrol" units, the "Channel Commander" units (the last three mentioned instruments being used at various times but not simultaneously), and the line and distributing amplifiers throughout defendant's systems are an assemblage of devices which—by enabling the received signals (voltages) to control a local source of electrical power—produces an enlarged reproduction of the essential characteristics of the received signals (input signals). The operations of the foregoing system of instrumentation, among other effects, modulate, on new carrier waves derived from locally supplied electrical energy, the pattern of variations of the input signals. Thereby, there are created output signals which are replicas in electronic terms of the input signals.

These output signals, while completely new, represent the same video and audio information and intelligence as did the input signals. The signals representing both the video and sound do not move as preserved electronic entities through the system, for at each stage of amplification or modulation a new duplicate of the

input is made; the input signals are dissipated and lost and do not join or become part of the output signals. The net effect of defendant's electronic processing is to transmit through defendant's coaxial cables to its subscribers reproduced signals on new carrier waves.

* * *

The intelligence of the performance of a telecast moving picture — consisting of sight and sound as transduced and embodied in the amplitude and frequency variations in the energy of the input signals — is reproduced and duplicated electronically by creating precisely corresponding variations in the new current flowing through the vacuum tubes. The conveyance of the intelligence is effected by reproducing the variations in electrical quantities in the form of output signals, while the input signals arriving at the tubes are dissipated in the form of heat.

* * *

A new amplitude modulated picture carrier wave and a new frequency modulated sound carrier wave reproduced by the head end equipment — representing the sights and sounds of the programs received — are transmitted by defendant in the form of electromagnetic waves propagated within a coaxial cable, *i.e.*, the transmission lines of defendant's systems, to the homes of the subscribers.

* * *

Defendant's systems convert the higher band channels (7-13) to the lower band channels (2-6) in the VHF range.

* * *

Defendant's systems are not passive antennas. They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables. The term "passive" signifies a device which does not add energy to any of the signals being handled by the system. In that sense, only the antenna and the cable are passive. All of the other equipment, such as the preamplifiers, "Teletrol" demodulators and modulators, WCON convertors, "Channel Commanders" and line and distribution amplifiers, used by defendant's systems at various times, are active, not passive.

* * *

Nature, function, design and purpose of defendants CATV systems compared with other television program distribution systems.

Four typical distribution systems are used to extend television service:

(1) Regularly licensed television broadcast stations receive the signals of other television stations by direct off-the-air reception or by a coaxial cable or microwave link system from a network originating source and then distribute the signals by rebroadcasting them;

(2) UHF translators receive and rebroadcast signals from television stations;

(3) VHF repeater stations receive broadcast signals by a superior receiving installation, and amplify and retransmit them;

(4) CATV systems receive, process and distribute signals by coaxial cable to their subscribers.

The electronic processes and equipment employed by all of these distribution systems for the reception, reproduction and transmission of the electromagnetic waves representing television programs originated by other television stations or network studios are basically the same in purpose, function and design. Each of them employs substantially the same complex combinations of amplifiers, detectors or modulators, frequency convertors, and attendant devices designed to accomplish the purpose of receiving, reproducing and retransmitting the electromagnetic waves representing television programs originated by other stations or network studios.

The basic purpose of defendant's CATV systems, like the basic purpose of other distribution systems, is to process and retransmit signals of a television broadcast station to areas in which direct reception by ordinary home antennas of such television broadcast is unsatisfactory because of distance, intervening topographical conditions, or similar factors.

Defendant's systems, with respect to each channel received, perform a function substantially identical to that of a network affiliated station, UHF translator, or VHF repeater in that they all not only receive but also retransmit signals originated elsewhere.

In preparing the received signals for retransmission, the head end equipment in defendant's systems creates new modulated carrier waves. This was particularly apparent in those instances where Teletrol units were used to create new AM carrier waves. The process by which defendant's systems creates new modulated carrier

waves from the received signals is electronically the same as the modulating processing performed by a television station, a translator and a repeater station in order to transmit received signals.

The head end equipment in each of defendant's systems could operate as a low-power television transmitter in a television broadcasting station.

The dominant, over-all function and design of defendant's systems at all times—regardless of the individual instruments or specific equipment used from time to time—were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting TV program material to a large number of subscribers, who are in effect their audience. In view of the foregoing characteristics, defendant's systems are, in material respects, analogous to television stations, translator and repeater stations.

Defendant's systems are communication systems for the reasons that they were designed and engineered to, and do, convey information from one location to other locations.

Transmitting signals through the air and transmitting signals through a coaxial cable are equivalent in electronic terms. The same kind of electromagnetic field is transmitted and both types of transmission are manifestations of the working of precisely the same set of physical laws (Maxwell's equations). In the case of a transmission over the air, an electromagnetic field is radiated from the transmitter antenna. In the case of a transmission by coaxial cable, an electromagnetic field is formed within the space in the cable between the metal conducting elements of the cable and is propagated along the cable in that interior space. Only the boundary conditions are different in the two cases. If the outer sheath of the cable were removed, the electromagnetic field would propagate in all directions through the air and there would be a low-power telecast.

* * *

When a television station telecasts from magnetic tape or from film, no visual images or sound are seen or heard in the studio; and the station does not reproduce within its system any perceivable sight or sound except on monitors. Insofar as sound and sight are concerned, there is no difference between television transmission through the air and CATV transmission: in both systems sound and sight are unobservable by the unaided human senses.

When a station affiliated with a network receives signals either by coaxial cable or off the air, it amplifies and modulates the signals and then transmits the newly created signals, usually without

making any tape of the signals. Similarly, when defendant's systems receive, reproduce and retransmit a program, no tape of the signals is made.

Predominantly and primarily, the operations of defendant's systems are auxiliary and complementary to television broadcasting.

Defendant's systems could and did transmit messages with its video scanner. It thus could and did originate a telecast of a message as an originating broadcast station would do. The video scanner converted a fixed scene contained on a slide into a video voltage similar to those derived from a television camera.

Defendant's systems, with but slight modification, had the capacity to originate programs from film or tape. The sending of a message by the use of a scanner constituted the operation of a television transmitting station.

Some CATV systems have the capacity to, and do, originate and send out weather reports from their own head end systems.

Like a network affiliated station, the head end of defendant's systems could receive electromagnetic signals directly from a microwave link and coaxial cable system and retransmit them through its coaxial cables to its subscribers.

* * *

The crucial question which this court must answer has been reduced, by a process of distillation, to whether defendant's CATV systems have infringed upon plaintiff's exclusive right "to perform"³ its copyrights works under section 1(c) and (d).⁴ As to that issue, the court finds and concludes that defendant has infringed, is infringing and threatens to continue to infringe plaintiff's exclusive rights to perform the copyrighted moving pictures specified in the complaint, which rights were and are granted to plaintiff by 17 U.S.C. § 1(c) and (d) (1964); and the court further finds and concludes that defendant's activities in the conduct of its business are not within the privileged scope of any license, express or implied, in fact or in law.

3. Footnote 8 of the opinion reads: "The court finds it unnecessary, for purposes of this decision, to make any distinction between the word 'perform' as it appears in 17 U.S.C. Sec. 1(c) and Sec. 1(d) (1964)."

4. Footnote 9 of the opinion reads: "Defendant has not taken the position that, if it is found 'to perform', such performances are not 'public' or 'for profit'. Therefore, the court does not find it necessary to discuss those issues in detail. For the record, the court finds and concludes that defendant's performances were 'public' and 'for profit'."

In thus completely upholding plaintiff with respect to the issues litigated in the first stage of the trial, the court does not deem it necessary to subscribe to all of plaintiff's claims in their full sweep. Plaintiff has charged defendant with infringing conduct violative of not only plaintiff's exclusive performing rights granted under section 1(c) and (d) but also of plaintiff's exclusive rights under section 1(a) and of those numerous rights under section 1(c) and (d) in addition to the right to perform. Although some of plaintiff's arguments as to these additional rights are not without force, the court does not think it appropriate to address itself to the questions raised by them. The potential ramifications of an adjudication of those additional issues are so far-reaching that the court will not pass on them where such a determination is not necessary to a disposition of the case at bar. The ends of justice are best served by the court's limiting its decision to the issue of whether defendant has infringed plaintiff's performing rights.

* * *

The rights asserted by plaintiff are derived solely from the Copyright Act. Consequently, the court's primary task is one of statutory interpretation. That task requires the court to give meaning to a word appearing in a Congressional enactment and not merely to ascertain on a show of hands what definition laymen would give the same word when used in ordinary conversation. The role of the court in interpreting statutory words is not the same as that of the dictionary editor. The desiderata guiding each are of a different order.

The court must decide whether the realities of the situation dictate a conclusion that defendant's activities fall inside the line on the spectrum which separates those acts which must be held to be beyond the scope of the copyright statute from those which must be held to be within the statute's purview. For purpose of analysis, the realities of the present situation may be considered in terms of (a) linguistic realities, (b) technological realities and (c) economic realities. These categories are, of course, not mutually exclusive; there is a degree of overlap.

* * *

In interpreting a statutory provision, the court must attribute to the operative word used that one of its meanings which accords most closely with the intention of the enacting legislature and with the underlying purpose which led the legislators to choose that particular word.

Manifestly, Congress could not have had any specific intent with regard to CATV systems when it enacted the Copyright Act for the reason that CATV is a relatively recent development.⁵ That, however, is not to say that CATV is outside the purview of the Copyright Act. In a cognate case, the Court of Appeals for the Sixth Circuit stated the proposition as follows:

"While the fact that the radio was not developed at the time the Copyright Act . . . was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning." . . . *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F. 2d 411-12 (6th Cir. 1925), *reversing*, 298 Fed. 628 (S.D. Ohio 1924), *cert. denied*, 269 U.S. 556 (1925). See *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 59 F. 2d 70, 76 (1st Cir. 1932); *Edison v. Lubin*, 122 Fed. 240, 242 (3d Cir. 1903).

* * *

In determining whether to do that which defendant does is "to perform," the court must ascertain the content of the word "perform" as it is used in the statute.

* * *

Allusion has been made to the classical conception of a performance as involving a player acting out a work in the immediate presence of an audience. The inclusiveness of this classic conception no longer holds true. The contemporary revolution in the science and technology of mass communication — a revolution generally recognized as profound as the invention of the printing press — has, in reality, altered the content of the concept "to perform." It is now not only within the realm of possibility, but, indeed, it is the prevalent mode of performance for the work to be rendered in a place physically or geographically apart from the place where the intended audience perceives and enjoys the performance.

Modern mass telecommunication technology has caused what was once coalesced in the term "performance" to be conceptually

5. Footnote 13 of the opinion reads: "The first commercial television license was granted in 1941. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, n. 3 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956). The pioneer commercial radio broadcasting station was erected in 1920. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 196 n. 2 (1931)."

and factually separable into its three components. This triad consists of (1) the rendition by the actor; (2) the method of communicating the rendition to the audience; and (3) the method by which the audience is enabled to perceive an audible and/or visible reproduction of the original rendition. All these elements are integral parts of today's "performance." Conceptual difficulty arises only when there is a lapse in our recognition of the effect the communication revolution has had on the concept of "performance" and when our thinking regresses to the time when the three component elements of a performance could be viewed as one without any danger of telling only a part of the story.

* * *

When a CATV system brings the acting or the playing to the audience and makes available to that audience a reproduction of a primary performance (as embodied in the phonograph record, the magnetic tape, or the film, etc.), it is executing a function that is so closely akin in result to the work that, for purposes of protecting the copyright proprietor's performance monopoly, the court finds that it should treat the situation as if there were a classical performance and attach to it the consequences resulting from an unauthorized primary performance. There can be no doubt that there are physical differences, but they arise out of differences in technique of communication — not in what is being transmitted and what is ultimately seen and heard by the viewing public. . . .

The technological realities involved in the operation of a CATV system demonstrate that it is not merely a passive antenna service. The court has found that defendant's CATV systems do not simply receive telecast signals and pass *those* signals on to its subscribers. To the contrary, defendant's CATV systems not only receive the telecast signals but also electronically process them. What defendant passes on to its subscribers are not the same signals that were received but electronic reproductions of them, containing, however, the same program information or intelligence.

Defendant emphasizes the undisputed fact that a telecast received on defendant's systems is not visible or audible at any point within defendant's systems; but it is visible and audible only on the television sets of defendant's subscribers. That plaintiff's copyrighted motion pictures are not visible or audible until they reach the subscriber's television sets emphasizes, rather than contradicts, the essential similarity between a CATV system and a broadcasting station and the dissimilarity between a CATV system and a home receiving set. Indeed, except in the comparatively rare in-

stances where a broadcasting station has a live performance in its own studio, there is nothing visible or audible at the broadcasting station. Even when a broadcasting station originates programs by transducing motion picture films or videotapes into electromagnetic energy, there is nothing visible or audible to an observer at the station. The projection of the film in a television studio is on a small photosensitive surface within a camera tube. The fact that in CATV operations, as in the case of a broadcasting transmission, nothing is visible or audible in the process of transmission demonstrates the dissimilarity between CATV and a home receiver, on the one hand, and the similarity between CATV and a broadcasting station, on the other.

It is incorrect to say that all broadcasting stations convert sight and sound into electromagnetic energy. Only when a "live" performance is originated in the studio do sight and sound exist as such. In those instances, the sight and sound is converted, *i.e.*, "transduced," into electromagnetic energy. In many other instances, broadcasting stations such as network affiliates, independent local stations, translators, repeater stations and satellite stations, merely retransmit electromagnetic energy received by them from the originating station in the same manner as CATV receives and retransmits electromagnetic waves—the only significant difference between such broadcasting stations and CATV being that broadcasting stations transmit through the air while CATV transmits through cables. Neither in the case of CATV nor in the case of such network affiliates, local stations, translators, repeater stations and satellite stations is anything which may be seen or heard converted into electromagnetic energy by the process of transduction.

By the technique of transduction, sounds and images are originally converted into precisely corresponding audio and video signals representing the same program information or intelligence as the sounds and images. Otherwise stated, the very same information or intelligence is embodied in two different but interconvertible forms of energy. Both forms of energy function as technological equivalents in the sense that each represents a "manner" in and "method" by which one may "perform," within the meaning of section 1(c) and (d) of the Copyright Act.

The economic realities involved in the operation of a CATV system demonstrate that defendant is in the business of selling television programs to the public. Contrary to defendant's contentions that it merely makes available electromagnetic waves and not performances, the subscriber is willing to pay for defendant's service

only because he gets that which he desires — television programs, not simply electromagnetic waves. Admittedly, the means of delivering the performances is novel — by the propagation of electromagnetic waves through a coaxial cable — but the performance itself is the salable commodity.

Moreover, it is apparent that in certain circumstances, defendant's CATV systems do, in a very real sense, perform the same function as broadcasters or rebroadcasters and are in direct competition with them for audiences. They are a means of making available a reproduction of a primary performance to an audience; and that is perhaps the economic justification for the existence of CATV systems as well as broadcasters and rebroadcasters. . . .

Denominating as a performance only the rendition by the actor is, today, not only descriptively inaccurate in fact, but is not in accord with judicial usage with respect to the Copyright Act.

Prior decisions have foreclosed the argument that the only performance occurs at the studio where the actor emotes, see, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 197-98 (1931). Defendant, however, would have the court find that there is no other "performance" until the homeowner switches on his television set; and that, therefore, one who — like defendant — stops short of the last act necessary to produce an audible and visible reproduction of the broadcast performance cannot be charged with having performed. The court finds that position contrary to the teachings of the relevant case law.

Although the precise question now presented for adjudication is one of novel impression,⁶ the decided cases indicate both a trend and a general philosophy that have assisted the court in resolving the issues before it. . . .

When radio broadcasting was in its infancy, a number of ingenious arguments were advanced, both by broadcasters and those who made commercial use of the broadcasts they received, in support of their contention that they were free to make commercial

6. Footnote 16 of the opinion which reads: "While it is true that the case at bar is the first one presenting the precise issue before the court for adjudication, the CATV phenomenon has come before the courts in other contexts. See, e.g., *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963); *Lilly v. United States*, 238 F. 2d 584 (4th Cir. 1956); *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho 1962), *rev'd and remanded*, 335 F. 2d 348 (9th Cir. 1964), *cert. denied sub nom. Klix Corp. v. Cable Union, Inc.*, 379 U.S. 989 (1965); *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (D. Idaho 1961)."

use of copyrighted works without subjecting themselves to amercement. . . . At what may be described as a rudimentary phase in this line of decisions, a radio broadcaster caused an unauthorized live performance of a copyrighted opera to be given in its studio without an audience being present. The court rejected the argument that the "performance" was private and not "public," and held the broadcaster liable as an infringer. *Messenger v. British Broadcasting Co.*, [1927] 2 K.B. 543, *reversed on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151. . . . [See also] *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925); . . . *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D.N.J. 1923). And this court had little difficulty in reaching a similar result even when the playing of a phonograph record was substituted for a live performance. *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 46 F. Supp. 829, 831 (S.D.N.Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944). . . .

Perhaps the leading case dealing with the liability of one who makes commercial use of a broadcast performance is the Supreme Court's decision in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) (Brandeis, J.) (hereinafter "*Buck*").

In a previous decision, the Supreme Court had held that a hotel which hired an orchestra to play dinner music in its dining room for its guests' pleasure, and another hotel which hired singers who were accompanied by an orchestra, infringed the copyright proprietors' exclusive right to perform in public for profit despite the fact that no separate charge was levied for listening to the music. *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

* * *

In the *Buck* case, the Court was presented with a situation where a hotel accomplished precisely the same result condemned in *Herbert v. Shanley Co.*, *supra*, albeit by another method. Instead of hiring an orchestra and singers, the hotel used radio music to entertain its guests.

The LaSalle Hotel maintained a master radio receiving set which was wired to each of the hotel's public and private rooms. As part of the service offered to its guests, loudspeakers or headphones were provided so that a program received on the master set could be simultaneously heard throughout the building. A radio broadcaster, *without authorization*, broadcast a performance of a copyrighted song which was received by the hotel on its master

radio receiving set and made available to its guests. The District Court, 32 F. 2d 366 (W.D. Mo. 1929), held that such acts did not constitute a "performance" within the meaning of the Copyright Act; and the Circuit Court certified the following question to the Supreme Court:

"*Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?*" 283 U.S. at 195-96. (Emphasis added.)

The Court answered the certified question affirmatively.

* * *

In a highly revealing statement of the Court's view of the flexibility of the concept "to perform," the Court stated that, in a situation such as the one then before it, "public reception for profit in itself constitutes an infringement" of the copyright proprietor's exclusive right to perform. *Ibid.*

* * *

In determining whether the hotel's acts constituted a performance, the Supreme Court regarded as significant the fact that:

"There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loudspeakers here employed, it furnishes the same music for the same purpose." 283 U.S. at 201.

The next case in this line is *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) (Woolsey, D.J.) (hereinafter "*SESAC*").

In the *SESAC* case, the hotel had installed for its guests' listening pleasure what was denominated "a two channel radio system." It consisted of two master radio receiving sets, amplifying apparatus and a cable from which distribution lines were connected to loudspeakers in the hotel's nineteen hundred individual guest rooms. A guest could, while in his own room, manipulate a switch in much the same manner in which one uses an ordinary radio to hear radio

broadcasts. However, the selection of programs available to him was limited to the two that were being received on the hotel's two master receiving sets.

* * *

Despite the fact that the hotel's acts stopped short of producing an audible reproduction of the broadcast performance, Judge Woolsey found them sufficient to constitute a performance within the meaning of the Copyright Act. The problem presented in *SESAC* differs from the problem presented for adjudication in the case at bar only in degree and not in kind. This court must likewise decide whether the acts of defendant—despite the fact that they stop short of producing an audible and visible reproduction of the broadcast performance—are sufficient to constitute a performance within the meaning of the Act.

Judge Woolsey rejected the argument that liability for an unauthorized performance exists only when defendant performs the last act necessary to convert the electromagnetic waves it receives into an audible reproduction of the broadcast performance. He said:

“This argument is based on the theory that it is only the last step which counts.

I do not agree to that principle as here applied. . . .”

19 F. Supp. at 4.

* * *

Relying on footnote 5 in the *Buck* case, *supra*, 283 U.S. at 199, defendant has argued in the case at bar that there is an *implied in law* license for commercial TV reception and distribution of a telecast performance.⁷ While the Supreme Court did not have the question before it in the *Buck* case (because the radio broadcaster, as well as the hotel which used the broadcast for commercial purposes, was unauthorized to do so), the Supreme Court did state that, had the broadcaster been authorized, “a license for its commercial reception and distribution by the hotel company might possibly have been implied.” 283 U.S. at 199 n. 5. The Court suggested a comparison to *Buck v. Debaum*, 40 F. 2d 734 (S.D. Cal. 1929).

7. Footnote 19 of the opinion which reads: “To obviate any possible confusion, the court points out that the following discussion concerns the possible existence of a license implied in law as opposed to one implied in fact. The court has found and concluded that no credible evidence was adduced at the first stage of the trial which would indicate that defendant was the beneficiary of any license in fact or in law, express or implied.”

In the *Debaum* case, *supra*, the District Court held that the owner and operator of a café, who played an ordinary radio set so that his patrons could hear and enjoy the programs, did not infringe a copyright proprietor's exclusive right to perform when he made available broadcasts of copyrighted music to his patrons.

Perhaps the most fruitful way to analyse the Supreme Court's reference to the *Debaum* case is to recognize that the District Court in *Debaum* rested its finding of no infringement on two theories — one of which the Supreme Court overruled and the other of which it did not find necessary or appropriate to consider on the facts then before it. The *Debaum* court's conclusion that the reception of a broadcast of a copyrighted work for commercial purposes cannot constitute a performance because the only performance in such a case takes place in the studio of the broadcasting station was clearly overruled by the Supreme Court. However, the court in *Debaum* also rested its decision on the ground that, when the copyright proprietors "licensed the broadcasting station to disseminate the . . . [copyrighted song], they impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception." 40 F. 2d at 735.

* * *

While our Supreme Court has never had occasion to consider the question, the existence of an implied in law license in such a situation would seem to have been rejected in both England and Canada. See *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co.*, 49 Times Law Reports 410 (Chan. Div. 1933), *aff'd*, 50 Times Law Reports 16 (Ct. of App. 1933), *aff'd*, [1934], 1 Ch. 121; *Canadian Performing Right Soc. v. Ford Hotel*, [1935], 2 Dominion Law Reports 391.

The question being not whether there *is* an implied in law license to perform publicly for profit but rather whether there *should* be, this court holds that there should not. Unlike the District Court in the *Debaum* case, this court cannot find that the copyright proprietor of today "can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station. . . ." 40 F. 2d at 736.

Included within the first stage of the trial by force of the court's pre-trial orders is the issue raised by the third separate defense. The gist of this defense, as pleaded in paragraphs "37" and "38" of the answer, is that, under the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), as implemented by regulations promulgated by the Federal Communications Commission, "no per-

son may lawfully impose [a] charge upon the reception of commercial television broadcasts and every person is free to receive such broadcasts by the equipment of his choice"; that the commercial television broadcasting stations referred to in the complaint as having broadcast the plaintiff's motion pictures did so pursuant to license from plaintiff and pursuant to license from the FCC; that the FCC license "precludes a charge to the public for the reception of the broadcasts"; and, hence, "plaintiff seeks by this action to impose an unlawful charge upon the reception by defendant's subscribers of broadcasts by commercial television, and may not recover." A paraphrase of this defense, as pleaded, is that the Communications Act and FCC regulations prohibit plaintiff from collecting copyright royalties from defendant because the Act and regulations make plaintiff's collection of such royalties unlawful.

Having considered defendant's arguments and examined the authorities it cites in support of its third separate defense, the court finds and concludes that there is no merit to that defense. No useful purpose would be served by including in this opinion a detailed exposition of the court's analysis of the contentions advanced by the respective parties. Beyond cavil, neither the policy nor the language of the Federal Communications Act or the regulations promulgated thereunder, nor the reports of the FCC are intended to or have the effect of repealing or modifying section 1 of the Copyright Act. The court finds no basis for concluding that defendant is the beneficiary of any license implied in law.

* * *

The court holds that when a CATV system, for profit, plays so substantial a part in a reproduction of a broadcast performance being seen and heard by the public that the only act necessary to transduce the electromagnetic waves it has processed and transmitted to subscribers into an audible and visible reproduction of the broadcast performance is a minor, albeit essential, one — such as "turning the knob" on a homeowner's television set — the CATV system must be said to have infringed upon the exclusive right to "perform" which Congress has bestowed upon the copyright proprietor in 17 U.S.C. § 1(c) and (d). In so holding, the court believes that it adopts a construction of section 1 that recognizes contemporary scientific realities, takes into consideration the current technologies of the television industry, effectuates the predominant purpose and policy of the statute, and gives the language of the Act a

meaning consonant with the trend of interpretative decisions in cognate fields.⁸

* * *

In summary, the court concludes:

1. With respect to plaintiff's copyrighted motion pictures other than photoplays, defendant has infringed upon plaintiff's copyrights by performing plaintiff's said copyrighted motion pictures in public for profit. 17 U.S.C. § 1(c) (1964).

2. With respect to plaintiff's copyrighted motion pictures which are photoplays, defendant has infringed upon plaintiff's copyrights by performing plaintiff's said copyrighted motion pictures publicly. 17 U.S.C. § 1(d) (1964).

3. The Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), does not prohibit plaintiff, as copyright proprietor, from collecting royalties from defendant's CATV systems for their public performance of plaintiff's copyrighted motion pictures.

4. Neither the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964) nor the broadcasting licenses from the Federal Communications Commission to the television stations in Pittsburgh, Steubenville and Wheeling nor the contractual licenses from plaintiff to said television stations operate as licenses which would authorize defendant to perform plaintiff's copyrighted works without plaintiff's consent.

The court grants plaintiff's motions (1) for an interlocutory decree and order as to the issues tried in the first stage of the trial, and (2) to strike and dismiss the third separate defense on the

8. Footnote 23 of the opinion which reads: "Compare the similar conclusion reached by the Register of Copyrights in the course of his inquiry into the question of whether CATV should be granted a statutory immunity in the proposed revision of the Copyright Act: 'On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill.' Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Printed for use of the House Committee on the Judiciary, 89th Cong., 1st Sess. at p. 42 (Comm. Print May, 1965)."

merits. The court denies defendant's motion for a decree and order dismissing the complaint.

348. *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 251 F. Supp. 302, 148 U.S.P.Q. 417 (S.D.N.Y., Dec. 16, 1965) (Wyatt, J.)

Action for copyright infringement. Defendant is a community television antenna (CATV) operator who had picked up television signals carrying plaintiff's copyrighted television programs and transmitted them to subscribers. Plaintiff moved for summary judgment.

Held, motion denied.

The court held that the question whether CATV transmission of copyrighted material is an infringement of the copyright is a question of first impression and one of very great importance and, therefore, should be decided after trial rather than on summary judgment. It was also held that it would be desirable to have "live" testimony, with the possibility of cross-examination, with respect to the complicated technical questions involved. The court said:

Plaintiffs charge that defendant by its CATV pickup and distribution infringed their copyrights. They rely on the precedents from the radio field involving the reception by a hotel of radio programs in a "master radio receiving set" and distribution through "loud-speakers or head-phones" to the rooms of the hotel. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191. 9 USPQ 17 (1931); *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., Inc.*, 19 F. Supp. 1, 34 USPQ 9 (S.D.N.Y. 1937).

An important factor for present purposes is that the case at bar is, or may well be, a test case.

Defendant is not the only operator of CATV systems. On the contrary, this type of enterprise began some fifteen years ago. . . .

The Federal Communications Commission has this year taken note of the "nationwide growth of CATV" and the "explosive CATV growth" (30 Fed. Reg. 6039 (1965)), has asserted jurisdiction over CATV systems (30 Fed. Reg. 6082 and following). . . .

There has never been a decision as to whether distribution by a CATV system was the infringement of a federal copyright, although the question has been frequently discussed. . . .

An action similar to that at bar is pending in this Court, the complaint having been filed June 29, 1960. For an interlocutory ruling and opinion by Judge Herlands in the earlier case, see *United*

Artists Associated, Inc. v. NWL Corp., 198 F. Supp. 953, 132 USPQ 248 (S.D.N.Y. 1961). . . .

From all the background it seems reasonably clear that the case at bar is not only one of first impression but is also a test case and one of the battles in a war between the television broadcasting industry on the one hand and the CATV system operators on the other.

I do not believe that our Court of Appeals would approve an attempt to decide such a case by summary judgment.

Moreover, a significant part of the factual area is technical. Each side has submitted an affidavit of an engineer, expert in electrical, television, electronic and communication matters. The affidavits of these experts are naturally drawn so that their language in stating facts reflects the legal theories of their respective employers. This may be another situation "where the so-called evidentiary facts—the underlying physical data—are not in dispute; but the inferences to be drawn from them are disputed". *Empire Electronics Co. v. United States*, 311 F.2d 175, 179 (2d Cir. 1962). In any event, it seems far better to have live testimony from the experts, with opportunity for cross-examination, before deciding a case like this.

349. *Davis v. E. I. DuPont de Nemours & Co.*, 249 F. Supp. 329, 148 U.S.P.Q. 328 (S.D.N.Y., Jan. 20, 1966) (Feinberg, J.)

Action for copyright infringement. It having been held that plaintiff's copyright in a dramatization of "Ethan Frome" was infringed by a subsequent network television broadcast of a dramatization of the same novel, 240 F. Supp. 612, 145 U.S.P.Q. 258 (S.D.N.Y. 1965), 12 BULL. CR. Soc. 378, Item No. 286 (1965), the court proceeded to consider the question of damages. Plaintiff had formally notified defendants prior to the broadcast of his claim that it would constitute an infringement of his copyright.

Held, damages awarded in the sum of \$25,000.

The court held that a network television broadcast over 162 stations constituted a single infringement, but that the statutory limit of \$5,000 for "in lieu" damages did not apply because defendants had been given written notice prior to the broadcast of the claim of infringement. The court said:

The basic issues before the court are: (1) whether the 1960 telecast by 162 stations was one "infringement" by these defendants

or 162, thereby determining whether the minimum statutory damage is \$250 or \$40,500; (2) if there was only one infringement, whether the maximum damage is the \$5,000 limit set forth in 17 U.S.C. 101(b), or whether this is inapplicable because defendants had "actual notice" of the copyright claim; and (3) in any event, at what figure "just" damages should be fixed. . . .

On the first issue — whether the network telecast over 162 stations was one infringement by these defendants or 162 — the cases are not truly helpful. In *Law v. National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943), plaintiff sued for copyright infringement of a song which had been performed on radio on three occasions over a total of 218 stations. . . . The court. . . fixed damages at 218 times \$10, or \$2,180, rejecting defendants' argument that damages amounted only to \$30 on the theory that each of the three network broadcasts should be considered only one yardstick performance. It is not clear whether the court regarded the three network broadcasts as one infringement or three. . . . It is clear, however, that the court did not regard each broadcast by each radio station as a separate infringement because it did not apply a multiplier of 218 to the statutory minimum of \$250 to reach minimum damages of \$54,500. . . .

In *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), relied upon by the court in *Law*, a radio station played two copyrighted songs without permission. A hotel in the same city, through a master receiving radio set, picked up the songs and transmitted them simultaneously by wire throughout public areas and many private rooms of the hotel. . . . [T]he court stated (283 U.S. at 198):

"But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. . . ."

Jewell-LaSalle was authority for the holding in *Law* that three could be 218 performances growing out of three network broadcasts. However, *Jewell-LaSalle* did not deal with the issue of whether a simultaneous broadcast over many stations is more than one "infringement" under 17 U.S.C. 101(b), as well as more than one "performance". . . .

L. A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919). . . involved newspaper publication of six separately copyrighted pictorial illustrations. The Court found seven infringements. Five of the infringements consisted of reproduction in de-

fendant's newspaper on five different occasions of a different copyrighted illustration. Of significance here, the Court found two additional infringements because defendant twice published (twenty-six days apart) plaintiff's sixth copyrighted illustration. . . . Thus, a review of the cases indicates that there is no binding precedent in point on the issue of whether a network telecast over 162 stations constitutes one infringement or 162. . . .

With this in mind, it is appropriate . . . to focus on the statute . . . The limits on the "in lieu of," or statutory, damages are that they shall in no "case" exceed \$5,000 or be less than \$250, with an exception to the maximum to be discussed below. The law is clear that an award of statutory damages of any amount from \$250 to \$5,000 for an infringement is within the discretion of the trial court. In situations where repetitive infringement of a copyrighted work is probable, the statute suggests amounts ("yardstick amounts") to guide the court in the exercise of its discretion. Thus, the yardstick amounts for "a dramatic composition" like the Davis play infringed here are \$100 for the first and \$50 "for every subsequent infringing performance." Clearly, then, the statutory scheme contemplates that one "infringement" may nevertheless result in more than one "performance". . . .

With neither conclusive precedents nor legislative guidance, the competing policies underlying the contending positions of the parties become more significant. Under the copyright law, plaintiff is undoubtedly entitled to protection for his independent creation, but the protection should be appropriate. . . .

Plaintiff points out that the statutory damage provisions have a deterrent, as well as a compensatory, purpose and argues that a finding of multiple infringements is necessary "to discourage wrongful conduct." . . . However, the cases neither minimize the compensatory statutory purpose nor indicate that deterrence should be carried to an extreme by converting a \$250 incentive to sue into a windfall . . . Requiring a mechanical application of a rule of multiple minimum damages for each network broadcast or telecast could . . . at times have absurd results. On the other hand, retaining flexibility with respect to minimum damages would not destroy the deterrent effect of any award since it would rarely, if ever, as a practical matter, require a court to undercompensate a plaintiff . . .

On balance, it seems preferable, for the purpose of applying the statutory damage provisions, to regard the simultaneous network telecast here as one infringement by the network and these

co-defendants rather than many. This preserves flexibility, avoids the possibility of a ridiculous and injurious award in other cases and is the result at least suggested by the cases and the statute. . . .

Having held that the network telecast of "Ethan Frome" was only a single infringement, the next issue is whether there is a \$5,000 maximum on damages. Section 101(b) sets that limit for one infringement but also states that:

"[T]he limitation as to the amount of recovery [shall not] apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice upon him."

In the former opinion in this case, it was noted that:

"In December 1959 and January 1960, Davis formally notified defendants that if they went ahead with the proposed television performance of "Ethan Frome" based upon the Deutsch screenplay, without the consent of Davis, they would be committing a deliberate copyright infringement."

. . . The issue is whether these warnings were "actual notice to a defendant, either by service of process in a suit or other written notice served upon him." . . . By specifying that written notice other than service of process will suffice, Congress has quite surely indicated that one need not already have become a defendant for written notice to be effective. No reason has been pointed out why Congress would have intended to shield an infringer who has been given full written notice until after the arbitrary point in time when the copyright owner has been able to draw up and file a complaint against him. See generally, Nimmer, Copyright § 154.2 at 685-86 (1964). I conclude that a letter or telegram may be sufficient written notice to lift the \$5,000 maximum set forth in section 101(b), and that such notice was given here. . . .

Having found that each defendant, except Babbitt and Gellen [the script writers], received timely and sufficient notice, CBS, DuPont, Talent, Susskind and BBDO may be held jointly and severally liable for damages in excess of \$5,000. Babbitt and Gellen may be held liable only to the extent of \$5,000.

Thus, the ultimate issue before the court is what damages "appear to be just." On the facts of this case, the possible range of discretion is broad, since the \$250 minimum for one infringement . . . is too small, and the \$5,000 maximum does not apply.

. . . With these two limits inapplicable, as might be expected, the suggestions of the parties are far apart.

Plaintiff urges that damages be fixed at \$211,500 based upon the following computation: \$30,000 as a figure "reasonably reflecting damages" to plaintiff, added to \$40,000, as a figure "reasonably reflecting profits and in lieu thereof a minimum of \$250 multiplied by 162 separate infringements to make a total of \$70,500 which, in turn, should be tripled "as a deterrent." Defendants suggest, . . . that the \$5,000 limit for one infringement applies. However, in the event this contention is rejected, as it has been, defendants alternatively argue that "just" damages should be determined by the yardstick amounts of \$100 for the first performance and \$50 for each additional performance, for a total of \$8,150.

Plaintiff's contention that a minimum of \$40,500 must be included in the damage figure because there were 162 separate infringements has already been dealt with . . . and rejected. Moreover, short shrift should be made of his argument that whatever figure is fixed as damages should be trebled to serve as "a deterrent." Plaintiff relies by analogy on patent and antitrust law in arguing that Congress has there determined "what formula would constitute a deterrent." However, the trebling of damages there is done pursuant to specific congressional authorization or command, notably absent here . . . Moreover, even if by some stretch of the imagination trebling, as proposed by plaintiff, were within the court's authority, I emphatically reject the notion that the suggested astronomical figure would on these facts be "just." . . .

After much reflection, I conclude that a court has the discretion to depart from the yardstick amounts, even if the \$5,000 limit is inapplicable, and can depart upward as well as downward. This upward discretion should be used most sparingly and only when the yardstick amounts produce a clearly inadequate damage award for a violation of plaintiff's copyright. I have no doubt that this is such a case. . . .

Accordingly, after a review of the entire record, I find that the damages which "to the court appear to be just" under the circumstances of this case amount to \$25,000. In reaching this conclusion I have taken into account plaintiff's undoubted injury, plaintiff's notice to defendants prior to infringement, and all of the other facts and arguments advanced by the parties. . . .

To summarize: I find that the network telecast over 162 stations was one infringement by these defendants, that the \$5,000

maximum does not apply, and that plaintiff is entitled to an award of damages of \$25,000.

350. *G. P. Putnam's Sons v. Lancer Books, Inc.*, 251 F. Supp. 210, 148 U.S.P.Q. 596 (S.D.N.Y., February 25, 1966) (Bryan, J.). For decision on preliminary injunction, see 239 F. Supp. 782, 144 U.S.P.Q. 530, 12 BULL. CR. SOC. 236, Item No. 174 (S.D.N.Y. 1965).

Action for copyright infringement. The original edition of the novel "Candy", written by two United States citizens, was published in France in 1958. There were several European editions, all of which carried notice of copyright. No ad interim copyright protection was applied for in the United States, and the European editions were not distributed here. In 1964, plaintiff published a slightly revised American edition which was extremely successful. Defendant then published a paperback version of the original French edition. Plaintiff's American edition carried a copyright notice and was registered for copyright, but the copyright claim was limited to the revisions. Plaintiff's motion for a preliminary injunction was denied on the ground that the original edition of "Candy" was in the public domain because no ad interim copyright protection was secured. Plaintiff then attempted to secure a copyright registration for the original unrevised version, but its application was rejected by the Copyright Office. Plaintiff's mandamus action to compel the Copyright Office to accept the registration application was pending and undetermined when defendant moved to dismiss the complaint.

Held, motion granted without prejudice.

I. The court held that the infringement action could not be maintained unless and until a copyright registration for the work alleged to be infringed was secured, and that the question of plaintiff's right to copyright registration could be decided only in the pending mandamus action, not in the infringement action. The court said:

Defendants argue that §13 of the Copyright Law forbids the maintenance of an action for copyright infringement unless the work has been registered with the Copyright Office. Since the plaintiffs have not obtained such a registration, defendants, relying on *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 119 USPQ 189 (2d Cir., 1958), contend that under *Vacheron*, where registration has been refused, plaintiffs' sole remedy lies in a proceeding in the nature of mandamus against the Register of Copyrights to compel registration, such as is pending

in the District of Columbia. Their ultimate position is that the original unrevised text of the novel as published in France in 1958 is now in the public domain in the United States because the authors failed to comply with the Copyright Law. However, they do not present that issue for determination here.

Plaintiffs, on the other hand, contend that despite the provisions of §13 an action for infringement may be maintained even though registration by the Copyright Office has been refused, as long as the work has been published with notice of copyright. They urge all questions concerning the validity and right to registration may be litigated and determined in such an action. They also argue that the *Vacheron* case was incorrectly decided and, in any event, is distinguishable from the case at bar.

Section 13 of the Copyright Law provides as follows:

“ . . . No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.” (17 U.S.C. 13).

The record is clear that plaintiffs have not obtained registration in the Copyright Office of the original unrevised text of the 1958 French edition of “Candy” on which they based their claim of infringement.

The *Vacheron* case holds directly that under §13 an action for infringement may not be maintained when the work has not been registered with the Copyright Office. Where there has been refusal to register a party's sole remedy lies in a proceeding in the nature of mandamus against the Register to compel registration. See *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co.*, supra. Compare *Bouve v. Twentieth Century-Fox Film Corp.*, 122 F.2d 51, 50 USPQ 338 (D.C. Cir. 1941). . . .

The only case which might be thought to be to the contrary, *White-Smith Music Pub. Co. v. Goff*, 187 F. 248 (1st Cir., 1911), was considered by Judge Hand in *Vacheron* and to the extent that it was not distinguishable was not followed. Law Review criticisms of *Vacheron* on which plaintiffs place most reliance, see, e.g., 72 Harv. L. Rev. 1167 (1959), 107 U. Pa. L. Rev. 1046 (1959), N. Y. U. L. Rev. 777 (1959), whether well taken or not, are, of course, quite beside the point. *Vacheron* is controlling authority on the District Court in this case.

If anything, the facts in the case at bar are stronger against the plaintiffs than those in *Vacheron*. . . .

When the plaintiffs belatedly sought to register the original text of the novel, some seven years after it was first published in France and subsequent to the publication of the Lancer novel and the commencement of this action, registration was refused on the ground of failure to comply with the ad interim registration provisions of §22 and regulation 202.4(b)(1). Plaintiffs' attack on the validity of the regulation has no place here. Under *Vacheron* that question can only be litigated in an appropriate action against the Register of Copyrights such as plaintiffs now have pending in the District of Columbia.

Plaintiffs give as their reasons for failing to comply with §22, and thus to satisfy the regulation, that the novel was banned by the Customs Bureau until after the time limitations in §22 had expired. If there be any merit in the contention that they were excused from complying with §22 for these reasons that should be explored in the appropriate mandamus proceeding to compel registration. It may not be litigated here.

Finally, plaintiffs' reliance on §10 of the Copyright Law as authorization for the maintenance of an infringement action without registration but merely on publication with copyright notice, despite §13, is misplaced. Section 10 deals with a right, not a remedy. The remedy is controlled and limited by §13.

II. Plaintiffs argued that the court should retain jurisdiction pending disposition of the mandamus action, rather than dismissing the complaint. The court held, however, that the proscription in §13 against maintaining a copyright infringement action where there is no copyright registration goes to the question of jurisdiction. It was also held that where a claim of copyright infringement is not sufficient to withstand a motion to dismiss, pendent jurisdiction over associated claims of unfair competition should not be retained. The court said:

The proscription against the maintenance of actions contained in §13 "goes to the jurisdiction of the courts to entertain such actions or proceedings. . . ." *New York Times Co. v. Star Co.*, 195 F. 110 (S.D.N.Y. 1912). An infringement action by a party who has not complied with the provisions of the Copyright Law "cannot be sustained, preserved or kept in being. . . ." *New York Times Co. v. Sun Printing Pub Ass'n*, 204 F. 586 (2d Cir., 1913), cert. den. 234 U.S. 758 (1914). . . .

There remains the question of the disposition of the two claims for unfair competition after dismissal of the federal claim for infringement to which they are pendent.

While the court may not necessarily be compelled to dismiss the pendent claims, sound principles of judicial administration dictate that "pendent jurisdiction over a claim under state law requiring a plenary trial on the merits should not be exerted when the federal claim is dismissed prior to trial." *Ruckle v. Roto American Corp.*, 339 F.2d 24 (2d Cir., 1964). . . .

351. *Fristot v. First American Natural Ferns Co.*, 251 F. Supp. 886, 149 U.S.P.Q. 352 (S.D.N.Y. Mar. 29, 1966) (Frankel, J.)

Action for infringement of copyright in a plastic artificial rhododendron. Plaintiff moved for a preliminary injunction.

Held, preliminary injunction granted.

The court held that the similarities between plaintiff's rhododendron and the rhododendrons imported by defendant from Hong Kong were of such a character as to amply demonstrate copying, despite some differences in detail and in over-all appearance. The court said:

The single issue seriously tendered by defendants is whether plaintiffs have proved their charge of copying sufficiently to make out a prima facie case of infringement and justify the preliminary relief sought on this motion. Accordingly, we have studied the polyethylene flora in evidence, together with the parties' esthetic, metric, and horticultural contentions about them. Thus enlightened, we find plaintiffs' contentions to be vividly demonstrated. . . .

The petals . . . are all in the shape of flared cups, with wavy circumferences and ripples, designed to simulate the random artistry of nature. . . . Plaintiffs showed that each of defendants' two petals fits neatly into the corresponding one of plaintiffs, nestling comfortably into every depression, rising with every rise, etc. . . . This is compelling evidence that the Hong Kong manufacturer used plaintiffs' earlier creation to make a mold for its petals.

Similar identities are revealed in the leaf clusters. . . . [T]he leaves of defendants' rhododendron, like its petals, fit snugly into plaintiffs', following with nearly microscopic exactness the pattern of veins and other contours. . . .

There are other close similarities—in stem arrangements, stamens, buds, and construction techniques. There are differences too, and defendants urge that the list of distinguishing features is so long as to refute the claim of copying. The petals are differently colored. The leaves are different shades of green. Plaintiffs' weighs

more, in part because its plastic construction is thicker. There are nine petals and six leaf clusters on defendants'; these numbers are, respectively, twelve and seven on the copyrighted flower. The stem of defendants' flower has more burrs and is glossier.

This is not a short catalogue of differences. It is enough, obviously to render the two flowers by no means identical in overall appearance. But, equally obviously, the distinguishing characteristics are wholly insufficient to conceal the substantial copying that adds up to infringement. . . .

Plaintiffs are entitled to a preliminary injunction against the distribution and sale of what has been shown, at least to the extent of an ample *prima facie* case, to be an infringing product.

352. *United States v. Rose*, 149 U.S.P.Q. 820 (S.D.N.Y., Apr. 18, 1966) (Tenney, J.)

Criminal prosecution before a jury for copyright infringement. In a sixty-count indictment, defendant Bert Rose was charged with producing or aiding in the production of four "fake-books," thereby infringing the copyrights in 44 musical compositions, some of which appeared in more than one of the books, for a total of sixty infringements. The songs were such standards as "You'll Never Walk Alone," "I Didn't Know What Time It Was" and "My Funny Valentine." It is believed that this may have been the first criminal prosecution in the United States for infringement of federal copyright.

Held, convicted on all counts. A \$6,000 fine was imposed, of which \$1,000 was remitted.

The court charged the jury on the law in the case as follows:

The defendant is charged in the instant indictment with a violation of Section 104 of Title 17 of the United States Code which in pertinent part provides:

"Any person who willfully and for profit shall infringe any copyright secured by this Title, or who shall knowingly aid or abet such infringement, is guilty of a crime."

In substance the defendant is charged with infringing the copyrights of 44 separate songs set forth in the indictment. . . . In essence, then, the charge relates to the publication of four different fake books and the separate counts of the indictment involve individual songs appearing in those books. . . .

The copyright proprietors of the musical compositions alleged in the indictment have the exclusive right to print, reprint, publish, copy and vend the applicable copyrighted work, and this exclusive right to multiply copies of the copyrighted work is the main purpose of the copyright statute. In order to prove the offenses charged in the indictment, the Government must prove each of the following essential elements as to each count beyond a reasonable doubt:

First, that the defendant infringed valid copyrights in existence on the dates alleged in the indictment or knowingly aided and abetted in such infringement; second, that the defendant's conduct was wilful; and, third, that the defendant's wilful conduct was entered into for the purpose thereby of obtaining profit for himself.

The first essential element of the crime that is charged which the Government must prove beyond a reasonable doubt is, as I just stated, that the defendant herein infringed valid copyrights in existence on the date alleged or that he knowingly aided and abetted such infringement, if any. To satisfy this element, the Government must prove only that the defendant infringed or that he knowingly aided and abetted an infringement by others, not both.

The Government must initially prove beyond a reasonable doubt that the copyrights alleged in the indictment were at the time involved valid and existing copyrights. I might note that there are certificates of copyright in evidence and no proof to the contrary has been proffered. Nonetheless, this being one of the elements of the offense, you must find that all of the copyrights alleged in the indictment were valid copyrights in existence at the times alleged in the indictment.

The next question that arises is whether the defendant infringed copyrights or whether he knowingly aided and abetted an infringement by others. In order to determine whether an infringement took place, it is necessary to refer to the exclusive rights granted to a person having such right to the copyrighted work, and these exclusive rights are set forth in Section 1 of Title 17 of the United States Code. It seems clear that what is involved herein is a musical composition, and accordingly we must look to sub-section (a) of Section 1 and sub-section (e) of that section.

Sub-section (a) gives the copyright owner the exclusive right to print, publish, copy and vend the applicable copyrighted work. Under 1(e) the owner of the copyright has the exclusive right in

the exercise of his rights under sub-section (a) to print, reprint, publish, copy and vend the copyrighted work, to make any arrangement or setting of the musical composition or of the melody of it in any system of notation in which the thought of an author may be recorded and from which it may be read [or reproduced].

In consideration the question as to whether the defendant infringed the copyrights or whether he knowingly aided and abetted an infringement by others, there are a number of elements which the Government must show beyond a reasonable doubt before you may find that the defendant infringed any of these copyrights. For you to find infringement, the Government must satisfy you beyond a reasonable doubt of, first, substantial similarity and, second, reproduction.

First I will define similarity. In this case the copyrighted works are the songs represented by Government's Exhibits 1 through 45, the copyrighted sheet music. The allegedly infringing works are the music and titles set out in various pages of Government's Exhibits 46, 48, 50 and 52, the musical fake books. To find similarity, you must be satisfied beyond a reasonable doubt that the applicable music and titles set out in the books in evidence are colorable or plausible copies or paraphrases, ascertainable by the ordinary listener, of the titles and music in the sheet music in evidence.

To find similarity you need not find that the allegedly infringing music is an exact copy of the copyrighted music. Substantial similarity is all that is required, and an evasive imitation of the copyrighted words and music would still be an infringement.

Thus, if you find beyond a reasonable doubt that the allegedly infringing music is not identical with the copyrighted music but is substantially similar, such that the copyrighted version may be said to have been a model for the allegedly infringing version, you may find that there has been an infringement as to the count you are considering, providing that there has been a reproduction.

Secondly, I will define reproduction. If you find similarity, then, to satisfy this element, you must find beyond a reasonable doubt that the defendant caused the allegedly infringing works to be reproduced or that he knowingly aided and abetted others who reproduced the books. Reproduction in this case means causing the printing, reprinting, publishing, copying or vending, in the disjunctive, of the musical compositions alleged in the indictment without the permission of the copyright proprietor. Thus, a finding of any of the above is sufficient on this element.

The Government must also show that the defendant did not have permission of the respective copyright proprietors to print, reprint, publish, copy or vend the copyrighted books, but I do not believe there is any serious contention that he had such permission.

I instruct you that if you find beyond a reasonable doubt that the defendant did not himself prepare Government's Exhibits 46, 48, 50 and 52, namely the fake books, but that he obtained them from third persons and had the books so obtained reproduced at the LaSalle Litho Corporation, you may find that the defendant infringed, providing that you have satisfied yourselves as to similarity as I have previously defined it.

Assuming similarity as I have previously defined it, defendant's obtaining of the songs in the books from third persons, if you so find, would not be an infringement, but causing the publishing or reprinting of the songs in the books so obtained would be an infringement. Thus, assuming similarity as I have previously defined it, if you find that the defendant had the songs in the books published or reprinted, without regard to where he got the books, then you may find that the defendant himself infringed. You should then move on to consider the next element. But if you do not find beyond a reasonable doubt that the defendant had the songs in the books published or reprinted, then you may find that the defendant did not himself infringe.

If you find that the defendant did not himself infringe, and assuming similarity as I have defined it, then you should consider whether the Government has proved to your satisfaction beyond a reasonable doubt that the defendant knowingly aided and abetted others who reproduced the allegedly infringing books.

Now what does aid and abet mean? In order to aid and abet another to commit a crime, it is necessary that a defendant wilfully associate himself in some way with the criminal venture, that he wilfully participate in it as in something that he wishes to bring about, and that he wilfully seek by some action of his to make it succeed.

Thus, assuming similarity as I have defined it, if you find that the defendant wilfully associated himself with others who were reprinting or publishing the allegedly infringing music books, and that he wilfully participated in their venture as in something he wished to bring about through acts of his own calculated to make their venture succeed, even though he did not do the actual reproduction himself, then you may find that the defendant was

an aider and abettor and that the Government has satisfied its burden on this element.

* * *

The second essential element of the crimes charged which the Government must prove beyond a reasonable doubt is that the defendant's conduct was wilful. An act is done wilfully if done voluntarily and purposely and with specific intent to do that which the law forbids—that is to say, with bad purpose either to disobey or disregard the law. If you find beyond a reasonable doubt that the defendant's conduct was entered into with a specific intent to violate the copyright laws and the rights of the respective proprietors to reproduce their own works, namely an infringement motive, then the Government has satisfied its burden on this element.

Specific intent to violate the copyright laws means knowingly doing that which the law forbids with a bad purpose to disobey the law. On the other hand, if the proof does not satisfy you beyond a reasonable doubt that the defendant had an infringement motive, then the Government has not satisfied its burden on this element and you may acquit the defendant.

Since wilfulness involves the defendant's state of mind, direct proof is rarely available. There can be no eye witness to a defendant's state of mind. In point of fact, wilfulness is almost always established by circumstantial evidence. To determine if wilfulness has been established, you should consider all of the acts of the defendant and the reasonable inferences to be drawn from those acts. And I will discuss circumstantial evidence after I have discussed the third essential element of the crimes charged.

This third essential element which the Government must prove beyond a reasonable doubt is that the defendant's conduct was entered into with a specific purpose to profit thereby. Proof of this element involves proof of the defendant's state of mind. Here again direct proof is rarely available. You should consider all of the acts of the defendant and the reasonable inferences to be drawn therefrom in determining if the Government has established a profit motive. If you are satisfied that the Government has demonstrated beyond a reasonable doubt the profit motive of the defendant, then the Government has met its burden on this element. If you are not so satisfied, then you may acquit the defendant.

As I mentioned before, in determining the element of wilfulness and intent and motive, since it is impossible to see into a person's mind, circumstantial evidence is often of necessity re-

sorted to. The law recognizes two types of evidence, direct and circumstantial, either of which may be sufficient to convict, providing the jury, upon all the evidence, is satisfied beyond a reasonable doubt.

* * *

Now on this question of wilfulness and intent or motive, there has been some testimony with respect to alleged statements by the defendant as to prior similar acts of making and compiling these fake books, and I might state at this time the mere fact that there was testimony that over the past 20 years musicians have used what are denominated as fake books is not relevant to the case which is before us.

On this question of wilfulness and motive and intent, as I said, there has been some testimony with respect to alleged statements by the defendant as to prior similar acts of making and compiling these fake books. Proof of prior similar acts is admissible for the limited purpose of establishing that the act charged in the specific count was committed knowingly and intentionally and was not the result of error or mistake or just inadvertence. Putting it another way, if you find that this testimony of prior similar acts is credible, it may be considered by you, if you are so inclined only as bearing on the element of knowledge and intent. This evidence, however, is to be considered by you only after you find beyond a reasonable doubt from the other evidence in the case that the accused did commit the act charged in the specific count under consideration.

I must caution you that proof of other similar acts, whether charged in the indictment or not, is not any proof whatever that the defendant committed the specific act charged in the count under consideration since, quite obviously, they relate to different times and people. Please bear that in mind.

353. *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*, 247 F. Supp. 578, 147 U.S.P.Q. 415 (E.D. Pa. Nov. 22, 1965) (Body, J.)

Action for copyright infringement and unfair competition. Defendant was charged with using copyrighted local news items taken from plaintiff's newspaper in defendant's daily news broadcasts. After a denial of defendant's motion to dismiss the complaint was affirmed by the Supreme Court of Pennsylvania (411 Pa. 384, 192 A.2d 657, 138 U.S.P.Q. 406, 10 BULL. CR. SOC. 389, Item No. 400 (1963)), defendant petitioned for removal of the case to the federal court. Plaintiff

moved to have the case remanded to the Pennsylvania court of common pleas and asked for costs, including counsel fees.

Held, plaintiff's motion granted.

I. Defendant argued that the decision of the United States Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 had "completely overruled" the holding of the Supreme Court of Pennsylvania in the case at bar that plaintiff had stated a common law cause of action for unfair competition under Pennsylvania law when it charged defendant with appropriating plaintiff's local news items. The court held, however, that common law rights with respect to matter not copy-rightable because not within the scope of copyright protection had not been affected by the *Sears* decision and that even copyrighted works may be the subject of common-law protection. The court also held that the federal court did have pendent jurisdiction over the unfair competition claim because of its substantial connection with a claim of federal copyright infringement, but that such pendent jurisdiction is not exclusive. The court said:

From its inception in 1960, this has proved to be a rather involved case from a procedural standpoint; however, for purposes of deciding the present motion to remand, the substantive legal issues can be narrowed down to the following two questions:

(1) Whether the federal court has exclusive jurisdiction over the causes of action alleged by plaintiff, with the effect that it cannot remand to the state court, which would have no jurisdiction whatsoever; and

(2) Whether the defendant Broadcasting Company has complied with the strict requirements of the removal statute found in 28 U.S.C.A. §§ 1441 and 1446.

These issues will now be examined in turn.

Whether Jurisdiction over Plaintiff's Causes of Action is Vested Exclusively in the Federal Courts

The Broadcasting Company's argument on this issue is that the News Company's complaint alleges two causes of action, that is, one claim which arises under the United States laws relating to copyright and another cause of action which asserts an unfair competition claim joined with a substantial and related claim under the United States copyright laws, and that as to both causes

of action, exclusive jurisdiction is vested in the federal courts by virtue of the provisions of § 1338. . . .

This contention of defendant was rejected by the Supreme Court of Pennsylvania in the very lucid and well written opinion of Mr. Justice Benjamin R. Jones. We agree in all respects with that decision of July 2, 1963, and therefore conclude as did Justice Jones that:

“ . . . under § 1338(b), the federal courts may now exercise pendent or derivative jurisdiction over a claim of unfair competition which is joined with a claim under the Copyright laws if the latter claim is ‘substantial and related.’ However, such permissive jurisdiction does not render the jurisdiction of the federal courts exclusive in nature or oust state courts of their jurisdiction over claims of unfair competition . . . ”

In its opinion the Supreme Court of Pennsylvania went on to hold that:

“ . . . insofar as the News Company pleads that the Broadcasting Company has ‘pirated’ news items gathered through the special services of the News Company, such states a violation of a property right and a claim of unfair competition which the state courts have jurisdiction to determine.” . . .

In its Reply Brief Contra Plaintiff's Motion to Remand, however, defendant contends that the portion of the opinion of the Supreme Court of Pennsylvania holding that the complaint states a common-law cause of action for unfair competition under Pennsylvania law was “completely overruled” by a decision of the United States Supreme Court in the case of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225. . . . With this contention we cannot agree. . . .

First of all, the language in *Sears, Roebuck* to the effect that a state may not prohibit the copying of *uncopyrighted* material could be construed as obiter dictum since, in that case, it was the *patents* on the “pole lamps” which were found invalid for lack of invention. Consequently, it cannot be said with absolute certainty that the law of common-law copyright has been limited by the *Sears, Roebuck* decision in exactly the same respects as the state protection of unpatentable articles. However, we need not rest our conclusion upon such a tenuous distinction.

For instance, it is entirely possible, even in light of *Sears, Roebuck*, that congressional failure to protect purely factual news accounts by the Copyright Act could be deemed an expression of a limitation of federal power rather than a congressional policy which allows the copyright of such items.

Another distinction can be found in the fact that in *Sears, Roebuck* the court was concerned with the *copying* of an unpatented and uncopyrighted product. In the case at bar, however, plaintiff alleges an unwarranted *appropriation* of its news stories by defendant. In the recent case of *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*, 141 USPQ 461 (1964), which involved the unauthorized appropriation of artistic performances to the profit of others, the New York Supreme Court drew a similar distinction

Another reason for supporting our conclusion that the rationale of the *Sears, Roebuck* case does not preclude an action based upon a state unfair competition law for an invasion of a property right in uncopyrighted news, for instance, is that any other construction would leave a glaring loophole in the law. For example, in the case at hand let us assume that defendant's contention that local news items are not capable of being copyrighted is sustained. Assume further that defendant's radio station has in fact "pirated" news items which were gathered and written by plaintiff's employees. To remedy such a violation, the plaintiff obviously would have no cause of action under the federal copyright laws.

Furthermore, if defendant's interpretation of *Sears, Roebuck* is correct, plaintiff would likewise be unable to maintain an action for unfair competition under the laws of Pennsylvania. The result would be that defendant could wait patiently every day secure in the knowledge that it could supply its radio listeners with news items gathered through the expense and labors of plaintiff's reporters and "pirated" from plaintiff's newspaper which is distributed at approximately three A.M. each morning except Sunday. The ultimate security, of course, would lie in the certainty that defendant would be untouched by either state or federal law. Men of conscience would hardly condone such an inequitable result and we, as a court of conscience, will not subscribe to such a conclusion unless the Supreme Court enlightens us with a clear ruling on this specific problem. . . .

We are not now deciding the merits of the copyright claim. It nevertheless deserves consideration at this point because defendant has argued on the strength of the *Sears, Roebuck* decision that if state unfair competition laws do not apply to items which

could not be copyrighted, then a fortiori, state unfair competition laws cannot affect items which have been copyrighted. We disagree with defendant's theory because it cannot be stated categorically that for a state to afford additional protection, through its unfair competition laws, to one's rights in an article which is capable of being either patented or copyrighted under federal law, would run counter to the congressional policy expressed in the *Sears, Roebuck* case.

In *International News Service v. Associated Press*, 248 U.S. 215, the Supreme Court conceded that the AP stories were copyrightable, but nevertheless applied the theory of unfair competition to enjoin INS both from using the bulletins as the basis of rewritten stories and from reproducing the AP stories without change. Plaintiff alleges a similar appropriation in the instant case. . . .

In conclusion then, it is our opinion that whether plaintiff's news items are copyrighted or uncopyrighted is immaterial to the question of whether "piracy" of such items, if proved, can be remedied in the state courts. We conclude that in either case the *Sears, Roebuck* decision does not preclude state jurisdiction over the cause of action for invasion of a property right and unfair competition, based upon defendant's alleged appropriation of plaintiff's news items.

Having finally determined that this federal court does not have exclusive jurisdiction over the causes of action alleged by plaintiff in its Complaint, and that the state court has jurisdiction over the unfair competition claim, we now turn to the question of whether defendant complied in all respects with the removal statute, because having done so defendant would be entitled to remove the entire civil action under the doctrine of pendent jurisdiction.

II. It was held that defendant failed to comply with the removal statute in that its petition for removal was filed too late.

354. *Nordstrom v. Radio Corporation of America*, 251 F. Supp. 41 (D. Colo. Dec. 10, 1965) (Arraj, J.)

Action for infringement of copyright in a musical composition. Defendant moved for summary judgment.

Held, motion denied.

Similarity between plaintiff's and defendant's musical compositions was conceded for the purposes of the motion, but defendant argued that Jerry Herman, the composer of defendant's composition, could not have had access to plaintiff's composition. The court held, however, that the facts showed a possibility of access and stated that in certain circumstances access can be shown indirectly by the close similarity between the musical compositions involved. The court said:

An examination of the affidavits submitted by the defendant discloses that there was a period of three days — May 16, 1960 to May 19, 1960 — in which Mr. Herman was present in the United States at the same time the plaintiff's composition was in the files of the defendant. Resolving, as we must on a motion for summary judgment, all doubts in favor of the party against whom the motion is directed, the defendant's affidavits disclose a period of time in which the plaintiff might by a searching cross-examination establish that Herman actually gained access to the plaintiff's composition. . . .

Passing to the question of whether access can be shown indirectly from close similarity between the musical compositions involved, despite the existence of uncontradicted sworn denial of access by the defendants, the Court is directed to the often cited case of *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir.). There, the trial court faced with a situation similar to that in the case at bar granted the defendant's motion for summary judgment. The Court of Appeals reversed, and, in alluding to the question of the proof of copying, pointed out that access could, in certain circumstances, be proved by showing close similarities between the compositions involved. See also, *Dorchester Music Corporation v. National Broadcasting Co.*, 171 F. Supp. 580 (S.D. Cal. 1959). In the course of the Court's opinion in *Arnstein*, Judge Frank made pertinent observations concerning the propriety of summary judgments in suits of this nature, where the entire factual record was based upon the denials of the alleged plagiarizers, submitted in the form of affidavits. Faced with such a record, a Court, he cautioned, should not substitute for a normal trial a "trial by affidavit". The underlying basis for such caution was that the credibility of the declarants becomes a prime issue and the plaintiff is denied the use of the effective device of cross-examination with the result that the denials must be accepted without inspection or examination. The Court concluded by stating that, ". . . generally there should be trials in plagiarism suits." *Id.*, 154 F. 2d, at 474; and we, with the record as it stands before us at this time, agree.

2. State Court Decisions

355. *Bond Buyer v. Dealers Digest Publishing Co., Inc.*, 25 A.D. 2d 158, 267 N.Y.S. 2d 944, 149 U.S.P.Q. 465 (N.Y. App. Div., 1st Dept., Mar. 15, 1966) (per curiam).

Appeal from judgment denying preliminary injunction in action for unfair competition. Plaintiff and defendant both publish newsletters dealing with the market in tax exempt bonds. Plaintiff also has a subscription wire service which gives immediate information on bond offerings in the field prior to its appearance in either newsletter. Defendant is able to publish in its newsletter information originally obtained by plaintiff, contemporaneously with the publication of the same information in plaintiff's newsletter, by getting the information when it is sent to subscribers of plaintiff's wire service.

Held, reversed.

The court followed *International News Service v. The Associated Press*, 248 U.S. 215, holding that defendant had misappropriated the fruits of plaintiff's "labor, skill and money" and that this constituted unfair competition. The court said:

Defendant has appropriated information gained from plaintiff's wire service, though defendant is not a subscriber, and by this means has been enabled to publish items in its news sheet contemporaneously with plaintiff's publication in its news sheet, thereby reaping the benefit of plaintiff's news gathering staff without either incurring the expense or expending the effort.

It is now no longer subject to question that there is a property in the gathering of news which may not be pirated. *International News Service v. The Associated Press*, 248 U.S. 215. In fact, defendant here does not dispute this. It contends first that there is no sufficient showing that it has engaged in any prohibited practice. This contention cannot prevail. Plaintiff on five separate occasions deliberately inserted errors in its Munifacts reports and these errors appeared in defendant's publication. In addition, plaintiff disseminated news of an issue by a non-existent agency, the name of which plaintiff made up, and this item forthwith appeared in defendant's publication. This is beyond the possibility of coincidence and establishes without question that defendant was using the information disseminated over the wire service for its publication.

Secondly, defendant contends that all the information contained in the wire service reports is obtained from releases of var-

ious kinds by the authorities issuing the bonds. Defendant further contends that these authorities desire the widest possible circulation of this information and hence all of it is in the public domain. All of this is true. However, plaintiff's rights do not depend on copyright, or any exclusory right in the information itself. They lie in the fact that the information "has been acquired by complainant as the result of organization and the expenditure of labor, skill and money, and . . . is salable by complainant for money." *International News Service v. The Associated Press*, supra, at 239. To make a commercial use of the result of the labor is, as the court said, to reap where one has not sown. In legal phraseology, it is a form of unfair competition.

Lastly, defendant contends that no irreparable harm has been shown as the information is published by the plaintiff itself on the day following its appearance on the wire service. The fact that the time during which the information is of special value is short does not affect the situation. It is long enough for defendant to seek a gain from its use.

356. *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. 755 (Cal. Super. Ct., L.A. Co. Feb. 11, 1966) (Nutter, J.) (memorandum opinion).

Action by producer-director George Stevens to determine defendants' right to televise Stevens' "A Place In the Sun" with cuts and interruptions for commercials.

Held, judgment for plaintiff.

The court held that where the creator of an artistic work has not consented thereto, presenting the work in such a fashion that the distortion amounts to a misrepresentation of the creator's authorship infringes his rights. The court also held that a motion picture may be an artistic work and that excessive or inartistic interruptions may amount to such a distortion. The court said:

It does appear to me on the evidence that is presented to this court that commercial interruptions of television may in the manner of their insertion result in emasculating a motion picture so that the picture will no longer contain substantially the same motion and dynamic and dramatic qualities which it was the purpose of the artist's employment to produce . . .

So as a matter of equity jurisdiction, I can conceive of a situation where a court of equity may grant preliminary injunctive relief to protect the work of an artist, or an author, or a director or a producer where the commercial interruptions would tend to

mislead the public, or would tend to actually emasculate or destroy the mood and effect of the creative work. . . .

I would now like to discuss the *Granz* case, *Granz v. Harris*, 198 F. 2d 585 at 589. I will quote the words of Justice Frank . . . He states at 589:

"I agree, of course, that, whether by way of contract or tort, plaintiff (absent his consent to the contrary) is entitled to prevention of the publication, as is, of a garbled version of his copyrighted product. . . . Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist had expressly authorized reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie) it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original. . . .

"Under the authorities, the defendant's conduct here, as my colleagues say, may also be considered a kind of unfair 'competition' or 'passing off'.

"The irreparable harm, justifying an injunction becomes apparent". . . .

The Court further feels that the granting of injunctive relief in this case is not necessarily inconsistent with the ruling of the court in New York, the *Preminger* case, for several reasons: One, in the *Preminger* case, there were specific contractual provisions regarding TV. In this case there were none as far as the plaintiff is concerned. As a matter of fact, the judge at the time of the preliminary injunction stated referring to that . . .

"It is this specific grant which this court considers determinative of this application."

So, therefore, this is the basis of this court's ruling which appears at first blush to be inconsistent with the New York ruling. . . .

That was a case where they were trying to enjoin the entire film. The court does not propose to grant such drastic relief in this case. So again, the court will have a different problem from the New York court. Quoting from the New York court:

" . . . in view of the provisions of the licensing agreement whereby the television distributors have obligated themselves not to so cut the film."

I consider that to be a very important statement in the New York decision. There was an obligation of the television distributors not to so cut the film. The court proposes to grant injunctive relief here to protect that type of a situation and that type of a situation only. There has been an argument made that this is an unrealistic type of order. However, there was a contractual provision in the New York case, and, apparently, the court felt that since there was a contractual provision which might be enforced, it was not unrealistic. That was one of the grounds for injunctive relief and, apparently, the main ground as far as the permanent injunction is concerned.

Again, I would emphasize that the court in this case is faced only with the question of deciding whether or not an irreparable injury to one of the parties will result if the order is not issued as prayed, or whether or not the court denies the relief. The court, of course, must weigh the evidence and determine whether or not the plaintiff has sustained its burden as to any type of equitable relief, and the court feels the plaintiff has sustained its burden in accordance with the rules for some type of equitable relief, but not in the exact form as requested. . . .

Again, on page nine, I distinguish the New York case . . . where it states:

“Plaintiff Preminger admitted that when he signed the agreement for ‘Anatomy of a Murder,’ he was aware that the practice of the television industry was to interrupt motion pictures for commercials and to make minor cuts.”

There is no evidence in this case, and as a matter of fact, due to the date of the signing of the contract, I think the court could infer that the evidence would be the other way. So that is an important consideration in this court denying relief there that the plaintiff in this case was aware of the practice of cutting a film for commercials. . . .

Now, what does this all mean? It means that I think a court of equity has a duty when presented with a novel situation to fashion remedies to protect parties and litigants against new harms where it appears that there is no adequate remedy at law, to protect against what may be an irreparable harm. I think the court has the right to protect the artistic integrity of a product, whether it be a film or a play, and I think a photofilm can be an art form; and for the purpose of this ruling, the court so holds.

I have discussed with the parties . . . [a] possible preamble. After hearing arguments, I don't think that that preamble is practical, and . . . it might raise more difficulties and cause more harm than any aid that it might give to the plaintiff. However, I do think that plaintiff is entitled to injunctive relief, and I propose it in the following form:

The defendants, except those, of course, who have not been served, would be enjoined . . . from cutting or editing the motion picture "A Place in the Sun" for the purpose of inserting therein in connection with the broadcast of said motion picture over television any commercials, advertisements or other messages, skits, speeches, playlets, musical or other material which will so alter, adversely affect or emasculate the artistic or pictorial quality of said motion picture as to destroy or distort materially or substantially the mood, effect, or continuity of said motion picture as produced and directed by plaintiff.

357. *Pocket Books, Inc. v. Dell Publishing Co., Inc.*, 49 Misc.2d 596, 268 N.Y.S. 2d 46, 149 U.S.P.Q. 466 (Sup. N.Y. Co. Mar. 22, 1966) (McGivern, J.). For decision on preliminary injunction see 148 U.S.P.Q. 239, 13 BULL. CR. SOC. 202, Item No. 223 (1966).

Action by paperback publisher of "Peyton Place" and "Return to Peyton Place" to enjoin publication of a biography of Grace Metalious under the title "The Girl from Peyton Place."

Held, judgment for defendant.

Plaintiff based its claim of unfair competition on the contention that the jacket of "The Girl from Peyton Place" was so designed that it would mislead the book-buying public into believing that it was a sequel to plaintiff's "Peyton Place" books rather than a biography of their author. The court held, however, that the paperback audience is sufficiently alert to be able to tell the difference. The court said:

This claim of the plaintiff is predicated on the contention that the jacket of "The Girl from Peyton Place" is so designed as to be the subject of confusion with the other "Peyton Place" books, to be substantially similar in appearance, and thus to detract from the plaintiffs' market for the "Peyton Place" books and the benefits flowing from their publication. Specifically, the grievance is based on the argument that the cover jacket of "The Girl from 'Peyton Place'" does not (a) contain the word "Biography"; (b) contains a picture of Grace Metalious; and (c) although the subject concerns

"Peyton Place", it does not sufficiently appear that the author is not Grace Metalious herself. Thus, the plaintiffs conclude that the paperback public will be misled into the conclusion that the book is a sequel to the "Peyton Place" books and not a biography.

The contention of the plaintiffs is further based on expert testimony that the paperback devotees are a gullible lot; they are "lip movers", "the lowest common denominators"; "impulse purchasers", and their inspection of a book does not extend beyond the cover; they do not even discern authorship.

This court does not agree. This court feels that there simply must be some limits to the claimed asininity of the paperback reading public. Moreover, the book before us, "The Girl from 'Peyton Place'" contains a legend on its cover, sufficiently noticeable, to indicate that the subject of the book is biographical. Indeed, the very presence of a picture of Grace Metalious on the cover would indicate even to the unwary that she is the subject of the story. The names of the authors are set forth on the cover, to wit "George Metalious and June O'Shea." . . .

In addition, there was testimony that no complaints of confusion were ever recorded. And there was contrary expert opinion that the paperback reading votaries are possessed of at least a modicum of discernment and are not easily fooled. This court, therefore, does not agree that the paperback readers are so obtuse and purblind that they cannot form a judgment that "The Girl from 'Peyton Place'" actually concerns Grace Metalious, her life and works, is biographical in nature and not a fictional sequel to the previous Peyton Place books.

358. *Read v. Turner*, 148 U.S.P.Q. 453 (Cal. App., 4th Dist., Jan. 20, 1966) (Coughlin, J.)

Appeal from judgment for plaintiffs in action for infringement of common law copyright. Plaintiffs supplied a copy of the proposed floor plan of their house to defendant Turner, a subcontractor, for his use in bidding on the foundation work. Subsequently plaintiffs' house was built and was exhibited to many persons before it was sold. The purchaser was given a copy of the floor plan. In the meantime, Turner, who was president of defendant T & T Investment Corp., turned plaintiffs' floor plan over to that company to be used in developing floor plans for ten houses it wished to build. The floor plan was then supplied by T & T to defendant Fullmer, a designer, who used it in designing the ten floor plans. These houses were subsequently erected. At trial, plaintiffs recovered a judgment for compensatory damages

against all the defendants and for punitive damages against Turner and T & T. Fullmer's motion for a new trial was granted. Defendants appealed from the judgment and plaintiffs appealed from the order granting a new trial.

Held, reversed.

I. The court held that public exhibition of plaintiffs' house constituted a general publication of the floor plan, but that giving the plan to Turner for his use in bidding on the foundation work was only a limited publication. Accordingly, the plaintiffs were held entitled to compensatory damages for infringements occurring prior to the time exhibition of the house threw the floor plan into general domain, but not for infringements occurring thereafter. The court said:

As applied to the instant case two alleged infringements of copyright occurred; one when the defendant Fullmer, at the request of defendants Turner and T & T Investment Corp., copied plaintiffs' floor plan from a drawing thereof furnished . . . by plaintiffs; and the other when defendants . . . followed plaintiffs' floor plan in the construction of their ten residences.

The uncontradicted evidence in the case at bench dictates the conclusion that plaintiffs, through their multiple listing and open house exhibitions, invited the general public to review the floor plan of the house they subsequently sold; that the floor plan as a subject of copyright was of such a nature that its characteristics were particularly susceptible to recordation by casual observation; and that in making such public showings they must be deemed to have intended to relinquish control of the right to copy their design. Furthermore, when they sold the residence and furnished the purchaser with a copy of the plans and specifications without restriction upon the use of the floor plan incorporated in the house, they actually relinquished control over the use of that floor plan. These facts in toto establish as a matter of law a general publication of the floor plan that terminated plaintiffs' copyright. *Shanahan v. Macco Constr. Co.*, 224 Cal. App. 2d 327, 144 U.S.P.Q. 154; *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W. 2d 282; *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184, 137 USPQ 96; *Weinstock Lubin & Co. v. Marks*, 109 Cal. 529. . . .

The case of *Smith v. Paul*, 174 Cal. App. 2d 744, 123 USPQ 463, upon which plaintiffs rely, is factually distinguishable from the case at bench in that the subject of copyright in the cited case was not merely a floor plan but the total architectural design contained in plans and specifications used in building a house

which could not be recorded by a view of the completed structure; the creator of the design expressly retained ownership thereof at the time he sold the house; and there was no public showing thereof by him prior to sale. Of particular note is the statement of the court in the cited case (p. 750) that where a building constructed pursuant to plans protected by copyright is opened to the gaze of the public "such fact may be a publication of the general design or idea of the building but not a publication of the exact plans whereby another may without effort other than that of tracing the work of the architect, completely duplicate the latter's effort."

Plaintiffs contend that construction of a house incorporating a design subject to copyright does not constitute a publication of that design, citing *Smith v. Paul*, supra . . . and *DeSilva Constr. Corp. v. Herrald*, supra . . . in support of this contention. It is our conclusion a design may be expressed by incorporating it in a structure as well as by incorporating it in a drawing. The publication of the design may be effected by an expression in like manner, depending upon whether the method of communication discloses the design to the claimed recipient. The circulation of a drawing expressing a design communicates the design to a person who receives the drawing. The exhibition of a structure expressing the same design, because it is incorporated therein, communicates the design to those to whom the exhibition is made if it is observable by them through the exhibition. The instant case is distinguishable from the cited case in that there the design, i.e., the floor plan, when incorporated in the house exhibited by plaintiffs, readily was observable by those to whom the exhibition was made. Such an exhibition constituted a publication of the plan. *Shanahan v. Macco Constr. Co.*, supra. . . .

However, the general publication by plaintiffs of their floor plan does not foreclose their right to recover for the previous infringement of their copyright which occurred when defendant Fullmer, at the request of defendants Turner and T & T Investment Corp., copied plaintiffs' plan from their drawing in executing designs to be used in the construction of ten residences. Plaintiffs had delivered this drawing, which showed the floor plan, to defendant Turner for a limited purpose, viz, in order that he might bid on the excavation and concrete work for their residence. The publication of the floor plan thus effected was limited and . . . did not terminate their copyright.

II. The court held that the plaintiffs were not entitled to punitive damages because no intent to "vex, annoy or injure" had been shown, and that compensatory damages had been assessed on an improper basis. The court said:

. . . [T]he judgment should be reversed . . . because the award of damages obviously resulted from a consideration of both the alleged copyright infringement occurring after the general publication of plaintiffs' floor plan as well as the copyright infringement occurring before that general publication.

Furthermore, the evidence does not support the amount of compensatory damages awarded plaintiffs. . . .

Plaintiffs' claim to punitive damages was based on the contention . . . that defendants "acted willfully and maliciously or with indifference and disregard to any damage that plaintiffs might suffer" from defendants' infringement of plaintiffs' copyright. To sustain a claim to punitive damages upon these grounds it is necessary that the evidence establish "an intent to vex, annoy or injure" . . . The evidence in the instant case does not support imposition of punitive damages under this rule. . . .

The reasons for reversing the judgment support the order of the trial court granting defendant Fullmer a new trial.

B. DECISIONS OF FOREIGN COURTS

1. Argentina

359. *Asociación Argentina de Interpretes v. L.S.5 Radio Rivadavia*, Court of Appeal of Argentina, July 13, 1965. (*Definition of "Interprete" (performing artist) in relation to Neighboring Rights.*)

*Report by S. M. STEWART**

Article 56 of Argentina Law No. 11,723 provides: "The performer of a literary or musical work shall have the right to demand a remuneration for any of his performances which are broadcast or re-transmitted by means of radio-telephony or television, or which are recorded or printed on a disc, film, tape, wire or any other medium capable of being used for sound or visual reproduction. If an agreement cannot be reached, the amount of the remuneration shall be established in a summary proceeding by the competent judicial authority.

* Director General, International Federation of the Phonograph Industry, London.

The performer of a literary or musical work can oppose the dissemination of his performance if the reproduction thereof has been made in such a form as to produce serious or unjust prejudice to his artistic interests.

If the performance has been given by a choir or orchestra, the right of opposition shall belong to the conductor.

Without prejudice to the copyright belonging to the author, a work performed in a theatre or public hall may, subject to the consent of the organizing manager of the spectacle, be broadcast or retransmitted by means of radiotelephony or television."

The agreed facts were that twenty-three records specified in the statement of claim had been played by the defendant radio station on three agreed days and that these records contained recordings of members of the plaintiff organization. The defendant did not seek to avoid payment of the remuneration but pleaded that they had paid an organization called *Corporación Musical Argentina (SA)*, which represents only conductors and soloists but not the members of orchestras. The works performed were orchestral works and the claim was made on behalf of the orchestral musicians. The defendants refused to pay the orchestral musicians any fees as they alleged that they were not right-owners under Article 56 of the law.

The sole issue, therefore, was whether orchestral musicians were entitled to a remuneration under Article 56 or whether such remuneration was confined to soloists and the conductor of an orchestra.

Article 56 uses the term "intérprete" and the argument of the defendants appellants was that only the conductor is an "interpreter" of music, whereas the members of an orchestra are "ejecutante" only—a category of artists not entitled to remuneration under the law. The "interpreters", they said, are genuine creators of an art peculiar to them, imparting a personal character to their interpretation, whilst an orchestral musician acts in accordance with the directions given him by the conductor.

The defendants prayed in aid the constitutional origin of these rights, i.e. Article 17 of the Constitution of Argentina, which protects intellectual property denoting a highly individualistic emanation of the artistic genius.

The Court of Appeal upheld (by a majority) the judgment of the court of first instance, and gave judgment for the plaintiffs (Judge Dr. Foutel and Judge Dr. Collazo in the majority, Judge Dr. Padilla dissenting).

Held: Both the conductor and the members of an orchestra have the right to remuneration under Article 56. Both act in intellectual

harmony in the performance of a work which all of them "interpret" from the score as written by the author. The judgment states that there are two clearly distinguished rights in Article 56: the right to remuneration in Paragraph 1 of the Article, and the 'droit moral' in Paragraphs 2 and 3 of the Article which enables the performer to object if the dissemination of the performance is prejudicial to his reputation. The fact that such opposition on moral grounds must be exercised by the conductor if the performance is given by a choir or an orchestra only signifies that the conductor exercises this moral right on behalf of all the musicians in an orchestra; it does not signify that he is the sole right-owner and the only person entitled to remuneration under Paragraph 1 as contended by the defendants.

The judgment traces the development of performers' rights from the German Copyright law of 1901 to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, and derives support from the definition of "performers" in Article 3 of that Convention as "actors, singers, musicians, dancers or other persons who act, sing deliver, declaim, play in or otherwise perform literary or artistic works".

In a powerful and lengthy dissenting opinion, Judge Padilla puts the opposing point of view. Holding that only the conductor is entitled to remuneration, he concludes that the musicians of an orchestra do not interpret the work in their own manner nor do they perform it with any artistic independence, but they provide their professional and technical skill under the direction of the conductor who is the coordinator, imposing his particular style and artistic temperament in forging his individual interpretation of the work. Without such coordinator as the conductor of an orchestra or a choir, there would, he says, be no music but only a series of noises and inarticulate sounds. He quotes a number of legal authorities, both Argentinian and foreign, to support his view, and concludes with the hope that Argentina will within a short time ratify the Rome Convention, at the same time amending Article 56 in order to give the right to remuneration to all performers, which he considers just and equitable, and which he held does not exist *de lege lata*.

The court did not decide two questions:

1. The question of the proportion of the remuneration which should go to the conductor on the one hand, and to the orchestra on the other. This question was not raised on the pleadings; and
2. The quantum of remuneration due under Article 56 which the Court, having decided the point of law, left to be decided by summary procedure.

It is to be noted that although no reference to it is made in the judgment, the court in fact followed both the decision and the philosophical reasoning of the Supreme Court of the Federal Republic of Germany given in 1960 in a case brought by the German Orchestral Association against Radio Berlin.¹

1. D.O.V. (Deutsche Orchester vereinigung v. Freier Rundfunk Berlin. Judgment of the First Division of the Federal Court of Justice ("Bundesgerichtshof") of May 31, 1960.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

360. BENJAMIN, CURTIS G. Copyright or public domain? A book publisher's view of a question of public policy. New York, 1966. 19 p.

"This statement represents the view and the position of the McGraw-Hill Book Company on the troublesome question of allowing private copyright of works financed either wholly or in part, either directly or indirectly, by Federal funds." Appended is a list of "Government-sponsored works published by McGraw-Hill and privately copyrighted."

361. COPYRIGHT LAW SYMPOSIUM, no. 14. New York, Columbia University Press, 1966. 407 p. Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors and Publishers, 1964.

The prize essays are analyzed separately, *infra*.

362. KNAPP, GEORGE EDWIN, JR. The Federal employee and the copyright law. Arlington? Va. 1965. 77 p. Thesis (M.A.)—University of Maryland.

"The case for the Government employee-author is examined in the light of court cases, Copyright Office studies, Congressional hearings, and law publications, in an effort to evolve a definitive statement of the problems involved, to project possible areas of settlement for them, and to look into the possibilities for positive legislation upon the subtle, elusive concept of copyright, the ownership of ideas."

363. MIDDLETON, GEORGE. The Dramatists Guild; what it is and does, how it happened and why. 5th ed. New York 1966. 36 p.

An updated account, in the form of questions and answers, of how the Authors League was founded, the "Guild's relation

to the League, its administrative structure, financial set-up, services and its other varied activities."

364. MUSIC PUBLISHERS' PROTECTIVE ASSOCIATION. Clearance of rights in musical compositions; a guide and directory. Prepared by Music Publishers' Protective Association and Music Publishers' Association of the United States. New York, 1966. 16 p.

A list of most of the leading music publishers of the world, with code symbols showing the proper source for the clearance of performing rights and mechanical rights.

365. PILPEL, HARRIET F., and MORTON DAVID GOLDBERG. A copyright guide. 3d ed. New York, R. R. Bowker Co. in co-operation with the Copyright Society of the U.S.A., 1966. 40 p.

A revised edition of the manual, in the form of questions and answers, on U. S. and international copyright. See 10 BULL. CR. SOC. 198, Item 220 (1963).

366. SUKIN, MICHAEL F. The phonograph record industry. New York, ©1966. 106 l. (reproduced from typewritten copy).

A thesis on the organization and structure of the phonograph record industry in the United States, based in large part on interviews with industry executives.

B. LAW REVIEW ARTICLES

1. United States

367. BANZHAF, JOHN F., III. Copyright protection for computer programs. *Copyright Law Symposium*, no. 14 (1966), pp. 118-179.

This essay, which was awarded the National Third Prize at the 1964 Nathan Burkan Memorial Competition, is a revised version of an article previously published in 64 *Columbia Law Review* 1274-1300, no. 7 (Nov. 1964). Includes a bibliography. See 12 BULL. CR. SOC. 176, Item 67 (1965).

368. FINE, TIMOTHY H. Misuse and antitrust defenses to copyright infringement action. (17 *The Hastings Law Journal* 315-336, no. 2, Dec. 1965).

An attempt to answer the question whether a court of equity should "lend its aid to protect the copyright owner's monopoly when he is using it to suppress competition in violation of the federal antitrust laws or otherwise misusing it."

369. HARDING, D. E. Copyright in lectures, sermons, and speeches. *Copyright Law Symposium* no. 14, 270-345 (1966).

This essay, which was included in the symposium as a "special publication," purposes, in part, "to survey the framework of the law as to the existence and infringement of copyright applicable to this classification [i.e., lectures, sermons, etc.] highlighting the main problem areas" in order "to provide an over-all perspective on some of the policy conflicts suggested by two recent cases, *Public Affairs Associates v. Rickover* and *King v. Mister Maestro, Inc.*"

370. KELLER, JOSEPH E. Is community antenna television a copyright infringer? (43 *University of Detroit Law Journal* 367-374; no. 3, Feb. 1966.)

"The purpose of this article is to review the judicial as well as the legislative activities relative to CATV and the copyright law. In addition, the writer will furnish some general observations which have occurred to him."

371. NEW YORK PATENT LAW ASSOCIATION. *Committee on Arbitration*. Arbitration of copyright problems; a colloquy among members of the New York Patent Law Association: Theodore R. Kupferman, Alan Latman, John Schulman, Samuel W. Tannenbaum, and Cameron K. Wehringer [chairman]. (21 *The Arbitration Journal* 1-23, no. 1, 1966.)

A discussion, among distinguished copyright lawyers, of the following questions:

1. Is arbitration suitable for copyright problems? 2. Is it suitable for any type of problem, and if so, what type? 3. Does a monetary consideration enter into the question of suitability? 4. Does the fact of a law question, as distinguished from a fact question, affect suitability? 5. Is the matter of appeals, or the lack thereof, a factor in suitability; and is this related to the monetary consideration question? 6. Can arbitration affect questions that require Copyright Office action? (Can it be adapted to

that purpose?) 7. Should the arbitrator be learned in copyright matters, or, as with a judge, is judicial temperament foremost?

372. PATTERSON, LYMAN RAY. The Statute of Anne: copyright misconstrued. (3 *Harvard Journal on Legislation* 223-255; no. 2, Feb. 1966.)

"Professor Patterson in this article examines the history of the English statute and concludes that its early misconstruction by English and American courts has resulted in the failure to accord legal recognition to what he calls the 'creative interest' of an author in the integrity of his work after he has sold the copyright. Professor Patterson argues that the copyright bill currently before Congress should expressly recognize this interest and afford protection to the author through the federal courts."

373. PETRE, DAVID C. Statutory copyright protection for books and magazines against machine copying. *Copyright Law Symposium* no. 14, 180-225 (1966).

This essay, which was awarded "Honorable Mention" in the 1964 Nathan Burkan Memorial Competition, first appeared in 39 *Notre Dame Lawyer* 161-184, no. 2, Feb. 1964. See 11 BULL. CR. SOC. 353, Item 238 (1964).

374. POSNER, S. PAUL. State and federal power in patent and copyright. *Copyright Law Symposium* no. 14, 51-89 (1966).

This essay, which was awarded National Second Prize in the 1964 Nathan Burkan Memorial Competition, is concerned with the impact of the *Sears* and *Compco* decisions on the federal-state relationships in the field of patent and copyright.

375. PRICE, MONROE E. The moral judge and the copyright statute: the problem of *Stiffel* and *Compco*. *Copyright Law Symposium* no. 14, 90-117 (1966).

This essay, which was awarded National Third Prize in the 1964 Nathan Burkan Memorial Competition, "is principally addressed to the role of federal courts in expanding unfair-competition law to supplement the copyright statute."

376. REVISION OF THE COPYRIGHT LAW. Chairman: Dr. Luther H. Evans. Panelists: Abe A. Goldman, Charles Gosnell [and] Horace S. Manges. (59 *Law Library Journal* 1-21, no. 1, Feb. 1966.)

A transcript of the panel discussions on copyright law revision at a session of the International Association of Law Libraries in New York on June 30, 1965.

377. SHAYE, ROBERT. Piracy within the law: a consideration of the copyright protection afforded foreign authors in the United States and the Soviet Union. *Copyright Law Symposium* no. 14, 226-269 (1966).

This essay, which was awarded "Honorable Mention" in the 1964 Nathan Burkan Memorial Competition, concludes that "[t]he possibilities of American-Soviet accord guaranteeing the rights of foreign authors are at this time as uncertain and ambiguous as they have ever been."

378. SPIEGEL, IRWIN O. Variety: Sticks and stones. (41 *The Los Angeles Bar Bulletin* 325-331, no. 7, May 1966.)

"Mr. Spiegel reviews the protection available to the architect or designer of architectural drawings and the problems raised by two recent district court of appeals decisions involving such plans."

379. STOLUSKY, WARREN G. Unauthorized interception of space-oriented telecommunications. (25 *Federal Bar Journal* 412-421, no. 4, Fall 1965.)

A discussion of whether the statutory proscription of section 605 of the Communications Act of 1934 against the unauthorized publication or use of communications "extends to an interception and use, within the United States, of audio transmissions between NASA ground stations and orbiting NASA spacecraft in those situations where NASA has explicitly withheld permission for such interception."

380. THROCKMORTON, REX D. Copyright revision: preemption as a panacea. (27 *Ohio State Law Journal* 176-192, no. 1, Winter 1966.)

This comment, which was entered in the Nathan Burkan Memorial Competition, assesses the effects of preemption by reviewing the distinctions between common-law and statutory copy-

right, examining the revision program, and analyzing section 301, the preemption provision of the current revision bill.

381. WOLTMANN, MARION LOZIER. The author and the state: an analysis of Soviet copyright law. *Copyright Law Symposium* no. 14, 1-50 (1966).

"It is the purpose of this essay [which was awarded the National First Prize in the 1964 Nathan Burkan Memorial Competition] to discover, insofar as it is possible, the extent to which the principles of Soviet copyright are 'sharply distinguished' from those prevailing in Western or 'capitalist' countries, the extent to and the ways in which the personal and property interests of the Soviet author are protected 'to the maximum' by Soviet copyright law, and the extent, if any, to which the author's interests are diminished by those of 'the state, the people.'"

2. Foreign

1. English

382. KEETON, A. A. F. Letter from South Africa; Copyright Act No. 63, of 1965. (2 *Copyright* 55-62, no. 2, Feb. 1966.)

A brief survey of the new South African copyright law, with a discussion of the differences between it and the British Act.

383. NEUFISCHER, KARL. The definition and meaning of the expressions "collective antenna" and "central antenna." (*E.B.U. Review* 47-59, no. 96B, Mar. 1966.)

A comparative examination of telecommunications law, "the broadcasting system (organizational law)," and copyright law in an attempt to find a solution to the legal problems created by community antenna and similar systems.

384. ROTH, ERNST. Music and the music publisher. (2 *Copyright* 68-69, no. 3, Mar. 1966.)

A rebuttal of the position taken by Carlo Zini Lamberti in an article published in 1 *Copyright* 148-151, no. 7, July 1965 under the title, *Considerations on certain aspects of the "de facto" monopoly in the field of music publishing*. Mr. Zini Lamberti's article was "a direct answer" to an article by Dr. Roth, published in the *EBU Review* 46-47, no. 89B, Jan. 1965 under the title,

The availability of musical scores. See 12 BULL. CR. SOC. 257, Item 202 (1965) and 13 BULL. CR. SOC. 76, Item 56 (1965).

385. SANCTIS, VALERIO DE. Letter from Italy. (2 *Copyright* 74-81, no. 3, Mar. 1966.)

A survey of recent legislative and judicial developments in the field of copyright and related laws in Italy.

386. SHER, ZE'EV. Comments on the "Letter from Israel." (2 *Copyright* 70-71, no. 3, Mar. 1966.)

The Israeli Registrar of Patents, Designs and Trade Marks replies to Mr. Hazan's criticism of the newly enacted Israeli Broadcasting Service Law pursuant to which copyright in a work prepared by invitation of the Broadcasting Service will be vested in the Service unless there is an agreement to the contrary. Mr. Hazan's article was published in 1 *Copyright* 244-245, no. 11, Nov. 1965. See 13 BULL. CR. SOC. 210, Item 238 (1966).

2. English, French and Spanish

387. HUET-WEILLER, DANIELE. L'abus du droit en matière d'oeuvres cinématographiques. (*Revue Internationale du Droit d'Auteur* 122-155, no. 48, Jan. 1966.)

A discussion in English, French and Spanish, of the problem of unwarranted litigation by an author in defense of his moral right in the case of cinematographic works, with special reference to French law.

388. REIMER, DIETRICH. Les nouvelles lois allemandes sur le droit d'auteur du 9 septembre 1965. (*Revue Internationale du Droit d'Auteur* 6-51, no. 48, Jan. 1966.)

An analysis, in English, French and Spanish, of the recently enacted West German laws on copyright and related subjects with special reference to the changes from the prior laws.

389. ROCHICCIOLI, ELIE. La saisie-contrefaçon, institution juridique autonome. (*Revue Internationale du Droit d'Auteur* 78-167, no. 47, Sept. 1965; 52-121, no. 48, Jan. 1966.)

A comprehensive article, in English, French and Spanish, on seizure of infringing copies under French copyright law.

3. French

390. NUS, JACOBUS VAN. Les oeuvres cinématographiques et assimilées. (Articles 14 et 2 de la Convention de Berne). (*Interauteurs* 13-30, no. 162, 1st quarter 1966.)

A discussion of the general report and proposals of the Swedish/BIRPI Study Group on the subject of cinematographic works, with particular reference to the proposed revision of articles 14 and 2 of the Berne Convention at the 1967 Stockholm Conference.

391. ROOS, GIDEON. La loi sud-africaine de 1965 sur le droit d'auteur. (*Interauteurs* 46-54, no. 162, 1st quarter 1966.)

A brief analysis of the recently enacted copyright law of South Africa.

392. SCHULZE, ERICH. La réforme du droit d'auteur en Allemagne. (*Interauteurs* 41-45, no. 162, 1st quarter 1966.)

French translation of an article on the recently enacted West and East German copyright laws which was published in 68 *GRUR* 82 (1966). See Item 404 *infra*.

393. VILBOIS, JEAN. Faculté de réserves et pays en voie de développement. (*Interauteurs* 31-40, no. 162, 1st quarter 1966.)

A discussion of the proposal, by the Swedish/BIRPI Study Group, and of the reactions thereto, to revise the Berne Convention at the 1967 Stockholm Conference by adding an article 25 *bis* so as to give developing countries the right to make reservations in respect of the conventional provisions on certain points.

4. German

394. BRUGGER, GUSTAV. Urheberrechtliche Produktionsfragen des Fernsehens. (10 *Film und Recht* 89-97, nos. 4-5, Apr. 15, 1966.)

An examination of some basic questions in the production of television programs under pertinent provisions of the new West German copyright law.

395. FROMM, FRIEDRICH KARL. Das neue deutsche Urheberrecht—Fortschritt und Kritik. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 50-61, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

An appraisal of the new West German copyright law.

396. HAENSEL, CARL. Das Verwertungsgesellschaftengesetz in der Urheberrechtsreform. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 68-84, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

A comment on the new West German law on the administration of copyright and neighboring rights.

397. HEINKER, HANS G. Film und Fernsehen im neuen Urheberrecht; Fragen der Praxis unter besonderer Berücksichtigung des Vertragsrechts. (10 *Film und Recht* 98-105, nos. 4-5, Apr. 15, 1966.)

An analysis of provisions relating to motion pictures and television in the new West German copyright law with special reference to contractual rights.

398. HILLIG, HANS PETER. Einführung in die urheberrechtliche Problematik des Rundfunks (Hörfunk und Fernsehen). (10 *Film und Recht* 79-89, nos. 4-5, Apr. 15, 1966.)

A survey of copyright problems relating to broadcasting under the new West German copyright law, in which is discussed the rights to be considered when using protected works and performances in radio and television, how such rights are acquired, and to what extent free use of protected works and performances is permitted.

399. LEINVEBER, GERHARD. Die wichtigsten Neuerungen der deutschen Urheberrecht; zur Neuregelung des Schutzes des geistigen Eigentums. (66 *Gewerblicher Rechtsschutz und Urheberrecht* 132-137, no. 3, Mar. 1966.)

A survey of the most important innovations of the new West German copyright law.

400. MENTHA, BENIGNE. Urheberrecht, Verwertungsgesellschaft und Berner Übereinkunft; einige Gedanken im Blickfeld der deutschen Urheberrechtsreform. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 61-68, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

A philosophic discussion of the role of a performing right society within the framework of copyright law reform in West

Germany and its relationship to pertinent requirements of the Berne Copyright Convention.

401. REICHARDT, ERNST. Die Vergütungspflicht für private Tonbandaufnahmen nach dem neuen Urheberrechtsgesetz. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 84-99, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

A discussion of the obligation to pay for the tape-recording of copyrighted works for private use under the new West German copyright law.

402. REISCHL, GERHARD. Grundfragen des neuen Urheberrechts. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-18, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

A discussion of some of the important issues involved in the revision of the West German copyright and related laws, with special reference to their parliamentary treatment.

403. ROEBER, GEORG. Film und Fernsehen in der urheberrechtlichen Grundsituation; zur rechtlichen Standortbestimmung des Fernsehens. (10 *Film und Recht* 77-79, nos. 4-5, Apr. 15, 1966.)

A brief survey of the legal requirements of the new West German laws of copyright and administration of copyright with respect to motion pictures and television.

404. SCHULZE, ERICH. Urheberrechtsreform in Deutschland. (68 *Gewerblicher Rechtsschutz und Urheberrecht* 82-84, no. 2, Feb. 1966.)

The basic differences are shown between the recently enacted copyright laws of West and East Germany.

405. ULMER, EUGEN. Das neue deutsche Urheberrechtsgesetz. (45 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 18-61, nos. 1/2/3/4/5/6, Nov. 30, 1965.)

The original German version of a summary of the new West German copyright law which appeared in 1 *Copyright* 275-286, no. 12 (1965), under title, "Letter from Germany." See 13 *BULL. CR. SOC.* 264, Item 302 (April 1966).

5. Italian

406. FABIANI, MARIO. Plagio inconscio e reminiscenze nella creazione di opere musicali. (36 *Il Diritto di Autore* 429-437, no. 4, Oct.-Dec. 1965.)

A brief discussion of the problem of "unconscious plagiarism" and copying from memory in the creation of musical works under Italian law and jurisprudence.

6. Swedish

407. STRÖMHOLM, STIG. Den tyska upphovsrätsreformen i hamn. (34 *NIR* 319-327, no. 4, 1965.)

A clarification of the changes made in the West German Government draft copyright laws during the parliamentary debates, and an evaluation of the results, comparing them with the Scandinavian copyright laws.

C. ARTICLES PERTAINING TO COPYRIGHT
FROM TRADE MAGAZINES

1. United States

408. BENJAMIN, CURTIS G. Computers and copyrights; restrictions on computer use of copyrighted material would protect authors, publishers, and even users. (152 *Science* 181-184, no. 3719, Apr. 8, 1966.)

An analysis, by the Chairman of the Board of the McGraw-Hill Book Company, of the problems and issues involved in computer use of copyrighted material, with reference to the possible impact of the proposed new copyright law on the future of computer-based information systems.

409. CLARKSON, AUSTIN. The 1965 revision of the U. S. copyright law. (*Current Musicology* 191-198, Fall, 1965.)

A summary of the *Supplementary Report of the Register of Copyrights* "with a view to interesting a readership concerned with matters musical and educational," prefaced by a brief introductory statement on the revision program.

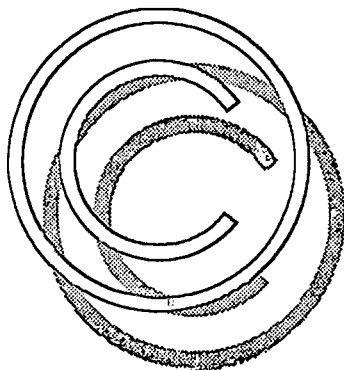
410. Duty and copyright problems in importing books and sheets. (189 *Publishers' Weekly* 40-43, no. 19, May 9, 1966.)

A summary of addresses delivered by Miss Margaret Nicholson and Mr. Arthur I. Demcy before a dinner meeting on March 29 arranged by the Co-production and Import Committee of the American Book Publishers Council. Miss Nicholson "spoke primarily about the interaction (or inter-abrasion) of the Universal Copyright Convention and the manufacturing clause" and Mr. Demcy described current duty rates and current methods for determining the value of import shipments under the Tariff Act of 1963.

411. ERRATUM. Bodenhause, Georg H. C., UNITED STATES COPYRIGHT PROTECTION AND THE BERNE CONVENTION. *The Fourth Annual Jean Geiringer Memorial Lecture on International Copyright Law*, 13 BULL. CR. SOC. 215 (April 1966) at p. 219: At the close of the second paragraph ending with the sentence reading: "The situation is comparable in other countries.", *add*:

Of course, the system would also work the other way round in obliging the U.S. to grant protection to already existing foreign works, but Article 18, paragraph 3, of the Berne Convention provides for means at least to avoid such retroactivity in cases where investments have already been made.

BULLETIN
OF THE
COPYRIGHT SOCIETY
OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 13, NO. 6

AUGUST, 1966

BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY

ANNA FELDMAN

GEORGE E. FROST

MORTON D. GOLDBERG

PROF. HARRY G. HENN

DR. STEPHEN P. LADAS

ALAN LATMAN

PROF. MELVILLE B. NIMMER

STANLEY ROTHENBERG

PAUL J. SHERMAN

JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*

MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

EDWARD A. SARGOY

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON D. GOLDBERG

Assistant Secretary

MARGARET NICHOLSON

Treasurer

EDWARD M. CRAMER

Assistant Treasurer

PAUL GITLIN

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

PROF. RALPH S. BROWN, Yale Law School, New Haven

GEORGE D. CARY, Washington, D. C.

CARLETON G. ELDRIDGE, Jr., New York City

ROBERT V. EVANS, New York City

HERMAN FINKELSTEIN, New York City

ARTHUR L. FISHBEIN, New York City

PROF. HARRY G. HENN, Cornell Law School, Ithaca

DANIEL HUTTENBRAUCK, New York City

PROF. BENJAMIN KAPLAN, Harvard Law School, Cambridge

IRWIN KARP, New York City

THEODORE R. KUPFERMAN, New York City

ISABELLE MARKS, New York City

ROBERT H. MONTGOMERY, Jr., New York City

PROF. MELVILLE B. NIMMER, U. of Cal. Law School, Los Angeles

AVERILL C. PASAROW, Los Angeles

SIGRID H. PEDERSEN, New York City

LAWRENCE H. REED, New York City

BARBARA A. RINGER, Washington, D. C.

SAUL N. RITTENBERG, Culver City, California

HARRY N. ROSENFELD, Washington, D. C.

JOHN SCHULMAN, New York City

FRIEDA M. TANNENBAUM, New York City

SIGMUND TIMBERG, Washington, D. C.

FRANKLIN WALDHEIM, New York City

RICHARD WINCOR, New York City

THEODORA S. ZAVIN, New York City

LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1966 by The Copyright Society of the U.S.A.

All rights reserved.

BULLETIN
OF THE
COPYRIGHT SOCIETY
OF THE U.S.A.

VOLUME 13
OCTOBER 1965-AUGUST 1966

Published at
NEW YORK UNIVERSITY LAW CENTER

Printed in the United States of America. Copyright © 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, by The Copyright Society of the U.S.A., 40 Washington Square South, New York, N.Y. 10011

THE BULLETIN of The Copyright Society of the U. S. A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Edward A. Sargoy, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Morton D. Goldberg, *Secretary*; Paul Gitlin, *Assistant Treasurer*; Margaret Nicholson, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York, N. Y. 10011.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J. 07606.

CITE: 13 BULL. CR. SOC. page no., Item (1966).

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

BOARD OF TRUSTEES

PROF. RALPH S. BROWN, Yale L. S.
GEORGE D. CARY, Washington, D. C.
CARLETON G. ELDRIDGE, JR., New York
ROBERT V. EVANS, New York
HERMAN FINKELSTEIN, New York
ARTHUR L. FISHBEIN, New York
PROF. HARRY G. HENN, Cornell L. S.
DANIEL HUTTENBRAUCK, New York
PROF. BENJAMIN KAPLAN,
Harvard L. S.
IRWIN KARP, New York
THEODORE R. KUPFERMAN, New York
ISABELLE MARKS, New York
ROBERT H. MONTGOMERY, JR., New York
THEODORA S. ZAVIN, New York
LEONARD ZISSU, New York

PROF. MELVILLE B. NIMMER,
U. of Cal. L. S.
AVERILL C. PASAROW, Los Angeles
SIGRID H. PEDERSEN, New York
LAWRENCE H. REED, New York
BARBARA A. RINGER, Washington, D. C.
SAUL N. RITTENBERG, Culver City,
California
HARRY N. ROSENFELD, Washington, D. C.
JOHN SCHULMAN, New York
FRIEDA M. TANNENBAUM, New York
SIGMUND TIMBERG, Washington, D. C.
FRANKLIN WALDHEIM, New York
RICHARD WINCOR, New York

CONTENTS

PAGES

PART I. ARTICLES.

Copyright Law Revision, The American Bar Association Copyright Symposium, Miami, Florida, August 10, 1965	1
A Single Federal Copyright System Franklin Waldheim	2-3
Notice and Formalities Franklin Waldheim	4-6
Subject Matter of Copyright: Exclusive Rights (Sections 102-106, 111) Morton David Goldberg	7-13
Copyright Infringement and Remedies (Sections 501-508) Morton David Goldberg	13-19
Phonorecords and Sound Recordings Sidney A. Diamond	20-24
Duration Sidney A. Diamond	25-30
Copyright Ownership, Transfer and Termination; Exemption and Fair Use Irwin Karp	31-42
A Patent Lawyer Looks at the Copyright System John T. Love	43-47
Closing Session of the Hearings in the House of Rep- resentatives on the Copyright Revision Bill Abraham L. Kaminstein	97-113
Statement by the Chairman of the House Com- mittee on the Judiciary Emanuel Celler	113-118
Closing Remarks before the Committee	113-122
The United States Income Taxation of Nonresident Alien Entertainers, Composers and Publishers Stanley Hagendorf and Alan H. Bomser	123-131
Tape or Red Tape — Current Developments in Back- ground Music Allen H. Arrow	161-166

	PAGES
Tape and Cartridge Development in the Phonograph Record Field	William M. Kaplan 167-170
Methods of Law Reform in Regard to Current Problems of Copyright and Related Matters	J. W. Miles 171-181
United States Copyright Protection and the Berne Con- vention — <i>The Fourth Jean Geiringer Memorial Lec- ture</i>	Georg H. C. Bodenhausen 215-224
Choreography and Copyright	Gary D. Ordway 225-240
"Verifying" from Prior Directories — "Fair Use" or Theft? <i>Delicate Distinctions in the Protection of Copyrighted Compilations</i>	Ira Lurvey 271-300
The Current Status of U. S. Copyright Law: <i>An Ex- periment in Legislative Technique</i>	
	Abraham L. Kaminstein 371-377
Recent Judicial Developments in Copyright Law	
	Morton David Goldberg 378-401

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and
Territories 48, 132, 182, 241, 301, 402
2. Foreign Nations 132, 182, 242, 302, 407

PART III. CONVENTIONS, TREATIES AND

- PROCLAMATIONS 134, 183, 245, 305, 408

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U.S. Courts.

1. Federal Court Decisions 49, 135, 187, 306, 411
2. State Court Decisions 60, 199, 253, 347, 424

B. Decisions of Foreign Courts.

1. Royalties for Record Play on the Radio.
(*Britain, Sweden, Denmark.*) 61-68
2. Argentina 355-358

PART V. BIBLIOGRAPHY.

A. Books and Treatises.

1. United States Publications 69, 153, 260, 359, 426
2. Foreign Publications.
 1. In English 69, 208, 426
 2. In French 153, 427
 3. In German 69, 208, 426
 4. In Italian 261

B. Law Review Articles.

1. United States 70, 153, 230, 260, 360, 427
2. Foreign.
 1. English 73, 154, 210, 263, 364, 429
 2. English, French and Spanish 76, 156, 211, 365, 429
 3. French 76, 157, 211, 264, 366
 4. German 77, 157, 212, 264, 366, 430
 5. Italian 79, 159, 212, 268, 369
 6. Swedish 80, 369, 430

C. Articles Pertaining to Copyright from Trade Magazines.

1. United States 80, 160, 212, 268, 369
2. England 92, 160, 214, 269
3. South Africa 95

NEWS BRIEFS.

- English Summaries Now Added to Inter-Scandinavian
Publication NIR 95
- Inter-American Meeting of Copyright Experts 430

ANNOUNCEMENTS.

- Copyright Fees*preceding* 1
- Copyright Law Revision, Part 5*preceding* 1
- Copyright Law Revision, Hearings*preceding* 161
- Miss Ringer Appointed Assistant Register*preceding* 371

ERRATUM

- Bodenhause, Georg H. C., United States Copyright Protection
and The Berne Convention 370

PHOTOGRAPHS.

Subcommittee No. 3, House Committee on the Judiciary on H.R. 4347, The Copyright Revision Bill, September 2, 1965	<i>preceding</i> 97
Georg H. C. Bodenhausen	<i>preceding</i> 215
Announcement of Awards, 1965 ASCAP Nathan Burkan Memorial Competition: Prof. W. J. Derenberg, Herman Finkelstein, Dean Miguel A. de Capriles	<i>preceding</i> 271
Barbara A. Ringer, Assistant Register of Copyrights	<i>preceding</i> 371
INDEX — Volume 13, October 1965- August 1966	432



BARBARA A. RINGER
Assistant Register of Copyrights

MISS RINGER APPOINTED ASSISTANT REGISTER

Barbara A. Ringer, a staff member of the Copyright Office since 1949 and a recognized authority on copyright law, has been appointed Assistant Register of Copyrights.

Miss Ringer is the author of several monographs in the series of studies in connection with the pending revision of the copyright law. Her contributions include *Renewal of Copyright* and *The Unauthorized Duplication of Sound Recordings*. She is the co-author of the Practicing Law Institute's volume on *Copyright*, and teaches Copyright Law at the Georgetown University Law Center.

In her new position, Miss Ringer will continue her pivotal role in the formulation of legislation relating to revision and will have extensive responsibilities in the management and policy making of the Copyright Office, under Register of Copyrights Abraham L. Kaminstein, and Deputy Register of Copyrights George D. Cary. Miss Ringer succeeds William P. Siegfried, who retired a few months ago.

Born in Lafayette, Indiana, on May 29, 1925, Miss Ringer received her A.B. degree with distinction from the George Washington University, where she was elected to Phi Beta Kappa. She received her M.A. degree from the same university and the LL.B. degree from Columbia University. In November 1949, she joined the staff of the Copyright Office as an examiner and has served successively as Head of the Renewal and Assignments Section and Assistant Chief and Chief of the Examining Division. More recently she has been the Assistant Register of Copyrights for Examining.

PART I.

ARTICLES

412. THE CURRENT STATUS OF U. S. COPYRIGHT LAW
REVISION: *An Experiment in Legislative Technique**

By ABRAHAM L. KAMINSTEIN

Mr. Chairman, Registrar Pippy, ladies and gentlemen, I appreciate this chance to bring you up to date on where we stand in the program for general revision of the copyright law, and to give you my thinking on the prospects for the year ahead. Before getting down to business, I should like to express my gratitude for the opportunity to visit this beautiful and hospitable city. I have been to many an A.B.A. annual meeting over the years, and I don't remember any that was more pleasant and enjoyable than this one has been for me.

I noticed that the program put out by the Association for the whole Annual Meeting listed the subject of this talk as "Current Status of Copyright Law *Division*." Five years ago, or perhaps even a year ago, I couldn't have argued too much with the accuracy of that title. The thinking on what should be done about the copyright law was indeed divided every which way, and some of the conflicts were so sharp that a lot of people laughed at the idea of ever reconciling them. I am happy to report that that situation has changed. Although I don't suppose I could go so far as to refer to the "Current Status of Copyright Law Peace and Harmony," I believe we are approaching agreements or accommodations on some of the most controversial issues in the revision program. There is good reason for optimism in hoping that a completely revised copyright statute will be enacted before the end of the 90th Congress.

Last year this time, as those of you who were in Miami Beach will remember, the House Judiciary Subcommittee was in the middle of its hearings on the revision bill. There were 22 sessions in all, running (rather like the song) from May to September, and producing a gigantic record. Incidentally, your Section contributed to that record by adopting a resolution endorsing a number of the major principles of the

* Address of the Register of Copyrights at the American Bar Association Copyright Division Luncheon, Tuesday, August 9, 1966, Royal Embassy Hotel, Montreal, P.Q., Canada.

revision bill; that resolution was in turn adopted by the House of Delegates for the membership of the Association, and was reported to the Congress on a hectic and memorable day last August by Jim Toomey, John Shulman, and Sidney Diamond.

The 1965 House hearings were markedly different from the various series of hearings on this bill's predecessors which began in 1924. There are reasons for these differences, and I mention three crucial ones.

First, we have a good bill. I don't think there is any doubt that the bill the Subcommittee had before it is the most thoughtfully and carefully developed of any of its predecessors. Practically every witness during the hearings echoed Ed Sargoy's remarks during his testimony, which I can't resist quoting:

I have been close to this project since it was only a gleam in the eye of our former Register, the late Arthur Fisher, who was the inspiration of the approach taken, as well as the monumental 34 studies on copyright which preceded the drafting deliberations. I remember the travail of panel meetings, debates, symposia, articles, public and private discussions—before as well as after Kami and his staff launched trial balloon drafting proposals. We all wondered, only a year ago, how the problems of the great complex of our modern electronic copyright world ever would be organized and compressed into a rational understandable piece of legislation.

Yet there it is—concededly not a perfect instrument ready for immediate passage, but basically sound in its fundamental approach to general revision. There has been no such comparable preparation for legislation in the history of world copyright—and I have in mind major countries long sophisticated in this field, whose basic systems of automatic copyright protection from creation, for life plus 50 years, under single Federal enforcement, we are now considering taking over, with some necessary American embellishments. I recall no such prior preliminary preparations for the extensive 1932 and 1936 Congressional hearings on general revision in which I took an active part.

In other words, the Subcommittee could not fail to be impressed with the careful draftsmanship that has gone into H.R. 4347, and with the number of substantive issues that had already been ironed out before the hearings began.

Second, we have a fine Committee. Even more important has been the high calibre of the Subcommittee itself. Under the dedicated chair-

manship of Robert W. Kastenmeier of Wisconsin, the members were generous in their attendance, searching in their questions, and clear in their determination to resolve the remaining conflicts on a reasonable basis and to report a bill that would substantially improve the present antiquated statute. Most striking of all was the enthusiasm of the members and their intellectual commitment to the subject matter. Copyright law is not exactly loaded with political glamour, and the Subcommittee's consideration of revision, throughout the hearings and thereafter, represents statesmanship of a very high order.

Third, and perhaps most important of all, the prevailing tone of the testimony the Subcommittee heard was good. I cannot remember any Congressional hearing at which the general level of statements was more constructive and reasonable. Sharp differences there were, but the conflicting positions were presented for the most part with a minimum of the extreme attitudes, emotional diatribes, personal attacks, and rambling discussions that have marked some of the past hearings on this subject. Nearly all of the witnesses spoke in favor of the revision bill in general, and confined their comments to specific proposals for amendments. All of this is quite a tribute to the copyright bar, and was reflected in the remarks of Representative Richard Poff of Virginia, the ranking minority member of the Subcommittee, on the closing day of the hearings. He said:

Mr. Chairman, I am in my 13th year in the Congress, and during the course of that time I have been privileged to participate in many congressional investigations and hearings, some of which have lasted for as long as 2 years. But I can say candidly and honestly that this has been the most objective, and instructive, and constructive of any hearing in which I have participated.

I think we are deeply indebted to all of the witnesses who have approached their advocacy without rancor and bitterness, . . . I do say that it has been most inspiring and stimulating to me, and I would press the point only that all congressional hearings could be so dispassionate, and learned, and so free of partisan bitterness.

When the hearings ended in September, 1965, we realized that we had a problem. We had a massive record which was full of meaty arguments and suggestions but which had to be organized, digested, and synthesized in a way that would make it useful to the Committee members. Our first step, in addition to helping the Committee counsel with the editing of the hearings, was to prepare a very complete combined subject and name index to the entire 2,000 printed pages of

hearings; the index was done with the assistance of the Library of Congress's computer, and itself runs to 124 printed pages. I know of no other Congressional hearings that have an index approaching this one in completeness. In addition, we went through the record and prepared detailed summaries of every statement, argument, and proposal that had been made.

When we got through with all this we had a less unmanageable body of information, but it was obvious that something more had to be done in order for the Subcommittee to come to grips with the many dozens of separate issues and proposals that had been presented at the hearings. Working in close cooperation with Herb Fuchs, the Committee counsel, what we did represents a unique experiment in legislative technique, and I have the Subcommittee's permission to tell you about it here.

We first took the entire corpus of the hearings, and divided it into ten general subject areas:

- (1) Subject matter of copyright
- (2) Ownership
- (3) Duration
- (4) Notice and registration
- (5) Manufacturing and importation requirements
- (6) CATV
- (7) Jukebox
- (8) Compulsory license for phonorecords
- (9) Educational copying and fair use
- (10) Educational broadcasting and other performance rights

As you can perhaps see, these topics were listed to present the less controversial issues first. The hope we had was two-fold: that as we went down the list the Subcommittee would become more and more educated in the whole subject of copyright so that it would feel confident in deciding the most sharply disputed issues when it got to them, and also that, while it was doing so, the conflicts would be moving toward a resolution. I am happy to say that although there was some variation in considering topics, both of these hopes have been realized.

For each of the ten general subject areas we have followed a consistent pattern. We first divided the subject into subtopics—usually about four or five—and within each of these we drew out from the hearings every single issue that had been raised, no matter how detailed. Each issue was put in the form of a question for the Subcommittee to answer. Then, under each question, we collected and summarized or quoted, as fairly and objectively as we could, every

argument, suggestion, or proposal bearing on the issue that was presented during the hearings and thereafter. In other words, by this method the Subcommittee was able to take an organized look at every one of the hundreds of separate points raised by the witnesses, to view them in context, to weigh the arguments for and against them, and to make considered decisions. I honestly do not believe it will be possible for anyone who presented a statement to the Subcommittee to say that his arguments or suggestions were overlooked.

The decisions of the Subcommittee have naturally produced a number of revisions in the bill, some minor and some quite important. The members participated actively in the redrafting process, which has gone along concurrently with the consideration of individual issues. When it finishes this phase of its work, which should be in the next few weeks or so, the Subcommittee will have a revised bill nearly ready to be reported to the full House Judiciary Committee. The only further delay will involve completion of the legislative report.

This whole process started in early February of 1966, and was carried on through the medium of meetings of the Subcommittee in Executive Sessions attended by representatives of the Copyright Office including Barbara Ringer, Assistant Register of Copyrights, Abe Goldman, General Counsel, and me. George Cary, Deputy Register of Copyrights, and Mr. Goldman testified at a session yesterday morning. There have usually been two sessions a week, generally lasting two hours or more, and as of yesterday there had been 42 of these meetings. The discussions, which have been carried on in a fairly informal atmosphere, have been marked by intelligence, careful attention to detail, and a constructive, searching effort to weigh the arguments and reach a reasoned conclusion. The tone has been entirely bipartisan and, while there are naturally some differences in approach and philosophy, I believe that there have been few, if any, decisions in which the Committee has not acted unanimously.

What I have been describing, I hope you realize, is impossible. It simply couldn't happen. It is unheard of. But it did happen and it is continuing to happen. Busy Congressmen, members of a busy committee, in the middle of a busy session, have been willing to spend an extraordinary amount of time and effort on a bill that cannot mean much to them politically. As things now stand, and make no mistake about this, most of the members of the Subcommittee know more about the copyright law than the majority of the people in this room, and they know a good deal more about the revision bill than most copyright lawyers. They are enthusiastically committed to copyright law revision, and the bill they report will be one of the most carefully

considered pieces of legislation, both as to language and as to substance, ever to emerge from a Congressional committee.

All this is not a matter of luck but of careful preparation combined with a prevailing spirit that is constructive and reasonable rather than destructive and extreme. I am convinced that what will come out of all this effort will be of lasting value for generations to come, and I believe that the techniques we have followed could be profitably studied by the proponents of other legislative programs.

The Senate Judiciary Subcommittee, under the chairmanship of Senator McClellan, opened hearings on the revision bill last year, but delayed resuming them this year, partly because of the intense copyright activity in the House Subcommittee. For the most part I am not at liberty to disclose or comment on the decisions agreed to by the House Subcommittee, but since its decision on the problem of community antenna television has been published I will refer to it briefly. The question here, which occupied a great deal of the Subcommittee's time, was the extent to which a CATV system should be liable for its unauthorized cable retransmission of copyrighted material picked up from authorized broadcasts. At the time the Subcommittee was considering this problem, the CATV issue was also under active consideration by the House Commerce Committee in the context of F.C.C. regulation of CATV systems, and by Judge Herlands in a case involving copyright liability under the present law. Because of the close relationship between copyright and the communications aspect of the problem, the Subcommittee made public the decision it had reached by means of a letter to the Chairman of the Commerce Committee. In broad terms the Subcommittee proposal would make the extent of liability of a CATV system depend on its impact on the copyright proprietor's market, exempting certain uses, making others fully liable, and subjecting those in between to a system of limited liability.

Shortly after the Subcommittee announced its conclusions, Judge Herlands handed down his landmark decision in *United Artists Television v. Fortnightly Corp.*, which I understand Mort Goldberg will review in detail tomorrow. (See Item 413 *infra*.) This decision, which ruled against the CATV operators, prompted urgent requests for the resumption of revision hearings in the Senate to consider the CATV problem and Senator Burdick chaired three days of hearings on this subject last week. I am convinced, in the light of these hearings, that this complex problem is moving toward a solution, and I expect that with some changes the House Subcommittee proposal will provide the framework of that solution.

In fact, thanks to a constructive attitude on both sides, some of the other most sharply drawn issues, including educational copying and the jukebox exemption, appear to be approaching agreement. If things go as planned, I hope to see the Full House Judiciary Committee report a revised bill this year. With this behind us, we should be able to hope for fast action in both Houses of the 90th Congress.

Let me remind you once more that although we in the Copyright Office have been working on this particular legislation for 11 years, which is long enough, the law we are trying to revise was enacted 57 years ago. The first efforts at general revision started in 1924, when the law was only 15 years old, and went on continuously throughout the 20's and 30's. We know the reasons why the previous efforts failed and we have tried to avoid them. So far we have succeeded, and we will continue trying until a bill is finally enacted. But every day that passes makes the need more urgent.

I recently came across a passage from Confucius which, though quoted in a very different context, seemed to me to underline the reasons why the 1909 Act must be revised:

If language is not used rightly, then what is said is not what is meant. If what is said is not what is meant, then that which ought to be done is left undone; if it remains undone, morals and art will be corrupted, if morals and art are corrupted, justice will go awry, and if justice goes awry, the people will stand about in helpless confusion.

Without belaboring the obvious, this is where we are today under a poorly-written and archaic copyright statute: injustice and confusion abound. To remedy that situation Congress has undertaken a task that is exactly the opposite of political expediency; it is the careful weighing of all of the opposing arguments on each of the many complex issues in copyright law and the reaching of balanced conclusions that will be clearly expressed and will be fair now and for years to come. It is impossible to overestimate the importance of this task, and we are closer to its achievement now than we ever have been.¹

1. This address, the succeeding paper by Morton D. Goldberg, and the papers offered at Montreal in the Copyright Symposium (to be printed in our October issue) are published with the permission of the authors and the American Bar Association, Section on Patent, Trademark and Copyright Law.

413. RECENT JUDICIAL DEVELOPMENTS IN COPYRIGHT LAW*

By MORTON DAVID GOLDBERG**

Preliminary—a decision reported unofficially

Before reviewing those decisions which have been officially reported, I should like to tell you of a case in the Superior Court of California in San Francisco which has so far been reported only unofficially, in that learned legal journal, *Variety*, July 27, 1966, pp. 94, 96. It appears that a topless dancer doing business under the firm name and style of "Tara" sued, for damages and an injunction, another performer doing business under the name of "Tosha." The gravamen of the complaint was that Tosha was plagiarizing the topless act which Tara was performing with snakes. Tosha counterclaimed for infringement of her trade name, in which she apparently claimed to have built up a substantial secondary meaning.

The court denied motions by Tara's attorney for either a recess to permit viewing the two performers at a nightclub or the appointment of a panel of experts consisting of other topless dancers. According to the report in *Variety*, evidence was then introduced that Tosha had started her career as the Glo Girl, a go-go dancer, then became one of the first topless, then topless and bottomless, dancers using the style, the Glo Worm Girl. On the other hand, according to the reported evidence, Tara began as the Golden Girl (painted like a Goldfinger victim) and then became plain topless Tara.

I am pleased to report that the court rendered a decision worthy of Solomon. An injunction was issued permitting Tara to do her topless snake dance but requiring her to use another name, and permitting Tosha to retain her name and snakes but restraining her from performing topless with them.

However, since art is long, life is short and so is the time allotted to me, I should therefore like to turn to those copyright decisions of the last twelve months which have been officially reported.

* Paper delivered before the Section of Patent, Trademark and Copyright Law of the American Bar Association at Montreal, Canada, Wednesday, August 10, 1966. Copyright © 1966 Morton David Goldberg. All Rights Reserved.

** Chairman, Copyright Division, A.B.A. Section of Patent, Trademark & Copyright Law; Chairman, Committee on Copyright and Literary Property of The Association of the Bar of the City of New York.

I.

THE CATV CASE: *United Artists Television, Inc. v. Fortnightly Corp.*

I don't think "momentous" is too strong a term to describe the significance of Judge Herlands' decision this past May in *United Artists Television, Inc. v. Fortnightly Corporation*.¹ This is undoubtedly the most significant copyright decision in the past twelve months, and perhaps a good deal longer. The decision held that a community antenna television (CATV) system had infringed the copyrights on motion pictures which the system had taken off the air from television stations which had been licensed by the motion picture proprietors to broadcast the pictures. In another CATV infringement case still pending, *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*,² Judge Wyatt had denied the plaintiff's motion for summary judgment. The court held that that case was also a significant test case and that the complexity of the evidentiary facts and the issues in such circumstances did not permit him to decide the case on affidavits.

The significance of the *United Artists* case is economic, legal and political. The decision has ramifications, depending on the outcome of a pending appeal, not only for the entire structure of the broadcasting industry but also for the application of the present copyright law (and its proposed revision) to other new technologies, such as photocopying and computer systems for information storage and retrieval. And the course through Congress of H. R. 4347 (89th Cong., 1st Sess.), the pending bill for overall revision of the Copyright Act, may be substantially affected. The broadcasting trade press reports that, as a result of Judge Herlands' decision, the CATV interests are pressing for a separate bill to be passed by Congress to cover the question of copyrights and CATV, without waiting for enactment of H. R. 4347.³ The Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights scheduled for this past week its only hearings this year on the overall revision bill, for the sole purpose of receiving views on the bill as it relates to community antenna television systems.⁴

A. *The facts.*

The plaintiff was the copyright proprietor of certain dramatic and non-dramatic motion pictures which were broadcast by television sta-

1. 149 U.S.P.Q. 758 (S.D.N.Y. 1966), digested 13 BULL. CR. SOC. 306 (June, 1966).

2. 251 F. Supp. 302, 148 U.S.P.Q. 417 (S.D.N.Y. 1965).

3. See, e.g., *Broadcasting*, July 25, 1966, p. 40.

4. Cong. Rec. 15253 (daily ed. July 18, 1966).

tions in Pittsburgh, Pa., Wheeling, W. Va., and Steubenville, Ohio, which were licensed by the plaintiff and its predecessor in title to do so. In plaintiff's contracts with the three television stations, the license was limited to the showing of the pictures on the facilities of the station for reception, without charge, by the public, and the TV stations were prohibited from making sublicenses to others. In some of the contracts, there was also an explicit prohibition of any broadcast or exhibition of the movies through a CATV system.

The signals broadcast by the television stations were picked up by the defendant's CATV system and made available, after the necessary electronic modifications, to the CATV subscribers in Clarksburg and Fairmont, West Virginia. The CATV system had no license from the plaintiff, although it contended that it had a license implied in law. The CATV system operated at a profit, derived from subscribers who paid an installation charge and flat monthly charge unrelated to the nature or quantity of the specific programs to which they tuned in. Without the CATV system the subscribers were unable to obtain satisfactory reception of the programs on the channels on which the Pittsburgh, Wheeling and Steubenville stations broadcast the programs.

B. *The issues.*

The complaint charged infringement under Section 1(a), (c) and (d) of the Copyright Act, 17 U.S.C., together with unfair trade practices and unfair competition. The answer denied these claims and alleged various defenses. These defenses included: the provisions of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609, and the FCC regulations under that Act, alleged to be countervailing; publication of the motion pictures without affixation of proper copyright notice; misuse of copyrights; the statute of limitations; and laches, waiver and estoppel.

The court directed a separate trial first on the basic issue of copyright infringement and the defense based on the Federal Communications Act of 1934 and FCC regulations (i.e., whether plaintiff was barred from recovery by the strictures contained in the Communications Act and the FCC license to the television stations against the imposition of a charge for reception of broadcasts). It reserved for later trial the remaining defenses and the claim of unfair trade practices and unfair competition.

C. *The holding.*

The court held that

when a CATV system, for profit, plays so substantial a part in a reproduction of a broadcast performance being seen and heard by the public that the only act necessary to transduce the electromagnetic waves it has processed and transmitted to subscribers into an audible and visible reproduction of the broadcast performance is a minor, albeit essential one—such as “turning the knob” on a homeowner’s television set—the CATV system must be said to have infringed upon the exclusive right to “perform” which Congress has bestowed upon the copyright proprietor in 17 U.S.C. § 1 (c) and (d).

More specifically, Judge Herlands held that:

1. The defendant’s CATV system had infringed the plaintiff’s right of public performance for profit under Section 1 (c) of the Copyright Act with respect to plaintiff’s non-dramatic motion pictures (i.e., not photoplays but motion pictures such as documentaries, etc.).
2. The CATV system had infringed the plaintiff’s right under Section 1 (d) of the Copyright Act (the right of public performance, whether or not for profit) with respect to plaintiff’s dramatic motion pictures (i.e., its photoplays).
3. The Federal Communications Act of 1934 did not prohibit the plaintiff, as the copyright proprietor, from collecting royalties from the CATV system for the defendant’s public performances.
4. Neither the Communications Act, the FCC licenses to the television stations whose signals had been picked up, nor the plaintiff’s copyright licenses to those stations operated to authorize the CATV system to publicly perform the plaintiff’s works.

D. *Discussion.*

The court discussed the issues in a lengthy and learned opinion replete with references ranging from the $E=mc^2$ formula of Einstein to the semantics of Hayakawa and H. L. Mencken. For reasons elaborated upon in the opinion, Judge Herlands stated that the term “community antenna” was a misnomer, because the defendant’s CATV operations consisted neither of “community” ventures nor mere passive “antennas.” He found, rather, that these were “large-scale commercial enterprises . . . making profit out of the exploitation of television

programs . . .," and that antennas comprised only one of the components of the elaborate electronic equipment of the defendant.

The court emphasized that the defendant's systems consisted of "sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables."

The core of the decision is its interpretation of the word "perform" in Section 1 (c) and (d) of the Act. Judge Herlands took the absence of a built-in definition in the Act to indicate Congressional intent that the courts must conform the definition to the linguistic, technological and economic changes in the scope of that concept through the years. He therefore undertook the task of statutory interpretation by looking to what he considered the linguistic, technological and economic "realities" of the matter.

1. *Linguistically*, he reasoned that the phrase "to perform" encompasses not merely the everyday meaning attached by the average layman but also the meaning which it must take from a changing context, which may not have been anticipated specifically by Congress but must nevertheless be construed as within the Congressional intent. He stated that when a CATV system brings the acting or playing of a copyrighted work to an audience and makes available a reproduction (such as a film) of the work it exercises a function so similar in result to the work's primary performance that it must be treated as though it were making available a classical performance in the immediate presence of a living audience; and if such a performance is unauthorized, the remedies of the Copyright Act must be made available to the copyright proprietor.

2. *Technologically*, he found that the CATV system was not merely a passive antenna service but a system closely analogous to a television station. The fact that plaintiff's motion pictures were not made visible or audible until they reached the CATV subscriber's television set emphasized, rather than contradicted, in Judge Herlands' view, the similarity between a CATV system and a television station. As concerns sound and sight, he found "no difference between television transmission through the air and CATV transmission: in both systems sound and sight are unobservable by the unaided human senses."

There was also a finding that the CATV system reproduced and duplicated the transmission from the television station. Beginning

with the "head end equipment" at the base of the defendant's actual antennas, its system "... created output signals which are replicas in electronic terms of the input signals. . . . The signals representing both the video and sound do not move as preserved electronic entities through the system, for at each stage of amplification or modulation a new duplicate of the input is made; . . . The net effect of defendant's electronic processing is to transmit through defendant's coaxial cables to its subscribers reproduced signals on new carrier waves."

The process was summarized as follows: "The intelligence of the performance of a telecast moving picture—consisting of sight and sound as transduced and embodied in the amplitude and frequency variations in the energy of the input signals—is reproduced and duplicated electronically. . . . The fact that defendant's systems duplicate and reproduce on newly supplied energy the patterns, arrangements, configuration, variations and sequences of energy that originated from the broadcast antenna is the essential feature of defendant's act of electronic reproduction."

3. The *economic reality*, Judge Herlands found, was that the defendant was not in the business of making electromagnetic waves available to its subscribers but in the business of selling them television programs. The subscribers were willing to pay for the electromagnetic waves only because they carried the programs to the subscribers' sets. In a real economic sense, CATV systems performed the same function as broadcasters and competed with them for audiences.

4. *Prior case law*. Although the precise question in the case was one of novel impression for the court, it nonetheless was able to rely on prior cases dealing with the liability of broadcasters and broadcast recipients for infringement of performance rights. It cited cases decided in the early days of radio broadcasting, in which the radio broadcaster was held liable for the broadcast of an unauthorized performance of a musical composition rendered in its studio.⁵

The court relied most heavily, however, on the philosophy of prior cases sustaining the liability of certain broadcast recipients. It cited the leading case of *Buck v. Jewell-LaSalle Realty Co.*,⁶ in which the Supreme Court held that the acts of the defendant hotel constituted an infringing performance of a musical composition when the hotel made a radio broadcast of the work available to its guests by means of loudspeakers and headphones throughout the hotel. The hotel

5. See, e.g., *Jerome H. Remick & Co. v. American Auto Accessories Co.*, 5 F. 2d 411 (6th Cir.), cert. denied, 269 U.S. 556 (1925).

6. 283 U.S. 191 (1931).

had argued, as did the CATV system in the instant case, that the copyrighted work was "performed" only by the broadcasters and that the defendant had merely facilitated the reception of the performance. Mr. Justice Brandeis, in *Jewell-LaSalle*, had rejected the defendant's contention by enunciating the "multiple performance doctrine," to the effect that nothing in the Copyright Act prevented a single rendition of a copyrighted work from resulting in more than one public performance for profit.

Judge Herlands was strongly influenced by the *Jewell-LaSalle* holding that, on the facts in that case, public reception for profit in itself constituted infringement. He relied also on the *SESAC* case,⁷ in which another hotel was held liable where the broadcast performance was audible only in the guest rooms and not in any of the hotel's public rooms, and *Harms, Inc. v. Sansom House Enterprises, Inc.*⁸ The *Harms* case had held that the novelty of the means of performance was irrelevant to the question of liability where infringement consisted of the playing of the works on recordings which were transmitted by leased wires to customers who amplified the music on loudspeakers in their places of business.

*E. Implications for computer systems and other
new technologies.*

The court found it unnecessary to agree with the "full sweep" of plaintiff's claims. Significantly, however, the court characterized some of these arguments as to additional rights as "not without force." As an example, it cited the argument based upon the "impressive testimony" of plaintiff's expert to the effect that

. . . defendant's CATV systems store information (i.e., program intelligence) in the coaxial cables during the time the audio and video signals are being propagated through the cables: that "the physical reality of the electromagnetic field containing the sights and sounds of the program is every bit as real as a piece of paper with print on it or of a photograph" . . . and that the storage of electromagnetic energy in CATV coaxial cables and on video-tape is basically the same.

7. *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937).

8. 162 F. Supp. 129 (E.D. Pa. 1958), aff'd. *sub nom. Leo Feist, Inc. v. Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

Premised on this expert testimony, the plaintiff had contended that the defendant's use of "program intelligence" in the coaxial cables constituted the making of a "transcription or record" of the plaintiff's work from which it could be "exhibited, performed, represented, produced, or reproduced," as such quoted language is employed in Section 1 (d) of the Copyright Act.

Although this is merely a judicial intimation and not a holding, the suggestion nevertheless has great significance as applied to computer systems for information storage and retrieval. The logical conclusion from this view is that, if unauthorized, the mere putting of a copyrighted work into the storage of a computer system, or the mere processing of that work internally in the computer system, constitutes an infringement of that work, because a "transcription or record" is being made from which the work may in some manner or method thereafter be "exhibited, performed, represented, produced, or reproduced" from the computer memory.

The court limited itself to deciding the question of infringement of plaintiff's performance rights under Sections 1 (c) and 1 (d). With understatement, it indicated that the "potential ramifications of an adjudication of those additional issues [argued by plaintiff] are so far-reaching that the court will not pass on them" where such a determination was unnecessary for disposition of the instant case.

When discussing the "technological realities" of the CATV systems, the court, in another highly significant footnote, cited examples of other kinds of energy conversions similar to that found to be infringing in the case of CATV. These included: a communication system which transmits data by modulating laser impulses; video-tape recorders; and the Xerox "Magnafax" system which transmits and receives documents by changing visual material to acoustical impulses and transmitting them over conventional telephones. The working of computer systems, including input and output stages, were not specifically mentioned by the Court but obviously may constitute other examples of similar energy conversions.

The ramifications of these suggestions of the court are thus of the broadest significance in the application of both the present Copyright Act and the pending revision bill to the uses of new technologies.

Those of you who have been active in the program for the revision of the present copyright law are aware that the fair use provision has been a matter of considerable discussion. The Copyright Office has taken the position that the simple statement which now appears as Section 107 of H.R. 4347 provides the optimum vehicle for riding with the changes which new technologies may introduce in

the copyright area.⁹ Such a flexible provision would appear to assist the courts in accommodating the language of the copyright statute to such technological changes during the long intervals between Congressional revisions. As Judge Herlands said in the *United Artists* case,

It is hardly conceivable that Congress intended the statute to be read with a strangling literalness so as to require it to be amended on a month-to-month basis as the means of keeping pace with science and technology. The responsibility of keeping the Copyright Act a living law devolves primarily, though not exclusively, upon the courts whose traditional function of statutory interpretation and construction, if effectively performed, will achieve in great measure the desirable objective of accommodating the statute to the realities of modern science and technology.

II.

OTHER RECENT DECISIONS

A. *Proof of access, copying and substantial similarity.*

Recent infringement ruling have dealt with a variety of copyrighted works, including artificial flowers, plays, musical compositions, novels, dolls, house plans, hand puppets, fabric designs, catalogs, ice cream wrappers and wall plaques.

In *Fristot v. First American Natural Ferns Co.*,¹⁰ the court granted a preliminary injunction against the distribution of defendants' artificial flowers in the peak season just before Easter, upon plaintiffs' showing of a marked drop in their sales. Some differences existed between the flowers of the parties. The court concluded, however, that an ample prima facie case of copyright infringement had been made out, based on sharp similarities evidenced by, among other things, the snug nestling of the random contours of the plaintiffs' leaves and petals into those of the defendants.

In *Scott v. WKJG, Inc.*,¹¹ the court found insufficient proof of access or copying, as well as a lack of substantial similarity between the plaintiff's play and that which had been broadcast by the defen-

9. Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Printed for use of the House Committee on the Judiciary, 89th Cong. 1st Sess. at p. 26 (Comm. Print May, 1965).

10. 251 F. Supp. 886, 149 U.S.P.Q. 352 (S.D.N.Y. 1966).

11. 149 U.S.P.Q. 413 (N.D. Ind. 1966).

dant station on the Loretta Young Show, and granted judgment for the defendants after trial.

In *Nordstrom v. Radio Corp. of America*,¹² the court denied the defendant's motion for summary judgment, ruling that affidavit denials of access were insufficient. In view of the possibility of such access, the court refused to substitute "trial by affidavit" for a full trial.

The Court of Appeals for the Second Circuit affirmed a District Court finding for the plaintiff in *Smith v. Little, Brown & Co.*¹³ This was an action for common law copyright infringement brought by the author of an unpublished manuscript which had been submitted to the defendant. The defendant thereafter published a novel by another author dealing with the same historical character who was the subject of the plaintiff's novel. The Court of Appeals agreed with the trial court's finding of sufficient access and substantial similarity, and noted that the New York law of common law copyright infringement was the same on these questions as the federal law applicable to statutory copyright.

In *Ideal Toy Corp. v. Fab-Lu Ltd.*,¹⁴ the same court affirmed a denial of plaintiff's motion for preliminary injunction in an action for infringement of the plaintiff's doll. The District Court had found insufficient similarities between the work of the plaintiff and that of the defendant. The same Court of Appeals, in another doll case, *Uneeda Doll Co. v. P. & M. Doll Co.*,¹⁵ sustained another denial of a preliminary injunction. In the *Uneeda* case, the court agreed with the District Judge that the defendants had copied only "the abstract idea of a doll on a pole in a display box," which may be freely appropriated, and had not copied the "tangible expression of that idea," which copyright protects.

In an opinion of a California State Court, *Read v. Turner*,¹⁶ an action was brought for common law copyright infringement of house plans under Sections 980b and 983b of the California Civil Code. The court held that although the plaintiffs' authorization of unlimited public inspection of the house and its floor plan forfeited the common law copyright thereon, this did not preclude the plaintiffs from recovering for prior infringement of the common law copyright. The court held, however, that an award of \$5,000 for compensatory dam-

12. 149 U.S.P.Q. 544 (D. Col. 1965).

13. 360 F. 2d 928, 149 U.S.P.Q. 799 (2d Cir. 1966), affirming 245 F. Supp. 451, 146 U.S.P.Q. 540 (S.D.N.Y. 1965).

14. 149 U.S.P.Q. 800 (2d Cir. 1966).

15. 353 F. 2d 788, 148 U.S.P.Q. 7 (2d Cir.), affirming 241 F. Supp. 675, 145 U.S.P.Q. 326 (S.D.N.Y. 1965).

16. 48 Cal. Rep. 919, 148 U.S.P.Q. 453 (Cal. Dist. Ct. App. 1966).

ages was excessive and that no evidence supported an award of punitive damages.

In *Mura v. Columbia Broadcasting System, Inc.*,¹⁷ the plaintiff had created and copyrighted three hand puppets and had sold them in the open market. The puppets were used briefly on the Captain Kangaroo television program broadcast by CBS. The court found that the use was an incidental portrayal of the accompanying music and that the image was evanescent, notwithstanding the making of a kine-scope (used only for archival purposes). As a consequence the court held that the image was not a "copy" of the copyrighted work and that even if it were, it constituted a fair use because incidental and of the type for which the puppets were intended and not a use as a substitute for the original work. The court pointed out that the use by the defendant did not detract from plaintiff's sales but rather would tend to increase them.

In a fabric design case, *Manes Fabrics Co. v. Miss Celebrity, Inc.*,¹⁸ the court found that the two designs were not substantially similar, after stating as the criterion that "the overall aesthetic impressions created by the designs [must be] substantially the same."

In a catalog case, *Blumcraft of Pittsburgh v. Newman Bros., Inc.*,¹⁹ the court granted summary judgment for the defendant, on the ground that the plaintiff had made an insufficient showing of copying. The illustrations contained in the catalogs of each of the parties were those of their own respective goods.

Grove Press, Inc. v. Greenleaf Publishing Co.,²⁰ was a decision granting plaintiffs' motion for summary judgment for copyright infringement. In that case, the plaintiffs' work was first published in its original French language and valid copyright secured thereon. An authorized English language translation (by an American citizen) was thereafter published in Paris by the Olympia Press without compliance with the manufacturing clause. No ad interim copyright was secured in this English translation. The defendants published a photocopy of the Olympia Press English-language translation. Judge Bartels, relying on *G. Ricordi & Co. v. Paramount Pictures, Inc.*,²¹ held that, even if the Olympia Press edition were in the public domain, the defendants had infringed the valid copyright on the underlying French-language work.

17. 245 F. Supp. 587, 147 U.S.P.Q. 38 (S.D.N.Y. 1965).

18. 246 F. Supp. 975, 147 U.S.P.Q. 63 (S.D.N.Y. 1965).

19. 246 F. Supp. 987, 147 U.S.P.Q. 107 (S.D. Ohio 1965).

20. 247 F. Supp. 518, 147 U.S.P.Q. 99 (E.D. N.Y. 1965).

21. 189 F. 2d 469 (2d Cir.) cert. denied 342 U.S. 849 (1951). The case is discussed in 79 HARV. L. REV. 1716 (1966).

In another fabric design case, *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*,²² the court reiterated the customary test of similarities as being that of inspection by the ordinary observer. It found infringement because the differences were purely incidental and would be overlooked by the ordinary observer, who would regard the aesthetic appearances as the same.

In *Gray v. Eskimo Pie Corp.*,²³ the plaintiff failed to convince the court that the similarities between its bag for an ice cream product and the related materials of the defendant were sufficient to pass the "ordinary observer" test.

In *Lin-Brook Builders Hardware v. Gertler*,²⁴ the defendant had copied drawings from the plaintiff's catalogue. The District Court had held that the plaintiff was not the copyright proprietor of the drawings, that the drawings were not copyrightable, and that the copyright notice was defective. The Court of Appeals reversed on each ground and remanded for findings on damages and injunctive relief.

In *Drugtax, Inc. v. Systems Programming Corp.*,²⁵ the court refused a preliminary injunction because the evidence adduced up to that time in the proceeding showed copying only of the idea, plan and method devised by the plaintiff for enabling pharmacists to supply their customers with information of deductible drug items for income tax purposes, which was held not to satisfy the test for determining copyright infringement.

In *H. M. Kolbe Co. v. Shaff*,²⁶ the outgrowth of an earlier fabric design case, individual officers and directors were held jointly and severally liable for the tort of copyright infringement where they personally participated in the infringing acts of the corporation.

Northern Music Corp. v. Pacemaker Music Co., Inc.,²⁷ was an action for copyright infringement in which Judge Palmieri, on cross-motions for summary judgment, found there was insufficient proof on the question of access, although indicating that he did not consider himself bound by Judge Cooper's prior decision to similar effect on plaintiff's motion for a preliminary injunction.

22. 244 F. Supp. 287, 147 U.S.P.Q. 138 (S.D. Fla. 1965).

23. 244 F. Supp. 785, 147 U.S.P.Q. 188 (D. Del. 1965).

24. 352 F. 2d 298, 147 U.S.P.Q. 265 (9th Cir. 1965).

25. 147 U.S.P.Q. 313 (M.D. Pa. 1965).

26. 352 F. 2d 285, 147 U.S.P.Q. 336 (2d Cir.), affirming 240 F. Supp. 588, 145 U.S.P.Q. 77 (S.D.N.Y. 1965).

27. 248 F. Supp. 278, 147 U.S.P.Q. 357 (S.D.N.Y. 1964) (Cooper, J.) and 248 F. Supp. 278, 147 U.S.P.Q. 358 (S.D.N.Y. 1965) (Palmieri, J.).

In *Miller Studio, Inc. v. Pacific Import Co.*,²⁸ the court held that the substantial identity of the wall plaques of the plaintiff and defendant gave rise to a presumption of copying, and the striking similarities provided a basis for inferring access even without direct evidence of it. It granted plaintiff's motion for summary judgment.

Lapsley v. American Institute of Certified Public Accountants,²⁹ was an action for infringement of common law copyright in an unpublished work. The court sustained defendant's motion for a directed verdict on the ground that there was insufficient proof of substantial similarity, access and copying.

In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*,³⁰ the Court of Appeals reversed a finding of non-infringement of one sales bulletin by another. The Court of Appeals stated that the defendant had not merely used the plaintiff's work as a starting point but had availed itself of the plaintiff's labor to save itself work, and had used its bulletin to interfere seriously with the plaintiff's use of its own bulletin in the market in which the parties competed. The court phrased the test of infringement as being whether the defendant's "arrangement and expression is its own, so as to make its use fair to" the plaintiff.

The court emphasized that it was "not concerned with a claim of infringement of the calculations, but with the manner in which the calculations, along with other matter, was presented." While the defendant was claimed to have copied only 2 out of the 32 pages in the plaintiff's bulletin, the infringement charge was sustained, because "these were the most important pages from the standpoint of keeping the bulletin in front of potential customers."

B. Common law literary property in ideas.

Two recent cases are worthy of note in this area. In the first, *Dell v. Chicago Tribune-New York News Syndicate, Inc.*,³¹ a New York appellate court affirmed a lower court finding of no protectible interest in the plaintiff. Mr. Dell had claimed appropriation of his literary property, unjust enrichment and breach of an implied contract for compensation. The defendant was a newspaper syndicate which continued to publish a type of puzzle (originated by the plaintiff) after the expiration of its contract with him. The court ruled that once

28. 147 U.S.P.Q. 388 (S.D.N.Y. 1965).

29. 246 F. Supp. 389, 147 U.S.P.Q. 439 (D.D.C. 1965).

30. 351 F. 2d 546, 146 U.S.P.Q. 694 (7th Cir. 1965), reversing 241 F. Supp. 127, 144 U.S.P.Q. 566 (N.D. Ill. 1964).

31. 24 A.D. 2d 859 (N.Y. App. Div. 1965), affirming N.Y.L.J., October 8, 1963, p. 14, col. 1 (Sup. Ct.).

the puzzle was published, the plaintiff's property interest therein fell into the public domain.

In the second case, *Silver v. Television City, Inc.*,³² the court affirmed a judgment for plaintiff in the amount of \$7,500 entered on a jury verdict in an action of assumpsit to recover for use of a television program protected by common law copyright. The court upheld a jury finding that the program was an original and novel idea reduced to concrete form.

C. Federal jurisdiction.

In *Gladys Music, Inc. v. Arch Music Co.*,³³ the court held that valid federal jurisdiction existed because, although the primary question before it was that of title to the copyright, a question of copyright infringement had been raised.

In the "Candy" case, *G. P. Putnam's Sons v. Lancer Books, Inc.*,³⁴ a claim of unfair competition pendant to a claim of copyright infringement was dismissed after the court (prior to trial) dismissed the copyright claim in the complaint.

In *Richmond v. Weiner*,³⁵ the Court of Appeals upheld the jurisdiction of the District Court to try the non-federal issue of ownership of copyright separately from the issue of copyright infringement.

In *Pottstown Publishing Co. v. Pottstown Broadcasting Co.*,³⁶ plaintiff, the publisher of a newspaper, sought to enjoin defendant from appropriating and broadcasting the newspaper's news stories over its radio station, claiming copyright infringement and unfair competition. The action was brought in the state court. Defendant claimed there that the state court lacked jurisdiction because the causes of action averred in the complaint were based on a violation of copyright, and that federal courts had exclusive jurisdiction over a complaint in which copyright infringement and unfair competition claims were joined. The state court denied defendant's motion to dismiss for lack of jurisdiction, which denial was affirmed by the Supreme Court of Pennsylvania.³⁷ Defendant then filed a petition for removal of the case to the federal District Court and the plaintiff moved to remand.

The court, in remanding the case to the state court, held that the cases of *Sears, Roebuck & Co. v. Stiffel Co.*,³⁸ and *Compco Corp. v.*

32. 207 Pa. Super. 150, 215 A. 2d 335, 148 U.S.P.Q. 167 (Pa. Super. Ct. 1965).

33. 150 U.S.P.Q. 26 (S.D.N.Y. 1966).

34. 251 F. Supp. 210, 148 U.S.P.Q. 596 (S.D.N.Y. 1966).

35. 353 F. 2d 41, 147 U.S.P.Q. 8 (9th Cir. 1965).

36. 247 F. Supp. 578, 147 U.S.P.Q. 414 (E.D. Pa. 1965).

37. 411 Pa. 384, 138 U.S.P.Q. 406 (1963).

38. 376 U.S. 225 (1964).

Day-Brite Lighting, Inc.,³⁹ do not oust the state courts of jurisdiction in state unfair competition actions, limiting *Sears* and *Compco* to patent cases. Those cases, the court held, do not preclude an action for invasion of property rights in uncopyrighted news based on state unfair competition laws.

The court said that the congressional failure to protect purely factual news accounts could be deemed an expression of a limitation of federal power, rather than a congressional policy which allows copying of such items. It was the view of the court that it would not run counter to congressional policy, as expressed in *Sears*, for a state to afford additional protection, through unfair competition laws, to an individual's rights in an article which is capable of being either patented or copyrighted.

The court stated that the federal court would have exclusive jurisdiction over the copyright claim alone and also pendent jurisdiction over the related claim under state law of unfair competition and invasion of property rights. However, since the motion to remove was not made within the twenty days provided in 28 U.S.C. § 1446, the motion to remove was fatally defective and the action was remanded to the state court.

D. Damages.

Lapsley v. American Institute of Certified Public Accountants,⁴⁰ illustrates one advantage of statutory copyright (where available) over common law copyright. In this case, where the plaintiff's work was unpublished (and presumably not registrable for statutory copyright), the court stated that the plaintiff was obliged to prove his actual damages and was not permitted to rely on any showing of defendant's profits.

In *Manpower, Inc. v. Temporary Help of Harrisburg, Inc.*,⁴¹ a statutory damage case, the court awarded damages in the amount of \$3,000, computed at the rate of \$1.00 per copy on three thousand copies of the plaintiff's copyrighted vacation schedule.

In *Harm's Inc. v. Theodosiades*,⁴² damages were awarded in the amount of the \$250 minimum per musical composition for a one-time unauthorized performance for profit in a cafe.

Judge Feinberg, in *Davis v. E. I. DuPont de Nemours & Co.*,⁴³ held that there was only one infringement of the work, despite the

39. *Id.* 234.

40. 246 F. Supp. 389, 147 U.S.P.Q. 439 (D.D.C. 1965).

41. 246 F. Supp. 788, 148 U.S.P.Q. 85 (E.D. Pa. 1965).

42. 246 F. Supp. 799, 148 U.S.P.Q. 147 (E.D. Pa. 1965).

43. 249 F. Supp. 329, 148 U.S.P.Q. 328 (S.D.N.Y. 1966).

fact that the work was broadcast simultaneously over an entire network. He had earlier made a general finding of infringement in a separate opinion,⁴⁴ reserving decision on the damages question. After an extensive discussion of the legislative and judicial history of the various alternatives under the ambiguous damages provision of Section 101 (b) of the Copyright Law, Judge Feinberg set damages at \$25,000. He held that the statutory maximum of \$5,000 under Section 101 (b) did not apply where the network had received written notice of the copyright claim.

Baccaro v. Pisa,⁴⁵ which relied in part on Judge Feinberg's damages decision in *Davis*, granted plaintiff's summary judgment motion against a joint tortfeasor for statutory damages for the infringing broadcast of plaintiff's musical compositions. The court found 19 occasions, separated by intervals of 26 days or more, on which the broadcasts were made on a single station, and awarded \$250 for each broadcast. Each instance of simultaneous broadcasting on the station's AM and FM transmitters was deemed to constitute a single infringement.

Norbay Music, Inc. v. King Records, Inc.,⁴⁶ was a decision on an accounting for damages for copyright infringement under Sections 1 (e) and 101 (e) and for counsel fees to the prevailing party. The court set the damages at \$1,244, computed at four cents per side, twice the amount of the statutory royalties. Judge Bryan relied on the discretionary authority provided him under the Copyright Act to award additional damages to the plaintiff up to three times the amount of the compulsory license royalty. The court denied the request for counsel fees, however, on the ground that the case had presented unsettled issues of law.

Shapiro, Bernstein & Co. v. Bleeker,⁴⁷ was an action for copyright infringement by reason of the sale of "fake books." The defendant had sold one copy of the infringing work, for which the complaint sought a total of \$3,000 in statutory damages, computed on the basis of \$250 for each of the twelve copyrights infringed by the book. The court found that the defendant bookseller's total profit was only \$19 and that the profit on each of the songs in the book was therefore less than 2 cents per song. On the *de minimis* theory, the court found for the defendant and awarded the defendant \$1,500 in counsel fees.

44. 240 F. Supp. 612, 145 U.S.P.Q. 258 (S.D.N.Y. 1965).

45. 252 F. Supp. 900, 149 U.S.P.Q. 296 (S.D.N.Y. 1966).

46. 249 F. Supp. 285, 148 U.S.P.Q. 420 (S.D.N.Y. 1966).

47. 243 F. Supp. 999, 146 U.S.P.Q. 152 (S.D. Cal. 1965).

E. Copyrightability.

County of Ventura v. Blackburn,⁴⁸ affirmed the proposition that maps are copyrightable with respect to the new matter added by reason of the effort of the cartographer.

Estate of Hemingway v. Random House, Inc.,⁴⁹ was a state court action to enjoin the publication of a book based in part on the author's conversations with the late Ernest Hemingway. The court denied a motion for preliminary injunction on the ground, *inter alia*, that no common law copyright existed in conversations. A later decision in the same case,⁵⁰ granted the defendant's motion to dismiss the cause of action which was based on infringement of common law copyright and a breach of the author's alleged confidential relationship with the decedent.

In *Gray v. Eskimo Pie Corp.*,⁵¹ a light and deep blue rectangle and material therein contained, which appeared on the bag for plaintiff's ice cream doughnut, was held to be a copyrightable work, but not the other matter on the bag which simply described the weight and content of the goods, named the manufacturer and distributor, and referred to the plaintiff's trade mark and slogan.

In *Lin-Brook Builders Hardware v. Gertler*,⁵² the court held that sufficient originality existed if there was authorship, and that creativity or novelty in the creation of catalog drawings was not required.

F. Copyright notice.

In several cases, it was held that publication without notice placed the work in the public domain. In *Kontes Glass Co. v. Lab Glass, Inc.*,⁵³ protection was lost on a catalog. In *Gray v. Eskimo Pie Corp.*, *supra*, protection was lost on a wrapper. In *Scandia House Enterprises, Inc. v. Dam Things Establishment*,⁵⁴ protection was lost on dolls.

B. Wilmsen, Inc. v. Consolidated Novelty Co.,⁵⁵ was an action for declaratory judgment as to the validity of a copyright on an artificial Christmas tree branch and leaves. The Collector of Customs had detained shipments of such material to the plaintiff on the ground that

48. 150 U.S.P.Q. 160 (9th Cir. 1966).

49. 49 Misc. 2d 726, 148 U.S.P.Q. 618 (N.Y. Sup. Ct.), *aff'd* 25 A.D. 2d 719 (App. Div. 1966).

50. N.Y.L.J., July 22, 1966, p. 7, cols. 5-6 (Sup. Ct.).

51. 244 F. Supp. 785, 147 U.S.P.Q. 188 (D. Del. 1965).

52. 352 F. 2d 298, 147 U.S.P.Q. 265 (9th Cir. 1965).

53. 250 F. Supp. 193, 148 U.S.P.Q. 707 (D.N.J. 1966).

54. 243 F. Supp. 450, 146 U.S.P.Q. 342 (D.D.C. 1965).

55. 251 F. Supp. 874, 148 U.S.P.Q. 247 (S.D.N.Y. 1965).

the goods infringed the defendant's copyright. The court held that the plaintiff had made a sufficient showing to indicate a substantial likelihood of proving at trial that the defendant's first publication of its work had been made without the statutory notice. Accordingly, the court granted the plaintiff's motion for a preliminary injunction restraining the Collector of Customs from detaining the plaintiff's shipments.

In *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*,⁵⁶ the defendant was held to have the burden of proving that notice of copyright could have been incorporated in the body of a textile design without impairing its market value or aesthetic appeal. The defendant failed to sustain such burden, and the court held placement of the notice on the selvage of the fabric to be sufficient even though the selvage is customarily removed when the goods are cut.

In a decision in *Grove Press, Inc. v. Greenleaf Publishing Co.*,⁵⁷ prior to the summary judgment decision discussed *supra*, Judge Rosling denied plaintiffs' motion for a preliminary injunction based on the copyright in an excerpt of the English translation previously published in compliance with the manufacturing clause. The denial was premised on the fact that the copyright notice on the 1954 Olympia Press edition did not separately identify the copyright on the 1952 translation excerpt.

In *Miller Studio, Inc. v. Pacific Import Co.*,⁵⁸ placement of the copyright notice on the sides of a wall plaque was deemed to be sufficient compliance with the statute.

G. Moral rights.

Decisions have been handed down in two interesting cases in this area, both concerned with the right of a motion picture producer to restrict the editing of his motion picture for showing on television with commercial interruptions. In the first of these cases, *Preminger v. Columbia Pictures Corp.*,⁵⁹ the producer of the motion picture, "Anatomy of a Murder," had sued the distributor of the motion picture to prevent its being telecast pursuant to licenses granted by the distributor to television stations. Under these licenses the latter were given the right to shorten the film and edit it for commercials.

56. 244 F. Supp. 287, 147 U.S.P.Q. 138 (S.D. Fla. 1965).

57. 247 F. Supp. 127, 147 U.S.P.Q. 31 (E.D.N.Y. 1965).

58. 147 U.S.P.Q. 388 (S.D.N.Y. 1965).

59. 25 A.D. 2d 830, 149 U.S.P.Q. 872 (N.Y. App. Div.), affirming 49 Misc. 2d 363, 148 U.S.P.Q. 398 (Sup. Ct. 1966).

The contract between Preminger and Columbia granted Columbia the right to license television performances but conveyed no right to edit the film. The trial court held that Preminger had the right to approve the final editing and cutting of the film but that this right was applicable only to theatrical exhibitions and not to telecasts.

The court founded its decision on the custom of the trade and the fact that the plaintiff had previously granted distribution licenses specifically reserving the right to edit for television use. The plaintiff was therefore held to know how this right was to be reserved when he desired to do so. The decision of the trial court was affirmed, *per curiam*, by the Appellate Division, but with a strong dissenting opinion.⁶⁰

In the second case, *Stevens v. National Broadcasting Co.*,⁶¹ the producer of "A Place in the Sun" had brought suit to enjoin the defendants from cutting or editing the motion picture for television showing. The court discussed the lower court decisions in the *Preminger* case, decided a few weeks earlier. It distinguished that case on the ground that, unlike the *Preminger* case, no evidence had here been introduced that Stevens was aware of the custom in the television industry.

The *Stevens* court issued a limited injunction restraining the defendants from cutting or editing the motion picture for the purpose of inserting commercials or other materials which would "destroy or distort materially or substantially the mood, effect or continuity" of the motion picture. However, the court stated explicitly that the defendants would be permitted to insert commercials, being required only to give primary consideration to the effect of the commercials as aforesaid.

H. *Renewal rights.*

Gordon v. Vincent Youmans, Inc.,⁶² was an action for a declaratory judgment on the question of title to a renewal copyright. The court, with a vigorous dissenting opinion, reversed the trial court's granting of a motion for partial summary judgment by plaintiff, the son of the lyric writer of the song, "Time on My Hands, You in My Arms." The court held that, based on a finding that the author never exhibited any interest in what the author's son alleged was his prop-

60. For the decision on the motion for preliminary injunction, see N.Y.L.J., Oct. 18, 1965, p. 17, cols. 3-5 (Sup. Ct.).

61. 148 U.S.P.Q. 755 (Cal. Super. Ct. 1966).

62. 358 F. 2d 261, 148 U.S.P.Q. 93 (2d Cir.), reversing 245 F. Supp. 607, 147 U.S.P.Q. 681 (S.D.N.Y. 1965).

erty, it could be inferred that the author believed he had no property right in the copyrighted song. Accordingly, doubts as to meaning of the agreement precluded summary judgment.

Donaldson Publishing Co. v. Bregman, Vocco & Conn., Inc.,⁶³ discussed *infra* in connection with works for hire, was also an action for declaratory judgment to establish ownership of renewal copyrights. Because of the composer's status as an employee for hire, it was held that the renewals belonged to the proprietor of the original copyright.

I. Works for hire, and commissioned works.

Brattleboro Publishing Co. v. Winmill Publishing Corp.,⁶⁴ was an action for copyright infringement and unfair competition. The plaintiff's newspaper had produced and published advertisements which were then copied by the defendant's weekly shopping news. The defendant was authorized by the advertiser but not by the plaintiff. The court held there was no copyright infringement, because the advertiser retained the property rights in the advertisements, in the absence of any agreement to the contrary, and had authorized the defendant to reproduce them. The court held there to be no unfair competition, on the ground that there had been no deception.

In *Lin-Brook Builders Hardware v. Gertler*,⁶⁵ a catalog case, the court stated, in a discussion of the question of proprietorship, that in the absence of an express reservation of rights it is presumed that title to the copyright was intended to be in the person at whose instance and expense the work was done.

Donaldson Publishing Co. v. Bregman, Vocco & Conn., Inc., *supra*, was an action for declaratory judgment to establish the ownership of the renewal copyrights in 87 songs written by Walter Donaldson. He was survived by a divorced wife and two children who transferred their rights in the renewals to the plaintiff. Donaldson, at the time the songs were written, was an employee of a corporation, and the court was presented with the question of whether the songs in question were written by Donaldson as an employee for hire. It held that Donaldson, on the evidence introduced, was an employee for hire and that therefore the defendant who had become proprietor of the original copyright was entitled to the renewal rights.

63. 253 F. Supp. 841, 147 U.S.P.Q. 409 (S.D.N.Y. 1965).

64. 250 F. Supp. 215, 149 U.S.P.Q. 41 (D. Vt. 1966).

65. 352 F.2d 298, 147 U.S.P.Q. 265 (9th Cir. 1965).

J. Joint authorship.

In *Ferrer v. Columbia Pictures Corp.*,⁶⁶ Jose Ferrer had sued to enjoin the production and distribution of a motion picture based on a screenplay on which he had collaborated. The collaborator had granted permission but the plaintiff had not. The court dismissed the complaint, holding that the screenplay was a work of joint authorship and that the plaintiff's collaborator was therefore empowered to grant a license without the plaintiff's consent.

In *Richmond v. Weiner*,⁶⁷ the copyright claim had been registered in the sole name of one of the two joint authors. The court held that the registrant held the legal title to the copyright in trust for the two joint authors.

K. Criminal copyright infringement.

In one of the few reported criminal cases for infringement of copyright, *United States v. Rose*,⁶⁸ the defendant was found guilty of infringing the copyrights on musical compositions by his unauthorized publication of "fake books."⁶⁹

L. Licenses.

In *County of Ventura v. Blackburn*,⁷⁰ the plaintiff had licensed the County to publish and sell the plaintiff's copyrighted map. The court held that the license implied a covenant binding on the licensee to insert the proper copyright notice on the copies of the map published by the licensee. It stated further that breach of this covenant by the licensee constituted copyright infringement, and the licensor's failure to make the affixation of copyright notice an explicit requirement under the license had not forfeited the licensor's copyright.

In *Hermusic, Ltd. v. Reverse Producers Corp.*,⁷¹ an action for copyright infringement, the court granted the plaintiff's motion for summary judgment. It overruled a contention by the defendants that they had received an oral license from members of Herman's Hermits, who were claimed to be stockholders and directors of the plaintiff and the parent organization of plaintiff. The court held that stockholders and directors do not, merely because of their status as such, have au-

66. 149 U.S.P.Q. 236 (N.Y. Sup. Ct. 1966).

67. 353 F. 2d 41, 147 U.S.P.Q. 8 (9th Cir. 1965).

68. (S.D.N.Y. 1966).

69. The court's charge to the jury is set forth at 149 U.S.P.Q. 820.

70. 150 U.S.P.Q. 160 (9th Cir. 1966).

71. 149 U.S.P.Q. 554 (S.D.N.Y. 1966).

thority to act individually for the corporation as its agent in granting licenses.

In *Hiawatha Card Co. v. Colourpicture Publishers, Inc.*,⁷² the court ruled that granting the right to reproduce a grantor's copyrighted material constituted, in the circumstances, a license and not an assignment of legal title to the copyright.

M. Registration.

In *Gladys Music, Inc. v. Arch Music Co.*,⁷³ the court held a registration of a copyright claim to be void, because the claimant's assignor had previously assigned the work to a third party, and therefore the claimant did not constitute an "author or proprietor" under Section 9 of the Act.

In the "Candy" case, *G. P. Putnam's Sons v. Lancer Books, Inc.*,⁷⁴ the District Court construed as controlling authority the decision in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*⁷⁵ Judge Bryan therefore dismissed the claim of copyright infringement on "Candy," because no copyright claim had been registered in the Copyright Office pursuant to Section 13 of the Act.

In *Kontes Glass Co. v. Lab Glass, Inc.*,⁷⁶ the court held that the plaintiff's work had fallen into the public domain by reason of omission of copyright notice. By way of dictum, however, the court expressed the view that the plaintiff was guilty of laches in not registering its copyright claim for a period of nine years after its initial publication.

In *Ross Products, Inc. v. New York Merchandise Co., Inc.*,⁷⁷ cross-motions for summary judgment were denied in a copyright infringement action, because a factual issue had been raised whether the plaintiff had acted in good faith when, on its registration application, it did not indicate prior publication in Japan of its inflatable vinyl baseball catcher.

N. Assignments.

Empire Trust Co. v. Yankee Productions, Inc.,⁷⁸ was an action to foreclose a mortgage on a copyright. The court awarded the mort-

72. 149 U.S.P.Q. 603 (E.D. Mich. 1966).

73. 150 U.S.P.Q. 26 (S.D.N.Y. 1966).

74. 251 F. Supp. 210, 148 U.S.P.Q. 596 (S.D.N.Y. 1966).

75. 260 F. 2d 637 (2d Cir. 1958).

76. 250 F. Supp. 193, 148 U.S.P.Q. 707 (D.N.J. 1966).

77. 242 F. Supp. 878, 146 U.S.P.Q. 107 (S.D.N.Y. 1965).

78. N.Y.L.J., June 28, 1966, p. 10, col. 2 (N.Y. Sup. Ct.).

gagee summary judgment, against defendants' contention that 17 U.S.C. § 30 precluded such foreclosure because the mortgage had not been recorded. The court held that the defense was unavailable to the defendants, in that "they are not assignees without notice; they are not assignees who have made due registration; and, finally, they are [licensees], not assignees."

In *Gladys Music, Inc. v. Arch Music Co.*, *supra*, the court held, *inter alia*, that title to a musical composition was assignable prior to its existence.

O. Sears, Compco and copyright.

In *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*,⁷⁹ the defendant had obtained a motion picture print (not claimed to be copyrighted) for limited use which did not include its use on television. In affirming the denial of defendant's motion to dismiss the complaint, the Appellate Division, with a strong dissent, held that if the complaint did nothing else it sufficiently set forth a cause of action for conversion by unauthorized use of the motion picture print.

In *Columbia Broadcasting System, Inc. v. Cartridge City, Ltd.*,⁸⁰ a temporary injunction was granted to restrain the defendants from dubbing plaintiff's phonograph records onto defendants' tape cartridges and selling them. However, in the absence of a sufficient preliminary showing of a protectible "competitive commercial advantage" under *International News Service v. Associated Press*,⁸¹ the defendants were not restrained from renting their recording machines to others for taping of customers' own records for their own use.

In *Bond Buyer v. Dealers Digest Publishing Co.*,⁸² the Appellate Division also on the authority of the *International News* case, reversed a denial of a temporary injunction sought by the plaintiff, which operated a wire service and published a news sheet. The defendant was held to have misappropriated the information gained by the plaintiff's wire service as the result of plaintiff's substantial news gathering effort. The court emphasized that plaintiff's rights did "not depend on copyright, or any exclusory right in the information itself."

In *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*,⁸³ the plaintiff had sued for copyright infringement of its textile designs and for

79. 24 A.D. 2d 953 (N.Y. App. Div. 1965).

80. N.Y.L.J., June 29, 1966, p. 10, col. 1 (N.Y. Sup. Ct.).

81. 248 U.S. 215 (1918).

82. 25 A.D. 2d 158, 149 U.S.P.Q. 465 (N.Y. App. Div. 1966), reversing N.Y.L.J., Nov. 16, 1965, p. 6, col. 5 (Sup. Ct.).

83. 244 F. Supp. 287, 147 U.S.P.Q. 138 (S.D. Fla. 1965).

unfair competition. The court held that, in the absence of palming off or misrepresentation, no action would lie for unfair competition, notwithstanding the fact that the defendant used the infringing goods in dresses sold at a lower price than those of the plaintiff.

The case of *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*,⁸⁴ is discussed under "C. Federal Jurisdiction," *supra*. While the extensive discussion of unfair competition is dictum, because of the holding on procedural grounds, the court, as indicated above, expressed the view that uncopyrighted news could be protected under state law, without violating the doctrine of the *Sears* and *Compco* cases.

84. 247 F. Supp. 578, 147 U.S.P.Q. 414 (E.D. Pa. 1965).

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

414. U. S. CONGRESS. SENATE. *The Design Protection Bill.*

S. 1237. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Talmadge (for himself and Mr. Hart), February 23, 1965, and referred to the Committee on the Judiciary. 26 p. 89th Cong., 1st Sess. (A companion bill to H.R. 450 introduced earlier during the session; see 12 BULL. CR. SOC. 161, Item 45 (February 1965).)

Committee on the Judiciary. Design protection. Hearing before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-ninth Congress, first session, pursuant to S. Res. 48 on S. 1237. July 28, 1965. Washington, U.S. Govt. Print. Off., 1966. 73 p.

S. 1237 as passed by the Senate:

On July 27, 1966, the Senate passed S. 1237,¹ the design protection bill sponsored by Senators Talmadge and Hart. This bill, as introduced, had been identical to two bills pending in the House of Representatives, H.R. 450 (Ford) and H.R. 3366 (Flynt).

The Senate action marks the third occasion in recent years on which the Senate has passed a design bill. For the first time, however, this was achieved over opposition expressed by a segment of industry, namely, representatives of retailing organizations. The views of these opponents were set forth at the hearing held specifically for that purpose on July 28, 1965. Thereafter, the bill was approved by the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee and on July 22, 1966 by the full Committee.² In approving the bill the Senate Judiciary Committee added an amendment, offered by Senator Javits, which

1. 112 *Congressional Record* 16499 (daily ed. July 27, 1966).

2. *U.S. Congress. Senate. Committee on the Judiciary.* Report to accompany S. 1237. 12 p. (89th Cong., 2d Sess., S. Rep. No. 1404).

"would exclude from protection, designs that are composed of three-dimensional features of shape and surface with respect to men's, women's and children's apparel, including undergarments and outerwear." This amendment, included in the bill as passed by the Senate, is similar to one introduced by Subcommittee No. 3 of the House Judiciary Committee in its favorable report to the House Judiciary Committee of the design bill in the 88th Congress, H.R. 5523.

S. 1237 now has been sent to the House of Representatives for further action.

415. U. S. CONGRESS. HOUSE.

H.R. 15638. A bill to provide for the collection, compilation, critical evaluation, publication, and sale of standard reference data. Introduced by Mr. Miller, June 13, 1966, and referred to the Committee on Science and Astronautics. 5 p. (89th Cong., 2d Sess.)

A companion bill, S. 3517, was introduced in the Senate by Mr. Magnuson. See Item 419, *infra*.

416. U. S. CONGRESS. HOUSE. *Committee on Interstate and Foreign Commerce.*

Regulation of community antenna television. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-ninth Congress, second session, on H.R. 12914, a bill to amend the Communications Act of 1934 to prohibit the Federal Communications Commission from exercising jurisdiction over the reception of radio signals, communications, and transmissions; H.R. 13286, a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes; H.R. 14201, a bill to amend section 3 of the Communications Act of 1934 (47 U.S.C. 153). Washington, U. S. Gov't. Print. Off., 1966. 831 p. (Its Serial No. 89-34.)

Hearings held March 22, 23, 24; April 5, 6, 7, 1966. Includes some testimony concerning the CATV copyright question.

417. U. S. CONGRESS. HOUSE. *Committee on Interstate and Foreign Commerce.*

Regulation of community antenna systems. Report to accompany H.R. 13286, submitted by Mr. Staggers, June 17, 1966. 28 p. (89th Cong., 2d Sess., H. Rep. No. 1635.)

A favorable report, with amendments, of a bill giving broad regulatory powers over CATV to the Federal Communications Commission. A number of committee members signed minority views in which they expressed considerable disagreement with the majority.

418. U. S. CONGRESS. HOUSE. *Committee on Ways and Means.*

Implementation of Florence and Beirut Agreements. Hearings before the Committee on Ways and Means, House of Representatives, Eighty-ninth Congress, second session, on H.R. 8664 and H.R. 15271, bills to implement the Agreement on the Importation of Educational, Scientific, and Cultural Materials, opened for signature at Lake Success on November 22, 1950 (the Florence Agreement); and H.J. Res. 688, to give effect to the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character, approved at Beirut in 1948. June 6 and 7, 1966. Washington, U. S. Govt. Print. Off., 1966. 258 p.

419. U. S. CONGRESS. SENATE.

S. 3517. A bill to provide for the collection, compilation, critical evaluation, publication, and sale of standard reference data. Introduced by Mr. Magnuson (by request), June 16, 1966, and referred to the Committee on Commerce. 6 p. (89th Cong., 2d Sess.)

This bill, which was introduced at the request of the Secretary of Commerce, is designed "to make critically evaluated quantitative data on the properties of substances readily available to Federal technical agencies and this country's scientists and engineers" (112 Cong. Rec. 12843 (daily ed. June 16, 1966)).

Section 7 (b) of the bill prohibits any person, without written authorization, from copying "any data compilation bearing the Standard Reference Data symbol or mark adopted pursuant to section 6," and section 8 (a) provides a civil penalty of up to \$100 for "each copy of a publication which violates any provision of section 7."

420. U. S. CONGRESS. SENATE.

Metcalf, Lee. CATV, translators, and copyright. (112 *Congressional Record* 12968-12969, no. 100 (daily ed. June 20, 1966).)

Senator Metcalf pleads for congressional consideration, in the light of the recent CATV decision (*United Artists Television, Inc. v. Fortnightly Corp.*), of "the application of the copyright laws to community antenna systems and translators in a separate special bill in order that immediate action can be taken to establish appropriate and fair copyright policies to be applied to CATV and translators."

421. U. S. CONGRESS. SENATE. *Committee on Foreign Relations.*

Foreign assistance, 1966. Hearings before the Committee on Foreign Relations, United States Senate, Eighty-ninth Congress, second session, on S. 2859, a bill to amend further the Foreign Assistance Act of 1961, as amended, and for other purposes, and S. 2861, a bill to promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward internal and external security. April 6, 18, 20, 25, 27, 29, May 2, 9, 11, 1966. Washington, U. S. Govt. Print. Off., 1966. 752 p.

Includes a statement of Mr. Basil Dandison on behalf of the American Book Publishers Council and the American Textbook Publishers Institute (pp. 413-417). In his statement, Mr. Dandison reports "some recent and rather encouraging developments which . . . [it is hoped] may eventually lead to the elimination of the serious problem of large numbers of unauthorized reprints of American books in Taiwan."

422. U. S. CONGRESS. SENATE. *Committee on the Judiciary.*

Patents, trademarks, and copyrights; report of the Committee on the Judiciary, United States Senate, made by its Subcommittee on Patents, Trademarks, and Copyrights pursuant to S. Res. 48, Eighty-ninth Congress, First Session. Washington, U. S. Govt. Print. Off., 1966. 13 p. (89th Cong., 2d Sess., S. Rep. No. 1350.)

The annual report on the activities of the subcommittee covering the first session of the 89th Congress. In respect to copyright the report concludes with the following statement:

"The subcommittee reaffirms its endorsement of a general revision of the copyright laws. While such a revision should foster creativity, a proper balance must be obtained between the interests of the copyright owner and the public purposes sought to be advanced by the copyright system."

423. U. S. COPYRIGHT OFFICE.

Sixty-eighth annual report of the Register of Copyrights for the fiscal year ending June 30, 1965. Washington, 1966. 27 p.

"Reprinted from the *Annual Report of the Librarian of Congress* for the fiscal year ending June 30, 1965."

Includes administrative, legislative and judicial developments of the fiscal year relating to copyright.

424. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *Office of Education*.

NOTICE OF OFFICE OF EDUCATION STATEMENT OF POLICY.

Notice is hereby given of the following Statement of Policy of the Office of Education:

Material produced as a result of any research activity undertaken with any financial assistance through contract with or project grant from the Office of Education will be placed in the public domain. Materials so released will be available to conventional outlets of the private sector for their use.

This policy is effective immediately.

Dated: July 12, 1965.

FRANCIS KEPPEL

U. S. Commissioner of Education

[NOTE: *Published in the Federal Register, July 28, 1966.*]

425. U. S. COURT RULES. *District Courts*.

Rules of civil procedure for United States District Courts. Letter from the Chief Justice of the United States transmitting amendments to the Rules of civil procedure for the United States District Courts, adopted by the Supreme Court, pursuant to the provisions of Title 28, United States Code. Referred to the Committee on the Judiciary, February 28, 1966.

Rule 2 of the special copyright rules adopted by the Supreme Court, which required, with certain exceptions, that copies of the allegedly infringing and infringed works accompany the complaint, is rescinded, effective July 1. In the report of the Judicial Conference of the United States, which accompanies the amendments, the reasons for the rescission of rule 2 are given as follows:

The question of annexing copies of the works to the pleading should be dealt with like the similar question of

annexing a copy of a contract sued on. The Federal Rules of Civil Procedure permit but do not require the pleader to annex the copy. A party can readily compel the production of a copy of any relevant work if it is not already available to him.

2. FOREIGN NATIONS

426. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Law of September 15th, 1965 on the Berne Convention for the Protection of Literary and Artistic Works of 9th September 1886, revised at Brussels on 26th June 1948. (*GEMA News* 160-161, nos. 4-5, Mar. 1966.) English, French, Spanish and German in parallel columns.

427. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Law of September 15th, 1965 on the European Agreement on the Protection of Television Broadcasts of June 22nd, 1960. (*GEMA News* 162-163, nos. 4-5, Mar. 1966.) English, French, Spanish and German in parallel columns.

428. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Law of September 15th, 1965 on the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26th, 1961. (*GEMA News* 164-167, nos. 4-5, Mar. 1966.) English, French, Spanish and German in parallel columns.

429. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Law on Copyright and Neighbouring Rights (Copyright Act) of September 9th, 1965. (*GEMA News* 76-159, nos. 4-5, Mar. 1966.) English, French, Spanish and German in parallel columns.

430. GERMANY (*Federal Republic, 1949-*) *Laws, statutes, etc.*

Law on the Administration of Copyright and Neighbouring Rights of September 9th, 1965. (*GEMA News* 168-189, nos. 4-5, Mar. 1966.) English, French, Spanish and German in parallel columns.

431. KENYA. *Laws, statutes, etc.*

The Copyright Act, 1966 (No. 3, of 1966). (2 *Copyright* 127-131, no. 5, May 1966.)

This Act, which came into force on April 1, 1966, supersedes the U.K. Copyright Act, 1956 as the copyright law of Kenya.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

432. KENYA ADHERES TO THE UNIVERSAL COPYRIGHT CONVENTION.

The U. S. Department of State has been informed by the Acting Director-General of UNESCO that the instrument of accession by Kenya to the Universal Copyright Convention and Protocols 1, 2 and 3 annexed thereto was deposited on June 7, 1966.

In accordance with Article IX, paragraph 2 of the Convention, the latter will come into force in respect of Kenya on September 7, 1966, three months after the deposit of the instrument of accession.

Under paragraph 2(b) of Protocols 1 and 2, these Protocols will come into force in respect of Kenya on the same date as the Convention. Under paragraph 6(b) of Protocol 3, the latter came into force in respect of Kenya on the date of deposit of the instrument of accession. Kenya is the 53rd country to become a party to the Universal Copyright Convention.

433. UNIVERSAL COPYRIGHT CONVENTION: *List of Accessions and Ratifications.*

(As of August 1, 1966)

<i>Country</i>	<i>Effective Date</i>
Andorra	September 16, 1955
Argentina	February 13, 1958
Austria	July 2, 1957
Belgium	August 31, 1960
Brazil	January 13, 1960
Cambodia	September 16, 1955
Canada	August 10, 1962
Chile	September 16, 1955
Costa Rica	September 16, 1955
Cuba	June 18, 1957
Czechoslovakia	January 6, 1960
Denmark	February 9, 1962
Ecuador	June 5, 1957

<i>Country</i>	<i>Effective Date</i>
Finland	April 16, 1963
France	January 14, 1956
German Federal Republic	September 16, 1955
Ghana	August 22, 1962
Greece	August 24, 1963
Guatemala	October 28, 1964
Haiti	September 16, 1955
Holy See	October 5, 1955
Iceland	December 18, 1956
India	January 21, 1958
Ireland	January 20, 1959
Israel	September 16, 1955
Italy	January 24, 1957
Japan	April 28, 1956
Kenya	September 7, 1966
Laos	September 16, 1955
Lebanon	October 17, 1959
Liberia	July 27, 1956
Liechtenstein	January 22, 1959
Luxembourg	October 15, 1955
Malawi	October 26, 1965
Mexico	May 12, 1957
Monaco	September 16, 1955
New Zealand	September 11, 1964
Nicaragua	August 16, 1961
Nigeria	February 14, 1962
Norway	January 23, 1963
Pakistan	September 16, 1955
Panama	October 17, 1962
Paraguay	March 11, 1962
Peru	October 16, 1963
*Philippines	November 19, 1955
Portugal	December 25, 1956
Spain	September 16, 1955

-
- UNESCO has advised the U. S. Government that on November 14, 1955, a letter was received from the Philippine Minister in Paris stating that the Philippine President had directed the withdrawal of the instrument of accession prior to November 19, 1955, the date on which the Convention would become effective in respect of the Philippines. No determination has been made as to the legal effect of this communication.

<i>Country</i>	<i>Effective Date</i>
Sweden	July 1, 1961
Switzerland	March 30, 1956
United Kingdom	September 27, 1957
United States of America	September 16, 1955
Yugoslavia	May 11, 1966
Zambia	June 1, 1965

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

434. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 150 U. S. P. Q. 715 (2d Cir., Aug. 17, 1966) (Moore, J.)

Appeal from granting of preliminary injunction in action for copyright infringement. Defendant published a biography of Howard Hughes which was written by John Keats and based upon an unfinished manuscript by Thomas Thompson. After galley proofs of the biographies were sent out for review, plaintiff, a corporation controlled by Hughes, acquired the copyrights to a series of articles about Hughes which had appeared in *Look* magazine, and brought suit charging that the presence in the biography of quotations from the *Look* articles constituted copyright infringement. The trial court, in rejecting defendant's claim of fair use, confined the privilege to materials "used for purposes of criticism or comment or in scholarly works of scientific or educational value." The trial court went on to hold that the publishers of the biography were not entitled to invoke a claim of fair use because the biography was published for "commercial purposes" and was designed for the popular market.

Held, reversed.

I. The court held that the fair use privilege is not limited to scholarly works, but is available also, if the use is reasonable, for popular commercial works which "offer some benefit to the public." The court said:

There is no question that material appearing in the *Look* articles is contained in the Hughes biography. Appellants contend, however, that the district court erred as a matter of law in refusing to honor their claim of fair use on the ground that the court unjustifiably restricted the privilege to scholarly works written and prepared for scholarly audiences. We agree.

"Fair use" is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner

without his consent, notwithstanding the monopoly granted to the owner. . . ." Ball, Copyright and Literary Property 260 (1944). . . . The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the Useful Arts." U. S. Const. art. 1, § 8. . . . To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." *Berlin v. E. C. Publications Inc.*, 329 F. 2d 541, 544 (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography. . . .

Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. Cf. *Harriss v. Miller*, 50 U.S.P.Q. 306, 309 (S.D.N.Y. 1941). This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution. . . . Indeed, while the Hughes biography may not be a profound work, it may well provide valuable source material for future biographers (if any) of Hughes or for historians or social scientists. Contrary to the district court's view, the arts and sciences should be defined in their broadest terms. . . .

Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e. the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "all publications presumably are operated for profit . . .," *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, aff'd 272 App. Div. 759, 69 N.Y.S.2d 432 (1st Dept. 1947), and that "Both commercial and

artistic elements are involved in almost every work. . . ." Note, 56 Colum. L. Rev. 585, 597. . . .

The district court relied heavily on *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, 174-76 (S.D. Cal. 1955), aff'd 239 F.2d 532 (9th Cir. 1956), aff'd without opinion by an equally divided court, 356 U.S. 43 (1958) to support its restrictive view of the fair use privilege. That case involved a claim of copyright infringement against Jack Benny for his television parody of the motion picture "Gaslight." The district court in finding an infringement insisted on distinguishing television parody from more scholarly endeavors, emphasizing its commercial nature. Clearly that portion of the court's opinion is inconsistent with our decision in *Berlin v. E. C. Publications, Inc.*, *supra*. Moreover, the Ninth Circuit in affirming the district court did not mention "commercial purpose." Its decision rested solely on the conclusion that the television parody constituted a wholesale appropriation of the motion picture and thus was unlawful. . . .

By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities. . . . Judging by the accounts in the Look articles and the biography, Hughes has almost an obsession as to his privacy and his right thereto. However, when one enters the public arena to the extent that he has, the right of privacy must be tempered by a countervailing privilege that the public have some information concerning important public figures. . . . Hughes has long been a newsworthy personality. Any biography of Hughes, of necessity, must recite the events of his life because biography in itself is largely a compilation of the past. Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner.

II. The court held that using two quotations and an eight line paraphrase from a long three-part article in a still longer biography about the subject of the articles was not necessarily a substantial taking.

III. The court disagreed with the holding of the district court that the use of the factual works of another in lieu of "independent research" can not be fair use. The court said:

While recognizing that "historical facts and events in themselves are in the public domain and are not entitled to copyright protection . . . ,"*Lake v. Columbia Broadcasting System, Inc.*, 140 F. Supp. 707, 708-09 (S.D. Cal. 1956) . . . and that a "writer may be guided by earlier copyrighted works . . . ,"*Benny v. Loew's, Inc.*, 239 F.2d *supra* at 536 . . . the court asserted in sweeping language that an author is not entitled to utilize the fruits of another's labor in lieu of independent research and, relying on *Toksvig v. Bruce Publishing Co.*, 181 F.2d 644 (7th Cir. 1950), stated that such activity could not be considered a fair use. Moreover, the court assigned the "apparent lack of independent research" as an additional reason for refusing to honor defendant's fair use claim. With this conclusion we disagree as a matter of law.

In *Toksvig v. Bruce Publishing Co.*, *supra*, the Seventh Circuit affirmed the grant of an injunction in favor of an author who had written a careful biography of Hans Christian Anderson, based on exhaustive research into Danish sources, against the publication of a subsequent biography of Anderson by an author who due to his inability to speak or read Danish had not independently examined the Danish sources and who had copied twenty-four specific passages of the first author's book. While the decision can be considered to rest on the ground that substantial and material copying was demonstrated, see Nimmer, Copyright at 133 n. 576 (1964), the court went on to say that the use of plaintiff's book was not a fair use for the reason that reliance on the English translations of the Danish sources enabled the defendant to complete her book in much less time than it took plaintiff . . . We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. *Oxford Book Co. v. College Entrance Co.*, 98 F.2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.

IV. Chief Judge Lumbard concurred (Judge Hays joining) in an opinion in which, in addition to agreeing with the decision of the court, he stressed his conclusion that a preliminary injunction should have been denied to plaintiff because it came into court with unclean hands. Finding that the copyright sued upon had been acquired by Hughes solely for the purpose of preventing a biography about him

from appearing, Judge Lumbard stated that "it would be contrary to the public interest to permit any man to buy up the copyright to anything written about himself and to use his copyright ownership to restrain others from publishing biographical material concerning him. The spirit of the First Amendment applied to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature."

435. *Smith v. Little Brown & Co.*, 360 F.2d 928, 149 U.S.P.Q. 799 (2d Cir., May 23, 1966) (Hays, J.). *For decision below, see* 245 F. Supp. 451, 141 U.S.P.Q. 540 (S.D.N.Y. 1965), *see* 13 BULL. CR. Soc. 138, Item 162 (1965).

Appeal from judgment for plaintiff in action for infringement of common law copyright. Defendant publisher had had plaintiff's unpublished manuscript in its possession for consideration for some time. Thereafter it published a similar book by another author. The trial court found infringement, holding that both access and similarity had been demonstrated.

Held, affirmed.

The court held that the trial court's judgment was supported by substantial evidence both as to access and similarity, and that under the law of New York, which was applicable, this was sufficient, as it would be under the federal law of statutory copyright, to support the holding of infringement. With respect to access, the court pointed out evidence had been offered to indicate that the employee of defendant who worked most closely with the author of the accused book was familiar with plaintiff's manuscript. On the issue of similarity, the court said:

The trial judge's findings of similarity are also supported by substantial evidence. Both plaintiff's manuscript and Mrs. Meyer's book concern Grania O'Malley who was a historical character but about whom few facts are known. Of the similarities in fictional elements in the two works . . . the trial judge said . . . :

"It is difficult to believe that two people, each sitting down to write a book about Grania O'Malley, entirely independent of each other, would each decide to begin the story on Grania's eighteenth birthday, would each recount that Grania went to watch for her father's return from sea,

would each conceive the idea of a party upon her father's return, and would each provide a substantially similar account of that party. The difficulty of ascribing this to coincidence becomes insuperable when we add to this parallel the fact that in each book Grania's horse is named Maeve, in each book she is upbraided for clothing not befitting 'a woman grown,' and that in each book, on her way to watch for her father, she discusses or reflects upon Queen Elizabeth. . . ."

The evidence of possibility of access when taken together with the elements of similarity provide sufficient basis for the trial court's finding of infringement. . . . Of course, the law of New York governs but that law appears to be the same as the federal law applicable to statutory copyright.

436. *Scott v. WKJG, Inc.*, 149 U.S.P.Q. 413 (N.D. Ind., Jan. 19, 1966) (Eschbach, J.)

Action for copyright infringement. Plaintiff charged that a television play, "Conditional Surrender," which appeared on the Loretta Young Show in 1962, was copied from her three-act play, "Discretion." "Discretion" was registered for copyright in 1944 as an unpublished drama.

Held, judgment for defendants.

I. The court held that since access was not shown, "striking" similarity between the two plays would have been required in order to show copying. The court found that there were certain similarities between the plays, but that they were not of such a nature as to preclude the possibility that the two plays were written independently. The court said:

This . . . play . . . was copyrighted in 1944 and . . . with a few brief additions was presented by an amateur group in Detroit, Michigan, for two performances in 1946. There have been no other performances of the plaintiff's play prior to the broadcast of the accused play. . . . Only fifteen copies of "Discretion," plus work copies for the Detroit production, were made before 1962. The play was never published. . . . There is no evidence that "Discretion" was seen or read by anyone connected with the author of "Conditional Surrender," the "Loretta Young Show," Toretto Enterprises, Inc., which purchased the play for the "Loretta Young Show," or any agent of either of the defendants. . . .

Evidence on the possibility of access to the plaintiff's play could not possibly support a finding that Mrs. Hire copied from "Discretion." Any finding of copying must rest solely upon the alleged similarities between the two plays. A succinct analysis and statement of the nature of the evidence needed to establish copying by showing similarities was well stated by Judge Frank in *Arnstein v. Porter*, *supra*, 468:

"If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."

Without direct proof of access, the plays must have a "striking similarity which passes the bounds of mere accident." *Wilke v. Santly Bros.*, 91 F.2d 978, 979 (2d Cir. 1937). Copying must be established with "reasonable certainty." *Jewel Music Publishing Co., Inc. v. Fiest*, 62 F. Supp. 596, 599 (S.D.N.Y. 1945).

The plaintiff introduced into the evidence two charts prepared by plaintiff showing alleged similarities between the two plays. . . .

Both plays revolve around a situation in which a middle-aged couple, having been married for approximately fifteen years, reach a divorce crisis resulting from the husband's infatuation with a woman who works at his place of business. In each play the husband asks the wife for a divorce, and the wife agrees upon certain terms. The wife's terms and her other actions are actually devices by which she seeks to defeat or delay her husband's divorce plans. . . .

The wife's devices include, in both plays, requiring the husband to assume custody of the children and purchase the wife's interest in the home property; requiring the husband to tell the children about the impending divorce; the wife's expressed intentions to seek a new husband; the deprivation of the husband's usual meals prepared by his wife; and the wife's acquisition of new clothes as a means of attracting men. There are several devices used in "Discretion" that are not used in "Conditional Surrender." More significantly, there are several devices used in "Conditional Surrender" that are not used in "Discretion." It would be natural to eliminate

some portions of a two-and-one-half-hour play when reducing it to a twenty-six-minute teleplay. However, in shortening the play there would be less likelihood of adding sequences to the shorter version than of reducing them in the longer version. . . .

Even the devices which are similar in the two plays are handled differently. . . . There is nothing unique in the love triangle plot involved in these plays. The similarity of the use of some of the same devices by the wife, as found in these two particular plays, is not itself strong evidence of copying. It is not a new or unusual idea in literature for a wife to save a marriage by apparently acceding to a husband's divorce request in such a way as to show the husband the disadvantages of a divorce. Such a deliberate scheme, although not with all the particular devices found in these two plays, was used by the wife in a play "Penelope" by the late W. Somerset Maugham, which was introduced into evidence by the defendant. Mrs. Hire testified that she had read similar advice given to correspondents through the "agony columns" in newspapers and that she and her husband speak jestingly about consenting to a divorce, "but you'll have to take the children." This court agrees that such allusions are not uncommon forms of jesting conversation and such remarks have achieved the status of the cliché. Given this general stock plot, the similar devices used by the wives in the two plays are the kind which would logically occur to the ordinary person contemplating ways to show the husband what life will be like if he pursues the divorce. These particular similarities are not so unique as to raise more than a suspicion of copying. When read within the contexts of these two plays, any such suspicions are eliminated. . . .

Besides the lack of convincing similarities between the two plays, there are numerous significant differences. The sequence of the wife's devices are not the same. The characterizations of the two girl friends are in vivid contrast to each other. The characterizations of the wife and the husband are quite different in the two plays. . . . The style of writing is strikingly different in the two plays. The total effect of these differences would leave with the average viewer of the plays the impression that, as Dr. Dodson testified, they are "two different plays."

The alleged similarities are certainly not so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same very general result. In fact, this court finds that the alleged similarities are not so striking as to raise the likelihood or probability that the accused play was copied from the plaintiff's

play. Despite certain stock similarities, these two plays are two entirely different plays, whether one examines them in the technical legal sense or reads or sees them from a strictly entertainment point of view.

The defendant has a heavy burden of proving a lack of copying, as the plaintiff contends, only after the plaintiff has shown access and "noteworthy similarity." *Overman v. Loesser*, 205 F.2d 521, 523 (9th Cir. 1953). There is no showing of access in this case, and the similarities hardly rise to the dignity of being classed as noteworthy. . . .

The plaintiff cites certain cases to show that direct evidence of access is not necessary in order to show copying. *Cholvin v. B. & F. Music, Inc.*, 253 F.2d 102 (7th Cir. 1958); *Wilkie v. Santly Bros., Inc.*, *supra*. In the *Cholvin* case there was strong evidence of access and amazing similarity between the two pieces of music involved there. . . . In the *Wilkie* case the two songs contained identical eight-bar melodic phrases with a three-bar departure in each eight-bar phrase, identical final chords and cadences, and similar changes in the directions of the melody. There are no comparably striking similarities between the two plays involved in the instant case.

The plaintiff cites several cases to illustrate that infringement can exist without identical copying. *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956); *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947); *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956). While plaintiff's legal contention is sound, a careful study of each of these cases shows far more striking similarity between the works involved in the cited cases than exist between the two plays in the instant case.

The play "Conditional Surrender" is not similar enough to the play "Discretion", either in the numerous aspects listed by the plaintiff or in the general impression left with the average reader or viewer, to establish either copying or infringement. Both must be established before the plaintiff can prevail.

437. *Baccaro v. Pisa*, 252 F. Supp. 900, 149 U.S.P.Q. 296 (S.D.N.Y., Mar. 21, 1966) (Bryan, J.)

Action for copyright infringement. Defendant Pisa owns a New York restaurant called "Chez Vito." He manufactured in Italy, through a corporation he controls, a long-playing record entitled "The Three Musketeers of the Opera at Chez Vito." This record included two musical compositions, "Dicitencello Vuie" and "Parlami D'Amore,

Mariu," in which plaintiff owned the copyrights. Thereafter defendant arranged to have the record played over the AM and FM facilities of Station WVNJ in Newark. The record was broadcast over WVNJ-AM on eleven occasions and over WVNJ-FM on eight occasions. There was a default judgment against Pisa on the issue of liability for these performances after Pisa failed to submit to examination before trial. Plaintiff moved for summary judgment on the issue of damages.

Held, judgment for plaintiff in the amount of \$4,750., representing \$250 minimum statutory damages for each of 19 infringements.

I. The plaintiff argued that each AM and each FM broadcast was a separate infringement of each of the two songs, whereas the defendant argued that there were only two infringements, one of each song. The court held, however, that while an AM-FM broadcast is only one infringement, a series of broadcasts at monthly intervals constitutes a series of separate infringements. The court said:

Thus the question for decision here is whether the series of broadcasts constituted two "infringements" by the defendant Pisa, 25 as plaintiff urges,⁴ or some other number which would more readily yield a "just" award of damages.

The literal language of § 101 (b), combining as it does an "ambiguous hodgepodge of improvisations,"⁵ provides only vague outlines for the solution of the problem. At one extreme, plaintiff's insistence that every infringing performance justifies a minimum award of \$250 would nullify the statutory yardstick provision prescribing "\$10 for every infringing performance" of a copyrighted musical composition. On the other hand, defendant apparently takes the position that the mandatory minimum and maximum figures prescribed for each "case" do not apply to each "infringement" as § 101 (b) suggests, but only apply to the number of copyrighted works infringed, viz. two. Thus under defendant's reading of the statute a single copyright can be infringed only once.

Neither of the interpretations advanced by the competing parties offers a satisfactory means of reconciling the various terms of the statute or achieving the ultimate objective here—the assessment of a "just" damage award.

Fortunately, the case law under § 101 (b) is more instructive. The issue was posed, but not conclusively decided, in *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919), where the Supreme Court found that two publications of a single copyrighted pictorial illustration at 26 day intervals constituted separate and distinct cases of infringement, justifying an award of twice the

statutory minimum. But the court reserved judgment on whether the outcome would have been otherwise if the "[second] publication had been merely a continuation or repetition of the first." *Id.* at 105-06. Compare *Jewell LaSalle Realty Co. v. Buck*, 283 U.S. 202, 9 USPQ 22 (1931).

The judicial adumbrations of the reservation in the *Westermann* opinion have been fairly summarized by Nimmer:

"if the interval between succeeding publications is a matter of days the courts will be inclined to consider all such publications as part of a single minimum damages award. If the interval between succeeding publications is for a substantially longer period then the courts will view each publication as giving rise to a separate claim for at least minimum damages." Copyright § 154.32, at 689 (1964) (footnotes omitted).

Thus the guiding "principle" distilled from the case law for the most part amounts to no more than a rather wooden reliance upon an arbitrary time standard. Successive publications at weekly,⁶ monthly,⁷ or yearly⁸ intervals will be treated as separate "infringements," whereas a time lapse of merely two or three days⁹ makes the succeeding publications "a continuation or repetition of the first."

It has also been suggested "that the nature of the business transaction giving rise to the infringement is significant, implying that a single integrated business transaction would result in one infringement, while separate and distinct transactions would result in more than one." *Davis v. E. I. du Pont de Nemours & Co.*, 249 F.Supp. 471, and n. 23, 148 USPQ 328, 335 (S.D.N.Y. Jan. 20, 1966); cf. *Markham v. A. E. Bordon*, 108 F.Supp. 695, 95 USPQ 313 (D. Mass. 1952), rev'd on other grounds, 206 F.2d 199, 98 USPQ 346 (1 Cir. 1953).

[1] Accepting the view that a finding of multiple infringements may be necessary "to discourage wrongful conduct," *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 95 USPQ 396, 398 (1952); see *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 273, 121 USPQ 109, 116 (2 Cir. 1959), a rule which looks to the circumstances surrounding each infringing transaction makes sense in this case, because the ultimate objective here is to determine the number of distinct occasions defendant Pisa has engaged in a separate taking of plaintiff's property as it is defined and safeguarded by the copyright law.

[2] So viewed, I reject at the outset plaintiff's contention that the AM and FM broadcasts which occurred simultaneously on six separate dates each constituted separate "infringements" of the copyrighted compositions. The actual act of infringement in each instance occurred only once by playing the album over the recording facilities of the radio station.¹⁰ Compare *Cory v. Physical Culture Hotel*, 14 F.Supp. 977, 985, 30 USPQ 353, 359-360 (W.D.N.Y. 1936). The result would not be changed by the fact that different audiences may have been reached through the two frequencies. A persuasive analogy is found in *Davis v. E. I. du Pont de Nemours*, 249 F.Supp. 471, 148 USPQ 328 (S.D.N.Y. Jan. 20, 1966). There Judge Feinberg in an exhaustive opinion held that an infringing television network broadcast, reaching 162 separate audiences, nevertheless constituted only one "infringement" for purposes of the statutory damage provisions of § 101(b). In any event, in view of my ultimate decision here, there is no reason to conclude that the assessment of a "just" award necessitates a holding that the simultaneous broadcasting of a single musical composition over both AM and FM frequencies amounts to two separate "infringements."

[4] The pivotal question here, then, in the words of the Supreme Court, is whether each successive broadcast was "merely a continuation or repetition of the first." Under the decisional law the case at bar is relatively simple: the separate broadcasts at monthly intervals¹¹ each constituted a distinct "case" of "infringement." It may be readily concluded that each playing of a copyrighted composition was a separate taking of plaintiff's property for purposes of § 101(b). This is a case where the treatment of "each stick in a faggot [as] a single [infringement] unit" is manifestly proper. Cf. *Bell v. United States*, 349 U.S. 81, 83 (1955). Computing the loss in this fashion, the damages in the case at bar amount to \$4,750, the \$250 minimum multiplied by each of the 19 infringements.¹²

II. It was held that a reference by plaintiff's attorney to "the size of this file" did not constitute a sufficient showing as to the amount of counsel fees which plaintiff should be awarded. The court said:

Finally, plaintiff seeks his attorney's fees in this action. Under 17 U.S.C. § 116 an award of counsel fees lies within the sound discretion of the trial court. See, e.g., *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194, 140 USPQ 631 (2 Cir. 1964); *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 133 USPQ 94 (2 Cir.), cert. den.,

371 U.S. 817, 135 USPQ 502 (1962). The criteria for fixing reasonable fees are well established. See, e.g., *Burnett v. Lambino*, 206 F.Supp. 517, 519, 134 USPQ 68, 70 (S.D.N.Y. 1962); *Cloth v. Hyman*, 146 F.Supp. 185, 193-94, 112 USPQ 254, 260-261 (S.D.N.Y. 1956). The elements are provable with relative ease. Yet plaintiff's counsel here has made no effort to establish such important elements as the amount of time required to be spent on the case and how much of that time was devoted to the claim against Pisa as distinguished from the claims against the other defendants. Instead he urges that the court award him fees after observing "the size of the file in this case."¹⁴

This is scarcely a satisfactory guide for the exercise of judicial discretion in assessing an appropriate allowance. Fees are not awarded by this court on the basis of *avoidsupois* or bulk. There is no reason for excusing plaintiff's counsel from showing the amount of time and effort he necessarily spent on the Pisa phase of the case when he should have the information and the records to do so. His application for fees on summary judgment is denied.

Plaintiff's motion for summary judgment will be granted to the extent of awarding him the sum of \$4,750 for damages resulting from the infringement of his copyrighted musical compositions, together with mandatory costs to be taxed. See 17 U.S.C. § 116. In all other respects the motion for summary judgment is denied. Direction for the entry of judgment pursuant to Rule 54(b), F.R.C.P., will not be made at this time since the issue of counsel fees remains open.

438. *Hermusic, Ltd. v. Reverse Producers Corp.*, 254 F. Supp. 502, 149 U.S.P.Q. 554 (S.D.N.Y., Apr. 15, 1966) (Levet, J.)

Action for copyright infringement. Defendant recorded five musical compositions in which plaintiff owned copyrights. Plaintiff moved for summary judgment.

Held, judgment for plaintiff.

The court held that defendant's claim that it had oral licenses for the recordings could not be sustained because it had not been shown that the individuals from whom plaintiff claimed to have obtained the oral licenses had either actual or apparent authority to grant such licenses on behalf of plaintiff. The court said:

Here, under defendant's version of the facts, Herman's Hermits and the group's managers only professed to own stock in and control

the plaintiff corporation. Such relationships do not give them apparent authority to deal on behalf of the corporation since stockholders, even a majority, or directors as individuals are not agents per se of the corporation. *Goldberg v. Berry*, 231 App. Div. 165, 247 N.Y.S. 69 (1st Dept. 1930); *De Seversky v. Republic Aviation Corp.*, 2 FRD 183 (E.D.N.Y. 1938).

2. State Court Decisions

439. *Cinepix v. Triple F Productions*, 150 U.S.P.Q. 134 (N.Y. Sup. Ct., N.Y. Co., June 15, 1966) (Mangan, J.)

Action for unfair competition. Plaintiff is the owner of a 1962 television series called "I Spy", and alleged that defendant's use of the same title for its current NBC series constitutes unfair competition. Both parties moved for summary judgment.

Held, motions denied.

The court held that the basic factual questions whether plaintiff's title had acquired a secondary meaning and whether it had retained its secondary meaning after a lapse of several years should be reserved for trial. The court said:

It is settled law that no copyright protection will be given to the title of a literary production, but equity will protect a mark, a name or a title if a property right has been created therein. The test to be applied is whether or not the mark, word or title in which a property right is asserted has acquired a "secondary meaning", distinguishing it from ordinary language in the public domain. "The test of secondary meaning is whether the trademark, word or title has become broadly known to the public as denoting a product of a certain origin. *Barton v. Rex-Oil Co.*, 3d Cir., 2 F.2d 402, 405, 40 A.R.R. 424; *Golenpaul v. Rosett*, 174 Misc. 114, 18 N.Y.S. 2d 889, 45 USPQ 45; *Philadelphia Storage Battery Co. v. Mindlin*, 163 Misc. 52, 296 N.Y.S. 176." *Saland v. Monogram Pictures Corp.*, 67 N.Y.S. 2d 436, 438, 71 USPQ 309.

The instant action presents a case of direct competition; two television series with the same title. At issue is whether the acts of the defendants in showing their series under the title "I Spy" have tended to confuse or deceive the general public into associating their series with the good will, if any, of the plaintiff's series. The answer depends upon whether or not there existed a "secondary meaning" for the title "I Spy", as claimed by plaintiff. See *Ball v. United Artists Corp.*, 13 App. Div. 2d 133, 140-41, 129 USPQ 192. "The acquisition of secondary meaning is a question of fact which

rests entirely upon the evidence adduced in support of its existence . . ." *Saland v. Monogram Pictures Corp., supra*. Furthermore, even if a "secondary meaning" were shown as a matter of law, nevertheless a lapse of time, as here, in the use of the title raises a question of fact as to whether the title still retains its secondary significance as to be suggestive of plaintiff's telefilm series. . . . These issues, together with several others herein can only be resolved upon a trial.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

440. HURST, WALTER E., and WILLIAM STORM HALE. The publisher's office manual; how to do your paperwork in the music publishing industry. Hollywood, Calif., 7 Arts Press [1966]. 1 v. (various pagings) (*Their Entertainment industry series*, v. 3).

Includes several chapters dealing with various copyright aspects of the music publishing business.

441. MACCAMPBELL, DONALD. Writing for publication. Cleveland, World Publishing Co. [1966]. 169 p.

Includes a chapter "Concerning the sale," covering such topics as media and rates of payment, paperback contracts, hard cover contracts, movie sales, television sales, dramatic rights, and copyright and plagiarism.

2. Foreign Publications

442. FINDLATER, RICHARD. The book writers; who are they? [London] Society of Authors [1966]. 16 p.

A new report of the financial conditions of book writers in Great Britain, based on the results of "a confidential postal survey" during the summer of 1965 of the membership of the Society of Authors. Mr. Findlater establishes that book writing does not pay enough and suggests what can and ought to be done about it.

443. FROMM, FRIEDRICH KARL, and WILHELM NORDEMANN. Urheberrecht; Kommentar zum Urheberrechtsgesetz und zum Wahrnehmungsgesetz, mit den internationalen Abkommen und dem sowjet-zonalen Gesetz über das Urheberrecht. Stuttgart, W. Kohlhammer, 1966. 434 p. (Kohlhammer-Kommentare).

An article-by-article commentary on the new West German copyright laws. Appendices include the texts of related laws and regulations, the Universal Copyright Convention, the Brussels

revision of the Berne Convention, and the new East German copyright law.

444. LE TARNEC, ALAIN. Manuel de la propriété littéraire et artistique. 2. éd. Préf. de J. Paul-Boncour. Paris, Dalloz, 1966. 414 p. (Manuels Dalloz de droit usuel).

The second and updated edition of a practical manual of French copyright law. Includes commentaries on, and texts of, the Berne and Universal Copyright Conventions as well as the texts of the French copyright law of 1957 and of the reciprocity law of July 8, 1964.

B. LAW REVIEW ARTICLES

1. United States

445. AMERICAN BAR ASSOCIATION. Annual report, including Proceedings of the Eighty-eighth annual meeting, held at Miami Beach, Florida, August 9-13, 1965. Vol. 90. Chicago [1966]. 602, 73 p.

Includes the proceedings of the House of Delegates in which a resolution presented by the Section of Patent, Trademark and Copyright Law calling for the Association to approve various principles as the basis for the revision of the United States Copyright Act was adopted (pp. 344-346) and the Report of the Section recommending the adoption of the resolution (pp. 601-602).

446. Copyright law revision: educational broadcasting and the proposed limitations on exclusive performing rights. (51 *Iowa Law Review* 1049-1065, no. 4, Summer 1966.)

"This Note will discuss those portions of the proposed revision which relate to the exclusive right to perform a copyrighted work publicly. An examination will be made of the effect of the proposed changes upon unlicensed uses of copyrighted material by educational broadcasters."

447. Copyrights—infringement—unauthorized photo-copying and sale of dedicated translation constitutes infringement of copyright on underlying novel. (79 *Harvard Law Review* 1716-1720, no. 8, June 1966.)

A note on *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F.Supp. 518, 13 BULL. CR. SOC. 146, Item 167 (E.D.N.Y. 1965).

448. GOLDMAN, ABE A. [A review of] Copyright and related topics—a choice of articles, edited by the Los Angeles Copyright Society and the UCLA School of Law. (*Duke Law Journal* 615-622, Spring 1966.)

The reviewer focuses "attention on the discussions in the articles of questions which have required consideration in the revision program." He concludes that the "volume offers the convenience of placing within ready reach some of the choicest material on the subject [of copyright]."

449. KAPLAN, BENJAMIN. An unhurried view of copyright: Proposals and prospects. (66 *Columbia Law Review* 831-854, no. 5, May 1966.)

This third in a series of three James S. Carpentier lectures delivered at Columbia Law School on March 15, 17, and 19, 1966 deals principally with the proposed revision of the U.S. copyright law and concludes "by invoking the long-range future of copyright."

450. NELSON, GREG J. The copyrightability of computer programs. (7 *Arizona Law Review* 204-218, no. 2, Spring 1966.)

"This article was awarded the first prize in the 1965 Nathan Burkan Memorial Competition at The University of Arizona College of Law."

451. NIMMER, MELVILLE B. The United States copyright law and the Berne Convention: the implications of the prospective revision of each. (2 *Copyright* 94-121, no. 4, Apr. 1966.)

"A current reassessment of the problems and possibilities of American accession to the Berne Convention in light of the substantive changes to be wrought by the respective revision programs." The conclusion is reached that although there are obstacles, "they are far from insuperable, and the goal well worth the effort."

452. RACKMAN, MICHAEL I. Re: Legal protection of computer programs. (48 *Journal of the Patent Office Society* 275-277, no. 4, Apr. 1966.)

A brief discussion of the practical aspects of securing program protection.

453. SCHULDER, DIANE B. Art Proceeds Act: a study of the *droit de suite* and a proposed enactment for the United States. (61 *Northwestern University Law Review* 1945, no. 1, March-April 1966.)

A case is made for the enactment of a law allowing an artist to claim a percentage of the sales price each time his work of art is resold on the ground "that the purposes and results of such legislation are consistent with objectives with which the United States Congress should be concerned."

454. SILVER, ISIDORE. Privacy and the first amendment. (34 *Fordham Law Review* 553-568, no. 4, May 1966.)

A comment on invasion of privacy by communications media, with particular emphasis on New York law.

455. Television sponsor and advertising agency held vicariously liable for copyright infringement. (64 *Michigan Law Review* 1172-1180, no. 6, Apr. 1966.)

A critical note on the decision in *Davis v. DuPont de Nemours & Co.*, 240 F.Supp. 612, 12 BULL. CR. Soc. 378, Item 286 (S.D.N.Y. 1965).

2. Foreign

1. English

456. ABEL, PAUL. Letter from Great Britain, dealing with copyright and related matters which have occurred in Great Britain in 1965. (2 *Copyright* 132-144, no. 5, May 1966.)

Twenty-fifth in a series published annually since 1942.

457. Religious ceremonies and minor reservations to the Berne Convention. (*E.B.U. Review* 82-84, no. 97B, May 1966.)
Signed: M. L.

A brief survey of provisions in national legislation of Berne countries which contain limitations, in favor of religious functions, on rights of authors, with special reference to broadcasting.

2. English, French and Spanish

458. SCHULZE, ERICH. Copyright reform: Germany. (*GEMA News* 17-75, no. 4-5, March 1966.)

English, French and Spanish in parallel columns. The French version was previously published in *Interauteurs*, no. 161 (4th

quarter 1965), pp. 343-376. See 13 BULL. CR. SOC. 264, Item 303 (1966).

459. SCHULZE, ERICH. Copyright reforms; III. Jean Geiringer Memorial Lecture on International Copyright. (*GEMA News* 2-16, no. 4-5, March 1966.)

English, French and Spanish in parallel columns. The English version was first published in 12 BULL. CR. SOC. 266, Item 220 (1965).

3. German

460. CONRADT, JOACHIM. Verfassungsrechtliche Bedenken gegen § 53 Abs. 5 des Urheberrechtsgesetzes v. 9.9. 1965. (19 *Neue Juristische Wochenschrift* 917-919, no. 20, May 18, 1966.)

Three reasons are given why art. 53, sec. 5 of the new West German copyright law is unconstitutional. This section makes manufacturers and importers of tape recorders liable for payment to a copyright licensing body of royalties amounting to five percent of the price of each recorder sold.

461. PUSCHEL, H. Das neue Urhebervertragsrecht in wissenschaftlichen Forschungsinstitut. (15 *Der Neuerer* 182-186, no. 4, 1966.)

A discussion of the contractual relationships, under the new East German copyright law, between authors and scientific-technical research institutes.

4. Swedish

462. BRUUN, LARS. Upphovsrätten i Sveriges tidningspress. (*NIR* 32-40, no. 1, 1966.)

A critical study of the relationships, with respect to transfers of copyrights, between authors and the Swedish press, based on replies by leading papers to questionnaires and on personal interviews.

NEWS BRIEFS

463. INTER-AMERICAN MEETING OF COPYRIGHT EXPERTS.

Sponsored jointly by UNESCO and the International Confederation of Authors' and Composers' Societies (CISAC), a meeting of copyright experts from 18 American countries was held in

Rio de Janeiro from July 4 to 9, 1966. Observers attended also from many organizations, such as the United International Bureaux for the Protection of Intellectual Property, the Organization of American States, the International Writers' Guild and others.

The United States Copyright Office was represented by the Deputy Register of Copyrights, George D. Cary, who has kindly agreed to report on the meeting in the forthcoming October issue of the BULLETIN.

INDEX

Volume 13. October 1965-August 1966

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

	Item	Page
CZECHOSLOVAK REPUBLIC		
Act of March 25, 1965, effective July 1, 1965. Copyright.		
German translation	266	242
GERMAN DEMOCRATIC REPUBLIC		
Act of Sept. 13, 1965, effective Jan. 1, 1966. Copyright	337	302
French translation	338	302
GERMAN FEDERAL REPUBLIC		
Law of Sept. 9, 1965, partially effective Sept. 17, 1965 (with regard to term) and Jan. 1, 1966. Copyright and Neighboring Rights	156	132
English translation	270	243
French translation	340	303
Italian translation	275	244
English, French, Spanish, German texts	429	407
Law of Sept. 9, 1965. Administration of Copyright and Neighboring Rights	155	132
English translation	271	243
French translation	339	302
English, French, Spanish, German texts	430	407
Law of Sept. 15, 1965. Implementing adherence to the Rome Convention on Neighboring Rights	274	244
English translation	268	243
English, French, Spanish, German texts	428	407
Law of Sept. 15, 1965. Implementing adherence to the European Agreement on Television Broadcasts. German, English, French	272	243
English translation	267	242
English, French, Spanish, German texts	427	407

	Item	Page
Law of Sept. 15, 1965. Implementing adherence to the Brussels revision, Berne Convention. German, English, French	273	244
English translation	269	243
English, French, Spanish, German texts	426	407
Decree of Dec. 18, 1965. Minister of Justice. Provision of Sec. 138, Para. 5, Law of Sept. 9, 1965. Copyright and Neighboring Rights. "Register of Authors"	342	303
Decree of Dec. 18, 1965. Minister of Justice. Provision of Sec. 14, Para. 7, Law of Sept. 9, 1965. Administration of Copyright and Neighboring Rights. "Arbitration Commission"	341	303
KENYA		
Bill No. 22, 1965, published Oct. 5, 1965. The Copyright Bill, 1965	157	133
Act No. 3, 1966, effective April 1, 1966. The Copyright Act. Superseding U.K. Copyright Act, 1956	431	407
MALAWI		
Act No. 38, 1965, effective May 24, 1965. The Copyright Act, 1965	158	133
SOUTH AFRICA		
Act No. 63, 1965, effective Sept. 11, 1965. The Copyright Act, 1965. Afrikaans	211	182
English translation	343	303
French translation	344	304
TUNISIA		
Law No. 66-12 of Feb. 14, 1966. Copyright. French text	345	304
UNITED STATES		
Public Law 89-142. Extending duration of protection in certain cases. Superseding Pub. L. No. 87-668	9	48
Public Law 89-297, Oct. 27, 1965. Amending title 17, United States Code, with relation to fees	154	132
CONGRESS		
House (89th Congress, 1st Session)		
H.R. 369, May 25, 1965, to accompany H.J. Res. 431. Extending duration of copyright protection in certain cases	10	48

	Item	Page
Senate (89th Congress, 1st Session)		
S. Rept. 548, August 10, 1965. Extending duration	11	48
S. Rept. 814, Oct. 4, 1965. Copyright fees	153	132
House (89th Congress, 2d Session)		
H.R. 13286, March 3, 1966. To amend the Communications Act of 1934 with respect to community antenna systems	260	241
H.R. 14903, May 5, 1966. A bill relating to tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Identical with H.R. 3430 and H.R. 8190, 89th Cong., 1st Sess.	332	301
H.R. 15004, May 11, 1966. To repeal the jukebox exemption. Identical with H.R. 18 and H.R. 2793, 89th Cong., 1st Sess.	333	301
H.R. 15638, June 13, 1966. To provide for collection, compilation, critical evaluation, publication and sale of standard reference data (properties of substances)	415	403
<i>Committee on the Judiciary</i>		
Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, bills for the general revision of the Copyright Law, May, June, August, September 1965	261	241
<i>Committee on Interstate and Foreign Commerce</i>		
Hearings on H.R. 12914, H.R. 13286, H.R. 14201, bills to amend the Communications Act of 1934, March and April, 1966	416	403
Report 1635, June 17, 1966. To accompany H.R. 13286. Regulation of community antenna systems	417	403
<i>Committee on Ways and Means</i>		
Hearings on H.R. 8664, H.R. 15271, and H.J. Res. 688, June 6-7, 1966. Implementation of Florence and Beirut Agreements	418	404
Kastenmeier, Robert W. Extension of remarks in Congressional Record: "CATV and Copyright Revision"	334	301
Kastenmeier, Robert W. Extension of remarks in Congressional Record: "A Congressman Looks at Copyright Law Revision," including address by Cong. Herbert Tenzer	335	302

	Item	Page
Kupferman, Theodore R. Remarks in introducing H.R. 14903, re tax treatment of transfers of rights to copyright and literary, musical and artistic compositions	336	302
Senate (89th Congress, 2d Session)		
S. 3017, March 4, 1966. To amend the Communications Act of 1934 with respect to community antenna systems. Companion bill to H.R. 13286	262	241
S. 1237, introduced Feb. 23, 1965, as passed, July 27, 1966. A bill to encourage the creation of original ornamental designs, etc.	414	402
S. 3517, June 16, 1966. To provide for collection, compilation, critical evaluation, publication and sale of standard reference data (properties of substances). Companion bill to H.R. 15638	419	404
<i>Committee on the Judiciary</i>		
Hearing, pursuant to S. Res. 48 on S. 1237, July 28, 1965. Design protection	263	242
S. Rept. 1350, pursuant to S. Res. 48. Patents, trademarks, and copyrights	422	405
<i>Committee on Foreign Relations</i>		
Hearings on S. 2859 and S. 2861, April and May, 1966. Foreign assistance	421	405
Magnuson, Warren G. Remarks when introducing S. 3017, March 4, 1966	264	242
Metcalf, Lee. CATV translators, and copyright. Remarks published June 20, 1966	420	404
COPYRIGHT OFFICE		
68th Annual Report of the Register, for the fiscal year ending June 30, 1965	423	406
Decisions of the United States Courts involving copyright, 1963-1964. Compiled and edited by Benjamin W. Rudd	210	182
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE		
Notice of statement of policy, July 12, 1965, published July 28, 1966. Public domain materials	424	406

	Item	Page
U.S. COURT RULES. DISTRICT COURTS		
Amendment to rules of civil procedure, adopted by the Supreme Court, pursuant to the provisions of title 28, United States Code, Feb. 1966. Copies of allegedly infringing and infringed works accompanying complaints	425	406
CONVENTIONS, TREATIES AND PROCLAMATIONS		
International Union for the Protection of Literary and Artistic Works (Berne Convention).		
Diplomatic conference of Stockholm, 1967 Copyright. Report of the Debates, Committee of Experts, 1965	159	134
Association Litteraire et Artistique Internationale (A.L.A.I.), Report on congress of August 23-28, 1965, on preparations for 1967 Revision of the Convention	212	183
UNESCO		
Universal Copyright Convention.		
Kenya, accession	432	408
United Kingdom	346	305
Bechuanaland	346	305
Grenada	346	305
Montserrat	346	305
St. Lucia	346	305
Yugoslavia, accession	276	245
Member countries	433	408

DECISIONS

Item

Asociación Argentina de Interpretes v. L. S. 5 Radio Rivadavia (Court of Appeal of Argentina, July 15, 1965)	359
Baccaro v. Pisa, 252 F.Supp. 900, 149 U.S.P.Q. 296 (S.D. N.Y., Mar. 21, 1966)	437
Blumcraft of Pittsburgh v. Newman Bros., Inc., 246 F.Supp. 987, 147 U.S.P.Q. 107 (S.D. Ohio, Sept. 23, 1965)	221
Bond Buyer v. Dealers Digest Publishing Co., Inc., 25 A.D.2d 158, 267 N.Y.S.2d 944, 149 U.S.P.Q. 465 (N.Y. App. Div., 1st Dept., Mar. 15, 1966)	355
B. Wilmsen, Inc. v. Consolidated Novelty Co., Inc., 251 F.Supp. 874, 148 U.S.P.Q. 247 (S.D. N.Y., Nov. 17, 1965)	217
Cinepix v. Triple F. Productions, 150 U.S.P.Q. 134 (N.Y. Sup. Ct., N.Y. Co., June 15, 1966)	439
Cinerama, Inc. v. Max Howe Motion Pictures, 147 U.S.P.Q. 497 (P.O. T.M. T.App.Bd., Dec. 10, 1965)	227
Columbia Broadcasting System, Inc. v. Teleprompter Corp., 251 F.Supp. 302, 148 U.S.P.Q. 417 (S.D. N.Y., Dec. 16, 1965)	348
Comptroller General, Opinion, 147 U.S.P.Q. 230 (Oct. 7, 1965)	277
David v. Paramount Pictures Corp., 24 App.Div.2d 555 (1st Dept., June 15, 1965)	18
Davis v. E. I. DuPont de Nemours & Co., 249 F.Supp. 329, 148 U.S.P.Q. 328 (S.D. N.Y. Jan. 20, 1966)	349
Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc., 253 F. Supp. 841, 147 U.S.P.Q. 409 (S.D. N.Y., Oct. 20, 1965)	216
Edgar Rice Burroughs, Inc. v. Charlton Publications, Inc., 243 F.Supp. 731, 145 U.S.P.Q. 655 (S.D. N.Y., Feb. 10, 1965)	15
Ferrer v. Columbia Pictures Corp., 149 U.S.P.Q. 236 (Sup. Ct., Westchester Co., Feb. 25, 1966)	283
Flick-Reedy Corp. v. Hydro-Line Manufacturing Co., 351 F.2d 546, 146 U.S.P.Q. 694 (7th Cir., Sept. 14, 1965)	160
Ford v. Camay Record Corp., 153 N.Y.L.J. 113, p. 16, col. 5, (June 14, 1965)	19
Fristot v. First American Natural Ferns Co., 251 F.Supp. 886, 149 U.S.P.Q. 352 (S.D. N.Y., Mar. 29, 1966)	351
Gordon v. Vincent Youmans, Inc., 245 F.Supp. 607, 145 U.S.P.Q. 681 (S.D. N.Y., April 23, 1965)	13
G. P. Putnam's Sons v. Lancer Books, Inc., 251 F.Supp. 210, 148 U.S.P.Q. 596 (S.D. N.Y., Feb. 25, 1966)	350
Gramex v. Danmarks Radio (Board for Remuneration for Use of Literary and Artistic Works, Copenhagen, Denmark, May 19, 1965)	21
Gray v. Eskimo Pie Corporation, 244 F.Supp. 785, 147 U.S.P.Q. 188 (D. Del., July 12, 1965)	164
Grove Press, Inc. v. Greenleaf Publishing Co., 247 F.Supp. 518, 147 U.S.P.Q. 99 (E.D. N.Y., Oct. 4, 1965)	167

	Item
Harms, Inc. v. Theodosiades, 246 F.Supp. 799, 148 U.S.P.Q. 147 (E.D. Pa., Oct. 18, 1965)	220
Hemingway, Estate of Ernest v. Random House, Inc., 49 Misc.2d 726, 148 U.S.P.Q. 618 (Sup. Ct., N.Y. Co., Feb. 25, 1966)	282
Henry v. Barrymore Theatre Corp., <i>not yet reported</i> (Sup. Ct., N.Y. Co., Feb. 23, 1966)	284
Hermusic, Ltd. v. Reverse Producers Corp., 254 F.Supp. 502, 149 U.S.P.Q. 554 (S.D. N.Y., Apr. 15, 1966)	438
H. M. Kolbe Co., Inc. v. Shaff, 352 F.2d 285, 147 U.S.P.Q. 336 (2d Cir., Oct. 27, 1965)	213
Isle of Man Broadcasting Co. Ltd. v. Phonographic Performance Ltd., Performing Right Tribunal No. PRT 18/64 (Douglas, Isle of Man, May 29, 1965)	21
Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 244 F.Supp. 287, 147 U.S.P.Q. 138 (S.D. Fla., July 30, 1965)	165
Lapsley v. American Institute of Certified Public Accountants, 246 F.Supp. 389, 147 U.S.P.Q. 439 (D. D.C., Oct. 18, 1965)	218
Life Music, Inc. v. Wonderland Music Co., 241 F.Supp. 653, 145 U.S.P.Q. 603 (S.D. N.Y., May 24, 1965)	16
Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 147 U.S.P.Q. 265 (9th Cir., Oct. 26, 1963)	215
Manes Fabrics Co., Inc. v. Miss Celebrity, Inc., 246 F.Supp. 975, 147 U.S.P.Q. 63 (S.D. N.Y., Aug. 17, 1965)	163
Manpower, Inc. v. Temporary Help of Harrisburg, Inc., 246 F.Supp. 788, 148 U.S.P.Q. 85 (E.D. Pa., Oct. 12, 1965)	219
Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir., April 30, 1965)	12
Miller Studio, Inc. v. Pacific Import Co., Inc., 39 F.R.D. 62, 147 U.S.P.Q. 388 (S.D. N.Y., Nov. 19, 1965)	279
Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 147 U.S.P.Q. 38 (S.D. N.Y., Sept. 14, 1965)	17
Norbay Music, Inc. v. King Records, Inc., 249 F.Supp. 285, 148 U.S.P.Q. 420 (S.D. N.Y., Jan. 11, 1966)	280
Nordstrom v. Radio Corporation of America, 251 F.Supp. 41, 149 U.S.P.Q. 544 (D. Colo., Dec. 10, 1965)	354
Northern Music Corp. v. Pacemaker Music Co., Inc., 248 F.Supp. 278, 147 U.S.P.Q. 358 (S.D. N.Y., Nov. 5, 1965)	278
Pocket Books, Inc. v. Dell Publishing Co., Inc., 267 N.Y.S.2d 269, 148 U.S.P.Q. 239 (Sup. N.Y. Co. 1966)	223
Pocket Books, Inc. v. Dell Publishing Co., Inc., 268 N.Y.S.2d 46, 49 Misc.2d 596, 149 U.S.P.Q. 466 (Sup. N.Y. Co., Mar. 22, 1966)	357
Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 247 F.Supp. 578, 147 U.S.P.Q. 415 (E.D. Pa., Nov. 22, 1965)	353
Preminger v. Columbia Pictures Corp., 49 Misc.2d 363, 148 U.S.P.Q. 398 (Sup. N.Y. Co., Jan. 19, 1966)	222
Read v. Turner, 148 U.S.P.Q. 453 (Cal. App., 4th Dist., Jan. 20, 1966)	358

	Item
Revere v. Forum Record, 154 N.Y.L.J. 51, p. 16, col. 8 (Sept. 13, 1965) (Sup. N.Y. Co.)	20
Richmond v. Wiener, 353 F.2d 41, 147 U.S.P.Q. 8 (9th Cir., Sept. 9, 1965)	161
Rosemont Enterprises, Inc. v. Random House, Inc., 150 U.S.P.Q. 715 (2d Cir., Aug. 17, 1966)	434
Ross Products, Inc. v. New York Merchandise Co., Inc., 242 F.Supp. 878, 146 U.S.P.Q. 107 (S.D. N.Y., June 24, 1965)	14
Scandia House Enterprises, Inc. v. Dam Things Establishment, 243 F.Supp. 450, 146 U.S.P.Q. 342 (D. D.C., July 15, 1965)	281
Scott v. WKJG, Inc., 149 U.S.P.Q. 413 (N.D. Ind., Jan. 19, 1966)	436
Shapiro, Bernstein & Co., Inc. v. Bleeker, 243 F.Supp. 999, 146 U.S.P.Q. 152 (S.D. Cal., June 21, 1965)	166
Silver v. Television City, Inc., 215 A.2d 335, 148 U.S.P.Q. 167 (Pa. Super. Ct., Dec. 16, 1965)	224
Smith v. Little Brown & Co., 245 F.Supp. 451, 146 U.S.P.Q. 540 (S.D. N.Y., June 25, 1965)	162
Smith v. Little Brown & Co., 360 F.2d 928, 149 U.S.P.Q. 799 (2d Cir., May 23, 1966)	435
Spangler Candy Co. v. Crystal Pure Candy Co., 353 F.2d 641, 147 U.S.P.Q. 434 (7th Cir., Dec. 6, 1965)	225
Stevens v. National Broadcasting Co., 148 U.S.P.Q. 755 (Cal. Super., L.A. Co., Feb. 11, 1966)	356
Swedish Group of The International Federation of the Phonographic Industry v. Sveriges Radio, Judgment No. DT 24/1965 of The Stockholm Rådhusrät, Stockholm, April 28, 1965	21
Tappan Co. v. General Motors Corp., 245 F.Supp. 972, 147 U.S.P.Q. 67 (N.D. Ohio, April 27, 1965)	226
Uneeda Doll Co., Inc. v. P. & M. Doll Co., Inc., 353 F.2d 788, 148 U.S.P.Q. 7 (2d Cir., Dec. 15, 1965)	214
United Artists Television, Inc. v. Fortnightly Corporation, 149 U.S.P.Q. 758 (S.D. N.Y., May 23, 1966)	347
United States v. Rose, 149 U.S.P.Q. 820 (S.D. N.Y., April 18, 1966)	352

A U T H O R S

	Item*		Item*
Abel, Paul	456	Desbois, Henri	57
Aitken, Wylie A.	26	Desjeux, Xavier	47
Aracama Zorraquin, E. D.	296	Deutsch, Volker	65, 66
Are, Mario	46	Diamond, Sidney A. p. 20, p. 25,	285
Arrow, Allen H. p. 161,	285	Dubin, Joseph S.	231
Aschenborn, H. J.	149	Dulin, Jacques M.	171
Attenborough, John	147	Englert, R. J.	119
Authors League of America	324	Epstein, Robert S.	30
Authors, Society of	168	Evans, Luther H.	376
Axster, Herbert	192	Fabiani, Mario	194, 406
Baldwin, Mark	81	Findlater, Richard	442
Banzhaf III., John F. 82, 83,	367	Fine, Timothy H.	368
Barker, R. E.	139, 205	Finkelstein, Herman	102, 204
Baum, Alfred	193	Fragola, Augusto	73
Behr, Omri M.	290	Françon, Andre	176
Benjamin, Curtis G. 84, 92, 129,	325, 360, 408	French, J. E.	119
Blundell, William E.	85	Freudenberg, Maxwell C.	103, 174
Bodenhausen, Georg H. C.	p. 215, 411	Fromm, Friedrich Karl	195, 395, 443
Bomser, Alan H. p. 123		Gamboni, Ciro A.	31
Brettler, Leon	285	Gast, Peter	66
Brugger, Gustav	394	Gerbrandy, S.	305
Bruun, Lars	462	Gitlin, Paul	23
Carter Ruck, P. F.	24, 206	Glücksman, Anselm	306
Cary, George D.	230	Goldberg, George	104
Celler, Emanuel p. 113		Goldberg, Morton D. p. 7, 365,	p. 378
Chernoff, George	22	Goldman, Abe A.	376, 448
Childs, James B.	91	Gosnell, Charles	249, 376
Clarkson, Austin	409	Grad, Judith, <i>case digests</i>	pp. 49-60, 135-152,
Code, Holland R. H.	206		187-207, 246-259,
Cohen, Maxwell T.	285		306-355, 411-425
Cohn, Kurt	304	Grassi, Alessandro	177
Colby, Richard	285	Hacker, Robert	172
Cole, Jr., John P.	27	Haensel, Carl	396
Collova, Taddeo	321	Hagendorf, Stanley p. 123	
Conradt, Joachim	460	Hale, William Storm	440
Copinger, Walter A.	228	Hamilton, William C.	232
Cordtz, Dan	97	Harding, D. E.	369
Cox, Henry Bartholomew	98	Hartlieb, Horst von	307
Cramer, Allan P.	170	Hazan, Victor	238
Dallos, Robert E.	99		
Demcy, Arthur I.	410		
Dempsey, David	100, 203		

* Page (p.) numbers refer to articles published in Volume 13.

Item*	Item*
Heinken, Hans G. 397	Leinveber, Gerhard 69, 71, 399
Herbert, Sir Alan 137, 141	Le Tarnec, Alain 444
Hesser, Torwald 75	Lidle, Günter 70
Hill, James 32	Limperg, Theodor 244
Hillig, Hans Peter 297, 398	Linden, Bella L. 235
Hofer, Walter 285	Linton, David 120
Hudon, Edward G. 33, 233	Lipszyc, Delia 187
Huet-Weiller, Daniele 387	Loh, I-Cheng 92
Hurst, Walter E. 440	Love, John T. p. 43
Isacker, Frans van 60	Lurvey, Ira p. 271
James, Edwin H. 107	Lutz, Martin J. 229
Janeway, Elizabeth 326	MacCampbell, Donald 441
Jeanneret, Marsh 93	MacDougall, A. Kent 250
Kaminstein, Abraham L. p. 97, 322, p. 371	Malaplate, Leon 184
Kaplan, Benjamin 449	Manges, Horace S. 376
Kaplan, William M. p. 167	Marro, Jean Louis 243
Karnell, Gunnar p. 212	Masouye, Claude 49, 61, 74, 185, 300
Karp, Irwin p. 31, 109	Mentha, Benigne 178, 301, 400
Kastenmeier, Robert ...p. 118, 334	Middleton, George 363
Katona, Gabriel P. 292	Miles, James W. 179, p. 171
Kaul, Friedrich Karl 309	Moreira da Silva, Mario 241
Keeton, A. A. F. 382	Mott, Kelsey M. 188
Keller, Joseph E. 370	Mouchet, Carlos 50
Kellman, Leon 34, 285	Munster, Jr., J. H. 122
Kennedy, Robert P. 35	Münzer, Georg 311
Kent, Cecil C. 110	Murphy, Arthur A. 174
Kestenbaum, Lionel 173	Myatt, Carl 121
Klaver, Franca 247	Nathan, Hans 312
Knap, Karel 67, 245, 310	Nawrocki, Boleslaw 62
Knapp Jr., George Edwin 362	Nelson, Greg J. 450
Knoll, Erwin 327	Neufischer, Karl 383
Koepke, John C. 111	Nicholson, Margaret 410
Krasilovsky, M. William 42	Nimmer, Melville B. 451
Kreiger, Albrecht 196	Nordemann, Wilhelm 443
Kristol, Irving 112	Novotny, Jiri 51
Kruse, Paul 113	Nugent II, William C. 36
Kullman, Harry 142	Nus, Jacobus van 390
Kupferman, Theodore R. 371	Ohlschlegel, Helmut 197
Kupke, Dietmar 68	Ordway, Gary D. p. 225
Lacy, Dan 114, 115, 119	O'Shea, John Donald 37
Landau, Jack C. 116	Palagyi, Robert 52
Latham, Paul A. 117	Papaconstantinou, Helen 38
Latman, Alan 371	Pasquera, Filippo 201, 239
Lawlor, Reed C. 118, 234	Patterson, Lyman Ray 372

* Page (p.) numbers refer to articles published in Volume 13.

Item*	Item*
Pattishall, Beverly W. 236	Sher, Ze'ev 386
Paul-Boncour, J. 444	Sherman, Paul J. 285
Perez Pastor, Francisco 180	Silver, Isidore 454
Peterson, John R. 293	Sinkankas, John 129
Petre, David C. 373	Skone James, E. P. 24, 228
Pilpel, Harriet F. 124, 365	Skone James, F. E. 24, 206, 228
Poff, R. H. p. 119	Smith, Justin C. 122
Posner, S. Paul 374	Society of Authors 168
Preston, Jean 125	Spiegel, Irwin O. 40, 41, 378
Price, Monroe E. 375	Spivacke, Harold 130
Püschel, Heinz 313, 314, 461	Staat, Friedrich 319
Rackman, Michael I. 452	Stewart, Stephen M., <i>case</i>
Radokovic, Zivan 181, 189, 242	<i>reports</i> p. 61-68, p. 355-358
Recht, Pierre 53, 63	Stolusky, Warren G. 379
Reichardt, Ernst 401	St. Onge, W. L. p. 118
Reichel, Werner 71	Straschnov, Georges 54, 182
Reimer, Dietrich 388	Streuli, Adolf 64
Reynolds, Paul R. 252	Strömholm, Stig 407
Rich, Giles S. 237	Stroth, R. R. 72
Ringer, Barbara A. 23, 127	Sukin, Michael F. 366
Rivington, Christopher 330	Sylte, Ann 131
Rochicciola, Elie 389	Tannenbaum, Samuel W. 371
Roeber, Georg 198, 199, 246, 403	Tanselle, G. Thomas 328
Ronga, Giulio 202, 315	Taubman, Joseph 42, 256, 285
Roos, Gideon 391, 402	Tenzer, Cong. p. 119
Roth, Ernst 384	Throckmorton, Rex D. 380
Sanctis, Valerio de 190, 248,	Tournier, Alphonse 58, 186
288, 385	Uggla, Claes 70
Sarbin, Hershel 22	Ulmer, Eugen 72, 302, 320, 405
Sauerstein, Hans J. 316	Urey, David S. 44
Savelson, R. S. 62	Vilbois, Jean 184, 393
Schiefler, Kurt 317	Wagner, Egon 55
Schmedel, Scott R. 128	Waldheim, Franklin p. 2, p. 3
Schneider, Hans H. 200	Walsh, John 132
Schneider, Ludwig 318	Wehringer, Cameron K. 371
Schorr, Burt 253	Wessel, Milton R. 133
Schulder, Diane B. 453	Whicher, John F. 287
Schulman, John 371	Whiting, William F. 294
Schulze, Erich 25, 191, 303, 323,	Williams, David R. 45
392, 404, 458, 459	Wilson, Edmund 135
Seton, Charles B. 285	Woltmann, Marion L. 381
Seymour-Smith, Martin 146	Würthele, J. 183
Shapiro, Norman R. 39	Wystram, Hugo 59
Shaye, Robert 377	Zini Lamberti, Carlo 56, 240, 384
Shemel, Sidney 42, 285	Zwerling, Ben 136

* Page (p.) numbers refer to articles published in Volume 13.

SUBJECT MATTER

(All numerals refer to Items)

- Access 413
Ad interim protection 203, 350
Adaptation 72
Advertising, agency liability 455; CATV 88
Africa 49; juridical developments 241
ALAI 212, 243
American Bar Association, symposium 1, 2, 3, 4, 5, 6, 7, 8; annual report 421
American Book Publishers Council, revision 255; tax aspects 77; manufacturing clause 78; Stratford Press 74, 410, 421
American Textbook Publishers Institute 80, 94, 95, 123; revision 255, 421
Antitrust 87, defense 368
Arbitration, NYPLA 371
Architectural plan 378
Argentina, law 296; performing rights 359
ASCAP 102
Assignment 413
Association of the Bar, City of New York, revision bibliography 289
Attorney's fee 280
Author, foreign, U.S. and U.S.S.R. 377; Gr. Br. 442; use of own name 195
Authors League of America, revision 109; licensing systems 324
Author's rights 242; Berne Convention 457; Sweden 142; Gr. Br. 145; Shakespeare's time 146
Bechuanaland, U.C.C. 346
Benelux draft law, designs, models 305
Berne Convention 48, 61, 63, 64, 196, 209, 299, 300, 301; ALAI 212; Argentina 50; author's rights, broadcasting 457; Netherlands 244; U.S. 258; U.S. revision 451; Stockholm revision 58, 60, 64, 73, 74, 75, 76, 159, 184, 190, 320; Articles 9-10: 53; Article 14: 2, 50; Article 25 bis: 393; cinematographic work 390; W. Ger. 308, 426
Biography, invasion of privacy 282
BMI 87
Book jacket, unfair competition 357
Book publishing, manufacturing clause 78, 79, 80, 134; tax aspects 77; U.K., subsidiary rights 147
Broadcasting 7; Gr. Br., Sweden, Denmark 21; Israel 238; records 28, 29; religious 457; W. Ger. 297
Burlesque 36
Canada, law 93, 110
Canadian Copyright Institute 93
Cartography 287
Cartridge, phonograph record 208
Catalog, infringement 160, 221
China, Republic of 92
Choreography 259
Cinematographic work, Berne Convention 58, 60, 73, 390; France 186, 187; moral right 387

- "Cinerama," trademark infringement 227
CISAC, Pan-American Council 50; Inter American meeting 463
Classification, designs 315
Collaboration 178
Collective work 7
Common law copyright 282, 283; infringement 358
Communication satellites 290
Community antenna 7, 27, 37, 85, 88, 89, 90, 107, 253, 254, 291, 334, 347, 348, 370, 413, 416, 417, 420; Europe 247; F.C.C. 260, 262, 264, 295; Gr. Br. 383; U.S. revision 151
Compto Corp. v. Day-Brite Lighting, Inc. (*see* *Sears, Roebuck & Co. v. Stiffel Co.*)
Compilations 167, 331
Comptroller General, design protection 277
Compulsory licensing, U.S. revision 151, 294
Computer program 32, 83, 94, 95, 104, 133, 197, 292, 367, 408, 413, 450; bibliography 234; protection 452; U.S. revision 151
Contract 13, 20; author, paperback edition 252; moral rights 71; motion picture, W. Ger. 307; cutting for television 356; publishing, E. Ger. 316; Italy 288; research, E. Ger. 319, 461; song 216
"Copies" 17
Copinger-Skone James, "The Law of Copyright" 206, 228
Copying, libraries 249
Copyrightability 413, 450; E. Ger. 314
"Copyright Laws and Treaties of the World" 169
"Copyright — Modern Law and Practice", Carter-Ruck Skone, James 206
Copyright Office, fees, *preceding* 1; bill 153, 154; revision, Pt. 5, *preceding* 1; extension of duration, certain cases 9, 127; Barbara A. Ringer, *preceding* 412
Credit, authorship 40
Criminal offense 4; prosecution 352
Cutting, motion picture 222, 356
Czechoslovakia 51, 183, 245, 248, 266, 310
Damages 224, 280, 349, 413
Deposit, records 130; South Africa 149
Design piracy 81
Design protection 171, 263; Benelux countries 305; U.S. bill 237, 414; classification 202, 315; fashion 97; helmets 277; international 179; stove 226; W. Ger. 70
Developing countries, Berne Convention 75
Doll, infringement 281
Domaine public payant, Italy 240
Dramatists' Guild, history, function 363
Dramatization, infringement 349
Droit de suite 453
"Dum Dums", infringement 225
Duration 6, 34; U.S. revision 117, 151
EBU 48
Educational broadcasting, U.S. revision 151, 446; fees 84; rights 86
Educational use 96
Electronic music 62; work 194

- Exclusive rights, U.S. revision 151
Exemption 7
European Agreement, Protection of Television Broadcasts 267
Fabric design, infringement 163, 165
Facsimile edition 250
Fair use 7, 17, 101, 131
Fake book, infringement 166, 352
Federal preemption, U.S. revision 151
Federal Bar, N.Y. N.J. and Conn., Committee on Theatre Law 285
Fee, U.S. 153, 154
Florence Agreement 136, 418, 421
Floor plan, infringement 358
Foreign author, U.S., U.S.S.R. 377
Formalities, U.S. 3
France, cinematographic work 186; foreign works 57; infringing copy 389; law 59, 444; legislative and judicial developments 176
GEMA 25
Germany, East (Democratic Republic) law 306, 313, 323, 337, 338, 392, 405, 443; applied art 314; broadcasting 309; computer program 314; contract 316, 461; infringement 304; motion picture 319; subject matter 311, 312
Germany, West (Federal Republic) law 270, 271, 272, 273, 274, 275, 302, 303, 317, 323, 339, 340, 341, 342, 388, 392, 402, 404, 405, 458, 459, 460; Berne Convention 269, 426, 443; broadcasting 297, 398, 403; contract 396; debates 407; design 70; European agreement 427; mechanical rights, transfer 55; moral right 71; motion pictures 246, 307, 397; neighboring rights 155, 156, 395, 429, 430; performing rights 69, 399; performer protection 428; Rome Convention 268; royalties 199; tape recording 401; television 267, 394, 397, 403; title 200; U.C.C. 443; WORT (authors' society) 199
Government work, U.S. 132, 174, 232; educational 424
Great Britain, authors 145; judicial developments 456; law 24; lending rights 137, 141, 143, 144; photocopying 140, 168, 205; pirate radio 257; Registered Designs act 1949, 139; tax 175; use, industrial 139
Grenada, U.C.C. 346
Handbooks, copyright 23, 365, 441
History, copyright, U.S. 91
Hungary, legislative and judicial developments 52
Idea protection 122; common law 413; program format 224
Import, books and sheets, duty 410
Income tax, author 135
Infringement 4, 160; antitrust defense 368; candy wrapping 225; catalog 221; co-authors 161; common law 282, 283, 358; community antenna 347, 348; copy, France 389; composition 354; doll 281; E. Ger. 304; fabric 163, 165; fake book 166, 352; floor plan 358; Hong Kong 121; inflatable figure 14; journal 167; news 353; novel 162, 350; plaque 279; plastic flower 351; puppet 17; record 280; song 278; "the word" 16, 220; schedule 219; television dramatization 349; textile 213; unpublished manuscript 218
Intergovernmental Copyright Committee, Paris 298, 299
International copyright 231; U.S.S.R. 170

- International Association of Law Libraries, U.S. revision 376
- Interview, Sweden 462
- Israel, broadcasting 238, 386
- Italy, domaine public payant 240; legislative and judicial developments 385; plagiarism 406; public performance 177; puzzles 201, 239; television 248; translation U.S. Revision Bill 265
- Jean Geiringer Memorial Lecture, Third 191; Fourth 215, 411
- Joint author 413; infringement 161
- Joint Libraries Committee, U.S. revision 108
- Joint work 7, 13, 65, 66
- Jukebox, U.S. revision 151, 333
- Jurisdiction 413
- Kenya, law 157, 431; U.C.C. 432
- Kinescope 17
- Law revision, methods 209
- Lecture 369
- Lending rights 137, 141, 143, 144
- Letters 98, 125
- Liability 455
- Libraries, copying 249; Gr. Br. 330; technological changes 326; U.S. revision 326, 376
- License 324, 413
- Los Angeles Copyright Society, articles collection 448
- Loss of copyright, publication of fragment 167
- Machine copying 373
- Malawi, law 158, 182
- Manufacturing clause 78, 79, 80, 106, 114, 119, 134, 151, 203, 410
- Manx radio 21
- Mark Twain, piracy 233
- Mechanical rights 364; W. Ger. 55
- Microfilm, copying 98
- Misrepresentation 15
- Montserrat, U.C.C. 346
- Moral rights 71, 181, 189, 193, 287, 387, 413
- Motion picture, current events W. Ger. 68; cutting 222, 356; law W. Ger. 246
- Music 42, 46, 56; business, symposium 285; publishing 384, 440
- Musical work, infringement 354
- Music Publishers' Protective Association 364
- NASA, audio transmission 379
- Nathan Burkan Memorial Competition essays 29, 31, 32, 36, 170, 259, 290, 292, 294, 331, 361, 367, 373, 374, 375, 377, 380, 381, 450
- Neighboring rights, 321, W. Ger. 155, 156, 395
- Netherlands, The, Berne Convention 244
- News, broadcast, infringement 353; letter, unfair competition 355
- Newsreel, law W. Ger. 68
- New York Patent Law Association, arbitration colloquy 371
- NIR 150
- Notice 3, 413; doll 281; U.S. revision 151
- Novel, infringement 162
- Originality 287

Original manuscript 46
Osterrieth, Albert, anniversary 192
Ownership 7, 13, 151
Paper bag, infringement 164
Paris Convention 61, 190, 196, 209
Parody 36
Patent Law Association of Chicago, Copyright Committee, taxation 286
Performance for profit 28, 29
Performing artist 47
Performing rights, Argentina 359; clearance 364; W. Ger. 69, 399
Performing rights societies 87, 285; GEMA 25, 2
Permissible taking 36
Phonograph records 5, 20, 285; industry 366
Photocopying, Gr. Br. 140, 148, 168, 205, 329, 447
Photograph, Tennessee Ernie Ford 120; World's Fair 30
Photography 22
Piracy 171, 217; broadcasting 99, 257; Hong Kong 121; literary 113; Mark Twain 233
"Pirate Queen" 162
Plaque, infringement 279
Plagiarism, Italy 406
Plastic flower, infringement 351
Pop Pops, unfair competition 225
Preemption, U.S. revision 380
Privacy, right of, biography 282; deceased relative 35; invasion of 282, 283, 284; new media 124; television program, Ill. 12; N.Y. 19, 454
Product simulation 26 (*see also* *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*)
Program format 224
Protection of foreign works, France 57
Publication 14; exhibition 358
Public domain, letters 98
Public performance, Italy 177, 220
Publishing, history 328; new technology 255
Puzzle, protection, Italy 201, 239
Record, infringement 280; Denmark 21; Gr. Br. 21; manufacturers 47; National Archives 130; Sweden 21; U.S. revision 151
Register's report 423
Registration, U.S. 151, 413
Remedies 4, 151
Renewal rights 13, 413; song 26
Reprinting, Chinese 92
Reproduction, ATPI 123
Reprography 129
Revision, South Africa 149; Switzerland 243 (*see also* *United States*)
Rights, exclusive 4
Right of personality, W. Ger. 198
Right of reproduction, Berne Convention 53, 63
Rights, sound recordings, U.S. revision 151

- Rome Convention, Art. 16, para. 1a 47; neighboring rights 185; W. Ger. 268, 274
- Royalties 21; W. Ger. 199
- Scientific matter 111
- Sears, Roebuck & Co. v. Stiffel Co., case notes 26, 31, 41, 43, 44, 45, 172, 173, 293, 374, 375, 413
- Secondary meaning 44, 223
- Sermon 369
- Society of Authors 168
- Song, infringement 278
- Sound recording 5, 7
- South Africa, law 149, 211, 343, 344, 382, 391
- Spain, copyright problems 180
- Speech 369
- Sponsor, liability 455
- St. Lucia, U.C.C. 346
- Standard reference data, bill 415, 419
- State law 172
- Statute of Anne 372
- Statute of limitations, invasion of privacy 284
- Storage, unfair competition 235
- Stratford Press, U.S. revision 79
- Subject matter 4, 151; E. Ger. 311, 312
- Subsidiary rights 147
- Sweden, authors 142; law 59; transfer of rights 462
- Switzerland, law 229; revision 243
- System, single federal 2
- Tape recording 104, 128, 207, 208, 321, 318, 460
- Taxation, 286; ABPC 77; Czechoslovakia 245; Gr. Br. 175; Transfer of rights 332, 336; U.S. nonresident aliens 152
- Television, invasion of privacy 12; use of puppets 17; Czechoslovakia 183; W. Ger. 68, 267, 272, 394, 397, 398, 403; Italy 248
- Termination 7
- Textile design, infringement 213
- "Thief's Journal" 167
- Title 38, 223, 227; W. Ger. 200
- Trademarks, Canada 39
- Transfer of rights 7; Sweden 462
- Translation 167
- Tunisia, law 345
- UNESCO, Inter American meeting 463
- Unfair Commercial Activities Bill 236
- Unfair competition 18, 34; storage and retrieval 235; design, stoves 226; Dum Dums-Pop Pops 225; book jacket 357; newsletter 355
- Uniform Deceptive Trade Practices Act 43
- Universal Copyright Convention, Bechuanaland 346; Grenada 346; member countries 433; Montserrat 346; St. Lucia 346; U.S.S.R. 112; Yugoslavia 276
- Unity of Art 188
- Unlicensed transmission 290

- Unpublished manuscript 218
United Kingdom, photocopying 148
University of California, Los Angeles, Law School, copyright articles 448
U.S.S.R. 67, 138, 170; author 381; U.C.C. 112
United States, decisions 1963-64 210; judicial developments 413; history of copyright 33, 91; government work 360, 362; military author 103, 118; extension of duration in certain cases 9, 10, 11; district court rules 425; Register's report 423
United States, General Copyright Revision 79, 105, 151, 204, 230, 256, 261, 322, 376, 380, 409, 412, 449; ABA symposium 1965: 1-8; Authors League 109; Berne Convention 258, 451; Bibliography 289; book industry 251; CATV 151, 334, 335; compulsory license 294; computer program 151; design protection 263; duration 117; educational broadcasting 151, 446; educators and publishers 327; preemption 380; publishing 255, 326; Government work 325; letters 125; libraries 108, 376; manufacturing clause 134; notice 151; photography 120; scholars 114; Senate subcommittee 422
Vacation schedule, infringement 219
Validity, Christmas decoration 217
"Verifying", compilations 331
Work of art 453
Work made for hire 7, 413
WORT 199
Yugoslavia, U.C.C. 276
Zambia, law 54

