

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U. S. A.

VOLUME 15

OCTOBER 1967-AUGUST 1968

NEW YORK UNIVERSITY LAW CENTER

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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: Sydney M. Kaye, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Paul Gitlin, *Treasurer*; Morton D. Goldberg, *Secretary*; Alan Hartnick, *Assistant Treasurer*; Bernard Korman, *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: 15 BULL. CR. SOC. page no., Item (1968).

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PART I.

ARTICLES

1. THE AMERICAN BAR ASSOCIATION COPYRIGHT SYMPOSIUM

(Honolulu, Hawaii, August 8, 1967)

The Subject: "Computers and Copyright: The New Technology and Revision of the Old Law."

Moderator: Morton David Goldberg, Chairman, Copyright Division

Panelists: E. Gabriel Perle, Counsel, Time, Inc.

H. Frederick Hamann, Counsel, North American Science Center, Thousand Oaks, California

Charles H. Lieb, Member of the New York Bar, of the firm, Paskus, Gordon & Hyman

Prof. John F. Harty, Director of Health Law Center, University of Pittsburgh; former Chairman, Special Committee on Electronic Data Retrieval, American Bar Association

Thomas C. Brennan, Chief Counsel, Senate Subcommittee on Patents, Trademarks and Copyrights

It is our privilege to publish, with the permission of the authors and the American Bar Association, Section on Patent, Trademark and Copyright Law, Robert W. Fulwider, Chairman, and Morton David Goldberg, Chairman, Copyright Division, the papers presented at the Honolulu annual meeting.

Introductory remarks by Mr. Goldberg:

In this morning's symposium we are following the age-old tradition that we lawyers approach any legal question with an open mouth. I think most of you are familiar with the background of our problem. The recent history of the Copyright Division effort started in approxi-

mately 1955. There were many studies conducted by the Copyright Office. A lengthy encyclopedic series of these studies was issued under the auspices of the House Judiciary Committee. There have been extensive meetings and symposia of American Bar Association groups and other groups. There have been exhaustive hearings by the House and Senate, although there was little testimony in the House with respect to the computer question. There was somewhat more in the Senate, but still there is by no means any intensive or extensive discussion of the computer problem in either set of legislative hearings.

H.R. 2512, 90th Congress, passed the House on April 11. The companion bill, S. 597, introduced in the Senate earlier, is now pending in the Senate committee along with H.R. 2512. The present statute enacted in 1909 probably makes both computer input and output other than under the doctrine of fair use an infringement, although there is some dispute on this. In any event, there is by no means any judicial decision, let alone any definitive decision, on this question.

The bill, both H.R. 2512 and S. 597, would appear to make both computer input and computer output more clearly infringements, again other than under the doctrine of fair use.

This matter has been discussed by Committees 304 and 408 of this Section for the last few years. There has been no resolution of this problem or of the proper approach to this problem even within the Section. One of the purposes of the morning's symposium is to attempt to educate the members of the Section, and to educate the members of the panel as to what the views of the Section are on these particular problems.

Because of the need to study the problem, a Study Commission has been proposed. The bill proposing that Study Commission, or which would implement that Commission, is S. 2216, of which copies are available at the table in the rear of the room; and Tom Brennan, Chief Counsel of the Senate Subcommittee on Patents, Trademarks and Copyrights, will be our wind-up speaker and will speak specifically with regard to the matter of the Study Commission.

I think on both sides there is fear of something being frozen into the copyright statute which can't be changed. Copyright owners are concerned that there may be some sort of exemption frozen into the copyright statute permitting free use of copyrighted materials for certain computer purposes, and they fear that at a later time that exemption

can't be taken out. Certain users of these materials and computer systems are concerned that the rights granted copyright proprietors under the statute would be so broad as to make it difficult or impossible for appropriate relaxation of these broad rights to be enacted at a later time. It is somewhat analogous to the problem of the cookbook with the two facing pages of mushrooms, poisonous and edible, which comes out in a second edition with an erratum notice saying that unfortunately the captions were interchanged. There is concern that there can be no change until after the damage has been done.

2. COMMENTARY ON ACCESS TO COPYRIGHTED MATERIALS BY INFORMATION STORAGE AND RETRIEVAL SYSTEMS

By E. GABRIEL PERLE

I have a friend who, he says, was hit by a New York City police prowl car. Naturally, he got ticketed for going through a stop sign. So he spoke with his lawyer, who advised him that it was a bum rap, that it couldn't be beaten, and that he should plead "guilty" and pay the man the ten bucks. But not my friend! He refused to plead guilty but did agree to plead *nolo*!

When he got to court the clerk called his name and asked, "How do you plead?"

"*Nolo contendere*," said my friend.

The clerk looked up and said, "You mean you don't speak *any* English at all?"

In that phase of copyright — and copyright law revision — which relates to information storage, processing, and retrieval, it may well be that we, like my friend, can be asked, "You mean you don't speak English?" Because, in the computer-copyright dilemma, we have not meaningfully communicated, one side with the other.

In this controversy, who and what comprise the sides? Who are the adversaries?

I was asked to speak here as a representative of the interests of the copyright proprietor as opposed to those of the "user." The new McClellan Subcommittee Study Commission bill (S. 2216) speaks of members "representing authors and other copyright proprietors" on the one hand and members "representing users of copyrighted works" on the other.

I submit that there is no such dichotomy, there are no such adverse parties.

Can it be said that the interests of University Microfilms, Basic Systems and American Education Publications are adverse to those of Xerox — which owns those entities? That the interests of Time, Inc. are adverse to those of G.E. when they jointly own *Silver Burdett*? That the interests of S.R.A. are adverse to those of I.B.M. which owns S.R.A.? That the interests of Random House are opposed to those of R.C.A. which owns Random House? Indeed not. There is an identity of interest. As General Sarnoff said in explaining R.C.A.'s merger with Random House, "They have the software and we have the hardware."

Realistically, the lines have been drawn between the private and the public sector; between those who create and market intellectual property — the authors and publishers — and those who wish freely to use that property — the educators, the academic world, and the world of non-profit science and research. In brief, between the profit and the non-profit.

It's been a helluva fight thus far. To date, neither side has even scored.

Professor Stedman said, in his testimony to the Senate Subcommittee, “. . . one is struck by the instances in which [the] opposing interests simply could find no common ground for agreement.” He, incidentally, demonstrated that the lines I have drawn may not be valid, when he said that “the American Association of University Professors' approach to copyright law revision . . . has been not solely that of the educator but, also, that of the author and publisher. University professors are primarily teachers, but they also provide a substantial share of the writings used in teaching, and extensively contribute to, and participate in, the publication of educational journals.”

Ted Sizer, the young and dynamic Dean of Harvard's Graduate School of Education, put it, “We have been dealt a new set of cards and we must learn to play with them.” So, too, must we who are involved in the game of copyright law revision learn to play with this new set of cards. The game, thus far, has advanced, or deteriorated, to a basic question of whether “users” may freely utilize copyrighted information as *input* into information storage, processing, and retrieval systems.

The answer can be approached only in the context of the system as it exists today and as it will exist in the foreseeable future.

We must think of the system as the computer utility. A computer utility is a general purpose public system which, according to Douglas Parkhill in “The Challenge of the Computer Utility,” includes such features as (1) essentially simultaneous use by many remotely located users; (2) concurrent running of multiple programs; (3) availability of the same range of facilities and capabilities at the remote stations as the user would expect if he were the sole operator of a private computer having the same capacity as the utility system; (4) a capacity for indefinite growth; and (5) flexibility so that the system can grow with the art, without interruption.

Parkhill then states: “The foregoing features apply principally to what might be described as a general-purpose public computer utility for which no upper limit would exist for either the numbers and types of tasks to be performed or the number of customers to be serviced.

In fact, as such a utility grew it might eventually embrace the entire nation and service not only industrial, government and business customers, but also private homes, until the personal computer console became as commonplace as the telephone. It would then constitute a national version of what Dr. Robert Fano, the director of Project MAC, has described as the 'depository of the data base and information processing procedures of the community.'

"Since the resources and information possessed by a utility of this sort would grow continuously as the system was used, they would represent at any particular instant the integrated knowledge and intellectual resources of the nation up to that time. Thus, in addition to realizing the economic advantages inherent in a time-shared system, such a utility would provide an unprecedented capacity for the rapid dissemination of knowledge. In a sense, it could be regarded as the ultimate in intelligence amplifiers, since all of the accumulated knowledge would be instantaneously available to every subscriber."

And, with improved communication techniques, the system can and will become not merely nation-wide but world-wide.

As a prelude to this all but omniscient system, there will be a proliferation of smaller, private, quasi-public or governmental systems or utilities which, predictably, will ultimately inter-connect when operating in related fields. A telephone line or cable connection is far cheaper than duplication of both input and programming.

Also inherent in the computer technology is the radical change that we can foresee in the mechanics and means of authorship and of publication.

As to authorship, Parkhill put it: "An author, for example, will probably do his writing at the keyboard of his personal utility console. As he types, his input will be stored in his private files at the computer utility, hence it will be retrievable on demand for viewing on his local display screen. From his console he will have the capability of correcting typing or spelling errors, adding or deleting sentences, inserting pictorial or reference material, etc., just as though he were working with pencil and paper. Moreover, once he is satisfied with his rough text, he will be able to request the utility computer to prepare final copy, corrected and in the proper format complete with any necessary justification, page headings, figures, and so forth.

"To publish, the author will simply notify the utility of the existence of his document and authorize its inclusion in the public files. Once in these files, it will be freely accessible to all the other utility customers via the viewing screens of their own consoles."

As for publishing, Professor Julius Marke has said:

“The information world of the future will revolve around information systems, educational programs, and library complexes in which the complete documentation of the system concerned will be equivalent to a computer memory. In a sense, therefore, by providing copies of works stored in the computer, these systems become publishers. Traditional publications will also be available from commercial publishers, but it would seem that “non-book” production will predominate. As a result, the role of the commercial publisher will probably change, especially in his relationship with authors and readers. Publishers will also have to reconsider the role they will want to play with reference to the regional and national information networks the government is planning and developing.” Not to be outdone, Marshall McLuhan has said, with a rare understandability factor, “In the age of the Xerox, the reader becomes a publisher, and so does the schoolroom.”

Under these circumstances, it becomes clear that if there were free access to copyrighted material by the computer without the consent of the proprietor, the resultant free storage of the copyrighted material would become a compulsory license under which the computer utility, and the subscriber to the computer utility, could use another’s copyrighted property subject only to some pre-fixed rate structure. Pre-fixed and pre-determined without consideration of the different and varying economic considerations of individual authors and proprietors to which Mr. Lieb has alluded. We must assume that, even as the “users” contend that they cannot, for an infinite variety of reasons, negotiate with copyright proprietors for the right freely to store copyrighted material in memory—free input—so the users would insist even more strongly that once the material is in memory they must be able to utilize that material without having to negotiate the amount, if any, which must be paid for such use.

What this approach, inevitably, leads to is a destruction of copyright protection. It assumes that authors and proprietors are interested only in the amount of financial payment which derives from particular uses of their copyrighted material. It effectively deprives the author and proprietor of any control over the manner in which his property is to be used. We cannot assume, as has been at least implicitly assumed, that payment is the sole factor involved in the licensing of the writings of authors. Obviously, payment is not and cannot be the sole factor. Payment cannot and must not be permitted to become the sole condition of use of another’s copyright.

Stated in this light, we need not deal now with the esoteric problems of who pays how much for what use, and who bears what risk for

what occurrences. Rather would these and all the other relevant factors be questions for negotiation between the copyright proprietor and the computer system and its subscribers. This will be a process of trial and error, of evolving art and philosophy, but it cannot be something which is imposed upon proprietor and user alike by arbitrary legislative fiat now. It may be that *if* — or, more probably *when* — the study commission becomes a reality and it has done at least the first giant share of its work, statutory guidelines can be staked out in this area. But until that time and, I feel, after that time, we must rely upon the ability of proprietors and authors, alone or in voluntary concert, to arrive at realistic agreement with users as to the conditions and terms of access to copyrighted material, evolving precedent and patterns through experience.

I submit that the art and method of licensing of copyrighted materials for utilization by information storage and retrieval systems will evolve with the needs of the systems for access to that material.

Mahalol

3. COMMENTS ON THE COPYRIGHT ASPECTS OF AUTOMATIC INFORMATION STORAGE AND RETRIEVAL SYSTEMS

By H. FREDERICK HAMANN

The proposed revision of the copyright act raises several problems which are of considerable concern to the government contractor. Of particular interest is the impact of the proposed revision on computerized information storage and retrieval, and the effect it would have in restricting the future operations of a government contractor. As a user of automatic storage and retrieval systems, primarily in the technical area, our concern is not limited to the relatively simple systems which are presently being used. The anticipated growth both in the size and the capability of these systems will, in a large measure, be governed by what restrictions and limitations are placed upon the utilization of copyrighted material. Clearly even the unsophisticated systems presently available, if limited in use to uncopyrighted materials, would operate only at a small fraction of their capability. Such a limitation would also be detrimental to the copyright proprietor and authors since they would be unable to share fully in the growth of an extremely large future market.

It is our view that the incentives provided authors under the copyright act should be continued and strengthened wherever possible. As a user of technical information of all types it is plain to us that sources of new works must be assured, particularly works in the technical fields. However, our regard for the system of incentives provided by the copyright law and the tremendous progress which it has fostered must be balanced against the need for greatly expanding the utilization and availability of all types of information to all segments of the public through automatic information storage and retrieval systems. No all-inclusive exemption from traditional copyright concepts is considered either necessary or desirable. What is required, in our view, is a compromise between the need for the traditional copyright incentives and the equally important need to provide all segments of the public with that information which they need in the fastest possible manner.

Our major concern is the practical aspects of information utilization in automatic information storage and retrieval systems. The effect of the proposed law would be to require the user to negotiate individual agreements with each copyright owner before the material could even be placed in a computerized system. All of you are familiar with the amount of time required to negotiate agreements and can well under-

stand how much time and effort would have to be consumed with each copyright proprietor in defining the scope of the license and uses to which the material could be put and the royalty rate to be charged. By the time the requisite agreements could be negotiated the information would probably be of historic interest only. Such an approach is obviously impractical and would effectively stifle the growth and utilization of automatic storage and retrieval systems since copyrighted material would be effectively excluded from use.

Under the proposed revision of the copyright laws infringement is so broadly defined that the copyright owner need not be actually damaged in any manner before infringement may be found. Thus, the mere act of translating a copyrighted work into computer readable form is an infringement. However, this act does not of itself in any way affect the copyright proprietor's market, nor does it necessarily result in any damage or loss. In fact, it is conceivable that through such acts and the manipulation available in an automatic system the market for the work could be enhanced, for example, by indexing a previously unindexed work. The mere storage in the memory is equally innocent when judged on the basis of reduced market or damage to the copyright proprietor. However, these acts could create a potential for generating an infringing output which might affect the proprietor's market. Therefore, some measure of copyright owner control or limitations on use may be reasonable.

The only freedom accorded the user of automatic systems under the proposed laws is that which would be available under the doctrine of fair use; however, this doctrine has never been applied to computerized information storage and retrieval systems and its scope and limitations would take many years to establish. Thus, the fair use doctrine offers little promise of escape from the impractical problems of obtaining individual licenses from each of the copyright proprietors.

Our concern is primarily directed to the effect in the future of the proposed legislation. Many of the issues and problems can not be clearly defined at this time because of the relatively immature state of automatic information storage and retrieval systems. However, some approach must be formulated and at least initially followed so that the development of automatic information storage and retrieval systems will be fostered. In our opinion some centralized licensing authority appears to be the most practical approach to alleviating many of these problems. However, there are many issues which may need more discussion both by potential users and by copyright owners. I will mention only a few.

The type of material to be stored may well be a significant factor in whether automatic storage and retrieval should be allowed without

complete and exclusive control under the direction of the copyright proprietor. Thus, certain areas, for example, choreography, lyrics, music, plays and similar areas where an element of performance is involved, may be prohibited from any storage unless direct negotiation with the copyright proprietor is undertaken. However, at least in our view, these areas are the least likely to need the speed and accessibility of an automatic system. Technical information, on the other hand, is by its very nature "quantitized" in such a manner as to make it readily adaptable to both storage and retrieval. This is the area where automatic systems can be most valuable, since the information explosion is for the most part technical.

The second issue is the nature of the stored material. Some distinction might be made between storing for reproduction and storing for abstracting, indexing or analysis. Another possible basis for a distinction is the age of the copyrighted materials to be stored. Yesterday's newspaper has little storage and retrieval value. Possibly on this basis translation and storage in an automatic system could be allowed under certain conditions and in certain categories of information for a limited number of years.

Also important is the character of the stored material, that is, whether an abstract, quotation or substantial reproduction is stored or merely title, author and key words. The amount of material put into the automatic retrieval system also raises the question as to whether the fair use doctrine could ever be applied to the input of such systems. This is apparent when it is considered that what may be held to be fair use today may not be fair use when disseminated through an automatic system because of the potentially greater effect on marketability.

Clearly the character of the output material is of primary significance in considering this problem since the reproduction of a copyrighted work or substantial portions thereof should be not be accomplished without compensating the copyright owner in some manner. The consideration of amount of material also concerns the output and raises the additional problem of determining whether both the input and output are to be judged on the same basis as far as fair use is concerned. It is conceivable that two different fair use rules might apply, one to the input, another to the output, if damage to the copyright owner is a criterion.

The final aspect is the effect of automatic systems on the marketability of copyrighted works. This factor can be evaluated only through the use of a crystal ball. Considerably more information is probably needed before any definitive statement can be made concerning this problem.

It is clear, however, that the area of automatic or computerized information storage and retrieval requires some sort of special consideration if the development of such systems is *not* going to be smothered by impractical legal restrictions and limitations.

The main concern should be the establishment of some system which compensates the copyright owner and provides some measure of control while allowing the automatic information storage and retrieval system to be developed and be used in an environment free of unnecessary uncertainties and impractical legal restraints.

4. THE COMPUTER AND COPYRIGHT: THE NEXT FIVE YEARS

By CHARLES H. LIEB

The Copyright Revision Bill is tantalizingly close to enactment. Its passage is delayed by a few issues still requiring resolution. One of these is the problem of correlating the interests and needs of producers of works of authorship with those who want to use them in the computer for education, scholarship and research.

Few of us have the background to adequately cope with this problem. For its overall solution one requires not only the wisdom of a Solomon but the experience and insights of a computer designer, a scientist, an educator, a librarian and a publisher.

I have some knowledge of one aspect of the problem, that relating to publishers and I shall try to state their point of view, although I speak only for myself.

Publishers and authors whose works they publish are not "anti-computer." On the contrary, they are eager to distribute their copyrighted works as broadly as they can and they see in the developing computer technology a new and challenging marketing opportunity.

There is more to publishing than the simple printing of a book. Publishing, or much of it, requires a substantial investment. Large and decentralized warehousing facilities, mechanized materials handling equipment, and sophisticated automated data processing systems have become essential to provide adequate distribution. Requirements for working capital are large. In many areas of publishing, publishers create the publishing concept, seek out and commission authors to write the work, pay substantial advances to finance their efforts and actively participate in the shaping and editing of the manuscript. The lead time between concept and publication may be five years or longer; the make-ready cost that precedes publication may be substantial. One publisher recently announced a seven million dollars make-ready cost for a new encyclopedia.

Publishers, and authors who make a profession of writing, make their investment of capital and effort in anticipation of profit. To make a profit, the publisher needs to accurately estimate two related factors; the cost of producing the work and the revenues to be expected from its sale. The cost of producing a work is determinable without too much difficulty and will be much the same regardless of the number of copies sold. The revenues from sales, of course, depend on demand. Not demand in the sense of a desire to read or to use in an automated sys-

tem, but "effective demand," a desire to read or use the work implemented by an ability and willingness to pay the price for it.

The price of a book today is based on the publisher's estimate of the number of copies that will be sold for reading in volume form. Computer input and use of many kinds of works will reduce the number of copies sold. Either the price per volume will be increased to compensate for the smaller market, thus perhaps pricing the individual reader out of the market, or more logically, the per copy price for traditional use will remain the same but computer systems will pay in a different manner for the right to use the work. These payments will vary with the system and the usage, and can either be in the form of a single advance payment, or periodic payments depending on use, or a combination of both. But however the charge is fixed and whatever the manner of payment, the publisher in advance of publication must be able to make a reasonably accurate estimate of the revenues he will receive for computer use. Otherwise he will lose the measure by which he determines publishability.

This need to make a valid pre-publication estimate of the market should not seem strange to those in other callings. A librarian cannot adequately stock his shelves unless he can estimate the calls that will be made upon them. An instructor cannot equip his classroom unless he knows how many pupils to expect.

So much for a capsule view of the publisher's problem. Like any other businessman, he must be able to estimate his market. What is the position of those who use and plan to use his copyrighted work in the computer?

It is said that broad computer rights for educational and scientific purposes are needed and that by interpretation these are likely extensions of "traditional exemptions" which should be recognized and reinforced in the Revision Bill.

Specifically, it is asserted that traditional library rights include the right to store a work in the library network for use throughout the system; that the traditional doctrine of fair use encompasses the right of unrestricted computer input for any kind of work, and that the traditional exemption for non-profit public performance of non-dramatic literary works encompasses the right not only to store any non-dramatic work in the computer but to display its contents for non-profit educational purposes.

Exemptions permitting a non-profit performance of non-dramatic works and countenancing conventional library practices were conceived and developed in a world innocent of computers where the printed page was the medium and the circle of neighbors the audience. Exemptions

were permitted which would not interfere with the sale of the work. They were not created to make it possible for one printed volume to take the place of many and thus to limit or destroy the market for which the work was created. Electronic input for multiple display of the whole or a substantial part of a book is not traditional and can hardly be called traditionally exempt.

I think it clear that computer input beyond the copying which would be permitted today for purposes other than computer use is subject to copyright control. This does not mean that computer input and uses should not be made. It does mean that computer use exceeding present standards of fair use should not be made without the copyright owner's prior consent.

How can it be otherwise? The corollary of free input is accountability and payment on printout or other use, but without agreement in advance of input, how would the charge for the use be determined? How would it be billed and collected?

Moreover, uncontrolled input subject to payment on use or printout would not help the publisher with his pre-publication problem, which is to make his market estimate in advance of publication. Certainly, he cannot do so today, having no experience of any kind on which to base a judgment. Indeed, it is arguable that protection against free input is more important to the publisher today and in the years immediately ahead than later when the extent of computer use and its effect on the market for works in traditional form will be better known.

Uncontrolled input for the purpose of making subsequent fair or other permitted use is not a practicable alternative. It would not solve the publisher's pre-publication problem. It would also raise an unresolved and difficult question relating to computer fair use. Suppose, for example, that a technical encyclopedia is stored in the computer and that multiple hard copy printouts are made at a thousand different consoles, but each separate printout is of such small quantity as by itself, in other circumstances, to constitute fair use. At what point will the parameters of fair use be exceeded? Bearing in mind that one does not buy an encyclopedia for cover to cover reading, what will be the displacement of the market for the work in traditional format? How will the publisher be able to estimate the number of copies which he will sell? Will he be willing to publish? The doctrine of fair use was developed with the traditional book in mind. How that doctrine should be adapted to computer technology which is capable of multiplying the single hard copy to an indefinite degree is a threshold question requiring solution before free computer input of any kind can be logically discussed.

The question before us is how to reconcile the present need of the publisher to control the computer use of his copyrighted work beyond existing standards of fair use with the need asserted by educators and others for broad computer rights.

Until now the issue has been clouded by the prospect of the awesome computer world of the future. If we can rid ourselves of that pre-occupation and address ourselves to the problems we presently face, we should have no difficulty in working out acceptable solutions. The computer today is in its infancy. The next five years will be devoted to experimentation. The principal effort will probably be with indexes and abstracts, reference data compilations in selected disciplines, and with computer assisted instruction in limited fields. A portion of this material will be specifically prepared for computer use. Some of it will be in the public domain, and some, desired for computer input, will no doubt be under copyright of others. But certainly, as important as this experimenting will be, it will not entail such a high degree of urgency that computer rights to material copyrighted by others cannot be left to normal permissions procedures. Only if these fail will it be time to consider legislation drafted to meet the needs which may then have crystallized.

What the problem really boils down to is who shall bear the burden at the later date of demonstrating his need, — the producer of copyrighted material or the computer system operator experimenting with the capabilities of his machine.

Stated in this manner the question appears to answer itself. The producer of a copyrighted work has copyright control now. It is only logical he should retain it unless and until an overriding public need to limit that control has been fully demonstrated.

Would it be constitutional, absent such a showing, to deprive a copyright proprietor of the period of exclusive control which has already been granted to him? If so, would it be equitable or in accordance with past legislative practice to do so?

Would not the uncertainty as to the impact on the traditional market of broad computer exemptions affect the flow of at least some kinds of new work? This is the view of many authors and publishers, as expressed earlier in this paper. This is the view of the American Chemical Society with respect to its Chemical Abstracts. It is also the view suggested by the American Association of University Professors.

In any event, is it possible to justify the scatter-shot approach of subjecting all copyrighted works to broad computer exemptions if during the next five years there will be an experimental computer need for exemptions with respect to only some categories of work?

I think it likely that most of those arguing for the exemptions recognize the strength of the opposing arguments but are oppressed by the fear that if exemptions are not now obtained, another sixty years will pass before the need for them will be reconsidered. Recent developments should allay that fear. A National Commission has been proposed which, after a study in depth of all facets of the problem, would submit its recommendations for corrective legislation. This would provide the self-correcting device which up to now has been lacking. Whether the National Commission or a different kind of study group is established, there is a general consensus that some kind of watchdog procedure will be required to keep the copyright statute adjusted to the advancing technologies.

I will not presume to anticipate all the problems that will be encountered during the experimental period and how they will be answered. I agree however with Professor Stedman of the American Association of University Professors that it will not be helpful to lump all kinds of publishing into one indistinguishable mass and to treat them all alike. Computer usage, obviously, will be different for different kinds of published material. Obviously, too, there will be differences in the effect that computer usage will have on the traditional market for various kinds of work. Computer scanning of Hemingway to analyze his style may have no effect upon the market but input of a technical encyclopedia might substantially reduce the hard copy sale.

The approach that is needed is one of gradualism, — one that will encourage the parties in each of the affected callings and disciplines to work out solutions to their own special problems and at the same time give them assurance of legislative review and corrective action when needed. It would encompass the following steps:

1. Prompt enactment of S. 597 substantially in its present form. Too much time and effort have been spent to warrant further delay.
2. Cooperation on an informal and ad hoc basis by federal agencies and other interested computer users with publishers in each of the various segments of publishing that are of mutual interest.
3. Appropriate assurance by the Department of Justice that these efforts will not be viewed as violations of the antitrust laws.
4. Establishment of an official study and advisory agency to provide a continuing forum for the airing of inequities and to make recommendations for changes in law if and when the need for change has been demonstrated.

Adoption of this kind of program would permit broad experimentation by educators, librarians and scientists and at the same time preserve the economic underpinnings of the publishers and authors who produce much of the material that will be needed for their experiments. Adoption of this kind of program would also accord with the constitutional intent that the flow of intellectual work be stimulated by according protection to authors and their publishers against encroachment on their markets.

5. COMPUTERS AND COPYRIGHT: A THIRD AREA

By JOHN F. HORTY

In his preliminary talk Gabriel Perle set out certain conflicts of groups interested in this area. One conflict of objectives was between the hardware people and the publishers, and he indicated that there might be, rather than a conflict here, a community of interest. He also talked of a conflict between the profit and the nonprofit group.

I think if I represent any group (and I am not sure I do), it is none of these; it is a third area. Perhaps the best way to put it is to say that I think my concern has been predominantly with the users of the system, the consumer, and with the maker of the information system for such a user, a maker not allied with either a publisher or a computer company.

This puts me and those who share these kinds of feelings in the rather unenviable position of being in no discernible interest group. We have relatively strong emotional feelings about the subject of this discussion but almost no certainty of position. The lack of a position of ABA Special Committee on Electronic Data Retrieval in this area is reflective of the fact that though it has a strong interest the committee has no certainty as to what should be done, as to what the proper law should be. I have the same ambivalence. In the past year since I have become concerned with copyright revision (and there are times when I wish I had never heard of it at all) I find that my own individual feelings are very mixed. I think that is inevitable, because my background and my interests are also mixed. I touch upon the personal to illustrate the viewpoint of those of us most concerned with the copyright law from the standpoint of the developer and user of information systems.

I am a professor, so I have some interest in the use of future computer information systems by the educational community. At the same time I am an author of a relatively successful book on hospital law, which from time to time I have thought would make an ideal thing to put into a computer, — as long as I do it and as long as I can control its ultimate dissemination. At the same time, over the past seven years I have been concerned with developing a system to provide information retrieval for lawyers.

If I may borrow again from Gabe, he has very expertly given us a look into the future. Whether it is the near future or the far future is what I would question. It is replete with first regional, then national, then world-wide information systems, called information utilities, and

with time sharing, direct access and consoles — all of the paraphernalia that goes with it and with the Government hovering over everything. It is, I would submit, a future described in such a way that it is absolutely guaranteed to scare everyone concerned with the problem from a publishing standpoint. It is a description and a viewpoint which makes consideration of the immediate situation and the next several years more difficult.

An information utility which gobbles up all information and spits it out on command will obviously leave very little of the publishing industry and the dissemination of publishing as we know it today. A prefixed and a predetermined rate structure to feed this monster clearly inhibits the kind of publishing considerations and decisions which are essential motivations, I would agree, when you are considering publishing anything.

With all deference to what Gabe has said, I would prefer to think of the problem of information retrieval systems in much more concrete terms and, I would submit, terms which are much more likely to be those operative in the field during the next ten years. I just don't see the development of a monster information utility, governmental, private or otherwise, in any way, shape or form such as Gabe described, in the near future. I think the economic factors are such as to prevent it.

For example, I think it is going to be a long, long time before we see the computerization (even with use of computer typesetting) of historical books, delightful though that would be to historians. I myself, with at least a former interest in historical research, would love to have gotten at some private collections of papers and letters, of Presidents and others in Government, to do an analysis of them that is only possible by computer. It just isn't going to happen soon. The cost of input relative to the commercial value of the use is just too high.

On the other hand, what is likely to happen is that in certain selected areas, where the use of the information is frequent or the value of the information is very great, computer information systems will develop. I think these systems will be limited. They will not only be limited in terms of the data that is put into the system, but they will also be limited in terms of users, because economic factors will deal rather decisively with these questions.

I don't see a console in everyone's office and I would submit to you that if I did, such a system is precisely the kind of system which, because of its size, could be easily regulated by free negotiation between publishers and the system operator.

What I see is a much more confused situation, one where the factors which must be given weight should to some extent depend on the dis-

parity between the power of the developing systems and the power on the other side — the weight represented by hardware manufacturers and by publishers. And I feel that Congress must move to protect and to some extent nurture developing information systems.

This situation is analogous to what is happening in the computer software industry today — software being computer programming, much of it not done by hardware manufacturers. As Reed Lawlor might agree, there is a present need for protection for the developers of computer programs, perhaps protection under the copyright law, because of the conflict between such developments and the policy of future use of computer programs in the computer hardware manufacturers' group.

There are several areas where I think it is worthwhile to take a look at the general information systems problem. One is the question of when payment for use of copyrighted material should occur. I state the problem exactly that way, because I want it clearly understood that I am totally and completely in favor of reasonable payment for use of copyrighted materials in any kind of an information retrieval system. Let there be no mistake about that.

There has been sufficient confusion on this. I do not endorse and I do not believe most of the people who make up this third ill-defined group that I speak of, would endorse a position of exemption from any kind of payment.

The education group speaks for itself. It has the resources to do so. It has certain positions and it does not need me to state them forcefully. The hardware manufacturers have the same ability, and so do the publishers. It is the people who are not quite so sure what their positions are, and the people who speak for no organized group except users and a few systems developers, with considerably less organization and power, who have more difficulty in getting their position heard.

The question is not *whether* there should be payment for the use of copyrighted data; the question is *when* payment should be made. And I would submit that this is not a question of principle but a question of mechanics, and as such it is one which can be worked out fairly, unless there is a deliberate intent to set up the mechanics in such a way that use under any reasonable circumstances is prohibited. This is perhaps the crux of the problem. Whether payment should be made upon input or output is a question of mechanics. Many of the arguments that I have heard as to why payment should be made on input do not impress me. I think there are ways in which reasonable payment can be made at output, and that there are certain uses of certain kinds of materials in which no payment would be made because the output is not such that payment is reasonable. I am speaking now of indexing and

searching, where the output is not text but a citation to something already published.

I admit I am not speaking of a simple problem. It is easy to find illustrations of situations where it is perfectly apparent that some kind of payment must be made on input because the output of the system consists of an answer: Books which have taken considerable time and expense to compile and which are nothing more than statistical tables or mathematical tables. In such instances payment only upon output might not be reasonable. On the other hand, I believe there are many areas where payment at output is the logical time.

Another question which has come up is the question of negotiation between the person designing the system and the people whose work he intends to use in it. This is also a difficult question, not admitting of an easy answer, because the problem of negotiating with a wide variety of copyright holders is a different one, not only because of the time involved but because the sheer expense of negotiation puts a large overhead upon the system. Of course, the ability of the copyright holder to delay in a negotiation can often have the same effect as a refusal since he is generally satisfied with the status quo.

Another problem, which I think is indicative of the uncertainty in the field, is the reluctance, the reasonable reluctance, that many publishers may have to negotiate for the use of their material at all, even with payment, because of ill-formed plans or thoughts that within the next x number of years they themselves might wish to operate an information system or because of an almost complete uncertainty of what would constitute a reasonable payment.

Personally, I am not willing at present to endorse the clearinghouse concept as the way out of these woods. This doesn't mean that it is not a good idea. It is just another indication of my own confusion — a confusion shared, I think, by members of the EDR Committee which refused at our midyear meeting to take any position on a clearinghouse, not because we didn't feel the concept was useful but because we weren't sure enough of what the effect would be.

There is obviously a need for compensation to protect the author and to protect the publisher. I sympathize very much with the position which Mr. Lieb has stated as to the publisher's need to know in advance the revenues that he might get from computer use of his book. I would say, however, from my small experience that most publishers don't have a particularly good idea as to the revenues they are likely to get from books when they publish them themselves. And I don't think the computer system developer is going to have a much better idea of potential revenue from use of a particular book in his system. In fact,

in the next few years he is going to have practically no idea at all, because he is presenting a product so new that the person about to use it can't even make a decision about how often he is willing to use it or how much he is willing to pay because he doesn't yet know the worth of the product.

That may be as good an argument as any for leaving the present situation alone temporarily while some experiments are made which might permit guide lines to be developed.

Finally, and perhaps this is fairly obvious from what I have been saying, I would heartily endorse the concept of a National Commission to study this problem. Most of you don't know me, but this is a real departure from my normal stance. I am not generally in favor of any commission to study anything. I think that this, if nothing else, shows my confusion in this field, that I am willing to grasp at a commission as being the best straw that seems to be available.

I think the most constructive thing that has happened in the past year, since hearings were held on the House bill, was to open this question of the effect of the proposed copyright law on the development of information systems, to begin to truly examine the copyright problems of computer information systems. I don't think this debate should be closed with any solution at the present time. I don't think any of you in this audience are bright enough to come up, at the present time, by yourself, with the solution. What is needed is collective study.

As I said, I endorse the idea of a commission with considerable trepidation because I know that a commission is the way to dispose of almost every problem that nobody knows what to do with. But here I submit is a problem that nobody really does know what to do with. I would urge that such a commission address itself not just to reconciling the interests of publishers, hardware manufacturers and the educational community, but also to satisfying and protecting the legitimate interests of the developers of computer retrieval systems and the public, the potential users of such systems, and that these interests be represented on the commission.

I say this particularly because I don't think that computer manufacturers and publishers are really on opposite sides in this argument. The present trend in mergers and acquisitions makes it quite clear that either the publisher changes and becomes more like a hardware company, or else the hardware companies change and become more like publishers. It is the other interests with less resources, less organization and less idea of where they are, where they are going and how they are going to develop that need consideration.

6. S. 2216, TO ESTABLISH THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS*

By THOMAS C. BRENNAN

It was suggested to me that I should be the final speaker on this panel since I might, thereby, learn something about the subject from the experts who have preceded me. The reason for my participation in this program is precisely because neither the Senate Subcommittee on Patents, Trademarks and Copyrights, nor its Counsel pretend to have the answers to the problems discussed by the other panelists. Consequently, the Chairman of the Subcommittee, Senator John L. McClellan, on August 2, introduced S. 2216 of the 90th Congress to provide for the establishment of a National Commission on New Technological Uses of Copyrighted Works to study the possible necessity for changes in copyright law or procedures in the light of the new technology.

Although most of the issues involved in the general revision of the copyright law had been exhaustively studied, it became apparent to our Subcommittee earlier this year that adequate attention had not been given to the impact of technological advances on the copyright law. The first extensive consideration of this issue in the Congress occurred during our Subcommittee's hearings on the pending revision bill. At the same time, within the Executive Branch, the Committee on Scientific & Technological Information (COSATI) of the Federal Council of Science and Technology was studying these matters.

Toward the end of the Subcommittee hearings, Dr. Donald Hornig, Director of the Office of Science and Technology, in the Executive Office of the President, visited Chairman McClellan to discuss what is loosely referred to as "the computer question". Dr. Hornig requested Senator McClellan to delay for a reasonable period of time any final Subcommittee action on the copyright revision bill until the Executive Branch concluded the COSATI study. He also urged the Chairman to afford representatives of the Executive Branch the opportunity to make known to the Subcommittee what they regard as the adverse impact which the copyright revision bill, particularly as interpreted in the report of the House Committee on the Judiciary, would have on the use of computers by the Government and nonprofit institutions. Senator McClellan, by virtue of his Chairmanship of the Senate Committee on Government Operations, has had a general interest in the use of computers by Gov-

* S. 2216 was passed with amendments by the Senate on October 12, 1967.

ernment agencies. He recognized the significance of the problems presented by Dr. Hornig and agreed to both of his requests.

In subsequent exploration of this issue it became apparent that the Subcommittee lacked sufficient information on which to base any intelligent decision about the need for possible modification of the copyright law. In fact, we were told by some experts that it was virtually impossible to project the future development of the technology and that any decision made on the basis of the information currently available might prove to be unsound. Consequently it appeared that the establishment of some type of study commission would be both necessary and desirable. The creation of such a body would avoid the protracted delay in copyright revision which would occur if the Congress at this time were to undertake a reappraisal of the pending bill in the light of the new technology. On July 25th I presided at a meeting in the Senate Office Building attended by approximately 150 representatives of authors, publishers, educators, librarians, hardware manufacturers and the executive agencies to discuss a proposed bill, drafted by the Copyright Office, to create the study Commission. There was unanimous support expressed for the establishment of the Commission.

Much of the July 25th meeting was devoted to an examination of the scope of the Commission's jurisdiction. It is not contemplated that the Commission should reopen issues which apparently have been resolved to the satisfaction of the parties, and very likely of the Congress. For example, it is not proposed that the Commission should consider the doctrine of "fair use" as it applies to traditional classroom teaching methods.

It was the consensus of the meeting that the principal function of the Commission should be to study and compile data on the reproduction and use of copyrighted works in automatic systems capable of storing, processing, retrieving, and transferring information. This is the first purpose of the Commission set forth in Section 1(b) of S. 2216. The bill also provides that a second purpose of the Commission shall be to study the reproduction of copyrighted works by various forms of machine reproduction. Photocopying in all its forms presents important issues of public policy, extending beyond that of copyright law. No satisfactory solutions have emerged in the limited consideration devoted to this problem during the current revision effort.

Certain representatives of educational organizations proposed that the Commission should also consider procedures for the establishment of a clearing house to grant permissions for the use of copyrighted materials by educational television. This proposal received little sup-

port and is not included within the Commission's jurisdiction as defined in S. 2216.

The bill carefully avoids prejudging the work or report of the Commission. The Commission is directed to make recommendations "as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners". The bill thus avoids any disposition toward a particular solution, such as the establishment of a clearing house.

In the few days that have elapsed since the bill's introduction, I have received several inquiries concerning the jurisdiction of the Commission. Representatives of composers and music publishers have asked whether it is contemplated that the Commission would be concerned with certain techniques involving the reproduction or transmission of music through various devices. While it would not be wise at this stage to be overly rigid in defining the metes and bounds of the Commission's jurisdiction, I believe it is reasonably apparent from the legislative history of this bill that it was not problems primarily involving the music industry that led to the introduction of this bill. I have also been asked whether the scope of the Commission includes the copyright liability of community antenna television systems (CATV). I would very much like to get rid of that question in one fashion or another, but it is not intended that the Commission shall have any jurisdiction in that area.

Another important question that had to be considered in the preparation of S. 2216 was the location or headquarters of the Commission. Three possibilities were examined:

- (1) To locate the Commission within the legislative branch,
- (2) To place it in the Executive Branch, possibly linked in some fashion to the Office of Science and Technology, or
- (3) To establish the Commission with a considerable degree of independence from either the legislative or executive branches.

From a study of the precedents with respect to other national commissions, it appears that the traditional policy is to locate such bodies in some degree of proximity to the agency which has the principal jurisdiction over the subject matter. For example, the President's Commission on the Patent System was located within the Department of Commerce. Consequently S. 2216 provides that the Commission shall be located in the Library of Congress and that the Librarian of Congress shall be the Chairman.

There was considerable discussion at the July 25th meeting concerning the method for selecting the members of the Commission. The Copyright Office, and copyright interests generally, favored a Commission composed almost exclusively of members selected from the categories of copyright-owner and copyright-user. On the other hand, educational groups, librarians, computer users and spokesmen for executive agencies preferred a Commission most of whose members would be selected by the President to represent the public generally, together with a minority representation of the affected interests. In preparing the bill we gave careful attention to whether it was preferable to have a Commission composed principally of members who had a direct interest in the subject matter of the Commission's work, and as a result could bring considerable expertise to its deliberations, or whether it would be better to have a Commission composed principally of individuals who, by lack of any previous associations, were not inclined toward any particular viewpoint. The patent attorneys present will appreciate this dilemma. We have heard from some members of this Section that the President's Commission on the Patent System was composed of honorable gentlemen, but it is claimed that most of them knew little or nothing about the patent system. On balance, Senator McClellan concluded that it was better to have the Commission composed in the main of members who had some knowledge and background. On the other hand, we felt that the draft bill prepared by the Copyright Office did not provide for adequate representation for the public since the only members on the Commission not selected from various interests would have been two members of the Senate and two members of the House of Representatives. Therefore, the bill as introduced provides also for representation of the public generally.

The Commission thus would be composed of twenty-three members:—the Librarian of Congress, two members of the Senate, two members of the House of Representatives, seven members selected from authors and other copyright owners, seven members selected from users of copyrighted works, and four nongovernmental members representing the public generally. The eighteen members in the last three categories would be appointed by the President with the advice and consent of the Senate.

The Commission is required to submit an interim report within one year after its first meeting and a final report within three years after the effective date of the Act establishing the Commission.

I wish to conclude by discussing the most controversial issue raised at the July 25th meeting. I refer to the proposal of certain computer users and educational associations that there should be a moratorium

on copyright liability by nonprofit computer users. The exact duration of the moratorium is not clear. One prominent spokesman for the educational groups suggested that there should be a moratorium not only during the life of the Commission, but until Congress acted upon the recommendations of the Commission. It was made clear by the user spokesman that their support of a study Commission was linked with Congressional action to provide a moratorium on copyright liability by computer users. On the other hand, just before coming to Hawaii, I received a letter from Mr. Dan Lacy of the American Book Publishers Council indicating that the publishing industry would oppose the Commission bill if it contained a moratorium provision.

When Senator McClellan introduced S. 2216 he indicated that this was not the proper mechanism for considering the moratorium issue. He indicated that when the Subcommittee acts on the general revision bill it will consider the suggestions for a moratorium. The Chairman stated that he had taken no position concerning the desirability of such a moratorium.

I presently anticipate that the Subcommittee will act on the Commission bill shortly after Labor Day and I am hopeful that it will pass the Senate during the current session of the Congress. Action will then be required by the House of Representatives.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

7. UNITED STATES. *President, 1963—(Lyndon B. Johnson)*

Proclamation 3792. Copyright extension: Germany. By the President of the United States. A proclamation. [Signed July 12, 1967]. (32 *Federal Register* 10341-10342, no. 135, July 14, 1967.)

This proclamation would permit German citizens who were unable to apply for United States copyright or renewal registration from September 3, 1939 through May 5, 1956, to do so during the year following the date of the proclamation. The extension is due to the disruption or suspension of copyright facilities during and after World War II.

8. UNITED STATES. CONGRESS. SENATE.

S. 2216. A bill to establish a National Commission on New Technological Uses of Copyrighted Works. Introduced by Mr. McClellan, August 2, 1967, and referred to the Committee on the Judiciary. 5 p. (90th Cong., 1st Sess.)

A proposal to establish in the Library of Congress a national commission to study the copyright implications of technological advances in information storage and retrieval systems and copying machines, and to make recommendations to the President and Congress concerning the need for any changes in copyright law and procedures. (See Brennan, *supra*, pp. 24-28.)

9. UNITED STATES. CONGRESS. SENATE. *McClellan, John L.*

Establishment of a National Commission on New Technological Uses of Copyrighted Works. (113 *Congressional Record S.* 10565, no. 120, daily ed. Aug. 2, 1967.)

The Senator's remarks upon his introduction of S. 2216. See Item 8, *supra*.

10. UNITED STATES. CONGRESS. SENATE. *Committee on Commerce.*

Standard Reference Data Act. Hearing . . . Ninetieth Congress, First Session, on S. 998, to provide for the collection, compilation, critical evaluation, publication, and sale of standard reference data. May 15, 1967. Washington, U.S. Govt. Print. Off., 1967. 20 p. (Serial No. 90-11.)

See 14 BULL. CR. SOC. 316, Item 215 (1967).

11. UNITED STATES. *Copyright Office.*

Sixty-ninth annual report of the Register of Copyrights for the fiscal year ending June 30, 1966. Washington, 1967. 37 p.

Includes administrative, legislative and judicial developments of the fiscal year relating to copyright.

2. FOREIGN NATIONS

12. AUSTRALIA. PARLIAMENT. *House of Representatives.*

A bill for an act relating to copyright, and for other purposes. Presented [by the Attorney-General] and read a first time, 18 May 1967. [Canberra, A. J. Arthur, Commonwealth Government Printer] 1967. 94 p.

In his remarks to the House of Representatives upon his introduction of the Bill, Mr. Bowen, the Attorney-General, stated that the purpose of the bill was to revise the Australian copyright law. Mr. Bowen said that his intention was that those interested in the legislation should have ample time to study it and that accordingly he proposed that the bill should lie over until the Budget session which begins on August 15. He added that the proposed changes will enable Australia to become a party to the Brussels revision of the Berne Convention, the U.C.C., and the Neighboring Rights Convention in so far as it relates to records and broadcasts. The Government is considering legislation which will enable it to become a full party to the Neighboring Rights Convention.

13. AUSTRALIA. PARLIAMENT. *House of Representatives. Bowen, Nigel.*

Copyright Bill, 1967. IN Australia. Parliament. House of Representatives. *Parliamentary debates (Hansard)*, May 18, 1967, pp. 2327-2335.

The attorney-general's remarks when he introduced the copyright revision bill on May 18. See Item 12, *supra*.

14. MALAYSIA.

Copyright bill. No. 2391. [Proposed for introduction by the Government] In *His Majesty's Government Gazette*, vol. 11, no. 12, suppl. no. 3 (June 14, 1967), pp. 1105-1166.

"The purpose of this Bill is to introduce a uniform copyright law throughout Malaysia. It is for the most part based on the Copyright Act, 1956, of the United Kingdom and the Copyright Act, 1962, of New Zealand, which were enacted to enable effect to be given to the latest international agreements on this subject."

15. SOUTH AFRICA. *Laws, statutes, etc.*

Act to provide for the protection of performers of literary and artistic works. No. 11, 1967. [Assented to 10th February, 1967. Pretoria, 1967] 9 p.

In English and Afrikaans.

This law, apparently enacted in order to enable South Africa to join the Rome Convention on Neighboring Rights, was not operative as of the date of its publication.

16. SPAIN. *Laws, statutes, etc.*

Decree determining the percentages and remuneration to be paid to the authors of a cinematographic work. (Of February 10, 1967). (3 *Copyright* 14, no. 4, Apr. 1967.)

BIRPI translation of a decree published in the *Boletin Oficial del Estado*, no. 49, of February 27, 1967.

17. TUNISIA. *Laws, statutes, etc.*

Gesetz Nr. 66-12 über das literarische und künstlerische Eigentum, vom 14. Februar 1966. (69 *Blatt für Patent-, Muster- und Zeichenwesen* 168-172, no. 5, May 1967.)

German translation of the new Tunisian copyright law.

18. TUNISIA. *Laws, statutes, etc.*

Gesetz Nr. 67-3 zur Änderung des Gesetzes Nr. 66-12 vom 14. Februar 1966 über das literarische und künstlerische Eigentum, vom 4. Januar 1967. (69 *Blatt für Patent-, Muster- und Zeichenwesen* 168-172, no. 5, May 1967.)

German translation of a recent amendatory law making some changes in articles 3, 21, and 37 of the new copyright law.

19. YUGOSLAVIA. *Laws, statutes, etc.*

Law amending the Copyright Act. (Of March 8, 1965). (3 *Copyright* 122, no. 6, June 1967.)

English translation of an amendatory law, changes of which are mostly in form.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS20. UNIVERSAL COPYRIGHT CONVENTION: *List of Accessions and Ratifications as of July 1, 1967.*

<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
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

<i>Country</i>	<i>Effective Date</i>
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
Netherlands	June 22, 1967
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
Sweden	July 1, 1961
Switzerland	March 30, 1956
United Kingdom	September 27, 1957
United States of America	September 16, 1955
Venezuela	September 30, 1966
Yugoslavia	May 11, 1966
Zambia	June 1, 1965

* 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.

21. LIST OF CONTRACTING BERNE UNION COUNTRIES. *As of July 31, 1967**.

Argentina	Lebanon
Australia	Liechtenstein
Austria	Luxembourg
Belgium	Madagascar
Brazil	Mali
Bulgaria	Mexico
Cameroon	Monaco
Canada	Morocco
Ceylon	Netherlands
Congo (Brazzaville)	New Zealand
Congo (Leopoldville)	Niger
Cyprus	Norway
Czechoslovakia	Pakistan
Dahomey	Philippines
Denmark	Poland
Finland	Portugal
France	Rumania
Gabon	Senegal
Germany	South Africa
Greece	Spain
Holy See	Sweden
Hungary	Switzerland
Iceland	Thailand
India	Tunisia
Ireland	Turkey
Israel	United Kingdom
Italy	Upper Volta
Ivory Coast	Yugoslavia
Japan	

The "Berne Union" is made up of countries adhering to one or more of the following: the original Berne Convention of 1886 and the successive revisions of Paris 1896, Berlin 1908, Rome 1928, and Brussels 1948. Since different countries have different relationships under one or more of these, persons interested in obtaining detailed information, including application of the various provisions to territorial areas, should consult the Bureau de l'Union internationale pour la protection des oeuvres littéraires et artistiques, 32, chemin des Colombettes, Geneva, Switzerland.

* From *Le Droit d'Auteur*, official publication of the Berne Union.

22. State of ratifications and accessions to the conventions and agreements affecting copyright on July 1, 1967. (*3 Copyright* 141-142, no. 7, July 1967.)

Covers the Rome Convention on Neighboring Rights, the Universal Copyright Convention, the European Agreement concerning Programme Exchanges by Means of Television Films, and the European Agreement on the Protection of Television Broadcasts.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

23. *Columbia Broadcasting System, Inc. v. DeCosta; Capital Cities Broadcasting Corp. v. Same; CBS Films, Inc. v. Same*, 153 U.S.P.Q. 649 (1st Cir., May 11, 1967) (Coffin, J.)

Appeal from a verdict for plaintiff in action for misappropriation. Defendant's television character "Paladin" — an itinerant early-West trouble shooter of distinctive appearance complete with "Have Gun Will Travel" business cards and chess knight symbol — bore a remarkable resemblance to the identity plaintiff had assumed for himself. Plaintiff, similarly attired, bearing the same name and symbol, and distributing the same calling cards, had become extremely well known and popular in the communities he visited. In a misappropriation action upon conflicting evidence of access and spontaneity of defendant's creation, the jury found for plaintiff and judgment was entered accordingly.

Held, reversed.

I. Plaintiff argued on appeal that he could sustain a finding of unfair competition as he had established a "secondary meaning" for his assumed identity and a "passing off" of the television character as himself. The court declined to pass upon these contentions as the issues had not been submitted to the jury. The court, however, rendered a brief survey of its interpretation of some unfair competition law:

Several cases have been cited around the general proposition that it is an actionable wrong to appropriate and exploit the product of another's creative effort; but all seem to involve distinguishable wrongs of at least equal or even superior significance. Most rest on the tort of "passing off": appropriation not of the creation but of the value attached to it by public association (the so-called "secondary meaning"), by misleading the public into thinking that the defendant's offering is the product of the plaintiff's established skill. *E.g., Lone Ranger, Inc. v. Cox*, 4 Cir., 1942, 124 F.2d 650, 52

USPQ 146; *Chaplin v. Amador*, 1928, 93 Cal. App. 358, 269 P. 544.⁴ Others add an element of injury to reputation caused by a poor imitation. *E.g.*, *Lahr v. Adell Chem. Co.*, 1 Cir., 1962, 300 F.2d 256, 132 USPQ 662. And at least one combined both of these with an element of injury to a valuable contract to assert "the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality * * *." *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, Sup. Ct., 1950, 199 Misc. 786, 793, 101 N.Y.S. 2d 483, 492, 87 USPQ 173; 178.

II. Under the charge submitted to the jury, the verdict had to be upheld upon a legal theory sustaining a cause of action upon a showing of creation and copying only. The court held that *International News Service v. Associated Press*, 248 U.S. 215 (1918) could not supply such a theory: insofar as it allows a state to prevent the copying of subject matter within the copyright clause of the Constitution, it has been overruled by *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); plaintiff's adopted character identity is arguably within that clause. Alternatively, the court held that while the subject matter of copyright might be limited to more tangible expressions of creation, the policy of *Sears* and *Compco* still precludes the protection of "ineffable" creations from copying. Nor could plaintiff utilize common law copyright, the court holding that he had published the crucial elements of his character creation through distribution of the calling cards. The court said:

. . . the plaintiff has had the satisfaction of proving the defendants pirates. But we are drawn to conclude that that proof alone is not enough to entitle him to a share of the plunder. Our Paladin is not the first creator to see the fruits of his creation harvested by another, without effective remedy; and although his case is undeniably hard, to affirm the judgments below would, we think, allow a hard case to make some intolerably bad law.

4. The plaintiff quotes the *Lone Ranger* case as involving "the element of fraudulent attempt of someone to 'reap where he has not sown' and to appropriate to himself 'the harvest of those who have sown'." 124 F.2d at 653, 52 USPQ at 149. But the opinion makes it clear that the "harvest" is the goodwill generated by long establishment of the *Lone Ranger* in the public eye, and the element of fraud is quite as important as the element of appropriation.

. . . the leading case affording a remedy for mere copying, *International News Serv. v. Associated Press*, 1918, 248 U.S. 215, is no longer authoritative for at least two reasons:⁵ it was decided as a matter of general federal law before the decision in *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64; and, as it prohibited the copying of published written matter that had not been copyrighted (indeed, as news it could not be copyrighted, 248 U.S. at 234), it has clearly been overruled by the Supreme Court's recent decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 1964, 376 U.S. 225, 140 USPQ 524, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 1964, 376 U.S. 234, 140 USPQ 528. While this normally would not prevent the state court from adopting the reasoning of INS in fashioning a rule of state law, we think it important to consider the scope of state power in this area in view of *Sears* and *Compco*.

It is true that *Sears* and *Compco* both deal with copying of articles covered by invalid design patents. But the opinions refer throughout to both copyright and patent; and in *Compco* the Court took pains to articulate the broad scope of its decisions:

“Today we have held * * * that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. —, §8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.” 376 U.S. at 237, 140 USPQ at 530.

More fully, that policy is to encourage intellectual creation by offering the creator a monopoly in return for the disclosure and eventual surrender of his creation to the public.

Does the language in *Compco*, “whatever the federal patent and copyright laws leave in the public domain”, refer to creations that Congress has deliberately chosen not to protect or more broadly to

5. See also *Cheney Bros. v. Doris Silk Corp.*, 2 Cir., 1929, 35 F.2d 279, 280, 3 USPQ 162, 163 (L. Hand, J.): “* * * there are cases where the occasion is at once the justification for, and the limit of, what is decided. This [INS] appears to us such an instance * * * .”

those it has simply not protected, whether by choice or by chance? In the case of patents the two questions are coterminous, for Congress has deliberately chosen not to protect inventions lacking the element of originality, and an invention is thus either patentable or unprotectible. In the case of "writings" there is no such universal test of qualification. But Congress has established a procedural scheme of protection by notice and registration. The necessary implication of this approach, we conclude, is that, absent compliance with the scheme, the federal policy favoring free dissemination of intellectual creations prevails. Thus, if a "writing" is within the scope of the constitutional clause, and Congress has not protected it, whether deliberately or by unexplained omission, it can be freely copied. See *Cheney Bros. v. Doris Silk Corp.*, 2 Cir., 1929, 35 F.2d 279, 3 USPQ 162.

The compelling reasons for this rule well stated in Judge Learned Hand's prophetic dissent in *Capitol Records, Inc. v. Mercury Records Corp.*, 2 Cir., 1955, 221 F.2d 657, 664-67, 105 USPQ 163, 167-170, where he referred to (1) the anomaly of allowing a creator to acquire a perpetual monopoly of his work under state law when he cannot obtain the limited right of exploitation under federal law, and (2) the impossibility of affording effective protection against copying except by a uniform national law.⁷ See also *RCA Mfg. Co. v. Whiteman*, 2 Cir., 1940, 114 F.2d 86, 89-90, 46 USPQ 324, 327.

To this plaintiff gives two answers. He argues that a character is not copyrightable — by which we must understand that it is not within the scope of Congress's power under the copyright clause — and that in any event a creation in the form of a public perform-

7. This case presents the problem very well. Counsels' failure to address it in their briefs is a tribute to its perplexity. Here a Rhode Island plaintiff performed in Rhode Island, Connecticut, Maine, Massachusetts, and New York, and once gave a batch of his cards to a truckdriver heading west. Can Rhode Island law effectively prohibit copying from a performance in New York or from a card carried to California by a person who may have received it in Kansas? Would Rhode Island resolve the choice of law question by inquiring whether California, the site of the television series, would prohibit the copying? If so, should California law apply to govern the rights of people in say, Arkansas to view the intellectual "property" of a Rhode Island citizen, stolen perhaps in Connecticut, perhaps in Kansas, certainly in parts unknown?

ance is protectible as an unpublished work under 17 U.S.C. §2.⁸ For the first proposition the authority cited is *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys.*, 9 Cir., 1954, 216 F.2d 945, 104 USPQ 103, which held that the assignee of the copyright of the novel *The Maltese Falcon* could not prevent the author from using the character Sam Spade in a sequel. But that case is inapposite, because it held only (a) that the contract of assignment did not convey the exclusive right to use the characters in the novel, and (b) that the sequel, *The Kandy Tooth* was not so similar as to infringe the copyright. That is far from saying that characters are inherently uncopyrightable.⁹

A more substantial argument for this first proposition is that the plaintiff's creation is not a "writing" in the sense used in the copyright clause (or, what is the same thing, that it is not an "article" in the sense used in *Sears and Compco*). There is no question that the term is to be interpreted more broadly than its common meaning would indicate, See, e.g., *Mazer v. Stein*, 1954, 347 U.S. 201, 100 USPQ 325 (statue used as a lamp base). But it has been argued that it should be limited to mean some identifiable, durable, material form. *Nimmer*, Copyright Publication, 56 Colum. L. Rev. 185, 196 n. 98 (1956). And it is argued here that the plaintiff's creation, being a personal characterization, was not reduced and could not be reduced to such a form.

To this argument there are several answers. First, while more precise limitations on "writings" might be convenient in connection with a statutory scheme of registration and notice, we see no reason why Congress's power is so limited. Second, we cannot say

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8. "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."
 9. Cf. *Nichols v. Universal Pictures Corp.*, 2 Cir., 1930, 45 F.2d 119, 121, 7 USPQ 84, 87:

" * * * If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."

that it would be impracticable to incorporate into the copyright system a procedure for registering "characters" by filing pictorial and narrative description in an identifiable, durable, and material form. Finally, however, there comes a point where what is created is so slight a thing as not to warrant protection by any law. All human beings — and a good part of the animal kingdom — create characters every day of their lives. Individuals often go beyond the realm of unconscious creation and devise characterizations for their own and others' amusement. Many a starred performer has so begun, and continued to grow on the borrowings from others. At some point his innate talent and eclectic poaching may enable him to attract a following, and ultimately to secure the law's protection against imitators. At what point short of this there should be additional protection we do not say. But in view of the federal policy of encouraging intellectual creation by granting a limited monopoly at best, we think it sensible to say that the constitutional clause extends to any concrete, describable manifestation of intellectual creation; and to the extent that a creation may be ineffable, we think it ineligible for protection against copying simpliciter under either state or federal law.

For the second proposition, that the plaintiff's creation is an unpublished work protected under 17 U.S.C. §2, the leading authority is *Ferris v. Frohman*, 1912, 223 U.S. 424, which held that the public performance of a play did not constitute publication in the sense of an abandonment to public use. But in that case the Court specifically noted that the play involved had not been "printed and published"; that is, no copies of the script had been distributed publicly.¹⁰

Here, plaintiff's "performance" consisted of two components: appearing in public and passing out cards and photographs. No other "action" was involved, except an occasional "quick draw" demonstration at a rodeo. So far as his costume and menacing ap-

10. We note, furthermore, that the Court relied on such cases as *Tompkins v. Halleck*, 1882, 133 Mass. 32, for the proposition that at common law performance of a play was not an abandonment of it to public use. In *Tompkins* the Supreme Judicial Court of Massachusetts abrogated the theory that a play might properly be copied from memory after witnessing a performance, adopting instead the theory that even a reproduction from memory violated the implicit license of the spectator's ticket of admission. Were it necessary, we might question whether the same result would apply to a free open-air performance where the audience is limited only by conditions of visibility, and no license might be implied.

pearance were concerned, it was fully conveyed on the cards bearing his photograph — which also contained the chess piece, the slogan, and the name “Paladin”. The cards were passed out in great quantities over the years to all who would have them. So far as any action accompanying his personal appearance is concerned, whether it be simply riding a horse, or staging a quick-draw gun fight, these are hallowed shelf items in the tradition of the early West. In any event, the theme and plots of defendants’ television series could not be said to have derived from anything created by plaintiff which was not revealed by his cards.

The cards were unquestionably “writings” within the meaning of the copyright clause, and arguably were copyrightable under the statute. See 17 U.S.C. §§1, 5 (g)5(k); *Burrow-Giles Lith. Co. v. Sarony*, 1883, 111 U.S. 53. The consequence is that the plaintiff’s character-creation was published, even under the doctrine of Ferris, and that this case falls squarely under the rule of *Sears and Compco*. Not having copyrighted the cards, the plaintiff cannot preclude others from copying them. We accordingly reverse.

24. *Morrissey v. The Procter & Gamble Co.*, 379 F.2d 675, 154 U.S.P.Q. 193 (1st Cir., June 28, 1967) (Aldrich, C.J.), *affirming* 152 USPQ 668 (D. Mass., Jan. 18, 1967) (Caffrey, J.)

Appeal from an order granting summary judgment for defendant in action for copyright infringement. Plaintiff secured copyright registrations for various promotional contest rules and charged defendant with infringement of one of his copyrighted rules. The district court granted summary judgment on the grounds of nonaccess and lack of copyrightable material.

Held, affirmed.

I. The court held that summary judgment should not have been based upon a determination of nonaccess. Noting that summary judgment will not lie where there is the slightest factual dispute, that the standard for a directed verdict may in some cases differ from that for summary judgment, and that inferences established by presumptions of law may aid a party in opposing such a motion, the court found that the district judge had employed an improper standard of decision. The court said:

. . . the defendant offered affidavits or depositions of all of its allegedly pertinent employees, all of whom denied having seen plaintiff’s rules. Although the plaintiff, by deposition, flatly testi-

fied that prior to the time the defendant conducted its contest he had mailed to the defendant his copyrighted rules with an offer to sell, the court ruled that the defendant had “proved” nonaccess, and stated that it was “satisfied that no material issue as to access . . . lurks . . . [in the record.]”

The court did not explain whether it considered defendant’s showing to have constituted proof overcoming the presumption of receipt arising from plaintiff’s testimony of mailing, or whether it felt there was an unsatisfied burden on the plaintiff to show that the particularly responsible employees of the defendant had received his communication. Either view would have been error. A notice to the defendant at its principal office, as this one assertedly was, is proper notice. There is at least an inference that the letter reached its proper destination. Even if we assume that if, at the trial of the case, it should be found that the particular employees of the defendant responsible for the contest were in fact without knowledge of plaintiff’s rules, defendant would be free of a charge of copying, *cf. Pinci v. Twentieth Century-Fox Film Corp.*, S.D.N.Y., 1951, 95 F.Supp. 884; *Dezendorf v. Twentieth Century-Fox Film Corp.*, S.D.Cal., 1940, 32 F.Supp. 359, *aff’d*, 118 F.2d 561, on a motion for summary judgment a plaintiff should not have to go to the point of showing that every employee of a corporate defendant received his notification. Nor can it be said that no issue of fact as to access “lurks” merely because it seems to the court that plaintiff’s own proof has been satisfactorily contradicted. Nothing is clearer than this on a motion for summary judgment; if a party has made an evidentiary showing warranting a favorable inference, contradiction cannot eliminate it. Summary judgment may not be granted where there is the “slightest doubt as to the facts.” *Peckham v. Ronrico Corp.*, 1 Cir., 1948, 171 F.2d 653, 657; *Arnstein v. Porter*, 2 Cir., 1946, 154 F.2d 464, 468. Defendant’s argument misreads *Dressler v. MV Sandpiper*, 2 Cir., 1964, 331 F.2d 130. The presumption arising from mailing remained in the case.¹

It is true that we have, on rare occasion, held that even though there is some slight evidence favoring a plaintiff, the evidence contrary may be so overpowering that a verdict for the plaintiff cannot be permitted, and judgment must be ordered for the defendant.

1. The court did not discuss, nor need we, the additional fact that the almost exact following of plaintiff’s wording and format in an area in which there is at least some room for maneuverability, might be found of itself to contradict defendant’s denial of access. *Cf. Arnstein v. Porter*, *supra*.

Dehydrating Process Co. v. A. O. Smith Corp., 1 Cir., 1961, 292 F.2d 653, cert. den. 368 U.S. 931; see *Magnat Corp. v. B & B Electroplating Co.*, 1 Cir., 1966, 358 F.2d 794. We have never suggested that such a principle is applicable to a motion for summary judgment, and we do not now.² Cf. *Robbins v. Milner Enterprises, Inc.*, 5 Cir., 1960, 278 F.2d 492, 496-97.

II. The district court had found plaintiff's rule to lack originality, a finding it derived from the simplistic nature of the concept expressed, and thus held it incapable of copyright. The appellate court found this reasoning fallacious, but upheld the determination of non-copyrightability on a policy against allowing the exclusive appropriation of a topic capable of only a limited spectrum of expression. The court said:

The district court, following an earlier decision, *Gaye v. Gillis*, D.Mass, 1958, 167 F.Supp. 416, took the position that since the substance of the contest was not copyrightable, which is unquestionably correct, *Baker v. Selden*, 1879, 101 U.S. 99; *Affiliated Enterprises v. Gruber*, 1 Cir., 1936, 86 F.2d 958; *Chamberlin v. Uris Sales Corp.*, 2 Cir., 1945, 150 F.2d 512, and the substance was relatively simple, it must follow that plaintiff's rule sprung directly from the substance and "contains no original creative authorship." 262 F. Supp. at 738. This does not follow. Copyright attaches to form of expression, and defendant's own proof, introduced to deluge the court on the issue of access, itself established that there was more than one way of expressing even this simple substance. Nor, in view of the almost precise similarity of the two rules, could defendant successfully invoke the principle of a stringent standard for showing infringement which some courts apply when the subject matter involved admits of little variation in form of expression. *E.g.*, *Dorsey v. Old Surety Life Ins. Co.*, 10 Cir., 1938, 98 F.2d 872, 874 ("a showing of appropriation in the exact form or substantially so."); *Con-*

2. Defendant seeks to attach weight to [and the lower court did consider] thirteen letters introduced through its witness who testified he had received them from thirteen other companies in contradiction of plaintiff's testimony that he had sent copies of his rules to them, as well as to the defendant. In the first place, in spite of defendant's elaborate argument, the letters so introduced were rank hearsay as to the truth of their content, in contravention to Rule 56's fundamental requirement that the party's position be sustained by competent and admissible evidence. Fed. R. Civ. P. 56(e). But even more elementary, had they been admissible affidavits of thirteen bishops they could not have varied the principle that issues of fact are not to be resolved on summary judgment.

tinental Casualty Co. v. Beardsley, 2 Cir., 1958, 253 F.2d 702, 705, *cert. denied*, 358 U.S. 816 ("a stiff standard for proof of infringement.").

Nonetheless, we must hold for the defendant. When the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires," *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 1905, 140 Fed. 539, 541; *cf.* Kaplan, *An Unhurried View of Copyright*, 64-65 (1967), if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated. *Cf. Baker v. Selden, supra.*

Upon examination the matters embraced in Rule 1 are so straightforward and simple that we find this limiting principle to be applicable. Furthermore, its operation need not await an attempt to copyright all possible forms. It cannot be only the last form of expression which is to be condemned, as completing defendant's exclusion from the substance. Rather, in these circumstances, we hold that copyright does not extend to the subject matter at all, and plaintiff cannot complain even if his particular expression was deliberately adopted.

25. *United Artists Television, Inc. v. Fortnightly Corporation*, 377 F.2d 872, 153 U.S.P.Q. 696 (2d Cir., May 22, 1967) (Lumbard, J.). *For decision below*, see 255 F. Supp. 177, 149 U.S.P.Q. 758, 13 BULL. CR. SOC. 306, Item No. 347 (1966).

Appeal from judgment for plaintiff in action for infringement of copyright in motion pictures by means of community antenna (CATV) off-the-air pickup of television signals and retransmission by cable to subscribers.

Held, affirmed.

1. The court agreed with Judge Herland's holding below that the operation of the defendant's CATV systems constituted an unlicensed public performance which infringed plaintiff's copyrights. The court said:

Defendant contends that its CATV systems should not be held to have performed plaintiff's copyrighted motion pictures in public because the motion pictures were not made visible or audible within the systems, but only in the television sets owned and controlled by their subscribers. We do not think that this fact is decisive. In light of prior decisions and of the policies of the Copyright Act, the result brought about by one of defendant's CATV systems — the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers — is fairly characterized as a public performance infringing the copyrights.

No legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's. We are furnished substantial guidance, however, by a decision of the Supreme Court finding a performance on closely analogous facts, *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 9 USPQ 17 (1931). The LaSalle Hotel in Kansas City, Missouri, provided loudspeakers or headphones in each of its public and private rooms over which guests could hear the programs being received on the hotel's master radio. The hotel first contended that it did not perform the programs because a broadcast could give rise to only one performance, that by the broadcaster. Mr. Justice Brandeis, writing for the Court, stated that "no reason is suggested why there may not be more than one liability." 283 U.S. at 198, 9 USPQ at 18. The hotel next argued that it did not perform the programs because it could not determine their content, but could only choose among the programs broadcast. The Court rejoined that "intent to infringe is not essential under the Act." *Ibid.* Finally, the hotel urged that "a radio receiving set is no more than a mechanical or electrical ear-trumpet for the better audition of a distant performance." 283 U.S. at 199 n.7, 9 USPQ at 19. Mr. Justice Brandeis answered:

"The transmitted radio waves require a radio receiving set for their detection and translation into audible sound waves * * * . In addition, the ordinary receiving set, and the distributing apparatus employed by the hotel company, are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers.

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. In each the music is produced by instrumentalities under its control." 283 U.S. at 200-01, 9 USPQ at 20.

The *Jewell-LaSalle* case was followed by Judge Woolsey in *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., Inc.*, 19 F.Supp. 1, 34 USPQ 6 (S.D.N.Y. 1937). In the SESAC case, the Hotel Pennsylvania in New York City had installed loudspeakers in some 1900 guest rooms, connected to two master radios, each receiving one station, between which guests could choose by turning a knob on the loudspeaker. The hotel urged that this element of choice meant that it did not perform. Judge Woolsey held, however, that "the reception of a broadcast program by one who listens to it is not any part of the performance thereof." . . .

This, we think, is the nub of *Jewell-LaSalle* and *SESAC*; how much did the defendant do to bring about the viewing and hearing of a copyrighted work? Cf. Comment, Copyrights and TV — A New Use for the Multiple Performance Theory, 18 U. Chi. L. Rev. 757, 764 (1951). Defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio programs for their guests. The expense and effort required to install, operate, and maintain the CATV systems' antennas, head end equipment, many miles of cable, and connections to subscribers' television sets clearly exceeded that involved in wiring master radio sets to loudspeakers in hotel rooms. The "piping" of radio programs was merely incidental to the hotels' business, while the only business of defendant's CATV systems is making possible the viewing of broadcast television programs. If anything were needed to demonstrate that this, and not merely delivering modulated carrier waves to the terminals of subscribers' television sets, is defendant's business, defendant's frequent advertising of the programs and stations available over its cables makes it clear. Finally, a fundamental purpose of the exclusive right of public performance is to protect copyright proprietors against dilution of the market for their works, see Nimmer, Copyright § 107.31 (1964), and a CATV system making television programs continuously available in viewers' homes seems much more likely to dispel any desire to see the same copyrighted

works elsewhere than a hotel which offers the same programs to a constantly changing group of guests.

Defendant appears to conclude that, under *Jewell-LaSalle* and *SESAC*, its CATV systems would perform broadcast television programs if they furnished television sets to their subscribers; but it argues that the fact that they do not is conclusive. Given the ready availability of television sets from other sources, however, defendant's decision not to provide them is wholly outweighed by the magnitude of its contribution to the viewing of broadcast television programs by its subscribers. . . .

Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constituted a public performance. Cf. e.g., *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, supra note 4. Defendant's rejoinder is that in the case of a television broadcasting station a visible or audible rendition of a copyrighted work is given at the station's studio. But as Judge Herlands found, 255 F.Supp. at 190-91, 149 USPQ at 768 no such rendition accompanies the broadcast of taped and relayed programs or, usually, of motion pictures. A more fundamental defect of the rejoinder is that it disregards the policies of the Copyright Act. A television broadcast of a copyrighted work harms the copyright holder not because a handful or a roomful of persons sees the work performed at the studio, but because thousands of viewers watch it in their homes. Perhaps recognizing this, defendant also contends that it is distinguishable from a broadcaster because the broadcaster is required by the Federal Communications Commission to have a studio for originating programs, generally in the principal community it serves, 47 C.F.R. § 73.613, and to retain the right to select the programs it broadcasts. See 47 C.F.R. § 73.658(e). But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. Similarly, the fact that a broadcaster chooses the programs it broadcasts, and that defendant's CATV systems did not choose those they distributed, does not mean that the latter did not render public performances. . . .

Thus we conclude that defendant's CATV systems did more to bring about the viewing and audition of plaintiff's copyrighted motion pictures than the hotels which were held to have performed copyrighted musical compositions in *Jewell-LaSalle* and *SESAC* did to bring the music to their guests, and that the distinctions defen-

dant advances are irrelevant to the policies of the Copyright Act. Our conclusion that defendant's CATV systems publicly performed the television programs they made available rests upon the result which they produced and which defendant clearly intended, the simultaneous viewing of the programs by its subscribers, rather than upon the technical characteristics of the systems, which both sides have urged upon us. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). We therefore hold that defendant's systems publicly performed plaintiff's motion pictures.

II. Defendant argued that even if its CATV systems publicly performed broadcast copyrighted works, they had a license implied in law to do so when the original broadcast was licensed by the copyright proprietor. The court held, however, that the copyright proprietor's right to limit public performances for profit includes material which is broadcast. The court said:

The record on this appeal squarely presents the question whether such a license should be implied in law, absent any expression of the intent of the parties to the original license or in the face of an expressed intent to the contrary, because the issue of infringement was tried on the assumption that plaintiff licensed the original broadcast of its motion pictures, and Judge Herlands found that the licenses were expressly limited to broadcasting by the licensee's transmitter, in some instances specifically excluding retransmission over CATV systems. 255 F.Supp. at 184, 149 USPQ at 763.

Defendant's argument for a license implied in law stems from Mr. Justice Brandeis' observation in the *Jewell-LaSalle* case that the musical composition in suit was broadcast without the consent of the plaintiffs, and his suggestion that

"if the copyright composition had been broadcast * * * with plaintiff's consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929)]." 283 U.S. at 199 n. 7, 9 USPQ at 19. . . .

Whether Mr. Justice Brandeis meant to suggest a license implied in fact or in law, the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression. Defendant's argument for a license implied in law proceeds from the principle that the primary purpose of the Copyright Act is to encourage authors and artists to release their works

to the public, and that reward to the copyright holder is a secondary aim incidental to this general purpose. *Mazer v. Stein*, 347 U.S. 201, 219, 100 USPQ 325, 333 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 77 USPQ 243, 253 (1958); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 141 USPQ 1 (2 Cir.), cert. denied, 379 U.S. 822, 143 USPQ 464 (1964). The secondary aim of reward to the copyright holder is satisfied, defendant contends, when the holder has been induced to license the original television broadcast, and the Copyright Act's primary policy then requires that CATV systems like defendant's be allowed to transmit the broadcast signals without further payment to the copyright holder. . . .

Defendant relies upon holdings that a copyright proprietor may not restrict the resale of a copyrighted article after he has sold it, *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349-51 (1908), and that "when [a] patentee has sold the patented article or authorized its sale and thus granted the purchaser an 'implied license to use,' it is clear that he cannot thereafter restrict that use * * *." *Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc.*, 377 U.S. 476, 497, 141 USPQ 681, 690 (1964); see, e.g., *Adams v. Burke*, 17 Wall. (84 U.S.) 453 (1873). Defendant's argument from these holdings paints with too broad a brush. *Bobbs-Merrill Co. v. Straus* rested solely upon construction of the copyright holder's exclusive right to vend; the court held that the first authorized sale of a copyrighted article exhausted that right, and that the purchaser might "sell it again, although he could not publish a new edition of it." 210 U.S. at 350. The rule of *Bobbs-Merrill Co. v. Straus* was codified in 1909, 35 Stat. 1084, as amended, 17 U.S.C. § 27, and as codified applies only when "possession" of a copyrighted article has been "lawfully obtained." . . .

This case presents a very different issue, the divisibility of the copyright holder's exclusive right to perform. In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences; and his right to do so has apparently never been seriously challenged. . . .

Thus plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems. And aside from raising questions under the Federal Communications Act, * * * the fact that the original licensees broadcast furnishes no reason to deny plaintiff the right to limit his

licenses to viewers who can receive the broadcasts through normal rooftop antennas. It is true that the difficulty of arranging licenses and the possibility of innocent infringement may be greater when television signals are received "off the air" and transmitted by a CATV system; but such considerations have never been held to justify an implied-in-law license.

Nor is a different result required by defendant's contention that if its CATV systems are not granted a license implied in law, its subscribers will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service. Whatever force this "double payment" contention may have, it must be made to Congress.

III. Defendant also argued that a finding of copyright restrictions on CATV use of broadcast material would be contrary to the underlying policy of the Federal Communications Act "to secure the maximum benefits of radio [and television] to all the people of the United States." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 217 (1943). The court held, however, that at least in situations where defendant's subscribers could not receive satisfactory signals by use of normal antennas from the stations whose signals were being transmitted to them by CATV, "the Federal Communications Act, which lacks a comprehensive scheme of regulatory powers and private remedies, was not intended to preempt the application of the Copyright Act." The court suggested that if the subscribers *could* receive one or more of the "CATV" carried stations satisfactorily with use of normal antennas, an argument could be made that the copyright proprietor's license to the broadcaster included this kind of CATV retransmission.

26. *Kontes Glass Co. v. Lab Glass, Inc.*, 373 F.2d 319, 152 U.S.P.Q. 654 (3rd Cir., Feb. 23, 1967) (Freedman, J.)

Action for trademark and copyright infringement and unfair competition. Plaintiff, a manufacturer of scientific glassware, alleged that defendant copied certain illustrations from plaintiff's copyrighted catalog and used these and confusingly similar trademarks in its catalog for a competing line of products. The trial court denied plaintiff's motion for a preliminary injunction on the grounds that plaintiff had made no showing of irreparable injury.

Held, affirmed.

I. Plaintiff contended that the trial court had erred because it believed plaintiff was relying on only its current catalog when in fact its motion was supported by all its past and present copyrighted catalogs, because it thought the injunction was aimed at all defendant's catalogs when plaintiff was seeking to enjoin only defendant's current catalog, because defendant's actions allegedly permitted it to enter into competition with plaintiff earlier than would have been possible without infringement, and because of the primary importance of plaintiff's catalog in its merchandising program. The court held that the lower court had not abused its discretion and that the above contentions went only to the questions of the impact of the injunction, the strength and scope of plaintiff's claim, and the measurability of damages; they did not alone demonstrate irreparable injury.

II. The court held that in reviewing the lower court's determination it must consider an additional factor — the likelihood of plaintiff establishing its claim upon the merits. Noting that the significance of this factor increases where there is minimal evidence on irreparable injury, and that defendant had raised several defenses including fair use, abandonment, inadequate notice, laches and non-originality, the court concluded that "there is not the strong likelihood of success which in the circumstances of this case would alone justify our holding that the court below abused its discretion. . . ."

27. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 270 F. Supp. 896, 154 U.S.P.Q. 616 (S.D.N.Y., July 11, 1967) (Bryan, J.)

Action for copyright infringement. On January 30, 1930 Hans Bartsch, plaintiff's predecessor in interest, received from the copyright owners of a musical play the exclusive motion picture rights thereto and the rights to "project, transmit and otherwise reproduce the . . . work or any adaptation or version thereof visually and audibly by the art of cinematography or any other process analogous thereto. . . ." On May 12, 1930 defendant's predecessor received from Mr. Bartsch a grant of motion picture and general reproduction rights in substantially the same language. Mr. Bartsch later obtained assignments of copyright and renewal copyright in the basic work. Under its license, defendant produced a motion picture and later licensed its exhibition on television. Plaintiff, claiming under the assigned copyrights, contended that television exhibition rights were never granted to defendant or its predecessor.

Held, judgment for defendant.

The court held that the terms of the May 12 transfer included television exhibition rights. After stating that the disposition of the question turned upon the intent of the parties to the transaction, the court proceeded to determine this intent by consideration of the commercial vernacular and business practices of the period, the breadth of the language used, and the similarities between television and motion picture exhibition. The court also noted that since the May 12 transfer was in substantially the same language as the January 30 conveyance, plaintiff's predecessor could not have retained television rights. The court said:

. . . the question is whether the right to exhibit "Maytime" on television was embraced in a conveyance of "motion picture rights" authorizing Warner "to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography or any process analogous thereto * * *."

The parties recognize that the correct disposition of this issue requires a determination of the intent of the principals as manifested in the contract of May 12, 1930. As in *Meyers v. Selsnick Co.*, 373 F.2d 218, 222 (2d Cir. 1966), the words used by the parties in this crucial document are hardly so "plain and clear" as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation." Accordingly the parties introduced evidence throwing light on the general practices of the motion picture industry in 1930. Unfortunately neither side was able to produce a witness who was directly involved in the negotiations or preparation of the particular grant with which we are directly concerned.

During 1930 the future possibilities of television were recognized by knowledgeable people in the entertainment and motion picture industries. There is no question that upon occasion rights to exhibit motion pictures on television were specifically bargained for and transferred during that year. Plaintiff introduced in evidence several grants to Warner during this period containing a specific reference to the right to televise motion pictures. On the other hand, at about the same time Warner also obtained several broad grants of motion picture rights omitting any specific reference to television.

In the case at bar I do not deem the absence of any specific reference to television in the crucial 1930 transfer to Warner to be of any controlling significance. In the first place, of course, grants and assignments to Warner by others during the same period obviously are not indicative of the precise scope of Bartsch's grant to Warner,

particularly in the absence of any evidence that Bartsch was aware of them. . . .

Moreover, we are by no means left in the dark as to exactly what bundle of rights was actually embraced by the 1930 transfer. The pertinent language in the contract of May 12, 1930, is strongly suggestive of the conclusion that the transferor Bartsch relinquished "Maytime" television rights. The phrase "to project, transmit and otherwise reproduce the said musical play" appears to represent an attempt by the parties to exhaust all possibilities with respect to the exhibition of the film. It was generally understood in the industry during 1930 that phrases such as the catch-all term "otherwise reproduce" were included in grants of film rights to assure an enlargement of the rights granted. And I have little difficulty on this record in reaching the conclusion that exhibition of the film on television is simply another way of projecting, transmitting and reproducing the play within the contemplation of the 1930 contract. This is true although, naturally enough, the parties who negotiated the grant were evidently not fully aware of the great commercial potential in motion picture entertainment through the medium of television.

In addition, defendant has established here that the exhibitions of the film on television qualify as reproductions of the play "by the art of cinematography or any process analogous thereto." The art of cinematography means generally the production of "a motion picture in any shape, form, size, color dimension" and thereafter making "use of that motion picture." The adjective "analogous" in this contract means "corresponding to something else" or "bearing some resemblance or proportion." Webster, *New International Dictionary* 94 (2d ed. 1954). The exhibition of a film through the television medium is certainly the utilization of a process analogous to or resembling the art of cinematography.

. . . defendant's well qualified expert witness, fully explained the respective techniques and mechanical operations of exhibiting a film in a theatre as compared with reproduction of a film image on a television screen in the home. His testimony was uncontradicted, since plaintiff did not produce an expert. The processes of theatre and home television exhibition are markedly similar. In a theatre the images in a motion picture film are produced by a projector casting rays of light against a screen. A shutter controls the various degrees of brightness which make up the picture seen by the audience. Similarly, the customary practice for exhibiting motion picture films over television requires the use of a standard

projector, sound head and lenses like those which are used in the theatre. A very small image is projected against a photosensitive electronic scanning system, rather than a standard screen, and the information by a process of transduction is converted into electrical energy, transmitted over the air in electrical impulses, and carried into the home where it is again converted by the viewer's set. The process of "unscrambling" or "descanning" the air-wave transmission so as to cast the image on the television screen is quite similar to that which takes place on the theatre screen, except that on the set in the home an electronic shutter, rather than a mechanical shutter, is used to control the picture image. Finally, the audio or sound portions of the film are transmitted entirely by wires in the theatre, whereas, of course, in television the airwaves necessarily provide part of the medium of transmission between the wires at the beginning and the end of the process. The intervention of the airwaves results in only a split-second hiatus and does not prevent the receiver at home from communicating the sound just as rapidly as the transmission in a large theatre.

It is evident, therefore, that the process of exhibiting a motion picture over television provides a very close analogy to an exhibition in a theatre. This was true in 1930 from the point of view of the production and commercial end of the motion picture industry. And this is true today from the point of view of the technical and mechanical processes involved. . . . [The] only substantial difference between the theatre and home television exhibitions concerns the intervention of the airwaves in the transmission or communication process. While this factor prevents the two processes from being identical, it certainly does not destroy the close analogy between them.

Beyond this, the broad, sweeping phrase "by the art of cinematography or any process analogous thereto," like the expansive terms "project, transmit or otherwise reproduce," was evidently included in the contract as a means of enlarging the grant to Warner. In my view this protective language was sufficiently broad to assure that Warner obtained the television rights here in issue. This is a case like *L. C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196, 199 (2d Cir. 1936), where "the genus embraced the later developed species." I therefore find that plaintiff's predecessor . . . relinquished all rights to exhibit "Maytime" on television by the express terms of the May 12, 1930 transfer to Warner.

There is yet a further reason why plaintiff cannot prevail in this action. [On] January 23, 1930, Bartsch obtained all motion

picture rights [in the work] "together with the sole and exclusive rights to use, adapt, translate, add to and change the said operetta or musical play and the title thereof in the making of motion picture photoplays, and to project, transmit and otherwise reproduce the said work or any adaptation or version thereof, visually and audibly by the art of cinematography or any process analogous thereto, and to copyright, vend, license and exhibit such motion picture photoplays throughout the world * * *." On May 12 of the same year Bartsch turned around and for all practical purposes transferred to Warner any and all rights he had obtained on January 23. With minor variations not here material the May 12 transfer to Warner reiterated *in haec verba* the language delimiting the extent of the rights Bartsch had obtained on January 23. In short, Bartsch transferred to Warner nothing less nor more (i.e., everything) he had received from the prior owners.

"One method of ascertaining what has or has not been transferred is to see what has been retained by the grantor." *Allied Chemical Corp. v. United States*, 370 F.2d 697, 699 (2d Cir. 1967). Since Bartsch transferred to Warner, M.G.M.'s predecessor in interest, everything he obtained from *his* grantors, there was nothing for him to retain. He thus could not have retained the television rights. This is quite consistent with the testimony of counsel to Warner in 1930, [who] approved the contract with which we are concerned upon the understanding that his employer had effectively obtained television rights, a conclusion which was based, among other things, on the identity between what was granted to Bartsch and what Bartsch granted to Warner.

Plaintiff points to a general reservation of rights in the 1930 transfer³⁷ as evidence of the fact that Bartsch did not specifically intend to relinquish unspecified rights, in particular the privilege to exhibit the film on television. Such a general reservation, however, was by no means unusual in assignments of motion picture rights of this type in 1930, and this particular provision is virtually useless in illuminating the specific intent of the parties as mani-

37. Paragraph 13 of Def. Ex. B provides: "The rights which the Purchaser obtains from the Owner in 'WIE EINST IN MAI' and/or 'MAYTIME' are specifically limited to those granted herein. All other rights now in existence or which may hereafter come into existence shall always be reserved to the owner and for his sole benefit, but nothing herein contained shall in any way limit or restrict the rights which Purchaser has acquired or shall hereafter acquire from any other person, firm, or corporation in and to 'WIE EINST IN MAI' and/or 'MAYTIME'."

fested by their contract. Warner obtained nothing more and nothing less than what was specifically relinquished. Bartsch retained nothing more and nothing less than what was specifically reserved. These observations scarcely illuminate the ultimate issue. I therefore find that Hans Bartsch unconditionally transferred to Warner any and all television rights he had secured. . . .

28. *Olympia Press v. Lancer Books, Inc.*, 267 F. Supp. 920, 153 U.S.P.Q. 349 (S.D.N.Y., Apr. 3, 1967) (Ryan, J.)

Motion for preliminary injunction in action for copyright infringement. Plaintiff published in France a seven-volume English translation of DeSade's "Juliette." The first five volumes were translated by Austryn Wainhouse, an American citizen, under the pen name "Pieralessandro Casavini." After learning that Lancer had published a version of the public domain "Juliette" which purported to be an abridgement of "Pieralessandro Casavini's translation", plaintiff secured copyright registration in the United States for volumes 2 through 5, allegedly copied by the Lancer edition. In applying for copyright registration, plaintiff listed itself as author of the translation, making no mention of Wainhouse. No *ad interim* copyright had been obtained.

Held, preliminary injunction denied.

Plaintiff argued that it was entitled to copyright in the United States in these books because, as a foreign "author", it was entitled to the benefit of an exception in the copyright law to the requirement that only books printed in the United States can be copyrighted here. The court held, however, that Wainhouse was an independent contractor rather than an employee for hire and, therefore, that Wainhouse was the author of the translation. Inasmuch as Wainhouse, unlike Olympia, is an American citizen, the manufacturing clause was held to apply. Inasmuch as plaintiff's copyright was therefore of doubtful validity, the preliminary injunction was denied. The court said:

It is undisputed that the French version of "The Story of Juliette" has long been in the public domain. . . . The Wainhouse English-language translation was a "new work" subject to United States copyright, even though the original work written in French was in the public domain (17 U.S.C. Section 7). For the present motion only, we find that plaintiff has made a substantial showing that defendants' American one-volume publication is in principal part a verbatim and slavish copy which infringes the Wainhouse English-language translation. The defendants question the validity

of the four copyrights in suit, asserting in fact and in law that plaintiff was not and cannot legally claim to be the "author" under the copyright law of the English-language translation which admittedly was the work of Wainhouse. . . .

The applications for all four copyright registrations were filed in the Copyright Office on May 27, 1966. It was not until plaintiff discovered defendants' publication prior to August, 1965, that he inquired of the Copyright Office what steps he should take to obtain copyright certificates in order to bring an action for infringement; the four certificates in suit were issued to plaintiff in July, 1966. . . .

None of the four applications disclose that the actual English language translation sought to be registered was the work of Austryn Wainhouse; his name does not appear at all on the applications. . . .

This brings us to the pertinent statute — the Manufacturing Clause of the Copyright Act, 17 U.S.C. 16, which requires that English language works, in order to receive copyright protection, must be typeset, printed and bound within the United States. There is no question but that plaintiff's works were not so done. The only exception to this clause which need detain us is that which permits copyright on a foreign book in the English language imported into the United States within five years after first publication in a foreign state if *ad interim* copyright in said work has been obtained pursuant to Section 22 of the Act prior to the importation in the United States of any copy. Plaintiff did not obtain *ad interim* copyright under Section 22.

The Act under Section 9(c) exempts from the Manufacturing Clause alien authors whose country is a signatory to the Universal Copyright Convention or whose work was first published in such country, but significantly excepts from this exception "works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication. . . ." France is a signatory to Universal Copyright Convention; the works in suit were first published there; the question is who was their author. On the assumption that Wainhouse, the translator, is the author of the works, defendants conclude that the exception to the Manufacturing Clause does not apply to them, and that they cannot be copyrighted. On the assumption that plaintiff and not Wainhouse is the "author" of the work, plaintiff argues that the works do come within the exception, relying for its position that it is the author of the works on the language of Section 26, 17 U.S.C., which includes within the definition of author "an employer of work made

for hire"; that is, that the translator Wainhouse was an employee of plaintiff rather than an independent writer.

This is the crux of the case. . . . The question is of paramount importance in determining . . . who is the person entitled to secure the copyright especially under the statutes in question. . . . Obviously, if plaintiff cannot on this motion show sufficient likelihood of succeeding in establishing its right to secure the copyrights and their validity, it may not secure the injunction. . . .

The plaintiff has stated in answer to defendant's interrogatory that there was no written agreement entered into between plaintiff and Wainhouse relating to the translation by Wainhouse for "The Story of Juliette". Wainhouse, in an affidavit given by him to defendants, sworn to before the American Consul at Nice, on January 20, 1967, agrees with this admission of plaintiff, stating that when "requesting a contract of the customary sort between publisher and translator, Girodias assured me that no contract need be established between us for the pure and simple reason that 'contracts are always made to be broken.'" His affidavit also recites that he is an American citizen. . . . In support of his position that he was not a hired writer but an independent author, he relates that he began his translations of Sade in 1952, at which time he had completed an essay of his own on Sade, had translated into French (sic) "La Philosophie dans le Boudoir", that it was this completed text that he presented to Maurice Girodias at the time of their first meeting in March, 1953 and that it was this text, unaltered and "integral", that plaintiff published in May, 1953, under the title of "The Bedroom Philosophers", for which Girodias paid him by check seventy five thousand francs. . . . Wainhouse further states that he worked on his translations in cafes, at his home and at the homes of his parents in Vienna and Washington, but "never at any time on the premises of the Olympia press." He is positive in his statement that in the majority of the instances he proposed that a translation be made and the work published, that no editing whatsoever was done upon any of his translations and that Girodias exercised absolutely no control over their style and content. . . .

Plaintiff, in its insufficient supporting affidavit, says that it engaged Wainhouse and commissioned the work for hire in return for a set fee of 300,000 francs per volume. This equivocal language, coupled with the vague reference to an oral agreement, the terms of which are not set forth, certainly do not support the naked conclusion that Wainhouse was an employee for hire. . . . It appears . . . also that Wainhouse chose the titles of the works, wrote the blurbs

for the Juliette books, that he procured the typing at his own expense and that, prior to his hiring, he had completed the translation of Volume I of the Juliette series, suggested manuscripts for translation to Girodias and submitted unsolicited translations for Girodias to try to have published for him.

The tenor of these letters (between Wainhouse and Girodias) bespeaks much more two independent men working together — one as author, the other as publisher — rather than employer and hired hand. See *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, 2d Cir., Mar. 24, 1967.

Because we conclude that there is a serious question as to the validity of the copyrights in suit, an injunction will not lie and it is unnecessary to discuss the defenses of laches and absence of irreparable harm.

29. *Urner Barry Publications v. Freeman*, 155 U.S.P.Q. 257 (S.D.N.Y., July 21, 1967) (Palmieri, J.) (not yet reported.)

Action for unfair competition and interference with contractual relations. Plaintiff formulates price quotations based upon its surveys of agricultural product prices in the New York wholesale markets and distributes this information by wire and periodical publication to its subscribers, who in turn agree not to communicate the information received to any third party. Defendants, the U.S. Secretary of Agriculture and members of his Department, allegedly obtained quotation statistics from plaintiff's subscribers and disseminated them in Department publications, wire services and newspapers to potential customers of plaintiff. Defendant interposed a pre-answer motion to dismiss.

Held, motion denied.

I. The court found that plaintiff was not claiming copyright infringement and thus was not relegated to the Court of Claims for relief. The court said:

If the basis for this action were plaintiff's alleged copyright, then the appropriate forum would be the Court of Claims. 28 U.S.C. §1498 (b). Plaintiff, however, does not complain that defendants violated any copyright, nor does it assert that defendant copied from its publication. The defendants are charged with interference with plaintiff's contractual relations in order to disseminate without charge the information which has been compiled at great cost to and effort by the plaintiff. The Plaintiff contends that

if it is unable to obtain relief against this practice, drastic and irreparable economic consequences will threaten the very survival of plaintiff and the important market function it performs.

II. The court held that the embryonic stage of the proceedings did not establish the facts with sufficient clarity to allow a determination of the effect of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day Bright Lighting Inc.*, 376 U.S. 234 (1964) on plaintiff's claim or whether the doctrine of *International News Service v. Associated Press*, 248 U.S. 215 (1918) "may still have application to the current situation." A similar disposal was made of the defense of sovereign immunity.

30. *Rosette v. Crown Record Co., Inc.*, 266 F. Supp. 393, 152 U.S.P.Q. 167 (S.D.N.Y., Dec. 22, 1965) (Cooper, J.)

Action upon a multiple count complaint charging infringements of common law and statutory copyright in the same musical composition. Although the parties were of diverse citizenship, the complaint failed to allege the requisite jurisdictional amount to sustain diversity jurisdiction. Defendant moved to dismiss the common law copyright claims for lack of subject matter jurisdiction and to compel service of the copyrighted works. Defendant also requested an extension of time to answer and a change of venue.

Held, motions to dismiss and for change of venue denied; service ordered and time to answer extended.

I. The court held that it could retain jurisdiction over the common law infringement claims under the doctrine of pendent jurisdiction. Although defendant relied on a leading Supreme Court decision in the area and invoked a narrow interpretation of the "related claims" statute, the court rested its decision on later cases broadly interpreting that statute and restricting the Supreme Court holding. The court also found the identity of parties involved in the alleged infringements and the evidentiary overlap in proof to support its jurisdiction. The court said:

In essence, movant advances two arguments: (1) the Court does not have jurisdiction of the claims for common law copyright infringement under the doctrine of pendent jurisdiction, *Hurn v. Oursler*, 289 U.S. 238, 248, 17 U.S.P.Q. 195, 199 (1933); *Weissman v. Radio Corp. of America*, 80 F. Supp. 612, 615, 79 U.S.P.Q. 120, 123 (S.D.N.Y. 1948); and (2) such claims are not "related" claims

within the meaning of 28 U.S.C. §1338 (b),² *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 543, 544, 110 U.S.P.Q. 462, 466, 467 (2d Cir. 1956); *Wagner v. World Wide Auto Corp.*, 201 F. Supp. 22, 24 (W.D.N.Y. 1961).

Movant reasons that the instant case is analogous to the claim of unfair competition with respect to an uncopyrighted version, dismissed for want of jurisdiction in *Hurn v. Oursler*, *supra*. That contention is supported by *Nikanov v. Simon & Schuster*, 246 F.2d 501, 504 n.2, 114 U.S.P.Q. 89, 91-92 (2d Cir. 1957); Note, 70 Harv. L. Rev. 1469, 1471 (1957). We observe language in *Hurn* (page 247, 17 U.S.P.Q. at 198-199) which impliedly, and in *Weissman v. Radio Corp. of America*, *supra*, expressly, emphasizes the factual dissimilarity found in those cases between the copyrighted and uncopyrighted versions in contradistinction to the non-federal claim of unfair competition as it relates to copyrighted or uncopyrighted versions. However, the Court of Appeals also indicated in *Nikanov v. Simon & Schuster*, *supra*, that the statute might go beyond *Hurn* although not, at least explicitly, so holding.

In deciding that *Hurn* does not deprive us of jurisdiction in the instant proceedings, we follow *Nikanov v. Simon & Schuster*, 144 F. Supp. 375, 380, 110 U.S.P.Q. 491, 493, 495 (S.D.N.Y. 1956), *aff'd* on other grounds, 246 F.2d 501, 114 U.S.P.Q. 89 (2d Cir. 1957); Note, 70 Harv. L. Rev. 1469, 1471 (1957).

Movant's second argument in support [*sic*] of pendent jurisdiction is that there is no substantial identity of proof underlying both a claim of infringement of a statutory copyright and infringement of a common law copyright even though the alleged infringements

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2. Contrary to better practice the complaint does not expressly allege jurisdictional reliance on 28 U.S.C. § 1338(b) although the parties apparently assume its applicability. Section 1338(b) provides that: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright * * * laws." Movant does not attempt to distinguish *Nikanov v. Simon & Schuster*, 144 F.Supp. 375, 379, 110 USPQ 491, 493 (S.D.N.Y. 1956), *aff'd* 246 F.2d 501, 504, n.2, 114 USPQ 89, 91-92 (2d Cir. 1957), insofar as the result in that case (and the cases cited therein) would lead us to deem the instant claims within the rubric of "unfair competition." This is so even though the gravamen of the allegations here goes merely to a transgression of the exclusive common law right of first publication. Moreover, even if certain non-federal claims were without § 1338(b), though not the case here, that would not foreclose federal jurisdiction; that section was not intended as an inclusive codification of the *Hurn v. Oursler* doctrine. See e.g., *Hazel Bishop v. Perfemme*, 314 F.2d 399, 403, 137 USPQ 4, 7 (2d Cir. 1963); *Wagner v. World Wide Auto. Corp.*, 201 F.Supp. 22 (W.D.N.Y. 1961).

are with respect to the *same* protected work and failing that, there can be no pendent jurisdiction. At base, the argument that there is no substantial identity of proof relies on the principle that once the statutory copyright is obtained, the common law copyright in that same subject matter is lost. Latman, Howell on Copyright Law pp. 111, 112. Thus, proof of damages for infringement of the statutory right (not for proof of a whole "claim" as movant would characterize it) is necessarily restricted to events occurring subsequent to the date of registration. Conversely, this would be so with respect to the claim of infringement of the common law right.

Furthermore, movant conjectures that "it could very well be that defendant manufactured and sold a record allegedly infringing the common law copyright * * * and that subsequent * * * an entirely different record which may * * * have infringed the statutory copyright was manufactured * * *." (Movant's Reply Memorandum, p. 5.)

However, neither virtual identity of proof, *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 543, 110 U.S.P.Q. 462, 465-466 (2d Cir. 1956), *Hazel Bishop v. Perfemme*, 314 F.2d 399, 403, 137 U.S.P.Q. 4, 7 (2d Cir. 1963), nor chronological identity, *Maternally Yours v. Your Maternity Shop*, *supra* at 543, 544, 110 U.S.P.Q. at 466, 467; *O'Brien v. Westinghouse Elec. Corp.*, 293 F.2d 1, 12, 13, 130 U.S.P.Q. 78, 87, 99 (3d Cir. 1961), is prerequisite for sustaining pendent jurisdiction. Here, as in *Nikanov*, the parties are identical and there is a substantial overlap in the evidence, because both claims originate from basically the same tortious acts. See *Nikanov v. Simon & Schuster*, 246 F.2d 501, 504, n.2, 114 U.S.P.Q. 89, 91-92 (2d Cir. 1957); Plaintiff's Brief, pp. 25, 26.

Should there be substance to movant's supposition that defendant may have manufactured a different record which infringed the statutory right, that, and other like possibilities, would be relevant in showing the dissimilarity of the proof incident to each claim. Yet, on the papers now before us such dissimilarity has not manifested itself, and until it does this Court is vested with jurisdiction. See *River Brand Rice Mills, Inc. v. Gen. Foods Corp.*, 334 F.2d 770, 773, 142 U.S.P.Q. 185, 187 (5th Cir. 1964).

Accordingly, defendant's motion to dismiss on the ground that this Court has no jurisdiction of the subject matter of the non-statutory claims here asserted is denied without prejudice to renew.

II. Defendant sought a change of venue based upon the California situs of its witnesses and discoverable documents. Plaintiff's opposition

rested on her witnesses' presence in New York and Pennsylvania. The court held that defendant had not made the required "clear cut showing that the convenience of parties and interests of justice will be better served in the transferee district" as required by 28 U.S.C. §1404 (a).

III. Plaintiff had failed to serve copies of the allegedly infringed works but did not attempt to excuse service under the "non-feasibility" proviso of Rule 2, Supreme Court Rules of Practice and Procedure. Since plaintiff submitted an affidavit indicating that manuscripts filed with the Register would be served upon receipt, the court ordered service upon those terms. Defendant was given twenty days after such service to answer.

31. *American Metropolitan Enterprises of New York, Inc. v. Warner Bros. Records, Inc.*, 154 U.S.P.Q. 311 (S.D.N.Y., June 19, 1967) (McGohey, J.)

Motion for preliminary injunction in action for copyright infringement. Defendant, who was manufacturing and selling phonograph records of copyrighted music under license from plaintiffs, withheld royalties after being notified that the composer was about to commence proceedings to recover the copyright from plaintiffs. Plaintiffs charged that although they had terminated the license agreement as a result of this "breach" by defendant, defendant continued to manufacture and sell records of these songs.

Held, preliminary injunction denied.

The court held that no irreparable damage to plaintiffs had been shown. Plaintiffs' contention that its right to license the first recording of each composition in the United States was being destroyed was rejected on the ground that that right had already been exercised, and thus exhausted, when plaintiffs licensed defendant to make and sell the recordings in question. The court said:

" . . . [O]nce the license was granted to the defendant, anyone could thereafter manufacture and sell records containing the compositions under the compulsory license provision of 17 U.S.C. 1(e). Thus, the right sought to be protected no longer exists."

32. *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F. Supp. 433, 152 U.S.P.Q. 56 (N.D. Ill., Oct. 28, 1966) (Robson, J.)

Action for copyright infringement. The publishers of the National Enquirer, a tabloid "newspaper", alleged that the National Insider, a

similar publication, had infringed the copyrights in six National Enquirer articles. Defendant claimed that it had purchased the articles in good faith from the free-lance writers who had previously sold them to the National Enquirer.

Held, judgment for plaintiff.

Defendant argued that when an article is sold to a tabloid by an author without the extent of the rights being transferred being specified or discussed, by industry custom only one-time rights, or at the most, first North American rights are conveyed. Thus, the defendant argued, the authors of the articles had retained sufficient property in them so that they could convey subsequent publication rights to defendant. The court held, however, that where no conditions are stated at the time of the sale of an article, the law implies that there is a complete sale of the article and the publisher has full rights thereto. The court said:

It would seem to be the law as established by the treatises that where an author sells an article to a periodical without specification of the rights he is conveying that he transfers his entire right to the publisher who has the right to a copyright thereon. . . .

The evidence presented by the litigants is in complete conflict — defendant's adamantly supporting its contention that only "first rights" were sold plaintiff, and plaintiff's evidence substantiating its position that it purchased complete rights, otherwise it would refuse to purchase.

Defendant's evidence supports its position that free lance authors could not afford to research and write articles for the paltry sums paid, unless they were permitted to sell for republication in other tabloids. It points out that in publications of the nature here involved that readers' memories are short and republication is not detrimental to the rights of the holder of first publication rights.

Plaintiff's evidence would support the conclusion that it researched both in its own "morgue" and through other sources to ascertain whether the article submitted had been theretofore published elsewhere, before it would accept the article and publish it.

While the court is no expert judge of the monetary value of the articles appearing in the respective tabloids and hesitates to deprecate their literary merit, it would seem that great literary skill and impeccable accuracy are not the aims of the parties, but rather sheer readability, eye-catching technique and a matter of attractiveness of style are desired, rather than perseverance for high literary quality demanding long rewriting and researching to achieve

perfection. Therefore the author's cost should not be as tremendous as defendant indicates. . . .

In appraising the evidence, the court did not have the advantage of weighing the credibility of much of the testimony inasmuch as it was presented in deposition form. There was the further element of ill-feeling between some of the witnesses and deponents which might detract from the value to be accorded their statements, or at least colored their approach.

The respective statures, circulation wise, of plaintiff and defendant; the long interval between the appearance of the similar articles in defendant's tabloid and plaintiff's newspaper, contrasted with the brief interval between the allegedly similar articles later appearing in plaintiff's paper after publication in defendant's newspaper; the not insubstantial amount paid the free lance writers for plaintiff; the established principle of law that where no terms are agreed upon on the sale of an article the law presumes no reservation of right in the author; the positive testimony of plaintiff's editor that the article would generally not be purchased absent a sale of complete rights by the author, all lead the court to conclude that plaintiff should prevail on its amended complaint.

II. The court awarded minimum damages (\$250 each for six counts, amounting to \$1,500) because plaintiff had sustained little or no actual damage. No attorneys' fees were awarded, in the court's discretion. The court said:

The issue of damages is a difficult one to resolve inasmuch as there is no evidence of the extent thereof. The parties cite the statute, 17 U.S.C. §101(b), providing a maximum of \$5,000 and a minimum of \$250 damages for infringement of copyright, and seek the maximum. The Supreme Court in *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 73 S. Ct. 222, 97 L. Ed. 276 (1952), discussed the purpose of the statutory maximum and minimum and the virtue of the statutory scheme of having the court exercise its discretion in setting the recoverable amount in this difficult field. It was said, at 233, 73 S. Ct. at 225:

“ * * * Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.”

The court concludes that plaintiff's damages for infringements of its copyright are not really substantial. Plaintiff had reaped the

benefit of its publications. That profit was not diminished by the much later publications of similar articles by defendant. Plaintiff, of course, has the right to have the integrity of its copyrights upheld, and an injunction should assure it of the protection of its rights in the future. The court is of the opinion that the minimum statutory provision for damages should be here applicable.

Both plaintiff and defendant have sought recovery of attorneys' fees. The court is of the opinion that this is not a case where such a recovery should be allowed on either side. As the late Justice Sherman Minton pointed out in a decision while on the Seventh Circuit Court of Appeals in the case of *Official Aviation Guide Co. v. American Aviation Associates*, 162 F.2d 541, 543 (1947), "The * * * statute * * * is wholly discretionary as to extraordinary costs of attorneys' fees." It could be added that the instant case was, like that cause, "hard fought and prosecuted in good faith." Also, the court in this case believes that, as in that case, "The defendants' counterclaim was merely an instrumentality of defense and was asserted only to ward off the assault of the plaintiff. It was an alternative defense. * * *"

Both counsel have shown extreme industry and resourcefulness. The court believes, however, that each party should bear its own attorneys' fees.

The recovery of costs being mandatory in favor of the prevailing party, the plaintiff will recover its costs. An injunction against future infringements of plaintiff's copyrights by defendant will issue. Plaintiff will submit an appropriate final decree within ten days. This decision will stand as the court's findings of fact and conclusions of law.

2. Tax Court

33. *Hill v. Comr. Internal Revenue*, 153 U.S.P.Q. 757 (Tax Ct., Mar. 23, 1967) (Scott, J.)

Petition by taxpayer who protested a determination by the Internal Revenue Service that his share of profits from the sale of a television program ("Divorce Court"), which he had written and produced, was ordinary income rather than a capital gain.

Held, judgment for respondent.

The court held that the taxpayer's share of the profits from the sale of the program, since under his agreement with the owner of the pro-

gram, it was a lump sum substitute for his 5% share of the income from the show, was ordinary income like the income participation which it replaced and was not a capital asset. The court also held that even if the profit participation had been a kind of property which would otherwise have qualified as a capital asset, it would not qualify as such because §1221(3) of the Internal Revenue Code excludes from the definition of capital asset "literary, musical or artistic compositions, or similar property held by a taxpayer whose personal efforts created such property."

Also of Interest:

34. *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal., Feb. 13, 1967) (Whelan, J.)

Action for injunction and damages for violation of the Federal Communications Act and unfair competition. Plaintiff is engaged in the FM multiplex transmission of background music to subscribers and charged defendant with the unauthorized interception and republication of such transmissions. In granting plaintiff's motion for partial summary judgment, the court found that plaintiff's transmissions were not designed for dissemination to the general public and thus were protected from appropriation by the non-broadcast section of the Communications Act and that a private cause of action lies for a violation of that section. On the unfair competition count the court held that plaintiff stated a pendant claim for relief under California law. *International News Service v. Associated Press*, 248 U.S. 215 (1918) was cited as still authoritative and the California CATV case, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1954), was distinguished on the basis of the public dissemination involved therein. Plaintiff owned no copyright in the selections comprising his transmissions.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

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1967 committee reports to be presented at the annual meeting to be held August 5-9, 1967, Honolulu, Hawaii. Editor: Edward C. Vandenburg. Chicago, American Bar Center [1967]. 210 p.

Includes reports of Copyright Division committees dealing with copyright legislation, international copyright treaties and laws, Copyright Office affairs, program for revision of the copyright law, program of protection of industrial designs, neighboring rights, authors, and government relations to copyrights.

36. GEORGE WASHINGTON UNIVERSITY. *Patent, Trademark, and Copyright Research Institute.*

The "C" in the circle; copyright—what is it? [Washington, 1967] 12 p. (Booklet 1 in a series on copyrights addressed to young people.)

An illustrated booklet which describes briefly the history, purposes, and procedures concerning copyright in the United States.

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gress, 1st Session) [providing for a compulsory license for making and distributing copies].

2. Foreign Publications

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disregard of truth in right to privacy actions. (18 *Syracuse Law Review* 661-666, no. 3, Spring 1967.)

A case note on *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

42. AUSLANDER, M. ARTHUR. Extending copyright law to designs urged. (158 *New York Law Journal* 4, cols. 4-5, no. 3, July 6, 1967.)

In a letter to the editor, the writer attempts to make a case for copyright protection to be extended "to styling, such as clothing and 'creative works,' which may be aimed as commercial end-products."

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45. BELL, T. KNOX. Industrial espionage: piracy of secret scientific and technical information. (14 *UCLA Law Review* 911-934, no. 3, Mar. 1967.)

"This comment will examine the present laws which protect secret scientific and technical information, will analyze their adequacy in light of the development of modern espionage devices, and will present alternative legal treatments for providing protection."

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A note on *United Artists Television, Inc. v. Fortnightly Corp.*, 225 F. Supp. 177, 13 BULL. CR. SOC. 306, Item 347 (S.D.N.Y. 1966).

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52. International law — European Convention on Human Rights — Commission decides to consider Dutch copyright decision challenged on freedom of expression grounds — *N. V. Televisier v. The Netherlands*, Council of Europe Doc. No. 5097 (No. 2690/65) (Dec. 15, 1966). (80 *Harvard Law Review* 1798-1805, no. 8, June 1967.)

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A case is made for the proposition that any unauthorized duplication of portions of copyrighted works by a legal information retrieval system should be considered an infringement.

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fourth prize in the national competition, which analyzes the copyright problems created by a new device consisting of a metal disk now in an advanced stage of development, "that reproduces motion pictures through a television set in much the same manner as a long-playing record reproduces music through a high fidelity phonograph." Both the present copyright act and the proposed bill are described as "inadequate to meet the copyright problems caused by the advancing technology in the production of motion pictures."

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A note which concludes that although the bill "makes a significant advance over the present law," it is deficient in that it does not provide a performance right in sound recordings. The writer states that the following changes in the bill appear warranted:

(1) Sound recordings should be accorded a right of public performance, limited to the right to receive remuneration for commercial use of the recording.

(2) The bill should state explicitly that the producer of a sound recording is the author, as an employer for hire.

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1. English

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Reports of the session which was convened at the request of the Director of BIRPI and "was motivated by the urgent necessity for the Director of BIRPI to have the advice of the Committee on the attitude to be adopted towards the problems posed by the possibility of a revision of the Universal Copyright Convention, which would affect in particular the conditions governing the appli-

cation of Article XVII of that Convention and of the Appendix Declaration thereto (the so-called Berne Union safeguard clause), as envisaged in Resolution No. 5122 passed by the General Conference of Unesco at its 14th session (October 25 to November 30 (1966))." The list of participants and texts of pertinent documents are appended.

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66. MUMMERY, JOHN. Copyright in letters. (117 *The New Law Journal* 485-486, no. 5284, May 4, 1967.)

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78. DITTRICH, ROBERT. Der Stand des österreichischen Urheberrechts im Lichte der neueren Rechtsprechung. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 231-240, no. 5, May 1967.)

The original German text of a survey, principally of judicial developments in Austrian copyright law since 1962, previously published in 2 *Copyright* 188-197, no. 7, July 1966, under the title, "Letter from Austria." See 14 BULL. CR. SOC. 110, Item 45 (1966).

79. FELLHAUER, H., and E. WINKLBAUER. Die Stockholmer Diplomaten-Konferenz und die Pläne zur Umgestaltung des internationalen Systems zum Schutze des geistigen Eigentums. (16 *Der Neuerer* 144-147, no. 3, 1967; 196-198, no. 4, 1967.)

The Stockholm Conference and the proposals for reorganizing the administrative structure of the Berne and Paris Unions are examined from the socialist point of view.

80. Intellectual Property Conference of Stockholm, 1967. Vorbereitende Dokumente zur Stockholmer Konferenz für geistiges Eigentum, 1967. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 115-189, Sonderheft, Spring 1967.)

German translation of the following preparatory documents for the Stockholm Conference: S/1 (Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20)); S/2 (Proposal for Amending Article 4 of the Paris Convention); and S/9 [abridged] (Proposals for revising the administrative structure of the Paris and Berne Unions).

81. LEINVEBER, GERHARD. Grundfragen des Rechts am eigenen Bild; eine grundsätzliche Stellungnahme zu der jüngsten höchstrichterlichen Rechtsprechung über den Bildnisschutz. (69 *Gewerblicher Rechtsschutz und Urheberrecht* 236-240, no. 5, May 1967.)

Comments on the latest West German Supreme Court opinions dealing with legal rights in portraits.

6. Italian

82. RONGA, GIULIO. Protezione dell'opera scientifica e dei suoi risultati. (38 *Il Diritto di Autore* 1-15, no. 1, Jan.-Mar. 1967.)

A study of the problems concerning the protection of rights in scientific discoveries.

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83. SGROI, VITTORIO. Facoltà del produttore del film in materia di modifiche necessarie per l'adattamento cinematografico. (38 *Il Diritto di Autore* 16-31, no. 1, Jan.-Mar. 1967.)

An article dealing with the right of a producer, under the Italian copyright statute, to make such modifications in works used for motion pictures as are necessary for their adaptation to the screen.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

84. CATV market impact object of study; broadcasters — CATV meeting seeks city to research effect of signal imports and program origination. (73 *Broadcasting* 27, 30, no. 4, July 24, 1967.)

An article on a meeting in Washington on July 19 attended by a number of broadcasters and CATV operators. "Those . . . attending the meeting . . . [came] to agreement on some of the major issues separating the broadcaster and CATV points of view: broadcasters exclusivity of rights; CATV program origination; CATV bringing in distant signals, and other program-carriage problems relating to copyright."

85. DUGGAN, MICHAEL A. Law, logic, and the computer; bibliography with assorted background material. Bibliography 13. (Supplement A to Bibliography (Mar.-Apr. 1967), pp. 171-188.)

"This bibliography together with its predecessor [*CR* 7, 1 (Jan.-Feb. 1966) 95-117], represents an effort to cumulate most of the writings on relations between the Law and Computing." See 14 *BULL. CR. SOC.* 345, Item 238 (1967.)

PART I.

ARTICLES

86. "DEVELOPING COUNTRIES"—*A Definitional Exercise*

By ELEANOR D. O'HARA*

During the past year the developing countries stole the scene in international copyright affairs. Several significant developments have focused the attention of the international copyright community upon the requirements of smaller and newer countries and upon methods of meeting these needs within the framework of existing multilateral conventions. The key developments included:

1. *The UNESCO resolution*: a 1966 resolution of UNESCO's General Conference¹ that asked the Director-General of UNESCO to take steps leading to the possible revision of the Universal Copyright Convention² in certain ways that would make it easier for developing countries to accede.

2. *The UNESCO questionnaire*: a questionnaire to UCC member states on the advisability of modifying Article XVII and its Appendix

* Adviser, Office of the Register, U.S. Copyright Office. The views expressed in this article are those of the author and do not necessarily reflect official positions of The Copyright Office or of The Library of Congress.

1. Resolution 5.122, 14th General Conference of UNESCO (Oct.-Nov. 1966).
2. The Universal Copyright Convention, which was signed in 1952 and came into force in 1955, was basically intended as a low common denominator for copyright protection throughout the entire world. Since one of its fundamental purposes was to enable developing countries to enter into multilateral copyright relations on terms they could accept, its few minimum requirements (as to the duration of copyright, formalities, and translation rights) were tailored to the needs not only of the United States but also of the newly-independent states not yet members of the Berne Union. The 1966 UNESCO resolution is worded broadly enough to permit examination of revisions that would reduce the minimum requirements of the UCC still further, although its immediate purpose was undoubtedly to seek removal of the "safeguard clause" preventing Berne Union members from denouncing their obligations under Berne and relying on the UCC with respect to other Berne members. See note 3, *infra*.

Declaration, the "safeguard clause."³ The proposed modification would permit developing countries to denounce the Berne Convention for the Protection of Literary and Artistic Works and to rely solely on the Universal Copyright Convention in their international copyright relations. Replies to this questionnaire are now due on March 1, 1968.

3. *The Stockholm Protocol*: adoption in July, 1967, of the Stockholm Protocol Regarding Developing Countries⁴ that would enable less-developed states invoking its benefits to fulfill their responsibilities as members of the Berne Union by affording lower protection than that required of developed country members.

4. *The Berne questionnaire*: the decision of the Permanent Committee of the Berne Union at its December, 1967 meeting⁵ to circulate a questionnaire to member states to discover which developed states plan to accept the Protocol and how they will implement it, and which developing nations plan to avail themselves of its reservations.

5. *Proposals for complete UCC revision*: the discussion of a full UCC revision to provide an even lower level of protection by developing countries at the recent meeting of the Intergovernmental Copyright Committee.⁶

6. *Resolution favoring joint study group*: the resolution⁷ adopted at the joint session of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union to set up a joint study group to consider the overall problems presented by the multilateral

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3. So-named because it preserves copyright relations under the Berne Convention among its members who belonged to the Union on January 1, 1951 or who joined later. See Mott, "The Relationship between the Berne Convention and the Universal Copyright Convention: Historical Background and Development of Article XVII of the UCC and its Appendix Declaration," 11 IDEA no. 5, 306-332 (Fall 1967).
 4. See Ringer, "The Stockholm Intellectual Property Conference of 1967," 14 BULL. CR. Soc. 417, 426-34 (1967); Krishnamurti, Protocol Regarding Developing Countries appended to the Stockholm Act of the Berne Convention, EBU Review (No. 106B) 59 (1967).
 5. Doc. CP/XIII/8, Resolution 1, Annex 2, Draft Report of the 13th Session, Permanent Committee, Berne Union, Dec. 12-15, 1967, Geneva.
 6. Doc. IGC/IX/9, Draft Report of the 9th Session of the Intergovernmental Copyright Committee, UCC, Dec. 12-15, 1967, Geneva.
 7. Doc. CP/XIII/9-IGC/IX/10, Resolutions No. 3 and 59 (IX), Draft Report of the Joint Meetings of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee.

copyright conventions, especially in the context of the special needs of the developing countries.⁸

All of these recent developments presuppose that developing countries will henceforth be given special treatment in international copyright and thus involve a fundamental issue: what is a "developing country"? There is obviously a growing need for research and study aimed at devising a definition of "developing countries," a functional definition based on criteria with some relevance to a country's need to provide lower levels of copyright protection. And hovering over the issue of setting such criteria, often obscuring it, is the problem of duration: how long shall these special provisions be part of international copyright relations?

The 1966 UNESCO resolution⁹ spoke of "a developing country, as defined by the Economic and Social Council Resolution 2029 (XX) of the United Nations General Assembly." As will be shown below, UN Resolution 2029 (XX) contains nothing that can be considered a real definition.¹⁰

At Stockholm last summer, Main Committee II of the Intellectual Property Conference wrestled not only with the criteria to qualify as a developing country but also with the term during which developing status would enable a country to use the special reservations in the Protocol. The experience of the Stockholm draftsmen proves instructive.

Establishing eligibility factors developed into one of the touchiest issues in the highly charged atmosphere of Committee II which produced the Stockholm Protocol. Even exploratory discussion of possible criteria embroiled the delegates in political and economic questions on which they were hesitant to express an opinion. The evident lack of instructions to some delegates from their governments on this question probably resulted from the preparatory work for the Stockholm Conference. That preparatory work must be explored if the Stockholm debates are to be fully understood.

The Preparatory Phases

In 1964 a Study Group, composed of representatives of the Government of Sweden and of the United International Bureau for the Protection of Intellectual Property (BIRPI), made a second report on sug-

8. An article on the December meetings in Geneva by Barbara A. Ringer, Assistant Register of Copyrights, will be published in a coming issue of the BULLETIN.
9. See note 1 *supra*.
10. See note 67 *infra* and text thereto. Excerpts from the resolution appear in Annex Four.

gested changes in the Berne Convention. This report recommended insertion of a new article that would permit developing countries to provide a lower level of protection. No definition of developing countries was suggested because of the difficulty of agreeing on criteria:

The Study Group thought it desirable that the new provisions should operate only for the benefit of developing countries. It found it difficult, however, to establish criteria suitable for defining objectively the countries coming within this category. It consequently proposed that each country should be left free to decide whether its stage of development allowed it to take advantage of the right of reservation.¹¹

The following language was recommended:

Article 25 *bis*

(1) Any country which desires to accede to this Convention but which, with regard to its economic situation and its social needs, does not consider itself immediately in a position to make provision for the protection of all the rights forming the object of this Convention . . .¹²

When a Committee of Governmental Experts considered these recommendations in 1965, six developing countries submitted an amendment aimed at broadening this self-administering test:

Any country of the Union may, having regard to its economic, *scientific*, social and *cultural* needs, declare at any time . . .¹³

The Committee of Experts stopped short of this but did broaden the factors to include "cultural needs." The Programme of the Stockholm Conference embodied the provision in Article 1 of a draft Protocol:

Any developing country which ratifies this Convention or accedes to it and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided in the Act . . .¹⁴

11. Doc. S/1 at 68, Intellectual Property Conference of Stockholm, 1967. Hereinafter Stockholm documents will be merely cited by number.

12. *Id.* at 67.

13. *Id.* at 69 (emphasis added).

14. *Id.* at 95.

The developing countries appeared to be satisfied with this formula, and made no suggestions for changes in the procedure or criteria in their proposals for Protocol amendments submitted at the Conference.¹⁵

However, as will be explained below, several developed countries urged the need for some sort of criteria of eligibility. It is also important to realize that, throughout the preparatory work, there was an assumption that some terminal date, at latest the date of the entry into force of the revision act following that of Stockholm, would be placed on the reservations allowed. As long as the reservations were not open-ended, the need for a precise definition of "developing countries" was of somewhat less importance.

During the review by the 1965 Committee of Experts, a suggestion that the Permanent Committee of the Berne Union should be given authority to decide which countries could make the reservations was rejected "in view of the legal and practical difficulties involved."¹⁶ Or, in rough translation, the Permanent Committee should not be delegated such a politically explosive function.

Thus, at the end of the preparatory phase, a certain amount of preliminary agreement had been reached on several related issues:

1) Each country which considered itself developing could invoke the reservations by notifying the Director of BIRPI as the country ratified or acceded to the Stockholm Act.

2) The reservations could be maintained until the next revision of the Berne Convention entered into force.

3) No objective criteria would be formulated to make a state ineligible for the reservations, but any developing country could decide not to invoke them or could later denounce them.

The Debate in Stockholm

What Main Committee II was able to accomplish on this question in ten meetings can hardly be surprising when several expert bodies had been unable to forge a workable solution in three years.

Interest in setting criteria continued to exist, as the governmental comments on the revision proposals made clear.¹⁷ Both France and the United Kingdom had drafted amendatory language¹⁸ that was later

15. S/160.

16. S/1 at 70.

17. S/13; S/17.

18. S/13 at 28 and 103.

formally introduced for Committee discussion.¹⁹ Italy urged “the adoption of objective criteria” for “uniformly determining the countries entitled to the benefit of the reservations stipulated in the Protocol.”²⁰ Israel, however, observed that it did “not believe it to be a shortcoming or otherwise disadvantageous that the term ‘developing countries’ has itself been left undefined.” The Israeli government felt that, “since the term expresses an essentially relative concept, it defies definition in advance and may be best left to pragmatic interpretation.”²¹ Bulgaria argued that the reservations under the Protocol should be open to all countries, and that the word “developing” should be deleted.²²

During the first Committee session, the delegates of France, Ireland, and Hungary, and the observer representing UNESCO supported the adoption of definitional criteria.²³ General discussion was deferred until the fifth meeting, however, when the Director of BIRPI observed that the formulation was “a difficult matter” that depended on the content of the Protocol and should accordingly be delayed while the substantive provisions were being discussed.²⁴

Proposals Submitted to the Committee

When the Committee returned to the question of criteria,²⁵ three proposals to amend the preamble’s language had been circulated:

United Kingdom: “Substitute any developing country which, having regard to the state of its cultural and economic needs does not consider it is in a position

19. S/149 (United Kingdom) and S/176 (France).

20. S/13 at 65.

21. *Id.* at 62. On the other hand, it can be argued that “pragmatic interpretation,” if undertaken without objective standards, would run directly counter to the recommendations of the 1965 Committee of Governmental Experts which refused to lodge such authority in the Permanent Committee (*supra*, note 16).

22. S/17 at 4.

23. S/II/PV/No. 1 at 7, 14, 15 and 18 respectively. Mr. Saba, the UNESCO observer, in discussing the proposed revisions in the Universal Copyright Convention, asserted that developing countries would be “defined according to a precise criterion,” and would be limited to states on “a list established by the Economic and Social Council.” Mr. Saba quoted the proposed amendment (*id.* at 17) as referring to “a developing country, as defined by the Economic and Social Council (Resolution 2029 [XX] of the General Assembly of the United Nations).” The cited resolution contains neither list nor definition; see note 67 *infra* and Annex Four.

24. S/II/PV/No. 2 at 2.

25. S/II/PV/No. 5.

to make provision for the protection of all rights provided for in this Act, *may, with the prior agreement of the Executive Committee of the Berne Union . . .*"²⁶

France: "Any developing country *which, as an independent and sovereign State, has acceded to the Union or has confirmed its accession thereto since June 26, 1948, may . . .*"²⁷

Greece: "Greece considers that recognition of the right to invoke the Protocol should be accorded at the request of an interested country after the decision of an organ of the future IPO or, should that Organization not be established, of a specially established organ of the Berne Convention. To ensure the independence of that organ, the latter might possibly consist of experts coming in part from the judiciaries of Member States and enjoying a certain permanence."²⁸

The representative of Israel objected to any definitional language "which did not leave it to the country to decide whether or not it was developing."²⁹ Tunisia also balked at the idea of the Conference defining "developing country" and supported the language in the draft Protocol.³⁰ The Democratic Republic of the Congo (Kinshasa) and Senegal also resisted the moves toward drafting a definition embodying objective factors that would connote underdevelopment.

Mr. Krishnamurti of India supported the draft text of the preamble and felt that neither the U.K. nor the French amendment improved it. "The criterion used in UNESCO," he noted, "was that those countries which produced less than a certain number of books and had fewer cinema seats and newspapers per thousand of population were developing countries."³¹ In a similar vein, the Italian delegate suggested

26. S/149 (emphasis added).

27. S/176 (emphasis added).

28. S/181.

29. S/II/PV/No. 5 at 5.

30. *Id.* at 6. The Tunisian delegate referred to a list of developing countries which the UN had established and which UNESCO purportedly included in resolution 5.122 (*supra* note 1). However, the UNESCO Resolution did not incorporate a list (*supra* note 23).

31. *Id.* at 8.

that "literacy and school attendance might provide a practical and ethically satisfying approach" and offered to supply data on both.³²

Czechoslovakia attacked the British scheme: since until now the developing countries have been a minority in Berne, "it is difficult to have confidence in the Permanent Committee without knowing its composition in advance."³³ The Ivory Coast, Gabon, Turkey, Madagascar, Tunisia, and Morocco joined in opposing the U.K. amendment. Put to a vote, it was rejected, 15 votes to 5, with 10 abstentions.³⁴

Finally, the question of developing criteria was referred to a Working Group chaired by Ireland and including Brazil, Congo (Kinshasa), Czechoslovakia, France, India, Italy, Ivory Coast, Senegal, Sweden, Tunisia and the United Kingdom.

The Working Group's Recommendations

Demonstrating that conflict often produces innovation rather than compromise, the Working Group rejected all the methods that had been suggested³⁵ and after one hour³⁶ it unanimously proposed that the preamble of Article 1 be amended to read:

Any developing country mentioned in the list of developing countries annexed to Resolution 1897 (XVIII) adopted by the General Assembly of the United Nations at its Eighteenth Session on November 13, 1963, or which has been or may be subsequently designated as a developing country by the General Assembly of the United Nations and which ratifies or accedes to the Act . . .³⁷

32. *Id.* Italy formally submitted its suggestion in S/213: "After the words: 'Any developing country which ratifies or accedes to the Act to which this Protocol is annexed and which, having regard to its economic situation and its social or cultural needs . . . ' Add: '1. in the light, with respect to the latter, of the percentage of illiteracy and the rate of school attendance,' or possibly '2. the latter conjoint with the objective situation of education, etc. (BIRPI draft).'"

33. S/II/PV/No. 5 at 9.

34. *Id.* at 11.

35. After the fifth meeting, Brazil suggested that the Committee: "Maintain unaltered the present wording of Article 1 . . . and stress the idea that the term *any* includes the less developed countries that are already members of the Berne Union and those that may subsequently accede to it." (S/219)

36. S/224 at 1, 2.

37. S/224 at 2. The text of the UN resolution is reproduced in Annex One. The list of countries appended are those member states of the UN in 1963 that subscribed to the joint declaration of developing countries on goals to be achieved at the coming UN Conference on Trade and Development (1964).

The report indicated that unanimity was reached "on the understanding that the Protocol might also be invoked by other countries which had been or would be subsequently designated as developing countries by the General Assembly of the United Nations."³⁸ Before this proposal was discussed by the full Committee, the Ivory Coast submitted addenda to the list in Resolution 1897: Botswana, Gambia, Ivory Coast, Kenya, Lesotho, Malawi and Zambia.³⁹

Committee Action and Reaction

To any student of organization procedure, the action on criteria during the seventh meeting of Committee II must seem a parliamentary curiosity. Some of the undertones can be interpreted only in light of the Committee's action on the related issue of duration of the reservations. At the preceding meeting, the Committee had decided not to accept the formula whereby reservations ceased to be effective when the next Act came into force. The developing countries' language⁴⁰ was substituted permitting the reservations to be maintained until the developing country in question acceded to the Act adopted by the next Revision conference.⁴¹ In short, the reservations could now be perpetual if a country remained "developing."⁴²

The issue of a definition now assumed much greater significance. Some method was needed to indicate when a country no longer was entitled to the reservations, or, as The Netherlands observed:

[T]he Berne Union would always have two kinds of members: those who gave the protection normally provided under the Berne Union, and those who availed themselves of exceptions and would continue to do so even after they had become sufficiently developed economically, socially and culturally, to assume the obligations of the Berne Union.⁴³

The Netherlands opened consideration of the Working Group's solution by asking what a country's status under Berne would be if the

38. *Id.*

39. S/234.

40. S/160.

41. S/II/PV/No. 6 at 8.

42. It should be noted that the developing countries in urging this amendment sought to make the Protocol conform to the Berne tradition whereby each state member is entitled to maintain a reservation for the term it deems necessary.

43. S/II/PV/No. 7 at 6.

United Nations removed it from the developing country list. The Netherlands recommended that such UN action should disqualify a Berne member from maintaining the reservations. Ireland suggested that future UN action should govern the list's composition and that such a reference should be incorporated in the text; France and Tunisia agreed.

Israel opposed the use of the list appended to UN resolution 1897 (XVIII) because it "was based on a political criterion and had nothing to do with the question of copyright."⁴⁴ Israel would, however, support the recommendation, as modified by Ireland, "provided that all the countries regarded as developing countries by the United Nations Conference on Trade and Development (UNCTAD) were also included in it."⁴⁵ Although India supported this interpretation of "UN list," Brazil objected on the grounds that "the United Nations list was based on a very broad definition, whereas the UNCTAD list was based on considerations relating solely to trade."⁴⁶ Israel's proposal was accordingly rejected, 9 votes to 2, with 25 abstentions.⁴⁷

Both the Netherlands and Israeli moves were less interesting than the activities of members of the "unanimous" Working Group. Senegal, Tunisia and India indicated that the UN list should not be considered exhaustive or mandatory.⁴⁸ Ireland, which had chaired the group, felt

44. S/II/PV/No. 7 at 3. The Israeli delegate later made it clear that his objection to the UN 1963 list was in making it the sole criterion of eligibility. *Id.* at 5.

45. *Id.* at 7. The Chairman erroneously noted that Israel appeared on the UNCTAD list. *See* Annex Two.

46. *Id.* at 8. The Director pointed out that the UNCTAD list had been discussed and rejected in the Working Group because of "the difference in the criteria used when drawing up the United Nations and the UNCTAD lists, as just pointed out by the Delegate of Brazil." *Id.* As Annex One shows, however, the United Nations resolution was that approving the declaration of developing member states concerning their goals at the first UNCTAD session. The UNCTAD list is also based on self-designation, consisting of the 77 members who adopted another declaration following the 1964 meeting and 9 states which have subsequently signed the declaration. *See* Annex Two. Neither list was drawn up by the United Nations nor by the Trade Conference; both sets of voluntary signatures were elicited in relation to trade goals of developing countries.

47. Despite the fact that it really updated the 1963 list in the Appendix to the UN Assembly's resolution, as the preceding note demonstrates. Part of the political atmosphere at Stockholm resulted from the fact that the Conference started while the Arab-Israeli war was still in progress.

48. India, for example, suggested "If anyone had doubts on legal grounds, the text could be amended to refer to countries designated by the Conference, in addition to countries in the United Nations list." S/II/PV/No. 7 at 5.

that for Berne purposes "it might be better to draw up a list based on the current United Nations list, but without any indication of its derivation, with the addition of any names that were required."⁴⁹ France, abandoning its earlier attempt to bar current Berne members from qualifying, suggested that the Committee draw up lists of present and possible future members who would be eligible. Alternatively, France favored ad hoc decisions by a committee on which developed and developing countries had equal representation.⁵⁰

These new proposals received little critical attention. The Chair put to the vote:

. . . the text proposed by the Working Group . . . , with the addition of a reference to the countries listed in the amendment submitted by the Delegation of the Ivory Coast . . . and the inclusion of wording to the effect that any country declared by the United Nations General Assembly as being no longer a developing country would not be entitled to avail itself of the Protocol.⁵¹

The Committee accepted this compromise language, 29 votes to 1 with 7 abstentions. Then Israel, the lone negative vote, played its trump, announcing that it would be forced to veto⁵² the measure in the Berne Plenary. At the suggestion of the Chairman of Committee II, who was head of the Indian delegation, the Director of BIRPI was asked to try to negotiate an acceptable text.

Compromise Proposals

On July 3, the Director submitted his recommendations:

Article 1

Any developing country mentioned in the list of developing countries annexed to Resolution 1897 (XVIII) adopted by the General Assembly of the United Nations and which is reproduced in Annex I to this Protocol, or in the list figuring in Annex II to this Protocol, or which has been or may be subsequently designated as a developing country by the General Assembly of the United Nations and which ratifies or accedes to the Act to which this Protocol is annexed

49. *Id.* at 6.

50. *Id.* at 4-5.

51. *Id.* at 8.

52. Revisions in the Berne Convention must be accepted unanimously.

and which, having regard to its economic situation and its social, or cultural, needs does not consider itself . . .

Article 4

Any country which, according to a decision of the General Assembly of the United Nations ceases to be considered as a developing country, shall no longer be entitled to avail itself of the reservations provided for by this Protocol . . .⁵³

The next day, the four Scandinavian delegations proposed that the eligibility language read:

Any country designated as a developing country under the established practice of the General Assembly of the United Nations and which ratifies or accedes to this Act . . .⁵⁴

Thorvald Hesser of Sweden presented the Nordic suggestion to the Committee and explained why the delegations felt that the Director's language was unfeasible:

The list reproduced in Annex I to the Draft Protocol was based on a United Nations resolution which was four years old; furthermore, the list of new countries given in Annex II was not comprehensive. In any case, the Conference was not competent to decide what countries should be treated as developing countries. It might be some years before a further resolution on the subject was adopted by the General Assembly of the United Nations; in the meantime, new developing countries would be debarred from the benefits of the Protocol. A more flexible year-to-year formula was necessary. The Nordic delegations regarded that need as being met by the words "established practice," since the United Nations had to determine regularly *which countries were to benefit from economic aid or from relaxations of the obligation to pay contributions*.⁵⁵

This proposal, with a slight technical amendment,⁵⁶ was adopted 17 votes to 7 with 11 abstentions. Although concern had been expressed

53. S/249.

54. S/253.

55. S/II/PV/No. 9 at 7 (emphasis added).

56. "Regarded" was substituted for "designated."

during the debate⁵⁷ over the status of newly-independent states prior to UN action, no special mechanism was incorporated.

Mr. Sher of Israel praised the formula finally agreed upon; as:

. . . the best possible one in the circumstances. Since 1963 there had been four United Nations General Assembly resolutions which, instead of determining which were developing countries, defined the countries which were not . . . the remainder — at present 96 countries — were developing countries. *Those resolutions were adopted from year to year because they dealt with contributions.*⁵⁸

When the Committee voted, then, two indicators were presumably intended to be consulted in deciding if a country was "developing": (1) Did it receive economic assistance? or (2) Did it qualify for reduced assessments for UN expenses? Yet the Committee's draft report failed to reflect the second factor:

A joint proposal of the Delegations of Denmark, Finland, Norway, and Sweden submitted in document S/253 stipulated that a developing country would be considered to be any country designated as such under the established practice of the General Assembly of the United Nations, it being understood that the term "established practice" implied that the country concerned receives assistance from the United Nations or its Specialized Agencies such as UNESCO.⁵⁹

Moreover, the report finally approved by the Committee not only omits any mention of the countries given lower assessment rates but seems to preclude reference to this annual UN resolution:

. . . it being understood that the term "established practice" implies that the country concerned receives *assistance from the United Na-*

57. By Senegal, the Ivory Coast, and Czechoslovakia.

58. S/II/PV/No. 9 at 9 (emphasis added). The following UN resolution is typical:

"*Decides* that, for the purpose of this resolution [peace-keeping expenses], 'economically less developed countries' shall mean all Member States except Australia, Austria, Belgium, Byelorussian SSR, Canada, Czechoslovakia, Denmark, Finland, France, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Romania, South Africa, Sweden, Ukrainian SSR, USSR, United Kingdom, and the United States of America." (Fourth Special Session, 1963).

59. S/270 at 3.

tions Development Programme through the United Nations or its Specialized Agencies.⁶⁰

Criteria Adopted At Stockholm

Thus, Article 1 of the Stockholm Protocol Regarding Developing Countries enables “[a]ny country regarded as developing in conformity with the established practice of the General Assembly of the United Nations⁶¹ to avail itself of the reservations therein on acceding to or ratifying the Stockholm Act. “Established practice” is to be interpreted as implying “that the country concerned receives assistance from the United Nations Development Programme through the United Nations or its Specialized Agencies.”⁶²

The procedures to be followed were outlined by the Director of the Berne Union after the Committee adopted its formula:

. . . the Director General of the Organization would be responsible for deciding whether a country notifying [sic] itself as a developing country could be so regarded in conformity with the established practice of the United Nations General Assembly. When in doubt, he would, of course, consult the United Nations Secretariat and, if necessary, inform the country in question that in his opinion it could not be accepted as a developing country in accordance with the practice of the United Nations General Assembly and of the Berne Union. The Berne Union, to which the Director General would have to report would make the final decision.⁶³

The question of duration had been resolved by adopting a provision similar to that recommended by the Director⁶⁴ but modified by the addition of a grace period to enable a country no longer qualifying to retool its legislation:

Article 4

If, in conformity with the established practice of the General Assembly of the United Nations, a country should cease to be regarded

60. S/270 Rev. 2 (emphasis added). The italicized language was added at the final session at the instance of the Brazilian delegate with the approval of the Committee.

61. Berne Convention for the Protection of Literary and Artistic works, as revised at Stockholm, July 14, 1967: Protocol Regarding Developing Countries.

62. S/301 at 2.

63. S/II/PV/No. 10 at 10.

64. S/249, Article 4.

as a developing country, the Director General shall give notification of such cessation to the country concerned and to all of the other countries of the Union. At the expiry of a period of six years from the date of such notification, the said country shall no longer have the right to maintain any of the reservations under this Protocol.⁶⁵

In practice, then, the Stockholm system is intended to work as follows:

1) A country that ratifies or accedes to the Stockholm Act would notify the Director General that it avails itself of the reservations for developing countries.

2) The Director General would decide whether the country qualifies, presumably by consulting the current aid list of the UN Development Programme or the UN Secretariat in doubtful cases.

3) The Director General would either accept the country or reject it. In the case of rejection, the situation is most unclear. Could the country ignore the rejection unless there is action by the Berne Union? How would the Berne Union act in this situation: through its Permanent Committee or only through a Plenary Conference? Assuming the country is finally rejected as "developing," what effect would this have on its ratification of or accession to the Berne Convention itself?

4) If the UN decided that a country no longer qualified as developing, the Director General would inform that state and all Berne members and the Protocol's benefits would cease six years later.

5) A country that originally qualified could maintain the reservations until it ratified or acceded to the Act adopted by the next revision conference (if it so chose) so long as the UN's "established practice" treats it as developing.

The Stockholm Formula, Six Months Later

Annex Three sets out a composite of the most recent available aid lists of the UN Development Programme (UNDP). A quick skimming yields some recipients that are not normally considered developing.⁶⁶

65. Stockholm Protocol, *supra* note 61.

66. E.g. Czechoslovakia, Hungary, Iceland, Ireland, Israel (which disclaimed the status for copyright purposes at Stockholm), Japan, Poland, and Romania. All of these countries would have been disqualified by the UN assessments resolutions, *supra* note 58.

A phone call to UN headquarters explains that the UNDP is not required to limit the assistance programs it approves to "developing countries." In theory a project submitted by one of the major powers could be approved;⁶⁷ indeed, projects for the dependent territories of developed countries are funded.⁶⁸

In theory any country could secure UNDP aid if a project proposal is submitted that seems reasonably designed to assist it in solving a national economic, social or cultural problem.⁶⁹ Conversely, a country can also fail to have a project funded, and its failure can have nothing whatever to do with whether it is or is not in the "developing" class. The well-known shortage of multilateral aid funds leads to careful project choices, decisions that are related as much to the purposes and chances for success of the proposal as to the country's overall need.

The list in Annex Three is not only a composite compiled from various sources, but it is also out of date. Since the Development Programme coordinates the aid of Specialized Agencies and UN organs with a variety of reporting dates, a time lag seems to be inevitable.

These factors seem almost certain to create problems under the Stockholm Protocol. What happens, *vis-a-vis* the Berne Convention, if the UNDP Governing Council fails to approve a project for a developing country in 1970, when the country ratified Berne and invoked the Protocol in 1968? Does Article 4 automatically apply and require the Director to notify the country it no longer qualifies for the reservations? If so, what is the country's status when a UNDP project is approved in 1971? Does its right to the reservations return, or is it disqualified? And when will anyone be able to tell?

67. UN Resolution 2029 (XX) created the UNDP by merging the existing Special Fund and the Expanded Programme of Technical Assistance (that is, the coordinated assistance projects of the United Nations and of the Specialized Agencies). It fails to define "developing" country; the only definitional language would seem to be in its Annex, paragraph 1 (a) — "developing countries of Africa, Asia and Latin America and to Yugoslavia" — used to describe which countries qualified for the seats on the Governing Council reserved to developing countries. This Annex determines that UNDP projects will be approved by a nearly balanced Governing Council in which 19 seats are allocated to developing and 17 to developed countries with a single seat filled on geographical rotation. See Annex Four.

68. Antilles and Surinam (Netherlands), French Antilles and French Somaliland, Solomon Islands Protectorate, Fiji, Federation of South Arabia and Swaziland (United Kingdom). This is unimportant in Berne since the U.K. won an amendment which enables members to invoke the Protocol for dependent territories.

69. Pragmatically submission of a project by a fully developed country or its approval would be unlikely.

The Stockholm activity thus produced a list that must be compiled from a variety of sources; a list that includes states in various intermediate stages of development; a list that will fluctuate annually; and a list that is perpetually out of date. It stands as one more complication in the already confused field of multilateral copyright relations.

A Lesson Alice Didn't Learn

Then you should say what you mean.
the March Hare went on.

I do, Alice hastily replied; at least
— at least I mean what I say — that's
the same thing you know.⁷⁰

Few of the participants in this search for criteria seem to have been able to analyze what they mean completely, and none of them were able to say it clearly. Stockholm is obviously not the end of the search, and if distinctions between developed and developing countries are to be made in future international copyright arrangements, a better formula must be sought.

When the term "criterion" is bandied about in discussing the meaning of "developing country," at least three factors are being juggled:

Who?
How long?
What next?

It seems possible that if "how long" and "what next" are resolved, "who" can be permitted to sink into the relative unimportance that characterized it during the preparatory work before Stockholm.

At that stage, the preparatory groups felt they had resolved those two crucial questions: the reservations could only extend until the next revision of the Convention came into force and at that time members who had invoked them would either be fully bound by the Stockholm Act or would have to ratify the next revision. When these safeguards were removed in Stockholm, "who" became all-important again. And regrettably, all-inclusive.

To be realistic, any lowering of protection to aid development should take into account a variety of factors, including:

- 1) What reservations particularly aid development?
- 2) How do they aid it?
- 3) How can advancements be objectively measured?

70. Lewis Carroll, *Alice in Wonderland*, p. 7.

4) How much of a reservation can be relinquished when some advancement is made?

Interestingly enough, Stockholm suggested several systems which could prove valid in the copyright context; they were introduced, briefly discussed and rejected.

1) The United Kingdom's proposal that requests for reservations be passed on by an Executive Committee was objected to because developing countries would be in a minority position. The French suggestion that the Committee be balanced between developing and developed states was ignored.⁷¹

2) The Indian delegate implied that UNESCO criteria — number of books produced, newspapers and cinema seats per capita — might be considered, but this idea was not pursued.

3) The Italian recommendation that rates of illiteracy and school attendance should govern was by-passed by the Working Group.

The Indian and Italian ideas seem particularly pertinent because they stress objective factors that are relevant to the philosophy of protecting the works of authors. What happens, however, if a nation develops economically but does not meet its citizens' desire for social and educational development? Some economic check would seem to be a necessary safeguard if either formula is pursued. Perhaps it could be as simple as a given per capita income level.

But "how long" and "what next" must also be considered in establishing criteria. It would seem that a multi-phased system could be devised with slight steps upward in level of protection to be adopted as a country makes advances. In deciding whether a country had passed from phase 1 to phase 2, a balanced committee, like that suggested by France, could be useful.

It is beyond the scope of this article to present a detailed solution to this problem, or even to outline the variety of factors that should be assessed to determine if and when a country is developing for copyright purposes. The aim has been to show that, although the formula adopted at Stockholm is unsatisfactory, some of the proposals that were brushed aside are worthy of serious consideration. Since the changes in the multilateral copyright conventions that are under discussion all require a distinction between developed and developing countries, it is not too soon to start that consideration.

71. The UNCTAD machinery employs weighted voting, adopted to ensure that its recommendations would result in trade changes, thus requiring the developed and developing states to seek practical accommodations. See note 67 *supra* for the similar composition of the UNDP.

ANNEX ONE

UNITED NATIONS GENERAL ASSEMBLY: Eighteenth Session

Resolution No. 1897 (XVIII). United Nations Conference
on Trade and Development

The General Assembly,

Recalling its resolution 1785 (XVII) of 8 December 1962 as well as Economic and Social Council resolutions 917 (XXXIV) of 3 August 1962, 944 (XXXV) of 18 April 1963 and 963 (XXXVI) of 18 July 1963,

Having considered the part of the report of the Economic and Social Council pertaining to the United Nations Conference on Trade and Development,

Noting with satisfaction that the purposes of the forthcoming United Nations Conference on Trade and Development are gaining strong support, which has been reflected during the eighteenth session of the Assembly in a general recognition of the need for thorough preparations for the Conference in order to ensure its full success,

Believing that the joint statement by representatives of the developing countries, contained in the report on the second session of the Preparatory Committee of the United Nations Conference on Trade and Development, summarizing the views, needs and aspirations of those countries with regard to the Conference, represents a well-considered basis for the examination of the problems of developing countries at the Conference and an important contribution to its deliberations,

1. *Notes with appreciation* the work already done by the Preparatory Committee of the United Nations Conference on Trade and Development at its first and second sessions and by the Secretary-General of the Conference;

2. *Welcomes* the Joint Declaration of the Developing Countries with regard to the United Nations Conference on Trade and Development, which was made at the eighteenth session of the General Assembly and which is annexed to the present resolution;

3. *Invites* the States which will participate in the United Nations Conference on Trade and Development, in dealing with the various items on the agenda and with documents and proposals contributing to the lofty aims of the Conference, to give serious consideration to the Joint Declaration of the Developing Countries.

*1256th plenary meeting,
11 November 1963.*

ANNEX

JOINT DECLARATION OF THE DEVELOPING COUNTRIES MADE AT THE EIGHTEENTH SESSION OF THE GENERAL ASSEMBLY BY THE REPRESENTATIVES OF THE FOLLOWING STATES: AFGHANISTAN, ALGERIA, ARGENTINA, BOLIVIA, BRAZIL, BURMA, BURUNDI, CAMBODIA, CAMEROON, CENTRAL AFRICAN REPUBLIC, CEYLON, CHAD, CHILE, COLOMBIA, CONGO (BRAZZAVILLE), CONGO (LEOPOLDVILLE), COSTA RICA, CYPRUS, DAHOMEY, DOMINICAN REPUBLIC, ECUADOR, EL SALVADOR, ETHIOPIA, GABON, GHANA, GUATEMALA, GUINEA, HAITI, HONDURAS, INDIA, INDONESIA, IRAN, IRAQ, JAMAICA, JORDAN, KUWAIT, LAOS, LEBANON, LIBERIA, LIBYA, MADAGASCAR, MALAYSIA, MALI, MAURITANIA, MEXICO, MOROCCO, NEPAL, NEW ZEALAND, NICARAGUA, NIGER, NIGERIA, PAKISTAN, PANAMA, PARAGUAY, PERU, PHILIPPINES, RWANDA, SAUDI ARABIA, SENEGAL, SIERRA LEONE, SOMALIA, SUDAN, SYRIA, TANGANYIKA, THAILAND, TOGO, TRINIDAD AND TOBAGO, TUNISIA, UGANDA, UNITED ARAB REPUBLIC, UPPER VOLTA, URUGUAY, VENEZUELA, YEMEN AND YUGOSLAVIA

[Footnotes and text of resolution omitted]

ANNEX TWO

UNITED NATIONS CONFERENCE ON TRADE
AND DEVELOPMENT

Countries signing Joint Declaration of Developing Countries, Geneva, 1964
("Group of 77")*

Afghanistan	Lebanon
Algeria	Liberia
Argentina	Libya
Bolivia	Madagascar
Brazil	Malaysia
Burma	Mali
Burundi	Mauritania
Cambodia	Mexico
Cameroon	Morocco
Central African Republic	Nepal
Ceylon	Nicaragua
Chad	Niger
Chile	Nigeria
Colombia	Pakistan
Congo (Brazzaville)	Panama
Congo (Democratic Republic of)	Paraguay
Costa Rica	Peru
Cyprus	Philippines
Dahomey	Rwanda
Dominican Republic	Saudi Arabia
Ecuador	Senegal
El Salvador	Sierra Leone
Ethiopia	Somalia
Gabon	Sudan
Ghana	Thailand
Guatemala	Togo
Guinea	Trinidad and Tobago
Haiti	Tunisia
Honduras	Uganda
India	United Arab Republic
Indonesia	Tanzania, United Republic of
Iran	Upper Volta
Iraq	Uruguay
Jamaica	Vietnam, Republic of
Jordan	Venezuela
Kenya	Yemen
Kuwait	Yugoslavia
Korea, Republic of	Zambia
Laos	

* As of September, 1967, there were 86 developing countries in the "Group of 77," so-named because 77 signed the original Declaration. The additional countries are: Barbados, Botswana, Gambia, Guyana, Lesotho, Malawi, Maldive Islands, Singapore and Zambia.

ANNEX THREE

UNITED NATIONS DEVELOPMENT PROGRAMME
RECIPIENT COUNTRIES AND TERRITORIES

(Composite list prepared on the basis of the following UNDP documents:
DP/SF/Reports, Series B, No. 4 (12 June 1967); DP/TA/L.4, Annex III
(28 October 1966); DP/RP/3/Add.2 (28 April 1967))

Afghanistan	Guinea
Albania	Guyana
Algeria	Haiti
Argentina	Honduras
Barbados	Hungary
Bolivia	Iceland
Botswana	India
Brazil	Indonesia
British Honduras	Iran
Bulgaria	Iraq
Burma	Ireland
Burundi	Israel
Cambodia	Ivory Coast
Cameroon	Jamaica
Central African Republic	Japan
Ceylon	Jordan
Chad	Kenya
Chile	Korea, Republic of
China	Kuwait
Colombia	Laos
Comoro Islands	Lebanon
Congo (Brazzaville)	Lesotho
Congo, Democratic Republic of	Liberia
Costa Rica	Libya
Cuba	Madagascar
Cyprus	Malawi
Czechoslovakia	Malaysia
Dahomey	Maldives Islands
Dominican Republic	Mali
Ecuador	Malta
El Salvador	Mauritania
Ethiopia	Mauritius
Fiji Islands	Mexico
French Antilles	Mongolia
French Somaliland	Morocco
Gabon	Nepal
Gambia	Netherlands Antilles
Ghana	New Guinea
Gilbert and Ellice Islands	New Hebrides
Greece	Nicaragua
Guatemala	Niger

Nigeria	Syria
Pakistan	Swaziland
Panama	Tanzania, United Republic of
Paraguay	Thailand
Peru	Togo
Philippines	Tonga Islands
Poland	Trinidad and Tobago
Romania	Tunisia
Rwanda	Turkey
Saudi Arabia	Uganda
Senegal	United Arab Republic
Seychelles Islands	Upper Volta
Sierra Leone	Uruguay
Singapore	Venezuela
Solomon Islands	Viet Nam, Republic of
Somalia	Western Samoa
South Arabia, Federation of	Yemen
Spain	Yugoslavia
Sudan	Zambia
Surinam	

(Total: 121 countries and territories)

ANNEX FOUR

UNITED NATIONS GENERAL ASSEMBLY: Twentieth Session

Resolution No. 2029 (XX). Consolidation of the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme

[Excerpts bearing on definition of "developing countries"]

The General Assembly,

Having considered the recommendation of the Economic and Social Council, in its resolution 1020 (XXXVII) of 11 August 1964, to combine the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme,

Being convinced that such a consolidation would go a long way in streamlining the activities carried on separately and jointly by the Expanded Programme of Technical Assistance and the Special Fund, would simplify organizational arrangements and procedures, would facilitate over-all planning and needed coordination of the several types of technical co-operation programmes carried on within the United Nations system of organizations and would increase their effectiveness,

Recognizing that requests for assistance on the part of the developing countries are steadily increasing in volume and in scope,

Believing that a reorganization is necessary to provide a more solid basis for the future growth and evolution of the assistance programmes of the United Nations system of organizations financed from voluntary contributions,

Being convinced that the United Nations assistance programmes are designed to support and supplement the national efforts of developing countries in solving the most important problems of their economic development, including industrial development,

* * * *

1. Decides to combine the Expanded Programme of Technical Assistance and the Special Fund in a programme to be known as the United Nations Development Programme, it being understood that the special characteristics and operations of the two programmes, as well as two separate funds, will be maintained and that, as hitherto, contributions may be pledged to the two programmes separately;

* * * *

4. Resolves that a single inter-governmental committee of thirty-seven members, to be known as the Governing Council of the United Nations Development Programme, shall be established to perform the functions previously exercised by the Governing Council of the Special Fund and the Technical Assistance Committee, including the consideration and approval of projects and programmes and the allocation of funds; in addition, it shall provide general policy guidance and direction for the United Nations Development Programme as a whole, as well as for the United Nations regular programmes of technical assist-

ance, it shall meet twice a year and shall submit reports and recommendations thereon to the Economic and Social Council for consideration by the Council at its summer session; decisions of the Governing Council shall be made by a majority of the members present and voting;

5. Requests the Economic and Social Council to elect the members of the Governing Council from among States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency, providing for equitable and balanced representation of the economically more developed countries, on the one hand, having due regard to their contribution to the United Nations Development Programme, and of the developing countries, on the other hand, taking into account the need for suitable regional representation among the latter members and in accordance with the provisions of the annex to the present resolution, the first election to take place at the first meeting of the Economic and Social Council after the adoption of this resolution;

* * * *

8. Decides that the present resolution shall come into effect on 1 January 1966 and that such action as may be required in terms of this resolution shall be taken prior to that date.

1383rd plenary meeting,
22 November 1965.

ANNEX

1. Nineteen seats on the Governing Council of the United Nations Development Programme shall be filled by developing countries and seventeen seats by economically more developed countries, subject to the following conditions:

(a) The nineteen seats allocated to developing countries of Africa, Asia and Latin America and to Yugoslavia shall be filled in the following manner: seven seats for African countries, six seats for Asian countries and six seats for Latin American countries, it being understood that agreement has been reached among the developing countries to accommodate Yugoslavia;

(b) Of the seventeen seats allocated to the economically more developed countries, fourteen shall be filled by Western European and other countries and three by Eastern European countries;

(c) Elections to these thirty-six seats shall be for a term of three years provided, however, that of the members elected at the first election the terms of twelve members shall expire at the end of the year and the terms of twelve other members at the end of two years.

2. The thirty-seventh seat shall rotate among the groups of countries mentioned in paragraph 1 above in accordance with the following nine-year cycle:

First and second years: Western European and other countries;

Third, fourth and fifth years: Eastern European countries;

Sixth year: African countries;

Seventh year: Asian countries;

Eighth year: Latin American countries;

Ninth year: Western European and other countries.

3. Retiring members shall be eligible for re-election.

87. UNLICENSED BROADCASTING FROM SHIPS ON THE HIGH SEAS: *A Challenge to Copyright Obligations*

By STEPHEN M. STEWART*

1. *The Phenomenon*

We are all familiar with many violations of the principles of copyright from plagiarism to ordinary infringements and from illegal importation to "bootlegging". In recent years a novel form has been added to the familiar list: "pirate broadcasting". Whereas the old varieties relied on lack of legislation or a lacuna in the law or an evasion of it, the new variety simply relies on the fact that the offending acts are committed on the High Seas and therefore allegedly are not contrary to any law. The "pirate radio" stations broadcast to audiences on the nearby mainland (mainly sound broadcasting but in one case TV) from ships moored outside territorial waters or from structures erected on the sea bed under the High Seas.

On land all States apply a strictly controlled system of licensing to broadcasting within their territory. The main reason for such control is of course that unlicensed transmissions would interfere with licensed broadcasting in the State concerned or in other States.¹ On the High Seas, pirate broadcasts cause interference with radio messages from ships and aircraft and may thus endanger life. Furthermore, pirate broadcasting lends itself to planned and continued evasion of copyright and, of course, income tax and other taxes.

2. *The Background*

The background of broadcasting in Western Europe against which the pirate stations came into being is one of public service broadcasting. This means that the broadcasting organizations are public corporations which are not run for profit and which are sustained either entirely by the license fees paid by the public or by these license fees supported by revenue from advertisements but such revenue amounting only to a moderate percentage of their total income. In those countries where

* Barrister-at-Law, Director General, International Federation of the Phonographic Industry, London.

1. During the heydays of pirate broadcasting in Britain, the British Government had complaints of interference from stations as far away as Italy and Czechoslovakia.

advertising is permitted, it is controlled in hourage and frequency: in other countries it is not permitted at all.²⁻³

The pirate stations, on the other hand, are financed solely by advertisements. Their programmes consist almost entirely of popular records interspersed with a disc jockey's talk.

3. *The History*

The first two "pirates" were Radio "Syd" and Radio "Mercur" in 1958, both stationed in the Oresund between Sweden and Denmark and broadcasting to Sweden and Denmark respectively. They were followed by Radio "Veronica" (1961) and Radio and TV "R.E.M." (1964) off the coast of Holland and Radio "Caroline" (1964), Radio "Atlanta", Radio "London" and others (1964 to 1966) around the coastlines of England and Scotland.⁴

The ships from which these stations were broadcasting were registered in far off countries and flying what in maritime law is called "flags of convenience". In some cases they had no registration and in some it was unknown whether they had any valid registration. The companies owning the stations were foreign companies, sometimes of unknown nationality, sometimes registered in tax havens such as Liechtenstein.⁵

-
2. In Britain, the BBC (British Broadcasting Corporation), a public service corporation, competes with a commercial profit-making corporation sustained by advertising for television, but sound broadcasting is a BBC monopoly.
 3. A curious hybrid type of broadcasting exists in France, where the RTF (Radiodiffusion-Télévision Française) has a state monopoly, but there are in existence stations outside French territory placed strategically at the four corners of France, Radio Luxembourg, Radio Monaco, Radio Andorra and Radio Europe No. 1 (in the Saar). Although outside France, they are controlled by a special authority created by French Statute, SOFIRAD (Société Financière de Radiodiffusion), which has acquired large shareholdings in these stations. Thus the French Government controls the official radio station and at the same time participates in the profits of the so-called radio périphériques. The stations périphériques are purely commercial stations relying largely on the playing of records for their programmes and it is from those stations that the format of pirate broadcasting has been derived.
 4. For a list of all pirate ships and their history and a detailed exposition of the whole problem, see N. March Hunnings, "Pirate Broadcasting in European Waters." 14 *The International and Comparative Law Quarterly* 410, part 2, April 1965. Also, Sorensen, "Pirate Broadcasting from the High Seas" — *Legal Essays (Festschrift Castberg)* p. 319.
 5. Principality on the borders of Switzerland.

4. *The Law*

a) *International Law*

As a pirate station consists of radio transmitters fixed on a ship, one must look to the international regulations governing broadcasting and telecommunications and to the law relating to the High Seas.

(i) *ITU (International Telecommunication Union) Regulations*

As the number of available wavelengths is limited, control is a necessity if constant interference and ultimate chaos is to be avoided. Such control is exercised by the ITU, which has over 100 members and covers almost the whole world. Through one of its organs, the International Frequency Registration Board, the Union allocates frequencies and the Administrative Conference of the Union issues radio regulations which are binding on all members. Regulation 6 of Article 28 (No. 962) provides: "The operation of a broadcasting service by mobile stations at sea and over the sea is prohibited". This regulation goes back to 1939 and was probably intended to safeguard communications from ship to ship or from ship to shore.

In 1959 another regulation was added, Regulation 1 of Article 7 (No. 422): "The establishment and use of broadcasting stations (sound broadcasting and television broadcasting stations) on board ships, aircraft or any other floating or airborne object outside national territories is prohibited". This was probably aimed at pirate ships, but the regulations provide no sanctions against ships or aircraft violating them. The signatory States simply undertake⁶ to enforce the regulations in their own territories and on their ships and aircraft. Thus the regulations have no "teeth" and one is thrown back on to national law.

(ii) *The Law of the High Seas*

The "Convention on the High Seas" (1958), which was adopted by the First United Nations Conference on the Law of the Seas⁷ as "generally declaratory of established principles of international law", contains provisions which are relevant here.

Article 2 declares the principle of the freedom of the High Seas under the conditions laid down in the Articles of the Convention and other rules of international law. It defines this freedom as comprising,

6. Via Article 18 of the Radio Regulations and Articles 15 and 22 of the International Telecommunication Convention (Montreux) 1965.

7. Held at Geneva, February 24 to April 27, 1958.

inter alia, the four essential freedoms: (i) freedom of navigation; (ii) freedom of fishing; (iii) freedom to lay submarine cables and pipelines; (iv) freedom to fly over the High Seas. Navigation means clearly moving from port to port or from one position on the High Sea to another. It does not mean dropping anchor whilst on the High Sea and remaining in one position for the purpose of broadcasting and it is submitted that such activities constitute an abuse of the first freedom. However, the sanctions permitted to be taken against such abuse are not clear.⁸

b) *National Law*

The legal problem of reaching the "pirate" ships by State legislation is basically one of jurisdiction. Lord Simmonds observed in the Privy Council in *Naim Molvan v. the Attorney General for Palestine*:⁹ "There is room for much discussion within what limits a State may, for the purpose of enforcing its revenue or police or sanitary law, claim to exercise jurisdiction on the sea outside the territorial water." These limits have been fixed by different countries in different ways.

1. Some countries (e.g. the United Kingdom) apply the territorial principle in its pure form, i.e., their Courts can, by and large, only hear cases of offences committed within its territorial limits, including its ships and planes, or by its citizens abroad.
2. Some countries (e.g. Germany and France) also apply the territorial principle but extend it to enable their Courts to hear cases dealing with acts committed abroad but directed against its military security or its currency regulations.
3. Other countries (e.g. the United States) extend it to acts committed abroad but producing effects on its territory (see the *Alcoa* case¹⁰ where the principle was used to enforce the anti-trust laws against non-American organizations).

5. *Possible Actions against the "Pirate" Ships*

Thus, as the law stands, it is submitted three lines of action are possible: a) to extend the national jurisdiction; b) to challenge the na-

8. See McDougall v. Burke, "The public order of the Oceans" (1962), p. 1080; Gidel, "Le Droit International Public de la Mer", Vol. 1, p. 74.

9. [1948] Appeal Cases p. 351.

10. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

tionality of the "pirate" ships and, if they fly a flag of convenience or no flag at all, bring them in to port and confiscate them; and c) to resort to joint legislative action by maritime states.

a) *Extension of National Jurisdiction*

By applying a doctrine similar to that applied by the United States courts in the *Alcoa* case, countries can extend their jurisdiction by judicial action as was done in Denmark in the case of "The Lucky Star",¹¹ and in Sweden in the case of Radio "Syd",¹² or by legislative action as the Dutch Government did in the "R.E.M." case.

In the last named case a structure had been erected on the sea bed off Noordwijk beyond the three-mile limit of Dutch territorial waters by a company called R.E.M. (Reklame Exploitatie Maatschappij) and both radio and TV transmitters installed on the structure. The structure and the company operating the station were owned by undisclosed foreign companies.

The Dutch Government passed the "North Sea Installations Act".¹³ This Act defines the installations it is dealing with as those erected on "that part of the North Sea the boundaries of which correspond with the portion of the Continental Shelf which belongs to the Netherlands" (Section 1). It does not refer specifically to broadcasting and thus can be made to cover any illegal activity (e.g. smuggling, gambling, etc.) carried out on these installations. It then provides (Sections 2 and 3) that by Order in Council any part of the Statutory Law of The Netherlands can be made applicable to these installations.¹⁴

An Order in Council was made immediately after the passing of the Bill making the Dutch broadcasting laws and certain criminal provisions applicable to the R.E.M. island installations and ten days later, police officers landed on the island, closed the station down and impounded the equipment. Neither the government of the country in which the company owning the island was registered nor any other government protested or made any claims against the Government of The Netherlands.

11. Order of Kriminalret Lyngby, August 15, 1962.

12. Redstam v. Wadner, Rådhusrätten i Lund, December 19, 1962.

13. Act of 3rd December 1964 concerning the installations on the bed of the North Sea [Staatsblad 1964 No. 447].

14. For a detailed analysis of the R.E.M. case and pirate broadcasting generally from the Dutch point of view, see H. F. van Panhuys and Menno J. van Emde Boas, 60 *American Journal of International Law* 303, No. 2 (April 1966).

b) *Challenge to Ships' Nationality*

In cases where pirate ships were challenged, they turned out to fly either a flag of convenience or no flag at all. In such cases the doctrine of the "genuine link" can be applied. This doctrine is stated in Article 5 of the *Geneva Convention on the High Seas* 1958: "Each State shall fix the conditions for the grant of its nationality to ships . . . and for the right to fly its flag . . . there must be a genuine link between the State and the ship, in particular the State must effectively exercise its jurisdiction and control . . . over ships flying its flag".

In the *Nottebohm case*¹⁵ the International Court of Justice stated the doctrine by ruling that a State's right of claim is dependent on a genuine link between the State and the individual on whose behalf the claim was made.

None of the pirate ships has any connection, let alone a "genuine link", with the country whose flag they fly. Their only "genuine link" is probably with the country to which they are broadcasting.¹⁶ It is submitted that the absence of a "genuine link" deprives the ship of diplomatic protection and renders it as vulnerable as a stateless ship.

The question what action can be taken against a stateless ship is not altogether free from doubt. In *Naim Molvan v. the Attorney General for Palestine*,¹⁷ the Privy Council took the view that "no question of comity or any breach of international law could arise if there was no State under whose flag a vessel sailed . . ." and "that a vessel not sailing under the flag of a maritime State enjoys no protection whatsoever." The Danish Government took the same view when it seized the "Lucky Star", a ship registered in Guatemala and broadcasting to Denmark, and brought it in to port. The Danish Courts upheld the Government action and issued a Confiscation Order.¹⁸ No protest or claim seems to have been made by the Government of Guatemala.

c) *Joint Legislative Action by Maritime States*

Each State, whilst limiting its jurisdiction to its own territory (including its ships and planes) and nationals, meets the problem by joining in common action in the common interest.

15. ICJ Reports 1955, 4.

16. It is significant that in the United Kingdom, the Postmaster General stated in a reply to a question in the House of Commons that Panama, on being informed that the ship "Caroline" was used for broadcasting, had withdrawn her registration. House of Commons Debates, Vol. 695, Written Answers, Column 39 of 12th May, 1964.

17. [1948] A.C. p. 351.

18. Order of Kriminalret Lyngby, August 15, 1962.

1. *The Nordic Council's recommendation and subsequent national legislation*

The Nordic Council in its meeting in Helsinki in March, 1962, recommended parallel action by the member States against pirate ships "in order to fulfil their international obligations under the ITU".¹⁹ The method they chose was to make it an offence for citizens anywhere and for non-citizens within the national territory to provide the pirate ships with supplies of all kinds including equipment, food, petrol, etc., as well as with programme material and, most important of all, to make it an offence to advertise on the stations. The underlying thought is, of course, that, starved of supplies and without advertising revenue, the stations will cease to broadcast and therefore direct action against them will not become necessary. During the same year, four Scandinavian Governments passed laws which, although not identical, deal with the problem on the same lines,²⁰ and so did the Belgian Government.²¹

The Danish Law, which goes furthest, gives jurisdiction on an extended territorial principle by subjecting to the law persons who are Scandinavian citizens or domiciled in the Scandinavian countries and to stations "directed to being received" in their territories or "interfering with reception" there.²²

The Swedish Law deals with Swedish citizens anywhere and with non-Swedish citizens if they come within the Swedish jurisdiction; the Norwegian Law with its own citizens and persons domiciled in the Scandinavian countries. The definition of the acts of collaboration anticipates the Strasbourg Agreement, which, in this respect, follows the Scandinavian laws closely. Advertising on the stations is not named as a punishable offence although it could be brought under S. 1 (5) which makes anyone an accomplice who "carries out other activities aimed at furthering the broadcasting".

Some of the stations ceased broadcasting when the laws came into force, but "Lucky Star" continued and was seized by the Danish police and taken into port. The Copenhagen County Court made an order forfeiting the ship and the equipment.²³ The persons concerned, who were all Danish citizens, were later fined in accordance with the law.²⁴

19. Recommendation No. 10 (1962) Nordiska Radet 1636.

20. Sweden, Lag 6th June 1962; Finland, Laki 20th June 1962 (No. 324); Denmark, Lov 22nd June 1962 (1/62/229/22/6); Norway, Lov 22nd June 1962 (62/1/22/6). All came into force on August 1, 1962.

21. Belgian Law of December 18, 1962, amending Law of May 14, 1930.

22. S. 7 (4) of the Danish Law (1/62/229/22/6).

23. Order of Kriminalret Lyngby, August 15, 1962.

24. State v. Kranker (Kriminalretten i Lyngby, June 4, 1963) unreported.

One of the Swedish off-shore stations, Radio "Syd", proved more obdurate. Its director, Mrs. Brit Wadner, who is a Swedish subject, was fined for an offence against S. 3 of the Swedish Law for unlawfully possessing broadcasting equipment.²⁵ She persisted and was eventually jailed.²⁶ She then transferred her activities to British off-shore broadcasting.

2. *The Council of Europe Agreement*

The Council of Europe, after lengthy debates, passed an agreement in December 1964 known as the "European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories".²⁷

The Agreement deals with broadcasting stations "on board ships, aircraft or any other floating or airborne objects and which, outside national territories, transmit broadcasts intended for reception or capable of being received . . . within the territory of any contracting party". The contracting parties (i.e., governments) undertake to make the establishment or operation of a broadcasting station as defined above a punishable offence under their national laws (Article 2/1). The Agreement sets out the "acts of collaboration" (Article 2/2) which shall be made punishable offences. These cover the provision of equipment, supplies, transport, maintenance service for the ships and transmitters and the production of material for the broadcasts themselves including advertisements and services in connection with advertising. The Agreement takes its stand on the strict territorial principle by providing that national laws to be enacted shall apply to nationals of the State concerned on its territory (including its ships, etc.) and on any ships, etc. anywhere outside national territories and to non-nationals on its territory (including its ships, etc.) (Article 3). Its possible weakness is that it does not deal with stations operating from objects affixed to or supported by the sea bed. It is simply left to national governments, whilst regarding their obligations under the Strasbourg Agreement as a minimum, to go beyond it and deal with these structures. The Agreement came into force on 19th October 1967. It became thereby open for accession (subject to prior agreement of the Committee of Ministers of the Council of Europe) to States who are not members of the Council of Europe if they are members of the International Telecommunication Union.²⁸

25. Redstam v. Wadner (Rådhusrätten i Lund, December 19, 1962) unreported.

26. Winberg v. Wadner (Rådhusrätten i Malmö, August 25, 1964) unreported.

27. Council of Europe CM (64) 259, European Treaty Series No. 53.

28. See text, at note 6, *supra*.

After the stations operating in Scandinavian waters had been silenced, the most popular target for the "pirates" became Britain. There were at one time as many as twelve stations strategically placed round the coast lines, some of them operating from disused wartime forts and other structures near the coast. The operators of the stations broadcasting from structures off the coast were prosecuted in Britain for operating without a licence, contrary to the Wireless Telegraphy Act.²⁹ The main issue in these cases was whether the stations were inside or outside territorial waters. The Courts held in each case that they were inside. The defence in one case challenged as ultra vires the Territorial Waters Order in Council 1964 (passed to implement the Geneva Convention on the Territorial Sea 1958), defining territorial waters. The Order was held to be valid and the conviction by the Magistrates upheld in the High Court.³⁰ All stations operating from these structures have now ceased broadcasting.

To cope with the ships, the Government eventually passed, after prolonged debates, which sometimes had political overtones, the *Marine etc. Broadcasting (Offences) Act 1967*.³¹ It extends to ships and aircraft within UK territorial limits and British ships and aircraft anywhere (Section 1), to marine structures within UK waters (Section 2) and to British subjects on the High Seas. The prohibited acts are drawn as widely as possible whilst remaining within the territorial principle. Supplying the ship itself or the apparatus, installing the latter or repairing or maintaining it, supplying goods for its maintenance and carrying persons to it, are offences if the defendant has reasonable cause to believe that broadcasts will be made from the ship.³² Equally, supplying films or records, writing literary or musical works with intent that a broadcast of them may be made from ships, etc. and participating in such a broadcast are offences.³³ Most important of all are the sections directed against the advertisements. Advertising, or inviting another to advertise by means of such a broadcast, and publishing times and details of such broadcasts and matters calculated to promote the stations are offences.³⁴ The penalties are fines with alternatives of imprisonment up to three months on summary conviction and up to two years on indictment. Dealing with a body corporate, proceedings can be taken against direc-

29. S. 1 (1) and S. 6 (1), Wireless Telegraphy Act 1949.

30. Regina v. Kent Justices: Ex parte Lye and others [1967] 2 WLR 765.

31. Eliz. II 1967 Chapter 41 — "An act to suppress broadcasting from ships, aircraft and certain marine structures", 14th July 1967.

32. Section 4 (3).

33. Section 5 (3) (a) to (d).

34. Section 5 (3) (e) and (f).

tors, managers, secretaries, etc., if it is proved that the offence has been committed with their consent or connivance or is attributable to their neglect. They are then liable to the same penalties.

6. *The Present Position*

As a result of the legislative and judicial actions described above, only three pirate stations survive in European waters, Radio "Caroline" with two ships off the British coast and Radio "Veronica" off the Dutch coast. Radio "Caroline" is trying to survive by drawing supplies from European countries who have not yet ratified the Council of Europe Agreement, particularly from the Irish Republic and Holland, and advertisements from overseas, particularly the United States. Whether "Caroline" could survive legislation on the lines of the Council of Europe Agreement in Eire and Holland is extremely doubtful. "Veronica" almost certainly could not survive Dutch legislation.

On the other hand, a new pirate station, Radio "Hauraki", has started broadcasting from the ship "Tiri" off the coast of New Zealand. The Minister of Marine issued a detention order against the "Tiri" before she sailed from Auckland on the grounds that she was not seaworthy. The owners appealed, and on November 7, 1966 the Auckland Stipendiary Magistrate held that "the detention order was not in the interest of safety, but served the dominant purpose of preventing the 'Tiri' from putting to sea to be used as a pirate radio ship". The detention order was quashed and the Crown made to pay costs.³⁵ The "Tiri" subsequently sailed and started broadcasting. The New Zealand Government is now said to be considering legislation on the lines of the Marine etc. Broadcasting (Offences) Act in the United Kingdom.

7. *Conclusions*

This article is not concerned with the political aspects of this problem. If the "pirate" stations had broadcast readings of Communist propaganda, the reaction of governments would presumably have been swifter. Nor is it concerned with the sociological aspect often debated in Europe: i.e., the question whether the broadcasting of nothing but light music on records to the exclusion of everything else is socially and culturally desirable. It is argued that this type of broadcasting is the natural consequence of commercial, as opposed to public service, broadcasting. This article has been solely concerned with the legal aspects

35. The Evening Post, November 7, 1966.

which are of interest in the copyright field. The technical means of transmitting programmes from aircraft or satellites as well as ships already largely exist and copyright owners may have to consider ways in which they can safeguard their rights in respect of performances of their works on stations which, not being land-based, may evade existing law. The judicial and legislative approach to "pirate" radio ships in Europe may serve as a starting point for such considerations. It is submitted that the approach chosen, although perhaps a little laborious, seems in the end to be proving reasonably effective.

88. TRENDS IN THE INTERNATIONAL DEVELOPMENT OF TELEVISION

By ROBERT G. SIMON*

The history of international television may be said to date back to 1928. In that year a shortwave television transmission was sent from England to the United States. All through the 1930's, experimental television transmissions were occurring domestically in the United States, Great Britain, France, Germany and the Soviet Union with a very occasional transmission across international boundaries.

The Depression and World War II intervened, but television resumed right after the war. By the late 1940's, television from the United States began regularly to cross the borders of Mexico and Canada and soon these nations reciprocated. By 1950, 30 or more countries either were telecasting or about to begin, and Great Britain and France were exchanging live programming regularly.

Television began in most countries outside of the Americas on a non-commercial basis, but its high costs prevented the continuation of this policy in many areas, even where it was decided to tax each receiving set to offset this expense, as is still widely done in Europe. Thus, for revenue as much as for any other reason, commercial television spread until today about 75% of countries utilizing that medium have some degree of commercial television.

In addition to dividing television networks into commercial and non-commercial categories, another method of categorizing international television is by the extent of government ownership or supervision over the medium. This ranges from absolute ownership and control, as in Cuba (where Castro himself preempts the air waves for six hours at a stretch), other Iron Curtain countries, the United Arab Republic and Indonesia, through partial control in many countries (e.g. France, where anti-De Gaullist views simply are not aired) and to the relatively uncontrolled systems such as exist in most of Latin America, South Korea and Great Britain. If a trend exists on a world-wide basis, however, I believe that it appears to be toward the exercise of more, rather than less, control by governments — with or without specific reference to cigarette advertising.

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* Member of the New York Bar; Vice President, McCann-Erickson, Inc. This article is a revision of Mr. Simon's contribution to the Symposium on the Law of the Artist: Problems in Broadcasting and Advertising, held October 18-19, 1967 at Fordham University School of Law.

Concerning the acquisition of international rights to television programming, such rights are acquired simply by bargaining for them. You can buy a license to telecast a program in one country or any group of nations or throughout the world. You can buy the rights to one or more telecasts (the usual foreign license is for 2 runs), or to years of telecasts, or even outright title; it's simply a matter of bargaining. But, before making this investment, you should know what use you can make of these rights once you have them.

Sometimes program rights are purchased by advertisers for use overseas; but this is a very limited proposition, since not only are commercials banned in about one fourth of the countries (e.g. France, at least at present; Norway; Denmark; and Sweden), but the majority of countries with commercial TV do not allow sponsorship as we know it in this country. Instead, countries such as West Germany, Austria, Italy and Switzerland allow commercial spots in specific time periods of the day — not connected or adjacent to any particular program. In Italy, for example, there is a nightly show called "Carosello", one of the most popular programs in the country. "Carosello" is nothing more nor less than a block of time set aside for commercials, each of which is 2 minutes and 15 seconds in length, with only the last 35 seconds of the message in the form familiar to us as commercials. The larger, preceding portion must be entertainment. A similar system of commercial advertising in Austria features 2-minute commercials — 90 seconds of entertainment and only 30 seconds of true commercial.

Logically, then, few advertisers buy international program rights, although for those whose major markets are in countries where sponsorship is permitted (e.g. Canada, Luxembourg, Monaco, Australia and Finland), such purchases may often occur.

The usual reason to acquire international rights is for the purpose of making money by distributing this programming to foreign networks or independent stations abroad — whether commercial or non-commercial — and this really *is* big business. Today, about \$80,000,000 per year is spent in the United States alone in license fees for filmed programs exported to 90 countries; and \$20,000,000 a year is spent in license fees to import programming from abroad into the United States; another \$45,000,000 is made in this country in the export of equipment and services related to international television.

Since, however, arranging to sell programs abroad is both complex and time-consuming, most of the dealing is done by a handful of experts — e.g. the international divisions of our three major networks, Time-Life, Wolper, and the major Hollywood film companies. As a general rule of thumb, the cost of a license for world-wide rights (exclusive of

the U.S.) can be said to average about \$50,000 for a half-hour show; but on a country-by-country basis, there really are no rules. Since most television abroad, outside of Canada, Japan, Australia and the Americas, is a government monopoly, often only one party bids for programs in each of these countries. This is not true in the United Kingdom, where the problem is a 14% quota on foreign production which creates a buyer's market for the one hour per night that is available. For that matter, even Canada requires that 55% of all programming must be Canadian in origin. Restrictions such as these often lead to coproduction arrangements as a way out of the dilemma, but such coproduction arrangements give rise to an entire set of problems which will not be discussed in this article.

A purely technical divisive force in the international field is the difference in transmission methods. The number of lines in a single transmitted black and white frame is 405 on two British networks, 525 on U.S. and U.S.-influenced networks, 625 on one British network (and throughout most of the world), and 819 in France and French-influenced networks. Further, the number of frames transmitted is either 25 or 30 per second, depending on the system used. All of the different systems are mutually incompatible without the use of expensive converters. Add to this the color argument now sweeping Europe between proponents of the Franco-Russian SECAM (memory sequential) system and the German phase alternation line (PAL) system, and the confusion grows. While converters can and do provide for transmissions between systems, the process is both complex and costly.

The foregoing may sound as if world-wide TV is unlikely in the near future, but where there is a need, obstacles have always been overcome. The late President Kennedy's funeral was seen live on four continents and in 26 countries by 300,000,000 viewers, via U.S. origination, satellite transmission, Eurovision and Intervisioin.

Although few events are of sufficiently world-wide importance to compensate for time differences and a host of other problems (some of which we have touched on above), there is evidence that world-wide television is possible whenever such an event may occur. Certainly the need for educational television programming is acknowledged throughout most of the world and some day may be available on a world-wide basis (although simultaneous transmission is not needed in this area). In this field of educational television, you should be aware that Japan is the undisputed leader, providing complete education via television.

In the meantime, there are a great many supranational regional networks, both existent and on the horizon. Time limits us to the

briefest description of these, each of which is worthy of extended comment.

EUROVISION — Under the auspices of EBU — the European Broadcast Union, a West European successor to the now East-European dominated Organisation-Internationale de Radiodiffusion (OIR), Eurovision has as members most of the countries of Western Europe and some outside the continent. Its 1,000 stations in 17 countries extend for 4,000 miles and its headquarters in Geneva acts as a central clearing house for programming. Transmission in a country is always voluntary with that country, thus allowing for government censorship. Within the Eurovision group is a smaller regional group called

NORDVISION covering the Scandinavian countries.

INTERVISION — Under the auspices of the OIR, this East-European broadcast group (comprised of 7 European communist block nations) can, through the USSR and its domestic satellite, transmit programs from East Germany to Vladivostok on the Pacific. Intervision is linked to Eurovision from time to time by hook-ups between Helsinki and Leningrad or between Warsaw and West Berlin.

ASIAVISION — Under the primary influence of Japan (the first Asian nation to become thoroughly television conscious through its 4 networks and 20,000,000 sets), this group of Far Eastern members of the Asian Broadcast Union expects its telecasts to extend from Japan and the Philippines to India and Pakistan by 1970. Since many of the countries involved do not yet have adequate television facilities, the linkage is still incomplete, limiting the "network" to the exchange of filmed and a very few taped shows, but the organization is only a few years old and the ABU is only 3 years old. It includes as members Australia, New Zealand and the U.A.R. as well as those states generally thought of as Far Eastern. The Japanese (like the British, Germans and ourselves) have a strong pecuniary incentive to expand television, since they are major manufacturers of TV equipment. India is not yet certain of what form of TV to adopt, and so has only experimental television amounting to 6,000 sets for its half billion people.

THE ARAB NETWORK — With the aid of ABC International, an Arab Middle Eastern network was begun in 1963, primarily as a program exchange and sales package organization. Every Arab state

(except Yemen) has TV, despite early religious objections, but the U.A.R.'s Nasser built up the largest and strongest network in the area with the aid of a 12½ million dollar grant from the U.S. Israel (which of course will not soon be a part of any Arab network, but is not a natural associate of any other network) has only recently established educational television, but recognized the need for the growth of its own network when, during the war in June, its citizens were limited to the TV coverage transmitted by its Arab neighbors.

CENTRAL AMERICAN TELEVISION NETWORK — Also organized by ABC International as a program exchange and sales package arrangement, this group came into being in 1961. It is now in the process of completing a landbased linkage between its members.

SOUTH AMERICA — In 1961, Argentina carried live a telecast of a meeting of the Organization of American States taking place in Uruguay. Once the need arises, the entire American continent from the Arctic to Tierra Del Fuego can be linked — either by land based relays, satellite or a combination of the two.

AFRICA — Although the Union of South Africa still bans television on political grounds, substantially all of the other states on this continent have some form of television — primarily educationally oriented, but also a major source of entertainment. Nigeria leads the continent with its 33,000 sets and technical help from NBC. Nigeria even exports some of its programs. To date, however, television programming between countries has progressed only on a bipartite basis, and the low set count, hundreds of tribal languages, plus turbulent politics discourages transcontinental linkage. Presumably this situation too is destined to change.

Despite the political tensions of the world and the variety of feelings toward the U.S., we remain the prime source of programming for the 2,000 television stations and 1,000 relay stations telecasting to the 205,000,000 sets in the world ("Bonanza" is seen in 75 countries and "Dr. Kildare" in 60 of them, according to a relatively recent count). While this is particularly true in non-communist countries, the communist block also carries several U.S. programs. The USSR carries no U.S. programming because they insist on exchange rather than money as payment and our private commercial companies do not consider the programs offered to have genuine entertainment or even sufficient news value. It is hoped that this situation will change as it has for occasional news stories of exceptional importance. Just as President Kennedy's

funeral was shown in Russia, so we here saw filmed coverage of Maj. Gagarin's reception in Moscow following the first successful manned orbital flight. Filmed news items are of course exchanged from time to time.

Obviously in any discussion of international TV, the problems created by language cannot be ignored. While this is particularly true in Europe as a whole, and in Asia and Africa, the problem exists even in Canada and in areas as small as Switzerland, Belgium, Cyprus and Hong Kong. India and Pakistan combined have 6 major languages, but sub-Sahara Africa speaks 800 different tribal languages. Certainly some linguistic modification is indicated, but the genesis of world TV need not await a new or revised Esperanto or Interlingua. The problem currently is handled in several multi-lingual countries by subtitling, the use of different sound tracks at the point of origination and/or by the use of radio simulcasts in the appropriate native language.

Since the "airwaves" of a country may be considered a part of its natural resources — a resource that is wasted unless used — governments tend to exercise some degree of control either directly (as in most of the world) or indirectly (as in the U.S., where the TV industry polices itself through a National Association of Broadcasters to avoid the government's putting even stronger restrictions into effect). Except in totalitarian states, this censorship is not so much political as moral, as morality is defined in the country involved by its religions and its mores.

I use the word "censorship" to describe any limitation on untrammelled broadcasting, whether by labelling a program or a product as obscene or by forbidding the advertising of certain products (e.g. whiskey and pork products in Arab nations, cigarettes in the United Kingdom, or money-lending in Australia). Australia, peculiarly enough for a free world commercial television area, has one of the most strictly regulated systems in the world. Herewith are quotations from a few of the Australian Broadcasting Control Board's published program standards¹ which would appear to ban most U.S. programming, although the latter in fact constitutes its very backbone!

General Program Standards. Section 8(a) — "No program may contain any matter which, if imitated, could be harmful to the well-being of individuals or of the community; this includes such sequences as those which — (i) demonstrate any techniques of crime in such a way as to invite imitation; (ii) are likely to incite any person to crime, violence or anti-social behaviour; (iii) deride or

1. Under the authority of Australia's Broadcasting and Television Act of 1942-1966.

otherwise discredit the law and its enforcement, or significant social institutions; (iv) display in detail any form of violence or brutality.”

What, you may ask, is left? Well, sex and horror seem to be left, but Australia's concern for its viewers regulates even those:

Subsection (e) of Section 8 states: “Respect should be maintained for the sanctity of marriage and the importance of the home. Divorce should not be treated casually or as a convenient solution to marital problems.”

Subsection (k) — “Reference to sex relations should be treated with discretion; reference to illicit sex relations should be avoided where possible.”

Subsection (n) — “The deliberate use of horror for its own sake and sound or visual effects likely to cause unnecessary alarm should not be permitted.”

Section 12, dealing with Family Programs, contains in part the following:

“(a) — The selection of subject-matter and treatment of themes should be wholesome and fresh in outlook. On no account should the more sordid aspects of life be presented in such a way that they appear to play a greater part in life than they actually do.”

“(b) — The following in particular should be avoided: (i) torture or suggestion of torture; (ii) horror or undue suspense; (iii) the use of the supernatural or superstition so as to arouse anxiety or fear; and (iv) other matter likely to lead to undesirable emotional disturbances in children.”

The Australian Broadcasting Control Board does not define desirable emotional disturbances in children.

Banned in Section 12(c) are “suggestions of excessive violence and morbid sound effects intended to anticipate or simulate death or injury.”

Children's Programs include all the standards of general program standards and of family programs and add further limitations. The regulations also provide that (Section 14(c)): “In programs in which children appear as artists, particular attention should be directed to avoiding the possibility of encouraging precocity in such children, who may be tempted to ‘show off’.”

There is also a Section 16 on programs unsuitable for adolescents, stating in part that: "Certain types of programs, either because of their themes or the method of treatment of the themes, may tend to produce in adolescents a false or distorted view of life. These programs, which because they deal with certain types of social and domestic problems, some aspects of crime or other themes which are suitable only for persons of more mature judgment, should not be televised before 8:30 P.M."

Section 21 covers programs containing matters of a medical nature and provides that such programs may not be broadcast unless the text of the matter "has been approved in writing by the Director General of Health, or by a medical officer in a state to whom the Director General has delegated this power, or, on appeal to the Postmaster General as provided in the act, by the Postmaster General."

There is a group of sections setting forth advertising standards strictly regulating what advertising may be presented and the method of its presentation, a few examples of which are: "Disturbing or annoying material, such as blatant sound effects, persistent repetition, and words and phrases implying urgency should be avoided." (Section 33b.)

In addition to governmental regulation, the Australian commercial television stations have agreed upon further restrictions on advertisers, but they do provide in those regulations a solid 15 minutes of adjacency product protection against competitive products.

Both the action and the wording of commercials concerning various personal products such as laxatives, deodorants, depilatories, toilet tissue, corn and callous remedies and foundation garments are highly restricted.

"Advertisements for money lenders should be avoided." With respect to time standard limitations, the following are a few of the multitudes of limitations in Section 39: in programs telecast during prime time, there may be 11 commercial minutes in an hour; in non-prime time, there may be 13.

Where programs are not sponsored, but spot commercials are telecast, there are other time standards. Not more than 30% of any program period during which spot advertisements are broadcast may be devoted to advertising matter. Not more than 18 minutes may be so occupied in any period of 60 minutes. Not more than 4 spots may be telecast back-to-back, and these 4 may not exceed a total of one and one-half minutes in duration. No announcement may be more than 60 seconds in length.

For Sunday, there is another whole set of separate regulations, including the banning of advertising relating to liquor, announcements during religious service programs, and talks relating to sex matters or VD. There is an entire section several pages long devoted to censorship

of matters of medical nature. All of this in one of the freest of free world nations.

With respect to Austria, the following was the situation as of a year ago: "Advertising relating to particular goods, objects and topics can be refused if for valid reasons these things are judged to be unsuitable for advertising to the public on radio and particularly on television." Political and religious advertising is banned and there are strong restrictions on ads for drugs, medicines and alcoholic beverages. To avoid having to enumerate all of the things that are refused, the Code of Practice contains a general clause to the effect that advertisements may be refused, *without explanation*.

It should be noted that there is an International Chamber of Commerce which has promulgated a Code of Standards of Advertising Practice, part of which includes international rules of conduct for television advertising. It is, of course, voluntary in that it has no actual authority, but represents voluntary self-government. As in most compromises, where the laws of many different nationalities are involved, the rules are fairly innocuous and merely forbid unfairness or the violation of the regulations of the individual countries. Amongst the few very specific forbidden acts is the following: "No medical advertising should create the impression that a positive result can be expected with certainty." Also forbidden are: "exaggerated claims, ads for hypnosis, or offers for medicines, products or advice relating to the treatment of serious diseases, complaints, conditions, indications or symptoms which should rightly receive the attention of a registered medical practitioner." Similarly prohibited are ads for medicines or treatments to promote sexual virility. So much for censorship.

Probably the largest of the American network commitments to world television is by ABC International's subsidiary named Worldvision. Worldvision claims that it can reach 60% of all of the world's TV homes where program sponsorship is permitted. This is a total of 23 million TV homes (excluding the U.S.) in 26 nations, primarily Canada, Central and South America, Lebanon, Japan (and the Ryukyus), the Philippines, Australia and Bermuda. ABC's difficulties in aiding this expansion, however, have reportedly led to unanticipated problems on more than one occasion. One (I recall reading) was a surprising religious conflict with Moslem customs. To Moslems, Mecca and Medina are sacrosanct cities to which only Moslems are allowed to approach any closer than a 12-mile radius. Consequently, the construction of relay stations by non-Moslems had to halt 12 miles from these areas while Saudi-Arabian personnel were trained to continue the work and to run the stations in these cities. Further complications arose because some Moslems be-

lied photography itself to be a sin, since it depicts the human form, a concept which harks back to the ban on graven images in our own Book of Exodus, Chapter 20, verse 4. As a consequence, no motion picture theatres had been allowed in these areas and women on television at first had to be veiled.

ARAMCO, the Arabian American Oil Company (owned by four U.S. producers and one of Saudi Arabia's largest sources of income), set up its own non-commercial television station in Saudi Arabia several years before the government stations opened. This ARAMCO station is not as restrictive as the government station.

While NBC is providing major assistance to the growth of Saudi Arabian broadcasting, ABC is serving a similar function in Lebanon and CBS is advisor to the new Israeli television industry.

Not only do governments place restrictions on the use of imported products (commercial or programming), but so do the unions, sometimes in close association with the government in this respect. I quote from the July 22, 1966 issue of *Advertiser's Weekly*: "Advertisers on Irish television have been ordered to cease using non-Irish voices on commercials as soon as possible and not later than September 30, 1966." Quoting *Radio Telefis Eireann*, it reports: "For some time past we have been concerned about the number of commercials being received with voices unsuitable for transmission on RTE. This increase has been due, in part, to the popularity this year of the street interview technique and films made specially for showing in Britain." The notice from RTE insisted that in the future, Irish voices are to be used in commercial messages — not only the straight voice-over types, but also in cases where the sound track is partly jingle and partly straight narration. This ruling bolsters the former agreement between Irish Actors Equity and Irish advertising agencies requiring that Irish voices be dubbed for English voices in many commercials.

Among requirements of countries effecting our domestic advertisers are those limiting the use of commercials made here for use abroad. In Mexico and Colombia, for example, the film may be produced abroad, but the voice must be local talent. Venezuela requires that the entire commercial be produced there except in certain limited circumstances. Australia too, in addition to all the restrictions referred to earlier, requires that all commercials for use on television be produced in that country.

As a final note, let's examine satellite systems and Comsat in particular.

Although satellites could eventually be used to beam programming directly to CATV cable systems, or possibly even to specially equipped

home receivers, present plans are to beam programming to ground stations for feeding to selected network facilities which would then re-broadcast the programs by conventional means. Obviously, the regional systems described earlier can be linked by satellite for purposes of world-wide broadcasting, but the process is quite expensive and the various owners of cable systems such as A.T.&T., I.T.&T., Western Union and RCA maintain that micro-wave relays and undersea cables can be equally effective for less money. The cost of just the satellite portion of a transmission, for example, is about \$30,000 per hour for prime time and about \$15,000 per hour for non-prime time.

While a satellite can be used to relay almost any form of information, including the linking of computers into a vast storehouse of instantaneously recallable facts, this discussion is limited to television. We should note in this connection that computers could some day serve as automatic translators from the language transmitted to the language of the country to which the signals are beamed. RCA has already developed such a device with a vocabulary of a few hundred words.

In 1962, Telstar I, a Bell Telephone satellite, was used for the first transatlantic satellite telecast. It was an orbiting satellite in motion with respect to the Earth and was relatively low, so that it would take 18 such satellites to blanket the globe, and it required tracking equipment to keep radio beams properly focused. This was followed by Comsat's three synchronous satellites — motionless with respect to the Earth, so that no ground tracking stations are needed, and in orbit 22,300 miles up — if there is an "up" at such altitudes.

The first, Early Bird I, was launched in April 1965 and was capable of live, color transmissions. It transmitted 74½ hours of programming in 1966 and was at a sufficient height so that three such satellites could blanket the globe. It was used to transmit across the North Atlantic.

Lani Bird I was launched one year ago to facilitate trans-Pacific telecasts and beamed to Japan a program sponsored by Max Factor shortly after attaining orbit. This month it was joined by another satellite, serving as a back-up and supplemental transmission device to increase the capacity for such transmissions.

Early Bird II was launched in February of 1967 to transmit across the South Atlantic between the U.S., South America and Africa.

While it appears that the cost of launching and maintaining satellites may be more than of laying and maintaining undersea cables, satellites are still in their infancy.

The most recent satellites launched have only a life expectancy of 18 months and a single TV channel capacity. But in 1968, satellites will have a 5-year life expectancy and 4 TV channels or 1200 voice chan-

nels. Now being planned is the newest type of satellite — known as a Category IV satellite — which will have 8000 voice channels or 20 TV channels. We would remember that satellites can broadcast simultaneously to many ground stations, while cables have only two ends for most practical purposes.

Comsat is a corporation created by the United States government in the Communications Satellite Act of 1962. It is owned 50% by the communications common carriers authorized by the FCC to invest in it and 50% by the general public. The conflict of interest situation is immediately apparent since the common carriers, who own half and are obligated to seek profit from it for their shareholders, are in competition with it as well.

As a further complicating factor, the United States government has entered into agreements with other governments and communications organizations so that the satellites and their command and control facilities do not belong strictly to Comsat but to a joint venture made up of 45 participating nations. Comsat is manager of the space units, but the ground stations are independent businesses in the countries where they are located. The joint venture that owns the satellites is made up of an Interim Communications Satellite Committee which votes by weighted share (although Comsat's share may never go below 50.6%, important decisions must be made by approximately a 2/3 vote) and, since the venture leases channels to countries and some members of the Committee have vital economic interests in cable systems, another conflict is apparent. There are a multitude of problems inherent in the structure of the Communications Satellite Act, but that's a different subject for a different time.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS89. UNITED STATES. CONGRESS. HOUSE. *Committee on the Judiciary.*

Extending the duration of copyright protection in certain cases. Report to accompany S.J. Res. 114, submitted by Mr. Kastenmeier, October 31, 1967. 4 p. (90th Cong., 1st Sess., H.R. Rept. No. 870).

A favorable report, without amendments. The resolution was passed by the House November 6, 1967, thus clearing it for Presidential signature. See Item 91 *infra*.

90. UNITED STATES. CONGRESS. SENATE.

S.J. Res. 114. Joint resolution extending the duration of copyright in certain cases. Introduced by Mr. McClellan, October 3 (legislative day, October 2), 1967. 1 p. (90th Cong., 1st Sess.)

A proposal "That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 89-142 (or by either or both of said laws), would expire prior to December 31, 1968, such term is hereby continued until December 31, 1968."

91. UNITED STATES. CONGRESS. SENATE. *McClellan, John L.*

Extension of duration of copyright protection in certain cases. (113 *Congressional Record* p. S. 14067, no. 157, daily ed. Oct. 3, 1967.)

Remarks of Mr. McClellan when he introduced the extension bill, S.J. Res. 114. The Senator indicated that legislation providing for a moratorium on infringement suits against operators of CATV systems was not introduced because voluntary arrangements between most of the interested parties made it unnecessary. See Item 89 *supra*.

92. UNITED STATES. CONGRESS. SENATE. *Committee on the Judiciary.*

Extending the duration of copyright protection in certain cases. Report to accompany S.J. Res. 114, submitted by Mr. McClellan, October 18, 1967. 3 p. (90th Cong., 1st Sess., S. Rept. No. 667).

A favorable report, without amendments. The resolution was passed by the Senate October 19, 1967. See Items 89 and 91, *supra*.

93. UNITED STATES. CONGRESS. SENATE. *Committee on the Judiciary*.

National Commission on New Technological Uses of Copyrighted Works. Report to accompany S. 2216, submitted by Mr. McClellan, October 11 (legislative day, October 10), 1967. 7 p. (90th Cong., 1st Sess., S. Rept. No. 640).

A favorable report, with four amendments, "The purpose of the first three amendments is to clarify the intent of the bill that although members of the Commission are to be chosen from certain categories, they are to function on the Commission as individuals and not as representatives of a particular viewpoint. The purpose of the fourth amendment is to provide that the participation of at least three members of the Commission is required for the conduct of hearings."

The bill was passed by the Senate on October 16, 1967.

94. UNITED STATES. CONGRESS. SENATE. *Committee on the Judiciary. Subcommittee on Patents, Trademarks, and Copyrights*.

Copyright law revision. Hearings, Ninetieth Congress, First Session, pursuant to S. Res. 37, on S. 597. Washington, U.S. Govt. Print. Off., 1967. 4 pts. (1383 p.)

Hearings held March 15 to April 28, 1967.

2. FOREIGN NATIONS

95. FRANCE. *Laws, statutes, etc.*

Decree applying the provisions of Law No. 64-689 of July 8, 1964 relating to application of the principle of reciprocity with regard to copyright protection (No. 67-181, of March 6, 1967). (3 *Copyright* 209, no. 9, Sept. 1967.)

See 12 BULL. CR. SOC. 128, Item 22 (1964).

96. KENYA. *Laws, statutes, etc.*

Legge del 1966, n. 3, sul diritto d'autore. (38 *Il Diritto di Autore* 287-299, no. 2, Apr.-June 1966.)

Italian translation of the Kenya copyright law of 1966.

97. SOUTH AFRICA. *Laws, statutes, etc.*

Legge 4 giugno 1965 n. 63 che unifica ed emenda la legislazione sul diritto d'autore e le materie ad esso relative. (38 *Il Diritto di Autore* 211-287, no. 2, Apr.-June 1967.)

Italian translation of the South African copyright law of 1965.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

98. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967. *Main Committee I.*

Report on the work of Main Committee I (Substantive provisions of the Berne Convention—Articles 1 to 20), by Svante Bergstrom, Rapporteur. (3 *Copyright* 183-207, no. 9, Sept. 1967.)

“This report was unanimously adopted by Main Committee I in its meeting on July 11, 1967.”

99. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967. *Main Committee V.*

Report on the work of Main Committee V (World Intellectual Property Organization) by Joseph Voyame, Rapporteur. (3 *Copyright* 154-164, no. 8, Aug. 1967.)

A report, dealing with the proposals for the establishment of a new Convention to lay down rules for the new organization (WIPO Convention), which was unanimously adopted by Main Committee V, under the chairmanship of Mr. Eugene M. Braderman, Head of the United States Delegation, at its eleventh meeting on July 10, 1967.

100. INTER-AMERICAN MEETING OF COPYRIGHT EXPERTS, *Rio de Janeiro, July 4-9, 1966.*

Records. (19 *UNESCO Copyright Bulletin* 41-60, 127-146, 215-234, 1966.)

Contains the report, recommendations, and list of participants in English, French, and Spanish. The meeting was convened by Unesco with the cooperation of CISAC in order “to examine the present state of national legislation in American Member States and Associate Members of Unesco in regard to copyright, and to make appropriate recommendations for the development of that legislation.”

101. INTERGOVERNMENTAL COPYRIGHT COMMITTEE. *8th Session, Paris, November 15-18, 1965.*

Records. (19 *UNESCO Copyright Bulletin* 14-39, 99-126, 185-213, 1966.)

Contains the report, resolutions and list of participants. An appendix contains the report and resolutions of the Twelfth Session of the Permanent Committee of the Berne Union, which held some of its meetings jointly with the Intergovernmental Committee. In English, French, and Spanish.

102. INTERNATIONAL COPYRIGHT UNION.

Berne Convention for the Protection of Literary and Artistic Works . . . [as] revised at Stockholm, on July 14, 1967. (*3 Copyright* 165-178, no. 8, Aug. 1967.)

The official English text of the Stockholm Act.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

103. *Electronic Publishing Co. v. Zalytron Tube Corp.*, 376 F.2d 592, 154 U.S.P.Q. 195 (2d Cir., May 4, 1967) (Hays, J.). *For decision below*, see 151 U.S.P.Q. 613 (S.D.N.Y. 1967), 14 BULL. CR. SOC. 327, Item No. 226 (1967).

Appeal from judgment for defendant in action for infringement of copyright in a trade catalog.

Held, affirmed.

The court held that where a publisher obtains advertising materials from manufacturers for inclusion in a trade catalog dealing with their products, any copyright rights in such materials remain with the manufacturers and do not vest in the publisher. The court said:

In preparing its mail order catalogs Zalytron admittedly copied the manufacturers' advertisements which appeared in the catalog prepared for Arrow by Electronic Publishing. This copying is the basis for Electronic Publishing's claim of copyright infringement.

In *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), we held that where advertisements previously published in a copyrighted newspaper were published subsequently in another newspaper, the second newspaper did not infringe the first newspaper's copyright because the right to the copyright on the advertisements was in the advertisers who commissioned the publication of the advertisements. We believe that *Brattleboro* governs this case. The advertisers whose advertisements appeared in the Arrow catalogue had the authority to approve or disapprove the use of their material and the form in which it appeared. They paid plaintiff for the costs of preparing the material and paid for the publication through advertising allowances to Arrow. . . .

We do not intend by our reliance on *Brattleboro* to rule out the possibility, for which defendant also argues, that plaintiff's production of the catalogue was work done for hire for Arrow.

104. *United Artists Television, Inc. v. Fortnightly Corporation*, 377 F.2d 872, 153 U.S.P.Q. 696 (2d Cir., May 22, 1967) (Lumbard, J.) also reported 15 BULL. CR. SOC. 37, Item 23 (1967). *For decision below*, see, 255 F. Supp. 177, 149 U.S.P.Q. 758, 13 BULL. CR. SOC. 306, Item No. 347 (1966).

The Supreme Court granted certiorari on December 4, 1967. After the granting of the writ of certiorari, the Solicitor General (former Dean Griswold of Harvard Law School) in a rather unprecedented move, filed a Memorandum for the United States amicus curiae, asking the Court to revoke that portion of its order which sets the case for argument early in the Spring, and instead to merely hold the case on its docket for a reasonable time pending legislative developments during the second session of the 90th Congress. Although realizing that the case seemed ripe for adjudication by the Supreme Court, the Solicitor General suggested in his memorandum that "the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution."

The memorandum went on to say:

"In our view, it is most unlikely that judicial proceedings under present law can achieve a workable and permanent solution to the overall problem of copyright liability for CATV operations that is consistent with the public interest. One evident difficulty is that courts are not wholly free to weigh and accommodate conflicting policy considerations; bound to apply existing law, they cannot make adjustments with the same freedom as the legislative branch. Yet all the governmental agencies with responsibilities in the area—whatever their different points of view—are agreed that a simple "yes" or "no" answer to the legal question presented here would not satisfactorily resolve the underlying problems as a matter of policy. Indeed, holding CATV systems liable for all copyright infringement might have a substantial adverse effect on the viability and continued growth of CATV as a valuable adjunct of live broadcasting. And, on the other hand, holding CATV systems immune from copyright liability in all cases probably would provide CATV with an unfair advantage over certain competitors (such as new UHF stations) and might unduly deter the creative incentive which copyright protection is designed to foster."

And further:

"We do not, however, suggest that the Court defer to congressional action only because that forum is more suited to making the

necessary policy accommodations and enjoys more latitude in fashioning a creative solution. Very relevant is the fact that the Congress is presently undertaking the task and that strong indications point toward a satisfactory legislative resolution of the problem in the near future. Indeed, several measures were introduced in the 89th Congress and promising proposals are now pending”.

* * * * *

“We recognize, of course, that the Court cannot follow a uniform practice of deferring its own action in cases properly brought before it merely because it is possible, or even probable, that any decision rendered will be modified by subsequent legislation. Yet there are rare instances where that course is appropriate in light of the imminence and special advantages of a legislative resolution of the underlying issue. We submit this is such an occasion. Indeed, here, if our appraisal is correct, the judgment of the courts, whoever prevails, will not rule the present parties or any others for the future, and their jurisdiction is invoked primarily to secure an advisory opinion to lay before another forum. In our view, the courts may properly decline to be so used.”

However, both parties to the litigation filed memoranda with the Court in opposition to the Solicitor General's motion and the Court recently denied his request but ruled that the matter was to remain on the docket for oral argument as originally scheduled.

105. *Best Medium Publishing Co. v. The National Insider, Inc.*, 155 U.S.P.Q. 550 (7th Cir., Oct. 31, 1967) (Cummings, J.). *For decision below*, see 15 BULL. CR. SOC. 65, Item 31 (1967).

Appeal from judgment for plaintiff in action for copyright infringement. Plaintiff publishes *The National Enquirer*, a weekly tabloid with substantial circulation. Defendant publishes a similar publication with a smaller circulation. Six articles which had appeared in *The National Enquirer* reappeared in slightly altered form in *The National Insider*. Defendant argued that it had properly bought the articles from their authors, who had sold first publication rights only to the *Enquirer*. Plaintiff offered evidence that the practice in the trade when selling free-lance articles, absent contrary agreement, is that all rights are sold. The trial court held that plaintiff had purchased full rights to the articles and that defendant had infringed plaintiff's copyrights.

Held, affirmed.

I. The court held that where all the testimony was by deposition, an appellate court has a greater right of review than where a trial court has had the opportunity to observe the demeanor of witnesses. Upon review of the evidence, by way of deposition, as to the trade practices in the sale of free-lance articles, the court agreed with the holding below that all rights to the articles had been sold to plaintiff. The court said:

The principal dispute between the parties was whether the Enquirer had purchased all publication rights or only first publication rights to the six articles covered by the amended complaint. The contracts between the Enquirer and the authors were silent on this point. However, the Enquirer offered the testimony of two "experts" that the prevailing practice in the trade is that when a free-lance author sells an article, he sells all rights thereto unless he indicates other restrictions. The Enquirer's editor and managing editor testified to the same effect in their depositions. The Enquirer also cited two articles to the same effect. (Wasserstrom, *Magazine and Newspaper Syndication Problems, Copyright Problems Analyzed*, CCH, 1953, p. 159; Henn, *Magazine Rights—A Division of Indivisible Copyright*, 40 *Cornell Law Quarterly* 411, 438 (1955).) The Insider did not introduce contrary expert testimony. The District Court observed that the evidence presented by the litigants was in complete conflict, but found that the Enquirer had purchased full rights to these six articles.

Where, as here, the only testimony was before the court by deposition, the findings of a trial court are not as binding under Rule 52(a) of the Federal Rules of Civil Procedure as where the court has had the opportunity to observe the demeanor of the witnesses. *Kiwi Coders Corporation v. Acro Tool & Die Works*, 250 F. 2d 562, 568 (7th Cir. 1957); *cr. Lundgren v. Freeman*, 307 F. 2d 104, 113-115 (9th Cir. 1962). However, our examination of the evidence satisfies us that the District Court's finding of the Enquirer's all publication rights purchases was justified and should not be overturned.

II. Defendant also argued that four of the plaintiff's articles lacked sufficient originality to be copyrightable. The court held, however, that very little originality is needed, and that the articles in question differed sufficiently from the source materials from which they were drawn to satisfy this modest requirement. The court said:

. . . [I]t is well settled that copyrighted matter need not be strikingly unique or novel. A distinguishable variation suffices. *Wihitol*

v. *Wells*, 231 F. 2d 550, 553 (7th Cir. 1956). Because of the Enquirer's different adaptation and arrangement of words in these articles, there was enough originality to bring the articles within the protection of the copyright law even though they were derived from other sources. Originality, in the context of the copyright laws, "means little more than a prohibition of actual copying". *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99, 103 (2d Cir. 1951). These articles were not slavish copies of source materials; they were sufficiently transformed to meet the copyright test of originality. Nimmer on Copyright, §101.

106. *Scholz Homes, Inc. v. Maddox*, 379 F.2d 84, 154 U.S.P.Q. 197 (6th Cir., June 20, 1967) (McCree, J.)

Appeal from summary judgment for defendants in action for infringement of copyright in plans for a house and for unfair competition. Plaintiff exhibited its "Southern Shore" split level house and distributed a copyrighted booklet containing its architectural plans for the house. Defendant Maddox, who admitted that he might have seen plaintiff's model of the house at a builder's convention, prepared a rough drawing from which he had plans prepared in order to build a similar house. The court below held that using copyrighted architectural plans to build a house "rather than to communicate to others how the house might be constructed" is not an infringement, and that it was not shown that plaintiff's plans had been used.

Held, affirmed.

I. The court held that *Baker v. Selden*, 101 U.S. 99 (1879) applies to architectural plans and suggested that the *Baker* principle could be extended farther than it has been in other architectural plan cases in that the copying of plans for the purpose of construction, as well as the construction itself, could be held to be a permitted use. It was held, however, that copying of plaintiff's plans had not been proved. The court said:

Baker v. Selden, supra, involved the alleged infringement of a copyrighted book which explained a novel system of bookkeeping. The purported infringer had marketed ledger books based upon the system described in the copyrighted work. The court held that the ledgers did not infringe the explanatory text. . . .

Muller v. Triborough Bridge Authority, 43 F. Supp. 298 (S.D. N.Y. 1942) and *De Silva Construction Corp. v. Herralld*, 213 F. Supp. 184 (M.D. Fla. 1962), the two cases cited by the district court which

applied *Baker* to architectural plans, involved no allegations that copyrighted plans were infringed merely by constructing buildings according to those plans. Instead, these two cases considered and rejected the contention that copyrighted plans were infringed merely by constructing buildings according to those plans. It might therefore be argued that the instant situation presents a stronger case for infringement than either of the earlier architectural cases, since Scholz alleged not only that Maddox constructed a house according to the Scholz Southern Shore plan but also made copies of that plan. Even if the holder of a copyright of architectural plans cannot prevent others from building according to those plans, he might still retain the exclusive right to their duplication. Section 1 of the Copyright Statute gives the copyright holder the exclusive right to "print, reprint, publish, *copy*, and vend the copyrighted work." §17 U.S.C. 1. (Emphasis added.)

The difficulty with this argument is that *Baker* would seem to go farther than either *Muller* or *De Silva* by permitting the copying of the plans themselves. It will be recalled that the Supreme Court said in *Baker* that if the art described in a book could not be employed without certain diagrams, "such . . . diagrams are to be considered as necessary incidents to the art, and given therewith to the public." Hence, if architectural plans are to be treated in the same way as "a book on science or the useful arts," then *Baker* would seem to permit the making of plans as well as the construction of buildings.

Perhaps the most promising method of avoiding this difficulty is to argue that copyrighted architectural plans should be treated differently from copyrighted books and that the principles enunciated in *Baker* should therefore be held inapplicable. . . . [I]f *Baker* is followed to the extent of holding that the possession of the copyright in the plans gives no exclusive right to construct the building, then protection could be provided by declaring the making of unauthorized copies of the plans to be an infringement.

We find it unnecessary in the present case either to choose one of the aforementioned alternatives or to reject them both. The trial court found that there was no evidence from which it might be inferred that either defendant had utilized plaintiff's copyrighted plans in planning or constructing the house. . . . We agree with the trial court. . . .

II. The court also held that neither the making of the plans for defendant's house nor its construction infringed plaintiff's booklet since

the purpose of the booklet was to place the house and its plans before the public, and the purpose of the copyright was to protect the booklet as a piece of advertising, not to protect designs contained therein. The court said:

Scholz is then left with the contention that the making of plans by Boland-Maloney and the construction of the house by Maddox infringed its copyrighted booklet "The Famed Scholz Design Collection." This argument, however, is answered by *Baker v. Selden*. While the copyrighted plans may not have been intended to place the Southern Shore home before the general public, this was the purpose of the booklet. . . .

It seems clear that "The Famed Scholz Design Collection" was copyrighted to preserve its value as an advertising medium, and not to give Scholz the exclusive right to copy the plans depicted therein. The district court was therefore correct in holding that Scholz' complaint and accompanying affidavits were insufficient to support a claim of infringement.

107. *Blazon, Inc. v. DeLuxe Game Corp.*, 266 F. Supp. 416, 156 U.S.P.Q. 195 (S.D.N.Y., May 11, 1965) (Tenney, J.)

Action for unfair competition, violation of Lanham Act §43(a) and infringement of plaintiff's hobby horse "War Cloud" for which a registration of claim to copyright had been secured. Counterclaim for misappropriation of trade secrets. Plaintiff moved for a preliminary injunction on each count and to dismiss the counterclaim.

Held, motions denied.

I. *Copyright infringement*. The court held that plaintiff's hobby horse was copyrightable but denied the motion for preliminary injunction on the alternative grounds of lack of infringement and insufficiency of proof.

A. Defendant questioned whether a model flowing from an effort to simulate real horses is entitled to copyright protection. The court held, however, that "it is no longer subject to dispute that statues or models of animals or dolls are entitled to copyright protection, see *e.g.*, *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162 (1st Cir. 1951) (model of a dog in 'show' position); *Rushton Co. v. Vitale*, 218 F.2d 434 (2d Cir. 1955) (chimpanzee); *Ideal Toy Corp. v. Adanta Novelty Corp.*, 223 F. Supp. 866 (S.D.N.Y. 1963) ('Tammy' doll), and accordingly a model horse, *per se*, is copyrightable."

B. Passing next to the copyrightability of *plaintiff's* hobby horse, the court observed that defendant's indirect inferences that plaintiff based its "War Cloud" on one of defendant's prior models were insufficient to rebut the prima facie evidence of originality derived from the statement of authorship ("authorship presumptively connotes originality") in plaintiff's registration certificate and held the fact that plaintiff had modeled its work on a public domain source (a horse) not to itself preclude a finding of originality "since plaintiff may have added unique features to the horse, enlarged it and made it sufficiently dissimilar from defendant's horse as to render it copyrightable to plaintiff."

C. On the infringement issue, the court noted that plaintiff's complaint could be viewed in two ways. The first approach predicated infringement upon the defendant's purchase, repainting (including the covering of plaintiff's trademark and copyright notices and addition of defendant's own trademark) and exhibition of one of plaintiff's hobby horses as its own. The court held that such conduct infringed none of plaintiff's Section 1(a) rights as there had been no copying, printing or reprinting and the exhaustion doctrine precluded application of the vending and publishing rights once defendant lawfully obtained possession of plaintiff's copyrighted work. Alternatively, the court held that even if the display of "War Cloud" by defendant constituted infringement, there was no showing of harm necessary to support a preliminary injunction. The court said:

[OPINION]

It is clear that before there can be infringement there must be both an averment and some proof of copying (*Affiliated Enterprises, Inc. v. Gruber*, 86 F.2d 958 (1st Cir. 1936); see Nimmer, Copyright §137.1 (1963), and as a matter of logic there can be no copying in the case at bar where the horse seized and alleged to copy "War Cloud" is *in fact* "War Cloud", nor is there an infringement upon any of plaintiff's other protected rights by reason of the display of the copyrighted work. For a full discussion of possible rights protected, see Appendix "A", hereto.

Furthermore, if it can be held that the display of "War Cloud" by defendant constituted a copying of "War Cloud" and/or a violation of any other rights, and therefore an infringement of the copyright, there is no showing of any harm, much less irreparable harm, by denying the motion for the injunction. While it cannot be doubted that after a prima facie showing is made by plaintiff of copyright validity and infringement, plaintiff need not make a detailed showing of danger of irreparable harm (*Rushton Co. v. Vitale*,

218 F.2d 434 (2d Cir. 1965)), nonetheless, as Professor Nimmer points out, "[t]he Court may nevertheless deny a preliminary injunction if the plaintiff's damages appear to be trivial [*Consumers Union of United States, Inc. v. Hobart Mfg. Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960)] * * * or possibly if the plaintiff fails to indicate a sufficient likelihood of immediate irreparable injury to satisfy the granting of such relief. [See *Platt & Munk Co. Inc. v. Republic Graphics, Inc.*, 218 F. Supp. 262 (S.D.N.Y. 1962), modified, 315 F.2d 847 (2d Cir. 1963)]". Nimmer, *supra*, §157.2 at 698. In the case at bar the model of "War Cloud" that was displayed has been seized, and accordingly there can be no further infringement by its continued display. In addition, there is no indication nor averment by plaintiff that defendants will buy another "War Cloud" and display it in place of the seized horse.

[APPENDIX]

"The Copyright Act grants to the copyright proprietor the exclusive right to reprint, publish, copy and vend the copyrighted work (17 U.S.C. § 1), but it gives him no further right of control over the use or disposition of the individual copies of the work once he has sold or otherwise disposed of them." *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F.Supp. 881, 882 (E.D. Pa. 1964) and cases cited therein at page 882 et seq.; see 17 U.S.C. § 27 (1952).

"The use of a copyrighted work is not an infringing act if such use does not fall within the scope of those rights expressly granted to the copyright proprietor." Nimmer, *Copyright* § 100 at 374 (1963). Of course, "the nature of rights available to a copyright owner will often vary considerably depending upon the type of work which has been copyrighted." Nimmer, *supra*, § 100 at 375. In the case at bar, Section 1(a) of Title 17 delineates the rights reserved to the plaintiff, which include the right to "print, reprint, publish, copy and vend the copyrighted work."

There clearly is no infringement herein by defendant on the right to print or reprint the copyrighted work. (See, generally, Nimmer, *supra*, § 102.) The only possible rights infringed upon are those of copying, vending and/or publishing.

The statute included the right to vend and publish as a protected right, as a complement to the preservation of the right to copy, since "it would be anomalous indeed if the copyright owner could prohibit public distribution of his work when this occurred through unauthorized copying but were powerless to prevent the

same result if the owner's own copies (or copies authorized by him) were stolen or otherwise wrongfully obtained and thereafter sold or published." Nimmer, *supra*, § 103.31 at 384-85.

However, "[t]his rationale becomes inapplicable in the situation where the copyright owner first consents to the sale or other disposition of his work. * * * [A]t this point the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation." Nimmer, *supra*, § 103.31 at 385. See *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, *supra*. The same rationale, policy considerations and rule of law apply to the right to publish as well. Nimmer, *supra*, § 104 at 390.

Accordingly, once the item has been lawfully obtained, as in the case at bar, the "first sale" doctrine (see, generally, Nimmer, *supra*, § 103 and its subdivisions) would apply and the proprietor thereafter loses his right to control its subsequent vending and/or publication.

As is obvious, however, the rule should not apply with respect to other rights protected by the statute. Nimmer, *supra*, § 103.34.

Since, in the instant case, it is not disputed that the hobby horse was lawfully acquired, the above-cited precedents would appear to apply and hence any subsequent vending (the existence of which is a very sharply disputed fact) or publication infringes on none of plaintiff's presently-protected rights.

Similarly, insofar as the right to copy is concerned, there is no "tangible object that is a reproduction of the original work," (Nimmer, *supra*, § 101.2 at 376); in fact there has been no reproduction whatsoever. Compare *Mura v. Columbia Broadcasting System, Inc. et al.*, 245 F.Supp. 587 (S.D.N.Y.), which involved the display of copyrighted puppets on television as constituting infringement of copyright. However, in that case the plaintiff alleged that the defendants made copies of her hand puppets by reproducing a transitory picture on a television screen.

Accordingly, there has been no infringement of any rights reserved to plaintiff as a result of the display by defendant of a lawfully-acquired model of plaintiff's hobby horse. See also *Scarves By Vera, Inc. v. American Handbags, Inc.*, 188 F.Supp. 255 (S.D.N.Y. 1960), wherein the defendants purchased plaintiff's copyrighted towels and incorporated them into their ladies' handbags. Significantly in that case, suit was not brought on the theory of copyright infringement but rather a violation of Section 105 of Title 17.

The second possible approach to plaintiff's complaint was to view it as alleging that defendant's plaster model of a not yet finished hobby horse named "Thunder" was the infringing item. Although the court found that under a liberal test equating an *opportunity* to observe with access rather than treating such an opportunity as creating an inference of access plaintiff had established access, it held that in view of the nature of the works in question as deriving from a public domain source and the extraordinary nature of a preliminary injunction, plaintiff's minimal, non-expert proof of similarity by affidavit and visual comparison of photographs was insufficient to support the motion.

II. *Unfair competition.* The court also denied plaintiff's motion for a preliminary injunction on the common law unfair competition count. Plaintiff had alleged that defendant bought one of the former's horses, painted it over thereby erasing plaintiff's copyright notice, changed the trademark thereon to defendant's trademark and thereafter displayed the horse in its showrooms and solicited orders representing that the horses to be delivered were the same as the model displayed. Categorizing the claim as one for "reverse palming off", the court questioned whether such was actionable under New York law — the law governing this pendant jurisdiction claim — and held that, at any rate, the facts were so in dispute as to render a preliminary injunction inapposite. The court said:

It appears that what is involved herein is a "reverse" palming-off situation. In the usual case a defendant presents its product in such a way as to give the impression that it is plaintiff's product, thus palming off its product as that of another. *Midwest Plastics Corp. v. Protective Closures Co.*, 285 F.2d 747 (10th Cir. 1960). In the case at bar, defendant has reversed the sequence and palmed off plaintiff's product as its own. Is this an actionable wrong?

It has now been definitively held by the Court of Appeals for this Circuit that state law (in this case New York law) governs an unfair competition claim resting upon the doctrine of pendent jurisdiction alone, as well as a claim resting both on pendent jurisdiction and diversity of citizenship. *Flexitized, Inc. v. National Flexitized Corp.*, 335 F.2d 774, 780-781 (2d Cir. 1964).

In *Pic Design Corp. v. Sterling Precision Corp.*, 231 F.Supp. 106 (S.D.N.Y. 1964), defendant bought certain items from plaintiff through an intermediary, removed their identifying markings, replacing them with its own, and resold the items to the customer. . . .

Chief Judge Ryan initially limited *International News Service v. Associated Press*, 248 U.S. 215, 235, 39 S.Ct. 68, 63 L.Ed. 211 (1918)

to its particular facts, thereby following that line of authority which has been less than enthusiastic with the broad sweep of that decision. . . .

Then, in reliance on *Mastro Plastics Corp. v. Emenee Indus., Inc.*, 16 A.D.2d 420, 228 N.Y.S.2d 514, 517 (1st Dep't), aff'd without opinion, 12 N.Y.2d 826, 236 N.Y.S.2d 347, 187 N.E.2d 360 (1962), Chief Judge Ryan held that "[w]e are unable to find any actionable wrong at common law under the facts of this case insofar as defendants' actions in purchasing items from plaintiff for resale are concerned." 231 F.Supp. at 114.

In the *Mastro Plastics* case, supra, the New York courts denied any common law right of action in a case where a defendant bought bongo drums from plaintiff, removed plaintiff's trademarks and identifying characteristics, replaced them with its own and used them as a sample to the trade of its own brand of bongos. As is obvious, the facts are almost indistinguishable from those in the case at bar.

. . . .

On appeal, the Court of Appeals affirmed the lower court's decision but granted plaintiff leave to serve an amended complaint based on 15 U.S.C. § 1125(a) (1963) for a preliminary injunction.

While these decisions are persuasive, I would prefer to rest my denial of the motion not on the absence of a cause of action for unfair competition, but rather on an insufficiency of proof. In the *Mastro* case, for example, the Court's opinion was based in part on the fact that plaintiff had not secured a patent or copyright on the drums, and accordingly "[w]hat it [defendant] could thus reproduce [without fear of copyright or patent infringement] and sell it could use as samples of what it would produce and sell." 228 N.Y.S.2d at 516. Similarly, in the *Pic* case, supra, there was no discussion as to whether the items bought were covered by a patent.

In addition, in *Midwest Plastics Corp. v. Protective Closures Co.*, 285 F.2d 747 (10th Cir. 1960), cited above, one of the averments was that the defendants had bought quantities of the plaintiff's products and resold them to its customers. *Id.* at 749. And while the thrust of the opinion revolves around the normal palming-off situation, at least one of the cited cases involved reversed palming off, and the Court cited the following language in its opinion: "Deceit is the basis of an action of this character. The principle underlying unfair trade practice cases is that one manufacturer or vendor is palming off his merchandise as that of another * * * or that he is vending the products of another as his own * * *." *Rey-*

nolds & Reynolds v. Norick, 10 Cir., 114 F.2d 278, 281.” *Id.* at 750. See *Pic Design Corp. v. Sterling Precision Corp.*, *supra*, 231 F.Supp. at 113.

Moreover, while *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed.2d 211 (1918) has been limited, there is language therein particularly applicable to the instant case. 248 U.S. at 241-42, 39 S.Ct. 68. The scope of the wrong was similarly expressed in the opinion of Mr. Justice Holmes, who disagreed not as to the impropriety of the action nor as to the necessity of some relief, but rather as to the scope of the relief granted. 248 U.S. at 247, 39 S.Ct. 68. See also *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-532, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

Accordingly, a review of the sharp conflict as to the facts is warranted.

[The court proceeded to discuss the conflict among the parties affiants as to the use to which plaintiff’s “War Cloud” was put by defendant.]

Based on the sharp conflict of facts in the affidavits, it is impossible to even attempt to ascertain whether, assuming that certain actions, if proved, would constitute actionable unfair competition, the horse was put to such an improper use. In view of this sharp conflict, I am unable to permit the invocation of the equity powers of this Court and permit the imposition of such a drastic remedy on such a minimal showing.

III. *Lanham Act Section 43(a)*. Plaintiff’s Lanham Act §43(a) count, also based on defendant’s appropriation of plaintiff’s hobby horse, was asserted for the first time in a supplemental memorandum of law. Despite the fact that there had been a sufficient interval for amendment of the complaint, no such motion had been made. Noting that “on that basis alone I would be disposed to deny [plaintiff’s] motion for a preliminary injunction predicated on a violation of [the Lanham Act]”, the court went on to hold that even were the complaint to be deemed amended, the preliminary injunction must be denied for insufficiency of proof on the jurisdictional requirement that a 43(a) item enter into interstate commerce or, possibly, have an “effect” on commerce. The court said:

Section 1125(a) of Title 15 of the United States Code in pertinent part provides:

(a) Any person who shall affix, apply, or annex, or use in connection with any goods * * * a false designation of origin * * * and *shall cause such goods or services to enter into commerce*, and any person who shall with knowledge of the falsity of such designation of origin * * * cause or procure the same to be transported * * * shall be liable to a civil action by any person * * * who believes that he is or is likely to be damaged by the use of any such false description or representation.” (Emphasis added.)

As is obvious from the language italicized in the above citation, the only actionable wrong proscribed by the statute is the false designation of origin of a product and the causing of its subsequent entry into interstate commerce.

The word “origin” has now been definitively held to refer not merely to geographical origin, but in addition, to origin of source or manufacture as well. *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405, 408 (6th Cir. 1963).

However, the requirement of the statute that the goods upon which the false designation appears must enter into interstate commerce is not to be lightly taken since it is jurisdictional in nature. . . . Even causing one item with false designation to enter into commerce is sufficient. *Drop Dead Co. v. S. C. Johnson & Son, Inc.*, 326 F.2d 87, 93 (9th Cir. 1963), cert. denied, 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed.2d 177 (1964). But for pleading purposes there must at least be that minimal connection and, *a fortiori*, there must be some proof of such connection on a motion for a preliminary injunction.

The term “used in commerce” is defined in the statute as follows:

For the purposes of this chapter a mark shall be deemed to be used in commerce (a) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and the goods are sold or transported in commerce. . . .

In the case at bar the only allegation is that defendant replaced plaintiff’s trademark with defendant’s in violation of Section 1125(a) and that the horse was on display in defendant’s showroom in New York. However, there is no averment herein that the seized “War Cloud” with the false designation entered into interstate commerce subsequent to the time that the trademark was changed. It is obvi-

ous that, having been seized, the article cannot now enter into interstate commerce. In short, even accepting all of plaintiff's assertions as true, there is no statement either express or implied that the seized "War Cloud" at *any time* was caused to enter into interstate commerce.

. . . .

While, in the case at bar, the defendant company obviously deals in interstate commerce, it is the transportation of the item with the mark on it rather than the general scope of business which would appear to be determinative under the statute, and, as noted, the item itself has never entered into interstate commerce and was never transported therein.

Moreover, even if we were to construe the statute as applying to goods which, though not themselves individually having false designations, were sold and entered into commerce as a result of the intrastate display of the seized "War Cloud" with the false designation and therefore "affecting commerce" . . . an injunction could not issue thereon in view of the sharp conflict as to the use made of the horse. The same considerations necessitating the denial of an injunction on a claim of unfair competition apply here as well.

IV. *Trade Secrets.* The counterclaim was predicated upon plaintiff's alleged inducement of one of defendant's former employees to betray trade secrets imparted thereto by defendant during the course of a confidential relationship. Defendant alleged further that it was the appropriation of these trade secrets which enabled plaintiff to produce its copyrighted "War Cloud" and sought the imposition of a trust on plaintiff's copyright. Plaintiff moved to dismiss the counterclaim upon the authority of the Supreme Court decisions in *Sears* and *Compco* as defendant's allegedly pirated designs were neither patented nor copyrighted.

Although observing that "insofar as the remedy is concerned, if plaintiff has a cause of action the imposition of a trust is one of the remedies which might be imposed. *Colgate-Palmolive Co. v. Carter Prod.*, 230 F.2d 855, 865, cert. denied, 352 U.S. 843, 77 S.Ct. 43, 1 L.Ed. 2d 59 (1956)", the court denied plaintiff's motion (i) on the authority of *Servo Corp. v. General Electric Co.*, 337 F.2d 716 (4th Cir. 1964), cert. denied, 383 U.S. 934 (1965) — an action for unjust enrichment based on the misappropriation of trade secrets in which the Fourth Circuit distinguished *Sears* and *Compco* on the grounds that the case at bar involved breach of a confidential relationship; and (ii) "in view of the state of flux in which this area of the law is presently embroiled in light of the *Sears* and *Compco* decisions."

108. *Thomas Wilson & Co., Inc. v. Irving J. Dorfman & Co., Inc.*, 268 F. Supp. 711, 154 U.S.P.Q. 226 (S.D.N.Y., May 17, 1967) (Frankel, J.)

Plaintiff's motion for preliminary injunction in action for copyright infringement. Plaintiff, engaged in the design, production and marketing of lace goods, brought an infringement action in November, 1965 predicated on defendant's alleged copying of one of its copyrighted lace designs and in April, 1967 moved for a preliminary injunction. Plaintiff charged that the design in question was made by it exclusively for Warner Brothers Co., a garment manufacturer and that defendant, requested by Warner Brothers to provide a design "with the look" of plaintiff's at a lower cost, manufactured infringing copies for the garment manufacturer. Defendant denied copying, alleging that it was able to give Warner Brothers the desired "look" merely by modest adaptations of its own prior designs and asserted that plaintiff had forfeited its copyright by selling substantial quantities of the design without a copyright notice.

Held, motion denied.

I. "To start from plaintiff's strongest point" the court admitted that there was substantial similarity between plaintiff's and defendant's designs but held that there was "not such a clear duplication as to foreclose trial of this issue." The court noted that the particular design in question appeared somewhat commonplace to a lay observer and fell in a category requiring more than a finding of substantial similarity to sustain infringement. Thus desiring further, and live, testimony on the infringement issue, the court declined to utilize the practice of trying factual issues on preliminary injunction applications as a solution because of plaintiff's tardy prayer for preliminary relief and the presence of other issues in the case. The court said:

In its Memorandum of Law (p. 2) plaintiff says the essential identity between its design and defendant's "will be manifestly evident from an examination of both samples * * * ." To nail the point home, the Memorandum later says (p. 15) that "mere inspection and comparison of the respective lace designs in issue by a lay observer compel a finding that the Dorfman lace design is a copy of the Wilson lace design." Then, in what may be only a superficial, but slightly arresting, inconsistency, plaintiff adduces by affidavit the opinions of no less than four experts who swear that the two designs are so alike that one must have been copied from the other. On oaths no less robust, defendant produces flatly contradictory expert opinions.

The court, confident only of its status as plaintiff's "lay observer," is left with the two pieces of lace directly in issue, plus more yardage supplied by defendant from the past designs it says it used to produce the accused product. The two designs at the center of the stage are indeed similar. They are more like each other than either is like defendant's prior designs. But there are plainly noticeable differences, and it would be hard to say certainly that these reflect no more than a studied effort to escape the trap the law sets for the wily as well as the wary infringer. Cf. *Scarves by Vera, Inc. v. United Merchants, etc.*, 173 F.Supp. 625, 627, 121 USPQ 578, 580 (S.D. N.Y. 1959).

The problem for plaintiff is aggravated by the fact that both pieces of lace look to the lay observer like rather commonplace pieces of lace, with seemingly commonplace floral designs. Neither design looks like the markings left by intensely creative activity. The plaintiff reports an earlier copyright of its own for an essentially similar "style." The defendant, upon a full trial, may be able to demonstrate, from the floral designs of others as well as its own, wide usage of such basically comparable patterns. The particular floral arrangement in issue seems to fall within an area—assuming, as the parties do, "even the modest originality that the copyright laws require", *H. M. Kolbe Co. v. Armigus Textile Company*, 315 F.2d 70, 72, 137 USPQ 9, 10, (2d Cir. 1963)—where more than "substantial similarity" should be necessary for a finding of infringement. *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334, 336, 126 USPQ 171, 173 (S.D. N.Y. 1960).

The problem, at a minimum, merits exploration with live testimony. If there were no more to the case, the matter could be set for hearing right now and determined for purposes of the preliminary injunction application. Or, if it were appropriate to decide the issue without a hearing, decision on the question of essential similarity might well go for the plaintiff. But there is more to the case, enough more to reject what amounts to a grossly tardy claim for a trial preference.

II. Among the "other issues" in the case was "a sharp dispute of fact as to whether plaintiff lost its right to copyright protection by purveying its lace in quantity without the statutory notice. . . . Upon oral argument of the motion, attempting to explain the long delay in bringing it, plaintiff's counsel said he needed the deposition of the Warner Brothers purchasing official (taken December 15, 1966) in order to establish that the copyright notice had been duly affixed." The court

remarked that "this is at once a poor explanation for the delay and a vivid acknowledgement that the notice problem is substantial" and held that although "again, this issue of fact could be tried out now, preliminarily or finally . . . familiar principles of equity counsel against such a course."

III. Defendant argued that as its financial responsibility was unquestioned and since plaintiff had waited over a year before moving for immediate relief by way of preliminary injunction, damages should be deemed an adequate remedy and the belatedly sought extraordinary relief denied. Plaintiff countered by asserting that the life of a lace design is short "and will have been spent before this action can be reached in its normal course" and by pointing to the fact that Warner Brothers was the only customer of both parties for the designs in question thus yielding a sharp decline in plaintiff's sales measureable precisely by the defendant's sales of the allegedly infringing goods. The court accepted defendant's objections to plaintiff's tardiness and observed that plaintiff's arguments were adverse rather than favorable to its position — a preliminary injunction in the context of a short-lived design would amount to granting the ultimate relief sought and "plaintiff's damages, if it proves entitlement to any, will be readily ascertainable. Defendant — to say nothing of Warner Brothers, the most obvious wrongdoer on plaintiff's theory though it has not been sued — appears able, on the undisputed facts, to pay a judgment. There is, as it is said, an adequate remedy at law."

109. *Kinelow Publishing Co., Inc. v. Photography In Business, Inc.*, 270 F. Supp. 851, 155 U.S.P.Q. 342 (S.D.N.Y., July 12, 1967) (Tyler, J.)

Action for copyright infringement. Plaintiff, publisher of the trade magazine *Graphic Sciences*, had secured permission from Western Electric Co. to publish an article by two employees of the latter on a "by-line basis". The article was published in an issue of *Graphic Sciences* bearing only a blanket copyright notice. Defendant, publisher of the trade magazine *Industrial Photography*, published a slightly revised version of the same article, having also received the permission of Western Electric. Decision had been reserved on defendant's motion to dismiss.

Held, judgment for defendant dismissing the complaint.

1. The court held that under the "works made for hire" rule of 17 U.S.C. §26 "copyright privileges" in the employees' article inured to Western Electric, at whose expense and under whose sponsorship the article was composed.

II. The court observed that "it has long been recognized that a general or 'blanket' copyright notice in a periodical does not protect rights in a specific article contained therein unless copyright privileges or a proprietary right have been previously assigned to the publisher" and thus that plaintiff must provide some basis for finding that it had acquired such rights from Western Electric.

Although plaintiff failed to produce any specific written agreement transferring the copyright, it attempted to rely on an alleged Western Electric intent to transfer and, alternatively, a custom in the technical trade publication field to the effect that no publisher will publish an article on a by-line basis except upon the implicit understanding that exclusive rights in the article pass to it. The court found, however, that the evidence adduced established that Western Electric conferred upon Kinelow nothing more than a license to publish the article in one *Graphic Science* issue. Plaintiff's "intent to transfer" theory was negated by Western Electric's implemented policy of securing wide trade publication dissemination for the article in question, the absence of Kinelow-Western Electric discussions or correspondence on the subject of copyright, and a Western Electric history of not granting exclusive rights in employees' articles. The court also found that no trade usage as urged by plaintiff existed. The court said:

A considerable portion of the trial was devoted to testimony on this issue. Kinelow's president . . . and an expert witness produced by Kinelow, testified to the existence of such a trade usage. In my view, aside and apart from their bias, the testimony of both of these witnesses is inherently incredible, if for no other reason than that such a policy would tend to be self-defeating for any aggressive publisher. For obvious reasons, companies like Western Electric have an interest in wide dissemination of "technical breakthrough" articles. A custom or usage of the kind urged by Kinelow would have a tendency to thwart and discourage any such dissemination. If technical trade publishers adhered to a custom as urged by Kinelow, they would thus encounter difficulty in obtaining the kind of fresh and imaginative articles which they obviously desire and need for competitive purposes in their field.

In any event, defendants' witnesses denied knowledge of the existence of any such usage. Specifically, Mr. Pliny Porter, a consultant to publishers of unquestioned stature and experience, testified that he had never heard of any such custom in the publishing field generally or in the trade publication field specifically. . . . Henry E. Marrows of Western Electric testified to the same effect. I find their testimony credible, reasonable and persuasive.

In fairness to Kinelow, however, mention should be made of certain curious and conflicting testimony given by Grady Morgan [the Western Electric representative who had granted clearances to plaintiff and defendant]. Plaintiff relies heavily on this testimony for obvious reasons. Specifically, for example, Morgan testified at one point during the trial that in February, 1963 when Western Electric received inquiries from United concerning the article, he told one of his business associates at Western Electric that the article had been copyrighted by Graphic Science. Morgan also stated that during the relevant period he had the understanding or opinion that a publisher which first published any article such as the Russell and House article obtained exclusive rights to that article by virtue of the first publication. In my view Kinelow's reliance on this and other evidence given by Morgan is misplaced. Morgan's testimony at trial, both on direct and cross-examination, particularly in the light of his deposition testimony taken several years earlier, suggests to me that his memory on the crucial events in this case was faulty. More important, neither this court nor the litigants are bound, at least under the facts of this case, by Morgan's mistaken opinions concerning copyright law.

III. The court declined to award counsel fees to defendant: "Despite my determination that plaintiff's claims are lacking in merit, I cannot say that plaintiff has been unreasonable or capricious in its commencement and conduct of this litigation."

Also of Interest:

110. *Morrison v. National Broadcasting Co.*, 19 N.Y. 2d 453 (May 16, 1967) (Fuld, J.)

Appeal from judgment denying motion to dismiss complaint. Plaintiff, a university professor, was a contestant on the television quiz show, "21". He charged that when the fact that "21" was fixed was revealed, all the contestants were believed by the public to have participated in the fraud, and that his reputation was thereby damaged. The Court of Appeals, reversing the Appellate Division, held that this action for damage to reputation was essentially a defamation action, and applied a one-year statute of limitations, thus barring plaintiff's action.

PART I.**ARTICLES****111. STATEMENT BY THE REGISTER FOR THE UNITED STATES DELEGATION AT GENEVA**

The Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee of the Universal Copyright Convention met in Geneva, Switzerland December 12-15, 1967. The discussions centered on the problems of developing countries and the Protocol to the Berne Convention which was adopted at the Stockholm Conference in July 1967.

Following is the Statement by Abraham L. Kaminstein, U.S. Register of Copyrights, on behalf of the United States Delegation, delivered on December 13, 1967:

Mr. Chairman:

At our last meeting in 1965 I referred to the status of the revision of the United States copyright law, and expressed the hope that enactment of a new statute in our country could be followed shortly by U. S. adherence to the Berne Convention and eventually by a merger of Berne and the Universal Copyright Convention (U.C.C.). In the past two years our revision program has moved forward substantially, and I believe that the next time we meet a new U. S. copyright statute will be on the books.

It is no secret that some of the provisions of our revision bill were strongly influenced by the Berne Convention and its requirements. Were the international copyright situation the same today as in 1965, we could confidently expect that enactment of the new statute would be followed by the necessary steps to have the United States join the Berne Union. It is therefore most ironic and unfortunate that, because of the Stockholm Protocol, the chances of U. S. adherence to Berne have been greatly reduced. Let me say plainly that the opposition in the United States to our joining the Berne Union under the conditions imposed by the Stockholm Protocol is so strong and concerted that I regard our adherence during the foreseeable future as impossible. Indicative of American opinion is an editorial in yesterday's New York Times.

This is, of course, a very serious matter for us. For the same reasons, we look with very grave concern upon the efforts to amend the Universal Copyright Convention in ways that would further undermine the international protection of copyright. I speak specifically of the proposals to delete Article XVII and its Appendix Declaration, to revise the translation provisions, or to introduce other compulsory licensing provisions or free use provisions into what is already an extremely low-level system of protection.

With respect to the safeguard clause of Article XVII, the United States Government feels it has a clear commitment to oppose its deletion unless there is unmistakable sentiment among the members of the Berne Union in favor of removing it. We have heard discussions in recent weeks suggesting that one way to avoid the implementation of the Stockholm Protocol is to delete the safeguard clause and push the developing countries out of Berne and into U.C.C. This strikes me as both a delusion and a mistake. A delusion because the Stockholm Protocol has already been adopted and will probably be implemented long before the U.C.C. could be amended, and a mistake because it would further undermine the Berne Convention itself.

As to revisions of the Universal Copyright Convention, our position is that the guarantees of protection in that convention are already at the rock-bottom level, and cannot justifiably be lowered further. U.C.C. revisions aimed at raising the level of protection while at the same time taking account of the legitimate needs of developing countries could well be considered. However, the entire international copyright situation has become so confused and uncertain that I do not feel we are ready now to plunge blindly along the path to U.C.C. revision. We are badly in need of a comprehensive survey of the entire international copyright situation that will enable all of us to see clearly where we stand now and where we ought to go from here.

Obviously the most serious problem facing us in international copyright today is that of the needs of developing countries to use copyrighted works under conditions suited to their educational demands. I am not going to waste your time by paying sanctimonious lip service to these needs. The events of the past six months made us clearly realize that these needs are real and that they are urgent. We are going to have to find practical ways of meeting them. The past six months have also shown us the vital importance of working out practical solutions that will meet the needs of developing countries without eroding or destroying the rights of authors throughout the world.

I do not believe that the Stockholm Protocol offers that kind of practical solution. For one thing, all of us here recognize that some

major Berne Union members may never ratify or accede to the Stockholm text. If this happens the developing countries will have gained little or nothing, the Berne Union will have been seriously weakened, and international copyright relations will become unspeakably complicated and confused. Moreover, when the Stockholm Protocol comes into effect between certain developed and developing countries, it seems likely to hurt the interests of authors in both types of countries without really solving the educational problems in the latter. I have no intention of opening the contents of the Protocol itself to debate here, but I will mention the four things that most bothered authors and copyright owners in the United States:

First, and most important, the lack of any real guarantee that authors will be paid at all for the use of copyrighted materials in cases of “teaching, scholarship, and research”;

Second, the rather broad provisions allowing export of copies to other developing countries;

Third, the lack of any real standards as to what *are* developing countries;

Finally, and also very important, the lack of any provision for time limits or transitional periods that would offer a developing country some inducement to improve protection over that provided by the Protocol.

The Stockholm Protocol is, of course, a fact of life, but the problems it raises are still in urgent need of solution in other contexts. The same issues that arose at Stockholm will inevitably be presented in discussions of revision of the Universal Copyright Convention and in considering the relationship between Berne and the U.C.C. In this connection I might say that there has been some talk recently of the possibility that countries might negotiate bilateral copyright treaties that would replace or supplant the Protocol. I am genuinely alarmed at these suggestions. Bilateral treaties in this area would add chaos on top of confusion and might well destroy the whole basis of multilateral protection on which both the Berne and the Universal Copyright Convention are built.

All this, I think, is particularly unfortunate because, even if one views the Protocol in the most favorable possible light, it can accomplish only a tiny part of what the developing countries need. It is essential that the developed countries go forward without delay to meet

the educational demands of millions of people throughout the world, but a denial of copyright protection utterly fails to meet these demands. It also brings with it unjust sacrifices by authors, loss of incentive to create and publish, and a groundswell of ill will and bad feelings that can hurt a country's copyright relations for generations.

As I see it, what the developing countries really want is to provide their people with enormous quantities of educational materials, mainly textbooks, at the lowest possible cost. As a practical matter this requires some method of clearing translation and reproduction rights protected by foreign copyrights quickly and with a minimum of red tape. It also requires royalty payments at lower rates than usual, coupled with some concessions regarding exchange of currency. On the basis of almost endless discussions since July, I am certain that a workable international system could be set up that would go a long way toward accomplishing these ends, but that would also preserve international copyright protection and avoid the dangers we see in the Stockholm Protocol. The establishment of an international fund that would insulate authors from loss of remuneration for use of their works in developing countries has already been suggested in a resolution adopted at Stockholm, and this is only one possible aspect of a larger program.

All of us here at Geneva are fully aware that international copyright is at a turning point, perhaps the most important in its history. The course that it should take is not yet clear, but it *is* clear that we must avoid blundering down another side road. In urging the need for broad and thorough study, the United States Government is not seeking to buy time or to delay the implementation of the Stockholm Act. What we are seeking specifically are three things: (1) a reversal of the dangerous erosion of authors' rights that seems to be taking place internationally; (2) a carefully considered program that might take various forms — further revisions of both Berne and U.C.C., merger of the two conventions, a third convention, or some other solution — but that would literally bring order out of chaos in multilateral copyright relations; and (3) international agreement upon a workable, effective program aimed at the needs of developing countries in which copyright would play a positive rather than a negative role.

This is admittedly an ambitious program, but I am absolutely convinced that it is attainable if we can achieve a maximum of good will and cooperation and a minimum of suspicion, personal hostility, and political friction. A program like this cannot be accomplished in a single year or even two, but I urge that we make a start here, without further delay, and that we press forward on the most accelerated timetable we can devise.

The Indian Government has recommended formally in Document IGC/IX/I Add. that a Working Party be set up to report to the next UNESCO General Conference “on such revisions as may be necessary in the Universal Copyright Convention.” In this connection Professor Ulmer of the Federal Republic of Germany suggested that this problem is so important for both the U.C.C. and the Berne Convention that it should be studied jointly. In Doc. CP/XIII/3 the BIRPI Secretariat proposes that a study be made of the problems raised by proposals to amend the U.C.C. in the light of the Stockholm Protocol. For reasons I hope I have made clear, the U. S. Delegation hopes that these recommendations will be broadened. Our hope is that the Intergovernmental Copyright Committee, and the Berne Permanent Committee will set up a broadly-based Study Group composed of experts from developing and developed countries throughout the world, acting in their individual capacities. This Group would seek to analyze the present international copyright situation in the light of the Stockholm Protocol and other recent developments, to evaluate the present contents and structure of all existing multilateral copyright conventions in light of the present situation, to consider all possible methods of meeting the needs of developing countries within the framework of established copyright principles, and to formulate recommendations for further study and action in light of its findings.

Our hope would be that the first meeting of this Study Group could take place within the next six months, and that it could make its first report to the next meeting of these joint committees some time next year.

This has been a hard year for all of us, although no one should forget that we have some major improvements in the basic text of the Berne Convention and the adoption of the World Intellectual Property Organization Convention to show for it. But on the issues raised by the Protocol it is hard for me to see that, aside from a deeper understanding of each other's problems, either side has gained much ground. My hope is that we can put the angry debates and unproductive maneuvering behind us and that in 1968 we can finally identify our real differences in international copyright and start working toward resolving them.

Appended are two Resolutions adopted at Geneva,

Resolution I of the Berne Convention

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union),

Noting the revision of the substantive provisions of the Berne Convention concluded at Stockholm;

Having debated the proposal of the Indian delegation to find out the intentions of the member States of the Berne Union on the bringing into force of the Protocol Regarding Developing Countries;

Considering that it is in the interests of all the member countries of the Berne Union to be fully informed of each other's intentions on this point;

Requests BIRPI to conduct an inquiry among all States which, having recalled this general interest and underlined the desire made known by some developing countries to be able to benefit as soon as possible from the provisions inserted in their favour in the Protocol to the Berne Convention, would cover the following points:

1. In respect of developed countries:
 - (a) the procedure, Parliamentary or otherwise, for the acceptance of the application of the Protocol to works of which they are the country of origin;
 - (b) the present state of the proceedings for acceptance of the Protocol in accordance with its Article 5, ratification or accession to the Protocol or the steps envisaged for this purpose;
2. In respect of developing countries:
 - (a) on what points and to what extent they propose to make use of the reservations provided for in the Protocol;
 - (b) the provisions which they expect to introduce to this effect in their national legislation, and in particular as to the remuneration of authors and the conditions on which the licenses envisaged by the Protocol will be granted;

Considers that a reasonable time limit should be allowed to reply to this inquiry and that thereafter BIRPI should inform member States.

Resolutions No. 3 and 59(IX) of the Joint Committee

The Intergovernmental Copyright Committee sitting with the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union),

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) sitting with the Intergovernmental Copyright Committee,

Considering the increasing complexity of international copyright problems associated with the various multilateral copyright conventions and the need for analysis and clarification of their effects and interrelationships;

Considering the continuing and urgent needs of developing countries for the use of literary and artistic works essential to their educational, scientific and cultural development;

Considering the importance of adequate and effective copyright protection which is necessary for the continuing creation and dissemination of such works;

Considering the proposals for changes in the provisions of the Universal Copyright Convention with respect to its relationship to the Berne Copyright Convention and for examining the possibility of revision of the substantive provisions of the Universal Copyright Convention,

Expresses the wish that, as soon as possible after the replies requested by the Director-General of Unesco to his circular letter dated December 30, 1966, on the question of revising Article XVII of the Universal Copyright Convention, and after the replies requested by the Director of BIRPI to the inquiry concerning the attitude of Member States of the Berne Union towards the Protocol Regarding Developing Countries are received, a joint group for the study of matters referred to in the Preamble to this Resolution be established,

Suggests that it might be appropriate that the composition and terms of reference of such a study group should be considered at an extraordinary joint session of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union.

112. COMPUTERS, COPYRIGHTS, AND THE LAW PRIOR TO REVISION*

By ARTHUR J. GREENBAUM**

I have been asked to speak on the law as it exists today with respect to (1) whether it is infringement to convert copyrighted works into machine readable form for use as computer input, (2) computer output and fair use, and (3) copyrightability of computer programs.

My topics pose certain difficulties, not the least of which is that some of the current law may soon be changed by statute. However, since we don't know when the statute¹ will be changed or what form the changes will take and because the problems do exist and must be dealt with today, it is worthwhile to examine the law as it currently exists.

The Copyright Act does not expressly deal with the question of whether the conversion of copyrighted material into machine readable form for use as computer input, such as, for example, punched cards or magnetic tapes, constitutes a violation of any of the exclusive rights granted by §1 of the Act² and there are no cases that I know of which are directly in point. However, merely because Congress did not consider a new technology and amend the Copyright Act to clearly comprehend its manifestations we cannot automatically conclude that the results of using the technology are not covered by the Act. For example, in 1925 in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,³ it was held that radio broadcasting constituted the performance of a musical work publicly and for profit, even though such broadcasting was unknown at the time the 1909 Act was passed. The court noted that:

While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

* Text of a talk, slightly revised, delivered on July 19, 1967 in the Current Copyright Problems course sponsored by the Practising Law Institute in New York City.

** Member of the New York Bar and the firm of Cowan, Liebowitz & Latman.

1. 17 U.S.C. §1 (1964).

2. Section 1 of the Copyright Act enumerates the exclusive rights granted to a copyright proprietor and unless the alleged infringer comes within the scope of at least one of these rights, there is no infringement. *Jewelers Circular Pub. Co. v. Keystone Pub. Co.*, 274 Fed. 932 (S.D.N.Y. 1921), aff'd 281 Fed. 83 (2d Cir. 1922).

3. 5 F.2d 411 (6th Cir.).

Thus, within this context of a new technology colliding with an outmoded statute, is the proprietor's exclusive right to *copy* a copyrighted work, as provided in §1(a), infringed by unauthorized conversion of the work into machine readable form for use as computer input?

Arguments can and have been made on both sides of the question and the following discussion will point up some of the approaches.

Copying is a broad term which as a matter of simple English usage encompasses a reproduction of a work in machine readable form. This is undoubtedly true, but if the Act was meant to prohibit all copying, it would not have been necessary to spell out in detail all of the other rights in §1, most of which are a form of copying. As an illustration of the narrowing of the exclusive right to copy consider, for example, the private non-profit performance of a copyrighted musical work. Such a performance clearly can be considered copying as a matter of English usage, but just as clearly it is not copying as that term is used in the Act. Thus, as used in the Act, copying is a narrow, not a broad concept. But, on the other hand, the word "copy" in §1 would be superfluous if it were limited only to the specifically enumerated forms of copying listed in that section and, considering that we are talking about the most fundamental of the rights granted, namely, the "copy right", the word must have some independent meaning over and above the specific forms of copying listed there.

The argument about the broad or narrow concept of copying is, say some, irrelevant because in this area of copying from a printed work into a vehicle for the storage of information which can be reproduced only by a machine, the issue was settled by the U.S. Supreme Court in 1908 in *White-Smith Music Publishing Co. v. Apollo Co.*⁴ This case held that the reproduction of sheet music in the form of piano rolls for use in player pianos was not copying as that term was used in the Copyright Act of 1891. The Court, per Mr. Justice Day, defined a copy of a musical composition as a "written or printed record of it in intelligible notation" or, in other words, a reproduction which could be read. Since I assume that punched cards or magnetic tapes are in the same category as piano rolls in that they cannot be read by the general public without the aid of a machine, it is clear that the *Apollo* case settles the question by requiring a holding that such computer readable materials are not copies under the Act, *unless* the case can be distinguished.

Perhaps *Apollo* can be distinguished as follows:

4. 209 U.S. 1.

Apollo was decided by a unanimous Court primarily on the basis of *stare decisis*, but Mr. Justice Holmes filed a concurring opinion stating that in view of the prior lower court and foreign authorities he did not feel justified in dissenting, but, he observed that:

The result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand.

I think that you will agree with Holmes that *Apollo* is somewhat irrational.

Mr. Justice Day reasoned that since the Act required the copyright proprietor of a musical composition to submit two copies of the work to the Librarian of Congress such copies must be a duplication of the original work. If the copyrighted work is sheet music, a duplicate of the sheet, that is, another sheet bearing the same notations, must be deposited. This proposition is still generally the law and is certainly a logical requirement. The piano roll did not meet this requirement because it was an undecipherable sheet of perforated paper which was definitely not a duplicate original of the copyrighted sheet music and did not even produce a duplicate of the copyrighted sheet music when played — it produced sounds, not the original readable material. As the Court, with great insight, stated: "These musical tones are not a copy which appeals to the eye." Accordingly, the piano roll was not a copy of the original work for the purpose of meeting the deposit requirement. In addition, in the Court's view, the piano roll itself was uncopyrightable, because it was merely a part of a machine.

The Court then leaped to the unexplained, and to me unexplainable, conclusion that the piano roll also wasn't a "copy" for infringement purposes, apparently on the unarticulated premise that if something is not a copy for one purpose of the Act, it is not a copy for all purposes. This reasoning is baffling because there is no good reason why there can't be copying for infringement purposes even if the copy is in another medium⁵ or is itself uncopyrightable.⁶

In attempting to distinguish *Apollo* it would be important to note that at present machine readable materials which produce words are considered by the Copyright Office to be copies and to be copyrightable, whereas piano rolls which produce sounds were not copies and were not

5. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936) (motion picture copied from play); *Fleischer Studios Inc. v. Freundlich Inc.*, 73 F.2d 276 (2d Cir. 1934) (doll copied from cartoon).

6. An unauthorized performance of a copyrighted drama is an infringement, Copyright Act, §1d, even though the performance is uncopyrightable.

copyrightable. (See the article by George Cary, Deputy Register of Copyrights, entitled "Copyright Registration and Computer Programs", 11 BULL. CR. SOC. 362, 364, August 1964.) The Copyright Office in coming to this conclusion distinguished *Apollo*, holding computer readable materials copyrightable on the ground that cards and tapes are susceptible of being read, since their manipulation in a computer could be made to produce a "print out" of the information contained on the cards or tape, whereas the piano rolls could not reproduce the original notations of the sheet music. Thus, since magnetic tapes and related storage vehicles are copies for deposit purposes and are capable of producing printing "which appeals to the eye", the two main pillars of *Apollo* disappear and we are free to conclude that the unauthorized conversion of copyrighted material into machine readable form constitutes a "copy" and, therefore, is infringement.

This reasoning can be attacked by pointing out that, as the Copyright Office freely admits, its views are not final and are subject to court review. Furthermore, while it is correct that with *Apollo* distinguished a machine readable copy can be classified as a copy for purposes of §1(a), there is no compulsion to come to this conclusion. Accordingly, we must still be concerned with determining the parameters of the word "copy" as used in §1 (a) of the Act.

Judge Herlands, in his opinion in *United Artists Television, Inc. v. Fortnightly Corporation*,⁷ struggled to determine if the CATV operators were "performing" the copyrighted motion pictures within the meaning of the Copyright Act. I will not infringe upon the rights of the later speakers in this program by commenting on the merits of the case, but I must commend to you all Judge Herlands' lucid explanation of how a statutory term should be construed. The following passages from scattered parts of the opinion illustrate his approach, an approach which is just as applicable to determining the meaning of the word "copy" as the word "perform":

In a legalistic sense, this case requires the application of traditional judicial techniques of statutory construction to give specific words in Section 1 of the Copyright Act a meaning that will accommodate the underlying legislative purposes and the realities of modern communications technology. (255 F.Supp. at 180).

* * *

7. 255 F.Supp. 177 (S.D.N.Y. 1966).

The updating of statutory language to accommodate it with current technological advances is part of the genius of our law to adapt and to grow. (255 F.Supp. at 213).

* * *

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. (255 F.Supp. at 214).

Judge Herlands made a particularly pertinent observation in footnote 13. He compared the cases where the courts deferred to the presumed intent of Congress because the issue before the courts had been known to the legislators, with other cases where the phenomenon in question had not been in evidence the last time Congress had considered the problem. The conclusion to be drawn from this analysis is that since the problem of conversion of copyrighted material into computer readable form has not been the subject of Congressional scrutiny, the court need not lean overly heavily upon the twists and turns of legislative history.

A criticism of Judge Herlands' decision to my mind would be that while he stresses the need to examine the underlying purpose of the law he does not do it particularly effectively.

In the report of the House Committee on the Judiciary which accompanied the pending revision bill it was stated that the "dual purposes of copyright protection [are] to stimulate authors to create and to reward them for their efforts".⁸ If the word "copy" in §1(a) were to be construed so as *not* to encompass the conversion of copyrighted materials into machine readable form for computer input then, so the argument goes, both of these purposes of the Copyright Law would be undermined.

Let me provide some examples of why this might be so:

Copyrighted materials could be used as computer input in such a way that the material never appears as output or the computer might manipulate the data in such a way that only a minute proportion of the input becomes part of the output. Such uses could be held to be no use or a fair use of the copyrighted material and no compensation would be available to the copyright proprietor for the use of his work. A copyrighted work could be converted into machine readable tapes with no payment made to the proprietor and sold in competition with the copyright proprietor's printed works and own machine readable tapes.

8. Report of the Committee on the Judiciary, House of Representatives, 90th Congress, 1st Session, to accompany H.R. 2512 at p. 2.

Similarly, a copyright proprietor who operated his own computer system might find himself faced with the competition of another computerized system which utilizes without cost the copyrighted materials of the proprietor with the output of the second comer immune under the fair use doctrine. In addition, the control which the author exercises over the content of his work is greatly diluted because he has little or no control over how the computer distorts his work. Furthermore, the task of trying to control the output and of determining which uses are fair, which are not, which are infringements, which are not, is virtually impossible. At least if control is exercised at the input level, there is some hope of the copyright proprietor obtaining the rewards which his efforts entitle him to.

These thoughts are presented in expanded form in the course materials which I have distributed to you.⁹

But, some might say, the scope of the fair use exception is exaggerated and it will not permit such destructive copying. Furthermore, if we look to the purpose of the Copyright Law we must first look to the Constitution which grants Congress the power to provide to authors the exclusive right to their writings in order to "promote the progress of science and useful arts". Science and the useful arts will be improved if the copyrighted materials which are useful in these worthwhile endeavors are permitted to be disseminated without charge and in a more efficient manner. The difficulty with this argument is that if the copyright proprietor's material can be used without compensation then in many cases the copyright proprietor will have no incentive to produce the materials and there will be nothing to copy. It could equally as well be argued that it would assist the scientists and educators of the nation if they all had great computers at their beck and call. I have heard, however, few suggestions that IBM, Sperry Rand, et al., donate their rather expensive computers to the scientists and educators of the nation.

9. The course materials consisted of (1) a chapter entitled "Copyright and the Computer: Why the Unauthorized Duplication of Copyrighted Materials for Use as Computer Input Should Constitute Infringement" which I wrote for a book to be entitled *AUTOMATED INFORMATION SYSTEMS AND THE COPYRIGHT LAW*, edited by Professors Lowell H. Hattery and George P. Bush, and to be published by American University, and (2) a printed copy of an address by Mr. Curtis G. Benjamin of the McGraw-Hill Book Company entitled "Computers, Copyrights and Educators" which he delivered in June, 1967 at the 75th Annual Meeting of the American Society For Engineering Educators. (See *infra*, Item 122.) Both of these works look toward what the law should be and not what it currently is.

I will note in passing that an argument could also be made that the exclusive right granted by §1(b) "to translate the copyrighted work into other languages" might also be infringed by converting the printed materials into a language to be read only by a machine. Such a position would have some obvious problems.¹⁰

However, there are less problems in arguing the relevancy of the exclusive right granted by §1(c) with reference to non-dramatic literary works, namely, "the right to make . . . any transcription or record." It has been argued at length in Lawlor, "Copyright Aspects of Computer Usage",¹¹ that the words "transcription or record" as used in the Act do not encompass computer readable copies. He relies heavily on the legislative history which shows that these words in §1(d) of the 1909 Act were intended merely to prevent stenographers from recording what they heard at performances of unpublished dramatic works. He then goes on to explain that the 1952 amendment which prohibited for the first time the making of a "transcription or record" of a non-dramatic literary work was meant to deal with performances of the copyrighted work. Thus, it applies, for example, to sound recordings, but not to computer readable materials which produce only words because a print out of the recording does not constitute a performance. This conclusion may be correct if we focus only upon what Congress was concerned with, although even this is somewhat doubtful because the Committee report¹² states that:

It is intended that *all* recordation rights in non-dramatic literary works will be protected and this protection includes any subsequent recordation or copying of the original record. (emphasis added)

Much time could be profitably spent on this point because it may develop that the right to transcribe or record set forth in §1(c) may prove to be more potent than the right to copy provided in §1(a). However, as I must hurry along, I will conclude this point by praising Mr. Lawlor's article as an excellent example of the static approach to construing the Copyright Act, as opposed to Judge Herlands' dynamic approach to the problem.

In any discussion of the use of copyrighted materials we must be concerned with the doctrine of fair use. This doctrine is relevant when considering the copying of material for use as computer input as well as

10. See *Addison-Wesley Publishing Co., Inc. v. Brown*, 223 F.Supp. 219 (E.D. N.Y. 1963) suggesting that the conversion of verbal text into mathematical language violated the right to translate.

11. 11 BULL. CR. Soc. 380, August 1964.

12. 1952 U.S. Code Cong. & Adm. News p. 2308.

the use of a copyrighted work as part of a computer print out. For example, if someone utilizes for scholarly purposes a very small part of a copyrighted work as part of the input of the computer it would be relevant to determine if such use was a fair use. If it was, then no liability would attach.

It should be kept in mind, however, that it has been stated that the copying of all or substantially all of a copyrighted work can never constitute a fair use.¹³ A contrary argument would be that no matter what may have been said in the past concerning copying of an entire work, computer usage presents a new situation and we must re-examine the rationale of the privilege to determine in each case if a particular use constitutes a fair use at the input level.

If we assume that the conversion of copyrighted materials into machine readable form is not a copy, a translation, or a transcription or record under Section 1, we are faced with the difficulty of determining if the printed computer output constitutes a fair use.

The proposed Copyright Bill¹⁴ at §107 sums up the criteria currently used to determine if a use is a fair use, as follows:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Of course, all of the factors which must be considered to determine if a use is "fair" are not entitled to equal weight in all situations. NIMMER says that the central question is "whether the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work."¹⁵ In his excellent study entitled "Fair Use of Copyrighted Works", Alan Latman noted that the criteria of fair use may be distilled to the formulation that we must look to the "importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?"¹⁶

13. NIMMER ON COPYRIGHT, 650-51.

14. H.R. 2512, 90th Cong., 1st Sess.

15. NIMMER ON COPYRIGHT, 646.

16. STUDIES ON COPYRIGHT, 793 (*Arthur Fisher Memorial Edition*).

In light of this background it is important to consider that a computer system can replace the need for a copyrighted work. For example, let us assume that the new Random House dictionary was placed in computer readable form by the University of Michigan and was available to scholars throughout the United States by means of consoles tied into the computer. If a scholar utilizes this dictionary occasionally during the year to find definitions, this is certainly a very small use of the copyrighted work, and the scholar is using the work for the purpose for which it was published, namely to find out the meaning of words. Of course, if we say that input is not infringement and that this output constitutes a fair use, then if these consoles are widely enough distributed there would be no need for anyone to buy the dictionary or any other works which may be utilized in this manner. Under these circumstances, it could certainly be argued that we should hold such a small use to be an unconsented to and infringing use. As noted in the Report of the House Committee accompanying the pending Bill, "isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."¹⁷

Prof. Nimmer writing in 1964 dealt with the problem of reproduction of copyrighted works by libraries and noted that:

There would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars.¹⁸

This statement points to what is perhaps an important distinction, namely that while the minute use by the scholar, educator, housewife or anyone else might be a fair use, the organization which provides the output falls within a different category and it is not entitled to the privilege of fair use where such use diminishes the sales of the original copyrighted work. The contrary argument would be that if the end use is a fair use, that is, the use by the ultimate consumer, such admittedly permitted uses would be thwarted if we enjoined the supplier of the permitted output. The response to this argument would be that the computer has such a potential for the destruction of the value of the copyrighted work that such a result is entirely appropriate when we consider the purposes of the Copyright Law. I think that the argument ends here, but perhaps it can go on for a few more rounds.

17. Report of the Committee on the Judiciary, House of Representatives, 90th Congress, 1st Session, to accompany H.R. 2512 at p. 35.

18. NIMMER ON COPYRIGHT, 654.

In short, the computer system, while perhaps not today, certainly in the near future will be able to substitute for conventionally printed fact works. As for purely literary works, such as novels and short stories, it is not too likely that they will be utilized in the near future by computers in such a way that they will destroy the demand for such works. Accordingly, as a practical matter we are not immediately faced with the problem of how to deal with all literary works, but how the law should treat fact works.

Now, in order to complete my assigned topic, just a few words about the copyrightability of computer programs. As far as I am concerned this problem has been resolved by the Copyright Office announcement in May, 1964 that it will consider registration of computer programs under Class A as books if certain rules are followed. Copyright Office Circular 31D outlines the requirements and George Cary, the Deputy Register of Copyrights, has explained the reasons why the Copyright Office determined that computer programs were copyrightable.¹⁹

The United States Patent Office originally took the position that computer programs are not patentable subject matter and therefore are unpatentable per se, and only lately has given some indication that they are seeking to formulate less restrictive guidelines. At the same time Congress is considering a bill to revise the patent law which would, among other things, make computer programs unpatentable.

19. See Cary, "Copyright Registration and Computer Programs," 11 BULL. CR. Soc. 362, August 1964.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

I. UNITED STATES OF AMERICA AND TERRITORIES

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

Public Law 90-141, 90th Congress, S.J. Res. 114, November 16, 1967. Joint resolution extending the duration of copyright protection in certain cases. Approved November 16, 1967. 1 p. (81 Stat. 464.)

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

114. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967. Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967. (3 *Copyright* 146-152, no. 8, Aug. 1967.)

Official text in English of the new Convention.

115. UNIVERSAL COPYRIGHT CONVENTION. *Italy*.

The Copyright Office recently received word from UNESCO that Italy had deposited its instrument of ratification of Protocol 1 annexed to the Universal Copyright Convention on December 19, 1966. Although Italy had ratified the Universal Copyright Convention and Protocols 2 and 3 annexed thereto effective January 24, 1957, that country did not at that time ratify Protocol 1.

In accordance with its paragraph 2 (b), the Protocol entered into force, in respect of Italy, on the date of deposit of this instrument of ratification.

Protocol 1 concerns application of the Convention to the works of stateless persons and refugees.

116. UNIVERSAL COPYRIGHT CONVENTION. *St. Vincent*.

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 at various times, declared, pursuant to Article XIII of the Convention, that the Convention shall also apply to the Isle of Man, Fiji, Gibraltar, Bermuda, Bahama Islands, British Virgin Islands, Falkland Islands and Dependencies, St. Helena and Dependencies, Seychelles, Mauritius, Montserrat, St. Lucia, Grenada, Cayman Island, and British Honduras.

The U. S. Department of State has now been officially informed by the Acting Director-General of UNESCO that the Government of the United Kingdom has deposited its notification that the Convention shall apply to St. Vincent, effective November 10, 1967.

St. Vincent is one of the Windward Islands, situated on the eastern edge of the Caribbean Sea, with its capital at Kingstown. It has an area of 150 square miles and an estimated population of 85,000.

117. UNIVERSAL COPYRIGHT CONVENTION. *State of ratifications and accessions. September 1, 1967.*

Since the eighth session of the Intergovernmental Copyright Committee, Kenya, the Netherlands, Venezuela and Yugoslavia deposited with the Director-General of Unesco their instruments of ratification of or accession to the Convention and its annexed Protocols 1, 2 and 3, and Italy deposited its instrument of ratification of the annexed Protocol 1.

	<i>Date of deposit</i>	<i>Entry into force</i>
Italy ⁽¹⁾	19 December 1966	19 December 1966
Kenya	7 June 1966	7 September 1966 (Convention and Protocols 1 and 2) 7 June 1966 (Protocol 3)
Netherlands ⁽²⁾	22 March 1967	22 June 1967 (Convention and Protocols 1 and 2) 22 March 1967 (Protocol 3)
Venezuela	30 June 1966	30 September 1966 (Convention and Protocols 1 and 2) 30 June 1966 (Protocol 3)
Yugoslavia	11 February 1966	11 May 1966 (Convention and Protocols 1 and 2) 11 February 1966 (Protocol 3)

(1) Italy deposited its instrument of ratification of the Convention and of the annexed Protocols 2 and 3 on 24 October 1956.

(2) The Netherlands ratified the Convention and the Protocol 3 and acceded to its Protocols 1 and 2.

As of September 1, 1967, 55 States had ratified or acceded to the Convention:

Andorra	Guatemala	New Zealand
Argentina	Haiti	Nicaragua
Austria	Holy See	Nigeria
Belgium	Iceland	Norway
Brazil	India	Pakistan
Cambodia	Ireland	Panama
Canada	Israel	Paraguay
Chile	Italy	Peru
Costa Rica	Japan	Philippines
Cuba	Kenya	Portugal
Czechoslovakia	Laos	Spain
Denmark	Lebanon	Sweden
Ecuador	Liberia	Switzerland
Finland	Liechtenstein	United Kingdom
France	Luxemburg	United States of
Federal Republic of Germany	Malawi	America
Ghana	Mexico	Venezuela
Greece	Monaco	Yugoslavia
	Netherlands	Zambia

118. CONVENTION ON THE RECIPROCAL PROTECTION OF COPYRIGHT. *Hungarian People's Republic and Union of Soviet Socialist Republics.*

Text of the first bilateral copyright convention entered into by the U.S.S.R. with another country, signed November 17, 1967, to become effective January 1, 1968 (translation by BIRPI):

CONVENTION ON THE RECIPROCAL PROTECTION OF COPYRIGHT — *Hungarian People's Republic — Union of Soviet Socialist Republics*

The Governments of the Hungarian People's Republic and the Union of Soviet Socialist Republics,

Inspired by the desire to promote, through the exploitation of scientific, literary and artistic works, their cooperation in the field of the mutual exchange of cultural values,

Recognizing the necessity of establishing rules and conditions governing the reciprocal protection of copyright,

Have decided to conclude this Convention and, to that end, have appointed their Plenipotentiaries:

for the Government of the Hungarian People's Republic:
Pál Ilku, Minister of Education,

for the Government of the Union of Soviet Socialist Republics:
S. K. Romanovszki, President of the State Committee of Foreign Cultural Relations attached to the Council of Ministers of the Soviet Union,

Who, having presented their full powers, recognized as in good and due form, have agreed as follows:

Article 1

The Contracting Parties shall

(a) encourage the publication of scientific, literary and artistic works created by the citizens of the other Contracting Party;

(b) encourage the theatres, orchestras, musical ensembles and soloists of their countries to include in their programs theatrical and musical works created by the citizens of the other Contracting Party.

Article 2

Each Contracting Party shall recognize the copyrights of the citizens of the other Contracting Party in scientific, literary and ar-

tistic works first made available to the public (published or publicly performed) in the territory of the other Contracting Party, provided that such citizens have their permanent residence in the territory of the Hungarian People's Republic or the Union of Soviet Socialist Republics, and shall safeguard the protection of the said rights in the same conditions as those which their laws provide in respect of their own citizens.

An unpublished work may be made available to the public simultaneously in both countries, or first in the territory of the other Contracting Party, only with the consent of the competent organs of the Contracting Parties.

Article 3

The term of protection enjoyed by the successors in title of the Hungarian and Soviet authors of works falling within the scope of the present Convention shall be fifteen years, to be reckoned from the first of January of the year of the author's death.

Article 4

Royalties accruing under the Convention shall be subject to taxation only in the country where such royalties are paid to the beneficiary.

Article 5

Settlement of copyright royalties shall be effected in the currency of the country where the work has been utilized.

Article 6

There shall be no obligation to pay copyright royalties for the utilization in the territory of one of the Contracting Parties of a work protected under this Convention in cases in which citizens of the said Contracting Party are not entitled to royalties for the utilization in the territory of the other Contracting Party of their works.

Article 7

The practical implementation of the provisions of this Convention shall be the task of the Offices for the Protection of Copyright of the Contracting Parties. The two Offices shall, for that purpose, conclude an agreement in which they shall regulate the questions relating to the transfer of the rights needed for the exploitation

of works protected under this Convention, as well as those questions relating to their cooperation in the field of the protection of the copyrights of their respective citizens, and shall further regulate the system of payment of royalties due to authors, and that of the mutual settlement of accounts.

Article 8

The scope of this Convention shall extend to every type of utilization of the works protected under the Convention, when such utilization takes place after the entry into force of this Convention.

Article 9

This Convention shall not affect the obligations of the Contracting Parties under other international agreements.

Article 10

This Convention has been concluded for a term of three years; it shall enter into force on January 1, 1968.

Done at Budapest, this seventeenth day of November, 1967, in duplicate, each in the Hungarian and Russian languages, both texts being equally authentic.

On behalf of the Government
of the Hungarian People's
Republic

Pál Ilku

On behalf of the Government
of the Union of Soviet
Socialist Republics

S. K. Romanovszki

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

119. *Smith v. Little, Brown & Co.*, 273 F. Supp. 870, 154 U.S.P.Q. 473 (S.D.N.Y., May 16, 1967) (McLean, J.) For prior decision, see 245 F. Supp. 451, 146 U.S.P.Q. 540 (S.D.N.Y. 1965), 13 BULL. CR. SOC. 138, Item No. 162 (1965), *affirmed* 360 F.2d 928, 149 U.S.P.Q. 799 (2d Cir. 1966), 13 BULL. CR. SOC. 415, Item No. 435 (1966).

Proceeding to fix damages in action for copyright infringement. A book published by defendant was held to have infringed plaintiff's common law copyright in her unpublished, partially completed manuscript.

Held, judgment for plaintiff on accounting.

I. The court held that plaintiff failed to prove actual damages because she did not show that she would have been able to sell her book but for plaintiff's infringement. Plaintiff's research and travel expenses were also rejected as proper elements of actual damages. The court said:

. . . [Plaintiff] testified that in 1961 she discussed her book with another publisher, Houghton, Mifflin & Co., and that Houghton Mifflin & Co. lost interest when it heard of Mrs. Meyer's book published by Little, Brown. There is no showing, however, that Houghton Mifflin would have published plaintiff's novel but for the Meyers book. Whether it would have or not is wholly speculative. Plaintiff has thus failed to prove that the plagiarism deprived her of the sale of her work which she could otherwise have achieved. Under the circumstances, and bearing in mind the fact that plaintiff has never produced a completed book, plaintiff's expenses for travel and research are not proper elements of damage. Plaintiff is not in any way dependent for her livelihood upon novel writing; that is purely an avocation. She did not attempt to place any value on her time. I conclude that plaintiff has not proved any actual damage.

II. Plaintiff argued that she should be awarded punitive damages because (1) defendant's employee, Miss Jones, participated in the plagiarism by showing plaintiff's manuscript to Mrs. Meyers, or disclosing to her its details and (2) because defendant continued to print the infringing book after being notified of plaintiff's claim. The court held, however, that since Miss Jones was not an officer of defendant and was not acting within the scope of her employment, her participation in the plagiarism did not justify the imposition of punitive damages against her employer, and that although defendant was negligent in going ahead with further printings after receiving notice of plaintiff's claim, without a more thorough investigation than it did in fact make, there was no such reckless disregard of plaintiff's rights as would justify punitive damages on that ground. The court said:

Miss Jones was and is head of Little, Brown's Juvenile Department. She is not an officer of Little, Brown. Her duties comprise the procurement and processing of manuscripts for possible publication for juvenile readers. . . .

Mrs. Meyer's book was a juvenile book, hence it came within the scope of Miss Jones' duties. Plaintiff's manuscript was not intended to be a juvenile book. . . . Miss Jones knew of its existence, however, and had access to it. In granting the injunction, I found that Miss Jones either showed plaintiff's manuscript to Mrs. Meyer or gave her a detailed account of it. There was no other probable explanation of how Mrs. Meyer was able to make use of plaintiff's manuscript, as she obviously did.

The second contention is based upon the acts of omissions, not of Miss Jones, but of Williams. In 1957 Williams was manager of Little, Brown's New York office. Beginning in about 1959 he became a vice-president in charge of defendant's trade department. He is now a senior vice-president.

The relevant facts are these. In early February 1962 plaintiff's then attorney, Vorenberg, a member of a Boston firm, advised Little, Brown that plaintiff had noted similarities between her manuscript and the Meyer book. . . .

Thereafter, on February 15, 1962, Vorenberg wrote to Williams setting forth fourteen instances described in Mrs. Meyer's book and inquiring as to Mrs. Meyer's sources for them. Williams transmitted this inquiry to Mrs. Meyer. On April 11, 1962 she replied. As to most of the incidents, Mrs. Meyer stated in substance that she had invented them. Williams took her word for it at the time. Little, Brown had had previous dealings with Mrs. Meyer and Williams believed her to be reliable. . . .

Williams made no effort to compare plaintiff's manuscript with Mrs. Meyer's book. Such a comparison would have revealed the similarities which led me to conclude that plagiarism must have occurred. Little, Brown did not have a copy of plaintiff's manuscript in February 1962, as it had returned it to her in May 1957. . . .

Finally, in January 1963, Williams did obtain possession of a copy of plaintiff's manuscript from plaintiff's New York attorney, but even then he did not read it carefully.

On October 19, 1962, Williams authorized a second printing of 2,000 copies of Mrs. Meyer's book. These were delivered in December 1962. In June 1963 he authorized a third printing of 2,000 copies, which were delivered in August.

New York law governs this case. The Court of Appeals has recently written at length upon the New York law of punitive damages. *Roginsky v. Richardson-Merrell, Inc.*, Docket No. 30629 (2d Cir. April 4, 1967).

That decision announced two governing principles: (1) New York law does not impose punitive damages on a corporation unless its "management," i.e., its officers or directors, participated in or authorized or ratified the conduct complained of; (2) there must either be an actual intent to injure plaintiff or recklessness which is "close to criminality."

Williams was a part of defendant's "management." Defendant is bound by his acts. But his conduct does not meet the second test. Granted that his investigation of plaintiff's claim was not thorough and may even be thought to have been negligent, plaintiff has not proved that Williams intended to injure her or that he was so recklessly indifferent to her rights as to be guilty of conduct which was "close to criminality. . . ."

Miss Jones' conduct presents a somewhat different problem. She was a subordinate employee. She was not part of defendant's "management" as defined in *Roginsky*. Hence the first requisite is not met, and if the *Roginsky* rule is to be taken as applying to every case, that is an end of the matter.

But it is not clear that the Court of Appeals intended the *Roginsky* rule to be applied to every case. It there said (n. 17):

"Because defendant asserts, and plaintiff does not dispute, that for purposes of applying this rule to the case at bar 'management' includes only the presidents and vice-presidents of Richardson-Merrell and its Wm. S. Merrell Division, we need not decide whether, under New York law, the acts of interior supervisory employees would otherwise be deemed the acts of

the corporation for purposes of assessing punitive damages. See, e.g., *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 71-72 (1920); *Rose v. Imperial Engine Co.*, 127 App. Div. 885, 888 (4th Dept. 1908), aff'd, 195 N.Y. 515 (1909); *Gill v. Montgomery Ward & Co.*, 129 N.Y.S. 2d 288, 294 (3rd Dept. 1954)."

It is necessary to decide here the question which the Court of Appeals in *Roginsky* did not decide. And in my opinion the cases referred to in the passage quoted above, notably *Corrigan v. Bobbs-Merrill Co.* and *Gill v. Montgomery Ward & Co.* indicate a New York rule which is less favorable to defendants than the rule applied in *Roginsky*. These cases do not hold that for purposes of punitive damages a corporation can be bound only by the acts of its officers and directors. Rather the principle appears to be that the corporation is bound by the acts of a subordinate employee who is a managing agent, provided that the agent was acting within the scope of his employment. See Restatement (Second), Agency §217 C (1958).

Miss Jones was a supervisory employee. She could be regarded as a managing agent for this purpose. The only relevant New York authority that the court has found is *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260 (1920), in which the court said that the knowledge of defendant's "literary editor and chief manuscript reader" was the knowledge of defendant. The opinion does not give enough details to permit an exact comparison between the status of that individual and that of Miss Jones.

It is more doubtful whether in making plaintiff's manuscript available to Mrs. Meyer, Miss Jones was acting in the scope of her employment. Her duties did not require her to deal with plaintiff's manuscript. This was processed in another department. And certainly it was not part of her duties to assist in plagiarism. There is no evidence that any officer of defendant participated in the plagiarism in any way, or knew of it, or authorized it or ratified it.

The courts have been reluctant to grant punitive damages. This is especially true in copyright cases. Only one such case has been found in which an award of punitive damages was approved. *Press Pub. Co. v. Monroe*, 73 F. 196 (2d Cir. 1896), appeal dismissed, 164 U.S. 105 (1896).

Later decisions have denied punitive damages in copyright actions. *Szekely v. Eagle Lion Films*, 140 F.Supp. 843, 109 USPQ 348 (S.D.N.Y. 1956), aff'd, 242 F.2d 266, 113 USPQ 98 (2d Cir. 1957), cert. denied, 354 U.S. 922, 113 USPQ 549 (1957); *Nash v. Alaskan Airlines*, 94 F.Supp. 428, 88 USPQ 85 (S.D.N.Y. 1950).

Punitive damages are of course a pure windfall to a plaintiff. They amount to a penalty against a defendant. They should be awarded only in an extreme case. After careful consideration I have concluded that plaintiff has not made a strong enough showing to justify punishing defendant in this fashion because of the acts of Miss Jones. In the exercise of the court's discretion, plaintiff's prayer for punitive damages is denied.

III. Plaintiff was awarded \$650.11, representing defendant's profits on the infringing book. Defendant claimed a loss, but was held not to be entitled to credit against profits the cost of printing books still on hand. Royalties paid to the infringing author were held to be a proper credit, however, and the court suggested that these royalties be claimed in plaintiff's pending action against the author. In refusing to apportion the profits, the court said:

The question remains whether plaintiff's recovery should be still further reduced by an apportionment of this profit. It is true that the material plagiarized from plaintiff constituted a comparatively small part of Mrs. Meyer's total work, but I have already found, in granting the injunction that Mrs. Meyer appropriated a substantial portion of plaintiff's work, viewed both quantitatively and qualitatively. It is impossible on this record to attribute any particular part of defendant's sales of Mrs. Meyer's book to the plagiarized portion. The people who bought the book obviously did not know that any of it was plagiarized. Presumably they bought it because they wanted to read a book about a "Pirate Queen." Defendant's profit is due to the book as a whole, not to any particular chapter or paragraph. The book as a whole infringed plaintiff's common law copyright. Under the circumstances, I believe that the only fair thing to do is to award to plaintiff the entire amount of defendant's small profit.

I am aware of *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 133 USPQ 94 (2d Cir. 1962), cert. denied, 371 U.S. 817, 135 USPQ 502 (1962), in which the court found that the evidence suggested "some division which may rationally be used as a springboard" (301 F.2d 119 at 121, 133 USPQ at 95).

2. State Court Decisions

120. *Fitzgerald v. Hopkins*, 425 P.2d 920 (Wash. Sup. Ct., March 30, 1967) (Weaver, J.)

Action for common law copyright infringement and counterclaim for defamation. Plaintiff, an established sculptor of excellent reputation, had made a work of art entitled "Rock Totem" in 1959 — appar-

ently in vertical form abstract sculpture. Plaintiff's first "Rock Totem" having been destroyed by fire, his final thirteen-foot work was exhibited at the 1962 World's Fair in Seattle where defendant was among those who viewed it. Defendant, a promising sculpturing student, executed an eight-foot high vertical form sculpture entitled "Transcending" under commission to an architectural firm engaged in the construction of a bank. Plaintiff viewed defendant's work and in oral and written communications to the architectural firm and bank demanded removal of "Transcending". The communications contained references to plaintiff as a "thief" and plagiarist. The lower court dismissed plaintiff's infringement claim and awarded judgment against plaintiff and his marital community in the amount of \$15,000 on the counterclaim.

Held, dismissal of plaintiff's claim affirmed; remittitur on award for defendant.

I. On plaintiff's copyright claim, the court did not discuss the concept of originality¹ nor the question of publication by exhibition. Rather, it limited its inquiry to whether there was evidence to support the lower court's finding that defendant had not copied from plaintiff. Finding a sharp conflict in the evidence adduced below, the court held its jurisdictional limitations to require an affirmance. The court also held that although the trial judge's findings of fact had noted only a lack of conscious copying, his oral opinion demonstrated that there had been a finding of a lack of any copying. The court said:

The ultimate decision pivots upon the answer to one question: Is "Transcending" a copy of "Rock Totem"? The superior court is the only court authorized by the constitution to resolve this question of fact. *Gilbert v. Rogers*, 56 Wash.2d 185, 351 P.2d 535 (1960).

Characteristic of experts testifying in a field other than the exact sciences, there is a diversity of opinion.

After an extended trial and after viewing plaintiff's "Rock Totem" and defendant's "Transcending," the trial court dismissed plaintiff's complaint, based, primarily, upon finding of fact No. 4:

1. In the *prefatory* portion of the opinion, the court did note that it was "impressed with the observation" of the lower court that "the use of vertical form sculpture, which is one of the issues here, is ancient, possibly dating as far back as 20,000 years ago . . . or possibly to 50,000 years ago . . ." and added that "neither plaintiff nor defendant invented vertical statuary, cubism, or abstract art. In fact, both have been exposed to approximately the same artistic influences, except that plaintiff . . . enjoys a much broader development in the field of sculpturing." The context of the opinion renders it difficult to determine if these observations were prompted by an evidentiary dispute below on the originality issue, or whether they referred to the issue of copying.

That both pieces of sculpture were similar in that both had a vertical design with angular semi-horizontal plain masses to a vertical axis. They were also similar in that they were both abstracts. The plaintiff's "Rock Totem" gave a feeling of rockiness with flowing lines in an upward movement. The texture of the surface material of the plaintiff's sculpture was dripped and brushed for a rough effect and contained little element of anatomy. The defendant's "Transcending" gave a different impression and could not be mistaken for a rock-like quality. This sculpture was squattier and had a semi-smooth surface with a definite feeling of anatomy. These dissimilarities and the testimony pertaining thereto were strong enough to convince the court as the trier of the facts that there *had been no conscious copying done by the defendant.* (Italics ours.)

The thrust of plaintiff's appeal is that the trial court by the italicized portion of finding of fact No. 4, *supra*, placed upon plaintiff the burden of proving that defendant intentionally copied plaintiff's statute. We do not agree.

On appeal, the negative finding that "there had been no *conscious* copying done by defendant" is not completely satisfactory, but the trial court's oral decision which we may consider in the circumstances (*Mertens v. Mertens*, 38 Wash.2d 55, 227 P.2d 724 (1951)), makes it clear that the trial judge found that there had not been *any* copying for he said:

It is the opinion of the Court that the plaintiff has failed to sustain the burden of proving that there was any copying done by the defendant in this case.

II. The lower court had found that plaintiff's characterization of the defendant as a plagiarist, compounded by the fact that "such statements [came] from one of the foremost sculptors in the Pacific Northwest", did "hold the defendant . . . up to ridicule and derision in the art community and among the architects of the Northwest" and awarded defendant \$15,000 in damages. The appellate court held that distinctions between libel and slander were immaterial and that plaintiff's comments were not privileged. The court said:

. . . In *Grein v. LaPona*, 54 Wash.2d 844, 340 P.2d 766 (1959), we erased the distinction between the twin torts of libel and slander. The form of the statement is no longer important so long as a defamatory meaning is conveyed, published, or promulgated.

Plaintiff argues that a person who presents his work or product to the public for its approval and acceptance, thereby subjects it to public criticism, and honest comment upon it is privileged. 3 Restatement, Torts § 609, p. 288. See *Cohen v. Cowles Publishing Co.*, 45 Wash.2d 262, 273 P.2d 893 (1954).

We have no quarrel with the rule; but plaintiff's statements were not criticisms — constructive or otherwise — of the statue "Transcending". They refer to defendant as a person and as an artist. Such statements are imputations "affecting the * * * [defendant] in his business, trade, profession, office or calling" (Prosser, *Law of Torts* (3d ed.) § 107, p. 772) and are actionable.

Although thus affirming the finding of defamation, the court held that the record was not sufficiently persuasive to support a \$15,000 award. On the evidence, said the court, "the amount shocks our sense of justice and sound judgment." The court ordered a reduction to \$7,500 with the proviso that should defendant not accept the reduced award within fifteen days after the remittitur, a new trial would be ordered limited to the issue of damages on defendant's counterclaim.

Also of interest:

121. *O'Hara v. Gardner Advertising, Inc.*, 158 N.Y.L.J. 10, col. 8, July 3, 1967 (N.Y. Sup. Ct., N.Y. County, 1967) (Postel, J.)

Defendant's motion for summary judgment in action for unfair competition. Plaintiff, a former television "weather girl", had customarily signed off her weather reports with the expression "Have a Happy", and now charges defendant with misappropriation and confusion of sponsorship in its use of the advertising slogan "Have a Happy No Cal (and never add a pound)". Noting that plaintiff's claim that the public and advertising industry were led to believe she was associated with, or endorsed, defendant's product "is a bit unusual arising as it does in a setting wherein plaintiff is not a manufacturer of goods but a spokesman for various commercial products", the court stated that "defendants have the inherent right to use any or all words in the English language or any combination thereof for any legitimate purpose" but to the extent that words have acquired a secondary meaning, they may be protected against another's use which confuses or deceives the public. Although the court expressed its opinion that the question of the words at bar having acquired distinctiveness associated with plaintiff "should be answered in the negative as a matter of common sense", it denied defendant's motion for summary judgment "since issue finding rather than issue determination is the foundation upon which such motion rests. . . ."



THE HONORABLE T. S. KRISHNAMURTI
Deputy Secretary of the Ministry of Education and
Registrar of Copyrights, Government of India

PART I.

ARTICLES

247. COPYRIGHT – ANOTHER VIEW

*The Sixth Annual Jean Geiringer Memorial Lecture
on International Copyright Law*

By T. S. KRISHNAMURTI*

My name is Tirumanilaiyur Subbaramier Krishnamurti. The first name is that of my ancestral village in South India and the second that of my father. The third name, Krishnamurti, is my personal name. In my official life, I am a Deputy Secretary, a permanent civil servant, employed in the Ministry of Education of the Central Government in India and am also in addition the Registrar of Copyrights. However, my present appearance before you is in my personal capacity and not on behalf of the Government whom I have the honour to serve.

It is customary to preface one's talk with an expression of one's gratefulness for the opportunity afforded to give the talk and to thank the sponsors and the audience. When I do so now, I do not do as a mere customary formality but from the very bottom of my heart; for I value highly this opportunity afforded to me to place before you a few thoughts of mine for your kind consideration in solving one of the important problems which a major portion of the world is facing in the field of knowledge.

* B.Sc. Presidency College, Madras University, 1934; M.Sc. Banaras Hindu University, 1936. The Hon. Mr. Krishnamurti entered the service of the Government of India in 1938. Since 1959, he has represented India at international conferences on education, neighboring rights and copyright, most recently (1967) as Delegate to the BIRPI East Asian Seminar at New Delhi; the Extraordinary Session of the Permanent Committee of the Berne Union, Geneva; the Stockholm Conference; and the subsequent joint meetings last December of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee, in Geneva. As spokesman for the developing countries, his writings include: "Needs of Developing Countries in the Field of International Copyright," SYMPOSIUM (Ministry of Education, New Delhi, January, 1967) and "Protocol Regarding Developing Countries." (*EBU Review* 59-68, No. 106B, November, 1967).

I take it as an extremely good portent that this opportunity for sharing my thoughts with you should have opened up under the Jean Geiringer Memorial. I believe that the physical body of a person is no more than the visible portion of the passage of a soul and that a good soul influences actions even long after it has shed its corporeal habitation. Though I have not had the privilege of meeting the late Mr. Geiringer in flesh and blood, I can sense to some extent the great esteem and affection he must have inspired in you all, from the loving way in which you honour his memory and re-create for yourselves a communion with him at an intellectual plane. Fit is it then that the subject matter for the occasion should be intellectual property. I join you all in venerating his memory and shall hope that under the benign influence of his soul we shall all take a step forward in making the world a little more prosperous than we find it and in making 'Man' less an enemy or obstructor of 'Man.'

I have chosen for my talk the subject "Copyright — Another View." Another view does not necessarily mean a new or a novel view. All that I shall attempt to do is to place before you, with your permission, some thoughts of mine and pose certain questions for your kind consideration.

Copyright consciousness in India has been rather low, notwithstanding our membership of the Berne Union right from the beginning. Could this have been so, due to a different tradition, has been a question that has long exercised my mind. Since ancient Indian texts are mostly in Sanskrit, I turned for help to Mr. C. Sivaramamurti, the Director of the National Museum, a distinguished museologist and scholar, not unknown to your museum experts, and with his help have been able to gather some picture of the past.

There are references in the Sanskrit poet Bana's work about 620 A.D. to bad poets and plagiarists.

About 850 A.D., the poet Anandavardhana, in his work called *Dhvanyaloka*, also treated of literary thefts. He divided them into three categories, viz., prototype and type, an object and its picture and a similarity between two individuals. The last was permissible but not the other two.

In the first quarter of the tenth century after Christ, the poet Rajasekhara included some chapters on plagiarism in his treatise on "Poetry" called *Kavyamimamsa*. He referred to plagiarism as an appropriation by a writer of words *and ideas* — I emphasize, and ideas — from the work of another and passing them off as his own. He divided them into two categories, that which should be avoided and that which should be adopted. He detailed five varieties of borrowing of words and thirty-two varieties of borrowing ideas. Even the borrowing of a single word

could amount to plagiarism. Some of the passages that occur in his work may be of interest. They are:

“While all other thefts committed by a person pass away by lapse of time, literary theft endures even to sons and grandsons.”

“The plagiarist may say ‘I have a reputation, he has none; I enjoy a secure position, he is a climber; . . . no one knows that he is the author; the author lives a long way off; the book he wrote is obsolete; this is the work of a foreigner’.”

“If one gets works written in return for money and passes them off as his own, that too is nothing but plagiarism.”

“It is better if one fails to win fame than to incur ignominy.”

Writing about 1088 A.D., another writer, Bilhana said

“Guard, O, great poets, your nectar-like poetry, churned out of the ocean-like literature, for demon-like plagiarists assemble in hundreds in order to steal it.”

“Or, rather let them all steal to their hearts’ content. This (literary) theft matters not to the great poets. The ocean, although robbed of its many jewels by gods, remains even to date a mine of jewels.”

Perhaps, I might briefly explain here that in ancient lores of India, the ocean is treated as the repository of countless wealth and many of the best things of heaven, not excluding the goddess of wealth, sprang from the ocean when it was churned by the gods and demons, in search of nectar, the drink of immortality.

Due to considerations of time I shall not elaborate further on this but shall refer such of you as may be interested to two articles in English on “Sanskrit Writers on Plagiarism” by Dr. V. M. Kulkarni, contained in Vol. 3 No. 4 and Vol. 4 No. 1 of the Journal of the Oriental Institute, M.S. University of Baroda, dated June 1954 and September 1954 respectively, from which I have taken them.

Dr. Kulkarni notes that the Sanskrit writers and law-givers never discussed the legal aspects of plagiarism.

In his work Rajasekhara advised authors not to show or read out the manuscript to anybody in private lest the work should be stolen. He also advised the preparation of multiple copies to protect the work from ravages of man and nature.

There are many references in the old texts to the convening of regular assemblies of learned men in the Courts of Kings and other

centres of learning for releasing to the public new literary creations and to the financial and other gifts made to the authors in recognition of their merit and contribution. Royal and other grants of great munificence to scholars are on record. Some times, the gifts were even fabulous, running to a gift of many villages, much land or gold. A ceremony known as "Kanakabishekam," i.e., showering him with gold coins so as to leave no part of his body uncovered and gifting these coins to him or gifting him with a quantity of gold equal to his own weight was not uncommon.

What, then, is one to think of a society which went into prescribing minute details for holding assemblies for judging and honouring poets, exhorted kings and nobles to acquire knowledge, not merely for its sake, but for judging the merits of poets and authors, and analyzed the nature and shades of plagiarism but made no rules or provisions for conferring on the author copyright for his works or legal remedies in cases of infringement?

The readiness with which intellectual creators of olden India vied with one another to bring for the common weal their works with no thoughts of the financial rewards leads but to one conclusion that the concept of virtue or Dharma as we call it dictated one's duty but not his rights. It reminds me of the saying of one of your great Presidents, the late Mr. Kennedy, "Ask not what your country can do for you — Ask what you can do for your country." (*Inaugural Address*; January 20, 1961, delivered at the Capitol.)

The authors of old felt it their duty to contribute to progress. It was the duty of the State and the people to look after the authors. That one side might stray from its duty or its obligations was not considered sufficient justification for the other to give up its duty. So far as I understand, it was more or less the same in Europe till about three centuries ago.

In recent times we seem to have outgrown these concepts and devised the modern copyright system under which the dependence of an author on the State or private patrons has been replaced by an indirect income from the public based on the extent of some but not all uses of his works.

The first question I shall pose today is whether the old system was really so idealistic or erratic as to be scrapped completely and whether our present day concepts are entirely ideal and practical. Or could both be imperfect? I myself incline to this latter view. For, there are in India, as in Europe, instances when in the past the system tended to encourage fawning and sometimes meritorious authors were poorly recompensed. Such instances are not unknown today also.

I gather from the proceedings of your Committee of Judiciary of the House of Representatives on your Copyright Bill that by and large an author makes less than what could be considered his due. A recent survey of "What Are Writers Worth?" made in U.K. (by the Society of Authors, London) presents no brighter a picture. I had better not speak of my own country; for, in many cases, if an author could write his work, invest money himself for its publication and recoup his bare investment from sales, he should bless the Lord thrice.

It appears therefore that our present system also leads to this result that financial success for an author may depend less on his merit than on the passing whims of the public.

The recompense for an author is linked with the amount of some kinds of use made by the public and the paying capacity of the medium which uses his work. An author who makes an outstanding contribution in a specialized field, of interest but to a few, might find himself far less well recompensed than another who caters to a larger audience. Of course, in such cases, one might perhaps argue that if an author chose to limit himself to a restricted audience, he must also resign himself to a reduced recompense. Perhaps, these are the very authors who may be living in advance of their times and but for whose contributions, the world might have been poorer in the long run. If so, they would deserve a better deal from the society.

Should we in the circumstance submit ourselves to *laissez faire* and pay but lip sympathy to the author or can we take stock of the past and present and combine the good elements of both to bring into being a system which can on the one hand restore the author to the pedestal he ought to have but hardly has and on the other provide for a better dissemination of his work amongst the public on whose weal the author depends as much as the public depends on the author. This is a problem which I lay before you for your expert consideration.

I start with the premises that an intellectual creator is a benefactor of society not only of his own but of the whole humanity, that he deserves protection and that he should have his due rewards or if I may say so, even more than his due rewards.

My first criticism of the present copyright systems is that they force the author to fight for his financial interests by seeking controls over the means of dissemination of his work, since that is about the only way he can secure his economic freedom now. I assume that when his financial interests are safeguarded, he would be quite as anxious as anyone else that his work should reach the widest possible audience.

My first postulate is, therefore, that the tie between authorship and economic interests should be separated, the latter being looked after by

other means to be determined. The concept of copyright should simply be that it is for the author to create and for the society to protect him, securing for him the financial independence and reward to encourage him to continue his creative efforts and live in such comforts as his eminence would demand.

That such a separation of the two components can be made is a historical fact. As I have tried to show earlier, it was so in India and in Europe till a few centuries ago. It is still so even today. I say so because not in all cases is an author conceded his right to secure recompense today. Sometimes these cases go under the name of "fair use." Sometimes, the right of the author is not recognized at all.

For instance, when your existing copyright law was passed, you felt it unnecessary to entitle the author for any payments when his works were used in a juke box.

A second instance is your non-recognition of the right of a manufacturer of a record to claim fees for public performances of his record, though such a right is recognized in my own country and many others as well.

The Nordic law provides for payments to authors when their books are used in lending libraries and the concerned interests in U.K. are agitating for the recognition of a similar right.

I need not multiply these instances. The point I seek to make is that in some fields we recognize the right of the author but make it incumbent on him to fight as best as he may for his recompense and in some fields, we do not give him a right at all. In some other fields, as in the case of records, we stipulate a statutory royalty as a ceiling.

This shows that even amongst developed societies the working of the copyright law is not on the concept that an author should receive his fair rewards when his work is used but is based on the concept of administrative convenience, the financial capacity of the medium which uses the work and rather oddly, considerations of reciprocity.

Even though your juke boxes and community antenna television systems enjoy exemptions from payment today, you may soon require them to pay some compensation. Perhaps by and by, you may bring within this field other industries and businesses which use intellectual works.

What does this trend show? I interpret this as only meaning that as societies develop, they become growingly conscious of their obligations to intellectual creators; but, inevitably, a realization of the obligations can only follow development and cannot precede it. In the state of the then development, you considered juke boxes as entitled to exemption. In your present state, you are inclined not to. In the past, you

considered a rate of two cents per recording as fair but you now think of increasing this rate, and no doubt consider that the public and the record manufacturing industry can stand it.

In other words, as your national wealth grows apace and your industry expands, you enlarge the area from which your authors can seek a return. This is rightly so and this would apply not only to your society but for all.

If you had tried to force the pace of expanding the field of protection or the rate of recompense to authors, when the society was not ripe for it, perhaps you would have made the user or the author suffer or perhaps both. Perhaps, if the juke box exemption had not been provided, the industry might not have grown up and a new medium of dissemination might have been stifled, with consequent losses not only for the public but also for the authors.

It strikes me, therefore, that a uniform concept of copyright beyond the basic concept of protecting an author, cannot and should not be looked for throughout the world. The field of protection and the rates of recompense are inextricably linked with the state of society, knowledge of science and technology and the financial capacity of the consumers. I consider, therefore, that it would be a pragmatic approach to this problem if we were to enunciate only the basic principle and call upon the various Governments to review periodically, at stated intervals, the possible enlargement of the field of protection and rates of recompense, in the light of the prevailing local conditions.

That this might lead to varying fields of protection or different scales of recompense should not bother us. That the Nordic countries have a law for recompense when books are used in libraries or that some countries provide for "droit de suite" or that the German law provides for manufacturers or sellers of tapes making a payment to the German collecting society to compensate for the possible use of the tape for recording copyrighted material, is no justification by itself for your law or my law providing for these.

My postulate therefore is the separation of the philosophical and economic aspects of copyright. It is the duty of the author to create as best as he may utilizing his God-given talents and discharging his enviable and noble task of improving the world. The responsibility for supporting him should be that of Society. It would be unfortunate if a society were to think meanly of its authors and provide no more for him than for an unskilled worker. Probably, it is these very societies which need the intellectual works more, so that the state of knowledge can grow and with growth, better conditions can arise for authors.

My next postulate, arising from the preceding one, is that intellectual works should be available without hindrance and formalities to all users within the author's society as well as outside. This, I realize, is going to bring me to a head-on collision with the theories that intangible property is no less sacred than tangible property, that an author should not only reap financial rewards from his work but also have full control over the use of his work and that I can no more take away from an author his work than his pen unless he were to agree.

I have spent some anxious thoughts on these points and I must confess that the more I think, the more unconvinced I end.

Intellectual property has never been treated as tangible property. It is a child of statute. While tangible property can be assessed for its value, intangible property cannot be so assessed. The value is bound to vary from society to society depending on the emphasis it places on knowledge and its financial resources. The less a society values knowledge or the less it can pay for it, the greater is its need for intellectual property.

Whereas tangible property generally evokes only a tangible income — I say generally, because of exceptions like old furniture or heirlooms receiving a higher price based on sentiments — intellectual property evokes tangible as well as intangible returns. How can anyone assess the value of the satisfaction or pleasure an intellectual creator feels when his work is widely received and highly esteemed and he gets enshrined in the hearts of his readers and commands respect in his community.

Intellectual property cannot, therefore, be equated with tangible property and has never been so treated, so far as I am aware. This is also borne out by the fact that protection for intellectual property has always been for limited periods, even in societies which laid the greatest stress on the importance of protecting tangible property for ever and a day.

Over the recent past, it has, no doubt, been sought to expand or enlarge the domain of human rights by bringing within its purview social and economic rights. The latest of these attempts is the U.N. Universal Declaration of Human Rights of December 10, 1948. The declaration is to be welcomed by one and all; but, at the same time, we should not perhaps take it as capable of being fulfilled instantly. It sets before us a great ideal to work to and such ideals are necessary for any progress towards the common goal of mankind, despite the opposing interests between the rich and the poor, the employer and the employee, the ruler and the ruled and the majority and the minority. It has been pointed out, however, that all the privileges in the U.N. Declaration

cannot be treated as rights. Many can be only claims or demands which the member States or even an international supervisory agency cannot meet in the near future but may, we hope, some day. The U.N. Charter is an evolution of history. As States have developed and human consciousness has grown, tending not towards *laissez faire* but towards social ethics and social justice, the domain of human rights, which started originally as political and civil rights and that too, as the right of an individual against his own State, has or is being enlarged to cover social and economic rights. It is natural that growth of knowledge should evoke such results and what is considered today, as at best a moral right by a minority or enlightened few might come to be considered as a human and legal right a few years hence.

Though the concept of political and civil rights as human rights, worthy of application universally, has had a long past, can we say that even these basic rights have found acceptance everywhere without exception? Apartheids, racial discriminations, persecution of innocent and helpless minorities, and genocide in the name of religion figure in our daily newspapers, even amongst developed areas.

In such a situation, where even the basic rights have yet to find roots, it would not be wise to seek to tag on economic rights to the basic concept of copyright as a human right and withhold the means of enlightenment from those who have not the wherewithal to pay a set price.

Can we even claim that the simple concept of copyright, without the economic rights, has been universally conceded? There are many societies who have no copyright laws. Even amongst those who have one, many do not recognize the rights of foreigners. Even they who do accept to protect foreigners impose certain conditions for protection and protection is denied unless these conditions are met or there are reciprocal agreements. If copyright, even without the economic rights, is a human right, why do we treat some authors as entitled to protection and some not? Why can we not take the step of protecting all authors, irrespective of nationality and set an example for others to follow? States which are opulent might also grant economic rights unilaterally. Others may not, but perhaps, they might also find it expedient to utilize the product of the economic rights for the betterment of their own authors, even if not for the alien authors.

I submit, therefore, that in a world where even the basic concept of copyright has not yet found acceptance, it would be unpractical to expect that the further adjunct of economic rights would find acceptance. An insistence on this approach would, I fear, postpone the results we have in view.

As I said a little while ago, not all societies have copyright laws even for their nationals or extend the rights to foreigners. Such societies have, rightly or wrongly, an unimpeded access to works of all authors. Not all of them can be called developing areas. Is it our intention to handicap societies who behave differently by placing them at a distinct disadvantage in the matter of unhampered access to intellectual works even though such access may not necessarily mean economically free access?

I tend to believe that the slow growth of the Copyright Union is in a large measure due to the economic consequences of membership. In the field of tangible property, it is common practice that when a new item is introduced in the field, samples are distributed freely or at reduced costs. To capture foreign markets, State or private subsidies are not unknown. In fact, before a new idea catches on, much or at least some sacrifice is involved. Even the product itself is a result of sacrifice on the part of the entrepreneur and his society. Out of this sacrifice, grows the future. Without such a sacrifice, nothing would have grown. We may or may not have an answer to the metaphysical question whether the seed or the plant came first. But, we may not have far to seek whether rights or obligations come first. Obligations have to be discharged first before rights can be claimed. This, I feel, is an immutable human law, which is often stressed in all our religious texts and we cannot afford to ignore this, even if we were a society intent on divorcing religion from life.

To take away an author's work with or without compensation is not something which is not being done now. As I said earlier, all exemptions under the fair use clause are appropriations. I shall indicate a little later that appropriation with adequate remuneration is also in usage. The appropriation of a literary work cannot be more serious than taking away a man's body and perhaps even his soul. We incarcerate a man's physical body if he should refuse to be drafted into the army or having been drafted, he quits it on his own.

In many societies, as also in mine, a man's land can be taken away for public use on payment of equitable compensation. So can a man's house be requisitioned for garrisoning a troop or even civilians. I tend to believe that even in the most democratic societies, the policy of *laissez faire* is increasingly being given up and the field of eminent domain is expanding. This is inevitable and rightly so, since societies are becoming more and more prone to emphasize social justice and ethics. Why, then, should there be opposition to any appropriation of intellectual property for the war enjoined upon all for the removal of ignorance, poverty and disease?

An intellectual creator may well deny me the right to use his pen or toothbrush but not his intellectual creation. His works should, like the ennobling creations of God, be available unhampered to all, like light, air or water. When I say this I am not dragging God down to man's level but raising the author to the level of God. This, believe me, is not mere hyperbole; for it is an accepted tenet of my society that a teacher is identical with God.

I incline to believe that much of the developed part of the world also believes similarly in the universality of knowledge, judging from what Jesus said to his disciples "What I tell you in darkness, *that* speak in the light and what ye hear in the ear, that preach ye upon the house tops" (N.T., St. Matthew 10-27). In the Sermon on the Mount, He said also:

"Ye are the light of the world. A city that is set on an hill cannot be hid.

"Neither do men light a candle and put it under a bushel but on a candle-stick; and it giveth light unto all that are in the house.

"Let your light so shine before men, that they may see your good works and glorify your Father which is in heaven" (St. Matthew 5;14-16).

In St. Luke (11-52), the passage occurs: "Woe unto you, lawyers! for ye have taken away the key of knowledge; ye entered not in yourselves and them that were entering in ye hindered." Only the closing words, "them that were entering in ye hindered" is applicable now.

An intellectual creator has full control over his work till he releases it to the public. But, once he has done so, it should be available to all and no man should hinder or hamper the dissemination of the work. Where the work is withheld from any society on economic considerations, it is even worse than the practice, which I believe you have now seen fit to give up, of burning your excess wheat which could not fetch a price you thought appropriate.

Appropriation of a literary work under a compulsory or a legal license is criticized, even where some compensation is assured. I do not see why it should be so. I shall indicate now a few of the old or current provisions permitting such compulsory licensing. These are:

1) The provision in Article V of the Universal Copyright Convention in regard to translations.

2) The provision in many laws and in our own in favour of record manufacturers.

3) The provision in Article 11(2) of the Brussels text of the Berne Convention empowering States to legislate for determining the condi-

tions under which an author may exercise his rights to claim remuneration when his works are used for broadcasting.

4) The provision in Sections 14-15 of the Canadian Copyright Law enabling the issue of compulsory licences for reproduction in Canada of certain foreign works under certain conditions.

5) The proviso to Section 3 of the old U.K. Act of 1911, under which, at any time after the expiration of 25 years from the death of the author, a protected work could be reproduced just by giving to the copyright owner a notice about the intention to reproduce and ten per cent royalty on the published price. In his Research Monograph entitled "Copyright and the Creative Artist," published in 1967 by the Institute of Economic Affairs, London, Mr. Denis Thomas says, "The consequence was competition by price and quality, as a result of which the interests of the copyright holder and of the public were equally well served. This valuable and enlightened safeguard was, however, sacrificed when the U.K. accepted the revisions to the Berne Convention made at Brussels in June 1948."

6) Section 4 of the U.K. Act of 1911 provided for issue of compulsory licences, if at any time after the death of an author, the owner of copyright withheld the work from the public. That this provision was never used in fact does not detract from my argument.

7) Under Section 29(5) of the U.K. Act of 1956, the Performing Right Tribunal is authorized to reduce or even exempt altogether the licence fees payable by non-profit clubs or societies concerned with education, religion and social welfare, even where a charge is made for admission to the place where a protected work is being performed, and the proceeds may be applied otherwise than for the purposes of the club or society.

8) In their Report published in 1960, the Copyright Law Review Committee 1959 of Australia said (in para 404): "The Gregory Committee (the Copyright Committee of 1951 set up in U.K.) recommended that the Crown should be empowered to reproduce copyright material in connection with the equipment of the Armed Forces and possibly also for civil defence and essential communications, subject to compensation (para 75). This recommendation has to a large extent been put into effect by the provisions of the Defence Contracts Act, 1958. The Solicitor General of the Commonwealth has expressed the view that the Commonwealth and the States should be empowered to use copyright material for any purposes of the Crown, subject to the payment of just

terms to be fixed in the absence of agreement, by the Court. A majority of us agree with that view. The occasions on which the Crown may need to use Copyright material are varied and many.”

9) In critical times and emergencies, copyrights of specified nationals are suppressed, irrespective of conventions.

10) The provisions in the ‘Protocol Regarding Developing Countries’ annexed to the Stockholm Text of the Berne Convention.

11) Such licences, subject to just compensation, are permissible in the sister field of patents.

In view of these instances, is it not time that we re-examined the position and withdrew our objections to compulsory licenses in any field of copyright?

This would facilitate easy availability of the protected works to users. Societies which believe more in negotiated contracts, as yours does, could continue as now. Societies which would like to provide for compulsory licences in those situations only when negotiated contracts fail, could do so. Still other societies who for any reason prefer to resort to compulsory licences straightaway may also do so. All that matters is that in the latter two situations also national treatment is accorded to the author in respect of remuneration.

This leads me to the next question on standards of compensation. It is only natural that any compensation should be based on the local conditions, and linked with the national income, gross national product etc. I believe that the tariff schedules of the various performing right societies in the world are not uniform. I wonder whether even the tariffs of ASCAP and BMI are identical, even though they operate within the same society. To oppose then, the use of your works abroad on the ground that the rates of compensation may be less than what prevail in your own country would be unreasonable and I would add, unethical.

At the Intellectual Property Conference held in Stockholm in June-July, 1967, a proposition moved by the Delegation of Israel was adopted and it was resolved that studies should be made of setting up a national fund in each country from which payments could be made to local authors to compensate them for any reduced remuneration they might receive from a foreign country for the use of their works.

That this may not be impracticable is borne out by the provision in Section 28(2) of the U.K. Act of 1956 which authorizes the Performing Right Tribunal to order the making good of any deficiency in the charges payable by or on behalf of a foreign broadcaster whose broadcast is rediffused in U.K.

An issue which should be considered in this context is what happens when a country using a work is unable to pay the compensation in foreign exchange. Such difficulties may arise in most of the emerging countries who do not have favourable balance of trade of adequate raw or finished products for export or even where exportable goods are available and buyers are not. The question then hinges on whether in such situations the usual practices adopted in regard to tangible property should be adopted and we should say "No Cash; No Carry" or we should apply a different practice for the intangible property. This is a matter of conscience and I have already emphasized that the less developed a country is the more it is in need of intellectual properties. It may be asked what an author could do with the blocked local currency. The answer as I have indicated earlier is for the author's society to recompense him in his own currency at the rate prevalent at home and use the foreign accumulated fund for such purposes as may be agreed upon between the two States. So far as our two countries are concerned, there is already a similar arrangement in regard to supplies of wheat. What is there to prevent some similar arrangement in regard to the equally essential food for the intellect?

It is my understanding that many developed societies pump in a lot of money for increasing book exports. I suggest that if only these moneys are utilized to build up national funds to compensate local authors for losses, if any, sustained when their works are used abroad, the authors could receive many times more compensation than under the present system.

At the hearings of your House of Representatives Committee of the Judiciary, your printers pointed out that importing into your country of U.S. works printed outside in areas where printing labour could be hired more cheaply than in U.S.A. would shut shop for the U.S. printers. If India were to import her books from the U.S.A., for the growing educational needs, education would suffer since most cannot afford the books and a primary need will go unmet. Of course, you must not forget that we too would have an equally valid desire to promote our printing industry, to provide more openings for employment and to lay the foundation for promoting indigenous publishing of Indian works.

The concept of "One World" has come to stay. We have been moving imperceptibly towards it over the past few years. Whether we shall have "One World" on the political and economic plane is something on which I cannot pronounce. But this I can say with confidence that we cannot have "One World" on the economic or political level till after we have achieved "One World" on the intellectual plane. If we sin-

cerely believe in the aims of United Nations and Unesco to remove the barriers to spread of knowledge, we shall first have to remove the intangible barriers of which the foremost is the concept of copyright as now applied.

In view of these considerations, I postulate that the time has arrived for taking an urgent and anxious look at the present international copyright provisions. All indications are that a concept which started with the primary purpose of protecting an author for the benefit of society has neither protected the author adequately nor served the public purpose but has on the other hand got so mixed up with economic aspects that, instead of promoting the common weal it actually hampers it. As I see it, the present situation demands it that copyright and its economic aspects have to be untangled. It should be incumbent on the society and the State to supplement the income of the author not only to cover any reduced payments he might receive from outside his society but also to correct imbalances where the author's position in his own community has fallen below appropriate levels. Having assured this, the intellectual creations should be readily accessible to all, not only in the home State but also outside. It should be the duty of every State to provide that within its own territory, the principle is progressively established that any use and not merely some kinds of use of an intellectual work should lead to a payment.

I urge this not only on ethical grounds but also out of practical considerations. It has been established that the gap between the haves and have-nots has been increasing yearly and if an attempt to establish heaven on earth is to be the goal, men's minds and hearts should expand even more rapidly than the world shrinks.

I referred to practical considerations. Let me dwell upon these, briefly though. Let us try and imagine for a moment what a Government or a society, thirsting for knowledge, may do when it finds itself barred to sources of knowledge due to economic barriers. I see only three alternatives.

The first may be for that society to turn to sources which do not present economic barriers. How far such sources may meet the entire need for balanced development is for you to ponder. If in your own case you tend to believe that education must be through a multiplicity of text-books, diverse schools of thought, and up-to-date materials, you may not perhaps vote for any less liberal or less efficient educational materials for the others.

The second alternative may be for the society or individuals to lay hands, forcibly as you may call it, on protected materials without paying compensation or even resort to bringing out spurious editions in the

name of the original author and/or publisher. To spot the offence and locate the offender might well nigh be impossible in some situations. A society might even claim that using intellectual works freely is nothing more than what happened in your own country in the last century, even when it was so advanced as not to have been compelled to resort to it. Litigations in such cases may be cumbersome and costly and damages bound with the financial capacity of the infringer, which in many such cases may have to be assumed as next to nothing.

The third alternative may be for a country finding itself in this situation not to join any international union or if already a member, to quit it. Since, as I have pointed out, copyright is not yet even a human right and as economic rights act only as barriers to spread of knowledge and as even developed countries consider it of no moral consequence to ignore the rights of authors of non-union countries, there can be no moral or legal stigma to staying out of or resigning from the copyright union. States which are not bound entirely by *laissez faire* can always find bucklers in their armoury to guard against the works of foreign authors acting as obstacles to the growth of national writers. Were a State to do this, I imagine that it would have greater consequences for the publishers of the developed members of the copyright unions than for the non-member country or its own authors and publishers.

With more than two-thirds of the world starved of knowledge and the adequate means of even achieving bare literacy, the question cannot be one of economic rights but of social consciousness.

Addressing the second session of the United Nations Conference on Trade and Development (UNCTAD) at New Delhi on February 9, 1968, the Secretary-General of the United Nations said:

“My own view is that developing countries will in any case find their own way towards the solution of the economic problems that now confront them and that in the long run they will overcome the obstacles which they face, with or without a better framework for trade and with or without more external financial resources.

The real question is not whether development will occur, but how it will occur and within what international framework. Do we envisage a framework in which the developing countries are forced back largely upon their own resources and are compelled to take the political and economic steps required for an autarkic pattern of development? . . .” (16 *U.N. Weekly Newsletter*, No. 6, February 9, 1968, p. 3).

The same question would apply in the field of copyright.

Let us now turn to an unorthodox view of copyright. Words, speech, writing, printing, broadcasting and other inventions or developments

of a similar nature were all born out of the desire for communication between man and man and society and society. The means of communication have become finer and finer. Telstar communications, electronic memory systems and constantly improving reprographic methods will soon create conditions undreamt of today. It is not unlikely that even as the mathematical concept of plus infinity and minus infinity merging together, the conditions of the world of long ago when communication systems were underdeveloped and of the world of tomorrow when communication systems will annihilate space and time may not be too different in certain respects. When the means of communication were too few, an author was denied copyrights, so that the works could be disseminated widely. When tomorrow the means of communication become perfect, the author may find that try as hard as he might, he cannot prevent the means of communication disseminating his work.

It may be an idle vision but I foresee, not in too distant a future, a completely different kind of book-making. With the Xerox and other methods of reprography, an author may well nigh dispense with the present day concept of publishing through a home publisher. He may be able to hawk his manuscript in various parts of the world with cheap multiple copies at his disposal. Printing books simultaneously in various parts of the globe by means of signals sent from a satellite is not an empty dream. Progressive replacement of books by micro-cards readable at will by means of a handy equipment cannot be ruled out. Inter-connected electronic retrieval systems are, I believe, already on the way. The human urge for communication has and will ever be irresistible and I foresee that very soon our present systems of copyright will call for a thorough reorganization. The day is not far off when again the right to control dissemination of his work is going to be unexercisable by the author.

I fear that this has been a long infliction. If I have dwelt too long on certain aspects or repeated some, it is out of an anxiety that the problem should not be missed. Your society holds an enviable position amongst free societies and perhaps the single dominant factor for this has been your earnest search after truth and the high value you place on knowledge. The cross-currents of the thoughts of the world have intermingled here freely and to the extent of being accused of brain drain, you have extended an open welcome for men of learning from anywhere irrespective of caste, creed or colour. When I, therefore, address myself to you on this occasion, it is with the hope that with your passion for searching for truth, you will find the means for kindling the torch of knowledge in other parts of the world too so that the search can be on a universal level; for, half the world or humanity cannot live

in knowledge and the other half in ignorance, even as Mr. Abraham Lincoln said, that a nation cannot live half in freedom and half in slavery. It is only by providing knowledge for all that human rights can become a reality and it will be my fervent hope that your society will take its rightful place in this vital movement.

I have now come to the end. I must thank you all for listening to me so patiently and I should like to thank Mr. Abraham Kaminstein, your distinguished Register of Copyrights, for suggesting my name to the Jean Geiringer Memorial Committee and Mr. Harold Orenstein and his fellow-trustees of the Jean Geiringer Memorial Committee for having conferred this signal honour on me and for having provided me with an opportunity to meet some of the best experts in the field as you gathered here. I thank you all.

I should also like to acknowledge before you my indebtedness to Mr. B. N. Lokur and Mr. N. M. Ketkar. Mr. Lokur is an expert on copyright known to many of you and has represented India at many international meetings. What little of copyright I know, I have learnt from him and that I have been an undeserving pupil is not his fault. Mr. Ketkar is the Librarian of the Central Secretariat Library and an esteemed friend, whose rational approach I admire much and who took much pains to provide me with all references that I needed. Both Mr. Lokur and Mr. Ketkar found time to discuss this text with me and both the text and I have been richer for this.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

248. CALIFORNIA. *Legislature. Assembly.*

Assembly Bill No. 83. An act to add Section 653h to the Penal Code, relating to sound recordings. Introduced by Assemblymen Conrad [and others], January 11, 1968, and referred to the Committee on Criminal Procedure. 2 p. (1968 Regular Session).

This bill "makes it a misdemeanor for persons to transfer sounds from recording devices to other such devices for commercial purposes, without consent of owner."

2. Foreign Nations

249. SWITZERLAND.

Stellungnahme der schweizerischen Bundesregierung zum Stockholmer Revisionsprogramm der Artikel 1 bis 20 RBÜ. Vom 16. März 1967. (50B *Archiv für Urheber-, Film-, und Theaterrecht* 661-665, nos. 1/2/3/4/5/6, Oct. 15, 1967.)

Observations of the Swiss Government, dated March 16, 1967, on the proposals under consideration by the Stockholm Conference, for revising the substantive provisions of the Berne Convention.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

250. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967.

Decisions and recommendations. (3 *Copyright* 299, no. 12, Dec. 1967.)

Among the recommendations adopted by the Conference is the undertaking "in association with other governmental and non-governmental organizations [of] a study of ways and means of creating financial machinery to ensure a fair and just return to authors."

251. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967.

Signatory countries of the various texts adopted by the Conference. (4 *Copyright* 2-3, no. 1, Jan. 1968.)

"All signatures affixed are subject to ratification, with the exception of Ireland which signed the WIPO Convention without reservation as to ratification." The United States signed the WIPO and Paris Conventions.

252. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967.

Stockholmer Fassung der Berner Übereinkunft. Vom 14 Juli 1967: Convention de Berne pour la protection des oeuvres littéraires et artistiques du 9 septembre 1886, complétée à Paris le 4 mai 1896, révisée à Berlin le 13 novembre 1908, complétée à Berne le 20 mars 1914, révisée à Rome le 2 juin 1923, révisée à Bruxelles le 26 juin 1948 et révisée à Stockholm le 14 juillet 1967. (50B *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 666-694, nos. 1/2/3/4/5/6, Oct. 15, 1967.)

The official French text of the Stockholm revision of the Berne Convention.

253. INTERNATIONAL COPYRIGHT UNION.

State of the International Union on January 1, 1968. (4 *Copyright* 3-6, no. 1, Jan. 1968.)

The annual report of the Berne Bureau listing member countries and showing the revisions of the Berne Copyright Convention

ratified by each, together with their reservations, as of January 1, 1968.

254. State of ratifications of and accessions to the conventions and agreements affecting copyright on January 1, 1968. (*4 Copyright* 16-17, no. 1, Jan. 1968.)

Covers the Rome Convention on Neighboring Rights, the Universal Copyright Convention, the European Agreement concerning Programme Exchanges by means of Television Films, the European Agreement on the Protection of Television Broadcasts and the Protocol to the said Agreement, and the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

255. *Breffort v. I Had a Ball Company*, 271 F. Supp. 623, 155 U.S.P.Q. 391 (S.D.N.Y., July 24, 1967) (Mansfield, J.). See also, 240 F. Supp. 1018, 144 U.S.P.Q. 708 (S.D.N.Y. 1965), 11 BULL. CR. Soc. 300, Item No. 233 (1965).

Action for infringement of copyright in a musical play. At trial, a jury found that the musical play "I Had a Ball" infringed the copyright in "Impasse de la Fidelite" and awarded \$19,000 damages against the author and producer but not against the "I Had a Ball Company" or against the composer and lyricist. The plaintiffs then moved for a permanent injunction against further showing of "I Had a Ball" and for attorneys' fees. The prevailing defendants moved for attorneys' fees and expenses. It was stipulated that the record of the jury trial would be accepted as the basis for determination of equitable relief.

Held, judgment for plaintiffs.

I. The court held that defendants Chodorov and Kipness, who had been commissioned to do an English adaptation of "Impasse de la Fidelite," deliberately infringed the copyright when they wrote and produced "I Had a Ball" two years later, but that the music and lyrics in the two musicals were not similar. Accordingly, the injunction granted by the court against further performance of "I Had a Ball" did not bar independent performance of the songs and lyrics. The court said:

Viewing the proof as a whole, and independently determining the weight and credibility to be extended to the testimony, the Court finds that to the ordinary observer there appears to be a substantial similarity of expression in material portions of both works, and that "I Had a Ball" infringes copyrightable material in "Impasse." Although a finding of irreparable injury may not be essential to the issuance of injunctive relief, see *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 173 F. Supp 292 (S.D.N.Y. 1959), *affd.*, 274

F.2d 487 (2d Cir. 1960); *Rushton v. Vitale*, 218 F.2d 434 (2d Cir. 1955), the proof here leads me to conclude that it would be difficult to measure the damages that might flow from any future infringement of plaintiffs' play, which had substantial value before it was infringed by Chodorov and Kipness.

Defendants oppose injunctive relief, arguing that it is not warranted for the reasons that although plaintiffs asserted their claim of infringement in November 1964, at the commencement of the six-month Broadway run of "I Had a Ball," and commenced suit shortly thereafter, plaintiffs did not press their claim for injunctive relief until trial in 1967, two years later; that there is no real probability or threat of continuing or additional infringements, since the defendants' production and performance of the infringing work was not a financial success; and that the 16 songs and lyrics written by the defendants Lawrence and Freeman, which are incorporated into the play, were not found to infringe the songs and lyrics of "Impasse." On the other hand, the record shows that it was not until approximately two years after abandonment of their work on an English adaptation of plaintiffs' play that Chodorov and Kipness apparently resurrected plaintiffs' arrangement and dressed it in a modified suit of clothes to produce the infringement.

Against this background and the existence of proof providing ample grounds for the inference that the infringement represented calculated and deliberate conduct, as distinguished from an unwitting or negligent misuse, the plaintiffs should not be required to assume the risk that these two defendants will not repeat such infringement or engage in similar conduct in the future. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, supra. In addition to protecting the plaintiffs against such risk, the issuance of a permanent injunction does not threaten any substantial harm to any legitimate interests of the defendants, particularly since it will not bar independent performance of the songs and lyrics involved.

II. The court determined that in view of the complexity of the issues, the level of skill required of plaintiffs' attorneys and the amount of time expended by them (475 hours), an award of \$12,500 for attorneys' fees was appropriate.

III. The successful defendants were held not to be entitled to attorneys' fees because such fees are awarded only when the plaintiff's lawsuit is unreasonable, capricious, or brought in bad faith. The court said:

The application of the above-named defendants for an award of a reasonable attorney's fee to them as prevailing defendants is denied. Plaintiffs' claim against them does not fall in the category of actions instituted unreasonably, capriciously or in bad faith, which are to be discouraged through assessment of attorneys' fees as a penalty. Far from being groundless, the claim was supported by evidence warranting its submission to the jury, at least as the basis for an inference of contributory infringement. . . .

Against this background an award of attorneys' fees to them under Title 17 U.S.C. §116 will not be made since the effect of such a penalty would be to inhibit the submission of legitimate issues for resolution by the Court. The situation here is quite different from that found in decisions cited by Lawrence and Freeman, where awards of attorneys' fees were granted against plaintiffs who had instituted groundless suits. In *Burnett v. Lambino*, 206 F. Supp. 517 (S.D.N.Y. 1962), for instance, the court found that "the asserted claim of infringement was so demonstrably lacking in merit that bringing it was clearly unreasonable." To the same general effect is *Mailer v. RKO Teleradio Pictures, Inc.*, 332 F.2d 747 (2d Cir. 1964), where plaintiffs' claim was found to be "unreasonable"; *Cloth v. Hyman*, supra, where the claim was found to have been commenced in bad faith and lacking any merit. *Rose v. Bourne, Inc.*, supra, also heavily relied upon by the defendants, presented an unusual situation, clearly distinguishable from that here. In that case the plaintiff voluntarily dismissed his claim, the presentation of which was found by the court to be frivolous after attention was called to a dispositive Supreme Court decision, whereupon the defendants successfully prosecuted a counterclaim for a declaratory judgment; and since the defendants in effect became plaintiffs, the court awarded them attorneys' fees. The facts warranting assessment of attorneys' fees in favor of the defendants in the foregoing cases do not exist here.

IV. The successful defendants were also held not to be entitled to recover expenses because of plaintiffs' refusal to admit that the songs and lyrics of "I Had a Ball" were not copied from the music of "Impasse." The court said that while the music was generally dissimilar, sixteen bars of music in one of the "I Had a Ball" songs was quite similar to music of "Impasse" and that, in any event, most of the expenses incurred by these defendants in connection with the trial were incurred in proving that they were not contributory infringers with respect to the

text of "Impasse" rather than in proving that they had not copied the music.

256. *Public Affairs Associates, Inc. v. Rickover, et al.*, 268 F. Supp. 444 (D.D.C. May 9, 1967) (Smith, J.) See also 8 BULL. CR. SOC. 22 (1961).

Action for declaratory judgment and supplemental relief on remand from the United States Supreme Court. Defendant Rickover, a Vice-Admiral in the U.S. Navy serving with the Bureau of Ships and the Atomic Energy Commission, had delivered a number of speeches to various groups between 1955 and 1959. Plaintiff, an educational publisher specializing in works on national affairs, was denied permission to quote from or publish these speeches and received notice from Rickover's publisher that action would be brought against him should he proceed in his plans to publish a volume of the Admiral's addresses. Plaintiff then commenced suit, seeking a declaratory judgment that the speeches were in the public domain under the "Government publications" provisions of the Copyright Act, 17 U.S.C. §8. In 177 F. Supp. 601 (D.D.C. 1959) Judge Holtzoff dismissed the complaint upon a finding that the twenty-three speeches then in question were not given as a part of the Admiral's official duties and accordingly were subject to copyright; in 284 F.2d 262 (D.C. Cir. 1960) the decision was reversed and remanded for a consideration of fair use and forfeiture by publication without notice; in 369 U.S. 111 (1962) the Supreme Court vacated the judgment of the Circuit Court and remanded the case to the court of first instance for development of a fuller record. In the present stage of proceedings, plaintiff has amended his complaint to add as defendants the Register of Copyrights, the Librarian of Congress, the Secretaries of Defense and the Navy, and members of the AEC. Alleging that these defendants had violated the Copyright Act and plaintiff's First Amendment rights in refusing to treat the speeches as public domain "Government publications," plaintiff seeks orders requiring the expunging of the Admiral's extant copyright registrations and the promulgation of departmental regulations against securing copyright in such speeches. Plaintiff further added one more speech to his complaint and defendant Rickover abandoned his claims to all but one of the speeches formerly in question.

Held, complaint dismissed with costs to be assessed against the plaintiff; parties to pay their own attorney's fees.

I. As between plaintiff and the Government defendants, the court held it lacked jurisdiction to grant the relief sought in the nature of mandamus as it lacked authority to control said defendants in the exercise of their discretionary functions: "The promulgation of regulations

governing the speech making activities of Defense Department and AEC employees is clearly a duty requiring the exercise of judgment and discretion. By the same token registration of a copyright application calls for executive judgment. Neither function is within the power of this court to control [*Decatur v. Paulding*, 39 U.S. 497 (1840); *Adams v. Nagle*, 303 U.S. 532 (1938); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940)].”

II. As between plaintiff and defendant Rickover, the court held this to be a proper case for the exercise of the court's discretionary jurisdiction under the Declaratory Judgement Act despite defendant's dual contention that (i) judicial restraint was mandated by the legislative copyright revision program, and (ii) there was lacking a justiciable controversy due to plaintiff's failure to publish the speeches in question. The court said:

These arguments are not persuasive. Rickover has refused plaintiff the right to publish his speeches and through his publisher has threatened suit should plaintiff attempt to do so. There is no obligation on plaintiff to infringe the copyright he challenges. . . . Judicial restraint is only exercisable when the presence of an actual case or controversy is questioned. . . . The conflict between Rickover's right to copyright his speeches and plaintiff's right to publish materials allegedly in the public domain has been clearly set forth before this court. Consequently the court finds that as between these parties a justiciable controversy exists.

III. Passing to the merits of plaintiff's contention, the court stated the “fundamental determination” to be “whether the disputed speeches fall within the purview of Admiral Rickover's official duties . . . [such] duties [being] a matter of contract between Admiral Rickover and the Navy Department.” Declining to base a decision *in this case* merely on the absence of speech making among the Admiral's officially enumerated duties and orders, the court predicated its holding that the speeches were not delivered in an official capacity on the circumstances of the preparation and delivery of the addresses, the tenor of the invitations therefor, and the contents of the speeches. The court said:

The assertion that speech making is not enumerated among Admiral Rickover's official duties remains uncontroverted, nor has there been any evidence that he was directed to make the speeches in issue. Normally, such evidence would be dispositive of the question, but the broad authority vested in Rickover carries with it the power to act in a variety of ways not enumerated in his formal position description. In this context the duties of a high Govern-

ment official should not be narrowly interpreted. Consequently, the circumstances of the preparation and delivery of the speeches and the speeches themselves must be examined to determine whether the Admiral was acting in his public or his private capacity.

Delivery of the speeches had its inception in invitations extended directly to Rickover by two private organizations. There is nothing in the correspondence between these groups and the Admiral to suggest that the invitations were extended to him other than in his private capacity. Rickover treated them as such and did not consult his superiors, the Secretary of the Navy and the members of the AEC. The speeches were prepared in the privacy of Rickover's own home. Purely mechanical operations were then performed on the completed manuscripts by his administrative assistant in typing a final draft for duplication, in the case of the Education speech, on Navy facilities. The duplication served a dual purpose, one official, i.e. obtaining security clearance (Rickover's standard practice no matter what the subject matter of the speech), and the other unofficial, obtaining copies for distribution to the addressees and the press. The additional releases only evidence the Admiral's recognition that his official position made anything he had to say of interest to the press. Furthermore, the copyright borne by both speeches appeared in the name of "H. G. Rickover," unqualified by any official titles. Both speeches were delivered on the Admiral's own time. The fact that he was also performing official duties in the area is immaterial; those duties had no connection with the addresses. In short, both speeches were handled as private business from start to finish.

The absence of a disclaimer clause on the speeches as allegedly required by Navy regulations . . . and the alleged use by Admiral Rickover of certain Department of Defense facilities in preparing the speeches are neither material to the case nor proper subjects of comment for this court.

That Rickover delivered the speeches in his private capacity is further confirmed by their subject matter. The Education speech [given before members of the Harvard Club] presents the Admiral's private views on the danger of the professional educationist's exclusive control of the public secondary school system. A subject further removed from the Admiral's official duties is difficult to imagine. The Shippingport speech [concerning the problems involved in the construction of Shippingport Atomic Power Station, a joint project of the AEC and a private company designed to produce civilian atomic power] contains the Admiral's views on the

meaning of the Shippingport experiment to those private individuals, concerned with future development in public power, who comprised the American Public Power Association. The speech was aimed at administrators, not scientists, and the entire content from a technical standpoint had long been public knowledge. . . . Admiral Rickover [had] sought to address the group on the subject of education. The correspondence makes it clear that the American Public Power Association approached the Admiral as a private individual, and had he insisted, would have agreed to an address on education as the Admiral initially desired. The tone and content of the address ultimately delivered confirm the understanding contained in the correspondence.

In view of the foregoing the court finds that the writing and delivery of the speeches formed no part of Admiral Rickover's official duties and that the speeches are the Admiral's private property which he was entitled to copyright. [A more detailed statement of the court's Findings of Fact and Conclusions of Law is appended to the court's opinion at pp. 450-456; *ed.*]

IV. The court found that plaintiff's complaint could be read as invoking the doctrine of fair use. Noting that the applicability of the doctrine depends on the particular circumstances of the use to which copyrighted material is put, the court held that as "there has been no clear showing of the use to which [quotations from the Admiral's speeches] would be put, the court finds the doctrine inapplicable."

257. *Goodis v. United Artists, Inc. and American Broadcasting Co., Inc.*, 278 F. Supp. 122, 157 U.S.P.Q. 334 (S.D.N.Y., Jan. 2, 1968) (Mansfield, J.)

Action for copyright infringement. Plaintiff alleged that defendant broadcasting company's telecast of the motion picture series "The Fugitive" under an asserted license from defendant distributor infringed his novel "Dark Passage". Defendants moved for summary judgment on the grounds (a) that "Dark Passage" was in the public domain, and (b) that, in any event, defendant United Artists had been granted the rights in question by plaintiff.

Held, motion granted.

I. Prior to its publication in book form with copyright notice, "Dark Passage" had been serialized in the Saturday Evening Post without an individual copyright notice. The court found that plaintiff had merely licensed one-time serialization rights to the magazine, retaining copyright proprietorship in himself. Hence, the serialized version could

not have been protected by the magazine's blanket notice and fell into the public domain through publication without notice. The court said:

"Dark Passage" was first published . . . during the summer of 1946, pursuant to Goodis' authorization for a one-time serialization in return for payment of \$12,000 in a series of eight installments in *The Saturday Evening Post*. Although each edition of that magazine bore a notice of copyright in the name of The Curtis Publishing Company, none of the installments of the serialized novel bore any separate notice of copyright. On October 1, 1946 the novel was first published in book form bearing a notice of copyright in Goodis' name, and on the same date Goodis, for the first time, filed with the Copyright Office a notice of claim of copyright in the work. It does not appear that Goodis ever granted or assigned any copyright in the novel, or the serialized version to Curtis Publishing Company. According to Goodis' deposition testimony, he made "a sale to the Saturday Evening Post for serialization." . . .

Upon the foregoing undisputed facts, plaintiff is precluded from asserting any copyright in "Dark Passage" for the reason that his grant to the *Saturday Evening Post* of a license to publish the novel in serialized form, without assignment or sale to it of his rights in the work, followed by general publication of the serialized work in that magazine in July, 1946, constituted a dedication of his rights to the public domain. *Egner v. E. C. Schirmer Music Co.*, 139 F.2d 398 (1st Cir. 1943), *cert. denied*, 322 U.S. 730 (1943); *Morse v. Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954). Since the copyright notice filed on October 1, 1946 was not yet in existence at the time of the serialized magazine publication, the notice could not provide the basis for protection for the earlier general publication of the serialized version; and since the *Saturday Evening Post* was neither the owner nor assignee of Goodis' copyright in the serialized publication, plaintiff could not acquire copyright protection through the general notice and registration of each issue of the magazine. *Mail & Express Co. v. Life Pub. Co.*, 192 Fed. 899 (2d Cir. 1912); *Kaplan v. Fox Film Corp.*, 19 F. Supp. 780 (S.D.N.Y. 1937).

While this Court is disposed to strain toward adopting any plausible theory that might avoid surrender or dedication by an owner of his copyright to the public domain, before it can do so some basis must appear. Here there is none. On the contrary, the undisputed record reveals that plaintiff was well aware of his copyright, that he retained ownership of it in himself rather than make any grant or assignment of it to the *Saturday Evening Post*, and

that in the course of his pretrial deposition he did not suggest any error or mistake but frankly conceded that he had agreed to permit the magazine to make a one-time serialization in return for \$12,000. Absent the possibility of the magazine's being an assignee, no basis exists, therefore, for adopting a "constructive trust" theory, *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 93 F. Supp. 349, 353-54 (S.D.N.Y. 1950), *rev'd on other grounds*, 191 F.2d 594 (2d Cir. 1951); *Cohen v. Richmond*, 19 F. Supp. 771 (S.D.N.Y. 1937), or for finding mistake. 17 U.S.C. §21. To do so would be to stretch protection under the copyright law well beyond established bounds.

II. The court found defendant's alternative argument equally persuasive. In 1945 plaintiff had entered into an agreement with United Artists' predecessor in interest granting, in pertinent part, "exclusive, complete and entire motion picture rights [in "Dark Passage"] . . . ; the exclusive right to make motion picture versions . . . and to produce and reproduce one or more motion picture photoplays, of every kind, nature and description now or hereafter known . . . including the exclusive right to show or project ["Dark Passage"] . . . and/or any adaptation thereof . . . ; the right to broadcast . . . any photoplay produced hereunder by the process of television . . . provided that such broadcasts . . . are given from the film of such photoplay and not directly from the performances of living actors. . . ." Reserved to plaintiff was "the right to broadcast ["Dark Passage"] by television from performances given by living actors. . . ." Further pursuant to the 1945 agreement, after publication of "Dark Passage" in book form in 1947 plaintiff granted to defendant's predecessor all motion picture rights therein. The court held that under the 1945 agreement United Artists had succeeded to all rights required to make and distribute the series in question. The court said:

Even if plaintiff had not dedicated his copyright to the public domain, the unequivocal and undisputed terms of his . . . 1945 agreement with [defendant's predecessor] require summary dismissal of the present claim. The language of that agreement constituted a broad general grant by Goodis of all motion picture or photoplay rights in "Dark Passage" to the Purchaser, including all rights required to make a television film series of the type presented on "The Fugitive." Paragraph 1 — which contains the principal grants involved — is not limited to one motion picture, or photoplay, as plaintiff urges. On the contrary, it gave the Purchaser the "exclusive right" to make as many motion picture adaptations as it

wished, the rights being described as the right "to make motion picture versions thereof and to produce and reproduce *one or more* motion picture photoplays, of every nature, kind or description now or hereafter known" (emphasis added) — including those "representing scenes and/or action taken from and/or based upon said writings, and/or any adaptations thereof" and "all other now or hereafter existing dramatic, exhibition and other performing rights in the writings and, without limiting the generality of the foregoing, including talking motion picture rights." It was agreed that all such rights "shall be cumulative".

After thus broadly defining the term "photoplay" . . . to include any motion picture version or adaptation of the novel, the parties made radio and television rights the subject of [a] . . . provision . . . to the effect that Goodis would reserve "the right to broadcast said writings by television from performances given by *living actors*" . . . and that "The Purchaser shall have the right to broadcast and transmit *any photoplay* produced hereunder by the process of television", provided such broadcasts should be given from the film and "not directly from the performance of living actors" (emphasis added). It is clear that the motion picture film series known as "The Fugitive" constitute performances of photoplays, as defined in [the agreement] and not "performances of living actors".

No basis is offered for plaintiff's . . . contention that the television rights granted under the agreement were limited to "the original motion picture" or to "the photoplay" made from "Dark Passage." The plain language of the written agreement is to the contrary. It granted television rights with respect to "any" photoplay . . . and broadly defined the term "photoplay" as stated above. The agreement discloses a clear intent that except for television programs given by living actors, all television film broadcast rights were granted to the Purchaser.

The excision by the parties of the last five and a half lines of Paragraph 1(f) of the *standard* printed form agreement, which refers to television broadcasts, is not inconsistent with their clear intent. The excision was made for the reason that the parties more completely articulated their respective rights with respect to radio and television rights in [a later paragraph]. In view of this paragraph's precise definition, the excision was required to avoid any inconsistency or ambiguity. Furthermore plaintiff's construction of his rights under the agreement would render meaningless the restrictions put upon live television rights expressly retained by him, since it would

give him greater rights in television film broadcasts than in live television broadcasts. Although he could not engage in live broadcasts for at least eight years [under the agreement], his interpretation would permit him to compete in the field of film telecasts immediately. This construction of similar agreements has been rejected as illogical. *Wexley v. KTTV*, 108 F. Supp. 558 (S.D. Cal. 1959), *affd.*, 220 F.2d 438 (9th Cir. 1955).

Quite aside from the clear language of the agreement, under New York law (which is expressly made applicable . . .) the broad grant of motion picture rights [in] the agreement, absent explicit reservation, grants television rights in such films. *Hollywood Plays, Inc. v. Columbia Pictures Corp.*, 77 N.Y.S.2d 568 (Sup. Ct. 1947), *revd. on other grounds*, 299 N.Y. 61, 85 N.E.2d 865 (1949); *Bartach v. Metro-Goldwyn-Mayer, Inc.*, — F. Supp. — (S.D.N.Y. 1967), 154 U.S.P.Q. 616; *Wexley v. KTTV*, *supra*; *cf. Grant v. Kellogg Co.*, 58 F. Supp. 48 (S.D.N.Y. 1944), *affd.*, 154 F.2d 59 (2d Cir. 1946).

258. *Luster Enterprises, Inc. and Helen Winston v. Arthur Jacobs and Apjac Productions, Inc.*, not yet reported (S.D.N.Y., Nov. 6, 1967) (Croake, J.). See also 156 U.S.P.Q. 422, Item 264, *supra*.

Action for plagiarism. Asserting that individual plaintiff Helen Winston was the architect of the screen play for the motion picture "Doctor Doolittle", plaintiffs moved for a preliminary injunction restraining defendants from distributing, exhibiting, or advertising said picture unless suitable credit is given. Defendant countered with a motion to dismiss the complaint on the ground that neither plaintiff had legal title to or beneficial interest in the literary property involved.

Held, both motions denied.

I. The preliminary injunction was denied for lack of irreparable injury, plaintiffs' delay, and prejudice to defendants' enterprise. The court said:

Rule 65, Fed. R. Civ. P., enunciates the applicable standards for the relief requested in this case. It is a restrictive rule. It requires among other things that a showing be made that if an injunction is not granted, irreparable harm will result. . . .

In considering whether to issue a preliminary injunction, the court must consider the relative importance of the rights asserted, the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, probability of

ultimate success or failure of the suit and balancing of damages and convenience generally. . . .

In this particular case we find the determinative aspect is the nature of the irreparable harm claimed. The plaintiff, Helen Winston, states that if a preliminary injunction is not issued by this court she will suffer irreparable injury. Dealing with the substance of this claim, we find it to be without merit. Helen Winston is apparently a successful and talented screen play author. If a screen credit is improperly denied her by the defendants she has an action in damages. One of the forgotten functions of the damage remedy is to apprise members of the community of the rights which the court has adjudicated in the plaintiffs' favor. If the plaintiffs prevail in this action the attendant publicity and the subsequent damage award will make Helen Winston whole within her professional community. Outside of this small professional community, screen credits have little or no significance and any resulting harm by failure to include her name in the credits will be minimal.

On the other hand, if this court grants the preliminary injunction, [Twentieth Century Fox Film Corp.] will be required to include Helen Winston's name in the screen credits or forego its plans to premiere the film in early December. [Although Fox was not a named defendant in this action, it was the defendant in a companion case brought by plaintiffs in the N.Y. State courts. See 156 U.S.P.Q. 422; *ed.*] In short, as FOX has engaged in extensive advertising with this December date in mind it would in effect be forced to include Helen Winston's name in the screen credits. As Justice Talesford noted in his opinion directed to essentially the same issues (see *Luster Enterprises, Inc. v. Twentieth Century Fox Film Corp.*, 156 U.S.P.Q. 422) “. . . such credit . . . [would] be but the first step in the building of a claim for damages.” On balance, then, in weighing the equities, we find that if the preliminary injunction issues, the plaintiffs will have in fact been granted a large part of the relief requested in advance of any trial on the merits and will be in a superior position to press their damage claims. See *Dino De Laurentiis Cinematografia v. D-150, Inc.*, 258 F. Supp. 459, 464 (S.D.N.Y. 1966). If this court grants the requested preliminary injunction, it will not be preserving the status quo but will be tipping the scales of justice in favor of the plaintiff.

Finally, the plaintiffs were aware for some time that there was a dispute as to ownership of the literary property of the screen play

because they commenced their action in this court in July of 1966. It was certainly within their power to put the case in issue before this time. The plaintiffs state that the reason it took over one year from the filing of the original complaint until the service of the answer was primarily that the defendants delayed answering the complaint. We note that the time to answer was extended by stipulation ten times. From this it appears that the plaintiffs were not anxious for a speedy determination of the issues now presented.

II. Stating that if defendants' asserted ground for dismissal were true the complaint would be legally insufficient, the court nonetheless denied dismissal because it found itself possessed of "insufficient information to determine the precise relationship between the parties who are before it and those who are not with regard to rights in this material."

259. *Parker v. Wonderland Music Company*, 156 U.S.P.Q. 394 (S.D.N.Y., Oct. 24, 1967) (Bonsal, J.)

Defendant's motion to enjoin further litigation in an action for unfair competition and copyright infringement. In February 1965 plaintiff and others instituted an action in the Southern District against the moving defendant and others. The complaint in that action claimed, *inter alia*, (1) infringement of plaintiff's copyrighted musical composition entitled "SUPERCALAFALISTICEXPEEALADOJUS" through defendant's utilization, in connection with the motion picture "Mary Poppins," of an allegedly plagiarized composition entitled SUPER-CALIFRAGILISTICEXPIALIDOCIOUS"; and (ii) unfair competition based upon the title similarities above noted. In May plaintiff's application for a temporary injunction was denied upon a finding of lack of similarity in the compositions and failure of secondary meaning in plaintiff's title; in November the action was dismissed with prejudice and an appeal therefrom was not perfected. In February 1967 plaintiff commenced the present action for unfair competition and copyright infringement in the New York State Supreme Court (N.Y. County). Upon removal to the Southern District the action was dismissed upon a finding that the transactions sued upon were the same as those underlying the 1965 action and the attendant bar of *res judicata*. Defendant's motion at that time for an order restraining further litigation was denied for lack of demonstrated need, but without prejudice to renewal. In September 1967 plaintiff instituted another action in the New York State courts for unfair competition. Defendant removed the action to the Southern District and renewed its application in the present action for

an order enjoining plaintiff from further litigating in any court the claims already determined. Plaintiff countered with a motion for remand to the state court in its latest action and defendant cross-moved to dismiss the complaint therein.

Held, injunction granted with costs and attorneys' fees on the motion; remand granted and motion for dismissal denied.

The court found that the complaints in the three actions convincingly demonstrated that in its latest proceeding plaintiff was attempting to relitigate the claims already determined in the 1965 and instant actions. "Therefore, defendants are entitled to a supplemental order [in the instant action] enjoining further litigation by the plaintiff of these claims. See 28 U.S.C. § 2283; *Helene Curtis Industries, Inc. v. Sales Affiliates, Inc.*, 247 F.2d 940, 114 U.S.P.Q. 469 (2d Cir. 1957); cf. *American National Bank & Trust Co. v. Taussig*, 255 F.2d 765 (7th Cir.), cert. denied, 358 U.S. 883 (1958); *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952); *Jackson v. Carter Oil Co.*, 179 F.2d 524 (10th Cir.), cert. denied, 340 U.S. 812 (1950)." Although defendant's motion to dismiss the latest action was denied and plaintiff's remand therein granted, "[f]urther prosecution of that action will be stayed by the order to be entered herein."

260. *Magnus Organ Corporation v. Magnus*, 269 F. Supp. 981, 154 U.S.P.Q. 431 (D. N.J., June 14, 1967) (Wortendyke, J.)

Motion for preliminary injunction in action for infringement of copyright in public domain music with superimposed symbols to facilitate playing the music on plaintiff's electric organ. Both plaintiff's and defendants' organ music books contain simple playing instructions and public domain music (with no new arrangement) and numbers and/or letters indicating the keys and chord buttons on their respective electric organs which correspond to the notes and chords. Defendants copied substantially from plaintiff's books, but used different symbols.

Held, motion denied.

The court held that since the "Magnus" and "Norske" electric organs were similar, instructions for playing them could be similar without infringement and, therefore, that plaintiff had not sufficiently shown likelihood of success at trial to justify a preliminary injunction. The court said:

I cannot say, in the face of the allegations of the pleadings and upon the evidence before me that there is a reasonable likelihood

that the plaintiff will succeed in establishing its case on the merits. I distinguish the case before me from that in *Consolidated Music Publishers, Inc. v. Ashley Publications, Inc.*, 197 F. Supp. 17 (S.D. N.Y. 1961), because in the latter case the "works" of the respective parties consisted of compilations of musical selections concededly in the public domain for use by the player on any piano. The Court found substantial appropriation by the defendant with regard to several of the compositions. The Court held that the work of the copyright holder was original and therefore copyrightable. Since access by the defendant to the plaintiff was admitted, and there were unmistakable signs of copying, the Court found infringement on the application for the preliminary injunction and therefore granted that relief. In the case at bar there is no question of *patent* infringement by the Norske of the Magnus Organ. Moreover, there is no basis for inference that the method of playing each of the organs was not substantially the same. The right of the manufacturer of each organ to advertise and sell his product included the right to compile, publish and sell instructions for the playing of the instrument. It was only the form in which the Magnus Organ instructions were embodied which was copyrightable by the plaintiff. In the absence of any evidence that the method of playing the Norske Organ was not similar to that of Magnus, Norske had a perfect right to compile and publish instructions for the playing of its organ as long as those instructions did not amount to a copy of the Magnus instructions. The situation presented by the pending application is strikingly similar to that in *Baker v. Selden*, 101 U.S. 99, 25 L.Ed. 841 (1879). In that case Selden obtained the copyright of a book entitled "Selden's Condensed Ledger, or Bookkeeping Simplified." The object of Selden's book was to exhibit and explain a peculiar system of bookkeeping. Additional copyrights were from time to time obtained by Selden for other books, containing additions to and improvements upon his system. The defendant Baker was charged with infringement of these copyrights. The evidence disclosed that the defendant used a similar plan of bookkeeping so far as results were concerned, but employed a different arrangement of columns and different headings. The Supreme Court in *Baker* held that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account books ruled and arranged as designated by him and described and illustrated in his book. The Court cited the English case of *Cobbett v. Woodward*, Law Rep., 14 Eq. 407, which involved a claim to copyright in a catalog

of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants, who were dealers in the same business, published a similar book and repeated many of the plaintiff's drawings, though it was shown that they had on sale the articles represented thereby. The English Court held that the drawings of the defendants were not subjects of copyright but mere advertisements for the sale of particular articles which any one might imitate and any one might advertise for sale. . . . Because both Magnus and Norske manufactured and sold electric chord organs, for the playing of which instructions were required by the novice, each manufacturer had a right to compile, publish and sell samples of music with instructions for the playing thereof on the manufacturer's product. Although Norske selected the same musical compositions as had been selected by Magnus, they were well known, were in the public domain, and available to each of the parties. Since each organ manufacturer had a right to instruct purchasers in the method of playing its product, the publication and sale of such instructions was a right available to both manufacturers so long as the format of the Norske instructions was not "lifted" from the copyrighted instructions for the Magnus Organ. "[A] copyright gives no exclusive right to the art disclosed, protection is given only to the expression of the idea — not the idea itself." *Mazer v. Stein*, 347 U.S. 201, 217, 74 S.Ct. 460, 470, 98 L.Ed. 630 (1954). The pleadings, affidavits and exhibits presented to me present substantial issues of fact, the resolution of which will require plenary final hearing. In the exercise of my discretion therefor, I refuse the preliminary injunctive relief sought by the plaintiff. Accordingly, the Order to Show Cause made upon the filing of the complaint in this action is discharged. An appropriate Order may be presented.

261. *Norton Printing Co. v. Augustana Hospital*, 155 U.S.P.Q. 133 (N.D. Ill., July 21, 1967) (Decker, J.)

Motion to dismiss in action for copyright infringement and unfair competition. Plaintiff alleged that it and its assignor developed a number of forms for recording medical information for defendant's use, and that after purchasing the printed forms from plaintiff and its assignor for a period of time, defendant gave copies of the forms to another printer and had them produced by him.

Held, motion denied.

I. The court held that some forms are copyrightable, and that whether these forms were copyrightable and infringed should be determined after trial. The court said:

The determination of whether "forms" are copyrightable is generally said to depend upon whether they are merely "works designed for recording information" or whether they "in themselves convey information." See § 202.1 (c), Regulations of The Copyright Office. All business, medical, legal and other forms are thus not per se excluded from copyright protection, but the determination turns on whether they actually convey information or whether they are merely to be used to record it. In the former situation, a copyright may be validly obtained, but not in the latter situation. See, e.g., *Taylor Instrument Companies v. Fawley-Brost Co.*, 139 F.2d 98, 59 USPQ 384 (7th Cir. 1943). This distinction has been strongly criticized and would appear to be without foundation in the Copyright Act or in Article I, Section 8 of the Constitution, which generally provides for copyright creation and protection. See Nimmer on Copyright, § 37.31, at 153 (1966). It is argued that where originality and intellectual effort exist on the creation or design of forms, copyright protection should be available as it is to other "writings," such as commercial circus posters, mass-produced lamp bases, and cartoon figures. Nevertheless, it is not necessary in this case to repudiate the distinction, since it is not at all clear that the particular medical laboratory forms involved only record and do not convey information.

Certainly the fact that the Copyright Office issued the copyrights which specifically cover "Hospital & Laboratory Examination Forms: Bacteriology: Basal Metabolic Rate, and Gastric Analysis Forms" and "Hospital & Laboratory Examination Forms" is prima facie evidence that the Copyright Office itself considered that these forms convey information. In addition, it is apparent from an examination of the forms that they are quite detailed and contain many separate categories and areas for examination. Certainly, they are used to record information. But the format and arrangement used, together with the different boxes and terms, can also serve to convey information as to the type of tests to be conducted and the information which is deemed important.

Thus, for the purposes of a motion to dismiss, I do not find that these forms are clearly uncopyrightable under the Copyright Act. The cases cited by defendant dealing with reports for servicing television sets, or with blank bookkeeping forms, are not determinative of the issues and questions in this case. Of course, the degree

of identity required for infringement of such forms and the actual extent of copyright protection are separate issues. See, e.g., *Continental Casualty Co. v. Beardsley*, 253 F.2d 702, 117 USPQ 1 (2d Cir. 1958).

II. The court held that plaintiff had sufficiently stated a cause of action for unfair competition to withstand the motion to dismiss by alleging that defendant induced plaintiff and plaintiff's assignor to create and develop the forms and then subsequently solicited a third party to print the same forms for defendant's use. The court said that insofar as the forms were the particular and individual creation of plaintiff's assignor, "it is clear that defendant's actions, as alleged, would constitute misappropriation. See, e.g., *International News Service v. Associated Press*, 248 U.S. 215 (1918)."

262. *Acuff-Rose Publications, Inc. v. Silver Star Publishing Company, Inc.*, 155 U.S.P.Q. 455 (D. Tenn., Aug. 2, 1967) (Gray, J.)

Action for copyright infringement. Seeking discovery on its claim that defendant's musical composition "A Million and One Times" infringed its own "I Cant Stop Loving You", plaintiff propounded a number of interrogatories under Federal Rule 33. Defendant moved to vacate four of the demands.

Held, motion granted in part and denied in part.

I. One of plaintiff's interrogatories required defendant to state whether it had procured a comparative analysis of the two compositions and, if so, to divulge the names and addresses of the analyzer and anyone having a copy of his report, if written, or the substance thereof if oral. Defendant objected on the grounds that it had acquired the analysis at its own expense and that expert analysis was equally available to plaintiff. Noting that cases dealing with the analogous problem of one party seeking to take the deposition of an opposing party's expert witness were not in agreement, the court held that defendant's objections were well founded. The court said:

The cases dealing with this point are divided and most have involved situations where the moving party sought to take the deposition of an adversary's expert witness. Here plaintiff seeks substantially the same result by asking that defendants state the substance of any such reports.

Upon consideration, the court is of the opinion that the better rule is that discovery of reports prepared by an adverse party's

expert should not ordinarily be permitted in the absence of a showing that factual information, which is necessary for the moving party's trial preparation, cannot be obtained by the moving party's independent investigation or research. 4 Moore's Federal Practice, ¶ 26.24 at 1531.

Those cases which have permitted discovery of an adverse party's expert reports on the ground that the information sought was not obtainable through the moving party's own efforts have involved situations where, due to the destruction or change in an object, the existing expert information is the only evidence which could ever be available. See e.g., *Colden v. R. J. Schofield Motors Co.*, 14 F.R.D. 521 (N.D. Ohio 1952); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947). However, the instant case does not come within this exception. In this situation, where the factual material upon which a comparative analysis would be based is readily available, to require the disclosure of these reports would constitute an unreasonable interference with defendants' trial preparation.

The discovery procedures of the Rules are intended to aid trial preparation by narrowing the issues and by providing a flexible means for ascertaining basic facts. . . . In the light of the equal availability of the underlying facts and the absence of a showing of special need, to permit the disclosure sought by this inquiry would further these goals in only a tangential manner. Accordingly, defendants' objection . . . is sustained.

II. A second challenged interrogatory called for defendant to state its belief as to whether plaintiff's composition was copyrightable and, upon a negative response, to state the factual basis supporting its belief. Defendant objected to the inquiry as calling for a legal conclusion but the court, noting a conflict in the cases, sustained the interrogatory despite a probable weight of authority to the contrary upon the grounds that the proper guide was the significance of the answer rather than the categorization of the question. The court said:

The cases are divided as to whether opinions are properly subject to pre-trial discovery. They are further divided as to the propriety of inquiry into factual conclusions and legal conclusions. Perhaps a majority of the cases hold that legal conclusions are not a proper subject of inquiry.

This court, however, does not feel that this represents the better view. Two leading treatises on federal practice are in agree-

ment that opinions are a proper subject of inquiry. See 2A *Baron & Holtzoff* (Wright ed.), *Federal Practice and Procedure* § 768, at 311; 4 *Moore's Federal Practice*, ¶ 33.17, at 2354. At page 2354, Professor Moore states the following:

The correct approach to the problem, it is submitted, required the discarding of any dogmatic ideas that matters of opinion may never be called for by interrogatory. There is nothing in the language of the rules to require such a holding. The rules do not say that only "facts" may be the object of discovery proceedings; * * *. In passing on objections to interrogatories, the question before the court should not be whether, as a theoretical matter, the interrogatory calls for an expression of opinion, but whether an answer would serve any substantial purpose.

The purpose of discovery is to narrow the issues and to avoid waste. Here the defendants have raised as an affirmative defense that plaintiff's song, . . . was not a copyrightable musical composition. From the foregoing, the court is of the opinion that this inquiry is relevant and is likely to lead to discovery by plaintiff of what issues it will be required to meet at the trial. Accordingly, defendants' objection is overruled.

III. A third interrogatory required that defendant disclose the source of any statement it had obtained from any person in connection with the allegations of the complaint. The court sustained the question as within the proper scope of inquiry under Federal Rule 26(b) but ordered stricken that part of it pertaining to any such statements "from the plaintiff relevant to any matter . . ." on the grounds that it was "so unclear as to make it impossible for the defendant to fashion a responsive reply. . . ."

IV. The final controverted interrogatory required that defendant state whether, to its knowledge and belief, plaintiff's composition was copied or patterned after a prior source and, if so, to specify such source, the portion believed copied therefrom, and the witnesses who would testify thereto. The court held that "the disclosure sought is limited to the issue of conscious copying" and accordingly overruled defendant's objection. A demand for production of a copy of such source was, however, ordered stricken.

2. Tax Court Decision

263. *Arlen v. Commissioner*, 155 U.S.P.Q. 665 (Tax Ct., Aug. 3, 1967) (Arundell, J.)

Petition against notice of Federal Income Tax deficiency. On March 3, 1959 petitioners, composer Harold Arlen and his wife, entered into an agreement with five musical publishers assigning renewal rights in a number of copyrighted musical compositions, the original term of which Mr. Arlen had previously granted said publishers. Two days earlier petitioners addressed a letter agreement to the assignees' parent company acknowledging receipt of a \$50,000 loan as an inducement for the renewal assignments. The loan was to be repaid in ten annual installments of \$5,000 each as evidenced by a series of negotiable promissory notes and was secured by provision for the application of royalties against the debt. The challenged deficiency notice held the \$50,000 received in 1959 to be taxable income in that year as advance royalties. Petitioners objected on the grounds that the amount was received as a non-taxable loan.

Held, for petitioners.

Upon scrutiny of the renewal mechanism of the Copyright Act and the attendant risk of failure of an enforceable renewal assignment, the court found a valid business purpose for a loan transaction. Then considering New York law regarding the dual rights of a secured creditor, the court found that the loan was, in substance, more than a mere prepayment of royalties. Hence, the court held that the amount in question was received as a bona fide loan and did not constitute income to petitioners in 1959 except to the extent of \$5,000 of royalties applied in payment of one of the notes in that year. The court said:

Under section 24 [of the Copyright Act] the order of succession for the renewal term of the copyrights is as follows:

- 1 – Author
- 2 – Widow and children
- 3 – Executor, if there is a will
- 4 – Next of kin

An assignment by an author of the renewal rights to a copyright made before the original copyright expires is valid against the world if the author is alive at the commencement of the renewal period. Likewise, each member of the successor class must survive the expiration of the original term in order to obtain a

vested interest in the renewal copyright term. An attempted assignment by any one of the class who fails to survive the expiration of the original term of the copyright is void. . . .

At the time of the execution of the agreement of March 3, 1959, petitioners were without children. Petitioner's wife was made a party to the agreement of March 3, 1959, because, under section 24, if petitioner had died before the expiration of the original term, the attempted assignment of the copyrights for the renewal term thereof by petitioner alone would have been void against his wife unless she was a party to the agreement. It was thus possible to make provision for the first contingency, that of the widow making application in case the author is not living. It was not possible to make provisions for any of the other contingencies provided for in section 24. An assignee of a renewal expectancy cannot obtain assurance prior to the time the renewal vests for the reason that the assignor may die before the expiration of the original term. If the author (or other assignor of the renewal expectancy) dies before the expiration of the original term, then those persons who by statute succeed to the renewal rights are not bound by any assignment executed by the author (or by any assigning member of a prior renewal class) so that the assignee takes nothing. . . . Even if the assignee obtains assignments from the wife and children and other known members of the successor class, it is possible for the parties to be divorced, or additional children to be born, or adopted, which would make the assignment invalid as against the new wife or newly adopted or after-born children. As to some of the compositions here in question, the time for some of these contingencies has not at the present time expired.

Thus, there was a very real and valid business purpose for making the advance of \$50,000 to petitioner in the form of a loan evidenced by negotiable, unconditional promissory notes. In the event of the happening of any of the contingencies which would make the assignment of the renewal rights by petitioner void, the publisher would be fully protected by the notes. The notes were negotiable and unconditional and, although they were non-interest bearing, the payee could have discounted them and petitioner would have had to pay the notes when they became due.

Respondent contends, however, that petitioner was not required to repay the \$50,000 except out of the royalties to be received and that the parent company could only look to the collateral, namely, the royalties for repayment under any and all circumstances. We do not agree with this contention. Both parties to the March 1,

1959 letter agreement were domiciled in the State of New York, and the said letter agreement is subject to interpretation under the laws of the State of New York.

In *First Trust & Deposit Co. v. Potter*, 278 N.Y.S. 847 (1935), the defendant executed a promissory note and collateralized it with a pledge of various securities. The plaintiff, after demanding payment, brought an action on the note. The defendant moved for dismissal on the ground that collateral had been deposited and that the plaintiff had failed to apply the collateral to reduce the amount of the loan. In holding for the plaintiff the Supreme Court, . . . , among other things, said:

The obligation of the debtor to pay the debt is the same as if no security had been given * * *. While it may be argued that, on account of the wording of the instrument, the intent was that, in the first instance, before a recovery on the note be had, there should be realization upon the collateral, that reasoning is specious. * * *

To the same effect are *Jefferson County Nat. Bank v. Dusckas*, 2 N.Y.S.2d 336, 339 (1938); *Manufacturers Trust Co. v. Hollinger*, 141 N.Y.S.2d 795, 798 (1955); and *First Trust & Deposit Co. v. W. W. Conde Hardware Co.*, 262 N.Y.S.2d 565, 568-569 (1965). In the latter case, the Supreme court, . . . , said:

It has long been well settled that the bank cannot be charged with liability for failing to sell or be compelled to sell collateral pledged to it on account of a loan. * * *

It is important to recognize that if the creditor may only look to the collateral for repayment why would the debtor execute and deliver fully negotiable promissory notes containing no restriction on the enforceability thereof. The execution and delivery of these notes to the creditor clearly indicate that all parties to the agreement considered the transaction to be a loan and that the creditor could enforce payment thereof. The notes were set upon the books of Music Publishers Holding Corporation as "notes receivable." In view of the circumstances herein set forth it would be unrealistic to hold that the payment of the \$50,000 in 1959 to petitioner was in substance a payment of advance royalties rather than a loan.

The case of *Victor H. Heyn*, is clearly distinguishable on the facts. The purported promissory notes in *Heyn* were non-negotiable, without substance, and as such had to be disregarded. Victor H.

Heyn, the maker of the purported notes, did not pay anything on the notes and it was not expected that he would pay anything. The notes had no business purpose. Victor testified that he did not expect to pay any money on these notes. Anna E. Gilfillan, one of the parties to the contract in the *Heyn* case, testified that the contract was set up as a loan "to avoid the tax." In our opinion, we said:

The substance of the transaction is controlling. In reality, there is a plain settlement of an employment contract dispute by a payment of \$41,835 to the petitioner-employee in 1955. That sum is ordinary income to petitioner in 1955. [Emphasis supplied.]

The notes in the instant case were negotiable, unconditional, could have been discounted by the payee at any time, and were issued for a business purpose. Eight of the 10 notes have been paid by petitioner with royalties earned by him during the years of payment. The substance of the transaction here is that the \$50,000 received by petitioner was borrowed money and not advance royalties.

It is true that absent the loan in the instant case the \$50,000 would have been advance royalties and taxable as ordinary income when received in 1959. *Perfumers Manufacturing Corporation*, 33 T.C. 532. But we cannot ignore the loan. The notes evidencing the loan had a business purpose and were not a sham.

3. State Court Decisions

264. *Luster Enterprises, Inc. et al. v. Twentieth Century-Fox Film Corp.*, 156 U.S.P.Q. 422 (N.Y. Sup. Ct., N.Y. County, Oct. 20, 1967) (Telesford, J.). See also Item 258, *supra*.

Action for plagiarism. Plaintiffs, alleging defendant's plagiarizing of their ideas and treatment for movie adaptation of the "Doctor Doolittle" children's stories, moved for a temporary injunction restraining defendant, *pendente lite*, from showing or exhibiting the motion picture of the same name unless proper credit is given individual plaintiff Helen Winston as contributor to preparation of the movie.

Held, motion denied.

The court found the following factors adverse to plaintiff's application for preliminary relief: (i) prejudice to defendant resulting from the imminent release of the motion picture and extensive pre-release

publicity; (ii) a substantial period of delay on the part of plaintiff in enforcing the claimed rights; (iii) the adequacy of money damages; (iv) uncertainty as to the legal basis of relief. The court said:

The picture is scheduled for release during the forthcoming Christmas season, and advertising and pre-release publicity have been going on since 1966. That the picture cost many millions of dollars to make and that extensive promotional work has already been done is conceded. So, too, defendant's claim that restraining showing of the film will work substantial damage to it is clear. While plaintiffs assert that withholding the showing is not the ultimate relief requested, for all they seek is an appropriate screen credit, this court need not close its eyes to the fact that any adjudication for any purpose that such credit should be afforded will be but the first step in the building of a claim for money damages. Indeed plaintiffs request appropriate money damages in the *ad damnum* clause of their complaint and an accounting, as well as punitive damages of \$3,000,000. Approximately equivalent relief is sought in a pending Federal action, involving plaintiffs, the producer of the picture and the producer's principal, previously commenced. In fact, that suit was commenced by plaintiffs in July, 1966 — over one year prior to institution of the instant action. This is but one indication of plaintiffs' awareness for an appreciable period of defendant's rejection of plaintiff Winston's claim for credit. This awareness and its necessary concomitant — the opportunity plaintiffs had to obtain a final adjudication of their claim prior to the scheduled first showing — furnish the prime basis for denial of the injunction requested. See *Gerard Holding Corp. v. Hollander*, 195 Misc. 878; *Reynolds v. Snow*, 10 App.Div.2d 101.

Further, considering the more formal objections raised to issuance of the relief, as above noted, the injunction is sought as a first step toward establishment of a claim for money damages. Plaintiff Winston is apparently a well-recognized screenplay author. There has been no showing that withholding from her the credit requested (as originator of the "idea" — not author of the screen play) will work such irreparable injury so as not to be compensable by an award of money damages, if she is held ultimately entitled to the relief requested. This court need not be expert in the area of movie production and movie viewing to recognize that credits run off on the screen immediately prior to or after the showing of the story portion of the film are of more interest to the industry than to the public. Adequate opportunity will exist, if this case is expeditiously processed, to insure publication of plaintiff Winston's

authorship of the idea to the industry if she is ultimately held entitled to such credit. Thus balancing the "equities" — the harm to the parties that would follow upon granting or withholding the relief requested — also dictates denial of the injunction. See *Loren v. Samuel Bronston Prod., Inc.*, 32 Misc.2d 602; *Ufa Films, Inc. v. Ufa Eastern Division Dist., Inc.*, 134 Misc. 129, aff'd 226 App. Div. 869.

Finally, it is of course plaintiffs' burden, on an application such as this to demonstrate a clear legal right to the ultimate relief requested. Serious doubt exists, on this point, as to the protection afforded "ideas" for screen plays in New York and California. See *Fendler v. Morosco*, 253 N.Y. 281; *Ware v. C.B.S., Inc.*, 155 USPQ 413, and whether plaintiff Winston, either under her contract with defendant, *Vargas v. Esquire, Inc.*, 164 F.2d 522, 75 USPQ 304, or otherwise, *Harris v. Twentieth Century Film Corp.*, 43 F.Supp. 119, 52 USPQ 167, is entitled to screen credit under the circumstances.

265. *Ashworth v. Glover*, 433 P.2d 315, 156 U.S.P.Q. 219 (Utah Sup., Oct. 31, 1967) (Henriod, J.)

Appeal from judgment dismissing complaint in action for "conversion" of architectural plans. The architect designed a distinctive looking drive-in restaurant for one Allen, and also supervised the construction of a second similar building for Allen. Sets of plans were delivered to Allen and to prospective contractors. The latter were required to give \$25 deposits. The plans carried a legend stating, inter alia, that they were the property of the architect and were not to be used on other work. One of Allen's employees, without the consent of either Allen or the architect, permitted the defendant to use the plans to build a competing drive-in a few miles away. The trial court held that the distribution of the plans to prospective contractors and filing them with the local authorities in order to obtain a building permit each constituted a publication, resulting in loss of common law copyright in the plans.

Held, reversed.

The court held that neither giving plans to prospective contractors nor filing them with the city was such a publication as to forfeit common law copyright. The court said:

The gravamen of this case simply is whether A sold, published or otherwise abandoned his conceded common law right in the plans, irrespective of state or federal copyright legislation. There is nothing in this record, except by way of speculation, to the effect

that he abandoned any common law property right in these plans which he created by his own professional skill and expertise. A building hardly can be built according to an architect's plans, unless the builder sees them and contractors interested in bidding see them, — else the structure never could be built. It is a well-known fact that architects necessarily have to permit their plans to be examined by bidding contractors in preparing the latter's bids. Many times such plans are loaned to such prospective bidders without charge. That is not to say that in giving such permission to take a look at the plans, he bequeaths his common law right therein to the world, — a result that would automatically inter any such proprietary right. It appears to us that requiring a deposit of \$25 to take a look-see at such plans evinces, not an intention to sell them, but an intention to have them returned to the architect to use in construction perhaps in an area far removed from the local area where competition would be no factor, and in which distant area there would be no question as to using them in an unfair competition problem. The A.I.A. conditions plus the written specifications confirm us in this conclusion. We have no doubt that under the facts of this case A required a deposit to insure the return of the plans, since if A himself used the same plans to supervise the construction of an identical drive-in next door to Allen's, in equity he might have to respond in damages to Allen. Nowhere in this record did A concede nonownership of these plans, but contrariwise said otherwise. He admitted that if the contractors did not return them, the latter could keep them, — but not once did he admit, nor does the record reflect anything to the effect *that they could use them* to construct an identical structure in the area. Finding of Fact No. 4 is not borne out by any substantial evidence, other than speculation, and we think that on this ground alone a reversal is in order.

As to publication by filing the plans with the city (a requirement before a permit could issue), the contention that the architect gave up his common law proprietary right, and thereby published and gave it to the world, is somewhat naive. Such conclusion would be absurd and there is no law cited to establish such a contention, — albeit there is respectable authority to refute such a conclusion. *Smith v. Paul*, 174 Cal.App.2d 744, 345 P.2d 546, 123 USPQ 463 (1959); *Edgar H. Wood Associates, Inc. v. Skene*, 347 Mass. 351, 197 N.E.2d 886, 141 USPQ 454 (1964). The latter we espouse. In passing, Finding of Fact 5 recites this circumstance of filing, and we assume it was recited to show an abandonment and general

publication. If that were the intention, we reject it as being untenable.

266. *Ware v. Columbia Broadcasting System, Inc.*, 61 Cal. Rptr. 590, 155 U.S.P.Q. 413 (Ct. App., Aug. 11, 1967) (*Files, J.*)

Appeal from summary judgment for defendant in action for infringement of literary property under state statute and breach of contract. Plaintiff wrote an unpublished play entitled "The Mannequin" and submitted it to defendant. After reading and rejecting the proffered script defendant telecast the allegedly infringing work "Miniature". The lower court granted summary judgment to defendant on both counts.

Held, affirmed.

I. Cal. Civil Code § 980(a) provides: "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." Inasmuch as plaintiff's work had never been published nor copyrighted under Federal law, the court held that it was susceptible of protection under this act. However, the court continued, the shelter of the act is limited to the representation or expression of ideas and does not include ideas as such.

Upon analysis of the works in question, the court found that at most they shared a generic public domain concept with no similarity in form of expression and hence sustained the holding below. The court said:

Plaintiff's story is about a character called "old man" who lives with his daughter, Louise, and son-in-law, Bill, and works as a night watchman in a department store which has a display of 12 mannequins, grouped and costumed as members of a community. The old man spends his working time talking to these figures as his "friends." Louise and Bill are, in the author's words, "a pair any of us would very much like to have as our next-door neighbors." They are kind to the old man, but are worried about his mental health. After he has gone to work, they decide something must be done, so Bill phones the store to tell the old man that he is to see a doctor in the morning. The old man understands what is intended. He proceeds to consult with his "friends," the mannequins. In the morning his body is found on the floor. A few minutes later workmen bring in a new mannequin, a grandfather figure "extremely

reminiscent of the old man." The final scene shows the new mannequin smiling.

The protagonist of defendants' play, "Miniature," is "Charley," 35 years of age, unmarried, a friendless and bitter failure, residing with a mother who is both demanding and overprotective. Charley makes a habit of visiting a museum, where a glass case contains a miniature cross section of an 1890 town house, complete with furnishings. A figure of a beautiful young woman is seated at the spinet. As Charley watches, the doll plays the piano, moves about and carries on a variety of activities typical of a young lady in her home. We know from the comments of the museum guard that the doll is immovable, and that Charley is hallucinating. When Charley sees a mustachioed caller assault the lady, Charley goes into a frenzy and breaks the case. He is forcibly removed and then hospitalized for psychiatric treatment. After his release from the hospital, Charley again visits the museum. In the closing scene the guard discovers the figure of Charley seated alongside the girl in the glass case, holding a stereopticon in front of his face. As the guard watches, the Charley figure lowers the instrument, revealing his face.

. . . what the two works have in common is the theme or idea of a man who finds happiness with an inanimate figure, whom he treats as a real person. This theme is at least as old as Ovid's myth of Pygmalion and Galatea. Such a theme could not be the private property or monopoly of any author. Of course a play based upon the myth, or upon any other theme which is a part of the public commons, may constitute literary property. The playwright delineates characters, establishes character relationships, and creates a sequence of scenes, incidents and actions, all portrayed in the dialogue and stage directions of the play. This creation becomes the author's property, and is protected by copyright.

When we examine the defendants' television play, "Miniature," we find in it nothing of what plaintiff created in "The Thirteenth Mannequin." The characterizations, character relationships, scenes, incidents and dialogue are all markedly different. The protagonist in "Mannequin," the old man, is essentially a friendly, happy person, affected only by an apparently normal onset of senility. He loves his family and they love him. There is an affectionate relationship with the only other character in the play who meets him — the young man whom the old man relieves as watchman. If the old man can be described as lonesome, it is because he has outlived his contemporaries and because he has a lonely job. The

mannequins are, in effect, his office friends. He talks to them, but they are not shown moving or speaking. This is a man in second childhood, playing with dolls. It is more like whimsy than psychosis.

Defendants' Charley is definitely psychotic. The story discloses the failure of his interpersonal relationship with his fellow workers, his employer, his mother, a sister, and a seductive girl friend. As the psychiatrist explains, "He was unable to cope with this world, so his mind created another world."

The mood of the defendants' play, and its dramatic development, are entirely different from plaintiff's. Although the death of the old man and the arrival of the grandfather mannequin are presented in plaintiff's play as mysterious events, there is nothing there which cannot be accepted as natural phenomena except the closing smile on the face of the mannequin. This is only a bit of titillating foolishness, rather than a display of the supernatural. In defendants' play, what Charley sees in the museum can never be reconciled with the world of nature. Where the plaintiff presents happy fantasy, defendants' theme is morbid unreality.

Plaintiff's brief lists a number of claimed parallels between the two plays. Some of them relate to the single idea common to both plays, the Pygmalion-Galatea situation. Other parallels are constructed by emphasizing trivia and overlooking substance. Two examples will suffice.

Plaintiff argues "In each play the protagonist is in conflict with a family member with whom he lives." In "Mannequin," the son-in-law, Bill, expresses to his wife his irritation when the old man keeps the television too loud, but he never lets the old man know. It is Bill who decides that the old man must see a doctor and, inferentially, be placed in an institution. Bill's decision is a kindly one, and the old man understands this, even though he does not want to go. There is no animosity among any of the characters in "Mannequin." Certainly there is in that play no conflict which is remotely comparable to the pathological tension which constitutes the principal driving force in "Miniature."

Plaintiff argues that "In each play there is a worker who is privy to the relationship of the protagonist with his created people." In "Mannequin," the "worker" is the early evening watchman whom the old man relieves when he comes to work. This character, who is seen once at night and again in the morning after the old man dies, illustrates the old man's capacity for friendship with ordinary people — a quality which marks an important contrast with the characterization of defendants' Charley.

The “worker” in “Miniature” is the museum guard, a hostile figure who ridicules the protagonist, Charley, and eventually arrests him. The guard serves the important plot function of telling us that the doll does not move, thus assuring us that what Charley sees is his own hallucination, not a mechanical trick or a supernatural event. The role of the guard is in no substantial respect a counterpart of the role of the young man in plaintiff’s work.

II. Plaintiff’s contractual claim for remuneration rested alternatively on an express oral agreement, an implied contract, and trade custom. Although the court admitted that a public domain idea lacking any element of private literary property could provide the subject matter of an enforceable agreement, it held that plaintiff had in fact offered a concrete literary expression to defendant rather than an idea therefor. Since it was already established that the expression had not been copied there remained no basis for relief. The court said:

In *Desny v. Wilder* (1956) 46 Cal.2d 715, 733, 299 P.2d 257, the court pointed out that the conveyance of an idea may be valuable and may be the consideration for a promise to pay, even though the idea itself is not private property, and even though that which was conveyed could have been obtained elsewhere without any payment. . . . In the *Desny* case the plaintiff submitted a three-page synopsis of a proposed motion picture to be based upon actual events which had been well publicized in newspapers and magazines. Defendants made a motion picture based upon the same events. The court held it was a factual issue whether defendants had actually used the plaintiff’s synopsis and had thereby incurred an obligation to pay for it.

The record here is significantly different from the *Desny* record. Plaintiff here attached to his complaint not a mere synopsis but a complete dramatic work. The complaint alleges that he submitted it to defendants “with the express oral understanding and agreement that in the event plaintiff’s said literary property was thereafter used or telecast by said defendants, or any of them, in whole or in part, defendants would pay plaintiff the reasonable value of such use or telecast.” Each of the other contract counts alleges similarly that the matter offered was plaintiff’s “literary property.” Plaintiff does not allege that the parties contracted with respect to any idea, synopsis, or format. Literary property is what plaintiff had for sale; that is what he submitted to defendants, and that is

the subject matter of his complaint. The consistent use of the term "literary property" in the complaint does not appear to have been an inadvertence of the pleader. There is nothing in the record to suggest that plaintiff was, like *Desny*, offering to sell a public domain story idea. It would have been fatuous for plaintiff to have alleged that when his story was submitted defendants agreed, by implication, to pay him if they ever in the future made a picture embodying any stock situation which plaintiff had drawn upon in constructing his play. Plaintiff has not so alleged, and we therefore need not decide whether such a claim could be maintained under the *Desny* rationale.

The other implied contract cases relied upon by plaintiff are distinguishable upon the same basis. In *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 256 P.2d 947, the plaintiff submitted what was described in the complaint as a "composition." The case involved only a ruling upon a demurrer and it was decided upon the theory that the plaintiff was alleging, among other things, that defendants had agreed to pay for her composition regardless of its protectibility.

In *Kurlan v. Columbia Broadcasting System, Inc.* (1953) 40 Cal.2d 799, 256 P.2d 962, the plaintiff was trying to sell "a new and original program idea" as well as a sample script.

In *Colvig v. KSFO* (1964) 224 Cal.App.2d 357, 36 Cal.Rptr. 701, the alleged contract related to an idea, format and title for a radio series, none of which was copyrightable. No sale of literary property was alleged.

In *Johnston v. 20th Century-Fox Film Corp.* (1947) 82 Cal. App.2d 796, 187 P.2d 474, the subject of the contract was a book title, which is not protected by copyright.

In *Yadkoe v. Fields* (1944) 66 Cal.App.2d 150, 151 P.2d 906, the plaintiff supplied jokes at the request of the defendant. Under the circumstances, the defendant's obligation to pay was not dependent upon whether the material was literary property.

Davies v. Krasna (1966) 245 A.C.A. 557, 54 Cal.Rptr. 37, involved a claim that a "central theme and dramatic core concept" had been entrusted to defendant, in confidence, and that defendant used this disclosure in violation of that confidence. There again, the alleged transaction was not a sale of literary property as such.

Also of interest:

267. *The Tappan Company v. General Motors Corporation*, 380 F.2d 888, 154 U.S.P.Q. 561 (6th Cir., July 21, 1967) (Weick, J.)

Appeal from judgment for defendant in action for design patent infringement and unfair competition. Plaintiff held two design patents for a particular type of electric cooking range. Although one of the patented designs was never commercially developed, ranges incorporating the second had enjoyed great consumer popularity. Defendant's allegedly infringing ranges achieved similar success when later introduced, apparently at the expense of plaintiff's sales. Without passing upon the validity of the patents in question, although the issue had been squarely raised, the lower court held that there had been no infringement. On the claim of unfair competition by copying distinctive non-functional features, the lower court granted summary judgment for defendant on the authority of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

Held, affirmed.

I. Noting that the "ordinary observer" test* is applicable to claims of design patent infringement and that such infringement must be tested with respect to the disclosures in the patent applications without reference to later modifications or improvements as manifested in final manufacture, the court held that the trial judge's findings of fact on the infringement issue were supported by substantial evidence and not clearly erroneous. Plaintiff had objected to the trial judge's detailed comparison of the competing ranges in asserted "minor details of construction" as incompatible with the "ordinary observer" standard. The appellate court held, however, that "the careful study made by the Court below was in fulfillment of its duty to make subsidiary findings to support its ultimate conclusions and it might have been deficient if it had not so specified the underlying reasons for its appraisal of the two designs. . . . It should be noted that the District Court made a separate finding as to the comparison of the [underdeveloped patent and its allegedly infringing copy] and concluded in terms to which appellant's objection could not apply since it was stated in terms of the total visual impression of the two designs."

* "If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other. *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511, 528 (1871)."

In *dictum* the court added that "while it should never be a strict rule that validity be tested in every case . . . the protection of the public interest upon which the patent system is founded dictates that the better procedure . . . is to inquire fully into the validity of the patents as a preliminary step to a consideration of the infringement issues."

II. In affirming the lower court's granting of summary judgment to defendant on plaintiff's product simulation claim, the appellate court held that the pre-emption doctrine of *Sears* and *Compco* applies where the lack of federal protection derives from a finding of non-infringement of granted rights as well as where a design is left unprotected due to patent invalidity. Although plaintiff attempted to bring its case within an asserted *Sears* and *Compco* exception for intentional product confusion, the court found no evidence of such tactics. On the contrary, it pointed out that defendant had submitted uncontroverted affidavits attesting to the fact that all its ranges bore its own trademark.

268. *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir., Apr. 28, 1967) (Barnes, J.)

Petition for review of Federal Communications Commission order temporarily limiting a San Diego community antenna company to delivering Los Angeles originated signals only in the areas it previously served, and to adding subscribers in new areas only for the purpose of serving them with San Diego and Tijuana signals. It was held that this order did not fall within the regulatory powers of the Commission, which are limited to the scope of its licensing authority.

Certiorari denied:

269. *National Insider, Inc. v. Best Medium Publishing Co., Inc.*, 385 F.2d 384, 155 U.S.P.Q. 550 (7th Cir., Oct. 31, 1967): see 15 BULL. CR. Soc. 138, Item 105 (December 1967).

Petition for certiorari denied March 4, 1968, 156 U.S.P.Q. No. 11, p. ii; petition for rehearing denied, April 1, 1968.

PART V.

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291. PLAISANT, ROBERT. Adaptation et oeuvre adoptée. (50B *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 468-476, nos. 1/2/3/4/5/6, Oct. 15, 1967.)

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An article on the rights, under the West German Law on Copyright and Neighboring Rights of September 9, 1965, of performers and producers of records arising out of the use of records in broadcasting.

297. DITTRICH, ROBERT. Die Stockholmer Fassung der Berner Ubereinkunft. (16 *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 97-106, no. 5, Sept.-Oct. 1967.)

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306. SCHULZE, ERICH. Die ersten Erfahrungen mit der neuen deutschen Urheberrechtsgesetzgebung. (50B *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 476-491, nos. 1/2/3/4/5/6, Oct. 15, 1967.)

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C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

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313. FINKELSTEIN, HERMAN. CATV and the American writer. (2 *ASCAP Today* 9, 30, no. 1, Winter 1968.)

A slightly condensed version of the author's article, which appeared in the January 3, 1968 Anniversary Issue of *Variety* under the caption: Whither television and CATV? See 15 BULL. CR. SOC. 208, Item 215 (February 1968).

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314. SCHOENFELD, HERM. Goaded by Cuba, poor nations frankly plan pirating of U. S. copyrights. (249 *Variety* 1, 52, no. 10, Jan. 24, 1968.)

An account of an address, delivered by the Register of Copyrights on January 16 at a meeting of the Association of the Bar of the City of New York, on the Stockholm Protocol Regarding Developing Countries and the potential threat it poses in regard to international copyright relations and the protection of U. S. works in a number of foreign countries.

2. England

315. Public Lending Right: proposed compensation fund for authors and publishers. (*The Bookseller* 340-342, 344, no. 3241, Feb. 3, 1968.)

A summary of a document, recently issued by the British Arts Council under the title, "The Arts Council and the Public Lending Right," publicizing its proposals for a "Compensation Fund for British Authors and their Publishers, which have been submitted to the Department of Education and Science and embodied in a draft Bill."

PART I.

ARTICLES

316. 1968 ANNUAL REPORT OF THE PRESIDENT OF THE
COPYRIGHT SOCIETY OF THE U.S.A.

By HERMAN FINKELSTEIN*

I. *Copyright Revision—1967-68*

The past year has seen much action in the world of copyright, but little actual accomplishment. A year ago it seemed that the 90th Congress would achieve a much overdue revision of our copyright law. After 22 days of hearings and 51 executive sessions the House Subcommittee on Patents, Trademarks and Copyrights, chaired by Congressman Robert W. Kastenmeier of Wisconsin, had reported out a bill which passed by the House of Representatives (H.R. 2512) with some amendments relating to CATV (cable television), instructional television and juke boxes. A movement begun more than thirty years earlier had finally passed its first major hurdle. The bill was piloted through the House by Judiciary Committee Chairman, Emanuel Celler, Congressman Kastenmeier, Congressman Richard H. Poff, senior minority member of the Committee and others after a stormy and disappointing initial session. The bill provided for a term of copyright equal to the author's life and 50 years after his death; it recognized the right of authors to be paid for the use of their works in juke boxes; it took into consideration the needs of education, both in the classroom and in instructional television; it protected sound recordings against unauthorized copying. With a slight change here and there it appeared to be an ideal bill. It seemed that we were now in a position to adhere to the Berne Convention if some slight changes could be woven into the Berne fabric.

* President 1967-68. Mr. Finkelstein's comprehensive Report was presented at the annual meeting of the Board of Trustees of the Society at New York University Law Center on May 16, 1968. The Editors believe that those portions of the Report highlighting events of general interest to the readers should be published here. At the meeting, Mr. Sydney M. Kaye of the New York Bar was elected to serve as President of the Society for the coming year.

But this optimism was premature. When the bill reached the Senate, it appeared that its Committee on Patents, Trademarks and Copyrights was not prepared to report out any bill unless it resolved the CATV problems—to a large extent, more a matter of regulating the competition of CATV with television than determining its position within the framework of copyright. In another area, the performers, unwilling to await separate legislative consideration in the context of “neighboring rights,” sought recognition in the revised copyright law, as “authors” entitled to full copyright protection. The whole area of reprography, computers and storage and retrieval systems was to be assigned for study by a National Commission.¹

While all this was going on in the legislative halls, the courts were wrestling with the problem of CATV liability for copyright infringement under the 1909 law. The rights of copyright owners were upheld by the lower courts, but the Supreme Court granted certiorari and set the case down for argument with another appeal involving the question of the right of the Federal Communications Commission to regulate CATV.² Thus the seemingly related questions of copyright infringement and regulation of competition between the new CATV and the established television systems would be considered at the same time. The two appeals were argued on March 12, 1968. The Supreme Court’s final pronouncement will certainly affect the revision bill.

Actually, the Supreme Court will not have the last word. That rests with Congress. But the Senate will not move until the Supreme Court has spoken. In the meantime, revision is likely to go over to the next Congress, which may delay enactment of a new law for an indeterminable period. Any time estimate is likely to depend on whether the prophet is by nature an optimist or pessimist.

II. *Interim Extension of Expiring Copyrights*

An important provision of the Copyright Revision Bill is the extension of the term of existing copyright to 75 years. Inasmuch as the existing 56 year terms of many important copyrights were about to

1. S. 2216 introduced by Senator McClellan, August 2, 1967. See T. C. Brennan, *S. 2216. To Establish the National Commission on New Technological Uses of Copyrighted Works*, 15 BULL. CR. SOC. 24 (1967).
2. *United Artists Television, Inc. v. Fortnightly Corporation*, 377 F.2d 872 (2d Cir. 1967) aff’g Judge Herlands’ decision 255 F.Supp. 177 (S.D.N.Y. 1966), *cert. granted*,—and case set for argument following *Southwestern Cable Co. v. United States*, and *Midwest Television, Inc. v. Southwestern Cable Co.*, 377 F.2d 872 (9th Cir.), *cert. granted*, 389 U.S. 911 (1967). [Ed.: For the U.S. Supreme Court decision in the Fortnightly case, see *infra*, p. 316.]

expire when the original revision bill was introduced, it was felt that those copyrights should be extended for a limited period pending enactment of the new law. Accordingly, those copyrights have been extended by Congressional enactment from time to time. The most recent extension became law on November 16, 1967, extending the term of expiring copyrights until December 31, 1968.³ In view of the slim chances of the Revision Bill being enacted at this session, it is likely that another extension bill will be passed covering a period sufficient to enable the next Congress to pass the bill.

III. "*Crisis in International Copyright*"

The past year in international copyright was described by the distinguished and untiring Register of Copyrights, Abraham L. Kaminstein, as a "crisis."⁴

Two related events occurred during the year which endanger the rights of copyright owners in so-called "developing countries". One was a Protocol to the Berne Convention permitting certain reservations by these countries approved at the Stockholm Conference last July; the other, a related proposal to amend the Universal Copyright Convention, was presented at the Geneva meeting of the Inter-governmental Copyright Committee of the Universal Copyright Convention and the Permanent Committee of the Berne Union last December.

The purpose of these proposals, as summarized by Mr. Kaminstein, was to enable "developing countries" to have a shorter term of protection than now required by either Berne or UCC; to disregard rights of authors as applied to large areas of broadcasting; to impose a compulsory license without reasonable standards or any assurance of actual compensation with respect to translations and reproductions to be used for educational and scholarly purposes (a rather broad area), and very sharp limitations on all rights of copyright owners with respect to uses for teaching, study and research. The only requirement for compensation is conformity "to standards of payment made to national authors"—an amount which is more than likely to be zero.

3. Public Law 90-141; 81 Stat. 464. [Ed.: Extended July 15, 1968, to Dec. 31, 1969.]

4. Kaminstein, *Crisis in International Copyright*, address delivered at Association of the Bar of the City of New York sponsored by the Committee on Copyright and Literary Property of the Section on Patents, Trademarks and Copyrights of the American Bar Association and the Committee on Copyrights of the Association of the Bar of the City of New York, N.Y.L.J. Jan. 19 and Jan. 22, 1968.

These limitations were incorporated in a Protocol to the Berne Convention adopted at Stockholm.

At the UCC meeting in Geneva, similar proposals were advanced by the developing countries. In addition, they threatened to leave the Berne Union if the major developed countries failed to adhere to the Berne Protocol. A stumbling block to such withdrawal, however, is an Appendix Declaration to Article XVII of the UCC known as the "Berne Safeguard Clause". This clause provides that a member of the Berne Union may not withdraw from Berne and thereafter rely on the UCC to regulate its copyright relations with other Berne Union countries. The developing countries sought to repeal this Safeguard Clause, thus freeing them to withdraw from Berne unconditionally.

At the Geneva meeting, the United States delegation, headed by Mr. Kaminstein, opposed both these efforts to revise the UCC.⁵ He summarized the United States' position with respect to the efforts of developing countries as follows:

Because of the Stockholm Protocol, it will be impossible for the United States to join the Berne Union in the foreseeable future.

The United States has a clear commitment to oppose deletion of the "Berne safeguard clause" in the U.C.C. unless the sentiment for deletion in the Berne Union itself is unmistakable.

The guarantees of protection in the U.C.C. are already at rock-bottom level, and cannot be justifiably lowered any further.

The entire international copyright situation has become so confused and uncertain that, instead of immediate U.C.C. revision there should be a comprehensive survey of the entire picture to enable countries to evaluate their positions thoughtfully.

The Stockholm Protocol is unsatisfactory not only because it complicates the international situation and hurts the interests of authors, but also because it does not accomplish what the developing countries really need.

The United States delegation believes that a workable international system could be set up that would accomplish the ends of the developing countries and preserve international copyright protection. Specifically, we have three aims:

(1) A reversal of the erosion of authors' rights that started at Stockholm.

(2) The development of a carefully-considered program that would bring order out of the current chaos; this could take the form of further revisions of both Berne and U.C.C., merger of the two, or even of a third convention.

5. Statement of Abraham L. Kaminstein on behalf of the United States Delegation, Geneva, December 13, 1967, 15 BULL. CR. SOC. 157 (February 1968).

(3) Agreement upon a workable program aimed at the needs of developing countries, possibly involving establishment of an international fund, in which copyright would play a positive role.

This position has been echoed and endorsed throughout American copyright circles.

In recognition of the increasingly complex nature of the problems involved in ensuring protection of United States copyrighted material abroad, the Department of State has established a National Copyright Advisory Committee to act as advisors to the Bureau of Economic Affairs of the Department of State. This will insure closer collaboration between government and private copyright groups necessary to protect and promote our national interests in these matters. In the words of the Honorable Anthony M. Solomon, Assistant Secretary of State for Economic Affairs, "The Panel will serve as a forum for a thorough exchange of views, and a mechanism whereby responsible government officials (not only from the Department of State but also the office of the Register of Copyrights and other interested Government agencies) and recognized experts representing private enterprise may discuss international issues and problem areas and explore alternative courses of public policy."

Honorable Eugene M. Braderman, Deputy Assistant Secretary of State for Commercial Affairs and Business Activities will serve as Chairman of the Panel. Mr. Braderman headed the United States delegation to the recent Stockholm Conference, and has had considerable experience in the complex international sphere.

We are proud to note that the U.S. Copyright Society has been asked to join with 26 other organizations in providing a representative for this Committee.

IV. *The Annual Jean Geiringer Lecture On International Copyright*

The Sixth Annual Jean Geiringer Memorial Lecture under the auspices of THE SOCIETY and the New York University Law School was given by the leading exponent of the Stockholm Protocol, the Honorable T. S. Krishnamurti, Register of Copyrights of India, Secretary of the Department of Education, and representative of his Government at all the recent conferences on International Copyright.

The proceedings were opened by Harold Orenstein who paid tribute to Mr. Geiringer. Mr. Orenstein has served as Chairman of the Special Committee in charge of making the arrangements for these lectures since their inception. We again owe him a debt of gratitude for the efforts

he expended to make the occasion of the Geiringer Lecture a stimulating one.

The guest speaker was introduced by your President who described him as "the Abe Kaminstein of India". Mr. Krishnamurti's remarks were supplemented by a Panel consisting of Professor Walter J. Derenberg, Moderator; Leo N. Albert, President, Prentice-Hall, Inc.; Dan Lacy, Executive Vice President, McGraw Hill Pub. Co., Inc.; Irwin Karp, Counsel, Authors League of America, and Charles S. Gosnell, Director of Libraries, New York University.

The subject of Mr. Krishnamurti's address, "Copyright—A New View",⁶ was largely devoted to the needs of developing countries in advancing their educational and cultural programs. Pointing to the limitations in our own law on the rights of owners of copyrighted musical works (the exemption of "nonprofit" performances; the antiquated "juke box" exemption and the compulsory license for phonograph records) the speaker asserted that it was not too great a departure from our own precedents to extend these limitations in a country like India, to other works and to other purposes (education and culture). The argument was made in all sincerity, but to an American author it emphasizes the danger of encroaching on the authors' exclusive rights, however slight the encroachment may appear to be at the moment. In 1909, no one paid for the right to perform copyrighted musical works in public whether or not for profit. The market for such performances was relatively negligible. And no payment had been made for recordings before 1909. On the other hand, in 1968 we are correcting to a great extent this discriminatory treatment of musical works. We are all aware that educational uses may be the great market for future authors. Obviously, ways must be found to reconcile the economic needs of developing countries while safeguarding the basic rights of authors. The statement of the United States Register of Copyrights seems to point the way.

Mr. Krishnamurti's lecture helped us to understand the views of his Government and we feel confident that his subsequent journeys to California and Washington will forward the search for a sensible solution to this vexing problem.

* * *

VI. *Copyright in Law School Curricula and in Other Educational Media*

There was a time when Professor Derenberg's course at N.Y.U. was the only one that regularly specialized in copyright. Since that course

6. Published, 15 BULL. CR. SOC. 217 (April 1968).

was initiated (in 1942), the subject has been included either alone or as part of a survey course on patents, trademarks and copyrights in about 20 law schools throughout the country. Courses in copyright include those by Ralph S. Brown, Jr., at Yale; George Cary at George Washington University Law School; Paul Goldstein at the University of Buffalo; Robert A. Gorman at the University of Pennsylvania; Harry Henn at Cornell; Benjamin Kaplan at Harvard; John M. Kernochan at Columbia; Arthur Miller at Michigan; Melville B. Nimmer at U.C.L.A.; Barbara A. Ringer at the Georgetown University Law Center, and Harold Woodard at Indiana University Indianapolis Law School.

The Practising Law Institute has held well attended symposia on copyright and related fields, the most recent one having been chaired by our able Vice President, Alan Latman.

VII. *Nathan Burkan Memorial Competition*

In addition to the Copyright Society of the U.S.A., another active force in the analysis and development of copyright law and in bringing the subject of copyright to the attention of law students has been the Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors and Publishers (ASCAP). Your president has been associated with that Competition since its foundation in 1939. The winning papers are published by Columbia University Press in the Annual ASCAP Copyright Law Symposium, Volume 16 of which will be published shortly. Winners of the Competition include many of our present teachers of copyright law, including Professor Nimmer (U.C.L.A.), Professor Miller (University of Michigan), Professor Goldstein (University of Buffalo), and Professor Gorman (University of Pennsylvania).

Winners of the Competition include three members of Congress: Theodore R. Kupferman, of New York; Robert G. Stephens, of Georgia; and Wendell Wyatt, of Oregon. The winners also include a Chief Justice, Hon. Leonard V. B. Sutton, of the Supreme Court of Colorado.

It is expected that the Nathan Burkan Memorial Competition will add some new subscribers to THE BULLETIN of the Copyright Society by giving each of the five national winners (in addition to the monetary awards) a student subscription to THE BULLETIN.

VIII. *Acknowledgements*

It is a pleasure and privilege as outgoing president to pay tribute to my predecessor Edward Sargoy and to Benjamin Rudd, Librarian of the Copyright Office, for their invaluable aid to the Society over the years. I can think of no better way of expressing our gratitude than by

including in this Report the texts of the plaques which the Society has presented to them:

EDWARD A. SARGOY:

Be it hereby resolved, that the Board of Trustees of The Copyright Society of the United States of America formally expresses its appreciation to Edward A. Sargoy, Esq. for his tireless and creative leadership of the Society for the past 4 years. The officers, trustees and members of the Society who have been privileged to work with Mr. Sargoy have been universally appreciative of the warmth, knowledge, sincerity and dependability with which he has given direction to the activities of the Society. Although Mr. Sargoy's presidency in the Society has been but another dimension of an already distinguished career to the service of copyright and intellectual property throughout the world, the Society deems itself fortunate to have had Mr. Sargoy's service as President and we all look forward to his continuing interest and activity in the work of the Society.

And be it further resolved, that the secretary of the Society be and hereby is empowered to present to Mr. Sargoy a memorialization of this resolution in an appropriate tangible medium of expression.

BENJAMIN W. RUDD:

Be it hereby resolved, that the Board of Trustees of The Copyright Society of the United States of America formally expresses its appreciation to Benjamin W. Rudd, Esq., Librarian of the Copyright Office, for his extraordinary initiative, devotion and scholarship in furnishing to the Society unique and comprehensive reports on developments in the copyright field throughout the world.

And be it further resolved, that the secretary be and hereby is authorized to present to Mr. Rudd, on behalf of the Society and as a symbol of its appreciation, a specially bound set of the BULLETIN of The Copyright Society of the United States of America with his name inscribed thereon.

The Society is also greatly indebted to other officials of the Copyright Office, especially the Register, Mr. Kaminstein, as well as George Cary, Abe Goldman, Waldo Moore, and Barbara A. Ringer. Miss Ringer, Assistant Register of Copyrights, and Professor Walter J. Derenberg, our Executive Director, were invited last fall by Professor Ulmer of the University of Munich as the United States representatives at the opening ceremonies of the Max Planck Institut in Munich. At that meeting Miss Ringer offered an outstanding paper on "Computers and Copyrights" which has been published in German and several other languages.

The success of the Copyright Society of the U.S.A. since it was founded in 1953 is largely due to the untiring work of its Executive Director, Professor Derenberg. Through his course in copyright in the

New York University Law School, he is probably training more copyright lawyers than anyone else in America. During the past year, CISAC (the International Confederation of Societies of Authors and Composers) invited him to be the U.S. member of its legislative commission and, in that capacity, he attended a meeting of the Commission in Paris last December where he delivered a report on the status of copyright revision in the United States. This appears in the current issue of *Interauteurs*, the official publication of CISAC.

As chairman of the Editorial Board of *THE BULLETIN*, Professor Derenberg is responsible for the high quality of the articles and reporting of current copyright literature, decisions and legislation, in which he is ably assisted by Mrs. Mary T. Hunter, assistant editor, and Miss Judith Grad, associate editor for case digests. A new member of the editorial staff is Jon A. Baumgarten, a former editor of the New York University Law Review who is now associated with the firm of Parker, Chapin & Flatow.

Morton D. Goldberg, the Society's secretary, has been most faithful and cooperative in serving the Society's interests while at the same time filling the posts of Chairman of the ABA Committee on Copyright and Chairman of the Copyright Committee of the Association of the Bar of the City of New York.

The Society is grateful to Fred B. Rothman, our publisher, for the invaluable assistance and service he has rendered since the inception of *THE BULLETIN*.

Finally, to Chancellor Allan Cartter of New York University, and to Dean Robert B. McKay of its School of Law, the Society expresses its gratitude for encouraging the Society to use the many facilities of its Law Center, and for the cordial reception and cocktail party after Mr. Krishnamurti's lecture.

Following Ed Sargoy as President of any organization is not an easy assignment. He devoted much time, effort, energy and imagination to the current affairs of the Society, but with an eye mainly to the Society's future. With the aid of our indefatigable Executive Director, trustees, officers and members, he succeeded in raising our sights. They have all been most helpful in advancing this program during the past year. A new dues structure has been devised which should enable the Society to build on a firmer base, and to supply the Executive Director with the assistance he requires to advance the work that has been carried on for so many years on a very small budget. During the next year, the continued cooperation of everyone will be needed to add a new dimension to the Society's participation in copyright developments. I am sure my successor will find the same enthusiastic support that has

been so evident during the past year. It has been a pleasure and privilege to serve as President at this stage in the Society's development. For the future, let us hope that Professor Derenberg—who has been our mainstay, and whose knowledge, energy and direction make it possible for a busy lawyer to serve as President—will have all the assistance he needs to add to the present service and lustre of THE BULLETIN and to further the role of THE COPYRIGHT SOCIETY in the advancement of copyright both nationally and internationally.

317. A GUIDE TO THE DRAFTING AND NEGOTIATING OF BOOK PUBLICATION CONTRACTS.

By RICHARD DANNAY*

This paper will attempt to outline the kinds of clauses frequently encountered in book publication contracts and some of the points publishers and authors alike should consider in the drafting and negotiating processes.

1. GRANT OF RIGHTS

“The Author grants and assigns exclusively to the Publisher, the Work, and each and every right and the copyright therein, to print, publish and sell the Work throughout the world during the full term of all copyrights and renewals, extensions, and continuations thereof.”

The central questions concern (1) which publication rights are granted and which are not, (2) for what territory, and (3) for what period of time. From the author's standpoint, this broad grant of rights should be revised to indicate that the grant is a license of specified publication rights for a specified territory together with such subsidiary rights as are to be spelled out later in the agreement.

Notwithstanding the general rule of contract law that ambiguities will be resolved against the party preparing the instrument, in the absence of an explicit reservation of rights or limitation on the grant, the scope of the grant probably will be construed broadly in favor of the publisher. Therefore, if the author wishes limitations as to time, territory or use (in whole or in part), he should say so. However, since a license will not survive the original term of copyright where no reference is made in the agreement to a renewal term, the publisher should provide for this (subject, of course, to the rule that the renewal term belongs to the author's widow or heirs should he die before the last year of the original term).

* Member of the New York Bar; associated with the firm of Ginsberg, Schwab & Goldberg.

2. SUBSIDIARY RIGHTS

Here, again, in view of the multiplicity of subsidiary rights, it is important that the contract specify which rights are granted and which reserved, as well as the particular languages, forms, media and territory in which the Publisher may exercise or license them.

Among the vast number of recognized subsidiary rights are: first and second serial (magazine rights), newspaper syndication, dramatization, motion picture (exclusive of such visuals as microfilm, microprint, and filmstrip), and broadcasting (radio and television); reprints, special school or library editions, book clubs (including school and mail order), abridgments, condensations, digests, selections, anthologies, translations, and commercial tie-ins; picturized, three-dimensional, and game versions; visuals (such as microfilm, microprint, and filmstrip), lyric, sound-reproducing, and recording rights; the right to sell copies by mail order or coupon advertising direct to purchasers; the right to sell bound copies or sets of sheets to book clubs, or to purchasers abroad; and so forth.

The definition of each right is rarely unambiguous. "Reprints," for instance, may include "mass market" paperbacks (distributed through such channels as chain store outlets and news and magazine wholesalers), "quality" paperbacks, cheap hardcover editions, "Permabound" editions, etc. Abridgments, condensations, and digests may be published in periodicals, newspapers, as a separate book publication, or as part of a book. These terms should be clearly defined.

It must also be clarified when a publication may occur: before, simultaneously, or after the first trade edition. "Translations" should also be defined with respect to languages, territory and media of publication, and even as to who may do the translation. The author should learn which book clubs are subsidiaries or affiliates of the publisher, and thus with whom arms-length transactions may not occur.

Frequently the publisher will also include "all other publishing rights" not specifically enumerated, "whether now in existence or hereafter coming into existence," or "the preparation, reproduction, distribution, performance, and display of all manner of other derivative or supplementary editions and works based upon the Work." The parties should consider the development of entirely new uses or ones not then commercially known.

It is important that each right granted have a royalty pertaining to it, otherwise that portion of the grant will be void for indefiniteness. Likewise, an agreement to agree upon royalties in the future is void.

The author should be primarily concerned with control over the disposition of these rights by the publisher. He should therefore seek

a clause to the effect that the sale or other disposition of such rights shall be subject to his prior written approval. The publisher may grant this as to one or more of the subsidiary rights, but should provide that the author's approval shall not be unreasonably withheld.

Copies of all subsidiary rights licenses should be given to the author promptly after they are executed, modified or extended.

The author, rather than granting these rights to the publisher, may wish to reserve some or all of them or limit the publisher's participation to that of an agent. This is particularly appropriate where the publisher itself is not equipped to exploit such rights (e.g., motion pictures).

3. RESERVATION OF RIGHTS

"All rights in the Work not specifically granted to the Publisher, now or hereafter known, developed or in existence, and whether or not competitive with the rights granted to the Publisher, are reserved to the Author in all languages, forms and media throughout the world, for the Author's exclusive use or other disposition as he may deem fit in his sole discretion, at any time, and from time to time, without obligation to the Publisher."

The author should insist on a reservation clause, even if not this broad, and even if it appears that no known rights have in fact been withheld. When known rights are reserved, they should be specified and stated to be inclusive only.

While this clause will not cure an ambiguity as to the scope of the grant (for it is a truism to say what is not granted is reserved), it is nonetheless helpful to show that the parties contemplated the reservation of some rights. In addition, it may negate the grantor's implied negative covenant not to use his reserved rights to injure the rights transferred, particularly if the reserved right was commercially known when the contract was signed.

4. ROYALTY

While the specific royalties must be left to negotiation in each case (as influenced by prevailing customs), the author will usually want them based on retail list price rather than wholesale, discount or "net" prices (where the size and nature of the deductions may cause disputes). Likewise, because of the ever-present possibility of an increase in retail prices, the royalty should not be expressed in terms of a specific amount

per book sold, but rather a percentage (such as the percentage which such amount bears to the current retail price).

Whenever feasible the author should request a graduation in royalty rates based on copies sold, in order to participate more fully in the proceeds as initial costs are recouped by the Publisher. The author must expect a reduced royalty when the Publisher exercises a subsidiary right, due to the increased costs (e.g., for manufacture and distribution) incurred by the Publisher in exercising the right itself rather than licensing it to a third party to do so.

Publishers often provide that where the discount in the United States is 48% or more from the retail price, the agreed royalty shall be reduced by one-half the difference between 44% and the discount granted. To lessen the impact of this provision, the author should request that (a) the reduced royalty shall in no event be less than one-half the agreed rate, (b) the reduction should not apply to individual sales of less than, say, 250 copies or on books delivered to book sellers and book dealers in payment for trade advertising, and (c) the reduction should not apply to any sales which in any accounting period exceed, say, 15% of the aggregate number of copies sold in such accounting period.

Publishers usually require reduced royalties to keep their editions in print and in circulation as long as possible, such reduction being necessitated by the publisher's increased costs for small printings and/or holding inventory at low turnover. In this event, the author should request a ceiling on the number of sales (e.g., 250 copies) or on the number of copies in a reprinting (e.g., 2,000) in any accounting period for which the reduced royalty may be imposed, and should place a floor on such reduction (e.g., one-half). In addition, the provision sometimes is not operative until expiration of a certain period (e.g., two years) after the date of first publication.

The Publisher generally may dispense with payment of royalty on copies sold at or below the cost of manufacture (as damaged copies, remainders or other overstock) or given away gratis for review, sample, etc. and not for resale. However, the author should receive a percentage of the publisher's receipts in excess of manufacturing cost, and of any compensation from promotional use. Sometimes the Publisher may not sell overstock until after, e.g., one year from first publication, and the author is given an option for a specified period to purchase part or all of the overstock at the manufacturing cost.

5. PAYMENT OF ROYALTY

An itemized statement (showing the number of copies printed, bound, sold and given away by the publisher and its licensees, and current inventory) should accompany each royalty payment, and the royalty should be paid promptly after due. The publisher often has the right to retain a reasonable reserve for returns. However, should there be any overpayment of royalty on copies sold but subsequently returned (or other overpayment), the publisher may deduct it from the author's future royalty payments or advances under any agreements between them.

The author, or his representative, may be given a right to examine the publisher's books of account. This right is often limited to, e.g., the two-year period immediately preceding the examination. If an error to the author's detriment is found amounting to a certain percentage (e.g., 5%) or more of the sums due him, then the publisher may be required to bear the expense of the examination.

It is sometimes provided that if there is a wilful default in payment by the publisher, not cured within a stated grace period, the agreement automatically terminates and all rights revert to the author.

6. SPREADFORWARD

In order to prevent undue bunching of income in any one year, with its enhanced tax burden, the author should insist on a spread-forward provision, such as:

"Notwithstanding anything to the contrary in this or any prior agreement between the parties, the Author shall in no event be entitled to receive in any one calendar year under this and all prior agreements between the parties a total of more than \$———. If in any one calendar year the total of the sums credited to the Author under this and all prior agreements with the Publisher shall exceed such amount, the Author shall be entitled to receive the excess amount in any succeeding calendar year in which the sums credited to the Author under this and all prior agreements shall not exceed the maximum herein stated, until all accumulated sums under this and all prior agreements have been paid the Author in full. However, the total amount to which the Author may be entitled under this and all prior agreements with the Publisher in any succeeding calendar year shall in no event exceed the maximum herein stated."

Frequently the maximum sum payable is expressed as a specified amount plus a percentage of the excess, to reduce possible excessive

royalty deferments. Different maximums can be set for each year, and the author should decide whether the advance should be included or not in the first year's maximum.

Whatever the particular arrangement, the maximum should be agreed on before the contract is signed, or at least before the parties know what the work will earn. And escrow or interest-paying schemes should be avoided to prevent taxation through "constructive receipt." The author, of course, bears the risk of the publisher's continued financial stability.

Despite the increased bookkeeping involved, the publisher will gladly accept this clause since it benefits from the free use of the undistributed royalties.

7. ADVANCES

Whatever the amount of the advance against royalties, the author should request that it be non-returnable on any ground other than failure to deliver the work on time. Publishers, on the other hand, usually want it recoverable if the work is "unsatisfactory" or if other terms of the agreement are not complied with.

As a continuing incentive, the advance is often payable part on signing of the contract, part on delivery of the manuscript, and the remainder on publication of the book.

The advance should be deducted only from royalties earned under that contract—not other contracts between the parties.

8. COPYRIGHT

The author should request that the copyright be taken out in his name, or, if in the publisher's name, that it be held in trust for him. As a condition of the agreement, the publisher should be required to obtain protection for the work wherever published, i.e., in the United States; under the Universal Copyright Convention; and also under the Berne Convention, by publishing it in, e.g., Canada "simultaneously" with the first publication in the United States. Thus all copies of the work published by, or with the authorization of, the publisher should bear the proper copyright notice in the proper position. If there is a failure to do so, the publication will then be unauthorized and the work will not fall into the public domain. The publisher should also be required to secure copyright renewal.

So that the publisher may comply with applicable copyright requirements, the author should furnish the publisher with the details of any publication occurring prior to publication of the work by the

publisher and should deliver to it, before the publisher's edition goes to press, recordable assignments of all prior copyrights registered in any name other than that in which the publisher's edition is to be copyrighted.

If there are joint authors, it may be desirable to place the copyright in the single name of the publisher, unless a collaboration agreement clearly spells out the manner in which the work is to be exploited by them.

9. DELIVERY OF MANUSCRIPT

Often the contract requires the author to deliver a manuscript in "content and form satisfactory" to the publisher. The author should request deletion of the word "content" (or, at least, insertion of "reasonably" before "satisfactory") since it gives the publisher what would be in effect an arbitrary option to accept the work or reject it if, in its discretion, it is unsatisfactory. Failing this, there should at least be some limit on the time in which the publisher may reject the work.

If the publisher has seen the completed manuscript before the contract is signed, this option should be deleted and replaced by a statement that the author has delivered the manuscript in final form and content satisfactory to the publisher.

The author should request a *force majeure* clause or a grace period in the event of his failure to deliver the manuscript on time, particularly if the publisher has such benefits with regard to publication date. There should be a clear specification of any supplementary materials (e.g., index) due from the author, and, on failure to supply them, the publisher can do so and charge the expense to the author. No changes in the manuscript (or additions thereto) or in the provisional title should be made without the author's consent.

The author should request that the publisher be responsible for procuring permissions, inasmuch as it is usually far better equipped administratively to do so. On occasion, the publisher will pay the entire permissions (or one-half) up to a specified maximum, charging the excess against the author's royalties. The Publisher should then have a right to approve what permissions are secured before any indebtedness is incurred. The cost of permissions depends on the territory, editions, media, etc. covered by them.

10. PUBLICATION OF MANUSCRIPT

The publisher should be obligated to publish the work by a date certain, such as within twelve months after delivery of a complete and

satisfactory manuscript (or, at least, within a "reasonable time" thereafter). It generally has sufficient protection on this point by virtue of the *force majeure* provision, although occasionally there is even a limit on the permissible postponement of the publication date.

If the publisher does not publish the work by the agreed time (subject to the *force majeure* clause), the agreement should terminate automatically, with all rights reverting to the author, who should be entitled in such event to retain all advances.

Ordinarily the publisher has only the vague obligation "to publish the work at its own expense and in such style and manner and at such price(s) as it deems suitable." The author should request that the work be issued under the publisher's imprint (rather than that of any of its subsidiaries), and at a specified minimum retail list price.

Generally only established writers may share in decisions on production (e.g., design, price and promotion), and provisions may be requested for a first printing of a minimum number of copies or expenditure of a stated minimum amount for initial advertising. In some cases a more vague statement can be obtained that the advertising and promotion of the work are to be in accordance with the highest standards of scholarly publishing and the professional reputation of the author.

11. WARRANTY AND INDEMNITY

"The Author warrants that he is the sole author and owner of the Work, is empowered to enter this agreement, and has not previously granted or encumbered the rights hereunder; that the Work is original, unpublished, and not defamatory, obscene, or violative of any right of privacy, common law, or statutory copyright, or other personal or property right. The Author agrees to indemnify and hold harmless the Publisher, its licensees, and purchasers from all costs, expenses (including attorneys' fees), losses, liabilities, damages, and settlements arising out of or in connection with any claim or suit based on allegations which if true would constitute a breach of this warranty; and in the event of any such claim or suit, the Publisher may withhold payments due the Author hereunder. The Publisher shall not be obligated to publish a work which in its opinion breaches this warranty. This warranty and indemnification shall survive the termination of this agreement."

The foregoing broad warranty may be limited in either or both of two ways: scope and/or money.

The author should request that no settlement be made without his prior written approval. A settlement on financially favorable terms might nevertheless severely injure the author's professional reputation, his prime asset and one over which he should have undiluted control. A frequent compromise is the addition of a clause that his approval shall not be unreasonably withheld.

The author should request that his indemnity be limited to 50% of any damages sustained by "final judgment" against the publisher (or settled by the publisher with the author's consent), providing the action was defended (i.e., there was no default) with counsel selected jointly by the author and publisher (or sometimes the author receives instead a "right of consultation"). Thus the author is not required to indemnify the publisher against unsuccessful or discontinued suits, or against "claims" or "demands" on which suits are not brought. In other words, the author is responsible only for an actual breach of his warranties and not for a mere alleged breach, and then only to the extent of one-half the damages (often including the reasonable cost of the defense, e.g., attorneys' fees, frequently the largest single element of expense).

It must be clarified whether "final judgment" means the decision of a court of original jurisdiction. Either the author or the publisher, however, should have a right to appeal, with the author's responsibility not accruing until the judgment is finally sustained.

Some contracts require the author's indemnity to be 100% with respect to copyright infringement, libel by extrinsic fact, intentional invasion of privacy, and breach of any warranties as to ownership of rights, authorship or originality. The basis for this distinction is that only the author can be certain that the facts are as stated in those warranties, whereas the publisher is in an equal, if not superior, position to know whether the book is, as a legal matter, libelous per se, obscene, etc. and thus should share equally in the payment of any damages arising therefrom.

Excluded from any warranty or indemnification should be any material inserted in the work by or at the direction of the publisher or any material affected by material so inserted. In order to limit his total liability, the author should request that he not be liable for any indemnification in excess of the consideration received by him under the agreement (or some portion or multiple thereof).

The withholding provision should be deleted or modified. Any withholding of royalties for the long periods consumed by possible litigation could effect a drastic cut in the author's income. Thus there should be, at least, a limit on the amount and on the period of with-

holding: e.g., the amount of payments withheld should not exceed a reasonable estimate of the author's liability, nor should any payments be withheld beyond the settlement or final judgment with respect to any suit or claim or more than twelve months beyond the receipt of any claim (or demand) without the institution of suit thereon. (The one-year period is equal to the period of the statute of limitations in New York for claims of libel, privacy, etc., although for copyright infringement the term is three years.) The amount withheld might be put in a separate fund and invested at the author's reasonable discretion so that interest will not be forfeited.

The publisher may insert a clause that if, prior to publication, there appears to be substantial risk of liability to third persons or of governmental action against the work, the author will share equally with the publisher the pre-publication costs (including counsel fees) incurred by the publisher in connection with the analysis, elimination of, and/or lessening of such risk (e.g., a reading for libel, etc.), and the author agrees to make such changes in the manuscript as recommended by such attorneys. The publisher will also provide, however, that no modification or revision of the work made for the purpose of eliminating or reducing the risk shall affect the author's obligation to indemnify and hold harmless the publisher.

The publisher may also require the author to further indemnify it against the expense (including attorneys' fees) of enforcing, by suit or otherwise, its basic indemnity against the author. And the publisher will want all the warranties and indemnities to survive the termination of the agreement, and to extend to its licensees and certain other third parties. The publisher, however, cannot be indemnified, notwithstanding the terms of the contract, against its own criminal or intentionally unlawful acts (e.g., distributing "obscene" works).

In the case of joint authors, where the contributions of each differ (e.g., artist and author), it may be necessary to segregate the warranties and indemnification.

12. INFRINGEMENT BY OTHERS

The publisher ordinarily has the right, but not the obligation, to institute an infringement suit (for injunction, damages, etc.) against third parties, and the author may, at his option, join as co-plaintiff. If the publisher declines to take legal action, the author has the right, but not the obligation, to sue alone. The party declining to join in the suit should (at no cost or expense) nonetheless be required to cooperate with the party taking the action. The publisher will want

the right to bring the action in the author's name, if necessary, and, if the copyright is in the publisher's name, the author may request an assignment for purposes of the suit.

If the suit is brought by one party alone, that party will usually bear all costs and expenses (including counsel fees) and retain all recoveries. If the suit is brought jointly by the author and the publisher, such items should be borne or divided, as the case may be, equally between them. It is often provided, however, that such items are shared equally only when the right involved is one granted to the publisher for its own exercise; and if the alleged infringement is of a right granted to the publisher for sale or license to a third party, such items are borne or divided in the proportion in which the proceeds from such a sale or license would be divided.

The author should have the exclusive right to institute suit for infringement of any of his reserved rights, alone bearing all the costs and retaining all recoveries.

13. REVISIONS

This clause is generally not pertinent in the case of fiction works, but is very important as concerns text books and the like.

The contract should provide that if the publisher desires a revision of the work, it must first request the author to do it before giving anyone else the opportunity to do so. If the author is unable or unwilling to undertake or complete the revision, the publisher may then arrange for its preparation and completion by another.

The royalty on any revised edition is often made subject to future negotiations between the parties; or, if the same royalty terms are to apply, the royalty may revert to the base percentage if more than, e.g., half the work requires resetting or new plates. It is often provided that the terms of the contract are to apply to any revised edition as if it were the work being published for the first time.

The main problem is the author's compensation from a revision to which he does not contribute. Frequently the contract states that the compensation paid to the reviser(s), whether lump sum or royalty, will be charged against any sums due the author. However, compensation to substitute revisers should not be deductible from monies due the author under *other* agreements.

Another solution is a "phasing out" of the author from royalty payments on a revision to which he does not contribute, e.g., the author's royalty from the first such revised edition is reduced by one-fourth, by one-half on the succeeding revision, by three-fourths on the next suc-

ceeding revision, and thereafter the author receives no royalty from any further revision (providing the author has not contributed to any such revisions).

To guard against loss of his rights through frequent or minor revisions, the author should request that such "phase out" provisions not apply to any revision prepared within a stated period (e.g., three years) from date of publication of the previous edition of the work being revised, or to any revision requiring resetting of less than a stated percentage (e.g., one-half) of the work.

14. COMPETING WORKS

"The Author agrees that, during the existence of this agreement, he will not prepare or cause to be prepared or published in his name or otherwise, any work based on the material in the Work or on the same subject, that might injure the sale of the Work."

This provision is one the author should be much concerned about. Either it constitutes an excessively broad non-competition clause or it is mere surplusage in that *exclusive* rights in the work are already being granted to the publisher elsewhere in the agreement. If the author has devoted a significant part of his professional life to the subject area of the book, he cannot reasonably be restricted from publishing other works relating to the same subject.

If the publisher will not delete the clause, one solution might be to limit the restrictive covenant to, say, one year following publication of the publisher's edition. Another is to provide that nothing in the provision shall prevent or limit the author's customary or usual business and professional activities, and that only "substantially similar" material may be prohibited.

The publisher is protected not only by the grant to it of *exclusive* rights, but also by the author's implied negative covenant not to injure or destroy the rights granted.

15. OPTION

The publisher often requires an option on the author's next work. Since the rationale alleged is that the publisher deserves this right by incurring the financial risk of publication of the earlier work, the provision should have no applicability in the case of established writers or successful works.

If the option cannot be deleted, it may in any event be legally unenforceable where the terms of later publication are too indefinite

(e.g., where the terms are to be agreed on by the parties, or are to be "fair and reasonable"). Where the work under option is to be published on the same terms as the earlier work, or perhaps even on terms "no less favorable" to the author, the option may be enforceable since an identifiable standard is available.

There should be a stated time limit after submission of the work (usually not to commence until after publication of the first work) within which the publisher must notify the author of its desire to publish the manuscript, failing which the author is free to submit it elsewhere. The publisher may provide, however, that in the event it and the author cannot in good faith arrive at a mutually satisfactory agreement for publication, the author cannot enter a contract with any other publisher on terms less favorable than those offered by the original publisher, who may also retain the further option of publishing the work on terms no less favorable to the author than those offered by any other publisher.

The author should not agree to multiple options, i.e., for more than one later work.

16. AUTHOR'S MATERIALS

The publisher should agree to return the manuscript and all corrected galleys and page proofs to the author upon or within a reasonable time after publication of the work, since the author may be able to take an income tax deduction of its worth, as a charitable contribution. Often the publisher requires that the author first request their return in writing, and disavows any liability for loss or damage (except due to its own negligence). It is not customary, however, for the publisher to indemnify the author for loss or damage.

17. TERMINATION

The contract ordinarily terminates no later than the expiration of the renewal term (and extensions or continuations thereof). There may be an early termination should the publisher fail to publish the work within the required time. And often there is a provision terminating the agreement upon the bankruptcy, receivership, liquidation, or other insolvency of the publisher.

The publisher has an obligation to exploit the exclusive rights granted to it, although the extent of that obligation is not clear. Failure to exploit may enable the author to rescind the agreement, but it is also not clear to what extent, if any, there can be a partial rescission, i.e., a reverter of some but not all the rights granted.

Usually the agreement contains an "out of print" clause which defines the level of exploitation required for the publisher to maintain its rights under the agreement. Thus, if the work goes out of print and off sale, the author may under certain conditions request a reassignment to him of all rights in the work.

Often this provision does not come into effect until a stated number of years after first publication, and the work must be out of print and off sale for a stated period of time (e.g., six months), either in one edition (e.g., the hardcover edition) or in all editions, including reprints, whether over the imprint of the publisher or another imprint. It is sometimes provided that no edition need be in print but merely a contract outstanding for any impending edition or for the license to a third party of any rights in the work. The author usually must request the publisher to reprint the work, and the publisher generally has a period of time (e.g., six months) thereafter within which to reissue the work or make arrangements therefor or for a license, failing which the agreement terminates. There are, of course, a multitude of ways to define when a work is "in print," including also the printing and/or selling of a specified number of copies annually or the expenditure of a minimum yearly amount for advertising and exploitation.

Upon termination, the rights should automatically revert to the author, who should have no further obligation to the publisher. Any reverter should be without prejudice to the author's right to monies due or to become due the author under the agreement. Often the publisher will refuse to permit reverter if there is any unearned advance or other indebtedness of the author to it.

The author should have an option, upon termination, to buy copies, sheets or plates of the work which are the unrestricted property of the publisher, at a stated percentage of the manufacturing cost. If the author declines to do so, within a specified time, the publisher should then be permitted to sell remaining copies at whatever prices it can obtain, subject to the applicable royalty provisions. The plates and other reproductive material should be destroyed, if not purchased by the author.

Usually any termination and reverter is subject to licenses previously granted by the publisher, although the author may request that they terminate as well or that the publisher not continue to participate in moneys received from such licenses, even if the licensees cannot be so prejudiced.

Finally, there is usually a provision enabling the publisher to discontinue publication on notice to the author if in its opinion the work is no longer merchantable or profitable.

18. ARBITRATION

It is usually desirable to include an arbitration provision in a book publication contract, because disputes can then be resolved more quickly and less expensively than by lawsuit. For these very reasons, however, the publisher may reject arbitration so as to deny the author such a convenient mode to resolve disputes. Since the publisher has greater resources, and thus can more readily afford the expense of litigation than the author, its bargaining power will be greater when arbitration is not available.

The prime disadvantage of arbitration is that, in the absence of fraud, etc., there is no appeal from a decision, no matter how erroneous on the facts or law. Thus when complicated legal questions are involved, a legal action is generally a more appropriate form of disposition.

To help avoid arbitrary decisions, it is better to provide for arbitration before a panel of three arbitrators, each of whom will have to account to the others. The author should reserve the option to pursue legal remedies in lieu of arbitration when the dispute involves royalties due the author.

19. ASSIGNMENT

It is frequently provided that no assignment is binding on either party without the written consent of the other. However, the author, upon proper written notification to the publisher, should be able to assign any monies due or to become due to him under the agreement. And the publisher may make an assignment as part of any transfer of all or a material part of its publishing business to a successor firm or corporation which assumes all the publisher's obligations under the agreement.

20. AUTHORSHIP CREDIT

The manner, wording and placement of authorship credit, including the size and prominence of the names (and the comparative size and prominence, where joint authors are involved), should be specified whenever possible. The author should require his name to be placed on the cover, title page and, if feasible, the spine of the work.

The authorship credit to be given a reviser, and its relation to that of the original author (who may or may not have contributed to the revision) should also be set forth.

21. AUTHOR'S ALTERATIONS

The publisher ordinarily allows the author an amount equivalent to a stated percentage (e.g., 10%) of the total cost of composition for

the purpose of author's alterations, made upon proofreading the work. If the cost of his alterations exceeds that sum, the balance should be charged only to the author's royalty account. Corrections of printer's errors should be excluded from the cost of alterations, as well as changes suggested by the publisher or developed jointly in consultation with the author.

When the amount allowed the author is a flat sum, the author should be given information on how the specific dollar figure would correspond to the percentage of cost of composition.

22. FREE COPIES

The publisher generally furnishes the author with at least six copies of the work, upon publication, at no charge, and permits him to purchase further copies for his personal use, but not for resale, at a discount of, e.g., 40% of the retail list price.

23. AGENCY

The parties frequently agree that all sums of money due the author under the agreement will be paid to and in the name of the author's agent, and that receipt by the latter is a good and valid discharge of such indebtedness to the author. Occasionally the agent is empowered to act on the author's behalf in specified or even all matters pertaining to the agreement. If the agent's authority is limited by an agency contract, it might be wise to have the parties initial that contract and annex a copy as an exhibit to the publication agreement.

24. SECURITY INTEREST

To secure the advances made to the author and any other sums due or to become due the publisher, the contract may contain a clause granting the publisher (i) a security interest under the Uniform Commercial Code, to attach to the manuscript and to all outlines, drafts, notes and background material relating thereto as and when they are prepared, and (ii) the right to immediate possession, at any time upon demand, of all such materials. The author will be required to execute and deliver to the publisher such documents (e.g. a financing statement) as may be required to perfect its security interest.

25. DELAY IN SIGNING

To discourage excessive delay by the author in signing, the publisher may provide that if the agreement is not signed and delivered to

it within a specified time (e.g., 30 days), the publisher may, without obligation, withdraw its offer at any time prior to the expiration of, e.g., ten days following delivery to it of the signed agreement.

26. MISCELLANEOUS PROVISIONS

There are a variety of so-called "boiler-plate" provisions which usually appear in publication agreements, e.g.: (a) that no waiver, change or modification is valid or binding unless in writing and signed by the parties; (b) that no waiver of any breach, default or provision shall be deemed a waiver of any repetition of such breach or default, or affect any other provision; (c) specification of what state law shall govern the interpretation of the agreement, (d) that the parties will perform all acts and deliver all documents necessary or desirable to evidence and/or effectuate the terms of the agreement; (e) specification of the addresses to which all notices should be sent; (f) that the contract is binding on, and inures to the benefit of, the parties, the successors and assigns of the publisher and the heirs, assigns and personal representatives of the author; (g) that if there are joint authors, all of the obligations are deemed to be the joint and several obligations of all of them.

To avoid the general rule of construction that ambiguities are resolved against the party who prepared the agreement there may be stated, if appropriate, that the contract was prepared by the joint efforts of the parties and should not be construed against either party (and perhaps, also, an acknowledgment that all parties were represented by counsel).

CONCLUSION

There are, for the most part, no absolutes as regards the foregoing provisions. Rather, there are varying degrees of "the desirable," born of the judicious evaluation and utilization of one's bargaining power vis-a-vis that of his adversary.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

318. U. S. CONGRESS. HOUSE.

H.R. 16450. A bill relating to the tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Introduced by Mr. Kupferman, April 3, 1968, and referred to the Committee on Ways and Means. 5 p. (90th Cong., 2d Sess.)

Almost identical to H.R. 14903, 89th Cong., 2d Sess. (1966) [see 13 BULL. CR. SOC. 301, Item 332 (1966)], also introduced by Mr. Kupferman. 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.

In an extension of his remarks in connection with his introduction of the bill, Mr. Kupferman concludes with the following statement:

“Let us now take the concrete step of ending the economic discrimination against those authors and composers of literary, musical, and artistic compositions which exist under our present tax structure by eliminating their inequity.”—114 Cong. Rec. H2566 (daily ed. Apr. 3, 1968).

319. U. S. CONGRESS. SENATE. *Javits, Jacob G.*

Revision of the copyright law. (114 *Congressional Record* S4703-S4704, no. 73, daily ed. May 1, 1968.)

Senator Javits receives unanimous consent to have an article by Dr. Howard Hanson, director of the Institute of American Music at the University of Rochester, printed in the *Record*. The article, entitled “For revision of copyright law,” which makes a strong plea for enactment of a new copyright law, originally appeared in the April 14, 1968 issue of the *New York Times*.

320. U. S. OFFICE OF EDUCATION.

Copyright materials; statement of policy. (33 *Federal Register* 3653, no. 42, Mar. 1, 1968.)

“F.R. Doc. 68-2578; Filed Feb. 29, 1968.”

A new policy, effective immediately, under which limited copyright protection may be authorized at the request of a grantee or contractor for materials they produce under project grants or contracts from the Office of Education "upon a showing satisfactory to the Office of Education that such protection will result in more effective development or dissemination of the materials and would otherwise be in the public interest."

2. Foreign Nations

321. TANZANIA. *Laws, statutes etc.*

The Copyright Act, 1966. (Of December 14, 1966). (4 *Copyright* 39-43, no. 2, Feb. 1968.)

"This Act came into force on October 1, 1967."

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

322. HUNGARY. *Treaties, etc. Russia (1923-U.S.S.R.), Nov. 17, 1967.*

Convention on the Reciprocal Protection of Copyright concluded between the Hungarian People's Republic and the Union of Soviet Socialist Republics. (4 *Copyright* 63-64, no. 3, Mar. 1968.)

The English translation of the text of the Convention was also published in 15 BULL. CR. SOC. 178, Item 118 (1968).

323. Intellectual Property Conference of Stockholm, 1967.

Reports on the work of the five Main Committees. Geneva, United International Bureaux for the Protection of Intellectual Property (BIRPI), 1967. 156 p.

324. Intergovernmental Copyright Committee. *9th Session, Geneva, December 12-15, 1967.*

[Records]. (4 *Copyright* 51-56, no. 2, Feb. 1968.)

Contains the report and resolutions. Some of the meetings were held jointly with the Permanent Committee of the Berne Union. See Item 325, *infra*.

325. International Copyright Union. *Permanent Committee 13th Session, Geneva, December 12-15, 1967.*

[Records]. (4 *Copyright* 23-32, no. 2, Feb. 1968.)

Contains the report, resolutions, and list of participants. Some of the meetings were held jointly with the Intergovernmental Copyright Committee. See Item 324, *supra*.

326. Report [of the] Intergovernmental Committee established under Article 32 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in Rome on October 26, 1961. First Session (Geneva, December 18-19, 1967). (4 *Copyright* 32-38, no. 2, Feb. 1968.)

The agenda of the first session, held at the International Labour Office in Geneva, included adoption of rules of procedure;

election of officers, approval of observer representation, consideration of the draft list of points concerning application of the Rome Convention by member states, and other business. Appended are the List of Participants, Rules of Procedure, List of International Organizations invited to be represented as observers, and List of points concerning the application and operation of the Convention.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. The United States Supreme Court

327. *Fortnightly Corporation v. United Artists Television, Inc.*, 157 U.S.P.Q. No. 11, Supplement (June 17, 1968).

Editorial Note: Because of the importance of the Court's decision in the "Community Antenna" case, it is here printed in full:

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Fortnightly Corporation, owns and operates community antenna television (CATV) systems in Clarksburg and Fairmont, West Virginia.¹ There were no local television broadcasting stations in that immediate area until 1957. Now there are two, but, because of hilly terrain, most residents of the area cannot receive the broadcasts of any additional stations by ordinary rooftop antennas. Some of the residents have joined in erecting larger cooperative antennas in order to receive more distant stations but a majority of the householders in both communities have solved the problem by becoming customers of the petitioner's CATV service.²

The petitioner's systems consist of antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength.³

During 1960, when this proceeding began, the petitioner's systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania, one in Steubenville, Ohio, and

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1. For a discussion of CATV systems generally, see *United States v. Southwestern Cable Co.*, *ante*, at —.
 2. In 1960, out of 11,442 occupied housing units in the Clarksburg area, about 7,900 subscribed to the petitioner's CATV service; out of 9,079 units in Fairmont, about 5,100 subscribed.
 3. The petitioner's systems utilized modulating equipment only during the period 1958-1964.

one in Wheeling, West Virginia.⁴ The distance between those cities and Clarksburg and Fairmont ranges from 52 to 82 miles.⁵ The systems carried all the programming of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. The petitioner neither edited the programs received nor originated any programs of its own.⁶ The petitioner's customers were charged a flat monthly rate regardless of the amount of time that their television sets were in use.⁷

The respondent, United Artists Television, Inc., holds copyrights on several motion pictures. During the period in suit, the respondent (or its predecessor) granted various licenses to each of the five television stations in question to broadcast certain of these copyrighted motion pictures, broadcasts made under these licenses were received by the petitioner's Clarksburg and Fairmont CATV systems and carried to its customers. At no time did the petitioner (or its predecessors) obtain a license under the copyrights from the respondent or from any of the five television stations. The licenses granted by the respondent to the five stations did not authorize carriage of the broadcasts by CATV systems, and in several instances the licenses specifically prohibited such carriage.

The respondent sued the petitioner for copyright infringement in a federal court, asking damages and injunctive relief. The issue of infringement was separately tried, and the court ruled in favor of the respondent. 255 F.Supp. 177. On interlocutory appeal under 28 U.S.C. §1292(b), the Court of Appeals for the Second Circuit affirmed. 377 F.2d 872. We granted certiorari, 389 U.S. 969, to consider an important question under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U.S.C. §1 *et seq.*

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.⁸ Instead, §1 of the Act enumerates

4. Since 1960, some changes have been made in the stations carried by each of the petitioner's systems. As of May 1, 1964, the Clarksburg system was carrying the two local stations and three of the more distant stations, and the Fairmont system was carrying one local station and four of the more distant stations.
5. Clarksburg and Fairmont are 18 miles apart.
6. Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion.
7. The monthly rate ranged from \$3.75 to \$5, and customers were also charged an installation fee. Increased charges were levied for additional television sets and for commercial establishments.
8. See, e.g., *Fawcett Publications v. Elliot Publishing Co.*, 46 F.Supp. 717; *Hayden v. Chalfont Press, Inc.*, 281 F.2d 543, 547-548.

"The fundamental [is] that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . ." Kaplan, *An Unhurried View of Copyright* 57 (1967).

several "rights" that are made "exclusive" to the holder of the copyright.⁹ If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in §1, he does not infringe.¹⁰ The respondent's contention is that the petitioner's CATV systems infringed the respondent's §1(c) exclusive right to "perform . . . in public for profit" (non-

9. "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or 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, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of \$100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; 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; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . ." 17 U.S.C. §1.

10. The Copyright Act does not contain a definition of infringement as such. Rather infringement is delineated in a negative fashion by the §1 enumeration of rights exclusive to the copyright holder. See Nimmer, Copyright §100 (1967).

dramatic literary works)¹¹ and its §1(d) exclusive right to “perform . . . publicly” (dramatic works).¹² The petitioner maintains that its CATV systems did not “perform” the copyrighted works at all.¹³

At the outset it is clear that the petitioner’s systems did not “perform” the respondent’s copyrighted works in any conventional sense of that term,¹⁴ or in any manner envisaged by the Congress that enacted the law in 1909.¹⁵ But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.¹⁶ In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.¹⁷

11. See n. 9, *supra*. We do not reach the petitioner’s claim that the respondent’s animated cartoons are not “literary works.”
12. See n. 9, *supra*.
13. The petitioner also contends that if it did “perform” the copyrighted works, it did not do so “in public.”
14. Cf. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1.
15. The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).
16. “While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.” *Jerome Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411.
17. A revision of the 1909 Act was begun in 1955 when Congress authorized a program of studies by the Copyright Office. Progress has not been rapid. The Copyright Office issued its report in 1961. Register of Copyrights, Report on the General Revision of the U.S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. (1961). Revision bills were introduced in the House in the Eighty-eighth Congress and in both the House and the Senate in the Eighty-ninth Congress. See H.R. 11947, 88th Cong., 2d Sess.; Hearings on H.R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (1966). H.R. 4347 was reported favorably by the House Judiciary Committee, H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but not enacted. In the Ninetieth Congress revision bills were again introduced in both the House (H.R. 2512) and the Senate (S. 597). The House bill was again reported favorably, H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and this time, after amendment, passed by the full House. 113 Cong. Rec. H3888 (April 11, 1967). The bill as reported contained a provision dealing with CATV, but the provision was struck from the bill on the House

The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV systems "performed" the copyrighted works was: "[H]ow much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?" 377 F.2d, at 877. Applying this test, the court found that the petitioner did "perform" the programs carried by its systems.¹⁸ But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals,¹⁹ and broadcasts the signals at radio frequency for public reception.²⁰ Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and

floor prior to enactment. See n. 33, *infra*. The House and Senate bills are currently pending before the Senate Subcommittee on Patents, Trademarks, and Copyrights.

18. The court formulated and applied this test in the light of this Court's decision in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191. See also *Society of European Stage Authors & Composers v. New York Hotel Statler Co.*, 19 F.Supp. 1. But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n. 5. The *Jewell-LaSalle* decision must be understood as limited to its own facts. See n. 30, *infra*.
19. If the broadcaster obtains his program from a network, he receives the electronic signals directly by means of telephone lines or microwave.
20. Broadcasting is defined under the Communications Act of 1934 as "the dissemination of radio communication intended to be received by the public . . ." 47 U.S.C. §153 (o).

audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.²¹

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act,²² broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform.²³ Viewers do not perform.²⁴ Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line.²⁵ Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set.²⁶ It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful

21. See Hearings on H.R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., at 1312-1318 (1965).

22. See n. 15, *supra*.

23. Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F.2d 411 (radio broadcast); Associated Music Publishers v. Debs Memorial Radio Fund, 141 F.2d 852 (radio broadcast of recorded program); Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (D.C.S.D.N.Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to §1(c) a special damages provision for "infringement by broadcast." 66 Stat. 752.

24. "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." Buck v. DeBaum, 40 F.2d 734, 735.

"[T]hose who listen do not perform . . ." Jerome H. Remick & Co. v. General Electric Co., 16 F.2d 829.

25. While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case.

26. Cf. Lilly v. United States, 238 F.2d 584, 587:

"[T]his community antenna service was a mere adjunct of the television receiving sets with which it was connected . . ."

and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.²⁷ If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters.²⁸ CATV systems do not in fact broadcast or

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27. The District Court's decision was based in large part upon its analysis of the technical aspects of the petitioner's systems. The systems have contained at one time or another sophisticated equipment to amplify, modulate, and convert to different frequencies the signals received—operations which all require the introduction of local energy into the system. The court concluded that the signal delivered to subscribers was not the same signal as that initially received off the air. 255 F.Supp. at 190-195. The Court of Appeals refused to attach significance to the particular technology of the petitioner's systems, 377 F.2d at 879, and we agree. The electronic operations performed by the petitioner's systems are those necessary to transmit the received signal the length of the cable efficiently and deliver a signal of adequate strength. Most of the same operations are performed by individual television sets and antennas. See Hearings on H.R. 4347 before the Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. at 1312-1318 (1965). Whether or not the signals received and delivered are the "same," the entire process is virtually instantaneous, and electronic "information" received and delivered is identical. 255 F.Supp. at 192.
28. Cf. *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F.Supp. 315, 325:

"[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes.

"[Broadcasters] are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broadcasts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as may be equipped to receive them.

"[CATV systems], on the other hand, have nothing to do with sponsors, program content or arrangement. They sell community antenna service to a segment of the public for which [broadcasters'] programs were intended but which is not able, because of location or topographical condition, to receive them without rebroadcast or other relay service by community antennae. . . ."

rebroadcast.²⁹ Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.³⁰

We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy.³¹ We decline the invitation.³² That job is for Congress.³³ We take the Copyright Act of 1909 as we find it. With

29. *Cable Vision, Inc. v. KUTV, Inc.*, 211 F.Supp. 47, vacated on other grounds, 355 F.2d 348; *Report and Order on CATV and TV Repeater Services*, 26 F.C.C. 403, 429-430.

30. It is said in dissent that, "Our major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until Congress legislates . . ." *Post*, at [325]. But existing "business relationships" would hardly be preserved by extending a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context, *post*, at [325], n. 3, so retroactively to impose copyright liability where it has never been acknowledged to exist before. See n. 18, *supra*.

31. Compare, e.g., *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514 (1967); *CATV and Copyright Liability: On a Clear Day You Can See Forever*, 52 Va. L. Rev. 1505 (1966); Kaplan, *An Unhurried View of Copyright* 104-106 (1967); Statement of then Acting Assistant Attorney General (Antitrust Division) Edwin Zimmerman, Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess., at 211-219 (1966).

32. The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us "imply" a license for the CATV "performances." This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the "Grade B Contour" of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works, we do not reach the question of implied license.

33. The copyright revision bill recently passed by the House, see n. 17, *supra*, originally contained a detailed and somewhat complex provision covering CATV. H.R. 2512, 90th Cong., 1st Sess., §111. Congressman Willis, chairman of the subcommittee which reported the bill, described the bill in terms of its effect on the District Court's decision in the present case:

due regard to changing technology, we hold that the petitioner did not under that law “perform” the respondent’s copyrighted works.

The judgment of the Court of Appeals is *Reversed*.

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN took no part in the decision of this case.

MR. JUSTICE FORTAS, dissenting.

This case calls not for the judgment of Solomon but for the dexterity of Houdini. We are here asked to consider whether and how a technical, complex, and specific Act of Congress, the Copyright Law, which was drafted in 1909, applies to one of the recent products of scientific and promotional genius, CATV. The operations of CATV systems are based upon the use of other people’s property. The issue here is whether, for this use, the owner of copyrighted material should be compensated. From a technical standpoint the question—or at least one important question—is whether the use constitutes a “performance” of the copyrighted material within the meaning of §1(c) of the Copyright Act, 17 U.S.C. §1(c). But it is an understatement to say that the Copyright Act, including the concept of a “performance,” was not created with the development of CATV in mind. The novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a

“By, in effect, repealing the court decision which would impose full copyright liability on all CATV’s in all situations, the committee recommends H.R. 2512, which would exempt them in some situations, make them fully liable in some, and provide limited liability in others.” 113 Cong. Rec. H3614 (April 6, 1967).

See H.R. Rep. No. 83, 90th Cong., 1st Sess., 6-7, 48-59 (1967). On the House floor the CATV provision was deleted in order to refer the matter to the Interstate and Foreign Commerce Committee, which has jurisdiction over communications. 113 Cong. Rec. H3624-3626, 3636-3637, 3644-3647, 3857-3859 (April 6 and 11, 1967). In urging deletion of the CATV provision, Congressman Moore said:

“[W]hat we seek to do in this legislation is control CATV by copyright. I say that is wrong. I feel if there is to be supervision of this fast-growing area of news media and communications media, it should legitimately come to this body from the legislative committee that has direct jurisdiction over the same.

“. . . This bill and the devices used to effect communications policy are not proper functions of copyright . . .” 113 Cong. Rec. H3625 (April 6, 1967).

television set with a mallet. And no aid may be derived from the recent attempts of Congress to formulate special copyright rules for CATV—for Congress has vacillated in its approach.¹

At the same time, the implications of any decision we may reach as to the copyright liability of CATV are very great. On the one hand, it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights of materials used in the television industry. On the other hand, it is foreseen that a decision to the effect that CATV systems never infringe the copyrights of the programs they carry would permit such systems to overpower local broadcasting stations which must pay, directly or indirectly, for copyright licenses and with which CATV is in increasing competition.²

The vastness of the competing considerations, the complexity of any conceivable equitable solution to the problems posed, and the obvious desirability of ultimately leaving the solution to Congress induced the Solicitor General, in a memorandum filed prior to oral argument in this case, to recommend "that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution."

That is a splendid thought, but unhappily it will not do. I agree with the majority that we must pass on the instant case. An important legal issue is involved. Important economic values are at stake, and it would be hazardous to assume that Congress will act promptly, comprehensively, and retroactively. But the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object, I suggest, should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face.

1. See Kaplan, *An Unhurried View of Copyright* 105-106, 127-128 (1967).

2. The Solicitor General, in his brief on the merits, recommends that we adopt a compromise approach—finding a license implied in law with respect to some CATV operations, but not with respect to others. Regardless of the advisability of such an approach from the standpoint of communications, antitrust, and other relevant policies, I do not believe it is open to us, in construing the Copyright Act, to accept the Solicitor General's proposal.

The opinion of the majority, in my judgment, does not heed this admonition. In an attempt to foster the development of CATV, the Court today abandons the teachings of precedent, including a precedent of this Court (see *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191 (1931); *Society of European Stage Authors and Composers (SESAC) v. New York Hotel Statler Co.*, 19 F.Supp. 1 (1937)), as to the meaning of the term "perform" in the Copyright Act. It is not our general practice to reverse ourselves, without compelling reasons to do so, on matters of statutory construction, especially on a construction of many years' standing under which an entire industry has operated.³ Yet today's decision might not be objectionable, if the majority replaced what it considers an outmoded interpretation of the term "perform" with a new, equally clear, and workable interpretation. It does not, however, do this. It removes from the copyright law an interpretation which, though perhaps not altogether satisfactory as an analytical matter,⁴ has at least been settled for nearly 40 years; and it substitutes for that discarded interpretation a rule which I do not believe is an intelligible guide for the construction of the Copyright Act. Moreover, the new rule may well have disruptive consequences outside the area of CATV.

The approach manifested in the opinion of the Court is disarmingly simple. The Court merely identifies two groups in the general field of television, one of which it believes may clearly be liable, and the other clearly not liable, for copyright infringement on a "performance" theory: "Broadcasters perform. Viewers do not perform." From this premise, the Court goes on to hold that CATV "falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment performs is little different from that performed by the equipment generally furnished by a television viewer." *Ante*, pp. [321-2].

The decision in *Buck v. Jewell-LaSalle*, must, the Court says today, "be understood as limited to its own facts." *Ante*, n. 16. In *Buck*, the

3. Nimmer, a leading authority in the copyright field, states that although "the two major performing right societies, ASCAP and BMI, do not choose to enforce the *Jewell-LaSalle* doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers, . . . such demands are made of hotels which operate in the manner of the LaSalle Hotel." Nimmer, Copyright §107.41, n. 204 (1967).

4. See Nimmer, Copyright §107.41 (1967)

Court, speaking unanimously through Mr. Justice Brandeis, held that a hotel which received a broadcast on a master radio set and piped the broadcast to all public and private rooms of the hotel had "performed" the material that had been broadcast. As I understand the case, the holding was that the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a "performance" of the material originally broadcast. I believe this decision stands squarely in the path of the route which the majority today traverses. If a CATV system performs a function "little different from that performed by the equipment generally furnished by a television viewer," and if that is to be the test, then it seems to me that a master radio set attached by wire to numerous other sets in various rooms of a hotel cannot be distinguished.⁵

The vague "functional" test of the meaning of the term "perform" is, moreover, unsatisfactory. Just as a CATV system performs (on the majority's analysis) the same function as the antenna of the individual viewer, so a television camera recording a live drama performs the same function as the eye of a spectator who is present in the theater. Both the CATV and the television camera "receive programs that have been released to the public and [carry] them by private channel to additional viewers." *Ante*, p. [323]. Moreover, the Court has indulged in an oversimplification of the "function" of CATV. It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a "cooperative antenna" employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves. In such a case the CATV is performing a function different from

5. The majority attempts to diminish the compelling authority of *Buck v. Jewell-LaSalle*, by referring to a vague footnote in that opinion to the effect that the Court might not have found a "performance" if the original broadcast, which was picked up by the hotel and brought to its various rooms, had been authorized by the copyright holder—as it was not. I cannot understand the point. Whatever might be the case in a contributory infringement action (which this is not), the interpretation of the term "perform" cannot logically turn on the question whether the material that is used is licensed or not licensed.

a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes.

Buck v. Jewell-LaSalle may not be an altogether ideal gloss on the word "perform," but it has at least the merit of being settled law. I would not overrule that decision in order to take care of this case or the needs of CATV. This Court may be wrong. The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

I see no alternative to following *Buck* and to holding that a CATV system does "perform" the material it picks up and carries. I would, accordingly, affirm the decision below.

ROBERT C. BARNARD, Washington, D.C. (R. MICHAEL DUNCAN, STEPHEN R. BARNETT, E. STRATFORD SMITH, CLEARY, GOTTLIEB, STEEN & HAMILTON, and SMITH, PEPPER, SHACK & L'HEUREUX, with him on the brief) for petitioner; LOUIS NIZER, New York, N.Y. (GERALD MEYER, GERALD F. PHILLIPS, LEONARD S. BAUM, LAWRENCE S. LESSER, and PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, with him on the brief) for respondent; MICHAEL FINKELSTEIN and MARTIN E. FIRESTONE filed brief for All-Channel Television Society, as amicus curiae, seeking affirmance; WARNER W. GARDNER, WILLIAM H. DEMPSEY, JR., RICHARD M. SHARP, DOUGLAS A. ANELLO, and SHEA & GARDNER filed brief for National Association of Broadcasters, as amicus curiae, seeking affirmance; IRWIN KARP filed brief for The Authors League of America, as amicus curiae, seeking affirmance; AMBROSE DOSKOW, SYDNEY M. KAYE, ASA D. SOKOLOW, JOSEPH W. GELB, and ROSENMAN COLIN KAYE PETSCHKE FREUND & EMIL filed brief for Broadcast Music, Inc., as amicus curiae, seeking affirmance; LEONARD ZISSU, ABRAHAM MARCUS, and ALAN J. STERN filed brief for Screen Composers Association of the United States of America, as amicus curiae, seeking affirmance; HERMAN FINKELSTEIN, SIMON H. RIFKIND, JAY H. TOPKIS, PAUL S. ADLER, and PAUL, WEISS, RIFKIND, WHARTON & GARRISON filed brief for American Society of Composers, Authors and Publishers, as amicus curiae, seeking affirmance; PAUL P. SELVIN, WILLIAM BERGER, SELVIN AND COHEN, WILLIAM B. HAUGHTON, and MORTIMER BECKER filed brief for Writers Guild of America, Screen Actors Guild, Directors Guild of America, and American Federation of Television and Radio Artists, as amici curiae, seeking affirmance; ERWIN N. GRISWOLD, Solicitor General, filed brief for the United States, as amicus curiae, seeking reversal in part; BRUCE E. LOVETT and GARY L. CHRISTENSEN filed brief for National Cable Television Association, Inc., as amicus curiae, seeking reversal.

2. Federal Court Decisions

328. *American Metropolitan Enterprises of N.Y., Inc. v. Warner Bros. Records, Inc.*, 389 F.2d 903, 157 U.S.P.Q. 69 (2nd Cir., Feb. 16, 1968) (Smith, J.)

Appeal from denial of plaintiff's motion for preliminary injunction in action for copyright infringement. Plaintiffs, assignees of American mechanical reproduction rights in thirty-three copyrighted musical compositions from an English corporation which had acquired world-wide rights from the author thereof, licensed defendant to produce and sell records containing such compositions in the United States and supplied defendant with master recordings containing performances of same. After defendant advised plaintiffs that any license fees due or to become due under agreement would be withheld, plaintiffs commenced suit and moved for a preliminary injunction, which was denied by the district court.

Held, affirmed.

The court held that the denial of the preliminary relief was warranted by an absence of demonstrated irreparable injury, a requisite to relief *pendente lite*. The court noted that "in a number of cases involving enforcement of the Copyright Act, it has been held that upon a showing of a prima facie case of copyright infringement a copyright holder is entitled to a preliminary injunction without a detailed showing of irreparable harm [because he] may be presumed to suffer [same] when his right to the exclusive use of the copyrighted material is invaded." However, stated the court, this presumption may not be invoked where musical compositions already recorded are involved since the compulsory licensing provisions of the Copyright Act remove the element of exclusivity. The court said:

Copyrights covering mechanical reproductions of musical compositions, however, are given different statutory treatment from copyrights covering other material. Section 1(e) of the Act provides that:

whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work * * * any other person may make similar use of the copyrighted work [upon compliance with the fee and notice provisions of this section].

Since the appellants had "knowingly acquiesced in the use of the copyrighted work[s]," they no longer have any right to the exclusive

use of them. Any person who complies with the compulsory licensing provisions of the Act, may manufacture records containing the thirty-three songs in question without becoming liable as an infringer. . . . Thus, the usual rationale for granting a preliminary injunction upon the showing of a prima facie copyright infringement does not apply where the copyright covers musical compositions mechanically reproduced since the copyright holder does not have any right of exclusivity once he has permitted use. No irreparable injury may be presumed in such a situation. . . .

The Copyright Act expressly preserves the traditional doctrines of equity when one seeks equitable remedies in a copyright action. 17 U.S.C. §112. The existence of an adequate legal remedy traditionally bars a plaintiff from equitable relief. This rule has frequently been applied in patent litigation in which a licensee has refused to pay royalties under a licensing arrangement. . . .

Of course, the equitable power of a federal district court to grant an injunction could be properly invoked, after liability is determined, to aid a copyright holder in the collection of his judgment against an infringer, as specifically authorized by the proviso to 17 U.S.C. §101(e).

Plaintiff, joined by the National Music Publishers Association as *amicus curiae*, argued that the ruling announced enabled financially strong record manufacturers to violate the copyright laws with impunity. The court responded by observing that the "discouraging of willful violations of the Copyright Act can be sufficiently handled through the trial court's use of its power to grant treble damages and attorneys' fees . . .".

329. *Hoffenberg v. Kaminstein*, 157 U.S.P.Q. 358 (D.C. Cir., April 23, 1968 (*Per curiam*))

Appeal from summary judgment for defendant Register of Copyrights in action to compel registration of a claim to copyright. Plaintiff and another, both American citizens, co-authored the novel "Candy" which was first published and printed in the English language in France in 1958 with copyright notice. More than six years later plaintiff applied for *ad interim* copyright in the foreign edition and registration of a substantially identical American edition. The Copyright Office denied both applications, citing failures to comply with 17 U.S.C. §§16, 22 and 23. On cross-motions for summary judgment in an action to compel registration of the American version only, the district court granted the Register's motion, denied plaintiff's motion, and dismissed the action.

Held, affirmed.

Two members of a three-judge panel, Judge Burger concurring in the result without opinion, held that plaintiff had failed to rebut the presumptive validity of a Copyright Office regulation which denied registration on the facts presented. The court said:

Except when the ad interim provisions of Sections 22 and 23 are met, Section 16 of the Copyright Code allows copyright registration of English-language books by United States citizens only where the first publication is printed in the United States. Implementing these provisions of the Copyright Code pursuant to 17 U.S.C. §207 (1964), in 1956 the Register of Copyrights promulgated the following regulation:

“Ad interim registrations. (1) An American edition of an English-language book or periodical identical in substance to that first published abroad will not be registered unless an ad interim registration is first made.” 37 C.F.R. §202.4(b) (1967).

Since the novel “Candy” was first published and printed abroad in the English language and there is no ad interim registration of that edition, registration of the American edition was properly refused.

A regulation, of course, is presumptively valid and ordinarily should be upheld unless it is inconsistent with the statute. *New York Foreign Freight Forwarders & Brokers Ass’n v. F.M.C.*, 2 Cir., 337 F.2d 289, 295 (1964), *cert. denied*, 380 U.S. 910, 914 (1965). The above regulation is not only not inconsistent with the pertinent sections of the Copyright Code, but in our judgment it accurately reflects the intention of Congress. *Compare United States v. Zasove*, 334 U.S. 602, 611 (1948). Even if there were some doubt, we would be required to resolve that doubt in favor of the Register’s interpretation. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

330. *G. R. Leonard & Co. v. Stack d/b/a Reliance Traffic Service*, 156 U.S.P.Q. 161 (7th Cir., Nov. 22, 1967) (Castle, J.)

Appeal from judgment for defendant in action for copyright infringement. Plaintiff and defendant publish competing freight-rate schedule guides for the use of shippers. Alleging infringement of one of its copyrighted editions, plaintiff brought suit for damages and injunctive relief. After full trial, the district court awarded judgment for defendant on the bases of “de minimus copying” and fair use, noting that defendant’s guide was primarily the product of its own independent

research and that some degree of similarity was inevitable due to the fact that both parties utilized similar source materials.

Held, affirmed.

I. The court observed that it was bound by the federal "clearly erroneous" rule of appellate review and added that "it is recognized that a compiler of a directory or the like may make a fair use of an existing compilation serving the same purpose if he first makes an honest, independent canvass; he merely checks and compares his own compilation with that of the copyrighted publication; and publishes the result after verifying the additional items derived from the copyrighted publication." Although some extent of copying had been clearly established by the appearance in defendant's guide of five "trap" items—fictitious entries inserted in plaintiff's publication for the purpose of ensnaring copyists—viewing the entire record, the court considered itself bound by its scope of review to affirm the finding below that such copying as was proved was *de minimis* and within the realm of fair use. The court said:

Where, as here, copying is shown to have taken place the question of fair or unfair use arises, but as stated in *West Publishing Co. v. Edward Thompson Co.*, 169 F. 833, 861-862, it is a correct statement of the law that:

"Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent."

The District Court's finding of *de minimis* copying is based on the record disclosure that out of the 90,000 or more entries in defendant's guide five towns listed therein were copied from plaintiff's guide. In this connection the record reveals that in plaintiff's guide there were approximately 100 fictitious entries which were inserted for the purpose of trapping copyists, 50 of which "trap towns" were first inserted in an edition earlier to that allegedly infringed, and 5 of these trap towns appeared in defendant's guide. While the copying thus disclosed opened the door to consideration of whether there had been an unfair use of plaintiff's guide, the sole issue remaining is whether the extent of defendant's use of the guide was so great as to exceed the bounds of fair use and thus constitute an infringement. . . .

Under Rule 52(a) of the Federal Rules of Civil Procedure the findings below are binding on this Court unless they are "clearly erroneous". A finding is "clearly erroneous" only when it is without evidentiary support or "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 76 USPQ 430, 442-443.

The extent of the use defendant made of plaintiff's guide is a factual question. . . .

The defendant's use of the plaintiff's guide is admitted. But the testimony of the defendant and of his witnesses is to the effect that defendant's use of the guide was confined to verification of his own independent research and labor. This testimony is supported by the volume of physical material in the form of defendant's original work sheets reflected in the record. It appears futile to claim that the elaborate and comprehensive system involved in their production was designed "merely as a cloak". . . .

II. Plaintiff sought to minimize the effect of limited appellate review by reliance on the "documentary evidence rule". Asserting that the lower court's findings were "deprived of that degree of finality they would otherwise have if based principally upon the resolution of conflicting testimony", plaintiff urged that documentary evidence established that quite extensive use was made of its publication as a standard for determining whether "no population towns" (i.e., places indicated on maps without accompanying population figures) were of sufficient commercial significance to be included in defendant's guide. The court rejected this approach, pointing out that the rule relied upon "does not 'speak for itself' to supply evidentiary content in the form of proof of such unfair use. . . . Plaintiff's evidence consisted for the most part of testimonial analysis . . . made, and statistical data prepared by, its witnesses from documentary material. . . . [While] the documentary material upon which plaintiff relies, together with the proof plaintiff adduced, warrants . . . inferences . . . opposed to the dispositive factual findings made by the trial court . . . it does not compel such inferences. On the record before us we cannot say that the failure of the trier of fact to draw such inferences in the face of the testimony of defendant's witnesses was 'clearly erroneous'".

Judge Cummings dissented, stating that:

In my view, the findings supporting non-infringement are "clearly erroneous" within the meaning of Rule 52(a) of the Federal

Rules of Civil Procedure. A tenth of the towns listed in the defendant's Reliance Guide are no population towns.¹ The documentary evidence discloses that defendant's guide contains 16% of Rand McNally's no population towns. Of such towns in plaintiff's guide, 75.4% are in defendant's, and 96.6% of the no population towns in defendant's guide are in plaintiff's.² This overlap was never satisfactorily explained by defendant and shows that although defendant omitted 25% of the no population towns in plaintiff's guide, he included scarcely any such towns unless they were in plaintiff's guide. Here the testimony offered by defendant was conclusively rebutted by the unchallenged documents, so that on the entire evidence, one is "left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 76 USPQ 430, 442-443. Therefore, the no substantial copying findings should not be permitted to stand. Defendant's use of plaintiff's guide in selecting no population towns for his Reliance Guide was an unfair use and infringed plaintiff's copyright.³ Other compelling proof of infringement appears in defendant's copying of five of plaintiff's 50 new fictitious "trap" towns into the Reliance Guide, his use of plaintiff's guide in updating post office information in various states, and in common errors with respect to a post office and several express offices in Utah. The judgment should be reversed.

331. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 157 U.S.P.Q. 65 (2d Cir., Feb. 16, 1968) (Friendly, J.), affirming 154 U.S.P.Q. 616 (S.D.N.Y., July 11, 1967). See also 155 U.S.P.Q. 577 (S.D.N.Y., Oct. 3, 1967); see Item No. 332, *infra*.

Appeal from judgment for defendant in action for copyright infringement. The plaintiff claimed that the right to show the motion picture "Maytime" on television was not included in the grant of motion picture rights in the German musical play on which it was based, "Wie Einst in Mai". The trial court held, however, that the right to exhibit the motion picture included the right to show it on television.

Held, affirmed.

The court held that, even in 1930, the prospect of television was well known in the entertainment industry and that an experienced businessman like Hans Bartsch, when he assigned the motion picture rights by way of a broad general grant should be assumed to have had in mind the right to exhibit the motion picture on television. The court said:

The district court, appearing to consider that defendant's rights turned on the authorization "to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography *or any process analogous thereto,*" concluded that television came within the phrase we have italicized. We have grave doubt on that score. We freely grant that "analogous" is a broader word than "similar," and also that the first step in a telecast of a film, namely the projection of the motion picture to an electronic pickup, is "analogous" to throwing the picture on a theatre screen. But to characterize the to us nigh miraculous processes whereby these images actuate air-waves so as to cause electronic changes in sets in millions of homes which are then "unscrambled" or "descanned" and thus produce pictures on television screens—along with the simultaneous electronic transmission of sound—as "analogous" to cinematography pushes the analogy beyond the breaking point. This is particularly so since the district court's construction would seem to lead to the conclusion that the assignment would entitle the assignee to "project, transmit and otherwise reproduce" the musical play by a live telecast—a right which pretty clearly was not granted and indeed has not been claimed.

As we read the instruments, defendant's rights do not turn on the language we have been discussing but rather on the broad grant, in the assignments to and from Bartsch, of "the motion picture rights throughout the world," which were spelled out to include the right "to copyright, vend, license and exhibit such motion picture photoplays throughout the world." The "to project, transmit and otherwise reproduce" language appears rather to have been directed at how the musical play was to be made into a photoplay. This may well have seemed a more vexing problem in 1930, due to uncertainties as to the best method for linking visual and audible reproduction, cf. *Paramount Public Corp. v. American Tri-Ergon Corp.*, 294 U.S. 464 (1935), and whether a grant of motion picture rights to a play or novel included the right to sound reproduction, see *L.C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196 (2d Cir. 1936), than today. Being unclear whether sound reproduction would require alterations in previous methods of converting a play into a photoplay, Warner Brothers sought and obtained a considerable degree of freedom in that regard. On this view the clause whose meaning has been so hotly debated is irrelevant to the point here at issue, and decision turns rather on whether a broad assignment of the right to "copyright, vend,

license and exhibit such motion picture photoplays throughout the world" includes the right to "license" a broadcaster to "exhibit" the copyrighted motion picture by a telecast without a further grant by the copyright owner. . . . The words of Bartsch's assignment, as we have shown, were all designed to give the assignee the broadest rights with respect to *its* copyrighted property, to wit, the photoplay. "Exhibit" means to "display" or to "show" by any method, and nothing in the rest of the grant sufficiently reveals a contrary intention. Nor is this case like *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79 (1938), in which the new medium was completely unknown at the time when the contract was written. Rather, the trial court correctly found that, "during 1930 the future possibilities of television were recognized by knowledgeable people in the entertainment and motion picture industries," though surely not in the scope it has attained. While *Kirke La Shelle* teaches that New York will not charge a grantor with the duty of expressly saving television rights when he could not know of the invention's existence, we have found no case holding that an experienced businessman like Bartsch is not bound by the natural implications of the language he accepted when he had reason to know of the new medium's potential. . . .

With Bartsch dead, his grantors apparently so, and the Warner Brothers lawyer understandably having no recollection of the negotiation, any effort to reconstruct what the parties actually intended nearly forty years ago is doomed to failure. In the end, decision must turn, as Professor Nimmer has suggested, *The Law of Copyright* §125.3 (1964), on a choice between two basic approaches more than on an attempt to distill decisive meaning out of language that very likely had none. As between an approach that "a license of rights in a given medium (e.g., 'motion picture rights') includes only such uses as fall within the unambiguous core meaning of the term (e.g., exhibition of motion picture film in motion picture theaters) and exclude any uses which lie within the ambiguous penumbra (e.g., exhibition of motion picture film on television)" and another whereby "the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license," he prefers the latter. So do we. But see Warner, *Radio and Television Rights* §52 (1953). If the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor; if Bartsch or his assignors had desired to limit "exhibition" of the motion picture to the conventional method where light is carried from a

projector to a screen directly beheld by the viewer, they could have said so.

332. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 155 U.S.P.Q. 577 (S.D.N.Y., Oct. 3, 1967 (Bryan, J.)). For prior decision, see 154 U.S.P.Q. 616 (1967), affirmed 2d Cir., Feb. 16, 1968; see Item No. 331, *supra*.

Defendant's motion for attorney's fees in action for copyright infringement. Plaintiff had claimed that a grant of motion picture rights in "Maytime" in 1930 did not include the right to show the film on television. The court held, however, that the rights granted to exhibit the photoplay included the right to show it on television.

Held, motion denied.

It was held that inasmuch as the issue involved was novel and presented substantial questions of law, plaintiff's claim of infringement "was by no means 'clearly unreasonable,' 'patently erroneous,' 'trivial,' or in bad faith, the tests usually used to support the discretionary award of attorney's fees. E.g., *Mailer v. RKO Teleradio Pictures, Inc.*, 332 F.2d 747, 141 USPQ 462 (2d Cir. 1964); *Norbay Music, Inc. v. King Records, Inc.*, 249 F. Supp. 285, 148 USPQ 420 (S.D.N.Y., 1966); *Burnett v. Lambino*, 206 F. Supp. 517, 134 USPQ 68 (S.D.N.Y. 1962)."

333. *Alart Associates, Inc. v. Aptaker*, 279 F. Supp. 268, 156 U.S.P.Q. 559 (S.D.N.Y., Jan. 15, 1968) (Mansfield, J.)

Motion by defendants for summary judgment in action for infringement of copyright in a pierced-earring tree in the form of a sculpture of a flower, stem and leaves.

Held, motion denied and counsel fees and costs awarded to plaintiff.

I. Defendant argued that plaintiff's certificate of copyright registration was void because it was issued to "Alart, Inc.", a non-existent corporation, rather than to "Alart Associates, Inc." The court held, however, that the inadvertent error in plaintiff's corporate name on the copyright registration application (a certificate of correction was subsequently filed) was not fraudulent or misleading and therefore did not invalidate the registration. The court said:

The merits of this motion based on the variance between plaintiff's name in its amended complaint and in its certificate of copyright registration were expressly raised in defendants' previous motions for summary judgment and for reargument of that motion.

For the third time defendants seek to magnify an inadvertent clerical error by plaintiff to the level of a substantial defense warranting dismissal of the action, although defendants do not point to any prejudice suffered by them or the public as a result of plaintiff's mistake. On the contrary, the name "Alart, Inc." appears sufficiently close to plaintiff's full name to identify plaintiff as the copyright owner, so that the public would be aware of the existence of its copyright and not be misled. In the absence of prejudice, an innocent clerical error in the application and certificate of registration, unaccompanied by fraud, does not invalidate the copyright or render it incapable of supporting an infringement action. See *United States v. Backer*, 134 F.2d 706, 57 USPQ 133 (2d Cir. 1943); *Advisors, Inc. v. Weisen-Hart, Inc.*, 238 F.2d 706, 111 USPQ 318 (6th Cir. 1956), cert. denied, 353 U.S. 949, 113 USPQ 350 (1957); *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*, 269 F. Supp. 605, 155 USPQ 130 (S.D. Fla. 1966); *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374, 92 USPQ 350 (S.D.N.Y. 1952); *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686, 78 USPQ 41 (S.D.N.Y. 1948), aff'd., 173 F.2d 288, 80 USPQ 535 (2d Cir. 1949). The result might well be different if plaintiff had failed to file any certificate of incorporation, cf. *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916), but, as in *Allen v. Walt Disney Prods.*, 41 F. Supp. 134, 50 USPQ 365 (S.D.N.Y. 1941), where it was similarly contended that an infringement action could not be maintained because the copyright was registered in the name of "The Thornton Allen Company" whereas the certificate of incorporation was filed under the name of "T. W. Allen Company", "the difference between the name set forth in the certificate [of incorporation] and the name on the copyright is at most a slight variation and is not material. The name on the copyright notice gives sufficient notice to the public of the name of the owner of the composition upon which copyright is claimed, and the date when this right was obtained. That is all that the statute requires." 41 F. Supp. at 135, 50 USPQ at 367.

Accordingly, defendants' motion being totally without merit, is denied.

II. Because defendants had raised this "frivolous and dilatory contention" twice before, defendants were ordered to pay plaintiff \$300 for expenses, including counsel fees. The court said:

. . . Since defendants have twice before raised this frivolous and dilatory contention, first on their prior motion for summary judgment and second on their motion for reargument of that motion,

both of which efforts were unsuccessful, and it is difficult to believe that the present motion has been made in good faith, it is ordered pursuant to Rule 56(g), F.R.C.P., that within (10) days from the date of this decision defendants shall pay to plaintiff \$300 as the amount of reasonable expenses, including reasonable attorney's fees, which plaintiff has thus been caused to incur. See *Munson Line, Inc. v. Green*, 6 F.R.D. 470 (S.D.N.Y. 1947).

334. *Klauber Brothers, Inc. v. Lady Marlene Brassiere Corp.*, 157 U.S.P.Q. 338 (S.D.N.Y., Jan. 10, 1968) (Palmieri, J.)

Motion for preliminary injunction in action for infringement of copyright in a design for lace. Defendant Lady Marlene, formerly a customer of plaintiff, subsequently purchased laces from defendant Acme Laces, Inc. similar to those it had formerly purchased from plaintiff.

Held, motion denied.

The court held that there were sufficiently serious factual disputes as to the business relationships of the parties and the origin and ownership of the lace designs so that the "clear showing of probable success upon the trial" which would be required to grant a preliminary injunction was not present. *Société Comptoir de L'Indus., etc. v. Alexander's Dept. St.*, 299 F.2d 33, 35, 132 USPQ 475, 476 (2d Cir. 1962). The court also held that the plaintiff's inaction for about a year after it found out about the alleged infringement "in all the circumstances of this case disentitled it from the drastic threshold remedy it seeks." The fact that lace designs have a longer commercial life than fabric designs was considered by the court to be an additional reason for not granting a preliminary injunction, since the useful life of the design would not necessarily expire before trial could be had.

335. *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 157 U.S.P.Q. 685 (S.D.N.Y., Feb. 26, 1968) (Levet, J.)

Action for unfair competition and infringement of copyright in seven registered "original works of art" consisting of artificial corsage arrangements.

Held, judgment for defendant.

I. The court held that the allegations of copyright infringement must fail due to the invalidity of the asserted copyrights for lack of creativity, failure of originality and publication with defective notice. The court initially observed that although defendant's certificates of

registration generated a presumption of validity, defendant had demonstrated sufficient evidence of facts contrary to those stated in the certificate to shift the burden of proof to defendant. Such shifting of the evidentiary burden, added the court, is proper even with respect to issues over which the Register of Copyrights has exercised discretion for "such exercise is subject to judicial review."

The court then held that some degree of creativity is required for copyright in a Class G "work of art", that though the standard of creativity might be low there are limits beyond which that status cannot be accorded, that the requisite creativity could not be found in utilitarian innovation and that, under these standards, there existed a fatal lack of an essential element to protection of plaintiff's works. The court said:

With regard to works of art, 37 CFR § 202.10 states:

"(a) * * * This class includes published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings and sculpture. * * * [and] (b) in order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form."

Creative authorship is required as a matter of definition in this class of works subject to copyright; without it there can be no work of art. See Nimmer on Copyright § 19.1 (1964). The requirement of creativeness is separate and distinct from authorship or originality. "Where creativity refers to the nature of the work itself, originality refers to the nature of the author's contribution to the work." Nimmer, *supra*, § 19.2.

The standard for determining that degree of creativity necessary to constitute a work of art is not high. But though the boundaries may be generous, there are, nevertheless, limits beyond which courts cannot accord objects the status of work of art. . . . Plaintiff has conceded that its claims are limited to the *arrangements* of the flowers in the corsages. No claim is made that the component parts thereof are covered.

With respect to the arrangements in question, however, plaintiff's president testified that he did not create anything new. On the contrary, he admitted that before arranging for manufacture he had seen flowers arranged with ferns, corsages with a lilly of the valley, a carnation bud with gardenias, daisies with ferns in a

bouquet, and rosebud corsages with a fern attached. He had seen these arrangements made both with natural and cloth components. . . . Furthermore, plaintiff's president acknowledged that the rosebud corsages with a fern attached, the rose and bud with lillies of the valley and ferns, the double gardenia with lillies of the valley and ferns, as well as the full-blown camellia and bud with a lilly of the valley and fern were all "traditional" flower arrangements for corsages. . . . There is no evidence of creativity in plaintiff's flower arrangements.

That degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical. 37 CFR § 202.10 (a); *Mazer v. Stein*, 347 U.S. 201 (1954). Thus, the fact that plaintiff may have been responsible for adding certain practical features to the component parts of the flower arrangements, which facilitated their assembly and eliminated the need for certain manufacturing operations, does not overcome the absence of creativity inherent in the arrangements. Likewise, plaintiff's decision to use plastic material for fabrication of the articles may have added certain utilitarian advantages, such as durability or color retention over natural or cloth materials, but this, too, does not constitute the creativity required for copyright purposes.

Then noting that "to some extent [a] deficiency in originality may be more vital than an absence of creativity [since] the requirement of originality applies universally, while creativity must be given special consideration only for the purposes of Class G works due to its definitional function therein. . . .", the court held that plaintiff's arrangements lacked originality on grounds similar to those expressed with regard to the issue of creativity. The court said:

[It] is elementary that no work is entitled to copyright protection unless it is " * * * original in that the author has created it by his own skill, labor, and judgment." *Stuff v. LaBudde Feed & Grain Co.*, 42 F. Supp. 493, 495 (E.D.Wis. 1941).

"The 'originality' requirement for copyrightability is not onerous." *Peter Pan Fabrics, Inc. v. Acadia Company*, 173 F. Supp. 292, 299 (S.D.N.Y. 1956), aff'd, 274 F. 2d 487 (2nd Cir. 1960). Indeed, it has been held that: " * * * practically anything novel can be copyrighted. * * * 'No matter how poor artistically the "author's" addition, it is enough if it be his own'. * * * " *Dan Kasoff, Inc. v. Novelty Jewelry Co.*, 309 F. 2d 745, 746 (2nd Cir. 1962). Moreover, it has been said that "[o]riginality in this context 'means little more

than a prohibition of actual copying.'” *Rushton v. Vitale*, 218 F. 2d 434, 435 (2nd Cir. 1955).

As with the question of creativity, though, the fact that only minimal standards need be applied does not prevent the court from concluding as a matter of fact that works may lack even the modicum of originality required. When the copyright claimant has added nothing of his own to a work, then copyright protection must be denied. See *Nimmer*, supra, § 19.2.

Much of the same reasoning which led this court to the determination that plaintiff's corsages were devoid of creativity applies with equal force to its claim of originality. Applying the standard in *Sieff v. Continental Auto Supply*, 39 F. Supp. 683, 688 (D.Minn. 1941), that “ * * * sameness or similarity is determined by the eye of the ordinary observer,” it cannot be said that plaintiff's works represent anything new.

Once more it must be noted that plaintiff's claims relate only to the arrangements of the components of the corsages and not the component parts themselves. These arrangements, which consisted primarily of placing flowers and flower buds upon a background of fern and leaves, were old traditional styles in the flower industry and they had existed in both natural and cloth corsages well before the time the works at issue appeared in plastic. . . .

Cases relied upon by plaintiff do not support the premise that its arrangements of flowers in the corsages are sufficiently original to be protected by copyright. Concededly, reproductions of creations of nature such as Balinese dancers, cocker spaniels and even artificial flowers themselves have been given copyright protection where they represented some originality in their treatment of the subjects. . . .

The copyright claims here, however, do not represent creations of nature but merely patterns of arranging floral components for decorative purposes, and plaintiff has shown no originality in the patterns of arrangements it chose. Furthermore, the fact that flower arrangements may have been given copyright protection when incorporated into fabric designs is not relevant, for in such cases the originality required is inherent in the reduction of three dimensional objects to a two dimensional presentation on cloth. . . .

Plaintiff's argument that requisite originality is demonstrated by slight irregularities of details in the component parts of the flower arrangements, which may be noticed only upon extremely close observation, is also of no avail. The originality of the component parts is not at issue here, but, more important, even a botanist's

inspection which might reveal an unusual vein pattern in some of the leaves or abnormal stem configurations would be irrelevant. Considering, arguendo, that some small details of the component parts of the plastic corsages may be somewhat dissimilar to natural components, still it cannot be said that such variances affect the arrangements of the components or the overall impression made by the complete corsages when viewed by the eye of an ordinary observer. In any event, there was no proof that such minor variations of detail were not present in the artificial cloth corsages which antedated plaintiff's creations.

Finally, it must be noted that originality is not proved merely because plaintiff may have had the idea to produce artificial corsages made out of a new plastic material. There can be no copyright on an idea. . . .

"The purpose of the copyright law is to protect creation, not mechanical skill." *Shapiro, Bernstein & Co., Inc. v. Miracle Record Co., Inc.*, 91 F. Supp. 473, 475 (N.D.Ill. 1950). Here there is no doubt that the corsages were completely lacking in creativity and originality. The arrangements of components in these corsages are no different from the arrangement of components in artificial and natural corsages which had been common and traditional in the trade for many years before plaintiff's were produced, and plaintiff's president admitted familiarity with such common and traditional arrangements of corsage components during his long experience in the flower business. . . .

The court also found that plaintiff had dedicated to the public any rights it might have had by publication with improper notice. Holding that a general publication occurred when plaintiff showed samples of its corsages to customers who (had previously?) placed substantial orders for future delivery, the court refused to accept defendant's categorization of such activity as a "limited publication":

A limited publication is one which communicates a work " * * * to a definitely selected group and for a limited purpose, without the right of diffusion, reproduction, distribution, or sale * * * ." *White v. Kimmell*, 193 F. 2d 744, 746 (9th Cir. 1952). Though plaintiff's customers might be considered a selected group since they must all have been retail flower sellers, it cannot be said that plaintiff's publication of the corsages was for a limited purpose. The customers whose orders were accepted by plaintiff were never subject to any limitations on their rights to distribute or sell

the corsages. Obviously, the only purpose for which such customers purchased the corsages was to resell them.

Cases cited by plaintiff relate to the distribution of samples for the purpose of enabling the recipients to place future orders, to distributions for the purpose of record "plugging," or distributions for the purpose of soliciting backers for future theatrical productions. Such authorities are not relevant to the facts of this case, since the customers here had already placed orders with the plaintiff which it had accepted. Furthermore, those of plaintiff's cases which suggest that there can be no general publication unless the author so intends, represent a minority view only. I agree with the prevailing view which holds that an intentional surrender is in no sense necessary to the forfeiture of a copyright. See *National Comics Publications v. Fawcett Publications*, 191 F. 2d 594 (2nd Cir. 1951). Plaintiff's publication of the corsages in the manner described amounted to a dedication to the public.

At the time of such publication, purported copyright notices had been printed on removable paper tags slipped over the stems of the corsages. The court held that such notices were insufficient "for the law is clear that notices which appear on paper tags attached to articles do not meet the requirement of affixation . . . ". Although plaintiff, invoking the saving clause of 17 U.S.C. § 21, asserted that the use of paper tags demonstrated that it had "sought to comply" with the Copyright Act, the court refused to excuse the deficient notice on the grounds that the saving clause was inapplicable where a defective notice resulted from a mistake of law or was the deliberate choice of a copyright claimant.

II. Plaintiff's claim for unfair competition was predicated upon (i) defendant's alleged inducement of plaintiff's original manufacturer (Italspring) to terminate its business relation with plaintiff, and (ii) palming off and reverse palming off through the manufacture of corsages made from plaintiff's molds with defendant's name tags attached and the sale of corsages produced for defendant under circumstances leading customers to believe that they were dealing with plaintiff. The court found the proof insufficient to sustain either theory of liability under the applicable principles of law. The court said:

Sharing in the goodwill of an unprotected article " * * * is the exercise of a right possessed by all—and in the exercise of which the consuming public is deeply interested." *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122, rehearing denied, 305 U.S. 674 (1938). "In our freely competitive economy, there is no vested and inde-

feasible right to monopolize customers." *Corica v. Ragen*, 140 F. 2d 496, 498 (7th Cir. 1944).

The owner of property may sell to whom he chooses, *Locker v. American Tobacco Co.*, 195 N.Y. 565 (1909); *Federal Trade Comm'n v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924), and in the absence of an exclusive sales contract with plaintiff, Italspring breached no duty by selling to defendant.

The proof as to defendant's alleged inducement to Italspring to terminate its business relationship with plaintiff is insufficient. There is no proof, other than an unsupported statement of plaintiff's president, that Italspring had agreed to sell the corsages to plaintiff exclusively . . . , and the fact that defendant placed orders larger than plaintiff's is immaterial. No liability falls upon defendant just because Italspring, for its own reasons . . . , ceased to sell corsages to plaintiff. Furthermore, defendant placed no orders with Italspring until three months after Italspring terminated its business relationship with plaintiff. . . .

The only contracts proved by plaintiff between itself and Italspring were mere orders for the delivery of corsages, and though Italspring's refusal to fill plaintiff's order may give rise to some liability on the part of Italspring, there can be no liability of the defendant herein absent of any causal relationship.

The second part of plaintiff's unfair competition claim alleges that defendant palmed off plaintiff's corsages as its own. Indeed, the essence of the wrong of unfair competition lies in the sale of the goods of one manufacturer or vendor for those of another or under such conditions as may lead the purchaser to think they are the goods of another. *Lewis v. Vendome Bags*, 108 F. 2d 16 (2nd Cir. 1939), cert. denied, 309 U.S. 660 (1940).

Conceding, however, that under certain circumstances, particularly by reason of prior use, unfair competition may exist without infringement of a copyright, *Sally Chain Stores, Inc. v. Sally's Fur Studio, Inc.*, 40 F. Supp. 445 (E.D.Mich. 1941), that condition is not present here. Palming off, or the fair likelihood of it, is not shown by production or sale of plaintiff's uncopyrightable corsages which defendant may be deemed to have caused, since plaintiff had no exclusive right to produce or use them. See *Airolite Co. v. Fiedler*, 147 F. 2d 496 (2nd Cir.), cert. denied, 326 U.S. 726 (1945). Mere copying of plaintiff's corsages does not constitute unfair competition. See *Day-Brite Lighting, Inc. v. Sardee Manufacturing Co.*, 286 F. 2d 596 (7th Cir. 1960).

There is no proof whatever that defendant sold any corsages to anyone upon a representation that they were produced by plaintiff, and, in any event, no purchaser would be injured by purchase of defendant's corsages since they were identical to plaintiff's. In addition, when plaintiff's employees purchased defendant's corsages from a Woolworth store they found that all references to "Gardenia Flowers" had been scraped from the corsages. . . . Such obliteration of plaintiff's name was proper inasmuch as it diminished chances of possible confusion and is some evidence that defendant's corsages were not sold upon misrepresentations that they were plaintiff's products.

336. *Frederick Chusid & Co. v. Marshall Leeman & Co., Inc.*, 279 F. Supp. 913 (S.D.N.Y., Jan. 26, 1968) (Mansfield, J.)

Plaintiff's motion for preliminary relief in action for copyright infringement and unfair competition. Plaintiff, a national organization incorporated in Delaware and engaged in management consultation and personal counseling, sought a preliminary injunction against the corporate defendant, a New York corporation engaged in the executive search and career counseling field, and five individual defendants, all former employees of plaintiff now working for the corporate defendant, to restrain all defendants from (i) copying plaintiff's written forms, tests and advertising brochures, (ii) using such written material of plaintiff, (iii) using any confidential information learned in the employ of plaintiff, (iv) enticing plaintiff's employees to join defendant, and (v) soliciting plaintiff's customers. Plaintiff also sought enforcement, *pendente lite*, of restrictive covenants contained in agreements with two of the individual defendants which precluded their engaging in employment for any executive search or career counseling firm for a two-year period within the Borough of Manhattan.

Held, motion granted in part and denied in part.

I. The court enjoined defendants, *pendente lite*, from copying or using in any other manner plaintiff's forms, brochures and pamphlets acquired while defendants were employed by plaintiff. Recognizing that the written materials in question were distributed by plaintiff to over 17,000 persons and hence could not be considered trade secrets, and apparently accepting defendants' assertion that similar forms were widely used in the guidance industry and that detailed information about such materials was available from a wide range of literature, the court observed that, nevertheless, "under New York law the parties have the

right by contract to prevent disclosure of such materials, even though they are not confidential or secret and may indeed be a matter of public knowledge." The contracts of two of the defendants with plaintiff specifically forbade the utilization of the materials in question; the contracts of the remaining three individual defendants with plaintiff precluded their utilization of "trade secrets, selling procedures, client data and other information not known to or ascertainable by the general public" for two years after termination of their employment by plaintiff. The court found that "since the 'blue books,' pamphlets, brochures, and other tests were given to Chusid's clients upon payment of substantial fees and on condition that they be returned at a later time, they fall within the category of 'information not known to or ascertainable by the general public'. The lack of general interest in such a highly specialized brochure, the fact that in order to receive the desired services clients must return the materials to Chusid and that no right of republication had ever been granted, when coupled with the financial barrier to access, sufficiently isolates the material from the public to negate a forfeiture or intent to dedicate it to the general public as common property."

The court also held that plaintiff's "copyright interest in its printed material on file with the Copyright Office . . . entitles it to injunctive relief with respect to such material." The court found no evidence negating the origin of such material with plaintiff and held that although one of the publications contained an antedated copyright notice, the misdating was in favor of the public and did not forfeit copyright protection.

However, plaintiff was held (despite the contractual provisions quoted above) "not entitled to enjoin defendants from using the intangible procedures and techniques that defendants have learned while they were employed by Chusid. The interests of the public and the employees in the latter's being permitted to pursue their trade entitle such employees to carry with them their 'faculties, skills and experience' that they have learned in their former trade. . . . Plaintiff has not endeavored to particularize the selling or counselling procedures alleged to have been unknown to the rest of the industry and imparted to the defendants. Trade secret relief is therefore unwarranted.

II. The court denied enforcement of the restrictive covenants on the grounds that, under New York law, even reasonable restrictions on future employment are enforceable only if the employee's services are "unique or extraordinary" or only to the extent necessary to prevent the employee's disclosure of trade secrets or solicitation of his former

employer's customers. The court noted that plaintiff failed to demonstrate that the two employees under restriction could not be easily replaced, that there was little proof of solicitation of plaintiff's customers, and that the materials in question could not be considered trade secrets.

The court did enjoin defendants' enticing of plaintiff's employees, but refused to so restrain the alleged solicitation of customers for failure of sufficient proof. On the enticement issue, the court observed that the individual defendants who had been employed by plaintiff owed a common law duty of loyalty to the employer which continued after the employment relation, that soliciting employees remaining with plaintiff to transfer their allegiance constituted a breach of this good faith duty, and that, under New York law, injunctive relief was available despite the non-unique character of the services performed by those solicited. The court said:

The fact that within three months after Leeman had been incorporated five Chusid employees transferred their allegiance to Leeman and at least two other Chusid employees discussed the possibility of working for Leeman points strongly in the direction of finding that defendants were actively soliciting Chusid's employees. Unless temporary relief is granted, plaintiff may lose such a large part of its staff that it might be unable to continue as a viable business organization, whereas an injunction restraining defendants from soliciting or enticing Chusid's employees to leave their employer will not preclude defendants from acting in a manner consistent with their fiduciary duties to Chusid. The balance of equities and hardships warrants the issuance of such relief.

Having found for plaintiff on common law grounds, the court refused to decide at the instant stage of proceedings whether defendants' enticement of plaintiff's employees constituted a violation of the Sherman Antitrust Act.

337. *Peer International Corp. v. Flama Record Corp.*, 156 U.S.P.Q. 52 (E.D.N.Y., Sept. 11, 1967) (Rosling, J.)

Motion for an order compelling defendant to answer certain questions propounded to defendant Valdez upon his deposition by plaintiff in action for copyright infringement.

Held, motion granted.

Defendant Valdez had admitted in his answer that he participated in the sale of phonograph records of six of the sixteen musical compositions alleged by plaintiffs to have been infringed. The court held that

plaintiffs were entitled to conduct a sweeping inquiry, with "relevance as the touchstone for propriety of the questions put", to establish his complicity in the pirating procedures as to all sixteen compositions.

338. *Robbins Music Corp. v. Southington Inn, Inc.*, 156 U.S.P.Q. 489 (D. Conn., Nov. 17, 1967) (Blumenfeld, J.)

Plaintiffs' motions for default judgment and counsel fees in consolidated action for copyright infringement. Plaintiffs commenced suit in June, 1967 against defendant, owner of an inn in which copyrighted musical compositions were "once" played without permission. Four months later a Federal Rule 55 (a) default was entered in favor of plaintiffs. On the day set down for application for judgment no one appeared for defendant. After the application was heard, an office of defendant telephoned the court and stated that (i) he had consulted counsel but lacked sufficient time to come to agreement with them, and (ii) he had received notice of the hearing too late to be in attendance.

Held, conditional judgment for each of the plaintiffs to recover \$250 plus costs, including aggregate counsel fees in the amount of \$100.

The court felt that "some opportunity to present a defense should be permitted if done promptly" and hence conditioned judgment upon defendant's failure to file "a pleading or other defense accompanied by an affidavit setting forth the existence of a valid defense" within thirteen days after the original return date of plaintiff's application (nine days after the date of decision).

The minimum damage provision of 17 U.S.C. 101(b) governed the amount of damages; the single fee award was set at \$100 "in light of the facts that the complaint as filed was prepared by plaintiffs' staff attorneys in New York [and not Connecticut trial counsel], that judgment was obtained by default, that no more than minimum damages have been suffered, and that both cases were consolidated as one. . . . Beyond doubt, the services of counsel are eagerly sought and their professional standing merits substantial compensation, but a defendant ought not be obligated to compensate them on that account—particularly this defendant whose only wrongful conduct was to own an inn in which a couple of popular songs written in the 30's have once been played."

3. State Court Decisions

339. *In re Williams*, 156 U.S.P.Q. 704 (Ala. Cir. Ct., Montgomery Co., Jan. 30, 1968 (Emmet, J.)

Proceeding to review approval of a contract entered into on behalf of Hank Williams' heir, who was a ward of the court. The heir's right

to Williams' copyrights and copyright renewals was challenged by an alleged illegitimate child of Williams who had been adopted by others.

Held, contract approved.

The court held that an illegitimate child is not an heir entitled to copyrights or to copyright renewals under Section 24 of the Copyright Law if it has been adopted by others. The court said:

Addressing itself to the question of the child born to one Bobbie W. Jett, the Court finds from the evidence the child does not have any right in the copyrights or the renewal of those rights of the late Hiram (Hank) Williams.

The Court is impressed with the argument of the Guardian ad Litem. The Court adopts the sound reasoning advanced in brief that the time is long past due when illegitimate offspring should be afforded adequate property rights. The common law is severe in calling such offspring a "nonperson" or a "person of no blood".

However, the evidence in this case is without dispute, this offspring of one Bobbie W. Jett is not now a "person of no blood".

The evidence shows the child has been permanently adopted under the very excellent, wise and beneficial direction of this state's Department of Pensions and Security. By fiction of law only but with the same effect as if natural, the child has been infused with the blood of the adopting parents. The evidence shows the adopting parents were fully informed by the state authorities of these proceedings. The evidence shows the adopting parents chose not to pursue any action in regard to these proceedings.

The Court is of opinion that the Copyright Law as interpreted by the Supreme Court of the United States in *De Sylva v. Ballentine*, 351 U.S. 570, 100 L.Ed. 1415, 109 U.S.P.Q. 431, precludes the inclusion of any heir other than the ward of this Court as having any right of renewal, providing the ward survives to the appropriate time.

Notwithstanding the proposed revision of the Copyright Law of this nation pending in the Congress, this Court retains the same opinion.

340. *Gethers v. Blatty*, 157 U.S.P.Q. 297 (D. Cal., Feb. 26, 1968) (Whelan, J.)

Defendants' motion for summary judgment in action for copyright infringement and unfair competition. Plaintiff, author of a copyrighted play entitled "A Cook for Mr. General", granted motion picture rights

therein to defendant Columbia Pictures Corporation. Thereafter, defendant Blatty contracted with Columbia to adapt plaintiff's work for the screen under the tentative title "Twinkle, Twinkle, Killer Kane". One year after such adaptation agreement Blatty contracted with defendant Doubleday & Co. to author a novel under the same "Twinkle, Twinkle . . ." title and said novel was subsequently written and published with copyright notice. Alleging infringement of his play by the Blatty novel, plaintiff commenced suit. Defendants moved for summary judgment under a stipulation by all parties that the court might consider the play and novel as exhibits and evidence upon hearing of the motion; the screen play adaptation was also stipulated for consideration but was not put in issue as an infringing work.

Held, motion granted.

I. The court held that, under the "average reader" test, there was no substantial similarity between the protectible portions of plaintiff's play and the allegedly infringing novel and hence that there could be no infringement despite the uncontroverted fact of access during the writing of the screen play. The "protectible portion" of a copyrighted work was defined by the court to encompass "the development, treatment and expression of such elements as theme, locale, settings, situations, ideas, bare basic plots and ordinarily [sic] characters. . . . The elements mentioned in themselves are not protectible. . . . It is the 'expression of ideas' not the ideas themselves that is protected." The court's opinion (157 U.S.P.Q. at 299-300) contains an analysis of the locale, settings, theme, characters, and mode or tone of expression of the works in issue. In summary, the court found that:

Certainly the [average] reader of the novel could not consider it as a novelization of the play; nor could he find substantial similarity between the two. The play is, as has been stated, a farcical, somewhat shallow expression of ideas and plot; it has no underlying philosophy, and has the "happy ending" so traditional in comedies of stage and screen. On the other hand the novel is a serious, if not tragic, expression combining a probing of the metaphysical and the theological with the development of the character of Kane. In fact, a reading of the two works leaves the Court with the impression of substantial dissimilarity of theme, situations, story line, major and minor characters and expression of ideas. Here Blatty has met the test stated in *Eisenschiml v. Fawcett Publications*, 246 F.2d 598, 603, 114 USPQ 199, 202-203 (7th Cir. 1957)—he "has made an independent production" rather than a "substantial and unfair use of the complainant's work."

The court stated further that there was an additional ground upon which to predicate summary judgment for defendant Columbia: 'Before Blatty published his novel Columbia . . . advised Doubleday, as it had Blatty, that it could not give clearance for publication of the novel without the consent of plaintiff. Hence Columbia has not infringed plaintiff's copyright even were it held that the other defendants had done so.'

II. Because plaintiff's unfair competition allegations were based on the identical alleged copyright infringement, the court found defendants entitled to summary judgment thereon: There is here no palming off or false labeling. See *Sears, Roebuck & Stiffel Co. . . . and Compco Corp. v. Daybrite Lighting, Inc. . . .* Plaintiff's two causes of action involve but a single right, namely, the right to protection of the copyrighted play."

341. *Marcus v. McNaught Syndicate, Inc.*, 159 N.Y.L.J. p. 16 col. 5, Feb. 1, 1968 (Sup. Ct. NY. Co., 1968) (Schweitzer, J.)

Motion to strike amended complaint in common law action for misappropriation of literary property and idea piracy regarding a comic strip. Defendant's motion was granted, with leave to amend, insofar as it was addressed to a cause of action for common law copyright infringement for failure to allege that plaintiff's "idea" for a comic strip was reduced to concrete form; such motion was also granted, with leave to amend, insofar as it was directed at a cause of action alleging wrongful appropriation of the comic strip and unjust enrichment: "The dismissal [of the infringement] cause of action requires that [this] cause of action automatically fall, because there would be no damage if there was no property for defendant to appropriate."

Defendant's motion was denied in connection with (i) a cause of action alleging disclosure of plaintiff's concept in confidence, and exploitation in breach of that confidence, and (ii) a count based on contract implied in fact for compensation upon use in consideration of disclosure.

342. *Easton v. Universal Pictures Co.*, 288 N.Y.Supp.2d 776, (Sup. Ct. N.Y. Co., March 28, 1968) (Aurelio, *Special Referee*).

Action and counterclaim for declaratory judgment regarding obligation to assign renewal copyright. In 1931 Frederick Faust (Max Brand) assigned the motion picture rights in his copyrighted work "Destry Rides Again", originally published in 1930, to Universal Pictures Co. and agreed to renew or procure the renewal thereof and assign to Universal the renewed motion picture rights. In 1944 Faust died and by his will

named his wife as sole legatee, devisee and beneficiary. By order of the California Supreme Court she was designated sole distributee of his property. In 1951, the original term still in effect, Mrs. Faust granted to County National Bank & Trust Co. of Santa Barbara (California), as trustee, all her interest in all copyrights in her husband's works, half the income therefrom to herself and half to be divided among the three Faust children. By the same instrument Mrs. Faust granted the bank the right to apply for any renewal which might accrue "in the name of [Mrs.] Faust and/or [the Faust children/beneficiaries] who have by acceptance of this trust ratified and approved this power and authority." The trust instrument was prefixed by a ratification and confirmation by all the Faust children/beneficiaries. In 1952 the bank assigned to defendant, successor in interest to Mr. Faust's original screen rights assignee, all rights acquired by it under the trust with respect to "Destry Rides Again"; affixed to the assignment was the consent of Mrs. Faust and the children. In 1957 Universal renewed the copyright in the name of Mrs. Faust and the children and requested their assignment of the matured renewal rights. There was an immediate dispute as to whether Mrs. Faust and the children had agreed to transfer all their right in the "Destry" work or merely motion picture rights therein. In 1960 Mrs. Faust died and a new argument—the subject of the instant litigation—was put forth on behalf of the children, namely, that the trust conveyance to the bank involved only Mrs. Faust's interest and thus the children were under no obligation to transfer their rights.

Held, for defendant.

I. Posing the intent of the parties to the documents involved as the determinative factor, the referee observed that "an instrument must be construed according to the intent of the parties at the time it was drawn [and] the state of the law with respect to its subject matter is a material factor in ascertaining such intent." He then pointed out that the decision in *DeSylva v. Ballentine*, 351 U.S. 570 (widow and children entitled to share renewal rights as a class) was not rendered until 1956; prior to that time the law regarding the renewal rights of widows and children was unclear though a "prima facie reading" of Copyright Act §24 and eminent authority indicated the widow during her life held the sole inchoate renewal right exclusive of the children and, accordingly, had the sole right to assign same. If, stated the referee, this state of affairs colored the parties' intent at the time of execution of the trust instrument in 1951, then: "the children's signatures were affixed not as necessities, but rather to be sure that if Mrs. Faust predeceased, as she did, they too would execute any instruments necessary to complete the assign-

ment, and they understood that Universal was, in any event, to be the ultimate assignee of all renewal rights.

No special instrument of assignment from the children was needed in 1951-1952 because they had, in fact, as the law then appeared to be, nothing to assign."

On the other hand, continued the court, if the children did know in 1951 that "they had a bundle of rights *dehors* Mrs. Faust's rights, the effect of their consent could have been either that (a) they concurred in their mother's release to the bank in irrevocable trust for them of half of her own share, in which event their consent would have been supererogatory; or (b) they clearly intended to convey to the bank, and to Universal, their own inchoate share."

A view of the parties' intent intermediate between that based on either of the assumptions of law noted above—"the only other understanding of the documents by which [the children's] consent take on meaning"—was held to be that the law was recognized as unclear as to the distribution of renewal rights among widows and surviving children and that, in such a state of affairs, the children were asked to and did consent "so that beyond what was conveyed in trust they intended to assign their own individual rights to renewal to Universal, no matter how the law might be ultimately interpreted."

The referee felt that "this conclusion" was supported also by (i) the testamentary designation of Mrs. Faust as sole legatee and her judicial appointment as sole distributee of her husband's property; (ii) the "broad and unambiguous" language of the consents affixed to the documents in question; and (iii) the fact that: "For the assignment of the original copyright [sic] [by Mr. Faust] the consideration paid by Universal was \$1,650. In view of the decreased value of the dollar, the \$4,500 paid for the assignment of the renewal right would seem to be a fair price. That the \$4,500 was intended in 1952, however, to be in payment for only a portion of the renewal rights, the original of which had been assigned for \$1,650, borders, in my opinion, on the incredible."

II. The court also found that defendant had raised a meritorious defense based on estoppel. The court said:

We come finally to the defense of estoppel, the effect of which in this situation is to prevent one party to a litigation from taking a new approach to a situation after there has been an unalterable change in their respective positions.

The unalterable change here is the death of Mrs. Faust, who would have been ideally in a position—if not precluded by the Parol Evidence Rule—to testify as to the intent of the documents.

These plaintiffs sat by during three years of negotiations and never raised the question until after her death. In the opinion of the court, they are precluded from raising it now.

Also of interest:

343. *Shapiro, Bernstein & Co., Inc. v. Continental Record Co., Inc.*, 386 F.2d 426 (2nd Cir., Nov. 28, 1967) (*Per curiam*)

Appeal from denial of plaintiff's motions in action for unauthorized use of copyrighted musical works. Action was commenced in November, 1964; defendant answered the next month, admitting use of the work in question and the existence of license agreements but denying that any royalties were due and owing. In April, 1966 defendant was adjudicated liable in a companion case with the question of damages being referred to a special master. *Chappell & Co. v. Continental Record Company, Inc.*, 64 Civ. 3173 (S.D.N.Y., Oct. 20, 1964). Soon thereafter defendant's attorneys in both the companion and instant litigation moved to be relieved in this case on the grounds that the former owner of defendant had sold his interest therein to a person unknown to them. Although opposed by plaintiff as causing further delay in an already protracted cause, such motion was granted the following month with directions that defendant designate a new attorney within two weeks or face a motion by plaintiff for any relief deemed appropriate. In January, 1967, no attorney having ever been designated by defendant and plaintiff's attempted filing of a note of issue being found unavailing absent representation of the defendant corporation, plaintiff moved for an interlocutory default judgment under Federal Rule 55, a preliminary injunction pending entry of final judgment, and the appointment of a special master for determination of damages. Six months later the District Court denied the motions and ordered plaintiff to refile a note of issue indicating defendant corporation as appearing *pro se*.

Held, reversed.

The court stated:

Because the district court's order denied plaintiffs' request for a preliminary injunction, we have jurisdiction. 28 U.S.C. § 1292(a) (1). It is clear that failure to grant that relief was error and reversal on that ground alone is called for. Moreover, we note that for eight months prior to the motion and for well over a year prior to the decision below, defendant was under an order of the district court to appoint counsel so that this case could proceed to trial. Without question, such cavalier disregard for a court order is a

failure, under Rule 55 (a), to "otherwise defend as provided by these rules." In addition, it is settled law that a corporation cannot appear other than by its attorney. . . .

As plaintiffs requested, the district court should also have entered a default judgment on the issue of liability and appointed a special master to determine the amount of damages.

344. *Pet Needs, Inc. v. T.F.H. Publications, Inc.*, 156 U.S.P.Q. 479 (Sup. Ct., N.Y. Co., Nov. 9, 1967) (Fine, J.)

Action for unfair competition. A temporary injunction was granted restraining defendant from publishing pet books with covers identical in size, title, format and other characteristics with those published by plaintiff, the only difference being the picture of the pet which was the particular subject of each book. The court said that the use of the words "enjoy" or "know" in the titles without copying the "trade dress" would not be actionable and that putting defendant's name on its book covers, which it proposed to do, would not be sufficient to eliminate the likelihood of confusion where the covers were otherwise so similar. The court held that the doctrine of *Sears, Roebuck & Company v. Stiffel Company*, . . . and *Compco Corporation v. Day-Brite Lighting, Inc.*, . . . prevented plaintiff from complaining of the copying of the contents of its books, but did not preclude the state court from protecting "businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings from misleading purchasers as to the source of the goods". 376 U.S. 225, 232.

345. *Hayden v. Bristol Meyers Co.*, 159 N.Y.L.J. p. 16, col. 7, Jan. 24, 1968 (Sup. Ct., N.Y. Co., 1968) (Hecht, J.)

Motion for preliminary injunction in action under the New York "right of privacy" statute, Civil Rights Law §51. Plaintiff, a ballerina of renown, sought to restrain defendant from continuing distribution and exhibition of television commercials for a headache remedy which, without plaintiff's consent, contained a sequence in which she was shown dancing. Defendant asserted that because the commercials ran only thirty and sixty seconds (depending on the version concerned) and contained only "longshots" of plaintiff, she was not recognizable therein. The court, observing that "the issue . . . is not whether plaintiff will ultimately prevail, but rather, whether she will be irreparably injured if the restraint requested is not issued and whether the damage to defendant from such issuance will be of comparable quality and severity", denied the motion: "It is clear that to obtain relief under Section 51,

the 'use' of plaintiff's name or likeness must be such as to render the name or likeness recognizable. . . . If the 'recognizability' presents a factual issue, the preliminary injunction should not issue. . . . Based upon the court's viewing of the commercial, it is its decision that at the least triable issues exist as to 'Recognizability'. It may well be that virtually any use of another's likeness for commercial purposes mandates judgment, leaving open only the question of damages. . . . However, it does not appear that the fleeting glimpse of plaintiff in the commercial here at issue, for the few seconds concerned, mandates issuance of the temporary injunction, with its consequent damage to defendants."

346. *Ryan v. Kama-Sutra Productions, Inc.*, 159 N.Y.L.J. p. 17, col. 6, Jan. 17, 1968 (Sup. Ct., N.Y. Co., 1968) (Schweitzer, J.)

Plaintiffs, individuals performing under the name "The Critters", moved for a preliminary injunction restraining defendant from the manufacture and sale of certain phonograph records bearing that name. Conceding that the records in question were made by plaintiffs for defendant, plaintiffs predicated their motion on the allegation that such records were made as demonstration samples and contained defects not generally present in records produced for distribution to the public. The court denied the motion "not upon any determination with regard to the quality of the recording", but in view of an agreement between the parties providing, *inter alia*, that "the Company shall have all rights in perpetuity to master recordings. . . ." Noting plaintiffs' argument that the demonstration records in issue could not be considered "masters" within the scope of such provision, the court observed that defendant had "adduced proof of custom to the contrary and . . . a serious question is raised . . . which precludes basing the issuance of the injunction on this ground." "Moreover", added the court, "proof has been adduced that plaintiffs were paid royalties on . . . the records at issue and no proof has been submitted that such payments were refused. Thus plaintiffs have affirmed the agreement and pending a determination of their right to rescission thereof, it cannot be held that they have demonstrated a clear right to the ultimate relief sought. Such a determination is prerequisite to award of the temporary relief requested."

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

347. Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., Washington, D. C.

The determination of legal facts and economic guideposts with respect to the dissemination of scientific and educational information as it is affected by copyright—a status report, by Gerald J. Sophar, principal investigator, and Laurence B. Heilprin, co-investigator. Washington, Office of Education, Bureau of Research, Dec. 1967. 1 v. (various pagings).

At head of title: Final report, Project No. 7-0793, Contract No. OEC-1-7-070793-3559.

The report “is organized by chapters, of which the first four are introductory to the fifth which contains the substance of the report and conclusions.”

Chapter 5 reviews the attitudes of librarians toward copyright and how these attitudes determine their operating practices, and measures the amount of copying of copyrighted books and periodicals located in libraries and information centers. The data for this chapter “were obtained from 66 separate in-depth interviews at selected active copying U.S. libraries, and from the detailed records of one month’s copying by six libraries on forms designed by CICP.”

348. Federal Bar Association of New York, New Jersey and Connecticut. *Committee on the Law of the Theatre*. Subsidiary rights and residuals; a symposium. Bernard A. Grossman, chairman. Edited by Joseph Taubman. New York, Federal Legal Publications [1968]. 199 p.

An elaboration and development of “an important area of theatre law never before systematically treated.”

349. SCALETTA, PHILLIP J., JR., Observations on copyright law and patent law and their importance to management. Lafayette, Ind., Herman C. Krannert Graduate School of Industrial Administration, Purdue University Jan. 1968. 34 p. Purdue University, Lafayette, Ind. Institute for Research in the Behavioral, Economic and Management Sciences. Paper no. 203.

"The purpose of this paper is to alert management and those training for managerial duties, as to the problems present in the business use of patents and copyrights and the benefits and perils which face the author and inventor and his employer."

350. Summer Study on Information Networks, *University of Colorado, 1966*. EDUNET; report. Authors and editors: George W. Brown, James G. Miller [and] Thomas A. Keenan. New York, Wiley [1967]. 440 p. Information sciences series. Conducted by the Inter-university Communications Council (Educom).

An investigation into the desirability of creating an EDUNET, *i.e.*, "a revolutionary new system through which colleges and universities of all sizes and in all parts of the country can have quick access to information and can share their human, library and computer resources," and an explanation of how such a system can work. Includes some discussion of potential copyright problems.

351. U. S. National Academy of Sciences. Panel on the Application of Copyright on Computer Usage. Report on the application of copyright on computer usage. Washington, National Academy of Sciences, Dec. 1, 1967. 26 p.

Some of the main findings of the panel are that (1) the enactment of the general revision bill into law in its current form "could lead to difficulties of interpretation"; (2) further study of the copyright issue is needed; and (3) the proposal to create a study commission should in general be supported.

2. Foreign Publications

352. Arts Council of Great Britain. The Arts Council and Public Lending Right. London, Jan. 1968. 5 p.

A proposal for setting up a "Compensation Fund for British Authors and their Publishers," based on the Danish system, which uses book stocks in libraries as its foundation and is financed out of public funds.

353. KNAP, KAREL. *Smluvní vztahy v právu autorském*. [1. vyd.] Praha, Orbis, 1967. 368 p.

An up-to-date text on the copyright law of the Czechoslovak Republic, with special attention to authors' contractual relationships. Includes a summary in German.

B. LAW REVIEW ARTICLES

1. United States

354. The ASCAP consent decree: the effect on potential litigants. (41 *Southern California Law Review*, 418-439, no. 2, Winter 1968.)

"The concept of 'immunity' has recently been added to types of protections afforded antitrust defendants operating under consent decrees. The author surveys ASCAP's dealings with private parties, dealings governed by rules set forth in a government consent decree. The private consent decree solutions have operated to both regulate and shield the Society from further private antitrust attack."

355. BENDER, DAVID. Computer programs: shall they be patentable? (68 *Columbia Law Review* 241-259, no. 2, Feb. 1958.)

The question posed by the title of this article is answered with a strong affirmative, particularly in the light of the proposed patent reform bill. Copyright protection is declared "inadequate . . . to protect truly inventive programming techniques."

356. Copyrights—employee status. (17 *Catholic University of America Law Review* 249-253, no. 2, Winter 1967.)

A case note on *Public Affairs Associates, Inc. v. Rickover*, 268 F.Supp. 444 (D.D.C. 1967).

357. COWAN, A. HALSEY. Copyright: an introduction for the general practitioner. (40 *New York State Bar Journal* 116-132, no. 2, Feb. 1968.)

"It is the purpose of this article to set forth summary information for those seeking some knowledge on the subject of copyright."

358. FCC jurisdiction over CATV: a need for reins? (56 *The Georgetown Law Journal* 597-608, no. 3, Jan. 1968.)

A note on the decision in *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967), recently argued on appeal before the Supreme Court.

359. The Federal Communications Commission and regulation of CATV. (43 *New York University Law Review* 117-139, no. 1, Mar. 1968.)

"This Note will examine the statutory basis for FCC jurisdiction over CATV, and will evaluate the Commission's regulations and policy objectives in order to determine the need for and value of FCC regulation."

360. FENWICK, WILLIAM A. Automation and the law: challenge to the attorney. (21 *Vanderbilt Law Review* 228-265, no. 2, Mar. 1968.)

"This note will explore the use of electronic data processing (EDP) in areas which affect the law, and will discuss present and future uses of the computer by courts, administrative agencies and legislatures. Finally, this note will discuss the use of computers for legal information retrieval, with consideration of the need for immediate implementation of automated techniques by the legal profession." Brief consideration is given to potential copyright and antitrust problems of an information retrieval system.

361. Copyright law revision—a symposium. (53 *Iowa Law Review* 805-890, no. 4, Feb. 1968.)

Contents: Foreword: copyright problems—twenty-first century style, by Richard F. Dole, Jr.; Copyright duration, by Joseph S. Dubin; Fair use and the revision of the Copyright Act, by John Schulman; Sound recordings and copyright revision, by Sidney A. Diamond; Copyright revision—music: CATV, educational broadcasting and juke boxes, by Herman Finkelstein; Educational television—a non-commercial viewpoint, by Eugene A. Aleinikoff.

A symposium, by eminent members of the copyright bar, on many of the controversial issues obstructing the enactment of a new copyright law.

362. MYERS, GARY R. Industrial protection of preproduction disclosures. (72 *Dickinson Law Review* 160-186, no. 1, Fall 1967.)

"This Comment will analyze the various means a company may employ to protect preproduction disclosures which have been

designed for a customer. More particularly, methods will be suggested to prevent the customer from reverse engineering the disclosures and producing the disclosed product, and to prevent the customer from distributing the disclosures to competitors of the disclosing company for competitive bids. Particular attention will be directed to patent, copyright, trade secret and contract protection."

363. The *Stiffel* doctrine and the law of trade secrets. (62 *Northwestern University Law Review* 956-974, no. 6, Jan.-Feb. 1968.)

"This comment will examine the implications of *Stiffel* in the area of trade secret law, specifically where there is a conflict between the law of trade secrets and the patent law, and, if so, how a trade secret case must be treated under the *Stiffel* rationale."

364. VOORHEES, MICHAEL G. Protecting architectural plans and structures with design patents and copyrights. (17 *Drake Law Review* 79-93, no. 1, Dec. 1967.)

"A substantially revised version of a paper . . . entered in the 1967 Nathan Burkan Memorial Competition," the purpose of which "is to compare the protection available by copyright for architectural plans and structures with that available by design patent."

365. WEIDNER, DONALD J. Copyrights—since fictional characters fall within the scope of congressional power over copyrights, federal policy prohibits States from protecting published characters that the Copyright Act has left in the public domain. (46 *Texas Law Review* 379-383, no. 3, Feb. 1968.)

A case note on the appellate decision in *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315, 15 BULL. CR. SOC. 37, Item 23 (1st Cir. 1967).

2. Foreign

1. English

366. DUVAL, HERMANO. Letter from Brazil. (4 *Copyright* 44-51, no. 2, Feb. 1968.)

A survey of international relations, domestic legislation, federal and local case law, and miscellaneous matters involving recent copyright developments in Brazil.

367. NOMURA, YOSHIO. Letter from Japan. (4 *Copyright* 70-77, no. 3, Mar. 1968.)

“This second ‘Letter from Japan’ will be devoted mainly to a description of the preparatory work now under way for the general revision of the present Law on Intermediary Business concerning Copyrights (1939)—commonly called the Authors’ Society Law or the Collecting Society Law (Part I). Our description is again based on the recommendations for revision made by the Government Copyright Council which formulated a revisionary opinion. Supplementing what was reported in our previous ‘Letter’, we shall also try to sum up the partial revision (Part II) and the general revision (Part III) of the Copyright Law.”

368. TIMAR, ISTVAN. The Hungarian-Soviet Copyright Convention. (4 *Copyright* 67-70, no. 3, Mar. 1968.)

The Director General of the Hungarian Bureau for the Protection of Copyright gives a brief description of the antecedents of the Convention and follows with a discussion of its details. For the BIRPI English translation of the Convention, see 15 BULL. CR. Soc. 178, Item 118 (1968) and 4 *Copyright* 63 (Mar. 1968).

2. German

369. FROMM, FRIEDRICH KARL. Geistige Entwicklungshilfe und Grundgesetz. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 891-905, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

A study of the constitutional aspects of aid to cultural development in the German Federal Republic, with special reference to the Stockholm Protocol Regarding Developing Countries. A conclusion is drawn that the Federal Government is constitutionally obligated to compensate those authors whose works are expropriated in whole or in part as a result of German ratification of the Protocol.

370. HIRSCH BALLIN, E. D. Zufallsmusik. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 843-853, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

A case is made for the proposition that the performer of “chance” or “aleatory” music is also an author, and that he should

be in a position similar to that of a translator with regard to copyright protection.

371. KARNELL, GUNNAR. Die verschiedenen Fassungen der Berner Übereinkunft; ihre Geltung im Verhältnis der Verbandsländer zueinander. (*Gewerblicher Rechtsschutz und Urheberrecht* Int. Teil 25-32, no. 2, Feb. 1968.)

An article on the relationship between Berne countries linked by a text of the Berne Convention, a question which was the subject of lengthy debate at the Stockholm Conference.

372. KNAP, KAREL. Werkschaffung in Arbeitsverpflichtung nach dem Urheberrecht der sozialistischen Länder. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 926-938, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

A comparative study of the rights of employee-authors under the copyright laws of the "socialist" countries.

373. LEINVEBER, GERHARD. Zur Frage des persönlichkeitsrechtlichen Schutzes mündlicher und schriftlicher Ausserungen. (70 *Gewerblicher Rechtsschutz und Urheberrecht* 81-85, no. 2, Feb. 1968.)

A discussion of the protection, under the right of personality in the German Federal Republic, of oral and written expressions, such as personal and telephone conversations, letters, diaries, and confidential notes.

374. MÖHRING, PHILIPP. Können technische, insbesondere Computer-Erzeugnisse Werke der Literatur, Musik und Malerei sein? (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 835-843, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

A discussion of the question whether technical, especially computer products, can be works of literature, music and art susceptible to protection under the West German copyright law.

375. NORDEMANN, WILHELM. Zur Abgrenzung des Geschmacksmusterschutzes vom Urheberschutz. (50C *Archiv für Urheber-, Film-, Funk und Theaterrecht* 906-914, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

An attempt to differentiate the protection of designs and models offered by the design law from that of the copyright law of the German Federal Republic.

376. PEDRAZZINI, MARIO M. Hauptakzente der schweizerischen Revision des Urheberrechtsgesetzes. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 915-926, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

Highlights of the Swiss copyright law revision program.

377. RINGER, BARBARA A. Speicherung und Wiedergabe urheberrechtlich geschützter Werke durch Datenverarbeitungsanlagen. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 18-20, no. 1, Jan. 1968.)

A translation of an address on uses of copyrighted works in information storage and retrieval systems, delivered on October 18, 1967 at the Max Planck Institute for Foreign and International Patent, Copyright and Unfair Competition in Munich.

378. SCHMIEDER, HANS HEINRICH. Ist die "kleine Münze" des Urheberrechts nach den neuen Gesetz ungültig? (70 *Gewerblicher Rechtsschutz und Urheberrecht* 79-85, no. 2, Feb. 1968.)

The question whether "small change" materials such as telephone lists, directories, rules for games, catalogs, price-lists, collections of forms, and the like are protectible under the new West German copyright law as they were under the previous copyright law is answered in the affirmative.

379. STERLING, J. A. L. Die Urheberrechtsreform in den Vereinigten Staaten; der vom Repräsentantenhaus im April 1967 verabschiedete Entwurf HR 2512. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 853-890, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

An outline of the provisions of the general revision bill, H.R. 2512, 90th Cong., 1st Sess. (1967) as passed by the House of Representatives and of the principal issues still to be resolved, preceded by a brief account of the preparatory work leading to the introduction of the bill.

380. ULMER, EUGEN. Rechtsvergleichung und Grundlagenforschung im Urheberrecht und gewerblichen Rechtsschutz. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 1-7, no. 1, Jan. 1968.)

An inaugural address, delivered on the occasion of the opening of the Max Planck Institute for Foreign and International Patent,

Copyright and Unfair Competition Law in Munich on October 17, 1967. The address presents a comparative, theoretical survey of, and basic research in, copyright and the legal protection of industrial property.

381. ULMER, EUGEN. Tagungen des Ständigen Ausschusses der Berner Union und des Regierungsausschusses des Welturheberrechtsabkommens vom 12. bis 15. Dezember 1967 in Genf. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 96-98, no. 3, Mar. 1968.)

A brief report of the meetings, held at Geneva in December 1967, of the 13th session of the Permanent Committee of the Berne Union and the 9th session of the Intergovernmental Copyright Committee. Some of the meetings were held jointly, with most of the discussions devoted to the Stockholm Conference with special emphasis on the Protocol Regarding Developing Countries.

382. WOLPERT, FRITZ. Der Schutz der Melodie im neuen Urheberrechtsgesetz. (50C *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 769-835, nos. 1/2/3/4/5/6, Dec. 15, 1967.)

A study of the protection of the melody under the new copyright law of the German Federal Republic, with special reference to art. 24(2) of that law. That article provides, in effect, that the permission of the author of a musical work is required to take a melody from that work and make it the basis of a new work, so that it is recognizable.

3. Italian

383. GALTIERI, GINO. Appunti in tema di autonomia del diritto di autore. (38 *Il Diritto di Autore* 499-511, no. 4, Oct.-Dec. 1967.)

A discussion of the question whether the copyright law should be considered autonomous or a chapter of the civil law within the Italian legal system.

384. LOI, SALVATORE. Per l'insegnamento del diritto di autore nelle scuole artistiche. (38 *Il Diritto di Autore* 512-519, no. 4, Oct.-Dec. 1967.)

The teaching of copyright law in Italian "art lyceums, art institutes, music conservatories, and academies" is advocated.

385. RINGER, BARBARA A. L'utilizzazione di opere protette dal diritto di autore per mezzo apparecchi di raccolta di informazioni e rielaborazione di dati. (38 *Il Diritto di Autore* 491-498, no. 4, Oct. Dec. 1967.)

An Italian translation of an address delivered on October 18, 1967 at the Max Planck Institute for Foreign and International Patent, Copyright and Unfair Competition Law in Munich. The address was also translated into German and published in *GRUR*, Int. Teil. See Item 377, *supra*.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

386. ANELLO, DOUGLAS A. The problems of copyright. (11 *The Viewer* 1-2, 12, no. 6, Dec. 1967.)

The General Counsel of the National Association of Broadcasters tells why the broadcasters are opposed to proposals to incorporate in the general revision bill, as reflected by Senator Williams' proposed amendment to S. 597, "performance rights for record manufacturers and performers with respect to sound recordings." See 14 *BULL. CR. SOC.* 316, Item 214 (1967) and Item 389, *infra*.

387. BESSIE, SIMON MICHAEL. The flow of ideas: a proposal for an International Book Institute. (62 *ALA Bulletin* 249-254, no. 3, Mar. 1968.)

An address, by the president of Atheneum Publishers, delivered at a program on the International Year of the Book held during the Midwinter Meeting, January 1968, in Bal Harbour, Florida, of the American Library Association. The address includes a discussion of the purposes of the International Publishers' Association, among which are copyright protection and supporting "the promulgation of textbooks in developing countries"; and an account of the recent proposal for an International Book Institute with the purpose of greatly expanding the exchange of books with foreign countries.

388. KARP, IRWIN. Literary property and estates. (*Authors Guild Bulletin* 2-5, Nov.-Dec. 1967; 14-16, Feb.-Mar. 1968.)

A discussion of "some of the characteristics of literary property—including copyrights—which relate to the preparation of wills and trusts, the administration of estates, the 'literary executor,' other aspects of 'estate planning,' and estate taxes."

389. KENTON, STAN. Copyrights: a reply. (12 *The Viewer* 1, 10, no. 1, NAB Convention Issue, 1968.)

A case is made for incorporation, in the copyright revision bill, of a provision giving performance rights in sound recordings to record manufacturers and performers, written as a reply to Mr. Anello's article published in the December 1967 issue of *The Viewer* under the title, "The problems of copyright." See Item 386, *supra*.

390. Midwinter in Bal Harbour. (62 *ALA Bulletin* 269-300, no. 3, Mar. 1968.)

A summary of the proceedings, and of the committee reports presented, at the Midwinter Meeting of the American Library Association held in Bal Harbour, Miami Beach, in January 1968. Included is a summary of a joint report by the Committee on Legislation and the Committee on Copyright Issues in regard to the general revision bill and the bill for the establishment of a national commission to study the computer and other uses of copyrighted works made possible by technological advances. Also included is the full text of resolutions recommended by the committees, and adopted unanimously by the Council, suggesting substitute language for some of the fair use provisions of the general revision bill, and provisional approval of the commission bill.

2. England

391. Forging ahead despite setbacks; P. A. reports on publishing in 1967-68. (*The Bookseller* 1798-1800, 1802, no. 3249, Mar. 30, 1968.)

An article on the latest annual report of the Publishers Association, which covers, among other topics, the potentially serious impact of the Stockholm Protocol on international copyright and the continuing increase in the "erosion of copyright of unauthorised photocopying."

392. HILL, ALAN. C'wealth Conference's proposals on book supply. (*The Bookseller* 1734, 1736-1738, no. 3248, Mar. 23, 1968.)

An article on the fourth Commonwealth Education Conference, organized by the Commonwealth Secretariat and held in Lagos, Nigeria, from February 26 to March 9, 1968. The basis of the main discussion centered on a "vigorous paper" issued by the Commonwealth Secretariat under the title "Commonwealth book development," which contained a number of proposals for increasing the supply of cheap and educational books in the developing countries. Among the views set forth in the Conference Report was a sentiment that "every other possible method should be explored to bring about the provision of cheap books, before resorting to the abrogation of the rights of authors with all its attendant dangers."

NEWS BRIEFS

393. *Meeting on Copyright.* On April 18, 1968, Thomas Brennan, Counsel of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, chaired a meeting in Room 1202 of the New Senate Office Building on the question of a possible moratorium on copyright liability for certain uses of copyrighted works in relation to S. 2216, the bill for the establishment of a National Commission on New Technological Uses of Copyrighted Works.

At the outset, Mr. Brennan read from a letter from Senator John L. McClellan, chairman of the Subcommittee, to the Register of Copyrights, which stated that he was unable to support the "skeleton bill" that had been proposed in lieu of the full revision bill, which seems unlikely of passage this year, but that he would support action on the full revision bill at the earliest feasible date in the next Congress. In the letter, he also indicated that he intended to introduce another bill for the interim extension of expiring renewal copyrights.

There followed a statement by Mr. Kaminstein, the Register of Copyrights, outlining his reasons for proposing the skeleton bill and stressing the dangers and disadvantages of further delay in enacting a revision bill.

The rest of the morning session was devoted to explanations by the representatives of a number of Government agencies of the impact of the new technology and its current potential relation-

ship to copyright, and to statements by other user groups in favor of a moratorium provision. The afternoon session was largely devoted to statements by those opposing a moratorium.

The view of the large majority of the groups represented seemed to be that those uses being considered by the Commission should be governed by the copyright law of 1909 (that is, the present law) during the three-year period of the Commission's study.

394. UNESCO COPYRIGHT BULLETIN IN SEPARATE ENGLISH EDITION.

The UNESCO Copyright Bulletin, a Quarterly Review, Volume 1, No. 1, 1967, has just been received, published entirely in the English language. The Foreword states:

Beginning with this issue, the Copyright Bulletin will appear in a new form. The trilingual edition will be replaced by three separate editions, in English, French and Spanish, and the English title will be: Copyright Bulletin: Quarterly Review.

The need to maintain as close a contact as possible with Member States, with interested international and national organizations and with specialists and other individuals concerned with copyright and the protection of performers, producers of phonograms and broadcasting and television organizations, can only be met by a publication appearing more frequently than did the Copyright Bulletin.

This publication is designed to assist the dissemination of information on these subjects and to report on Unesco's activities with regard to them. It will include information on the number of countries that have acceded to the Universal Copyright Convention and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and on national legislation as it stands, studies in comparative law, bibliographical notices concerning doctrine and jurisprudence, and any other information of international significance with regard to copyright and neighbouring rights.

By providing the specialized public with the broadest possible information on the work undertaken and its progress, the Quarterly Review should enable that public to keep more closely in touch with the efforts being made to increase,

throughout the world, the protection of authors, performers and producers of phonograms and broadcasting organizations.

Unesco would be glad to receive from those who peruse this publication any further information and suggestions that they may consider of interest.

It is Unesco's intention not only to keep the appropriate specialists regularly informed but also to invite their collaboration, which will be greatly appreciated, and to provide a forum for exchanges between all those whose ability and good will are available for the defence of authors and the progress of education, science and culture.

The price of the new review is Three Dollars annually and subscriptions should be addressed to UNESCO, Place de Fontenoy, 75 Paris-7^e, France.

PART I.

ARTICLES

395. COPYRIGHT PUBLICATION, THE MOTION PICTURE
DISTRIBUTOR AND THE COPYRIGHT REVISION BILL

By JEROME J. SUSSMAN*

*"The law is a dreary thing, and its
judgments have nothing to do with life."*

— D. H. Lawrence

I.

Proponents of copyright revision bills that have been introduced in Congress in the last several years have been fond of observing sagely that the present U. S. Copyright Act,¹ which was first enacted in 1909, embodies 19th Century concepts no longer applicable to 20th Century technology and 20th Century methods of doing business. Accordingly, they have urged Congress to enact a revision bill which, they say, would update the concepts of U. S. copyright law and bring it in line with present realities.

It will be the aim of this paper to examine one problem presented by inadequacies of the existing U. S. Copyright Act — what constitutes publication of a motion picture — to see why the problem has arisen, how the courts have dealt with it and how the proposed revision bills would treat it.

II.

As many commentators have noted, the 1909 Act deals with all literary and artistic works on the model of a book,² which is published by the offer and sale to the general public of printed copies.³

The 1909 Act does not directly define "publication". The only clue given by the draftsmen of the statute is to be found in Section 26, which provides in part:

... "the date of publication" shall in the case of a work of which copies are reproduced for sale or publication be held to be the

* Member of the New York Bar; associated with Golenbock & Barell, New York.

1. 17 U.S.C. §§ 1-216.

2. E.g. Kaplan, AN UNHURRIED VIEW OF COPYRIGHT, 85.

3. Wheaton v. Peters, 33 U.S. 591 (1834).

earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed. . . .⁴

However, it has been held that this section merely defines the *date* of publication but does not define publication.⁵ This conclusion is emphasized by consideration of the case of *Marx v. United States*.⁶ There defendants contended that the provisions of Section 12 of the Copyright Act were unconstitutional. Defendants argued that the Constitution permits Congress to grant copyright only for "limited times".⁷ Since Section 24 of the Act fixes the duration of protection as "twenty-eight years from the date of first publication" but makes no provision for the duration of copyright in unpublished works, defendants argued that copyright in unpublished works was perpetual and, therefore, unconstitutional. The court held, however, that such copyrights ran for a period of 28 years measured from the first filing in the Copyright Office. Since it has now been held that filing in the Copyright Office of an otherwise unpublished work does not effect a publication,⁸ it would also seem safe to assert that the "date of publication" merely means the date on which the term of copyright begins to run but does not tell us when the work is published.

Aside from Section 26, the Act does not give us any help in determining what constitutes "publication". And yet the concept of publication is of central importance to copyright law in the United States. Publication causes the loss of all common law protection,⁹ and statutory protection is secured by registration under Section 12 of those works that qualify thereunder or by publication of all other works with notice of copyright.¹⁰ Furthermore, publication without compliance with the statutory formalities terminates all right to statutory copyright and effects a dedication to the public.¹¹

III.

Unlike books, motion pictures are rarely sold in the United States today. While a book can be published at a cost of about 95¢ for a

4. 17 U.S.C. § 26.

5. *Cardinal Film Corp. v. Beck*, 248 Fed. 368 (S.D.N.Y. 1918).

6. 96 F.2d 204 (9th Cir. 1938).

7. U. S. Constitution, Article I, Section 8.

8. *Nimmer, COPYRIGHT*, pp. 213-216, and cases cited therein.

9. *Wheaton v. Peters*, 33 U.S. 591 (1834); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908).

10. 17 U.S.C. § 10.

11. *Wheaton v. Peters*, 33 U.S. 591 (1834).

paperback edition and a few dollars for a hard bound edition, the laboratory cost of a 35mm. print of a black and white motion picture is now approximately \$300. and a color print approximately \$600., and these figures do not include any fees for the creative talent but reflect only the cost of the labor and material involved in making a positive print from a negative. Because of the added fact that prints can be used many times, the present system of distribution has evolved. Prints are leased or licensed by motion picture distributors to theatre owners who then exhibit the picture to theatre audiences. After the licensed engagement is concluded, the print is returned to the distributor for licensing to another theatre in the same manner.

IV.

Cases arising in this factual setting have grappled inconclusively with the question of what constitutes publication of a motion picture.

In the early case of *Universal Film Mfg. Co. v. Cooperman*¹² it was held that a motion picture was published by the sale of prints. This conclusion is in accord with the concept of publication relating to books (i.e. publication is by sale of copies to the public), and it has been accepted without reservation. However, the case is of little help since it does not tell us anything about the results of leasing.

Most motion picture distributors register their films in the Copyright Office as published works, thereby evidencing their opinion that motion pictures distributed by them in the manner described above are published at some point. The distributors' counsel rely for theoretical support on two cases relating to the leasing of books.

The first of these cases, *Ladd v. Oxnard*,¹³ involved the publisher of a book of credit ratings which was distributed by leasing copies to subscribers for their own use subject to a restriction that possession of the rating book might not be transferred to a third party. The publishers sued for infringement of statutory copyright in the book as a published work. The court found that the book had in fact been published.

One might be tempted to explain the result in the *Ladd* case as an example of the rule stated in *American Visuals Corp. v. Holland*,¹⁴ that courts will readily find that a work was published in order to invest a statutory copyright. However, in the subsequent case of *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*,¹⁵ the New York Court

12. 212 Fed. 301 (S.D.N.Y. 1914), affd. 218 Fed. 577 (2d Cir. 1914).

13. 75 Fed. 703 (C.C. Mass. 1896).

14. 239 F.2d 740 (2d Cir. 1956).

15. 155 N.Y. 241 (1898).

of Appeals, on facts almost identical to those presented in the *Ladd* case, held that plaintiff had published his book of credit ratings so as to divest the common law copyright on which plaintiff sued.

Motion picture industry lawyers also rely on the case of *Patterson v. Century Productions*.¹⁶ Professor Nimmer expressed the prevailing motion picture industry view of the case as follows:

It would seem that the proper inference to be drawn from this case [*Patterson*] is that where distribution of a film is made on an unrestricted and commercial basis such distribution constitutes a general publication.¹⁷

Plaintiff, in the *Patterson* case, had produced a non-dramatic motion picture about wild animals in Africa. Mr. Patterson then showed the picture to many employees of the National Cash Register Company, of which he was President. Through the Y.M.C.A., Patterson also made prints available to various religious, educational and social organizations for exhibition. The prints were made available to the organizations without charge (except for the cost of transportation) on the express condition that no charge would be made to those who saw the exhibitions. Patterson had registered his film for copyright as an unpublished work before it was exhibited and sued the defendants for allegedly copying the film. Defendants urged that the copyright had been lost by publication of the motion picture after registration, arguing that the public exhibitions constituted a publication. The Second Circuit, while noting that the film had been "exhibited to many thousands of people",¹⁸ held that Patterson's motion picture had not been published. In attempting to state what would constitute publication, the court said:

The sale of copies of the work is a general publication. . . . And, moreover, the reproduction in copies for sale is what the statute in Section 11 [now Section 12] treats as though a general publication. * * * Public exhibition is not necessarily a general publication merely because the public generally is shown the work. * * * If the conditions of publication are such that the only right is to look at the copy of the work exhibited, there is no general publication which makes the work thereafter a published work in the copyright sense.¹⁹

16. 93 F.2d 489 (2d Cir. 1937).

17. Nimmer, COPYRIGHT, p. 217.

18. 93 F.2d 489, 491.

19. Id. at 492.

From this language, it would appear that at least part of the test of publication enunciated by the court is whether tangible copies of the work were distributed or made available to members of the general public who could possess the copies, lend them to others and peruse them at will. Since the court expressly held that the defendants, in projecting the image of the film on the screen, made a copy, albeit temporary, of the motion picture, it is clear that the court understood that copies of the motion picture were available for viewing. It seems proper to conclude, then, that the *Patterson* case relates publication not merely to availability of copies but to availability of tangible, permanent copies.

The court does point out that distribution of the motion picture was restricted to noncommercial exhibitions and that no one was permitted to exhibit the picture commercially. However, in light of the language quoted above, I do not agree that the *Patterson* case supports the conclusion that an unrestricted commercial distribution, at least in the manner now customary in the motion picture industry, would constitute a publication.

The few additional cases that have considered the problem of what constitutes publication of a motion picture have added to the confusion.

Perhaps the most famous case dealing with publication as a legal concept is *Blanc v. Lantz*.²⁰ In that case, plaintiff sued for infringement of a common law copyright, and defendant moved for dismissal on the ground that plaintiff's work — the laugh of Woody Woodpecker, which is still well known to copyright lawyers if not to the general public — had been published and common law copyright thus lost. The court found that plaintiff's work had indeed been published, saying:

. . . the recordation of that laugh on a motion picture sound track for the purpose of distribution for reproduction in commercial theatres throughout the world and the actual distribution of such prints and playing of the sound tracks in such theatres constituted a "publication" of the plaintiff's composition.²¹

The court also said that it made no difference that prints of the motion pictures had been leased rather than sold. In either case, the court said, a publication took place.²²

The *Blanc* case was decided, not on the basis of the common law, but under a California statute which provided that rights in a work

20. 83 U.S.P.Q. 137 (Cal. Super. Ct., 1949).

21. *Id.* at 140.

22. *Id.* at 142.

granted by that statute were lost if the owner "makes it public".²³ The court acknowledged that the phrase "make public" may have a somewhat different and broader meaning than the word "publication",²⁴ and commentators have often noted this distinction.²⁵ Were it not for this distinction, the California court would seem to be taking issue with the well-settled rule, enunciated by the U.S. Supreme Court in *Ferris v. Frohman*,²⁶ that performance of a dramatic work on the stage does not constitute publication.

The only other cases I have been able to locate relating to publication of motion pictures were decided in courts of first instance — two in a U.S. District Court and two in the New York State Supreme Court — and none of them was appealed. All four cases²⁷ rely on the doctrine of *Ferris v. Frohman*.

In *DeMille Co. v. Casey*,²⁸ plaintiff had granted to defendant a license to produce motion picture versions of certain plays. When defendant failed to make the payments due under the license agreement, plaintiff rescinded the contract and sued to enjoin defendant from any further exploitation of the motion pictures. Defendant argued that plaintiff's only remedy was by an action in federal court for infringement of statutory copyright, if that was available, since the plays had been published by the exhibition of the motion pictures. The court granted plaintiff his injunction, saying:

Performance of an ordinary play has never been held to be a publication. The mere performance of a photoplay can have no different result; nor can the leasing of the latter or the furnishing of the film constitute a dedication under the circumstances here shown.²⁹

23. Cal. Civil Code §§ 980, 983. These sections were amended after the alleged publication in the *Blanc* case but before that case was decided. These sections now provide that the rights granted thereby are lost when the owner "publishes" the work.

24. 83 U.S.P.Q. at 138.

25. E.g. Nimmer, COPYRIGHT, p. 210.

26. *Ferris v. Frohman*, 223 U.S. 424 (1912).

27. *De Mille Co. v. Casey*, 121 Misc. 78 (N.Y. Sup. Ct. 1923); *Tiffany Productions v. Dewing*, 50 F.2d 911 (D. Md. 1931); *M-G-M Distributing Corp. v. Wyatt*, 21 COPYRIGHT OFFICE BULLETIN 203 (D. Md. 1932); *Brandon Films, Inc. v. Arjay Enterprises, Inc.*, 33 Misc.2d 794, 230 N.Y.S.2d 56 (Sup. Ct. 1962).

28. *Supra* note 27.

29. 121 Misc. at 87-88.

In two cases decided in the U.S. District Court in Maryland, a Federal District Judge stated that the projection of a motion picture on the screen in a theatre is not a publication of the motion picture.³⁰ However, both of these cases were actions for infringement of statutory copyright and the court was considering whether the defendants had "published" the motion pictures within the meaning of Section 1 of the Act so as to infringe upon the exclusive rights reserved to the plaintiff copyright proprietors, not whether the plaintiff's work could be protected as a published work under the Copyright Act.

The question of what constitutes publication of a motion picture was raised most recently in the New York case of *Brandon Films v. Arjay Enterprises*.³¹ Plaintiff sued for an injunction to restrain defendant from exhibiting two films to which plaintiff claimed ownership by reason of a grant from the Alien Property Custodian. It appeared that the two motion pictures had been distributed and exhibited in the United States and abroad for over 30 years without an appropriate copyright notice. Distinguishing the case of *Blanc v. Lantz*,³² the court relied instead on *DeMille v. Casey*³³ and ruled that the films had not been published. It is not clear whether this ruling by the court is a holding or dictum, since the court went on to say that in any case it could not examine the determination of the Alien Property Custodian, who had granted rights to the plaintiff.

From the foregoing discussion, it is clear that the authorities are far from unanimous in their views of what constitutes publication of a motion picture, or, indeed, of whether a motion picture distributed in accordance with industry practices in effect for many years is ever published.

V.

Far from resolving this problem of publication, the Revision Bill seems to avoid it intentionally.

Under the 1909 Act, publication has been of critical importance because it terminated all common law rights and, for most classes of works, statutory copyright could be secured only by publication with notice of copyright. By adopting a single system of copyright under which all rights in the nature of copyright are determined only by refer-

30. *Tiffany Productions v. Dewing*, 50 F.2d 911 (1931); *M-G-M Distributing Corp. v. Wyatt*, 21 COPYRIGHT OFFICE BULLETIN 203 (1932).

31. *Supra* note 27.

32. *Supra* note 20.

33. *Supra* note 27.

ence to the federal statute and not to state statutes or common law, the Revision Bill would go far to minimize the importance of publication.³⁴

However, the need to determine what constitutes "publication" will not disappear entirely. Section 302(c) of the Revision Bill provides as follows:

In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first.

Thus, in determining the duration of protection accorded to those works mentioned in Section 302(c), it is necessary to determine when the work is published, if ever. Since most motion pictures are created by actors, writers, directors and technicians employed by a production or distribution company, most motion pictures will constitute works made for hire, and the problem of determining the date of publication will continue to exist for motion pictures.

The Revision Bill defines publication in Section 101 as follows:

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

This definition makes it clear that a motion picture is published when copies are rented or leased as well as when they are sold. However, it still leaves open two questions: (1) what constitutes the "public" and (2) what kind of copy — i.e. tangible or intangible.

The House Committee Report which accompanied the Revision Bill, in discussing Section 302, contains the following statement:

Under the definition in Section 101 a work is "published" if one or more copies or phonorecords embodying it are distributed to the public — that is, generally, to persons under no explicit or implicit restrictions with respect to disclosure of its contents — without regard to the manner in which the copies or phonorecords changed hands. This definition clears up the question of whether the sale of phonorecords constitutes publication, and also makes plain that any form of dissemination in which a material object does not change hands — performances or displays on television for example — is not a publication no matter how many people are exposed to the work.³⁵

34. H.R. 2512, 90th Cong., 1st Sess. (1967) [hereinafter referred to as "Revision Bill"] Sec. 301.

35. H.R. Rep. No. 83, 90th Cong., 1st Sess. 105.

This comment, by its stress on transfer of a "material object", makes clear that publication is tied to the distribution to the general public of "hard" copies of the work. The making available of temporary copies, of the kind discussed in *Patterson v. Century Productions*, would not meet the test suggested by this comment.

While it may be urged that making prints of a motion picture available to exhibitors satisfies the requirement of availability to the public since anyone can be an exhibitor by opening or leasing a theatre, the language of the comment just quoted indicates that this suggestion is unsound. The comment expressly states that distribution of copies must be made to "the public—that is generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents". Exhibitors are normally under an explicit restriction as to the time, manner and place in which they will exhibit a motion picture that is leased to them. The normal exhibition contract permits a motion picture to be shown only for a specified number of performances at a specified place during a specified period of time. It does not permit the exhibitor to display it whenever and wherever he wishes.

Further, Section 101 of the Revision Bill gives the following definition of a performance:

To "perform" a work means to recite, render, play, dance or act it, either directly or by means of any device or process or, in the case of a motion picture or other audio-visual work, to show its images in sequence or to make the sounds accompanying it audible.

By this definition, the exhibition of a motion picture film in a theatre would be regarded as performance, and the House Committee report reaffirms the rule that performance is not a publication.

Since the foregoing conclusion would grant an extra period of twenty-five years of exclusivity to motion picture distributors, and since it is at variance with the thinking of many of those who have been involved in the copyright revision, it seems doubtful whether this result was in fact intended. Thus it would appear that motion picture distributors and those who would adapt old films into new works will be subject to a continuing period of uncertainty as to the duration of existing copyrights.

This conclusion seems most unfortunate in connection with a bill that is designed to provide a general revision of U.S. copyright law and to clarify and eliminate the problems that have plagued producers and users of literary and artistic property throughout the last sixty years.

VI.

The problem, of course, could easily be solved by concluding that performance, like any other form of making a literary and artistic work available to the public, is in fact a publication. Dramatic works, in general, are intended primarily for performance, and this is the manner in which they are most commonly disseminated to the public. It is unusual for a dramatic work and even more unusual for a motion picture to be printed in book form for dissemination to the general public. The normal manner of dissemination for a play is by production and performance on the stage. The normal dissemination of a motion picture is by its performance or exhibition in motion picture theatres. To tie publication to the distribution of hard copies to the public is to ignore the reality of these artistic forms. Dramatic works are intended to be performed and seen, not to be read. While this has always been true of dramatic works and motion pictures it is becoming even more true with respect to motion pictures which often rely on visual effects rather than on dialogue to develop the plot and characters. Accordingly, a motion picture often cannot adequately be presented in words but can only be presented by an image projected on a screen. To suggest that the projection of this image before tens of millions of people does not constitute a publication, while the printing of a motion picture script which is distributed to perhaps ten thousand people does, is to prefer legal formalities over artistic substance.

The result with respect to motion pictures is all the more disappointing because the Revision Bill would settle the long-raging controversy over whether music is published by distribution of phonograph records embodying that music in favor of the conclusion that music is published when phonograph records embodying that music are distributed and made available to the general public.³⁶

In connection with phonograph records, the Revision Bill would recognize the economic truth that popular music is often written in the first instance for dissemination by phonograph records and only if it is successful on phonograph records is it thereafter printed and distributed as sheet music and that only a small proportion of all popular music recorded today is published in sheet music form. It is submitted that the statute should similarly recognize that motion pictures are produced and distributed for purposes of display to the public and not for sale to the public in tangible form and that such sale as does take place is merely incidental and results in the distribution of the work to relatively few people as compared to the millions who may see it in theatres.

36. Revision Bill, Sec. 101.; see also *id.* at 105.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

396. U. S. CONGRESS. HOUSE.

Extending the duration of copyright protection in certain cases. Report to accompany S.J. Res. 172, submitted by Mr. Kastenmeier, July 2, 1968. 3 p. (90th Cong., 2d Sess., H. Rept. No. 1613.)

A favorable report, without amendment. Paul L. Berry, Acting Librarian of Congress, in a letter attached to the report, recommends that the resolution be amended to extend copyright renewal terms for another 2 years, until December 31, 1970, rather than for only 1 year, until December 31, 1969, as approved by the Senate. The committee, however, was "of the opinion that a 1-year extension is better calculated to preserve the continuity and momentum of the revision program."

The resolution was passed by the House on July 15 and cleared for Presidential signature.

397. U. S. CONGRESS. HOUSE. *Kastenmeier, Robert W.*

Automated information systems and copyright law. *Congressional Record*, vol. 114, no. 99 (daily ed. June 11, 1968), pp. E5261-E5266; no. 100 (daily ed. June 12, 1968), pp. E5329-E5332; no. 101 (daily ed. June 13, 1968), pp. E5387-E5394; no. 102 (daily ed. June 14, 1968), pp. E5436-E5446.

After brief introductory remarks, Congressman Kastenmeier includes in the *Record* a report, in four installments, on a symposium held at the American University, Washington, D.C. in April 1967, for the purpose of developing "a dialog among many parties concerned with computers, other new communications media, and the copyright law."

The report, prepared by Lowell H. Hattery and George P. Bush, has the following table of contents:

- (1) Copyright Law Revision: History and Prospects, Barbara A. Ringer;
- (2) Post-Gutenberg Copyright Concepts, Paul

G. Zurkowski; (3) Copyright and The Computer: Why the Unauthorized Duplication of Copyrighted Materials for Use as Computer Input Should Constitute Infringement, Arthur J. Greenbaum; (4) Economics, Automation and Copyright, Charles H. Lieb; (5) Electronic Computers: Storage and Retrieval, Mervin E. Muller; (6) Technology and The Copyright Law: The Systems Approach, George V. Eltgroth; (7) Authors' Rights, Irwin Karp; (8) Permissions and Payments in Automated Systems, Harold E. Wigren; (9) A Code for The Unique Identification of Recorded Knowledge and Information, Howard J. Hilton; (10) The Publishers' Rumpelstiltskin: Copyright Revision, Kirby B. Westheimer; (11) Summary and Analysis, Lowell H. Hattery and George P. Bush; (12) Conclusions and Recommendations, Lowell H. Hattery and George P. Bush; and (13) Selected Bibliography.

398. U. S. CONGRESS. SENATE.

S.J. Res. 172. Joint resolution extending the duration of copyright protection in certain cases. Introduced by Mr. McClellan, May 22 (legislative day, May 20), 1968, and referred to the Committee on the Judiciary. 1 p. (90th Cong., 2d Sess.) See Items 396, *supra*, and 399, *infra*.

The Resolution reads as follows:

Joint Resolution extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-142, or by Public Law 90-141 (or by all or certain of said laws), would expire prior to December 31, 1969, such term is hereby continued until December 31, 1969.

399. U. S. CONGRESS. SENATE. *McClellan, John L.*

Senate Joint resolution 172 — introduction of joint resolution relating to copyright extension. *Congressional Record*, vol. 114, no. 88 (daily ed. May 22, 1968), p. S. 6127.

Remarks of Senator McClellan upon his introduction of S.J. Res. 172, the purpose of which "is to continue until December 31, 1969, the renewal term of any copyright subsisting on the date of

approval of this resolution, or the term as previously extended by Public Law 87-668, Public Law 89-442, or Public Law 90-141."

400. U. S. CONGRESS. SENATE. *Scott, Hugh.*

Copyright revision 1968: the new technology. *Congressional Record*, vol. 114, no. 89 (daily ed. May 23, 1968), pp. E4551-E4554.

Senator Scott receives unanimous consent to have printed in the *Record* an address made by Andrew A. Aines, Colonel, U.S. Army, retired, a technical assistant on the staff of the Office of Science and Technology in the Executive Office of the President, to the Association of the Bar of the City of New York, May 2, 1968. "In his remarks, Colonel Aines discusses the breathtakingly rapid developments in communications technology and their relationship to the copyright problem."

401. U. S. CONGRESS. SENATE. *Williams, John J.*

Government reports should not be published before release. *Congressional Record*, vol. 114, no. 94 (daily ed. June 3, 1968), pp. S6741-S6742.

Senator Williams of Delaware receives unanimous consent to have printed in the *Record* the text of a letter sent by him to the Comptroller General of the United States on March 20, and the reply of the Comptroller General on May 21, on the question of the propriety of a Presidential commission, financed with Government funds, "to make available to any private publication an advance copy of its report whereby it could be printed and be ready for distribution 'on the exact hour' that the official report was released to the Congress and the public." The occasion for the inquiry was the release by the National Advisory Commission on Civil Disorders of an advance copy of its official report to the *New York Times* and Bantam Books, Inc.

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

Copyright protection in certain cases. Report to accompany S.J. Res. 172, submitted by Mr. McClellan, June 10, 1968. 3 p. (90th Cong., 2d Sess., S. Rept. No. 1181.) See Items 396, 398 and 399, *supra*.

A favorable report on the copyright extension resolution, which includes the text of a letter from Dr. Mumford, Librarian of Congress, supporting its enactment, but making a strong plea that it

be followed "as soon as possible by enactment of a new copyright law for the United States."

403. U. S. CONGRESS. SENATE. *Committee on the Judiciary. Subcommittee on Patents, Trademarks, and Copyrights.*

Report . . . made . . . pursuant to S. Res. 37, Ninetieth Congress, First Session. June 10, 1968. Washington, U. S. Govt. Print. Off., 1968. 20 p. (90th Cong., 2d Sess., S. Rept. No. 1168.)

The annual report on the activities of the subcommittee covering the first session of the 90th Congress. In respect to copyright law revision, the major controversies the subcommittee found still existing at the conclusion of the hearings on S. 597 are listed and summarized.

404. U. S. COPYRIGHT OFFICE.

International copyright relations of the United States with other independent countries. (As of April 1, 1968). Washington [U.S. Govt. Print. Off., 1968] 1 p. (Cir. 38A). A list of the countries, giving the status of copyright relations of each with the United States, follows:

<i>Code:</i>	UCC	Party to the Universal Copyright Convention, as is the United States.
	BAC	Party to the Buenos Aires Convention of 1910, as is the United States.
	Bilateral	Bilateral copyright relations with the United States by virtue of a proclamation or treaty.
	Unclear	Became independent since 1943. Has not established copyright relations with the United States, but may be honoring obligations incurred under former political status.
	None	No copyright relations with the United States.

<i>Country</i>	<i>Status of copyright relations</i>	<i>Country</i>	<i>Status of copyright relations</i>
Afghanistan	None	Bhutan	None
Albania	None	Bolivia	BAC
Algeria	Unclear	Botswana	Unclear
Andorra	UCC	Brazil	UCC, BAC, Bilateral
Argentina	UCC, BAC, Bilateral	Bulgaria	None
Australia	Bilateral	Burma	Unclear
Austria	UCC, Bilateral	Burundi	Unclear
Barbados	Unclear	Cambodia	UCC
Belgium	UCC, Bilateral	Cameroon	Unclear

<i>Country</i>	<i>Status of copyright relations</i>	<i>Country</i>	<i>Status of copyright relations</i>
Canada	UCC, Bilateral	Japan	UCC
Central African Republic	Unclear	Jordan	Unclear
Ceylon	Unclear	Kenya	UCC
Chad	Unclear	Korea	Unclear
Chile	UCC, BAC, Bilateral	Kuwait	Unclear
China	Bilateral	Laos	UCC
Colombia	BAC	Lebanon	UCC
Congo (Brazzaville)	Unclear	Lesotho	Unclear
Congo (Kinshasa)	Unclear	Liberia	UCC
Costa Rica	UCC, BAC, Bilateral	Libya	Unclear
Cuba	UCC, Bilateral	Liechtenstein	UCC
Cyprus	Unclear	Luxembourg	UCC, Bilateral
Czechoslovakia	UCC, Bilateral	Madagascar	Unclear
Dahomey	Unclear	Malawi	UCC
Denmark	UCC, Bilateral	Malaysia	Unclear
Dominican Republic	BAC	Maldives Islands	Unclear
Ecuador	UCC, BAC	Mali	Unclear
El Salvador	Bilateral by virtue of Mexico City Convention, 1902	Malta	Unclear
Ethiopia	None	Mauritania	Unclear
Finland	UCC, Bilateral	Mauritius	Unclear
France	UCC, Bilateral	Mexico	UCC, BAC, Bilateral
Gabon	Unclear	Monaco	UCC, Bilateral
Gambia	Unclear	Morocco	Unclear
Germany	Bilateral; UCC with Federal Republic of Germany	Muscat and Oman	None
Ghana	UCC	Nauru	Unclear
Greece	UCC, Bilateral	Nepal	None
Guatemala	UCC, BAC	Netherlands	UCC, Bilateral
Guinea	Unclear	New Zealand	UCC, Bilateral
Guyana	Unclear	Nicaragua	UCC, BAC
Haiti	UCC, BAC	Niger	Unclear
Holy See (Vatican City)	UCC	Nigeria	UCC
Honduras	BAC	Norway	UCC, Bilateral
Hungary	Bilateral	Pakistan	UCC
Iceland	UCC	Panama	UCC, BAC
India	UCC, Bilateral	Paraguay	UCC, BAC
Indonesia	Unclear	Peru	UCC, BAC
Iran	None	Philippines	Bilateral; UCC status undetermined
Iraq	None	Poland	Bilateral
Ireland	UCC, Bilateral	Portugal	UCC, Bilateral
Israel	UCC, Bilateral	Rumania	Bilateral
Italy	UCC, Bilateral	Rwanda	Unclear
Ivory Coast	Unclear	San Marino	None
Jamaica	Unclear	Saudi Arabia	None
		Senegal	Unclear
		Sierra Leone	Unclear
		Singapore	Unclear
		Somalia	Unclear

<i>Country</i>	<i>Status of copyright relations</i>	<i>Country</i>	<i>Status of copyright relations</i>
South Africa	Bilateral	Turkey	None
Southern Yemen	Unclear	Uganda	Unclear
Soviet Union	None	United Arab Republic	None
Spain	UCC, Bilateral	(Egypt)	
Sudan	Unclear	United Kingdom ...	UCC, Bilateral
Sweden	UCC, Bilateral	Upper Volta	Unclear
Switzerland	UCC, Bilateral	Uruguay	BAC
Syria	Unclear	Venezuela	UCC
Tanzania	Unclear	Vietnam	Unclear
Thailand	Bilateral	Western Samoa	Unclear
Togo	Unclear	Yemen	None
Trinidad and Tobago	Unclear	Yugoslavia	UCC
Tunisia	Unclear	Zambia	UCC

2. Foreign Nations

405. PORTUGAL. *Laws, statutes, etc.*

Décret-loi no. 46.980 du 27 avril 1966, portant Code du droit d'auteur. *Revue Internationale du Droit d'Auteur*, no. 56 (Apr. 1968), pp. 151-185.

The officially authorized French translation of the Portuguese copyright law of April 27, 1966.

406. YUGOSLAVIA. *Laws, statutes, etc.*

Loi du 8 mars 1965 destinée à modifier et à compléter la loi sur le droit d'auteur. *Revue Internationale du Droit d'Auteur*, no. 56 (Apr. 1968), pp. 197-198.

French translation of a law amending the Yugoslav copyright law, the changes being mostly in form.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

407. Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *Rome, 10 to 26 October 1961.*

Records. Geneva, International Labour Organisation (ILO); Paris, United Nations Educational, Scientific and Cultural Organization (Unesco); Geneva, United International Bureaux for the Protection of Intellectual Property (BIRPI) [1968] 312 p.

Includes the texts of the Convention and of the Final Act, Report of the Rapporteur-General, Summary records of the proceedings, Working documents, and Indexes.

408. GERMANY (FEDERAL REPUBLIC, 1949-). *Treaties, etc. Austria.*

Exchange of notes between the Government of the Federal Republic of Germany and the Government of the Republic of Austria concerning the extension of the term of copyright protection. (Notification dated December 12, 1967). *Copyright*, vol. 4, no. 5 (May 1968), pp. 107-108.

A BIRPI translation of the notes, according to which works of Austrian origin will be protected in the Federal Republic of Germany for 57 years after the death of the author, if they were created before January 1, 1949, and if they were still protected on September 17, 1965. And works of German origin will receive similar length of protection in Austria. These actions were taken by virtue of the increased term of protection under the new copyright law of the Federal Republic of Germany, Article 7(2) of the Berne Copyright Convention, and Article III of the Austrian amendatory Act of 1953.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

409. HURST, WALTER E., and WILLIAM STORM HALE. The U.S. master producers & British music scene book. [1st ed.] Hollywood, Calif., 7 Arts Press [1968]. 373 p. (*Their Entertainment industry series*, vol. 4).

Practical business and legal (including copyright) information for persons in the music and record industries, with special attention to United States producers of master records. Includes a variety of specimen contracts, such as a master "lease" contract between a master producer and a record company, a contract between a publisher and songwriter, artists' recording agreements, and many others.

410. OETTINGER, ELMER R. Copyright laws and copying practices. Chapel Hill, Institute of Government, University of North Carolina [1968]. 35 p.

"This publication . . . [which] . . . grew out of an organizational need for an informed basis upon which to determine policy in the use and dissemination of copyrighted matter . . . [purposes] to present background, information, and perspective on present copyright law and practice, together with outlines of procedures consonant with current realities and future prospects."

2. Foreign Publications

411. LUKES, RUDOLF. Urheberrechtsfragen bei überbetrieblichen technischen Normen, insbesondere DIN-Normen und VDE-Vorschriften. Köln, Carl Heymann, 1967. 63 p.

A study of copyright questions, such as copyright protectibility, authorship, and transfer of rights, in connection with engineering standards of the German Federal Republic, with special emphasis on the standards of the German Standards Association in relation

to those of specific technical organizations like the German Electrical Engineering Society.

B. LAW REVIEW ARTICLES

1. United States

412. AHRENS, MICHAEL H. The misappropriation doctrine after *Sears-Compco*. (11 *University of San Francisco Law Review* 292-319, no. 2, Apr. 1968.)

"To determine the effect of the *Sears-Compco* decisions on the misappropriation doctrine, this comment will look at the *INS* case, the *Sears-Compco* decisions . . . and the broad and narrow interpretations given the *Sears-Compco* cases concerning misappropriation. This growing conflict in the federal courts points to a question which must soon be resolved by the Supreme Court: whether the *Sears-Compco* cases overruled the misappropriation doctrine of *INS*. The comment will then look to the proposed Revision of the copyright laws to see whether the entire misappropriation doctrine will be preempted by federal statute when and if the Revision is passed by Congress."

413. BIGELOW, ROBERT P. The computer as a copyright infringer. (1 *Law and Computer Technology* 2-5, no. 5, May 1968.)

A brief article on legislative efforts, up to the present time in the general revision program, to reconcile conflicting interests with respect to "the problem of the author's right to protection and income versus the researcher's right to easy information retrieval."

414. BLOUSTEIN, EDWARD J. Privacy, tort law and the Constitution: is Warren and Brandeis' tort petty and unconstitutional as well? (46 *Texas Law Review* 611-629, no. 5, Apr. 1968.)

"President Bloustein of Bennington College argues that a mass publication tort can be maintained within the limitations of the first amendment."

415. BRETT, PETER. Free speech, Supreme-Court style: a view from overseas. (46 *Texas Law Review* 668-705, no. 5, Apr. 1968.)

A discussion of, and attempt to resolve a "paradox . . . [which] may be discerned by contrasting the results achieved by the Supreme Court in interpreting the free-speech-press aspect of the first

amendment with those achieved by using the method of legislative restraint in two other similar countries, namely England and Australia.”

416. COLIN, RALPH F. Legal problems involved in art forgery. (5 *Lex et Scientia* 73-85, no. 2, Apr.-June 1968.)

The administrative vice-president and counsel for Art Dealers of America examines the legal rights and obligations of each of the interested parties, including the rights of the original artist, to a transaction in which a fake work of art is sold.

417. Computer programs and proposed revisions of the patent and copyright laws. (81 *Harvard Law Review* 1541-1557, no. 7, May 1968.)

“This Note will analyze the need for . . . [extending copyright or patent protection to computer programs], the consequences of protection, and the possibility of leaving programs outside both the copyright and patent systems.”

418. DEMETER, THOMAS PAUL. Legal perils of parody and burlesque. (17 *Cleveland-Marshall Law Review* 242-250, no. 2, May 1968.)

“[A] consideration of the current copyright law as it applies to parody and burlesque, a history of parody and burlesque as a literary form, and significant United States cases dealing with the problems of the conflict.”

419. GISLA, JOHN F. Copyright protection for architectural structures. (11 *University of San Francisco Law Review* 320-328, no. 2, Apr. 1968.)

The “question is approached by considering the extent of design protection under the federal patent statute; under the present federal copyright statute and the proposed Copyright Law Revision; and finally under the proposed Design Protection Act. In light of these three considerations copyright protection for artistic architectural structures could and should be included in the proposed Copyright Law Revision.”

420. GREEN, LEON. Continuing the privacy discussion: a response to Judge Wright and President Bloustein. (46 *Texas Law Review* 750-756, no. 5, Apr. 1968.)

See Item 414, *supra*, and Item 428, *infra*.

421. PATTERSON, LYMAN RAY. [Review of] An unhurried view of copyright. By Benjamin Kaplan . . . (21 *Vanderbilt Law Review* 607-611, no. 4, May 1968.)

The reviewer concludes that "Professor Kaplan has provided the opportunity for those most concerned with the law of copyright to gain new insights into the problems they face."

422. PRICE, MONROE E. Government policy and economic security for artists: the case of the *droit de suite*. (77 *The Yale Law Journal* 1333-1366, no. 7, June 1968.)

"This essay examines the assumptions underlying the *droit de suite*, tests their validity in the American context, and explores alternatives to an art proceeds right to determine if they better comport with the American temperament, the American art market, and the needs of the American artists."

423. ROSEN, DANIEL M. Multiple infringements. (50 *Journal of the Patent Office Society* 254-265, no. 4, Apr. 1968.)

An examination of the statutory background and of the body of developmental case law pertaining to damage issues of multiple infringement, with special attention to the decision in *Davis v. E. I. Dupont de Nemours & Co.*, 249 F.Supp. 329, 14 BULL. CR. SOC. 182, Item 92 (S.D.N.Y. 1966), "in an attempt to analyze the proper direction for an eventual solution or compromise."

424. SCHOONMAKER, MEYRESSA HUGHES. Hiatus in justice: the problems in applying copyright protection to fabric designs. (4 *Wake Forest Intramural Law Review* 271-299, no. 3, May 1968.)

"This paper [submitted in the Nathan Burkan Memorial Competition] will explore the problems of the fabric designers in trying to get under the protective cloak of the Federal Copyright Law, and it will examine some problems they face under copyright protection in the competitive market today."

425. SCHUSTER, NANCY, and MARC J. BLOCH. Mechanical copying, copyright law and the teacher. (17 *Cleveland-Marshall Law Review* 299-323, no. 2, May 1968.)

The article begins with a definition of infringement, follows with a discussion of (1) the "common law defenses" available to a teacher in an infringement action arising out of his duplication

of copyrighted material for his class, and (2) the opposing attitudes of authors and educators to the new revision, and concludes with an "examination of the pertinent sections of S. 597 and the probable effect of its passage."

426. SHAPO, MARSHALL S. Media injuries to personality: an essay on legal regulation of public communication. (46 *Texas Law Review* 650-667, no. 5, Apr. 1968.)

"Some general suggestions concerning directions the law should take in regulating the media with respect to injury to personality, a classification that . . . [the author] use[s] to denote cases traditionally classified under both defamation and 'privacy' categories."

427. SZILAGYI, RICHARD. How far may newspapers go in criticizing? (17 *Cleveland-Marshall Law Review* 283-298, no. 2, May 1968.)

For the most part a critical comment on the Supreme Court decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Times, Inc. v. Hill*, 385 U.S. 391 (1967).

428. WRIGHT, J. SKELLY. Defamation, privacy, and the public's right to know: a national problem and a new approach. (46 *Texas Law Review* 630-649, no. 5, Apr. 1968.)

Judge Wright of the Court of Appeals for the District of Columbia Circuit attempts to make a case for the enactment of a federal law of defamation based on the commerce clause of the Constitution. He favors the granting by Congress of concurrent jurisdiction to the state courts over this new federal cause of action, with the application of federal law regardless of the chosen forum.

2. Foreign

1. English

429. ABEL, PAUL. Letter from Great Britain, dealing with copyright and related matters which occurred in Great Britain in 1967. (*Copyright* 89-98, no. 4, Apr. 1968; 109-116, no. 5, May 1968.)

A survey of legislative, judicial and miscellaneous developments.

430. BRACK, HANS. The rights of performers and producers of phonograms when gramophone records are used in broadcasting in the Federal Republic of Germany. (*EBU Review* 47-55, no. 109B, May 1968.)

A translation of an article which was first published in 50B *UFITA* 544 (1967). See 15 *BULL. CR. SOC.* 278, Item 296 (1968).

431. GERBRANDY, S. Letter from the Netherlands. (4 *Copyright* 117-120, no. 5, May 1968.)

An examination of some Netherlands court decisions "that bear on international relations in particular."

432. Intergovernmental Copyright Committee. Rules of procedure (revised). (2 *Copyright Bulletin* 26-31, no. 1, 1968.)

"[I]ncorporates the amendments adopted by the Committee at its second, third, sixth and ninth sessions (Washington, 1957; Geneva, 1958; Madrid, 1961; Geneva, 1967.)"

433. International conventions. (1 *Copyright Bulletin* 5-12, no. 1, 1967.)

Contains the lists of states which have deposited instruments of ratification, acceptance or accession, with pertinent dates, in regard to the Universal Copyright Convention and annexed protocols, and the Neighboring Rights Convention, respectively.

434. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Copyright bulletin: quarterly review. Vol. 1, no. 1, 1967. [Paris, United Nations Educational, Scientific and Cultural Organization, 1968] 34 p.

"Beginning with this issue, the Copyright Bulletin will appear in a new form. The trilingual edition will be replaced by three separate editions, in English, French and Spanish."

435. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Study of comparative law: duration of protection. (1 *Copyright Bulletin* 15-29, no. 1, 1967.)

"In the *Unesco Copyright Bulletin*, Vol. II (1949), No. 2-3, p. 71-79, an article appeared on this subject, which is updated here." This article is a synthesis of "the provisions concerning the commencement, duration and termination of the protection accorded

to works and/or authors, as well as to phonograms, broadcasting and performers under copyright statutes, and/or under the laws relating to the protection of performers, producers of phonograms and broadcasting organizations.”

436. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Study of comparative law: persons protected. (1 *Copyright Bulletin* 11-36, no. 2, 1967.)

“This brings up to date the study on the same subject which appeared in *Unesco Copyright Bulletin*, vol. II, No. 2-3, 1949, p. 45-57.” The study attempts to show who are the owners of copyright, in general when a work emanates from a natural person, several persons, or a juridical person, and in certain special cases.

437. Working Group, Stockholm Conference Recommendation No. III (Copyright). [Proceedings of meeting], Geneva, March 12 to 14, 1968. (4 *Copyright* 84-88, no. 4, Apr. 1968.)

The Working Group met, pursuant to a Recommendation at the Stockholm Conference requesting BIRPI to undertake certain studies regarding the possible implementation of the Protocol Regarding Developing Countries. The Group “had the task of advising the Director of BIRPI on the ways and means of creating financial machinery to ensure a fair and just return to authors for the use of their works pursuant to the provision of the Protocol.”

2. English, French & Spanish

438. CASTELAIN, RAOUL, and ANDRE ROUANET DE VIGNE-LAVIT. Les disques et le référé. (*Revue Internationale du Droit d'Auteur* 40-81, no. 56, Apr. 1968.)

An examination, in English, French and Spanish, of court decisions “rendered pursuant firstly to Articles 66 and following of the [French Copyright] Act of 11th March, 1957, and secondly through the application of Article 806 of the Code of Civil Procedure” with respect to summary procedure in actions involving disputes over mechanical reproductions by means of magnetic tape and phonograph records.

439. FERRARA-SANTAMARIA, MASSIMO. Le régime juridique des oeuvres cinématographiques après la révision de Stockholm. (*Revue Internationale du Droit d'Auteur* 82-105, no. 56, Apr. 1968.)

A critical commentary, in English, French and Spanish, on "the position regarding the international legal protection of cinematographic works after the Stockholm revision."

440. STRNAD, VOJTECH. Quelques aspects de la nouvelle loi tchécoslovaque. (*Revue Internationale du Droit d'Auteur* 6-39, no. 56, Apr. 1968.)

An article, in English, French and Spanish, on changes and innovations introduced by the Czechoslovak Copyright Act of April 8, 1965.

3. French

441. DERENBERG, WALTER J. Etat de la révision en cours de la loi sur le droit d'auteur des Etats-Unis. (*Interauteurs* 18-27, no. 170, 1st quarter 1968.)

A survey of the state of copyright law revision in the United States. The present survey, published in French translation, was the subject of a report presented by Professor Derenberg at the December 1967 meeting in Paris of the Legal and Legislative Committee of the International Confederation of Authors' and Composers' Societies (CISAC).

442. GARCIA-NOBLEJAS, JOSE ANTONIO. La nouvelle législation espagnole en matière de droit d'auteur sur les oeuvres cinématographiques. (*Interauteurs* 28-31, no. 170, 1st quarter 1968.)

A brief comment on the Spanish Law of May 31, 1966 on Intellectual Property Rights in Cinematographic Works.

4. German

443. BOYTHA, GYORGY. Das Abkommen zwischen Ungarn und der Sowjetunion über den gegenseitigen Schutz der Urheberrechte. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 159-163, no. 5, May 1968.)

An analysis of the recent precedential Hungarian-Soviet Copyright Convention, followed by a German translation of the text of the Convention. For the BIRPI English translation of the Con-

vention, see 15 BULL. CR. Soc., Item 118 (1968) and 4 *Copyright* 63 (Mar. 1968).

444. Freigabe deutscher alt-Urheberrechte in den USA; Hinweise an deutsche Rechtsinhaber zur Nutzung ihnen eingeräumter Vorteile, insbesondere für Filme alter Produktionen. (12 *Film und Recht* 106-110, no. 4, Apr. 15, 1968.)

An explanation of the provisions of the Presidential proclamation of July 12, 1967, with respect to copyright extension to German citizens. [See 15 BULL. CR. Soc. 29, Item 7 (1967)]. The explanation, which is directed principally to owners of copyrights in motion pictures registrable under the Proclamation, is followed by a German translation of Copyright Office Circular 22 (*How to Determine Whether a Work is Copyrighted*).

445. STROMHOLM, STIG. Zur Problematik der Fortsetzung eines urheberrechtlich geschützten Werkes. (70 *Gewerblicher Rechtsschutz und Urheberrecht* 187-193, no. 4, Apr. 1968.)

A discussion of the question whether unauthorized continuations of a copyrighted work are legally permissible. The article is to a considerable extent a critical commentary on a study of the same question by Joseph and Schwanhäusser, which was published in 64 *GRUR* 444 (1962) under the title: Das Recht auf Fortsetzung.

446. TOVOTE, H. G. Titelschutz bei Film und Fernsehen; ein zusammenfassender Überblick. (12 *Film und Recht* 120-126, no. 5, May 15, 1968.)

A survey of the protection of titles of motion pictures and television programs under the laws of copyright and unfair competition in the Federal Republic of Germany. A conclusion is drawn that copyright protection is available only in exceptional cases and is of no practical significance, so that the only effective title protection is offered by unfair competition law.

5. Italian

447. SANTORO, EMANUELE. Brevi osservazioni in tema di parodia. (39 *Il Diritto di Autore* 1-15, no. 1, Jan.-Mar. 1968.)

A discussion of the criteria for determining whether or not a parody of a copyrighted work without the consent of the author of the work parodied constitutes a permissible use.

C. ARTICLES PERTAINING TO COPYRIGHT
FROM TRADE MAGAZINES

I. United States

448. AEPI views federation, copyright, urban crisis. (193 *Publishers' Weekly* 25-29, no. 22, May 27, 1968.)

An article on the 26th annual meeting in Miami Beach, May 8-10, of the American Educational Publishers Institute (formerly, the American Textbook Publishers Institute). The meeting included addresses and discussions on domestic and international copyright, in which a view was expressed that the "overall climate of opinion is more favorable toward a general revision program than at any time in recent years," and the audience was reminded "of the dangers inherent in the 'Protocol Regarding Developing Countries.'"

449. ACKERMAN, PAUL. 3M enters historical fee agreement with societies (80 *Billboard* 1, 82, no. 23, June 8, 1968.)

An article on "a precedential agreement with ASCAP, BMI and SESAC covering payment for — and the use of — copyrighted material in 3M's forthcoming multiple track CARtridge player for background music installations."

450. IPA votes to press vs. waiving of copyright in new countries. (80 *Billboard* 72, 75, no. 28, July 13, 1968.)

An article on a unanimous vote by music and book publishers, attending the 18th Congress of the International Publishers Association in Amsterdam, to press their respective governments not to ratify the Stockholm Protocol Regarding Developing Countries.

451. Interest groups stymie changes in copyright law. *Legislators and the Lobbyists*, 2d ed. (May 1968), pp. 82-84. "Case study III — 1967 copyright bill."

A case study on dissatisfaction of "pressure groups over a few provisions, especially those relating to community antenna television (CATV) systems [which] led the Senate Judiciary Subcommit-

tee on Patents, Copyrights and Trademarks to defer action on the bill (HR 2512, S 537) in 1967."

452. LAZOWSKA, MRS. EDWARD S. Photocopying, copyright, and the librarian. (19 *American Documentation* 123-130, no. 2, Apr. 1968.)

Organized under the following section captions: The historical background of copyright; The history of U.S. copyright law and the judicial doctrine of fair use; Libraries, photocopying and copyright — 1930-1961; Efforts to revise the U.S. Copyright Act — 1961-present; and, A look at the future.

453. MICHIE, LARRY. See CATV on gold-rush standard as sequel to court's 'no copyright.' (251 *Variety* 1, 78, no. 5, June 19, 1968.)

An article on the Supreme Court decision in the *Fortnightly* case and on reactions thereto.

454. POLLETT, JEANNE. The photographer and the law. (12 *Camera* 35 50-51, 82-83, no. 2, Feb./Mar. 1968.)

A discussion of court decisions in suits brought against photographers and/or publishers of photographs for copyright infringement, libel, and invasion of privacy.

455. ROTHENBERG, STANLEY. Copyright. *Encyclopedia Americana*, 1968 ed., pp. 772-776.

A thumbnail sketch of United States copyright law, containing a definition of copyright, its English origin, development in the United States, functions, international copyright and "Problems in the Electronic Era."

Congressman Kupferman was given permission to extend his remarks and to include the entire article in the *Congressional Record*, vol. 114, no. 67 (daily ed. Apr. 23, 1968), pp. H2930-H2933.

456. USOE official amplifies new relaxed public domain policy. (193 *Publishers' Weekly* 26-28, no. 15, Apr. 8, 1968.)

An article on a new policy of the Office of Education, published in the March 1, 1968 issue of the *Federal Register*, toward copyright protection for materials produced under project grants or contracts from the Office of Education.

2. England

457. SOCIETY OF AUTHORS. Random retrospect. (79 *The Author* 67-83, no. 2, Summer 1968.)

A special section presenting "a few backward glances at old campaigns and battles" waged by the Society of Authors in defense of the rights of authors.

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amendment with those achieved by using the method of legislative restraint in two other similar countries, namely England and Australia.”

416. COLIN, RALPH F. Legal problems involved in art forgery. (5 *Lex et Scientia* 73-85, no. 2, Apr.-June 1968.)

The administrative vice-president and counsel for Art Dealers of America examines the legal rights and obligations of each of the interested parties, including the rights of the original artist, to a transaction in which a fake work of art is sold.

417. Computer programs and proposed revisions of the patent and copyright laws. (81 *Harvard Law Review* 1541-1557, no. 7, May 1968.)

“This Note will analyze the need for . . . [extending copyright or patent protection to computer programs], the consequences of protection, and the possibility of leaving programs outside both the copyright and patent systems.”

418. DEMETER, THOMAS PAUL. Legal perils of parody and burlesque. (17 *Cleveland-Marshall Law Review* 242-250, no. 2, May 1968.)

“[A] consideration of the current copyright law as it applies to parody and burlesque, a history of parody and burlesque as a literary form, and significant United States cases dealing with the problems of the conflict.”

419. GISLA, JOHN F. Copyright protection for architectural structures. (11 *University of San Francisco Law Review* 320-328, no. 2, Apr. 1968.)

The “question is approached by considering the extent of design protection under the federal patent statute; under the present federal copyright statute and the proposed Copyright Law Revision; and finally under the proposed Design Protection Act. In light of these three considerations copyright protection for artistic architectural structures could and should be included in the proposed Copyright Law Revision.”

420. GREEN, LEON. Continuing the privacy discussion: a response to Judge Wright and President Bloustein. (46 *Texas Law Review* 750-756, no. 5, Apr. 1968.)

See Item 414, *supra*, and Item 428, *infra*.

421. PATTERSON, LYMAN RAY. [Review of] An unhurried view of copyright. By Benjamin Kaplan . . . (21 *Vanderbilt Law Review* 607-611, no. 4, May 1968.)

The reviewer concludes that "Professor Kaplan has provided the opportunity for those most concerned with the law of copyright to gain new insights into the problems they face."

422. PRICE, MONROE E. Government policy and economic security for artists: the case of the *droit de suite*. (77 *The Yale Law Journal* 1333-1366, no. 7, June 1968.)

"This essay examines the assumptions underlying the *droit de suite*, tests their validity in the American context, and explores alternatives to an art proceeds right to determine if they better comport with the American temperament, the American art market, and the needs of the American artists."

423. ROSEN, DANIEL M. Multiple infringements. (50 *Journal of the Patent Office Society* 254-265, no. 4, Apr. 1968.)

An examination of the statutory background and of the body of developmental case law pertaining to damage issues of multiple infringement, with special attention to the decision in *Davis v. E. I. Dupont de Nemours & Co.*, 249 F.Supp. 329, 14 BULL. CR. SOC. 182, Item 92 (S.D.N.Y. 1966), "in an attempt to analyze the proper direction for an eventual solution or compromise."

424. SCHOONMAKER, MEYRESSA HUGHES. Hiatus in justice: the problems in applying copyright protection to fabric designs. (4 *Wake Forest Intramural Law Review* 271-299, no. 3, May 1968.)

"This paper [submitted in the Nathan Burkan Memorial Competition] will explore the problems of the fabric designers in trying to get under the protective cloak of the Federal Copyright Law, and it will examine some problems they face under copyright protection in the competitive market today."

425. SCHUSTER, NANCY, and MARC J. BLOCH. Mechanical copying, copyright law and the teacher. (17 *Cleveland-Marshall Law Review* 299-323, no. 2, May 1968.)

The article begins with a definition of infringement, follows with a discussion of (1) the "common law defenses" available to a teacher in an infringement action arising out of his duplication

of copyrighted material for his class, and (2) the opposing attitudes of authors and educators to the new revision, and concludes with an "examination of the pertinent sections of S. 597 and the probable effect of its passage."

426. SHAPO, MARSHALL S. Media injuries to personality: an essay on legal regulation of public communication. (46 *Texas Law Review* 650-667, no. 5, Apr. 1968.)

"Some general suggestions concerning directions the law should take in regulating the media with respect to injury to personality, a classification that . . . [the author] use[s] to denote cases traditionally classified under both defamation and 'privacy' categories."

427. SZILAGYI, RICHARD. How far may newspapers go in criticizing? (17 *Cleveland-Marshall Law Review* 283-298, no. 2, May 1968.)

For the most part a critical comment on the Supreme Court decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Times, Inc. v. Hill*, 385 U.S. 391 (1967).

428. WRIGHT, J. SKELLY. Defamation, privacy, and the public's right to know: a national problem and a new approach. (46 *Texas Law Review* 630-649, no. 5, Apr. 1968.)

Judge Wright of the Court of Appeals for the District of Columbia Circuit attempts to make a case for the enactment of a federal law of defamation based on the commerce clause of the Constitution. He favors the granting by Congress of concurrent jurisdiction to the state courts over this new federal cause of action, with the application of federal law regardless of the chosen forum.

2. Foreign

1. English

429. ABEL, PAUL. Letter from Great Britain, dealing with copyright and related matters which occurred in Great Britain in 1967. (*Copyright* 89-98, no. 4, Apr. 1968; 109-116, no. 5, May 1968.)

A survey of legislative, judicial and miscellaneous developments.

430. BRACK, HANS. The rights of performers and producers of phonograms when gramophone records are used in broadcasting in the Federal Republic of Germany. (*EBU Review* 47-55, no. 109B, May 1968.)

A translation of an article which was first published in 50B *UFITA* 544 (1967). See 15 *BULL. CR. SOC.* 278, Item 296 (1968).

431. GERBRANDY, S. Letter from the Netherlands. (4 *Copyright* 117-120, no. 5, May 1968.)

An examination of some Netherlands court decisions "that bear on international relations in particular."

432. Intergovernmental Copyright Committee. Rules of procedure (revised). (2 *Copyright Bulletin* 26-31, no. 1, 1968.)

"[I]ncorporates the amendments adopted by the Committee at its second, third, sixth and ninth sessions (Washington, 1957; Geneva, 1958; Madrid, 1961; Geneva, 1967.)"

433. International conventions. (1 *Copyright Bulletin* 5-12, no. 1, 1967.)

Contains the lists of states which have deposited instruments of ratification, acceptance or accession, with pertinent dates, in regard to the Universal Copyright Convention and annexed protocols, and the Neighboring Rights Convention, respectively.

434. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Copyright bulletin: quarterly review. Vol. 1, no. 1, 1967. [Paris, United Nations Educational, Scientific and Cultural Organization, 1968] 34 p.

"Beginning with this issue, the Copyright Bulletin will appear in a new form. The trilingual edition will be replaced by three separate editions, in English, French and Spanish."

435. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Study of comparative law: duration of protection. (1 *Copyright Bulletin* 15-29, no. 1, 1967.)

"In the *Unesco Copyright Bulletin*, Vol. II (1949), No. 2-3, p. 71-79, an article appeared on this subject, which is updated here." This article is a synthesis of "the provisions concerning the commencement, duration and termination of the protection accorded

to works and/or authors, as well as to phonograms, broadcasting and performers under copyright statutes, and/or under the laws relating to the protection of performers, producers of phonograms and broadcasting organizations.”

436. United Nations Educational, Scientific and Cultural Organization. *Copyright Division*. Study of comparative law: persons protected. (1 *Copyright Bulletin* 11-36, no. 2, 1967.)

“This brings up to date the study on the same subject which appeared in *Unesco Copyright Bulletin*, vol. II, No. 2-3, 1949, p. 45-57.” The study attempts to show who are the owners of copyright, in general when a work emanates from a natural person, several persons, or a juridical person, and in certain special cases.

437. Working Group, Stockholm Conference Recommendation No. III (Copyright). [Proceedings of meeting], Geneva, March 12 to 14, 1968. (4 *Copyright* 84-88, no. 4, Apr. 1968.)

The Working Group met, pursuant to a Recommendation at the Stockholm Conference requesting BIRPI to undertake certain studies regarding the possible implementation of the Protocol Regarding Developing Countries. The Group “had the task of advising the Director of BIRPI on the ways and means of creating financial machinery to ensure a fair and just return to authors for the use of their works pursuant to the provision of the Protocol.”

2. English, French & Spanish

438. CASTELAIN, RAOUL, and ANDRE ROUANET DE VIGNE-LAVIT. Les disques et le référé. (*Revue Internationale du Droit d'Auteur* 40-81, no. 56, Apr. 1968.)

An examination, in English, French and Spanish, of court decisions “rendered pursuant firstly to Articles 66 and following of the [French Copyright] Act of 11th March, 1957, and secondly through the application of Article 806 of the Code of Civil Procedure” with respect to summary procedure in actions involving disputes over mechanical reproductions by means of magnetic tape and phonograph records.

439. FERRARA-SANTAMARIA, MASSIMO. Le régime juridique des oeuvres cinématographiques après la révision de Stockholm. (*Revue Internationale du Droit d'Auteur* 82-105, no. 56, Apr. 1968.)

A critical commentary, in English, French and Spanish, on "the position regarding the international legal protection of cinematographic works after the Stockholm revision."

440. STRNAD, VOJTECH. Quelques aspects de la nouvelle loi tchécoslovaque. (*Revue Internationale du Droit d'Auteur* 6-39, no. 56, Apr. 1968.)

An article, in English, French and Spanish, on changes and innovations introduced by the Czechoslovak Copyright Act of April 8, 1965.

3. French

441. DERENBERG, WALTER J. Etat de la révision en cours de la loi sur le droit d'auteur des Etats-Unis. (*Interauteurs* 18-27, no. 170, 1st quarter 1968.)

A survey of the state of copyright law revision in the United States. The present survey, published in French translation, was the subject of a report presented by Professor Derenberg at the December 1967 meeting in Paris of the Legal and Legislative Committee of the International Confederation of Authors' and Composers' Societies (CISAC).

442. GARCIA-NOBLEJAS, JOSE ANTONIO. La nouvelle législation espagnole en matière de droit d'auteur sur les oeuvres cinématographiques. (*Interauteurs* 28-31, no. 170, 1st quarter 1968.)

A brief comment on the Spanish Law of May 31, 1966 on Intellectual Property Rights in Cinematographic Works.

4. German

443. BOYTHA, GYORGY. Das Abkommen zwischen Ungarn und der Sowjetunion über den gegenseitigen Schutz der Urheberrechte. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 159-163, no. 5, May 1968.)

An analysis of the recent precedential Hungarian-Soviet Copyright Convention, followed by a German translation of the text of the Convention. For the BIRPI English translation of the Con-

vention, see 15 BULL. CR. Soc., Item 118 (1968) and 4 *Copyright* 63 (Mar. 1968).

444. Freigabe deutscher alt-Urheberrechte in den USA; Hinweise an deutsche Rechtsinhaber zur Nutzung ihnen eingeräumter Vorteile, insbesondere für Filme alter Produktionen. (12 *Film und Recht* 106-110, no. 4, Apr. 15, 1968.)

An explanation of the provisions of the Presidential proclamation of July 12, 1967, with respect to copyright extension to German citizens. [See 15 BULL. CR. Soc. 29, Item 7 (1967)]. The explanation, which is directed principally to owners of copyrights in motion pictures registrable under the Proclamation, is followed by a German translation of Copyright Office Circular 22 (*How to Determine Whether a Work is Copyrighted*).

445. STROMHOLM, STIG. Zur Problematik der Fortsetzung eines urheberrechtlich geschützten Werkes. (70 *Gewerblicher Rechtsschutz und Urheberrecht* 187-193, no. 4, Apr. 1968.)

A discussion of the question whether unauthorized continuations of a copyrighted work are legally permissible. The article is to a considerable extent a critical commentary on a study of the same question by Joseph and Schwanhäusser, which was published in 64 *GRUR* 444 (1962) under the title: Das Recht auf Fortsetzung.

446. TOVOTE, H. G. Titelschutz bei Film und Fernsehen; ein zusammenfassender Überblick. (12 *Film und Recht* 120-126, no. 5, May 15, 1968.)

A survey of the protection of titles of motion pictures and television programs under the laws of copyright and unfair competition in the Federal Republic of Germany. A conclusion is drawn that copyright protection is available only in exceptional cases and is of no practical significance, so that the only effective title protection is offered by unfair competition law.

5. Italian

447. SANTORO, EMANUELE. Brevi osservazioni in tema di parodia. (39 *Il Diritto di Autore* 1-15, no. 1, Jan.-Mar. 1968.)

A discussion of the criteria for determining whether or not a parody of a copyrighted work without the consent of the author of the work parodied constitutes a permissible use.

C. ARTICLES PERTAINING TO COPYRIGHT
FROM TRADE MAGAZINES

I. United States

448. AEPI views federation, copyright, urban crisis. (193 *Publishers' Weekly* 25-29, no. 22, May 27, 1968.)

An article on the 26th annual meeting in Miami Beach, May 8-10, of the American Educational Publishers Institute (formerly, the American Textbook Publishers Institute). The meeting included addresses and discussions on domestic and international copyright, in which a view was expressed that the "overall climate of opinion is more favorable toward a general revision program than at any time in recent years," and the audience was reminded "of the dangers inherent in the 'Protocol Regarding Developing Countries.'"

449. ACKERMAN, PAUL. 3M enters historical fee agreement with societies (80 *Billboard* 1, 82, no. 23, June 8, 1968.)

An article on "a precedential agreement with ASCAP, BMI and SESAC covering payment for — and the use of — copyrighted material in 3M's forthcoming multiple track CARtridge player for background music installations."

450. IPA votes to press vs. waiving of copyright in new countries. (80 *Billboard* 72, 75, no. 28, July 13, 1968.)

An article on a unanimous vote by music and book publishers, attending the 18th Congress of the International Publishers Association in Amsterdam, to press their respective governments not to ratify the Stockholm Protocol Regarding Developing Countries.

451. Interest groups stymie changes in copyright law. *Legislators and the Lobbyists*, 2d ed. (May 1968), pp. 82-84. "Case study III — 1967 copyright bill."

A case study on dissatisfaction of "pressure groups over a few provisions, especially those relating to community antenna television (CATV) systems [which] led the Senate Judiciary Subcommit-

tee on Patents, Copyrights and Trademarks to defer action on the bill (HR 2512, S 537) in 1967."

452. LAZOWSKA, MRS. EDWARD S. Photocopying, copyright, and the librarian. (19 *American Documentation* 123-130, no. 2, Apr. 1968.)

Organized under the following section captions: The historical background of copyright; The history of U.S. copyright law and the judicial doctrine of fair use; Libraries, photocopying and copyright — 1930-1961; Efforts to revise the U.S. Copyright Act — 1961-present; and, A look at the future.

453. MICHIE, LARRY. See CATV on gold-rush standard as sequel to court's 'no copyright.' (251 *Variety* 1, 78, no. 5, June 19, 1968.)

An article on the Supreme Court decision in the *Fortnightly* case and on reactions thereto.

454. POLLETT, JEANNE. The photographer and the law. (12 *Camera* 35 50-51, 82-83, no. 2, Feb./Mar. 1968.)

A discussion of court decisions in suits brought against photographers and/or publishers of photographs for copyright infringement, libel, and invasion of privacy.

455. ROTHENBERG, STANLEY. Copyright. *Encyclopedia Americana*, 1968 ed., pp. 772-776.

A thumbnail sketch of United States copyright law, containing a definition of copyright, its English origin, development in the United States, functions, international copyright and "Problems in the Electronic Era."

Congressman Kupferman was given permission to extend his remarks and to include the entire article in the *Congressional Record*, vol. 114, no. 67 (daily ed. Apr. 23, 1968), pp. H2930-H2933.

456. USOE official amplifies new relaxed public domain policy. (193 *Publishers' Weekly* 26-28, no. 15, Apr. 8, 1968.)

An article on a new policy of the Office of Education, published in the March 1, 1968 issue of the *Federal Register*, toward copyright protection for materials produced under project grants or contracts from the Office of Education.

2. England

457. SOCIETY OF AUTHORS. Random retrospect. (79 *The Author* 67-83, no. 2, Summer 1968.)

A special section presenting "a few backward glances at old campaigns and battles" waged by the Society of Authors in defense of the rights of authors.

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