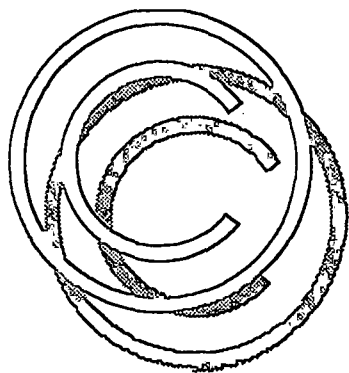

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 1

OCTOBER, 1970

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN
DONALD S. ENGEL
JUDITH GRAD
MORTON DAVID GOLDBERG
PROF. HARRY G. HENN

DR. STEPHEN P. LADAS
ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

EUGENE N. ALEINIKOFF, New York City
ALLEN H. ARROW, New York City
IRVING COHEN, New York City
EDWARD M. CRAMER, New York City
SIDNEY A. DIAMOND, New York City
HERMAN FINKELSTEIN, New York City
EUGENE L. GIRDEN, New York City
A. A. GOLDMAN, Washington, D.C.
PROF. ROBERT A. GORMAN, U. of Penn. Law School, Philadelphia
JOHN F. HARDING, New York City
PROF. HARRY G. HENN, Cornell Law School, Ithaca
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
PROF. JOHN M. KERNOCHAN, Columbia Law School, New York City
ARTHUR B. KRIM, New York City
ABRAHAM MARCUS, Los Angeles
JOHN A. MARSHALL, Boston
WALDO H. MOORE, Washington, D.C.
PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles
HARRY R. OLSSON, Jr., New York City
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
EDWARD A. SARGOY, New York City
ADOLPH SCHIMEL, New York City
CHARLES B. SETON, New York City
LEON SHIMKIN, New York City
SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1970 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

PART I.	ARTICLES.	PAGE
	Importing and Copyrights — <i>The Role of the United States Bureau of Customs</i>	John F. Atwood 1
	The Origins of Copyright Law in Ancient Jewish Law Victor Hazan	23
PART II.	LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
	1. United States of America and Territories	29
	2. Foreign Nations	29
PART III.	CONVENTIONS, TREATIES AND PROCLAMATIONS	31
PART IV.	JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
	A. Decisions of U.S. Courts.	
	1. Federal Court Decisions	32
	2. Tax Court	55
	3. Also of interest	57
PART V.	BIBLIOGRAPHY.	
	A. Books and Treatises.	
	1. United States Publications	70
	2. Foreign Publications	70
	B. Law Review Articles.	
	1. United States	71
	2. Foreign	73
	1. In English	73
	2. In German	74
	3. In Italian	75
	4. In Portuguese	75
	5. In Swedish	75
	C. Articles Pertaining to Copyright in Trade Magazines.	
	1. United States	76
	2. England	87
	NEWS BRIEFS	89

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: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1970).

PART I.

ARTICLES

I. IMPORTING AND COPYRIGHTS—*The Role of the United States Bureau of Customs**By* JOHN F. ATWOOD*

INTRODUCTION

There is an important daily relationship between copyrights and the Treasury Department's Bureau of Customs. Existing copyright law imposes on Customs the responsibility of prohibiting the importation into the United States of "piratical copies" of copyrighted works, or articles bearing a false notice of copyright. The Bureau is also obliged to enforce the American "manufacturing clause" requirements for books and periodicals.

Under the copyright law, the Secretary of the Treasury and the Postmaster General are empowered and required to make and enforce individually or jointly such rules and regulations as shall prevent the importation into the United States of prohibited articles. Prior to a 1940 amendment, the Secretary and the Postmaster General were required to make rules and regulations jointly. Since it has developed that the Bureau of Customs carries out virtually all the administration in this area, there are currently no Post Office Department regulations concerning importations pertaining to copyrights.

The Bureau of Customs regulations on copyrights and importing are interpreted and administered at the Headquarters level by the Restricted Merchandise Section in the Division of Entry Procedures and Penalties, Office of Regulations and Rulings. The Office of the Chief Counsel of Customs may also become involved with copyright matters, especially as to legislative liaison.

It is likely that the Customs Regulations relating to copyrights will be clarified and revised before long. If the copyright revision bill is passed, the regulations would then be further revised to reflect any additional changes.

* Customs Law Specialist, United States Bureau of Customs, Washington, D. C.; member of the Massachusetts Bar. This article represents the author's understanding of the Bureau of Customs position; it is not officially expositive of that position nor necessarily binding on the Bureau.

While decisions set in the context of importations are those of the Bureau of Customs, the assistance of the Copyright Office staff, when asked, is always helpful in arriving at those decisions. Hopefully, the following discussion of legal and administrative considerations, supplemented with occasional examples, will result in a clearer picture for all those who may work with, or be interested in, the subject matter.

1. FALSE NOTICE

A. *Existing Law*

One of the Bureau of Customs responsibilities under the Copyright Act¹ arises from its section 106 which prohibits the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States.

Section 105 of the copyright law imposes fines of not less than \$100 and not more than \$1,000 for placing copyright notices on articles with fraudulent intent or removing or altering copyright notices. Any person who knowingly imports any article bearing a copyright notice or words of the same purport when such article is not copyrighted is liable to a fine of \$100.

B. *Current Regulations and Administration*

The statutory prohibition against the importation of articles bearing false notice of copyright is implemented in the Customs Regulations² by section 11.18. Subsection 11.18(b) provides that articles bearing a false notice and imported by mail shall be returned to the postmaster for return to the sender as nondeliverable; all other articles bearing a false notice of copyright shall be seized and forfeited (by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the Customs revenue laws).³

Customs experience usually involves notices which are technically false rather than intentionally false or fraudulent claims to copyright. For example, a book may be entitled to copyright abroad but not in the United States; if it bears all the essential elements, (1) the word or symbol for "copyright," (2) the name of the copyright proprietor, and (3) the year date of publication, of a notice indicating copyright in this country,

-
1. Title 17, United States Code.
 2. Title 19, Code of Federal Regulations.
 3. 17 U.S.C. 108.

it is thus subject to the prohibition and liability of section 106 and section 108 of the copyright law.

In construing the predecessor of section 105, the court held in *Hoertel v. Raphael Tuck Sons & Co.*,⁴ that a notice which is defective in omitting one of the essential elements can be considered no notice, and that it is therefore not a "false notice." Works published in the United States bearing such a legend are ordinarily considered to be in the public domain.

In practice, false notices are generally detected only in connection with importations of books after consulting with the Copyright Office. The Bureau of Customs does not conduct copyright searches for private parties, through its liaison with the Copyright Office, since section 215 of the copyright law expresses the intention of Congress that searches by Copyright Office staff members of Copyright Office records must be paid for on the basis of prescribed fees.

Although section 211 speaks of distributing catalogs of copyright entries to the collectors (now District Directors) of Customs, that has not been done for years, nor would it be of much assistance. The fact that a title may or may not at one time be listed in the catalog is not a reliable indication as to present copyright status since registration may not have been made for years after publication, or a registered claim to copyright may have been subsequently abandoned.

Pursuant to the general authority for granting relief from Customs forfeitures, set out in section 618 of the Tariff Act of 1930,⁵ an importer is usually granted the privilege of exporting the articles bearing a false notice of copyright, or removing or obliterating the false notice.⁶ Occasionally, permission is given to cure the false notice by expanding it so as to read for example:

© Copyright 1970, John Doe, in Hong Kong only

© Copyright 1970, John Doe, except in the United States

If the false notice violation were intentional or due to willful negligence, Customs discretionary relief might not be granted. Since the misdemeanor liabilities imposed by section 105 of the copyright law are

4. 94 Fed. 844 (C.C.N.Y. 1899).

5. 19 U.S.C. 1618.

6. Cf. Bureau of Customs Circular COP-1-RM, dated July 23, 1970; see also 17 BULL. CR. SOC. 408, Item 204 (August 1970).

criminal rather than civil, violations of that statute would not be disposed of administratively by Customs but would be referred for enforcement to the United States Attorney having jurisdiction. The author is unaware of any case which Customs has referred for criminal prosecution.

C. Possible Future Developments

The July, 1961 Report of the Register of Copyrights⁷ states that since 1909, a copyright notice in published copies has not been merely a factual representation that a copyright claim had been registered, but is now a question involving a legal determination of copyrightability and the claimant's good faith. The report concludes that it is impractical to expect Customs officers to recognize a false notice or to exclude articles on this ground, and the falsity of the notice should be a matter for judicial determination. Accordingly, the Register recommended that section 106 is not a suitable method for preventing importation of articles bearing a false notice of copyright, but that should be accomplished by means of a provision such as section 105, under which a person who knowingly imports an article bearing a false notice is subject to criminal prosecution.

The copyright revision bill⁸ adopts the recommendation of the Register. There would no longer be a civil prohibition against the importation of articles bearing a false notice of copyright, but section 506 (b) lists as a criminal offense, any person's fraudulently intentional importation for public distribution of any article bearing a notice of copyright or words of the same purport, that the person knows to be false. A fine of not more than \$2,500 is provided for this offense and apparently no forfeiture liability is contemplated. Accordingly, should the bill be passed, the Bureau of Customs would take no action against false notice violations.

II. PIRATICAL COPIES

A. Existing Law

In addition to articles bearing a false notice of copyright, section 106 of the copyright law prohibits the importation of piratical copies

7. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (House Committee Print, 87th Congress, 1st Session) July, 1961.

8. S. 543, 91st Congress, 1st Session; January 22 (Legislative Day, January 10, 1969), "A Bill For the General Revision of the Copyright Law, Title 17 of the United States Code, and for other purposes."

of any work copyrighted in the United States. This prohibition is repeated by section 107 which specifies that the exceptions from the "manufacturing clause" for books do not apply to piratical copies.

B. Current Regulations and Administration

If concern has been expressed about false notices properly being a subject for judicial determination, there should be even greater concern in the area of piratical copying. For it is here that the Bureau of Customs is compelled to make important substantive decisions of immediate application. Often the Bureau finds itself in the role of an arbiter between an importer and a copyright owner. Regardless of whether litigation is pending or not, Customs must either hold an import shipment or release it — an injunctive-type action. Assuming no relevant court action, the Bureau must decide if one article is a "piratical copy" of another. That decision is made on the basis of applicable administrative procedures and general principles of copyright law. Although Customs does not have the benefit of a formal hearing examiner system, interested opposing parties are always given an opportunity to state their case.

1. Customs Recordation

Section 11.19 of the Customs Regulations sets out the procedure for recording a registered copyright with the Bureau of Customs in order to prevent the importation of piratical copies of the copyrighted article. Pursuant to the general regulation-making authority of section 109 of the copyright law, the deposit of a certificate of registration issued by the United States Copyright Office is made a condition precedent to Custom recordation. However, there is currently an exception for foreign-copyrighted works claiming American protection under section 9(c) of the copyright act by virtue of the Universal Copyright Convention, whereby these works may be recorded with Customs by filing (when no certificate of registration has been issued by the Copyright Office) a statement setting forth the citizenship and domicile of the author at the time of publication, the date and place of publication and a description of the work, including the title and author in the case of a book. There is a fee of \$100 for recording a copyright for the balance of its existing term of protection. When a copyright registration is renewed, its recordation may be renewed with Customs by depositing a Copyright Office document showing renewal and \$40.

Subsection 11.19(a) of the regulations currently requires that 1,000 notices in the form of an index card be deposited with Customs to

record books and other printed works which may be readily identified by title and name of the author. These cards are distributed to all Customs officers and ports of entry to assist in the detection of piratical copies of books.

For works not readily identified by title and author, subsection 11.19(b) requires that 700 photographic or other likenesses of the copyrighted work reproduced on paper 8 by 10½ inches in size shall be filed with Customs for distribution to all Customs officers and ports of entry. Occasionally, it happens that although protection is sought for cartoon characters which appear in a book, the subject matter of primary concern cannot be readily identifiable by title and author. Subsection 11.19(b) may then be the appropriate one under which to record, even though the work is registered in the Copyright Office under its Class A, as a book.

2. *Piratical Copies*

Subsection 11.20(a) of the Customs Regulations states that "Actual copies or substantial reproductions of legally copyrighted works *produced and imported* in contravention of the rights of the copyright proprietor shall be considered 'piratical copies' within the meaning of the copyright act" (emphasis added).

During the committee hearings on the 1940 amendment to section 33 of the 1909 Copyright Act, a representative of the Treasury Department stated that Congress has, in effect, through the Copyright Law said to the Treasury Department, "We have decided what importations are violations of the copyright law, and we want you fellows to see that they don't come into this country."⁹ Moreover, the bill was characterized as simply giving the Treasury Department the administrative machinery with which it can discharge its purely administrative responsibility. But what is the "purely administrative" responsibility which Customs has when faced with the immediate necessity of deciding if an import of thousands of inflatable water toys constitutes piratical copies of a two-dimensional Walt Disney character cartoon?

Speaking of the import protection statute proposed in the general revision of the Copyright Law, the Register of Copyrights said:

9. Hearing before the House Committee on Patents on S. 2689, "A Bill to Amend Section 33 of the Act entitled 'An Act to Amend and Consolidate the Acts Respecting Copyright,' approved March 4, 1909, and for other purposes," (76th Cong. 3rd Sess. March 21, 1940).

The statute does not define "piratical copies," but the phrase has been understood to mean copies made without the authorization of the copyright owner. "Piratical copies" are, of course, infringing copies, and the copyright owner could sue for the infringement in the United States after piratical copies made abroad had been imported and distributed here. The statute is designed to prevent the importation of infringing copies in the first instance.¹⁰

Of course, although all piratical copies are by definition infringements, not all forms of infringement are piratical copies. A copy which was unauthorized when and where produced abroad is not considered "piratical" if its sale or distribution is authorized or licensed prior to importation.

As indicated above, the Bureau of Customs, when carrying out its "administrative" responsibilities, applies the principles of the "Betty Boop"¹¹ and "Sparkplug"¹² cases in that three-dimensional copies of two-dimensional cartoon copyrights are ruled to be piratical. However, the Bureau would not rule that a music box playing a melody constitutes a piratical copy of copyrighted sheet music. This position is based on the Supreme Court decision in *White-Smith Music Publishing Company v. Apollo Company*¹³ which held that perforated rolls for piano players did not "copy" a musical composition represented by notes and figures in staff notation. In rejecting the appellants' contention, the court said:

* * * if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds * * *

As a general principle, Customs decisions on piracy are confined to items which are apparent to the visual senses and thus more readily understandable for administrative comparison. Such opinions are limited to the Bureau of Customs responsibilities and interpretation and are not to be construed as commenting on the likelihood of success in prosecuting an action in court for copyright infringement or unfair competition.

10. Report of the Register, *supra*, Note 7, at 125.

11. *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276, 23 USPQ 295 (2d Cir. 1934).

12. *King Features Syndicate v. Fleischer*, 299 Fed. 533 (2d Cir. 1924).

13. 209 U.S. 1 (1908).

Occasionally, an importer will offer in rebuttal of a charge of piratical copying, the argument that his article is itself the subject of a copyright. At least in the case of a claim to copyright registered in the Copyright Office, such a contention will quickly dispose of the matter in the importer's favor. This result is based on the *prima facie* presumption of validity implicit in section 209 of the copyright law.

When is a rose not a rose? For instance, any experienced copier will vary some part of artificial plastic flowers and claim that the many similarities are mere coincidence. To resolve any doubts in such a case, the Bureau of Customs has on occasion submitted samples of the recorded copyrighted flower and the questioned imported one to botanists and received confirmation that it was impossible for so many identities to occur randomly, both in nature and also because the manufactured items themselves all vary from nature in technical detail. High quality artificial flowers are not easy to sculpt, especially the petals to be assembled in the blossoms which are usually the most distinctive feature. To ascertain the existence of copying, Customs officers may resort to the "petal test," which often demonstrates copying as the several tiers of petals will fit together, vein for vein. Often, the less difficult parts of the flowers such as the stalk and leaves will be original, but Customs concludes that to the ordinary observer, there has been such a substantial appropriation of a material part of the copyrighted item as to add up to piratical copying.¹⁴ Although courts have on occasion repudiated "dissection" of articles to establish copyright infringement, they nevertheless have cataloged lists of differences and similarities when considering piracy of artificial flowers.¹⁵ Customs' "petal test" seems consistent with court decisions and the "ordinary observer" test.

Due to the tendency of many "knock-off artists" to copy so literally, the doctrine of "common error" is often of particular probative value in assisting Customs to rule that piratical copying exists. When a popular "G. I. Joe" doll was recorded with Customs several years ago, bearing one thumb in an inverted position, it was not long before shipments of items having the same unnatural thumb positioning were attempted to be imported. Copyright owners might well consider the advantage of incorporating an "intentional error" for Customs protection as well as possible evidentiary use in a copyright infringement suit.

14. *Arnstein v. Porter*, 154 F.2d 464, 68 USPQ 288 (2d Cir. 1946), *cert. denied*, 330 U.S. 851, 73 USPQ 550 (1947).

15. *Prestige Floral, S.A. v. Zunino-Altman, Inc.*, 203 F. Supp. 649, 133 USPQ 75 (S.D.N.Y. 1962).

Even in cases of blatant "Chinese copies," an importer frequently, and honestly, maintains his innocence. Unfortunately, intermediaries arranging a sale for foreign manufacturers may neither know nor care about Customs copyright protection. One motto of piratical copiers might be "if at first you don't succeed, try, try again." Occasionally, the Bureau is asked bluntly, "Well, *how* different do I have to make it before Customs will let it pass?" Even if it were ethical to give such advice, no experienced person in Government or not, would attempt to predict what a court might conclude in a copyright infringement case.

The majority of substantive decisions by the Bureau of Customs on piratical copying concerns three-dimensional toys and novelty items. Thus, the author's office frequently resembles a kennel of dog dolls, ranging through a whole gamut of similarities to a "SNOOPY" doll copyrighted by United Feature Syndicate. The Bureau seldom rules on questions of book piracy, *per se* (such as photocopies of expensive textbooks or American bestsellers which are often produced in the Orient at a fraction of their cost in the United States), because the special procedures for Taiwan and Hong Kong books (to be discussed in Part III of this article) focus on the American manufacturing requirements of the copyright law. When confronted with the question of piratical copying of books, the Bureau headquarters or field office involved must have a sample of the copyrighted book to compare with the imported one; usually, samples are required in any case where the Bureau must make a piracy decision. Although non-binding advisory assistance is occasionally given by Customs, a final ruling on piratical copying, like that of a court, requires an actual case and must of necessity be *ad hoc*.

C. Possible Future Developments

Section 602, subsection (a), of the revision bill would make unauthorized importations (of works legally produced abroad) of copies or phonorecords an infringement of the exclusive right to distribute. Exceptions are provided for certain government and private uses, or use by charitable institutions. Subsection (a) would not be enforced by the Bureau of Customs.¹⁶ Subsection (b) would prohibit importations "In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable." Besides clearly "piratical" counterfeit copies, articles which were lawful

16. Copyright Law Revision, Part 6, House Committee on the Judiciary, 89th Congress, 1st Sess. (Comm. Print, May, 1965), p. 150.

where made, as for example works in the public domain of a foreign country would also be prohibited unless authorized by the United States copyright owner.¹⁷ If copies or phonorecords were lawfully made abroad by authorization of the copyright owner, the Bureau of Customs would have no authority to prevent their importation unless the American manufacturing requirements of section 601 apply. Passage of section 602 would formalize existing Customs practice of requiring that articles must be produced and imported in contravention of the copyright owner's rights before they are piratical. Since foreign authorized copies may still be seized for violation of the "manufacturing clause" it could be argued that *a fortiori* foreign unauthorized copies may be so seized, as is being done under the existing special procedures for books from Hong Kong and Taiwan.

Whether copies were piratical where made, or not, section 602 would authorize the Secretary of the Treasury to prescribe by regulation a procedure under which "any person claiming an interest in the copyright" may upon payment of a specified fee, be entitled to notification by the Bureau of the importation of articles that appear to be copies or phonorecords of the work. The Register of Copyrights 1965 report comments that this provision is patterned after the Customs patent import survey and would enable copyright owners to obtain information needed to institute court proceedings.¹⁸ The Customs patent survey is furnished only to the "owner of a patent registered in the United States."¹⁹ Thus, if the bill passed in its present form, Customs would have the burden of determining what constitutes "claiming an interest." Since this procedure would disclose information which might be regarded as confidential, it seems rather broad. Moreover, there would seem to be little need for an import survey for copyrights in the case of "piratical" copies if Customs continues its current administrative activities. This is because Customs has the authority and responsibility to seize and forfeit piratical items infringing a copyright, but does not have such authority and responsibility concerning patents. As to lawfully-made but unauthorized importations, there might be some benefit in beginning the detective work which could culminate in an infringement suit. However, that would mean diverting Customs manpower to a purely private and preliminary function.

17. *Id.* at 149-150.

18. *Id.* at 150.

19. 19 CFR 12.39a.

III. THE MANUFACTURING CLAUSE

A. *Existing Law*

The American "manufacturing clause" requires that books or periodicals in the English language authored by American citizens or domiciliaries, or first published in the United States, must be manufactured in the United States in order to receive full-term copyright protection. Basically, section 16 of the copyright law requires the following mechanical work to be done in the United States: typesetting (by hand or machine); plates made within the United States from type set therein; lithographic or photoengraving processes, whether of text or illustration; and the printing of text and binding. These requirements do not apply to: works in raised characters for the use of the blind; books or periodicals of foreign origin in a language or languages other than English; works printed or produced in the United States by any process other than those specified in section 16; books first printed abroad and subject to "ad interim" treatment; or to illustrations of scientific works or works of art located in a foreign country. Some version of the "manufacturing clause" has been in effect since 1891.

Section 22 of the copyright law provides an "ad interim" copyright registration for foreign-manufactured books or periodicals which are (1) in the English language and (2) first published abroad. This registration is only available when both conditions are met and must be made in the United States Copyright Office within six months of first publication; it may be extended to full term by publishing an American-manufactured edition in the United States within five years after first publication abroad. During the existence of ad interim copyright, fifteen-hundred copies of the work may be imported.

Section 107 prohibits the importation into the United States of any book or copies thereof, covered by American copyright, when subject to the manufacturing requirements of section 16. Plates of these books not made from type set within the United States, are also prohibited importation. There are several exceptions in addition to repeating those in section 16, including importations for libraries and educational societies, and the personal baggage of persons arriving in the United States when books are not intended for sale.

Section 9(c) implements the provisions of the Universal Copyright Convention (UCC) which was adopted by the United States on September 16, 1955. Works qualifying for American copyright protection by virtue of the Universal Copyright Convention may be imported without

regard to the manufacturing clause. However, the Universal Copyright Convention may not be used to permit importation of a book bearing a copyright notice where an American citizen or domiciliary authored the work or it was first published in the United States.

Due to its complexity in wording, meaning and application, as well as other considerations such as what constitutes "manufacture," the "manufacturing clause" cannot be satisfactorily abstracted in an article of this length.²⁰

B. *Current Regulations and Administration*

Reference to the United States manufacturing clause requirements and import prohibitions is set out in section 11.21 of the Customs Regulations. Subsection 11.21(b) refers to the ad interim copyright registration whereby an "import statement" to import 1,500 foreign-made books is obtained from the Copyright Office. This statement must be surrendered to Customs each time books are imported within its terms. Customs officers note the number of books on the statement and return it to the Copyright Office which deducts that amount from the balance until the 1,500 is exhausted or the five-year ad interim period expires.

Besides reporting the number of ad interim books, the Customs Service reports to the Register of Copyrights all other importations of English-language books bearing a notice of copyright. The original purpose of this effort was to provide the Register with statistics for possible use in connection with legislation affecting the manufacturing clause. However, in view of the materials already collected and discussed in the extensive Congressional consideration in this area during the many years of debating the revision bill, the continued efforts by Customs, and probably the Copyright Office, may be of questionable future value.

A recent Bureau of Customs circular²¹ which is available to the public, supersedes earlier instructions to Customs field officers governing treatment of book and periodical importations. As before, Customs officers will require that importers of English-language books bearing a notice of copyright furnish in writing, the following information:

20. See McCannon-Rudd, "The Manufacturing Clause of the U.S. Copyright Law," 2 STUDIES ON COPYRIGHT (*Arthur Fisher Memorial Edition*), 1123 (1963); see also, Engel, "Importation and Protection of Works of American Authors Manufactured Abroad Via the U.C.C. Exemption from Formalities: How Now Sacred Cow? 12 BULL. CR. SOC. 83 (Dec. 1964).

21. Bureau of Customs Circular, *supra*, Note 6.

- (1) The country in which the book was first published;
- (2) The citizenship of the author at the time the book was first published;
- (3) Whether or not the author was domiciled in the United States at the time the book was first published.

However, the circular goes on to describe most of the more important problems likely to be encountered and indicates appropriate dispositions. Some of the subjects dealt with are:

(1) *UCC works*—books entitled to United States copyright by virtue of the Universal Copyright Convention. These may be imported though in the English-language and bearing a notice of copyright, so long as they are not authored by American citizens or domiciliaries, nor first published in the United States.

(2) *Ad interim works*—a total of 1,500 copies of a foreign-made English-language book or periodical first published abroad may be imported under an import statement issued with an ad interim copyright registration.

(3) *"Dual" registration*—where some portions of a book are entitled to copyright protection through the UCC and other portions qualify for ad interim registration, a "dual" registration on both Form A-B Foreign and Form A-B Ad Interim may be made in the Copyright Office. Customs may then permit unlimited importation after first admitting the 1,500 copies covered by the import statement, on the basis of the "foreign" registration certificate. The legal effect of this procedure on the American-authored portions is uncertain.

(4) *False notice of copyright*—a copyright notice on books which cannot secure United States copyright is technically "false" under 17 U.S.C. 106 and subject to forfeiture under 17 U.S.C. 108. If the violation is not intentional or due to willful negligence, Customs will permit the release of the books for importation after the false notice has been removed or obliterated at the owner's expense. Alternatively, the books may be exported.

(5) *Foreign-manufactured reprints of American copyrighted books*—these are prohibited importation under 17 U.S.C. 107 for violation of 17 U.S.C. 16. The works may be released as in the public domain if formal abandonment and surrender of the certificate of registration is made with the Copyright Office, and the notice of copyright is removed or obliterated.

(6) *Foreign-manufactured periodicals*—are generally subject to the manufacturing clause as to original publications but may qualify for the ad interim import exception for 1,500 copies. However, if the foreign-made periodical is a reprint of a periodical first published in the United States and registered in the Copyright Office, it may be imported bearing a copyright notice, in unlimited quantities. The rationale for this procedure is based on the inconsistency between 17 U.S.C. 16 which requires American manufacture of *books and periodicals*, and 17 U.S.C. 107 which only prohibits the importation of *books* which have not been produced in accordance with the manufacturing provisions of 17 U.S.C.

(7) *Foreign-made English-language books without a notice of copyright*—are admissible in unlimited quantities unless unauthorized piratical copies.

(8) *Books from Taiwan or Hong Kong*—are subject to special restrictive procedures for dealing with English-language books whether or not bearing a copyrighted notice. The special procedures implement the finding reported by the Commissioner of Customs press release of June 18, 1962, that many books, especially textbooks, are being pirated in the above-named countries. Such books are in violation of the manufacturing clause as well as being prohibited piratical copies.

In addition to the other information provided in the circular, an attached list²² shows those countries adhering to or ratifying the Universal Copyright Convention as of June 20, 1969 (the list is up-to-date as of December 1, 1970).

In considering whether importations of books qualify for an exception to the manufacturing clause, under section 107 (a) Customs has said that works in "raised characters for the use of the blind," means braille and not over-size type sometimes used in books for the legally blind. When recognizing the section 107 (d) First exception for works imported by the authority or for the use of the United States, the Bureau has required a statement to that effect from a federal government official unless it were obvious that the United States Government is involved in the importation.

Customs' administration does not confine itself to a determination of respective percentages of authorship and nationality. These considerations become complicated and burdensome to the point of administrative infeasibility for Government and business alike, such as

22. Copyright Office Circular 38 C.

when dealing with foreign works by international organizations, published over many years with a great variety of contributing authors. Generally, if foreign authorship for a portion is established, that portion will bring the remainder in with it. This position is in line with that of the Copyright Office, which will generally make a registration on the basis of substantial copyrightable new matter, without regard to what ratio this bears to the work as a whole.

C. Possible Future Developments

Some version of the manufacturing clause and restriction on book and periodical importations seems destined to remain, even if the copyright revision bill is passed.

Perhaps the major argument against retaining the requirement of American manufacture is that it is purely an economic concern and not a matter of copyright substance—the Register of Copyrights recommended complete repeal of the “manufacturing clause” in his 1961 report to Congress.²³

The United Nations’ sponsored “Florence Agreement” to which the United States is a party, essentially aims at promoting the free flow of ideas by reducing barriers to the importation of educational, scientific and cultural materials—while this country has removed the duty on books, except for certain commercial sales catalogs,²⁴ books are still prohibited entry when in violation of the manufacturing clause.²⁵ The preamble to the Universal Copyright Convention states as a goal to encourage the development of literature, the sciences and the arts by means of a universal copyright system which will facilitate a wider dissemination of works of the human mind and increase international understanding. The objectives of neither international agreements seem to be furthered by conditioning American copyright on American manufacture, especially when it is recognized that the United States is the only country in the world which has this particular kind of barrier except for a rather ineffective retaliatory provision by Canada.²⁶

23. Report of the Register, *supra*, Note 7, at 124.

24. Tariff Schedules of the United States Annotated (1970) Schedule 2 — wood and paper, printed matter, Part 5. Books, Pamphlets, and other printed and manuscript material.

25. Bureau Circular COP-2-RM, January 31, 1967.

26. *Howell's Copyright Law*, Revised Edition, by Alan Latman, BNA Inc. Washington, D.C., 1962, pp. 98-99; also, *supra*, note 7, at 119-120.

Although the American printing trades may claim their protection is justified economically because of cutthroat competition, new tariffs or quotas could probably not be imposed because of our obligations under the Florence Agreement. However, the generally accepted view seems to be that the manufacturing clause does not run afoul of either GATT or the Florence Agreement.

Apparently, the labor conditions of the Canadian printing industry do not bear out the cheap foreign labor argument, and this is recognized in section 601(a) of the revision bill which in effect would exempt Canadian-made works from the American manufacturing clause. This would be a significant development since Canada ships the great majority of its book exports to the United States.

Under the proposed new law, the requirements of American manufacture would apply only to "a work consisting preponderantly of non-dramatic literary material that is in the English language and is protected under this title," and would not extend to: dramatic, musical, pictorial, or graphic works; foreign language, bilingual, or multilingual works, public domain material, or works consisting preponderantly of material that is not subject to the manufacturing requirement. Thus, illustrations could be made abroad, regardless of whether the text were required to be made domestically.²⁷ Also, it appears that Americans writing in a foreign language would no longer be required to manufacture in the United States.

The 1967 House Committee Report on the revision bill discussed variations of "substantial parts" of the works and exemption for the "main body of the text," or the situation where an American wrote the work as an employee for hire of a foreign "author." A conclusion was:

The complexity of the problems of foreign policy and administration raised by this proposal preclude its consideration as a part of the current revision of the copyright law.²⁸

As indicated in this article's discussion of piratical copies, the Bureau of Customs is unable to preclude consideration when faced with actual detentions of books at the border and an importer demanding, in effect, "Can I bring these books into the country, now — yes or no?"

27. House Rept. No. 2237, p. 163, Oct. 12, 1966.

28. Copyright Law Revision, House Rept. No. 83 to accompany H.R. 2512, 90th Cong. 1st Sess. p. 135, March 8, 1967.

Unlike existing law which only exempts works imported by authority or use of the "United States," the revision bill would grant the exception to works for the use, other than in schools, of the Government of the United States or of any State or political subdivision of a State. Under this exception, Customs would probably have to require a statement from a State or local official, in questionable cases, as it now does from Federal officials.

An additional exception in the revision bill is that American nationals who are "expatriates" for a year, would also be exempted from the requirements of American manufacture as to their works.

The likely result, even if the revision bill is passed, is that the Bureau of Customs will have to continue its enforcement of American manufacturing requirements in much the same fashion as at present. This will be so even though subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright protection, and that the effects of non-compliance are limited to rights with respect to reproduction and distribution of copies. Although the bill would remove the "ad interim" time limits an import statement would be required to import a specified number (currently proposed at 2,000) of books otherwise subject to the manufacturing requirements. In administering the import statement procedure, the Bureau of Customs will be an effective agent to prevent the importation of more than that number. The complexity of administration and determining which books are subject to the 2,000 limit, however, would remain a burden of Customs. Where specific Congressional or judicial guidelines are lacking, the Bureau will continue making those interpretations which dispose of the actual cases presented to it, not in a vacuum, but representing very real problems of businesses and individuals.

IV. IMPORTATION PROHIBITIONS: JURISDICTION, ENFORCEMENT AND DISPOSITION OF EXCLUDED ARTICLES

A. *Existing Practice*

Although the laws of the United States relating to patents, trademarks and copyrights have been extended to the Virgin Islands,²⁹ that territory is not within the "United States" Customs territory for operational procedures.³⁰ Nor is action taken concerning copyrights for im-

29. 48 U.S.C. 1405 q.

30. 19 U.S.C. 1401 (k).

portations into other American territories such as Guam, American Samoa, or Wake Island. Since the Commonwealth of Puerto Rico is technically within Customs territory, all Customs procedures, including copyright operations for importations, are applied there.

Customs administrative cases usually arise at local Customs offices pursuant to the general or specific instructions issued by headquarters. Perhaps a case could be brought in the Customs Court protesting Customs refusal to release³¹ allegedly piratical merchandise, articles bearing a false notice of copyright, or works in violation of the manufacturing clause, but to the author's knowledge, this has never been done.

Under section 23.25(a)(2) of the Customs Regulations, a District Director (or New York Regional Commissioner) is delegated the authority to dispose of forfeitures of merchandise valued at \$2,000 or less. However, local offices have the option to submit any case to the Bureau for assistance, decision, or clarification. Of course, if other Customs penalties are incurred such as for false invoicing, they would be treated individually.

Theoretically, at least, the Tariff Act's statute of limitations permits Customs to go after a violation of "customs law" up to 5 years after the discovery of the alleged offense.³² More realistically, Customs may, within a reasonable time, demand redelivery of offending merchandise which has been released pursuant to immediate delivery procedures, for example. If the merchandise can not be returned, Customs may assert a claim for liquidated damages equal to the value of the merchandise plus duty, which runs in favor of the Government and not the copyright owner. In unintentional violations this claim is usually cancelled upon payment of a nominal sum.

Section 108 of the copyright law provides that all articles prohibited importation shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the Customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or a court, as the case may be, shall direct. However, an exception is made whereby copies of authorized editions of copyrighted books imported in the mails or otherwise in violation of the copyright law may be exported and returned to the country of export when it is shown to the Secretary of the Treasury in a written application, that such importation does not involve willful negligence or fraud.

31. 19 U.S.C. 1514.

32. 19 U.S.C. 1621.

As indicated above, the current practice of Customs is to consider a petition for relief whether the violation be a piratical copy or a failure to comply with the manufacturing clause. The rationale for this practice would seem to be that the copyright law's section 108 reference to seizing and forfeiting by like proceedings as those provided for violations of Customs laws incorporates the general relief-granting authority of section 618 of the Tariff Act.³³ Customs can not "mitigate" the liability incurred by a piratical copy since the item itself constitutes the violation. However, occasionally it may be possible to "cure" the violation, as for example, by removing a non-piratical item from a box or display card which is a piratical copy of a commercial print or label, or instruction book. To date, forfeited piratical copies, particularly books, have not been turned over to Government or charitable use, but have invariably been destroyed. Exportation for charitable use abroad (such as the Peace Corps or UNESCO) has not been done but might be a possibility, especially if requested or agreed to by the importer, for example in a willful case where Customs otherwise would have destroyed the forfeited merchandise.

An administrative dilemma arises when the copyright owner wishes to "have his cake and eat it, too," by first prevailing upon Customs to rule that an import is piratical of a recorded copyright and then, after private negotiations with the importer, requesting Customs to release the shipment. Here, Customs is being used as an agent to collect royalties. However, the copyright owner's position is that since the law is intended to protect him, why should the Bureau of Customs complain? Within legitimate limits of feasibility, Customs tries to accommodate the importer and the copyright owner if this stop-and-go pattern is not likely to be asserted repeatedly.

Although inconsistent with previously initiated court action or Customs satisfaction that piracy existed, Customs has accepted a copyright owner's claim that an article should be released as not piratical because it is no longer imported "in contravention of the copyright owner's rights," as defined in the Customs Regulations. Not so clearly inconsistent is the situation where, in a questionable case, a copyright owner first files the bond (in an amount equal to the value plus duty of the claimed piratical goods) required by section 11.20(c) of the Regulations, within ten days after notification by Customs, and then asks to withdraw it. In both situations, Customs is likely to require a written statement from both the copyright owner and the importer consenting to release

33. *Supra*, note 6.

of the goods from Customs' custody and agreeing to hold Customs harmless from any claims arising from the release of the shipment.

In the two above-mentioned cases and where the copyright owner once admits he can not prove piracy, subsequent shipments of identical goods to the same importer are likely to be passed without question. Customs does not rule on the substantive effect of releasing without a copyright notice, goods which were first detained but are now "licensed" by the copyright owner.

B. Possible Future Developments

Section 603 of the revision bill would retain in subsection (a) the authority for the Secretary of the Treasury and the Postmaster General to separately or jointly make regulations for the enforcement of prohibited importations. Subsection (b) would provide that such regulations may require as a condition for exclusion of articles under section 602 ("piratical copies") that the person seeking exclusion (1) obtain a court order enjoining importation of the articles or, (2) furnish proof of the validity of the copyright "in which he claims an interest"; and that the importation would violate the prohibition of section 602. Under (2) the person seeking exclusion may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be "unjustified."

Since the alternatives of section 603(b)(1) and (2) are apparently those of the Secretary of the Treasury and not the person seeking exclusion, Customs could add to the Customs Regulations a provision for implementing a court order without requiring the normal steps of Customs recordation to be followed, and/or continue its present recordation practices and protection procedures. As indicated in connection with the copyright survey outlined by section 602, the term "copyright owner" would probably be more appropriate and less vague and troublesome than a person "claiming an interest" in a copyright.

If the regulations mentioned in section 603(a) are to be mandatory, it seems that Customs action based on the court order procedure of proposed subsection 603(b)(1), unlike subsection 603(b)(2), recognizes that "customs officers are called upon to decide questions of law and fact which are sometimes complex or beyond their ability to investigate" and that "The Bureau of Customs is often in no position to decide questions of law or fact involved in determining whether copies or phonorecords are 'piratical'." ³⁴ As indicated above, the Bureau of Customs when

34. Report of the Register, *supra*, note 7, at 125.

presented with actual cases involving importations, resolves the matter on the basis of principles of copyright law as developed by court decisions, or when appropriate, reference to legal writers.

To the author's knowledge, no case has gone unresolved administratively simply because the questions of law and fact were complex. However, if the basic issue of piratical copying is implicit within a pending copyright infringement lawsuit, the Bureau will defer any action until some court decision bearing on the matter is reached. Under these circumstances, merchandise which has been released is subject to recall, and merchandise under detention shall remain so until some aspect of the litigation disposes of the case.

Proposed subsection 603(c) applies to articles imported in violation of either section 601 (the "manufacturing clause") or section 602 ("piratical copies") and provides that such articles are subject to seizure and forfeiture in the same manner as property imported in violation of the Customs "revenue" laws. Forfeited articles "shall" be destroyed but they may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law. As discussed above, Customs has granted relief in the form of exportation, under existing law. It would seem that the Bureau's watchdog responsibilities would be fulfilled by preventing the importation of forbidden items without attempting to condition release on exportation to a territory over which it has no jurisdiction. If strictly construed, this point might well invite litigation.

CONCLUSION

In carrying out its administrative responsibilities for copyrights, the Bureau of Customs must make decisions based largely on substantive factors. This is because of the inherent difficulty in developing precise legislative and judicial guidelines. Customs must consider questions of law as well as fact before concluding what is a "piratical copy" and matters of substance may also be implicit in determining what is a "false notice" of copyright, or a violation of the American "manufacturing clause." As copyrighted works become technologically more complicated, the job of import protection will become more difficult.

Since Customs deals with the realities of international commerce and travel on a daily basis, the tough questions cannot be deferred. The goal of the implementation and revision of the Customs Regulations is

to make the relationship between importing and copyrights as understandable and painless as is legitimately feasible.

Passage of the copyright revision bill in its present form would remove the question of "false notice" from Customs activities; but it would add a copyright survey procedure and permit Customs to prohibit importations on the basis of court action without Customs copyright recordation. Otherwise, Customs functions concerning copyrights will remain basically the same under the proposed law.

2. THE ORIGINS OF COPYRIGHT LAW IN ANCIENT JEWISH LAW

By VICTOR HAZAN*

The origins of copyright and copyright laws are always of interest to copyright lawyers. A recent research made in Israel has brought to light certain sources which were heretofore unknown, or perhaps it is more correct to say undiscovered. The sources were there and those conversant in Jewish traditional laws have probably known the sources all along. But the people who practice Jewish traditional law are usually Rabbis and scholars, and not particularly interested in the practice of copyright law. The sources are, in the view of this writer, of such universal importance that copyright lawyers should be acquainted with them and perhaps their study may establish whether there is any connection between the sources of Jewish law and universal copyright.

A few words of explanation are perhaps required. The State of Israel is now in the process of reviewing its civil law, which is a mixture of laws left over by various occupying powers: the Ottoman laws of the Turks, the British legal system, and various ordinances promulgated during the Mandate. The Ministry of Justice, under cultural, religious and political pressures, has undertaken a series of studies to find how and whether principles of ancient Jewish law are applicable to modern times and modern legal systems.

I have no intention to lead the reader into the labyrinth of ancient Jewish law: basically of course it is founded on the Torah, which is the Pentateuch of the Bible. Then there are the oral and written principles of the Rabbis through the centuries of Jewish history which form the basis of Talmudic law.

Copyright law is now and has been for some time under revision in the State of Israel and like every other chapter of Israeli Civil Law, a thorough research has been made on whether the concept of copyright was at all known in ancient Judea, and if so, what were the first precepts of Jewish copyright principles, and how old were they.

* The author is a barrister of Tel Aviv and member of the firm of Hazan & Noam. The talk here reproduced was delivered at the CISAC Congress held in Las Palmas, Grand Canary Islands, from June 19 to June 27, 1970, and is printed here with the author's permission and that of BIRPI, which plans to publish the talk in a forthcoming issue of COPYRIGHT.

This thorough research work was made by Dr. Nahum Rakover, the Adviser for Jewish Law in the Israeli Ministry of Justice, and great credit should be given to him for the various concepts he uncovered and which are the subject of this article. It is impossible to give here the full, thorough and very instructive work which Dr. Rakover has made, because space does not permit to do so, and in any case one should be acquainted with Jewish Rabbinical Law to be able to follow the erudite conclusions of Dr. Rakover. It is my belief that a few instances will be enough to provide material for thought in the study of copyright in general.

It is commonly thought that the first principles of copyright law originated with the protection given to printers after the invention of printing. No principles of copyright going back further than that have been thus far published. A system of copyright law dating beyond these known sources is unknown. It is common knowledge that the principles of Roman law did not include author's protection so that the Romans had no principles similar to copyright's basic concepts.

It is, therefore, the more amazing that ancient Jewish law did have principles of copyright which, as we shall see presently, are very similar to principles that today are accepted as a matter of fact. Of course, these ancient Jewish principles are very primitive and the first concepts of copyright are very concise. But they are there. In any case all law dating back to ancient Jewish times, whether Jewish or not, is rudimentary and primitive in form, though certainly not in depth of thought. The question therefore arises: how old are the very first and early principles of copyright?

It could be said, perhaps, that the first principle of copyright can be found in the Eighth Commandment: "Thou Shalt Not Steal." But this ancient proposition did not deal with rights to chattels as distinct from the chattels themselves. At the time this Commandment was promulgated, society was too primitive to deal with "incorporeal rights." So Jewish law did not and could not base any principles of copyright on that precept, though the principle of stealing is at the base of the earliest conception of the right of authors to the product of their minds.

The first attributed concept to be found in ancient Israeli law was traced to Jeremiah. Thus in Jeremiah Chapter 23 is found, in the 30th verse, this saying:

"Therefore behold saith the Lord. I am against the prophets that *steal my words* everyone from his neighbour."

This "innocent" verse in Jeremiah became the basis for various rabbinical precepts against the stealing of words. It is also interesting to note that the word "plagiate" comes from the Greek "Logcaliptis" which literally can be translated into "stealing of words." It appears that the Greek word "Logcaliptis" found itself in the Talmudic literature; Jewish scholars have traced a distorted version of this word in the Talmud in connection with the stealing of words attributed to Jeremiah.

In the later Talmudic literature we find that this principle was used against certain prophets who, hearing what Jeremiah would prophesize "in the higher market" of ancient Jerusalem, would then go to the "lower market" and give the same prophecy, somewhat distorted as if it were their own prophecy. This practice was frowned upon as the "*stealing of words*."

The saying of the Prophet on "thieves of words" is probably at the basis of a very important rule of Jewish Law: "reporting a thing in the name of him who said it" and not saying things told by somebody else as if those same things were said by yourself. This precept was clearly reported as early as the year 70 A.D., and was probably conceived long before that.

A historical parenthesis is required here so as to give a clearer picture of how ancient this rule is and how it was preserved. In the year 70 of the present era, Jerusalem and the Temple were laid in ruins by the Armies of Rome. Independence gone, what was to become of Israel? At that time there lived a Rabbi Yochanan, the son of Zakai. He it was who conceived the future of Israel as a spiritual entity. He began the process of collecting a great number of common thoughts of extreme importance in early oral Jewish tradition; this process continued for some 130 years, until these thoughts were collected and classified in the later Mishna. The principle just quoted comes from one of those collected principles.

Thus you find in early Jewish religious law, that "reporting a thing in the name of him who said it" is one of the forty principles required to be studied by scholars in order to be acknowledged as a person "cognisant of the Torah." And also it was said that "a person reporting things in the name of him who said it, brings salvation to the world." This last form of declaring principles of law was common in Jewish traditional law.

Perusing through Talmudic law you therefore find that reporters (as is generally known, the Talmud is the collection of oral principles

reported from one generation to another), were very careful to express principles of law mentioning always their authors, and they would never adopt a principle as their own, unless indeed it was an original and unprecedented precept which was being expounded.

Most, if not all, of Talmudic law is espoused by way of arguments among Rabbis: each of them interpreting—perhaps it is more appropriate to say “dissecting”—this or that principle of the Pentateuch. These are reported as arguments given by the Rabbis themselves, and often they took principles already expounded either to make an analogy, or to support a point or use as precedent.

Thus you find the following interesting passage in one of the Talmudic books. Rabbi Eliezer, one of Rabbi Jonathan’s pupils, was telling something which obviously he had heard from his teacher Rabbi Jonathan, and Rabbi Jonathan, who was present, objected to this and was “calmed” only after he was told by Rabbi Jacob: “Not everything that Joshua told the people was told in the name of Moses, yet everyone knew that whatever Joshua commanded was in Moses’ name and not in his own name. So Rabbi Eliezer, your pupil, is expounding principles in your presence and everyone present here knows they are your principles and not his own.”

You see how jealous authors were even in those times!

These concepts developed much later into the principle that a book should not be credited to someone who did not write it. You find development of those principles in various books written by famous Rabbis of the Hassidic period in the 16th and 17th Centuries, all emphasizing the importance of authorship; later even stating that principles of trespass and fraud are involved when a person “steals words.” One Rabbi even expressed the opinion that the “stealing of words is worse than the stealing of money.”

It is impossible in this talk to go into the details of the various cases with which Rabbis had to deal through hundreds of years in various countries of the Diaspora and to give judgments based on the simple principles: “Stealing of words” and “reporting in the name of the author.”¹

-
1. The reader who may have a knowledge of Hebrew may refer to Dr. Rakover’s pamphlet, “Sources of the Principles of Copyright,” published by the Israeli Ministry of Justice; there are some sources translated into English such as the “Talmud” and “Pirkei Avot” (Fathers’ Chapters). The Israeli Ministry of Justice would also furnish information on the availability of sources in other languages than Hebrew.

It is of tremendous importance to note that this principle of "reporting a thing in the name of him who said it" was considered to be as important during the life of the author as after his death. Often it was considered even more important to abide by the principle of authorship after the death of "the teller" than during his lifetime, and Jewish Rabbis sitting as Judges very often gave judgments for the protection of author's heirs. The similarity between this and the "post-mortem" principle of protection in later copyright laws is striking. The Rabbis opined that the principle should be observed after the death of the author because, they said, after his death it is "not even possible for the author to forgive you for the fact that his authorship was not mentioned."

It is amazing to find in the immense literature developed by the Rabbis during the course of centuries, principles of copyright that are surprisingly similar to principles which developed in Europe only in the late 19th and early 20th centuries. Examples like a decision that permission must be obtained to copy or reproduce material published by an author or that, if such author died, then permission should be obtained from his heirs, can be found two or three hundred years before such obvious principles were developed in European copyright laws—and all those principles were based on the simple precepts taken from Biblical or Talmudic references quoted above.

Later in the history of Rabbinical jurisprudence is found the principle that if one wants to copy from another's work, then he should pay for such permission. Conflicting opinions also are not lacking, as, for instance, the one Rabbi who was of the opinion that if books had been printed or sold, then they could be copied without remuneration for the sake of learning. I wonder if this particular Rabbi did go so far as to foresee the Stockholm Conference and the troubles involved with copyright in the undeveloped countries.

Of course the principles enumerated here are, by their very nature, in their embryonic stage: the primitive life of the early Talmudic time and the limited Ghetto life of the Jewish people during the centuries, could not allow for a development of those basic principles of copyright into a detailed codex of law pertaining to all problems of copyright as are now widely acknowledged. Such development did take place in other fields, such as the dietary "Kosher" laws.

There is, however, one basic difference in the origins of copyright principles in Jewish ancient law and the precepts of general copyright in the world. Jewish ancient law started from the moral side (or *droit*

moral) of the principle involved in the defense of one's right to one's spiritual work: modern copyright law on the other hand had its beginning in the material worth of the right to the defence of one's literary work. Thus the early known verdicts of copyright were more concerned with printers' rather than authors' rights.

Jewish ancient law, by basing its precepts on the importance of not having prophets prophesying from the mouths of other prophets, as in Jeremiah, and from there to the statement of the importance of "reporting things in the name of their authors," stressed the moral rights of authors. The pecuniary rights involved were a later development, something which took place when those protected moral rights came face to face with daily materialistic life so that pecuniary rights came to be protected as a consequence of the defense of the moral right of authors.

This article was only meant to touch on some of the aspects of the research being made to uncover the origins of authors' rights in Jewish life, and to do no more than inform copyright lawyers of a field which was so far unknown. It carries the hope that enough interest will be generated for scholars throughout the world to begin to explore this hitherto undiscovered world of Jewish ancient jurisprudence and the possible influence that it had on the thoughts of people outside Judaism. We have a saying in Israel that a Rabbi could find a source for anything under the sun in the Bible. It may or may not be so, but I think it is of interest to all lawyers in the field of copyright to know that, with proper research and study, copyright like so many moral principles, can be traced to that great and universal book, which is the basis of all moral enlightenment for most of the civilised world: the Bible.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

3. U.S. CONGRESS. HOUSE. *Committee on Foreign Affairs. Subcommittee on National Security Policy and Scientific Developments.*

Foreign policy implications of satellite communications. Hearings . . . Ninety-first Congress, Second Session, April 23, 28, and 30, 1970. Washington, U.S. Govt. Print. Off., 1970, 212 p.

Includes some testimony on copyright problems.

4. U.S. CONGRESS. SENATE. *Committee on the Judiciary. Subcommittee on Patents, Trademarks, and Copyrights.*

Report, pursuant to S. Res. 49, 91st Cong., 1st Sess., as extended, submitted by Mr. McClellan, November 22, 1970. 13 p. (91st Cong., 2d Sess., S. Rept. No. 91-1219).

The annual report on the activities of the Subcommittee covering the first session of the 91st Congress. In respect to copyright, a brief summary is given of the major provisions contained in each of the three titles of S. 543, the copyright law revision bill as approved by the subcommittee, with amendments, on December 10, 1969.

5. U.S. *Laws, statutes, etc.*

Public Law 91-419, 91st Congress, S. 3838, September 25, 1970. An act to prevent the unauthorized manufacture and use of the character "Johnny Horizon," and for other purposes. 1 p. (84 STAT. 870).

See 17 BULL. CR. SOC. 401, Items 195 and 196 (August 1970).

2. Foreign Nations

6. JAPAN. *Laws, statutes, etc.*

Copyright law of Japan. [Law No. 48, promulgated on May 6th, 1970] Provisional translation. [Tokyo] Agency for Cultural Affairs, 1970. 56 p.

A newly revised Japanese copyright law which goes into effect on January 1, 1971. The new law includes neighboring rights provisions. See 17 BULL. CR. SOC. 454, Item 287 (August 1970). The address of the Agency is 3-2-2 Kasumigaski, Chiyodu-Ku, Tokyo, Japan.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

7. Ad Hoc Preparatory Committee for the Revision of the Berne Convention, *Geneva, May 19 to 21, 1970.*

Final report. (*6 Copyright*, 144-156, no. 8, Aug. 1970.)

Includes the Draft text adopted by the Committee. Appended are the "Working document submitted by the Director of BIRPI" and the "List of Participants."

The Draft text is also published in *Unesco Copyright Bulletin*, vol. 4, no. 2 (1970), pp. 32-36.

8. Ad Hoc Preparatory Committee to Prepare a Draft Text of the Proposals for Revision of the Universal Copyright Convention, *Paris, May 11 to 16, 1970.*

Report. (*6 Copyright*, 160-175, no. 8, Aug. 1970.)

Contents: I. Introduction; II. Preparation of a draft text of the proposals for revision of the Universal Copyright Convention; III. Draft text of the proposals for revision of the Universal Copyright Convention; Annexes: I. Working documents. II. List of participants.

The report is also published in *Unesco Copyright Bulletin*, vol. 4, no. 2 (1970), pp. 4-30.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

9. *Wiseman v. Massachusetts*, 26 L.Ed.2d 546 (U.S. July 15, 1970).

Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts seeking review of an order enjoining general commercial distribution of the film "Titticut Follies."

Held, petition denied (Mr. Justice Marshall taking no part in the decision).

Mr. Justice Douglas was of the opinion certiorari should be granted and Mr. Justice Harlan, joined by Mr. Justice Brennan, dissented in an opinion stating in part:

Petitioner's film is a "documentary" of life in Bridgewater State Hospital for the criminally insane. Its stark portrayal of patient-routine and treatment of the inmates is at once a scathing indictment of the inhumane conditions that prevailed at the time of the film and an undeniable infringement of the privacy of the inmates filmed, who are shown nude and engaged in acts that would unquestionably embarrass an individual of normal sensitivity. The Massachusetts court concluded that the State had standing on behalf of the inmates to bring an injunctive action to protect their right of privacy and that the balance to be struck between the First and Fourteenth Amendments . . . and the individual's interest in privacy and dignity was such that the dissemination of the film should be restricted to audiences of professional, *e.g.*, lawyers, psychiatrists, with a special interest. . . .

The balance between these two interests, that of the individual's privacy and the public's right to know about conditions in public institutions, is not one that is easily struck, particularly in a case like that before us where the importance of the issue is matched by the extent of the invasion of privacy. . . .

A further consideration is that fact that these inmates are not only the wards of the Commonwealth of Massachusetts but are the

charges of society as a whole. It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care. At the same time it must be recognized that the individual's concern with privacy is the key to the dignity which is the promise of civilized society. . . .

The subtlety and importance of the question presented by this case was, by no means, lost on the Massachusetts Supreme Judicial Court.

"That injunctive relief may be granted against showing the film to the general public on a commercial basis does not mean that all showings of the film must be prevented. As already indicated . . . the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution. It is a film that would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields and organizations dealing with the social problems of custodial care and mental infirmity. The public interest in having such persons informed about Bridgewater . . . outweighs any countervailing interests of the inmates and of the Commonwealth (as *parens patriae*) in anonymity and privacy . . ."

These conclusions represent a measured and thoughtful attempt to grapple with a difficult and important problem. Yet they demonstrate the importance of review by this Court for they sharply focus the dimension of the question presented by this case. The question at this juncture is not whether the Supreme Judicial Court was correct or incorrect in striking the constitutional balance, but merely whether this Court should grant certiorari. I fail to see how, on a complex and important issue like this, it can be concluded that this Court should withhold plenary review. The case for review is strengthened by the fact that a distinguished federal judge refused to enjoin in New York the showing of this very same film. This is not of course the traditional conflict that requires this Court to step in, but it underscores the difficulty and importance of the issues that are apparent both from reading the decision of the Massachusetts court and a viewing of the film.

I am at a loss to understand how questions of such importance can be deemed not "certworthy." To the extent that the Commonwealth suggests that certiorari be denied because petitioner failed to comply with reasonable contract conditions imposed by the Commonwealth, that question in itself is one of significant constitutional dimension, for

it is an open question as to how far government may go in cutting off access to the media to its institutions when such access will not hinder them in performing their functions. . . . In the case before us, however, the only asserted interest is the State's concern for the privacy of the inmates in its care, and the basis for the decision below was the predominance of that interest over that of the general public in seeing the film.

The Commonwealth does not urge, nor could it do so given the opinion of the court below, that the injunction against showing this film was a mere remedy for a breach of contract, assuming the Commonwealth was free to impose whatever restrictions it chose on press access to Bridgewater. . . I see no way to sift out an independent state ground based on contract principles. Moreover, even if the injunction could, in the absence of any discussion of principles of contract law, be viewed as a remedy for a breach of contract, a question of First Amendment dimension is presented when that remedy is to enjoin the dissemination of information of such importance.

10. *Goodis v. United Artists Television, Inc.*, 165 U.S.P.Q. 3 (2d Cir. March 9, 1970). For decision below, see 278 F.Supp. 122 (S.D.N.Y. 1968), 15 BULL. CR. SOC. 244, Item 257 (1969).

Appeal from summary judgment for defendants in action for copyright infringement. Plaintiffs are the executors of the estate of David Goodis. In 1945 Goodis wrote a novel entitled "Dark Passage" which was first published in serialization by the Curtis Publishing Co. in issues of *The Saturday Evening Post*. Although each issue of the *Post* bore a blanket copyright notice, there was no separate notice in Goodis' name for the serial excerpts. Subsequently, "Dark Passage" was published in book form, and a motion picture based on the novel was produced by Warner Bros., under agreements with Goodis. In 1956 defendant secured an assignment of Warner's contract rights and produced a successful television series ("The Fugitive") derived from the novel. Plaintiff claimed that the television series infringed his copyright, but the trial court granted defendant's motion for summary judgment on the grounds that (i) Plaintiff's novel had been thrown into the public domain by Curtis' serialization thereof without a separate copyright notice in Goodis' name, and (ii) Goodis' agreement with Warner encompassed the right to produce such a television series.

Held, reversed and remanded.

I. *Copyright*: In an opinion by Judge Lumbard concurred in by Judges Waterman and Kaufman, the Court unanimously concluded that

where a "magazine has purchased the right of first publication under circumstances which show that the author has no intention to donate his work to the public, copyright notice in the magazine's name is sufficient to obtain a valid copyright on behalf of the beneficial owner, the author or proprietor." The court said:

In the district court, defendants argued that the single copyright notice in the magazine's name was not sufficient to preserve Goodis' right in "Dark Passage"; thus, the novel, not being protected upon first publication, was thrown into the public domain as it appeared, installment by installment, in the "Saturday Evening Post." While it is clear that a periodical under some circumstances may obtain copyright for itself on the contents of an issue by a single copyright notice containing its own name . . . defendants urged that Curtis could only obtain copyright on behalf of the beneficial owner for those installments of which it was a "proprietor" or "assignee," rather than a mere "licensee." [T]he district court concluded as a matter of law that Curtis could not have been an assignee because it had been granted only a license for a one-time serialization of the novel.

Such a determination rests on the doctrine of "indivisibility of copyright," which rejects partial assignments of copyrights and requires a proprietor or assignee of a copyright to hold nothing less than all the rights in a copyrighted work. It is true that Curtis did not own all the rights in "Dark Passage" at the time it was first published; in fact, at that time Goodis and Warner Brothers had already contracted for the exclusive motion picture rights.

We are convinced, however, that the doctrine of indivisibility of copyright is a judge-made rule which relates primarily to the requisite interest needed to bring an infringement action. . . . The most frequently cited policy for applying the indivisibility rule is to avoid multiple infringement actions, each brought by the holder of a particular right in a literary work without joining as co-plaintiff the author or proprietor of the copyrighted work. . . . Even after the Copyright Act underwent substantial revision and liberalization in 1909, the courts in this circuit indicated support for the doctrine. . . .

But, regardless of the vitality of the indivisibility theory as it applies to the question of standing to sue, we do not think that it is determinative as to the requisite interest of a party who may act to obtain copyright. In the cases relied upon by the district court, it was found either that a complete assignment had been made or

that the plaintiff claiming infringement was not the author or proprietor of the work. . . . We find nothing in the established cases which requires us to extend the logic of those precedents to a case where an author is plaintiff. We are loath to bring about the unnecessarily harsh result of thrusting the author's product into the public domain when, as here, everyone interested in "Dark Passage" could see Curtis' copyright notice and could not have believed there was any intention of Goodis to surrender the fruits of his labor.

Courts have been understandably reluctant to invoke the doctrine of indivisibility where the author or proprietor of the work is the plaintiff and the result would be to deprive the plaintiff of the fruits of his creative effort. . . .

We believe a distinction between applying the indivisibility doctrine to cases where the issue is standing to sue for infringement and cases where the issue is protection of the author's interest is supported by the Copyright Act and by common sense. Under the Copyright Act of 1831, an author or proprietor obtained copyright, before publication, by depositing a copy of the title of his work in the district court in the district of his domicile. Thus, had Goodis completed his novel before 1909 and made the required deposit, he would have obtained copyright in his own name before publication and would have been free to market his work to his best advantage, selling serial rights, dramatic rights, etc. at his pleasure, without jeopardizing his copyright. In several cases before 1909 harsh forfeitures resulted from technical failures to comply with the statute, even though there was little chance that the public might have been misled by the errors. . . .

In 1909 the Copyright Act was amended and the method of obtaining copyright simplified. Under the revised Act, an author or proprietor could secure statutory protection by actual publication of the work with notice in conformity with the Act. Although appellees characterize this change as irrelevant, we think it is critical. Suddenly the author who might previously have obtained copyright before publication had to guard against any legal infirmity surrounding first publication which might throw his work into the public domain. One can understand the requirement that only an author or proprietor perfect copyright under the 1831 statute, since copyright had to be obtained before publication and the author or proprietor was expected to have exclusive control over the work. After 1909, however, it was to be expected that first publication of the work, whether in magazine or book form, would be the means

of obtaining copyright. To require full proprietorship by the initial publisher would too often provide a trap for the unwary author who had assumed the publisher would attend to copyrighting the work in his behalf.

In considering the 1909 amendments and the liberalizing spirit in which they were enacted, we note that the proposed general revision of the copyright law, introduced in the 90th Congress and referred to the House and Senate Judiciary Committees, would make the result reached by the district court in the present case impossible. S. 597, 90th Cong., 1st Sess. §§201 (c), 403 (a), 403 (b), 405(a) (1967). In summary, these proposed provisions make it clear that: (1) the author of a literary work which is published for the first time in a "collective work" such as a periodical holds a copyright distinct from that in the collective work as a whole, §201 (c); (2) that first publication in a collective work under a general copyright notice in the name of the periodical publisher is sufficient to secure the author's copyright in the work, §403 (a); and (3), that where the person named in the copyright notice applicable to a collective work is not the owner of the copyright in a separate contribution which appears in the collective work without its own notice, the case is treated simply as one with an error in the name in the notice, such error not affecting the validity or ownership of the copyright. §§403 (b), 405(a).

The report of the House Committee on the Judiciary states that these proposed provisions deal "with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works." H.R. Rep. No. 83, 90th Cong., 1st Sess. 113 (1967). Our decision today is that the result which the proposed legislation would compel is not precluded in any way by the decisions rendered under the present Copyright Act. As discussed earlier, the "problem" with which the proposed legislation deals is one which exists because of judicial dicta rendered in cases not apposite to the factual situation before us in this case. We believe that it is time to settle the disquieting implications of these dicta in cases where the author sues for infringement.

In reaching this result, we also take account of modern business practices. Today many magazines market new writings in serial form. It should be expected that serialization will often be the "first publication" of a work, since much of the value of such an arrangement to the periodical lies in reaching magazine readers before the complete book has been released.

The harsh results before the 1909 amendments should be avoided if possible, particularly as here where the magazine's own notice of copyright is more than adequate to apprise any innocent party that he might be infringing another's copyright. As both *amicus curiae* briefs point out, the principal purpose of the statutory notice provisions is to inform the public that copyright is claimed. Appellees do not dispute that the Curtis notice was perfectly adequate for this purpose. Although placing a special notice in the author's own name on each installment appearing in the magazine would be a more careful practice than we find here, we do not think that failure to do so, by itself, should cause an author to suffer forfeiture.

That such an arrangement between Curtis and Goodis is in the nature of a "partial assignment" is no reason to require a different result. . . . Where the question is the interest needed to obtain copyright, we reiterate that the important considerations are the intention of the parties to obtain copyright and the adequacy of notice to the public; the characterization of the publisher as assignee or licensee is secondary.

II. *Contract*: In an opinion by Judge Waterman, joined by Judge Kaufman, the Court held that the language of the agreement between Goodis and Warner did not so clearly convey the right to create a television series as to justify summary judgment for defendant. The court said, in part:

The party to whom summary judgment is awarded must have shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The question presented here is whether the contract language demonstrates unambiguously that Goodis meant to convey to Warner Brothers the right to create a television series such as *The Fugitive* or whether a genuine issue of material fact exists as to what the parties intended by the language they used.

The rights which the contract conveyed to Warner Brothers "in said writings" included "the exclusive, complete and entire motion picture rights," and "the right to broadcast and transmit any photoplay produced hereunder by the process of television . . . provided that such broadcasts and transmissions are given from the film of such photoplay and not directly from the performances of living actors." The judge below held that the term "any photoplay produced hereunder" unambiguously included a television series of

photoplays such the *The Fugitive*. Accordingly, he awarded summary judgment to the defendants.

We disagree. It is our holding that the contract language does not so clearly permit production of *The Fugitive* as to entitle the defendant to the grant of a summary judgment.

The language of the contract clearly conveys to Warner Brothers the right to make a movie of *Dark Passage* and to show that movie on television. Moreover, Paragraph 17 of the contract conveys the right to vary the plot and characters of *Dark Passage* in making that movie. The question before us, however, is whether the contract unambiguously fails to put any limits on the degree to which Warner Brothers could change or modify the original story while using the story's characters.

In any appeal from summary judgment we must resolve all disputed questions of fact in favor of the appellant. Therefore, we accept appellant's factual representations in the complaint and assume that *The Fugitive* television series took the characters in *Dark Passage* and, using the novel's plot as a springboard, placed the characters the author created in a whole series of new plot situations developed by the motion picture company. It seems to us that the right to make "additions in . . . said writings" and in the characters and plot of *Dark Passage* does not necessarily go so far as to show that there is no genuine issue as to whether the characters of *Dark Passage* may be depicted in photoplay adventures which bear little relationship to the "said writings" of *Dark Passage*. Viewed in the context of the entire contract, the "additions" and "alterations" clauses of Paragraph 17 could be read in a more restrictive manner to permit only those alterations necessary to adapt a written story to the medium of film. Similarly, use of the word "unlimited" with respect to the rights to alter and supplement could have been intended only to prevent Goodis from protesting that his story had been distorted or mutilated.

Among the reasons that have caused us to conclude that this case should not be decided without a full inquiry into the intent of the parties is that our disposition of this appeal may affect the interpretation of other contracts which convey some of the divisible rights in a given story but do not explicitly mention among the conveyed rights the right to make subsequent stories employing the same characters, i.e., "sequels" as such stories are called in the publishing industry. Too, a proper decision as to what the parties intended in this case may largely depend upon the general custom and expectations of authors and of members of the publishing,

broadcasting, and film vocations. Because this case reaches us after a grant of summary judgment we have before us no evidence as to these customs and expectations. Many authors have used characters they created in one novel in a whole series of subsequent works; surely it would be rash of us to hold on summary judgment that the sale of rights in one of an author's works ends, without specific mention that it ends, the author's exclusive ownership of the valuable characters he created in that one work, when he may well desire to create sequels of his own using these same characters. . . .

Judge Lumbard would have affirmed the decision below on the grounds that the Goodis-Warner agreement did encompass the right to make a television series based on the novel.

11. *Thomas Wilson & Company, Inc. v. Irving J. Dorfman Company, Inc.*, 167 U.S.P.Q. 417 (2d Cir., October 16, 1970) (Feinberg, J.). *For decision on motion for preliminary injunction, see* 268 F.Supp. 711, 154 U.S.P.Q. 226 (S.D.N.Y. 1967), 15 BULL. CR. SOC. 151, Item 108 (1967).

Appeal from judgment for plaintiff in action for copyright infringement. Plaintiff, a manufacturer of lace for ladies' lingerie, secured copyright and registration for a particular "pansy" design embodied in an elastic fiber and subsequently registered an adaption of this design in a nylon fiber. Substantial quantities of plaintiff's nylon pattern were purchased exclusively by a single customer (Werner). Werner subsequently suggested to defendant that it produce a lace with the "look" of plaintiff's design using a cheaper process. Using a sample of plaintiff's lace provided by Werner, defendant produced a very close copy which it sold exclusively to Werner, replacing plaintiff's market.

The lower court, after a non-jury trial, awarded plaintiff injunctive relief and damages of \$84,211.54. Defendant appealed, challenging the validity of plaintiff's copyrights, the propriety of its registrations, and the computation of damages.

Held, affirmed.

I. *Validity of Plaintiff's Copyrights:*

Defendant asserted that plaintiff's copyrights were invalid for lack of creativity but the court, noting that "neither the Constitution nor the Copyright Act refers to originality in the creative sense" and that "the required creativity for copyright is modest at best," held that plaintiff's design as created by its own staff in the exercise of "an appreciable amount of creative skill and judgment" possessed "more than the

'faint trace' of originality [sic.] required," though it was "not what the phrase 'work of art'* ordinarily calls to mind. . . ."

Defendant asserted that plaintiff had failed to affix any copyright notice to substantial amounts of its distributed lace, but the Court of Appeals held that the trial court's contrary findings on this point were not "clearly erroneous." Defendant also argued that other of plaintiff's material bore a faulty notice because a single copyright notice sticker "for a bolt of 125 yards of the lace design is [legally] insufficient." However, the court held:

Assuming arguendo that to be so, we do not know whether plaintiff sold its lace design in that way; certainly the judge made no such finding. At trial, plaintiff proved ownership of a validly issued copyright and defendant's copying, which alone established a prima facie case of infringement under the statute. . . . Plaintiff also introduced evidence showing prima facie compliance with the notice requirements of the copyright law. Thereafter, the burden of establishing that plaintiff labelled and shipped its lace with insufficient notice rested on defendant. Defendant offered little evidence on this precise issue and failed to meet that burden, apparently because it did not press the point before [the trial judge]. Indeed, plaintiff's attempt early in the case to amplify the record with regard to its compliance with the notice provisions was stopped by the judge after defendant's objection, apparently on the theory that it was not yet relevant to a defense "real or possible." Under these circumstances, defendant should not be able to raise the point here.

II. *Validity of Plaintiff's Registrations:*

Defendant claimed that plaintiff's registrations were invalid because the applications therefor identified the president of plaintiff corporation, rather than the corporation itself, as "author" (under employment for hire) but the court held that these defects were "minor, . . . made in good faith, and could not have affected the action taken by the Copyright Office." Defendant also challenged the registration for the nylon version of the design because it did not refer to the elastic version. Although noting that this defect was "potentially more serious since it is arguable that if the material for which successive copyrights are sought is identical, this is an attempt to obtain an unjustifiable extension of copyright monopoly," the court found that plaintiff had no

* Plaintiff's designs were registered in Class G.

unlawful intent and that "the omission" was clearly innocent—"the great bulk of defendant's infringing sales," added the court, "came after it was served with plaintiff's complaint, which certainly put it on notice at least of the second copyright, which covered the same design as the first, although for a different material [and] under these circumstances, we do not believe that plaintiff should be denied the protection of its copyright."

III. *Damages:*

The sum of \$84,211.54 awarded to plaintiff represented the total of (i) the lost profit on sales plaintiff would have made to Werner absent the infringement, and (ii) the profit made by defendant on its sales to Werner. Defendant argued that, notwithstanding the language of 17 U.S.C. §101 (b) (referring to an award of "damages . . . as well as . . . profits" and "damages and profits"), the court should have awarded only damages (lost profits on lost sales to Werner) *or* defendant's profits on sales to Werner, but not both. The court answered:

While the statute seems clear, defendant's argument is not frivolous and finds support in a portion of the legislative history. However, in *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194 (2d Cir. 1964) [11 BULL. CR. SOC. 337, Item 212 (1964)] we squarely faced the issue and thoroughly canvassed the authorities. In accepting the harsher "cumulative" rule, we specifically relied on the rationale that it is "designed to discourage wrongful conduct," quoting that language from *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). This interpretation of section 101 (b) has been criticized, as well as supported, but we assumed its continuing validity only last term. *Alouf v. Expansion Products, Inc.*, 417 F.2d 767 (2d Cir. 1969) [17 BULL. CR. SOC. 242 Item 86 (1970)]. Of course, whether the rule is, or can be, too harsh, as defendant asserts, is arguable; when the same customer is involved, as here, in both plaintiff's lost sales and defendant's infringing sales, objection to the rule is at its strongest. But the Congress is not unaware of the problem, since proposals to modify this aspect of the statute have been pending there for some time. In any event, we believe that even on these facts the rationale of *Jobela* commits us. Since our examination of the rule has been so recent, we decline to reconsider it and will continue to abide by it.

Defendant also claimed that the trial court was required to award "in lieu of" damages rather than actual damages and profits, but the

court held that this was "simply an incorrect statement of the law." "Putting to one side whether the judge could ignore adequate proof of both damages and profits [and award statutory damages], at the very least he had discretion on whether to resort to the 'in lieu of' damage provision."

Defendant also challenged the trial court's calculations of its profits on sales of the infringed pattern to Werner, but the Appellate Court (noting, in part, the statutory burden upon defendant to "prove every element of cost" claimed by defendant) sustained the calculations as free of reversible error.

12. *Marvin Worth Productions v. Superior Films Corporation*. Not yet reported (S.D.N.Y., September 30, 1970) (Lasker, J.).

Motion for preliminary injunction in action for copyright infringement.

Plaintiff Marvin Worth Productions secured from its coplaintiffs the exclusive right to use material from two copyrighted books by and about the late "night club entertainer and social critic" Lenny Bruce in making a film (in production at the time of the opinion) about Bruce's life. Defendants produced a biographical film entitled "Dirtymouth" about Bruce and plaintiffs contended that this film utilized, without permission, substantial material appearing in the books.

Held, motion granted.

The court found that defendants' motion picture "copied or paraphrased [plaintiffs' copyrighted] material in such substantial quantity as to constitute a prima facie case of infringement," that the defense of fair use was inapplicable, and that a preliminary injunction was an appropriate remedy.

I. Infringement of Copyrighted Material:

Defendants asserted that material utilized in its picture was not protected by copyright by reason of inclusion in "public sources" and origin in "stock jokes" and conversations. However, the court held that a substantial amount of material copied by defendants was protected by plaintiffs' copyrights.

A. "*Public Source*" Material: Defendants asserted that certain allegedly infringing items were derived from (i) the transcripts of record and opinions in several of the criminal prosecutions which had been

brought against Bruce, and (ii) uncopyrighted jackets of recordings made by Bruce. In each case, however, the court found that the matter was originally copyrighted and could not be deemed to have subsequently entered the public domain by reason of inclusion in judicial records or use by reviewers on uncopyrighted record jackets.

The court said:

Without determining whether defendants in fact took the language in question from transcripts of trials or opinions, I find unpersuasive the contention that the use of such material, if originally copyrighted (as is undisputed here), is rendered innocent by inclusion in legal transcripts or opinions. To hold that such originally copyrighted material becomes somehow dedicated by use in the courts would permit the unraveling of the fabric of copyright protection. If defendants' theory were accepted, James Joyce's *Ulysses*, for example, would lie within the public domain merely because the United States prosecuted the book, unsuccessfully at that, a generation ago. Defendants cite no authority to support their position, and I find it without merit. Indeed, though not covering the point precisely, Section 8 of Title 17, U.S.C. . . . suggests a statutory policy opposite to defendants' theory.

Defendants claim that three further allegedly infringing items emanated from the uncopyrighted jackets of phonograph recordings made by Bruce. The first two passages, defendants say, come from the jacket of "The Essential Lenny Bruce Politics." I find the attribution incorrect, however, since this "blurb" was not published until after defendants' picture was written and produced. The last of these passages is said to derive from the jacket material of "Lenny Bruce, The Berkeley Concert." I have examined this jacket and do not find the material referred to — certainly not in form recognizable as a source. However, more important is the fact that the material reprinted on the jacket of "Lenny Bruce, The Berkeley Concert" consists of a commentary on Bruce's work by one Ralph J. Gleason, a critic of repute. While it may well be that Gleason had the right to utilize such material, qua critic, under the doctrine of fair use, the law does not permit a third party to lift from a critic's article copyrighted material of the original author unless the third party can independently justify his utilization under the doctrine of fair use — a matter which I deal with in a later portion of this opinion. The same observation applies to an item that defendants assert was published in *The New York Times* in a critic's column.

B. "*Stock Jokes*": The court found that a limited number of allegedly infringed jokes "involve[d] stock situations and [lacked] the quality of originality necessary to render them copyrightable." The court also held that a few allegedly infringed items were "entirely factual in nature, and thus not entitled to protection."

C. *Conversations*: Defendants claimed that much of the allegedly infringing material was derived from conversations of Bruce with associates of defendants and that Bruce "did not care whether others took and used his material." The court found that the only evidence presented by defendants on this point were entirely "generalized," "self-serving" and "conclusory" affidavits of defendant's associates, "unrestrained by any counter-assertion by Bruce, who is dead." Noting that defendants failed to assert that they recorded, took notes of or "otherwise preserved" the conversations, and did not specify what material, if any, was taken from tapes of his material allegedly given away by Bruce, the court found this evidence "markedly insufficient to sustain the claim that the material . . . utilized [in defendants' motion picture], identical or nearly identical with the copyrighted material, was in fact derived from Bruce's conversations."

"A still greater weakness in defendant's position," added the court, "is that even if some of their material was derived from Bruce's conversations, they have not established that Bruce dedicated this material to the public or waived his common law copyright on it. Abandonment is not to be found in negative behavior. . . . [Here] there is no affirmative evidence of intention to abandon common law copyright, but on the contrary, Bruce's statutory copyrighting of his own material during his lifetime is compelling evidence that he intended his original work to be protected in every respect." *

II. *Fair Use*: Defendant's "major position [was] anchored on the theory of fair use," particularly as enunciated in application to biographies in *Rosemont Enterprises, Inc. v. Random House*, 366 F.2d 303 (2d Cir. 1966) (13 BULL. CR. SOC. 411, Item 434 (1966)). After examining the indicia of this defense, however, the court found it inapplicable to the instant case:

The defendants here . . . claim that their use of the plaintiffs' material is a "fair use" because their taking was neither substantial

* Cf., although not discussed by the court, *Estate of Ernest Hemingway v. Random House, Inc.*, 296 N.Y.S.2d 771 (Ct. App. 1968), 16 BULL. CR. SOC. 180, Item 148 (1968).

in amount or quality and the appropriation, if found, is reasonably necessary to permit a production for the public benefit of a biography of Bruce.

The cases and commentaries attempting to define the quicksilver concept of "fair use," although varying and overlapping in their definitions, appear to agree that at least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantial taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce the demand for the original copyrighted property? (3) (As stated in *Rosemont*, supra), does the distribution of the material serve the public interest in the free dissemination of information? And (4) does the preparation of the material require the use of prior materials dealing with the same subject matter? Applying these tests to the case before me, I find that defendants have not established a fair use of Bruce's writings.

(1) The takings here have been substantial both in quality and quantity. . . . [A]n examination of the offending materials with the copyrighted texts establishes sheer copying in many instances and substantial paraphrase in others. Taken as a whole, they cannot be described as anything but substantial within the meaning of the copyright law.

(2) Since both "Dirty-mouth" and plaintiffs' film deal with the same relatively narrow subject (Bruce's life) and would be exhibited to the same audiences, it seems as certain as it can be, except after the fact, that the distribution and public showing of "Dirty-mouth" will operate to reduce the demand for Worth's film. As far back as *Hill v. Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914), it has been held that "if enough is taken . . . to materially reduce the demand for the original, the use will not be permitted." Cohen, "Fair Use in the Law of Copyright," *ASCAP Copyright Law Symposium*, p. 57 (1955). There can be no doubt that, in this context, the term "the original" applies not only to Bruce's already published writings, but to any film made from them. As Nimmer has stated in positing a hypothetical case remarkably analogous to the one here:

"Suppose A is the copyright owner of a published novel. B produces a motion picture copied from and substantially similar to A's novel. The motion picture may well not adversely affect the sale of A's novel. In fact it almost certainly will have the opposite effect. It is nevertheless clear that B may not invoke the

defense of fair use. B's motion picture has not prejudiced the sale of A's work in the book medium, but it has certainly prejudiced the sale of A's work in the motion picture medium. If the defendant's work adversely affects the value of *any* of the rights in the copyrighted work (in this case the right to convert to motion picture form) the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." (Emphasis added.) Nimmer on Copyright (1970), Sec. 145, pp. 646-647.

(3) Nor does the distribution of "Dirtymouth" appear necessary to serve the public interest in the dissemination of information about Bruce. There is no question here of the public being denied a film biography portraying Bruce's life; defendants are free to issue their film without the copyrighted material, and plaintiffs are preparing to release a film biographically based on the copyrighted works. The film "Dirtymouth" itself demonstrates that Bruce's life can be pictorialized for the public in useful form without improper utilization of Bruce's work. Indeed, the defendants themselves have commendably replaced nine excised and allegedly infringing sections with new material representative of Bruce's style and writings, but not drawn from his copyrighted material. The facts of Bruce's life are available to all, and plaintiffs do not, of course, contest defendant's right to their use. With material other than that taken from Bruce the defendants have demonstrated in "Dirtymouth" itself that Bruce's style, manner, philosophy and message can be portrayed without the necessity of using copyrighted work.

(4) The considerations expressed immediately above lead also to the conclusion that the preparation of the information for a film about Bruce's life does not require "some use of prior materials dealing with the same subject matter" — however definite such a requirement may be in preparing the biographies of others. No public need appears which would justify defendants' saving themselves time and trouble at the expense of plaintiffs' copyright. . . .

Defendants' heavy reliance on *Rosemont, supra*, is misplaced. In *Rosemont*, the defendants sought to publish a biography of the industrialist Howard Hughes. Consistent with his well known desire for absolute privacy, Hughes' corporation Rosemont Enterprises, Inc. (which appears to have been created for the specific purpose of acquiring the rights to any copyrighted material relating to Hughes) secured the copyrights to magazine articles entitled "The Howard

Hughes Story" which had appeared years before the commencement of the litigation. Immediately upon acquisition, Rosemont sought to enjoin the publication of defendants' biography of Hughes. The Court of Appeals for this Circuit, overruling the District Court, denied the application for a preliminary injunction on the principal ground that the defendants' publication constituted a "fair use."

To whatever extent these facts may be considered analogous to those here, the cases part company at this point. In *Rosemont*, the court found that defendants had copied only two direct quotations and one eight-line paraphrase. Here the quantity of taking is, of course, substantially greater. In *Rosemont*, the court held that the plaintiff appeared to be acting in bad faith and to have acquired the copyrights solely for the purpose of *suppressing* the publication of other biographical matter; here there is no dispute that the plaintiffs acquired the material in good faith and, as distinct from *Rosemont*, intend themselves to *publicize* the facts of Bruce's life. In *Rosemont*, the court found that defendants' appropriations could not have injured the plaintiff since the copyrighted articles had been out of circulation for twelve years before the commencement of the action; here the distribution and exhibition of "Dirtymouth" will almost certainly cause injury to the nearly contemporary distribution and exhibition of Worth's film. In *Rosemont*, the defendants were permitted to make reasonable use of prior copyrighted statements concerning the actions of the biographical subject (a use to which plaintiffs here concede the defendants are entitled as to Bruce); here, however, defendants seek to utilize the independent, intellectual creation of the biographical subject.

* * *

Here what is sought is not restriction of the dissemination of information about Bruce, but reasonable protection of his creative work. [emphasis added; ed.].

III. *Propriety of Preliminary Injunctive Relief:* Although defendants argued that plaintiffs could be adequately compensated by money damages, the court held the established liberality of the Second Circuit in granting preliminary relief in copyright infringement actions, particularly in the case of infringement of dramatic works, and the prospective impairment of the value of plaintiff's motion picture by the contemporaneous exhibition of "Dirtymouth" to justify the award of a preliminary injunction.

13. *Nathan v. Monthly Review Press, Inc.*, 309 F. Supp. 130, 165 U.S.P.Q. 549 (S.D.N.Y. December 24, 1969) (Lasker, J.).

Cross-motions for summary judgment in action for copyright infringement. The action involved an essay by Dr. Albert Einstein, entitled "Why Socialism," first published (without any written agreement as to ownership of rights) in 1949 in defendant's periodical. Some years after such publication plaintiff, Einstein's executor, sought permission from defendant to publish the essay in a collection of Einstein's works and defendant gave its consent. Plaintiff then again wrote defendant and, citing advice of counsel that Einstein had merely licensed publication of the essay but retained ownership thereof, requested a "formal assignment of copyright." Defendant replied that it had no objection to assigning the copyright "provided that said assignment does not relinquish our right to republish the article in full or in part whenever we have occasion to do so." Plaintiff responded that he would take the assignment subject to such condition "which, I assume, is meant to include the use of certain passages of the article for advertising purposes". Failing to receive a reply from defendant, plaintiff again wrote and defendant responded that it had not thought any reply necessary since it considered plaintiff's last letter to constitute an "acceptance" of the conditions specified by it. Defendant added that "if a formal reply is required . . . we hereby acknowledge receipt of your letter . . . and note that it affirms the content of our letter of. . . ." Plaintiff replied that it needed a "formal letter assigning the copyright [which it would submit to the Copyright Office for recording and] which should contain no reference to the provision [for defendant's right to republish]." Defendant then sent plaintiff a letter stating that it "hereby assigns the copyright" for the essay and plaintiff recorded this letter in the Copyright Office. Some time later, defendant republished the essay in a book entitled "Introduction to Socialism" and plaintiff, claiming ownership of the copyright in the essay, asserted that this publication without its consent constituted an infringement. Defendant answered that the correspondence preceding the formal assignment recognized its right to republish the essay in book form and that the assignment was procured by fraud.

Held, motions denied.

The court held that substantial issues of fact precluded summary relief for either party, stating in part:

The parties disagree vigorously as to what is the legal effect of Dr. Einstein's original transmittal of the article to the Monthly Review for publication. Plaintiffs argue (fortifying the argument by

the fact that plaintiff Nathan was associated with the magazine at the time and was an intimate of Dr. Einstein's) that Dr. Einstein wrote the essay as a favor to Nathan and that he at no time intended to part with ownership thereof. The plaintiffs regard the defendants' copyright registration of the article as a mechanical act which, in effect, put the defendants in a position of trusteeship for the benefit of Dr. Einstein and the Einstein estate. They refer . . . to the custom in the literary profession of a publisher copyrighting its authors' works as a matter of convenience, but with the understanding that the equitable title to the property remains in the authors.

The defendants strongly dispute this interpretation of the situation. Their position is that Dr. Einstein did indeed make a generous gesture to the Monthly Review, that his generosity was unsullied, and that the article was given to the Monthly Review unconditionally. It is their view that they owned the article, lock, stock and barrel, until such time as they voluntarily acquiesced in Nathan's request that they assign the copyright to the estate of Dr. Einstein.

From this clear difference in concept as to the legal effect of the original transaction between Dr. Einstein and the defendants flow a number of other important differences as to the significance of the various transactions which have taken place between Dr. Einstein's estate and the defendants since Dr. Einstein's death. In view of their dispute as to whether Dr. Einstein donated the article unconditionally to the Monthly Review or, in fact, retained ownership of it, it is not surprising that the parties clearly view their acts of the last years quite differently. For example, plaintiffs, regarding Dr. Einstein as the constant owner of the property, take the position that the assignment of copyright executed by defendants to the estate constituted nothing more than a recognition of what had always been the equitable position and a mechanical device necessary for formal registration. Looking upon themselves as the owners, and representatives of the man who always did own title to the article, they regard their . . . grant to the defendants of the right to republish as a restricted right, the limits of which are to be carefully construed. The gist of the plaintiffs' position is that the right granted to defendants to "republish" the article consisted of reprinting the material in the same forms in which it had been issued or for advertising purposes (as mentioned in Nathan's letter to defendants . . .), but not in any other form, and particularly not in its present form as the leading article of a book.

Defendants, on the other hand, having regarded themselves always as the true owners of the essay, who generously assigned technical copyright to the estate, maintain that the proper interpretation of the republishing rights which they reserved should not be, and is not, a niggardly one; that they retain the right to republish not only in the previous forms, but in all forms of publication, including in a separate book.

* * *

The essential dispute between the parties here, of course, is over the meaning and scope of defendants' right to "republish." While it is elementary that under ordinary circumstances the meaning of a written contract is to be drawn from the writing itself, parol evidence is nevertheless admissible where required to clarify an ambiguous agreement, particularly where the ambiguity relates, as it does here, to the intentions, at various times, of the parties.

* * *

[T]he parties' dispute is not simply confined to the meaning of "republish"; they also strenuously challenge each other's ownership rights in the essay. Defendants now claim that their retention of the right to republish preceded the assignment and preserved such broad rights in them as to defeat plaintiffs' proprietorship claims. They rely on the "doctrine of indivisibility," which declares, in essence, that "the bundle of rights which accrue to a copyright owner are * * * incapable of assignment in parts. * * * A transfer of anything less than * * * [the totality of rights] is said to be a license rather than an assignment." Nimmer on Copyright, § 119, pp. 510-511. This doctrine, which Nimmer and others criticize is most relevant to the question of standing to sue. The proprietor of a copyright, of course, has such standing; so does the assignee. But a licensee does not have standing, except for an exclusive licensee who takes advantage of certain procedural machinery enabling him to compel joinder of the proprietor. . . .

Defendants' argument here is that the formal assignment of copyright in fact conveyed no ownership rights in the essay because of their retained republishing rights, and hence deprives the plaintiffs of standing to sue for infringement. Plaintiffs interpret the situation quite differently. As seen above, they view themselves as the owners all along, and claim that *Monthly Review*, far from being the proprietor at the time of the formal assignment, was merely a licensee.

Rule 56 provides that summary judgment may be granted where "there is no genuine issue as to any material fact." The analysis set forth above establishes that in this case there are genuine issues of fact. Accordingly, on the present state of the record it is impossible to determine as a matter of law what the legal rights of the parties are. Where, as here, the documents are ambiguous, a genuine issue exists as to a material fact within the meaning of Rule 56 and forbids the granting of summary judgment.

14. *Tape Industries Association of America v. Younger*, 316 F. Supp. 340, 166 U.S.P.Q. 468 (D. Cal. 1970) (Hauk, J.).

Action against the Los Angeles District and City Attorneys for declaratory judgment that the California "tape piracy" statute is invalid as in conflict with the Copyright Clause of the U.S. Constitution and the Federal Copyright Act and injunctive relief. The challenged statute [Cal. Penal Code § 653h (1968)] provides, in part, that

(a) Every person is guilty of a misdemeanor who:

(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner.

(2) Sells any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

The individual plaintiffs were engaged in the manufacture and sale of sound tapes produced by electrical re-transcription from records purchased on the open market. Each tape sold by defendants bore a label stating the title of the original recording and the names of the performing artists who made the recordings, as well as the following disclaimer:

No relationship of any kind exists between [plaintiffs] and the original recording company nor between this recording and the original recording artist. This tape is not produced under a license of any kind from the original company nor the recording artist(s) and neither the original recording company nor artist(s) receives a fee or royalty of any kind from [plaintiffs.] Permission to produce this tape has not been sought nor obtained from any party whatsoever.

Held, judgment for defendants.

Plaintiffs placed primary reliance on the Supreme Court's decisions in *Sears* and *Compco*; defendants urged the continued vitality and applicability of the 1914 Supreme Court decision in the *International News Service* case (248 U.S. 215). In finding for defendants, the court reviewed a number of post-*Sears & Compco* decisions and drew a distinction between permissible copying and the actionable "appropriation of a product itself," holding tape piracy to fall within the latter area. The court said:

The record companies which manufacture and sell the albums which plaintiffs use to make their unauthorized tapes expend great efforts and substantial sums of money for the commercial exploitation of their albums. Some of the costs incurred by these record companies are the various expenses in producing a master record of a performance which can be used to manufacture albums and authorized tapes, the expense of manufacturing records and tapes; the expense of advertising and promoting albums and tapes; and the expense of paying royalties to the recording artists and to the various trust funds established by collective bargaining agreements. Other than the small sums required to make and distribute their tapes, plaintiffs do not pay any other expenses. The issue of payment or nonpayment of royalties to the proprietors of copyrights of musical compositions involved was stipulated by the parties not to be relevant to this action.

* * *

Plaintiffs here contend that the Ninth Circuit in *Cable Vision* [*Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965)] rejected any distinction between copying and appropriating because the defendant was taking and selling the very same product being transmitted by the contractually authorized television station. They also rely on *Smith v. Chanel, Inc.*, 402 F.2d 562, 159 USPQ 388 (9th Cir. 1968), to bolster their contention that the method of duplication, whether by copying or appropriating, does not have any bearing on the application of *Sears and Compco*. *Smith*, however, is not relevant to the present suit. The parties in *Smith* conceded that a competitor had a right to copy as closely as possible the unpatented formula of Chanel's perfume, and the crucial issue in that case was actually whether one who has copied an unpatented product sold under a trademark may use the trademark in his advertising to identify the product he has copied.

In *Sears, Compco, Smith, and [Columbia Broadcasting System, Inc. v.] DeCosta* [377 F.2d 315 (1st Cir.), cert. denied, 389 U.S. 1007 (1967)] the defendants were not subject to state control because they merely copied the design or formula of the original producer. In *Cable Vision*, defendants were not enjoined because they simply re-broadcast a television transmission that was normally received without charge in individual homes. "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. 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." *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 399, 158 USPQ 1, 5 (1968).

In contrast, plaintiffs in the instant case do not imitate the product of the record companies. They actually take and appropriate the product itself—the sounds recorded on the albums—and commercially exploit the product. *Sears and Compco* would cover and immunize the plaintiffs here only if they had copied and imitated the product—that is, if they had listened to the sounds performed and embodied on the records and then had expended the necessary sums to copy and imitate the sounds on their own tapes . . .

And unlike the plaintiffs in *Cable Vision*, the plaintiffs here are not merely enhancing the listener's ability to receive something which he normally gets for free, but instead are selling for a reduced price another person's stolen and appropriated product for which the public customarily pays.

The Supreme Court in *Sears and Compco* appears to have enunciated a strict doctrine to avoid any possible conflict with Federal patent or copyright legislation and to enhance the Federal policy of free competition . . . At the same time, however, it is obvious that the Supreme Court tolerates some State regulation that is not inconsistent with the paramount Federal interest . . .

When all of the facts of the case here are considered, we are driven to the conclusion that Calif. P.C. §653h (1968) is a tolerable and permissible state regulation directed against theft and appropriation of a saleable product, and does not unconstitutionally intrude on the Federal policies enunciated in the Copyright Clause, U.S. Const. art. I, §8, cl. 8, and in Federal Copyright legislation, 17 U.S.C. §§1-215. Plaintiffs in this action are known in the record industry as "tape pirates" and rightly so, for to the best of our knowledge all other courts that have had occasion to consider the

conduct of such "tape pirates" have sanctioned state limitations upon their piratical activities . . .

Parenthetically we note that [it has been estimated] that "tape pirates" sold \$100 million in unauthorized tapes last year . . . Undoubtedly, tape pirates are costing legitimate and authorized tape producers substantial amounts of money, and the State of California has properly and reasonably concluded that these parasitic tape pirates must be controlled. Regardless of whether Calif. P.C. §653h (1968) is deemed a larceny statute or an unfair competition law, it is clear that the California Legislature is not precluded by the Copyright Clause of the Constitution or the Federal Copyright laws from prohibiting the activities of tape pirates. Nor should we intervene in the legitimate enforcement of the statutorily expressed desires of the California Legislature by the authorized prosecution officials who are the defendants.

The court also held that it lacked jurisdiction over the action as a statutory Three-Judge Court since (i) actions "arising solely under the Supremacy Clause" of the U.S. Constitution are not within the meaning of "unconstitutional" as used in 28 U.S.C. §2281 (providing for a Three-Judge Court in actions for injunctive relief against allegedly "unconstitutional" state statutes), (ii) a case arises "solely under the Supremacy Clause" when "a State Statute is alleged to conflict with some Federal legislation or with a non-substantive provision of the United States Constitution," and (iii) the Copyright Clause of the Constitution "merely empowers Congress to enact legislation and does not in any way confer a substantive right on any individual."

15. *Picchione v. Commissioner of Internal Revenue*, 167 U.S.P.Q. 110 (U.S. Tax Ct., July 15, 1970) (Featherstone, J.).

Petition against the Commissioner of Internal Revenue's determination of deficiencies in petitioner's federal income tax. Petitioner, a certified public accountant, originated a certain bookkeeping record book. In late 1944 he transferred his interest to his wife and son, who subsequently secured copyright therein and, in 1946, sold their interest to a corporation then owned by petitioner in consideration of the right to receive certain monthly royalties until 1973. In 1952 petitioner's wife and son transferred their rights to future payments to a trust. When the trust accumulated a specified amount, the trustee was to pay the net income to petitioner for his life. By January 1, 1964, the required accumulation had been reached and the trust was paying petitioner an

annual income. In the years in question petitioner reported his income from the trust as long-term capital gain but the respondent held the receipts to comprise ordinary income.

Held, for respondent.

The Tax Court held that the tax law definition of "capital asset" (amended in 1950 to exclude copyrights and literary property) in effect at the time of payment determined the character of petitioner's income. The court said:

Prior to 1950, the definition of a capital asset made it possible for a creative individual to sell his literary or artistic output and pay tax on the profits at capital gain rates as long as he could show his work was not property held primarily for sale in the ordinary course of his business . . . Congress was dissatisfied with this rule and changed it by section 210 of the Revenue Act of 1950 . . .

The change was accomplished by an amendment modifying the definition of "capital assets" to exclude, under stated conditions, a copyright; or a literary, musical, or artistic composition; or similar property. As to the effective date of the change, section 210(c) states:

The amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act.

Emphasizing that the 1950 amendments related only to the definition of the term "capital assets," petitioner points out that even the revised definition refers to a copyright "held" by the taxpayer. Citing *McFeely v. Commissioner*, 296 U.S. 102, 107, 108 (1935), he argues that "held" means "owned," and that he did not own the copyright on the effective date of the amendment and, indeed, has not owned it since January 2, 1946, when it was sold.

Although petitioner's argument is skillfully presented, we think it is without merit. In our view, his income tax on his copyright income for 1964, 1965, and 1966 is to be determined by reference to the definition of the term "capital asset" in section 1221, I.R.C. 1954 [carrying forward the 1950 amendment] in the form in effect in those years. This is the clear import of the following explanation in S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 544, accompanying the Revenue Act of 1950:

In the case of the sale, prior to the effective date of the amendment, of an artistic work by a creator who has elected the installment basis under section 44, the tax treatment of install-

ment payments received after such effective date will be governed by the rule of *Snell v. Commissioner*, (97 F.2d 891) [5 Cir. 1938].

Snell v. Commissioner, referred to in the report, holds that in the case of installment sales the law in effect at the time payment is made, rather than the time of the sale, determines the character of the income . . . While petitioners reported their income under the deferred payment rather than the installment method of accounting, such a fine distinction does not alter the rule. The statement in the Committee Reports, we think, was merely illustrative and was not intended to restrict the applicability of the principle. We hold, therefore, that petitioner is not entitled to capital gain treatment of his 1964, 1965, and 1966 receipts from the copyright.

We are aware of the Supreme Court's teaching that a court should give amendments to the Code "prospective application only, unless otherwise specifically provided." *Reo Motors v. Commissioner*, 338 U.S. 442, 450 (1950). . . . But that principle is not involved here; it refers to amendments which would change the tax results of years prior to the new enactment. Here, our interpretation of the 1950 amendments would not affect the tax result for any year prior to the enactment. It would merely apply the revised definition of capital assets in the computation of taxes for years subsequent to the enactment, regardless of when the transaction producing the gain occurred. This holding, in our view, is required by the language and legislative history of the 1950 amendments.

We conclude that for 1964, 1965, and 1966 petitioner's receipts from the Trust are ordinary income rather than capital gain.

Also of interest:

16. *State v. Wright Hepburn Webster Gallery, Ltd.*, N.Y.L.J. September 30, 1970 at 18, col. 2 (N.Y. Sup. Ct., N.Y. Co. 1970) (Fein, J.).

Application by Attorney General for appointment of a receiver, pendente lite, of sixty-eight paintings made by one David Stein and the proceeds from any sale thereof. The paintings were in the possession of defendant. Stein, who was not party to the action, had been convicted in 1967 of counterfeiting art work and grand larceny, and after serving his sentence was deported to France where he was again convicted for art forgery. While in a Paris jail, Stein was permitted by the French authorities to produce works "in the style of" renowned artists, provided the works bore his own signature. The paintings which were the subject of this action were produced by Stein under this privilege and imported and exhibited by defendant under promotional announcements

clearly indicating that they were "forgeries by Stein," works "in the style of" named artists by "Master Forger David Stein," etc. The underlying action by the Attorney General sought a declaration of the paintings to be a public nuisance subject to abatement on the grounds that Stein's signature could be easily removed from the paintings, thus allowing them to enter the art market as originals, and that Stein's ability to simulate the works of famous artists constituted the works a continuing threat to the "cultural welfare" of the art collecting public, art lovers and cultural institutions.

Held, application denied and complaint dismissed.

Observing that this was a case of first impression, the court stated that the paintings could not be deemed an abateable nuisance absent proof that their sale comprised an injury to the public's common interest, as opposed to the private rights of members of the public. Under this standard, the court found that no proof of public deception was offered—apart from the "mere possibility" of someone removing Stein's signature from the paintings—and that the advertising legend "forgeries by Stein," while literally false (since the existence of a "forgery" was technically negated by the presence of Stein's signature), was mere promotional "puffery." Neither of these elements, held the court, could justify condemnation of the paintings as a public nuisance. The court said, in part:*

The court is asked to find that the possible harm to the public from the sale of paintings made by a convicted forger "in the style of" acknowledged great painters warrants preventing this man from earning a livelihood by utilizing his peculiar and unusual artistic talents. It cannot be disputed that whatever Stein's motives, he is an artist, both in terms of dictionary definitions and as a matter of practical application. His work in perfecting the style of the masters may properly be ascribed to that special talent with which true artists are uniquely endowed. Otherwise it cannot be argued seriously that harm could result from the sale of his works.

No claim is made by the Attorney General that Stein is guilty of some criminal behavior by offering the subject paintings for sale to the public. However fraudulent or criminal his past transgressions have been, they cannot militate against Stein's right as an artist to sell his own works, acknowledged as such. Although Stein's prior

* Much of the court's opinion, omitted here, was taken up with distinguishing precedents offered by the State.

deceptive practices cannot be completely overlooked in weighing the allegations that the same result will occur if his works are permitted to be sold commercially, at this juncture the court is merely presented with the possibility of the future commission of a crime, by Stein or some purchaser of his works. A court of equity will not enjoin the commission of a crime as such, much less a possible crime, although a nuisance may be enjoined, albeit the activity enjoined is also criminal.

Not one iota of proof has been submitted that anyone is now engaged or about to engage in the removal of Stein's name for the purpose of passing off his work as an original work of one of the masters. It is difficult to perceive how these paintings constitute a public nuisance on the basis of the possibility or suspicion that this may occur. . . .

It is manifest that Stein cannot be charged with the crime of nuisance. Prosecutions for the crime of nuisance as a practical matter generally fall into two categories; the maintenance of manufacturing plants, entertainment resorts and the like which by virtue of excessive noise, noxious gases, odors, &c. annoy or offend large areas of the community, or the conduct of resorts where persons gather for illegal or immoral purposes . . . These statutory definitions of a public nuisance codify the distinction drawn at common law between public and private nuisance. . . . The teachings of the statutes and the cases are that a public nuisance is an offense to the public of a neighborhood or community in the enjoyment of its common rights, as distinguished from activity which results merely in injury even to a large number of persons in the enjoyment of private rights not shared by the members of the community or neighborhood at large. . . . Moreover, to establish a public nuisance it is essential to prove the injury as an accomplished fact. . . . Consequently, the conduct of a lawful business may not be deemed to constitute a public nuisance unless something is done in the operation thereof which is unlawful or its maintenance is negligent or improper in such degree or respect as to work an unreasonable obstruction or injury to the public. No such showing is made here.

The relief sought here is novel and drastic. It should not be granted in the absence of a clear showing that defendants have committed some public wrong amounting to a nuisance.

It may well be that Stein's paintings "in the style of" the masters are an attempt to appropriate ideas not his own and that the law should not permit one to profit who "is endeavoring to reap where [he] has not sown; * * *." (International News Service

v. Associated Press, 248 U.S. 215, 239.) However, such conduct does not constitute a public wrong. Stein's work may, under the circumstances, run afoul of some appropriate copyright law, or may even constitute a violation of General Business Law, Art. 12E, Section 234, limiting the right to reproduce works of fine art. If so, the rights violated are private and do not form a basis for action by the attorney general.

In this context, perhaps consideration should be given to Goethe's query:

· "People are always talking about originality; but what do they mean? As soon as we are born the world begins to work upon us, and keeps on to the end. What can we call ours, except energy, strength, will? If I could give an account of what I owe to great predecessors and contemporaries, there would be but a small remainder." (Eckermann, *Conversations with Goethe in the Last Years of His Life*, p. 147.)

So it must seriously be doubted whether the court, at the instance of the State, should prevent conscious appropriation of knowledge where no deception of the public is proven.

. . . .

There remains only to consider the significance of defendant's window sign and other publicity describing the exhibit as being "Forgeries By Stein." Both sides concede these paintings are not forgeries, as well they must. The essence of forgery, as recognized by Penal Law, article 170, the forgery article in its various sections, is the utilization as a "means of defrauding another" of that which "purports to be in all respects an authentic creation of" or "fully authorized by its ostensible maker." The signature of Stein on these paintings establishes there is no forgery even if a painting could be considered as within the condemnation of the article.

On this count, the advertising by defendant "Forgeries By Stein," is false, although when read in context this "tag line" is manifestly only an exaggerated form of "puffing," a sale "gimmick," like all too much advertising. This does not appear to violate the Penal Law or any other statute. Nor does the attorney general make any such claim.

Neither this advertising nor the possibility nor suspicion that in the future some one may remove Stein's name and substitute the name or signature of one of the masters is a sufficient basis for finding that the exhibition and sale of these paintings is a public nuisance.

17. *Mann v. Trans-Lux Corp.*, N.Y.L.J. September 15, 1970 at 2, col. 3 (N.Y. Sup. Ct., N.Y. Co. 1970) (Bloustein, J.). See also *infra* Item 18.

Plaintiff's consolidated motions for preliminary injunction and summary judgment in action for violation of N.Y. Civil Rights Law §51 ("Right of Privacy" statute). Plaintiff, a professional musician, alleged that while searching for his son at the widely-publicized Woodstock Music Festival he played a selection at the invitation of a stranger without knowledge that the event was being filmed. Plaintiff also alleged that his performance was not good and that his appearance was not neat and sought to enjoin the defendant from exhibiting a motion picture of Woodstock which included his performance and to recover damages for injury to his professional reputation. Noting Judge MacMahon's decision in the Southern District of New York granting the motions of other defendants to dismiss a similar action brought by plaintiff (see Item 18), the court denied plaintiff's motions and, *sua sponte*, entered judgment dismissing the complaint. The court said:

From all of the facts adduced before the court, the film appears to be an unadulterated reproduction of the events at the Festival from beginning to end. Plaintiff does not dispute that the film portrays the events that took place at the Festival accurately and truthfully. Nor does plaintiff allege falsity or malice or that his participation was presented out of context. There is no objection that he was unduly featured in the film.

. . . .

Plaintiff acknowledges that a number of significant decisions have modified the literal meaning of section 51 of this State's Civil Rights Law so as to preclude a right of action with respect to accurate, nonfictional reporting of occurrences in the life of public figures or private individuals who become newsworthy because of notoriety surrounding events in their lives.

. . . .

Moreover, the proofs of extensive and continuing coverage of the Festival and its aftermath establish beyond dispute that—for better or worse—this was and remains a newsworthy event. Rock and roll festivals of which Woodstock was the progenitor, are currently being conducted in various parts of this country and in foreign lands. Comparisons are constantly and repeatedly being made between the Woodstock Festival and other and similar festivals. Under such circumstances, Woodstock is currently newsworthy and will no doubt be of lasting public interest.

Plaintiff's contention that motion pictures necessarily must be afforded different treatment under the First Amendment from any other forms of public expression has been considered and rejected by the courts.

. . . . So, too, it has been held that the existence of a profit motive in the distribution of a newsworthy report or exhibition is of no consequence, if the challenged exhibition otherwise satisfies the requirements for exemption from the operation of the Civil Rights Law.

Plaintiff's interpretation of the case law which has developed with respect to limitations on the right of privacy, i.e., that these decisions apply only to public figures, appears to be erroneous.

. . . .

By his own admission, plaintiff was more than a mere spectator at this event. Appearing on stage center before an audience of over 400,000 people, this professional musician voluntarily performed a musical selection, employing his own musical instrument. His avowed purpose for doing so was to gain the attention of the entire audience. Furthermore, on the facts submitted, in affidavits of the defendant, it is difficult to understand or accept plaintiff's statement that he was unaware that he was being photographed. Plaintiff, it appears, was photographed from no more than ten feet from where he stood, blowing his horn, by an impressive array of photographic equipment. Defendant, in its submission, states that there were fourteen camera crews assigned to the Festival with seven permanently assigned to the stage area. Directly in front of the stage was a large boom for the purpose of taking pictures.

Plaintiff does not refute these statements but stands on his naked claim of lack of knowledge that he was being photographed. Under these circumstances, and with his voluntary appearance and performance, it can be said he relinquished and waived any rights under the cases [he may] already have had, without conceding he had any rights under the cases already cited.

. . . .

Plaintiff's legal objections to a finding that the film is a documentary (e.g., that it was made, distributed and exhibited for the purpose of financial gain) are without merit. Accordingly, defendant has established the merits of its first affirmative defense and that is a complete defense of this action. The instant papers do leave unresolved a number of incidental factual questions (e.g., whether the fluglehorn player depicted in the film was actually plaintiff; whether

the segment of the film in question, a 47-second clip, was so brief and so incidental in the three-hour production as to be deemed de minimus and not actionable; whether plaintiff is, in fact, a "public figure," who, as a professional entertainer, is one who seeks and welcomes publicity rather than withdraws from it; whether plaintiff was truly unaware that his performance was being photographed; whether plaintiff's delay in seeking injunctive relief was so unreasonable as to bar him by laches or estoppel; whether plaintiff's apparent splitting of his cause of action between state and federal courts and the inconsistent sworn statements submitted to these courts, should bar equitable relief under the "clean hands" doctrine). However, even if these questions were all resolved in plaintiff's favor, they would not overcome defendant's proof which exempts this exhibition from any claim by plaintiff under section 51 of the Civil Rights Act.

18. *Mann v. Warner Bros. Inc.*, Not yet reported (S.D.N.Y., August 31, 1970) (MacMahon, J.). See also *supra*, Item 17.

Plaintiff's motion for preliminary injunction and defendant's cross-motion for summary judgment in action for violation of N.Y. Civil Rights Law 51 ("Right of Privacy"). Plaintiff, a professional musician, complained of defendant's production and distribution of a motion picture depicting the events—specifically, plaintiff's impromptu performance—at the widely-publicized Woodstock Music Festival.

Held, plaintiff's motion denied and judgment entered for defendant dismissing the complaint. Noting that plaintiff failed to allege falsity, malice or disregard for the truth, and that motion pictures distributed for commercial profit were within First Amendment guarantees, the court found that defendant's motion picture was a truthful record of a matter of public interest, and hence within the Constitutional privilege on privacy intrusions. The court said:

The film depicts, without the addition of any fictional material, actual events which happened at the festival. Nothing is staged and nothing is false. It begins with the scene of the preparation and construction which preceded the event, moves on to the arrival of the vast crowds, the traffic problems, weather, mud, the artists, the activities of the audience, the reaction of the community, and concludes with the departure of the crowds and attempts to restore the ravaged property.

The parties do dispute whether the film is a "documentary," but that quarrel is of no moment, for our concern is not with

labels but with facts. The uncontroverted and incontrovertible fact is that the motion picture in which plaintiff says he appears presents a true account of what actually happened at an event of great public interest. Plaintiff does not even allege falsity, malice or disregard for the truth on the part of defendants in depicting and exploiting this highly publicized event.

Section 51 of the Civil Rights Law authorizes an action for damages and injunctive relief where a person's name, portrait or picture is used for advertising or for purposes of trade without that person's consent. Recent cases have engrafted exceptions and restrictions which preclude literal application of the statute in order to avoid abridgement of the constitutional right in the free dissemination of thoughts, ideas, newsworthy events and matters of public interest. These cases establish that in light of the constitutional guarantee of free speech, Section 51 may not be applied to afford relief either to a public figure or in a matter of public interest in the absence of proof that the defendant published false material with knowledge of its falsity or in reckless disregard of the truth. . . .

Plaintiff argues that these cases do not apply either to a motion picture shown commercially or to nonpublic figures. Neither argument is tenable. Clearly, motion pictures are within the free speech and free press guarantees of the First and Fourteenth Amendments. . . .

The mere fact that defendants are spurred by the profit motive and engaged in the commercial exploitation of the motion picture does not negate their right to depict a matter of public interest or to advertise the picture by the showing of a "trailer" (coming attraction). . . .

Accepting plaintiff's frivolous contention that a professional entertainer, performing on a stage before 400,000 people, is not a public figure, there is still no merit to the point. It is plain that the restrictions on the application of Section 51, discussed above, are not limited to public figures. [The court next discussed several cases which, in its opinion, established that "the constitutional gloss on Section 51 applies not only to public figures but to matters of public interest as well."]

There can be no question that the Woodstock Festival was and is a matter of valid public interest.

Plaintiff also argues that a movie depicting Woodstock is no longer news because of the lapse of time. The affidavits show, however, that newspaper articles and recent television programs

still refer repeatedly to Woodstock. The bizarre happenings of the festival were not mere fleeting news but sensational events of deep and lasting public interest.

The court also stated that "Section 51 was never intended to apply to professional entertainers who are shown giving a performance before a public audience. Plaintiff, by his own volition, placed himself in the spotlight of a sensational event which exposed him to the glare of publicity. That fact, without more, we think, makes him newsworthy and deprives him of any right to complain of a violation of Section 51."

"Finally," added the court, "the incidental use of plaintiff's forty-seven second record performance in defendant's motion picture of this public event is surely *de minimus*."

19. *Matter of Grumbach (Simon & Schuster, Inc.)*, N.Y.L.J. October 5, 1970 at 19 col. 2 (N.Y. Sup. Ct., N.Y. Co. 1970) (Lupiano, J.).

Petitioner's motion for order vacating an arbitration award. Petitioner (Grumbach) and respondent (Simon & Schuster, Inc.) entered into an agreement under which respondent agreed to pay certain sums in consideration of petitioner's submission, for possible publication, of a certain book. The agreement contemplated petitioner's use of a collaborator (who had a separate agreement) and provided for delivery of petitioner's manuscript by a specified date. Disputes between petitioner and his collaborator arose which caused a delay in the submission of the manuscript until eight months after the date provided in the agreement and four months after an extension date agreed to by the parties. During the interim, respondent had paid advances to petitioner. After receiving the delayed manuscript petitioner rejected it, the rejection also being belated as it was issued after the period provided for in the agreement for rejection without obligation to publish. Petitioner, claiming respondent's breach of its obligation to publish, invoked the arbitration clause of the agreement and sought payment of the remainder of the contract price. The arbitration clause vested the arbitrator with authority to settle "any controversy, claim or dispute arising out of or in connection with this Agreement or the breach thereof." The arbitrator denied petitioner's claim, declared that respondent had no rights in the book, and ordered petitioner, when and if he sold his book, to repay that portion of the advances he had received which had not been paid over to the collaborator and a literary agent. Petitioner sought to set aside the decision on the grounds the arbitrator had exceeded his

authority in "rewriting" the contract but the court, noting the broad scope of the arbitration clause, the mutual failures of petitioner and respondent to comply with the agreement, and the evidence before the arbitrator as to trade custom, denied the claim as lacking in substance. The court said:

The claim that the arbitrator acted in excess of his authority is not compelling. Where, as here, the parties agree in a broad arbitration clause to submit virtually all disputed matters to an arbitrator for settlement, the power so vested in the arbitrator is broad in scope. The cases involving more restrictive arbitration clauses are inapposite. Thus, *Matter of Strange*, 261 N.Y. 37, 42, is not on point for the contract there only authorized arbitration of disputes over "any clause in this contract." Nor was there herein involved any express contract provision limiting damages recoverable . . .

In the instant case, the original contract's terms were not met by either party; Grumbach in failing to deliver the work in the time prescribed therefor and S & S in failing to reject it within the time prescribed for such act. Considering the arguments raised before the arbitrator as to custom in the trade, publishing seasons and similar matters, it cannot be said the award was beyond that reasonably within the intent of the parties when they entered into the arbitration agreement.

The court also denied the claim on the grounds of improper procedure for "as the first application to the Court in this matter, use of an ordinary notice of motion, served by mail, is improper."

20. *Desmond v. Twentieth Century Fox Corporation*, N.Y.L.J. July 22, 1970 at 2 col. 4 (N.Y. Sup. Ct. N.Y. Co. 1970) (Waltemade, J.).

Cross-motions for summary judgment in action for breach of contract and unfair competition. Plaintiff and defendant had entered into a contract under which plaintiff agreed to perform as a recording artist (singer) for defendant. Plaintiff, complaining of defendant's distribution of a record album of his performances, contended that the contract only allowed defendant to record and manufacture two 45 RPM record sides or their equivalent. Defendant answered that the agreement actually provided for a minimum of such recordings. Plaintiff also alleged that the reproductions in defendant's album were of such inferior quality as to damage plaintiff's reputation.

Held, motion denied.

The court found that substantial issues of fact precluded a summary determination of the parties' claims. In dealing with defendant's interposition of *Sears* and *Compco* to plaintiff's unfair competition count the court said:

Plaintiff is claiming that defendants have appropriated the performance he made in a night club and that the recording made was of inferior quality. The recognition and protection of rights in an artistic performance depend upon the common law and upon the application of the principle that one may not misappropriate for his own benefit that which equitably belongs to another A performer has a property right in his performance and where it is used for a purpose not intended or in a manner which does not fairly represent his services, a cause of action will lie

Defendants' argument that the *Sears* and *Compco* decisions preclude any recovery under the theory of unfair competition is misplaced.

In *Sears Roebuck & Co. v. Stiffel Co.*, supra, the Supreme Court held that a commercial design, which was not subject to patent protection, could be freely copied by competitors of its originator and that the originator could not rely upon state unfair competition laws. *Compco Corp. v. Day Brite Light*, supra, dealt with the sale of an imitation of plaintiff's lighting fixture which allegedly had a distinctive design. However, neither of those cases stands for the proposition that a party is not entitled to protection against the unauthorized use or reproduction of an actual performance.

21. *Smith v. Goro*, N.Y.L.J. Nov. 6, 1970 at 18, col. 2 (N.Y. Sup Ct. N.Y. Co. 1970) (Fein, J.)

Action for invasion of privacy. The individual defendant authored a book entitled "The Block" which was published by a corporate defendant and excerpted in its magazine by a second corporate defendant. "The Block" dealt with living conditions on a particular block in a New York slum area and contained illustrations of, and narrative attributed to, the twenty-three plaintiffs, all of whom resided on the block. Plaintiffs asserted violations of Sections 50 and 51 of the New York Civil Rights Law ("Right of Privacy" statute) and complained of allegedly fictionalized attributed statements and thoughts, and breach of confidence.

Plaintiffs sought a preliminary injunction against publication of the work and defendants cross-moved to dismiss the complaint for failure to state a cause of action and upon documentary proof of releases.

Held, motions denied.

Plaintiff's motion for a preliminary injunction against the magazine publisher was denied "as academic" since the allegedly offensive excerpts had already been published; the motion for temporary relief against the author and publisher was denied since there were substantial factual disputes and because, since plaintiff's really appeared to be seeking money damages and the material had been widely disseminated through the magazine excerpts and sales and reviews of the book, "issuance of a temporary injunction would be more harmful to defendants than its denial would be to plaintiffs."

Plaintiffs alleged that the releases obtained from some of them by the individual plaintiff were secured through fraud, misrepresentation and breach of confidence and defendant's motion to dismiss on the basis of the releases was dismissed due to the presence of "sharp issues of fact."

Plaintiff's motion to dismiss was also based upon the alleged legal insufficiency of the complaint because the use of plaintiff's names, photographs and statements was constitutionally protected as related to a matter of public interest. The court dismissed this claim, noting the absence of authority for allowing an author to "seek out" private persons and write about them in such fashion as to constitutionally limit their right of privacy. The court said:

None of the plaintiffs are public figures. None have ever been publicized before. In this sense, they are obscure people. Their involvement in the book is not incidental or as mere spectators on the scene. They are rather important subjects of the book. In effect those who are portrayed and described in it are the book. They claim that precisely for this reason they are being exposed to public ridicule and shame, as examples of poverty stricken people living in a slum area, whose private lives are exposed to public scrutiny for purposes of private gain.

....

Both the article and the book portray the desperate and unfortunate conditions under which plaintiffs were required to live. Undoubtedly the lives and the plight of the poor, the underprivileged, and the depressed minorities are, and of right ought to be of public interest, concern and action. The issue is whether it necessarily follows that such people, being natural subjects for study, have no right of privacy.

The cases relied on by defendants do not clearly speak to this issue. It is now well settled that in the light of the constitutional

guarantee of free speech, Civil Rights Law Section 51 may not be applied to afford relief either to a public figure or to one whose life or activity has become a matter of public interest, in the absence of proof that the published material is false and has been published with knowledge of its falsity or in reckless disregard of the truth.

. . . .

[A] complaint [should not] be tossed off on motion, where there is a question whether the private lives of these depressed plaintiffs are matters of legitimate public interest because of the conditions of squalor and poverty in which they are condemned to live. Do individuals who are poor, underprivileged and members of a depressed minority have no right of privacy because of happenstances? . . . [T]here was nothing particular about the lives of these plaintiffs that separated them from their fellows as peculiar subjects of public interest so as to preclude their right of privacy. On the face of the papers, at least, it does not appear that they sought or wanted publicity or notoriety. No case has been cited or found which supports the views that a writer may seek out such people and write about them and by that fact alone make them public figures or persons of public interest debarred from claiming an invasion of their privacy.

PART V.

BIBLIOGRAPHY**A. BOOKS AND TREATISES****1. United States Publications**

22. CHAMBERLAIN, BETTY. The artist's guide to his market. New York, Watson-Guption Publications [1970], 128 p.

A practical manual designed for artists seeking exposure and sale of their work which includes such information as protection of their rights, reproductions in periodicals, and summaries of recently enacted New York State laws specifically related to fine arts in the areas of reproduction rights, artist-dealer relationships, seizure of work, and liability for counterfeits.

2. Foreign Publications

23. Book Development Council. Report of the publishers' missions to Korea [30 November-3 December 1969] and Taiwan [30 November-5 December 1969]. London [1970] 9, 7 p.

The report on the visit of British publishers to South Korea discusses possible market development and gives instructions for securing import licenses and payments for books imported into that country, while the report on the trip to Formosa emphasizes the problem of "unauthorized reprints" of English language books.

24. MUTTENZER, RENE. Der urheberrechtliche Lizenzvertrag. Basel, Helbing & Lichtenhahn, 1970. 66 p. (Basler Studien zur Rechtswissenschaft, Heft 90.)

A study of the copyright license agreement under Swiss laws, with some reference to other laws, preceded by a section on license agreements in general.

25. OEKONOMIDIS, DEMETRIUS. Die Zitierfreiheit im Recht Deutschlands, Frankreichs, Grossbritanniens und der Vereinigten Staaten. Berlin, F. Vahlen [1970], 286 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 42.)

A comparative study of the right of quotation under German, French, British, and United States copyright laws, preceded by a section on the bases and principles of copyright law.

26. United International Bureaux for the Protection of Intellectual Property. Teaching of the law of industrial property and copyright at universities and other institutions. Geneva, BIRPI, ©1970. 38 p. (PJ/DA/1.)

A preliminary survey, in tabular form, of the names and addresses of universities and other higher education establishments in which industrial property and/or copyright law are taught, arranged alphabetically by country.

27. Urheberrecht der Deutschen Demokratischen Republik, von einem Autorenkollektiv unter Leitung von Heinz Püschel. Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1969. 625 p.

A comprehensive textbook on the copyright law of the German Democratic Republic, with the first chapter captioned, "Principal features of the development of the bourgeois and socialist copyright law" [translated].

B. LAW REVIEW ARTICLES

1. United States

28. BENDER, DAVID. Trade secret protection of software. (38 *The George Washington Law Review* 909-957, no. 5, July 1970.)

A case is made for the proposition that "because of the uncertain atmosphere surrounding the application of patent and copyright law to the protection of software . . . classical trade secret law is the most reliable means of effecting legal protection," although a caveat is sounded that *Lear v. Adkins* may substantially have altered classical trade secret law.

29. CARNAHAN, WILLIAM H. Copyright or wrong. (12 *The United States Air Force JAG Law Review* 4-20, no. 1, Winter 1970.)

A brief exposition of the United States copyright law, with special emphasis on reproduction rights, which "[f]or the judge advocate . . . should provide some source material for the more common inquiries and easier research for the more finely honed questions posed, for example, by base librarians."

30. CARY, GEORGE D. Comments on the Senate Subcommittee revisions of S. 543. (42 *New York State Bar Journal* 340-346, no. 4, June 1970.)

"[C]omments made by the Deputy Register of Copyrights on Senate 543 amending Federal copyright law to the New York State Bar Association's Committee on Copyright Law meeting in New York on January 30, 1970."

31. Copyright — unfair competition — unauthorized reproduction of another's recording for resale violates state unfair competition doctrine. (23 *Vanderbilt Law Review* 840-847, no. 4, May 1970.)

A note on *Capitol Records, Inc. v. Erickson*, 2 Cal. App.3d 526, 82 Cal. Rptr. 798, 17 BULL. CR. SOC. 302, Item 120 (1969), *cert. denied*, 398 U.S. 960 (1970).

32. DANNAY, RICHARD. Fraud on the Copyright Office. (*APLA Bulletin* 352-356, July-Aug. 1970.)

A brief look at some of the major aspects of the doctrine of fraud on the Copyright Office, with the conclusion that its explicit recognition "as a defense independent of, and broader in its reach than, the defense of copyright invalidity" is warranted.

33. DERENBERG, WALTER J. The twenty-third year of administration of the Lanham Trademark Act of 1946. (166 *Patent, Trademark and Copyright Weekly Reports*, 1-52, no. 6, part II, Aug. 10, 1970.)

An annual progress report submitted to the Section of Patent, Trademark and Copyright Law of the American Bar Association at its Annual Convention. Of interest to the copyright bar are sections on slogans, background design and configurations, and a chapter captioned "Unfair Competition and the 'Sears-Compco' Doctrine."

34. GESTON, MARK S. Direct broadcasting from satellite: the case for regulation. (3 *New York University Journal of International Law & Politics* 72-93, no. 1, Spring 1970.)

"This Note will examine the technology of direct broadcast satellites, indicating the singular problems this form of communication will create and suggest a framework for its regulation."

35. PASLAY, JAMES B. Copyright — infringement of performance rights — plaintiffs denied recovery for copyright infringement when their agent failed to provide defendant with reasonable assistance in avoiding infringement. (22 *South Carolina Law Review* 132-136, no. 1, 1970.)

A case note on *Tempo Music, Inc. v. Myers*, 407 F.2d 503, 16 BULL. CR. SOC. 253, Item 194 (4th Cir. 1969).

36. TAYLOR, JOE D. Off-the-air video taping for educational purposes — fair use or infringement? (12 *The United States Air Force JAG Law Review* 90-99, no. 2, Spring 1970.)

An article which is directed toward potential copyright problems faced by an educational institution such as the Air University Learning Center on occasions when copyrighted programs are taped from a commercial television network. The conclusion is reached that minimum use of such copyrighted material before a small audience of Government employees for nonprofit, non-commercial, educational purposes over a closed circuit network in a restricted area, with no competition with the originating broadcaster or other copyright owner, would not constitute infringement either under the present copyright law or its proposed revision.

37. THOMAS, GEOFFREY L. The listener's right to hear in broadcasting. (22 *Stanford Law Review* 863-902, no. 4, Apr. 1970.)

The thesis is developed that "[o]nly by converting the economic structure of the [broadcasting] industry from over-the-air television broadcasting to cable television (CATV) on a common-carrier basis can the listeners exercise their right to hear with minimal interference from advertisers, broadcasters and the Government." Possible strategies are suggested "for overcoming the formidable resistance of broadcasters to CATV."

2. Foreign

1. In English

38. IONASCO, AURELIAN. Letter from Rumania. (6 *Copyright* 130-135, no. 7, July 1970.)

A brief description of the system adopted in the Rumanian copyright legislation, with the conclusion "that, starting from the

notion that copyright is based on the act of intellectual creation, this system affords effective protection to the intellectual, moral and patrimonial rights of authors, while remaining in harmony with the general interest."

39. IONASCU, OVIDIU. Cinematographic works and copyright in the Socialist Republic of Rumania. (6 *Copyright* 123-229, no. 7, July 1970.)

Covers such topics as determination of authors and authorship, legal status of film studios, the cinematographic adaptation as a derivative work, term of protection, common features of contracts governing the use of films that reproduce a work, other types of contracts, and remuneration due to authors.

2. In German

40. FREUND, PETER. Der Urheberschutzvermerk auf technischen Unterlagen. (*Der Neuerer* 114-116, Aug. B, May 1970.)

An article on how drawings incorporated in technical writings and patent applications may be protected from unauthorized reproduction under laws of the German Democratic Republic, and on the bases for such protection.

41. OEKONOMIDIS, DEMETRIUS S. Die Grenzen der Zitierfreiheit nach deutschen Recht. (57 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 179-188, June 15, 1970.)

An article, with French and English summaries, on the permissible extent of the right of quotation under section 51 of the copyright law of the German Federal Republic, with special reference to the *Kandisky* decision of the Federal Supreme Court.

42. RECHT, PIERRE. Das Urheberrecht, eine neue Form von Eigentum. (57 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-34, June 15, 1970.)

A German translation, with French and English resumés, of a summary of the author's recently published work on the history and theory of copyright, entitled *Le droit d'auteur, une nouvelle forme de propriété* (Paris, Librairie générale de droit et de jurisprudence, 1969). The summary was previously published in French in the May 1969 issue of *Le Droit d'Auteur*, and in English, in the May 1969 issue of *Copyright*.

3. In Italian

43. FABIANI, MARIO. Disumanizzazione dell'arte e diritto di autore. (41 *Il Diritto di Autore* 1-13, no. 1, Jan.-Mar. 1970.)

A philosophic discussion, under the intriguing title "The Dehumanization of Art and Copyright [translated]," of the protectibility of art produced by the use of mechanical and electronic devices as contrasted with art created by direct human intellectual endeavor.

44. FRAGOLA, AUGUSTO. Problemi di diritto cinematografico. Terza serie. (41 *Il Diritto di Autore* 14-33, no. 1, Jan.-Mar. 1970.)

This third of a series of studies on the problems of motion picture rights in Italy discusses judicial censorship, the cinematographic work, and aid to motion picture production.

4. In Portuguese

45. O Código do Direito de Autor e as Províncias Ultramarinas. (12 *Autores, Boletim da Sociedade de Escritores e Compositores Portugueses* 4, no. 49, Jan.-Feb. 1970.)

A plea for a more uniform application of the Portuguese Copyright Law of April 27, 1966 in some of the provinces and overseas colonies of Portugal, since authors' rights have been somewhat obscured by failure to publish the new law in the official gazettes of the local governments in these areas, thus technically making the superseded law of May 27, 1927 still effective there.

5. In Swedish

46. BRILIOTH, ERIK GUSTAF. Identitetsproblem i musikalisk upphovsrätt. (*NIR* 37-67, no. 1, 1970.)

An article, in Swedish with an English summary, on "the problem of identity in musical copyright law." The article begins with a brief account of musical copyright law awareness and development from the Middle Ages to the end of the 19th century, surveys the methods employed mainly during the 20th century to determine the identity of musical works in copyright disputes, taking into account French, German, and Anglo-American law, "attempts to evaluate the traditional solutions of musical identity

problems in light of modern Scandinavian copyright discussion and debate," and considers the question of how and by whom similarity-determination should be made.

47. DANELIUS, HANS. U-länderna och upphovsrätten. (*NIR* 68-76, no. 1, 1970.)

A brief account of international copyright developments in regard to developing countries, beginning with the Stockholm Conference of 1967, followed by the meetings at Washington, Paris, and Geneva, and the upcoming meetings in September 1970.

48. LJUNGMAN, SEVE. Nagot om verkshöjd. (*NIR* 21-36, no. 1, 1970.)

"Comments upon the level of achievement required for copyright protection," in Swedish with English summary. Emphasis is placed on "the nearly uniform Copyright Acts of the Nordic countries," but the article begins with a brief discussion of the evolution of copyright protection afforded written subject matter under English, French and German law. A conclusion is drawn that "[i]n general, copyright protection theory will benefit from less dramatizing and from substituting the more mundane expressions 'produce' and 'level of achievement' for 'create' and 'level of creativity.'"

C. ARTICLES PERTAINING TO COPYRIGHT IN TRADE MAGAZINES

I. United States

49. AAP emerges: newly federated organization meets in atmosphere charged by national issues. (197 *Publishers' Weekly* 36-45, no. 22, June 1, 1970.)

An article on a recent joint meeting of the American Book Publishers Council and the American Educational Publishers Institute during which they voted to merge and become the Association of American Publishers. Among the reports presented at the meetings those on the current status of the domestic and international copyright situation are reprinted in full.

50. ABPC-AEPI joint sessions: I—Merger of book firms; II—Copyright situation. (195 *Publishers' Weekly* 31-34, no. 23, June 9, 1969.)

An article on a joint session of the American Book Publishers Council and the American Educational Publishers Institute, held

at Miami Beach on May 7. Part II (Copyright situation) contains summaries of a talk by Thomas Brennan, counsel for the Senate Subcommittee on Patents, Trademarks and Copyrights and one of the panelists, on the program for general revision of the copyright law, and by Barbara Ringer, Assistant Register of Copyrights and another panelist, on international copyright, with special reference to the Stockholm Protocol Regarding Developing Countries.

51. ALPERT, ARTHUR. Crossed wires: cable TV and the public interest. (1 *The Washington Monthly* 35-46, no. 6, July 1969.)

A critical examination of "the three areas of decision-making — technology, industry, and government . . . [to] see how the original promise of conventional television evolved into the mass medium we have today."

52. BAUGHMAN, M. DALE. Copyright vs. free access? (26 *Educational Leadership* 260-263, no. 3, Dec. 1968.)

A discussion of the controversy between educators and publishers on the question of fair use "presented under the headings: (a) new and pending copyright laws; (b) U.S. Office of Education; (c) analysis of the conflict; and (d) views from afar." A conclusion is drawn that "[i]ndustry and education need to think and agree on new copyright criteria which will permit legal free access to and use of products of the mind, as well as preserve the principle of compensation for the copyright holder."

53. BENJAMIN, CURTIS B. What can be done to save the monograph? Reprinted from *Scientific Research*, Sept. 16, 1968. 2 p.

A brief discussion of the economic impact of inflationary factors and "uninhibited copying for purposes of research and scholarship" on the sale of specialized scientific books, and of possible ways to prevent such publications from being priced out of commercial book markets.

54. BENJAMIN, CURTIS G. The economic foundations of book publishing. Unesco Regional Centre for Book Development in Asia. (11 *Newsletter* 3-7, no. 2, Apr. 1969.)

Includes separate consideration of the several major markets that form the economic foundation of the book industry in every nation. In the discussion of the education market which is de-

scribed as the most important, "educators, government officials, and all others who think that low-cost access to copyrights will go a long way toward solving their problems with educational budgets," are urged to ponder carefully the smallness of the fraction of the total cost of educational books purchased in any country represented by the cost of copyrights.

55. BILLBOARD. A complete report; 2d annual International Music Industry Conference, Palma de Mallorca, Spain, April 26-May 2, 1970, sponsored by Billboard and Record Retailer. 36 p. (May 23, 1970, sec. 2.)

Includes summaries of addresses delivered at the Conference on such subjects as proposed revisions of the U.C.C. and the Berne Convention, the progress of copyright revision in the U.S., financial problems in foreign licensing contracts, record piracy, and other topics of interest to the music industry.

56. BRACK, RAY. 1964-1968: "making MOA what we all know is possible." (80 *Billboard* MOA-4-MOA-5, MOA-8, no. 41, Oct. 12, 1968.)

An article depicting the growth of the Music Operators of America (MOA) beginning with the year 1964, which includes an account of its legislative activities in connection with the jukebox exemption.

57. BURNITE, DAVE. Report on S. 543, proposed copyright law revision. (17 *The Voicesspondent* 3, 8, no. 3, Jan. 1970.)

A member of "The Voicesspondence Club," a non-profit organization "dedicated to the betterment of understanding and rapport through the means of 'Magnetic Recorded Friendships,' i.e., correspondence and music exchanges by means of tape recordings, exhorts each member of the Club to write to his respective Senators and "tell them you are but one of over 30 million tape recorder owners who will be seriously penalized if this bill, S. 543, becomes law."

58. CARY, GEORGE D. United States: copyright law. (In International Music Industry Conference. 1st, Nassau, 1969. The complete report. New York, Billboard Publishing Co. [1969] pp. 191-196.)

"A very broad brush treatment of a few of the main points [of the current copyright revision bill] that affect . . . [the music] industry."

59. CARY, GEORGE D. Some problems of copyright, domestic and international. (29 *National Music Council Bulletin* 10-14, no. 3, Spring/Summer, 1969.)

An address delivered by the Deputy Register of Copyrights on June 24, 1969 at the annual meeting of the National Music Council. The talk was devoted principally to some of the ways in which the pending copyright revision bill will effect members of the Council, and through them, the outside world.

60. CATV—utility or not. (84 *Public Utilities Fortnightly* 66-81, no. 7, Sept. 25, 1969.)

Contents: CATV from the industry viewpoint, by John D. Matthews; The CATV problem from the telephone carrier's view, by Warren E. Baker; The CATV problem from the broadcaster's viewpoint, by Douglas A. Anello; CATV, from the regulatory point of view, by Sol Schildhause.

A panel discussion given before the meeting, on August 12, 1969, of the Section of Public Utility Law of the American Bar Association.

61. CATV: wave of the communications future? (194 *Publishers' Weekly* 23, no. 25, Dec. 16, 1968.)

An editorial on a report of a special Presidential study committee which had recommended relaxation of some of the restrictions which the Federal Communications Commission has been applying to community antenna television systems. The editorialist concludes with the hope that since the report indicated that the development of CATV is in the public interest, creative interests would "get better recognition for their work if and when CATV graduates to the role of a program originator."

62. CLAPP, VERNER W. [Review of] Copyright in historical perspective. By Lyman Ray Patterson. Nashville, Tenn.: Vanderbilt University Press, 1968. (39 *The Library Quarterly* 279-281, no. 3, July 1969.)

The reviewer is not convinced of Professor Patterson's conclusion that "copyright is too complex and delicate a matter to be dealt with by statutes alone." See 16 BULL. CR. SOC. 137, Item 90 (1968).

63. CRAMER, EDWARD M. Music teacher: do you steal? (*27 Music Journal* 28-29, no. 8, Oct. 1969.)

The president of Broadcast Music, Inc. condemns the unauthorized reproduction of music by music teachers, and the provision of the current copyright law which permits the unlicensed performance of music if it is not "for profit."

64. DENNISTON, LYLE. Burger's efforts to monitor speech reprints draw fire. In *The Evening Star* (Washington, D.C.), vol. 118, no. 245 (Sept. 2, 1970), pp. A1, cols. 1-3, A16, cols. 1-2.

An article on reactions to the use of the phrase, "Not to be reprinted without permission," on printed copies of the August 10, 1970 speech of Chief Justice Warren E. Burger on the "State of the Federal Judiciary."

65. DIAMOND, SIDNEY A. Court rules salaried art belongs to employer. (*41 Advertising Age* 54, no. 10, Mar. 9, 1970.)

A brief comment on *Scherr v. Universal Match Corp.*, 417 F.2d 497, 17 BULL. CR. SOC. 120, Item 63 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970), *aff'g* 297 F. Supp. 107, 16 BULL. CR. SOC. 171, Item 141 (S.D.N.Y. 1967).

66. EHRLICH, HEYWARD. The Putnams on copyright: the father, the son, and a ghost. In *The Papers of the Bibliographical Society of America*, vol. 63 (1st quarter, 1969), pp. 15-22.

"Abstract . . . George Palmer Putnam is commonly credited with the authorship of *An Argument in Behalf of International Copyright* (1840), first American publication on the subject, and he is spoken of as 'the father of the movement for international copyright in the United States.' Unfortunately, the pamphlet is a bibliographical ghost; it was invented by Putnam's son and publishing heir, George Haven Putnam. The elder Putnam remains a distinguished American publisher, but the record of his activities for international copyright stands in need of revision."

67. FINKELSTEIN, HERMAN. Performing rights for composers and publishers — "The ASCAP approach." (*3 ASCAP Today* 17-18, 35, no. 2, Oct. 1969.)

An address, delivered at the 1969 International Music Industry Conference in Nassau, which examines the laws affecting performance rights, and the licensing organizations, particularly ASCAP, and how they differ from those of other countries. Mr. Finkelstein concludes that his "remarks are intended to suggest an area of discussion," and expects suggestions for some improvements.

68. FINKELSTEIN, HERMAN. The courts and the Congress: music and CATV. (3 *ASCAP Today* 17, no. 3, Dec. 1968.)

The general counsel of ASCAP makes a case for the payment of royalties by CATV operators for the use of copyrighted music.

69. GALANTIERE, LEWIS. What is the translator's proper share? (196 *Publishers' Weekly* 44-46, no. 1, July 1, 1969.)

A case is made for greater appreciation of the translator's contribution as a creative writer and for better economic recognition of the translator in American publication contracts.

70. GOODFRIEND, JAMES. Going on record: piracy and ethics. (24 *Stereo Review* 43, 45, no. 2, Feb. 1970.)

An article on the ethics of record piracy, in which "tentative suggestions" are made which include the enactment of a law "to define exactly what is legal and illegal in the manufacture and distribution of recordings," and the organization of an archive "to accept as donations, buy, or confiscate all illegally distributed musical recordings," and to "receive all commercially produced recordings that have been allowed to remain out of print for some period of time (say, ten years)."

71. Govt. vs. publisher; who does the sci-tech job? (196 *Publishers' Weekly* 20-23, no. 22, Dec. 1, 1969.)

An article on an annual seminar, held on November 7, 1969, and sponsored by the Technical, Scientific and Medical Book Publishers Group of the American Book Publishers Council. The Federal Government as author and publisher was the subject of the seminar, at which "[c]ontroversial subjects like copyright, the government as competitor, the 'archaic' methods of book distribution, and, in rebuttal, the 'archaic' methods of book procurement livened the all-day session."

72. KARP, IRWIN. Renewing authors' copyrights in magazine contributions." In *Authors Guild Bulletin* (May-June 1969), pp. 14-17.

An article which explains what renewal rights, if any, an author may have in his contributions to periodicals, and how he should protect them.

73. LANOUE, WILLIAM J. Technology tangles with bureaucracy in CATV tiff; in Texarkana, television viewers ask: who wants to see Clyde Fant [mayor of Shreveport] eat chicken? In *The National Observer*, vol. 8, no. 27 (July 7, 1969), p. 3, cols. 1-3.

An article about the failure of citizens of Texarkana to secure adequate programming through CATV "because the FCC has placed Texarkana in the Shreveport television market area — one of the nation's top 100 — and also ruled that CATV cannot bring distant signals into those areas." The article, which also surveys the major policy issues posed by the CATV controversy in general, was inserted into the *Congressional Record* by Senator McClellan [115 CONG. REC., S-7843 (daily ed. July 10, 1969)], who included, among his prefatory remarks, the following statement:

"I regret that little progress has been made so far. If the parties cannot reach some accommodation, then Congress will have to proceed actively with the preparation and consideration of appropriate legislation."

74. LISSNER, WILL. Protection of author's reprint rights. (28 *The American Journal of Economics and Sociology* 213-215, no. 2, Apr. 1969.)

A brief article on an action taken by the Executive Committee of the American Economic Association to protect the reprint rights of authors in their contributions to periodicals. To this end, the Committee has written to editors of a number of leading professional journals, suggesting that they undertake to follow several practices designed for protection of their contributors, including fee suggestions to authors. A number of journals that have agreed to follow these procedures is listed.

75. LIVINGSTONE, WILLIAM. Piracy in the record industry. (24 *Stereo Review* 60-69, no. 2, Feb. 1970.)

An account of record piracy, including unauthorized recordings of performances off the air, and of efforts to extend copyright protection to recordings.

76. McCARTAN, EDWARD F. Creativity, computers and copyright. (3 *Computers and the Humanities* 193-204, no. 4, Mar. 1969.)

A discussion of the question "where and when control is to be applied to use of copyrighted material in a machine-oriented environment," made principally in connection with copyright law revision and the proposed creation of a Commission on New Technological Uses of Copyrighted Material. The discussion concludes with a statement that "[o]ne person whose voice should be heard in selecting the point and degree of application is the scholar who not only produces copyrighted material but also uses it in creative interaction with the computer."

77. MIMASAKA, TARO. Publishing and copyright. (In *Newsletter of the Toyo Book Development Centre*, June, 1970), pp. 10-15.

A brief exposition of copyright, designed for those working in the publishing field and organized under the following topics: 1. What is copyright? 2. Two characteristics of copyright. 3. Copyright, national culture and community. 4. Limitations on copyright. 5. International copyright. 6. On Protocol Regarding Developing Countries. 7. Copyright law of Japan [expected to be in force from January 1971].

78. MORTENSON, ROBERT. The copyright of Byron's *Cain*. In *The Papers of the Bibliographical Society of America*, vol. 63 (1st quarter, 1969), pp. 5-13.

A critical account of efforts to enjoin publication of a pirated edition of Byron's *Cain*, which failed because Lord Chancellor Eldon held that a court of law must determine whether or not the work was blasphemous before a court of equity could grant the injunction. The account ends with the statement that "[p]erhaps one day society will be mature enough to relinquish its fear of the printed word, as it was not in Lord Eldon's day, as it is not in ours."

79. PASSANO, WILLIAM M. How photocopying pollutes sci-tech publishings. (197 *Publishers' Weekly* 63-64, no. 5, Feb. 2, 1970.)

This article is, to a large extent, about a pending action brought by the William & Wilkins Co., a publishing firm, against the National Library of Medicine and the Library of the National Insti-

tutes of Health, charging them with infringement of the publisher's copyrights by making photocopies of articles which appear in the publisher's journals.

80. PATTERSON, LYMAN RAY. Copyright and author's rights: a look at history. (16 *Harvard Library Bulletin* 370-384, no. 4, Oct. 1968.)

"This article is based on material in the author's book, *Copyright in Historical Perspective*" (1968). See 16 BULL. CR. SOC. 137, Item 90 (Dec. 1968).

81. Publishers' World 69-70; a yearbook for publishers, booksellers, librarians. New York, Bowker, 1969. 352 p.

Includes chapters captioned "Trade Customs and Other Data of Special Interest to Publishers and Dealers in Foreign Rights and/or Foreign Books," and "A Guide to Co-Production and Import Practices Between American Publishers and Foreign Publishers," which are of copyright significance.

82. RAYWARD, W. BOYD. Manufacture and copyright: past history re-making. (3 *The Journal of Library History* 7-31, no. 1, Jan. 1968.)

An analysis of the legislative history of previous manufacturing provisions in the Copyright Law which concludes that, despite lengthy attempts, copyright reform in this area seems to be foredoomed because the book manufacturers are a "body highly conservative and are only just beginning to realize the need for adaptation to contemporary economic and social conditions."

83. RINGER, BARBARA A. Copyright law revision and ETV. (1 *Educational Television* 24-25, 31, no. 5, Mar. 1969.)

A brief legislative history of recent attempts to revise the copyright law, with particular reference to the problem of copyright and educational television.

84. ROBERTS, MATT. Copyright and photocopying: an experiment in cooperation. (30 *College & Research Libraries* 222-229, no. 3, May 1969.)

"The problem of copyright and photocopying by libraries is examined, with particular reference to the arguments offered by publishers in defense of the 'exclusive right' provision of the copy-

right law. Proceeding step-by-step through these arguments, it appears rather that 'fair use' is virtually self-explanatory and that libraries not only are privileged, but are obligated to photocopy reasonable parts of copyrighted works in order to fulfill their responsibility to scholarship and to 'promote the Progress of Science and useful Arts.' "

85. SAMUELSON, ROBERT J. Cable TV bill puts networks on defensive. *The Washington Post*, May 24, 1970, p. B3.

An article on the controversy over the CATV provisions of the copyright revision bill, S. 543, which includes a sketch of the development of CATV, the opposition of the networks, and the shifting positions of the Federal Communications Commission on CATV regulation and its present status.

86. SMITH, ROGER H. More wraps off CATV. (169 *Publishers' Weekly* 33, no. 18, Nov. 3, 1969.)

An editorial on the recently issued F.C.C. report and order on CATV with a conclusion that "this is the time . . . for groups of copyright owners and users of copyrighted material to work out a voluntary, non-imposed payment schedule that will not inhibit CATV's development and will not penalize producers of an important source of its eventual input."

87. SULLIVAN, ROBERT C. Developments in reproduction of library materials and graphic communication, 1968. (13 *Library Resources & Technical Services* 391-421, no. 3, Summer 1969.)

One of an annual series of articles on research and developments relating to the reproduction of library materials. A section captioned "Copyright" is devoted principally to a survey of reports and articles dealing with concern over, and implications of, pending copyright law revision affecting reproduction of copyrighted materials by libraries.

88. SULLIVAN, ROBERT C. Developments in reproduction of library materials, 1969. (14 *Library Resources & Technical Services* 189-230, no. 2, Spring 1970.)

One of an annual series of articles on research and developments relating to reproduction of library materials. A section cap-

tioned "Copyright and Other Legislation" includes a summary of the fair use provisions of S. 543 as reported out by the Senate Subcommittee and comments on several publications dealing with the proposed legislation.

89. Technology vs. copyright: form vs. content. (196 *Publishers' Weekly* 18-20, no. 6, Aug. 11, 1969.)

An article on the discussions at the Information Industry Association's meeting on "Copyright and Related Protection for Information Age Products" at the Airlie Conference Center, Virginia, on July 18 and 19.

90. The Teacher & the copyright law. (43 *NJEA Review* 36-37, no. 5, Jan. 1970.)

A brief discussion of the problem, in connection with copyright law revision, "of achieving a balance between the rights of those who write for profit and the rights of educators to use certain copyrighted materials in teaching."

91. WEIL, BENJAMIN H., and JOSEPH H. KUNEY. ACS developing policy on copyright; technological developments in communications and methods of information exchange prompt revisions in copyright laws. (48 *Chemical and Engineering News* 37-39, no. 35, Aug. 24, 1970.)

Prepared by two members of a new Joint Board-Council Committee on Copyrights of the American Chemical Society to help the Society formulate its policy on copyright matters. The article focuses on copyright problems that have arisen in view of technical advances in communications since the 1909 Act, the need for prompt revision, and what the American Chemical Society is trying to do to help solve the problems.

92. WEST, STANLEY. [Review of] Copyright in historical perspective. By Lyman Ray Patterson. Nashville, Vanderbilt University Press, 1968. (30 *College & Research Libraries* 172-173, no. 2, Mar. 1969.)

The reviewer concludes a favorable review with the hope that the book "will become part of the literature of librarianship."

93. WIGREN, HAROLD E. Don't touch! This is copyrighted! (26 *Educational Leadership* 254-257, no. 3, Dec. 1968.)

A critical comment on the fair use provisions of the copyright revision bill in which the author concludes: "In my judgment, the public interest requires a proper balance between public and private concerns. And herein lies the problem in the present revision effort. The scale has been weighted heavily on the side of the private sector, to the detriment of the public."

2. England

94. BARKER, RONALD E. Copyright at the crossroads. (*The Bookseller* 358-362, no. 3293, Feb. 1, 1969.)

A presentation of the background of the international copyright meetings held jointly in Paris, February 3-7, 1969 by the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee.

95. BARKER, RONALD E. International copyright: the way ahead. (*The Bookseller* 1430-1432, no. 3296, Feb. 22, 1969.)

A report on the results of the joint meeting of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee held in Paris, February 3-7, 1969.

96. BARKER, RONALD E. The Washington recommendation; a formula to preserve international copyright. (*The Bookseller* 2142-2144, no. 3329, Oct. 11, 1969.)

A favorable report on the work of the International Copyright Joint Study Group which met in Washington from September 29 to October 3, 1969.

97. BARKER, RONALD E. Copyright concessions for the developing countries. (*The Bookseller* 2598-2602, no. 3364, June 13, 1970; 2678-2684, no. 3365, June 20, 1970.)

A report, by an adviser to the United Kingdom delegation at the recent meeting of the U.C.C. and Berne Convention Preparatory Committees in Paris and Geneva, "on the proposals which now go forward with the object of modifying the Stockholm Pro-

tocol," with special reference to the concessions made by the developed countries.

98. In Taiwan a cool look at the courteous pirates. (*The Bookseller* 2202-2206, no. 3358, May 2, 1970.)

A summary of a report (*Report of the Publishers Missions to Korea and Taiwan* published by the Book Development Council), by a two-man publishers' mission to Taiwan in December 1969 to examine the practice of unauthorized reproduction of English language books in Formosa.

99. BILAINKIN, GEORGE. Authors' ordeals; 300 for four years' work. (182 *The Publisher* 16-18, 46, no. 4953, Oct. 1969.)

The British author of fourteen books gives an account of his own experiences to demonstrate the economic plight of authors.

100. HILL, ALAN. In Africa: ex Africa. (*The Times Literary Supplement*, no. 3473, Sept. 19, 1968, pp. 1056-1057.)

An article taken from a paper delivered on September 28 by Mr. Hill, chairman of Heinemann Educational Books Ltd., to the African Studies Association of the United Kingdom. The article, which details the historical development of the educational book trade in Africa, indicates that "misuse of copyright material is virtually unknown in Africa," and that "[t]he African governments are behaving with scrupulous respect for the rights of authors."

101. Public Lending Right; authors and librarians state their cases anew. (*The Bookseller* 2030-2032, no. 3287, Dec. 21, 1968.)

A statement issued by the Society of Authors in which a case is made for the enactment of a law "whereby British authors would as of right receive royalties for the use of their books in the public libraries of Great Britain," followed by a memorandum by the Council of the Library Association, which has been forwarded to the Department of Education and Science, in opposition to such a law.

102. Where copyright went wrong. (181 *The Publisher* 4, no. 4947, Oct. 1968.)

A brief review of *Copyright in historical perspective* by Lyman Ray Patterson (Nashville, Vanderbilt University Press, 1968). See 16 BULL. CR. SOC. 137, Item 90 (Dec. 1968).

NEWS BRIEFS.

103. ABRIDGEMENT OF TELEVISED FILMS. *FTC Survey*. Federal Trade Commission *News Summary* No. 24 (September 1, 1970) at 2, col. 2:

"The FTC has announced that it has completed the preliminary stages of an investigation of the nature and extent of the abridgement of televised motion picture films.

As practiced, abridgement consists of the removal of scenes or parts of scenes appearing in the versions of the same film exhibited at earlier dates in motion picture theaters. The practice results in the reduction of the running time of the televised film from its running times when exhibited at motion picture theaters.

Preliminary inquiries directed to the three major television networks, CBS, NBC and ABC, revealed that 164 films originally made for and appearing in motion picture theaters were aired over those networks' facilities during the latter six months of 1969. Of that total number, 84 percent were reduced in length to some extent, and 57 percent were reduced in length by two minutes or more from their original theater running times. The cuts made were shown to have varied from several seconds of running time to scenes or parts of scenes amounting to more than 20 minutes of the original lengths of the films in some cases.

The Federal Trade Commission is not concerned with the reasons underlying the practice of abridgement, the propriety of the changes made, or other questions involving program content or standards. The Commission is concerned, however, with the question whether it is a deceptive or unfair trade practice to fail to disclose to the public the fact that a motion picture shown on television has been substantially abridged. The Commission will continue its examination of the practices of abridgement of motion picture films."

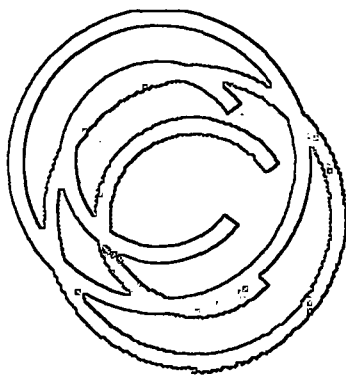
[*Ed. Note:* See generally the "Editor's Note" to *Stevens v. National Broadcasting Company*, 16 BULL. CR. SOC. 293, Item 221 (Cal. Ct. App. 1969).]

104. A REPRINTING OF THE SENATE REVISION HEARINGS.

S. Cong. Res. 81, authorizing the printing of 2,000 additional copies of parts 1, 2, 3, 4 and index of the Senate hearings before the Subcommittee on Patents, Trademarks and Copyright during the 90th Congress on copyright revision (S. 597) was submitted by Mr. McClellan on Aug. 28; reported by Mr. Jordan of North Carolina, without amendment, on Sept. 23 (S. Rep. No. 91-1227)

and passed by the Senate on Sept. 25, 1970. The measure was reported in the House by Mr. Dent on October 7 (H. Rep. 91-1577) and agreed to on the same day [116 CONG. REC. H9703 (daily ed. Oct. 7, 1970)], thus putting it into effect.

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



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 2

DECEMBER, 1970

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

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN
DONALD S. ENGEL
JUDITH GRAD
MORTON DAVID GOLDBERG
PROF. HARRY G. HENN

DR. STEPHEN P. LADAS
ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

EUGENE N. ALEINIKOFF, New York City
ALLEN H. ARROW, New York City
IRVING COHEN, New York City
EDWARD M. CRAMER, New York City
SIDNEY A. DIAMOND, New York City
HERMAN FINKELSTEIN, New York City
EUGENE L. GIRDEN, New York City
A. A. GOLDMAN, Washington, D.C.
PROF. ROBERT A. GORMAN, U. of Penn. Law School, Philadelphia
JOHN F. HARDING, New York City
PROF. HARRY G. HENN, Cornell Law School, Ithaca
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
PROF. JOHN M. KERNOCHAN, Columbia Law School, New York City
ARTHUR B. KRIM, New York City
ABRAHAM MARCUS, Los Angeles
JOHN A. MARSHALL, Boston
WALDO H. MOORE, Washington, D.C.
PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles
HARRY R. OLSSON, Jr., New York City
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
EDWARD A. SARGOY, New York City
ADOLPH SCHIMEL, New York City
CHARLES B. SETON, New York City
LEON SHIMKIN, New York City
SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1971 by The Copyright Society of the U.S.A.

All rights reserved.

CONTENTS

PART I. ARTICLES.	PAGE
THE ORIGINS OF THE STOCKHOLM PROTOCOL	
Charles F. Johnson	91
<i>Index</i>	
Introduction	91
Early Origins of the Protocol	93
The Brazzaville Meeting	103
The 1963 Committee of Experts Meeting and Its Origins	108
The Seventh and Eleventh Sessions of the Intergovern- mental Copyright Committee and the Permanent Committee of the Berne Union (New Delhi, 1963)	116
The Committee of African Experts – To Study a Draft Model Copyright Law	118
The 1964 Report of the Swedish/BIRPI Study Group	120
Comments and Observations on the Study Group's 1964 Report	124
The 1965 Committee of Governmental Experts – (Geneva, July 5-14, 1965)	127
The Eighth and Twelfth Sessions of the Intergovern- mental Copyright Committee and the Berne Perma- nent Committee (Paris, November 15-18, 1965)	134
The Official Programme for Revising the Substantive Provisions (Articles 1-20) of the Berne Convention	136
Observations and Comments by Various Governments on the Protocol	141
Observations of Various International Organizations on the Protocol	149
The East Asian Seminar on Copyright (New Delhi, January 23-30, 1967)	158
Possible Revision of the Universal Copyright Convention	163
The Extraordinary Session of the Permanent Com- mittee of the Berne Union (Geneva, March 14-16, 1967)	174
The Status of the Protocol on the Eve of the Convention	178

EDITORIAL NOTE

Charles F. Johnson's historical study on "The Origins of the Stockholm Protocol," which is printed in its entirety in this issue of THE BULLETIN, was deemed to be of sufficient timeliness and lasting value to be brought to the attention of our full readership. Mr. Johnson is a member of the District of Columbia Bar and completed this study while acting as Attorney for Examining on the Staff of the 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.

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: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1970).

PART I.

ARTICLES

105. THE ORIGINS OF THE STOCKHOLM PROTOCOL

By CHARLES F. JOHNSON

INTRODUCTION

The purpose of this paper is to examine the background of the Stockholm Protocol Regarding Developing Countries rather than the proceedings at the 1967 Stockholm Conference and their specific results. In the wealth of material now available on the Stockholm text of the Berne Convention, there seems to be general agreement that the most important and, incidentally, the most controversial item resulting from the Conference was the Protocol. Although the Stockholm Conference did adopt several substantive proposals in other areas, notably those dealing with cinematographic works,¹ all of these have virtually been transcended by the special reservations permitted developing countries in the text of the Protocol.

It has been suggested that the Protocol represents a "crisis in international copyright": a clash of attitudes between developed and developing countries and their differing notions regarding the sanctity of copyrights.² In actuality, this is true. Unfortunately, the developed countries have become the primary *producers* and *capital-exporters* of copyrighted works, while the less-advanced countries, in order to reduce their high illiteracy rates, have had little alternative but to become nothing more than users and capital-importers of these same works.³ It is not surprising then, that the two groups view the matter of copyright on somewhat different terms.

Basically, copyright law, when expressed in an international treaty, provides the means for an effective economic balance in the protection

1. See Ringer, "The Stockholm Conference of 1967", 14 *BULL. CR. SOC.* 424 (1967). Cf. also Masouyé, "Prospects of Revision of the Berne Convention," 43 *Revue Internationale du Droit d'Auteur* 28, 30 (1964), wherein the author suggests that at one time this issue was considered to be the most important item on the Conference agenda.

2. Sacks, "Crisis in International Copyright. The Protocol Regarding Developing Countries," 128 *Journal of Business Law*, 26 (1969).

3. *Id.*

of intellectual property among the member States.⁴ But can this traditional sort of balance be achieved between developed States and developing ones? Past experience in the world copyright community has shown that this question can be answered only with a qualified "yes," and the success of any attempt to reconcile the differences between two such groups of States clearly depends on their ability to recognize and deal with the complex and special problems presented.

The specific make-up of the Berne Convention provides a useful basis for illustrating the very limited compromises which can be worked out under these circumstances. Since the standards of the Berne Convention are traditionally very high, countries which are unable to accept its standards rarely entertain the prospect of membership. Those lesser-developed countries, which have attempted and gained their membership in the Berne Union, have eventually done so only by taking advantage of certain concessions intended to attract broad membership. For example, the 1928 Rome and 1948 Brussels texts contain a variety of compromises and permissible reservations. However, the basic principle underlying these texts has always been that any permitted reduction of protection must not be such as to emasculate either the function or purpose of the Convention.

The problem takes on a different dimension, however, when 20 or 30 developing nations in varying stages of economic development demand that a particular convention be made relevant to their economic, social and cultural needs. A request for a revision of a high-level convention by many developing countries carries with it the possibility of a change in the entire framework of the convention in question. This is precisely the problem the Berne Union faced in the early 1960's as it prepared for its fourth Revision Conference.

The dilemma of the member States of the Berne Union was obviously not a welcome one. Should they accommodate the newly-independent and underdeveloped countries and risk lowering the high standards of protection they had so zealously guarded theretofore? Or should they keep the Union a 'closed shop' and risk both eventual obsolescence and the possibility of rival conventions or widespread international literary piracy?

The Protocol Regarding Developing Countries was the controversial outcome of the efforts to resolve this dilemma. A thorough understanding of the present situation in international copyright requires, of necessity, an examination of the Protocol's evolution and history.

4. *Id.* at 27.

EARLY ORIGINS OF THE PROTOCOL

Although the idea of introducing special provisions into the Berne Convention for the benefit of developing countries was first expressed at Brazzaville in 1963 at the African Symposium on Copyright,⁵ its rumblings could be heard in the late 1950's. They accompanied the newly-acquired independence of the developing States, and their efforts to cope with new problems in the copyright field.

In the decade following the Brussels revision of 1948, many colonial dependencies, particularly in Africa, were seeking and achieving their independence. The onset of independence, however, brought with it a host of pressing problems. Foremost among these was the need for new legislation in areas previously governed by the laws of the mother country.

In this context it should be pointed out that one of the long-range aims of all of these developing countries was to educate, as quickly as possible, the masses of their illiterate peoples. Moreover, most of them realized that the quickest way to accomplish this end was through the use of copyrighted materials, primarily textbooks, from the more advanced countries. The developing countries, without the aid of any copyright laws, had encountered serious obstacles to the importation of foreign educational materials on favorable terms.⁶ These in turn dampened their hopes for accelerated development through education, and led them to realize the necessity for giving a high priority, *cum celeritate*, to the creation of a functional copyright system.

Interestingly enough, the United States took the initiative in this area. In October of 1959 the Intergovernmental Copyright Committee (IGC)⁷ held its fourth session in Munich. At that meeting, the United

5. "The Protocol Regarding Developing Countries" 54-55 *RIDA*, 393, October 1967/January 1968.

6. See Ringer, "The Role of the United States in International Copyright". 20 (1968).

7. The Intergovernmental Copyright Committee (IGC) is the governing body of the Universal Copyright Convention. The Committee, which was created by Article XI of the Convention, has no judicial functions. Its primary duties are: (a) to study the problems concerning the application and operation of the Convention; and (b) to make preparation for periodic revision of the Convention. The Secretariat for the Committee is provided by the United Nations Educational, Scientific and Cultural Organization (UNESCO). See A. Bogsch, "The Law of Copyright Under the Universal Convention," 98-101 (1968).

States representatives⁸ to the meeting proposed that the Committee include a new item in its agenda entitled "Assistance to and Consultation with States, not yet Parties to the Universal Copyright Convention and/or the Berne Convention."

This proposal recognized the emergence of newly-independent countries, their need to formulate legislation for the protection of literary and artistic works, and their lack of expertise in the area. The U.S. delegation therefore suggested that the Intergovernmental Committee should consider establishment of a program under one of the specialized international organizations which would offer assistance and consultation on such matters, and that Unesco had a Programme of Participation in the Activities of Member States which might possibly be expanded to include the copyright area.⁹ Following the discussion of this new item, the Committee, as a whole, decided to recommend to the Director-General of Unesco that the so-called Participation Programme be extended to the field of copyright.

After studying the Munich recommendation of the Intergovernmental Copyright Committee, the Director-General of Unesco agreed to accept the proposals and proceeded to formulate a basic copyright assistance program in keeping with the already established guidelines of the larger Unesco Programme.¹⁰ As the Director-General envisaged it, the Participation Programme would be extended to include assistance to newly-developed countries in formulating national copyright legislation. The Director-General made plans to present these new proposals to the General Conference of Unesco, which was scheduled to meet in Paris beginning on November 14, 1960.¹¹

However, a fortnight before Unesco's 1960 Paris meeting, the Intergovernmental Copyright Committee convened its 5th session in London from October 31-November 4, 1960.¹² Its agenda included, for a second time, the item of *Assistance to States with Regard to Copyright Legisla-*

8. Harvey J. Winter and Arpad Bogsch.

9. Intergovernmental Copyright Committee, Report on the Meetings of the Intergovernmental Committee Alone, 4th session, IGC/IV/13 at 3 (October 12, 1959).

10. Intergovernmental Copyright Committee, Report on the Meetings of the Intergovernmental Committee Alone, 5th session, IGC/V/13 rev., at 9 (November 10, 1960).

11. *Id.*

12. Intergovernmental Copyright Committee, 5th session, London, October 31—November 4, 1960.

tion.¹³ When this subject came up for discussion, the Committee was informed that proposals to provide assistance to developing states, as recommended at their 4th session in Munich, had been included in the Director-General's overall presentation to the forthcoming Unesco General Conference.¹⁴

Most of the representatives were satisfied with the proposals as they stood. However, the United States delegation called the Committee's attention to the fact that, since the last session, a number of States on the African continent had obtained their independence.¹⁵ Under the circumstances, it was felt that the proposals submitted by the Director-General to the General Conference might be insufficient to satisfy all of the pressing needs for assistance in the field of copyright.¹⁶ The U.S. delegate pointed out that, in light of the independence of these African states and their need to establish viable copyright systems, the proposals should be expanded to take particular account of Africa's problems.¹⁷

The Committee generally agreed that in view of the increasing number of States gaining independence, the proposals of the Director-General to the 11th Session of the Unesco General Conference should be widened to include not only the possible demands envisaged from certain regions of the world but also any new requests coming from the recently independent African states.¹⁸ Resolution No. 39 V was therefore adopted to bolster the Committee's 1959 recommendation. It centered around the need for Unesco to give specific attention in its Participation Programme to the copyright needs of the newly-independent States on the African Continent.¹⁹

The Intergovernmental Committee's concern over assistance to newly-independent States was naturally shared by the African nations themselves. One of the first manifestations of this concern, as expressed by

13. See Intergovernmental Copyright Committee, Report on the Meetings, *supra*, note 10.

14. *Id.*

15. See UNESCO, United Nations Educational, Scientific and Cultural Organization, What It Is, What It Does, How It Works (1962). In 1960, Unesco welcomed 17 new African States to membership.

16. See Intergovernmental Copyright Committee, Report on the Meetings, *supra*, note 10 at 10.

17. *Id.*

18. *Id.*

19. Resolution No. 39 V, adopted at the 5th session of the Intergovernmental Copyright Committee, London (1960).

African spokesmen on behalf of their governments, can be noted at the 11th session of the Unesco General Conference.²⁰

The format of the Unesco meeting provided for several working groups, including one formed to discuss the cultural activities of tropical Africa.²¹ It became evident during that discussion that the African nations were very concerned about rediscovering, developing and protecting their national heritage. The following excerpt, taken from the report by the Director of Unesco's Department of Cultural Activities,²² is illustrative:

The Director of the Department of Cultural Activities emphasized the need for the newly-independent states of Africa to develop national consciousness to rediscover their national heritage. He indicated the means made available by Unesco for this purpose; i.e., equipment for audio-visual recordings, fellowships for training of specialists in human scientific research techniques, the loan of experts from libraries and museums, the aid toward the organization of symposia. In this respect, delegates from Africa intervened with great feeling on the matter of African heritage and culture and stressed that there were African values, cultural and historical which were to be rediscovered as a foundation of their political freedom and through which they could make a positive contribution to world cultural values; that the scattered African heritage should be brought together to provide inspiration for creative artists, and that the oral traditions of Africa which were the key to the art and history of the Continent, must be recorded before they disappeared. Literacy was not enough. Education in Africa should be based on African values and rooted in the national heritage; and an inventory of cultural materials already existing should be made so that they could be used in textbooks and translations into languages of wide communication.²³

At the same working group meeting a delegate from the Congo (Brazzaville) made the following notable comment:

20. Unesco General Conference, 11th session, Paris (1960).

21. See, generally Records of the Unesco General Conference, 11th session, Report of the Working Party on the Development of Unesco's Activities in Tropical Africa, Paris (1960).

22. *Id.* at 233.

23. *Id.* §32.

Legislation derived from that of European countries does not cater to the problems of Africa. African states are not in a position to become parties immediately to the new Universal Copyright Convention, and therefore simplified copyright legislation must be devised for our countries. Doubtless, the ensuing protection would prove a creative stimulus to our creative artists.²⁴

Following the discussions on the copyright problems in the working group on tropical Africa, the delegate from Congo (Brazzaville) submitted two draft resolutions to be presented to the overall Conference, i.e., draft resolutions 11C/DR/156 and 11C/DR/160. Both resolutions noted the importance of cultural development in the African nations and the necessity of creating a viable copyright system to protect their authors and artists. Draft resolution 11C/DR/156 pointed out the need for the establishment of a reasonable convention on copyright and “droits de suite” and invited the Director-General and member States to consider the means of establishing such a convention enabling African authors and artists to contribute effectively to the cultural activity of the modern world.

The last two paragraphs of Draft Resolution 11C/DR/160 read as follows:

Convinced that the establishment of national copyright legislation as a first stage, and accession to the Universal Convention of Geneva as the second stage, can promote this development, *Invites* the Director-General and Member States to study ways and means of providing assistance for African States which might desire it in drawing up their own laws.

The two resolutions have been interpreted as an invitation by the African countries to Unesco to convene a conference on copyright on the African Continent.²⁵ As a result, the Unesco General Conference in 1960 adopted resolution 4.32(b) in the following general terms:

The Director-General is authorized:

24. *Id.* §34.

25. Intergovernmental Copyright Committee, Report of the Secretariat on the Implementation of Certain Resolutions and Decisions Adopted by the Intergovernmental Copyright Committee at its Fifth Session (London, 1960), 6th session, (Madrid) IGC/VI/6 at 3, (Paris) July 31, 1961.

- (a) To participate, at the request of Member States, in their activities concerning the international and national protection of copyright.²⁶

On the basis of this resolution Unesco planned to hold an African seminar on copyright. The purpose of the seminar was to help the new African States formulate general principles of copyright which they could employ in drafting their own national legislation in this area. Although the granting of fellowships was to be another feature of this programme, such action was delayed until the 1963-64 programme because there had already been similar requests (in other fields) which had a higher priority. It was hoped that in 1963-64 provisions for four fellowships could be granted to African nationals for travel in other States in order to study the organization of copyright systems and authors' societies.

At the sixth session of the Intergovernmental Copyright Committee, held in Madrid from September 25-30, 1961, the question of Unesco's participation in the activities of Member States in the field of copyright appeared only on the IGC agenda. However, the Berne Permanent Committee,²⁷ holding its 10th session in Madrid concurrently with the IGC's sixth meeting,²⁸ expressed some interest in the issue at a joint session of the two groups. After a discussion of the role each committee

-
26. See Records of the Unesco General Conference, 11th session, Resolutions, at 51, Paris (1960).
27. The Berne Permanent Committee, like the IGC, is the governing body of the Berne Convention. The Permanent Committee was created during the Brussels Conference in 1948 for the primary tasks of assisting the Union in overseeing the Convention between revision conferences and aiding the Bureau in preparing for revision. See Hesser, "Intellectual Property Conference of Stockholm," 1967, 14 BULL. CR. SOC. 270 (1967).
28. The Berne Permanent Committee and the IGC had conducted separate meetings until 1958. At the IGC's 2nd session, Washington (1957) Arthur Fisher, then U. S. Register of Copyrights, expressed the opinion that the two committees needed to meet jointly for better communication. The idea was enthusiastically accepted and the two committees held their first joint meetings, the IGC's 3rd session, the Permanent Committee's 7th, in Geneva in 1958. The two committees have since met in Munich (1959), (4th and 8th, respective sessions); London (1960), (5th and 9th sessions); Madrid (1961), (6th and 10th sessions); New Delhi (1963), (7th and 11th sessions); Paris (1965), (8th and 12th sessions); Geneva (1967), (9th and 13th sessions); and Paris (1969), (10th and 14th sessions).

could play in this area, the two committees were briefed by Mr. Diaz-Lewis, Secretary of the Unesco Copyright Division, on the progress Unesco had made in preparing for the proposed African Copyright Seminar. The briefing included an explanation of the role the selected consultants would play before, during and after the seminar.²⁹

In response to Mr. Diaz-Lewis's briefing, the U.S. delegation expressed the view that the IGC should approach the Unesco Director-General as soon as possible about nominating consultants for the proposed meeting. Accordingly, it put before both committees proposed resolution No. 6 or 45(VI). The resolution invited the two committees to assist the Secretariats of their respective groups in designating two or three consultants to assist the organizations in the preparation of the working papers for such seminars. It also invited the Directors of Unesco and BIRPI³⁰ to select specialists who could serve as experts on the request of the interested countries. The resolution was adopted by the joint committees, and Justice Hesser of Sweden and Mr. Kaminstein of the U.S.A. were designated to assist the Secretariats in preparing the documentation for the African regional meeting.

Following the Madrid meeting of September 1961, efforts to obtain relatively simplified working materials for the conference were undertaken. It was hoped, at the time, to hold the seminar in the summer of 1962. Unfortunately, preparation of the documentation was hampered by a rather awkward tripartite system of communication,³¹ which prevented the texts for the Conference from being completed in accordance with the set timetable.

The inability of the Secretariats to disseminate the working papers for the seminar according to schedule was one of the reasons for the postponement of the African copyright conference from 1962 to 1963, but it can hardly be considered the one determining factor. Among other things, the disturbances on the African continent that year, a "shrinking"

29. Report of the Intergovernmental Copyright Committee, 6th session, Berne Union Permanent Committee, 10th session, 14 *Unesco Copr. Bull.* No. 2 at 159.

30. BIRPI are the French initials of the United International Bureaux for Intellectual Property, which is itself an abridgement of the complete title of United International Bureaux for the Protection of Industrial Property and Literary and Artistic Works.

31. The draft materials for the Conference were being dispatched from Unesco headquarters in Paris to Mr. Hesser in Sweden and Mr. Kaminstein in the U.S.A., only to be returned to Paris for final drafting.

Unesco budget and an "expanding" African conference, and changes in Secretariat personnel certainly contributed to the delay. Another problem arose from the fact that, although Congo (Brazzaville) was the logical host country,³² it failed to extend a firm invitation until some time late in 1962.

It is clear in retrospect that, whatever the reasons for the postponement, the delay was regrettable. The period between 1962 and 1963 might well have provided a time-saving opportunity for a more fruitful analysis of what needed to be accomplished in this area. The two-year period from September 30, 1961, the date of the closing session of the Madrid meetings, and August 5, 1963, the date of the convocation of the Brazzaville meeting, was an unusually fallow one in international copyright. Work continued toward completing the texts for the meeting and familiarizing the African countries with the drafts, but no meaningful study was undertaken to see what other assistance might be offered developing countries. Had the governing bodies of the U.C.C. and Berne Convention met in 1962 they might have provided an impetus for some other action along these lines, but neither committee scheduled meetings for 1962.

The only meeting in 1962 that bore on this problem was the 12th session of the Unesco General Conference.³³ Although the African seminar was already well into its planning stages at this point, the General Conference adopted a resolution at its 12th session which specifically referred to the convening of an African study meeting. Resolution No. 4.32(a) read, in part, as follows.

The Director-General is authorized:

- (a) To maintain the services necessary for the implementation of the U.C.C., in particular.

.

- (iii) by assisting Member States to develop national Copyright legislation by such means as for the *African continent*, the *convening* in collaboration with the International Union for the Protection of Literary and Artistic Works (Berne Union) of a

32. Since the Brazzaville delegation had proposed the two draft resolutions, 11 C/DR/156 and 11 C/DR/160 at the 11th session of the Unesco General Conference, it was assumed that its expressed concern would make it agreeable to hosting the seminars.

33. Unesco General Conference, 12th session, Paris (1962).

study meeting on copyright and the granting of fellowships to officials of African States ³⁴ (emphasis added)

The adoption of resolution 4.32(a) cannot be regarded as much more than a *pro forma* action on the part of the General Conference. It merely provided the specific authority and finding to convene the then delayed meeting. It was, however, the last official organizational action before the Brazzaville meeting.

Concurrent with the preparations for the Brazzaville Conference were two other developments, both of which deserve attention. The first involves the changing attitude toward copyright in India which in 1958 was a member of both the Berne and the U.C.C. Conventions. Despite the fact that India had recently revised its copyright law,³⁵ it was experiencing essentially the same problems that confronted the new African States: the problems of obtaining access to reasonably priced books to assist in their scientific and technological advancement.

The emerging Indian position, which has been maintained and reinforced for the last decade, proceeded from the argument that the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries. The Indians did not contend that the authors in the developed countries should go without remuneration for the use of their works. It was, instead, their point of view that the more advanced countries should voluntarily recognize the enormous educational and social needs of the underdeveloped countries and take into consideration their financial capabilities. The point was that traditional ideas of copyright protection as an economic right would have to be modified when the developed nations of the world did business with the developing sector.

34. See Records of the General Conference, 12th session, Resolutions at 50. Paris (1962).

35. In 1957, India revised its copyright laws. One of the reasons for enacting the 1957 law was to enable India to ratify the Brussels Convention. The Act followed in many respects the new English Copyright Act of 1956. India's 1957 Copyright Act came into force on January 21, 1958, repealing the Indian Copyright Acts of 1911 and 1914. (The 1911 Indian Copyright Act was passed by the British Parliament. When India enacted its 1914 law, it simply modified the 1911 law to make it more applicable to its own needs). See P. Rao, "Copyright Law in India", *Copyright, A Symposium*, New Delhi, Ministry of Scientific Research and Cultural Affairs (1963).

The demand by India for some consideration in this area was first presented in 1960 at the 11th session of the Unesco General Conference.³⁶ This was, significantly, the same meeting in which the African problems were first brought to Unesco's attention.

At that meeting Professor Mahadevan of India included the following statement in his remarks to the Conference:

. . . . I urge also that some active, definite, help be given by Unesco to universities and scientific institutions for the purchase of books and equipment Our own exchange resources are very limited ³⁷

The remarks of the speaker were followed up by the formulation of a draft resolution by India pertaining to their need for *the cheap production of scientific and technical books*.³⁸

These efforts resulted in the adoption of resolution 2.43 by the General Conference authorizing an examination of these problems. The resolution was drafted in the following terms:

The General Conference,

Considering that one of the major problems confronting the development of higher scientific and technological education in the underdeveloped countries is the non-availability of reasonably priced books in various disciplines and that this obstructs and retards the advancement of scientific and technological knowledge in these countries,

Considering, further, that the prohibitive cost of scientific and technical books is mainly due to high production costs in the more advanced countries of the world and that this can be substantially reduced if these are freely allowed to be reprinted or translated by the underdeveloped country concerned,

Realizing that the development of a programme for cheap production of these books would involve the question of copyright and payment of royalty and that it would be neces-

36. Unesco General Conference, 11th session, Paris (1960).

37. Unesco General Conference, 11th session, Twenty-fourth Plenary Meeting, 383, Paris (1960).

38. Unesco General Conference, 11th session, General Documents, Draft Resolution 11 C/DR/104 at 41, Paris (1960).

sary to undertake an examination of the terms on which the publishers could be persuaded to part with copyright of their books and the arrangements that could be made for the payment of royalty in the currency of the country concerned,

Authorizes the Director-General to undertake an early examination of these and allied problems in order to help in formulation of suitable programmes for cheap production of scientific and technical books in the underdeveloped countries, on a national and a regional basis.³⁹

The adoption of this resolution and whatever steps were taken to implement it had little or no visible effect, and three years later India was still actively pressing for a solution to the same problem. It was not until 1963⁴⁰ that the developed countries were induced to accord some concrete recognition to the problems of developing countries in copyright matters. The slowness with which this recognition was given proved to have serious effects in the history of international copyright.

The African nations and India were not the only countries suffering from traditional economic concepts of copyright protection. Finding themselves out of step with their European and North American counterparts in copyright matters, the Latin American countries also sought assistance from Unesco to establish a study meeting which would help them in strengthening their own copyright laws.⁴¹ However, many of their requests went unanswered because of the lack of financial machinery and manpower to deal with their problems. Unfortunately, an administrative decision had already been made: that the complete lack of legislative guidelines in the African states made the latter's needs more pressing.

THE BRAZZAVILLE MEETING

(August 5-10, 1963)

The African Study Meeting, which had been organized through the efforts of both BIRPI and Unesco convened in Brazzaville (Congo) on

39. Unesco General Conference, 11th session, Resolutions at 39, Paris (1960).

40. In 1963, during the joint meetings of the Permanent Committee and IGC in New Delhi, the India delegates succeeded in getting the Committees to look into the possibility of adopting provisions regarding compulsory licenses for translations and reproductions of books.

41. See Intergovernmental Copyright Committee, Report of the Secretariat. *supra*, note 25.

August 5, 1963. The purpose of the meeting was to assist the African Member States and Associate Members of Unesco in defining the general principles applicable to the protection of authors in their respective territories. It was hoped that the principles formulated at the meeting would serve as a basis for the creation of new copyright legislation for the countries concerned.

Of the thirty African countries invited to participate in the seminar, twenty-three designated representatives.⁴³ In addition, three non-African States and six international non-governmental organizations were represented by observers.⁴⁴ BIRPI and Unesco provided the assistance of two experts of international standing, Professor Eugen Ulmer (Federal Republic of Germany) and Justice Torwald Hesser (Sweden).

The welcoming speech made by Mr. Prosper Gandzion, Brazzaville's Minister of Education, Youth and Sports, amply indicated the major concerns of the Africans. Mr. Gandzion noted that "access to independence implied the promulgation of national legislation." In his view, however, there was no question that preference had to be shown for intellectual work. He pointed out that the young African States were anxious to have access to the best works of other nations but also hoped to export their own. Accordingly, he informed the delegates that it was their duty to protect their own authors and provide them with the same guarantees of others. Thus, he urged the representatives to develop and exploit the many-sided gifts of African men of talent as a first step in their encouragement. He concluded by stating that, if the African authors were guaranteed the enjoyment of both the moral and material

42. Report of the African Study Meeting on Copyright (original document designated RADA/10), RADA 10, contained in 16 *Unesco Copr. Bull.*, No. 2 at 171 (1963).

43. Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Ethiopia, Ghana, Guinea, Ivory Coast, Liberia, Malagasy Republic, Mali, Mauritius, Morocco, Niger, Sierra Leone, Tanganyika, Togo, Tunisia, Uganda.

44. The non-African States in attendance were Czechoslovakia, Italy, and the United States. The United States was represented by Abraham L. Kaminstein, Register of Copyrights and Harvey J. Winter, Assistant Chief, International Business Practices Division, Department of State. The International organizations represented were the African Society of Culture, the Union of African National Radio and Television Broadcasters (URTNA), the European Broadcasting Union (EBU), the International Literary and Artistic Association (ALAI), the International Confederation of Societies of Authors and Composers (CISAC), and the Internationale Gesellschaft für Urheberrecht (INTERGU).

benefits resulting from their works, their contributions to the work of international cooperation would undoubtedly be significant.⁴⁵

Professor G. H. C. Bodenhausen, BIRPI's Director, also addressed the meeting at its opening session. He emphasized how important it is for every country to institute national legislation to safeguard its intellectual property, and to adhere to the various international conventions on the subject. In his view, copyright enables countries to communicate their aspirations and the intellectual conceptions to the entire world, thus making for better international understanding.⁴⁶

As planned by Unesco and BIRPI, the program of the meeting was divided into two main headings:

(A) *General Considerations Relating to Copyright Protection*,
and

(B) *Fundamental Considerations Relating to Copyright Protection*.

The format of the meeting was aimed at providing the delegates with general information and at familiarizing them with the concepts to be presented. The experts shared the task of presenting the major topics, and their presentations were followed by a general discussion of the material. The discussions provoked a number of vital questions, which in turn led to proposals for final conclusions.

During the part of the meeting concerned with "general considerations," Professor Ulmer gave a broad outline of copyright protection throughout the world, stressing (a) the intangible nature of copyright ownership, and (b) the need to encourage authors in their creative efforts. In his view, the regulation of copyright at the national level was the major task facing the African States. This he felt was especially true with regard to Africa's folklore and native music, which are lacking in material fixation.

Out of the comments following Professor Ulmer's presentation, the following five areas seemed to command the greatest attention of the delegates:

- (1) The absence of qualified and knowledgeable officials in many African countries;⁴⁷

45. Report of the African Study Meeting on Copyright, *supra* note 42 at 172.

46. *Id.*

47. The delegations from Congo (Leopoldville) and Congo (Brazzaville) expressed their concern regarding this matter.

- (2) the need for various established countries and international organizations to provide the necessary aid in this area;⁴⁸
- (3) the need for assistance in harmonizing the regulation of major rights in the area of broadcasting; especially since broadcasting in Africa is the most effective means of diffusing cultural works;⁴⁹
- (4) the need to reconcile the limited financial resources available in most African countries with their status as importers of intellectual works;⁵⁰ and
- (5) the immediate need for the drafting of national laws adapted to local conditions, with a special concern for African folklore.⁵¹

The problem of the protection of African folklore appeared to be of greatest concern to the delegates from Africa.

During the second part of the program, Mr. Hesser and Mr. Ulmer gave the delegates a briefing on the following fundamental considerations pertaining to copyright protection:

- (1) *The Subject Matter of Copyright;*
- (2) *The Beneficiaries of Copyright Protection;*
- (3) *The Scope of Copyright Protection;*
- (4) *Duration of Copyright Protection;* and
- (5) *Formalities Regarding Copyright Protection.*

The two experts also gave the delegates a basic survey of the subject of *international copyright* relations. The discussions following their presentation proved, at least in retrospect, to be the most far-reaching exchange of the entire meeting. During the discussion the Tunisian delegate made the following remarks (as summarized in the report) about Africa in relation to the international copyright community:

48. *Id.*

49. The need for harmonization was pointed out by the delegate from Dahomey.

50. The delegations from Chad, Ghana, Algeria and Tanganyika all shared a similar concern in this area.

51. Although the folklore issue seemed to concern most of the delegates, the delegations of Niger, Central African Republic and Mali made the most emphatic remarks.

*Africa should not pay too high a price for the fruits of important knowledge and African countries should be represented in the preparatory work of the revision of the Berne Convention.*⁵²
[emphasis added]

The Tunisian delegate also strongly urged the establishment of a Pan-African Copyright Union.

Following the deliberations, the Conference appointed a Drafting Committee⁵³ to prepare its final recommendations and resolutions. Because of the representatives' vital interest in the protection of African folklore, a special commission⁵⁴ was also appointed to submit draft recommendations on the subject.

The recommendations that emerged clearly showed the appreciation of the African representatives for the value of adopting domestic legislation. However, their opinion of the world copyright situation as of 1963 was that it was essentially European in orientation and therefore opposed to their interests. They expressed the view that the major conventions needed to be reexamined in light of the specific needs of the African continent. In this connection, they recommended that African experts be included as full members at all international copyright meetings, especially the committees which were then preparing for the revision of the Berne Convention.

The three most important recommendations made by the drafting committee were—

That the Committee of Experts scheduled to meet in Geneva in November 1963 in preparation for the revision of the Berne Convention (1967) consider:

- (1) the review of Article 7 concerning the term of protection, with a view to its reduction;

52. Report of the African Study Meeting on Copyright, *supra*, note 42 at 181, 182.

53. The drafting Committee was chaired by the delegate from Ethiopia and included delegates from Ghana, Ivory Coast, Tanganyika, Togo, Tunisia and Burundi.

54. The committee on folklore was composed of members from Guinea (Chairman), Congo (Leopoldville), Sierra Leone and Burundi. The delegate from Burundi, Rev. J. B. Ntahokaja, Secretary-General for Catholic Education, President of the Academy of Burundi, was the Rapporteur for both committees as well as for the report of the final proceedings.

- (2) the modification of Article 20, with a view to enabling bilateral agreements promoting exchanges in derogation of the present text of that provision; and
- (3) the inclusion of special provisions safeguarding the interests of the African countries in respect of their own folklore, on the one hand, and permitting, on the other, the free use of protected works for educational and school purposes.⁵⁵

Finally, the African experts proposed that they, as a group, draw up a draft model law for the protection of copyright on the African continent—a law that took into account their particular systems and realities. The recommendation requested the assistance of Unesco and BIRPI to accomplish that end.⁵⁶

THE 1963 COMMITTEE OF EXPERTS MEETING AND ITS ORIGINS

Although other developments in international copyright regarding developing countries before August 10, 1963, can be viewed as “constructive notice” to the members of the two conventions to institute some positive action in favor of the less-advanced countries, it appears that the recommendations made at the Brazzaville meeting constituted the first “actual notice” to them to begin to move toward that end. As has been seen, the African nations made it quite clear at that meeting that they wished both Conventions to review their respective substantive provisions in light of the specific needs of the countries on the African continent.

However, in the light of later events, it is somewhat ironical that the African experts centered their attention on the Berne Convention. The Berne Union traditionally an organization dedicated to a high-level of copyright protection, should have seemed unpromising as a vehicle for their immediate needs. On the other hand, the Universal Copyright Convention had been created for the purpose of accommodating the needs of countries unable to meet the level of Berne Convention protection.

55. Recommendations of the African delegates to the African Study Meeting on Copyright, Report of the African Study Meeting on Copyright, RADA 11, *supra*, note 42 at 184, 185.

56. Recommendations of the African delegates to the African Study Meeting on Copyright, RADA 9, *supra*, note 42 at 185.

Obviously, one of the main reasons that caused the Africans to look toward the Berne Union was the fact that revision of its Convention was imminent. At that time the African experts probably believed that they stood a better chance of getting a favorable response to their demands for concessions from the members of the Berne Union, in the midst of its first revision in nearly twenty years. No revision of the Universal Copyright Convention was then contemplated, and the "Berne safeguard clause" in the U.C.C., preventing any Berne member from denouncing the Berne Convention and relying on the U.C.C. for protection of its works in Berne countries, was also a factor for developing countries already in Berne.

Although the African experts at Brazzaville called on both Conventions to reexamine their principles in light of the specific needs of the African countries, they were also aware that revision of the relatively young Universal Convention⁵⁷ might prove harder. The high reputation and traditional prestige of the Berne Convention were also probably attractive reasons for turning in its direction.

It is interesting that, at the outset, the Africans may have planned to enter the international copyright community through the U.C.C. rather than Berne. In 1960 the delegate from Brazzaville used the following language in his Draft Resolution, 11C/DR/160,⁵⁸ at the 11th session of the Unesco General Conference:

"Convinced that the establishment of national copyright legislation as a first stage, and *accession to the Universal Convention as the second stage*, can promote *this development*. . . ."⁵⁹ (emphasis added)

The specific recommendations which the African nations made with respect to the Berne Convention came too late to have any effect on the first report on Berne revision. The report, prepared by a Swedish/BIRPI Study Group⁶⁰ that had been set up to prepare the preliminary drafts

57. The Universal Copyright Convention was adopted by an intergovernmental conference, fifty countries participating, on September 6, 1952, in Geneva, Switzerland. The Convention went into effect on September 16, 1955. See generally A. Bogisch, "The Law of Copyright Under the Universal Convention", *supra*, note 7.

58. It was this resolution that first brought Unesco's attention to the newly-independent African countries' need for assistance in the field of copyright.

59. Draft Resolution 11 C/DR/160, Unesco General Conference, 11th session, Paris (1960).

60. Article 24 (2) of the Berne Convention, Brussels text, provides that programs for revision conferences shall be prepared by the administration of the country where a conference is to meet, with the assistance of the

of a proposed text for the Stockholm Conference, appeared on June 1, 1963, two months before the Brazzaville meeting.

It is hardly surprising that the import of the events preceding Brazzaville seem to have made no impact on the Study Group's thinking when drafting their first report. The 1963 preliminary draft or revision of the Convention contained no reference to any proposal to include special provisions operating in favor of lesser-developed countries. Although the revision draftsmen were certainly aware of the educational and economic problems of Africa and Asia and of their copyright implications, proposals for Berne revisions to meet these problems had not yet been formulated in even general terms.

Following the issuance of the Study Group's report in June of 1963, a Committee of International Experts met in Geneva from November 18-23, 1963. This Committee was convened in accordance with Resolution No. 8 of the Berne Union Permanent Committee.⁶¹ The resolution provided for the Study Group's work to be assisted by a Committee of Experts appointed by those governments concerned with revision, as well as observers from nongovernmental organizations. These experts participated in the work of the Committee in their personal capacities without binding their respective governments.⁶²

Undoubtedly, the most important substantive issue dealt with in the Study Group's report and subsequently discussed by the 1963 Committee of Experts was the motion picture problem.⁶³ The preoccupation with

Bureau of the Union. Since Sweden was the host country, the Study Group which did the basic preparatory work for the Conference was referred to as the Swedish/BIRPI Study Group. Members of the Study Group were Judge Torwald Hesser (Sweden); Prof. G. H. C. Bodenhausen (BIRPI); Claude Masouyé, Esq. (BIRPI); and Prof. Svante Bergström (Sweden).

61. The idea of a Committee of Experts was put forth by the Permanent Committee at its 10th session (Madrid) 1961. Its Resolution No. 8, adopted at that session, was the authority for the creation of the Committee.
62. Sixteen countries, members of the Berne Union, were invited to appoint experts. The following twelve countries sent representatives to the meeting: Belgium, Czechoslovakia, France, Germany (Federal Republic), India, Italy, Poland, Spain, Sweden, Switzerland, Tunisia, and the United Kingdom. Canada, Ivory Coast, Japan and Brazil chose not to be represented. The United States, which had participated in the Study Group for the International Protection of Cinematographic Works (1961), was invited to attend the meeting as an observer. Mr. Kaminstein represented the United States.
63. The reason for the importance attached to this question has already been pointed out. See Masouyé, *supra*, note 1.

motion picture rights at this stage of the revision planning was the result of a report issued in 1959 by the Secretariats of BIRPI and Unesco. This report had in turn been prompted by a host of problems that had arisen from the use of films in the international sphere.

The 1959 report led to the drafting of a resolution⁶⁴ establishing the 1961 Committee of Film Experts. This Committee met on two occasions⁶⁵ to examine the questions presented by the problem. The extended attention devoted by the Study Group to the protection of cinematographic works in its 1963 Revision Report can be attributed to the comprehensive preparatory work on the subject, and particularly the research of the 1961 Committee of Film Experts. The following statement by M. Claude Masouyé⁶⁶ suggests the reasons why the 1963 revision drafts took shape as they did:

The search for a solution to the problems raised by the international protection of cinematographic works is considered to be one of the essential chapters of the next revision of the Berne Convention. It was at one time considered to be the main object, if not the only one.⁶⁷

The preeminent position the Study Group reserved for the complicated questions regarding cinematographic rights in its first report, though understandable, is one indication of the early failure to recognize the basic challenge to international copyright being posed by the developing countries. There were other indications.

The text of the first report of the Study Group indicates that the drafters were intent on raising the standards of the Berne Convention as well as enlarging the rights of the authors.⁶⁸ Most of the provisions

64. Resolution No. 4 and 37 (V), Berne Permanent Committee, 9th session and Intergovernmental Copyright Committee, 5th session, London (1960).

65. The Committee met in Geneva from June 20-23, 1961 and subsequently was reconvened in Madrid (26-29 September). The Committee was reconvened at the 1961 joint meetings in Madrid because neither the United States, India nor Czechoslovakia was present at the June meeting. When the Committee met in September, the United States and India were in attendance.

66. M. Masouyé was the head of the Copyright Division of the International Bureau.

67. Masouyé, *supra*, note 1.

68. Article 24 (1) of the Convention (Brussels text), cites the object of revision conferences as introducing "improvements intended to perfect the system of the Union." Judge Hesser, a member of the Swedish/BIRPI Study Group stated that the drafters had interpreted this to mean that revision

recommended by the Study Group to the Committee for discussion involved both substantive and technical changes which had, as their primary purpose, the protection of the author's rights. Some of the other subjects the Study Group proposed for change were those dealing with the scope of protection of the Convention, new avenues of protection for works (choreography), provisions dealing with fair use, and the question of duration of protection.⁶⁹

As late as 1961 there was serious consideration within the Berne Union to extend the term of protection for literary works. The consideration of this issue led to a Committee of Experts convening both in 1961 and 1962 for the purpose of discussing a possible extension.⁷⁰ The recommendations made by both Committees were in favor of longer terms of protection.⁷¹

One writer has provided us with further evidence on the tenor of thinking within the Berne Union in the early 1960's:

It was believed . . . that the next revision at Stockholm would concern itself entirely with further detailed revision in the text of the Berne Convention for the Protection of Literary and Artistic Works. . . . For some time the planning of the Stockholm Conference . . . was based on that assumption and/or belief.⁷²

From its inception in 1961,⁷³ the Swedish/BIRPI Study Group had a specific mission with respect to the then-planned 1965⁷⁴ Revision of

should seek to enlarge authors' convention rights and extend the field of application of the Convention as far as possible. See Hesser, *supra*, note 27 at 271.

69. Cf. Kaminstein, "Global Copyright: Recent International Copyright Conferences in Africa, Europe and Asia," 11 BULL. CR. SOC. 226-232 (1964).
70. The Committee of Experts to study a Possible Extension of the Term of Protection met in Geneva in January of 1961 and again in Rome in May of 1962. See Report of the Permanent Committee Alone, 11th session, New Delhi, CP/XI/13 (1963).
71. The 1961 Committee recommended a term of protection extended to the life of the author plus 80 years, while the 1962 Committee recommended a 60-year term p.m.a. The final Stockholm revision left the term unchanged.
72. Ringer, *supra*, note 1 at 418.
73. The Swedish/BIRPI Study Group was set up by the Permanent Committee in its 1961 Madrid Meeting. Resolution No. 8 which also provided the authority for the 1963 Committee of Advisory Experts also provided for the creation of a Study Group. See *supra*, note 61.
74. The Stockholm Conference was originally planned for the summer of 1965. This date was later postponed until the summer of 1967 as the

the Berne Convention. Clearly, the draftsmen are not to be blamed for their lack of foresight. There seems to have been a general feeling among the members of the Berne Union that the revision of the Convention was urgent to no one.⁷⁵

Although the Study Group had not included any reference to the problems of the developing states within the confines of their report, the position of the lesser-advanced countries was not without representation at the 1963 meeting of the Committee of Experts. Among the documents compiled by the Study Group for the Committee of Expert's examination were two that are worthy of observation.

- (1) DA/20/13—*The Recommendations Adopted by the African Study Meeting on Copyright* (Brazzaville—August 1963); and
- (2) DA/20/14—*The European Broadcasting Union's Observations (EBU) to the 1963 Report*.

When the African experts' recommendations were discussed at the meeting, the delegate from Tunisia attempted to impress the Committee with their importance. In the delegate's opinion, their adoption at the African meeting meant that the Berne Union must not fail to consider the necessity for eventually widening its Convention to take account of the special needs of the developing countries.⁷⁶

Even more significant were the comments by the European Broadcasting Union in favor of concessions for the developing countries. The EBU is not only one of the world's largest "user" organizations,⁷⁷ but it has wide membership among developing countries. The observations of the EBU were well put, and probably did more than anything else at the 1963 meeting to engender effective concern on the part of several delegates for the problem.

result of an idea put forward late in 1962 of combining the Conference for the Revision of the Berne Convention with a Diplomatic Conference for the purpose of establishing an Administrative Convention and of revising to that end some of the administrative provisions contained in the Conventions and agreements existing in the field of literary and artistic property and intellectual property. See J. Nus, "The Preparatory Work," 54-55 *RIDA* 121, October 1967, January 1968.

75. Letter from A. Bogisch, BIRPI Headquarters to A. Kaminstein, U. S. Register of Copyrights (March 13, 1963).

76. See Report of the Debates, DA 20/29 rev. at 18, contained in the documentation for the Committee of Advisory Experts, (1963).

77. In 1963 the EBU represented some 50 broadcasting organizations in five continents.

An entire section of the EBU observations was devoted to the *Special Problems of the Developing Countries*. In the EBU's opinion, a Convention mainly adapted to the needs of countries exporting works of the intellect, was not, without amendment, suitable for the developing countries, which were primarily importers and consumers of works of foreign origin. In a strongly worded statement, the EBU expressed its view on what it believed to be the duty of the Stockholm Conference:

. . . the Revision Conference will have to give very serious thought to the position, in relation to the Berne Convention, of those countries which have recently attained independence. It cannot but take into account the resolution which emerged from the African Study Meeting on Copyright in Brazzaville and it will be compelled to take some action in the matter, whether it likes it or not. Here (again) it will have failed its mission if it does not make every allowance for the needs of these countries and if it insists that they too must conform, without exception, to the high standard of protection attained in the course of successive revisions of the Convention.⁷⁸

The EBU not only brought the Committee's attention to the problems, but also offered a solution in the form of provisions that would speak to the problems of the developing countries as they related to the Berne Union. As the EBU saw it, these provisions might keep within the ambit of the Convention those African countries that had already acceded to it and also win over other countries on the same continent to the idea of membership.⁷⁹

The following text, as proposed by the EBU in its remarks on the 1963 Report, may be described as the forerunner of Article 25*bis* as it was proposed in the Study Group's Report of 1964:

As from this date, the new provision (which might, for instance, be inserted in Article 25) might operate in accordance with the following approximate language:

Countries which have entered the Union subsequently to the 1st January 1960 or which enter it hereafter shall have the option:⁸⁰

78. Observations of the EBU on the Preliminary Proposals for Revision of the Berne Convention, DA 20/14 at 2-3, contained in the documentation for the Committee of Advisory Experts (1963).

79. *Id.* at 40.

80. The January 1960 date was obviously designed to coincide with the time period in which the colonial controlled African nations were gaining independence.

(a) of substituting for Article 7 of the present Convention the provisions of Article 7 of the Union Convention as revised in Rome in 1928;

(b) of substituting for Article 11*bis*, paragraphs (1) and (2), of the present Convention the provisions of Article 11*bis* of the Union Convention as revised in Rome in 1928;

(c) of reserving to themselves to determine the regulations for the protection of works covered by the present Convention when such works are used for exclusively educational or scholastic purposes;

(d) of reserving the right to make arrangements among themselves in derogation of Article 20 of the present Convention.

The said countries may at any time in writing notify the Government of the Swiss Confederation that they intend to avail themselves of one, several or all of the options provided above.⁸¹

Although the EBU indicated that the suggested provisions were based on the recommendations of the African seminar, the delineation of its proposals went much further than the two specific recommendations that came out of the Brazzaville meeting.⁸²

As a result of the attention brought to the problems of the developing countries at the 1963 meeting, the Committee of Experts expressed the hope that the recommendations adopted by the African delegates would be studied either by the Swedish/BIRPI Study Group, or by a special Committee of Experts specifically appointed for that purpose.⁸³

Since the 1963 Committee of Experts was advisory in character, some question was raised as to whether it was representative of the attitude of governments. This concern suggested that future meetings would be required before the Stockholm Conference. The Geneva meeting of 1963 left the door open to other meetings of the Committee of Experts. It was envisaged that for the next meeting representatives might be designated to speak for their governments. The New Delhi meeting of

81. Observations of the EBU on the Preliminary Proposals for Revision of the Berne Convention, *supra*, note 78 at 42.

82. Most writers indicate that the only specific recommendations made by the African delegates to the Brazzaville seminar were for revision of Art. 7 and Art. 20 of the Berne Convention.

83. Report of the Debates, 1963, Committee of Experts, *supra*, note 76.

the Berne Permanent Committee (December 1963), immediately following the Geneva meeting, confirmed the likelihood of such further meetings.⁸⁴

THE SEVENTH AND ELEVENTH SESSIONS OF THE INTERGOVERNMENTAL
COPYRIGHT COMMITTEE AND THE PERMANENT COMMITTEE OF THE
BERNE UNION

(New Delhi, 2-7 December, 1963)

In December of 1963, the Berne Permanent Committee and the Intergovernmental Copyright Committee of the U.C.C. both held their sessions in New Delhi, India. It was the first time the two Committees had chosen to meet jointly in an Asian country. From the point of view of focusing attention on the problems of developing countries, the timing could not have been better.

At the very outset of the meeting, India's Minister of Education, Mr. Chagla, set the tone for the sessions by underlining the necessity for international copyright conventions to take into account the needs of all nations, particularly the newly independent nations and those in the course of development.

He suggested that there should be a study of the possibility of introducing into the conventions compulsory licenses to publish copyrighted works for educational purposes, and he also recommended introducing into the Berne Convention translation provisions similar to those in the Universal Copyright Convention.⁸⁵

The latter suggestion may well have represented a last minute change in the planned presentation of the Indian representatives since the item on compulsory licenses for translation and reproduction did not appear on the original agenda of either committee. Subsequently, Mr. Krishnamurti, the Registrar of Copyrights of India, briefly expanded on the subject, promising to furnish later some concrete proposals for study to the two Secretariats.⁸⁶

84. See Report of the United States Observer to the Meeting of the 1963 Committee of Experts on the Stockholm Conference of Revision of the Berne Convention, March 2, 1964 (Copy in Office of the Register of Copyrights).

85. Report of the Intergovernmental Copyright Committee, 7th session IGC/VII/13 and the Berne Union Permanent Committee, 11th session, CP/XI/14 contained in 17 *Unesco Copr. Bull.* 20 (1964).

86. *Id.*

The efforts of the Indian delegation were rewarded by Resolution No. 8 or 51 (VII), which was adopted by both committees. The resolution invited the Secretariats to make a study of these questions and report on them to the Committees at their next joint session.

Another development of interest took place during the discussions by the Berne Permanent Committee of the plans for the Stockholm revision. After reviewing the preparatory work already accomplished, the Director of BIRPI suggested to the Committee that it consider the feasibility of calling, at an opportune time, a Governmental Committee of Experts open to all Member States of the Union wishing to participate. As the Director saw it, the official governmental opinions expressed during the meetings of such a committee would provide a valuable source of information when it came to drafting the texts of the proposals to be submitted to the Revision Conference.⁸⁷ Justice Hesser (Sweden), Mr. Wallace (United Kingdom), and Professor Ulmer (Federal Republic of Germany) were in full agreement with the Director's suggestion. Additionally, Professor Ulmer pointed out the usefulness of such a committee when, of necessity, an examination of the recommendations adopted by the African States was undertaken.⁸⁸

Mr. Rohmer (France) expressed doubt about the wisdom of convening a governmental committee of this nature, which, in his opinion, would inevitably be a sort of "pre-conference".⁸⁹ However, the Committee unanimously adopted, with three abstentions,⁹⁰ its Resolution No. 2, representing formal authorization for the convocation of a Governmental Committee of Experts to evaluate further the preparatory work for the forthcoming Revision Conference.

The other notable development at this meeting pertained to the agenda item covering "Assistance to States in Developing their National Copyright Legislation." Both committees considered the subject at a joint session in which the Secretariats reported on their activities with particular reference to the following three areas:

- (a) the African Study Meeting on Copyright, held in Brazzaville from 5-10 August 1963;

87. Report of the Berne Union Permanent Committee Alone, 11th session, CP/XI/14, contained in 17 *Unesco Copr. Bull.* 15 (1964).

88. *Id.*

89. *Id.*

90. France, Italy and Spain.

- (b) the possibility of UNESCO and the Berne Union granting copyright fellowships to African officials, and
- (c) the possibility of a future Latin American and/or African copyright meeting.⁹¹

With regard to the last point, both committees adopted Resolution Nos. 7 and 50 (VII), which noted the success of the Brazzaville meeting and hoped that the African States would be able to adopt legislation suitable to their needs and allowing them to adhere to the international conventions.⁹²

THE COMMITTEE OF AFRICAN EXPERTS—TO STUDY A DRAFT MODEL
COPYRIGHT LAW

(Geneva, November 30-December 4, 1964)

The realization by the African States and the governing bodies of the two conventions that most of the developing countries would have to establish a functional system of national copyright laws before their adherence to either of the two treaties made the matter of drafting a model law an urgent one.

Pursuant to the Brazzaville recommendation on this subject, a committee of African experts met in Geneva in late 1964 under the joint auspices of BIRPI and Unesco to draft a model law. Seven African States⁹³ appointed experts to act in a personal capacity without binding their respective governments.

The purpose of the meeting was for the experts to determine the basic provisions to be included in a model law, and then to draft a prototype that the framers of African laws could later use in preparing legislation for particular countries. It was recognized that the goal of the committee was to create an exclusively African model law, reflecting the realities and requirements of the African continent. A working group was appointed to prepare a draft text of the model law, and this group in turn had at its disposal documentation prepared, with the help of consultants, by the Secretariats of the two host organizations.

91. Report of the Intergovernmental Copyright Committee, 7th session IGC/VII/13 and the Berne Union Permanent Committee, 11th session, CP/XI/14, *supra*, note 85.

92. This resolution was prompted by Mr. Kaminstein (USA). See Report of Meetings, *supra*, note 85.

93. Congo (Brazzaville), Ghana, Guinea, Ivory Coast, Liberia, Morocco and Nigeria.

The final result of the committee's discussions and study was a single general text, intended to be sufficiently flexible to permit all of the African Governments concerned to adopt its provisions subject to adjustments for individual legal structures and local requirements.

Notable among the provisions of the draft law were the following:

- (a) exclusive translation rights for the author (Art. 2);
- (b) the adoption of an employer-for-hire principle (Art. 3);
- (c) the protection of works inspired by "folklore" (Art. 6);
- (d) inclusion of "fair use" exceptions, especially regarding the use of works for purely private educational or scientific purposes (Arts. 8-14);
- (e) flexible broadcasting rights, including a limited compulsory license (Arts. 13-16); and
- (f) a shorter term of protection (the life of the author plus 30 years) (Art. 22).

The Committee of African Experts also adopted a significant resolution, which reinforced the recommendations of the *Brazzaville* meeting with respect to revision of the international copyright conventions. In essence the resolution requested those African nations already members of the Berne Union to take all appropriate measures at the Stockholm Conference and at all preparatory meetings to seek a revision of Articles 7 and 20 of the Berne Convention: (1) to secure a reduction in the minimum term of protection, and (2) to provide a means of adjusting the clause on special arrangements to take better account of the realities of the African continent.

In addition, the Committee of African Experts recommended that those African states that were parties to the Universal Copyright Convention request an amendment of Article 11 of the U.C.C., to make it possible for additional countries to become members of the Intergovernmental Copyright Committee.

Finally, the Committee recommended the adoption of a regional African convention that would adequately meet African requirements in the field of copyright.⁹⁴

94. See generally, Report of the Committee of African Experts to Study a Draft Model Law, contained in 18 *Unesco Copr. Bull.* 11 (1965) (Unesco Doc. CUA 65/III 39 AFS and Doc. CUA 65/III 39X/A).

THE 1964 REPORT OF THE SWEDISH/BIRPI STUDY GROUP

Following the 1963 meetings of the Intergovernmental Copyright Committee and the Berne Permanent Committee in New Delhi, there were no other formal meetings on Berne revision at the governmental level until the 1965 Governmental Committee of Experts. During the interim, and pursuant to Resolution No. 2 as adopted by the Permanent Committee at its 11th session, the Study Group undertook to revise its 1963 report.

The Study Group's Second Report appeared on July 1, 1964. The most notable difference between the 1963 report and its 1964 counterpart was the proposal to introduce an entirely new article into the Convention—Article 25*bis*—designed especially to fit the needs of the developing countries.

Another dramatic shift appeared to have taken place in the Study Group's thinking about the goals of Berne revision. In its 1963 report, the Study Group stated as its purpose the general principles expressed in the first paragraph of Article 24 of the Convention. According to Article 24 the Conference of Revision has as its object:

"The introduction into the Convention of improvements to perfect the system of the Union."⁹⁵

As the Study Group saw this principle in 1963, "improvements" meant "the enlargement of the protection granted to authors by the creation of new rights or by the increasing of rights which are already recognized."⁹⁶ The 1964 report qualified this object in the following terms:

However, it is also necessary to promote the general development of copyright by reforms intended to make the rules relating *to it more simply to apply, as well as to adapt them to the social, technical and economic conditions of the contemporary community*.⁹⁷ (emphasis added)

The Study Group observed that care should be taken to avoid the unreasonable creation of obstacles that might impede access to the

95. General Report of the Swedish/BIRPI Study Group, established at July 1, 1964, DA/22/2 at 5, contained in the documentation for the Committee of Governmental Experts (1965).

96. *Id.*

97. *Id.*

Union of countries at present outside it.⁹⁸ To this end, it suggested that such countries should be provided with the opportunity to make specific reservations, within certain time limits, regarding the—

- (a) *right of translation;*
- (b) *right of radiodiffusion;*
- (c) *right to use works for educational or scholastic purposes; and*
- (d) *possibility of making specific arrangements among themselves in derogation of the convention.*⁹⁹

The Study Group's 1964 Report, as it related to Article 25*bis*, had obviously been influenced by:

- (1) The recommendations made at Brazzaville, and reinforced at the African Experts meeting in Geneva, regarding revision of Articles 7 and 20; and
- (2) The proposals regarding compulsory licenses for translations and reproductions as suggested by the Indian experts at New Delhi in 1963.

Additionally, it seems clear that the Study Group gave serious consideration to the European Broadcasting Union's observations on the 1963 report, since it recommended a reservation on broadcasting for developing countries; this was an area that the Africans had noted but had not specifically included in their proposals for Berne revision. The EBU's emphasis on the need for reservations with regard to broadcasting was obviously considered to have some substantive validity.

In its General Report, the Study Group affirmed the principle that the inclusion of provisions in the Berne Convention to help developing countries organize on a lower level of protection was generally well-founded.¹⁰⁰ The rationale for this view was explained as follows:

The movement of such countries to the Universal Copyright Convention, as has been suggested, would not serve the best interests of their authors The adoption by these countries of copyright legislation within the framework of the Berne Convention would be of considerable advantage to their authors. Conditions in these

98. *Id.*

99. *Id.* at 10.

100. *Id.* at 85.

countries will improve and expression of literary and artistic works will result; thus it will be advantageous to organize protection for them from the start on the Berne level.¹⁰¹

This statement suggests that the special textual provisions for developing countries were included not only out of a desire to aid these countries, but also because of uncertainty about what the future status of the Union would be if such assistance were not offered.

In formulating Article 25*bis*, the Study Group encountered several difficulties regarding procedural points. First of all, the Study Group recognized that the special rules could have been drawn up as part of a separate Protocol, but decided that a better solution would be to bring the rules within the Convention itself.¹⁰²

Secondly, it was decided to state these rules in the form of provisions entitling the countries in question to make reservations, within time limits, in respect to some of the requirements of the Convention. There was precedent for this solution, since the Convention already contained provisions allowing for certain reservations, and these had originally been designed for the benefit of less-advanced countries.¹⁰³

Finally, the Study Group decided that the new provisions should only operate for the benefit of developing countries that could make reservations for ten years, with the possibility of extension for a further period of ten years. Whether or not the reservations could be extended beyond the 20-year period was left to the decision of the next Revision Conference after Stockholm.¹⁰⁴

However, the Study Group was unable to establish suitable criteria for objectively defining the concept of a "developing country." In its 1964 report, instead of choosing a solution, the Study Group recommended leaving to each State the right to decide whether its stage of development allowed it to take advantage of the right of reservations.¹⁰⁵

As they emerged in the 1964 Report, the five reservations contained in Article 25*bis* can be summarized as follows:

- (1) *The right of translation*—substitute for Article 8 of this Convention the provisions of Article 5 of the Convention as revised

101. *Id.*

102. *Id.*

103. *Id.* at 86.

104. *Id.*

105. *Id.*

in Paris in 1896, on the understanding that those provisions would apply to translations into the language or languages of the developing country. Article 5 of the Paris Convention permitted a member country to limit the protection of the translation right to ten years.

- (2) *The term of protection*—the Brussels text (Article 7) fixed a minimum of 50 years *post mortem auctoris*. The Study Group considered this requirement too rigid for developing countries, and proposed substituting for it Article 7 of the Rome text, which did not make the life-plus-fifty-year term mandatory.
- (3) *The right of radiodiffusion*—here the Study Group suggested the use of the Rome text instead of the Brussels text. The scope of broadcasting rights under the Rome text was somewhat more limited than that provided by Brussels, and the Rome provisions were considered as roughly the equivalent of the level of protection adequate for industrialized countries between 1930-1940.
- (4) *The right to limit the copyright in cases where the work is used for educational or scholastic purposes*—the right to determine the level of protection through each State's own national regulations in such cases.
- (5) *Regional arrangements in the field of copyright*—according to Article 20, regional arrangements can only be made on the condition that they confer upon authors more extended rights than those granted by the Convention or embody other provisions not contrary to the Convention. Since developing countries expressed the wish to be given the right to make arrangements among themselves, even if the above conditions were not fulfilled, the proposed text of the Study Group aimed at offering them this possibility.¹⁰⁶

Although the developing African nations had expressed a desire for special rules relating to the protection of folklore, the Study Group did not propose any rules in this area. Their decision was based on the belief that the best way to protect this subject matter was for the developing countries to adopt their own national legislation.¹⁰⁷

106. *Id.* at 86-88.

107. *Id.* at 88.

COMMENTS AND OBSERVATIONS ON THE STUDY GROUP'S 1964 REPORT

In 1962, the Director of BIRPI, with the agreement of the Swedish administration, set up a committee called the *Author's Consultative Committee* (hereinafter referred to by its French initials—C.C.A.), which was comprised of members of the following three international non-governmental organizations:

International Literary and Artistic Association (A.L.A.I.)

International Bureau for Mechanical Reproduction (B.I.E.M.)

International Confederation of Societies of Authors and Composers.
(C.I.S.A.C.)¹⁰⁸

The C.C.A. was extremely active in following the course of the preparatory work for the Revision Conference. It met eight times between 1962 and late 1964, and its commentary on the 1964 report is of vital interest. The Consultative Committee made the following specific comments on Article 25bis:

In making the grave proposal to reintroduce into the Convention, the system of reservations abandoned in 1928, the Study Group has had in view to facilitate membership of the Berne Union by qualified countries in the course of development through a system of diminished protection. The C.C.A. understands this preoccupation. It could therefore accept this proposal, but it also has full comprehension of the risks of degeneration which it is capable of importing into the Convention.¹⁰⁹

Furthermore, the C.C.A. made the following recommendations concerning the structure of the new Article 25bis:

- (1) The provisions should not be in the form of an Article but should be established in a Protocol.
- (2) The restrictive system should be open only to countries which have gained independence since the date when the Brussels Convention entered into force, and which are already members of the Union or which accede to it in the future.

108. See J. Nus, *supra*, note 77 at 127.

109. See Report of the Authors' Consultative Committee, DA/22/7 at 36, contained in the documentation for the Committee of Governmental Experts, BIRPI (1965).

- (3) The restrictive system should be confined to:
- (a) provisions concerning translations (with a ten-year period limitation on the right when a translation has not been put in a national language);
 - (b) provisions concerning broadcasting;
 - (c) the duration of protection (a minimum period which might be 25 years *post mortem auctoris*); and
 - (d) the conditions governing the exercise of reproduction when such exercise is intended exclusively for educational establishments.¹¹⁰

Additionally, the *Authors' Consultative Committee* was strongly opposed to changing the Convention to allow special arrangements contrary to Article 20. Their view was that this change could lead to a diversity of systems and eventually to an inequality of treatment in relations between member countries.¹¹¹

The *European Broadcasting Union* was probably the only non-governmental international organization that did not view the principles embodied in the new Article 25*bis* with a degree of skepticism or alarm. Its comments on the 1964 Report expressed genuine appreciation for the new article's inclusion in the revision program. Nevertheless, the EBU was not without criticism of the specific provisions as they were then drafted.

First of all, it did not believe that Article 25*bis* should be limited to two 10-year periods each and it offered two reasons why it considered that stipulation unsatisfactory:

- (1) If the next revision conference did not meet in time to extend these periods, the developing countries would have no effective method set up which would allow them to continue their reservations; and
- (2) The reservation regarding the right of translation in Article 25 (3) of the Brussels text could apparently be enjoyed for an unlimited period of time by those countries now taking ad-

110. *Id.* at 36-38.

111. *Id.* at 38.

vantage of it. If this were true, the developing countries were being prejudiced by being limited to two 10-year periods.

On the basis of foregoing points, the EBU recommended among other things that the limitation be dropped, and that any developing country be permitted to maintain the special provisions for an unlimited number of 10-year periods.¹¹²

The EBU also criticized the drafting of provisions 1(d) and 1(e) of Article 25*bis* dealing with reproduction rights for educational works and with the possibility of special arrangements among developing countries.

In its view, the language of these two sections was too vague and general. The EBU did not believe that either provision really met the needs of the developing countries since, because of their loose drafting, they could be given an extremely restrictive interpretation and could thus defeat the wider range of rights needed by the developing countries.¹¹³

Comments by two other international organizations, although not as specific as those of the EBU or the C.C.A., demonstrated the general opposition of most of the European author-oriented groups to Article 25*bis*.

The *Internationale Gesellschaft für Urheberrecht* expressed the following concern regarding the new Article:

Accession to the revised Berne Convention is to be eased somewhat for countries outside the Union. As understandable as these desires might on the one hand be, it must be remembered that on the other hand a too easy accession may endanger the subsistence of the Union. Countries on their accession are members of the Union and can handicap and possibly even vitiate all contemplated improvements of the Revised Berne Convention. Another danger which may arise is that countries still adhering strictly to the Convention might, in the light of special provisions granted to newly developing acceding members demand similar provisions on their own behalf. A further support for the above objection is given by the fact that the present Convention was intended only as minimum protection.

112. See Comments from the European Broadcasting Union, DA/22/8 at 36. contained in the documentation for the Committee of Governmental Experts, BIRPI (1965).

113. *Id.* at 37-39.

This standard should not be lowered for any country of the Union.¹¹⁴

The other organization to make specific comments to Article 25*bis* as it appeared in the '64 report was the *Federation of Artistes*.¹¹⁵ As the Federation viewed it, Article 25*bis* was capable of impairing both the uniformity and high level of protection achieved by the Berne Convention, and its implementation would also be detrimental to the interests of authors and performers in developing countries themselves. Utilization of the provisions of 25*bis* by developing countries would encourage wholesale importation of various intellectual works from developed nations, and thus would ultimately discourage and decrease the output of the authors and performers in the importing countries.¹¹⁶

Hence, the Federation believed that the provisions of Article 25*bis* should be restricted to an optional protocol that could be signed by the developing countries at the same time of the Convention. A determination of which countries might take advantage of this additional protocol could be guided by the use of a cut-off device, such as "those countries having achieved independence after a given date."¹¹⁷

THE 1965 COMMITTEE OF GOVERNMENTAL EXPERTS
(Geneva, July 5-14, 1965)

On November 30, 1964, the Director of BIRPI invited the Member States of the Berne Union to participate in a Committee of Governmental Experts. The purpose of the proposed meeting was to express the views of their respective governments on the proposals for revision of the Berne Convention as drafted by the Swedish/BIRPI Study Group.¹¹⁸ The Committee of Experts met at Geneva from 5-14 July, 1965.

114. See Comments from the Internationale Gesellschaft für Urheberrecht, DA/22/10 at 15, 16 contained in the documentation for the Committee of Governmental Experts, BIRPI (1965).

115. The Federation of Artistes is composed of three groups. The International Federation of Actors (F.I.A.), the International Federation of Musicians (F.I.M.) and the International Federation of Variety Artists (F.I.A.V.).

116. See Comments from Federation of Artistes, DA/22/11 at 3, contained in the documentation for the Committee of Governmental Experts, BIRPI (1965).

117. *Id.*

118. The report, established on July 1, 1964, had been distributed to the various governments concerned before the 1965 meeting.

Of the then 54 Member States of the Berne Union, 35 were represented.¹¹⁹ The non-Unionist States that had taken part in the meeting of the Study Group for the International Protection of Cinematographic Works, held in 1961, were invited to attend as observers, together with various intergovernmental or non-governmental organizations concerned.¹²⁰

The documentation for the meeting, which was prepared by BIRPI, included the General Report of the 1964 Swedish/BIRPI Study Group, the revised text of the Convention as prepared by the Study Group, and a number of comments on the proposals. Although the experts attending the meeting had been appointed by their respective Governments, it was understood that the Governments were not committed by any of the decisions the Committee might reach.

The Committee examined the Berne Convention article by article. The discussion of each article was introduced by Justice Hesser, the head of the Swedish delegation, who presented and commented on the proposals of the Study Group. Throughout this detailed examination, the Committee also discussed questions that had not given rise to proposals on the part of the Study Group, but that involved proposals, comments, or amendments presented at the meeting.

To facilitate its working plan the Committee subdivided the questions to be studied into four categories:

- (1) Miscellaneous questions;
- (2) General right of reproduction;

119. Austria, Belgium, Brazil, Bulgaria, Congo (Leopoldville), Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic), Greece, Hungary, India, Ireland, Israel, Italy, Japan, Lebanon, Luxembourg, Monaco, Morocco, Netherlands, Norway, Poland, Portugal, Senegal, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom and Yugoslavia.

120. The United States was the only non-Unionist State in attendance. Both the International Labour Office (ILO) and Unesco were represented by observers. Among the 17 international non-governmental organizations in attendance were, observers from the European Broadcasting Union (EBU), the International Bureau for Mechanical Reproduction (BIEM), the International Confederation of Societies of Authors and Composers (CISAC), the International Literary and Artistic Association (ALAI) and the Union of National Radio and Television Organizations of Africa (URTNA).

- (3) Provisions for the benefit of developing countries; and
- (4) Copyright in cinematographic works.¹²¹

For our purposes it is necessary to examine only the discussions and debates regarding the third category.

When the Study Group's draft of Article 25*bis* was presented to the Committee of Experts, a number of countries spoke favorably about the principle or theory underlying the stated reservations.¹²² At the outset France expressed its preference for the drafting of a separate protocol to be annexed to the Convention.¹²³ In defense of its position, France, joined by Italy, pointed out that it was important not to establish a system of protection for the Convention, even indirectly, that would be inferior to the level provided by the Universal Convention.

On the other hand, the developing countries, led by Congo (Leopoldville), Senegal, and Tunisia, were quick to point out that it was more important to the future of the Convention to establish measures to meet the wishes and aspirations of the developing countries.¹²⁴ The suggestion was not adopted.

After having studied the provisions of Article 25*bis* as proposed by the Swedish/BIRPI Study Group, the Committee was presented with a proposal drafted by the representatives of six delegations¹²⁵ (hereinafter referred to as the "joint proposal;"). This proposal was based on the text of the Study Group but differed on a number of fundamental points, such as: (a) the criterion of beneficiaries; (b) the time when countries would be able to make reservations; (c) the period when such reservations would be valid, and (d) the nature of the reservations themselves.

As to the criterion of beneficiaries, the joint proposal stipulated that —

121. See Report of the Debates of the 1965 Committee of Governmental Experts, DA/22/33 at 2 for the Diplomatic Conference of Stockholm, 1967.

122. At the opening of the discussions on the provisions for the benefit of developing countries, *supra*, note 121 at 15, Belgium, Czechoslovakia, Denmark, France, Israel and Italy expressed their sympathy with any measures taken for the benefit of the developing countries and with the general idea which had formed the basis of the Study Group's proposals.

123. Report of the Debates of the 1965 Committee of Governmental Experts. *supra*, note 121 at 15.

124. *Id.*

125. Congo (Leopoldville), India, Lebanon, Morocco, Senegal and Tunisia.

*"Any country of the Union may, having regard to its economic, scientific, social and cultural needs, declare at any time. . . ."*¹²⁶

while the Study Group's proposal stated:

*"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 Convention protection] may, . . . at the time of accession, declare. . . ."*¹²⁷

The proponents of the joint proposal argued that the right to make reservations should not be limited merely to States that might accede in the future. The Study Group's drafters explained that the reference to adherence to "this Convention" was aimed at countries, whether members of the Union or not, that accede to the Stockholm text. After much deliberation a compromise was worked out. Upon the basis of a proposal submitted by France, the Committee agreed to begin the text with the words —

*"Any developing country. . . ."*¹²⁸

In addition, in order better to define the characteristics of the data on which a country might base its claim to make reservations, the Committee adopted a proposal by Lebanon and the Netherlands to add to the text the notion of "cultural needs."

The Study Group text simply used the terms —

*". . . economic . . . and social needs . . . ,"*¹²⁹

while the joint proposal stipulated —

*". . . economic, social, scientific and cultural needs . . ."*¹³⁰

The Committee adopted the criterion of cultural needs, but rejected the term "scientific" in this context.

As for the time when a country concerned could avail itself of the right to make reservations, the aim of the joint proposal was to make

126. Report of the Debates of the 1965 Committee of Governmental Experts, *supra*, note 121 at 16.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

this possible "... at any time. . . ." ¹³¹ As explained by the proponents of the joint proposal, this language was designed to avoid the need for countries concerned to avail themselves of all the reservations *en bloc*, at the moment of ratification or accession, without having sufficient time to make a selection. However, the Committee rejected the joint proposal on this point, on the ground that the authors should be able to know the exact scope of their rights in the countries concerned. The Committee expressed its preference for the Study Group's text, which stipulated that the exercise of the right to make reservations should apply only "... at the time of accession. . . ." ¹³²

As to the period during which the reservations would be valid, the joint proposal had nothing to say. The Study Group's text provided for a period of ten years with one renewable period of a like term, and the Committee expressed its preference for that result. Two delegations, those of India and Switzerland, proposed that the second period extend until the entry into force of the text of the Convention to be adopted by the next revision conference, and the Committee accepted their proposal. ¹³³

As for the nature of the reservations that the countries concerned could adopt, the joint proposal proposed to introduce a sixth category relating to the right of reproduction, as follows:

... reserve to itself the right to permit reproduction of literary and artistic works for an exclusive use in its territory on payment of just remuneration to be fixed, failing agreement with the author, by its competent authority.

At the outset the delegations of both France and Italy were categorically opposed to the introduction into the Convention of any reservation of this nature, and two other delegations ¹³⁴ pointed out the danger of formulating such a reservation in general terms. The delegation of the Federal Republic of Germany proposed that this reservation, as presented in the joint proposal, be removed from Article 25*bis*, and that the following words be added to the provision on the restriction of protection:

131. *Id.*

132. *Id.*

133. *Id.* at 17.

134. Netherlands and Czechoslovakia.

. . . including the right to permit this reproduction on payment of just remuneration to be fixed, failing agreement with the author by its competent authority.¹³⁵

The delegation of Tunisia, seconded by that of France, then proposed that the provision regarding the restriction of protection should be a general formula couched in the following terms:

. . . the right, for exclusively *educational, scientific or scholastic* purposes, to restrict the protection of literary and artistic works.¹³⁶ (emphasis supplied)

Ultimately, the Committee adopted the latter formula, completely deleting the reservation pertaining to the "right of reproduction" from the text. As to the earlier mentioned provision regarding the right to restrict protection, the joint proposal suggested that expression "for educational, scientific and cultural purposes." Three delegations¹³⁷ observed that the adjective "cultural" was much too wide and unprecise. The Committee finally rejected the word "cultural" and, on a proposal by the delegation of Lebanon, accepted the term "scholastic" as a substitute.¹³⁸

As for the other reservations, the Committee made no comments on the right of radiodiffusion (which includes broadcasting by television as well as radio). The joint proposal took the position that the reservation concerning the right of translation was broad enough to cover dramatic and dramatico-musical works. On the other hand, the delegations of both France and Italy were concerned that the reservations permitted in Article 25*bis* should not be lower than the level of protection accorded by the Universal Convention. They therefore asked the Study Group to examine the possibility of submitting alternatives for the right of translation as well as for the term of protection.¹³⁹

The differences between the Study Group's proposal regarding special arrangements and the clause as drafted in the joint proposal produced a good deal of discussion. The joint proposal had suggested that

135. Report of the Debates of the 1965 Committee of Governmental Experts, *supra*, note 121 at 18.

136. *Id.*

137. Denmark, Italy and the United Kingdom.

138. Report of the Debates of the 1965 Committee of Governmental Experts, *supra*, note 121 at 17.

139. *Id.*

countries fulfilling the conditions of Article 25*bis* should have the right to make such arrangements with *any* other country of the Union. Although the Study Group's proposal on special arrangements was drafted in very general language, past discussions on the topic indicated that the draftsmen probably intended it to be applicable only among the developing countries.

Four delegations¹⁴⁰ expressed the view that, if a provision concerning special arrangements were to be permitted at all, it could only operate among countries utilizing the reservations. Their view was that the Convention would be thrown out of balance if special arrangements could be made with "any country of the Union." To solve the problem, the Lebanese delegation proposed the following:

... reserve the right to make arrangements with any other country of the Union in derogation of Article 20 of the Convention, on condition that the arrangement concerns solely works of the country of origin of which is a country party to that arrangement and relates only to the reservations mentioned above, such condition being operative only if a developed country is a party to the said arrangement.¹⁴¹

The language was extremely awkward and the discussion that followed its introduction almost led to a complete elimination of a reservation for special arrangements.¹⁴² However, the Lebanese delegation, supported by the authors of the joint proposal, continued to insist on the importance of developing countries being able to make special arrangements with highly developed countries. As a result the Committee finally adopted the Lebanese proposal.

The Committee did not comment on any other provisions of Article 25*bis*. After rejecting a proposal by the French delegation to add the expression "... as under the rules of the United Nations:"¹⁴³ to characterize "developing countries," took a vote on the new article.

140. France, Italy, Netherlands, United Kingdom.

141. Report of the Debates of the 1965 Committee of Governmental Experts, *supra*, note 138.

142. By 15 votes to 11, with 5 abstentions, the Committee first accepted a suggestion to strike from Article 25*bis* any provision concerning special arrangements.

143. A criterion which was suggested again during the meeting of Main Committee II at Stockholm and later adopted in the final text of the Protocol.

The final text of Article 25*bis* as drawn up by the Committee of Experts was a synthesis of the text presented by the Study Group, of the joint proposal, and of the amendments proposed during the meeting.

THE EIGHTH AND TWELFTH SESSIONS OF THE INTERGOVERNMENTAL
COPYRIGHT COMMITTEE AND THE BERNE PERMANENT COMMITTEE
(Paris, November 15-18, 1965)

With the plans for the Stockholm Conference well under way in late 1965, the eighth and twelfth joint sessions of the two committees did not produce many new proposals regarding the special provisions for the benefit of developing countries. Only two areas of discussion are noteworthy.

The first occurred during the discussions of the recently-drafted African Model Copyright Law. Mr. Strnad of Czechoslovakia pointed out that the model copyright law had been based on the preparatory work for the Stockholm Revision of the Berne Convention, and that care should be taken to avoid a situation in which the African States would have to modify their national legislation. In essence he was arguing that the Stockholm revision should not substantially vary from the preparatory proposals.¹⁴⁴

The other matter worth mentioning related to the agenda item dealing with "assistance to States in developing their national copyright legislation." During the meeting, the Secretariat of the IGC informed the Committees that copyright fellowships for officials in developing countries had been awarded to citizens of two African States: Liberia and Nigeria. The Secretariat of the Permanent Committee announced that BIRPI had awarded a fellowship to an Indian citizen.¹⁴⁵ The awarding of the fellowships was indicative that both Unesco and BIRPI were attempting to fulfill some of the earlier promises each had made with regard to the developing countries' needs for assistance in the field of copyright.

Even though plans for revision were well advanced by this meeting and the substantive provisions of the proposed text were not opened for further discussion, the sessions of the Permanent Committee disclosed some of the growing dissatisfaction regarding the situation. The dis-

144. See Report of the Berne Union Permanent Committee, 12th session, CP/XII/12 and the Intergovernmental Copyright Committee, 8th session IGC/VII/13 contained in 19 *Unesco Copr. Bull.* 22 (1966).

145. *Id.* at 24.

gruntled commentators included representatives of both the developing States and the organizations of authors and other copyright owners.

The many international non-governmental copyright societies had been holding frequent meetings after the Brazzaville developments. It would be an understatement to say that all of them were unhappy with the state of affairs.

In February of 1964 the legislative commission of the *International Confederation of Societies of Authors and Composers* (CISAC) met in Paris. The following excerpt from one of their resolutions (reprinted in the 1965 minutes of the joint meetings of the two committees) is an example of the prevalent dissatisfaction among representatives of copyright owners:

The Legislation Commission of CISAC, meeting in Paris on 27-28 February 1964, — *Having been informed* of the results of the African Study Meeting on Copyright (Brazzaville, 5-10 August 1963), — Regrets that some of those present seemed much more concerned about the defense of the interests of users of works than about the defense of the rights of authors. . . .¹⁴⁶

On the other side, an example of the discontent of many of the African nations with Article 25*bis* was expressed by a resolution passed at the meeting of the *Union of National Broadcasting and Television Services of Africa* (URTN) held in Tunis in 1964. The complete resolution appeared in the minutes of the joint meetings of the two committees.¹⁴⁷ The following excerpts are illustrative of unhappiness on the part of developing countries with the progress up to then, as well as a foretaste of things to come:

The African delegates of the broadcasting services meeting in Tunis from 16 to 20 December in an administrative and legal session, *Having examined* the problems of copyright in all African countries. . . . , *Have adopted* the following resolutions and recommendations:

1. INTERNATIONAL COPYRIGHT CONVENTIONS

Considering that multilateral copyright conventions are out of date in their present form, having been designed essentially to meet the needs of countries exporting intellectual works,

146. See Report of the Berne Union Permanent Committee, 12th session, CP/XII/9 and the Intergovernmental Copyright Committee, 8th session, IGC/VIII/9, at 4, Annex B (1965).

147. *Id.*, Annex C.

Deem it necessary that these conventions be re-examined and reviewed in the light of the specific needs of the African countries which at present import intellectual works,

Recommend that all African countries be particularly circumspect with regard to accession to the multilateral conventions now in force. *However, their highly necessary accession to the Universal Copyright Convention is recommended. It is also recommended that the African countries take care not to accede to the Berne Convention so long as the latter has not been revised in accordance with the interests of the African continent,*

Considering that the texts proposed by the Swedish/BIRPI Study Group for the revision of the Berne Convention, although taking account of the special situation of the African continent, do not adequately correspond to the interests and needs of the African countries,

Express reservations concerning these texts, particularly as regards Article 25bis, which has been introduced into these texts for the benefit of African countries but fails to reflect all the interests of the African countries, particularly in respect of bilateral relations with the world,

Consider that the revision of the Berne Convention which is now in progress and which is to culminate in a Diplomatic Conference in 1967 constitutes a favorable opportunity for Africa, in view of the accession of twelve African countries to that Convention, to put forward its point of view and to make amendments to the Convention in line with its interest and needs. . . .¹⁴⁸ (emphasis added)

THE OFFICIAL PROGRAMME FOR REVISING THE SUBSTANTIVE PROVISIONS
(ARTICLES 1-20) OF THE BERNE CONVENTION

On May 15, 1966, the official Programme for the 1967 Stockholm Conference was published.¹⁴⁹ The revision proposals embodied in the Programme were primarily the result of the preparatory work of the

148. *Id.* at 4-5.

149. The Programme was officially approved by the Swedish Government on January 21, 1966. The official proposals for Articles 1-20, the substantive copyright provisions of the Convention, were published in Document S/1 with an accompanying commentary. See Masouyé, "Stockholm 1967" 102B *EBU Review* 45 (1967).

Study Group from 1961-1966, together with the discussions in the two Committees of Experts. Such developments as the Brazzaville seminar and the Indian proposals regarding compulsory licenses for translations and reproductions had also made their mark on the Study Group's final product. The Programme explained that, "in the opinion of the Study Group, one of the most important tasks of the Revision Conference was the establishment of rules for the benefit of developing countries."¹⁵⁰ It was obviously with this thought in mind that Article 25*bis* had been included in the Study Group's 1964 Report.

Interestingly enough, however, the 1966 Programme did not follow this approach. Although it did contain special provisions for the benefit of developing countries, these did not appear in the form of Article 25*bis*. Instead, the text of the reservations had been shifted to an additional Protocol which was to be annexed to the Convention. The Study Group's Programme explained, however, that despite this change of format the Protocol would still be an integral part of the Convention, and that provision would be made in the final clauses to that effect.¹⁵¹

The explanation given for this change in form was twofold:

- (1) the provisions were to be in force for an interim period only and were not intended to be incorporated into the permanent system of protection provided by the Convention; and
- (2) the rules were fairly extensive, which for purely stylistic reasons, made it seem advisable not to make the text of the Convention unnecessarily unwieldy.¹⁵²

It was during the 1965 meeting of the Committee of Governmental Experts in Geneva that France had first suggested the use of a Protocol. At that time the suggestion was rejected because of the fear that this might make the effort to obtain concessions in favor of developing countries meaningless or nugatory.¹⁵³ The Study Group finally returned to the suggestion to use a Protocol only on the condition that it be considered an integral part of the Convention. The reasons for the change as stated in the Programme make sense, but it is also possible that the position of many of the societies of copyright owners favoring the use

150. Proposals for Revising the Substantive Copyright Provisions (Arts. 1 to 20). BIRPI Doc. S/1 (May 15, 1966), at 67 (hereinafter cited as BIRPI Doc. S/1).

151. *Id.*

152. *Id.* at 72.

153. See Report of the Debates of the 1965 Committee of Governmental Experts, *supra*, note 121.

of a Protocol was an important factor in the Study Group's final decision. It is clear, however, that if the authors and publishers had really had their way the Protocol would have been completely independent of the Convention.

Following the 1965 Committee of Governmental Experts meeting, the Study Group was asked by that Committee to make a further examination of some of the questions not solved by their deliberations, and this resulted in certain additions to the text adopted by the Committee. In the words of the Study Group, their final text of the Protocol was "based upon and quite similar to" the 1965 Committee's final draft of Article 25*bis*.¹⁵⁴ The Study Group admitted that they had made some changes, but indicated that they were not a drastic departure from the Committee's intentions. In reality, however, the changes of substance and wording of the text were considerable.

First, with regard to the provisions concerning translations and term of protection, the 1965 Committee of Experts had approved the proposed text of the 1964 Study Group but also recommended that developing countries should be offered the alternative of adopting the rules applicable in similar cases under the Universal Copyright Convention. The Committee had also agreed that these special provisions should not result in a level of protection lower than that of the Universal Convention.¹⁵⁵

This presented a problem, since the Study Group felt that the provisions proposed in its 1964 Report and approved by the Committee¹⁵⁶ would in fact offer less protection than the system provided by the Universal Copyright Convention. It therefore considered it advisable to drop its earlier proposal and substitute the U.C.C. system in the Programme.¹⁵⁷ With respect to translations, therefore, the Programme text provided that developing countries could substitute for Article 8 of the Convention (Stockholm text), provisions identical to those relating to the right of translation in Article V of the Universal Convention.

Similarly with respect to the term of protection, Article 25*bis* had offered developing countries the possibility of substituting for Article 7

154. BIRPI Doc. S/1 at 72.

155. The suggestion that the Study Group consider alternative proposals regarding the term of protection and the right of translation was originally made by France and Italy at the 1965 Committee of Experts meeting. See Debates, *supra*, note 121 at 17.

156. See BIRPI Doc. S/1 at 72.

157. *Id.* at 73.

of the Convention in the Stockholm text the provisions of Article 7 in the Rome text. The Study Group feared that the latter provision, which mentioned no restriction on the limits of the term, might offer less protection than the Universal Convention. The Programme proposed, therefore, to allow the developing countries to adopt, in principle, the term of protection provided under the U.C.C. A developing country could stipulate a shorter term than the terms of 50 and 25 years specified in Article 7 in the Convention, but these terms could not be less, respectively, than the terms of 25 and 10 years, which are the terms fixed by Article IV of the Universal Convention.¹⁵⁸ As to the dates from which these terms and other conditions were to be calculated, the rules provided under Article 7 of the Convention were to apply.

The Committee's proposals for exceptions concerning radiodiffusion, and concerning uses for exclusively educational, scientific or scholastic purposes were adopted without change in the Programme for the Conference.¹⁵⁹ However, the exception concerning the right of developing countries to make special arrangements in derogation of the Convention was greeted with some reticence when the Programme was drawn up.¹⁶⁰ As Article 25*bis* had been drafted, the special arrangements among Union countries could be classified under two headings: those providing for limitation on copyright protection permissible under the Convention or the proposed Protocol, and those intended to provide for wider restrictions.¹⁶¹

As the Study Group saw it, arrangements in the first category would probably be the most frequent and would need no special support.¹⁶² Since the Protocol would become an integral part of the Convention, arrangements made under it, within the meaning of Article 20, could not be regarded as "contrary to the Convention."

However, the second category of arrangements, allowing protection beyond the limits of the Convention and the Protocol, gave the Study Group some cause for worry. In their view, such arrangements could lower protection to any level whatsoever and might even abolish protection completely in the case of the works to which they referred. Real-

158. *Id.*

159. *Id.*

160. The provision regarding special arrangements had almost been deleted during the debates of the 1965 Committee of Governments. See note 142, *supra*.

161. BIRPI Doc. S/1 at 73.

162. *Id.*

izing this, the Study Group did not see fit to include in the Programme the exception proposed regarding special arrangements.¹⁶³

Thus the exceptions regarding (a) translations, (b) term of protection, (c) radiodiffusion, and (d) uses for exclusively educational, scientific or scholastic purposes were the reservations included in the Programme. In addition, there had been a proposal to delete from the Berne Convention the provisions of Article 9, paragraph (2), concerning the right to reproduce press articles. However, a concurrent proposal had been made to grant to developing countries that acceded to or ratified the Stockholm text the right to continue to apply these provisions.¹⁶⁴ In support of these proposals, the Study Group pointed out that a country already a member of the Union would be entitled to continue to apply the provisions of Article 9(2) until it acceded to the Stockholm text — a state of affairs, it noted, that might last for some time.¹⁶⁵ After the entry into force of the Stockholm text, a non-Union country could gain accession only to the Stockholm text. The Study Group saw a possible anomaly if older countries of the Union, including some highly developed ones, could still apply the provisions concerning excerpts from press articles, while new members of the Union would be deprived of this same possibility. The Programme thus provided for the possibility of a reservation in this respect.¹⁶⁶ As the Study Group viewed it, the right to reproduce press articles also included the right to reproduce them in the form of translations.

Three other aspects of the 1966 Programme are also worthy of discussion:

(1) *The time when developing countries might avail themselves of the reservations.* The Programme of the Conference adopted the Study Group's text, which had also won the 1965 Committee's preference, that reservations could be made only at the time of ratification or accession.¹⁶⁷

163. *Id.*

164. The deletion of Article 9(2) had been recommended by the International Federation of Journalists. The Study Group supported that recommendation in its 1963 and 1964 Reports and the 1965 Committee of Experts did not object to the proposed deletion. See BIRPI Doc. S/1 at 44. The granting of this right, however, to developing countries, despite its deletion from 9(2), was proposed in the discussion regarding Art. 9 in the 1965 Committee of Experts. See Report of the Debates, *supra*, note 121 at 13-14.

165. BIRPI Doc. S/1 at 74.

166. *Id.*

167. *Id.*

(2) *The period during which the reservations would be valid.* Here, again, the Conference Programme adopted the Committee's proposal: at the expiration of a ten-year period the developing country would have the right to maintain any or all of the reservations it had made until the entry into force of the act adopted by the Revision Conference following that of Stockholm. If, during either of these periods, the country considered that it no longer needed to maintain any or all of the reservations it had made, it could withdraw them.¹⁶⁸

(3) *Accelerated implementation of the reservations.* During its preparatory work the Study Group had been made aware on several occasions that the developing countries wished to institute the special regime in their favor as soon as possible after the adoption of the revised texts, and irrespective of the ratification of the other provisions of the Convention. Various proposals were made in this connection, but it became obvious during the deliberations of the 1965 Committee of Governmental Experts that the problem was not an easy one. The Committee therefore asked the Study Group to examine the matter.¹⁶⁹ The Programme of the Conference indicated that the solution to the problem was essentially linked to the final clauses of the Convention, and it was therefore decided to place any provisions relating to this matter in those clauses.¹⁷⁰

It should be noted that the final clauses of the Convention were inextricably tied up with the study of the structural and administrative reorganization of the Berne Union. The documentation relating to the final clauses was not prepared until after the publication of the 1966 Programme, which pertained only to the revision of the substantive provisions of the Convention.¹⁷¹ The sharp line that was drawn between consideration of the substantive and administrative provisions throughout the preparatory work and the revision conference itself was the cause of serious misunderstanding and difficulty.

OBSERVATIONS AND COMMENTS BY VARIOUS GOVERNMENTS ON THE PROTOCOL

The Programme of the Stockholm Conference dealing with the substantive clauses of the Berne Convention, (Document S/1), was distrib-

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

uted to the Member States of the Berne Union and various international non-governmental organizations. By March 31, 1967, only eighteen governments¹⁷² had made comments or observations concerning the proposed Programme, and of those only eleven actually addressed themselves to the Protocol.¹⁷³ Two others reserved the right to set forth views at a later date,¹⁷⁴ and five countries chose not to make any comments upon the Protocol.¹⁷⁵ In April of 1967, BIRPI published Document S/18, containing the observations of those 18 governments on the Programme text.

Taken as a whole, the comments on the Protocol were considerably less than profound. At this stage of the proceedings, despite the extended period of preparation, it appeared that most of the developed States had not come to grips with the question how best to resolve the problems presented by the developing countries. Moreover, those relatively few members of the Union that had made a serious effort to evaluate the problem had been unable to find any adequate solution.

The apparent inability of the developed States to produce an alternative solution to the Protocol is indicative of the obvious lack of leadership which existed within the Union itself at this time.

It is difficult to evaluate, and unfair to judge, the rather cautious, tentative, and sketchy comments of governments on the Protocol as proposed in the 1966 Programme. As a group, however, they do indicate a lack of leadership and a concerted program among the developed countries, in contrast with the unity and determination shown by the developing countries of Africa and Asia. On their face, at least, the comments suggest that none of the Governments, with the possible exception of the United Kingdom, were against concessions to the developing countries in principle. There was no agreement, however, as to how such aid should be rendered.

United Kingdom. Since the *United Kingdom* has been identified as the Protocol's principal opponent, we shall examine its observations first.

172. Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, France, Germany (Federal Republic), Ireland, Israel, Italy, Japan, Luxembourg, Madagascar, Portugal, South Africa, Switzerland, Turkey, and the United Kingdom.

173. Bulgaria, Czechoslovakia, Denmark, France, Israel, Italy, Japan, Luxembourg, Portugal, Turkey and the United Kingdom.

174. Ireland and South Africa.

175. Austria, Belgium, Germany (Federal Republic), Switzerland and Madagascar.

The U.K. prefaced its remarks concerning the Protocol with the following statement:

The Berne Convention is an instrument primarily designed to meet the needs of countries which have reached a certain stage of development. The United Kingdom can understand the feeling of some developing countries that certain of the obligations of the Convention are too onerous for them to accept. This does not, however, necessarily mean that the Convention should be amended in the way suggested.

If this were the only international copyright treaty, the situation might be different. But developing countries which feel that the state of their cultural and economic needs does not permit them to accept the standards of the Berne Convention, can, now, by adhering only to the Universal Convention, enjoy the much greater latitude which that Convention gives, while still gaining protection for their authors in all the 53 countries¹⁷⁶ which are members of it.

However, if it is the wish of the great majority of the member countries to provide for the possibility of membership of the Berne Union by developing countries on less onerous terms than those accepted by existing members, the United Kingdom would be prepared to assist in formulating a Protocol which makes this possible. *The United Kingdom believes, however, that the terms of the Protocol now proposed go too far in some respects if, in the long term, the Convention itself is not to be damaged. . . .*¹⁷⁷ (Emphasis added)

In addition, the United Kingdom suggested four amendments to the Protocol as it was then proposed. The most sweeping of these was

176. In 1966 the following countries were members of the U.C.C.: Andorra, Argentina, Austria, Belgium, Brazil, Cambodia, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, Ecuador, Finland, France, Germany (Federal Republic), Ghana, Greece, Guatemala, Haiti, Holy See, Iceland, India, Ireland, Israel, Italy, Japan, Kenya, Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Malawi, Mexico, Monaco, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, *Philippines, Portugal, Spain, Sweden, Switzerland, United States of America, United Kingdom, Venezuela, Yugoslavia and Zambia. *(The status of the Philippines is doubtful since it attempted to withdraw its instrument of accession before the convention was to become effective in respect to it).

177. Observations of Governments on the Proposals for Revising the Substantive Copyright Provisions (Document S/1), BIRPI Doc. S/13 at 103 (January 1967) (hereinafter referred to as BIRPI Doc. S/13).

their proposal for the complete deletion of Article 1(e). The text of that article read as follows:

- (e) reserve the right, for exclusively educational, scientific or scholastic purposes, to restrict the protection of literary and artistic works —

The following comment accompanied the U.K. proposal for deletion:

This paragraph is in such wide terms that it would permit the rest of the Convention to be virtually disregarded. There are few things which are not in one sense “educational” or “scientific”. The words “restrict the protection” would permit the enactment of laws which denied not only the right of reproduction but also the other rights given by the Convention, (performance, broadcasting, etc.). The United Kingdom therefore suggests that this paragraph be deleted.¹⁷⁸

France. The attitude of the French government, though expressed somewhat more sympathetically with regard to the needs of the developing countries, was similar to that of the United Kingdom. The opening statement of the French comments was as follows:

The French Government is fully aware of the difficulties which may be encountered by some developing States, having regard to their economic situation and their social or cultural needs, in making provisions immediately for the protection of all the rights provided for in the Convention of the Berne Union. . . .¹⁷⁹

However, the statement continued:

. . . The French Government considers it essential, moreover, to safeguard and further improve, to the utmost possible extent, the system affording a high degree of protection which has gradually been built up by the Berne Union. . . .¹⁸⁰

It concluded as follows:

. . . For the foregoing reasons, the French Government is not in favor of the incorporation in the Convention of possibilities for excessive reservations which would be liable to change the nature of the spirit and the very foundations of the Convention . . . Such would be the case with some of the proposed provisions, the applica-

178. *Id.* at 104.

179. BIRPI Doc. S/13 at 26.

180. *Id.* at 27.

tion of which might result in the establishment of a system of protection even inferior to that provided by the Universal Convention. . . .¹⁸¹

The French government was preoccupied with the danger that the level of the Berne Convention might fall below the level of protection offered by the U.C.C. in certain respects, and its representatives made this concern known on numerous occasions. In the French view, the Berne system of protection should on the whole be appreciably higher than that of the Universal Copyright Convention.¹⁸²

Like the United Kingdom, France indicated that it could accept the Protocol if it had to, but only with certain amendments. The three most important of the four it mentioned were the following:

(1) "Developing" countries must be defined and certain criteria established before such countries could take advantage of the reservations;¹⁸³

(2) The term of protection after the author's death should be increased from 25 to 30 years;¹⁸⁴ and

(3) The reservation in Article 1(e) of the Protocol regarding the use of works for "educational" and other purposes was wholly unacceptable unless drastically amended. The following terms were agreeable to the French:

- (c) reserve the right to restrict, to the extent justified by the purpose, the protection of literary and artistic works when their utilization is intended for the exclusive use of scholastic or educational institutions in connection with their pedagogical activities.¹⁸⁵

Italy. The Government of Italy expressed full sympathy with the principles on which the Protocol was based, but the Italian comments regarding it were not lengthy. The most important concern was that objective criteria be found for determining the countries entitled to avail themselves of the reservations provided in the Protocol.¹⁸⁶

181. *Id.*

182. *Id.*

183. *Id.* at 28.

184. *Id.*

185. *Id.*

186. BIRPI Doc. S/13 at 65-66.

Israel. The Government of Israel, on the other hand, did not share the French and Italian concern over the lack of a definition for the term "developing country." Instead, it believed that the definition might be best left to pragmatic interpretation. Its exact statement was as follows:

The Government of Israel does not believe it to be a short-coming or otherwise disadvantageous that the term "developing countries" has been itself left undefined. Indeed, since the term expresses an essential relative concept, it defies definition in advance and may be best left to pragmatic interpretation.¹⁸⁷

Denmark. Denmark's comments on the Protocol were favorable, if relatively sparse:

In the desire to meet the special needs of developing countries for a provisionally lower degree of protection than that provided in the Convention and with a view to giving the Berne Union a universal character to the highest possible degree, the Danish Government recommends the proposed Protocol.¹⁸⁸

Luxembourg. The comments by the Government of Luxembourg were like Denmark's, extremely general. It believed the Protocol to be well-founded:

The experts propose to enable developing countries to make certain reservations of limited duration

This flexibility of the Convention in favor of developing countries seems necessary. The strict application of the Convention might constitute an obstacle to the wide dissemination of intellectual works. The clauses drafted by the experts are worth being taken as a basis for discussion at the Stockholm Conference.¹⁸⁹

Japan. The Japanese Government also agreed with the principles of the Protocol. However, Japan also proposed the deletion of Article 1(c) of the proposed Protocol dealing with press articles. This proposal was consistent with another Japanese proposal to retain the Convention's

187. *Id.* at 62.

188. *Id.* at 23.

189. Observations of Governments on Proposals for Revising the Substantive Copyright Provisions (Document S/1) BIRPI Doc. S/17 at 11. (April 1967), (hereinafter referred to as BIRPI Doc. S/17).

existing Article 9(2) concerning press articles. If that proposal were adopted, section 1(c) of the Protocol would be superfluous.

Portugal. The Portuguese Government also favored the establishment of special provisions for developing countries. Portugal, like Japan and for the same reasons, proposed the deletion of Article 1(c).¹⁹⁰ In addition, it proposed the deletion of Article 1(a), regarding translations, in light of another Portuguese proposal that more liberal translation provisions be set forth in Article 8 of the Stockholm text itself.¹⁹¹ Similarly, Portugal felt that the provisions of the entire Protocol could be embodied in the Stockholm Act itself. It stated:

The Portuguese Government does not understand why these matters have their place in a separate Protocol instead of being integrated . . . or at least why they do not form the subject of a new article placed among the administrative provisions. Only a change of this kind would be in keeping with the statement contained in the proposed text of Article 20*bis*, according to which the Protocol forms an integral part of the present Act. It should be observed that the Programme mentions among the reasons justifying this arrangement the fact that the text is too extensive, which would cease to be the case if the amendments proposed by the Portuguese Government were adopted.¹⁹²

The Portuguese authorities closed out their comments by agreeing with the French and United Kingdom Governments that the language of Article 1(e) needed more precise definition.

Turkey. The Government of Turkey viewed the special provisions in favor of developing countries, as set forth in the Protocol, as a "positive and forward step."¹⁹³ Like Portugal, it expressed its preference for the inclusion of the special provisions in the Convention itself, but it stated that it did not intend to oppose the decision to include them in a separate Protocol. Turkey's main concern involved the reservation on translations. In its opinion, the provisions of article 1(a) were less advantageous than those provided by the reservations in the Brussels text on this subject (Article 25(3)). The Turkish Government considered

190. BIRPI Doc. S/13 at 90.

191. *Id.*

192. *Id.*

193. BIRPI Doc. S/17 at 20.

it essential to allow the countries in question a choice between the two systems.¹⁹⁴

Czechoslovakia. The Czechoslovakian Government shared the Turkish Government's concern regarding the translation reservation. Its comments to this point were as follows:

Proposed Article 1, subparagraph (a) of the Protocol is obviously based on Article V of the Universal Copyright Convention, but the automatic transfer of that Article to the Berne Convention cannot be considered as a satisfactory arrangement. In practice, it means that there will be within the Convention two different levels of reservations concerning translation,—one according to the existing Berne Convention (until and including the Brussels text), and—the other according to the Stockholm text.¹⁹⁵

The Czech Government pointed out that the Programme text differed in essential points from the 1965 Committee of Experts text, and expressed the view that the discrepancies should be eliminated before the Conference. It also felt that the proposed periods of ten years were unrealistically short.¹⁹⁶

Bulgaria. The Bulgarian Government shared both the Czechoslovakian and Turkish views on the translation reservation. Like Turkey, it felt that the developing countries should have the right to choose between the Brussels text (Article 25(3)), and the new Stockholm text based on Article V of the U.C.C.¹⁹⁷ Additionally, the Bulgarian Government agreed with the Czechoslovakian Government on the impracticality of the ten-year periods. It proposed the deletion of the words "for a period of ten years" from both Articles 1 and 2 of the Protocol.¹⁹⁸

The most striking comment by the Bulgarian Government was that all of the member countries of the Union should be allowed the possibility, when ratifying the substantive provisions of the Convention (Articles 1-20), of making the reservations now provided in the Protocol. Its rationale was that, if all countries wishing to make reservations were

194. *Id.* at 21.

195. BIRPI Doc. S/13 at 15.

196. *Id.* at 16.

197. BIRPI Doc. S/17 at 5.

198. *Id.* at 4.

not assured of the same possibilities, many would abstain from ratifying the Stockholm Act.¹⁹⁹

Ireland. The Government of Ireland felt that there was not enough information available at the time it made its comments to adopt a final view.

South Africa. The Government of South Africa reserved its position on the matter until after the discussions at Stockholm.²⁰⁰

OBSERVATIONS OF VARIOUS INTERNATIONAL
ORGANIZATIONS ON THE PROTOCOL

By March 10, 1967, BIRPI had received twelve comments from nongovernmental international organizations on the proposed Programme of the Stockholm Conference. Except for those of the European Broadcasting Union, none of the comments supported the Protocol, as it was proposed in the Programme.

ALAI. One of the organizations most strongly opposed to the Protocol was the International Literary and Artistic Association (ALAI). In August of 1965 the ALAI held its 51st Conference in Stockholm and recommended that Article 25*bis*, as then proposed by the Committee of Experts only a month before in Geneva, should be:

- (1) embodied in a supplementary protocol;
- (2) given a time limit after which no state would be allowed to join on the special terms;
- (3) applicable for no more than 20 years (two 10-year terms);
- (4) applicable only regarding—
 - (a) translation rights;
 - (b) minimum term of protection;
 - (c) radio rights;
 - (d) the right to use works pedagogically where education and training were concerned; and
 - (e) special arrangements which did not fall outside the province of Article 20.²⁰¹

199. *Id.*

200. BIRPI Doc. S/13 at 48 and 96.

201. See ALAI Resolution No. 6, adopted at its 51st Congress Stockholm, August 23 to 28, 1965, contained in 10 *Copyright* 232 (1965).

In November of 1966, the Executive Committee of the ALAI reviewed the organization's earlier recommendations and announced its official position. Meeting after the publication of the Conference Programme the Executive Committee expressed regret that the drafters of the Programme had not followed their 1965 recommendations. The main difference between the 1965 and the 1966 ALAI recommendations was their later insistence that the Protocol be made "independent" of the Convention. However, the general views set out in the preface of the 1966 resolution are of interest:

(1) The aims set out in the Protocol, namely the necessity to facilitate in these countries cultural, social and educational expansion, do not comply, however indisputable their interest may be, with the fundamental object of the Berne Convention, which is for the protection of intellectual works.

(2) That the Protocol finally amounts to measures of economic assistance granted to developing countries, or more exactly, to some users in these countries, and that such assistance should be sought by other diplomatic instruments and within the general scope of a programme of assistance afforded by the so-called fully developed countries to the developing countries.

(3) That far from enhancing the patrimony of these countries, the consequences of the Protocol could be to incite the said countries, members of the Union, desiring to adhere to it, to adopt legislation limiting the protection of authors and, thereby hindering both the birth and the development of their cultural patrimony . . .

The 1966 ALAI resolution therefore took the position that:

. . . the proposed Protocol appears to be useless and would even be capable, by discouraging the vocation of authors, of jeopardizing the cultural advancement of the countries in question.²⁰²

CISAC. Another organization that was strongly opposed to the Protocol as proposed in the 1966 Conference Programme was the International Confederation of Societies of Authors and Composers (CISAC). The comments of this organization regarding the nature of the Protocol were well-expressed and significant, and are thus worthy of consideration in detail:

202. Observations submitted to BIRPI by the International Literary and Artistic Association on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 18.

The authors have never contested the 'necessity for facilitating cultural, social and educational expansion' in developing countries. They cannot, however, agree with the system proposed by the Conference Programme to attain this objective. . . .

The authors do not consider that, for the countries of the Union, the obligations arising out of the Brussels Act are such as to constitute an excessive burden for developing countries. *The authors, therefore, consider the Protocol in question serves no purpose.*²⁰³ (emphasis added)

In any event, even if certain provisions must be made by the so-called "developed" countries with a view to facilitating 'cultural, social and educational expansion' in developing countries, the authors consider that such provisions are out of place in a Protocol annexed to the Berne Convention; that the system for which the provisions are made in the Protocol is not likely to achieve the object desired; and that such a system is not equitable. The drafters of the Protocol seem to have forgotten that the fundamental object of the Berne Convention has always been and still remains the protection of intellectual works. The aid in question should be sought in other diplomatic instruments and within the general framework of the Programme Aid to developing countries. Experience has shown that the cultural development of a country is closely linked to effective protection of author's rights. In point of fact, the *only true* beneficiaries of the Protocol would be *certain users* of intellectual works, at the expense of the national and foreign authors of these works. Finally, the system of the Protocol would not be equitable, since the main consequence of its application would be that the *authors alone* would bear the burden of the aid which would be granted to developing countries. Aid from other sources makes the givers pay its producers, why should there be any difference with the intangible productions of the mind? These are the reasons why the World Congress of Authors and Composers (constituted within CISAC) cannot assent to the Protocol, the adoption of which would sanction both a *false solution* for the developing countries and an *unjust solution* for the authors.²⁰⁴

203. See Observations submitted to BIRPI by the International Confederation of Societies of Authors and Composers on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 34 (1966).

204. *Id.* at 35.

In addition, CISAC offered two alternative proposals which, it hoped, might contribute to solutions more acceptable than those contained in the Protocol. The two proposals concerned the areas of:

- (1) Economic aid from "producing and exporting" countries; and
- (2) Possible recourse to the Universal Copyright Convention's system of protection.

As to the proposal regarding economic aid CISAC had the following to say:

Since the need for cultural aid to developing countries is undeniable, would it not be fair for the governments of the so-called "developed" countries to assume the responsibility as they do on other fields for the cost of such aid, in particular by allowing authors the remuneration to which they are entitled?

For this purpose it would seem both logical and just that, within the framework of a programme of cultural aid, the *producing and exporting* countries should, by means of a procedure to be defined, encourage and compensate authors whose works are used in the developing countries.

Such a solution would maintain the level of the Union Convention and without unduly burdening developing countries which have adhered to the Union, or which may accede to it; would at the same time make an effective contribution to true cultural development in these countries.²⁰⁵

This CISAC proposal was later to be espoused and elaborated upon by the Government of Israel at the Stockholm Conference. However, its official presentation at that stage came too late to alter the course of events.

CISAC had the following to say about its second proposal concerning "the Universal Convention's System of Protection";

If certain developing countries, notwithstanding the economic assistance they might receive from the "producing and exporting" countries, were to consider, rightly or wrongly, that it was not yet practicable for them to become members of the Berne Union, they could in any case adhere without further delay to the Universal Convention.

205. *Id.* at 36.

Thus, the Universal Convention would retain its full value and the Berne Convention would no longer be in danger of finding itself, sooner or later, emasculated.

The authors are aware that the Berne Convention without the addition of the Protocol annex, is preferable for them to the Universal Convention system, but they consider that if certain countries are to adhere to the Berne Union only under cover of the Protocol, then it would be better if at least for the time being they content themselves with the system of protection offered by the Universal Convention.²⁰⁶

Other comments.

The comments of the other organizations were quite similar to those of the ALAI and CISAC. Their arguments centered around the injustice of taking authors' private property, without payment, for the cultural benefit of developing countries, the dangers of weakening the Berne Convention, the lack of logic in doing in the Berne Convention what the U.C.C. was intended to do and the resulting weakening of the Universal Copyright Convention, as well as the detriment to authors and native culture in the developing countries. For example, the *International Writers Guild* (IWG) questioned whether the proposed means to achieve the needed assistance to the developing countries was the best and fairest, and then went on to answer its own question by stating that the reservations proposed were "unfair, unsuitable and irrational."²⁰⁷ They were unfair, it believed, because the burden of assistance would fall on the authors of foreign works; they were unsuitable because the wholesale importation of foreign works would be detrimental to the growth of the authors of developing countries; and irrational because Berne would be doing exactly what the U.C.C. had been designed for.²⁰⁸

Additionally, the IWG pointed out that, if a Protocol were utilized, it should be independent of the Convention and ratified separately. The Guild also deplored the generality with which Article 1(e) was worded. They considered its general terms to be capable of too broad

206. *Id.*

207. Observations submitted to BIRPI by the International Writers Guild on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 9.

208. *Id.* at 9-10.

an interpretation which, if implemented, in the long run would be extremely dangerous to all copyright protection guarantees.²⁰⁹

The International Publishers Association (IPA) joined the International Writers Guild in its doubts and apprehensions over the wisdom of utilizing the Protocol as an integral part of the Convention. The organization urged that the Protocol be separated from the revised text of the Convention, permitting independent ratification of both documents and thus safeguarding "the principle of the Convention that it is an instrument for the absolute protection of copyright."²¹⁰

The Internationale Gesellschaft für Urheberrecht (Intergu) was equally concerned about the Protocol:

If the intention of making accession to the Convention easier for the developing countries by means of certain concessions is realized, it is almost to be feared that such concessions will benefit only the users in those countries.

If concessions of this kind are made, it must be ensured that they can be claimed for a limited period only and only by countries capable of development. The Convention itself must under all circumstances remain unaffected by this exceptional ruling.²¹¹

Similarly, the *International Federation of Musicians, Variety Artists and Actors* (FFF) was not in favor of the Protocol, and for much the same reasons:

(1) The Protocol should not be an integral part of the Convention but should be ratified separately;

(2) The wholesale importation of intellectual works which the Protocol led to would probably be detrimental to native authors;

(3) The burden of supplying additional aid to the developing countries was being made the responsibility of authors; and

(4) The Protocol was taking over the functions of the U.C.C.

209. *Id.*

210. Statement submitted to BIRPI by the International Publishers Association concerning the additional Protocol, former Article 25bis dealing with developing countries.

211. Observations submitted to BIRPI by the Internationale Gesellschaft für Urheberrecht on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 3 (1966).

The three federations were convinced that authors and performers, without the need to impose on them a compulsory contribution, would continue to do all they could to foster easier and more amicable copyright relationships with organizations in developing countries.²¹²

The International Federation of Film Producers Association (FIAPF) also commented critically upon the Protocol:

Because of the rapid expansion of television, FIAPF must draw attention to the fact that the reservations contemplated for translations could constitute a danger for cinematographic works. Without adequate protection, the television networks of these countries would be able to record and rebroadcast cinematographic works televised by countries which are Members of the Convention of Berne. Thus, it should be stipulated that translation refers to texts. In effect, motion picture works are protected from this danger in cinematographic exhibition because the producer controls the negative and prints of films.

Producers join authors in recommending extreme caution in order not to compromise the protection of cinematographic works in countries which could take advantage of the reservations expressed in the Protocol.²¹³

The comments made by the *Council of Europe*, the *International Alliance for Distribution by Wire* (AID), and the *International Union of Cinematographic Exhibitors* were not directed to the Protocol. It is curious to note, however, that the unpopularity of the Protocol extended even to Sweden's KLYS, which is the Co-ordinating Committee of Organizations for Swedish authors and performing artists. On the eve of the Conference, KLYS had this to say:

KLYS, the co-ordinating committee of Swedish organizations of authors and performers joins the Swedish Government in welcoming all the participants of the Conference. There are, however, some points of great importance which we must make clear that, to our regret, we cannot share the views of the Swedish Government as expressed in the proposals forming the Programme of the Conference. KLYS, like the international organizations of authors and

212. Observations submitted to BIRPI by the Federation of Artistes on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 4 (1966).

213. Observations submitted to BIRPI by the International Federation of Film Producers Association on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 5.

performers takes it stand against two proposals in particular: *the revision of author's rights in relation to cinematographic works and the Protocol regarding developing countries.*

Authors and performers in Sweden have a positive interest in the problems of developing countries, particularly in relation to the encouragement of education and training. The proposed Protocol regarding developing countries, however, does not provide an acceptable solution. In practice the proposal would make the works of foreign authors available in developing countries by means of confiscation or expropriation. In our opinion, richer countries have an obligation to aid developing countries in every way—in the cultural as well as the economic and social fields. But the same principles must govern cultural aid as applies to the provisions of, for example, food or technical supplies. Payment should be made for author's rights in the usual way, by the states which provide aid; the rights should not be confiscated or expropriated. The rights should be passed on to the developing countries only after they have been properly acquired.

The most important factor in the cultural progress of a developing country is the growth of its own intellectual and artistic production. Therefore it is important that national creators enjoy effective protection of their own rights, particularly in the face of the means of exploitation of their work provided by modern technical advances. The proposed Protocol would hinder the development necessary to protection; therefore, it would in practice hold back, rather than encourage cultural progress in developing countries.²¹⁴

European Broadcasting Union.

In contrast to the opposition to the Protocol as expressed by the other international nongovernmental organizations, the European Broadcasting Company expressed satisfaction over the acceptance of special provisions for developing countries within the framework of the Convention. As the EBU considered the problem, it was "absolutely essential" for the Convention to accord developing countries this treatment.²¹⁵

214. Statement by KLYS, Coordinating Committee of Organizations for Swedish Authors and Performing Artists (1967).

215. Observations submitted to BIRPI by the European Broadcasting Union on the proposals for revising the substantive copyright provisions (Articles 1-20) of the Berne Convention, at 10 (1966).

However, the EBU considered it a mistake to relegate these provisions to a Protocol, instead of embodying them in the Convention itself as a supplementary article. The EBU did not understand the reason for the change in format and it considered the explanation offered for the change as inadequate:

By taking the provisions concerning developing countries out of the main body of the Convention and relegating them to the level of a Protocol, the Programme gives rise to danger of two kinds:

(1) A serious temptation to disassociate the Protocol from the Convention and not to make it an integral part of the treaty. (If this were to happen the Protocol could easily remain a dead letter by not having been ratified by the advanced countries whose cultural heritage is of most importance to the developing countries); and

(2) Even if the Protocol remains an integral part of the Convention, it raises a serious problem of when beneficiary countries can avail themselves of the exceptions and with what Union countries the exceptions will be applicable since the Programme does not yet supply these answers.²¹⁶

The following EBU comments have turned out to be uncannily prophetic:

There is, nevertheless, good reason to fear, even now, that once the principle of a Protocol has gained acceptance it will be held . . . to operate only in respect of . . . a country of the Union that has itself ratified the Stockholm Convention. . . . If such were to be the final conclusion, the developing countries would be liable to be denied the benefit of the Protocol because a particular country . . . prevents the Protocol from applying to its works by keeping to the Brussels text of the Convention.²¹⁷

The EBU, although satisfied with the inclusion of special provisions for developing countries in the Programme, was critical of the drafting of almost every provision. For example:

(1) The EBU did not feel that the provisions were so serious a departure from the Convention as to require special precautions

216. *Id.* at 11.

217. *Id.*

to limit its scope. It pointed out the use of earlier reservations such as Article 25 (3) of the Brussels text, which it believed to be more advantageous than the Stockholm offering, and which more highly advanced countries could maintain for an indefinite period.²¹⁸

(2) In this connection, the broadcasting union also felt that the length of time that the reservations made by the developing countries could be allowed to remain in force was prejudicial to their interests.²¹⁹

THE EAST ASIAN SEMINAR ON COPYRIGHT

(New Delhi, January 23-30, 1967)

From January 23-30, 1967, at the invitation of the Indian Government, BIRPI convened an East Asian Seminar on Copyright. The purpose of the meeting, as announced, was to provide for free discussion and an exchange of information, but the effect of the seminar upon the course of events at Stockholm five months later are clear to see.

Of the 19 East Asian States which were invited,²²⁰ only four declined.²²¹ Four other states had delegated observers.²²² Also represented at the meeting was a Unesco observer and several observers from certain non-governmental international organizations.²²³ As is the case with many of the meetings of this nature, the participants expressed their personal views, without binding their respective governments.

It is of interest that, although the IGC and the Berne Permanent Committee had met in New Delhi in December of 1963, the seminar was the first meeting of its kind to take place in Asia. And, if it had not become clear before this seminar exactly where the leadership of

218. *Id.*

219. *Id.* at 12.

220. Afghanistan, Burma, Cambodia, Ceylon, India, Indonesia, Iran, Japan, Korea, Laos, Malaysia, Mongolia, Nepal, Pakistan, Philippines, Singapore, Thailand, U.S.S.R. and Viet Nam. Although the U.S.S.R. did not send delegates to the seminar, it was represented by observers.

221. Burma, Mongolia, Pakistan and Viet Nam.

222. The following States, members of the Berne Union, had delegated observers: Congo (Democratic Republic), Israel, Spain, United Kingdom.

223. The Asian Broadcasting Union (ABU), the European Broadcasting Union (EBU), the International Federation of Musicians (FIM), the International Federation of Phonographic Industry (IFPI), and the International Federation of Variety Artists (FIAV).

the developing countries in copyright matters could be found, the role played by India at this meeting dispelled any doubts.

The chronicle of events up to this point indicates that the drafters of the Conference Programme were more than aware of the controversial nature of the Protocol. They knew that in the view of authors and other copyright owners, their attempts to accommodate the developing countries had gone too far, and that the developing States felt they had not gone far enough. The East Asian Seminar provided an opportunity to illuminate the nature of some of the dissatisfaction among the developing countries.

Before the items listed on the agenda were opened for discussion, two speakers addressed the seminar. Both speakers were Indian copyright experts and both made extremely interesting addresses. Neither wasted his time on generalities, but went straight to the heart of the problems facing their country.

The first of these speakers, Dr. Shri P. Kirpal, India's Secretary and Educational Adviser, informed the representatives that the "greatest problem facing India was to develop adequate means of educating a large number of people," which in turn meant increased production and consumption of intellectual works.²²⁴ It was his hope that, within this context, those present would consider not only the rights of the intellectual creator but also the concomitant duty of the creator to allow society to use his works. It was in connection with the latter statement that Dr. Kirpal stressed the urgent need for India to bring out both translations in Indian languages as well as its need to reproduce foreign works in the original language. He pointed out that both matters were of the utmost importance to India's "educational and other purposes."²²⁵

Dr. Kirpal continued his address by stating:

I cannot help feeling that national and international provisions in the field of copyright should provide for reasonable exploitation of intellectual works, without notice by Governments, subject to the economic interests of the intellectual creators not being neglected.²²⁶

224. See Report of the Debates, East Asian Seminar on Copyright contained in 3 *Copyright* 42 at 50 (1967).

225. *Id.* at 50-51.

226. *Id.* at 51.

He also stated that, although he was aware of the objections, he felt that the field of copyright should adopt the principles of eminent domain. He closed his address by comparing the purposes of both the Berne and Universal Convention, and concluded that the "wide dissemination" policy of the U.C.C. was obviously more suited to the needs of a contemporary society.²²⁷

The speaker who followed Dr. Kirpal, Dr. K. Krishna Rao, was later elected Chairman to the Seminar. He began on the following note:

It is only through the results of the studies of such seminars that a really good and all embracing world Convention can emerge or *keep itself in tune with the needs of specific areas and countries*.²²⁸ (emphasis added)

He also reminded the delegates and observers that, although "the modern law of copyright had its origins in Europe," it was no longer possible for any "region to claim an exclusive role in shaping what must necessarily be the universal law."²²⁹

In keeping with his theme of modernity, he also emphasized that what might have been applicable in 1886 "could hardly be considered adequate in 1967."²³⁰ He pointed out that both the "inter-dependence of the world and the changing social values, which involve the concept of international cooperation for mutual benefit must also be borne in mind."²³¹ In his opinion, the developing countries stood in a special position in the latter respect.

In closing his speech, Dr. Rao returned to Dr. Kirpal's earlier theme of the need for low-cost books consisting of both translations and reproductions. He requested that any future revision of the Berne Convention, or the entire international regime of copyright law, not be undertaken without simultaneous consideration of the "legitimate requirements of the developing countries."²³²

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 52.

231. *Id.*

232. *Id.*

The general agenda of the meeting contained four items for consideration:

- I. The Situation in East Asian Countries Regarding Copyright;
- II. The Draft Model Copyright Law for Developing Countries;
- III. Proposals for Revision of the Berne Convention for the Benefit of Developing Countries; and
- IV. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

The first item on the agenda had been considered by the two addresses made at the outset of the meeting. In regard to the second, the seminar was not given any responsibility of adopting a final draft model law, but rather of expressing the various points of view on general problems involved.

Professor Melville Nimmer (U.S.) and Dr. Vojtech Strnad (Czechoslovakia), who had been appointed as expert advisers to the meeting, followed the pattern already established at the African meeting in discussing the model draft law. It was suggested that the draft law include "alternative proposals," the final adoption of which would be at the discretion of the countries concerned.²³³

Some of the issues that arose during the discussion involved:

- (a) the importance of folklore to developing countries (a small committee was set up to study this problem);
- (b) the right of reproduction and translation and the fair compensation to be paid for it (it was suggested that the problem of fees should be left to the decision of a competent authority, noting that often publishers, not authors, prevented the diffusion of works);
- (c) the term of protection (it was felt advisable to re-examine the question in the light of decisions reached by the Stockholm Conference, especially regarding the Protocol).

The Government of Israel, represented at the meeting by an observer, also raised the issue of whether an international organization, such as Unesco, could find means to finance the payment of royalties

233. Report of the Debates of the East Asian Seminar, *supra*, note 224 at 43.

when works are used in developing countries for certain specific purposes.²³⁴

The discussions on the proposals for revision of the Berne Convention for the benefit of developing countries proved to be the most significant aspect of the meeting. The deliberations on this part of the agenda, and the views and recommendations put forward by the Asian delegates, represented a clear indication of the positions they would adopt at Stockholm.

Many of the countries felt that the Protocol should become operative immediately.²³⁵ In this connection, a great deal of emphasis was placed on the urgency of the need of developing countries to benefit from the special rules regarding translation, reproduction and term of protection. The delegation of Ceylon emphasized that it should be possible immediately to translate works necessary for educational and cultural purposes, and that if a royalty had to be paid it should be at a reasonable rate.²³⁶

The delegation of India also urged that the length of the periods provided in the Protocol for maintaining the reservations by developing countries was inadequate.²³⁷

One of the Indian experts also expressed the wish that facilities should be given to the press to reproduce not only articles on current affairs but also other works, both in their original form and in translation, either in full or in the form of a series.²³⁸ In response to all of the views expressed, the Director of BIRPI expressed regret that the proposals tended to enlarge the Protocol in ways that implied considerable economic repercussions for authors and publishers. He also regretted that no system of compensation had been proposed, such as a clearinghouse for translating and reproducing works, which would accord some remuneration to authors.²³⁹ An Indian delegate replied that it was not their intention to enlarge the Protocol to the detriment of the financial interests of authors or publishers. In his opinion, all that was intended was that a developing country should have the power to authorize local productions of translations or reproductions for cultural uses, since this use was essential to meet the needs of a growing

234. *Id.* at 44.

235. India, Indonesia, Ceylon.

236. Report of the Debates of the East Asian Seminar, *supra*, note 224 at 46.

237. *Id.*

238. *Id.*

239. *Id.*

population, but only on payment of fair and equitable remuneration under domestic law. Several other specific proposals for changing the draft Protocol were made by the delegates of both India and Ceylon.

The Director of BIRPI emphasized that the proposals for revision had already been officially decided by the Swedish government and that, if the seminar wished to introduce amendments to the Protocol, the proper course would be to submit them in their replies to BIRPI or as counter-proposals submitted to the Stockholm Conference itself.

Following this discussion, the delegate from Ceylon submitted a resolution which embodied a redrafted Protocol, based on the changes discussed and proposed at the seminar. The redrafted Protocol for developing countries was to take the place of the Protocol in the Conference Programme (Document S/1). The resolution requested that the Protocol in the Conference Programme be redrafted along the lines set out at the East Asian Seminar.

What is noteworthy here is that most of the provisions of the re-drafted Protocol as it emerged from the East Asian Seminar later became Document S/160 at the Stockholm Conference. The only substantial difference involved an elaboration of the translation provisions. Document S/160, one of the major documents of the Stockholm Conference, was submitted by ten Asian and African countries. This "joint proposal" was designed to accomplish the same purpose as the New Delhi resolution: to substitute its provisions, drafted from the viewpoint of the developing countries, for the provisions of the Protocol as they appeared in the Conference Programme. The efforts to work out a compromise at Stockholm centered on attempts to reconcile the differences between the provisions of S/160 and the provisions of the Protocol as they were drafted in the official Programme.

POSSIBLE REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION

The efforts to include a Protocol Regarding Developing Countries within the Berne revision programme, eventually led to a re-evaluation of the status and essential character of the Universal Copyright Convention. The U.C.C. was by its very nature a compromise.²⁴⁰ It was formed in an effort to link the countries of the American hemisphere with their European counterparts; but, since most countries outside the Berne Union had a lower level of copyright protection than that of

240. See "The Universal Copyright Convention: The First Ten Years" 16 *Unesco Copr. Bull.* 9 (1963).

Berne, it was recognized at the outset that any new Convention would have to be established on the basis of a common denominator. A fundamental principle of the Universal Convention was that it would permit countries not then capable of adhering to the standards of the Berne Union to provide a lower level of protection.

Thus, if the Berne and Universal Copyright Conventions were to exist simultaneously as complements rather than competitors, it was essential to safeguard the Berne Convention against erosion. The safeguard provision took two forms:

- (1) Berne members who also became members of the Universal Convention could not leave the Berne Union and rely on the U.C.C. in their relations with Berne Union countries; and
- (2) as between two countries both of which belong to both Berne and the U.C.C., Berne would control.

Article XVII of the Universal Copyright Convention, and its Appendix Declaration, became the statutory authority for these principles. The statutory provision had three objectives:

- (1) to emphasize that the U.C.C. did not affect the Berne Convention;
- (2) to establish sanctions against countries withdrawing from the Berne Union, and
- (3) to determine the extent of applicability of the U.C.C. by Berne Union members.²⁴¹

The actual text of the Article and Declaration as finally adopted is as follows:

Article XVII

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a Declaration has been annexed to the present article. This Declaration is an integral part of this Convention for the States bound by the Berne

241. A. Boggsch, *supra*, note 7 at 112. See also K. M. 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* 306, 307 (1967).

Convention on January 1, 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration as well as the Convention.

Appendix Declaration relating to Article XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to the Universal Copyright Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the co-existence of the Convention of Berne and the Universal Convention,

Have by common agreement, accepted the terms of the following declaration:

(a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

Then, as now, the most urgent problem for developing countries was the need to translate foreign works into their own national or regional languages as soon as possible. Realizing this, the drafters of the Universal Convention provided for an exclusive right of translation, but subject to a compulsory license under certain circumstances. The right of translation was the only type of use subject to a minimum requirement under the U.C.C.; all other rights were governed by the principle of "national treatment," which meant that they could be denied altogether as long as a country did not discriminate between domestic and foreign authors. With respect to the term of protection, the U.C.C. also adopted a minimum, but one substantially shorter than that of Berne.

With these factors in mind, one can understand why there was cause for alarm on the part of some experts when the proposed Protocol

adopted the U.C.C.'s provisions regarding the term of protection and translation rights. Was the Berne Union's Protocol actually usurping the functions of the Universal Convention?

Beginning in 1966 an effort was made to bolster the U.C.C. in the face of the Berne challenge by making it more attractive to developing countries. Among various proposals to accomplish this result, the most important was for a limited revision of Articles XI and XVII of the Universal Convention.

Although the 1966 efforts represented the first definite program to revise the U.C.C., tentative suggestions had already been advanced. As early as 1959,²⁴² the Intergovernmental Copyright Committee, at its 4th session (Munich), considered the desirability of initiating preliminary studies with a view toward the possible revision of some of the provisions of the Convention. Although the Committee felt that a general revision of a Convention as young as the U.C.C. was not very urgent, it expressed the opinion that a limited revision, affecting a few provisions, would probably become necessary in the future. Thus, initiation of preliminary work well in advance of a planned revision conference could avoid mistakes later. The Committee therefore invited the Secretariat to prepare for its 5th session (London), the draft of a circular letter to all States parties to the U.C.C., requesting them to indicate which provisions of the Convention, in their view, were urgently in need of revision.²⁴³ Although the Secretariat prepared the draft letter, it was never distributed because the IGC later concluded that revision would be premature.

The decision to postpone revision was made at Madrid in 1961, after the IGC had reviewed a preliminary study of the possible limited revision of the Convention.²⁴⁴ Although this study suggested that a limited revision might deal primarily with the subjects of minimum rights, translation rights, and the definition of the concept of "publication," it did not conclude that revision in these areas was pressing. There also seemed to be a consensus among IGC members that the nine-year old Convention, actually in effect for only six years, was too

242. See Report of the Intergovernmental Copyright Committee Alone, 4th session, IGC/IV/3, Munich (1959).

243. See Report of the Intergovernmental Copyright Committee Alone, 5th session, IGC/V/4, London (1960).

244. See Report of the Intergovernmental Copyright Committee Alone, 6th session, IGC/VI/3, Madrid (1961). Messrs. Arpad Bogsch and Eugen Ulmer were the two consultants who prepared the study.

young to revise. One of the reasons offered for postponement was that several countries, which were then actively considering adherence to the text as it stood, might defer their consideration of adherence if a revision of the Convention seemed to be imminent. Clearly, the Intergovernmental Committee was of the opinion that further adherences were more important than revision.²⁴⁵

Even though the IGC postponed any plans for immediate U.C.C. revision at its Madrid meeting in 1961, it desired to continue its consideration of the general problem. It therefore specifically recommended that the item appear on the agenda of the next meeting, to be held in New Delhi in 1963.

For some reason the subject of U.C.C. revision did not appear on the Committee's provisional agenda at the New Delhi sessions, but the Committee nevertheless voted to have the Secretariat study the need for revision of the Convention. It was suggested that, in light of the developments at Brazzaville and the 1963 Committee of Experts meeting, the Secretariat's revision study should place special emphasis on the problems of the developing countries. The Secretariat was to report its findings at the Committee's next session.

Following the 1963 IGC meeting in New Delhi, the Unesco Secretariat therefore consulted each of the States parties to the U.C.C. on the question. The letter, dated 26 August, 1964, contained two inquiries:

- (i) the best means (including the establishment of a Consultative Committee) of enabling the member States of the U.C.C. who were not members of the IGC, to present their views to the latter; and
- (ii) the need to revise the U.C.C., with due regard to the problems of the newly-independent and developing countries.

Both the idea for the creation of a Consultative Committee and the problem of U.C.C. revision were given increased attention because of growing concern of the developing countries in international copyright. The African countries had become increasingly aware of their lack of representation on the Intergovernmental Copyright Committee. It was their position that the system of membership rotation was ex-

245. See Report of the United States Delegation to the Sixth Session of the Intergovernmental Copyright Committee, Madrid, Spain, September 25-30, 1961 at 6-7 (1962). (Copy in file in Office of the Register of Copyrights).

tremely limited, thus the African experts sought a revision of Article XI of the Convention to prevent the tendency toward automatic re-election and a permanent membership on the Committee. They felt that their needs would be better served if they had an opportunity to be represented on and participate in the transactions of the Committee.²⁴⁶

By August 15, 1965, sixteen countries had replied to the Unesco Secretariat's letter of August 26, 1964.²⁴⁷ Of them, only 11 communicated suggestions bearing on the substance of the questions raised.²⁴⁸ These 11 replies indicated that none of the States were in favor of revision at the time. Although many of these countries felt that a study of certain problems for later revision might be useful, none were enthusiastic about the project. Generally, most believed that an insufficient period of time had elapsed since the entry into force of the Convention, and that this prevented a sound formulation of new principles likely to justify a revision. It was thought that a wider experience with the existing text was needed.

The idea of the creation of a Consultative Committee met with equally unfavorable reaction. The consensus was that the IGC's "observer" system provided those non-member States with ample opportunity to express their views. Most of the replies expressed the view that the creation of a Consultative Committee could be dangerous because of the possible rivalry or overlapping that might arise between it and the Intergovernmental Copyright Committee. A few States felt that the only real solution to the problem would be revision of Article XI, which governed the present composition of the IGC.

Belgium believed that the present system of inviting representatives of non-IGC member States as observers to the IGC sessions was sufficient. Its specific comments on revision were as follows:

The Universal Convention was signed in 1952 and was ratified by a number of States only during the following years and even quite

246. The idea of a Consultative Committee was introduced at the 7th session of the IGC. See (IGC/VII/3 ADD.). New Delhi (1963). See also the Comments of Ghana Regarding Revision of the Universal Copyright Convention, (IGC/VIII/4-ADD. 1), Paris (1965).

247. Belgium, Denmark, France, Federal Republic of Germany, Ghana, Guatemala, Israel, Italy, Liechtenstein, Nicaragua, Panama, Spain, Sweden, Switzerland, United Kingdom, United States of America.

248. Belgium, Denmark, France, Federal Republic of Germany, Ghana, Israel, Italy, Spain, Switzerland, United Kingdom and United States of America.

recently. Experience in the application of this new Convention is scarcely sufficient to permit conclusions that would justify making a first revision at the present time.²⁴⁹

Similarly, *Denmark* was not in favor of the creation of a Consultative Committee. It felt that the already established arrangement of allowing member States, not members of the Committee, to present their views as observers to the Committee's sessions had worked well enough. It expressed the desire to see this course of action continued until the provisions of Article XI could be amended to provide otherwise. As for revision, Denmark stated that it was not interested at the time. However, it also expressed the view that its lack of interest did not preclude the Secretariat from making studies on particular provisions that might need revision due to the particular problems of newly-independent and developing States.²⁵⁰

France was one of two countries which was not opposed to the formation of a Consultative Committee, and it was also not opposed to revision with a view toward aiding developing countries. However, in its own words, such revision must be "on the strict understanding that there would be absolutely no derogation from the provisions which . . . provided practical copyright safeguards, without which the author's rights would lose all substance or meaning."²⁵¹

The *Federal Republic of Germany* was the other State that was not opposed to the idea of a Consultative Committee. However, unlike France, Germany did not feel that revision of the U.C.C. was necessary at the time. What the experts of Germany were in favor of was collaboration between Berne and U.C.C. on the subject of additional dispositions for the benefit of the developing countries. Germany was more inclined to the view that Berne, not the U.C.C., needed revision. In its view, the minimum protection provided under the Universal Convention did not need to be lessened.²⁵²

Israel was opposed to the formation of a Consultative Committee for some of the same reasons already mentioned. In its view, the most logical solution to enlarging the IGC to allow greater participation was

249. See Reply of Belgium to the Unesco letter of 26 August 1964 (hereinafter referred to as Unesco letter) contained in Document IGC/VIII/4, IGC 8th session at 3, Paris (1965).

250. Reply of Denmark to Unesco letter, *supra*, note 249 at 3-4.

251. Reply of France, *supra*, note 249 at 4.

252. Reply of Federal Republic of Germany, *supra*, note 249 at 5.

by revising Article XI. However, it believed the "observer" situation to be sufficient until a revision convention could be arranged.

As for revision of the U.C.C., Israel believed that any decision to amend should be postponed until after the Berne Revision meeting in 1967. In its view, a better harmonization of the two conventions could take place after the Stockholm sessions. However, in the interim, Israel suggested a study of three areas:

- (1) Compulsory licenses for translations at an earlier date than Article V of U.C.C. provided;
- (2) Compulsory licenses to reproduce works for educational purposes, and
- (3) Availability of copyright protection for folklore.²⁵³

Italy's reply to both questions was negative. It saw no need for a Consultative Committee, since the "observer" system seemed satisfactory for the purpose. Furthermore, it did not see the need to create conflict by the establishment of two similar bodies. As far as revision was concerned, Italy stated that it thought the Convention too young to revise.²⁵⁴

Spain, like Italy, dismissed both items rather briefly. It thought that it was unnecessary to create a Consultative Committee and that, although the question of revision should be studied for future consideration, there was no urgent need to revise the Convention at the moment.²⁵⁵

Switzerland, like most of the other countries, saw no need to set up a separate Consultative Committee, on the ground that the "observer" system was sufficient. In its view, observers got much the same opportunities as IGC members since they not only were allowed to speak at meetings but could also submit proposals in the same manner as members of the Committee. In its opinion, the usefulness of revision at the time could only be considered as "questionable."²⁵⁶

The United Kingdom was opposed both to the creation of a Consultative Committee and to any projected plans for revision. The conflict that might arise from the co-existence of two similar bodies was, in its view, a danger to be avoided. On revision, the U.K. flatly stated

253. Reply of Israel, *supra*, note 249 at 6-7.

254. Reply of Italy, *supra*, note 249 at 7-8.

255. Reply of Spain, *supra*, note 249 at 9.

256. Reply of Switzerland, *supra*, note 249 at 10.

that the substantive rights of the U.C.C. were so few that it could not do any more than it already did for newly-developed countries.²⁵⁷

The reply of the *United States* to the letter of 26 August, 1964, is interesting. Although not expressly opposed to the formation of a Consultative Committee, the United States was of the opinion that it was unnecessary. It felt that the present "observer" principles were satisfactory. However, the U.S. comments also stated what it thought the sphere of activity of such a committee should be if it were formed.

The United States' comments on revision were limited solely to the issue of membership on the IGC. As the U.S. saw it, the problem could best be solved by revision of Article XI. However, it did not feel that a revision conference needed to be scheduled for that problem alone. The U.S. made no general comments regarding the subject of revision.²⁵⁸

Ghana, like the United States, restricted its comments to the issue of membership on the Intergovernmental Copyright Committee. In its view, the formation of a Consultative Committee would be acceptable only as an "interim arrangement." Its reasons for not wanting a Consultative Committee were twofold:

- (2) it might be a rival body to the IGC; and
- (2) there might be justification for considering it more authoritative since its makeup would undoubtedly be more representative than the IGC.

Ghana felt that the ultimate solution to the problem would be to revise paragraphs 1 and 3 (b) of Article XI.²⁵⁹

The results of the poll of states regarding revision were presented to the Intergovernmental Committee at its 8th session in Paris, November 15-19, 1965. In light of the expressed general consensus against revision, the Committee again decided to postpone any efforts to revise the Convention until its next session. Draft Resolution No. 53 (VIII) was adopted to express that view.

Following this decision, the consideration of efforts to revise the U.C.C. would ordinarily not have been discussed again until the Com-

257. Reply of United Kingdom, *supra*, note 249 at 11.

258. Reply of the United States of America, *supra*, note 249 at 11-12.

259. Reply of Ghana, IGC/VIII/4-ADD. 1, *supra*, note 246.

mittee's 1967 session. However, as mentioned earlier, the matter surfaced again in 1966, this time at the 14th session of the Unesco General Conference in Paris, October-November, 1966.²⁶⁰

The drive to reopen the issue was prompted by the obvious relationship that now existed between the Berne Convention's proposed Protocol and the provisions of the U.C.C. Whatever their reasons, there were many who favored revision of the U.C.C., particularly the Berne safeguard clause, as a way of strengthening one or both conventions.

The issue was brought before the General Conference by the *Tunisian* delegation, which presented a draft resolution, 14C/DR/51 proposing the revision of Articles XI and XVII of the U.C.C., and of the resolutions and declarations annexed to those articles, to facilitate their universal application. It was the Tunisian delegation's opinion that the U.C.C. "faced certain realities, but was not prepared to impose everywhere the guarantee of authors' rights."

Following the introduction of the Tunisian proposal, the *French* delegation submitted a proposal 14C/DR/202 which, they pointed out, bore only on the proposal for the actual text of the annexed Declaration relative to Article XVII of the U.C.C. The language of the Tunisian proposal gave the impression that the General Conference was empowered to state how the actual text of the U.C.C. should be amended. As the French saw it, the General Conference was not authorized to take such action. Tunisia accepted the French proposal and substituted for its last paragraph a compromise text as follows:

"Invites the Director-General of Unesco to take the necessary steps to permit the qualified organism (bodies) to examine the possibility of revising the Universal Convention at the earliest convenience within as short a period as possible, in order to permit developing countries to benefit, if they so wish, and in all cases, from the protection guaranteed by this Convention and asks the Director-General to make it (Unesco) a report of the results obtained."²⁶¹

260. See generally, Unesco General Conference, Fourteenth Session, Paris, 25 October–30 November 1966.

261. See Draft Resolutions 14C/DR 51(P) and 14C/DR 202(P), Unesco General Conference, *supra*, note 260.

The Tunisian draft resolution, as amended, was promptly supported by the following states: Denmark, India, Italy, Switzerland, Malta, Czechoslovakia, Rumania, Belgium and the United States.

The delegation of India made clear its position in support of U.C.C. revision. In its view, the developing countries that had adhered to the Berne Convention under the influence of the colonial powers had found it inappropriate for their needs, but were prevented from withdrawing from Berne and adhering instead to the more suitable Universal Convention. Therefore the impediment preventing withdrawal, Article XVII and its Appendix Declaration, should be removed.²⁶²

Since this was a meeting of the General Conference and not of the Intergovernmental Copyright Committee, the Italian delegation brought up a point of procedure which was later to cause some concern.²⁶³ In the Italian delegates' opinion, it would probably be best to reconvene the IGC before preparing for a revision conference of the U.C.C., since the latter body was the qualified organ for that purpose under Articles XI and XII of the Convention. The Italian delegation also introduced a note of caution, pointing out that proceedings in this area should be undertaken with a great deal of care in light of the pending revision of the Berne Convention.²⁶⁴

Pursuant to these discussions, the General Conference adopted Resolution 5.122 in regard to the proposed revision of the U.C.C. This resolution invited the Director-General of Unesco to submit the matter of revision of Articles XI and XVII as soon as possible to the competent bodies to examine the possibility of revising the U.C.C. along the lines indicated. The dual purpose of the resolution was:

- (1) to enable Africans to become members of the Intergovernmental Copyright Committee; and
- (2) to facilitate the accession of African States to the U.C.C., particularly in view of the stipulation of the Universal Convention whereby works which have as their country of origin a country which has withdrawn from the Berne Convention after January 1, 1951, and cannot, therefore, have its works protected by the Universal Convention in Berne Union countries.²⁶⁵

262. See discussions of the General Conference, *supra*, note 260.

263. *Id.*

264. *Id.*

265. *Id.*

On December 30, 1966, Unesco followed up the General Conference resolution by sending an inquiry to U.C.C. members which stated in part that the "proposed change is intended to enable developing countries to enjoy unrestrictedly the protection guaranteed by the U.C.C. which ensures minimum rights for authors, while permitting a wide dissemination of culture." The letter asked member countries to state whether or not they wished a revision conference to be convened, and it requested a reply by May 1, 1967. The Stockholm Conference was scheduled to begin on June 11, 1967.²⁶⁶

One writer has referred to the efforts, during this period, to include a Protocol for developing countries in Berne, and the efforts to revise the Universal Convention to eliminate Article XVII for the benefit of developing countries, as "jockeying for position."²⁶⁷ That is perhaps too broad a summary of the situation, since both Conventions expressed their motives in altruistic terms: "the desire to help developing countries to participate effectively in perfecting the human condition through the use of and easy access to literary works, including textbooks and works of an educational character." However, in actuality, both efforts were based on the rather tardy realization that the international copyright community could no longer operate as in the past. To many, the future success or failure of both conventions depended upon their appeal to a very large, and heretofore ignored, sector of the world.

THE EXTRAORDINARY SESSION OF THE PERMANENT COMMITTEE
OF THE BERNE UNION

(Geneva, March 14-16, 1967)

Following the letter of December 30, 1966, to member States of the U.C.C. from the Unesco Director-General, the Permanent Committee of the Berne Union met in March, 1967, in an extraordinary session. The purpose of the meeting was twofold: (1) to examine the signifi-

266. The Unesco letter of 30 December 1966 (DG/6/126/397) was followed up by a letter of June 1, 1967 which extended the deadline for replies until 1 March 1968. On February 1, 1968 Unesco sent another letter to member States reminding them of the March 1 deadline. The United States replied to the December 30th letter on April 19, 1967. The letter was answered by Thomas D. McKiernan, Deputy Director, Office of Multilateral Policy and Programs, Bureau of Educational and Cultural Affairs, U.S. State Department. In the reply, Mr. McKiernan stated that the U.S. believed "it would be advisable to wait until after the Intellectual Property Conference of Stockholm and then review the matter."

267. See Ringer, *supra*, note 6 at 26.

cance of resolution (5.122), which had been adopted by the Unesco General Conference, as far as it related to the development and general functioning of the Berne Union; and (2) to assist the Director of BIRPI in formulating the advice he might be called upon to give to the IGC, if and when it did meet.²⁶⁸ The discussions of the meeting were to center around two topics:

- (1) the possible repercussions from the Unesco circular of December 30, 1966 (especially in light of the proximity of the Stockholm Conference); and
- (2) the possible impact on the proposed Berne Union Protocol Regarding Developing Countries.²⁶⁹

During the session, the Committee decided not to deal with the substance of the question until after the Stockholm Conference. Thus, the postponement was presumably until the next regular session of the Permanent Committee, scheduled for December, 1967. It was concluded that the meeting would probably be in conjunction with the IGC, the only body the Berne Permanent Committee considered competent to make U.C.C. revision preparations. The Committee, however, did deal with the Unesco circular, and decided that it would be best if Berne Union member States did not express their views on U.C.C. revision until after the December 1967 session in Geneva.

In a report to the delegates at the meeting, DA/25/2, the Director of BIRPI devoted considerable attention to both the historical differences and specific functions of each Convention. In his opinion, it was important to come to grips with these factors before embarking on a consideration of elimination of Article XVII from the U.C.C. He emphasized that the primary difference between the two was that Berne provided more "minima" than the U.C.C., and that it was with this factor in mind that Berne accepted the creation of the Universal Convention, as an organization formed at a lower level of protection.²⁷⁰

268. Report of the Extraordinary Session of the Berne Union Permanent Committee, March 14-16, 1967, BIRPI document DA/25/6 at 2.

269. Report by the Director of BIRPI on the March 1967 Extraordinary Session of the Berne Union Permanent Committee, contained in Document S/16 at 2-3 (1967).

270. See Report by the Director of BIRPI to the Permanent Committee, BIRPI document DA/25/2 (1967).

The proposed elimination of the U.C.C.'s Article XVII, which had been a condition precedent to that Convention's formation, must be concluded, be studied closely.

Not only were all 12 member States of the Permanent Committee present at the Extraordinary Session, but 14 other States, all members of the Union, also sent observers.²⁷¹ As mentioned earlier, the unanimous feeling of the meeting was that, since the official proposals submitted to the forthcoming Revision Conference of the Berne Convention also included special provisions for the benefit of developing countries, it would be advisable to await the results of that Conference before expressing an opinion on the problems raised. This was the feeling expressed, in particular, by the delegations of Belgium, Denmark, France, Germany, India, Italy, Spain, Sweden, Switzerland and the United Kingdom, as well as by the observers of Ceylon, Czechoslovakia, Japan and Poland.²⁷²

Only the specific comments of a few delegations are noteworthy. The delegation of the Federal Republic of Germany pointed out that both the proposed U.C.C. revision and the proposals to be submitted to the Stockholm Conference were designed to benefit the developing countries. It did not believe that the U.C.C. was attempting to facilitate accession to its membership but, on the contrary, only to make it easier for developing countries to denounce the Berne Convention for the more suitable Universal Convention. In its opinion, both proposals represented two ways of satisfying the developing countries. However, the German delegates expressed the view that they considered it best to allow these countries to remain members of Berne by facilitating, in certain respects, the exercise of rights recognized by the Berne Convention.²⁷³ Thus the delegation observed that it seemed preferable to hold all opinions until after the IGC meeting in December. As far as the German Federal Republic was concerned, the two committees should first discuss the matter in joint session.

271. Members of the Permanent Committee: Belgium, Brazil, Denmark, France, Germany (Federal Republic), India, Italy, Portugal, Rumania, Spain, Switzerland, and the United Kingdom; (Sweden *ex officio*). Observer States included: Austria, Canada, Ceylon, Congo (Dem. Rep.), Czechoslovakia, Finland, Ireland, Japan, Morocco, Norway, Pakistan, Poland, Tunisia, Turkey.

272. Report of the Extraordinary Session of the Berne Union Permanent Committee, *supra*, note 268 at 3.

273. *Id.*

The French delegation declared that the problem of developing countries should be resolved within the Berne Union for countries members of that Union, in order to encourage them to remain members, and that the solution adopted should serve as an example to countries not yet members as an inducement for them to join the Union. The delegation reminded the meeting that it had participated in drafting Resolution No. 5.122, but that it had always considered it necessary to first discuss the problem within the framework of the Berne Convention. The French delegates added that the outcome of the Stockholm Conference would then make it possible to estimate the attitude to be adopted toward the Unesco resolution.²⁷⁴

The United Kingdom noted that it was quite difficult to reply to the Unesco circular by the May 1967 date. It would be necessary for them to know the outcome of Stockholm before replying and, if the U.K. were to reply before Stockholm, it would have to say that it was opposed to the revision.²⁷⁵ In support of the U.K.'s position, the Indian delegation expressed the hope that, in view of the Stockholm Conference, Unesco would extend the time limit given to States for making known their opinions.²⁷⁶

In reply, the Unesco observer informed the committee that the May 1, 1967, date, was not a deadline; in all probability States that had not replied would be consulted again after May 1. He also stated that there had been no intention to propose a possible revision of the U.C.C. to the Intergovernmental Committee before the fall of 1967.²⁷⁷

At the close of the Conference, the Tunisian observer reminded the delegates that his delegation had proposed Resolution 5.122 at the Unesco General Conference. He expressed the hope that a universality of copyright could be achieved that would reconcile both the respect for the rights of authors and the special position of certain countries, mainly at the economic level.

Despite the Permanent Committee's request to delay answers to the Unesco letter of December 1966, a few replies were filed. By December of 1967, seven countries had submitted replies, all in favor of a proposed U.C.C. revision conference. The seven replies were dis-

274. *Id.* at 4.

275. *Id.*

276. *Id.* at 5.

277. *Id.*

tributed to the IGC's December 1967 meeting, which was held in Geneva.²⁷⁸

THE STATUS OF THE PROTOCOL ON THE EVE OF THE CONVENTION

Although the drafters of the Protocol must have known that their proposals would prove controversial, they obviously hoped for their eventual adoption and acceptance. There was, however, little cause to expect that their proposals would remain substantially the same in content and language. For one thing, there were no indications that the dissatisfaction of the developing nations had lessened since the East Asian seminar, and moreover, the author's groups were as adamant in opposing the format of the Protocol on the eve of the conference as they had been throughout the preparatory stages. The developments at the ALAI Congress, held approximately two months before the start of the Stockholm Conference, are a good illustration.

Following its tradition of meeting in Switzerland on the eve of diplomatic conferences for the revision of the Berne Convention, the International Literary and Artistic Association (ALAI) held its 52nd Congress at Basle from March 29-April 4, 1967. The Congress was attended by representatives of the various national groups of ALAI from a number of countries.²⁷⁹ In addition, certain non-governmental organizations sent observers to the Congress.²⁸⁰ Both the French and the Swiss Governments were represented by observers, and BIRPI was represented by its Director, G. H. C. Bodenhausen and by the head of its Copyright Division, Claude Masouyé.

The agenda for the meeting dealt primarily with the proposals for revising the Berne Convention. Among the items to be discussed was "the draft Protocol regarding developing countries." Much of the discussion surrounding the Protocol was simply a reiteration of earlier ALAI positions. However, at the close of the discussions, the Association adopted two resolutions. One dealt with the Proposals for Revising

278. Argentina, Ghana, Kenya, Malawi, Nigeria, Peru and Venezuela.

279. Belgium, Brazil, Denmark, Finland, France, Germany (Federal Republic), Greece, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom.

280. International Association for the Protection of Industrial Property (IAPIP), International Bureau for Mechanical Reproduction (BIEM), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Patent Agents (FICPI), International League Against Unfair Competition, International Publishers Association, and the Union of Manufacturers.

the Substantive Copyright Provisions (Articles 1-20) (Document S/1); while the other dealt with the Proposals for Revising the Administrative Provisions and Final Clauses of the Convention, (Articles 20bis-32) (Document S/9 and Corrigendum Document S/10).

For our purposes, it is only necessary to examine the portion of the first resolution that dealt with the proposed protocol. The following excerpt is indicative of ALAI's continuing opposition to the Protocol.

ALAI RESOLUTION

1. Proposals for Revising the Substantive Copyright Provisions, Articles 1-20 (Document S/1).

After having heard the report concerning the matters on the agenda and having exchanged views thereon,

Having taken cognizance of the observations made by certain governments (Document S/13) and certain international organizations,

Noting that *these observations do not call for a change of attitude on its part.* (emphasis added)

Adopts and confirms the observations it presented to BIRPI on Document S/1,

Believes that attention should nevertheless be drawn to the following points in particular:

5. Considers,

while recognizing "the necessity of facilitating cultural, social and educational expansion in developing countries," that the Draft Protocol as presented could be criticized because:

(a) assistance in this field would be borne by the authors alone,

(c) it jeopardizes the cultural advancement of such countries, . . . feels that, if the Draft Protocol should be accepted, it would have to take the form of a Protocol that is independent of the Convention, with a criterion for determining the beneficiaries and with provisions that are strictly defined, particularly as regards paragraph (e).²⁸¹

281. Resolution of the 52nd Congress of the International Literary and Artistic Association (ALAI), 3 *Copyright* (1967) at 123, 124.

The continued resistance of ALAI and other similar author-oriented groups to the draft Protocol was a factor that some of the delegates had to consider as they prepared for the Conference. The lack of unanimity was assuredly cause for concern, and there was an increasing number of adverse reaction to the draft Protocol in the press. The greatest hue and cry came from the United Kingdom.

A statement in the *London Times* viewed the Protocol as predatory in that the provisions “. . . steal, or authorize the stealing of other people's property: the intangible but precious property of authors, composers, artists, and publishers.”²⁸² Another comment referred to the Protocol as a means of economic assistance by stating “copyright laws are one thing, aid to developing countries another.”²⁸³ A third article declared that the provisions amounted to “confiscation” if not “theft.”²⁸⁴ Sir Alan Herbert, Chairman of the British Copyright Council, later referred to the Protocol as “a delayed action bomb of dangerous principle into the flagship of copyright; a tunnel under the walls of the copyright fortress.”²⁸⁵ The same type of unfavorable reaction continued during the Conference as one writer declared, “Don't write or publish a textbook unless you want to be robbed”²⁸⁶ while another announced, “Copyright is being given away in Stockholm this week.”²⁸⁷ It would be fair to characterize the atmosphere on the eve of the Stockholm meeting as confused if not chaotic.

This confusion also pervaded the discussions of Main Committee II of the Stockholm Conference, which had the task of considering the Protocol and the problems of copyright concessions to developing states. The open negotiations took place in an atmosphere of obvious uncertainty and heated debate.²⁸⁸

One of the most colorful descriptions of the first meeting of that committee appeared in the “special double number” 54-55 of *Revue*

282. Letter, Vice-Chairman of the British Copyright Council, *The Times*, April 13, 1967.

283. “Breach of Copyright,” *The Times*, April 28, 1967.

284. Letter, Manager, the Performing Rights Society, *The Times*, April 21, 1967.

285. Letter, Chairman British Copyright Council, *The Times*, August 3 and 11, 1968.

286. *The Economist*, London, June 24, 1967.

287. R. Barker, “The Stockholm Conference,” *The Bookseller*, July 8, 1967.

288. Accord: Ringer, *supra*, note 6 at 28.

internationale du droit d'auteur (RIDA). The following excerpt from that article is worthy of note:

Chaired, appropriately enough by a delegate from India, the country the most directly concerned in the draft Protocol Regarding Developing Countries, Main Committee II immediately developed into a political debate in which ringing anti-colonialist declarations alternated with ingratiating descriptions of the needs of the Third World.

In an atmosphere of demagoguery and ambiguity, the Committee was never able squarely to tackle the essential problems, namely the definition of the ways and means to be implemented with a view to setting up a cultural assistance programme for developing countries. One wonders, moreover, whether the delegations of certain countries, far from being taken in, did not base themselves exclusively on the doctrine so as to undermine the Berne Convention, looked upon by them as an obsolete instrument, and were fully intent, on the fateful date of the signature of the Stockholm Act, on taking the Bastille all over again.

The crucial importance attached by BIRPI to the success of the Protocol . . . was emphasized by the constant presence in Committee II of the Director of the United Bureau in person, who more often than not, directed and channeled the discussion.

Authors were able to derive a certain wry satisfaction from the proceedings of the Committee, in that it fully justified the forebodings they had experienced after taking cognizance of the Programme of the Conference ²⁸⁹

The latter excerpt gives some indication of the tremendous amount of compromise and negotiation which became necessary to produce a Protocol that the Stockholm Conference could accept, and it seemed clear before the signing ceremony that the process of compromise and negotiation was far from ended. In essence, it is clear that the causes for the failure of the Stockholm Protocol can be found in the history of its development, and for the sake of international copyright one can only hope that the mistakes of the past will not be repeated.²⁹⁰

289. See Tournier, "Rykssdag 67, or the End of a Myth?", 54-55 *RIDA* 709-711 (1968).

290. For a detailed examination of the Protocol, in its final form, see D. M. Schrader, "Analysis of the Protocol Regarding Developing Countries," 17 *BULL. CR. SOC.* 160 (1970).

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN
DONALD S. ENGEL
JUDITH GRAD
MORTON DAVID GOLDBERG
PROF. HARRY G. HENN

DR. STEPHEN P. LADAS
ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

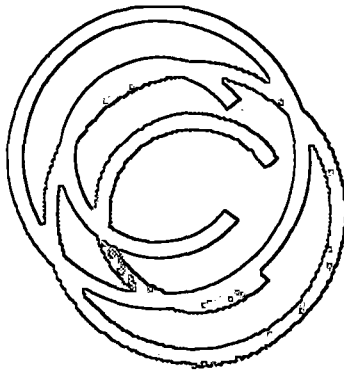
EUGENE N. ALENIKOFF, New York City
ALLEN H. ARROW, New York City
IRVING COHEN, New York City
EDWARD M. CRAMER, New York City
SIDNEY A. DIAMOND, New York City
HERMAN FINKELSTEIN, New York City
EUGENE L. GIRDEN, New York City
A. A. GOLDMAN, Washington, D.C.
PROF. ROBERT A. GORMAN, U. of Penn. Law School, Philadelphia
JOHN F. HARDING, New York City
PROF. HARRY G. HENN, Cornell Law School, Ithaca
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
PROF. JOHN M. KERNOCHAN, Columbia Law School, New York City
ARTHUR B. KRIM, New York City
ABRAHAM MARCUS, Los Angeles
JOHN A. MARSHALL, Boston
WALDO H. MOORE, Washington, D.C.
PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles
HARRY R. OLSSON, JR., New York City
SIGRID H. PEDERSEN, New York City
HARRIET F. PILPEL, New York City
EDWARD A. SARGOY, New York City
ADOLPH SCHIMEL, New York City
CHARLES B. SETON, New York City
LEON SHIMKIN, New York City
SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1970 by The Copyright Society of the U.S.A.
All rights reserved.

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



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 3

FEBRUARY, 1971

CONTENTS

	PAGE
PART I. ARTICLES.	
Toward International Copyright Revision. <i>Report on the Meetings in Paris and Geneva, September, 1970</i>	
Robert D. Hadl	183
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	229
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	238
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	239
2. State Court Decisions	249
3. Other Decisions of Interest	253
PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	268
2. Foreign Publications.	
1. In Dutch	270
2. In French	270
3. In German	271
4. In Italian	271
5. In Italian and French	271
B. Law Review Articles.	
1. United States	272
2. Foreign.	
1. In English	276
2. In English, French and German	281
3. In English, French and Spanish	281
4. In French	282
5. In German	283
6. In Italian	289
7. In Swedish	289
<i>In Memoriam.</i> Harold G. Fox, Q.C.	291

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: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1971).

PART I.

ARTICLES

106. TOWARD INTERNATIONAL COPYRIGHT REVISION

Report on the Meetings in Paris and Geneva, September, 1970

By ROBERT D. HADL*

Introduction and background

At a time when the prospects for revision of the copyright law of the United States seem to be progressively dimming, there is hope that an end may be near to the crisis that has plagued international copyright for the past three years. At meetings recently concluded in Paris and Geneva, the Intergovernmental Copyright Committee (IGCC) and the Berne Permanent Committee made final preparations for revision conferences of the Universal Copyright Convention (UCC) and the Berne Convention for the Protection of Literary and Artistic Works.¹ These conferences will be held at the same time in Paris from July 5 to 24, 1971. In addition, these Committees adopted resolutions looking toward the creation of a new international agreement for the protection of phonograms against their unauthorized duplication. It was envisaged that such an agreement might be negotiated, following a preparatory meeting in March, 1971, at the same time and place as the conferences for revision of the UCC and Berne Convention.

International copyright was plunged into crisis in 1967 at the Stockholm Intellectual Property Conference. One of the objectives of this Conference was the revision of the Berne Convention including special

* Legal Adviser, Copyright Office. The views expressed here are the author's own, and do not reflect the official position of the Copyright Office or the Department of State.

1. The Intergovernmental Copyright Committee is the governing body of the Universal Copyright Convention, see Article XI of the UCC. The Berne Permanent Committee was established pursuant to a resolution of the Brussels Conference (1948) of the Berne Union and has acted, since that time, as a quasi-governing body for the Berne Convention. Under the Stockholm Act of the Berne Convention, Article 23, it was replaced by an Executive Committee. The new Executive Committee was organized during the first meeting of the World Intellectual Property Organization (WIPO) which took place after the meeting of the Berne Permanent Committee reported on here.

provisions for the benefit of developing countries.² These provisions were annexed to the draft text of the Convention as a *Protocol Regarding Developing Countries* (hereafter, "Protocol", or "Stockholm Protocol").³ During the Conference, however, it became apparent that the developing countries were not satisfied with the concessions proposed in the draft text. Led by India, they were able to orchestrate a chorus of protest which sought much wider gains. The developed countries, unprepared for this onslaught and without strong leadership, found themselves in disarray and unable to silence the developing countries. As a result, the final text of the Protocol adopted by the Conference gave developing countries very broad and uncontrolled privileges with respect to works copyrighted in Berne Union countries.⁴ For the most part, these privileges were considered unacceptable by the developed countries.⁵

The Stockholm victory won by the developing countries proved, however, to be a hollow one. They had left one loophole, namely, the provision that unless a developed country agreed to accept the Stockholm Protocol, it could not be bound by it.⁶ To this day, no major developed country has ratified or acceded to the Stockholm Protocol,⁷ and none is expected to do so in the future. In the aftermath of Stockholm what became apparent was that the developing countries had won the opening battle, but they had not won the war.

For their part, the developing countries were not without recourse against the refusal of the developed countries to accept the Stockholm

-
2. For a detailed history of the preparatory steps leading to the Protocol, see Johnson, "The Origins of the Stockholm Protocol," 18 BULL. CR. SOC. 91 (1970); See also, Schrader, "Analysis of the Protocol Regarding Developing Countries," 17 BULL. CR. SOC. 160, 161-166 (1970); Ringer, "The Role of the United States in International Copyright," 56 *Georgetown Law Journal* 1050, 1065-68 (1968).
 3. BIRPI Doc. S/1, Annex II, Stockholm Intellectual Property Conference, 1967.
 4. For a detailed analysis of the Protocol, see Schrader, *supra* note 2.
 5. The most striking example was the United Kingdom which refused to sign the text on the last day of the Conference.
 6. Berne Convention (Stockholm text), Article 32.
 7. As of July 1, 1970, only three countries have ratified or acceded to the Protocol: Senegal, Rumania and Pakistan. In addition, two countries, Bulgaria and Sweden have made the declaration permitted by Article 5(1)(b) of the Protocol. Although the German Democratic Republic also deposited an instrument of accession, the validity of the deposit is not recognized by many member countries of the Berne Union.

Protocol. They had two substantial weapons in their arsenal. First, they could renounce their international copyright obligations completely by withdrawing from the UCC and Berne Convention.⁸ Second, they could alter their membership in the two major multilateral copyright conventions by resigning from one but maintaining membership in the other. At this point, the existence of two different copyright conventions with different levels of protection and a large overlap in membership created added complexities to the crisis produced by the Stockholm Protocol.

The UCC, to which the United States is a party, is characterized chiefly by the principle of national treatment: even if a country's domestic legislation provides for relatively low-level protection, it can still belong to the UCC. The Berne Convention requires its parties to provide a specified minimum of copyright protection for other Berne works in their domestic legislation, and that minimum establishes a standard providing for a high level of copyright protection.

The situation is further complicated by the fact that the original Berne Convention of 1886 has been revised a number of times and there are, as a result, several different "Berne texts," each providing for different standards of protection. Protection in Berne Convention countries will vary depending upon which text the particular country has accepted. Moreover, some of the texts permit reservations on particular points, and others do not. In addition, the UCC contains the so-called "Berne safeguard clause"—Article XVII and its Appendix Declaration—a provision prohibiting a Berne Convention country from denouncing Berne and relying on the UCC for protection of its works in Berne Union countries. Thus, under this clause, a country resigning from the Berne Union but remaining in the UCC would continue to have obligations under the UCC, but would have no protection for its own works under either convention.⁹

Under these circumstances, the developing countries wishing to leave the Berne Convention for the lower level UCC were frustrated by the existence of the "Berne safeguard clause." To remove this difficulty, they launched a counter-offensive designed to suspend the effec-

8. Following Stockholm, statements to this effect were made by the leaders of several developing countries. While these statements were regarded in some instances as mere bluff, the crisis never reached the stage where they were tested.

9. For a general discussion of the "Berne safeguard clause" see Mott, "The Relationship Between the Berne Convention and the Universal Copyright Convention," 11 *IDEA* 306, 309-25 (1967).

tiveness of the "Berne safeguard clause."¹⁰ They argued that without such a suspension their only practical alternative was denunciation of both major copyright conventions. The latter prospect was not appealing to the developed countries, despite their displeasure with the Stockholm Protocol.

It was with this background that the Register of Copyrights announced to a meeting of the IGCC and Berne Permanent Committee in December, 1967, that it would be impossible for the United States to join the Berne Convention if it had to accept the Stockholm Protocol, and that he viewed with very great concern the confusion and erosion in standards of international copyright protection resulting from the Stockholm Conference. He urged that the representatives of both developed and developing countries join together to restudy the whole international copyright situation, including practical ways of meeting the needs of developing countries.¹¹

Underlying the Register's remarks were two policy goals. The first was to renegotiate the concessions for developing countries contained in the Stockholm Protocol. The second was to maintain the structure of international copyright and the balance between the two major multilateral copyright conventions. In both of these he had to overcome the opposition of the developing countries. In the second, he also had to persuade some of the developed countries, members of the Berne Union, that Stockholm did not justify a reorganization of the international copyright system. In their view, Stockholm proved the danger to the developed countries of keeping the developing countries in the Berne Convention. The clear answer was to pave the way for the renunciation of Berne in favor of the UCC by suspension of the "Berne safeguard clause."¹²

Time was needed, however, to review the ramifications of Stockholm and to consider new policies. Thus, it was early 1969 before the curtain rose on the next act of the diplomatic melodrama. At this point the representatives were ready to accept the suggestion made by the Register

10. Tunisia and France were the sponsors of a resolution adopted for this purpose. See Unesco Res. No. 5.122 reprinted in 3 *Copyright* 72 (1967). See also, Ringer, *supra* note 2 at 1068-69; Johnson, *supra* note 2 at 18.

11. "Statement by the Register for the United States Delegation at Geneva," 15 BULL. CR. SOC. 157 (1968).

12. For a general discussion of United States policy during this period see Braderman, "International Copyright — A World View," 17 BULL. CR. SOC. 147, 153-54 (1970).

in December, 1967. The IGCC and Berne Permanent Committee adopted resolutions establishing an International Copyright Joint Study Group,¹³ and upon the invitation of the United States, agreed that the Joint Study Group would meet in Washington in September, 1969.

At that meeting, attended by representatives from twenty-five countries,¹⁴ a proposal to end the international copyright crisis was presented and adopted. Dubbed the "Washington Recommendation,"¹⁵ this proposal called for the simultaneous revision of both the UCC and Berne Convention to achieve the following objectives:

(1) In the UCC the level of protection would be improved by the adoption of certain minimum rights. These would include the rights of reproduction, public performance, and broadcasting. At the same time, special provisions would be included in the UCC for the benefit of developing countries. Finally, the "Berne safeguard clause" would be suspended to permit developing countries to leave the Berne Convention without penalty under the UCC.

(2) In the Berne Convention, the Protocol would be separated from the Stockholm Act and, in turn, the developing countries would be able to substitute the special provisions included for their benefit in the UCC. This would mean that the developing countries could remain in the Berne Convention and would not be forced to exercise the option provided by the suspension of the "Berne safeguard clause." As a protective measure, it was provided that the Stockholm Protocol could not be separated from the Stockholm text until such time as France, Spain, the United Kingdom and the United States had ratified

-
13. See Ringer, "Recent Developments in International Copyright," 16 BULL. CR. SOC. 223, 245-47 (1969). In addition, the IGCC adopted a resolution establishing a subcommittee to consider certain questions pertaining to the suspension of the "Berne Safeguard clause." *Id.* at 243-44. In retrospect, the work of this subcommittee has proved insignificant.
 14. Argentina, Australia, Brazil, Canada, Ceylon, Czechoslovakia, France, Germany (Federal Republic), India, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Peru, Philippines, Rumania, Senegal, Spain, Sweden, Tunisia, United Kingdom, United States, Yugoslavia.
 15. "International Copyright Joint Study Group," 5 *Copyright* 214, 227 (1969). The Study Group also adopted a report urging the establishment, within UNESCO, of an Information Center to assist developing countries in acquiring desired information with respect to the ownership, availability and process for obtaining reprint or translation rights on copyrighted material. *Id.* at 226-27. The new Information Center is scheduled to commence operation in 1971.

the revised text of the UCC.¹⁶ Furthermore, developing countries would be relieved of the obligation to pay assessments to the Berne Union if they continued their membership after the new revision.¹⁷

The Washington Recommendation won the general support of all the countries that attended the meeting.¹⁸ While it was a sound proposal on paper, the unresolved question was whether it could be implemented successfully. The meetings that have taken place since then have all addressed themselves to this problem.

In December, 1969, the IGCC and Berne Permanent Committee met to consider the results of the Washington meeting. With the exception of France, they agreed that the preparations for revision of each Convention should be made "in accordance with the considerations stated in the preamble to the Washington Recommendation and the specific recommendations contained therein, including, in particular the recommendation that the Universal Copyright Convention and the Berne Convention be revised in revision conferences to be held at the same time and place * * *."¹⁹ In addition they scheduled several preparatory meetings to consider draft texts.

Pursuant to these arrangements, two Ad Hoc Preparatory Committees met in Paris and Geneva in May, 1970. Based largely upon a proposal for revision of the UCC submitted by the United States, draft texts were prepared for the two conventions.²⁰ As contrasted with the trend represented by the Stockholm Protocol, several important demands of the developing countries were abandoned at this meeting. These

-
16. The purpose of this recommendation was to make ratification or accession to the revised text of the UCC (containing the new concessions for developing countries) the *quid pro quo* for separation of the Stockholm Protocol from the Berne Convention.
 17. This recommendation was included largely upon the initiative of the United International Bureaux for the Protection of Intellectual Property (BIRPI), the secretariat of the Berne Union. Designed to give the developing countries an added incentive to maintain their membership in the Berne Convention, it was abandoned in May, 1970, when it became apparent that some developed countries believed it would be grounds for limiting the voting rights of developing countries.
 18. France reserved its position on two parts of the proposal.
 19. "Resolution No. 1, Report of the Permanent Committee," 6 *Copyright* 21, 26 (1970); "Resolution No. 60(X), Report of the Intergovernmental Copyright Committee," 6 *Copyright* 30, 35 (1970).
 20. "Ad Hoc Preparatory Committee for Revision of the Berne Convention," 6 *Copyright* 144 (1970); "Ad Hoc Preparatory Committee for Revision of the UCC," 6 *Copyright* 160 (1970).

included the concessions respecting the term of copyright, the exclusive right of broadcasting, and the broad right to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education."²¹ Accordingly, the concessions for developing countries were limited to restricting the rights of translation and reproduction. The major negotiations in May concerned these points.

The draft texts produced in May were then circulated to governments and interested international non-governmental organizations. As recommended by the resolutions adopted in December, 1969, the IGCC and Berne Permanent Committee met in extraordinary sessions in September, 1970, to consider the draft texts and to make final preparations for the revision conferences. The part of the report that follows sets forth the results of the deliberations of the two Committees. Emphasis is placed on those articles in the draft conventions that are new or propose changes of substance. The complete texts are included as Annex A and Annex B to this report.

Draft Text for Revision of the Universal Copyright Convention.

Article IVbis

This Article is one of the new Articles to be inserted in the Universal Copyright Convention. It is divided into two paragraphs. Paragraph 1 embodies the proposal contained in the Washington Recommendation to add the basic rights of reproduction, public performance and broadcasting to the UCC.

At the start of its deliberations on this Article, the IGCC heard several delegations express the wish that the right of adaptation should be added to the list of enumerated rights. Other delegations pointed out, however, that the inclusion of this right might create difficulties, particularly for those States that recognized the right of adaptation as a part of the right of reproduction. For those States the express mention of the right of adaptation might raise legal questions and require them to amend their national legislation before they could accept the revised text of the Convention. This might, in turn, delay the chances for early ratification or accession.

After considering these views, the IGCC heard another delegation ask whether it would be sufficient to mention in the report that the

21. Berne Convention for the Protection of Literary and Artistic Works (Stockholm text), Protocol Regarding Developing Countries, Article 1(a), (d) and (e).

right of reproduction includes the reproduction of works "in their original form or in a form derived from the original." The Committee rejected this proposal but decided to include similar language in the text of paragraph 1 of Article IV*bis*. Thus it added to the draft of paragraph 1 prepared by the Ad Hoc Preparatory Committee the words "* * * of their works either in their original form or in any form recognizably derived from the original." This solution was considered acceptable by those countries whose legislation did not expressly provide for the right of "adaptation."

The Committee then turned to a consideration of the two alternatives the Ad Hoc Preparatory Committee had recommended as exceptions that might be made to the rights of reproduction, public performance and broadcasting. Alternative A was proposed by the French delegation and provided in general terms that national legislation might make exceptions to the basic rights mentioned in paragraph 1 as long as the exceptions did not conflict with the spirit and provisions of the Convention. However, States must accord a "reasonable degree of effective protection to each of the rights to which exception has been made." Alternative B was drafted by the German delegation and provided three specific areas in which national legislation might make exceptions to the rights enumerated. These included reproductions that did not conflict with the normal exploitation of the work or prejudice the legitimate interests of authors, non-profit public performances, and restrictions on the rights of authorizing the broadcast of musical works, including the texts of those works. In view of the overwhelming support for alternative A, the Committee decided to eliminate alternative B and to adopt the text for alternative A suggested by the Ad Hoc Preparatory Committee.

Article Vbis

This Article, which is a new Article in the Universal Copyright Convention, regulates the procedure for determining which countries are developing countries and the periods during which developing countries may apply the exceptions contained in Articles V*ter* and V*quater*. The definition of a developing country is the same as that used in the Stockholm Protocol ("Any contracting State that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations * * *") but, the exceptions are limited to successive periods of ten years each. In addition, developing countries need not indicate their intention to avail themselves of particular exceptions at the time of ratification, or accession, but may

make such notification at a subsequent time. Further, the ten-year period is uniform for all States and runs from the date of entry into force of the Convention.

Article Vter

The provisions of this Article are new and concern the exceptions which developing countries may make to the right of translation. They are related to Article V which governs the right of translation for all countries and recognizes that right only for a period of seven years from the date of first publication. After that time, and failing publication in the national language of the particular country, the translation right is governed by a compulsory license, subject to compensation, until the term of copyright expires.

At the meeting of the Ad Hoc Preparatory Committee, it was generally agreed to reduce further the seven-year term for developing countries. Because of the complexity of the question, the Committee decided to submit three alternative solutions to the IGCC for consideration. In each of the alternatives an important distinction was made between "world languages" and "non-world languages." This distinction, which derived from the original U.S. draft, described the former as a "language in general use in one or more developed countries," while the latter are languages not in general use in one or more developed countries. The essential differences between the three alternatives were as follows:

(1) Under alternative A and alternative B, translations into a "world language" were permitted after a period of three years provided that the translation was made for the purpose of teaching, scholarship or research and that no copies of the translated work were exported. Under alternative A, translations into "non-world languages" were permitted after one year, and under alternative B, translations into "non-world languages" were permitted after three years. Thus, the only difference between alternatives A and B was with respect to the period which must elapse before translations could be made into "non-world languages."

(2) Under alternative C, a translation into a "world language" was permitted only after five years and provided that it was made for the purpose of teaching, scholarship or research. In addition, no copies of the translated work could be exported. A translation into a "non-world language" was permitted after three years, or

one year if the translation was restricted to the purpose of teaching, scholarship, or research.

The remaining provisions of the three alternatives were common in that they provided for the reapplication of Article V and its rules governing payment and export once the seven-year period had expired. Under each of the alternatives royalty payments must actually be transmitted, subject to national currency regulations, and the license must carry a just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned. In addition, while each of the alternatives prohibited the export of copies of works translated into a "world language," they permitted the export of copies of a work translated into a "non-world language."

When these three alternatives were first discussed by the IGCC, they each received some support. The developing countries favored alternative A, although expressing some reservations about the distinction between languages, which they argued tended to discriminate against a country such as Brazil. Other countries, such as France supported alternative B while the United States indicated its preference for alternative C. In light of the difficulty of resolving the differences between countries in the plenary session, the Chairman decided to appoint a Working Group to consider the matter. Because of the close relationship between Article *Vter* and Article *Vquater*, the Working Group was charged with the responsibility of preparing a proposal for each Article.

When the Working Group returned from its deliberations, the proposal it advanced combined many of the elements present in the three alternatives. First, it maintained the distinction between "world languages" and "non-world languages." While it adopted the period of three years for the former, and one year for the latter, it added periods of six months and nine months, respectively to each period. In effect, therefore, the period for "world languages" is three and a half years, and the period for "non-world languages" is one year and nine months.

Second, it extended the prohibition on export to all copies whether or not the translation was into a "world language" or a "non-world language." Third, it similarly restricted the purpose of the translation to teaching, scholarship and research whether or not the translation was into a "world language" or a "non-world language." Fourth, it

maintained the common provision relating to the payment of just compensation and the transmittal of that payment, and finally it adopted a proposal presented by the International Publishers Association that for works consisting mainly of illustrations "a license to translate the text and to reproduce the illustrations may be granted only if the conditions of Article *Vquater* are also fulfilled."

The proposal advanced by the Working Group had the support of the following countries: France, Federal Republic of Germany, India, Kenya, Tunisia, United Kingdom, and the United States of America. It was subsequently approved by the Committee and adopted as the draft text for the diplomatic conference.

Two countries, Italy and Brazil, expressed reservations on the text of Article *Vter* adopted by the Committee. Italy indicated that it could not at the present time endorse the period of one year and nine months for "non-world languages." Brazil stated that the inclusion of Portuguese as a "world language" would constitute unjust discrimination and be contrary to the spirit of the revision which was to assist developing countries. Both countries, however, expressed the hope that after consultations with their governments they would be able to accept the new text at the time of the diplomatic conference.

Article Vquater

This is a new Article. It contains provisions regulating the conditions under which developing countries may reproduce works under compulsory licenses. The questions that were left unresolved by the Ad Hoc Preparatory Committee related to the decision whether copies reproduced under a compulsory license would be available for export and the time period after which compulsory licenses would be granted.

At the start of the discussion, however, the United States indicated that there were other problems raised by the draft adopted by the Ad Hoc Preparatory Committee which required solution.²² The United States pointed out that the description of the works subject to compulsory licensing was unduly vague in that the text merely spoke of the reproduction of a "literary or artistic work." It also indicated that the requirement of distribution at a "comparable price" was subject

22. See note 19 *supra*.

to abuse and an alternative formula should be considered. At the same time it raised the question of whether Article *Vquater* was intended to apply to reproductions of works translated into "world languages" under the compulsory license provisions of Article *Vter*. Finally, it noted that there was some inconsistency in requiring a general distribution to the public of a work to prevent the issuance of a compulsory license when the license itself was restricted "for use in connection with systematic instructional activities."

After considerable discussion on the questions of export, time period, and the points raised by the United States, the Committee decided to refer the entire question of revising Article *Vquater* to a Working Group. As indicated above, this was the same Working Group that met to consider a new text for Article *Vter*.

As a result of its deliberations the Working Group advanced a proposal which sought to resolve the various points that had been discussed by the Committee. At the outset it recognized that the phrase "literary or artistic work" was overly broad and that the needs of developing countries in the area of reproductions did not extend to cinematographic films and television broadcasts. While adding the word "scientific" to the phrase "literary and artistic" to conform to Article I of the Convention, the Working Group therefore decided to adopt a special definition of "literary, scientific, or artistic works" for Article *Vquater*. It agreed that for the purpose of Article *Vquater* the phrase would be limited "to works published in printed or analogous forms of reproduction" (paragraph 3). In its report, the Committee further noted that the words "analogous forms" were meant to enlarge upon the word "printed" to take account of technological developments in the forms of reproduction.

The developing countries accepted this limitation on the scope of compulsory licenses for reproductions but raised the question whether it would thereby exclude audio-visual works. They expressed the view that such works were of great importance to them in their educational programs. Most of the developed countries recognized the validity of this point. Accordingly, it was decided to include an exception to the limited definition of "literary, scientific, or artistic works" by adding "audio-visual works." However, the exception was only applicable when audio-visual works were "prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities" (paragraph 3). Thus, in determining whether an audio-visual work is subject to the compulsory license provision of Article *Vquater*,

the original purpose for which it was prepared and published is determinative.

With regard to the time period which must elapse before a developing country may make a reproduction of a work as limited by the definition in paragraph 3, the Working Group had before it the compromise proposal advanced by the developing countries. Under this proposal the time period would be fixed at three years in return for a complete prohibition on the exportation of copies. The Working Group did not adopt this compromise proposal. Instead, it fixed the period at five years, with specific exceptions, while maintaining the ban against export. The provision for a grouping of countries for the purposes of export was completely eliminated.

The exceptions to the five-year period were as follows (paragraph 1(b)):

“For works of the natural and physical sciences, including mathematics and of technology, the period shall be three years;

For works of fiction, poetry, drama and music, and for art books the period shall be seven years.”

Of course, in each of these categories, as in the general category (five years), the compulsory license may only be granted to reproduce a work “for use in connection with systematic instructional activities” (paragraph 1(a)). This phrase, as interpreted by the Committee would include the “formal and informal curriculum of an educational institution” and “systematic out-of-school educational activities.”²³ For this reason the Committee was of the view that works such as encyclopaedias of a general nature would fall completely outside the compulsory licensing scheme since these works could not be construed as used in connection with systematic instructional activities.

Furthermore, the Working Group added a special limitation to the exception for works which might be reproduced after a three-year period. In the case where the owner of the right of reproduction refuses to grant a license to a particular national of a developing country, the license may not be granted for a period of six months following such a refusal. This provision would grant the owner of the right of reproduction time to find an alternative source of distribution in the case where the national making the request was considered an unsatisfactory licensee.

23. Draft Report IGC/XR.2/19, paragraph 62.

The Working Group also amended the text proposed by the Ad Hoc Preparatory Committee to provide that either a general distribution of a work in a developing country *or* a distribution in connection with systematic instructional activities would be sufficient to defeat the issuance of a compulsory license. It similarly agreed that the phrase "comparable price" might be construed to mean the same price and therefore substituted the phrase "at a price reasonably related to that normally charged in the State for comparable works." Thus, if an inexpensive edition of a work is distributed in a developing country at a price "reasonably related" to the price of comparable works sold in the country, no compulsory license may issue.

Finally, the Working Group tackled the problem of whether Article *Vquater* should permit the reproduction of works translated into "world languages" under Article *Vter*. While it found no basis to distinguish between "world languages" and "non-world languages" for this purpose, it saw the potential threat of multiple licenses and a possible indirect threat to the prohibition against export under Article *Vter*. For this reason it adopted a provision prohibiting the granting of licenses to reproduce and publish translations where (a) the translation is not published by the copyright proprietor or with his authorization, or (b) where the translation is not in a language that is a language in general use in the State issuing the license. Stated differently, a license to reproduce a translation may only be granted where the translation is authorized by the copyright owner and the language of the translation is a language in general use in the country issuing the license.

The proposal advanced by the Working Group had the support of the following countries: Brazil, France, Federal Republic of Germany, India, Italy, Kenya, United Kingdom, and the United States of America. It was subsequently adopted by the Committee as the draft text for Article *Vquater*.

Article IX

Paragraphs 3 and 4 of Article IX are new. They attempt to regulate the problem posed by the fact that the Universal Convention will exist in two versions and that some States may only belong to one of these two versions of the UCC. Regulating the relations between two such States involves difficult questions of international law and practice.²⁴

24. See Ringer, "Relationship between two texts of the Universal Copyright Convention," 125B *EBU Review* 42 (1971).

As a first step in solving the problem, paragraph 3 provides that any State that accedes to the revised Convention and that is not a party to the 1952 Convention, automatically becomes a party to the 1952 Convention. Furthermore, once the revised Convention comes into force, no State may accede solely to the 1952 Convention. In this way, new members and old members (whether or not the old members have ratified or accepted the new text) are assured of having a common text between them—the 1952 Convention.

Automatic accession under paragraph 3, however, does not completely solve the problem since the mere fact of a common text between States does not mean that all States accept the view that the common text governs their relations. Some States have taken the position that they may apply the latest version of a treaty to which they are party, even if other States are only members of an earlier version. To ameliorate the inconsistency between the common text and latest version theories, paragraph 4 provides a compromise solution.

Paragraph 4 starts with two major premises. First, it provides that States party to the revised Convention will apply the revised Convention in their relations with all other Contracting States. Second, it provides that States party to the 1952 Convention shall, with respect to their relations with all other Contracting States, be governed by the 1952 Convention. It then adds that, by notifications deposited with UNESCO, States in the first category may declare that they will apply only the provisions of the 1952 Convention in their relations with States that do not become party to the revised Convention, and that States in the second category may declare that they will only admit the application of the 1952 Convention with States party to the revised Convention. The paragraph concludes with a sentence stipulating that the notifications must be deposited with UNESCO by a date certain, presumably sometime after the revised Convention comes into force.

Despite the complexity of the formula embodied in paragraph 4, the Intergovernmental Copyright Committee approved the proposal without considerable discussion. Two countries, Sweden and France, indicated that they would reserve their positions on the question. Sweden took the view that the revised Convention could not bind States party only to the 1952 Convention by requiring them to deposit a notification without which the revised Convention could be applied against them. This view may be shared by other countries at the diplomatic conference.

Article XI and the Resolution

This Article regulates the duties of the IGCC, governs the number of members on the Committee and states the criteria for their selection.

For the past several years there has been a continuing attempt to place more developing countries on the Committee and to reduce the number of European members. To solve this problem, the Ad Hoc Preparatory Committee proposed that the Committee be increased in size from twelve members to eighteen members. This proposal was adopted by the Committee as the draft text for paragraph 2.

With respect to the criteria for selection of the Committee members, the Ad Hoc Preparatory Committee had elaborated on the criterion of "fair geographical representation" which appeared in the 1952 Convention. It added such factors as population, languages, stage of development and relative status as an importer or exporter of copyrighted works. Several States, however, opposed the concept of relative status as an importer or exporter of copyrighted works. Accordingly, the Committee deleted this factor, but maintained the others introduced by the Ad Hoc Preparatory Committee (paragraph 3). The addition of these new criteria takes fuller account of those factors beyond mere geographical representation which bear rightfully upon a meaningful selection of countries with regard to copyright.

The Resolution related to this Article elaborates on the procedure for establishing the new IGCC and stipulates certain rules regarding terms of membership and the number of ordinary sessions which the IGCC must hold. It is controversial in two major respects. First, it assumes that the initial members of the Committee will be elected at the diplomatic conference and that, thereafter, the ordinary rules of the Committee will prevail regarding vacancies, the order in which terms of membership expire, eligibility for re-election, and election procedures. Several States, however, expressed the view that all the States party to the Convention should participate in the electoral process, initially and in the future. Others questioned whether a new IGCC could be elected at the diplomatic conference when the old IGCC continued to exist and before the entry into force of the revised Convention.

This last point illuminated the second controversial aspect of the resolution. Paragraph (1) of the draft Resolution provides that the Committee shall include, at its inception, the twelve States members of the Committee under the 1952 Convention. The reason for this provision is to avoid a problem which might arise if a State party to the

1952 Convention and member of the IGCC were suddenly replaced on the new IGCC by another country. This could raise legal questions as to the validity of having only one IGCC. Conceivably, a State party only to the 1952 Convention might insist that there should be a separate IGCC under the Convention.

In light of the complexity and procedural difficulty which would arise by creating two IGCC's, and given the political problems of deciding which States should choose the countries and at what point of time, it was decided to leave these questions open until the diplomatic conference. At that time, and with most if not all States party to the 1952 Convention present, it was believed that a satisfactory solution to these difficult problems might be found.

Article XVII and the Appendix Declaration relating thereto

Article XVII and the Appendix Declaration contain the so-called "Berne safeguard clause." Under paragraph (a) of the Appendix Declaration, works which have as their country of origin a country which has withdrawn from the Berne Union would lose their protection under the UCC in other Berne countries. Since the Berne Convention offers a higher level of copyright protection than the UCC, the purpose of the provision was to prevent countries members of the Berne Convention from withdrawing in favor of the UCC.

While the suspension of the safeguard clause for developing countries was the focal point for the early efforts to revise the UCC, much of the controversy has now abated. The reason is that the Washington Recommendation offered developing countries substantially the same concessions under the Berne Convention as under the UCC. Thus, there is little likelihood that many developing countries will avail themselves of the opportunity which the proposed suspension provides. The proposal to amend the Appendix Declaration did not, therefore, encounter any opposition when it was considered by the IGCC.

The Committee did, however, make a minor change in the proposal advanced by the Ad Hoc Preparatory Committee. It added a provision requiring countries that withdraw from the Berne Convention under the special exception for developing countries to deposit a notification to that effect with the Director-General of UNESCO.

Drafting Committee

At the conclusion of its discussions on the proposals for revision of the UCC, the Intergovernmental Copyright Committee appointed a

drafting committee to prepare a draft text of the revised Convention. The drafting Committee harmonized the wording of paragraph 1 of Article IVbis with paragraph 1 of Article V. In addition it developed similar wording for the provisions of Articles Vter and Vquater relating to export, notice, and payment of compensation. Finally, the drafting committee considered proposals by the United Kingdom, Kenya and France that the IGCC include in its report a statement concerning the relationship of Article IVbis to Articles Vter and Vquater.²⁵

This statement, which is of considerable importance to developed countries, was adopted by the IGCC and appears in its report. It reads as follows:

"The inclusion in the Convention of special provisions allowing developing countries to publish certain works and translations under compulsory licenses means, *a contrario*, that, except as provided in Article V, there could be no question of developed countries instituting a general system of compulsory licensing for the publication of literary, scientific or artistic works."²⁶

Draft Text for Revision of the Berne Convention

The three points of the Washington Recommendation which the Ad Hoc Preparatory Committee had implemented were the recommendations, (1) to sever the Protocol from the main text of the Stockholm Act, (2) to condition the entry into force of the new Berne revision upon the ratification of the revised UCC by France, Spain, the United Kingdom and the United States, and (3) to include in the Berne Convention provisions to allow developing countries to apply in their relations with other Berne countries, the revised text of the UCC. As indicated above, the point concerning the relaxation of the obligation to pay contributions to the Berne Union was abandoned by the developing countries.

Concerning the first point, the Ad Hoc Preparatory Committee had decided that the best method of separating the Protocol from the main text of the Stockholm Act was to draft an entirely new text of the Berne Convention. In this revision of the Berne Convention, Articles 1 to 20 of the Stockholm Act would be repeated to insure that the substantive improvements in the Convention achieved at Stockholm were maintained. Article 21 would then be amended by replacing the Protocol with an "Additional Act." The Additional Act would form an integral part of the new text.

25. IGC/XR.2/18; IGC/XR.2/21.

26. IGC/XR.2/21 (i.e. 22), paragraph 83.

To complete the transformation, Article 34 of the new text would provide that the substantive provisions of the Stockholm Act and earlier versions of the Berne Convention could not be ratified or acceded to once Articles 1 to 21 of the new Act had come into force. This would mean that the Protocol could not be ratified or acceded to by States and would no longer have any viability as an international instrument.

Concerning the second point of the Washington Recommendation, the Ad Hoc Preparatory Committee had conditioned the coming into force of the substantive articles of the Berne Convention and the Additional Act upon the entry into force and ratification of, or accession to, the revised UCC by France, Spain, the United Kingdom and the United States. As indicated previously, the reason for this proposal was to provide the developing countries with some assurance against a further refusal by the major developed countries to accept the new texts. Hence, ratification or accession to the revised UCC was made the *quid pro quo* for severing the Protocol from the main text of the Berne Convention.

These first two points of the Washington Recommendation, implemented by the Ad Hoc Preparatory Committee, were adopted without change by the Permanent Committee. They appear with some further technical amendments in the opening part of the draft text for revision of the Berne Convention as part I, "Modifications to be made to certain Articles of the Stockholm Act." (See Annex B to this report.)

Additional Act

The third point of the Washington Recommendation gave developing countries the option of staying in the Berne Convention and applying the exceptions to be included in the revised UCC. Because of opposition from France, the Ad Hoc Preparatory Committee had modified this recommendation by eliminating the reference in the Berne Convention to the UCC. It decided, instead, to specify the same concessions for developing countries negotiated under the UCC in a new Additional Act. In effect, therefore, the new Additional Act became a revised Protocol with provisions similar to those adopted for the UCC. These provisions are discussed more fully below.

In one major respect, however, the provisions for developing countries were subject to a further limitation in the Berne Convention. At the Ad Hoc Preparatory Committee, the developing countries abandoned their demand for a reduction in the term of copyright. This means that there will be a substantial difference between the Berne Convention (life

plus fifty years) and the UCC (life plus twenty-five years) for developing countries that may wish to join the Berne Convention.

Article 1

This Article of the Additional Act is patterned after Article *Vbis* of the draft text proposed for the revision of the UCC. While the Ad Hoc Preparatory Committee had left unresolved the question of whether Article 1 should contain provisions limiting its application to the existing members of the Berne Union, the Working Group which met to consider this problem recommended against the inclusion of such limitations. Accordingly, as approved by the Permanent Committee, any developing country, whether or not it is presently a member of the Berne Convention, may avail itself of the reservations contained in the Additional Act.

The Article differs from Article *Vbis* of the UCC by the inclusion of paragraph 6. This paragraph was considered necessary because of technical differences between the two Conventions, namely the use of the word "reservations" under Berne and the use of the word "exceptions" under the UCC.

Article 2

This Article concerns the special reservations that developing countries may make to the right of translation. Because of the particular provisions of the Berne Convention relating to translation, this Article was the subject of much debate by the Permanent Committee.

Under the Berne Convention, there is an exclusive right of translation for the full term of copyright, but certain countries, already members of the Union, may restrict the right to a period of ten years. If no translation is made in the particular country within ten years, it may then grant a license to translate the work without payment or other conditions attached. This restriction to the right of translation may also be elected by new members who adhere to the Berne Convention, but in either case, it is subject to material reciprocity (that is, the possibility of lowering the level of protection to that offered by the other country).

Because the basic translation provisions in Berne are different from those in the UCC, the Ad Hoc Preparatory Committee had undertaken to incorporate in the Berne text proposals which would harmonize the different texts. For this reason, it had proposed modifying the Berne text by (1) introducing a special provision broadening the translation reservation after seven years (i.e. to harmonize it with Article V of the

UCC), and (2) by giving to any developing country, whether or not it was presently a member of the Berne Convention, the option of applying the translation scheme of Article 2 of the Additional Act or the translation scheme of ten years in the Berne Convention. If the ten year scheme were adopted, no material reciprocity would be applied.

When the Permanent Committee considered the translation question, it had no difficulty in adopting compulsory license provisions similar to those adopted in Paris by the IGCC for the revised text of the UCC (compare Article Vter of the UCC with Article 2 of the Additional Act, paragraphs (1) to (6) and the provisions of Article 4 of the Additional Act). Thus, the compulsory license provisions of the two Conventions are identical in almost all respects.

The Permanent Committee could not agree, however, about the further question of harmonizing the seven-year provision of the UCC (Article V) and the ten-year provision of the Berne Convention (Article 30). Accordingly, it referred this matter to a Working Group. After extensive deliberations, the Working Group submitted the following compromise formula:

1. The proposal to broaden the translation reservation for developing countries after seven years under the Berne Convention should be deleted;
2. Developing countries under the Berne Convention should have an irrevocable choice, so far as the right of translation is concerned, between the system of compulsory licenses provided for in Article 2 of the Additional Act and the ten-year limitation provided for in Article 30(2) (a) and (b), without the possibility of applying both alternatives;
3. In the case of developing countries the possibility of reciprocity provided for in Article 30(2)(b) should not apply;
4. When a country ceases to be regarded as a developing country it should be able to make a declaration according to Article 30(2) (b), in which case reciprocity could be applied to it.

In effect, these provisions mean that a developing country, whether or not it is presently a member of the Berne Convention, may opt for either the system of compulsory licensing or the ten-year system referred to in Article 30 of the Berne Convention (Stockholm text) without material reciprocity.

The practical consequences of this scheme for the United States are two-fold. First, it is doubtful whether many developing countries will choose the ten-year plan because of their immediate needs for current educational and instructional materials. This will mean that most developing countries members of the Berne Convention will choose the compulsory licensing scheme provided in Article 2 of the Additional Act.

Second, the Berne scheme will continue to encourage simultaneous publication of United States works in Berne countries. By eliminating any reference to changes in the compulsory license system after a seven-year period (as required by Article V of the UCC), the Berne scheme will mean that any United States work, simultaneously published in a Berne country, will enjoy in those developing countries members of the Berne Convention that have accepted the compulsory licensing scheme, the benefits of that scheme for the duration of copyright. Thus, such a work will not be subject to the more liberal licensing provisions possible under the UCC after the seven-year period has expired.

When the compromise formula was presented to the full Committee, the delegations of Belgium, France, Germany (Fed. Rep.), India, Kenya, Spain, Tunisia and the United Kingdom declared their readiness to adopt the proposals. Thereafter, the proposals were included in the final text approved by the Committee (see paragraphs (7) to (9) of Article 2 and paragraph (6) (b) of Article 1).

Several countries, however, expressed reservations regarding the final text. The Delegation of Yugoslavia declared that it could not approve the text since Yugoslavia, a developing country, had already made a declaration of the kind permitted by Article 30(2). This would deprive it of the possibility of applying the reservations in Article 2. In addition, the Delegations of Brazil and Italy made similar reservations to the ones they had announced in Paris when the draft text of Article *Vter* of the UCC was adopted.

One final point regarding Article 2 of the Additional Act requires comment. In paragraph 1 it is clear that the scope of the translation reservation extends to "works published in printed or analogous forms of reproduction." This definition is the same as the one adopted by the UCC for the provision on reproduction and may also be found in the reproduction provision of the Berne Convention (Article 3 of the Additional Act, paragraph 7). It does not appear, however, in Article *Vter* of the UCC, because Article *Vter* is based on Article V wherein the right

of translation is subject to a compulsory license seven years "from the date of the first publication of a writing."

Since the concept of a "writing" under the UCC does not have a counterpart under the Berne Convention, it was considered necessary to limit the scope of the translation reservation to avoid the undue vagueness which would otherwise accompany the words "literary or artistic work." The formula chosen was the same as the one adopted for the reproduction provision and the wisdom of the same approach for the two articles seems inescapable. However, given the agreement not to seek any amendment in Article V of the UCC, it appears that some differences in interpretation may be possible under Article *Vter* of the UCC and Article 2 of the Additional Act.

Article 3

This Article concerns the question of reproduction rights. It is in all major respects identical with Article *Vquater* of the draft text proposed for revision of the UCC. For that reason, reference can be made to Article *Vquater* for consideration of the main substantive points.

In paragraph 7, however, there is one addition of substance to the parallel text of Article *Vquater*. In Geneva, the developing countries raised the question whether the special exception for audio-visual works should apply to the right of translation. They pointed out that printed texts are often an integral part of such works and that some confusion might exist whether the printed matter might be translated and, if so, following which period of time. The Permanent Committee agreed that this matter should be governed by the reproduction provision rather than the translation provision and therefore added a clause in paragraph 7 to permit "the translation into the language or one of the languages of the country concerned of any accompanying text." It may be assumed that a similar clause will be proposed for Article *Vquater* of the UCC at the diplomatic conference.

Article 4

This Article contains provisions common to Articles 2 and 3. In that respect it parallels common provisions found in either Articles V, *Vter*, or *Vquater* of the draft text for revision of the UCC. The proposals advanced by the Ad Hoc Preparatory Committee for this Article were adopted by the Permanent Committee without change.

Article 5

This Article repeats the provisions of Article 5 of the Stockholm Protocol. It gives a developed country the opportunity to accept the special exceptions for developing countries in the Additional Act before becoming a party to the substantive provisions of the Convention (Articles 1 to 21). Thus, it permits rapid acceptance of the Additional Act without requiring parliamentary or legislative approval.

The draft text for this Article proposed by the Ad Hoc Preparatory Committee was adopted by the Permanent Committee with certain minor technical amendments.

Drafting Committee

At the conclusion of its consideration of the text for revision of the Berne Convention, the Permanent Committee appointed a drafting committee. The drafting committee proposed further modifications of the text and these were incorporated in the final draft. In approving the final draft, the Committee noted two points that were incorporated in its report.

First, the view was expressed that the word "research" appearing in Article 2 of the Additional Act did not include research for the purpose of industrial or commercial purposes. Second, the view was expressed that the words "a correct translation of the work or an accurate reproduction of the particular edition" did not exclude the possibility of minor adaptations made for the purpose of conformity with local usage, such as changes in references to units of currency.

While the final text was approved by the Committee as a whole, the reservations made by the delegations of Brazil, Italy and Yugoslavia were noted. Furthermore, after the approval of the final text, the delegations of Portugal, Canada and Australia made declarations that were included in the Committee's report. While recognizing that the primary purpose of the revision effort was to assist the developing countries, these delegations noted that there were countries which did not easily fall into either the developed or developing category. They expressed the view that in the future the interests of all countries should be considered.

Protection of Phonograms

As a separate matter, unrelated to revision of the UCC and Berne Convention, the two Committees considered a proposal by the United Kingdom to adopt an international agreement prohibiting the unauthorized duplication of sound recordings. The problem of unauthorized duplication has reached alarming levels both abroad and in this country.

A recent article estimates the loss to the record industry, performers and copyright owners in the United States at the sum of \$100 million a year.²⁷

This problem, however, is not crucial for all western European countries as several belong to the Rome Convention,²⁸ or have domestic laws that protect the unauthorized duplication of sound recordings as a matter of unfair competition.²⁹ Nevertheless, the Rome Convention does not have, and will not have in the near future, the number of adherents to make it the appropriate vehicle for preventing the piracy which has now become rampant.³⁰

For this reason, the two Committees agreed that a special Committee of Experts should meet in March, 1971, to try and draft a separate agreement to prevent the unauthorized duplication of sound recordings. This agreement might also be negotiated at the same time and place as the diplomatic conferences for revision of the UCC and Berne Convention.

The chances for acceptance of such an agreement in the United States appear favorable. Support can be expected from the record industry, the performing artists, the authors and music publishers. Potential opposition seems doubtful or diffuse. The most difficult question is whether such an agreement can be negotiated in the short span before July, 1971. However, given the immediacy of the problem and the desire to achieve some understanding on the part of the major countries involved, the outlook appears favorable.

Conclusion

The international copyright crisis started by the Stockholm Protocol seems headed for a successful resolution. At Stockholm, the developing countries had won concessions relating to the term of copyright, the rights of broadcasting, translation and reproduction. They had also

27. *Newsweek*, October 5, 1970, pp. 70-71.

28. Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organizations, 1961.

29. Record producers in the United States have had scattered success in containing record piracy under State unfair competition laws. See, e.g. *Tape Industries Association of America v. Younger*, 166 USPQ 468 (1970); *Capitol Records v. Erickson*, 2 Cal.App.3d 526, 82 Calif. R. 798, cert. denied 398 U.S. 960, and cases cited therein.

30. As of July 1, 1970 only eleven countries were members of the Rome Convention. These included: Brazil, Congo (Brazzaville), Czechoslovakia, Denmark, Ecuador, Germany (Federal Republic), Mexico, Niger, Paraguay, Sweden, United Kingdom.

gained broad power to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education." The possible economic benefits from all of these concessions were further enhanced by exceptionally loose provisions concerning the export of copies made under compulsory licenses and royalty payments.

In the final texts of the draft Conventions adopted by the two Committees, the concessions relating to the term of copyright and the right of broadcasting have been eliminated. The broad power to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education" has also disappeared. The export of copies made under compulsory licenses has been prohibited and the payment provisions and standards for determining royalties have been improved considerably. Furthermore, the translation and reproduction provisions are now more realistic and generally represent the kind of concessions which the copyright owners in the developed countries are ready and willing to make.

Moreover, the level of protection in the UCC has been improved by the introduction of certain minimum rights. This will guarantee a minimum level of protection in the UCC which had previously been subject, under the national treatment standard, to any level the particular country wished to set.

With respect to maintaining the equilibrium between the two Conventions, the final texts carry out the thrust of the Washington Recommendation by duplicating the concessions for developing countries in each Convention. While some substantive differences exist because of differences in structure, they should not lead to a wholesale defection by developing countries from the Berne Convention to the UCC. Thus, the Berne Convention will continue to maintain its historic role of improving the level of copyright protection throughout the world, and the United States can continue to look with hope upon the day when it may become a member.

Given the results of the September, 1970 meetings, it would seem that the chances are good for successful diplomatic conferences next July. As contrasted with the Stockholm situation, the developing countries have moderated their demands, the developed countries have had an affirmative program, there have been careful preparation beforehand, firm leadership, and the discussions have taken place in a more rational and less emotionally charged atmosphere. All of these are the ingredients for success, and the United States has contributed substantially to each of them.

ANNEX A

PROPOSALS FOR THE REVISION OF THE UNIVERSAL
COPYRIGHT CONVENTION*adopted by the Intergovernmental Copyright Committee*

PREAMBLE

[No change]

ARTICLE I

[No change]

ARTICLE II

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Revised Convention.
2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Revised Convention.
3. For the purpose of this Revised Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

[No change, except insert "Revised" before "Convention" in each case.]

ARTICLE IV

[No change, except insert "Revised" before "Convention" in each case.]

ARTICLE IV bis

1. Copyright shall include the basic rights constituting the author's economic right, including the rights of reproduction by any means, of public performance and of broadcasting of their works either in their original form or in any form recognizably derived from the original.
2. However, any Contracting State may, by its domestic legislation make exceptions that do not conflict with the spirit and provisions of this

Revised Convention to the rights mentioned in paragraph 1 above. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

ARTICLE V

[No change, except insert "Revised" before "Convention".]

ARTICLE V bis

1. Any Contracting State that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, and that has ratified, accepted, or acceded to this Revised Convention, may, by a notification deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization at the time of said ratification, acceptance or accession or thereafter, avail itself of any or all of the exceptions provided by Articles V ter and V quater.
2. Any such notification shall be effective for ten years from the date of coming into force of this Revised Convention, or for such part of that ten years as remains at the date of deposit of the notification, and may be renewed in whole or in part for further periods of ten years each if, during the year preceding the expiration of the relevant ten-year period, the Contracting State deposits a further notification with the Director-General of Unesco. Initial notifications may also be made during these further periods of ten years in accordance with the provisions of this paragraph.
3. Notwithstanding the provisions of paragraph 2 of this Article, a Contracting State that has ceased to be a developing country as defined in paragraph 1 shall no longer be entitled to renew the period during which it can avail itself of the exceptions provided by Articles V ter and V quater, and whether or not it formally withdraws them, such State shall be precluded from availing itself of said exceptions at the end of the current ten-year period, or at the end of three years after it has ceased to be a developing country, whichever period expires later.
4. Any copies of a work made under the exceptions provided by Articles V ter and V quater may continue to be distributed after expiration of the period for which notifications under this Article were effective.

5. Any Contracting State that has ratified, accepted or acceded to this Revised Convention, and that has deposited a notification in accordance with Article XIII with respect to the application of this Revised Convention to a particular country or territory, the situation of which can be regarded as analogous to that of the States referred to in paragraph 1 of this Article, may also deposit notifications of exceptions and renewals thereof under this Article with respect to any such country or territory. During the effective period of such notifications, the provisions of Articles V ter and V quater may be applied with respect to such country or territory.

ARTICLE V ter

1. Any Contracting State to which paragraph 1 of Article V bis applies may substitute for the period of seven years provided in paragraph 2 of Article V the period of three years or any longer period determined by its national legislation. However, in the case of a translation into a language not in general use in one or more developed countries, the period shall be one year instead of three.
2. Any licence under this Article shall be granted only for the purpose of teaching, scholarship or research.
3. Subject to the provisions of this Article, any licence granted under this Article shall be governed by the provisions of Article V, and shall continue to be governed by the provisions of Article V and of this Article, even after the seven-year period provided for in paragraph 2 of Article V has expired.

However, after the said period has expired, the licensee shall be free to request that the said licence be replaced by a new licence governed exclusively by the provisions of Article V.

4. Any licence granted under this Article shall not extend to the export of copies and shall be valid only for publication in the territory of the Contracting State where it has been applied for.

Any copy published in accordance with a licence granted under the provisions of this Article shall, from the time of its first publication, bear a notice in the appropriate language stating that the copy is available for distribution only in the Contracting State to which the said licence applies.

5. Licenses obtainable after three years shall not be granted under this Article until a further period of six months has elapsed, and licences

obtainable after one year until a further period of nine months has elapsed, from the date of the request for permission to translate mentioned in paragraphs 3 and 4 of Article V.

6. Due provision shall be made to assure
 - (i) that the licence provides for just compensation that is consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned; and
 - (ii) payment and transmittal of the compensation: however, should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.
7. For works which are composed mainly of illustrations a licence to translate the text and to reproduce the illustrations may be granted only if the conditions of Article V quater are also fulfilled.

ARTICLE V quater

1. Any Contracting State to which paragraph 1 of Article V bis applies may adopt the following provisions:

- (a) If, after the expiration of
 - (i) the relevant period specified in sub-paragraph (b) of this paragraph commencing from the date of first publication of a particular edition of a literary, scientific or artistic work referred to in paragraph 3, or
 - (ii) any longer period determined by national legislation of the State,

copies of such edition have not been generally distributed in that State to the public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works, by the owner of the right of reproduction or with his authorization, any national of such State may obtain a non-exclusive licence from the competent authority to publish such edition at that or a lower price for use in connexion with systematic instructional activities.

This licence may only be granted if such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the propri-

etor of the right to publish such work, or that, after due diligence on his part he was unable to find the owner of the right.

A licence may also be granted on the same conditions if authorized copies of the particular edition have ceased to be generally available to the public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works.

- (b) The period referred to in sub-paragraph (a) above shall be five years except that:
 - (i) For works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;
 - (ii) for works of fiction, poetry, drama and music, and for art books the period shall be seven years.
- (c) If the owner of the right of reproduction cannot be found, the applicant for a licence shall send, by registered air mail, copies of his application to the publisher whose name appears on the work and to any national clearing house identified as such in a notification deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization by the State to which the publisher is believed to belong. He shall also send a copy to any international copyright information centre established by said Organization to assist in the clearance of rights in works such as that in question. The licence shall not be granted before the expiration of a period of three months from the date of dispatch of the copies of the application.
- (d) Licenses obtainable after three years shall not be granted under this Article until a period of six months has elapsed from the date of the request for permission referred to in subparagraph (a) of this paragraph.
- (e) The name of the author and the title of the particular edition of the work shall be printed on all copies of the published reproduction. The licence shall not extend to the export of copies and shall be valid only for publication in the territory of the Contracting State where it has been applied for. The licence shall not be transferable by the licensee.
- (f) Due provision shall be made by domestic legislation to assure an accurate reproduction of the particular edition in question. The

licence shall not be granted when the author has withdrawn from circulation all copies of that edition.

- (g) A licence to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:
 - (i) Where the translation was not published by the copyright proprietor or with his authorization; or
 - (ii) where the translation is not in a language that is a language in general use in the State issuing the licence.
- 2. The exceptions provided by paragraph 1 of this Article are subject to the following provisions:
 - (a) Any copy published in accordance with a licence granted under this Article shall, from the time of its first publication, bear a notice in the appropriate language stating that the copy is available for distribution only in the Contracting State to which the said licence applies.
 - (b) Due provision shall be made to assure:
 - (i) That the licence provides for just compensation that is consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned; and
 - (ii) payment and transmittal of the compensation: however, should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.
 - (c) Whenever copies of an edition of a work are generally distributed in the Contracting State to the public or in connexion with systematic instructional activities, by the copyright owner or with his authorization, at a price reasonably related to that normally charged in the State for comparable works, any licence issued under this Article shall terminate if such edition is in the same language and is substantially the same in content as the edition published under the licence; provided, however, that any copies already made before the licence is terminated may continue to be distributed.
- 3. The literary, scientific, or artistic works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

However, the provisions of this Article shall also apply to the reproduction of audio-visual works in which case such provisions shall be limited to audio-visual works prepared and published for the sole intrinsic purpose of being used in connexion with systematic instructional activities.

ARTICLE VI

[No change, except insert "Revised" before "Convention".]

ARTICLE VII

[No change, except insert "Revised" before "Convention".]

ARTICLE VIII

1. This Revised Convention, which shall bear the date of shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization and shall remain open for signature by all States Parties to the Convention signed at Geneva on 6 September 1952 for a period of 120 days after the date of this Revised Convention. It shall be subject to ratification or acceptance by the signatory States.
2. Any State which has not signed this Revised Convention may accede thereto.
3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

ARTICLE IX

1. This Revised Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession.
2. Subsequently, this Revised Convention shall come into force in respect of each State three months after that State has deposited its instrument of ratification, acceptance or accession.
3. Accession to this Revised Convention by a State not Party to the Convention signed at Geneva at 6 September 1952 shall also constitute accession to that Convention; however, if its instrument of accession is deposited before this Revised Convention comes into force, such State may make its accession to the 1952 Convention conditional upon

the coming into force of this Revised Convention. After the coming into force of this Revised Convention, no State may accede solely to the 1952 Convention.

4. Contracting State Parties to this Revised Convention shall, with respect to their obligations to all States Party to either the 1952 Convention or this Revised Convention, be governed by the provisions of this Revised Convention, and it is understood that Contracting States not Party to this Revised Convention shall, with respect to their obligations to all other States Party to either the 1952 Convention, or this Revised Convention, be governed by the provisions of the 1952 Convention. However, any State Party to this Revised Convention may, by notification deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization, declare that it will apply only the provisions of the 1952 Convention in its relations with Contracting States not Party to this Revised Convention, and any Contracting State not Party to this Revised Convention may, by notification deposited as aforesaid, declare that it will admit the application only of the 1952 Convention in its relations with States also Party to this Revised Convention. [Any such notification shall be made by 1972.]

ARTICLE X

[No change, except insert "Revised" before "Convention".]

ARTICLE XI

1. An intergovernmental Committee is hereby established with the following duties:
 - (a) to study the problems concerning the application and operation of this Convention;
 - (b) to make preparation for periodic revisions of this Convention;
 - (c) to study any other problems concerning the international protection of copyright, in cooperation with the various interested international organizations, such as the United Nations Educational, Scientific and Cultural Organization, the International Union for the Protection of Literary and Artistic Works and the Organization of American States;
 - (d) to inform the Contracting States as to its activities.

2. The Committee shall consist of the representatives of eighteen Contracting States.
3. The Committee shall be selected with due consideration to a fair balance of national interests on the basis of factors of geographical location, population, languages and stage of development.
4. The Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director-General of the World Intellectual Property Organization and the Secretary-General of the Organization of American States, or their representatives, may attend meetings of the Committee in an advisory capacity.

ARTICLE XII

The Intergovernmental Committee shall convene a conference for revision of the Revised Convention whenever it deems necessary, or at the request of at least ten Contracting States Party to the 1952 Convention.

ARTICLE XIII

[No change, except insert "Revised" before "Convention" in each case.]

ARTICLE XIV

1. Any Contracting State may denounce this Revised Convention in its own name or on behalf of all or any of the countries or territories as to which a notification has been given under Article XIII. The denunciation shall be made by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization. Such denunciation shall also constitute denunciation of the 1952 Convention.
2. Such denunciation shall operate only in respect of the State or of the country or territory on whose behalf it was made and shall not take effect until twelve months after the date of receipt of the notification.

ARTICLE XV

[No change, except insert "Revised" before "Convention".]

ARTICLE XVI

[No change, except insert "Revised" before "Convention".]

ARTICLE XVII

1. This Revised Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.
2. In application of the foregoing paragraph, a declaration has been annexed to the present Article. This declaration is an integral part of this Revised Convention for the States bound by the Berne Convention on 1 January 1951, or which have or may become bound to it at a later date. The signature of this Revised Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration, as well as this Revised Convention.

ARTICLE XVIII

[No change, except insert "Revised" before "Convention".]

ARTICLE XIX

[No change, except insert "Revised" before "Convention".]

ARTICLE XX

[No change, except insert "Revised" before "Convention".]

ARTICLE XXI

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall send duly certified copies of this Revised Convention to the States interested, to and to the Secretary-General of the United Nations for registration by him.

He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Revised Convention comes into force, the notifications under this Revised Convention and denunciations under Article XIV.

APPENDIX DECLARATION
relating to Article XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to this Revised Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the co-existence of the Convention of Berne and the Universal Convention, Recognizing the temporary need of some States to adjust their level of copyright protection in accordance with their relative stage of cultural, social and economic development,

Have, by common agreement, accepted the terms of the following declaration:

- (a) Except as provided by paragraph (b), works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after 1 January 1951 shall not be protected by the Universal Copyright Convention in the countries of the Berne Union.
- (b) Where a Contracting State is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, and has deposited with the Director-General of Unesco, at the time of its withdrawal from the Berne Union, a notification to the effect that it regards itself as a developing country, the provisions of paragraph (a) shall not be applicable as long as such State may avail itself of the exceptions provided for by this Revised Convention in accordance with Article V bis.
- (c) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

RESOLUTION CONCERNING ARTICLE XI

The Conference for Revision of the Universal Copyright Convention, Having considered the problems relating to the Intergovernmental Committee provided for in Article XI of the Revised Universal Copyright Convention, to which this resolution is annexed,

Resolves that,

1. At its inception, the Committee shall include representatives of the twelve States members of the Intergovernmental Committee established under Article XI of the 1952 Convention and the resolu-

tion annexed to it, and, in addition, representatives of the following States

2. As soon as this Revised Convention comes into force the Committee as provided in paragraph 1 shall be deemed to be constituted in accordance with Article XI of the Revised Convention.
3. The first session of the Committee shall take place within one year after the coming into force of this Revised Convention; thereafter the Committee shall meet in ordinary session at intervals of no more than two years.
4. The Committee shall elect its Chairman and one Vice-Chairman. It shall establish its rules of procedure having regard to the following principles:
 - (a) All members represented on the Committee at its inception shall serve for an initial term of six years and until the end of the first ordinary session held thereafter. At such ordinary session of the Committee and each ordinary session held thereafter, the terms of not less than one-fourth and not more than one-third of the total membership of the Committee shall expire.
 - (b) The rules governing the procedure whereby the Committee shall fill vacancies, the order in which terms of membership expire, eligibility for re-election, and election procedures, shall be based upon a balancing of the opposing needs for continuity of membership and rotation of representation, as well as the factors provided in paragraph 3 of Article XI.

Expresses the wish that the United Nations Educational, Scientific and Cultural Organization provide its Secretariat.

ANNEX B

DRAFT TEXT FOR THE
REVISION OF THE BERNE CONVENTION*Adopted by the Permanent Committee**I. Modifications to be made to certain Articles
of the Stockholm Act*

1. In the Articles mentioned below, any reference to "Protocol Regarding Developing Countries" should be replaced by a reference to "Additional Act".

- Articles 21(1) and (2),
- Article 27(3),
- Article 28(1)(b)(i),
- Article 28(1)(c),
- Articles 28(2)(a), (c) and (d)
- Article 30(1),
- Article 32(3).

2. In Article 32(3), the words "in ratifying or acceding to the present Act" should be omitted.

3. In Article 22, the following words should be added at the end of both paragraph (1)(a) and paragraph (2)(a)(ii):

"[of this Act or of the Stockholm Act]"

4. In Article 28(2)(a) the following words should be added:

"but not before the Universal Copyright Convention as revised at on has been ratified, accepted or acceded to by France, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America and has entered into force."

5. In Article 29(2)(a)(i) the words "including the Additional Act" should be added after the words "Articles 1 to 21". The words "Brussels Act" should be enclosed in square brackets and followed by "[Stockholm Act]". In Article 29(2)(a)(ii) the words "Articles 21 to 24 of the Brussels Act" should be replaced by the words "Articles 22 to 26 of the Stockholm Act".

6. Article 34 should be drafted as follows:

"After the entry into force of Articles 1 to 21 of this Act including the Additional Act, no ratification of earlier Acts of this Convention or accession thereto will be permissible. In addition, it will not be permissible, after the said date, for a country of the Union which is not bound by Articles 1 to 21 of the Stockholm Act and which has not made a declaration under Article 5(1)(a) or (b) of the Protocol Regarding Developing Countries to make such a declaration."

*II. Draft Text of an Additional Act to the
Act of of 1971*

ARTICLE 1

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Additional Act forms an integral part, 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 for in this Act may, by a notification deposited with the Director General at the time of making the said ratification or accession or thereafter, declare that it will avail itself of any or all of the reservations provided for in this Additional Act.

(2) Any reservation so notified shall be effective for a period of ten years from the date of the entry into force of this Act, or for such part of that period as remains at the date of deposit of the notification, and may be renewed in whole or in part for further periods of ten years each if, during the year preceding the expiration of the relevant ten-year period, the country concerned deposits a further notification with the Director General. Initial notifications may also be made during these further periods of ten years in accordance with the provisions of this paragraph.

(3) Notwithstanding the provisions of paragraph (2) of this Article, a country of the Union which, in conformity with the established practice of the General Assembly of the United Nations, has ceased to be regarded as a developing country shall no longer be entitled to renew the period during which it can avail itself of the reservations referred to in paragraph (1) and, whether or not it formally withdraws them, such country shall be precluded from availing itself of the said reservations at the end

of the current ten-year period, or at the end of three years after it has ceased to be a developing country, whichever period expires later.

(4) Any copies of a work already made under the reservations provided for in this Additional Act may continue to be distributed after the expiration of the period for which notifications under this Article are effective.

(5) Any country which is bound by the provisions of this Act and which has deposited a declaration or a notification in accordance with Article 31(1) with respect to the application of this Act to a particular territory, the situation of which can be regarded as analogous to that of the countries referred to in paragraph (1) of this Article, may also deposit notifications of reservations or of renewals thereof with respect to any such territory. During the effective period of such notifications, the provisions of this Additional Act shall be applicable to such territory.

(6) (a) The fact that a reservation provided for in this Additional Act has been notified does not permit another country of the Union to give less protection to works of which the country of origin is the country availing itself of the reservation, than is provided for in Articles 1 to 20 of this Act.

(b) The right of reciprocity provided for in Article 30(2)(b) of this Act cannot be exercised in relation to works the country of origin of which remains a country to which paragraph (1) of this Article applies.

ARTICLE 2

(1) Any country of the Union to which Article 1 of this Additional Act applies may, so far as works published in printed or analogous forms of reproduction are concerned, substitute for the exclusive right of translation provided for in Article 8 of this Convention a system of non-exclusive and non-transferable licences, granted by the competent authority, under the following conditions and subject to the provisions of Article 4 of this Additional Act.

(2) If, after the expiration of a period of three years from the date of the first publication of a literary or artistic work, or of any longer period determined by national legislation of the country referred to above, a translation of such work has not been published in the language or in one of the languages of that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a licence to translate the work and publish the work so translated in the said language in printed or analogous forms of reproduction.

(3) However, in the case of a translation into a language which is not in general use in one or more developed countries a period of one year shall be substituted for the period of three years provided for in paragraph (2) above.

(4) Any licence under this Article shall be granted only for the purpose of teaching, scholarship or research.

(5) Licences obtainable after three years shall not be granted under this Article until a further period of six months has elapsed, and licences obtainable after one year until a further period of nine months has elapsed, from the date of the application for permission to translate mentioned in paragraph (1), or of the dispatch of the copies of the application mentioned in paragraph (2), as the case may be, of Article 4 of this Additional Act.

(6) For works which are composed mainly of illustrations, a licence to translate the text and to reproduce the illustrations may be granted only if the conditions of Article 3 of this Additional Act are also fulfilled.

(7) Any country to which Article 1 of this Additional Act applies, whether or not it is already a member of the Union, may, instead of availing itself of the reservations provided for by this Article, make, in ratifying or acceding to this Act, the declaration provided for in Article 30(2)(a) or (b) of this Act. However, any country making such a declaration may not subsequently avail itself of the reservations provided for in this Article, even if it withdraws its declaration.

(8) A country which has availed itself of the reservations provided for in paragraphs (1) to (6) of this Article may not subsequently make a declaration in accordance with Article 30(2)(a) or (b) of this Act.

(9) Any country which has ceased to be regarded as a developing country may, within three months from the expiry of the period provided for in paragraph (3) of Article 1 of this Additional Act, make a declaration according to Article 30(2)(b) of this Act.

ARTICLE 3

(1) Any country of the Union to which Article 1 of this Additional Act applies may substitute for the exclusive right of reproduction provided for in Article 9 of this Convention a system of non-exclusive and non-transferable licences granted by the competent authority under the following conditions and subject to the provisions of Article 4 of this Additional Act.

(2) If, after the expiration of

- (i) the relevant period specified in paragraph (3) of this Article commencing from the date of first publication of a particular edition of a literary or artistic work referred to in paragraph (7) of this Article, or
- (ii) any longer period determined by national legislation of the country referred to above,

copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works, by the owner of the right of reproduction or with his authorization, any national of such country may obtain a licence to publish such edition at that or a lower price for use in connection with systematic instructional activities.

(3) The period referred to in sub-paragraph (i) of paragraph (2) above shall be five years, except that

- (i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;
- (ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(4) Licences obtainable after three years shall not be granted under this Article until a period of six months has elapsed from the date of the request for permission to reproduce mentioned in paragraph (1), or of the dispatch of the copies of the application mentioned in paragraph (2), as the case may be, of Article 4 of this Additional Act. Licences obtainable after other periods shall not be granted until a period of three months has elapsed from the date of the dispatch of copies of the application.

(5) A licence to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

- (i) where the translation was not published by the owner of the right or with his authorization; or
- (ii) where the translation is not in a language that is the language or one of the languages of the country granting the licence.

(6) Whenever copies of an edition of a work are distributed in the country referred to above to the general public or in connection with

systematic instructional activities, by the owner of the right or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any licence granted under this Article shall terminate if such edition is in the same language and is substantially the same in content as the edition published under the licence. However, any copies already made before the licence is terminated may continue to be distributed.

(7) The literary or artistic works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction. However, the reservations permitted by this Article shall also apply to the reproduction of audio-visual works and to the translation into the language or one of the languages of the country concerned of any accompanying text, in which case the reservations shall be limited to audio-visual works prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities.

ARTICLE 4

(1) Any licence granted under Articles 2 or 3 of this Additional Act may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the proprietor of the right to make and publish the translation or to reproduce the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right.

(2) If the owner of the right cannot be found, the applicant for a licence shall send, by registered airmail, copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right is known, to the diplomatic or consular representative of the country of which such owner is a national, or to the organization, or to any national or international information centre, which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country of which the publisher is believed to be a national.

(3) The name of the author and the original title of the work or of the particular edition of the work shall be printed on all copies of the published translation or reproduction.

(4) No licence granted under Articles 2 or 3 of this Additional Act shall extend to the export of copies, and any such licence shall be valid only

for publication of the translation or of the reproduction, as the case may be, in the territory of the country of the Union where it has been applied for.

(5) All copies published in accordance with such a licence shall, from the time of first publication, bear notices in the appropriate language stating that the copies are available for distribution only in the country or territory to which the said licence applies.

(6) Due provision shall be made by national legislation to assure

- (a) that the licence provides, in favor of the owner of the right of translation or of reproduction, as the case may be, for just compensation that is consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned; and
- (b) payment and transmittal of the compensation: should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent; and
- (c) a correct translation of the work or an accurate reproduction of the particular edition, as the case may be.

(7) Licences may also be granted in accordance with the conditions of Article 2 of this Additional Act if, in respect of a translation already published in the language concerned, the editions are out of print. Licences may also be granted in accordance with the conditions of Article 3 of this Additional Act if for a period of six months no authorized copies of the edition in question have been on sale in the country concerned to the public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.

(8) A licence shall not be granted when the author has withdrawn from circulation all copies of the edition of the work.

ARTICLE 5

(1) Any country of the Union may declare as from the signature of this Act, and at any time before becoming bound by Articles 1 to 21 of this Act and by this Additional Act,

- (a) in the case of a country referred to in Article 1 of this Additional Act, that it intends to avail itself of any or all of the reservations provided for in the latter in relation to works whose country of origin is a country of the Union which admits the application of the reservations provided for in this Additional Act, or
 - (b) that it admits the application of the reservations provided for in this Additional Act to works of which it is the country of origin by countries which, upon becoming bound by Articles 1 to 21 of this Act and by this Additional Act, have notified reservations permitted under the latter, or have made a declaration of application of any or all provisions of this Additional Act.
- (2) The declaration shall be made in writing and shall be deposited with the Director General. The declaration shall become effective from the date on which it is deposited.
-

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

107. U.S. *Laws, statutes, etc.*

Public Law 91-555, 91st Congress, S.J. Res. 230, December 17, 1970. Joint resolution extending the duration of copyright protection in certain cases. 1 p. (84 STAT. 1441). The sixth interim extension law reads:

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 89-442, by Public Law 90-141, by Public Law 90-416, or by Public Law 91-147 (or by all or certain of said laws), would expire prior to December 31, 1971, such term is hereby continued until December 31, 1971.

Approved December 17, 1970.

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

Copyright protection in certain cases. Report to accompany S. J. Res. 230, submitted by Mr. Celler, November 24, 1970. 2 p. (91st Cong., 2d Sess., H. Rep. No. 91-1621).

A favorable report on the measure to provide a further extension of the renewal term of any copyright subsisting on the date of approval of this resolution, or term as extended by previous extension laws, to December 31, 1971, where such term would otherwise expire prior to that date.

109. U.S. CONGRESS. HOUSE.

Copyright protection in certain cases. (116 *Congressional Record* H11215-H11216, no. 195, Dec. 7, 1970.)

The brief debate on Senate-passed S.J. Res. 230, the extension measure, which was passed by the House under a suspension of the rules, thus clearing it for Presidential signature.

110. U.S. CONGRESS. HOUSE.

H.R. 19926. A bill to amend the Communications Act to express the intent of Congress to establish in the Federal Communications Commission the exclusive jurisdiction for regulation over all aspects of cable television systems. Introduced by Mr. Tiernan, December 8, 1970, and referred to the Committee on Interstate and Foreign Commerce. 2 p. (91st Cong., 2d Sess.)

This bill provides, in essence, that regulation "of any CATV system by any State, territory or possession of the United States, a political subdivision of any of the foregoing, or the District of Columbia" must be conditioned on a finding by the FCC that the public interest requires such regulation. See Item 111, *infra*.

111. U.S. CONGRESS. HOUSE. *Tiernan, Robert O.*

Uniform or minimum standards for the cable TV industry. (116 *Congressional Record* E10156-E10157, no. 196, Dec. 8, 1970.)

Extension of the remarks of Representative Tiernan in connection with his introduction of H.R. 19926. Mr. Tiernan stressed the need for "uniform regulation throughout the country in order to make CATV an effective communications tool. This cannot be accomplished if authority for regulation is left to the State and local governments." See Item 110, *supra*.

112. U.S. CONGRESS. SENATE.

S. 4592. A bill to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording and for other purposes. Introduced by Mr. McClellan, December 18 (legislative day, December 15), 1970, and referred to the Committee on the Judiciary. 3 p. (91st Cong., 2d Sess.)

The bill would not give performance rights to sound recordings, would become effective three months after its enactment, and would not be retroactive.

It reads: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That title 17 of the United States Code is amended in the following respects:

(a) In section 1, title 17 of the United States Code, add a subsection (f) to read:

"To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to single ephemeral recordings made by transmitting organizations for their own use.

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings other than fixations of sound accompanying a motion picture."

(c) In section 19, title 17, of the United States Code, add the following at the end of the section: "In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol P (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided*, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice."

(d) In section 20, title 17, of the United States Code, amend the first sentence to read: "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

(c) In section 26, title 17, of the United States Code, add the following at the end of the section: "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof.

SEC. 2. This Act shall take effect three months after its enactment. The provisions of title 17 of the United States Code shall apply only to sound recordings fixed, published and copyrighted on and after the effective date of this Act and nothing in title 17 of the United States Code shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before that date.

113. U.S. CONGRESS. SENATE. *McClellan, John C.*

S. 4592—Introduction of a bill to provide for the creation of a limited copyright in sound recordings. (116 *Congressional Record* S20661-S20663, no. 204, Dec. 18, 1970.)

MR. MCCLELLAN. Mr. President, as chairman of the Senate Subcommittee on Patents, Trademarks, and Copyrights, I introduce, for appropriate reference, a bill to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes.

Information supplied to the Copyrights Subcommittee indicates a rapid increase in the unauthorized duplication and piracy of sound recordings. It has been estimated that as many as 18,000 illegal tapes are being produced each day depriving the record industry, its distributors, and performing artists of an estimated \$100 million annually in tape sales. Recording artists and members of the musicians union are major victims of the record piracy racket because artists under contract lose royalties from the legitimate sale of albums and tapes, and the percentage of the sales price of each record that would normally go to the music performance trust funds and the musicians themselves is not conveyed by the pirates to the fund. Furthermore, Federal, State, and local governments are deprived of tax revenues they would otherwise receive from record manufacturers. The consumer is harmed by the frequently inferior quality of the pirated records and tapes.

Because the illegal duplication of recordings is rather simple, it affords a lucrative activity for organized crime. The pirates purchase for a few dollars a tape or record which represents to the record company substantial recording and manufacturing costs, transfer mechanically the music from the legitimate record or tape to the pirated tape and sell it at reduced cost in competition with the legitimate tape. Thus, the pirates, with virtually no financial investment, sell under their own labels, or with no label identification at all, the recordings of others. On the other hand, the costs to the record manufacturer of producing and promoting a modern album or tape can well be over \$100,000.

Not surprisingly the pirates produce those albums that are proven money makers. It is well known that a substantial percentage of the recordings of classical music, such as operas and symphonies, do not make a profit. The sales of classical records have been further reduced by off-the-air taping. If the income of record manufacturers from the sale of popular records is significantly harmed by the activities of the pirates, this will further reduce the ability of such manufacturers to produce new recordings of classical music.

The existing U.S. copyright law, enacted in 1909, does not grant copyright protection to the owner of a sound recording. The remedies available to record manufacturers under State law are inadequate. Consequently, the Copyrights Subcommittee, in reporting the pending legislation for a general revision of the copyright law, included provisions establishing a limited copyright in sound recordings. The bill which I am introducing today is based on the provisions contained in S. 543, the copyright revision bill.

The earliest feasible effective date for the implementation of the general copyright revision bill is January 1, 1973. While the revision bill has been making its slow and tortuous progress through the legislative process, the Congress has endeavored by the passage of several joint resolutions and by various informal understandings to preserve the rights and equities of all parties. The widespread unauthorized duplication of recordings is causing irreparable injury to the record industry, performers, and the public. It may therefore be desirable for the Congress to act on this issue independently of the general revision bill.

The bill which I am introducing today seeks to combat record piracy by establishing a limited copyright in sound recordings. Al-

ternative remedies, such as a criminal statute, may also have merit. The subcommittee can review this matter further in the 92d Congress. In the meantime any individuals having views on this subject should address their comments to the subcommittee.

I ask unanimous consent that there be printed at this point in the RECORD an article on piracy and counterfeiting of records and tapes which appeared in the Wall Street Journal on November 30.

The PRESIDING OFFICER (MR. STEVENSON). The bill will be received and appropriately referred; and, without objection, the article will be printed in the RECORD.

The bill (S. 4592) to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes, introduced by MR. McCLELLAN, was received, read twice by its title and referred to the Committee on the Judiciary.

The article presented by MR. McCLELLAN is as follows:

**HOT NUMBERS: PIRATES AND COUNTERFEITERS OF STEREO TAPES STEAL
HUGE SALES AND GIVE THE INDUSTRY FITS**

(By Stephen Grover)

NEW YORK.—Heard about those hot new recording groups that are cutting new stereo tapes almost daily? One's called The Pirates, and the other is The Counterfeiters. They've got the whole industry talking.

Actually, muttering is a better word.

The pirates and the counterfeiters are real pirates and real counterfeiters. The pirates make illegal copies of tapes and peddle them cheaply to record shops, unabashedly admitting that they are pirated copies. The counterfeiters make illegal copies but then go a step further and copy the packaging that the original comes in, too; the counterfeiters then palm off their work as the original.

Last year the two groups sold about \$100 million in copied tapes, accounting for about a fourth of all tapes sold, according to Jules Yarnell, counsel for the Recording Industry Association of America. This year the figure is believed to be sharply higher.

Pirating and counterfeiting musical works is nothing new; records have been copied illegally for years. But tape piracy is far easier than record piracy, and thus is far more of a problem for the

industry. Record piracy has never accounted for more than 5% of total record sales, industry officials say. Last year the figure was 5%, equal to sales of about \$60 million, the officials estimate.

WILL PRICES GO DOWN?

This big threat to the blossoming tape industry could have either of two major repercussions: The legitimate tape makers might cut the prices of their stereo tapes to try to make the copies less of a bargain and therefore less attractive to retailers. Or "it could mean the destruction of the business," one executive says.

No one really expects the industry to be killed by the pirates, but neither does anyone expect the pirates to be knocked off by the industry. Alarmed record companies have filed more than 100 lawsuits against pirates and counterfeiters in recent weeks, but "no sooner do we win one suit than another three counterfeit operations spring up," says a lawyer for one recording company.

The problem is simply that counterfeiting tapes is one of the easiest ways to make an illegal bundle. "You don't need metal presses or any of the other expensive equipment it takes to make records," says Henry Brief, executive secretary of the Recording Industry Association. All a person needs is a tape recorder, a tape playback deck and some machines that will produce many copied tapes at a time. "The cost of going into business as a tape pirate or counterfeiter is less than \$10,000," says one person in the industry.

THE GRAND FUNK RAILROAD

There are other advantages. The pirate doesn't have to bother with the expenses of developing talent, promoting it, paying royalties when a recording is a hit or swallowing huge losses if a recording is a flop. Thus, the pirates and counterfeiters often get a high return on their investment. They often get \$20 or more for a tape that cost them only 95 cents to produce — and that legitimate record companies sell for \$6.95.

Pirates and counterfeiters often make as many as 5,000 copies of a hit tape, and they seem to have little difficulty selling them. Many record retailers regularly sell pirated tapes under the counter, and a few sell them openly. Capitol Records, for example, alleges that a Minnesota chain was recently advertising "a fresh shipment of regular \$6.95 stereo tapes for only \$2.00 each" and that the tapes included two pirated tapes by the Grand Funk Railroad, which is a rock group under contract to Capitol.

Capitol has sued the stores, which say they are blameless. Indeed, it's unclear what laws are broken by sellers of pirated records outside New York and California. There is a Federal law that prohibits the sale of counterfeited tapes, but only New York and California have statutes that specifically forbid the sale of pirated tapes. Some companies win actions that are based on the ground of "unfair competition," but these actions are long and costly.

The companies are pressing for more state laws against pirating and for changes in the U.S. copyright law to bar counterfeiting and piracy. At the moment, the copyright law applies only to the work performed, not to the performance, that is, if a pirate tapes a number rendered by the Grand Funk Railroad and written by the Beatles, the Beatles but not the Grand Funk Railroad would have an action for copyright infringement. The Beatles' action could be brought against both the pirate and the seller.

TAKING THE OFFENSIVE

"We know that tougher laws aren't the complete answer," says an industry executive, "but it would be a start. They have laws against piracy in Canada, and the problem there isn't a serious one anymore." The industry also complains that the New York and California laws are too lenient; they make the offense a misdemeanor and provide for a maximum sentence of a year in jail.

Record companies find it especially galling that some pirates have taken the legal offensive. In the past, two groups, Tape-a-Tape of Chicago and Tape Industries Association of America in Los Angeles, have made pirated tapes and made no bones about it. Each of their copied tapes carries this message: "No relationship of any kind exists between Tape-a-Tape (or Tape Industries Association of America) and the original recording company, nor between this recording and the original recording artist. . . . Permission to produce this tape has not been sought or obtained from any party whatsoever."

Both groups were sued by record companies on the ground of unfair competition, and both groups lost. The California company, however, is appealing to the Supreme Court. It says clothing makers are allowed to copy famous designs, and it argues that "the Supreme Court held an Illinois law on unfair competition could not Constitutionally be applied to prevent a competitor from copying the designs and selling identical products simply because consumers might be confused about the source of the product."

The judge in the lower court refused to accept that argument. He ruled that pirated tapes "actually take and appropriate the product itself — the sounds recorded on the albums — and commercially exploit the product."

A DIFFERENT ARENA?

Some people maintain that instead of fighting in court the tape companies should fight the pirates in the marketplace. "They could solve their problem if the record companies cut their listed prices," asserts one buyer of pirated tapes. "It still costs about a dollar more to buy a stereo cartridge than it does to buy a record containing the same music. That's just too much money."

Tape companies argue that their heavy overhead costs — royalties, promotion and the like — prevent them from reducing prices significantly. And they say that even if they cut expenses to a minimum they could never possibly approach the low prices offered by pirates and counterfeiters.

But industry officials do admit that if the pirates keep increasing their share of the market the industry will have to take a long, hard look at its pricing practices.

114. U.S. BUREAU OF CUSTOMS.

19 CFR Parts 11, 24, 133. Trademarks, trade names, and copyrights. Notice of proposed rule making. (35 *Federal Register* 19269-19274, no. 246, Dec. 19, 1970.)

A proposal to revise the pertinent Customs Regulations. "The revision is part of the general revision of the Customs Regulations and replaces the provisions of §§11.14 through 11.21 with a new Part 133. This part follows a new format and contains changes or additions in language to clarify the former provisions."

See also John F. Atwood, "Importing and Copyrights. The Role of the United States Bureau of Customs," 18 BULL. CR. SOC. 1 (October 1970). The rules were printed, also, in 17 BULL. CR. SOC. 408, Item 204 (August 1970).

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

115. Intergovernmental Copyright Committee. *Extraordinary Session, Paris, September 2 to 11, 1970.*

Report. (6 *Copyright* 223-235, no. 10, Oct. 1970.)

Appended are proposals for revision of the UCC, and the text of the resolutions adopted by the Committee. See Hadl, *supra*, Item 106 and Annex A.

116. International Copyright Union. *Permanent Committee. Extraordinary Session, Geneva, September 14 to 18, 1970.*

Report. (6 *Copyright* 209-217, no. 10, Oct. 1970.)

Appended are draft texts for revision of the Berne Convention and texts of the resolutions adopted by the Permanent Committee, and the list of participants. See Hadl, *supra*, Item 106 and Annex B.

PART IV.

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

117. *Sinatra v. The Goodyear Tire & Rubber Co.*, 168 U.S.P.Q. 12 (9th Cir. Nov. 20, 1970) (Trask, J.). For decision below, see 159 U.S.P.Q. 356 (D. Cal. 1968), 16 BULL. CR. SOC. 176, Item 146 (1969).*

Appeal from summary judgment for defendant in action for unfair competition. Plaintiff Nancy Sinatra, a professional singer, made a successful recording of a song entitled "These Boots Are Made For Walkin' ". Defendants broadcast radio and television tire commercials using, under license from the copyright proprietor, the music and revised lyrics from this song as performed by an unidentified female singer.

Plaintiff claimed that she and the song had become identified with each other, that defendants selected a singer whose style was deliberately intended to imitate that of plaintiff, and that the appearance and dress of girls who appeared briefly (but did not sing) in the television commercials copied that of plaintiff, all of which was allegedly designed to deceive the public into believing that plaintiff was a participant in the commercials. The lower court held that defendants did not pass off their commercials as plaintiff's and, noting that "imitation alone does not give rise to a cause of action", granted summary judgment for defendant.

Held, affirmed.

Noting that plaintiff's claim was one for "incidental or secondary passing off" — an attempt to "bring her case within the ambit of the traditional pattern of unfair competition by asserting that because some people would read her voice into the commercial the defendant has increased its sales of tires 'by millions of dollars'" — the court held that relief was barred under the theory of *Sears* and *Compco*. The court also distinguished certain of plaintiff's precedents on the grounds that

* See also, Liebig, *Style and Performance*, 17 BULL. CR. SOC. 40, Item 4 (1969).

plaintiff did not claim rights in uniquely personal sound characteristics, but only in her voice mannerisms in connection with a particular song in which copyright was owned by defendants' licensor. The court said:

Counsel has called attention to, and we have discovered, four cases which directly bear on appellant's claim. They are: *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969) [16 BULL. CR. SOC. 267, Item 201 (1969)]; *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962) [9 BULL. CR. SOC. 383, Item 257 (1962)]; *Sim v. H. J. Heinz Co., Ltd.*, [1958] 1 W.L.R. 313 (C.A. 1959); and *Gardella v. Log Cabin Products, Inc.*, 89 F.2d 891 (2d Cir. 1937).

Gardella was the Aunt Jemima case. In it the defendants used a singer and an actor in an advertising campaign for Aunt Jemima Pancake Flour and Log Cabin Syrup over a radio station. They were presented under the name of "Aunt Jemima", a name which, with a picture of the character, had been registered as a trademark since 1890. The plaintiff was a stage and radio performer who had used the name in many performances and in recordings. Although plaintiff obtained a recovery in damages in the district court, it was reversed because it was improperly based in part upon a claim under the state's Civil Rights Law. The claim based upon unfair competition was sent back to be established, if at all, upon standards set out in the court's opinion. The court pointed out that although the name "Aunt Jemima" was used by both performers, the use of the name for the fictitious character was protected by the trademark registration and the only duty of the defendants was one of identification to prevent confusion with the theatrical Aunt Jemima who was the plaintiff and who had an established reputation and earning power as a performer. Absent confusion or deception, the court stated, imitation alone was not sufficient to sustain the claim. The court further suggested that so long as the pancake Aunt Jemima advertised her own product, imitation would not be deception.

....

In *Sim, supra*, the Heinz Company developed an advertising program using speech from a cartoon figure. Alastair Sim, a well known actor, alleged that the advertiser employed another actor, Ron Moody, to make the vocal comments. Moody had in the past simulated the voice of Sim and the complaint was that he did so on these television commercials. The application for an injunction was denied on appeal. Lord Justice Hodson expressing some doubt said:

"I would only add this. This is, on any view of the matter, a novel form of action of passing off. The plaintiff contends that his voice as an actor is part of his stock-in-trade and therefore is something which he is entitled to protect as part of his goods. No doubt that is an arguable case, but there are various questions to be determined in this action, which has not yet been tried, including the question whether this voice can in truth be regarded as a property and whether, in the circumstances of this case, there could be said to be anything in the nature of unfair trade competition in a common field, where in the one case you have an actor who uses his voice in the performance of his particular occupation and, on the other hand, another actor who, in some way or other, uses his voice to imitate a voice on television for advertising purposes." 1 W.L.R. at 319.

Lahr v. Adell Chemical Co., *supra*, was also a television commercial in which a cartoon duck was used to speak with a voice alleged to be the simulated voice of Bert Lahr, a successful professional entertainer. The complaint alleged three causes of action, for unfair competition, for invasion of privacy, and for defamation. An order dismissing the complaint for failure to state a claim was reversed on the basis of the claim of unfair competition. The court on appeal pointed out that the plaintiff had achieved stardom:

"[I]n substantial measure because his 'style of vocal comic delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds,' has caused him to become 'widely known and readily recognized * * * as a unique and extraordinary comic character.'" 300 F.2d at 257.

The court held that the impostor was "stealing his thunder" and that on the face of the allegations the plaintiff was entitled to have his complaint go to trial. It was clear however that a cause of action for damage to reputation was not stated.

"If every time one can allege, 'Your (anonymous) commercial sounded like me, but not so good,' and contend the public believed, in spite of the variance, . . . that his abilities had declined, the consequences would be too great to contemplate." 300 F.2d at 259.

It appears that *Lahr* was decided on the basis of a singular uniqueness of quality of voice that made his situation not just a difference of degree but a difference in kind.

"We may agree with defendant that plaintiff has not shown any 'property' interest entitled to copyright protection. And we might hesitate to say that *an ordinary singer whose voice, deliberately or otherwise*, sounded sufficiently like another to cause confusion was not free to do so. Plaintiff here alleges a peculiar style and type of performance, unique in a far broader sense." 300 F.2d at 259 (emphasis supplied).

Because appellant relied so heavily upon *Lahr*, we point to a factual distinction, shared with *Sim*, that will have greater significance when seen in the light of *Sears* and *Comco*, discussed *infra*. In *Lahr* and *Sim* the defendants were not dealing in materials in which the defendants had a copyright. Or, to elaborate, in *Lahr* and *Sim* the plaintiffs claimed a "secondary meaning" in pure sound, their individual vocal characteristics. The protection sought was not for the combination of sound together with copyrighted lyrics, melody and arrangement, as here. In this case appellant's complaint is not that her sound is uniquely personal; it is that the sound in connection with the music, lyrics and arrangement, which made her the subject of popular identification, ought to be protected. But as to these latter copyrightable items she had no rights. Presumably, she was required to obtain permission of the copyright owner to sing "Boots", and to make an arrangement of the song to suit her **own** tastes and talents. Had she desired to exclude all others from use of the song so that her "secondary meaning" with the song could not be imitated she could have purchased those rights from the copyright proprietor. One wonders whether her voice, and theatrical style, would have been identifiable if another song had been presented, and not "her song", which unfortunately for her was owned by others and licensed to the defendants. But that case is not before us now.

Davis v. Trans World Airlines, *supra*, involved a television commercial where the airline used the music, lyrics and arrangement of a popular song "Up, Up and Away" to which it had acquired the rights from the copyright proprietor. Plaintiffs, a nationally known singing group called "The Fifth Dimension," had made a well known recording of the same song. The singing in the commercial was anonymous, as here. The district court held on a motion for summary judgment that there had been no passing-off and that imitation alone did not give rise to a cause of action. In any event, *Davis* does not aid Sinatra for the court there denied recovery upon

similar facts and a similar, if not identical, legal theory to that urged by Sinatra.

Across all of these cases fall the shadows of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). In those two cases the Court announced, or we should probably more properly say, reaffirmed the "strong federal policy favoring free competition in ideas which do not merit or qualify for patent protection." Although both cases involved imitation of patented articles the language of the Court spoke in broader terms. . . .

The Court made it very clear that just as a state could not encroach upon the federal patent laws directly it could not do so indirectly under the guise of enforcing its laws against unfair competition where those laws would clash with the federal objectives. Here, the defendants had paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements. The plaintiff had not sought or obtained the same rights which would have protected the secondary meaning which she asserts. The resulting clash with federal law seems inevitable if damages or injunctive remedies are available under state laws. Moreover, the inherent difficulty of protecting or policing a "performance" or the creation of a performer in handling copyrighted material licensed to another imposes problems of supervision that are almost impossible for a court of equity.

An added clash with the copyright laws is the potential restriction which recognition of performers' "secondary meanings" places upon the potential market of the copyright proprietor. If a proposed licensee must pay each artist who has played or sung the composition and who might therefore claim unfair competition-performer's protection, the licensee may well be discouraged to the point of complete loss of interest. Finally, as Judge Hand pointed out in his dissent in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 666-667 (2d Cir. 1955) to allow unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitations of time to permit definite public domain use.

118. *The Hearst Corporation v. Shopping Center Network, Inc.*, 307 F. Supp. 551, 165 U.S.P.Q. 1 (S.D.N.Y., October 24, 1969).

Plaintiff's motion to remand to state court in action for misappropriation of literary property and unfair competition. Plaintiff alleged

(i) that it was the producer of the animated motion picture "The Yellow Submarine" which was promoted and distributed by United Artists Corporation, (ii) that, as part of the production of the film, plaintiff commissioned the creation of a number of original animation cells and other artwork, (iii) that United entered into an agreement for plaintiff's benefit with defendant which provided for use of the cells and artwork in a promotion of the film pursuant to which approximately 65,000 items of said artwork were delivered by plaintiff to defendant, (iv) that, instead of providing the promotional services agreed to, defendant sold the artwork, which had never been previously published, to the public. Based upon these allegations, plaintiff claimed a violation of its literary property, conversion, fraud and deceit. Plaintiff also alleged ("Seventh Cause of Action") that defendant made and sold compilations, adaptations and arrangements of the animation cells without authority under the designation "Yellow Submarine" and hence passed off such compilations as plaintiff's. The action was commenced in New York Supreme Court and removed by defendants to the Federal courts wherein plaintiff sought remand.

Held, motion granted.

Noting that the parties' jurisdictional dispute encompassed only the seventh cause of action, the court held that if this cause of action stated a claim for copyright infringement it referred only to common law copyright and was hence without the purview of "Federal copyright jurisdiction". The court based this conclusion upon the "status" of plaintiff as not possessed of a statutory copyright. The court said:

[T]he question [is]: Does the seventh cause of action set forth an infringement claim under the federal copyright statute? If it does, removal was clearly in order; if it does not, remand is required. We conclude that it does not.

This conclusion, however, is not based on plaintiff's own intention to cast its claim on state grounds, although such an intention was clearly manifest. Plaintiff brought the suit initially in state court. At no point in its complaints did it so much as allude to the federal copyright statute (except briefly and tangentially in the sixth cause of action, which is not at issue here), nor did it ever indicate any desire to rely on such a law. Indeed, the plaintiff has vociferously disclaimed any desire or intention to recover on anything other than a purely stated cause of action. Nevertheless, these circumstances alone do not constitute sufficient cause to remand this case to state court. . . .

It is true that the traditional rule in removal proceedings prohibits the court from looking outside the plaintiff's own complaint to determine whether or not a suit arises under federal law. . . .

It is equally true that where plaintiff's claim involves both a federal ground and a state ground, the plaintiff is normally free to ignore the federal question and pitch his claim on the state ground. . . .

These principles, however, cannot always be rigidly applied. True it is that, where the plaintiff has a right *either* under federal law *or* under state law as an independent source of that right, the federal court on removal proceedings may not generally look beyond the face of the initial pleading in the state action to determine whether a federal question is presented. . . . In certain areas, however, this either-or option is no longer available, for Congress has deemed that federal substantive law should altogether preempt and supplant state law. In such a case, where Congress has explicitly said that the exclusive source of a plaintiff's right to relief is to be federal law, it would be unacceptable to permit that very plaintiff, by the artful manipulation of the terms of a complaint, to defeat a clearly enunciated congressional objective. Thus, the courts have held that where federal jurisdiction hinges on a party's having a particular status, the court may ascertain the existence of that status independently of the complaint. . . . And in the case of statutory copyright Congress has not only chosen to make federal forum available, but has designated it as the one and only forum acceptable.

Applying this principle to present case, the question of federal jurisdiction turns on the status of the plaintiff; that is, whether or not plaintiff was in possession of a statutory copyright on the original animation cells and other artwork in question. For procurement of such a copyright would operate to divest plaintiff of whatever common law remedy might otherwise be available. . . . In its complaint plaintiff clearly makes no claim to have copyrighted either the animation cells or any of the other artwork. Even an examination under the status rule of all the pleadings in the action reveals no such copyright. Nor do the defendants in their petition for removal ever suggest that plaintiff is a copyright proprietor. Certainly none of the formal requisites of copyright procurement are anywhere in evidence. Under 17 U.S.C.A. § 12, the mere registration and deposit of copies of the unpublished works with the Copyright Office constitute the act of obtaining statutory copyright. Indeed, these same requirements of registration and deposit are, under

17 U.S.C.A. § 13, conditions precedent to the right to maintain a copyright infringement action under Title 17. Yet, plaintiff in its complaint nowhere alleges compliance with any of these requirements, nor do defendants in any of their papers suggest that plaintiff has so complied. Thus, plaintiff's action can hardly be said to set forth an infringement claim under the federal copyright statute.

Plaintiff does, however, still have an action for common law copyright infringement.

Section 2 of the copyright act makes it clear that registration and deposit under Section 12 constitute only an optional and not a mandatory form of protection for unpublished works. . . . Thus, at least until a proprietor of unpublished works, allegedly like the plaintiff herein, is issued a valid statutory copyright, his position with respect to his common law copyright remains unimpaired. . . . Therefore, if plaintiff's seventh cause of action does in fact, as defendants contend, spell out a claim for copyright infringement, it can only be one for common law, and not statutory, copyright. And in this regard, it is clearly established that federal copyright jurisdiction under 28 U.S.C.A. § 1338(a) does not extend to actions for infringement of common law copyright, so that in general such jurisdiction lies exclusively with the state courts. . . . Defendants argue that plaintiff's use of the word "publication," coupled with allegations of failure to pay royalties and infringement, indicates that the real substance of plaintiff's cause of action is a claim for statutory copyright infringement. This is not so. The term "publication" has significance equally as strong in the law of common law copyright as it does in the law of statutory copyright. The defendants here have not at all demonstrated that the plaintiff has lost its common law rights by publication or otherwise. Indeed, it appears that plaintiff's use of the word publication throughout its complaint only has reference to defendants' allegedly unauthorized publication in violation of plaintiff's common law right of first publication. Clearly, then, the mere use of the word publication, or indeed any other such term of art, cannot be determinative of the question of federal jurisdiction. By themselves, these words cannot be said to state a claim under the copyright statute. Right to recovery under the copyright act must be based upon allegations of compliance with its specific provisions. Obviously, there has been no such compliance here.

119. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, et al.*, 167 U.S.P.Q. 754 (S.D.N.Y., October 27, 1970) (Lasker, J.).

Motion by co-defendant Broadcast Music, Inc. (BMI) for preliminary injunction compelling royalty payments on counterclaim for copyright infringement in action for violation of the Sherman Antitrust Act. Plaintiff CBS brought suit under the Sherman Act, alleging that the refusal of the defendant performing rights societies — ASCAP and BMI — to grant it a “per use” license (payment only for music actually used) and their insistence on a “blanket” or “per program” basis comprised a misuse of copyright in violation of the antitrust laws. Although ASCAP and CBS entered into an interim license upon the expiration of prior agreements, CBS has continued to use music from the BMI repertoire without a BMI license.

Held, motion granted.

1. The court held that it had the power to grant the “unusual relief requested: a mandatory injunction requiring the plaintiff affirmatively to make payments to BMI *pendente lite*” because the “circumstances and equities of the case” and the public interest rendered it appropriate to do so. The court said:

Although BMI licenses the use of its music by many others than CBS, the income received by BMI from television usage of its music and in particular, from CBS, is an important portion of its revenue. Furthermore, the arrangements made between CBS and BMI constitute something of a bellwether for the terms of agreements between BMI and other broadcasters. Indeed, BMI contends that as an indirect result of CBS’s non-payments to date in 1970, BMI has been unable to consummate license agreements with other television networks. BMI and ASCAP are each other’s sole competitors of any consequence. ASCAP is a considerably older organization than BMI, deriving substantially more revenues from the television industry than BMI; and ASCAP is presently being paid for the broadcasting of its music by CBS and the other networks while BMI is not. It is impossible to measure with any degree of accuracy the extent to which this complex of factors puts ASCAP at a present advantage over BMI, but that it gives it some advantage, and perhaps a substantial one, is not to be doubted. It appears altogether inequitable to permit CBS to continue to use BMI music without making a fair payment *pendente lite* (especially considering the protracted nature of the instant litigation), while the networks continue to make large

payments to BMI's stronger competitor. It is true that CBS makes the important claim that BMI has misused its copyrights, but that contention is necessarily far from demonstrated at this early stage of the case and is presently insufficient to warrant the court's refusal to grant relief. . . .

The public, too, has an interest in the matter at hand. It is in the public interest, certainly, at this stage of the litigation, that BMI's viability as competitor of ASCAP not be weakened, and it is in the public interest to have the choice of listening to BMI music on CBS's many outlets.

2. BMI proposed that the CBS payments should be a stated percentage of the amount paid by CBS to ASCAP but the court found the evidence to be insufficient to justify this approach before trial. The court also rejected CBS' proposal that the fee be determined on a per-use basis since this would grant CBS substantially the relief demanded in the complaint. The court determined that the fee should be based upon the amounts paid by CBS to BMI under licence at the commencement of suit:

The proper remedy is to be measured by the office of a preliminary injunction itself; that is, to restore the parties to the status quo ante. There appears to be no more viable standard for the determination of a reasonable fee pendente lite than the fee in effect and actually paid by CBS to BMI at the commencement of the litigation. That fee (for the year 1969), the largest ever paid by CBS to BMI, was in the amount of \$1,607,000.

Accordingly, I hold that the reasonable fee which CBS shall pay to BMI, effective January 1, 1970, and during the pendency of the litigation, shall be at the rate of \$1,607,000 per annum.

The court offered the parties the opportunity to present evidence of changes of CBS' use of BMI music in 1970 which might warrant adjustment of the above amount.

3. The court held that, as a condition of the relief, BMI must grant CBS, pendente lite, a license to broadcast its repertoire. Although BMI argued that this condition would require it to relinquish its counterclaims for copyright infringement, the court said:

The short answer to BMI's contention is that the award of monetary relief pendente lite here can only be justified as being in lieu of claims for infringement. Furthermore, measured, as the entire award of relief must be, by the rationale for granting any pre-

liminary injunction, that is, to preserve the status quo, payments by CBS to BMI must be conditioned on the granting of a license to CBS, since, had CBS continued under prior circumstances to make payments to BMI, it would, of course, have received a license in exchange therefor. Indeed, it is difficult to understand what consideration CBS could be expected to have received if it were required to pay a reasonable fee *pendente lite* and remain exposed in full to claims for infringement until the final determination of the case.

Finally, it is important to note that BMI retains its option to accept the relief granted by this opinion on the conditions set forth or to withdraw its motion prior to the entry of a decree, require no fee from CBS *pendente lite*, and retain its full rights under the copyright statute. That is to say, this opinion is not to be construed as ordering BMI to grant a license to CBS, unless, of course, BMI should decide to accept the reasonable fee set by the court.

2. State Court Decisions

120. *Columbia Broadcasting System, Inc. v. Spies, d/b/a Tape - A - Tape Tape Sound Reproduction Company*, 167 U.S.P.Q. 492 (Ills. Cir. Ct. October 19, 1970) (Cohn, J.). *See also*, Item 121, *infra*.

Action for unfair competition and infringement of common law copyright. Defendant, without authority, made tapes by electronic transcription from plaintiff's sound recordings and sold such tapes to the public under a label which disclaimed any relationship between defendant and the original recording company or the recording artists and stated that no permission or license had been secured to produce the tapes. Plaintiff argued that the sale of its records did not comprise a publication of the performances embodied therein and that it therefore retained a common law copyright in such performances; that defendant was guilty of unfair competition by misappropriating the performances embodied in its recordings; that defendant's use of the names of the recording artists and titles of the performances as they appeared on plaintiff's records comprised unfair competition as likely to cause confusion of source; and that defendant's use of the names and likenesses of plaintiff's recording artists comprised unlawful interference with the exclusive recording contracts entered into between plaintiff and such artists. Defendant answered that the performances were in the public domain as a result of the public sale of plaintiff's records, that its label disclaimer obviated the likelihood of confusion, and that unfair competition relief was precluded under the *Sears* and *Compco* cases.

Held, judgment for plaintiff.

In a lengthy opinion (only briefly summarized here) containing an extensive review of the parties' arguments and proffered precedents the court held that plaintiff was entitled to an injunction restraining defendant from selling performances recorded by plaintiff pursuant to agreements with recording artists "with the artists rendering the recorded performance in the form of tape, record or other mechanical or electronic sound reproducing device or product." The court specified that the restraint should apply through the United States and its territorial possessions and should endure "with respect to each performance [for] a period of ten years from the date of the first broadcast, telecast or first sale of a recording manufactured by plaintiff of such performance."

1. *Common Law Copyright*: The court held that plaintiff's common law copyright claim was not persuasive because:

While the [Federal copyright] statute does not disturb the right of an author or proprietor of an unpublished work at common law or equity to prevent the copyright, publication or use of such unpublished work without his consent and to obtain damages therefor, (Section 2 Title 17 U.S.C.) it is eminently clear that the broadcast of the records manufactured by Plaintiff or the sale of those records constitutes a publication or public performance.

2. *Unfair Competition*: Noting that the defendant "has chosen to capitalize on the talent of performers and the plaintiff's establishment of good-will and vast expenditures for national advertising without paying any compensation whatsoever," the court found that plaintiff had established a meritorious claim for misappropriation under the theory of *International News Service v. The Associated Press*, 248 U.S. 215 (1918) which was not barred by *Sears and Compco*. The court said, in part:

Defendant's assertion of "no copyright act" or other prohibition against his activity is not persuasive. Plaintiff does not seek an injunction to prohibit Defendant from copying any or all of its recordings but seeks an injunction to prevent it from copying its recordings and then selling them based upon the goodwill for those very performers and recordings, which Plaintiff has established at great expense.

The purpose of the Copyright Law is to protect against both coincidental copying of the work of the author who brought forth his creation first as well as protection against the unscrupulous individual who would plagiarize or intentionally steal the ideas and

creations of another. The same is true of the patent law. However, the common law always has and always will protect against intentional and admitted outright theft of another's creation. The copyright law has not permitted such an intentional appropriation of the work product of another opening the path to such an unconscionable practice where the victim has not been able to copyright his work* or chosen so to do. The copyright law protects against copying whether done stealthily and dishonestly and avariciously or whether the result of happenstance and coincidence. . . . [The court next cited "cases holding that the expense, effort and talent of the artists involved entitle the owner of the exclusive right to reproduction and sale of the product of such efforts to equitable relief from competitive reproduction of the records resulting from such work effort and capital investment"].

Returning to the question of publication, the court continued:

Plaintiffs cite the case of *Martin Luther King, Jr. v. Mr. Maestro, Inc.*, 224 F.Supp. 101, 140 U.S.P.Q. 366 (U.S.D.C. N.Y. 1963). However, this and similar cases treating with what is a publication are not determinative of the question at bar. In the giving of a speech or the rendering of a musical performance before large audiences or via electronic media which transmit the sounds of voice or musical instruments throughout the length and breadth of the land, it defies reason and tortures the English language to say that under any circumstances such a knowing transmittal by the performer or by the creator of the words and/or music is not a publication. However, the question is not whether it is a publication but whether it is a dedication to the public of the sounds uttered or created or the words spoken. One may, as Dr. King did, speak and have distributed copies of his speech to gain the widest possible dissemination of his message espousing a social cause; however, when the use of his words is converted to an enterprise for profit on the part of one not authorized by him so to do, he is being unfairly and unjustly exploited by such person. Thus, in the instant case, the broadcast, telecast or sale of records by the plaintiff constitutes a publication of the sounds derived when the record is played; however, it is not in-

* The court had previously stated that "It appears clearly established, though somewhat difficult to accept, that the Supreme Court of the United States has refused to extend the protection of the copyright law to phonograph records [citing] *White-Smith Music Co. v. Apollo Company*, 209 U.S. 1 (1908)."

tended by any of the persons under contract with the Plaintiff or the Plaintiff itself that there is a dedication to the public of this work product to the extent that anyone may feel free to copy the same and compete for financial profit with those whose talent, skill, effort and capital investment have resulted in the production of such records. Such an obvious stealth of effort and talent cries out for censure and prohibition and the courts of equity historically have dealt with that which does violence to our fundamental principles of fairplay.

Responding to defendant's contention that its disclaimer precluded confusion the court said: "[Defendant's] bald admission of what he is doing no more insulates him from the plaintiff's action here than does the proclamation by a thief that he has committed a theft vitiate his criminal act."

The court also considered it "eminently clear" that defendant's activities interfered with "the contractual relationship and the rights as the authors of the music concerned. . . ."

121. *Capitol Records, Inc. v. Spies*, 167 USPQ 489 (Ills. App. Ct. October 22, 1970) McNamara, J.). See also, Item 120, supra.

Plaintiff's appeal from denial of motion for temporary injunction in action for unfair competition. Defendant, without authority, made tapes by electronic transcription from plaintiff's sound recordings and sold such tapes to the public under a label which disclaimed any relationship between defendant and the original recording company or the recording artists and stated that no permission or license had been secured to produce the tapes. The lower court held that, under the theory of *Sears and Compco*, it could not prohibit defendant from engaging in its activities.

Held, reversed and remanded with instructions to grant plaintiff's motion.

The court held that as defendant was appropriating plaintiff's product itself — the performances embodied in the recordings — rather than engaging in mere copying, *Sears and Compco* did not preclude relief under the misappropriation theory of *International News Service v. Associated Press*, 248 U.S. 215 (1918). The court said:

Cases decided subsequent to *Sears and Compco* have distinguished between the copying of an unpatented or uncopyrighted

product and the appropriation of another's property. . . . Several decisions subsequent to *Sears and Compco* in other jurisdictions have held that the activities precisely in issue in the instant case should be enjoined . . . Consequently we hold that the *Sears and Compco* decisions do not apply to the case at bar. The evidence reveals that Spies was not merely copying unpatented or uncopyrighted articles, but that he was actually taking and appropriating Capitol's product itself — the actual sounds recorded on the albums. Spies was thus relieved of the necessity of contracting with various performers so that he might produce a recording; he needed only to wait until a particular rendition produced by Capitol became popular and then was able to take advantage of the existing market. It seems evident that the Supreme Court in *Sears and Compco* did not intend to condone this form of unfair competition.

Although we have found no Illinois decision factually similar to the instant case, the rationale behind prohibiting certain forms of unfair competition has been enunciated.

3. Other Decisions of Interest

122. *Standard Industries, Inc. v. Tigrett Industries, Inc.*, 165 U.S.P.Q. 289 (U.S. Sup. Ct. April 20, 1970) (Per Curiam).

On writ of certiorari to the Sixth Circuit Court of Appeals to review judgment for plaintiff in action to recover royalties under a patent license. After the decision of the lower court (162 U.S.P.Q. 32) and its affirmance by the Sixth Circuit (162 U.S.P.Q. 13) the Supreme Court, in *Lear v. Adkins* (162 U.S.P.Q. 1), overruled its previously applied licensee-estoppel doctrine in patent law. In the proceedings below, defendant did not attack the validity of plaintiff's patent, apparently due to the pre-*Lear* state of the law. On certiorari, defendant sought to mount such an attack, but plaintiff asserted that the failure to raise the issue below precluded its consideration. The Court affirmed the judgments below by an equally divided court. Mr. Justice Black, joined by Mr. Justice Douglas, dissented:

The failure to assert invalidity below cannot, in these circumstances, be deemed a waiver of that defense. The Court has recognized that to be effective a waiver must be "an intentional relinquishment or abandonment of a known right or privilege," . . . and we have frequently allowed parties to raise issues for the first time

on appeal when there has been a significant change in the law since the trial . . . In deciding whether such new arguments can be considered, we have primarily considered three factors: first, whether there has been a material change in the law; second, whether assertion of the issue earlier would have been futile; and third, whether an important public interest is served by allowing consideration of the issue. It is clear to me that all these criteria are met in this case.

Undoubtedly, our decision in *Lear* was a major change in the field of patent law. The Court implicitly recognized this fact by overruling the estoppel holding in [*Automatic Radio Mfg. Co. v. Haseltine Research, Inc.* 85 U.S.P.Q. 378 (Sup. Ct. 1950)]. It is also clear that the trial court was satisfied that applicable law precluded the assertion of invalidity by patent licensees and thus earlier argument on the point would have been futile. Finally, and most importantly, an overriding public interest would be served by allowing petitioner to challenge the validity of this patent. Last Term we unanimously held that "the public's interest in the elimination of specious patents would be significantly prejudiced if the retroactive effect of [*Lear*] were limited in any way." *Lear*, supra. 162 U.S.P.Q. at 9-10, n. 19. I do not understand how today's decision can be reconciled with that statement. Although analytically this case may present a question of waiver and not retroactivity, the public interest which the Court felt required full retroactivity in *Lear* is an equally compelling reason for allowing petitioner's attack now in spite of the concessions below. I would vacate the judgments below and remand the case to the District Court for a determination of the validity of the patent in issue.

123. *Dekar Industries, Inc. v. The Bissett-Berman Corporation*, 168 U.S.P.Q. 71 (9th Cir. Nov. 19, 1970) (Koelsch, J.).

Appeal from order restraining defendant, *pendente lite*, from misusing alleged trade secrets in action for unfair competition and patent infringement. In affirming the injunction the court noted that certain of the defendants were found to have gained knowledge of the secrets in confidence and that the "Sears-Compco Rules [do not] prevent equitable relief for the misuse of trade secrets by those who are bound by a confidential relationship or by an express or implied agreement to maintain secrecy". In a footnote the court added "the same observation is valid with reference to [*Lear, Inc. v. Adkins*, 395 U.S. 653 (1969)]".

124. *Educational Sales Program, Inc. v. The Dreyfus Corporation*, N.Y. L.J. December 14, 1970 at 19 col. 2 (Sup. Ct. N.Y. Co. 1970) (Greenfield, J.).

Action for misappropriation of an idea. At a trade convention the president of plaintiff (herein plaintiff), a sales training and promotion enterprise, approached the president of defendant (herein defendant), the marketing arm of one of the largest mutual funds in the world, with an idea which he asked defendant to keep confidential and not to use if they could not reach agreement. Defendant agreed to these terms and plaintiff disclosed his idea of making tape players and cassettes bearing educational and promotional material, purchased from plaintiff, available to independent mutual fund salesmen. Defendant had previously experimented with tapes for use of its sales force, but was intrigued by the idea of going directly to independent salesmen via cassettes. The parties entered into protracted discussions and exchanged many memoranda discussing the idea and modifications thereof, but no written agreement was reached and all conduct between the parties was ultimately broken off. Defendant subsequently embarked on a tape program similar to that discussed and plaintiff brought this action for (i) fraud, (ii) breach of contract based upon an oral agreement to carry out the details of plaintiff's suggestions at a certain minimum price, (iii) a breach of agreement of confidentiality which prevented plaintiff from selling its program to others, and (iv) unjust enrichment by misappropriation of plaintiff's idea. The fraud claim was dismissed at trial and the breach of contract claim was dismissed upon special jury verdict that no agreement had resulted from the discussions. The court, in the instant opinion, dealt with the remaining causes of action [(iii) and (iv) above].

Held, judgment for defendant.

The court stated that both remaining causes of action turned on whether plaintiff's idea was "unique, novel and original . . . if it was not, it had no value as property, and would not suffice either as consideration for a promise of confidentiality, or as a basis for finding defendant was unjustly enriched." The court found that plaintiff's idea of using tapes as a vehicle of sales information did not meet this standard. The court said:

There can be no question but that after the rupture of negotiations between the parties, defendant proceeded on its own with a program that was similar in many respects. It was offering players and twelve monthly tape cassettes to independent mutual fund salesman under the name "Dreyfus Portable Sales Seminar" at a price

of sixty dollars, and the program content covered essentially the same topics as those suggested by plaintiff. While the use of tapes for education and sales training was known to the industry, and defendant had experimented itself on a limited basis, unquestionably it was the impetus of plaintiff's suggestion which galvanized it into action. While there were points of difference as to the way the program was promoted, the genesis of the defendant's ultimate actions was the proposal by plaintiff.

Defendant acted on plaintiff's idea. Plaintiff sues for theft of that idea. Does the use of that idea create the legal obligation of compensation? An idea is impalpable, intangible, incorporeal, yet it may be a stolen gem of great value, or mere dross of no value at all, depending on its novelty and uniqueness. Its utility is not the test. An idea may be regarded as useful, and worth putting into execution, even though the imparting of it gives no claim for recovery to its originator. . . . Not every "good idea" is a legally protectible idea. A sensible suggestion must have more to it than good sense to be compensable. Its adoption may be the occasion for gratitude or the voluntary bestowal of tangible reward, but that does not of itself call into play legal compulsion.

Nothing is bestowed if the facts of a "secret" imparted in confidence are already the subject of general knowledge. . . . Under those circumstances the promise of compensation or confidentiality, even though undoubtedly made, is without consideration. . . . An agreement premised on the disclosure of a secret is a blind deal. When the purveyor of that secret exacts a promise of confidentiality, he knows what he is dealing with, but the recipient is in the dark. The enforceability of such threshold agreement — a promise in exchange for a revelation — turns on the value of the disclosure. To paraphrase Holmes, J. in *E. I. DuPont de Nemours v. Masland*, 244 U.S. 100, 102, while the confidence cannot be denied, its worth as property can be. If the idea is of such a nature, its worth as property can be. If the idea is of such a nature that it cannot be appropriated by a party, it cannot be misappropriated by another. One cannot be forever barred from using a worthwhile but unoriginal idea merely because it was once asked to be treated in confidence.

Was plaintiff's idea here of such originality as to be deemed to be property of a value sufficient to constitute consideration for a promise not to use it without consideration? Was it so uniquely plaintiff's creation that its use without payment can be labeled as the theft of an idea? The fact that the basic idea was simple — using

tape for sales training and indoctrination — does not negate its value, for truly great ideas, like the wheel or the safety pin, can be stunning in their simplicity. Taking a page from the patent law dealing with the property right in inventions, the idea need not reflect the “flash of genius”, but it must show genuine novelty and invention, and not a merely clever or useful adaptation of existing knowledge. . . . Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions — all the variations on a basic theme — partake more of the nature of elaboration and renovation than of innovation. . . .

Concededly, there was nothing new in the idea of using tape or tape cassettes to carry a sales message or a wealth of repeatable information. It had been done in many fields, and even in the mutual funds field, though no prior efforts quite fit the bill. Nor was there anything unique about putting the material, which was not only educational but promotional and self-laudatory, directly into the hands of the independent salesmen. While plaintiff insisted that was the truly unique aspect of its plan — bypassing the middle-men, the broker-dealer organizations — and that was one aspect the defendant found attractive — putting the sales message on a convenient tape cassette and offering it at an attractive price not for immediate profit but for long-range institutional advertising, was no more than a clever sales “gimmick,” useful, appealing but hardly of dazzling originality. The topics to be covered, the content, the media for promotion, and the marketing plan (six-month trial subscriptions, a cassette a month with player “free”, quantity discounts, etc.) were natural outgrowths of existing factual patterns, with no element of novelty.

Plaintiff pointed to defendant's own promotional references to its cassette program as “an exciting new development” and a “unique program” but the court held that this “traditional puffery of advertising jargon” could not determine the legal issue:

Just as the language of the sailor is punctuated by pithy expletives, so the language of the salesman is studded with superlatives and hyperbole. But what is ‘unique’ in advertising need not be regarded as such in the law. The medium alters the message.

Plaintiff also emphasized the protracted nature of the negotiations and the details of presentation and marketing discussed therein, but the court noted:

The fact that the parties had extended negotiations does not fortify plaintiff's claim for the value of its idea. The details of presentation and marketing changed considerably from September to November. Clearly it was quite malleable and not in such concrete form as to indicate a protectible idea. 'Ideas not reduced to concrete form are not protected.'

The court found there was no evidence that defendant was "appreciably and unjustly" enriched or that plaintiff was deprived of the opportunity to promote its program elsewhere and concluded: "Plaintiff's claim appears to have been conceived in hope, born out of disappointment, and nurtured in labored elaboration, but it must die aborning."

125. *Leopold v. Levin*, 259 N.E.2d 250 (Ills. Sup. Ct., May 27, 1970) (Ward, J.).

Appeal from summary judgment for defendant in action for invasion of privacy. In 1924 Richard Loeb (deceased) and defendant pleaded guilty to the kidnapping and murder of a fourteen-year-old boy in a case which became a "historical cause célèbre". In 1956 the novel "Compulsion", authored by a defendant, was first published. The "basic framework" of the novel and a motion picture subsequently produced therefrom in 1959 was "factually provided" by the Leopold-Loeb crime, the events leading to their capture and their prosecution. However, all names in the novel and movie were fictitious and the court credited the author's foreword to the novel, which stated:

"Though the action is taken from reality, it must be recognized that thoughts and emotions described in the characters come from within the author, as he imagines them to belong to the personages in the case he has chosen." And, "I follow known events. Some scenes are, however, total interpolations, and some of my personages have no correspondence to persons in the case in question. This will be recognized as the method of the historical novel. I suppose Compulsion may be called a contemporary historical novel or a documentary novel, as distinguished from a *roman à clef*. [That is, a novel drawing upon actual occurrences or real persons under the guise of fiction.]"

Plaintiff's name was, however, used in advertising the novel and film.

Plaintiff, acknowledging that a documentary account of the case would be constitutionally protected from challenge as would a "com-

pletely fictional work inspired by the case if matters such as locale would be changed and if there would be no promotional identification with plaintiff", sued the author, publisher and distributors of the novel and play on the grounds that constitutional guarantees did not extend to an invasion of privacy through commercial exploitation of plaintiff's name, likeness and personality in "knowingly fictionalized accounts" of his life and through the use of his name in promotional materials. The court, however, affirmed the trial court's judgment for defendant on the grounds of the public interest and "enduring public attention" to the case and plaintiff's continuing status as a public figure. The court said:

While the question of a right of privacy has not until now been considered by this court, such a right has been recognized in other courts of this State. . . . A right of privacy has been recognized in more than 30 States in addition to the District of Columbia. . . .

The dimensions of the right in Illinois have thus far been conservatively interpreted under the appellate courts' decisions. . . .

We agree that there should be recognition of a right of privacy, a right many years ago described in a limited fashion by Judge Cooley with utter simplicity as the right "to be let alone." Privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law. However, we must hold here that the plaintiff did not have a legally protected right of privacy.

In *Time, Inc. v. Hill* [385 U.S. 374], the Supreme Court for the first time had occasion to consider directly the effect of the constitutional guarantees for speech and press upon the rights of privacy. There . . . the right of privacy when involved with the publication of a matter of public interest was viewed narrowly and cautiously by the court. That decisional attitude toward publication is consistent with other first amendment holdings of the court in recent years, especially in the areas of libel and obscenity, where the announced objective was to insure "uninhibited, robust and wide-open" discussion of legitimate public issues or to protect published materials unless they are "utterly without redeeming social value." . . .

It is of importance here, too, that the plaintiff became and remained a public figure because of his criminal conduct in 1924. No right of privacy attached to matters associated with his participation in that completely publicized crime. . . . The circumstances of the crime and the prosecution etched a deep public impression which the passing of time did not extinguish. A strong curiosity and social and news interest in the crime, the prosecution, and Leopold re-

mained. . . . It is of some relevance, too, in this consideration, that the plaintiff himself certainly did not appear to seek retirement from public attention. The publication of the autobiographical story and other writings and his providing interviews unquestionably contributed to the continuing public interest in him and the crime. Having encouraged public attention " 'he cannot at his whim withdraw the events of his life from public scrutiny.' " *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 258.

A carefully narrowed argument of the plaintiff appears to be that the defendants through "knowingly fictionalized accounts" caused the public to identify the plaintiff with inventions or fictionalized episodes in the book and motion picture which were so offensive and unwarranted as to "outrage the community's notions of decency." . . . However, the core of the novel and film and their dominating subjects were a part of the plaintiff's life which he had caused to be placed in public view. The novel and film were derived from the notorious crime, a matter of public record and interest, in which the plaintiff had been a central figure. Further, as the trial court appeared to do, we consider that the fictionalized aspects of the book and motion picture were reasonably comparable to, or conceivable from facts of record from which they were drawn, or minor in offensiveness when viewed in the light of such facts. *Sidis* upon which the plaintiff bottomed this argument of outraging "the community's notions of decency," involved the publishing of a "profile" of a one-time prodigy. A magazine article disclosed his undistinguished achievement as an adult and described some of his eccentricities. The court held the publication proper but in a dictum observed: "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." Even if one were to accept the validity of the dictum for the purpose of discussing it, the genesis of the fictionalized episodes in "Compulsion," as we have observed, can be traced in a substantial way to the exposed conduct of Leopold. Argument that the community's notions of decency were outraged here must be regarded as fanciful.

The contention that a right of privacy was violated by an appropriation, without consent, of the plaintiff's name and likeness for the commercial gain of the defendants through their advertisements must also fail. . . . The reference to the plaintiff in the advertising material concerned the notorious crime to which he had pleaded guilty. His participation was a matter of public and, even,

of historical record. That conduct was without benefit of privacy. It is clear that *Time, Inc. [v. Hill]* involved a situation essentially dissimilar from the one here. The case involved what was claimed to be a false but purportedly factual account of the Hill incident. Here, the motion picture, play and novel, while "suggested" by the crime of the plaintiff, were evidently fictional and dramatized materials and they were not represented to be otherwise. They were substantally creative works of fiction and would not be subject to the "knowing or reckless falsity" or actual malice standards discussed in *Time, Inc. v. Hill*, where the court considered an untrue but supposedly factual magazine account. . . .

Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, which is offered as authority by the plaintiff, is basically irrelevant to the questions posed by "Compulsion." There, a publication which was offered as a biography of Warren Spahn, the well known baseball pitcher, contained much false material concerning his private life. A judgment under the New York privacy statute in favor of Spahn, a public figure, was upheld and the case was apparently settled, though the Supreme Court had noted "probable jurisdiction" and placed the case on its summary calendar. It is unnecessary to consider the validity of the holding because of the clear dissimilarity between "Compulsion" and a biography of Spahn.

126. *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. Feb. 24, 1969) (Wright, J.), cert. denied 89 Sup. Ct. 2021 (June 9, 1969).

This is an action brought by Senator Thomas Dodd against the late newspaper columnist Drew Pearson and his associate Jack Anderson arising out of the columnists' articles exposing alleged mis-deeds of plaintiff. Two former employees of plaintiff, at times assisted by members of plaintiff's staff, removed certain documents from plaintiff's Senate office files, copied them, returned the originals and delivered the copies to defendants who published their articles containing information derived therefrom. The articles discussed plaintiff's relationship with certain lobbyists and "gave an interpretative biographical sketch of [plaintiff's] public career." Plaintiff brought suit for invasion of privacy, conversion and libel (the latter claim being abandoned below) and secured summary judgment for liability on conversion.

Summary judgment on the privacy claim was denied. On defendants' appeal the court held: denial of summary judgment for invasion of privacy affirmed; summary judgment for plaintiff on conversion reversed.

1. *Invasion of Privacy by Publication*: The court held that as defendants' columns bore directly on plaintiff's qualifications as a U.S. Senator they were of general public interest and hence comprised a "paradigm example of published speech not subject to suit for invasion of privacy".

2. *Invasion of Privacy by Intrusion*: The court approved the theory that an action might lie for improper "intrusions" into one's privacy without the results of such invasions being communicated. However, the court declined to impose tort liability on defendants under this theory as they had not themselves engaged in the actual intrusions. The court said:

Appellee proceeds under a branch of privacy theory which Dean Prosser has labeled "intrusion," and which has been increasingly recognized by courts and commentators in recent years. Thus it has been held that unauthorized bugging of a dwelling, tapping a telephone, snooping through windows, and overzealous shadowing amount to invasions of privacy, whether or not accompanied by trespasses to property.

Unlike other types of invasion of privacy, intrusion does not involve as one of its essential elements the publication of the information obtained. The tort is completed with the obtaining of the information by improperly intrusive means.

"Intrusion" has not been either recognized or rejected as a tort in the District of Columbia. It has been recognized by a number of state courts.

We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should "protect people, not places." . . . [We] may assume, without deciding, that [plaintiff's] employees and former employees did commit such an improper intrusion when they removed confidential files with the intent to show them to unauthorized outsiders.

Although [plaintiff's] complaint charges that [defendants] aided and abetted in the removal of the documents, the undisputed facts,

narrowed by the District Judge with the concurrence of counsel, established only that [defendants] received copies of the documents knowing that they had been removed without authorization. If we were to hold [defendants] liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens. [The court then noted that defendants' acts of privileged publication could not "reach back" to render them liable for the analytically separate charge of intrusion].

3. *Conversion*: The court held that since (i) the physical documents taken from plaintiff's files were returned thereto and plaintiff was not substantially deprived of their use; and (ii) the "information" obtained from such materials did not comprise "property", the tort of conversion was not established. On the latter point the court said:

It has long been recognized that documents often have value above and beyond that springing from their physical possession. They may embody information or ideas whose economic value depends in part or in whole upon being kept secret. The question then arises whether the information taken by means of copying appellee's office files is of the type which the law of conversion protects. The general rule has been that ideas or information are not subject to legal protection, but the law has developed exceptions to this rule. Where information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property. Where ideas are formulated with labor and inventive genius, as in the case of literary works or scientific researches, they are protected. Where they constitute instruments of fair and effective commercial competition, those who develop them may gather their fruits under the protection of the law.

The question here is not whether appellee had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not. The in-

formation included the contents of letters to appellee from supplicants, and office records of other kinds, the nature of which is not fully revealed by the record. Insofar as we can tell, none of it amounts to literary property, to scientific invention, or to secret plans formulated by appellee for the conduct of commerce. Nor does it appear to be information held in any way for sale by appellee, analogous to the fresh news copy produced by a wire service.

4. In a footnote the court noted, but did not pass upon, defendants' assertion that the intruders committed no legal wrong because their actions were privileged by public policy in favor of exposing misconduct. The court referred to Restatement (Second) Agency § 395 Comment (f) (1958) (Agent's privilege to disclose confidential information in the protection of a "superior interest") and Code of Ethics for Government Service, House Doc. No. 103, 86th Cong. 1st. Sess. (1958): "Any person in government service should . . . (IX) expose corruption wherever discovered".

In another footnote, the court raised the issue of the nature of plaintiff's rights in the contents of his Senate office files. Although declining to decide the issue as it had not been briefed, the court noted:

Those files, themselves paid for by the United States, are maintained in an office owned by the United States, by employees of the United States. They are meant to contribute to the work of appellee as an officer of the United States. The question thus is not entirely free from doubt whether appellee has title to the contents of the files or has a right of exclusive possession of those contents, or is a bailee, or even a mere custodian of those contents.

5. Judge Tamm, concurring, stated:

Some legal scholars will see in the majority opinion — as distinguished from its actual holding — an ironic aspect. Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press. There is an anomaly lurking in this situation: the news media regard themselves as quasi-public institutions yet they demand immunity from the restraints which they vigorously demand be placed on government. That which is regarded as a mortal taint on information secured by any illegal conduct of

government would appear from the majority opinion to be permissible as a technique or *modus operandi* for the journalist. Some will find this confusing, but I am not free to act on my own views under the doctrine of *stare decisis* which I consider binding upon me.

I concur, therefore, in Judge Wright's disposition of this case albeit I have some difficulty in concluding that the appellee would be without legal remedy if the entire factual situation herein were before us on pleadings encompassing all possible legal aspects suggested by the facts.

127. *O'Hara v. Gardner Advertising, Inc.*, 300 N.Y.S. 2d 441, 32 A.D. 2d 632 (N.Y. Sup. Ct. App. Div. 1st Dept. May 22, 1969) (Per Curiam). For decision below, see N.Y.L.J. July 3, 1967 at 10, col. 8 (Sup. Ct. N.Y. Co. 1967), 15 BULL. CR. SOC. 188, Item 121 (1967).

Appeal from order denying defendant's motion for summary judgment in action for unfair competition. Plaintiff, a former television "weather girl" who had customarily concluded her weather reports with the expression "Have A Happy", charged defendant with misappropriation and confusion of sponsorship in its use of the soft drink advertising slogan "Have A Happy No Cal (and never add a pound)". Although the lower court doubted that the words at issue had acquired an associative significance with plaintiff, it denied defendant's motion for summary judgment on the grounds that this comprised a triable issue of fact.

Held, reversed and complaint dismissed.

The court noted that plaintiff had no "property right" in the phrase "Have A Happy", quoting the language of *Ball v. United Artists Corp.*, 13 A.D. 2d 133, 137 (1st Dept. 1961):

Disassociated with the subject thereof, whatever it may be, a title or name composed of ordinary words cannot acquire the status of property. So disassociated, it becomes merely words; and all words of our language are in the public domain. All who speak or write have an inherent right to use any and all words in the English language or any combination thereof for any legitimate purpose.

The court found that although plaintiff had sufficiently *pleaded* a cause of action for unfair competition, her complete failure to present proof of evidentiary facts, showing a triable issue of fact was, in face of defendant's *prima facie* showing of the lack of merit of her claim, fatal:

She has not factually demonstrated that the bare words in the phrase used by her have achieved a secondary meaning so that actual confusion resulted, nor is there any showing that defendant's use of these words was intended to confuse or deceive the public, or that there was a connection between plaintiff's activities and defendants' No-Cal beverages and, further, she has not shown any actual injury.

128. *Bouton v. World Publishing Company*, N.Y.L.J. December 11, 1970 at 18 col. 2 (N.Y. Sup. Ct. N.Y. Co. 1970) (Ross, J.).

Action for breach of contract. Plaintiffs are the authors of a book entitled "Ball Four". The book is an account of the athletic career of co-plaintiff Jim Bouton, a former major league baseball pitcher. Plaintiffs' contract with defendant publisher World provided that "the first publication [of Ball Four] shall be in hardcover edition and the publisher may publish a softcover edition not earlier than one year, nor later than two years, after the hardcover edition." The agreement also provided that it could not be modified other than by a written instrument. No such writing was executed. The hardcover edition of Ball Four was first published on June 19, 1970 and, after World entered into an agreement with co-defendant Dell Publishing Co. for publication of a softcover edition on or about March 1, 1971 in violation of the agreement, plaintiffs brought this action to restrain softcover publication until June 19, 1971 and moved for a preliminary injunction against such publication *pendente lite*.

Held, motion granted.

1. Plaintiffs asserted that it was a "well-known fact of publishing life" that hardcover sales virtually vanish after publication of a softcover edition. Defendants did not deny this fact and the court considered it proven for the purpose of the motion. The court therefore found that plaintiffs would be irreparably damaged by reason of the loss of royalties on hardcover sales which would be replaced by premature softcover sales. The court said:

If defendants are allowed to proceed with their threatened violation of plaintiffs' rights under the clear and unambiguous language of the agreement, plaintiffs' damage will be difficult, if not impossible to compute, as there is no easy method of comparison of the condition in which the hardcover edition is offered for sale without the softcover edition being offered and the condition in which the two editions are offered in competition with each other. Therefore defendants should be held specifically to the terms of the

agreement and not be allowed to violate the agreement by willingness to pay for the privilege of doing so . . .

2. Defendants alleged that plaintiffs were maintaining this action to "harass" defendants and "coerce" them into giving in on certain "other demands" * and that plaintiffs orally agreed to early softcover publication but withdrew such consent as a result of defendants' failure to accede to such demands. Finding this to amount to a charge of unclean hands, the court held it lacking in merit since (i) the alleged oral consent was without effect in view of the requirement of written modification of the agreement; (ii) plaintiffs were seeking to enforce their contractual rights and "therefore . . . cannot be said to be coming into court with unclean hands . . ."; and (iii) "the doctrine of unclean hands cannot be applied in relation to the 'other [demands]' . . . as that doctrine only applies to some misconduct in regard to the particular transaction under consideration."

3. Co-defendant Dell claimed that it was not liable to injunctive relief as it was not in contractual privity with plaintiffs but the court considered it "well-settled" that a plaintiff might secure injunctive relief to prevent damage to contract rights against a party "with whom such plaintiff has no direct contractual relationship."

Alluding to the subject matter of the book in issue, the court concluded:

... plaintiffs' deliveries upon this motion are untainted, and that defendants' attempts to refute them on foul grounds, and finally [sic.] fan the breeze. As to defendants' efforts, during the pendency of this action, to publish in advance of the expiration of the period provided by the agreement, a softcover edition of "Ball Four," the court calls "Strike Three."

* Such "demands" were unspecified except for plaintiffs' allegedly seeking increased remuneration for promotional trips.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

129. DUGGAN, MICHAEL A. Law, logic, and the computer: bibliography with assorted background material. Austin, Bureau of Business Research, University of Texas [1970] 1 v. (various pagings) (Reprint series in economics and business, no. 18.)

"Reprinted by permission from *Computing Reviews*, vol. 7, no. 1 (Jan.-Feb. 1966), vol. 8, no. 2 (Mar.-Apr. 1967), vol. 11, no. 4 (April 1970)." Includes works dealing with copyright problems.

130. International Music Industry Conference. *2d, Palma, Mallorca, April 26-May 2, 1970.*

The music industry: markets and methods for the 70's; creative, technological, financial and legal reports, compiled by Billboard. New York, Billboard Publications [1970] 324 p.

Includes reports on transshipping records, copyrights and artists in the Common Market, income from performing rights, mechanical rights, and sheet music in Europe, copyright licensing, prospects for copyright revision in the international sphere and in the United States, legal developments, piracy of recordings and home dubbing; and the text of an international anti-piracy resolution which was "overwhelmingly approved" at the closing plenary session of the Conference.

131. JOHNSON, LELAND L. Cable television and the question of protecting local broadcasting. Santa Monica, Calif., Rand, Oct. 1970. 27 p. (R-595-MF.) A report prepared under a grant from the John and Mary R. Markle Foundation.

A critical report on the regulatory policy of the Federal Communications Commission in respect to cable television, with the aim of "sketch[ing] out public policies that would provide a satisfactory

basis for substantial cable penetration of major urban markets, without seriously harming over-the-air broadcasting."

132. PARK, ROLLA EDWARD. Potential impact of cable growth on television broadcasting. Santa Monica, Calif., Rand, Oct. 1970. 80 p. (R-587-FF.) A report prepared under a grant from the Ford Foundation.

A study which estimates the dimensions of the threat to over-the-air television broadcasting posed by cable television, using statistical techniques, "the elements of a model describing how the audience divides its viewing among available signals, and relationships between audience and revenue and between revenue and programming. These pieces are put together in a comprehensive computerized model, which is used to estimate in detail the potential impact of cable on broadcasting."

133. PISAR, SAMUEL. Coexistence and commerce; guidelines for transactions between East and West. New York, McGraw-Hill Book Co. [1970] 558 p.

The first part of this work, which "deals with the complex ideological, political, strategic, economic and commercial factors at work and seeks to identify the basic obstacles to business activity between free enterprise and state enterprise countries," includes a very informative chapter entitled, "East-West copyright relations" (pp. 356-378).

134. Practising Law Institute, *New York*. Current developments in CATV. Robert A. Dreyer, chairman. New York [1970] 256 p. (*Its* Patent, copyright, trademark and literary property. Course handbook series, no. 16.)

Contents: 1. Cable television and copyright, by Barbara A. Ringer. 2. Contractual arrangements for a new CATV system, by Jay E. Ricks. 3. Buying the system: acquisition problems, by Charles C. Woodard, Jr. 4. Going public: the investment banking relationship, by Richard W. Kreshner. 5. The cable television industry's view of a regulatory intermix, by Gary I. Christensen. 6. The authority and role of state government in CATV regulation, by Archie Smith. 7. CATV regulation: the State point of view

(Los Angeles), by Reese H. Taylor, Jr. 8. The local point of view, by Bernard J. Ruggieri. 9. The case for State regulation of CATV distribution systems, by Reese H. Taylor, Jr. — A Connecticut statute.

135. United Nations. Secretary-General, 1961 (Thant). The application of computer technology for development; report. [New York?] May 20, 1970. 1 v. (United Nations. [Document] E/4800.)

At head of title: United Nations. Economic and Social Council. Forty-ninth session, agenda item 15.

"The present report comprises two main parts. Part one discusses programmes for developing countries while part two deals with caveats, barriers and incentives with respect to computer technology for development." Part two includes a chapter on patents, copyrights, customs regulations, and standards.

2. Foreign Publications

1. In Dutch

136. KOMEN, A., and D. W. F. VERKADE. *Compendium van het auteursrecht*. Deventer, Kluwer, 1970. 175 p.

A manual on the Netherlands copyright law.

2. In French

137. FRANCON, ANDRE. *La propriété littéraire et artistique*. Paris, Presses Universitaires de France, 1970. 126 p. (Que sais-je? No. 1388.)

A manual divided into four chapters, the first three of which present an analysis of the French copyright law of 1957, and the fourth, a brief account of the international law of copyright.

138. GAUTREAU, MICHEL. *La musique et les musiciens en droit privé français contemporain*. Préf. de Gérard Cornu. [1. éd.] Paris, Presses universitaires de France, 1970. 372 p.

A comprehensive study of the legal status of composers and performers of music under French laws, originally presented as the author's thesis, Poitiers.

3. In German

139. FROMM, FRIEDRICH KARL, and WILHELM NORDEMAN. Urheberrecht. Kommentar zum Urheberrechtsgesetz und zum Wahrnehmungsgesetz, mit den internationalen Abkommen und den Urheberrechtsgesetzen der DDR, Österreichs und der Schweiz. 2. durchgesehene und ergänzte Auflage. Stuttgart, Kohlhammer, 1970. 538 p.

A revised edition of a work first published in 1966, which includes an article-by-article commentary on the West German copyright laws. Appendices contain the texts of related laws and regulations, of East German, Austrian and Swiss copyright laws, those of the Universal Copyright Convention, the Brussels and Stockholm revisions of the Berne Convention, and several other pertinent international agreements.

140. KATZENBERGER, PAUL. Das Folgerecht im deutschen und ausländischen Urheberrecht. München, C. H. Beck, 1970. 133 p. (Urheberrechtliche Abhandlungen, Heft 10).

A study of legal problems raised by article 26, the *droit de suite* provision of the copyright law of the German Federal Republic, and a discussion of the historical, doctrinal, and constitutional aspects of the provision, followed by a comparative study of foreign laws as a possible solution to the problems.

4. In Italian

141. PADELLARO, GIUSEPPE. Lezioni di diritto d'autore. Ad uso degli studenti. 2. ed. riveduta ed ampliata. Napoli, Lib. scientifica, [1969]. 130 p.

A revised and enlarged edition of a textbook on Italian copyright law designed for student use. The text of the Universal Copyright Convention has been included.

5. In Italian and French

142. GALTIERI, GINO. Il regime amministrativo de diritto di autore in Italia. Le régime administratif du droit d'auteur en Italie. Berlin, F. Vahlen [1970] 101 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 43).

A study, in Italian and French, of the administrative system of the current and previous copyright laws in Italy.

B. LAW REVIEW ARTICLES

1. United States

143. BARNETT, HAROLD J., and EDWARD GREENBERG. Regulating CATV systems: an analysis of FCC policy and an alternative. (34 *Law and Contemporary Problems* 562-585, no. 3, Summer, 1969.)

"Communications, part II." A review and appraisal of FCC regulatory behavior with respect to CATV and an offer of recommendations for revision.

144. BOTEIN, MICHAEL. CATV regulation: a jumble of jurisdictions. (45 *New York University Law Review* 816-843, no. 4, Oct. 1970.)

"The community antenna television (CATV) industry is rapidly becoming a major element of the communications media. Unfortunately, attempts to regulate the industry have not kept pace. Local, state and federal authorities were slow to recognize the need for CATV regulation and, when they finally entered the field, their efforts were uncoordinated and inadequate. But, recent activity in the field by city and state authorities, the Federal Communications Commission and the Congress signals the emergence of a multi-jurisdictional system of CATV regulation. The author describes this system and suggests improvements that will encourage CATV to realize its full potential."

145. BREYER, STEPHEN. The uneasy case for copyright: a study of copyright in books, photocopies, and computer programs. (84 *Harvard Law Review* 281-351, no. 2, Dec. 1970.)

"Congress is currently considering the first major revision of the Copyright Act of 1909. Professor Breyer examines the moral and economic rationale for copyright in books. He goes on to consider proposals that would lengthen the term of protection and increase its scope in relation to photocopies and computer programs. On the basis of existing evidence he is unable to conclude that copyright should be abolished, but he argues that its extension is unnecessary and would be harmful."

146. CELLER, EMANUEL. Whither copyright? (164 *New York Law Journal* 1, cols. 4-5; 4, cols. 1-2, no. 81, Oct. 26, 1970.)

An article based on an address delivered by the chairman of the House Judiciary Committee on October 16 before the Copy-

right Luncheon Circle in New York. Mr. Celler reviewed the main features of the general revision bill which passed the House on April 12, 1967, questioned whether the inclusion of Titles II and III and a number of new and controversial provisions in the Committee Print of S. 543 as approved by the Senate Subcommittee, particularly those dealing with CATV, served "to help or hinder the dispositive consideration of the revision bill," expressed confidence in the enactment of a new law during the next session, and concluded, that "another extension is imperative" partly because it "has become a central symbol of the entire copyright law revision project."

147. Copyright — works for hire — common law copyright in lectures vests with professor rather than with university. (45 *New York University Law Review* 595-608, no. 3, May 1970.)

A case note on *Williams v. Weisser*, 273 A.C.A. 807, 78 Cal. Rptr. 542, 17 BULL. CR. SOC. 55, Item 14 (1969).

148. GOLDSTEIN, PAUL. Copyright and the first amendment. (70 *Columbia Law Review* 983-1057, no. 6, June 1970.)

"This article will assess the extent to which copyright's statutory and enterprise monopolies presently conflict with the first amendment and will identify methods for reconciling the competing interests involved in these conflicts."

149. KNOWLES, CLAYTON P., JR. Who's afraid of CATV? (16 *New York Law Forum* 187-231, no. 1, Spring 1970.)

An examination of FCC's rules for CATV, present and proposed, directed toward the question of what regulation of CATV, if any, is in the public interest. "In particular, CATV regulation will be scrutinized in order to determine whether the public interest is being 'ignored in order to defend old institutions from new technology.'"

150. Licenses — enforceability — royalty provisions in know-how licensing held unenforceable. (84 *Harvard Law Review* 477-484, no. 2, Dec. 1970.)

A case note critical of the decision in *Painton & Co. v. Bourne, Inc.*, 309 F.Supp. 271 (S.D.N.Y. 1970) wherein the court relied on the *Lear* holding that royalty payments could not be compelled on

a patent license after the patent was invalidated, and applied the doctrine to the licensing or sales of know-how or trade secrets.

151. MACLEAN, ANN W. Education and copyright law: an analysis of the amended copyright revision bill and proposals for statutory licensing and a clearinghouse system. (56 *Virginia Law Review* 664-689, no. 4, May 1970.)

"This Note [which has been entered in the Nathan Burkan Memorial' Competition] will examine the effects upon education of the latest Copyright Revision Bill, as amended and reported out of the Senate Judiciary Committee [sic] on December 10, 1969. It will conclude by proposing a statutory scheme for compulsory licensing and a clearinghouse system that would guarantee educators the right of access to all copyrighted materials and at the same time protect the legitimate interests of copyright owners."

152. MCFARLANE, GAVIN. Legal protection of computer programs. (*The Journal of Business Law* 204-208, July 1970.)

Largely confined to a discussion of whether copyright can exist in a computer program under the U.K. Copyright Act of 1956 as that statute now stands or under the Berne and Universal Copyright Conventions.

153. MULLALLY, DONALD P. CATV: where do we grow from here? (58 *Illinois Bar Journal* 954-961, no. 12, Aug. 1970.)

"A look at some of the issues which should be raised when CATV is being introduced and franchises are being negotiated," with a number of ideas the "thinking counselor should be able to suggest" which might become part of the franchise agreement.

154. NIMMER, MELVILLE B. Does copyright abridge the first amendment guarantees of free speech and press? (17 *UCLA Law Review* 1180-1204, no. 6, June 1970.)

"This article was adapted from the inaugural Donald C. Brace Memorial Lecture delivered before the Copyright Society of the U.S.A. in New York City on March 16, 1970, and published in its *Bulletin*, vol. 17, no. 4 (Apr. 1970), Item 109, pp. 255-279, under the title Copyright vs. the first amendment."

155. Regulation of community antenna television. (70 *Columbia Law Review* 837-875, no. 5, May 1970.)

"This Note will examine the existing structure and potential scope of CATV with a view to pointing out present shortcomings in the regulatory pattern of this expanding enterprise. While the ultimate in regulation is probably neither wise at this stage of CATV's development nor authorized by present legislation, it will be suggested that the FCC could use existing controls over common carriers by wire to afford more comprehensive regulation in the public interest."

156. SPIRER, JULIAN H. Copyright — Application of South African compulsory licensing provision to Americans — Copyright Tribunal must use domestic standard to determine reasonableness of American authors' refusal to grant performance licenses as protest against apartheid. (11 *Harvard International Law Journal* 565-578, no. 2, Spring 1970.)

A critical note on a 1969 decision of the South African Copyright Tribunal in the case of *In re Johannesburg Operatic and Dramatic Society v. Music Theatre International*, Patent J., Mar. 1969, at 223, 17 BULL. CR. SOC. 63, Item 17 (Oct. 1969). One of the conclusions reached is that "[i]t appears as though any political thrust against the system of apartheid will be met by an effective politico-legal response, which is not conditioned by any obligation of a supranational nature which might otherwise color a national legal system's reaction to the introduction of foreign persons or things into its legal ambit."

157. STRAUSS, LEO, JR. Foreign income in the music industry. (3 *The Vanderbilt International* 90-98, no. 2, Spring 1970.)

A discussion of various aspects of international dealings by the United States record and music publishing industries.

158. STRODE, JOSEPH A. A clarification of indivisibility of copyright. (24 *Southwestern Law Journal* 711-717, no. 4 (Oct. 1970).

A critical note on the decision in *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

159. VERRILL, CHARLES O., JR. CATV's emerging role: cablecaster or common carrier? (34 *Law and Contemporary Problems* 586-609, no. 3, Summer, 1969.)

"This article describes the forces that compelled the FCC, after an initial disclaimer of authority, to take jurisdiction over CATV and illustrates the enormous difficulties an administrative agency faces in the necessary application of old legislative tools and procedures to rapidly developing technology, particularly where an agency stepchild — here the UHF broadcast system — is threatened."

2. Foreign

1. In English

160. BOYTHA, GYÖRGY. Some borderline problems of copyright with special regard to the protection of industrial property and the law of competition. (11 *Acta Juridica Academiae Scientiarum Hungaricae* 267-293, nos. 3-4, 1969.)

A study, "with a view to contribute a solution," of the following principal borderline problems: classification of industrial or ornamental design; protection of computer programs; the segregation of the protection to be extended to the exploiters of intellectual products in trade and industry from the protection of the copyright of the author himself; and, "the question of the social recognition of scientific discovery work."

161. CHAKROUN, ABDULLAH. What attitude should the developing countries adopt following the Paris Copyright Conference, February 1969. (*E.B.U. Review* 50-54, no. 115B, May 1969.)

Observing that economic interests are at stake, the writer finds that "the decision to convene a conference for revision of the Universal Convention represents a distinct achievement on the part of those countries having limited means at their disposal," but states that if a "newly revised and adopted Universal Convention also remains abandoned by the producers and exporters of works of the mind . . . it is easy to guess what would be the position of the developing countries."

162. GORELICK, R. General study: copyright in the U.S.S.R. (3 *Unesco Copyright Bulletin* 32-37, no. 4, 1969.)

"This article contains a brief account of the basic provisions and principles of Soviet copyright and the relevant legal texts. The author does not deal with problems of theory or the history of copyright in the U.S.S.R., which would require a separate study."

163. International Copyright Society. INTERGU on the Protocol Regarding the Developing Countries. (*GEMA News* 6-9, no. 9, Oct. 1969.)

Contains an open letter to the members of the German Bundestag, a declaration, and a resolution, all critical of the concept of aid to developing countries which takes the form of "devaluating the legal protection of works of a particularly high cultural standard which serve educational and scientific purposes."

164. International Copyright Union. The Berne Union and international copyright in 1969. (6 *Copyright* 6-8, no. 1, Jan. 1970.)

A brief survey of the events, occurring in 1969, of interest to the Berne Union.

165. MASOUE, CLAUDE. Problems of copyright and neighbouring rights in the use of communications satellites. (*E.B.U. Review* 43-47, no. 115B, May 1969.)

A discussion of "a few of the factors to be borne in mind when considering how a solution might be sketched out to the problems of copyright and neighbouring rights associated with the use of communications satellites."

166. MENTHA, BENIGNE. Reflections on the Convention establishing the World Intellectual Property Organization. (*E.B.U. Review* 53-57, no. 113B, Jan. 1969.)

The author's "intention is merely to draw attention to some of the main lines and general features of the new instrument [i.e., the WIPO Convention] and show how it falls in with certain trends of the times."

167. MENTHA, BENIGNE. Book review: the United States and the Berne Convention (musings inspired by a recent study). (*E.B.U. Review* 56-60, no. 117B, Sept. 1969.)

A review of J. A. L. Sterling's "Revision of the United States Copyright Law: the bill H.R. 2512 passed by the House of Representatives in April 1967," which also appeared in German translation in 500 *Archiv für Urheber- Film- Funk- und Theaterrecht* 853-890, nos. 1-6, Dec. 15, 1967. See 15 *BULL. CR. SOC.* 365, Item No. 379 (1968).

168. MENTHA, BENIGNE. The reception given to the Stockholm literary and artistic agreements. (*E.B.U. Review* 60-63, no. 116B, July 1969.)

A brief survey of some of the recommendations of the Stockholm Conference, with special attention to the Protocol and the reactions thereto, including a summary of the debates in the West German Bundestag on the question of ratification of the Stockholm Act.

169. MOUCHET, CARLOS. Problems of the "domaine public payant." (6 *Copyright* 197-201, no. 9, Sept. 1970.)

Beginning with general remarks concerning the case for and against a system of "domaine public payant," such problems are discussed as its effect on the circulation and dissemination of literary and artistic works, safeguards against intellectual control by the state, retroactive application of legislation in this field, application to all works or only to certain categories of works, criteria for establishing the amount; destination and distribution of fees, and the legal nature of the charges imposed.

170. NOMURA, YOSHIO. Letter from Japan. (6 *Copyright* 49-56, no. 3, Mar. 1970.)

A description of the "salient features" of the pending bill for general revision of the Japanese copyright law.

171. O HANNRACHAIN, FACHTNA. Performers' rights in the Republic of Ireland; a commentary on the Performers' Protection Act, 1968. (*E.B.U. Review* 44-46, no. 113B, Jan. 1969.)

The Act which became law on October 1, 1968, is described as filling "a significant gap in Irish legislation."

172. OLIVEIRA ASCENSAO, JOSE DE. Letter from Portugal: attribution of the original copyright to the entity financing or publishing the work. (6 *Copyright* 9-11, no. 1, Jan. 1970.)

A revision of the provisions of the Portuguese copyright law which permit ownership of the original copyright of a work in entities that are not intellectual creators of the work is recommended.

173. PALAGYI, ROBERT. Letter from Hungary. (6 *Copyright* 74-77, no. 4, Apr. 1970.)

A survey of court decisions involving copyright handed down before the entry into force on January 1, 1970, of the new Hungarian copyright law promulgated in 1969.

174. PLAISANT, ROBERT. The "droit de suite." (5 *Copyright* 157-161, no. 8, Aug. 1969.)

"The purpose of this article is to analyze French legislation and its implementation in order to define the conditions in which the *droit de suite* might become firmly established."

175. SHEWCROFT, J. The 1968 Australian Copyright Act operative from 1st May 1969; a paper on the preliminaries to and introduction of the Act. (*E.B.U. Review* 46-49, no. 117B, Sept. 1969.)

A brief survey of the legislative evolution of the Australian Copyright Act of 1968 is followed by an analysis of those provisions which apply to broadcasting, including the national, commercial and educational systems and their use of sound recordings and taped programs.

176. SOLTYSINSKI, S. J. New forms of protection for intellectual property in the Soviet Union and Czechoslovakia. (32 *The Modern Law Review* 408-419, no. 4, July 1969.)

A paper which deals with the legal protection afforded to creators of non-patentable or non-copyrightable discoveries and ideas under Czechoslovak and Soviet law; and with a new scheme of protection, which is known as a "certificate of authorship," under Soviet law, and is intended to compensate the employee-inventor for the loss of exclusive rights to the employer.

177. STOJANOVIC, MICHAILO. The new Yugoslav copyright statute. (*E. B.U. Review* 52-55, no. 114B, Mar. 1969.)

Largely a summary of the principal changes the new law makes in the system of copyright protection in Yugoslavia.

178. TEDESCHI, G. Art forgeries and their prevention. (4 *Israel Law Review* 364-370, no. 3, July 1969.)

A presentation of some ideas, "couched in somewhat general terms," to prevent the exploitation of art forgeries and stolen works of art.

179. TIMAR, ISTVAN. The new Hungarian Copyright Act. (5 *Copyright* 242-246, no. 12, Dec. 1969.)

A comment on the principal new features of the Act, preceded by a brief account of its evolution.

180. ULMER, EUGEN. The revision of the copyright conventions in the light of the Washington recommendation. (1 *IIC* 235-254, no. 2, 1970.)

"This article combines the information given by the author in 1969 *GRUR Int.* 10 and 1970 *GRUR Int.* 6. The present version includes in Sections I-IV a report of the results of the sessions of the Copyright Committees held in Paris in February, 1969, of the UCC Subcommittee held in Paris in June, 1969, and of the Joint Study Group held in Washington, September/October, 1969. Sections V-VII report on the meetings of the Copyright Committees held in December, 1969, in Paris and on the recent meetings of the *ad hoc* Committees preparing the revision of the Conventions held in Paris and Geneva during May, 1970."

181. ULMER, EUGEN. The Washington international copyright proposals. (*E.B.U. Review* 48-55, no. 120B, Mar. 1970.)

"Professor Ulmer has revised and brought up to date . . . his article which first appeared in German in *Gewerblicher Rechtsschutz und Urheberrecht (GRUR Int.* 10, October 1969."

2. In English, French and German

182. DÜNNWALD, ROLF. Die neuen audiovisuellen Medien in urheberrechtlicher Sicht. (23 *Neue Juristische Wochenschrift* 1996-1999, no. 45, Nov. 5, 1970.)

An examination, from a copyright point of view, of recent technological developments in audio-visual recording equipment in the German Federal Republic. An opinion is expressed that part 3 (Special Provisions Relating to Cinematography) of the present West German copyright law is sufficiently elastic so as to afford protection against the unauthorized recording of motion pictures or television programs with such equipment, for either public or private use.

3. In English, French and Spanish

183. DOCK, MARIE CLAUDE. Les sanctions pénales des infractions au droit d'auteur commises à l'étranger. (*Revue Internationale du Droit d'Auteur* 2-59, no. 65, July 1970.)

A comparative study of criminal provisions dealing with copyright infringement in national legislations, in which, due to the lack of unity in this field, a case is made, in behalf of authors who claim protection of their rights outside their frontiers, to have offenses against literary property as the subject of provisions in international copyright conventions.

184. JOUBERT, CLAUDE. La Convention de Berne en mal de déséquilibre ou: l'abus du droit de réserve. (*Revue Internationale du Droit d'Auteur* 32-57, no. 66, Oct. 1970.)

A criticism of member states of the Berne Union which fail, in their domestic legislation, to abide by the provisions of the Berne Convention, using as examples a recent Brazilian decree-law relating to the collection of authors' royalties in connection with cinematographic performances, and a recent Greek decree-law on the radio and television broadcasting of copyrighted works "which gives Greece the right, if not *de jure* at least *de facto*, to expropriate authors' broadcasting rights." At the end of the article appears a "Nota bene" by the editor of the *Revue* which notes with satisfaction the repeal of the forementioned Greek decree-law.

185. KEPLINGER, MICHAEL S. The case for invisible copies. (*Revue Internationale du Droit d'Auteur* 2-31, no. 66, Oct. 1970.)

A paper on the problem of control of the use of copyrighted works in computerized information storage and retrieval systems in the United States. A clearinghouse for copyrighted works is suggested as a solution to the problem, "based on the conclusion that, under current decisional law, input to a computer system can be considered copying and hence constitutes copyright infringement."

4. In French

186. FRANCON, ANDRE. Des limitations que les droits de la personnalité apportent à la création littéraire et artistique; rapport sur le droit français. (41 *Il Diritto di Autore* 171-193, no. 2, Apr.-June 1970.)

A study of how protection of personal rights, such as freedom from defamation, right of privacy, etc., restrict literary and artistic creation in France, and the various penalties provided for infringement of such rights under the French penal code and the recent law of July 17, 1970, on the protection of private life (*vie privée*).

187. NORDEMANN, WILHELM. Droit d'auteur et moyens d'enseignement. (*Revue Internationale du Droit d'Auteur* 90-123, no. 65, July 1970.)

A study of the protectibility, by copyright, of educational and teaching aids.

188. REBELLO, LUIZ FRANCISCO. Le nouveau code portugais du droit d'auteur. (*Revue Internationale du Droit d'Auteur* 60-89, no. 65, July 1970.)

An analysis of the "new" Portuguese law of April 27, 1966 (in force in Portugal since May 2, 1967), preceded by a brief account of the historical development of copyright in Portugal.

189. SAVATIER, RENE. L'exercice libre de l'art et des lettres au regard du droit économique. (55 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-42, 1970.)

"The present analysis is a completion of the author's prior contribution 'Artists and Writers as Employees' contained in the collection in honour of Levenbach. It attempts to determine the legal position of the free-lance artist or writer [in France] under

the law of business enterprises and, furthermore, under a government-regulated economic system."

5. In German

190. BARTELS, DAGHILD, and FRANK KNOP. Betrachtungen zum Folge-recht des bildenden Künstlers; gesetzlicher Anspruch ohne die Mittel seiner Durchsetzbarkeit. (14 *Film und Recht* 165-170, no. 6, June 15, 1970.)

A critique of the *droit de suite* provisions of the copyright law of the German Federal Republic, which, in the writers' opinion, are extremely difficult, if not impossible, to enforce.

191. BOYTHA, GYÖRGY. Die Urheberrechtsabkommen zwischen der Sow-jetunion und Ungarn im Spiegel der jüngsten Entwicklung der Urheberrechte beider Staaten. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 439-445, no. 12, Dec. 1969.)

The latest copyright developments in the Soviet Union and Hungary are viewed in the light of the recent Hungarian-Soviet copyright convention.

192. BOYTHA, GYÖRGY. Urheberrechtliche Konsequenzen der Abhängig-keit der Übersetzung vom Originalwerk. (55 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 89-103, 1970.)

It is contended that "[t]he use of translations is expanding with ever increasing speed while legislation and theory have failed to define the nature of copyrights in translations and the scope of their protection." A proposal is made that "[i]n view of the rela-tively limited protection accorded translators under the law of copyright it should be discussed whether translating as activity re-quiring artistic skill should be given better treatment under the theory of related (neighbouring) rights." Includes summaries in French and English.

193. BLUM, ARNO A. Grundzüge des gewerblichen Rechtsschutz und Urheberrechts in Israel. (*Gewerblicher Rechtsschutz und Urheber-recht, Int. Teil* 237-243, no. 8, Aug. 1969.)

Noting that the Israeli legal system had been derived from Ottoman law, English law, and the law enacted by the Palestine legislature, which was largely modeled on English law, the author

reports briefly on the principal features of the laws relating to intellectual property in present-day Israel.

194. DITTRICH, ROBERT. Elektronische Datenverarbeitung und Urheberrecht. (19 *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* no. 1, Jan.-Feb. 1970.)

A brief technical explanation of electronic data processing is followed by a discussion of copyright problems in connection with the protection of computer programs and with the storage and retrieval of copyrighted data.

195. DITTRICH, ROBERT. Staatsbürgerschaft und Urheberrechtsschutz; zugleich eine Buchbesprechung. (*Osterreichische Blätter* 116-118, no. 5, Sept.-Oct. 1970.)

An analysis of article 120 (1) of the copyright law of the German Federal Republic and article 94 of the Austrian copyright statute, which are similar and provide, in essence, that a work shall enjoy copyright protection under the respective laws regardless of the date or place of publication provided the author or a co-author is a citizen of the respective countries. The analysis is described as an independent article and, at the same time, a review of the recently published commentary, by Möhring and Nicolini, on the West German copyright law.

196. FEIGE, GERHARD. Zur Problematik des Rechtsschutzes von Computerprogrammen. (*Der Neuerer* 229-233, Aug. B, Oct. 1969.)

The writer observes that recent improved applications of electronic data processing in the German Democratic Republic require prompt action in resolving questions of how and to what extent legal protection should be afforded to computer programs. He stresses that the patent system of capitalist countries offers no guidance, but that legal protection must be based on socialist principles.

197. FEIGE, GERHARD. Auffassungen zum Rechtsschutz von Computerprogrammen in kapitalistischen Ländern. (*Der Neuerer* 282-284, Aug. B, Dec. 1969.)

A survey of the views expressed in the recent decisions and legislation of capitalist countries relative to protection of computer

programs. The countries included are Japan, the United States, France, Austria, West Germany, and Australia.

198. GAMM, OTTO FRIEDRICH FRHR. VON, and EVA FRHR. VON GAMM. Urheberrechtsschutz für allgemeine Geschäfts- und Vertragsbedingungen, Formularverträge und Wettbewerbsregeln. (71 *Gewerblicher Rechtsschutz und Urheberrecht* 593-596, no. 11, Nov. 1969.)

A comment on the scope of copyright protection, if any, afforded in the German Federal Republic to general business and contract terms, contract forms, and codes of fair competition.

199. JOHANNES, HARTMUT. Schallplatten-Import und § 85 des Urheberrechtsgesetzes. (*Gewerblicher Rechtsschutz und Urheberrecht Int. Teil* 222-226, no. 7, July 1970.)

An analysis of section 85 of the copyright law of the German Federal Republic, dealing with the protection of the producer of sound recordings, as it affects the importation of records.

200. LEINVEBER, GERHARD. Zur bevorstehenden Novelle zum Urheberrechtsgesetz vom 9. September 1965. (72 *Gewerblicher Rechtsschutz und Urheberrecht* 405-407, no. 8, Aug. 1970.)

A critical analysis of impending, proposed changes in the copyright law of the German Federal Republic, prepared recently by the Ministry of Justice at the behest of the West German author societies and GEMA. The changes involve either repeal or modification of provisions concerning (1) the lending of copies of a work (sec. 27), (2) limitations on copyright with respect to religious, school, or instructional use of works (sec. 46), (3) school broadcasts (sec. 47), and (4) public communication (sec. 52); and a new provision establishing a "domaine public payant" (Urheber-nachfolgevergütung).

201. LOCKER, HORST. Aktuelle Fragen aus dem Recht der bildenden Kunst. (55 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 129-157, 1970.)

A discussion of the following questions in regard to works of art under German laws: (1) The terms "art" and "work of art"; (2) "Work of art" as used in criminal law; (3) Promotion of art and awards; (4) The "droit de suite"; and (5) Liability of art experts. Includes summaries in French and English.

202. LUBY, STEPHAN. Schutz der Rechte ausübender Künstler nach tschechoslowakischem Recht. (55 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 105-128, 1970.)

A brief analysis of the protection of the performing artist under the Czechoslovakian copyright statute, with the conclusion "that the statute provides only inadequate safeguards for the right it creates, e.g., there are no minimum rights or no rights that are not subject to contractual stipulation. In some cases, however, principles of general law of contracts or civil procedure may offer solutions." Includes summaries in French and English.

203. NORDEMANN, WILHELM. Die Rechtsstellung des Lizenznehmers bei vorzeitiger Beendigung des Hauptvertrags im Urheberrecht. (72 *Gewerblicher Rechtsschutz und Urheberrecht* 174-176, no. 4, Apr. 1970.)

A paper on the legal status, under the laws of the German Federal Republic, of a sublicensee in the case of a premature termination of the principal contract between an author and publisher.

204. NORDEMANN, WILHELM. Die Anwendung der Zweckübertragungstheorie im Leistungsschutzrecht. (58 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-11, Oct. 15, 1970.)

An article, with summaries in French and English, which demonstrates that "[t]he generally recognized theory" of purposely limited assignment in German copyright law, according to which the copyright holder in doubtful cases assigns his rights only to the extent absolutely necessary for the purpose of the contract, is also applicable in the area of related rights.

205. NEUFISCHER, KARL. Grundlagen, Begriffe und Rechtsfragen des Drahtfunks und des Drahtfernsehens. (54 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 67-109, July 15, 1969.)

A comparative study, with French and English summaries, of legal and regulatory questions in the laws of telecommunications, broadcasting institutions, copyright and neighboring rights in connection with operations of community antenna systems.

206. NEUMANN, HANS-WOLFGANG. Inwieweit gilt die Rechtsprechung zum allgemeinen Persönlichkeitsrecht für die Auslegung des § 97

Abs. 2 UrhG? (72 *Gewerblicher Rechtsschutz und Urheberrecht* 544-546, no. 11, Nov. 1970.)

An article on the extent to which decisions of the Supreme Court of the German Federal Republic involving the general right of personality influence its interpretation of article 97, paragraph 2 of the German copyright law dealing with infringement of the rights of authors, persons having rights in scientific editions, photographers, and performers.

207. OEKONOMIDIS, DEMETRIUS S. Protokoll betreffend die Entwicklungsländer. (55 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 43-87, 1970.)

An article on the Stockholm Protocol Regarding Developing Countries. Includes summaries in French and English.

208. RIE, ROBERT. Ein neues "Copyright;" Darstellung des Entwurfs einer neuen Urheberrechtsakte der Vereinigten Staaten: eine Studie de lege ferenda. (54 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 37-65, July 15, 1969.)

The highlights of U.S. copyright revision bill, S. 593, 91st Cong., 1st Sess. (1969). With French and English summaries.

209. RUNGE, KURT. Das Urheber- und allgemeine Persönlichkeitsrecht. (54 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-35, July 15, 1969.)

"[A] comparative account [with French and English summaries] of the development of both the moral right of an author (*droit moral*) and the *Persönlichkeitsrecht*, the German concept of a basic right of individual privacy and freedom. After an examination of the elements of these legal notions follows a discussion of the problems in determining their borderlines and the areas where they supplement each other."

210. SAMSON, BENVENUTO. Das Folgerecht des § 26 des Urheberrechtsgesetzes. (72 *Gewerblicher Rechtsschutz und Urheberrecht* 449-453, no. 9, Sept. 1970.)

An analytical examination of the provisions contained in Art. 26 (*droit de suite*) of the Copyright Law of the German Federal Republic.

211. THURMAN, RONALD V. Der Rechtsschutz von Computer-Programmen in den USA. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 207-221, no. 7, July 1969.)

A German translation of the article entitled "Adequate Legal Protection for Computer Programs," which appeared in the September 1968 issue of the *Utah Law Review*. See 16 BULL. CR. SOC. 140, Item 94 (1968). [Editor's Note: The author's name was omitted from the original entry through an oversight.]

212. ULMER, EUGEN. Die Washingtoner Vorschläge für das internationale Urheberrecht. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 375-381, no. 10, Oct. 1969.)

An article on the meeting of the International Copyright Joint Study Group in Washington from September 29 to October 3, 1969, dealing with its background, proceedings, recommendations, evaluation and prospects.

213. ULMER, EUGEN. Die Entwürfe für die Revision der Urheberrechtsabkommen. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 329-334, no. 11, Nov. 1970.)

A report on the drafts for revisions to the Universal Copyright Convention and the Berne Copyright Convention which are being prepared for submission to the diplomatic conferences scheduled to be held at UNESCO House in Paris in July 1971.

214. UNGERN-STERBERG, JOACHIM VON. Die Satellitensendungen des Rundfunks; zur Frage ihres Schutzes durch das Rom-Abkommen. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 303-310, no. 10, Oct. 1970.)

A discussion of whether television and radio programs transmitted via communications satellites could be protected under the provisions of the Rome Convention or whether a new international convention should be formulated.

215. VERONA, ALBERT. Die Reform des jugoslawischen Urheberrechts. (*Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil* 221-225, no. 7, July 1969.)

A comment on those provisions of the new Yugoslav copyright law of July 20, 1968 which represent changes from the previous law or are entirely new.

6. In Italian

216. CUPIS, ADRIANO DE. Limiti alla creazione artistica di fronte alla tutela della personalità. (41 *Il Diritto di Autore* 157-170, no. 2, Apr.-June 1970.)

A brief analysis of conflicts in rights relating to letters and portraits, under the Italian copyright law, which might arise between the author or creator and third persons.

217. LEONELLI, LEONELLO. La video-cassette e il diritto d'autore. (41 *Il Diritto di Autore* 200-210, no. 2, Apr.-June 1970.)

With the development of video-cassettes a number of problems arise in regard to the multiplicity of copyright interests involved, such as those of the author, the composer, the dramatist, the artist, editor, producer, sound engineer, actors and performing artists. Five problem areas are presented and briefly explored with the conclusion that Art. 2 of the Italian copyright law needs amending, and other steps must be taken to insure protection of these interests.

218. SANCTIS, VALERIO DE. Appunti sul diritto di autore nei paesi europei a economia socialista. (40 *Il Diritto di Autore* 347-398, no. 3, July-Sept. 1969.)

A commentary on the development of copyright law in the socialist countries of Europe and its effect on international copyright relations.

219. TROLLER, ALOIS. La tutela della personalità nella creazione e nella utilizzazione delle opere letterarie e artistiche nel diritto svizzero. (41 *Il Diritto di Autore* 194-199, no. 2, Apr.-June 1970.)

A brief report on the protection of the right of personality with regard to the creation and use of literary and artistic works under Swiss law.

7. In Swedish

220. BERGSTRÖM, SVANTE. Den svenska upphovsrättslagstiftningen under omprövning; ett lagrevisionsarbete i etapper. (*NIR* 256-275, 3d quarter, 1970.)

An article on the work of a commission set up by the Swedish Ministry of Justice to study and make recommendations for revision

of the Swedish copyright law so as to permit Sweden to adhere to the Stockholm text. The commission was also instructed to study and make recommendations for other revisions of the copyright law and of the law on freedom of the press.

221. BERNITZ, ANNIKA LOKRANTZ. Telesatelliterna och upphovsrätten. (*NIR* 295-332, 4th quarter, 1969.)

"This article [in Swedish, with English summary] considers the legal problems which the recently developed telesatellites have raised within the fields of copyright law and neighbouring rights (*droits voisins*). It also discusses certain related conflicts of law questions."

222. ROTKIRCH, HOLGER. Telesatelliter och upphovsrätt ur rundradio-perspektiv. (*NIR* 276-285, 3d quarter, 1970.)

A supplementary study to an article by Annika Lokranz Bernitz (see *supra*, item 221). The study deals with the problem of copyright protection for broadcasts by communications satellites.

223. SEIPEL, PETER. Patentskydd för datorprogram; några Kommentarer till rattsbilden i USA. (*NIR* 345-361, 4th quarter, 1969.)

Comments on the 1966 and 1968 guidelines of the U.S. Patent Office for the examination of patent applications on computer programs, and on the *Prater & Wei* decisions of the Court of Customs and Patent Appeals. The writer states that the second *Prater* decision (rehearing) "has not presented any undisputable or clear rule that programs (for general purpose computers) as such may be patented."

In Memoriam

HAROLD G. FOX Q.C.

1896-1970

Dr. Harold G. Fox, well known to the American copyright Bar for his book on "Canadian Law of Copyright and Industrial Design", died on September 29, 1970, while on a visit to London. Dr. Fox was a distinguished scholar and practitioner not only in the copyright field, but in the patent and trademark fields as well. His works include the most authoritative treatise on "Canadian Law of Trade Marks and Unfair Competition," which saw its third edition in 1954 and his work on "Canadian Patent Law and Practice", last revised in 1969. In addition, Dr. Fox's well-annotated series entitled "Fox's Patent Cases," now awaiting publication of its 44th volume, is widely used in the United States.

The honors bestowed upon Harold Fox during his lifetime were numerous. He was named an Honorary Benchler of the Middle Temple in London in 1961, was admitted in 1956 to the freedom of the City of London, and in 1958 to the Livery of the Worshipful Company of Stationers and Newspaper Makers. He was created King's Counsel in 1937 and served also as an honorary lecturer at the University of Toronto. He had practiced in Toronto and St. Catharines, Ontario, since 1919. Those of us who were fortunate enough to count him as a friend will never forget his generosity and never-failing counsel both in his professional and personal relationships. He will be remembered and honored by generations to come as the foremost Canadian scholar in the field of intellectual property during the twentieth century.

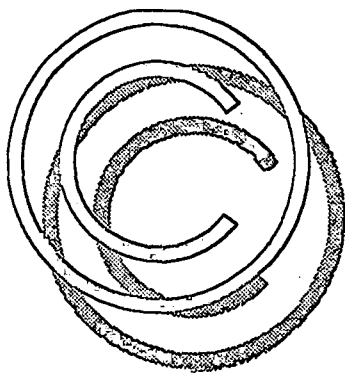
W.J.D.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 4

APRIL, 1971

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN

DONALD S. ENGEL

JUDITH GRAD

MORTON DAVID GOLDBERG

PROF. HARRY G. HENN

DR. STEPHEN P. LADAS

ALAN LATMAN

PROF. MELVILLE B. NIMMER

STANLEY ROTHENBERG

ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

EUGENE N. ALEINIKOFF, New York City

ALLEN H. ARROW, New York City

IRVING COHEN, New York City

EDWARD M. CRAMER, New York City

SIDNEY A. DIAMOND, New York City

HERMAN FINKELSTEIN, New York City

EUGENE L. GIRDEN, New York City

A. A. GOLDMAN, Washington, D.C.

PROF. ROBERT A. GORMAN, U. of Penn. Law School, Philadelphia

JOHN F. HARDING, New York City

PROF. HARRY G. HENN, Cornell Law School, Ithaca

LEONARD KAUFMAN, New York City

SYDNEY M. KAYE, New York City

PROF. JOHN M. KERNOCHAN, Columbia Law School, New York City

ARTHUR B. KRIM, New York City

ABRAHAM MARCUS, Los Angeles

JOHN A. MARSHALL, Boston

WALDO H. MOORE, Washington, D.C.

PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles

HARRY R. OLSSON, Jr., New York City

SIGRID H. PEDERSEN, New York City

HARRIET F. PILPEL, New York City

EDWARD A. SARGOY, New York City

ADOLPH SCHIMEL, New York City

CHARLES B. SETON, New York City

LEON SHIMKIN, New York City

SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1971 by The Copyright Society of the U.S.A.
All rights reserved.

CONTENTS

	PAGE
PART I. ARTICLES.	
The Impact of New Technology on International Copyright and Neighboring Rights— <i>The Ninth Annual Jean Geiringer Memorial Lecture on International Copyright Law</i>	William Wallace, C.M.G. 293
Audio Visual Systems	Denis de Freitas 304
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	313
2. Foreign Nations	317
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	319
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	321
2. State Court Decisions	336
3. Other Decisions of Interest	344
PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	345
2. Foreign Publications.	
1. In English	346
2. In German	346
3. In Swedish	347
B. Law Review Articles.	
1. United States	347
2. Foreign.	
1. In English	350
2. In English and French	351
3. In English, French and Spanish	352
4. In German	353
NEWS BRIEFS	354

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: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1971).



WILLIAM WALLACE, C.M.G.

PART I.

ARTICLES

224. THE IMPACT OF NEW TECHNOLOGY ON INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS—*The Ninth Annual Jean Geiringer Memorial Lecture on International Copyright Law.*

By WILLIAM WALLACE, C.M.G.*

First let me say how honoured I am to have been invited to deliver this annual memorial lecture. My predecessors, as lecturers in recent years, have included Prof. Bodenhausen, the recently appointed First Director-General of the World Intellectual Property Organisation and my friends and colleagues Hesser of Sweden, Krishnamurti of India, Sher of Israel and Braderman of your own country, all eminent in copyright and other affairs and all with stimulating and interesting things to say to you. My fear is that my talk may be something of an anti-climax. Had this been the 1972 lecture instead of that of 1971 I would have liked to have followed up talks given by previous speakers on the very difficult problem of the copyright relationships between developed and developing countries. I would have liked to offer my own account of how, with much give and take on both sides, it all came out right in the end, as I now hope and believe it will. But the Paris Revision Conference of the Berne and Universal Conventions is yet to come and this subject is not therefore one for discussion now.

I have therefore chosen to talk about some of the copyright problems arising as a result of new or comparatively new methods of dis-

* Mr. Wallace is Assistant Comptroller of the Industrial Property and Copyright Department, Board of Trade, London. He has served as United Kingdom Delegate to the International Conferences on Copyright and Patents, and as Chairman, Intergovernmental Committee on Rights of Performers, Record Makers and Broadcasting Organizations from 1967 to 1969. He was Acting Chairman of the Permanent Committee of the Berne Copyright Union and of the Intergovernmental Committee of the Universal Copyright Convention in their September 1970 Meetings.

This lecture was delivered on March 19, 1971, in the Auditorium, Time-Life Building, New York.

semination. It is unlikely that I shall have anything original to say but you might be interested to hear how some of these problems appear to a Briton with some experience of international negotiations and a working knowledge of the British copyright law. Any views I express are of course my own and not those of the British Government. If I am heard to take a different line on some official occasion do not be surprised. It would simply mean that my masters see things differently.

My first subject is that of the dissemination of copyright works by means of computers. You are, I know, much further advanced in this than we are in the United Kingdom, though we too are conscious that a problem exists and will grow greater.

It is not, I believe, entirely fanciful to think that ultimately the computer may replace the printing press altogether. The individual will have at his desk, or even in his home, a scanner linked by line to a central computer store by means of which he can consult the works stored, and have copies made of any extracts he wishes to keep. If and when this stage is reached, then there can be little doubt that the author must look to the computer disseminator of his work to provide him with his revenue, just as he now looks to his publisher.

But it is the interim situation that is more nearly upon us which is more difficult to regulate fairly and sensibly: namely, that in which publishing is continuing to take place by traditional methods, while at the same time these publications are increasingly stored in computers and consulted by such means. It could be argued that the computer is really no more than a library which contains a photocopying machine and that therefore the same latitude with regard to published works should be allowed to the computer owner as is allowed to a librarian. But this analogy, though attractive, is I think false. The analogy is nearer to publishing. I find it difficult to envisage a case in which it will be worthwhile to store works in a computer merely in order to serve a public as small as that normally catered for in any given library. If I am right then the fair use—our “fair dealing”—exemptions, if any, should be those applicable to the operations of a rival publisher rather than those applicable to the librarian.

As one who took part in the drafting of the British Copyright Act of 1956, I can say with some confidence that it did not have computers specifically in mind. But, no doubt fortuitously, the answer it seems to produce appears to me, if not to everyone, a reasonably satisfactory one, at least so far as literary, dramatic or musical works are concerned. There have been no court decisions on the subject and perhaps the

first of these will shatter my complacency. But, for what it is worth, this is my view of the law.

I am not dealing with the computer merely as an index. The storage of titles, chapter headings and key words does not involve any infringement of copyright. No permissions or payments are called for. What we are considering is the storage of a work or a substantial part of a work in a computer in such a way that it can be consulted word by word with the illustrations if any. The first question is therefore: what rights, if any, of the owner of the copyright in the work are involved? There seem to be two possibilities: namely his performing right and his right of "reproduction." "Performance" is defined widely in the British Act. It includes "any mode of visual or acoustic presentation including any such presentation by the operation of wireless telegraphy apparatus or by the exhibition of a cinematograph film" (itself defined so as to include magnetic wire) "or by the use of a record, or by any other means." (Copyright Act of 1956 Section 48(1)). Furthermore, where a work is performed by means of an apparatus, the occupier of the premises where the apparatus is situated, rather than the operator of the apparatus, is the person giving the performance (Section 48(6)). It is therefore arguable that computer dissemination involves "performance" by the occupier of the premises in which the computer is located. But it is much less likely that this performance takes place *in public*, as it must in order to infringe. I do not think our law has gone as far as Section 101 of your revision bill in its definition of performance "publicly".

A more likely act of infringement therefore in British law is, "reproducing the work in any material form." I know of no British decisions like your case of *White-Smith v Apollo*, laying down that copyrightable subject matter must be expressed in humanly intelligible notation. Under the British Act, "reproduction" of a literary, dramatic or musical work includes a reproduction in the form of a record or a film. This shows that there can clearly be reproduction of a literary work even if one cannot, by merely looking at the article bearing the reproduction, perceive the content of the work. From this it is reasonable to assume that, if a literary work is committed to punched tape, magnetic wire etc. in such a way that, with the aid of a machine, it can be perceived by human eye or ear, the work has been "reproduced." Our courts would, I think, be likely to apply the test proposed in your revision Bill: "'copies' are material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine

or device." Thus, if a work forms part of the input of a computer it seems likely that this will be an infringement of copyright under the existing British law, unless either it is done with the consent of the copyright owner or the "fair dealing" provisions of the Copyright Act exempt it.

If I may digress for a moment, it is perhaps worth pointing out that this incidentally has interesting implications on the burning question of the protection of computer soft-ware—the "series of instructions which control or condition the operation of a data processing machine" (if I may borrow from the 1966 Report of your President's Commission on the United States' Patent System. Since my audience is, I assume, composed of copyright specialists rather than the Patent Bar, I can, I hope, mention that Report without you all feeling the need to cross yourselves). A computer program is almost certainly a "work" in the copyright sense, and hence enjoys protection against copying. It would almost certainly be an infringement for me to print and sell, without permission, copies of someone else's program. But it is highly doubtful whether copyright laws give the devisor of the program the power to control the use of that program in a computer. As I once said at a Max-Planck Institute meeting in Munich, when having the temerity to disagree on this point with so eminent a specialist as Prof. Eugen Ulmer, if I devise a new game, copyright law will prevent someone else from making and selling copies of the rules which I have formulated; but it will not prevent anyone from playing the game according to those rules. But suppose that, in order to make effective use of the computer program it is necessary first to reduce it to punched tape, or signals on magnetic wire, and feed this into the computer. It is then I think arguable that this is a reproduction of the work and hence an infringement if done without permission.

But to forget computer soft-ware and come back to my main thesis of the dissemination of the work itself by means of a computer. What fair use provisions, if any, should apply? Section 6(1) of the British Act provides that:

"No fair dealing with a literary, dramatic or musical work for the purposes of research or private study, shall constitute an infringement of the copyright in the work."

By case law this covers the case of a student copying out of a book for his own use but not the circulation of copies among other students. Because there was doubt whether librarians were permitted to make photocopies of works or extracts from works for the use of students,

the Copyright Committee, on whose 1952 report the British Act is based, recommended special provisions relating to this and these are now in Section 7 of the Act. This provides that a librarian may make single copies of articles in periodicals without the consent of the copyright owner, and extracts from books if the copyright owner cannot readily be traced, for persons who "satisfy the librarian that they require them for purposes of research or private study and will not use them for any other purpose."

So far I have dealt with single copies. As to making multiple copies for publication, Section 6(2) of the Act provides that:

"No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and is accompanied by sufficient acknowledgement."

Perhaps the main test here is whether the second publication competes with the original. If so it infringes. Quantity and value of the matter taken are also important factors.

What is "fair" clearly differs according to whether one is considering single individuals or a mass public. This is reflected in the open general licence given by the British Publishers Association and the Society of Authors in their pamphlet, "Photocopying and the Law". For publication in another book for criticism or review, they consider it fair to take an extract of 400 words or a series of extracts of no more than 800 words in all. For single copies of extracts from books for private study or research, the limits are wider, i.e. a single extract of 4,000 words or a series of extracts to a total of 8,000 words provided that what is copied is not more than 10% of the whole work. This rule of thumb is not part of our law but is accepted widely as providing a fair test.

I do not propose to go into the difficult question of abridgements. It is here that the axiom that copyright does not protect ideas begins to be qualified. It does not help much to say, as does the author of the standard British text book on the subject, that the answer to the question depends on "whether the production has involved the substantial use of copyright material or only of ideas and information". Some lines of thinking emerge from the court decisions: if the abridgement does not compete with the original (because its effect is likely to direct the reader to the original) there is less likely to be infringement. Again, the more skill and labour involved in making the abridgement the less likely it is to infringe, whereas mere clerical labour, for example reducing extracts or passages to an alphabetical order, is an

infringement. But in any event, I do not believe that the question of abridgements is susceptible of solution in specific words. I am reinforced in this view by having recently read a penetrating discussion on the point in Prof. Melville Nimmer's 1970 Donald C. Brace Memorial Lecture on Copyright and the First Amendment.

I think almost everyone would agree that authors and publishers must, in principle, subject possibly to the kind of fair use exemptions that are available to publishers, have the right to be paid when their work is disseminated. In computer-based information services, this payment might, in theory, be demanded at any of three stages:

1. In-put—when the work is first stored in the computer.
2. Processing—when the computer scans the work, possibly only to reject it.
3. Output—when the computer makes the work perceptible to the human eye, either by making it visible on a screen or by producing a copy on paper.

If the copyright owner has the right to control input (as I believe he now has in the UK and as he will have to have under the Stockholm text of the Berne Convention) he can make what terms he likes and can negotiate as to payment, e.g. lump sum or royalties based on scanning or output. He may decide that the terms are not sufficiently attractive and refuse to allow the work to be stored. Those who disseminate by computers are then, quite rightly, in no different position from those who disseminate by the sale of printed copies. I know that a burning question with you is whether there should be some form of compulsory licensing whereby the permission of the copyright owner to have his work stored in a computer, could be dispensed with. But unless all authors (or their publishers) were to combine to entrust their works to a single organisation controlling computer storage, I personally am not convinced of the need for this. True, it can be said that a computer service, to be really useful, should be complete; and that it would therefore be wrong to allow a copyright owner to hold the person offering the service to ransom by refusing permission to store his work. But the copyright owner is only likely to refuse if the terms offered are not sufficiently attractive to compensate him for the expected loss of sales. Negotiations taking place between copyright owner and the person offering the computer service do not differ in principle from those which take place between a hard-back and a paper-back publisher.

It is true that Section 7 of our Act, which I have mentioned, does not lay down the means which librarians may use in supplying indi-

vidual copies. But I have considerable doubts whether our courts would consider that the Section gave them the right to store texts in computers, particularly if it meant that persons not physically present in the library would thereby be able to consult them and get copies. Subject to this doubt I think the British Act probably achieves a reasonably fair result. Whether I am right, time alone will tell.

My second subject is the impact on international copyright of the communication satellite—and here my reference to copyright includes the rights not only of authors, composers and film makers protected by the Berne and Universal Copyright Conventions, but also those of performers, record makers and particularly broadcasters, which are not. Many of you will know more about the technicalities of space satellites than I do, but, as I understand them, they are as follows. Until recently the building of a ground station capable of receiving a satisfactory television signal from a space satellite was a most expensive matter and not many countries could afford such a station. Again, the Early Bird and first Intelsat series of satellites were “point-to-point” satellites: i.e. they were only capable of establishing a link between two specified earth stations such as Andover in the United States and Goonhilly in Great Britain. Likely developments in the near future, however, are ground stations at one-tenth of the present cost, coupled with the possibility of a number of such stations simultaneously receiving the signal from the satellite. Finally, in some 20 years time, unaugmented receivers in the home will be capable of picking up signals direct from the space satellite.

The broadcasting organisations, in Europe and I believe also in the United States, claim that they need laws which give them control over the further public dissemination of their programs. It must be remembered incidentally that most (though by no means all) broadcasting in Europe is of the “public service” variety in which the broadcasting organisation is not so dependent for its revenue on the number of people receiving the programs as is the case with commercial, advertisement-carrying, broadcasters. The organiser of a sporting event, with an eye to his “gate” receipts may demand, as a condition of permitting it to be televised, that it should not be available to an audience in certain specified places, or, if it is, that extra payment should be made. And the same may be true of a News Film Agency or the members of an orchestra or ballet. Unless therefore the broadcasting organisation is able to control the area in which its program is publicly disseminated, it may either find it is having to pay for audiences, for example, in another country, in which it has no interest, or not being allowed to broadcast the matter in question at all. In the United Kingdom we

have, in principle, accepted the merits of this claim and give, in Section 14 of our Act, a copyright in broadcasts additional to, and not in substitution for, the copyright in any works which these broadcasts contain. This copyright is enjoyed by our own broadcasting organisations and by those foreign broadcasting organisations which are members of either of the two international conventions to which we belong and which cater for this right. These are: the Council of Europe Agreement on the Protection of Television Broadcasts of 1960 and the Rome Convention of 1961 on the International Protection of Performers, Producers of Phonogram and Broadcasting Organisations.

The three principal methods of public dissemination of programs which the broadcasting organisations wish to control are: first, re-broadcasting by another organisation; secondly, the public showing of their programs to paying audiences, e.g. in cinemas (though this is virtually a dead letter); and thirdly, the wire diffusion of their programs (which we call relay and you call C.A.T.V.) The Council of Europe Convention, which seven countries have joined, covers all three, though with the possibility of a reservation on the third. The Rome Convention covers only the first and second. You may well think it illogical to give broadcasting organisations the right to control re-broadcasting of their programs but not the right to control their wire diffusion, at least in those areas to which the original broadcast signal does not normally reach. I fear my own country must take some of the blame. The United Kingdom was one of the first countries to give a copyright to broadcasting organisations but this right did not, and our copyright law still does not, include a power for *them*, as distinct from the authors and composers, to control C.A.T.V. operations. In Britain, the payments made to *authors and composers* take into account the C.A.T.V. audience. They can control the wire diffusion of foreign broadcasts containing their works, and the C.A.T.V. operator will have to pay them if the broadcast in question was not one intended for a British audience. But the *broadcasting organisations* did not ask for, and were not given, a similar right and this has perhaps influenced the later international treaties. The fact that our telecommunications authorities control, by licence, what our C.A.T.V. operators disseminate, no doubt played a considerable part in influencing our copyright law on this point.

It was mainly the difficulties encountered by broadcasting organisations in acquiring the right to televise sporting events which led to them being given the right to control the showing of their broadcasts of these events in cinemas. However, the more receiving sets there are in homes the less this right is needed. And since it is no longer worth-

while for cinemas in the United Kingdom to show the live broadcast of, for example, the Football Cup Final, this right is virtually a dead letter there. The same is, I think, true of most of Western Europe, and would undoubtedly be true here.

Now to return to space satellites. The Rome Convention is not fully satisfactory as a means of assuring the necessary control. In the first place, it defines broadcasting as, "the transmission by wireless means *for public reception* of sounds or of images and sounds". The question then arises: if I send signals to a satellite intending that they be picked up by a ground station, and then broadcast from a transmitter or transmitters, am I doing so "for public reception"? My own view is that provided I know that my signals are *ultimately* intended for reception in the home, my action falls within those words. But I admit the point is arguable.

Again, it allows member countries to confine the protection to broadcasts made from the same Contracting State as that in which the broadcasting organisation has its headquarters; and the British law so provides. Thus, if cameras from Radio Television Francaise televise the Olympic Games in Mexico and transmit by satellite to a ground station in France, the BBC could, in theory, without breach of the Convention, pick up the signal from the satellite and broadcast it in Britain. Indeed the organisation sending the signal to the satellite might not be a broadcasting organisation at all, and hence probably not within the protection of the Convention.

Finally, it is said that, because the Rome Convention obliges countries to protect performers and record producers as well as broadcasting organisations, only a comparatively few countries have joined*; and that some new international agreement to ensure protection of programs transmitted by satellite is therefore needed. To this one can reasonably answer that it is difficult to understand the hesitations of countries which have not yet joined: the Convention's obligations regarding performers and record makers are no more than natural justice, namely no clandestine recording or broadcasting of a performance and no copying of phonograms; the only controversial matter, namely, the obligation to make payment when a commercial disc is broadcast and/or performed in public is optional in the sense that any member country can refuse to provide for it. But it may be partly because each potential member

* Member countries are: Bermuda, Brazil, Congo (Brazzaville), Czechoslovakia, Denmark, Ecuador, Germany (Fed. Rep.), Mexico, Niger, Paraguay, Sweden, United Kingdom.

has to make up its mind on this controversial question before joining, and lay itself open to lobbying from both sides, that comparatively few countries have so far grasped the nettle. Whatever the reason it is undeniably a fact that the number of members is not yet great.

The Rome Convention was drafted with the idea that since the three categories of beneficiaries enjoyed rights at the expense of each other, all their rights should be contained in a single Treaty. There is therefore, understandably, reluctance, in countries which believe in the Rome Convention and have all three interests at heart, to encourage a new Convention giving rights to one category alone.

One school of thought would solve the problem by countries agreeing to make it a criminal offence to pick up and broadcast, without permission, any signal in the course of transmission by satellite. This solution would be on the lines of certain stipulations already accepted in the International Telecommunications Convention with a view to securing secrecy of international correspondence. The national and international technical bodies, concerned with communications feel, however, that their proper task is merely to ensure that communications reach their intended destination, and are unwilling to go further.

It is perhaps not surprising that a meeting, which took place in UNESCO Headquarters in Paris in December 1969, was inconclusive, since all the possibilities were canvassed and there was even discussion on the question of a convention to forbid the transmission of propaganda matter by satellite. Perhaps more progress can be made at the meeting which is to take place next month in Lausanne on this subject.

I am reasonably satisfied that it is in the interests of all concerned—sports promoters, authors, performers and ultimately the public—that the broadcasting organisations should have a measure of de facto control over the areas in which their programs are disseminated. To take two examples: suppose the broadcasting organisations of France, Germany and the Netherlands were to pay for the right to televise the Olympic Games, but Britain refuses to contribute. It would seem wrong for the BBC to take the program from a satellite, or indeed from a cross channel broadcast, and put it out on the BBC network. It would be equally wrong for a British C.A.T.V. organisation, without permission, to pick up the signal on the south coast of England and to distribute it to its subscribers in areas in which the cross channel signal is not normally obtainable.

The second example is that of an American variety artist with a new spectacular act. He may be quite content for it to be televised and

shown in France but, since he proposes shortly to tour the German music halls, wishes to ensure that his act is not killed in advance by being televised there.

But this is not to say that a crying urgent need for a new Convention on the subject of satellite transmissions has been demonstrated. Those operating even the cheaper ground stations receiving satellite transmissions will normally be government telecommunications' authorities or large reputable corporations. It seems almost inconceivable to me that they would deliberately poach programs for which they have not paid and use them to entertain their public. And the rules of the broadcasting unions which now exist in areas like Europe, Africa and Asia would almost certainly frown on any such thing. Either because of control exercised by the governmental telecommunications' authorities or perhaps just by gentlemen's agreements, poaching of programs does not, so far as I am aware, now take place, at least on any scale.

Finally, when, in 10 to 20 years time programs from satellites can be picked up directly on unaugmented receivers in the home the only practicable way to control the areas in which satellite transmitted programs are seen, will be by scrambling or otherwise encoding the signal sent to the satellite. No one, at least in a free society, would seek to regulate by law what programs an individual may watch or listen to in his own home.

The two new technological aids I have talked about—computers and communication satellites—are by no means the only ones which raise or accentuate copyright problems. The advent of cassettes, making copies of motion pictures readily available to the public, may demand that we reconsider national and international rules on this point. Easier methods of making commercial phonograms have led to the growth of flourishing pirate industries in a number of countries and, in my view at least, a need for international action to stamp this out. Finally, the enormous advance in techniques of reprography has posed what is perhaps the most difficult unsolved problem internationally: that of the permissible limits of photocopying, and how to reconcile the needs of scholars and researchers with the equally legitimate need of authors and publishers to be paid for their labours. But I am in no position to propound simple solutions. In any case I have spoken for quite long enough.

225. AUDIO VISUAL SYSTEMS

By DENIS DE FREITAS*

Among the latest and potentially far reaching developments in the communications medium are the systems currently being developed in the United States, Europe and Japan, for recording and presenting via conventional television sets, combined sound and visual programmes.

The essential characteristics of all these new Audio Visual Recording and Presentation systems (AVRP) can be quite simply described. They all involve an appliance which is connected to the aerial input socket of an ordinary television set whereby a programme recorded on either a film, tape or disc contained in the appliance can be shown on the screen of the television set. Broadly speaking, the programmes thus shown may come from two different sources. In the most advanced systems, the appliance itself may be used to record from the home television set a broadcast programme received by that set and recorded on a blank tape, film or disc in the appliance which is then subsequently played back to present the programme on the screen of the television set. Alternatively, the programme presented may have been previously recorded either especially for AVRP use or simultaneously with an original recording primarily made for some other purpose, such as a television programme or a cinema film.

It is clearly desirable that there should be an examination of the implications of these systems so as to be able to ensure that when the new equipment actually comes into use all the rights of the various copyright and other interests which will be affected by the development are properly licensed or otherwise protected. The starting point of such examination is, naturally to consider the potential areas of use to which the new appliances may be put.

(i) Home Recordings of television programmes

Television programmes received on an ordinary home television set can be recorded and shown again as often as desired.

* Denis de Freitas, M.A., is Legal Adviser and Secretary, The Performing Right Society Limited, London. This paper was delivered in London during the recent meeting on February 22-23 of The Legal and Legislation Committee of CISAC, of which he is Member for England.

(ii) *Commercial Recordings of television programmes*

When an ordinary television programme is recorded initially for subsequent transmission purposes, or when it is televised live, a special recording may simultaneously be made from which duplicate tapes, films or discs (depending on the system being used) can be made and fitted into cassettes for use on one of the play-back appliances and thus presented on a television set screen. This kind of use may develop in various directions.

(a) For simple home entertainment, there may be a market for the sale or rental of cassettes containing recordings of popular television shows which a private television viewer may wish to be able to repeat from time to time.

(b) It is also possible that recordings of some television programmes may have a potential commercial use as an amenity to be offered by proprietors of hotels, restaurants, bars and similar premises where at present a television set is provided for the entertainment of guests and customers. The selectivity afforded by AVR systems might well be regarded as a valuable advantage over the use of the television set which can only show programmes as they are broadcast.

(c) Certain television programmes may have considerable potential for educational purposes, and indeed in the United Kingdom one of the television companies has already been approached for permission to record some of its educational programmes for the purpose of making them available in cassettes for use in educational establishments.

(iii) *Recordings of films*

One obvious use for these new systems is for the private showing of films produced in the first instance for public exhibition in cinemas. AVR may well therefore replace 16 and 8 mm. sound movie projector equipment, except in the case of those enthusiasts who in addition to showing 16 and 8 mm. versions of commercial films also produce their own home movies in which case they need to retain existing film projection equipment.

(iv) *Specially-produced AVR programmes*

Apart from the use of AVR appliances to present, or re-present, programmes produced originally for broadcasting or some other use, clearly there is scope for the production of programmes specifically for AVR use, and equally clearly there is no limit to the kind of pro-

grammes which may be produced—documentaries, entertainment, instructional, sport. If cassettes can be put on the market at the price of \$10.00 U.S. forecast by one company, it is not inconceivable that AVR P cassettes of popular songs may even be produced instead of conventional sound recordings so that fans may watch as well as hear their current popular recording idols, and many homes will find it necessary to have two sets, at least—one for receiving broadcasts and the other for presenting AVR P programmes.

AVR P therefore in addition to making it possible to record television programmes as broadcast, converts the ordinary television receiving set into a projection screen on which can be presented an almost unlimited variety of pre-selected programmes for home consumption, educational or commercial use.

From the foregoing description of the nature of the AVR P systems and the different ways in which the use of these appliances may develop, I now turn to the copyright implications. The two principal rights involved are the right of reproduction (i.e. the recording right) and the right of public performance; and each of these rights will be considered separately.

The Recording Right

Clearly, whenever an AVR P appliance is used in a home for the purpose of recording a broadcast programme received on a home television set, then if the programme contains any works protected by copyright, the permission of the copyright owner is required if the recording is not to constitute an infringement. The number of copyright owners and the different kinds of copyright property involved will, of course, depend on the nature and content of the particular broadcast, and on the range of rights protected by the copyright law of the country concerned.

(a) Clearly every kind of literary and musical copyright works may be affected;

(b) in countries where the right to record sound recordings is protected, the rights of record manufacturers may be affected;

(c) in countries where broadcasts themselves are protected as copyright works, the rights of broadcasters may be affected. (*N.B.* In the United Kingdom, it is not an infringement of the copyright in a "broadcast" as such, for a recording of it to be made for "private purposes"—Copyright Act, 1956—S.14)

(d) in countries where films are protected as copyright works, the rights of the copyright owners of films may be affected. Also in countries where the rights of performers are directly protected, these rights may be affected.

Although none of the manufacturers has so far mentioned the possibility of using one AVRP appliance to record a programme being presented on a television set by another AVRP appliance, this may well be a possible development. This would mean that by collaboration between two householders, each owning an AVRP appliance, they could each build up a private library of AVRP programmes (including, for example, feature films) for future use. This, of course, could affect the interests of manufacturers of AVRP programmes, and the question might arise as to whether a cassette of an AVRP programme itself is entitled to copyright protection as either a "phonogram" or a "cinematographic" work.

The answer to this question will naturally depend on the precise terms of the relevant legislation. Under the United Kingdom Copyright Act, 1956, a "cinematograph film" is defined as—

"any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material,—

- (a) of being shown as a moving picture, or
- (b) of being recorded on other material (whether translucent or not), by the use of which it can be shown;"

This seems to include AVRP cassettes. Under the latest version of the U.S. Copyright revision bill (S.644—introduced in the Senate on 8th February 1971) a special category of "audio-visual works" is defined in terms clearly including AVRP cassettes.

This problem of unauthorised recording is not a new problem. It has existed for years in the case of unauthorised recordings made by home tape recording machines, and more recently the proliferation of photo-copying and other duplicating methods, has magnified the problem. Over the years, copyright owners of musical works consider that they have lost considerable amounts of royalties through the inability to find a practical basis for enforcing their rights in respect of such recordings, and now literary copyright owners are increasingly exposed to the same danger. As far as I know, the only copyright legislation which has attempted to remedy this inequity is the Copyright Act, 1965

of the West German Republic. Under Article 53(5) of that law the author of a work which by its nature is likely to be reproduced for personal use by appliances such as tape or video recorders, is given a right to claim through an authors' society from the manufacturers or importers of such instruments the payment of a royalty in respect of such anticipated personal use. Without such statutory provision it is difficult to see how the rights of copyright owners can be adequately protected against further and potentially greater abuse by AVRP systems.

Commercial recordings of television programmes

Basically such recordings may be made in either of two ways—(a) Where a television programme is produced (whether transmitted live or from a recording) by the broadcasting organisation itself; (b) Where the programme is made by an independent programme producer for sale or rental to broadcasting organisations.

In both these cases, there appears to be no legal, nor insuperable practical difficulty in ensuring that any special recordings made for the purpose of producing AVRP cassettes are properly licensed. Mechanical right societies should therefore consider appropriate tariffs and licensing procedures well in advance so that the question of payment of royalties can be settled before, and not after, this commercial development takes place.

In those countries where the law provides for the compulsory licensing of musical works, the commercial recording of programmes containing such works for AVRP use may raise the problem as to whether this recording is permitted under the compulsory licensing system (in which case the statutory royalty would be payable) or whether it is outside the system (in which case the royalty is entirely subject to negotiation). Where this problem arises, the answer will naturally depend upon the particular statutory provision of the country concerned. In the United Kingdom the compulsory licensing system applies when, *inter alia*, a record manufacturer—

“intends to sell the record by retail, or to supply it for the purposes of its being sold by retail by another person or intends to use it for making other records which are to be sold or supplied.”

(Copyright Act, 1956—section 8 (1)(c)).

Although not free from doubt, it appears that for the purposes of this provision the recording of a musical work on a film, tape or disc contained in a cassette for use in an AVRP play-back appliance would be

a "record." Consequently, in the case of cassettes *intended to be sold by retail* (but not when intended solely for rental) it would appear that the compulsory licensing system would apply and the copyright owners would be legally entitled to the statutory royalty calculated at the statutory rate of $6\frac{1}{4}\%$ of the ordinary retail selling price of the records, i.e. the cassettes.

The strict legal position may well give rise to problems in practice. The manufacturers of AVR P cassettes may have no ascertainable intention at the time of manufacture as to whether or not the cassettes they produce will ultimately be sold by retail or will be distributed on a hiring basis.

In the United States it appears that this particular problem may not arise. The general opinion is, I believe, that the compulsory licensing system has no application to film synchronisation—although I think there was one dissenter from this view in the shape of the late Judge Burton, President of BMI. If the recording of music on an audio visual cassette i.e. as an accompaniment to a visual programme, is regarded as an exercise of the film synchronisation right, which I believe is the general opinion in the United States, then this particular difficulty does not exist. Certainly, under the latest Copyright Revision Bill (S.644) the matter appears to be put beyond doubt; the compulsory licensing system is expressed to apply to "phono records" which are defined as expressly excluding "audio visual works."

Recording of films

As in the case of the commercial recording of television programmes, so the special recording for use in AVR P system of films primarily produced for cinema exhibition does not appear to present any special copyright problems. All that is involved is that the licence obtained from the appropriate copyright owners for the synchronisation of the copyright works on the film, must be extended to cover the special recordings to be made for the AVR P use, and of course, additional royalties should be paid for this use.

Specially produced AVR P programmes

Just as for recordings made of television programmes or of broadcasts, so recordings of programmes specially produced for AVR P use obviously require to be licensed by, or on behalf of, the copyright owners; and the appropriate societies, organisations and other copyright owners should commence devising tariffs and licensing procedures.

Contractual problems

The foregoing analysis of the various ways in which the recording right will be exercised under AVRP developments dealt with the copyright position, as such, and not with practical problems which may arise under existing contracts, or standard business relationships.

One problem which is quite likely to arise is the difficulty of ascertaining who has the right to authorise the making of AVRP recordings. In the music field it is a common practice in subpublishing contracts, particularly when the original publisher is in the USA, for the "film and television synchronisation" rights to be reserved by the original publisher. The question would then arise whether the subpublisher's authority to licence general recording rights would cover the AVRP recordings. The solution to this problem will obviously depend on the express terms used in the contract and on the system of law applicable but it is possible also that technical differences between an AVRP system using magnetic tape and a system using film might be relevant.

The problem mentioned above can arise in relation to the other kinds of copyright works and analogous interests. In the case of films, for example, it will be vital to the interests of script writers to make special provision for AVRP use in all future contracts, and in relation to existing contracts there may be considerable controversy as to whether writers have any claim to additional payments if films already made are used for AVRP purposes.

In this connection it may be of interest to mention that a conference of the International Federation of Authors held in London in January 1971 passed a resolution in the following terms—

"It was re-affirmed that there is no moral or legal justification for the use in cassettes of existing cinema films and television programmes made at a time when such use was unforeseen, without the consent of the performers."

Whether under existing contracts made by writers or composers in respect of existing films or television programmes, they have the legal rights to implement this resolution must again depend on examination of each contract in detail. Under the United Kingdom and United States law, if the agreements are clearly drawn, probably in most cases writers and composers no longer have such rights, but under the German Copyright Law the position may be different. Article 31(4) provides that—

"The granting of licences in respect of manners of exploitation which have hitherto not yet become known as well as covenants relating thereto shall not be effective."

Thus, even in a contract which purports expressly to give the assignee rights in respect of means of exploitation not presently known, under present German Law the author, or copyright owner, who has purported to give such rights may in fact still retain them and be in a position to negotiate fresh terms for new uses such as, for example, audio visual recordings.

The development of AVRP systems illustrates the value to the author of such statutory provision, and it might be desirable in other countries for authors and their advisers to seek to include a similar limitation by appropriate terms in all future contracts.

The Performing Right

It will be clear from the foregoing analysis that the performing right is not likely to be involved to the same extent as the reproduction right in the use of AVRP systems. The most likely instance of AVRP use involving the performing right is probably the use already described. AVRP appliances may be used so as to present commercially produced AVRP programmes in hotel lounges, restaurants, etc. through television sets. In practice, wherever television sets are already in use for this purpose they will, generally speaking, be already licensed by the national performing right organisation and the new kind of performances which may be given through the television sets by means of AVRP appliances will in all probability be covered by existing licences—unless, of course, the terms of the existing licence are drawn so rigidly that it does not extend to the use of a television set for showing AVRP programmes.

However, it may well be that the rate of royalty payable under existing tariffs for existing use of television sets may require to be re-considered. The existing rates will naturally have been related to the use of television sets for giving public performances only of programmes as broadcast. However, if television sets are to be used for giving public performances by means of AVRP systems, it may well be that the copyright content of the programmes so presented particularly if they are commercially produced programmes specially for AVRP use may contain a much higher content of copyright material, particularly of music. Moreover, although the act of broadcasting is, in many countries, a right protected by copyright quite separately from the act of public perfor-

mance, nevertheless it is probably true to say that the rate of royalty charged for public performances taking place by means of television sets implicitly, if not explicitly, takes into account the fact that the broadcaster has already paid a royalty for the right to broadcast to an audience which would include the audience for the public performance taking place by means of the normal use of the television set in a public situation. Where the television set is significantly used to give public performances by means of an AVR P system, this consideration does not apply. Consequently for these two reasons it may be appropriate for tariffs to be revised.

If the development of AVR P cassettes of popular music already mentioned does materialise, AVR P systems might replace or supplement the present use of juke-boxes. As juke-boxes are almost always used in public situations, this use of AVR P systems would lead to public performances requiring to be licensed by the copyright owners of the music (normally through the appropriate authors' society) and, if the AVR P cassettes themselves enjoy copyright protection, by the manufacturer of the cassettes. It is interesting to note that the compulsory licensing scheme contained in S.116 of the latest U.S. Copyright Revision Bill (S.644) applies only to a "non-dramatic musical work embodied in a phonorecord" and to a "sound recording" but not to audio-visual works. It would therefore appear that juke-box operators who use AVR P cassettes will have to negotiate licences with the copyright owners of the cassettes.

Naturally, it will not be until AVR P systems have actually been in use for a significant period, that all the legal and practical difficulties can be identified. I therefore end this paper by simply pointing to one of the kinds of interesting and important practical situations which the use of AVR P cassettes bring about. Thus, I wonder whether difficulties may not arise out of the use of audio visual cassettes for advertising or political purposes. If a writer or composer produces material under unqualified contract terms for the maker of audio visual cassettes, not contemplating that they might subsequently be used for advertising, or political purposes, can he subsequently prevent such use? Clearly many writers might wish to exercise some discretion, in the field of advertising, for example, over the particular commodities or services which their written or musical works were being used to promote. In the political field, for example, just imagine the wrath of a die-hard Republican composer who found his music accompanying an eloquent Democrat appeal for funds!

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

226. U.S. CONGRESS. HOUSE.

H.R. 35. A bill to authorize and direct the Librarian of Congress to establish and maintain a library of television and radio news programs, and for other purposes. Introduced by Mr. Matsunaga, January 22, 1971 and referred to the Committee on House Administration. 3 p. (92d Cong., 1st Sess.)

This bill, similar to H.R. 17010 and its companion bill S. 3720, which were introduced by Representative Fulton (Tenn.) and by Senator Baker, respectively, on April 15, 1970, contains an additional provision "That the Librarian first shall promulgate such regulations pertaining to the procedure for obtaining said copies as will secure from infringement any copyright or other restrictions which may exist, and, in so doing, the Library shall not be subject to suit for infringement."

227. U.S. CONGRESS. HOUSE.

H.R. 670. A bill to amend the Communications Act of 1934 so as to provide for the regulation of subscription television broadcasting in the public interest. Introduced by Mr. Dingell, January 22, 1971, and referred to the Committee on Interstate and Foreign Commerce. 4 p. (92d Cong., 1st Sess.)

Among other provisions of the bill, a proposed subscription broadcast of regularly broadcast series of programs, or sports events would be forbidden until five years after the program had been shown on regular television in the community; and feature films could not be exhibited until one year after their general release.

228. U.S. CONGRESS. HOUSE.

H.R. 843. A bill relating to the tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Introduced by Mr. Koch, January 22, 1971, and referred to the Committee on Ways and Means. 4 p. (92d Con., 1st Sess.)

Identical to H.R. 15615, introduced Jan. 29, 1970 by Mr. Koch during the previous session of Congress, and similar to a number of bills introduced in prior Congresses, the bill would provide for taxation, at the capital gain rate, of sums received as the result of transfers of rights in literary property, under certain conditions.

229. U.S. CONGRESS. SENATE.

S. 644. A bill for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Introduced by Mr. McClellan, February 8 (legislative day, January 26), 1971 and referred to the Committee on the Judiciary. 85 p. (92d Cong., 1st Sess.)

Identical, except for certain technical and perfecting amendments, to S. 543 as reported favorably during the previous Congress by the Senate Subcommittee on Patents, Trademarks, and Copyrights.

230. U.S. CONGRESS. SENATE. *McClellan, John L.*

S. 644 — Introduction of a bill relating to general revision of the copyright law. (117 *Congressional Record* S962-S963, no. 13, daily ed. Feb. 8, 1971.)

Remarks of Senator McClellan when he reintroduced the revision bill. Most of the remarks concerned the CATV controversy and included a statement that action "by the Federal Communications Commission on the CATV question will be a major contribution to the enactment by this Congress of the long overdue modernization of the copyright statute."

231. U.S. CONGRESS. SENATE.

S. 646. A bill to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes. Introduced by Mr. McClellan (for himself and Mr. Scott) February 8 (legislative day, January 26), 1971, and referred to the Committee on the Judiciary. 3 p. (92d Cong., 1st Sess.)

Identical to S. 4592, introduced by Mr. McClellan in the second session of the 91st Congress, the bill would not give performance rights to sound recordings, would become effective three months after enactment, and would not be retroactive. See 18 BULL. CR. Soc. 232, Item 113 (Feb. 1971).

The bill was passed by the full Judiciary Committee April 20, 1971, and by the Senate one week later, with only one dissenting statement, and was sent to the House Subcommittee on Patents, Trademarks and Copyrights.

232. U.S. CONGRESS. SENATE. *McClellan, John L.*

S. 646 — Introduction of a bill to protect against piracy of sound recordings. (117 *Congressional Record* S963, no. 13, daily ed. Feb. 8, 1971.)

Senator McClellan's remarks upon his reintroduction of the record piracy bill. Views of the Librarian of Congress on the predecessor bill, which are described as "unqualifiedly" favorable, are quoted in part, and anyone having comments on the subject is invited to submit them to the subcommittee. See Item 231, *supra*.

233. U.S. CONGRESS. SENATE.

S. 647. A bill to amend the act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes. Introduced by Mr. McClellan (for himself and Mr. Scott) February 8 (legislative day, January 26), 1971, and referred to the Committee on the Judiciary. 6 p. (92d Cong., 1st Sess.)

Other than for technical amendments, the bill which would establish a uniform body of Federal unfair competition law, is identical to S. 766 of the 91st Congress. See 16 BULL. CR. SOC. 250, Item 187 (1969), and Item 234, *infra*.

234. U.S. CONGRESS. SENATE. *McClellan, John L.*

S. 647 — Introduction of the "Unfair Competition Act of 1971." (117 *Congressional Record* S963, no. 13, daily ed. Feb. 8, 1971.)

Senator McClellan's remarks upon his reintroduction of a bill providing for a Federal law of unfair competition. The Senator anticipates that hearings on the bill will be scheduled during the current session and invites interested parties to address their comments to the subcommittee.

235. U.S. CONGRESS. SENATE.

S. 792. A bill to amend the Communications Act of 1934 to provide for the regulation of community antenna television systems. Introduced (by request) by Mr. Pastore, February 17, 1971, and

referred to the Committee on Commerce. 3 p. (92d Cong., 1st Sess.)

This bill, introduced at the request of the Federal Communications Commission, is designed so as to direct the Commission "to effect the orderly accommodation of both cable and broadcasting in order to secure maximum diversity of programming through the maintenance and expansion of free broadcasting and the provision via cable of multiple reception, origination and related services." The Commission is also authorized to prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by CATV of signals carrying sports contests under certain circumstances. See Item 236, *infra*.

236. U.S. CONGRESS. SENATE. *Pastore, John O.*

S. 792 — Introduction of a bill to provide for the regulation of community antenna television systems. (117 *Congressional Record* S1377-S1378, no. 17, Feb. 17, 1971.)

Senator Pastore's remarks on his introduction, at the request of the Federal Communications Commission, of an amendatory bill designed to give general guidance to the Commission in the CATV field. Included are letters of March 11 and March 24, 1970, from the Chairman of the FCC to Senator Pastore, Chairman of the Subcommittee on Communications of the Senate Commerce Committee. The letter of March 11 is a reply to Senator Pastore's request for the Commission's views on those portions of the copyright revision bill of the 91st Congress, S. 543, which deal with CATV. And the letter of March 24 is in reply to the Senator's request for submission of "a draft of suggested legislative amendments which are of a clarifying nature and give general guidance to the Commission in the CATV field." See Item 235, *supra*.

237. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 73. Television programs produced by non-network suppliers; availability to commercial television stations and CATV systems; further notice of proposed rule making. Docket No. 18179; FCC 71-42. (36 *Federal Register* 935-936, no. 13, Jan. 20, 1971.)

An invitation by the FCC for additional comments on non-network programming. The following explanation is given, in part:

"Indeed, while some reasonable degree of time exclusivity ('clearance') has long been recognized, we raise here the basic issue

whether any exclusivity as to the distribution of nonnetwork programming serves the 'public interest in the larger and more effective use of radio' (section 303 (g)). Would either the copyright owner or the CATV industries generally be hurt by the elimination of such exclusivity or would all generally, and most important, the public interest be benefited?"

238. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 74. Community antenna television systems: maintenance of program logs for cablecasting. Docket No. 19128; FCC 71-45. (36 *Federal Register* 939-942, no. 13, Jan. 21, 1971.)

Comments are invited in regard to a proposed amendment of Subpart K of Part 74 of the Commission's rules and regulations with respect to the maintenance of program logs for cablecasting by CATV systems. The Commission states the belief "that maintenance of a program log for all cablecasts, and periodic reporting to the Commission and the public, will assist the Commission in fulfilling its regulatory obligation to monitor the progress of CATV program originations and note their impact on the broadcast field."

239. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 74. Television broadcast translator stations. Notice of proposed rule making. Docket No. 19121; FCC 71-40. (36 *Federal Register* 936-939, no. 13, Jan. 20, 1971.)

Comments are invited on proposed changes in TV translator rules involving, among other matters, frequency assignment, interference, eligibility and licensing requirements, time of operation, and rebroadcasts.

2. Foreign Nations

240. AUSTRALIA. *Laws, statutes, etc.*

Copyright Act 1968 (No. 63 of 1968). An act relating to copyright, and for other purposes. (6 *Copyright* 178-196, no. 9 (Sept.); 218-222, no. 10 (Oct.); 247-261, no. 11 (Nov.); and 267-280, no. 12 (Dec. 1970).)

241. MOROCCO. *Laws, statutes, etc.*

Dahir (Act) relating to the Protection of Literary and Artistic Works (No. 1-69-135, of 25 Jumada I 1390 [July 29, 1970].) (7 *Copyright* 24-30, no. 2, Feb. 1971.)

242. MOROCCO. *Laws, statutes, etc.*

Dahir no. 1-69-135 du 25 jourmada I 1390 (29 juillet 1970) relatif à la protection des oeuvres littéraires et artistiques. (*Revue Internationale du Droit d'Auteur* 205-215, no. 67, Jan. 1971.)

The French version of the new Moroccan copyright statute of July 29, 1970. The last article provides that the law will enter into force six months after its publication in the Official Gazette of Morocco. The text was published in the October 7, 1970 issue of the *Gazette*. See Item 241, *supra*.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

243. Conventions not administered by WIPO. (7 *Copyright* 12-14, no. 1, Jan. 1971.)

Partial contents: Universal Copyright Convention (Geneva, September 6, 1952): state of ratifications and accessions as on January 1, 1971. European agreements; state of signatures, ratifications and accessions as on January 1, 1971; European Agreement concerning Programme Exchanges by Means of Television Films. European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories. European Agreement on the Protection of Television Broadcasts. Protocol to the said Agreement.

244. Intergovernmental Copyright Committee. *Extraordinary Session, 2d, Paris, September 2-11, 1970.*

Report adopted by the Committee. (4 *UNESCO Copyright Bulletin* 4-37, no. 4, 1970.)

Annexes (pp. 18-37): A. Proposals for revision of the Universal Copyright Convention adopted by the Intergovernmental Copyright Committee. B. Provisional rules of procedure for the Conference for Revision of the Universal Copyright Convention. C. Resolutions. D. List of participants.

245. International Copyright Union. (7 *Copyright* 6-12, no. 1, Jan. 1971.)

Contents: State of the International Union on January 1, 1971. Membership of the administrative bodies. Table of member states as on January 1, 1971. The Berne Union and international copyright in 1970. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, October 26, 1961): state of ratifications and accessions as on January 1, 1971.

246. Meeting of Governmental Experts on International Arrangements in the Space Communication Field, *Paris, December 2 to 9, 1969.*

Final report (excerpts). (4 *Unesco Copyright Bulletin*, 3-8, no. 3, 1970.)

The excerpts dealt with "Action towards satellite television transmissions: legal protection against uses not authorized by the originating body."

247. World Intellectual Property Organization. (7 *Copyright* 3-5, no. 1, Jan. 1971.)

Contents: The World Intellectual Property Organization in 1970. Member states of the World Intellectual Property Organization as on January 1, 1971. Membership of the administrative bodies.

PART. IV

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

248. *Tape Industries Assn. of America v. Younger*, 168 USPQ 609 (U.S. Sup. Ct. Feb. 22, 1971). *For decision below see* 316 F.Supp. 340, 166 USPQ 468 (D. Cal. 1970), 18 BULL. CR. SOC. 52, Item 14 (1970).

Appeal from decision sustaining constitutionality of California's "tape piracy" statute [Cal. Penal Code §653h (1968)].

Held, appeal dismissed for want of jurisdiction.

249. *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 436 F.2d 315, 168 USPQ 193 (2nd Cir., December 21, 1970) (Friendly, J.)

Appeal from judgment for plaintiff in action for copyright infringement in a jeweled pin.

Held, that a copyright notice consisting of the © symbol and the letters HR within a diamond was sufficient compliance with the statute, notwithstanding that plaintiff's full name did not appear on the work, and affirmed the decision below.

The court (i) noted that since the UCC amendments to Section 19 in 1954, use of the © symbol was no longer limited to the "short-form" notice (use of the proprietor's "mark", rather than name, in the notice *provided* his name appears elsewhere on the work); and (ii) found that plaintiff's HR/diamond trademark was equivalent to plaintiff's "name" under the standard notice provisions. The court said:

Until 1954, the first sentence of § 19 of the Copyright Act directed that the notice "shall consist either of the word 'Copyright' or the abbreviation 'Copr.', accompanied by the name of the copyright proprietor * * *". The second sentence qualified this by saying that for certain objects, including works of art or their reproductions, "the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or

of the substance on which such copies shall be mounted, his name shall appear." Prior to 1954, then, plaintiff's notice would not have qualified under the first sentence because it used only ©. Similarly, to the extent that the HR trademark is viewed as Rosenthal's "initials, monogram, mark, or symbol," the notice would have been inadequate under the second sentence which requires that in addition to the initials, the copyright proprietor's name appear on the margin, back, base, pedestal, or mounting substance and the implication would be that initials or a mark would not suffice for that purpose. . . .

However, Congress amended § 19 in 1954. . . . The amendment modified the first sentence by adding the symbol "©" to "Copyright" and "Copr.", as a notation which may accompany the name of the copyright proprietor in the notice of copyright. The second sentence of § 19 was left intact. Although the motivation for the amendment was to simplify the problems of American publishers exporting books to foreign countries, . . . it would seem to have had an unintended effect on the problem here presented. Under the amended statute a combination of © and "the name of the copyright proprietor" suffices in all cases. Hence, the use of © no longer need signify that the copyright proprietor is proceeding under the second sentence of § 19 with its requirement that the proprietor's "name" appear in addition to the initials, etc. on the object itself, and leaves room for the argument that the latter may qualify as a name under the first sentence of § 19 despite the antimony drawn in the second.

Since the 1954 amendment, there have been numerous holdings that the use of a well-advertised or widely known trademark or trade name on the copyrighted article itself will suffice even though no attempt is made to include the proprietor's true name on the base, pedestal, etc. . . .

Although Rosenthal does not claim to have secured trademark registration at the time the bees were first sold, we still believe that at all relevant times, the HR trademark was widely enough known to serve as an adequate substitute for the full Rosenthal name. In deciding this, we stress the evidence that Rosenthal has used HR as a trade name or mark since 1945, that it applied for trademark registration on June 1, 1962 and received it on Jan. 29, 1963 (barely three months after the first bee was sold), and that defendants and others in the jewelry trade have known perfectly well that HR referred to Herbert Rosenthal Jewelry Corp. In sum, these factors reveal that Rosenthal has complied with "the substance of what is prescribed in § 19."

250. *United States v. American Society of Composers, Authors and Publishers*, 168 USPQ 426 (S.D.N.Y., December 21, 1970) (Ryan, J.).

Petition, under the ASCAP consent judgment, by National Broadcasting Company for a license limited to performance of two thousand specified musical compositions from ASCAP repertory. NBC had previously held blanket licenses for the entire ASCAP repertory and ASCAP asserted that it was not required to grant limited licenses.

Held, petition denied.

Although the parties alleged conflicting claims of substantive anti-trust violations,* the court held that its inquiry was limited to whether ASCAP was required to grant limited licenses to NBC under the terms of the Government's anti-trust consent judgment against ASCAP. Based on the language and structure of the consent judgment, the potential impracticability of limited licenses, and the prior course of dealings of the parties, the Court found that such licenses were not required. The court said:

The scope of a license to a television network is stated in Section V(A) of the judgment to be "the ASCAP repertory". This is the judgment directive applicable to NBC; the provisions for a limited license in Section VI are permissive, not mandatory. A bulk user of music such as NBC can hardly avail itself of the limited procedures in Sections VI and IX, which are clearly designed for situations not here involved. In fact, the whole thrust of Section IX is to provide the mechanics for setting appropriate license fees, not for establishing the scope of a license.

In passing, we note that ASCAP persuasively points out that a limited license for a bulk user of musical compositions, such as NBC, would be unworkable. Broadcasting live parades, sporting events and similar programs, in which bands perform without prior censorship of their selections, would make a license of some 2,200 of the tens of thousands of available musical works completely illusory. [The court then discussed, and found support for its conclusion in, *United States v. ASCAP*, 208 F. Supp. 896, 135 USPQ 297 (S.D.N.Y. 1962) *affirmed* 331 F.2d 117, 141 USPQ 312 (2d Cir. 1964).] The consistent practice of NBC in licensing the entire ASCAP repertory for

-
- * NBC asserted that ASCAP's refusal to license less than its entire repertory itself constituted an anti-trust violation. ASCAP claimed that limited licenses sought would violate the anti-trust laws by allowing NBC, through its affiliated stations, to "pitch the might of the NBC television network" against unprotected individual composers, who would have to knuckle under to NBC's terms in order to have their songs performed on the air."

network presentation for the twenty years since entry of the amended judgment is indicative of the intent of the judgment and is most persuasive that this is the correct interpretation of its terms. Two decades of acquiescence in this interpretation of the judgment is most relevant to a decision on this application. Nowhere in the judgment is ASCAP directed to issue a license to a television network of less than the entire catalogue. Indeed, any such directive might very well import substantial anti-trust implications. We need not, however, undertake an analysis of this phase of the application, since we find that ASCAP is not required to grant the limited license sought by NBC.

The license sought by NBC is not only radically different from those it has had for more than twenty years under the amended judgment, but it is also a departure from those licenses that ASCAP is required to grant by the terms of the judgment. Consequently, we sustain ASCAP's position that it is not appropriate for us to undertake what would be tantamount to a modification of the judgment on the application of one who was not a party to the lawsuit. The application for the limited license sought is denied.

251. *Picture Music, Inc. v. Bourne, Inc.*, 314 F.Supp. 640, 167 USPQ 348 (S.D.N.Y. July 6, 1970) (Pollack, J.).

Action for declaratory judgment as to ownership of copyright in a musical composition.

In 1933 Walt Disney Productions produced and distributed a motion picture cartoon entitled "Three Little Pigs." The cartoon included the song "Who's Afraid of the Big Bad Wolf," the words and music of which were written by a Disney employee (Frank Churchill). The cartoon was a notable success and a representative of Irving Berlin, Inc., believing that the song could be turned into a popular vocal work, brought the cartoon score to songwriters Ann Ronell and Johnny Burke. Burke and Ronell "restructur[ed] and lengthen[ed] the central melody to the customary proportions for a popular song and supply[ed] incidental necessary musical changes and additional lyrics." After further review and revision by the Berlin music department, the popularized version was submitted by Berlin to Disney. Disney agreed to Berlin's publishing the song and assigned its original and renewal copyright interests to Berlin in exchange for royalties. Disney also granted Ronell a percentage of its royalty income in return for her services. For the twenty-seven years from 1933 to 1960, Ronell accepted a quarter-interest in Disney's income, though at times she protested that she was entitled to a one-third interest. From 1960 on she refused to accept this royalty share on

the grounds she was a co-owner of copyright and entitled to an undivided one-half interest in the last year of the initial term and in the renewal term of copyright in the popular song. Both parties registered claims to renewal copyright, defendant claiming as proprietor of a work made for it by Churchill and Ronell. In the instant action plaintiff, successor to Ronell, sought a declaration of such ownership. Defendant, successor to Bourne, claimed ownership of the entire copyright interests.

Held, for defendant.*

1. *Joint Ownership*: Plaintiff contended that through her contributions, Ronell became a joint owner of the song and thus entitled to an undivided half interest therein. The court held, however, that:

No joint ownership arose here. There was no collaboration between Frank E. Churchill, the author of the source material, and Ann Ronell. Neither Churchill nor his employer, Disney, intended to create a new work. Miss Ronell's contribution to the work which she undertook with Berlin's employees was not a new version of the music or lyrics. Even if her additions were copyrightable, and this is shrouded in doubt, a more substantial and significant contribution was required to reach a finding of joint ownership. . . .

It was not the intention of the parties that Miss Ronell should become a joint owner of the source material or of the popular song so closely derived therefrom. The original work was not transferred to her. At most, she provided only certain musical changes in the same musical composition which were not a significant contribution or change, except in musical style, of the original source material; and she added lyrics in the same vein as the original lyrics.

(The court preceded its conclusion with a thorough review of the development of the American joint-authorship doctrine.)

2. *Employment-For-Hire*: In reply to defendant's assertion that Ronell was an employee of Disney, the court extensively reviewed the "employment-for-hire" doctrine, stating in part (with citations omitted):

Section 24 of 17 U.S.C. inter alia provides that "in the case of * * * any work copyrighted * * * by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years" upon due and timely application in the final year of the original term. Thus, it is crucial in determining renewal rights to define the relationship between

* The following is only a partial summary of an extensive opinion dealing with several copyright concepts.

the author and any publishing company to whom he may have ceded rights in the original copyright term.

If the relationship is one of employment, then the renewal rights vest in the employer or his successor in interest absent any contrary agreement, . . . and provided the particular work was made pursuant to the relationship and not as a special assignment outside of the regular scope of employment. . . .

On the other hand, the rights vest in the author, not the proprietor, if the author was a commissioned independent contractor . . . or if any of the ingredients of the employment relationship are lacking, . . .

In spite of the importance of the distinction, however, the law is unclear as to precisely what constitutes an employment for hire.

The legislative history of the provision entitling proprietors of "works made for hire" to renew in their own right is hardly enlightening in this regard. [The court then noted certain aspects of the legislative discussions and drafts culminating in the 1909 Copyright Act.]

The case law is similarly unhelpful in articulating the constituent elements of an employment for hire or the rationale underlying the provision.

In spite of the absence of a conceptual basis for the distinction, certain objective indicia may be noted in the cases finding an employment for hire, and in those declining to do so.

Indicative of an employment for hire are the following:

(1) The existence of an arrangement going beyond an assignor-assignee relationship prior to the undertaking of the particular work. The antithesis of such an arrangement is a case where an author creates a work of his own volition and then sells it to a proprietor, . . .

(2) The payment of wages or other remuneration. . . . A regular salary is an important indicant of employment, . . . but the salary need not be fixed and has often been in the form of advances against future royalties, if any. . . .

It has been said that one may be an employee even if the writing is done as an accommodation with no compensation at all. . . . Thus, neither the form of compensation, nor the amount, if any, is determinative. Conversely, the fact that the author was obliged to repay advances or royalties which were never accrued is an indicant that the relationship was not an employment for hire. . . .

(3) The right of the employer to direct and supervise the manner in which work is performed. . . . This indicant has been called "crucial". . . . Courts have noted whether the author's work was

edited by his employer and whether control was exerted over the style and content of the work. . . .

(4) The existence of an express contract for hire, especially one calling for an author to devote his exclusive artistic services to his employer, . . . or requiring him to execute special contracts in connection with all works created which assign his copyright interest. . . . By contrast, an author's freedom to engage in outside writing activities from which he derives substantial independent income is indicative of the absence of an employment for hire notwithstanding the use of the word "employment" in an agreement with the writer. . . .

(5) Regular working hours. . . . This factor has been expressly declared a non-essential ingredient of the employment relationship, however. . . .

(6) The fact that the creative work occurred in whole or in part at the employer's place of business. . . .

(7) The master's right to suspend or dismiss the employee. . . .

In addition to the elements mentioned above, the following factors indicate an absence of an employment for hire:

(1) The fact that the work was created as a special job assignment, that is, outside the scope of the employee's regular duties. . . .

(2) The fact that the author received no compensation until the entire work was completed. . . .

3. *General.* The court concluded:

The resolution of this case and the renewal copyright claims gets down to an issue of the intention of the parties. This must be adjudicated after a lapse of 37 years from the time of the operative events. Most of the people who dealt with the matter contemporaneously are dead and the memories of interested witnesses in their recital of the past have undeniably dimmed, lapsed or been constructed. The objective manifestations, the acts, writings and contemporaneous claims of the parties and the reasonable inferences therefrom, measured against the probabilities, provide a more reliable index to the truth than mustered recollections on each side of the case, understandably schooled for the trial.

The inference which the Court draws from the credible evidence which does not bear the infirmity of lapsed memory or wisdom or desire born or created 37 years after the event, is that during the summer of 1933, Berlin obtained the assistance of Miss Ronell for its desire to publish an adaptation and arrangement of the vocal

music and lyrics in "Three Little Pigs" for use as a popular song, utilizing the theme words of the source material as the title, "Who's Afraid of the Big Bad Wolf?"

Ann Ronell did not participate in the composition of any of the music or lyrics contained in the Disney copyrighted motion picture musical cartoon—"Three Little Pigs". The music used in the song was actually taken from the music in the picture but placed in different positions; the basic music in the song is not different; moreover, it is identical as to key, harmony and time; it is melodically, harmonically, and rhythmically the same. Miss Ronell did not add anything creative, original or substantial to the Disney source material of the song; there is a virtual musical identity between the musical source material and lyrics and the piano song and the latter represents no musical contribution over the former.

Miss Ronell conveyed and intended to convey her contribution to the adaptation and arrangement of the original material together with the additional words she supplied, and all her rights, including copyrightable interest, original and renewal, in the song, in exchange for a share of all royalties to Disney from copyrights, original and renewal, as well as any royalties accruing thereafter.*

The Court does not credit the claim made on the trial that in 1933 Miss Ronell also sought a so-called SPA (Songwriter's Protective Association) contract for her services on the Disney song.** The force of a claim to that effect was to seek to carve out of the transfer to Disney the renewal rights to her own additions. Her only discontent during the original 28 year copyright period was with the percentage of royalty given to her (she testified that she expected one-third and got only one-fourth) and the contraction of the original legend expressing artistic credits on the song sheet. Miss Ronell sought and expected only money and credits—not copyrights or renewal privileges. She was not a weak negotiator for her own interests. She never indicated a claim to an ownership in the popular song or its copyright or in any renewal copyright until about 1960. She knew that Berlin was the music publisher and had immediately copyrighted the song. Berlin had not sought or obtained any authorization in respect of the copyright or the publication of

* The court had previously reviewed the law concerning an author's assignment of his renewal expectancy.

** Earlier in its opinion, the court noted that ASCAP's division of the author's share in the song between Churchill and Ronell "has no significance on the question in this case of the ownership of the copyright interests, original or renewal."

the song from Miss Ronell. It would have been normal to seek and obtain or supply such authorization if warranted by the facts known to both parties. Nonetheless, Miss Ronell never claimed that she had any interest in the work, its copyrights or the publication of the song, except to obtain the royalties agreed upon in 1933 and except to be given public recognition (plaudits) in the form set out in the original credits. She did not broaden her claims even when the popular song was a great success. Nearly three decades later, she hit upon the ideas which gave rise to this suit and the filing of claims to the last year of the original copyright and to the renewal copyright.

On the other hand, Disney contemporaneously described itself in the assignment of ownership and copyrights to Berlin as the sole composer and warranted to Berlin that there were no arrangements affecting copyrights or renewals thereof. Both Disney and Berlin were sensitive and sophisticated on the need to procure an assignment of copyright interests before proceeding with publication except where no factual situation existed for a claim of retained ownership or an interest therein by a writer, adapter or arranger.

In 1960, Ann Ronell's contribution to the adaptation of the cartoon song and the added lyrics were worthless without the source material. It is for these items which Ann Ronell delivered in 1933 that she was given the substantial percentage of the ongoing royalty income, payable during the original and renewal copyright periods and beyond.

The Court has been unable to find any merit in the claim for renewal rights regardless of the rubric applied. I cannot see any room to doubt that when Miss Ronell finished her work on the source material and handed over the product and had it reviewed and revised by Berlin's music editor and arranger and it was sent on to Disney, that it was intended to become Disney's property exclusively. The creative spark emanated from the original work. Nothing materially new was added. The additions were too insubstantial to induce an owner to share its copyrights or their ownership or do more than pay fair compensation for the services rendered which was here cast in terms of the royalty income returned.

252. *The Boltens Trading Corporation v. Killiam*, 168 USPQ 424 (S.D. N.Y. December 21, 1970) (Pollack, J.)

Action for infringement of copyright in certain motion pictures. Eastin-Phelan Corporation, one of the multiple defendants, moved to dismiss the suit as to itself for improper venue and to quash return of

service for lack of personal jurisdiction. The court described movant's activities and contacts with New York as follows:

Defendant corporation is incorporated under the laws of Iowa and its principal place of business is in Iowa. According to the affidavit of its president, it operates a mail order business in Davenport, Iowa; it is not licensed to do business and does no business in New York; has no employees, agents or sales representatives in New York; has no property, pays no taxes, has no telephone listings, and makes no contributions to anyone else's place of business in New York. The affidavit does state that twice a year its corporate officers visit New York to confer with film suppliers for the selection and purchase by it of films.

In addition, defendant using the trade name "Blackhawk Films" print the "Blackhawk Film Bulletin" through which it solicits the purchase of films listed therein. That bulletin is distributed to interested persons in New York by mail only. The bulletin contains order blanks and charge account applications. The order blanks, and checks or money orders to cover the price of the films requested, are mailed to Eastin-Phelan's offices in Iowa for approval and acceptance there of the orders. Eastin-Phelan has no control over these sales. The films are shipped directly to purchasers in New York and elsewhere. Eastin-Phelan's films are sold to Sears Roebuck which advertises them in its catalogs distributed in New York. Eastin-Phelan has no control over the distribution of Sears' film catalogs. These catalogs do not identify Eastin-Phelan or Blackhawk Films as the source of the films offered therein. Eastin-Phelan also sells films to the Willoughby-Peerless Film Library in New York which then in turn either sells or rents those films to individuals.

None of the films listed in paragraphs 7 and 8 of the complaint said to constitute the films whose copyrights were infringed are offered for sale by Eastin-Phelan in New York or anywhere else.

Held, motions granted.

The court noted that 28 U.S.C. §1400, governing venue and personal jurisdiction in copyright cases, required that suit be instituted in a district where defendant or its agents "may be found" and that the standard of required presence was the same as that under the New York long arm statute's (C.P.L.R. §302) criteria of "transacting business." However, the court found that Eastin-Phelan's mail order business, sale of films to businesses which then dealt with individuals, and corporate visits to New York did not comprise the "systematic and continuous activity" required under both 28 U.S.C. §1400 and N.Y. C.P.L.R. §302.

253. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers*, 168 USPQ 460 (S.D.N.Y., December 30, 1970) (Lasker, J.) (Supplemental Opinion). *For opinion supplemented, see* 167 USPQ 754 (S.D.N.Y. 1970), BULL. CR. SOC. 247, Item 119 (1971).

In an action by Columbia Broadcasting System against ASCAP and BMI for violation of the anti-trust laws, BMI counterclaimed for copyright infringement based upon CBS' continued use of BMI music without license. In a prior opinion, Judge Lasker held that CBS should pay to BMI, annually during the pendency of the litigation, a sum equivalent to CBS' 1969 BMI fees, *subject to* possible adjustments reflecting substantial changes in CBS' use of BMI music after 1969 (or BMI's decision to decline monetary relief *pendente lite* and thus preserve their claims for infringement).

BMI subsequently submitted a proposed order to implement the above judgment which included a provision designed to enjoin CBS from discriminating against CBS Network use of BMI Music. BMI contended that such a provision was necessary because, under CBS' ASCAP license, CBS might use as much ASCAP music as it wished for a fixed sum while the prior opinion provided for possible adjustment of CBS payments due BMI. Thus, BMI argued, CBS might be induced to use ASCAP selections wherever possible in order to reduce BMI fees. Judge Lasker found, however, that "the existence of such a [provision] might be a source of constant further litigation and the administration of such a provision would be close to unworkable."

Judge Lasker then modified his prior opinion to provide that if the parties were unable to agree on a fee for any year during the litigation, the court might set such fee with due consideration to factors proffered by the parties, which fee would remain fixed for that year without further adjustment.

254. *Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago*, 168 U.S.P.Q. 559 (N.D. Ill., December 22, 1970) (Napoli, J.)

Cross-motions for summary judgment in an action for declaratory judgment that defendant's claimed copyright in a Pablo Picasso sculpture is invalid and that said sculpture is in the public domain.

In 1965 Pablo Picasso, acting at the request of the Chicago Building Commission, completed a maquette (model) for a monumental sculpture intended for the plaza in front of the planned Chicago Civic Center. An aluminum model taken from the maquette was subsequently prepared as a guide to construction of the sculpture. Insisting that his design be taken as a gift, Picasso refused the Commission's proffered payment for his rights in the maquette and signed a "Deed of Gift" providing:

The monumental sculpture portrayed by the maquette pictured above has been expressly created by me, Pablo Picasso, for installation on the plaza of the Civic Center in the City of Chicago, State of Illinois, United States of America. This sculpture was undertaken by me for the public building commission of Chicago at the request of the Chicago Civic Center architects. I hereby give this work and the right to reproduce it to the public building commission, and I give the maquette to the art institute of Chicago, desiring that these gifts shall, through them, belong to the people of Chicago.

In 1966 the Commission, the City of Chicago public relations department, the Chicago Art Institute and U.S. Steel Corporation (the prime contractor for construction of the final sculpture) commenced a campaign to publicize the sculpture. As a part of the campaign, two press showings were held. At the first showing, the maquette was placed on public exhibit at the Chicago Art Institute. No copyright notice was affixed to the maquette, although a posted notice stated that "The rights of reproduction are the property of the Public Building Commission of Chicago, © 1966, all rights reserved." Pictures of the maquette and the aluminum model were taken by invited press photographers and were published in various periodicals; the Commission also supplied photographs of the models to persons requesting them for publication. At the second showing, U.S. Steel exhibited, without notice, a twelve and one half foot wooden model of the sculpture. This model was also photographed by the press and U.S. Steel's public relations department and the pictures were published in various periodicals without separate notice.

In June, 1967, the maquette was displayed at a London Gallery without notice. A catalog for the exhibit was published with a picture of the maquette, again without notice and the court found that the Commission was aware of these facts. On August 4, 1967 the monumental "Chicago Picasso" sculpture, with an affixed copyright notice in the name of the Public Building Commission, was dedicated at the Chicago Civic Center Plaza.*

-
- * The opinion also discussed publication (without notice) of pictures of the final sculpture coincident with the dedication ceremonies and the Commission's subsequent policy with regard to private and commercial photographing and other copying of the sculpture. However, upon finding that the Chicago Picasso entered the public domain prior to August, 1967, the court found it unnecessary to deal with the following issues: "1) Whether a monumental sculpture of the type at issue can be copyrighted . . . ; (2) Whether the sculpture was dedicated to the public and thus incapable of being copyrighted; 3) Whether a valid copyright can be

Held, summary judgment for plaintiff.

The court found that the Chicago Picasso — the final “monumental sculpture” — was in the public domain because (i) models of the final sculpture had been generally published without copyright notice, thus entering the public domain, and (ii) the final sculpture was a mere copy, “albeit on a grand scale,” of the public domain models and was thus not susceptible of copyright.

1. Defendant argued that the copyrightable work of art was the final sculpture — properly published with notice — rather than the models. However, the court held that the maquette was a copyrightable work of art which entered the public domain upon publication without notice:

When Picasso signed the deed of gift on August 21, 1966, there existed but a single copyright. Picasso had a common law copyright in the maquette. He gave the maquette itself to the Art Institute and the right to reproduce it to the defendant. The monumental sculpture did not exist at this point in time and accordingly there could be no copyright in the monumental sculpture, either common law or statutory. It is settled that a copyright can exist only in a perceptible, tangible work. It can not exist in a vision. When Picasso made his deed of gift the monumental sculpture was undeniably but a vision and thus not subject to copyright protection.

The maquette, however, was an original, tangible work of art which would have qualified for statutory copyright protection under 17 U.S.C. 5(g) [works of art; models or designs for works of art]. The court finds that when the maquette was published without statutory notice Picasso's work was forever lost to the public domain. When the monumental sculpture was finally completed it could not be copyrighted for it was a mere copy, albeit on a grand scale, of the maquette, a work already in the public domain.

2. The court held that the showings of the models, without restriction on copying and under adequate control of defendant, and the taking and publication of “uncopyrighted” photographs of the models constituted a divestive general publication of the models without notice. The court said:

Defendant urges that display of the maquette at the Art Institute was a “limited” publication and thus did not place the Chicago

maintained where the public is totally free to make copies, albeit for non-commercial use; and 4) Whether uncopyrighted copies of the sculpture published after the dedication caused the sculpture to be placed in the public domain.”

Picasso in the public domain. In support of this position the defendant's prime authority is *American Tobacco Co. v. Werkmeister*, [207 U.S. 284 (1907)]. In the American Tobacco case . . . the court [held] that the display [of a painting without notice] in [a Royal Academy] amounted to a limited publication and thus did not operate to divest the holder of the copyright of its rights. The basis for this decision was the finding that absolutely no copies were permitted to be made by anyone viewing the picture at the gallery. In fact, it was noted that guards were stationed in the gallery to rigidly enforce the rule of the Royal Academy that no copying take place. The court properly decided that the rational basis for the notice requirement would not be transgressed by showing a picture bearing no notice where that picture could not be copied. In closing dicta the Court in *American Tobacco* noted: "We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect".

It is this court's finding that the case at bar more closely resembles the situation postulated in the aforementioned dicta than it does the actual facts of the American Tobacco case. In the case at bar there were no restrictions on copying and no guards preventing copying. Rather every citizen was free to copy the maquette for his own pleasure and camera permits were available to members of the public. At its first public display the press was freely allowed to photograph the maquette and publish these photographs in major newspapers and magazines. Further, officials at this first public showing of the maquette made uncopyrighted pictures of the maquette available upon request. Were this activity classified as limited publication, there would no longer be any meaningful distinction between limited and general publication. The activity in question does not comport with any definition of limited publication. Rather, the display of the maquette constituted general publication. . . . [D]efendant [also] argues that the Art Institute did not hold the copyright to the maquette and therefore could not have placed notice on the maquette. The answer to this assertion is that the Commission, the alleged holder of the copyright, was required to insure that proper notice was placed on the maquette. The Commission was able to place improper notice at the showing, i.e., notice in the room, but it did not comply with the statutory requirement that notice be placed on the work itself in order to be effective.

3. Defendant asserted that the use of "uncopyrighted" photographs of the models was excused under the doctrine of "fair use," but the court stated that "[t]he doctrine of fair use . . . was meant to be used and has only been used, as a defense in infringement actions; . . . defendant can not cite a single authority to support its unique claim that the doctrine can be asserted to excuse a failure to put copyright notice on copies of a work of art intended for distribution to the press [and] the court after diligent research has also failed to find any support for the defendant's position. It seems appropriate to ask why defendant's desire for wide and favorable distribution of copies of the maquette and the other models could not have been fulfilled by distribution of pictures which had copyright notice printed on them?"

4. Defendant, relying on *Goodis v. United Artists*, 425 F.2d 397 (2nd Cir. 1970), 18 BULL. CR. SOC. 34, Item 10 (1970), also claimed that the photographs of the models which were published in various periodicals were protected under the blanket notices in these media. The court found, however that "[t]he case at bar is distinguishable from the *Goodis* decision for in the instant case the newspapers and magazines that published the pictures of the work of art did not have as the *Goodis* court said, 'such an interest in the work that notice of copyright in the publisher's name will protect the copyright . . .'. The publishers in the case at bar had no interest whatever in the pictures of the work that they published." Accordingly, the court, citing the "general rule" that "if a work is published in the press, without a separate notice in the name of the holder of the copyright of the work in question, that work has been published without valid notice," held that the copyrights of the publishers in their own publications did not serve to preserve the defendant's copyright.

5. The court also found that the Commission "passively and in some cases actively engaged in the distribution of uncopyrighted pictures promoting the Chicago Picasso" and that such distribution did not comprise unauthorized publication and was attributable to defendant.

In conclusion, the court observed:

This decision comports with a strict adherence to copyright law and is also in consonance with the policy of enriching society which underlies our copyright system. The broadest and most uninhibited reproduction and copying of a provocative piece of public sculpture can only have the end result of benefiting society.

255. *Abli, Inc. v. Standard Brands Paint Co.*, 168 U.S.P.Q. 553 (D. Cal., Dec. 23, 1970) (Hauk, J.).

Action for infringement of copyright in a label used for packaged beads.

Held, judgment for plaintiff.

1. *Copyrightability*: Defendant argued that since plaintiff's label simply described the articles for which it was used and had no independent value, it was not copyrightable. The court found, however, that "there was sufficient pictorial and written material on plaintiff's label . . . so as to render same the proper subject of copyright protection. It was more than merely descriptive and was dictated by more than functional considerations."

2. *Infringement*: Finding that defendant deliberately copied substantially all of plaintiff's label, the court considered it a "clear case of copying and infringement." The court added:

Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for independently arrived at results is copyright infringement.

3. *Damages*: Since the costs of defendant's beads, packages and labels could not be separated, the court held that it would be improper to award the profits defendant derived from approximately \$13,000 sales of packaged beads under the infringing labels.

Noting that, after receiving plaintiff's claim of infringement defendant destroyed unused labels and switched to another label, the court concluded that \$500 (plus attorney's fees and costs) would be a just award under the "in lieu of" provisions of the Copyright Act.

2. State Court Decisions

256. *Firm Amusement Corporation v. Metro-Goldwyn-Mayer, Inc.*, 317 N.Y.S. 2d 186 (Sup. Ct. N.Y. Co., October 29, 1970) (Kupferman, J.).

Motion for preliminary injunction directing defendant to make a certain motion picture ("Dirty Dingus McGee") available to plaintiff's theatre pursuant to contract, and restraining its exhibition at any other New York Metropolitan area theatre.

Held, motion denied.

Although noting that defendant "was clearly in anticipatory breach of its contract" by declaring, in a letter, its refusal to deliver the film

pursuant to agreement, the court held that preliminary injunctive relief was not warranted because (i) its issuance would comprise the ultimate relief requested, and (ii) doubt as to the issue of irreparable damage:

Defendant shows that many other films are available to the plaintiff, and, further, that defendant has already made other arrangements at Red Carpet Showcase Theatres for the film and time period involved. As Judge Cardozo said in *Broadway Photoplay v. World Film Corp.*, 225 N.Y. 104 (1919) at page 109, 121 N.E. 756 at page 758:

"The indifferent show succeeds by force of the reputation of the actor. The results have all the endless variety of human tastes and fashions."

However, "DIRTY DINGUS McGEE," so aptly named for this litigation, gives no indication either in the moving papers or otherwise of inspiring paeans of praise and may be considered unique only in that it consummated the divorce of Loew's and MGM[*].

257. *Roberts v. Dahl*, 168 U.S.P.Q. 428 (Ill. Cir. Ct., January 21, 1971) (Bua, J.).

Action for infringement of common law copyright. Plaintiff developed a number of unpublished scripts for a television show on beauty counseling and alleged that she showed these scripts to one Victor Morris, who subsequently became employed by a public relations firm (Ruder & Finn) which represented the Clairol cosmetics company.

Defendant Arlene Dahl is a well-known movie and television personality who was featured on a TV series ("Beauty Spot") dealing with beauty counseling. Other defendants were the telecasting company, Clairol (sponsor of "Beauty Spot"), Clairol's advertising agency, Victor Morris and Ruder & Finn.

Plaintiff alleged that defendants copied her scripts and published the contents thereof on the "Beauty Spot" series. Defendants moved for summary judgment.

Held, motion granted.

1. *Independent Development*. The court quoted the principle of independent development as stated in *O'Rourke v. R.K.O. Pictures, Inc.*, 44 F.Supp. 480, 53 U.S.P.Q. 95 (D. Mass. 1942): "... even an exact

* Plaintiff is part of the Loew's Theatre Chain. Prior to the anti-trust decision in *United States v. Paramount Pictures*, 334 U.S. 131 (1948) Loew's, Inc. and defendant were part of the same organization.

counterpart of another's work does not constitute plagiarism, providing that such counterpart was arrived at independently and without in fact resorting to the other's work". Emphasizing defendant Dahl's experience in the beauty field, her preparation of articles and other counseling materials prior to plaintiff's preparation of her scripts and relationship with Morris, and the uncontradicted affidavits of defendants, the court found that defendants developed the "Beauty Spot" series "independently of and without knowledge of plaintiff's idea and TV scripts" and thus held that defendants were entitled to summary judgment on this basis alone. The court said in part:

Thus, Arlene Dahl, with a lifetime of experience in the beauty and fashion field, complemented with the experience of her staff of writers, was eminently qualified to write scripts for a television series on the very same beauty and fashion subjects treated in her newspaper articles and her books. Under the foregoing circumstances, the question might be asked: What could the plaintiff bring to Arlene Dahl and her highly qualified staff? The answer is clear from this record: Absolutely nothing. A different situation might exist if Arlene Dahl had been a race driver, a national baton champion, or one who had no previous beauty or fashion consulting experience. However, such is not the case and it stretches the imagination to suggest, as does plaintiff, that there is any inference of copying under the above circumstances.

2. *Access*: The court also held that plaintiff had failed to establish access to her materials on the part of the persons responsible for the "Beauty Spot" scripts. The court said in part (emphasis added):

[I]t is uncontested that plaintiff advised Victor Morris of her idea and scripts for a television show on beauty counseling. It may be assumed that Mr. Morris read plaintiff's unpublished television scripts on several or many occasions . . .

However, there is no evidence that Victor Morris disclosed or communicated this knowledge to anyone. . . .

Even assuming that Victor Morris had contact directly or indirectly with Clairol personnel . . . Mr. Morris, Ruder & Finn personnel and Clairol personnel had no responsibility for or involvement in the creation, writing or production of the Arlene Dahl scripts. . . .

"[A]ccess" as used in the reported decisions means knowledge of the contents of plaintiff's unpublished scripts by those persons who actually wrote the Arlene Dahl scripts. . . . At the very least,

there must be a reasonable possibility of Arlene Dahl and her staff *actually viewing* plaintiff's work—not a remote possibility as exists here. . . . Indeed, it is uncontroverted in the record that those persons responsible for conceiving and writing the Arlene Dahl scripts were totally unaware of Victor Morris, unaware of plaintiff, and/or unaware of plaintiff's idea or scripts for a television show on beauty consulting. . . .

Accordingly, without evidence that the authors of Arlene Dahl's scripts either viewed *or had an opportunity to copy* plaintiff's scripts, plaintiff cannot establish access.

3. *Similarities.* Although considering the issue "moot" because of its decision as to independent development and access, the court noted that such similarities as existed between plaintiff's scripts and the "Beauty Spot" scripts could not be considered indicative of copying since "much of what is common is either old (and therefore in the public domain) or is the subject of Arlene Dahl's proprietary rights in her own works [published prior to Morris' employment by Ruder & Finn] and the nature of the subject matter is very restrictive and limited (for example, "How to Make-Up Your Face") and of necessity certain descriptive words or routine phraseology are used in the beauty consulting field."

4. *Propriety of Summary Judgment:*

Plaintiff urges that the case of *Arnstein v. Porter*, 154 F.2d 464, 68 U.S.P.Q. 288 (2nd Cir. 1946), compels denial of defendants' motions for summary judgment. The *Arnstein* case is distinguishable on its facts, because plaintiff in that case was asserting infringement of a federal copyright for works that had been published and made accessible to the public. In the present case, plaintiff asserts infringement of unpublished TV scripts which by definition, have not been published and have not been made "accessible" to those persons who authored the Arlene Dahl TV scripts. Further, the *Arnstein* case is an aberration of the law* and those cases decided subsequently to the *Arnstein* case have virtually destroyed its viability as a meaningful precedent. . . .

* Barron and Holtzoff have characterized the *Arnstein* case as a product of the dramatically divergent views of Judges Frank and Clark of the Second Circuit regarding the proper role for summary judgment. Judge Frank, the author of the *Arnstein* decision, was an avowed critic of Rule 56 of the Federal Rules of Civil Procedure. Judge Clark, on the other hand, was the principal draftsman of Rule 56. As Barron & Holtzoff observe, the conflict was apparently resolved in the *Dyer* case [*Dyer v. MacDougall*,

258. *Jones v. Spindel*, 177 S.E. 2d 187 (Ga. Ct. App. July 16, 1970) (Jordan, J.).

Defendants appeal from judgment for plaintiff for compensatory and exemplary damages in action for infringement of common law copyright in plaintiff engineer's plans. Defendants asserted error in the failure of the trial judge to charge that if the jury should find a certain engineering firm (Modular Components) to be a joint owner of the plans, plaintiff's action must fail for lack of such firm as an indispensable party. The court sustained the refusal to charge because the "evidence of the relationship between [plaintiff] and Modular Components . . . is insufficient to support the conclusion in law and fact that Modular Components was a joint owner of the plans which the plaintiff prepared. Instead, it clearly appears that [plaintiff] had a common law copyright in the plans and Modular Components had agreed to pay [plaintiff] a fee for each unit constructed from the plans . . . and the unauthorized use of the plans by the defendants as disclosed by the proof is shown to be entirely outside the scope of the arrangement with Modular Components." However, the court *reversed* the judgment below on the grounds that the total award of compensatory and exemplary damages and attorney's fees was so excessive as to indicate bias or prejudice on the part of the jury.

259. *Donahue v. United Artists Corporation*, 83 Cal. Rptr. 131, 2 Cal. App. 3d 794 (Ct. App. Dec. 18, 1969; rehearing denied Jan. 6, 1970; hearing denied Feb. 13, 1970) (Lillie, J.).

Action for plagiarism. Plaintiffs claimed that they had created an idea for a certain underwater adventure television series format; that they had submitted the format in written form to defendants, together with twelve story outlines and one screen play; that such submission was under express and implied understanding that if defendants decided to use such materials, plaintiffs would receive compensation; that defendants subsequently produced and exhibited their "Sea Hunt" series which "used and exploited" plaintiffs' format and outlines; and that plaintiffs were not compensated for such use. The jury returned a verdict for plaintiffs and the court below entered judgment thereon, denying defendants' motion for judgment notwithstanding the verdict. Defendant appealed from the order denying its motion for judgment n.o.v.

12 F.R.D. 357 (EDNY 1951), affirmed, 201 F.2d 265 (2d Cir. 1952)] where Judge Frank concurred in the affirmance of a grant of summary judgment in a factual situation which is "difficult to reconcile" with Arnstein. 3 Barron & Holtzoff, Federal Practice & Procedure §1235, pp. 149-152. See also 6 Moore Federal Practice p. 56, 17[14] pp. 2515-2521 [Footnote by the Court].

Held, affirmed.

(1) *Statute of Limitations*: Defendant asserted that the action was barred by the two-year limitations period of Cal. Code Civ. Prac. §339(1)* because two "Sea Hunt" pilot films were "auditioned" to national advertising agencies for potential sponsorship more than two years prior to the filing of plaintiff's complaint. Defendant sought to bring the auditions within the running of the statute under the decision in *Thompson v. California Brewing Co.*, 191 Cal. App. 2d 506, in which plaintiff was nonsuited on the grounds that a contract to pay the value of his idea for beer sales promotion was breached by the extensive distribution of "test" advertising more than two years before commencement of suit. Finding the rationale of the Thompson case to rest on the degree of public exposure created by test situations, the court found it inapplicable to the "private or quasi-private" film auditions in question and held the statute to be no bar:

While not precisely so saying, defendant would equate the private auditioning of a film to national advertising agencies with the "sneak preview" of years gone by. It bears emphasis that the [Thompson] case turned on the exhibition of the idea [by test advertising] to "a substantial segment of the public in two metropolitan centers in this state," which exhibition "would certainly destroy any further marketability of the idea." . . . Implicit in the above observations is the idea's public marketability and not, as defendant urges, its asserted diminution in value after rejection by so-called advertising experts after a private showing. Certainly it may not be said as a matter of law and under the conceded facts that the foregoing circumstances should be considered a use of plaintiffs' property for the purpose of the running of the statute.

(2) *Damages*: Defendant also attacked the trial court's determination of the value of plaintiffs' property and award of damages. The court sustained the findings below, holding:

(i) It was not error to admit the testimony of one of the plaintiffs, a co-owner of the property, as to the value thereof. "California courts have consistently held that an owner of literary property may properly

* See *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469, holding the two-year statute applicable to an action for the use of an idea in violation of an agreement to pay its reasonable value. The parties did not dispute the applicability of *Thompson* to the causes of action relied upon here.

testify as to its value even if he is not an expert in such matters" stated the court and, in any event, the witness was evidently experienced in appraising the worth of television properties since he frequently received agents' submissions for rejection or approval. The degree of an owner-witness' experience (and his partisanship), added the court, might affect the weight to be given his testimony as opposed to its admissibility.

(ii) The trial court properly permitted the co-owner witness to testify to the value of plaintiffs' property at the time of "Sea Hunt" syndication. Defendant asserted that valuation should have been restricted to the time of the pilot auditions, but the court deemed this contention answered by its determination on the limitations issue and added:

"In order to be compensable, the 'use' must be an unauthorized one. The contemplated use upon which the contract was based was the showing of the property to the public on television; it is this kind of uncompensated use which would diminish or destroy the value of the property. Plaintiffs have never objected to the auditioning of the two pilots; as a matter of fact they concede that defendant had a perfect right to do so in order to determine if the property was saleable to a sponsor."

(iii) The trial court did not err in granting damages based upon an award of \$2.00 per telecast for each of some 100,000 telecasts of defendant's "Sea Hunt" episodes: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proved invasion of the plaintiff's rights'. The court also sustained the award despite defendant's contentions that the market value of plaintiff's property, not the value of its use to defendant, was the proper basis of compensation. The court considered the language of *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9 Cir.) (quoting the Supreme Court) controlling: "'Value for exchange is not the only value known to the law of damages. There are times when heed must be given to value for use, if reparation is to be adequate. * * * The market test failing, there must be reference to the values inherent in the thing itself whether for use or for exchange'."

(3) *Infringement*: Noting the opinion in a prior appeal in this case (245 Cal. App. 2d 593, 54 Cal. Rptr. 130) that "there are enough simi-

larities in basic plot ideas, themes, sequences and dramatic 'gimmicks' that a jury might well have thought that it was [plaintiffs'] format which was the inspiration for 'Sea Hunt', rather than [the] alleged original idea [of an employee of defendant]", the court held that there was sufficiently "substantial evidence . . .for the [jury's] implied finding that plaintiff's format, not the idea allegedly conceived by [defendant's employee], was used."

(4) *Preemption*: Defendant argued that an affirmance would conflict with federal law by creating a private right in public domain material under guise of a "coerced" implied contract. However, the court held that in light of substantial evidence of an "actual" implied agreement, and the nature of plaintiff's "property" as unpublished at the time of disclosure, defendant's claim was of no merit. The court said:

Reference is . . . made to *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257, and the rules therein laid down. "1. Recovery for the use of an idea must be based on a true contract which the court were it not for precedent . . ., would prefer to call an express contract, which may be proved by either express promises or by 'circumstantial evidence.' . . . The court recognizes, however, that usage and the Civil Code (§1621) have established the term 'implied-in-fact' for express contracts proved by circumstantial evidence. . . ." As noted in *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 794, 256 P.2d 947, 959, "The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct." Viewed in light of the foregoing, it is not strictly correct for defendant to urge that the record does not support a finding of an express contract unless no attention is given to the considerable circumstantial evidence disclosed by the record; and certainly it may not be claimed that no contract, implied-in-fact, arose between the parties to this litigation.

For this reason alone, the several federal cases cited by defendant are not in point. Too, they adhere to the view that once something is made public the only protection is by invoking certain federal statutes which implement the policy found in Article I, section 8 of the Constitution and allow free access to copy whatever such laws leave in the public domain. That is not the situation here where there had never been disclosure or publishing (which would make the property public) prior to the negotiations in question.

Also of interest:

260. *Berenstein v. Columbia Broadcasting System, Inc.*, N.Y.L.J. January 8, 1971 at 18, col. 2 (Sup. Ct. N.Y. Co. 1971) (Loreto, J.).

Plaintiffs, creators of a cartoon series entitled "It's All In The Family" which has appeared in several magazines since 1956 and been republished in book form several times, moved for a temporary injunction restraining defendant from producing and broadcasting a television series entitled "All In The Family". Noting that defendants had "tender[ed] proof to create an issue as to whether plaintiffs have a property right to a secondary meaning of the title, and whether there has been or will be an invasion of such a right by dilution or otherwise" the court *held* that temporary relief was not warranted.

261. *CMI Corporation v. Standard Havens Systems, Inc.*, 168 U.S.P.Q. 571 (D. Oklahoma, Jan. 27, 1971) (Chandler, J.).

Action for unfair competition. In granting plaintiff's motion for temporary relief the court *held* (i) that the Oklahoma Deceptive Trade Practices Act (Okla. Stats. 1965, Title 78, Sec. 51, et. seq.) "does not violate either the Constitution of the United States of America or the Constitution of the State of Oklahoma, and is therefore constitutional"; and (ii) that certain factual misrepresentations willfully made by defendant disparaged plaintiff's goods, services and business, injured plaintiff's good will, caused plaintiff to incur expenses in convincing prospective customers that such representations were "false and/or misleading", and comprised deceptive trade practices within the meaning of the Oklahoma statute.

262. *Greenfield v. Magazine Mgt. Co., Inc.*, N.Y.L.J. January 20, 1971 at 2, col. 2 (Sup. Ct. N.Y. Co. 1971) (Amsterdam, J.).

Plaintiff, a professional model, moved for summary judgment on a cause of action for violation of the New York "Right of Privacy" statute (N.Y. Civ. Rights L. §51). Defendant purchased a photograph of plaintiff and published it on a magazine cover. Although defendant urged that it had relied upon the photographer's representations that he had obtained a written release, plaintiff had in fact not given her written consent. *Held*, motion granted. It is no defense that defendant believed the statute to have been complied with.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

263. BERK, LEE ELIOT. Legal protection for the creative musician. [Boston, Berklee Press Publications, 1970] 371 p.

Written as a guide for "the creative musician, who, through his efforts as a performing and recording artist, film scorer and jingle writer, composer and arranger, will provide the grist for the entertainment industry mill." Appendices include the texts of the Statute of Anne, the U.S. Copyright Act, the copyright revision bill, S. 543 as it was introduced in January 1969, and copyright application forms. A brief bibliography appears at end.

264. BIRRELL, AUGUSTINE. Seven lectures on the law and history of copyright in books. A Rothman Reprint. [New York, Augustus M. Kelley, 1971], 228 p. Originally published in London in 1899.

It deserves special mention that one of the classics of copyright law, which has not been generally available in the United States, has now been reprinted by Rothman Reprints, Inc. and can be bought from Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N.J. 07606, at a price of Fifteen Dollars.

As every student of copyright law knows, the seven lectures by Professor Birrell must be considered among the basic writings in the history of copyright in England, and it is a distinct service to the profession that this volume has now become available again for use by those interested in intellectual property and its international aspects.

265. McGRATH, WILLIAM J. Data law (patents, copyrights, trade secrets) 2d ed. [Columbus] Ohio State University Research Foundation, 1971. 20 p.

A brief analysis of the Armed Services Procurement Regulations (ASPR) with respect to acquisition of rights in patents, copyrights, and technical data, and the scope of such rights.

266. SOANS, CYRIL A. *Return to Robinson* (1890). Northbrook, Ill., Whitehall Co. [1970], 131 p.

A critical study of the United States patent system, with special emphasis on its "almost absolute novelty requirements . . . [which] have become in most cases so unrealistic, unworkable, and unjust, that adequate enforceable patents can seldom be obtained". Proposals for changes are made consonant with the basic philosophy of William C. Robinson in volume I of his three-volume treatise on the law of invention patents in the U.S.A. published in 1890. The work is of copyright interest in that our copyright system is regarded with approbation as compared with our patent system.

2. Foreign Publications

1. In English

267. HUANG, PAUL TE-HSIEN. *Bibliography on copyright*. [Halifax, N.S., 1971], 61, 15 p.

A list of materials on copyright and neighboring rights, "cited from legal and non-legal sources", which includes for the most part, American, British and other European publications published during 1965-1970. Some pre-1965 materials, considered by the compiler as valuable for research, are included. "This bibliography is not intended to be a comprehensive one; it is to be regarded as experimental."

2. In German

268. BEILHARZ, MANFRED. *Der Bühnenvertriebsvertrag als Beispiel eines urheberrechtlichen Wahrnehmungsvertrages*. München, C. H. Beck, 1970. 110 p. (Urheberrechtliche Abhandlungen, Heft 9).

An investigation into the legal relationships between the "stage author" (Bühnenautor) and the publishing house for stage exploitation in the German Federal Republic, with special reference to stage contracts. Appended are three proposed standard contracts with respect to a "spoken" dramatic work, a musical play with, and one without, reproduction rights for the musical material, respectively.

3. In Swedish

269. STRÖMHOLM, STIG. Upphovsrättens verksbegrepp. Stockholm, P. A. Norstedt [1970], 265 p.

A philosophical study of the "work" concept from the copyright point of view with special attention to the development of the Scandinavian philosophy of copyright.

B. LAW REVIEW ARTICLES

1. United States

270. ARNOLD, TOM, and JACK GOLDSTEIN. Life under *Lear*. (48 *Texas Law Review*, 1235-1260, no. 7, Nov. 1970).

"The authors, practicing patents attorneys, are appalled by the implications of the holding in *Lear v. Adkins* that a licensee may challenge in court the validity of his licensor's patent. They are particularly concerned that *Lear* foreshadows preemption of all know-how licensing by federal patent law. Since the courts uphold only a modest percentage of the patents attacked, the authors believe small and medium-sized companies will simply keep their inventions to themselves or will cease their R. & D. efforts rather than endure the expense of extended patent litigation."

271. Copyrights—Indivisibility of copyright rule held inapplicable where author is plaintiff. (39 *Fordham Law Review* 317-325, no. 2, Dec. 1970.)

A case note on *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

272. DERENBERG, WALTER J. Copyright law. (1969/70 Annual Survey of American Law, pp. 711-724, 1970.)

The annual survey of legislative, judicial, and international developments in the United States in the field of copyright and related subjects.

273. George Washington University, Washington, D.C. PTC Research Institute. Clinic on Unfair Trade Practices, April 29, 1970. Unfair trade practices relating to industrial-intellectual property. (14 *Idea* 384-465, no. 3, Fall 1970.)

"[A]n interchange of ideas on certain major topics involving to a great extent, the interaction of unfair competition and patent

law and copyright law, as reflected in recent judicial decisions and legislative proposals." Two of three scheduled speakers participated in the Clinic. The first speaker was Albert C. Johnson, who presented a paper on trade secrets versus patent protection. The second speaker was George D. Cary, Deputy Register of Copyrights, who presented a paper on what he entitled "Freebooters and Free Riders", dealing with record and tape piracy. The speeches which were followed by free discussions on the part of all of the Clinic participants, were preceded by "off the cuff comments" of the moderator, Professor Oppenheim, on the *Sears* and *Compco* decisions, interspersed by discussions of the participants.

274. HARRIS, MICHAEL, and ROBERT A. MIRISCH. Video cassettes and the law. (4 *Journal of the Beverly Hills Bar Association* 18-19, 47-50, no. 6, Summer 1970.)

"The purpose of this article is to highlight some areas which come readily to mind as those in which legal questions are most likely to arise with respect to audio-visual cassettes."

275. KRASILOVSKY, M. WILLIAM. Problems in the relationship between the record industry and librarians of recorded sound. (1 *Performing Arts Review* 559-583, no. 4, 1970.)

Based on an address at the Association for Recorded Sound Collection Meeting, in New York in the Fall of 1969, the paper discusses the problems encountered by librarians in securing permission to make copies, or in actually making copies of the recorded works in their collections, under the present U.S. Copyright Law and under proposed revisions.

276. LATMAN, ALAN. Preliminary injunctions in patent, trademark and copyright cases. (60 *Trademark Reporter* 506-511, no. 5, Sept.-Oct. 1970.)

An article, based on an address given at the ABA Section on Patents, Trademarks and Copyrights meeting in St. Louis in August 1970, which deals with the differing standards for obtaining a preliminary injunction for infringement of patents, copyrights and trademarks under Rule 65 of the Federal Rules of Civil Procedure.

277. MESSINGER, BARRY WILLIAM. A nice dilemma: the protection of literary titles. (1 *Performing Arts Review* 585-610, no. 4, 1970.)

"The purpose of this paper [which was awarded first prize in the Nathan Burkan Memorial Competition at the Washington College of Law of American University] is to survey the area of intellectual property, placing particular emphasis on the protection of literary titles. First, the history of legal protection will be investigated. Then, the significance of literary titles in the market place, the types of protection available in the United States and abroad, and the effect of the *Scars* and *Compco* cases on the law of unfair competition will be examined. Lastly, the present status of the law of literary titles will be reviewed, and the law as it might be in a few years discussed."

278. NAWALAVIC, FRANK J. Common law copyright, and conversation. (20 *Cleveland State Law Review* 188-195, no. 1, Jan. 1971.)

An analysis of the elements of common-law copyright in order to determine if conversation, defined by the writer as "an exchange of observations, opinions and ideas", can be the subject of common-law copyright.

279. The New York Times rule: an analysis of its application. (55 *Minnesota Law Review* 299-319, no. 2, Dec. 1970.)

"In 1964 the decision of *New York Times v. Sullivan* erected stringent new constitutional obstacles which greatly diminished a defamation plaintiff's prospects for success if he is a public official . . . This Note will critically examine the post-*Times* cases in the state and federal courts and will suggest the directions in which this constitutional tort rule seems to be developing."

280. SCHRADER, DOROTHY M. Ad interim copyright and the manufacturing clause: another view of the *Candy* case. (16 *Villanova Law Review* 215-282, no. 3, Dec. 1970.)

A strong argument is made to the effect that the decision in the case of *Hoffenberg v. Kaminstein*, 396 F.2d 684, 15 BULL. CR. SOC. 330, Item 329 (D.C. Cir.), cert. denied, 393 U.S. 913 (1968) was correct in upholding the validity of the regulations of the Copyright Office on the ad interim provisions of the copyright law.

2. Foreign

1. In English

281. BODENHAUSEN, G. H. C. Historical outline of the preparations for revision of the Berne Convention; report by the Director General of WIPO. (7 *Copyright* 19-23, no. 2, Feb. 1971.)

"This document, bearing the number B/DC/3, is part of the documentation prepared by the International Bureau of WIPO for the Diplomatic Conference for the Revision of the Berne Convention, to be held in Paris from July 5 to 24, 1971."

282. Comparative study of copyright law: the right of reproduction. (4 *Unesco Copyright Bulletin* 9-42, no. 3, 1970.)

"This report is an attempt to summarize the provisions set out in the various national legislations concerning the definition and scope of the right of reproduction, as well as the exceptions to this right."

283. DITTRICH, ROBERT. Some comments on Austrian film copyright law. (*EBU Review* 45-50, no. 122B, July 1970.)

Among the questions discussed are whether live television works come under the heading of "cinematographic work," what is meant by "the works used in the creation of the cinematographic work," and when does the recording of lectures, stage performances, concerts and sporting events become a cinematographic work.

284. KAISER, RONALD. EVR — the CBS system for packaging high quality pictures with sound for playback through standard television receivers; the process and its potential. (*EBU Review* 19-21, no. 125B, Jan. 1971.)

A description of the system of EVR (Electronic Video Recording) developed by the Columbia Broadcasting System. Reference is made to "a unique attribute of EVR with definite legal ramifications," in that "[i]t is impossible for viewers to make their own EVR cartridges. As to usual copyright protection there is no obstacle to the inclusion, where appropriate or desired, of the standard Universal Copyright Convention notice on the EVR film : . . . [and on] the cartridge itself."

285. MASOUYE, CLAUDE. Some reflections on the protection of signals transmitted via communications satellites. (*EBU Review* 54-57, no. 121B, May 1970.)

A brief discussion of the reasons why legal problems arise or are likely to arise in connection with the protection of satellite broadcasts against unauthorized use, and of what solutions can be considered.

286. RINGER, BARBARA A. Relationship between two texts of the Universal Copyright Convention. (*EBU Review* 42-46, no. 125B, Jan. 1971.)

Based on the assumption that within a year there will be two texts of the Universal Copyright Convention, i.e., the present 1952 text and the proposed 1971 text, and that they will differ on certain specific points, the question of which text will control the relations between UCC members that have adhered to the 1971 text and those that have not is discussed.

287. RODRIGUEZ FRAGUAS, JOSE LUIS. Cable and closed-circuit television in Spain. (*EBU Review* 54-56, no. 125B, Jan. 1971.)

A brief analysis of the regulatory and technical aspects of closed-circuit and cable television in Spain, including some mention of copyright.

288. ULMER, EUGEN. The draft texts for revisions of the copyright conventions. (*EBU Review* 47-53, no. 125B, Jan. 1971.)

A discussion of solutions found to questions previously left open and of additional problems that have cropped up, since the publication of the author's previous two articles (*EBU Review*, Nos. 120B, p. 48 ff. and 122B, p. 40 ff.), in connection with the proposed revisions of the Universal and Berne Copyright Conventions.

2. In English and French

289. African Symposium of Copyright Experts. *Rabat, Morocco, October 29-30, 1970*. [Reports and resolutions. Paris, 1970] pp. 261-380. No. 181 of *Interauteurs*, published as a special issue.

This special number of *Interauteurs* devoted to the Symposium, organized by CISAC with the collaboration of the Moroccan Copy-

right Bureau, includes, in French and English, opening and closing addresses, brief reports of the copyright situation in Congo (Democratic Republic), Ethiopia, Ghana, Morocco, United Arab Republic, Senegal, and Tunisia, and two resolutions adopted at the end of the proceedings.

290. SANCTIS, VALERIO DE. Evolution of copyright at the international level. (*Interauteurs* 225-234, no. 180, 3d quarter, 1970.)

A report by the President of the Legal and Legislation Committee of CISAC to the 27th World Congress of Authors which met in Spain in June 1970. The report on the evolution of international copyright accents the Stockholm Convention and the events which followed in connection with efforts to meet the cultural and economic needs of developing countries. The report ends with a brief mention of the importance and increasingly changing role of authors' societies in the modern world. The report also appears in French at pp. 214-224.

3. In English, French and Spanish

291. RINGER, BARBARA. Judicial developments in United States copyright law (1968-69). (*Revue Internationale du Droit d'Auteur* 2-81, no. 67, Jan. 1971.)

The third of Miss Ringer's "annual reports on American judge-made copyright law."

292. SCHULZE, ERICH. Small copyright revision. Petite reforme de la legislation sur le droit d'auteur. Pegueña reforma del derecho de autor. (*GEMA News* 3-15, no. 10 (1970).)

Based on a lecture given at a Seminar for the Protection of Industrial Property and Copyright at Frankfurt University in January 1970, the article contains commentaries on certain proposed revisions of the West German copyright law by a member of the Expert Committee on Copyright appointed by the Federal Ministry of Justice. The article is written as a reminder to the Ministry of an unfulfilled promise it made in March 1962 "to supplement the new Copyright Act by a comprehensive law on authors' contracts which shall contain provisions for all types of contracts in the field of copyright."

293. SEGRETTIN, MARC. La nouvelle loi marocaine sur le droit d'auteur. (*Revue Internationale du Droit d'Auteur* 82-139, no. 67, Jan. 1971.)

An analysis of the provisions of the new Moroccan copyright law of July 29, 1970 [published in the October 7, 1970 issue of the Official Gazette of the Kingdom of Morocco], "firstly by way of reference to the Tunisian Act and to the African model draft law and accessorially by way of reference to the French Act and to the Stockholm text of the Berne Convention, in an attempt to determine the extent to which the Moroccan legislators have based themselves on or departed from these four poles of attraction and by trying to bring out the problems for which they have provided genuinely original solutions."

294. VAKSBERG, ARKADY. La protection des droits des auteurs en Union Soviétique. (*Revue Internationale du Droit d'Auteur* 140-175, no. 67, Jan. 1971.)

An analysis of the protection given authors' rights in the Soviet Union in accordance with provisions contained in the Civil and Penal Codes, and other pertinent legislation, together with comments on the Soviet Union's precedential bilateral copyright convention with Hungary in 1967.

4. In German

295. DITTRICH, ROBERT. Der urheberrechtliche Werkbegriff und die moderne Kunst. (25 *Osterreichische Juristen-Zeitung* 365-377, nos. 14-15, July 14, 1970.)

In applying the definition, "original intellectual production in the field of literature, music, art and cinematography" as found in sec. 1, para. 1, of the Austrian Copyright Law, to works of modern art, the author concludes that copyrightable creativity springs from the creator's individual spirit, talents and capabilities. Hence, productions of chance, such as computer lyrics, or parts of novels contained on cards which are then shuffled to produce a variety of novels would not be copyrightable; neither would drawings of two circles around an identical center, unless they are notched in some way which would express an artistry peculiarly the creator's own.

296. EDLBACHER, OSKAR. Verleger und Verwertungsgesellschaft, eine Erwiderung. (25 *Osterreichische Juristen-Zeitung* 429-432, no. 16, Aug. 25, 1970.)

A reply to a recent article that appeared in an issue of Austrian *Juristische Blätter*, which made the statement that publishers inter-

ested in exploiting certain "small rights" were not obligated to join a state-approved copyright licensing organization. The present article claims that such publishers come within the purview of art. 2 of the Austrian Law on Enterprises to Utilize Rights in the Delivery, Performance or Broadcast of Works Expressed by Words or Works Expressed by Music (*Bundesgesetzblatt* No. 112 (1936)), and therefore must join the organization.

297. NORDEMANN, WILHELM. Kann der Theaterregisseur Urheber sein? Anknüpfungspunkte und Unterschiede. (*Film und Recht* 73-78, no. 3, Mar. 15, 1970.)

The question whether stage managers should be entitled as authors to copyright or neighboring rights protection for their productions is answered in the negative.

298. STRUNKMANN-MEISTER, KARL E. Systematische Betrachtungen zum Neuheitsbegriff und Geschmacksmusterrecht. (58 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 13-42, Oct. 15, 1970.)

A study of the question of novelty in design protection under the Design Protection Act of the German Federal Republic. With French and English summaries.

NEWS BRIEFS

299. PARIS MEETING ON RECORD PIRACY. A Committee of Governmental Experts met in Paris under the auspices of Unesco and the World Intellectual Property Organization, March 1-5, to prepare an international agreement to protect producers of phonograms against the unauthorized duplication of their recordings. Barbara A. Ringer, Assistant Register of Copyrights, was Chairman of the United States Delegation and was elected Chairman of the meeting. Other members of the United States Delegation were Robert D. Hadl, Legal Advisor, Copyright Office; John Adams, Business Practices Division, U.S. Department of State; Ernest Meyers, General Counsel, Record Industry Association of America; Robert Evans, General Counsel, Columbia Broadcasting System and representing the National Association of Broadcasters; and Henry Kaiser, General Counsel, American Federation of Musicians.

The meeting reaffirmed the concern of the 41 countries represented to combat record piracy on the international level. The

difficulties in achieving a solution arose from the effort to accommodate differing legal systems of protection, and the resulting draft convention is aimed at achieving that accommodation. It was the sense of the meeting that no further preparatory committees would be needed to work on the text, but that the original plan to consider the text at the same time as the diplomatic conferences on revision of the Berne and Universal Copyright Conventions in July 1971 would be a mistake. The present plan is to convene a diplomatic conference solely on the subject of protection of phonogram producers in Geneva in 1971.

300. **GENEVA MEETING ON COMPUTER SOFTWARE.** The first international meeting devoted to the significant question of protection for computer software was convened under the auspices of the World Intellectual Property Organization from March 8-12, in Geneva. The meeting consisted of a small advisory group of governmental experts representing nine countries. Barbara A. Ringer, Assistant Register of Copyrights, was Chairman of the United States Delegation to the meeting, and was accompanied by John Farmakides, Assistant General Counsel of the National Science Foundation.

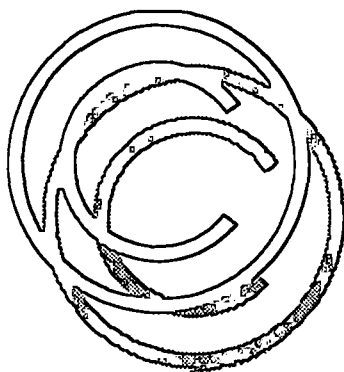
The purpose of the meeting was to study, in a preliminary fashion, the form of legal protection of computer programs that is most appropriate at the national and international levels, and to examine what new international arrangements or modifications of existing arrangements might be necessary once a form of protection is adopted. After an exchange of views and information, the group agreed that the legal situation throughout the world is unclear, and that further study is needed "to concentrate upon the desirable ingredients of any system of legal protection of computer programs, rather than follow rigidly the lines of established legal concepts for the protection of other inventions or works."

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 5

JUNE, 1971

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN

DONALD S. ENGEL

JUDITH GRAD

MORTON DAVID GOLDBERG

PROF. HARRY G. HENN

DR. STEPHEN P. LADAS

ALAN LATMAN

PROF. MELVILLE B. NIMMER

STANLEY ROTHENBERG

ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

ALLEN H. ARROW, New York City

IRVING COHEN, New York City

EDWARD M. CRAMER, New York City

KARLA DAVIDSON, New York City

EUGENE L. GIRDEN, New York City

A. A. GOLDMAN, Washington, D.C.

PROF. ROBERT A. GORMAN, U. of Pa. Law School, Philadelphia

ROBERT D. HADL, Washington, D.C.

JOHN F. HARDING, New York City

PROF. HARRY G. HENN, Cornell Law School, Ithaca

WILLIAM M. KAPLAN, Los Angeles

IRWIN KARP, New York City

SYDNEY M. KAYE, New York City

M. WILLIAM KRASILOVSKY, New York City

ARTHUR B. KRIM, New York City

BRUCE LOVETT, Washington, D.C.

PAUL MARKS, New York City

JOHN A. MARSHALL, Boston

PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles

HARRY R. OLSSON, Jr., New York City

E. GABRIEL PERLE, New York City

EDWARD A. SARGOY, New York City

ADOLPH SCHIMEL, New York City

JOHN SCHULMAN, New York City

CHARLES B. SETON, New York City

LEON SHIMKIN, New York City

SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1971 by The Copyright Society of the U.S.A.

All rights reserved.

CONTENTS

	PAGE
PART I. ARTICLES.	
Copyrightability of Motion Picture Sound Tracks E. Fulton Brylawski	357
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	371
2. Foreign Nations	376
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	378
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	379
2. Also of Interest	387
PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	388
2. Foreign Publications.	
1. In English	388
B. Law Review Articles.	
1. United States	390
2. Foreign.	
1. In English	392
2. In English, French and German	394
3. In German	394
4. In Italian	395
5. In Swedish	396

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: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1971).

PART I.

ARTICLES

301. COPYRIGHTABILITY OF MOTION PICTURE
SOUND TRACKS

By E. FULTON BRYLAWSKI*

The most valuable, or at least the most expensive type of copyrightable work is a motion picture. Yet, despite the addition to the copyright law of motion pictures as a copyrightable class in 1912, we still find some fifty-eight years later considerable uncertainty as to whether sound tracks of motion pictures, containing the all-important dialogue or story-telling element, are copyrightable under the present statute.

The purpose of this article is to explore and sort out the theories which cause this uncertainty and to examine the problems and consequences which flow from them.¹ Hopefully, this analysis will encourage the motion picture industry to re-examine its present practices and to adopt, where necessary, new procedures to avoid some of the more unfortunate consequences of the present law. In the process, the article will examine the proposed revision of the copyright law to see whether these problems have been eliminated.

Motion Picture Sound Tracks Are Copyrightable—One Theory.

Today, virtually all motion pictures carry sound tracks. The story of the motion picture, formerly told in pantomime by the actors and the subtitles of the silent picture, is now told by the dialogue recorded in the sound track. Without the sound track, the cinematographic portion of the motion picture is mostly unintelligible. Since the motion picture without the sound track would not be a complete work, several have argued that the sound track of a motion picture is an

* Member of the District of Columbia Bar, and of the Washington, D.C. Law Offices of Fulton Brylawski.

1. The *Sears* and *Compco* cases, producers of massive uncertainty in copyright and related fields, are believed to be beyond the scope of this report. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225; *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

integral part of the picture or that talkies are a species of the genus of motion pictures.²

The principal or at least the earliest support for this position appeared in the case of *L. C. Page v. Fox Film Corp.*,³ wherein the court stated:

The development of mechanism making it possible to accompany the screen picture with the sound spoken words was but an improvement in the motion picture art. As the plaintiff well says, "talkies" are but a species of the genus motion pictures; they are employed by the same theaters, enjoyed by the same audiences, and nothing more than a forward step in the same art. Essentially the form and area of exploitation were the same. The mere fact that the species "talkies" may have been unknown and not within the contemplation of the parties in their description of the generic "moving pictures" does not prevent the latter from comprehending the former.

However, the quoted language in the *Page* case was merely dictum since that case was concerned only with whether the proper construction in an assignment of "exclusive motion picture rights" included "sound motion picture rights", and not with whether a motion picture sound track was "copyrightable". Furthermore, the broader interpretation of "exclusive motion picture rights" was based upon a 1923 agreement when inventors in the film industry had already been experimenting with the idea of "talkies" and it seemed clear to the court that the plaintiff thus contemplated the possibility of commercial development of sound with motion pictures. In any event, the copyrightability of a sound track was far removed from the court's thinking or reasoning.

The *Page* case has been cited with approval in some cases,⁴ but no case has determined whether the copyright on a motion picture protects the sound track.⁵ Yet, by a process of syllogistic reasoning, it could be argued that sound pictures and derivatively sound tracks are copyrightable because sound motion pictures are of the genus of mo-

2. See NIMMER ON COPYRIGHT (1970), 442.

3. 83 F. 2d 196, 199 (2d Cir. 1936).

4. See, *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946), stating that a motion picture sound track was not the type of mechanical reproduction to which Section 1(e) of the Copyright Act applied.

5. NIMMER ON COPYRIGHT, 111.

tion pictures and "motion pictures" are themselves copyrightable under Sections 5(l) and 5(m) of the Copyright Act.

The case which comes nearest to declaring that a motion picture sound track is copyrightable is *Famous Music Corp. v. Melz*,⁶ wherein the court stated at page 769:

It is the opinion of the court that the motion picture films were copyrighted insofar as they were instruments capable of reproducing mechanically these three musical compositions.

But it is totally unclear from this decision why the court saw fit to make such a pronouncement, since the issue in that case was simply whether a motion picture exhibitor had to secure a further license to publicly perform music from a sound track in his theatre. This dictum was further weakened by the court's muddled remarks on page 770 of the decision that no copyright notice would be required on a sound motion picture nor could such a notice be affixed "because there was no license from the copyright owner to the manufacturer of the reel . . ." Hence, the *Melz* case cannot be taken too seriously because the court was obviously on unfamiliar grounds in dealing with the technical doctrines of copyright and rather inexpertly rattled off its own notions about copyright like stray arrows, hoping that some of them might hit the target.

In the extensive hunt for language in the cases and copyright treatises that a sound track is copyrightable, the following statement of Arpad Bogsch from his commentary on the Universal Copyright Convention⁷ took on interest:

It (a sound track) is not a copy of the . . . work, the performance of which is fixed on the sound track. On the other hand, a sound track is part of a copy of the cinematographic work.

These quoted remarks were made in a larger context seeking to differentiate between a phonograph recording and a sound track. However, the language seems to be contradictory on its face, namely, that a sound track can be part of a copy but not an entire copy, which is typical of the semantic confusion in this area of copyright.

There is some suggestion in Bogsch's remarks, as in the *Page* case, that the mechanical coupling of a sound track to a copyrightable cinematographic work somehow might make the sound track itself copy-

6. 28 F. Supp. 767 (W.D. La. 1939).

7. Bogsch, *THE LAW OF COPYRIGHT UNDER UNIVERSAL CONVENTION* (1967), 71.

rightable. If it were true that copyrightability is an automatic consequence of being coupled or intermixed with a clearly copyrightable work,⁸ as a sound track is with the cinematographic portion of a sound picture, then a phonograph recording of music included in the pocket of a printed album of lyrics would be copyrightable. Portions of mechanically recorded dialogue used in conjunction with a "book" would likewise be copyrightable, since the mechanical recording would be an integral part of a "book," which is copyrightable under Section 5 (a) of the Act. Hence, the mechanical coupling of a sound track with a film cannot of itself change the copyrightability of the sound track.

Sound Tracks Are Not Copyrightable—The Opposing Theory.

The Act of August 24, 1912 amended the copyright law to embrace for the first time copyright in motion pictures. Such motion pictures at that time, of course, were only silent motion picture productions and "talkies" were not even in contemplation. Actually, Congress in its 1912 enactments to include motion pictures as a copyrightable class failed to even review and change other sections of the copyright law in order to make them compatible with the new class, thereby evidencing little legislative thought about what it was doing. As a result, today we are called upon to fit motion pictures into the language of other sections of the copyright law inapplicable to motion pictures, such as what constitutes the "best edition" under the deposit requirements of Section 12 or what is "twice the amount of the retail price of the best edition" insofar as the failure to deposit under Section 13.

Some sixteen years later when sound motion pictures were made, first by the addition of a recording disc and subsequently by means of a sound track affixed to the film itself, the question became real whether the sound track was a copyrightable component of the entire motion picture production.

That a sound track is not a copyrightable component of a motion picture derives partly from the fact that sound tracks as adjuncts to motion pictures were not in existence or contemplation at the time of the 1912 Act and, hence, it could not have been the intention of Congress to have included sound tracks at that time. The more popular rationale, however, stems from the famous Supreme Court case of

8. It is important to distinguish between a copyrightable work comprehended physically within the copyright on another work and that which is physically attached but not copyrightable. An example of a physically attached but copyrightable component is a map inserted in the pocket of a book. *Lydiard-Peterson Co. v. Woodman*, 204 Fed. 921 (8th Cir. 1913).

White-Smith Music Publishing Co. v. Apollo Co.,⁹ wherein the Court held that a piano roll was not a "copy" of the musical composition embodied therein because the composition could not be visually perceived from the piano roll. Rather, the Court continued, a piano roll was merely part of the mechanical device which in conjunction with other devices would cause the composition to be performed. For our purposes here, the Court added the embellishment that an intellectual conception or production is not copyrightable unless it is produced or duplicated in the form of "copies" as this term was defined.¹⁰ This case has been extended to phonograph records and should not be logically extended to sound tracks of motion pictures, since a sound track is not capable of being visually perceived from the photo-electric marks on the sound track and, hence, is neither a "copy" of the original work recorded therein nor copyrightable.

Some judicial decisions even go so far as to equate motion picture sound tracks with phonograph recordings for other purposes.¹¹ Actually, similar treatment of phonograph recordings and motion picture sound tracks or the sound portions of videotapes at times is not illogical, since in some cases sound tracks are entirely composed of music or musical background. Thus, to the extent that the Copyright Act does not comprehend phonorecords, it should similarly exclude sound tracks.

A distinction here should be made between what constitutes an infringement and what is copyrightable. A performance of a musical composition or a dramatic work may infringe but the performance itself is not copyrightable. A phonograph recording of a copyrighted work may infringe but the phonograph record itself is not copyrightable. Similarly, the sound track of a motion picture, at least since the Amendment Act of July 17, 1952 amending Section 1 (c) of the Act,¹² might infringe but like a phonorecord is not copyrightable.

Following the *White-Smith* case, efforts were made to amend the copyright law to include phonograph records as copyrightable works.

9. 209 U.S. 1 (1908).

10. After declaring that a piano roll was not a "copy", the Court stated that for an intellectual conception to be protectible (copyrightable), it must have been reproduced in the form of "copies". 209 U.S. 1, at 17.
11. *Foreign and Domestic Music Corp. v. Licht*, 196 F. 2d 927 (2d Cir., 1952); *Encore Music Publishing Inc. v. London Film Productions*, 89 USPQ 501 (S.D.N.Y. 1951); *contra*, *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946).
12. Mostly as a result of the *Durante* case, *Kreymborg v. Durante*, 21 USPQ 557 (S.D.N.Y. 1934), involving the public performance of a poem without a license, the rights accorded to a copyright proprietor under Section 1 were substantially expanded by the Act of 1952, 66 Stat. 572.

but Congress has steadfastly refused to do so. This refusal or failure, it can be argued, evidences a Congressional intention that mechanical recordings or similar reproductions as motion picture sound tracks should not be copyrightable.

The doctrine of the *White-Smith* case that a work is not copyrightable unless it is a "copy" not only retains considerable vitality today but is recognized by no less authority than the Copyright Office itself as a basis for denying copyright in sound tracks. While the Copyright Office will register a claim of copyright in a motion picture with or without a sound track, there is no question that the Copyright Office views a motion picture sound track as an uncopyrightable element. In the *Copyright Office Rules of Practice*, No. 2.14.1, Chapter 2, page 47 of the "Compendium of the Copyright Office Practices 1967" under the sub-heading "III. Sound Tracks" is the following:

b. Registration is not made for a sound track alone, or for a sound track as the only new matter in a previously published or registered motion picture.

Examples: (1) An old silent picture with a new sound track

(2) A previously published foreign film with a dubbed sound track in English.

Thus, the Copyright Office specifically does not recognize the addition of a sound track or a new sound track as copyrightable matter within the meaning of Section 7 of the Copyright Law. Furthermore, the examples quoted above from the "Compendium of the Copyright Office Practices" would specifically reject any application of the *Page* dictum that talkies are of the "genus of motion pictures", to the determination of whether sound tracks are copyrightable.

Consequences of The Copyrightability of Sound Tracks

The uncertainty over the copyright status of sound tracks breeds strange conceptual and practical consequences. For instance, if a motion picture sound track is copyrightable, then any work recorded in the sound track should likewise be copyrightable. Consequently, a musical composition not previously copyrighted would thereby be copyrighted for the first time as a component part of the copyright in the motion picture, and the validity of such copyright might well depend upon whether the proprietor of the motion picture had a right to claim copyright on the musical compositions and whether he has complied with the other formalities of securing copyright. Subsequent printed copies of the musical composition might have to carry a copyright notice

reflecting the year date and copyright proprietor of the motion picture and the renewal might have to be filed within twenty-eight years of the release of the motion picture.

Further, if the sound track is a copyrightable component of a sound picture, then it should be registrable for copyright alone and, to so qualify, it should carry a copyright notice. If so, what should be the form and location of the copyright notice as affixed to a sound track? Subjecting a motion sound track to the notice requirements would distinguish it from the other forms of mechanical reproductions, like phonograph recordings, which do not require copyright notices,¹³ and this anomaly itself casts doubt on the copyrightability of sound tracks.

A motion picture sound track is really of the genus of mechanical reproductions. Thus, if all other forms of mechanical or electro-mechanical reproductions, not visually perceivable without mechanical or electronic aid, are copyrightable, then a sound track should be copyrightable. Phonograph records, as one type of mechanical reproduction, have been consistently ruled as not copyrightable. But with technological changes, new types of mechanical and electronic reproductions have appeared and industry pressure has been applied to the Library of Congress, of which the Copyright Office is a part, to register claims of copyright in two of these new forms of reproductions not readable by the human eye, namely videotapes and computer programs.

As a result, the Copyright Office in 1960 registered for the first time a claim of copyright in a videotape and since that time several hundred videotapes have been registered for copyright.¹⁴ It is our understanding that the Copyright Office has rationalized its surrender to the technological pressures of registering videotapes and video cassettes on three grounds.¹⁵ First, videotapes and video cassettes are functionally similar to motion pictures and that portion analogous to the cinematographic portion of motion pictures should be copyrightable, even if the sound portions of videotapes and video cassettes are not. Second, the *White-Smith* case strictly is applicable to the Act of 1891 and not the Act of 1909 as amended, and the Copyright Office feels that it is not appropriate to extend the doctrine in this case to any new mechanical or

13. See NIMMER ON COPYRIGHT, n. 202, 331.

14. Colby, "A Historic 'First'—Copyright Office accepts magnetic videotape for registration", 8 BULL. CR. Soc. 205 (1960); see also *Annual Report of Register of Copyrights* (1961) at page 3. Technically, these are motion pictures reproduced in the form of videotapes.

15. Extensive treatment of the copyrightability of videotapes appears in Fritch, "Some Copyright Implications of Videotapes" ASCAP COPYRIGHT LAW SYMPOSIUM, Number Thirteen (1964), 87.

electronic reproductions, even though that Office has already extended the *White-Smith* doctrine to the post-1909 mechanical reproduction of a motion picture sound track. Third, videotapes and video cassettes are reproductions which with the aid of machines provide a product with visual appeal, which the Copyright Office feels would distinguish them from the sound or auditory appeal of phonograph records and motion picture sound tracks.

Once the door was opened to the copyright registration of videotapes, it became difficult to exclude non-visual computer programs so that, commencing in 1964, the Copyright Office registered such programs even though the copies deposited were slotted cards, punched paper tape or magnetic tape readable only by machine.¹⁶ Here the similarity of slotted cards to piano rolls and magnetic tape to phonorecords was so great that the Register of Copyrights expressed grave doubt on the copyrightability of these programs.¹⁷ Registration of these programs was allowed¹⁸ because such could be reproduced in a visually perceivable copy,¹⁹ as distinguished from the classic *White-Smith* exception for piano rolls and phonograph records, which traditionally with

16. On May 19, 1964, the Copyright Office released Announcement SML-47 entitled "Copyright Registration For Computer Programs", 11 BULL. CR. SOC. 361 (1964) in which the Copyright Office agreed to accept a program in a form "perceptible or *capable of being perceptible to the human eye*". The latter text on which emphasis is added meant readable on a machine or capable of producing a visual print-out. However, the Copyright Office also requires a deposit of one print-out for each tape as a visually perceivable component and such component may be the only copyrightable element.
17. The Register of Copyrights, Abraham Kaminstein, stated that the decision to accept computer programs involved some doubtful problems that the Copyright Office decided should be resolved in favor of registration. Kaminstein "Copyright Developments", 12 BULL. CR. SOC. 3, 4 (1964). This expression was consistent with an earlier declaration of policy, "We, (the Copyright Office) register material which we feel a court might reasonably hold to be copyrightable even though, personally, we feel that it is not subject to copyright." Library of Congress Dept. and Divisional Manual No. 7, Copyright Office 38 (1950).
18. For a more complete analysis, see J. Banzhaf, "Copyright Protection For Computer Programs", ASCAP COPYRIGHT LAW SYMPOSIUM Number Fourteen (1966), 118.
19. Since 1954, copyright registration has been made on the new forms of electronic, synthesized and other indeterminate types of music, even though the *White-Smith* requirement of a visually perceivable copy was furnished only in the form of an incomplete, inexact and somewhat unintelligible system of notation. See Keziah, "Copyright Registration for Aleatory and Indeterminate Musical Compositions", 17 BULL. CR. SOC. 311 (June, 1970).

the aid of machines only reproduced sounds for the ear. Today, however, this is really a distinction without a difference, since some of the more sophisticated devices can now print out a musical score from a phonograph record or a printed copy from a motion picture sound track.

Consequences of the Non-Copyrightability of Sound Tracks.

On the other hand, the non-copyrightability of a motion picture sound track, while technically more consistent with established doctrine, breeds its own strange consequences. If the sound track of a motion picture is deemed an uncopyrightable component of a motion picture, what then happens to the property rights in the sound track when the motion picture is "published"?²⁰

We have always assumed upon an analogy to the *Jewelers' Mercantile*²¹ case that a motion picture is "published" when it is leased or distributed for purposes of public exhibition.²² Under the theory of the *Page* case that the sound track is an integral part of the picture itself, the publication of the motion picture would automatically publish the sound track. Where a sound track is a separable element, as a sound disc in the case of some of the earlier talkies, it would still be published when the motion picture is publicly distributed upon an analogy to the phonograph record cases.²³ Accordingly, under either theory, a sound track would be "published" when the sound motion

20. The clearest statement that the sound track of a motion picture is published when the picture is distributed appears in *Blanc v. Lantz*, 83 USPQ 137 (Cal. Sup. Ct. 1949): "I nevertheless am of the opinion that the recordation . . . on a motion picture sound tract (sic) for the purpose of distribution for reproduction in commercial theaters throughout the world and the actual distribution of such prints and playing of the sound tracts in such theaters constituted a 'publication' of the plaintiff's composition."

However, the Court relied on the construction of state law in holding that the performance of a musical laugh constituted a "publication" so that the case has been largely ignored.

21. *Jewelers' Mercantile Agency Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898), wherein the foreign distribution of a motion picture was held not to be a publication.

22. A contrary view was expressed in *Brandon Films v. Arjay Enterprises*, 33 Misc. 2d 794, 230 N.Y.S. 2d 56 (1962).

23. *Shapiro, Bernstein v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1952); *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681 (S.D. Cal. 1958); and *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954). *Contra, Capitol Records, Inc. v. Mercury Records*, 221 F. 2d 657 (2d Cir. 1955), but see dissenting opinion of Judge Learned Hand.

picture is distributed and, in the absence of a pre-existing copyright, the uncopyrighted works recorded in the sound track would pass into the public domain.

If, however, a motion picture sound track is *not* published, either by way of analogy to the *Jewelers' Mercantile* case or the phonograph record cases, then the sound track of the motion picture would remain both unpublished and uncopyrighted during exploitation. Unpublished and uncopyrighted material recorded in the sound track would then continue to enjoy protection at common law under Section 2 of the Copyright Law. If protected at common law, why wouldn't the film story and derivatively the motion picture thereby enjoy perpetual protection at common law? The possible result of perpetual protection, of course, is repugnant to both the limited term of copyright and the underlying Constitutional provision, but still this is a matter presently unresolved by Congress²⁴ or the courts.

Impact of the Proposed Copyright Revision on the Copyrightability of Motion Picture Sound Tracks.

The latest general revision of the Copyright Law, as introduced into the U.S. Senate February 8, 1971 as S. 644, seems to eliminate the uncertainty of copyright in motion picture sound tracks.

The obstacle to copyright in sound tracks based on the restricted definition of "copy" in the *White-Smith* case is removed by the broader definition of the subject matter of copyright in Section 102, namely:

(a) Copyright subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories . . . motion pictures and other audio visual works.

Moreover, the uncertainty of whether the distribution, sale, leasing and exhibition of a motion picture would publish its sound track

24. See, "Copyright Protection for Motion Pictures: Limited or Perpetual?" by Peter F. Nolan in 12 IDEA 1135-1160, No. 4 (Winter 1968-1969) wherein the author states, "The vast majority of motion pictures produced in this country can be granted virtually perpetual copyright protection under state common law. The author concludes that this is contrary to the Patent-Copyright Clause in the United States Constitution and he suggests that this anomaly be clearly overruled by Congress in the Revision Bill".

seems resolved by the new language in the definition Section 101 of what constitutes "publication", namely:

'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. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.

The definition of "copies" follows to complete the definition of "publication" so as to include all forms of mechanical reproductions, including sound tracks, but excluding phonorecords:

'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed.

A harbinger of this new approach was an earlier examination of the Universal Copyright Convention, which provided that works must be "visually perceived" in order to be considered published under the Convention.²⁵ The argument apparently was advanced that the sound track of a motion picture like a phonograph record must be incapable of Convention protection because it could not be "visually perceived" but this possible interpretation was rejected at the first meeting of the Interim Copyright Committee established under the Convention, where the Committee expressed the view that the only purpose of the "visually perceived" requirement was to exclude phonograph records.²⁶ With the broader language provided in the proposed revision, no similar uncertainty would seem possible under the new law.

Recommended Changes in Motion Picture Industry Practice Under Present Law.

A court squarely faced with the question of the copyrightability of a sound track would probably not say that the sound track is an unpublished, uncopyrighted element of the motion picture, if only to avoid creating perpetual rights in the sound track. Rather, the court would probably be inclined to hold that the sound track itself is uncopy-

25. Article 6, Universal Copyright Convention.

26. Bogsch, *UNIVERSAL COPYRIGHT CONVENTION* (1959), page 89.

rightable, but is "published" as part of the motion picture upon an analogy to the *Jewelers' Mercantile* or phonograph record cases. In such a case, any material in the sound track of the motion picture not protected by a pre-existing copyright would pass into the public domain, just as in the phonograph record cases. This consequence would be very grave where the motion picture was based upon an original, unpublished and uncopyrighted story or dramatic work, to the extent that protection of the film story would thereby lapse.

The risk of uncopyrighted material in the sound track passing into the public domain can be obviated by copyrighting the script, dialogue continuity or some printed version of the material recorded in the sound track, preferably as an unpublished dramatic work or work intended for oral delivery *prior* to the release of the motion picture. In this manner, copyright protection for the material in the sound track would be secured without jeopardizing any aspect of the copyright protection on the entire motion picture.

This recommended change of practice has two additional advantages, unrelated to the question whether the motion picture sound track is copyrightable. First, separately copyrighting the dramatic or other material in the sound track would provide an easily provable copyright in the story of the motion picture, which should simplify some actions for copyright infringement. For instance, a copy of a printed work is always more available than a print of a motion picture and might lend itself better to infringement proceedings than bulky motion picture prints.

The second collateral advantage of pre-copyrighting material in the sound track pertains more peculiarly to a motion picture first released abroad. The American motion picture industry in our experience normally has considerable difficulty in securing prints of foreign releases in the original or foreign-language version for copyright registration or litigation purposes. Registering a claim of copyright in the script or dialogue continuity embodying the film story would provide substantial protection and deterrence against any infringing activities in this country until copyright registration on the motion picture itself is effected. In some cases where registration of the original foreign edition cannot be accomplished, either because the foreign edition is unavailable or because the foreign version has no copyright notice, the prior copyright secured on the script or dialogue continuity might be the only form of copyright protection.

In this latter connection, the motion picture industry in this country has typically registered for copyright only the American editions of foreign-language films originally released abroad. In such cases, a

claim of copyright on the American edition of a foreign film should be limited to such changes or new matter, if any, added to the picture when released in the United States and would provide no copyright protection for the basic cinematographic or original material of the picture. Often, the American editions are registered for copyright without any limitation on the claims of copyright—that is, no statement of new matter is included in Line 5 of the copyright application and no statement of prior publication of any version of the picture is made. As warned in a recent article,²⁷ failure to so limit the claim of copyright or to recite the earlier publication in the copyright application on the American edition of a film originally released abroad might constitute fraudulent misrepresentation or concealment as would vitiate the copyright in the picture. Particularly is this so, since the Copyright Office today will not register a claim of copyright omitting reference to a prior publication if it knows of the earlier publication. Again, some of the risks, in this case the risk of no copyright protection, could be eliminated or at least alleviated by copyrighting the material in the sound track of a motion picture prior to release of any version of the picture either here or abroad.

Thirdly, pre-copyrighting the film story of a picture may eliminate the risk that the basic underlying story of the picture will not be protected abroad. Foreign protection depends substantially upon the unsettled and precarious concept of “publication” of the motion picture.²⁸ To acquire protection in the Berne Union, first or simultaneous publication in a member country is required.²⁹ Protection under the Universal Copyright Convention also requires publication in a Conven-

27. “Fraud on the Copyright Office: Its Use and Misuse as a Defense in Copyright Infringement Actions”, by Morton David Goldberg and Richard Dannay, 44 NYU LAW REVIEW 3, May, 1969.

28. Typical of the judicial difficulty in finding a general publication of a motion picture are *Patterson v. Century Productions, Inc.*, 93 F. 2d 489 (2d Cir. 1937) (distribution of motion picture prints for non-commercial exhibition was not a publication); *Cardinal Film Corp. v. Beck*, 248 Fed. 368 (S.D.N.Y. 1918) (a deposit in the Copyright Office is only a publication for purposes of determining the commencement date of copyright); and *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (2d Cir. 1914) (sale of a positive print of a motion picture did not divest the common law copyright in the motion picture). See also *Brandon Films v. Arjay Enterprises, supra* (New York case declaring that distribution of a motion picture in Germany was not a publication).

29. The British copyright authority, E. J. MacGillivray, has stated that protection of an American motion picture in the Berne Union was not possible because of the difficulty in complying with the concept of “publication”.

tion country with the prescribed form of copyright notice. On the other hand, pre-copyrighting a film story by publishing³⁰ a printed copy in the United States with the prescribed copyright notice would automatically protect the story of the film both here and in most countries abroad and, if the film story were thus protected, then the motion picture itself would enjoy protection abroad.

Conclusion.

The purpose of this article is not to tilt with the shadowy wind-mills of copyright doctrine nor to dismantle them. Rather it is to make a candid effort to strip away the layers of legal obfuscation from the simple fact that the copyright statute is inapplicable to motion picture sound tracks. No amount of mental or semantic effort will accommodate sound tracks to the present copyright law.

Hence, until the law can be revised, we have suggested a change in industry practice which would accomplish the main goal of making the sound track protectible, namely to copyright the material recorded in the sound track prior to the release of the motion picture. Even when or if the new copyright revision law is passed, a separate copyright on the screenplay, dialogue continuity, cutting continuity, film strip or the like would offer real advantages of foreign protection, convenience and ease of handling, particularly where copyright registration of the motion picture might be difficult, impractical or considered too expensive.

30. Copyrighting the film story as an unpublished dramatic work or work prepared for oral delivery (17 U.S.C. §5) would result in automatic protection in at least Canada (Canadian Copyright Act of January 1, 1924 extended to American authors by decree dated December 26, 1923); the United Kingdom (British Order in Council of February 3, 1915); and France (French decree of March 28, 1852 as assured to the U.S. Department of State by the French Minister on March 25, 1891).

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

302. U.S. CONGRESS. HOUSE.

H.R. 6718. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Aspin, March 24, 1971, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92nd Cong., 1st Sess.)

The bill would ban the presentation of sports events on closed circuit television except where the person proposing to make such a presentation has first obtained approval from the Federal Communications Commission. Such approval would be given only if the FCC is satisfied that rights to broadcast a sports event have been offered to an "adequate number of radio and television networks," and that regular network carriage alone would be unprofitable.

303. U.S. CONGRESS. HOUSE.

H.R. 6927. A bill to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes. Introduced by Mr. Fulton of Tennessee, March 30, 1971, and referred to the Committee on the Judiciary. 3 p. (92nd Cong., 1st Sess.)

A companion bill to S. 646, which was introduced by Mr. McClellan on February 8, 1971. See 18 BULL. CR. SOC. 314, Item 231 and Item 232, *infra*.

304. U.S. CONGRESS. HOUSE.

H.R. 6992. A bill to amend the Communications Act of 1934 so as to provide for the regulation of the broadcasting of certain major sporting events in the public interest. Introduced by Mr. Sandman (for himself, Mr. Gerald R. Ford, Mr. Kemp, Mr. Athias of California, and Mr. Mizell) on Mar. 30, 1971, and re-

ferred to the Committee on Interstate and Foreign Commerce. 4 p. (92d Cong., 1st Sess.)

Similar to H.R. 6718, introduced by Mr. Aspin on March 24. See Item 302, *supra*.

305. U.S. CONGRESS. HOUSE.

H.R. 7127. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Aspin (for himself, Mr. Veysey, Mr. William D. Ford, Mr. Badillo, Mr. Hull, Mr. Hamilton, Mr. Downing, Mr. Roy, Mr. Montgomery, Mr. Fulton of Pennsylvania, Mr. Morse, Mr. Pucinski, Mr. Dent, Mr. Dorn, Mr. Leggett, Mr. Halpern, Mr. Zwach, Mrs. Abzug, Mr. St. Germain, and Mrs. Chisholm), April 1, 1971, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92nd Cong., 1st Sess.)

Identical to H.R. 6718, introduced by Mr. Aspin on March 24. See Item 302, *supra*.

306. U.S. CONGRESS. HOUSE. *Dorn, William Jennings Bryan.*

Dorn introduced sports broadcast bill. (117 *Congressional Record*, E2661-2662, no. 47, daily ed. Apr. 1, 1971.)

Remarks of Mr. Dorn in connection with his cosponsorship with Mr. Aspin and others of H.R. 7127, in which he calls the blackout on home radio and television for the recent heavyweight fight "a flagrant abuse of Government-regulated broadcast rights which must be avoided in the future."

307. U.S. CONGRESS. HOUSE.

H.R. 7679. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Aspin (for himself, Mrs. Abzug, Mr. Addabbo, Mr. Badillo, Mrs. Chisholm, Mr. Dent, Mr. Dorn, Mr. Downing, Mr. Edwards of California, Mr. Fisher, Mr. William D. Ford, Mr. Fulton of Tennessee, Mrs. Grasso, Mr. Halper, Mr. Hamilton, Mr. Harrington, Mr. Hays, Mr. Hull, Mr. Koch, Mr. Leggett, Mr. Montgomery, Mr. Morse, Mr. Moss, Mr. Patten, and Mr. Pepper), April 22, 1971, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92d Cong., 1st Sess.)

Identical to H.R. 6718 and H.R. 7127, also introduced during the same session of Congress.

308. U.S. CONGRESS. HOUSE.

H.R. 7680. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Aspin (for himself, Mr. Pettis, Mr. Pucinski, Mr. Rosenthal, Mr. Roy, Mr. St. Germain, Mr. Stokes, Mr. Vander Jagt, Mr. Veysey, and Mr. Zwach), April 22, 1971, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92d Cong., 1st Sess.)

Identical to H.R. 6718, H.R. 7127 and H.R. 7679, also introduced during the same session of Congress.

309. U.S. CONGRESS. HOUSE.

H.R. 7962. A bill to amend the Communications Act of 1934 so as to provide for the regulation of the broadcasting of certain major sporting events in the public interest. Introduced by Mr. Collier, May 3, 1971, and referred to the Committee on Interstate and Foreign Commerce. 4 p. (92d Cong., 1st Sess.)

Identical to H.R. 6992 previously introduced during the same session of Congress.

310. U.S. CONGRESS. HOUSE.

H.R. 8060. A bill to amend the Communications Act of 1934 so as to provide for the regulation of the broadcasting of certain major sporting events in the public interest. Introduced by Mr. Sandman (for himself, Mr. Sebelius, Mr. Whitehurst, Mr. Burlison of Missouri, Mr. Addabbo, Mr. Keating, Mr. Lloyd, Mr. Roncalio, Mr. Dickinson, Mr. Price of Illinois, Mr. Widnall, Mr. Morse, Mr. Frenzel, Mr. Eilberg, Mr. Derwinski, Mr. Buchanan, Mr. Nelson, Mr. Rhodes, Mr. Cordova, Mr. Railsback and Mr. Flowers) May 4, 1971, and referred to the Committee on Interstate and Foreign Commerce. 4 p. (92d Cong., 1st Sess.)

Identical to H.R. 6992 and H.R. 7962 previously introduced during the same session of Congress.

311. U.S. CONGRESS. HOUSE.

H.R. 8061. A bill to amend the Communications Act of 1934 so as to provide for the regulation of the broadcasting of certain major sporting events in the public interest. Introduced by Mr. Sandman (for himself, Mr. Lent, Mr. Michel, Mr. Forsythe, Mr. Lennon, Mr. Shoup, Mr. Schneebeli, Mrs. Hicks of Massachusetts, Mr. Hosmer, Mr. Halpern, Mr. Shriver, Mr. Gubser, Mr. Ander-

son of Illinois, Mr. Roybal, Mr. Pettis, Mr. Waggonner, Mr. Andrews of North Dakota, Mr. Arends, and Mr. J. William Stanton) May 4, 1971, and referred to the Committee on Interstate and Foreign Commerce. 4 p. (92d Cong., 1st Sess.)

Identical to H.R. 6992, H.R. 7962, and H.R. 8060, introduced in the same session of Congress.

312. U.S. CONGRESS. HOUSE.

H.R. 8102. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Minish, May 5, 1971, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92d Cong., 1st Sess.)

Identical to H.R. 6718, H.R. 7127, H.R. 7679 and 7680, introduced previously during the same session of Congress.

313. U.S. CONGRESS. SENATE.

Creation of a limited copyright in sound recordings. (117 *Congressional Record* S5939-S5942, no. 61, daily ed. Apr. 29, 1971.)

The remarks upon Senate consideration and passage, under unanimous consent, of the record piracy bill, S. 646. The remarks include favorable comments by Senator McClellan during the course of which he received unanimous consent to have printed in the *Record* a few of the many letters he received describing the need for this legislation. Also included are remarks of Senator Hart in which he expresses reservations about constitutional and other aspects of the legislation, and favors further study, "with a view toward clearer definitions of the problems and a more precise remedy consistent with our constitutional authority."

314. U.S. CONGRESS. SENATE. *Scott, Hugh.*

Copyright of sound recordings. (117 *Congressional Record* S5985, no. 62, daily ed. Apr. 30, 1971.)

Senator Scott comments with approval on the passage by the Senate of the record piracy bill, S. 646, pointing out the need for this legislation, and urging early action by the House.

315. U.S. CONGRESS. SENATE.

S. 1435. A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. Introduced by Mr. Steven-

son, April 1, 1971, and referred to the Committee on Commerce. 3 p. (92d Cong., 1st Sess.)

Similar to H.R. 6718, introduced by Mr. Aspin on March 24, H.R. 6992, introduced by Mr. Sandman on March 30, and H.R. 7127, introduced by Mr. Aspin for himself and a number of other Representatives on April 1.

316. U.S. CONGRESS. SENATE. *Stevenson, Adlai E., III.*

S. 1435—[Introduction of] A bill to amend the Communications Act of 1934 to ban sports from closed-circuit television. (117 *Congressional Record* S4227, no. 47, daily ed. Apr. 7, 1971.)

Remarks by Mr. Stevenson on his introduction of S. 1435, in which he stated that the bill was substantially in the same form as that introduced by Representative Aspin, and that it recognized the greater interest of the television viewing public by prohibiting closed circuit TV coverage of sports events except when the FCC concludes that broadcasts to home TV viewers for which no charge is made are not commercially feasible.

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

Creation of a limited copyright in sound recordings. Report to accompany S. 646, submitted by Mr. McClellan, April 20, 1971. 11 p. (92d Cong., 1st Sess., S. Rept. No. 92-72).

A favorable report, with amendments, most of which are of a perfecting nature or provide for the definition of various terms. Some of the more substantive amendments are: (1) changing the effective date of the legislation to 4 months after enactment rather than 3 months; (2) permitting the making of unlimited ephemeral recordings by transmitting organizations for their own use rather than a single ephemeral recording; and (3) extending to owners of copyrighted music used in the making of recordings the same remedies available for other copyright infringements, including in a case of willful infringement for profit, the criminal prosecution provided in section 104 of title 17.

318. U.S. CONGRESS. SENATE. *Committee on the Judiciary. Subcommittee on Patents, Trademarks, and Copyrights.*

Report, pursuant to S. Res. 343, Ninety-first Congress, Second Session. April 20, 1971. Washington, U.S. Govt. Print. Off., 1971. 8 p. (92d Cong., 1st Sess., S. Rep. No. 92-74).

The annual report on the activities of the subcommittee, covering the second session of the 91st Congress. The statement in respect to copyright law revision attributes the inability of the Senate to proceed with further consideration of the revision bill in part to the unsolved CATV issue, and indicates that action on modernization of the copyright statute is long overdue, and that further delay in the resolution of the CATV issue by the Congress and the Federal Communications Commission is unjustifiable.

319. U.S. COPYRIGHT OFFICE.

Title 37—Patents, trademarks, and copyrights. Chapter II—Copyright Office, Library of Congress. Part 202—Registration of claims to copyright: deposit for registration of motion pictures. [F.R. Doc. 71-6710. Filed 5-13-71.] (36 *Federal Register* 8868, no. 94, May 14, 1971.)

Amendments concerning deposit copies of motion pictures, effective May 4, 1971.

320. U.S. DEPT. OF TRANSPORTATION.

41 CFR Ch. 12. Procurement regulations; notice of proposed rule making. Part 12-9—Patents, data, copyrights, and recovery of developments costs. [Issued on March 10, 1971.] (36 *Federal Register* 5116-5126, no. 52, Mar. 17, 1971.)

Among the proposed rules are those governing rights in data first produced in performance of a Government contract and in data not first produced or composed in performance of a contract, but which are incorporated in the work furnished under the contract. Also included is a provision to indemnify, and save and hold harmless the Government, its officers and agents, against any liability for violation of proprietary rights, copyrights or right of privacy.

2. Foreign Nations

321. HUNGARY. *Laws, statutes, etc.*

Legge sul diritto di autore del 1969. (41 *Il Diritto di Autore* 372-385, no. 3, July-Sept. 1970.)

An Italian translation of the Hungarian copyright statute of 1969, effective January 1, 1970.

322. IRAN. *Laws, statutes, etc.*

Law on the Protection of the Rights of Authors, Composers and Artists. (7 *Copyright* 65-67, no. 4, Apr. 1971.)

"This law was promulgated on January 12, 1970, and came into force 15 days after the date of its publication in the Official Gazette of February 10, 1970 . . . Translated into English by WIPO."

PART III.**CONVENTIONS, TREATIES AND PROCLAMATIONS****323. UNIVERSAL COPYRIGHT CONVENTION. HUNGARY.**

Copyright Office has been informed that the instrument of accession by Hungary to the Universal Copyright Convention and annexed Protocol 2 was deposited with the Director-General of Unesco on October 23, 1970.

In accordance with Article IX, paragraph 2, the Convention came into force with respect to Hungary on January 23, 1971, three months after the deposit of the instrument of accession.

Protocol 2, in accordance with the provisions formulated in paragraph 2 (b) thereof, came into force for Hungary on the same day as the Convention.

This deposit was made under cover of a verbal note (No. U/43/1970), dated October 22, 1970, containing the following declaration: "... the Hungarian Permanent Delegation declares on behalf of the Presidential Council of the Hungarian People's Republic that the provisions of Article XIII of the said Convention are contrary to the fundamental principle of international law concerning the self-determination of peoples, which the United Nations General Assembly also wrote into its resolution 1514 (XV) on the granting of independence to colonial countries and peoples . . ."

324. UNIVERSAL COPYRIGHT CONVENTION. MAURITIUS.

The Copyright Office has also been informed that the Director-General of Unesco received on August 20, 1970 from the Government of Mauritius a communication notifying that it considers itself bound, as from March 12, 1968, by the Universal Copyright Convention and annexed Protocols 1, 2 and 3, the application of which had been extended to its territory by the United Kingdom between January 6, 1965 and the attainment of independence.

PART IV.

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

325. *Runge v. Lee*, 169 USPQ 388 (9th Cir. March 26, 1971) (Carter, J.)

Appeal from judgment for plaintiff in action for copyright infringement and unfair competition. Plaintiff, operator of a facial exercise salon, wrote a book concerning her exercises. The book included articles previously written by plaintiff and published in *Vogue* magazine. Defendant, a former employee of plaintiff, wrote a book on facial exercises which allegedly infringed plaintiff's book.

Held, affirmed.

I. Copyright

A. *Validity*: Defendant asserted that plaintiff's book copyright was invalid for lack of novelty but the court, noting that "the standard of novelty . . . is applicable to patents . . . not to copyrights", held that there was sufficient evidence below to support the requisite finding of originality.

Defendant also argued that plaintiff's book copyright was invalid because, in her application for registration of the book, plaintiff failed to disclose the prior *Vogue* publication of the articles. However, the court concluded that this omission was "innocuous" and did not affect the copyright:

Runge's agreement with *Vogue* provided that the magazine acquired only publication rights to the materials and that the copyright was to revert to Runge for all further uses as of January 1, 1960. Thus, Runge was the beneficial owner of the copyright and entitled to unrestricted use of the materials after January 1, 1960. . . .

Also, Runge's book contained substantial new matter not contained in her 1959 article. Therefore, the notice of copyright in the 1961 book represented complete compliance with the Act's requirements. . . . There was certainly no evidence that Runge's application was intended to or did in fact deceive or mislead anyone.

Accordingly, we must conclude that Runge's omission, if any, was innocuous and did not render the copyright invalid.

B. *Infringement*: The court sustained the trial judge's charge, framed in terms of misappropriation of another's labor, and the verdict of infringement:

Lee had access to Runge's book when she wrote her book. She was entirely familiar with the exercises as practiced by Runge. Lee's only published writing was an article in a newspaper on interior decorating. But Lee was able to write her book in one month during parts of November and December 1964. The complete manuscript was ready for printing in July 1965.

We have examined the court's instructions on the matter of copyrights and infringement, and cannot find them erroneous. The court gave instructions favorable to appellants' theories, based in the main on appellants' requested instructions. These instructions read: "The law allows anyone the right to publish and copyright a new treatment of a subject; and a similarity of form or impression between the two different writers which necessarily follows due to the nature of the subject matter or idea being conveyed is allowable and permissible. A new treatment of a subject matter that demonstrates *its independent production, or using a prior work, as a model, is allowable and not an unlawful copy*. If you find that a subsequent writer *used her own labors, skills or common sources of knowledge open to all men*, and that the resemblances are accidental, or arise from the nature of the subject matter, this does not amount to a wrongful copying * * *". [Emphasis added]

One of the issues before the jury was whether Lee by her own labors had made an independent treatment of the subject matter, or whether she had copied from Runge's book and relied on Runge's labors. The jury found on this against the appellants. We sustain its verdict.

C. *Damages*: The court sustained the trial court's award of \$80,000.00 compensatory damages as determined by the jury, noting that publication of defendant's book was shown to have severely damaged publisher interest in reissuing plaintiff's book and publishing a completed sequel. Determination of the damages was based upon plaintiff's testimony as to the value of her labor in writing the sequel and the value of "reissuance" rights in her original book, and the court said that "[c]redible testimony by the owner of literary property regard-

ing its value can provide an adequate evidentiary basis for an award of damages."

In awarding damages, the trial judge chose to not award a lesser amount of profits calculated from defendant's stipulation. The court held that "such an election is properly within the court's discretion."

II. *Unfair Competition:*

A. *Confusion:* Plaintiff secured relief on its claim that defendant's claims to origination of the facial exercises described in her book comprised unfair competition. Noting that there was sufficient evidence for the jury to conclude that plaintiff was the creator of such exercises, the court sustained the jury's verdict of unfair competition and the following charge:

"Where there is a secondary meaning or public identification between an author and a certain work or program and another person falsely represents that she is the originator of such work or program resulting in confusion of authorship, such representations constitute unfair competition."

B. *False Advertising:* Plaintiff claimed that defendant used deceptive "before and after" photographs in promotional material and that such deception damaged plaintiff's business reputation because she could not truthfully proclaim similar results. The court found that there was sufficient evidence below for a jury to conclude that the remarkable "after" results were attributable to factors other than defendant's exercises and that defendant's use of the photos was unfair competition.

C. *Damages:*

Appellants also contend that the jury's award of \$40,000.00 in compensatory damages for unfair competition was not supported by adequate evidence in the record. The record contains evidence that appellants' claims caused public confusion regarding the true originator of the exercises. Also appellants' "before" and "after" representations suggested results that Runge was forced to tell prospective clients could not be obtained by her methods. It seems inevitable that Runge's business and reputation would suffer as a consequence of these representations. Runge testified that she had lost many salon customers to appellants and her sales of related cosmetics had declined as a result of appellants' representations. Accordingly, we conclude that appellants' contention that there is insufficient evidence to support the jury's verdict is without merit.

The court also found that the trial court charges and evidence were sufficient upon which to base an award of punitive damages for "wanton and malicious" acts of unfair competition.

326. *Concord Fabrics, Inc. v. Generation Mills, Inc.*, 169 USPQ 470 (S.D.N.Y. March 9, 1971) (Frankel, J.)

Motion for preliminary injunction in action for infringement of copyright in plaintiff's alternating madras and solid color fabric design.

Held, motion denied.

I. Validity of Plaintiff's Copyright

Defendant, pointing to fabric samples of similar design produced by various manufacturers over the years, disputed the originality of plaintiff's design. Plaintiff urged that its registration certificate constituted prima facie evidence of the validity of its copyright, but the court noted that "it seems obvious that a . . . registration is prima facie evidence of a valid copyright only 'in the absence of contradictory evidence' . . . [and here] defendant has introduced considerable evidence to cast serious doubt on the validity of plaintiff's copyright, and plaintiff cannot foreclose evaluation of this evidence merely by pointing to its certificate."

The court found, however (and only for the purposes of the motion) that plaintiff's copyright was valid as having achieved a sufficient "distinguishable variation" from prior designs. "At least where a design concept has been worked over by many prior designers," said the court, "the showing of originality necessary to uphold the validity of a copyright is small."

II. Infringement

The court found that the analysis which sustained the validity of plaintiff's copyright also militated against its claim of infringement and that, under the "ordinary observer" test, the differences between the parties' designs were meaningful (though small) and avoided infringement of plaintiff's limited original contribution. The court said:

Millworth [*Converting Corp v. Slifka*, 276 F.2d 443, 125 USPQ 506 (2 Cir. 1969)] is explicit that the test for infringement is not the same in cases where the basic design is in the public domain as it is in cases . . . where the basic design is original with plaintiff. Where, as here, a basic design is not original with a plaintiff, small variations by subsequent designers may protect them from charges of infringement . . .

[The basic issue is whether] an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. At the same time, because the concept of alternating squares of solids and plaids is shown not to be novel, the court has necessarily mixed into the emulsion of pertinent ideas the burden upon plaintiff in such a case of proving extremely close copying. [We believe that here] the lay observer would more probably than not reject plaintiff's claim of copying. While the differences between defendant's and plaintiff's designs are small, that is equally true of the differences between plaintiff's and prior designs. Having said that, we conclude that the differences are meaningful ones, and that to the extent that plaintiff's "expression" is separate from the basic "idea" of both designs, the defendant has stayed clear of the copyright.

[The court then analyzed the parties' designs]

The court concluded that "plaintiff's proper claim to originality is an extremely limited one [and in] this context, defendant's variations are significant, and it has not infringed the claimed originality and . . . distinctive feature of plaintiff's [design]."

327. *Slifka v. Citation Fabrics Corp.*, 169 USPQ 545 (S.D.N.Y. March 23, 1971) (Frankel, J.)

Motion for preliminary injunction in action for infringement of copyright in textile design.

Held, motion denied.

Although noting that the "strikingly similar colors" of the parties' designs was a factor to be weighed in plaintiff's favor ("despite the agreed non-copyrightability of color as such"), the court found that it would "probably" deny the motion simply based upon the differences between the designs as seen through the eyes of the ordinary observer. "The two fabrics are far from identical" said the court, adding:

The differences between them are not the mere stratagems of the tricky copyist, but relatively substantial differences affecting the feeling quality and sensory impact of the whole. The materials before the court show that both parties have worked in a heavily traveled terrain where comparatively modest distinctions may be sufficient to avoid charges of infringement.

The court more firmly based its denial of the motion on "equitable considerations"—*viz.*, (i) plaintiff's laches, by reason of delaying

almost five months after charging infringement and before filing suit during which time defendant produced and sold substantial quantities of the allegedly infringing fabric; and (ii) plaintiff's exhibition, in offering "absurd", "totally unacceptable" and inconsistent explanations of its delay, of "less than the candor owed by a party seeking th[is] extraordinary form of equitable relief. . . ."

328. *Covington Fabrics Corp. v. Artel Products, Inc.*, 169 USPQ 26 (S.D.N.Y. Feb. 2, 1971) (MacMahon, J.)

Motion for preliminary injunction in action for infringement of copyright in a floral fabric design.

Held, motion granted.

Stating that the copyright requirement of originality is "little more than a prohibition against copying" and that an author need only "do something on his own which is more than a trivial variation", the court held that defendant had failed to overcome the prima facie evidence of validity attaching to plaintiff's registration. The court also noted that "floral designs are copyrightable, and the configuration of the design, including such details as petals and leaves, often requires 'an appreciable amount of creative skill and judgment. . . .'"

The court found that, under the ordinary observer test, plaintiff's would be able to show infringement at a trial on the merits.

329. *Couleur International Ltd. v. Opulent Fabrics, Inc.*, 169 USPQ 294 (S.D.N.Y. March 3, 1971) (Frankel, J.)

Motion for preliminary injunction in action for infringement of copyright in fabric design. *Held*, motion granted. The court noted defendant's concession that it "used" plaintiff's design and found that "all appearance and aesthetic appeal of defendant's fabrics are the same as plaintiff's." The court said, in part:

Copyright infringement cases are necessarily decided in an ad hoc fashion, through a particularized assessment of the facts in any given case in light of what Judge Learned Hand characterized as a "vague" legal test for infringement. . . . Good eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts. As defendant has pointed out, the fabrics in this case are not identical. But the differences in the designs are so small that, when taken together with defendant's conceded "borrowing" from plaintiff's design, the deviations come across vividly as the kind of

"studied effort to make minor distinctions" which is "itself evidence of copying." . . .

If this is really a domain in which "ideas" and their "expression" are meaningfully distinguishable, that is of no help to defendants. Fanfare's work is a plodding copy across the board with only childish disingenuous deviations. It remains plain that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." . . .

The appearance in one of defendant's fabrics of colors identical to plaintiff's is additional evidence of actual copying, as well as another factor leading to the conclusion that the aesthetic appeal of the fabrics is the same; and given the essential similarity of the designs, defendant's use, in one of its samples, of a color scheme somewhat different from plaintiff's cannot hide the fact that the overall appearance and aesthetic appeal of defendant's fabrics are the same as plaintiff's. . . . Nor can it hide the essential character of defendant's behavior: substantial copying amounting to infringement.

330. *Herbert Rosenthal Jewelry Corp. v. Zale Corporation*, 323 F.Supp. 1234, 169 USPQ 393 (S.D.N.Y. Feb. 22, 1971) (Mansfield, J.)

Plaintiff's alternative motions for summary judgment or preliminary injunction in action for copyright infringement by a jewelry manufacturer and retailer against a jewelry retailer.

Plaintiff claimed infringement of copyright in a bee-shaped pin and a turtle-shaped pin. Defendant had received its supply of the allegedly infringing pins from the same manufacturer ("Honor"). Plaintiff had already secured a permanent injunction against infringement of the bee pin and a preliminary injunction against further manufacture of the turtle pin in actions against Honora.

Held, summary judgment denied; preliminary injunction granted.

I. *Summary Judgment (Res Judicata & Collateral Estoppel)*

As part of the consideration for defendant's purchase of the pins from Honora, the latter promised that its attorneys would defend defendant against claim for copyright infringement and that it would indemnify defendant against an award of damages in such actions. Plaintiff asserted that defendants were thus "in privity" with Honora and should be bound by the prior judgments against Honora. However, the court noted that the "concept of privity . . . is a conclusory term that requires

development of facts as to the exact relationships in order to be meaningful.”

Upon further consideration, the court held that defendants were not bound by *res judicata* or collateral estoppel:

Although an agreement to represent and indemnify can be a basis for *res judicata*, . . . the present case does not fall within that factual arrangement. Privity exists between two defendants in different lawsuits when the defendant in the *second* litigation represents and agrees to indemnify the defendant in the first litigation. A judgment against the first defendant binds the second defendant in the later case because the second defendant has reasonable notice of the claim and opportunity to oppose the claim by representing the first defendant. . . . Hence had Rosenthal sued Zale first, and had Honora defended Zale and been prepared to indemnify as to damages assessed against Zale, then Rosenthal could successfully assert *res judicata* against Honora in the later lawsuit. . . . In this case, however, Rosenthal first sued Honora. This distinction is more than conceptual. In the present suit, Zale swears—and plaintiff does not deny—that neither of the present defendants was a party to, or in any manner was involved in, the previous lawsuits. . . . If Zale loses this suit, it would be liable to plaintiff. Though Zale would have an indemnity claim against Honora, if Honora would refuse to pay the claim (because of insufficient assets, or for whatever reason) Zale would still be liable to plaintiff. To bind Zale and Lambert because of the judgment against Honora, regardless of the connections between Honora and the present defendants, would strip Zale and Lambert of the opportunity to contest the cause of action. *Res judicata* is, therefore, inapplicable.

So also is *collateral estoppel*. Ordinarily, the concept refers to a second litigation between the same parties or their privies involving a different cause of action but some identical factual issues. Any factual issues actually decided in the first suit that are common to both cases are foreclosed by the first judgment from being relitigated in the second action. . . . However, even though the application of *collateral estoppel* has been extended to cover those who are parties to the second, but not the first, action, this applies only where the first decision is invoked against one who was a party to the first action. It does not apply here where the party invoking the decision in the first case won, and wishes to use it against those who were not represented in the first litigation.

II. *Preliminary Injunction*

The court found that a comparison of plaintiff's and defendant's pins would convince the ordinary observer that they were the same, adding that "in the earlier action Honora admitted that it had copied the bee design and, although that admission does not bind defendants here, it is relevant to the issue of similarity". Noting the lower burdens on a plaintiff seeking preliminary relief in a copyright infringement case as opposed to other actions, the court awarded a temporary injunction.

Also of interest:

331. *Kalb v. Metro-Goldwyn-Mayer*, N.Y.L.J. April 14, 1971 at 19 col. 4 (Sup. Ct. N.Y. Co. 1971) (Saypol, J.)

Action for breach of contract. Plaintiff granted defendant the exclusive right to record plaintiff's music and sell the recordings. Plaintiff, alleging that defendant improperly computed and failed to pay royalties, brought an action for damages. Defendant refused to make any payments after the suit was brought and plaintiff moved for an injunction requiring defendant to provide royalty statements and pay accrued royalties *pendente lite*. *Held*, motion denied: "[P]laintiffs rely on decisions of United States courts to support their motion. . . . However, [N.Y.] C.P.L.R. § 301 governs this court as to when a preliminary injunction may issue. . . . This action is one for money damages. Plaintiffs do not sue for permanent injunction. While they say they have no adequate remedy at law, the contrary is evident. The actions of defendant may tend to increase plaintiff's damages but do not in any way tend to render ineffectual any future judgment.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

332. LAWSON, ALEXANDER S. *Printing types, an introduction*. Boston, Beacon Press [1971] 119 p.

"Primarily a guide to the recognition of printing types transferred to a printed surface by any process," preceded by a section on the historical development of printer's type. Includes a brief item on the lack of legal protection and consequent pirating of type designs (pp. 11-12).

333. SPIEGEL, IRWIN O., and JAY L. COOPER, *compilers and editors*. Record and music publishing forms of agreement in current use. New York, Law-Arts Publishers, Inc., 1971. 859 p. (loose-leaf) On cover: Entertainment Law Institute of U.S.C.

"A source book of representative types of agreements in current use throughout the Music/Recording Industry," issued with the aim of creating "a usable drafting guide for lawyers, and a useful frame of reference for people involved in deal-making functions and business affairs."

2. Foreign Publications

334. AUSTRALIAN COPYRIGHT COUNCIL. *Photocopying and the law; a guide for librarians and teachers and other suppliers and users of photocopies of copyright work*. Sydney, 1970. 7 p.

A concise guide for the use of librarians and teachers in determining the conditions under which they may make photocopies of copyrighted works, for private use and research, or for published criticism or review. A booklet of the same title was used as a basis for this work with the permission of the Society of Authors and the Publishers Association which prepared the booklet in 1965. See 13 BULL. CR. SOC. 153, Item 168 (1965).

335. ECONOMIC COUNCIL OF CANADA. *Report on intellectual and industrial property*. January 1971. [Ottawa, Information Canada, 1971] 236 p.

A report arising out of a special reference from the Federal Government of Canada, dated July 22, 1966, under the terms of which the Council was requested, in the light of the Government's long-term economic objectives, to study and advise regarding, among other matters, "patents, trade marks, copyrights and registered industrial designs." The Council's recommendations in these areas are made in the belief that they "will bring the general public and consumer interest effectively into an area of public policy where it has not been adequately expressed and implemented before."

336. FINDLATER, RICHARD, *ed.* Public Lending Right: a matter of justice. Introd. by Lord Goodman. [London] A Deutsch [and] Penguin Books [Harmondsworth, Middlesex, 1971] 111 p.

A number of contributors make a strong case for the enactment of some kind of "Public Lending Right" scheme whereby authors would be entitled to payment each time one of their books is borrowed from a public library. An appendix contains the Arts Council proposals made in 1967 and extracted from the Council's publication in January 1968 of *The Arts Council and Public Lending Right*.

337. HINDLEY, B. V. The economic theory of patents, copyrights, and registered industrial designs. [Ottawa] Economic Council of Canada, Jan. 1971. 74 p.

"Background study to the Report on intellectual and industrial property."

An inquiry into whether the establishment of exclusive private property rights in patents, copyrights, and registered industrial designs can be justified on economic grounds using as a sole criterion "the aggregate wealth of the community."

338. McDONALD, BRUCE C. Copyright in context: the challenge of change. [Ottawa] Economic Council of Canada, Jan. 1971. 87 p.

"Background study to the Report on intellectual and industrial property."

"The purpose of this paper is to outline the basic legal principles of the various forms of intellectual property, with a view to isolating common elements and basic differences."

339. MÖHRING, PHILIPP and KATE NICOLINI. Urheberrechtsgesetz. Gesetz über Urheberrecht und verwandte Schutzrecht (Urheberrechts-

gesetz) vom 9. September 1965. Erläutert von Philipp Möhring und Käte Nicolini unter Mitwirkung von Otto Arzt [et al.] Berlin, Vahlen, 1970. 874 p.

A comprehensive, article-by-article commentary on the 1965 Law on Copyright and Neighboring Rights of the German Federal Republic. Appendices contain texts of related laws and of pertinent international conventions of which the Republic is a member.

340. O'BRIEN, DENIS. Inventory property guide, with annotated paraphrasals of the statutes: patents, trade marks, designs, copyright in the United Kingdom and abroad. Liverpool, Lithocraft, ©1970. 163 p.

"The aim in preparing this booklet has been to present relevant separated statutory provisions of the Patents, Trade Mark and Designs Act together and in a more digestible form and at the same time to give a background guide to procedure and law in this and the copyright field, as interpreted by decided cases and practice." A number of pertinent forms are included in appendices.

B. LAW REVIEW ARTICLES

1. United States

341. Copyright—Indivisibility doctrine—Publication of novel in magazine serial with notice in publisher's name alone will secure author's copyright. (23 *Alabama Law Review* 169-179, no. 1, 1970).

A case note on *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

342. Copyright law—federal preemption—State statute forbidding tape piracy held not to be in conflict with the Copyright Act. (46 *New York University Law Review* 164-176, no. 1, Mar. 1971.)

A note on *Tape Industries Ass'n of America v. Younger*, 316 F.Supp. 340, 18 BULL. CR. SOC. 52, Item 14 (C.D. Cal. 1970), appeal dismissed for want of jurisdiction, 401 U.S. 902 (1971).

343. FCC conducts hearings on CATV-copyrights dispute. (*BNA's Patent, Trademark and Copyright Journal*, no. 21, Apr. 1, 1971, pp. A8-A-11.)

A brief summary of the recent hearings at a panel discussion (FCC Docket No. 18397-A) conducted by the Commissioners *en banc*. Among the members of the panel were Barbara Ringer, Assistant Register of Copyrights, and attorneys Louis Nizer, Douglas A. Anello, and Herman Finkelstein.

344. FEINBERG, BARRY H. The viability of trade secret protection after *Lear v. Adkins*. (16 *Villanova Law Review* 551-570, no. 3, Mar. 1971.)

"This Comment will explore the rationale for and against continued protection of trade secrets and will attempt to determine the fulcrum upon which the delicate balance between inventor's rights and federal patent laws can comfortably rest."

345. GOLDSMITH, HARRY. Patent, trademark and copyright arbitration guide. (53 *Journal of the Patent Office Society* 224-255, no. 4, Apr. 1971.)

"[T]he object of this publication [prepared for the Committee on Arbitration, New York Patent Law Association] is primarily to be helpful to the patent, trademark or copyright lawyer in determining whether to select arbitration as a method of resolving a dispute." An appendix contains sample arbitration clauses recommended by the American Arbitration Association.

346. HENDERSHOT, THOMAS R. Principal trademark registration and patent policy: an inherent conflict which requires denial of registration to container designs. (16 *Villanova Law Review* 533-550, no. 3, Mar. 1971.)

"[I]t is the initial purpose of this Comment to examine developing trademark law as it relates to configuration registration. Second, the effect of Sears-Compco upon trademark registration will be analyzed as well as the status of the apparent inconsistency between those cases and Mogen David. Finally, the conflict between patent policy, as stated in Sears-Compco, and coexistent trademark protection will be examined in order to reach a conclusion as to whether the existence of a valid, or expired design patent on a container configuration should, as a matter of law, preclude principal trademark registration."

347. HUANG, THOMAS W. S. The protection of American copyrights under Nationalist Chinese law. (12 *Harvard International Law Journal* 71-90, no. 1, Winter 1971.)

The conclusion is reached that "[i]n broad terms, the problem of protecting foreign copyrights in Nationalist China, stemming from China's desire for easy access to western knowledge, is but a small scale reflection of the conflict of interests between the developed and the developing countries. But as the rich nations begin to show some sensitivity to the information problems of less affluent nations, the conflict between the yearning for knowledge and proprietary interests is beginning to ease."

348. MILGRIM, ROGER M. *Sears to Lear to Painton: of whales and other matters.* (46 *New York University Law Review* 17-34, no. 1, Mar. 1971.)

"A recent decision in the Southern District of New York jeopardizes the entire law of trade secrets. Based upon dictum in nontrade-secret Supreme Court cases, *Painton & Co. v. Bourns, Inc.* holds that the law of trade secrets is applicable only to patentable inventions and only during the time between the application for and issuance of the patent. Mr. Milgrim . . . traces the genealogy of this case and warns of the perils of permitting a concept expressed as dictum in response to one set of circumstances to become a rule of law of general applicability. He concludes that trade secret protection is too important in our technological society to be cast lightly aside through mechanical application of questionable dictum."

349. (STATE BAR OF TEXAS.) *Patent, Trademark and Copyright Section.*

Computer program protection, by Robert A. Felsman, Thomas L. Crisman, Henry W. Hope, John E. Holder and V. Bryan Medlock, Jr. (34 *Texas Bar Journal* 33-40, 53-61, no. 1, Jan. 22, 1971.)

A discussion of "the protection of computer programs available to the software client by means of patent, copyrights and trade secrets."

2. Foreign

1. In English

350. Committee of Governmental Experts on the Protection of Phonograms, *Paris, March 1 to 5, 1971.*

Final report. (7 *Copyright* 54-64, no. 4, Apr. 1971.)

The final report of the meeting which met under the auspices of UNESCO and WIPO to prepare an international agreement to

protect producers of phonograms against the unauthorized duplication of their recordings. Barbara A. Ringer, Assistant Register of Copyrights, was chairman of the United States Delegation and was unanimously elected Chairman of the meeting. Appended are the draft text of a new Convention resulting from the meeting, and the list of participants.

351. Conference on the Legal Problems of International Communications, *Ottawa, October 24-25, 1969. Proceedings.* (20 *University of Toronto Law Journal* 287-358, no. 3, 1970.)

Contents: The legal problems of international telecommunications with special reference to Intelsat. International legal problems of direct satellite broadcasting. International legal problems of computer communications: automation of the transnational information flow.

"At this conference [sponsored jointly by the Canadian Department of Communications and the International Law Association] one hundred lawyers, academics, businessmen, broadcasters, and government officials met together to study and discuss some of the international legal implications of satellite communications generally, of satellite broadcast particularly, and of transnational computer communications."

352. DALFEN, C. M. Direct satellite broadcasting: towards international arrangements to transcend and marshal the political realities. (20 *University of Toronto Law Journal* 366-374, no. 3, 1970.)

A discussion of guideline principles for the conclusion of interstate agreements on the establishment and operation of satellite systems, covering certain fundamental norms such as the right of each state within the zone of beaming of a particular satellite to demand change in or to reject the content of programs to be transmitted to its territory, and the right of all states which are the receivers of broadcasts from a satellite to have a right of access, in law and in fact, to the system.

353. GOTLIEB, ALLAN E. Recent developments in the law of space communications: some current satellite questions. (20 *University of Toronto Law Journal* 359-365, no. 3, 1970.)

An attempt "to bring readers up to date on the developments in the field of international telecommunications which have taken

place in Intelsat, UNESCO, and the ITV. In addition, it attempts to present some recent thoughts in Canada on the development of international legal norms for satellite telecommunications."

354. LEE, EDWARD G. UNESCO meeting on space communications: legal issues. (20 *University of Toronto Law Journal* 375-379, no. 3, 1970.)

A summary of the decision and conclusions reached at the meeting, held in Paris, December 2 to 9, 1969, on certain legal issues which include problems of program control and protecting satellite television transmissions against unauthorized use.

355. NIXON, F. G. Intelsat: a progress report on the move toward definitive agreements. (20 *University of Toronto Law Journal* 380-385, no. 3, 1970.)

A short review of the history of the International Satellite Communications Consortium (Intelsat), followed by a brief examination of the most recent "renegotiations."

2. In English, French and German

356. NORDEMANN, WILHELM. Zum Stand der Urheberrechtsnovelle; Fortgang der Arbeiten. (*Film und Recht* 65-70, no. 2, Feb. 15, 1971.)

A report on some of the revisions being proposed for amending the Copyright Law of The German Federal Republic 1965, particularly those dealing with section 26 (*droit de suite*); 27 (library lending right); 46 (school books) and 47 (school broadcasts).

3. German

357. DITTRICH, ROBERT. Zur Abgrenzung der "kleinen" und der "grossen Rechte." (20 *Osterreichisch Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 1-8, no. 1, Jan.-Feb. 1971.)

A discussion of the delimitation between "small" and "grand" rights under Austrian laws.

358. Die Konstituierung der Weltorganisation für geistiges Eigentum (WIPO), von Albrecht Krieger, Heribert Mast und Winfried Tilmann. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 29-40, no. 2, Feb. 1971.)

An article on the establishment of the World Intellectual Property Organization (WIPO), including its objectives, and personnel, administrative and other operational problems.

359. OLENHUSEN, A. GÖTZ VON. Autor und Verwertungsvertrag; aktuelle Fragen der Rechtsgestaltung. (*Film und Recht* 285-290, no. 10, Oct. 15, 1970.)

A commentary on some of the provisions which have been proposed for inclusion in model publishing contracts to be incorporated into legislation designed to supplement the current copyright law of the German Federal Republic.

360. OLENHUSEN, A. GÖTZ VON. Folgerecht und Urheberrechtsreform; zugleich eine Besprechung der Schrift Paul Katzenberger, Das Folgerecht im deutschen und ausländischen Urheberrecht. (*Film und Recht* 326-332, no. 11, Nov. 15, 1970.)

A commentary on the proposed revisions of the "droit de suite" provisions (Art. 26) of the copyright law of the German Federal Republic from the viewpoint of recent court decisions and a work by Paul Katzenberger on the same subject.

361. STERN, HERMANN J. Gemeinschaftsantennen und Urheberrecht. (*Schweizerische Mitteilungen über Gewerblichen Rechtsschutz und Urheberrecht* 196-211, no. 2, Nov. 1970.)

A report made at the general meeting of the Swiss Association for Copyright Protection in Berne on April 28, 1970. The report was on the copyright situation in Switzerland with respect to community antenna television.

4. In Italian

362. FERRARA-SANTAMARIA, MASSIMO. Appunti in tema di istituzione di un pubblico registro cinematografico europeo. (41 *Il Diritto di Autore* 275-284, no. 3, July-Sept. 1970.)

A discussion of possible effects a proposed international system of public registration of motion pictures for the European Common Market countries might have on the distribution, licensing, control of unauthorized reproductions, and general economics of the motion picture industry.

363. IONASCU, OVIDIU. L'opera cinematografico ed il diritto di autore nella repubblica socialista di Romania. (41 *Il Diritto di Autore* 352-371, no. 3, July-Sept. 1970.)

An Italian translation of an article on certain aspects of motion picture copyright in Rumania, which previously appeared in English in *Copyright* (July 1970), and in French in *Le Droit d'Auteur* (July 1970). See 18 BULL. CR. SOC. 74, Item 39 (1970).

5. In Swedish

364. LÖGDBERG, AKE. Nagra ord om internationella konventioner pa privaträttens område med särskilt beaktande av Bernkonventionen. (*NIR* 341-356, no. 4, 1970.)

An article in Swedish, with English summary, on international conventions in the field of private law and their effects, particularly in their interpretation, with special reference to the Brussels and Stockholm texts of the Berne Convention.

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN

DONALD S. ENGEL

JUDITH GRAD

MORTON DAVID GOLDBERG

PROF. HARRY G. HENN

DR. STEPHEN P. LADAS

ALAN LATMAN

PROF. MELVILLE B. NIMMER

STANLEY ROTHENBERG

ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President

LEONARD ZISSU

Vice-Presidents

ALAN LATMAN

STANLEY ROTHENBERG

Secretary

MORTON DAVID GOLDBERG

Assistant Secretary

BERNARD KORMAN

Treasurer

PAUL GITLIN

Assistant Treasurer

ALAN J. HARTNICK

Executive Director

WALTER J. DERENBERG

BOARD OF TRUSTEES

ALLEN H. ARROW, New York City

IRVING COHEN, New York City

EDWARD M. CRAMER, New York City

KARLA DAVIDSON, New York City

EUGENE L. GIRDEN, New York City

A. A. GOLDMAN, Washington, D.C.

PROF. ROBERT A. GORDON, U. of Pa. Law School, Philadelphia

ROBERT D. HADL, Washington, D.C.

JOHN F. HARDING, New York City

PROF. HARRY G. HENN, Cornell Law School, Ithaca

WILLIAM M. KAPLAN, Beverly Hills, California

IRWIN KARP, New York City

SYDNEY M. KAYE, New York City

M. WILLIAM KRASILOVSKY, New York City

ARTHUR B. KRIM, New York City

BRUCE LOVETT, Washington, D.C.

PAUL MARKS, New York City

JOHN A. MARSHALL, Boston

PROF. MELVILLE B. NIMMER, U. of California L.S., Los Angeles

HARRY R. OLSSON, Jr., New York City

E. GABRIEL PERLE, New York City

EDWARD A. SARGOY, New York City

ADOLPH SCHIMEL, New York City

JOHN SCHULMAN, New York City

CHARLES B. SETON, New York City

LEON SHIMKIN, New York City

SAMUEL W. TANNENBAUM, New York City

Published at New York University Law Center
40 Washington Sq. South, New York, N. Y. 10011

Printed and distributed by Fred B. Rothman & Co.
57 Leuning Street, South Hackensack, N. J. 07606

© 1971 by The Copyright Society of the U.S.A.

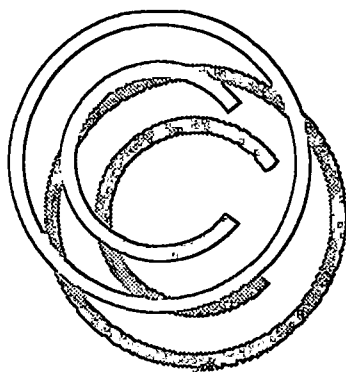
All rights reserved.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 18, NO. 6

AUGUST, 1971

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

VOLUME 18
OCTOBER 1970-AUGUST 1971

Published at
NEW YORK UNIVERSITY LAW CENTER

Printed in the United States of America. Copyright © 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971 by The Copyright Society of the U.S.A., 40 Washington Square South, New York, N.Y. 10011.

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Leonard Zissu, *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 individual, and library subscription: \$25. Student subscription at dues of \$25 for three years available to individuals actively enrolled in an accredited institution of higher learning. Student subscription at dues of \$25 for two years available to individuals who were actively enrolled in an accredited institution of higher learning within one year prior to subscribing. Sponsoring memberships in the Society on inquiry.

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: 18 BULL. CR. SOC. page no., Item (1971).

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

MARTIN J. BERAN
DONALD S. ENGEL
JUDITH GRAD
MORTON DAVID GOLDBERG
PROF. HARRY G. HENN

DR. STEPHEN P. LADAS
ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
ALFRED H. WASSERSTROM

Associate Editor: JON A. BAUMGARTEN

Production Editor: MARY T. HUNTER

BOARD OF TRUSTEES

ALLEN H. ARROW, New York
IRVING COHEN, New York
EDWARD M. CRAMER, New York
KARLA DAVIDSON, New York
EUGENE L. GIRDEN, New York
A. A. GOLDMAN, Washington
PROF. ROBERT A. GORMAN, U. of Pa. L.S.
ROBERT D. HADL, Washington
JOHN F. HARDING, New York
PROF. HARRY G. HENN, Cornell L.S.
WILLIAM M. KAPLAN, Los Angeles
IRWIN KARP, New York
SYDNEY M. KAYE, New York
M. WILLIAM KRASILOVSKY, New York

ARTHUR B. KRIM, New York
BRUCE LOVETT, Washington
PAUL MARKS, New York
JOHN A. MARSHALL, Boston
PROF. MELVILLE B. NIMMER, U. of Cal.
L.S., Los Angeles
HARRY R. OLSSON, Jr., New York
E. GABRIEL PERLE, New York
EDWARD A. SARGOY, New York
ADOLPH SCHIMMEL, New York
JOHN SCHULMAN, New York
CHARLES B. SETON, New York
LEON SHIMKIN, New York
SAMUEL W. TANNENBAUM, New York

Announcement

NEW EXTENSION BILL PASSED BY SENATE

On July 23, 1971, the Senate passed S. J. Res. 132, which had been introduced on July 15, 1971, by Senator John L. McClellan. S.J. Res. 132 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, by Public Law 90-141, by Public Law 90-416, by Public Law 91-147, or by Public Law 91-555 (or by all or certain of said laws), would expire prior to December 31, 1972, such term is hereby continued until December 31, 1972.

The joint resolution provides for the automatic extension of copyrights in their renewal term that would otherwise expire on December 31, 1971. Six earlier Acts of Congress (P.L. 87-668, P.L. 89-142, P.L. 90-141, P.L. 90-416, P.L. 91-147, and P.L. 91-555) have extended second-term copyrights which would have expired between September 19, 1962 and December 31, 1971, to the end of 1971. The present measure, if enacted, will further extend the duration of those copyrights to December 31, 1972, and will also extend to December 31, 1972, second-term copyrights that were due to expire during 1972.

Last Minute News

On November 15, 1971 the House passed S.J. Res. 132 and the bill now awaits signature of the President.

CONTENTS

	PAGES
PART I. ARTICLES.	
Importing and Copyrights — <i>The Role of the United States Bureau of Customs</i> John F. Atwood	1-22
The Origins of Copyright Law in Ancient Jewish Law Victor Hazan	23-28
The Origins of the Stockholm Protocol Charles F. Johnson	91-181
Toward International Copyright Revision — <i>Report on the Meetings in Paris and Geneva, September, 1970</i> Robert D. Hadl	183-228
The Impact of New Technology on International Copyright and Neighboring Rights — <i>The Ninth Annual Jean Geiringer Memorial Lecture on International Copyright Law</i> William Wallace, C.M.G.	293-303
Audio Visual Systems Denis de Freitas	304-312
Copyrightability of Motion Picture Sound Tracks E. Fulton Brylawski	357-370
The Battle of the Books Revived — Copyright Law Revision in the Year 1971 — <i>The Second Donald C. Brace Memorial Lecture on Copyright Law</i> John Schulman	397-421
Current United States Developments in Copyright Law Stanley Rothenberg	422-430
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories 29, 229, 313, 371, 431	
2. Foreign Nations 29, 317, 376, 385, 439	
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS 31, 238, 319, 378	
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts	
1. Federal Court Decisions 32, 239, 321, 379, 440	
2. State Court Decisions 249, 336, 447	

	PAGES
3. Tax Court Decision	55
4. Other Decisions of Interest	57, 253, 387, 449

PART V. BIBLIOGRAPHY.

A. Books and Treatises.

1. United States Publications	70, 268, 345, 388, 451
2. Foreign Publications.	
1. In Dutch	270, 452
2. In English	70, 346, 388
3. In French	270
4. In German	70, 71, 271, 346, 452
5. In Italian	271
6. In Italian and French	271
7. In Swedish	347

B. Law Review Articles.

1. United States	71, 272, 347, 390, 453
2. Foreign.	
1. In English	73, 276, 350, 392, 454
2. In English and French	351
3. In English, French and German	281, 394
4. In English, French and Spanish	281, 352, 456
5. In French	282
6. In German	74, 283, 353, 394, 457
7. In Italian	75, 289, 395, 460
8. In Italian and French	271
9. In Portuguese	75
10. In Swedish	75, 289, 396

C. Articles Pertaining to Copyright in Trade Magazines.

1. United States	76, 461
2. England	87

ANNOUNCEMENTS.

New Extension Bill Passed by Senate	<i>preceding</i> 397

IN MEMORIAM — Harold G. Fox. 1896–1970	291

NEWS BRIEFS.

Abridgement of Televised Films. <i>FTC Survey</i>	89
A Reprinting of the Senate Revision Hearings	89

	PAGES
Paris Meeting on Record Piracy	354
Geneva Meeting on Computer Software	355
Anti Piracy Bill	464
Model Law for Developing Countries on Industrial Designs	464
PHOTOGRAPHS.	
William Wallace, C.M.G. preceding	293
John Schulman preceding	397
INDEX — Volume 18, October 1970-August 1971	465



JOHN SCHULMAN

Who delivered the Second Lecture in the new annual series,
The Donald C. Brace Memorial Lectures on Copyright Law.

PART I.

ARTICLES

365. THE BATTLE OF THE BOOKS REVIVED—COPYRIGHT LAW REVISION IN THE YEAR 1971. *The Second Donald C. Brace Memorial Lecture on Copyright Law.**

By JOHN SCHULMAN**

The honor and privilege of presenting the second in the series of Brace Lectures provides me with a unique and welcome opportunity of discussing the nature of the law of Copyright in the United States, its origins and development, and the urgency of completing a program intended to substitute a new and modernized Statute for the outmoded Copyright Law of 1909.

The title of my presentation has been chosen to reflect the history of the copyright system, and its vitality and survival despite sporadic attacks upon its value to the society in which we live. The present program for revision of the United States Copyright Law is, and I submit will continue to be, no exception. But although the hostile voices continue to be strident, they have become weaker at each stage of the debate.

The greatest delay in the present revision program, however, does not stem from any concerted movement to abolish copyright, but rather from the efforts of those groups, other than the authors and creators of literary and artistic works, who seek to derive special benefits and advantages from the revision of the Statute. But as an accompaniment to this newly discovered additional interest in copyright, occasioned to a great

* Delivered at New York University Law Center on May 11, 1971.

** John Schulman is a member of the Panel of Experts for the Revision of the United States Copyright Law appointed in 1955 by the Librarian of Congress, and has represented this country abroad in international conferences on both the Universal and Berne Conventions. He was a member of the Stockholm Conference on International Patent and Copyright Treaties and of the 1967 Geneva Conference on the Patent Cooperation Treaty. He is a member of the Board of Trustees of The Copyright Society of the U.S.A., and has served as President of the American Patent Law Association and as a member of the Council, Section of Patent, Trademark and Copyright Law, American Bar Association.

extent by modern technology, we are no longer engaged in a mere Battle of Books¹ but are engulfed in a veritable War of Words.

It is obviously not feasible in the compass of a single lecture to discuss all of the facets of the revision program which was commenced in the year 1955, and is still in progress, or to explain in detail all of the problems which remain unresolved. Accordingly, this presentation will attempt to clarify the basic principles on which our Copyright System is founded, in the hope of dispelling some of the doubts which have been expressed concerning the proper role which copyright plays in our society, and correcting some of the errors and misconceptions which have recently been injected into the debate.

PART I

The Nature of Copyright

The copyright system is concerned with the *content* of writings. It is a system of law dealing with the communication of information, ideas and entertainment, reduced to a tangible form from which the material communicated may be perceived by a reader or viewer, and from which it may be reproduced.² Embraced within the copyright system are such intellectual products as books, plays, songs, newspapers, magazines, pictures and other works of art, motion pictures, television programs, computer programs and a host of similar creations. Coming within the concept of "writings of an author", they are usually referred to as literary, artistic and scientific works, and the proprietary interest in their content is variously termed literary or intellectual property.³

The objective of a copyright system is to create a social and economic climate which will encourage the creation and dissemination of material of this nature by enabling authors to profit from their labors, and by making it possible for industry to profit from the publication, distribution and promotion of these products. An adequate copyright system ensures widespread communication of these works by providing a legal basis permitting their distribution and dissemination without loss of dominion over the inherent literary property.

-
1. Birtell, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* (1899). Reprinted by Rothman Reprints, South Hackensack, N.J. (1971).
 2. Schulman, "Patents, Trademarks & Copyright—An Informal Comparative Analysis," 10 *New York Law Forum* 174 (June 1964).
 3. Schulman, "Authors' Rights," 7 *COPYRIGHT PROBLEMS ANALYZED 1951*, 19 republished in *COPYRIGHT PROBLEMS ANALYZED* (1966).

The copyright statute,⁴ and the common law rules of literary property in unpublished works,⁵ together presently constitute the copyright system under which this form of property is protected against invasion in the United States. It serves the same purpose in this sphere of law as that which a negotiable instruments law provides in financial transactions, and which a sales act or commercial code furnishes to govern the ownership, sale or leasing of tangible personal property. They all establish ground rules by which the pertinent activities are regulated and judged.

The right secured by the copyright system is a highly sophisticated form of property. It is not capable of being possessed in the sense of physical control, nor can it be measured in metes and bounds or surrounded by a fence. It finds its safeguard only in a general respect of the community for the legal rights established, the possibility of enforcement of these rights in the courts, and the sanctions which the law imposes for any trespass upon this property. The rights in this species of property rest solely upon the concepts which the law supplies and the means of enforcement which it provides.

A significant attribute of this property is that it flows from an affirmative contribution to a common reservoir enjoyed by society, and not from any withdrawal of property from that reservoir. A book written by an author or a song created by a composer would not have come into being except by the creator's personal effort. Intellectual property does not exist in nature; it is not a machine or handmade product. It stems entirely from human intellectual ingenuity, initiative, effort and imagination.

It would be difficult to find more eloquent language to describe this unique property than the statement of Benjamin Disraeli:⁶

There are works requiring great learning, great industry, great labor, and great capital, in their preparation. They assume a palpable form. You may fill warehouses with them, and freight ships. And the tenure by which they are held is, in my opinion, superior to that of all other property; for it is original. It is tenure which does not exist in a doubtful title, which does not spring from any adventitious circumstances. It is not found; it is not purchased; it is not prescriptive. It is original. So it is the most natural of all titles, because it is the most simple and least artificial. It is paramount and sovereign, because it is a tenure by creation.

4. 17 U.S.C. Sec. 1 (1947).

5. *Supra* note 3, at 23. See also 17 U.S.C. Sec. 2 (1947), and *DRONE ON COPYRIGHT*, 97 (1879).

6. Quoted in *DRONE*, at 82.

Although the copyright system had its origin in the privileges which were granted by the Crown in England prior to 1695 and by the Kings of France prior to 1793, these conditions no longer prevail.⁷

Under our law, and the same philosophy prevails in a majority of the advanced countries throughout the world, copyright may no longer be considered a special privilege. It is available to every individual who can qualify by virtue of his own talents and the exercise of his own initiative and ingenuity. The acquisition of this property is open to all on an equal basis under the law, and accordingly constitutes a legal right rather than a privilege.

Nor does the copyright system create a monopoly or stifle or impede the enjoyment, use or utilization of ideas or information. Copyright protection extends only to copying or other forms of reproduction. It does not establish a monopoly in the ideas which are expressed, but preserves the property right only in the manner and content of that expression.⁸

Exclusive rights may be claimed by an author or proprietor of a literary, scientific or artistic work only in the tangible expression of his ideas, the manner in which his information is presented, or the way in which his facts are arranged. The extraction of data or information, as such, from a copyrighted work, or the use of that data or information, do not constitute violations or infringements of copyright. Infringement results only from the copying or reproduction, either in whole or in a substantial part, of an author's form of expression, or the manner of presentation or development of his material as formulated by him.⁹

Even though a work is protected by copyright, the facts recited or processes described therein are therefore freely available to the public at large and may be freely utilized by it.

It should be borne in mind that the scope of protection of both common law and statutory copyright is extremely limited. These rights are unlike those which stem from a patent where the monopoly granted to the patentee is quite broad.¹⁰

7. COPINGER & SKONE JAMES ON COPYRIGHT, 10th ed. at 7, *et seq.*

8. Schulman, "The Copyright Law — Is It A Roadblock to Information Retrieval?" 11 BULL. CR. SOC. 369 (August 1964).

9. See *Kane v. Penn. Broadcasting Co.*, 73 F. Supp. 307 (E.D. Pa. 1947); *Pic Design Corporation v. Sterling Precision Corporation*, 231 F. Supp. 106 (S.D.N.Y. 1964); *Guthrie v. Curlett*, 36 F. 2d 694 (2d Cir. 1929).

10. *Baker v. Selden*, 101 U.S. 99, 101-104 (1879); *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, at 23, 24 (2d Cir. 1906), *aff'd* 210 U.S. 339 (1908); *Arnstein v. Edward B. Marks Music Corp.*, 82 F. 2d 275 (2d Cir. 1936); *Gerlach-Barklow v. Morris & Bendien*, 23 F. 2d 159, 161 (2d Cir. 1927); and *Schulman*, note 2 *supra*.

The owner of common law or statutory copyright does not, and may not, claim to usurp or appropriate any field of writing or any literary or artistic subject.¹¹ Having composed a song about moonlight, having written a book concerning life in New York, having painted a picture or taken a photograph, he does not acquire a right to claim exclusive dominion over any of those areas. All he may do is prevent another person from copying or reproducing his work.¹² He is entitled only to prevent the piracy of the exact words of his composition or plagiarism of the sequence of the ideas expressed.¹³ A photographer who produces a photograph may prevent another person from copying that photograph,¹⁴ but has no standing to prevent that other person from placing a camera in the same position facing the same object, and producing an original picture substantially identical with the earlier one.¹⁵ Although a publisher of a directory may prevent another publisher from copying that directory,¹⁶ he has no legal right to prevent a second publisher from producing an original directory compiled by visiting the same householders or business enterprises whose names have appeared in the earlier work.¹⁷

The law of copyright is designed to prevent only larceny, not to deter legitimate use, independent creation or mere imitation.

11. Schulman, "The InterAmerican Convention on the Rights of the Author in Literary, Scientific & Artistic Works—Signed in Washington, D.C. on June 22, 1946. The Advisability of Ratification by the United States," pp. 19-20. (Privately published, 1947).
12. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83, at 94, 95 (2d Cir. 1922), cert. denied 259 U.S. 581; *Chappell & Co. v. Costa*, 45 F. Supp. 554, at 556 (S.D.N.Y. 1942); *Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 50 F. 2d 908, at 910 (D. Mass. 1931).
13. *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35, at 36 (7th Cir. 1926), cert. denied 273 U.S. 738.
14. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, at 249-252 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, at 58, 60, 61 (1884); *Gross v. Seligman*, 212 Fed. 930, at 931 (2d Cir. 1914); *Altman v. New Haven Union Co.*, 254 Fed. 113, at 117, 118 (D. Conn. 1918).
15. *Gross v. Seligman*, note 14 *supra*, at 931.
16. *Bleistein v. Donaldson Lithographing Co.*, note 14 *supra* at 250; *Jeweler's Circular Publishing Co. v. Keystone Pub. Co.*, note 12 *supra*, at 85 and cases cited, and 88; Ball, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY*, Sec. 26.
17. *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, note 12 *supra*, at 91; *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145, at 150, 151 (S.D.N.Y. 1924).

The property represented in this system of law is of a nature which can have a value only in a free society, one which places emphasis upon individual initiative, and one which has reached a stage of economic development beyond the mere satisfaction of primitive needs. A copyright system can flourish best in a climate wherein the ownership of private property is recognized and the profit motive is esteemed.

It is not surprising, therefore, to find that the greatest progress which has been made in development of the law of intellectual and industrial property is to be found in highly developed industrial areas such as Western Europe, the British Commonwealth, the Scandinavian Countries and in the United States.¹⁸ We likewise see the emergence of these systems of law in other developing areas, again resulting from the evolution of industrial capitalism, and an emphasis on individual initiative.

Because the right to secure copyright is available to every author or creator of a literary or artistic work on an equal basis, it is not subject to censorship, and is a concomitant of the right of freedom of speech not inconsistent with, or antagonistic to, the rights guaranteed under the First Amendment to the Constitution.

PART II

The Origins and Development of Copyright in the United States

The compatibility of the economic interests of the author and the public interest was recognized by the Supreme Court in *Mazer v. Stein*,¹⁹ in its statement that:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the Useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

18. Schulman, "International Copyright in the United States—A Critical Analysis," *LAW & CONTEMPORARY PROBLEMS* (Spring 1954); Schulman, "Another View of Article 3 of the Universal Copyright Convention," *Wisconsin L. Rev.* 298 (March 1953); Schulman, "A Realistic Treaty," 1 *The American Writer* 18 (Nov. 1952).

19. 347 U.S. 201 (1954).

Comments to the effect that copyright is intended to be a "reward" to an author are naive and outmoded. The copyright law does not "reward" an author or other creator or copyright proprietor for creating, publishing or presenting a book, a song or a play. It does not "induce" people to write or produce books, plays, songs or other literary works. These portrayals of authors as individuals dependent upon patrons, or the assertion that the incentives to be provided to them must be measured by the test of sticks and carrots, have no relevance in a free society.

The purpose of a copyright system is to create a hospitable atmosphere for individuals possessing proper skills to exercise their talents by creating literary and artistic works, and for people and business enterprises to invest their capital in producing, promoting and distributing these products. In a society which recognizes the right of an author, composer, playwright or artist to earn his livelihood or to amass a fortune by the exercise of his talents, and which recognizes the right of an entrepreneur to produce and sell these products at a profit, many citizens will turn their efforts in this direction in preference to engaging in other gainful occupations. The benefit to society in turn lies in its enjoyment and utilization of the productions made available by these efforts.

That this concept truly represents the view of the framers of the Constitution finds full support in the early history of Copyright in the United States prior to the adoption of the Constitution itself.

I need hardly mention that Article I, Sec. 8 of the Constitution specifically delegates to Congress the power to enact copyright legislation in the following terms:

The Congress shall have power:

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

There is, however, an interesting history of copyright in the United States which antedates the adoption of the Constitution. It may be read in Bulletin No. 3 issued by the Copyright Office in 1963,²⁰ entitled Copyright Enactments.

As early as 1672, the General Court for Elections of The Massachusetts Bay Colony in New England issued the following order:

20. COPYRIGHT ENACTMENTS, LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT, Copyright Office Bulletin No. 3, revised 1963.

In ansr to the petition of John Vsher, the Court judgeth it meete to order, & be it by this Court ordered & enacted, that no printer shall print any more coppies then are agreed & paid for by the owner of the said copie or coppies, nor shall he nor any other reprint or make sale of any of the same, without the said owners consent, upon the forfeiture and poenalty of treble the whole charges of printing, & paper, &c, of the whole quantity paid for by the owner of the copie, to the said owner or his assigns.²¹

That order was promulgated almost a half century before the enactment of the British Copyright Act of 1710, the statute usually said to be the first copyright legislation known to the world. In the half century which followed the adoption of the Statute of 1710, no copyright legislation appears to have been necessary in the colonies since the rights of authors were undoubtedly governed by the statute which had been enacted in Great Britain.

However, after the original States of the Union had achieved independence, legislation became necessary to fill the void which had resulted. Accordingly, we find that in January 1783, the State of Connecticut became the first to adopt a copyright statute. This act was followed by legislation in the State of Massachusetts on March 17, 1783 and in Maryland in April of the same year.

On May 2, 1783 a resolution adopted by the Continental Congress recommended to the several States that copyright legislation be enacted. The resolution of which the authors were Mr. Williamson, Mr. Izard and Mr. Madison, recited:²²

Resolved, That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of

21. *Ibid.* 140, from "Records of the Governor and Company of the Massachusetts Bay in New England. Printed by order of the Legislature. Edited by Nathaniel B. Shurtleff." Vol. 4, part 2, 1661-1674. Boston, W: White, 1854, pp. 506, 527.

22. *Ibid.* 1, from "Journal of the United States in Congress assembled, Containing the Proceedings from Nov. 1782, to Nov. 1783." Printed by order of Congress. Vol. 8, 8vo. Philadelphia, D. C. Claypoole, 1783, pp. 256-257. Also printed in "Journals of the American Congress: from 1774 to 1788." 20 Vol. 4, 8vo. Washington, Way & Gideon, 1823, p. 219.

such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as to the several States may seem proper.

Thereafter copyright laws were adopted in ten of the remaining thirteen original states, Delaware being the only exception.

The significance of this activity lies not merely in terms of its chronology but also in the factor that the language employed explains the wording of Article 1, Section 8 of the Constitution. The preambles to the various State statutes serve to clarify the meaning which must be attributed to the phrase "to promote the progress of science and useful arts".

The preamble to the Connecticut statute, for example, recites:²³

Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.

Rhode Island was even more explicit in its statement of purpose when it wrote:²⁴

Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons, in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is the natural right of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind;

There can be little doubt that all of these statements reflect the teachings of John Locke, who wrote in his essay on Civil Government:²⁵

Though the earth and all inferior creatures be common to all men, every man has a property in his own person; this nobody has any

23. *Ibid.*

24. *Ibid.* 9.

25. Locke, CIVIL GOVERNMENT, ch. 5.

right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For, this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to; at least where there is enough, and as good, left in common for others.

Those who urge that copyright in literary, artistic and scientific works should not be treated as the property of their creators or who contend that the Congress, acting in the "public interest", must subordinate the interests of creators, would have us disregard this contemporary demonstration of the intent of the Constitution. They would also have us ignore the reasons advanced by James Madison for entrusting to the Congress the power to enact copyright legislation. In the 43rd *Federalist* paper he wrote:²⁶

The *fourth* class comprises the following miscellaneous powers:

1. A power 'to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries'.

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

This brief review of the origins of the United States Copyright system, and of the Constitutional power granted to Congress to enact Copyright legislation would seem to provide a complete answer to, and

26. THE FEDERALIST, No. 43 (Mod. Lib. Ed.), 279 (1941).

refutation of, critical comments which have recently been published concerning this branch of the law.²⁷

The wording of the preambles and statements to which reference has been made above should also provide a clear and unequivocal answer to an assertion in a recent publication that "the general case for copyright protection is weak".²⁸ The author of that article, apparently carried away by Macauley's ancient condemnation of authors and authorship,²⁹ would have us abandon the very purpose and function of a copyright system as expressed by those statesmen who participated in formulating the grant to Congress of the power to "promote the progress of science * * * by securing for limited times to authors * * * the exclusive right to their respective writings * * *".

Rather than relying upon an outmoded cliché, we should recognize the value of authorship, and support the recent report of the Congressional Committee on the Judiciary which recites:³⁰

There is an urgent need for copyright legislation that takes full account of the continuing technological revolution in communications and, even more important, that *recognizes individual authorship as an indispensable national resource.*

Professor Nimmer,³¹ in delivering the inaugural lecture in the instant series, advanced the theory of a hidden inconsistency between the guarantee of freedom of expression under the First Amendment to the Constitution, and the power granted to Congress to enact Copyright laws. Leaving aside the limitations of copyright protection and particularly the doctrine of Fair Use, it should be apparent from the contemporaneous statements made concerning the rights of authors, that the framers of the Constitution and of the First Amendment thereto saw no conflict.

An unequivocal answer to the claim of an alleged hidden conflict is also found in the doctrine of Fair Use, which is specifically recognized in the pending legislation.³²

27. Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," 84 *Harvard L. Rev.* 350 (Dec. 1970). See also Melville B. Nimmer, "Copyright vs. The First Amendment," 17 *BULL. CR. SOC.* 225 (April 1970).

28. Breyer, *supra* note 27, 350.

29. Quoted in Drone, *supra* note 6, at 80, 82.

30. House Rep. No. 83, March 8, 1967, 90th Cong., 1st Sess., at 3.

31. Nimmer, *supra* note 27.

32. Schulman, "Fair Use and the Revision of the Copyright Act," 53 *Iowa L. Rev.* 832 *et seq.* (Feb. 1968).

Fair Use is a principle which has been developed in copyright jurisprudence over the years, although it has never been affirmatively expressed in any of our copyright statutes. The rule is designed to permit limited quotation and copying from a copyrighted work for purposes which have neither the intent nor effect of fulfilling the demand for the original work. The doctrine has no rigid boundaries, but takes into account the nature and purpose of the respective works, the quantity and the importance of any portions copied, the relationship of the portions used to the respective works of which they are or become a part and the impact of the unauthorized use of these portions in a rival publication upon the demand for the original copyrighted publication.³³

The doctrine of "fair use" as a balance wheel and safety valve for the copyright system, was promulgated more than one hundred thirty years ago, as a judicial rule of public policy.³⁴ Without statutory basis or definition it has become and remains firmly established as a basic tenet of our copyright system. A concise summary of that rule as stated in *DRONE ON COPYRIGHT*³⁵ reads as follows:

It is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication. The recognition of this doctrine is essential to the growth of knowledge; as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors. The law, therefore, wisely allows a 'fair use' to be made of every copyrighted production; and this liberty is consistent with the true purpose of the law to give to the earlier author adequate protection for the results of his labor. But to determine the extent of this license, and to draw the line between a fair and an unlawful use, is often one of the most difficult problems in the law of copyright. The question must generally be determined by the special facts in each case.

The authorities are in agreement that the line of demarcation between "fair use" and copyright infringement does not depend upon

33. *Continental Cas. Co. v. Beardsley*, 253 F. 2d 702 (2d Cir. 1958); *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F. 2d 82 (6th Cir. 1928); *West Publishing Co. v. Edward Thompson Co.*, 176 Fed. 833, (2d Cir. 1910); *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922 (2d Cir. 1903).

34. *Folsom v. Marsh*, 9 Fed. Cas. 342, 343 (C.C. Mass. 1841).

35. *Drone*, 386-387.

any arbitrary rules or fixed criteria. In each situation, the decision depends on an examination of a variety of factors which include:³⁶

1. The nature and purpose of the respective works;
2. The quantity and importance of the portions taken;
3. The relation of the portions used to the respective works of which they are a part;
4. The impact of the use of these portions upon the demand for the copyrighted publication.

An expression used by Judge Kaufman is particularly apt in describing one of the criteria of fair use. He said in *Berlin v. E. C. Publications, Inc.*:³⁷

At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of *fulfilling the demand for the original*, and where the parodist does not appropriate a *greater amount of the original work* than is necessary to "*recall or conjure up*" the object of his satire, a finding of infringement would be improper.

The relevance of these various criteria is found in the recognition that not all works serve the same function, have the same purpose, or enjoy the same market. What may constitute fair use when factual material is taken from a reference book, may well constitute infringement if fictional material were taken from a novel. The greater liberality in permitting the use of material from reference works, textbooks, and other scholarly publications represents a public policy developed by the courts as a reconciliation between the exclusive rights of a copyright proprietor and the requirements of an overriding public interest.³⁸

The courts have, on a number of occasions, dealt specifically with the doctrine of fair use in relation to legal reference books and source material. They have recognized that although these works are entitled to copyright protection, the extent to which they are protected must be

36. Schulman, *supra* note 32; *Folsom v. Marsh*, *supra* note 34; NIMMER ON COPYRIGHT, Sec. 145 (1963); HOWELL, COPYRIGHT LAW (A. Latman ed. 1962) at 151-154; Yankwich, "What Is Fair Use?" 22 *U. Chi. L. Rev.* 203, 212 (1954).

37. 329 F. 2d 541 (2d Cir. 1964) at 554.

38. *Oxford Book Company v. College Entrance Book Company*, 98 F. 2d 688 (2d Cir. 1938).

judged in the light of the function which they serve and the purpose for which they are sold.³⁹

The doctrine of Fair Use as developed and applied in the courts has provided both a safety valve and a balance wheel for the copyright system. It furnishes a complete answer to the suggestion referred to earlier, that the copyright system is incompatible with the First Amendment, and to the argument that copyright laws are contrary to the public interest.

In *Sampson & Murdock Company v. Seaver-Radford Company*⁴⁰ permissible use was outlined in the following terms:

. . . So, also, it is clear that, under some circumstances and for certain purposes, a subsequent publisher may draw from the earlier publication its identical words, and make use of them. This is peculiarly so with reference to works in regard to the arts and sciences, using those words in the broadest sense, because, with reference to them, any publication is given out as a development in the way of progress, and, to a certain extent by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science. Therefore, as to copyrighted works of that character, by the common consent to which we have referred, subsequent authors are sometimes entitled, and, indeed, required, to make use of what precedes them in the precise form in which last exhibited, so that with regard to them the rules under the copyright statutes are very far from fitting a case like that we are now considering.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,⁴¹ the court held that a person in the public eye (Howard Hughes) could not, by purchasing copyrights on material published about him, use the copyright to restrict the use of that material by others.

Where the public interest requires the fullest information to be presented on an issue of importance, the courts have permitted greater latitude in amount of copyright material which may be freely utilized.

39. *Edward Thompson Co. v. American Law Book Co.*, *supra* note 33.

40. 140 Fed. 539, at 541 (1st Cir. 1905).

41. 366 F. 2d 303 (2d Cir. 1966).

In *Time Inc. v. Bernard Geis Associates*,⁴² the court held (citing among other references this author's article, "Fair Use and the Revision of the Copyright Act"),⁴³ that in view of the public interest in having the fullest information available relative to murder of our late President Kennedy, the defendant, by virtue of the doctrine of "fair use", was entitled to make artistic copies of plaintiff's copyrighted photographs of the President's death, and to include such copies in a serious book on the subject.

The courts, in encouraging full disclosure on matters of public importance, have emphasized the constitutional guarantees of freedom of speech and freedom of the press as factors in determining questions of "fair use". Chief Judge Fuld stated in *Hemingway v. Random House, Inc.*:⁴⁴

The main purpose and function of book reviewing is to introduce the author's work into the stream of public information, the free flow of which is safeguarded by the First and Fourteenth Amendments. A publisher, in circulating a book for review, risks unfavorable comment as well as praise; he places the work in the arena of debate. The same reasons which support the author's freedom to write and publish books require a similar freedom for their circulation before publication, for comment by reviewers.

As the late Hon. Leon R. Yankwich, formerly Judge of the District Court of Southern California, stated in his article "What Is Fair Use?",⁴⁵ the determining factors are:

... whether there is "fair use" of the copyrighted material in any of the cases enumerated, the courts are governed by the exigencies of each situation. Given the diversity of instances, it is inevitable that no rigid rules can be applied to all situations. Nevertheless, certain tests have been evolved to determine whether the taking of copyrighted material does or does not exceed the limits of "fair use". They require consideration of (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication. The first two elements are the subject of quantitative or qualitative analysis. As such, they are capable of measurement. The third element is, to some extent, conjectural.

42. 293 F. Supp. 130 (S.D.N.Y. 1968).

43. Schulman, *supra* note 32.

44. 23 N.Y. 2d 341 (1969).

45. 22 *U. of Chi. L. Rev.* 203, at 212 (1954).

Heretofore fair use has been applied by the courts in the absence of any statutory provision. The express provision in the pending legislation fortifies the principle as a crystallization of legislative policy. Its application should satisfy all legitimate needs and requirements for the utilization of copyrighted material in all appropriate cases.

The problems presented in applying the doctrine of Fair Use are no different than those which arise in any other branch of the law. All lawyers are familiar with statutes or rules of law which speak in terms of reasonable notice, bona fides, reasonable care, good faith and other general terms based on established legal doctrine. Juries decide questions of negligence, gross negligence, contributory negligence and similar matters on the basis of the facts presented to them and in the light of the law which is charged by the court. The doctrine of Fair Use is even simpler to apply since it is based on good faith, and most problems may be answered by recourse to the Golden Rule, "Do unto others as you would have them do unto you."

PART III.

The Existing Copyright System and the Need for its Modernization

The program for a general revision of the United States Copyright Law was initiated in 1955.⁴⁶ The present Copyright Law is basically the same as the Act adopted in the year 1909, and there is general agreement that there is urgent need of modernization.

The Report of the Congressional Committee on the Judiciary issued in 1967⁴⁷ recites that:

During the past half century a wide range of new techniques for communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and lasers promises even greater changes in the near future. These technical advances have generated new industries and new methods for the reproduction

46. American Bar Association, Section of Patent, Trademark and Copyright Law, Report of Committee No. 15, Program for Revision of the Copyright Law, 1957 Committee Reports presented at the annual meeting July 13, 16, 1957, New York, Schulman, *The Road to Progress in Revising the Copyright Law*, 9 BULL. CR. SOC. 435 (1962); Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Committee Print, 87th Cong., 1st Sess., July 1961; Copyright Law Revision, Part 2, Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Committee Print, 87th Cong., 1st Sess., February 1963.

47. House Rep. No. 83, 90th Cong., 1st Sess., March 8, 1967, 2.

and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Although the proposed revision of the Copyright Law, and the changes to be effected thereby, have been the subject of vigorous and constructive debate,⁴⁸ equal credit for serious criticism cannot be allowed to the writer of the recent article entitled "The Uneasy Case For Copyright" which was published in the *Harvard Law Review*.⁴⁹ The author of that article, obviously beguiled by an outworn and long rejected cliché, has argued that "the general case for copyright protection is weak" and "that the generally unsatisfactory nature of the Congressional Hearings on the revision bill underlines the importance of these conclusions".

It is hardly necessary to remind those who are interested in the copyright system that during the course of the debates in Parliament prior to the adoption of the British Copyright Act in 1842, Thomas Macauley, condemning the copyright system, asserted: ⁵⁰

The principle of copyright is this: It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures.

This cliché has been rejected over and over again, but seemingly continues to survive as a battle cry for those who are hostile to the Copyright System. Professor Breyer in his article has refurbished the hackneyed arguments, and in doing so has formulated the following:

It would be possible, for instance, to do without copyright, relying upon authors, publishers, and buyers to work out arrangements among themselves that would provide books' creators with enough money to produce them. Authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection. In the nineteenth century American publishers sold countless copies of British works and paid their authors royalties despite the fact that American copyright law did

48. See Nimmer; also Julius J. Marke, Copyright Intellectual Property, Fund for the Advancement of Education (January 1967).

49. Breyer, *supra* note 27 at 281.

50. Drone, at 81-82.

not protect British works. It would also be possible for the government to pay for books to be produced.⁵¹

* * * * *

In the sixteenth and seventeenth centuries as well as today the publisher has argued that not only the author's, but also his own, considerable investment in bringing a book to market must be protected. To emphasize the publisher does not slight the author, for as long as a publisher believes he can make money from a book its author can bargain for a share of the publisher's revenue by threatening to withhold it or go elsewhere.⁵²

* * * * *

In the absence of copyright protection, one might also consider using government subsidies to maintain publishers' and authors' revenues.⁵³

* * * * *

Without copyright protection colleges and their students, considered as a group, should be willing and able to spend more money on salaries (if necessary), for they would receive a benefit that is at least equivalent in the form of lower book prices.⁵⁴

* * * * *

Although the author's royalty may fall, he will still be paid—in fact often paid well. And there are at least a few general reasons for believing that authors of best sellers will not prove very sensitive to changes in revenue; these authors have incomes that are comparatively large; some have a particular talent for writing; and at least a few may be more interested in literature than money. Thus, many may continue to write despite some loss of income.⁵⁵

* * * * *

And one cannot conclude that society is much worse off if some writers, discouraged by longer odds, take up some other occupation. Many other jobs open to the potential author also involve risk and innovation without protection from competition or copyright, and one simply cannot predict whether the marginal writer will produce a more or a less valuable social product in one of these other fields.⁵⁶

* * * * *

51. Breyer, at 282.

52. *Ibid.* at 292.

53. *Ibid.* at 306-307.

54. *Ibid.* at 309.

55. *Ibid.* at 311.

56. *Ibid.* at 312.

The revisors also may have been moved by the plight of a few aged authors or composers attempting to live on royalties from works written in their youth. The aged writer himself presents a more sympathetic case than does his middle-aged orphan. But one need only recognize that such a writer would, for example, have to be over eighty and to have written his last popular work before the age of twenty-four to see that the poor, but doddering, prodigy is an unusual case. Nor is it obvious why it should disturb us more to see a writer outlive his fifty-six year copyright than an inventor, his seventeen-year patent. If simple income support is desirable, other forms of economic assistance may be more appropriate.⁵⁷

* * * * *

It is almost impossible to believe that these statements were intended to be taken seriously, and did not constitute a jest made with tongue in cheek. They not only display a lack of familiarity with the origins and development of the copyright system in the United States, but also a disregard of the more enlightened view of copyright prevalent throughout the civilized world. His disparagement of authors and other creators of literary and artistic creations and of those who have participated in the revision program is evidence of a failure to appreciate the value and importance of the Copyright System to a free society of free human beings.

Fortunately, the Committee on the Judiciary of the House of Representatives has presented a more enlightened judgment. In reporting on H.R. 2512, Chairman Kastenmeier wrote:

Although they have differed on various issues, the interests affected by copyright law revision are in general agreement as to the inadequacy of the present law. The dual purposes of copyright protection, to stimulate authors to create and to reward them for their efforts, are of fundamental importance, and these purposes are ill-served by the 1909 statute. There is an urgent need for copyright legislation that takes full account of the continuing technological revolution in communications and, even more important, that recognizes individual authorship as an indispensable national resource.⁵⁸

57. *Ibid.* at 328.

58. House Rept. No. 83, Copyright Law Revision, March 8, 1967, 90th Cong., 1st Sess. at 3.

It should also be noted, moreover, that in addition to his disparagement of authors and creators, and those who publish and disseminate their works, Professor Breyer seeks to belittle the efforts of Congress and the Senate and all of the individuals who participated at the panel meetings dealing with the Revision Program and as witnesses at the Hearings. His article states:

The generally unsatisfactory nature of the congressional hearings on the Copyright Revision Bill underlines the importance of these conclusions. The hearings reveal little critical analysis of industry claims that protection is needed. They show little awareness of the possible harms of extending protection. Rather, the data amassed at the hearings is unsifted, often irrelevant, fact and opinion, and many critical facts about affected industries are missing.⁵⁹

This bold assertion does not add credence to the criticism levied by Professor Breyer upon the Copyright System, but rather constitutes an additional basis for the rejection of his thesis. The copyright studies, and the comments thereon, the transcripts of the panel discussions which took place under the auspices of the Register of Copyrights, the testimony before the Committees of the House and the Senate, as well as the reports issued thereon, all provide proof of the validity of the integrity of the program. The data available for study is listed in a footnote reference below.⁶⁰

59. Breyer at 351.

60. See Combined Subject and Name Index of Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Washington 1968. Report No. 2237, 89th Cong., 2d Sess., Oct. 12, 1966, to accompany H.R. 4347, and Report No. 83, 90th Cong., 1st Sess., March 8, 1967, to accompany H.R. 2512. Copyright Law Revision—Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate. The studies were published under S. Res. 53, 86th Cong., 1st Sess. 1960, and S. Res. 240, 86th Cong., 2d Sess. 1961, in committee prints, as follows: Study No. 1, The History of U.S.A. Copyright Law Revision from 1901 to 1954, by Abe A. Goldman (July 1955); Study No. 2, Size of the Copyright Industries, by William M. Blaisdell (May 1959); Study No. 3, The Meaning of "Writings" in the Copyright Clause of the Constitution, by Staff Members of New York University Law Review under the guidance of Prof. Walter J. Derenberg (Nov. 1956); Study No. 4, The Moral Right of the Author, by William S. Strauss (July 1959); Study No. 5, The Compulsory License Provisions of the U.S. Copyright Law, by Prof. Harry G. Henn (July 1956); Study No. 6, The Economic Aspects of the Compulsory License, by William M. Blaisdell (Oct. 1958); Study No. 7, Notice of Copyright, by Vincent A. Doyle, George D. Cary, Marjorie Mc-

60. (Continued)

Cannon and Barbara A. Ringer (Nov. 1957); Study No. 8, Commercial Use of the Copyright Notice, by William M. Blaisdell (Feb. 1959); Study No. 9, Use of the Copyright Notice by Libraries, by Jos. W. Rogers (Jan. 1959); Study No. 10, False Use of Copyright Notice, by Caruthers Berger (March 1959); Study No. 11, Divisibility of Copyright, by Abraham L. Kaminstein with supplements by Lorna G. Margolis and Arpad Bogsch (June 1957); Study No. 12, Joint Ownership of Copyrights, by George D. Cary (Aug. 1958); Study No. 13, Works Made for Hire and on Commission, by Borge Varmer (April 1958); Study No. 14, Fair Use of Copyrighted Works, by Alan Latman (March 1958); Study No. 15, Photoduplication of Copyrighted Material by Libraries, by Borge Varmer (May 1959); Study No. 16, Limitations on Performing Rights, by Borge Varmer (Oct. 1958); Study No. 17, The Registration of Copyright, by Prof. Benjamin Kaplan (August 1958); Study No. 18, Authority of the Register of Copyrights to Reject Applications for Registration, by Caruthers Berger (March 1959); Study No. 19, The Recordation of Copyright Assignments and Licenses, by Alan Latman, assisted by Lorna G. Margolis and Marcia Kaplan (Sept. 1958); Study No. 20, Deposit of Copyrighted Works, by Elizabeth K. Dunne (Jan. 1960); Study No. 21, The Catalog of Copyright Entries, by E. K. Dunn and Jos. W. Rogers (April 1960); Study No. 22, The Damage Provisions of the Copyright Law, by William S. Strauss (Oct. 1956); Study No. 23, The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study, by Prof. Ralph S. Brown, Jr. with the assistance of Wm. A. O'Brien and Herbert Turkington (March 1958); Study No. 24, Remedies Other Than Damages for Copyright Infringement, by William S. Strauss (March 1959); Study No. 25, Liability of Innocent Infringers of Copyrights, by Alan Latman and William S. Tager (Jan. 1958); Study No. 26, The Unauthorized Duplication of Sound Recordings, by Barbara A. Ringer (Feb. 1957); Study No. 27, Copyright in Architectural Works, by William S. Strauss (August 1959); Study No. 28, Copyright in Choreographic Works, by Borge Varmer (Oct. 1959); Study No. 29, Protection of Unpublished Works, by William S. Strauss (Dec. 1957); Study No. 30, Duration of Copyright, by James J. Guinan, Jr. (Jan. 1957); Study No. 31, Renewal of Copyright, by Barbara A. Ringer with the editorial assistance of Julius A. Culp (June 1960); Study No. 32, Protection of Works of Foreign Origin, by Arpad Bogsch (June 1959); Study No. 33, Copyright in Government Publications, by Caruthers Berger (Oct. 1959); Study No. 34, Copyright in Territories and Possessions of the United States, by Borge Varmer (March 1959); and Study No. 35, The Manufacturing Clause of the U.S. Copyright Law, by Marjorie McCannon and Benjamin W. Rudd (Feb. 1963). See also *STUDIES ON COPYRIGHT*, Arthur Fisher Memorial Edition 1963 published by The Copyright Society of the U.S.A. This edition does not, however, reproduce the comments by the members of the Panel of Experts, which are contained in the Committee Prints.

In addition to the Studies enumerated above, the progress of the program for Copyright Law Revision can be followed in the official documents such as:

- (a) Subject Index to Studies.
- (b) *House Committee Prints* as follow:

60. (Continued)

Copyright Law Revision — Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Congress, 1st Session, July 1961,

Copyright Law Revision Part 2 — Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Congress, 1st Session, February 1963,

Copyright Law Revision Part 3 — Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, September 1964,

Copyright Law Revision Part 4 — Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Congress, 2nd Session, December 1964,

Copyright Law Revision Part 5 — 1964 Revision Bill with Discussions and Comments, 89th Congress, 1st Session, September 2, 1965,

Copyright Law Revision Part 6 — Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Congress, 1st Session, May 1965.

(c) *Hearings*

Hearings before Subcommittee No. 3 of the Judiciary, *House of Representatives*, 89th Congress, 1st Session, May 26, 27, 28, June 2, 3, 4, 9, 10, 16, 17, 23, 24, 30, August 4, 5; 11; 12; 18; 19; 26; September 1 and 2, 1965; Parts 1-2-3, Washington 1966. See also Combined Subject and Name Index to Parts 1-2-3 (pages 1-1930) of the Printed Record,

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights, of the Committee on the Judiciary, *United States Senate*, 89th Congress, 1st Session, Pursuant to S. Res. 48 on S. 1006, August 18, 19, and 20, 1965,

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *United States Senate*, 89th Congress, 2nd Session, Pursuant to S. Res. 201 on S. 1006, August 2, 3, 4, and 25, 1966,

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *United States Senate*, 90th Congress, 1st Session, Pursuant to S. Res. 37 on S. 597, Part 1, March 15, 16, and 17, 1967,

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *United States Senate*, 90th Congress, 1st Session, Pursuant to S. Res. 37 on S. 597, Part 2, March 20, 21, and April 4, 1967.

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *United States Senate*, 90th Congress, 1st Session, Pursuant to S. Res. 37 on S. 597, Part 3, April 6, 11 and 12, 1967,

Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, *United States Senate*, 90th Congress, 1st Session, Pursuant to S. Res. 37 on S. 597, Part 4, April 28, 1967.

Earlier in this discussion mention was made of Professor Nimmer's suggestion⁶¹ that a "hidden conflict" exists between the Copyright Act and the First Amendment to the Constitution, which guarantees freedom of speech and of the press. In the same article Professor Nimmer also questioned the authority of Congress to extend the term of copyright in works on which copyright had already been secured.⁶²

As to the extension of the copyright term in a work already enjoying protection under the present law, Professor Nimmer's reliance upon *Graham v. Deere Company*⁶³ is clearly misplaced. A work still protected under existing copyright law is clearly not one which is "available to the public" in the sense that an extension would remove "existant knowledge from the public domain". His suggestion that the author's "creativity" would not be "encouraged" by the extension of the term of copyright in a work already published and protected under existing law represents much too narrow a view of the purpose and function of the copyright system. The concept of copyright as a "reward" to a specific author to produce a specific work, as a goad or "carrot" for accomplishment, is wholly unrealistic. As said earlier, the function of a copyright law is to create a general hospitable climate as a measure to encourage authorship, not as a special reward for the completion of a specific task. The copyright system is not intended to provide payment for the specific work which is registered for copyright, but only an *opportunity* to secure remuneration if the work is successful in achieving acceptance by the public.

The history of copyright legislation, moreover, discloses that the prolongation of the term of copyright follows the pattern of earlier copyright acts in the United States. Under the Act of 1790, the copyright term was established at fourteen years, with a right of renewal for an additional term of fourteen years. The Copyright Act of 1831 increased the first term to twenty-eight years but retained the fourteen-year term of renewal. Under the Act of 1909, the renewal term was increased to twenty-eight years, this period to be applicable "when application for such renewal shall have been made within one year prior to the expiration of the original term of copyright". No question has been raised about the applicability of this provision to works on

61. See NIMMER ON COPYRIGHT, *supra* note 27, at 256.

62. *Ibid.* at 270.

63. *Ibid.* at 271.

which copyright was in effect at the time of the adoption of the Act of 1909.⁶⁴

It should also be noted that Congress has from time to time enacted special statutes in favor of specific works of specific authors, as well as special statutes providing patent protection to specific inventors for specific inventions. Although no questions have been raised in the courts concerning such special copyright statutes, the validity of private acts granting patents has been upheld by the courts. The most recent case on the subject is *Radio Position Finding Corp. v. The Bendix Corp.*,⁶⁵ decided by a three-judge court in 1962 and affirmed per curiam by the Supreme Court in 1963.

A response to Professor Nimmer's suggestion of a hidden conflict between the guarantees under the First Amendment and the power of Congress to enact copyright laws has been given earlier in this lecture during the discussion of Fair Use, and as part of the outline of the legislative history of Article I, Section 8, of the Constitution. The doubts expressed by him bring to mind the statement of Birrell in his introduction to lectures on Copyright in Books, to the effect that: ⁶⁶

Whatever charm is possessed by the subject of copyright is largely due to the fact that it is a bundle of ideas and rights of modern origin. It is not like the majority of legal conceptions lost in an antiquity about which we can only guess, and about which each generation guesses differently.

This clarity of legal concept is particularly evident in the present situation. It is impossible to believe that the very same statesmen who formulated both the Constitutional provision concerning the Congressional power to enact copyright laws, and the terms of the First Amendment, would have ignored the existence of a conflict, if in fact a conflict of that nature existed. They could hardly have been oblivious of the history of the Licensing Acts in England and elsewhere, of the controversies which had given rise to the Battle of Books, and to other struggles

64. Report No. 2222, 6th Cong., 2d Sess., in referring to Section 24, Act of 1909, recites: "Section 24 deals with the extension of copyrights *subsisting when this act goes into effect* and has the same provision regarding those who may apply for the extension of the subsisting term of the full term, including the renewal, as is found in the preceding section regarding renewals generally." (See Howell, *supra* note 36, at 248.)

65. 205 F. Supp. 850 (D. Md. 1962), *aff'd per curiam*, 371 U.S. 577 (1963).

66. See Birrell, *supra* note 1, at 9.

for freedom of expression.⁶⁷ *Donaldson v. Beckett*⁶⁸ had been decided as late as 1774, and *Millar v. Taylor*⁶⁹ in 1769.

Needless to say, it is the general consensus both among the Bar and in the Courts, as well as in all other copyright circles, that the doctrine of Fair Use, as a balance wheel, is in itself sufficient to bridge the gap between the First Amendment and the Copyright System. I need hardly add that to the extent that additional limitations are necessary, adequate provisions are included in the pending Bill to revise the Copyright Act.

Although amendments to the House Bill are under consideration in the Senate, there can be no doubt whatsoever that a study of the record will fully support the statement of Mr. Kastenmeier⁷⁰ that:

The bill now reported reflects the intricate network of relationships among the many groups and industries dependent for their existence upon works created by authors, and represents an effort to reconcile conflicting interests as fairly and constructively as possible. Despite the complexity and particularization of some of its provisions, however, the basic aim of the bill is very simple; to insure that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations.

In expressing the hope for an early conclusion of the program for Copyright Revision, I am pleased to concur in that observation.⁷¹

67. See DRONE ON COPYRIGHT, 54 *et seq.*; Birrell, *op. cit.* note 1.

68. 4 Burr. 2408 (1774).

69. 4 Burr. 2303 (1769).

70. House Rep. No. 83, 90th Cong., 1st Sess. March 8, 1967, p. 3.

71. S. 597, introduced by Senator McClellan on January 23, 1967, was substantially identical to H. R. 2512; S. 543, a revision of S. 597, was introduced in the Senate on January 22, 1969, 91st Cong., 1st Sess., and this, in turn, was reintroduced with changes on January 26, 1971 as S. 644, 92nd Cong., 2d Sess. S. 646 introduced at the same time would amend Title 17 U.S.C. to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes.

366. CURRENT UNITED STATES DEVELOPMENTS IN
COPYRIGHT LAW

*A Report to the American Bar Association, Section of Patent,
Trademark and Copyright Law.**

By STANLEY ROTHENBERG**

No general revision of the Copyright Law of the United States has been enacted, thus Public Law 91-555 was signed by the President on December 17, 1970.

By this law, all subsisting copyrights in their *second* term (as same may have been extended by such prior statutory extensions) that would expire after December 31, 1970 and before December 31, 1971, have been extended, so that they will continue in force through December 31, 1971. The statutory extension is automatic and does not require any filing with or action by the Copyright Office.

This interim extension does *not* apply to copyrights in their first term, has no effect on the time limits for renewal registration, which must be made during the last year of the original 28-year term and applies only to copyrights that have already been renewed, for which the period of protection would otherwise expire. Also, this law does not revive any copyrights that have already expired, does not involve creation of a new term of copyright and does not have any extraterritorial effect.

Interim statutory extensions have been occurring since the first such enactment on September 19, 1962. Therefore, it has been necessary to discard the old rule-of-thumb of counting backwards 56 years to determine whether a particular published work is of necessity in the U.S. public domain. These extensions, collectively, have in some instances added more than 9 years to the second term of the copyright, resulting in particular copyright terms exceeding 65 years with the end not yet in sight so long as there is a reasonable possibility of a general revision of the copyright law, including a proposed increase in the length of the copyright term.

Old contracts in which the draftsmen did not foresee this form of extension of the term of copyright may yield a new field for litigation

* Delivered at the Annual Meeting of the Association, on July 6, 1971 at The Waldorf-Astoria Hotel, New York City.

** Member of the New York Bar and partner of the firm of Heit & Rothenberg, New York; he is a Vice President of this Society.

as did the omissions of reference in contracts to "talking pictures", television and the forthcoming video cassettes.

The current copyright revision bill consists of three Titles, i.e., three parts, I. the general revision bill; II. the bill "To establish a National Commission on New Technological Uses of Copyrighted Works"; and III. the design bill.

Also pending is a separate bill to establish a limited copyright in sound recordings for the purpose of protecting them against unauthorized duplication and piracy.

In recent years both New York and California have enacted penal statutes, originally N.Y. Penal Law §441(c) (1966), now N.Y. General Business Law §561 (1967), and California Penal Code §653h (1968), respectively, prohibiting unauthorized "dubbing" of phonograph records—as well as of motion picture sound tracks—raising the very real possibility that if the federal bill were enacted the state statutes would give way to federal pre-emption of the field. And *Variety*, June 9, 1971, p. 49, reports that Tennessee now has an anti-dubbing penal statute containing rather stiff penalties.

In the past year there have been several significant decisions relating to such unauthorized record or tape dubbing, so-called record piracy: *Tape Industries Association of America v. Younger*, 166 U.S.P.Q. 468 (C.D. Cal., decided July 27, 1970); *CBS v. Spies*, 167 U.S.P.Q. 492 (Ill. Cir. Ct. Cook Cty., decided Oct. 19, 1970); *Capitol Records, Inc. v. Spies*, 167 U.S.P.Q. 489 (Ill. App. Ct., 1st Distr., decided Oct. 22, 1970).

Tape Industries, supra, was an action for declaratory and injunctive relief to restrain defendants from initiating any proceedings to enforce the aforementioned so-called "tape piracy" penal law of California on the grounds that it is in conflict with the Copyright Clause of the U.S. Constitution and the implementing Federal copyright statutes. Each unauthorized tape or cartridge contained a label disclaiming any connection with the original record company, the recording artists or the payment of royalties to either of them. The issue of payment or non-payment of royalties to the proprietors of the copyrights of the musical compositions involved was stipulated by the parties not to be relevant to the action.

A single-judge court thus held a hearing as to whether a substantial issue of constitutionality of a state statute was raised so as to necessitate the convening of a Three-Judge Federal Court. Answered in the affirmative, a Three-Judge Court was convened. Said court held, however, that the Copyright Clause of the Constitution did not in and of itself create substantive rights, that every conflict between a state statute and a federal statute enacted pursuant to such constitutional authority does

not satisfy the jurisdiction of the Three-Judge Court, and that the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and in *Compco v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) did not perceive any substantive right emanating from the "Copyright Clause". Nevertheless, in order to avoid needless repetition and duplication, the court retained jurisdiction and heard the case and entered its decision as a non-statutory Three-Judge Court and also in the name of the single District Judge.

Said court then found a probable absence of valid grounds for federal jurisdiction, but said that even if the prerequisites were there, it did not find that a substantial claim was presented. The Court rejected the argument that *Sears* and *Compco* are applicable to so-called record piracy, stating that plaintiffs "actually take and appropriate the product itself — the sounds recorded on the albums — and commercially exploit the product. *Sears* and *Compco* would cover and immunize the plaintiffs here only if they had copied and imitated the product." Thus the Court held the California penal statute "a tolerable and permissible state regulation directed against theft and appropriation of a saleable product."

In *Capitol Records, Inc. v. Spies, supra*, the Illinois Appellate Court with respect to a virtually identical method of so-called record piracy reversed a lower court which had denied Capitol Records' motion for a temporary injunction against the admitted pirate. The lower Illinois court indicated that *Sears* and *Compco* (which, incidentally, arose in Illinois) precluded it from prohibiting the unauthorized making and selling of tapes of Capitol's recordings. The appellate court said rather than the *Sears* and *Compco* decisions, it finds *International News Service v. Associated Press*, 248 U.S. 215 (1918) controlling, as did *Tape Industries*, which (together with several earlier anti-piracy decisions) it also cited with approval.

CBS v. Spies, supra, was decided in the same lower Illinois court (by another judge) from which the appeal in *Capitol Records* was taken, and which was then pending. Yet here the injunction was granted. The plaintiff's argument that its common law copyright in the records was infringed was rejected because [the Court said] "it is eminently clear that the broadcast of the records manufactured by Plaintiff or the sale of those records constitutes a publication or public performance." Once again it is made abundantly clear that unpublished musical compositions must be registered for copyright before commercial phonograph records are placed in wide distribution. See Judge Igoe's ground-breaking decision in *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill., 1950).

The Court did, however, accept plaintiff's arguments (1) that its exclusive agreements with the performing artists gave it a valid tort action of intentional interference with an agreement (See Rothenberg, *Intentional Interference With Exclusive Talent Agreements*, 10 BULL. CR. SOC., Item 381 (August 1963)), and (2) the "actual appropriation" as distinct from imitation of the plaintiff's product constituted unfair competition, which the Court described as plaintiff's "most cogent and persuasive argument." The Court responded to the frequent argument that legal recognition will result in protection for an unlimited period by providing that "The time limit for the injunction should be that period for which the Plaintiff would have protection had the phonograph record been eligible for copyright protection less a reasonable period at the far end during which the popularity of the artists and the songs rendered may be expected to be of a 'de minimis' character."

Imitation of a recorded performance of a popular song was, obviously, held not to constitute unfair competition in *Nancy Sinatra v. Goodyear Tire & Rubber Co.*, 168 U.S.P.Q. 12 (9th Cir., decided November 20, 1970), even though the imitation was used in a radio and television commercial. Among other things, the Court stated that to give "unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitation of time to permit definite public domain use." The Ninth Circuit decision (especially taken together with *CBS v. Spies*, *supra*) thus raises at least two compelling questions:

1. Are the New York and California anti-dubbing penal statutes unconstitutional even in the absence of enactment of Senator McClellan's separate bill to create a limited (anti-dubbing) copyright in sound recordings; and, for the same reason, do *Tape Industries*, *supra* and *Capitol Records v. Spies*, *supra*, contravene the basic principle of the *Nancy Sinatra* and *CBS v. Spies* case? and

2. If the New York and California legislatures amended their anti-dubbing statutes to include: (a) unauthorized imitation and (b) statutory protection for a limited period of time, say, five or ten years from the general release of the original recording, would such clear limitation on duration of state protection so as to permit definite public domain use, free the anti-dubbing statutes and decisions from some of the doubt that surrounds their legitimacy and raise the unauthorized imitation action to the same level of protection? I am simply asking that question in light of the *Nancy Sinatra* and *CBS v. Spies* decisions, and am not suggesting that such a form of performer's right, or record manufacturer's or broadcaster's right, for that matter, is feasible or wise on a state-by-

state basis (statutory — or judge-made) as distinguished from nation-wide neighboring rights protection through Congressional action.

A recent major change in judge-made copyright law which requires careful reading by all of us, is *Goodis v. United Artists Television, Inc.*, 425 F. 2d 397 (2d Cir., 1970), which reversed the judgment of the district court and remanded for further proceedings, interpretation of the motion picture contract, involving factual questions. The pure copyright question which the 2d Circuit unanimously answered in the affirmative and as to which it reversed the trial judge was as follows: Does a magazine publisher who acquired *only* the right to serialize a novel before it is published have such an interest in the work that the general notice of copyright for the magazine in the publisher's name will obtain for and protect the copyright of the author of the novel when the work is first published in serial form in the magazine without a separate copyright notice in the author's name? As far as the Second Circuit is concerned, we need not seek to work up a "constructive trust," the magazine publisher can, as a matter of right, secure the copyright for the author without the use of a separate notice. In any event, in representing authors, we should as a matter of good practice, promptly obtain an assignment from the publisher to record in the Copyright Office so as to avoid the problems encountered by "Dr. Seuss" in *Geisel v. Poynter Products, Inc.*, 160 U.S.P.Q. 590 (S.D.N.Y., 1968) where the Court held that in 1932 when the magazine *Liberty* acquired certain cartoons from the artist it acquired all rights therein and there was not a custom that the magazine obtained proprietorship only under a constructive trust theory.

The liberal trend of the Second Circuit in construing what constitutes adequate notice is referred to in footnote 8 of the *Goodis* decision, which footnote includes, of course, a citation of the landmark case of *National Comics, Inc. v. Fawcett Publications, Inc.*, 191 F. 2d 594 (2d Cir., 1951). The Second Circuit repeated its innovative quality regarding adequacy of copyright notice in *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 436 F. 2d 315 (2d Cir., 1970) in which the Court held that the combination of the copyright symbol, i.e., the letter "c" enclosed in a circle, and the initials of the jewelry manufacturer is sufficient notice of copyright on a jeweled bee pin (i.e., a work of art), without the nearby use of the name. The Court so applied the first sentence of § 19 of Title 17 USC notwithstanding that said sentence says the symbol must be accompanied by the *name* of the copyright proprietor and that the second sentence of § 19 provides for the location on some accessible part of the copies or on the margin, back, base, pedestal or mounting of the *name* of the proprietor where the notice contained "initials, monogram,

mark, or symbol of the copyright proprietor". The Court, of course, cites *National Comics, Inc. v. Fawcett Publications, Inc.*, *supra*, in support of the proposition that where the plaintiff has used its well-known trademark initials as a trade name or trademark for many years, plaintiff has complied with "the substance of what is prescribed in § 19."

On the contractual interpretation issue in *Goodis v. United Artists Television, Inc.*, the Second Circuit divided 2 to 1, with the dissenter favoring the view of the district court.

The dissenting view was that the broad grant of motion picture rights in the literary work including the right to make changes and additions in the work and characters, etc., would encompass a television film series derived from the work and its characters. The majority did not hold that the Warner Bros. contract did not so provide but rather that it was not unambiguous and that "a genuine issue of material fact exists as to what the parties intended by the language they used."

A footnote of the majority gives its view of this aspect of the Ninth Circuit holding in the Sam Spade case, *Warner Bros. v. CBS*, 216 F. 2d 945 (1954), cert. den. 348 U.S. 971 (1955). The Ninth Circuit held that a not-too-dissimilar Warner Bros. contract reserved to and did not preclude the author, Dashiell Hammett, from using his famous hard-boiled detective character (and colleagues) in radio sequels, notwithstanding his grant to Warner Brothers of sole and exclusive motion picture, radio and television rights under copyright. Now the Second Circuit majority says that Warner Brothers could not have used the Falcon characters in a new series on the theory they are in the public domain, that "such a conclusion would be clearly untenable from the standpoint of public policy, for it would effectively permit the unrestrained pilfering of characters." Presumably it would make no difference if the author had transferred to Warner Brothers the entire copyright in "The Maltese Falcon" as distinguished from sole and exclusive motion picture, radio and television rights under copyright. If so, on what theory would the author proceed against an unauthorized user if the author had so divested himself of his copyright? Are we back to *Teletape Industries, supra*, and *INS v. A.P., supra*? Must the author's rights depend on a state-by-state law of unfair competition? Or do we also need a limited federal copyright in literary characters?

Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y., 1970) is a learned trip with Judge Pollack through those difficult areas of: (1) joint authorship and joint ownership of a derivative work in the absence of collaboration between the author of the original work and the adaptor, (2) when an assignment or employment is to be construed to convey the right of renewal copyright in addition to the original term,

and (3) factors indicating presence or absence of employment for hire; thus this case is recommended reading for a solid review and synthesis of the applicable law.

Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F. 2d 409 (2d Cir., 1970) cert. den. 169 U.S.P.Q. 65 (decided March 22, 1971) construed § 101(b) of Title 17 U.S.C. with respect to the question: Is the copyright proprietor entitled to recover from the infringer the proprietor's damages AND the infringer's profits, as, in fact, the statute literally provides.

The Second Circuit referred to its earlier holding in *Peter Pan Fabrics, Inc. v. Jobela Fabrics Inc.*, 329 F. 2d 194 (2d Cir., 1964), in favor of the harsher "cumulative" rule, wherein the Court relied on the rationale of the Supreme Court in *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), namely, the rule is "designed to discourage wrongful conduct." In the instant case because the copyright proprietor's lost sales and the defendant's infringing sales involved the same customer, the Court recognized that "objection to the rule is at its strongest." Nevertheless, the Court said "Congress is not unaware of the problem", "that even on these facts the rationale of *Jobela* commits us" and "Since our examination of the rule has been so recent, we decline to reconsider it and will continue to abide by it."

Blaustein v. Burton et al., 168 U.S.P.Q. 779 (Cal. Distr. Ct. of Appls., 2d Distr., Div. 5, decided May 28, 1970) held that the well-known plaintiff film producer's idea of filming Shakespeare's "The Taming of The Shrew" may be protected by contract, whether the contract is express or implied, and thus reversed the lower courts summary judgment in favor of defendants Richard Burton and Elizabeth Taylor, and ordered a trial of whether such a contract was entered into. The Court found support for its holding in the recently decided *Frederick Chusid & Company v. Marshall Leeman & Co.*, 168 U.S.P.Q. 755 (S.D.N.Y., Jan. 29, 1971) which cited 279 F. Supp. 913, 917: "Under New York law the parties have the right by contract to prevent disclosure of such materials, even though they are not secret or confidential and may indeed be a matter of public knowledge." However, the *Chusid* case involved an agreement by an employee not to make certain disclosures following termination of employment and is therefore inapplicable (although cases therein cited were). In fact, New York law was not seen in the same way by New York Supreme Court Justice Greenfield in *Educational Sales Programs, Inc. v. The Dreyfus Corporation*, 65 Misc. 2d 412 (Sup. Ct. N.Y. Co. 1970) wherein he stated that if the plaintiff's idea was not "unique, novel and original . . . it had no value as property, and would not suffice either as consideration for a promise of confidentiality, or as a basis for finding defendant was unjustly enriched."

The most recent and most celebrated case involving an alleged unauthorized confidential disclosure is last week's *N. Y. Times v. U. S. and U. S. v. The Washington Post Company* in the U. S. Supreme Court, reported in *N. Y. Times*, July 1, 1971, at p. 17. According to the transcript of the oral argument which also appeared in the *N. Y. Times*, June 27, 1971, at page 24, the Solicitor General, Dean Griswold, argued: "There is a well known branch of the law that goes under the heading of literary property. In the Court of Appeals I gave the example of a manuscript written by Ernest Hemingway, let us assume while he was still living, unpublished, perhaps incomplete, subject to revision. In some way the press gets hold of it. Perhaps it is stolen. Perhaps it is bought from a secretary through breach of fiduciary responsibility, or perhaps it is found on the sidewalk. If The New York Times sought to print that, I have no doubt that Mr. Hemingway or now his heirs, next of kin, could obtain from the courts an injunction against the press printing it."

I suggest that on a property concept the Government should no more be entitled to protection than under § 8 of the Copyright Act with respect to publications of the U. S. Government, that insofar as the Government is involved, protection, if available, should be based on a principle of privacy—the right of an author (in this case an author of employees-for-hire) to determine when, how and if his work shall be first published. In fact, the common law copyright is often referred to as a "right of first publication." However, as has been well-established in the *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the right of privacy is subordinate to the First Amendment in the appropriate factual setting. (Incidentally, Richard Nixon, Esq., argued Hill's case in the Supreme Court.)

The Solicitor General also stated: "Now, in our main brief in this case which I may say was largely prepared by my associate, Mr. Friedman, last evening and last night, we have cited one case which comes very close to being an injunction by this Court against publications in the press. That is The Associated Press case in I believe 215 United States. The Associated Press is a cooperative of newspapers, and there The Associated Press sought and obtained an injunction against the dissemination of news by its competitor International Press, and that was granted on copyright and related grounds."

I am sorry I have not examined the briefs in the case, but I did not have access—not for security reasons—but because of the shortness of time. The correct citation is, I assume, *INS v. A.P.*, 248 U.S. 215 (1918), which I referred to earlier. There, however, the Court clearly held that the "news" was in the public domain, "it is the history of the day", and went on to say that the case must turn upon the question of unfair competition. As to that, the opinion is filled with numerous statements that

the parties (and their respective newspaper subscribers) were in the keenest competition between themselves in the distribution of news throughout the U.S. In other words, this was not a case of restraint on the dissemination of news or history but of whether one or both of these major news services should disseminate the news gathered by one of them.

The other arguments of the Government, which presented the real issues in the case, are probably well known to you, and I am *not* putting that before you.

Parenthetically, the Deputy Register of Copyrights, in response to my query, said that insofar as he knows, the Copyright Office did not participate in the preparation of the Solicitor General's case.

In sum, the past year in U. S. copyright reveals:

(1) No statutory progress in the overhaul of our federal copyright system,

(2) Prolongation of interim extensions of the second copyright term to enable such copyrights to benefit from the longer term contained in the general revision bill,

(3) Continued liberalization by the Second Circuit of the notice provision, be it what constitutes the "name" of the proprietor or whose name should be in the copyright notice,

(4) Continued distinction by state and federal courts and by state legislatures between unauthorized "dubbing", against which they will protect, and imitation of performers' style, against which they will not provide protection, and

(5) Continued judicial difficulty with the issue of ownership of and protection for literary characters used in television film series and the confidential disclosure of an "idea", which leads me into a recent delightful statement by Judge Frankel as my closing remark:

"Copyright infringement cases are necessarily decided in ad hoc fashion, through a particularized assessment of the facts in any given case in light of what Judge Learned Hand characterized as a 'vague' legal test for infringement, *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F. 2d 487, 489, 124 U.S.P.Q. 154, 155 (2d Cir. 1960). Good eyes and common sense may be as useful as deep study of reported and unreported cases, which themselves are tied to highly particularized facts." *Couleur International Ltd. v. Opulent Fabrics Inc.*, 169 U.S.P.Q. 294, 295 (S.D.N.Y., 1971).

PART II.**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. United States of America and Territories****367. U.S. CONGRESS. HOUSE.**

H.R. 8812. A bill to amend title II of the Social Security Act to provide that, for purposes of the provisions thereof relating to deductions from benefits on account of excess earnings, there be disregarded, in certain cases, income derived from the sale of certain copyrights, literary, musical, or artistic compositions, letters or memoranda, or similar property. Introduced by Mr. Reid of New York, June 1, 1971, and referred to the Committee on Ways and Means. 2 p. (92d Cong., 1st Sess.)

This bill would exclude as excess earnings, from the gross income of any individual for any taxable year the gain from the sale or other disposition, during such year of literary property which is not a capital asset of such individual as a taxpayer under the pertinent provisions of the Internal Revenue Code of 1954, if such individual has attained the age of 65 on or before the last day of such taxable year, and he shows to the satisfaction of "the Secretary" that such property was created by him or, in certain cases, prepared or produced for him before he attained age 65.

368. U.S. CONGRESS. HOUSE.

H.R. 9103. A bill to modify the restrictions contained in section 170(e) of the Internal Revenue Code in the case of certain contributions of literary, musical, or artistic composition, composition, or similar property. Introduced by Mr. Reid of New York, June 14, 1971, and referred to the Committee on Ways and Means. 2 p. (92d Cong., 1st Sess.)

A proposal to modify the restrictions contained in section 170(e) of the Internal Revenue Code so as to permit deductions from taxable income of the full market value, not reduced by the amount of appreciation, of contributions of literary or similar property to public institutions.

369. U.S. CONGRESS. HOUSE. *Reid, Ogden R.*

A change in the tax laws restoring the full charitable deduction to creative artists. (117 *Congressional Record* E5787, no. 90, daily ed. June 14, 1971.)

Remarks of Representative Reid on his introduction of H.R. 9103 (see Item 368, *supra*) which is designed to do away with the "adverse effect [of the existing law] on the financial situation of individual artists and on the receipt of gifts by museums and libraries."

370. U.S. CONGRESS. HOUSE.

H.R. 9424. A bill to amend title II of the Social Security Act to provide that, for the purpose of the provisions thereof relating to deductions from benefits on account of excess earnings, there be disregarded, in certain cases, income derived from the sale of certain copyrights, literary, musical, or artistic compositions, letters or memoranda, or similar property. Introduced by Mr. Monogan, June 24, 1971, and referred to the Committee on Ways and Means. 2 p. (92d Cong., 1st Sess.)

Identical with H.R. 8812, introduced by Mr. Reid of New York on June 1. See Item 367, *supra*.

371. U.S. CONGRESS. HOUSE.

H.R. 9505. A bill relating to the income tax treatment of charitable contributions of copyrights, artistic compositions, or a collection of papers. Introduced by Mr. Mills of Arkansas, June 29, 1971, and referred to the Committee on Ways and Means. 2 p. (92d Cong., 1st Sess.)

Somewhat similar to H.R. 9103, introduced by Mr. Reid on June 14, with the principal difference being that the Mills bill provides for a tax deduction of only one-half of the fair market value of the material contributed. See Item 368, *supra*.

372. U.S. CONGRESS. HOUSE. *Waldie, Jerome R.*

Cable television. (117 *Congressional Record* E6637-E6638, no. 99, daily ed. June 28, 1971.)

Representative Waldie inserts into the *Record* "an informative white paper" which he received from Donald V. Taverner, president of the National Cable Television Association, and which is captioned "Let Cable TV Grow." The paper makes a case against

continuing "overly restrictive regulations" which stifle CATV's potential. Also, it indicates that the cable television industry "is on record as supporting revisions [of the copyright law] requiring reasonable copyright payments."

373. U.S. CONGRESS. SENATE.

S.J. Res. 132. Joint resolution extending duration of copyright protection in certain cases. Introduced by Mr. McClellan, July 15, 1971, and referred to the Committee on the Judiciary. 1 p. (92d Cong., 1st Sess.)

This resolution would continue until December 31, 1972, the renewal term of any copyright subsisting on the date of approval of the resolution, or the term as extended by previous extension measures.

374. U.S. CONGRESS. SENATE.

S.J. Res. 132. A joint resolution extending the duration of copyright in certain cases. (117 *Congressional Record* S11096-S11097, no. 109, daily ed. July 15, 1971.)

Mr. McClellan's remarks:

Mr. President, as chairman of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, I introduce, for appropriate reference, a joint resolution extending the duration of copyright protection in certain cases.

The purpose of this legislation is to continue until December 31, 1972, 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, by Public Law 89-142, by Public Law 90-141, by Public Law 90-416, by Public Law 91-147, or by Public Law 91-555. The objective of this resolution, as well as the preceding interim extensions, is to temporarily continue the renewal term of copyright pending the enactment by the Congress of a general revision of the copyright law, including a proposed increase in the term of copyright.

It is apparent that the Congress cannot complete action during this session on the legislation for general revision of the copyright law. The copyright revision bill has been delayed for several years principally because of the cable television controversy. More recently the Congress has been awaiting action by the Federal Communications Commission on the necessarily related communications

aspects of CATV. The Congress has now been advised by the Chairman of the Federal Communications Commission that the Commission anticipates completing its current CATV rule-making proceedings before the start of the summer recess of the Congress. Clearly, however, adequate time will not remain for action on the revision bill and, therefore, it is necessary to consider another temporary extension of copyrights.

The Senate on April 29 passed S. 646 to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against the unauthorized duplication and piracy of such records. A subcommittee of the House Judiciary Committee on July 1 reported this legislation with an amendment providing that the grant of copyright protection in recordings shall expire on December 31, 1973. I am not personally acquainted with the reasons for this amendment, but it appears that the purpose of the amendment is to relate the piracy bill to progress on the general copyright bill.

The House subcommittee is best qualified to estimate how much time will be required in that body to process any revision bill that may be passed by the Senate. If it is the opinion of the other body that a revision bill cannot be processed through both Houses prior to 1973, then it would appear appropriate to amend this resolution to provide for a temporary extension until December 31, 1973.

375. U.S. CONGRESS. SENATE.

Copyright protection in certain cases. Report to accompany S.J. Res. 132, submitted by Mr. McClellan, July 21, 1971. 2 p. (91st Cong., 1st Sess., S. Rep. No. 92-277.)

The resolution passed the Senate July 23, 1971. See Item 373 *supra*, and 375 *infra*.

376. U.S. CONGRESS. SENATE.

S. 1866. A bill for the relief of Clayton Bion Craig, Arthur P. Wuth, Mrs. Lenore D. Hanks, David E. Sleeper, and DeWitt John. Introduced by Mr. Burdick (for himself, Mr. Percy, Mr. Bayh, Mr. Brooke, Mr. Cranston, Mr. Griffin, Mr. Hatfield, Mr. Humphrey, Mr. Montoya, Mr. Scott, Mr. Thurmond, and Mr. Tunney), May 14, 1971, and referred to the Committee on the Judiciary. 2 p. (92d Cong., 1st Sess.)

A private bill which proposes that a copyright be granted to the trustees under the will of Mary Baker Eddy, their successors and assigns, in her work "Science and Health With Key to the Scriptures," including "all editions thereof in English and translation heretofore or hereafter published, for a term of seventy-five years from the effective date of this Act or from the date of first publication, whichever is later."

377. U.S. CONGRESS. SENATE.

S. 1883. A bill to permit a compact between the several States relating to taxation of multistate taxpayers; to provide a formula for taxing multistate taxpayers for States not entering into this compact; to require certain sellers to collect sales and use taxes; and for other related purposes. Introduced by Mr. Magnuson (for himself and Mr. Allott), May 17 (legislative day, May 14), 1971, and referred to the Committee on Finance. 42 p. (92d Cong., 1st Sess.)

Includes a section which indicates the conditions under which patent and copyright royalties are allocable to a State for tax purposes, and also the conditions for determining when a patent or a copyright is utilized in a State.

378. U.S. CONGRESS. SENATE.

For the relief of Clayton Bion Craig, Arthur P. Wuth, Mrs. Lenore D. Hanks, David E. Sleeper, and DeWitt John. Report to accompany S. 1866, submitted by Mr. Burdick, July 21, 1971. 6 p. (S. Rep. No. 92-280.)

A favorable report of the "Christian Science" bill with several technical amendments recommended by the Copyright Office. The amendments relate to (1) correct identification of the work which is the subject matter of this legislation, (2) the printing of a copyright notice, and registration in the Copyright Office, and (3) the protection of innocent parties who lawfully made use of the work prior to the effective date of this legislation. The bill passed the Senate July 22. See Items 376 and 379.

379. U.S. CONGRESS. SENATE.

Clayton Bion Craig, Arthur P. Wuth, Mrs. Lenore D. Hanks, David E. Sleeper, and DeWitt John. (117 *Congressional Record* S11898-S11900, no. 14, daily ed. July 22, 1971.)

The debates on S. 1866, the bill extending the term of protection for Mary Baker Eddy's *Science and Health*. Senator Burdick, principal sponsor of the bill, spoke in favor of its passage, and Senator Hart explained the reason for his vote against the bill in the Judiciary Committee. The Senate agreed to the committee amendments and passed the bill as amended.

380. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47 — Telecommunication. Chapter I — Federal Communications Commission. [FCC 71-577] Part 74 — Experimental, auxiliary, special broadcast and other program distributional services. Suspension of community antenna television mandatory origination rule pending further judicial review. [FR Doc. 71-7814]. (36 *Federal Register* 10876, no. 108, June 4, 1971.)

This suspension results from a recent opinion of the U.S. Court of Appeals for the 8th Circuit in the case of *Midwest Video Corp. v. United States* to the effect that the program origination requirement is beyond the Commission's statutory authority. The Solicitor General of the United States has been requested by the FCC to seek a writ of certiorari in this case.

381. U.S. LIBRARY OF CONGRESS.

Annual report of the Librarian of Congress for the fiscal year ending June 30, 1970. Washington, 1971. 169 p.

A survey of activities in the Library of Congress, including the *Annual Report of the Register of Copyrights* which contains statistical information on Copyright Office business, a survey of legislative and judicial developments relating to copyright, international developments, and a table showing the status of United States copyright relations with other independent countries of the world as of Oct. 10, 1970.

382. U.S. NATIONAL CENTER FOR EDUCATIONAL COMMUNICATION. *Copyright Administrator*.

Office of Education copyright program information. [Washington, D.C., U.S. Govt. Print. Off., 1971] 11 p. "Superintendent of Documents Catalog No. HE5.211:11031."

"The purpose of this publication is to provide information about the U.S. Office of Education (USOE) Copyright Program. It is a supplement to the Copyright Guidelines published in the *Federal Register* on May 9, 1970 (35 F.R. 7317) and effective June 8,

1970. The information is provided primarily for those institutions and organizations which are developing educational materials under USOE contracts and project grants and which desire to obtain commercial dissemination, under copyright, for those materials." See 17 BULL. CR. SOC. 363, Item 139 (1970).

383. U.S. NATIONAL INSTITUTES OF HEALTH.

NIH copyright policy; proposed implementation. (36 *Federal Register* 11768-11769, no. 118, June 18, 1971.)

The NIH policy, as published in 35 F.R. 5470, states that:

Except as may otherwise be provided under the terms and conditions of the award, the grantee may copyright without prior approval any publications, films, or similar materials developed or resulting from a research project supported by a grant under this part, subject, however, to a royalty-free, non-exclusive license or right in the Government to reproduce, translate, publish, use, disseminate, and dispose of such materials and to authorize others to do so.

It is proposed to implement that portion of the above policy which reads "and to authorize others to do so," by adding to the policy statement:

Communications in primary scientific journals reporting results of research supported in whole or in part by the National Institutes of Health may be copyrighted consistent with the copyright policy of the publication, with the understanding, however, that individuals are authorized to make, or have made by any means available to them, a single copy of any such article for their own use.

Anyone wishing to comment on this proposed policy change should contact Dr. Ronald Lamont-Havers before July 15, 1971, addressed as follows:

Dr. Ronald W. Lamont-Havers, Associate Director for Extramural Research and Training, National Institutes of Health, 9000 Rockville Pike, Building 1, Room 118, Bethesda, Md 20014.

Dated: June 11, 1971.

ROBERT Q. MARSTON,
Director,
National Institutes of Health.

384. U.S. LIBRARY OF CONGRESS. *The Copyright Office. Changes in Copyright Office Registration Regulations.*

Section 202.15 of the Regulations of the Copyright Office (Chapter II of Title 37 of the Code of Federal Regulations), which relates to the registration of motion pictures, has been amended by adding the following provisions, which appeared in the May 14, 1971, issue of the FEDERAL REGISTER, Volume 36, Number 94, at page 8869.

Title 37 — Patents, Trademarks, and Copyrights
Chapter II — Copyright Office, Library of Congress
Part 202 — Registration of Claims to Copyright
Deposit for Registration of Motion Pictures

Section 202.15 of Chapter II of Title 37 of the Code of Federal Regulations is amended by adding new paragraphs (c) and (d) reading as follows:

§ 202.15 Motion pictures (Classes L-M).

(c) *Deposit copies of motion pictures.* In the case of published motion pictures submitted for registration in Classes L or M, the requirement for deposit of "two complete copies of the best edition thereof then published" will be satisfied by the deposit of identical copies of that edition of the motion picture, from among any two or more editions in existence, that in the opinion of the Register of Copyrights most closely conforms to the established criteria of the Library of Congress with respect to the acquisition and retention of copies of motion pictures for its collections, as expressed in the Library of Congress acquisitions policy statement in effect at the time of the deposit. The Copyright Office will furnish to any person concerned, upon request, a copy of the pertinent Library of Congress acquisitions policy statement then in effect.

(d) *Videotape copies.* If otherwise qualified as a motion picture, a work published in the form of videotape copies may be registered in Class L or M. If a motion picture is published in both videotape and film copies, the requirement for deposit of "two complete copies of the best edition thereof then published" will be satisfied by the deposit of two identical film copies in accordance with paragraph (c) of this section. If a motion picture is published solely in the form of videotape copies, the deposit requirement will be satisfied by the deposit of two identical videotape

copies accompanied by a set of photographic reproductions of portions of the videotape copies showing the title of the work, the copyright notice, the production, performance and other creativity credits, and two or more scenes from different sections of the work. (Sec. 207, 61 Stat. 666; 17 U.S.C. 207)

Effective date. This amendment shall become effective on the date of its publication in the FEDERAL REGISTER (5-14-71).

ABRAHAM L. KAMINSTEIN,
Register of Copyrights.

Approved:

L. QUINCY MUMFORD,
Librarian of Congress.

[FR Doc.71-6710 Filed 5-13-71;8:46 am]

2. Foreign Nations

385. JAPAN. *Laws, statutes, etc.*

Copyright law. (No. 48, of 1970). (7 *Copyright* 71-90, no. 5, May 1971.)

"English translation communicated to WIPO by courtesy of the Cultural Affairs Department, Copyright Division, of Japan."

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

386. *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627, 170 U.S.P.Q. 65 (2d Cir., April 21, 1971) (Friendly, J.)

Appeal from order dismissing complaint against one defendant in action for copyright infringement, unfair competition and breach of contract. In one count of its complaint, plaintiff alleged that Grosset & Dunlap conspired with the other defendants to infringe plaintiff's copyright and that such conspiracy constituted unfair competition. Other counts claimed copyright infringement, but the conspiracy-unfair competition charge was the only one lodged against Grosset. The trial court dismissed the complaint against Grosset for want of subject matter jurisdiction and plaintiff appealed.

Held, reversed.

1. *Nature of the claim against Grosset:*

The Court noted that plaintiff had never argued that its conspiracy count comprised a claim arising under the Copyright Law "although", added the Court, "we would not have regarded such a contention as frivolous."

2. *Pendent jurisdiction:*

The trial court, treating the conspiracy claim against Grosset as one for unfair competition under state law, dismissed the action against Grosset on the ground that no federal claim was made against Grosset (unlike the case of the other defendants who, in other counts, were charged with copyright infringement) and "a state claim against one defendant cannot be appended to a federal claim against another." The Court of Appeals held that (i) the action against Grosset came "within the letter of" 28 U.S.C. § 1338(b) (the statute providing for pendent federal jurisdiction over unfair competition claims "when joined with a substantial and related claim under the copyright, patent or trademark laws; and (ii) notwithstanding a split of district court authority, there

is no reason to remove claims against additional defendants against whom no independent federal claim is made from the normal operation of 1338 (b).” In reaching this conclusion, the court discussed the Supreme Court’s view of pendent jurisdiction as stated in *United Mine Workers v. Gibbs*, 383 U. S. 715 (1966) and found its “common nucleus” and practical standard of federal jurisdiction to be applicable to the issue at bar. The Court said:

The Gibbs Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Although the pendent claim in Gibbs did not include a party not named in the federal claim, Mr. Justice Brennan’s language and the common sense considerations underlying it seem broad enough to cover that problem also. . . . A plaintiff with claims against three alleged conspirators for the same set of acts “would ordinarily be expected to try them all in one judicial proceeding,” assuming that all defendants were subject to the process of the court. It would be an unjustifiable waste of judicial and professional time — indeed, a travesty on sound judicial administration — to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset “in a State court a block away.”

There may, of course, be special reasons for a court’s exercising its discretion against joinder in such a case particularly if the plaintiff demands a jury trial against the joined defendants or vice versa. . . .

While we are thus inclined to the view that a federal court may in its discretion entertain a state claim against a party not named in the federal claim if the state claim meets the Gibbs test, we are not required to decide that issue here. The third count falls within the letter of 28 U.S.C. § 1338(b), see n. 1, added in the revision of 1948. While there is nothing in the Reviser’s Note, see 3A Moore, Federal Practice ¶ 18.07[1-2] n. 13, to show that he focused on the problem of a pendent unfair competition claim involving an additional party as to whom no other ground of federal jurisdiction

existed, nothing indicates that he would have wished to exclude such a case from the new provision if he had thought about it. There appear to be no post-Gibbs court of appeals decisions raising the instant problem under § 1338(b). The district court cases are divided, with *Bevan v. Columbia Broadcasting System, Inc.*, 293 F.Supp. 1366, 161 USPQ 376 (S.D.N.Y. 1968), and *Ellicott Machine Corp. v. Wiley Mfg. Co.*, 297 F.Supp. 1044, 162 USPQ 76 (D. Md. 1969), like the lower court here, holding against jurisdiction of a party not named as a defendant in the copyright, patent or trademark claim, and *American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc.*, 268 F.Supp. 656, 152 USPQ 576 (E.D. Pa. 1967), to the contrary. Since the letter of the statute upholds jurisdiction and that result is manifestly desirable, we see no reason not to read it that way.

387. *Computer Searching Service Corporation v. Ryan*, 439 F.2d 6 (2nd Cir., March 2, 1971) (Feinberg, J.)

Petition for mandamus in action for copyright infringement. West Publishing Co. brought an action against Law Research Service, Inc. (LRS), alleging that LRS' computerized legal research service copied certain West digests and used this material in computer data banks.

West subsequently moved to join petitioner Computer Searching Service (CSS), an 83%-owned subsidiary of LRS, on the grounds that it was "threatening to take over" LRS' allegedly infringing acts by transfer of the data bank from LRS. After this motion was granted, West filed an amended complaint and CSS answered with a number of defenses and counterclaims and a demand for jury trial. Prior thereto, CSS had filed a separate action against West in which its present counterclaims were alleged affirmatively in complaint. West moved to strike CSS' counterclaims and demand for jury trial and Judge Ryan granted the motion. CSS now seeks mandamus vacating Judge Ryan's order.

Held, petition denied.

1. *Counterclaims*: The Court held that Judge Ryan reached a "reasonable result" in that CSS would have the opportunity to press the subject matter of its counterclaims in its pending suit against West and "it would have been both inefficient and inequitable to delay the action between West and LRS . . . merely to allow CSS' allegations to be pressed in the nature of counterclaims."

2. *Jury trial*: Upon West's making it clear that it was seeking only injunctive relief against CSS to preclude the transfer of the alleged in-

fringements, the Court sustained the striking of the demand for jury trial.

388. *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 170 U.S.P.Q. 378 (5th Cir. June 22, 1971) (Goldberg, J.)

Action for infringement of copyright in a novel. The trial court granted summary judgment for defendant under the Federal statute of limitations on copyright infringement actions.

Held, affirmed.

1. Plaintiff argued that the lower court should have applied the Florida Blameless Ignorance Doctrine to toll the statute. However, the Court of Appeals, basing its conclusion on the Congressional intent to "nationalize" the statute of limitations on copyright actions, held that it would not be appropriate to apply this "peculiarly local doctrine" to a Federal copyright claim. The court said:

Prior to 1957 there was no statute of limitations on civil suits relating to copyright infringement, and courts applied the law of the state in which the action was brought. This led to a wide divergence of time periods in which infringement suits could be brought in the various states and thus encouraged forum shopping. The Senate report on the bill which became the limitations statute leaves no doubt but that the purpose of the legislation incorporating the three year limitations period was to provide a uniform federal period of limitations applicable throughout the United States. . . . The report also makes it clear that the intent of the drafters was that the limitations period would affect the remedy only, not the substantive right, and that equitable considerations would therefore apply to suspend the running of the statute. Although the committee report mentions "equitable considerations of the locality" we think the drafters could not have intended that each court apply those equitable considerations peculiar to its locality since to do so would completely destroy the announced Congressional purpose of providing a federal statute of limitations uniform throughout the United States. We refuse to attribute to Congress by virtue of a single, ambiguous statement in the legislative history a purpose of undermining the very goal which it desired to reach. In speaking of "equitable considerations of the locality" Congress could logically have had reference only to the fact that general equitable considerations were available to toll the statute. These equitable considerations must be derived from general principles applicable to every federal forum,

not those peculiar to a local jurisdiction, if the announced purpose of providing a uniform limitations period throughout the United States is to be achieved. In short, the federal statute seeks to nationalize the copyright statute of limitations, but if each state can fetter, condition, and entail its effect, we end with a parochial instead of a national statute. We refuse to so frustrate the Congressional goal of homogeneity. Consequently, we must reject plaintiff's contention that the Florida Blameless Ignorance Rule, which is after all only a peculiarly local doctrine, should be applied. Instead, we must look to general equitable principles to determine the proper disposition of this cause.

2. The court observed that the doctrine of fraudulent concealment of a cause of action was a sufficiently "general equitable doctrine" to be available to toll the statute in a copyright case. Plaintiff claimed concealment by reason of defendant's failure to list the novel in question during discovery proceedings in an earlier suit between the parties. However, the court held that since plaintiff was not, despite the alleged concealment, ignorant of this cause of action, he could not avail himself of this doctrine. "The real problem," said the court, "seems to have been plaintiff's inability to procure a copy of [the allegedly infringing] work. In essence, plaintiff suspected that he had a cause of action, but could not prove the infringement without the book."

Referring to a 1967 Court of Claims decision (*Japanese War Notes Claimants v. U.S.*, 373 F.2d 356), the court concluded that plaintiff's inability to secure a copy of the allegedly infringing work was not a sufficient showing of concealment:

This was merely ignorance of evidence, not ignorance of a potential claim. Appellant knew of the alleged infringement, but did not have in his possession the precise minutiae of the plagiarism. The bells do not toll the statute while one ferrets the facts.

389. *Riback Enterprises, Inc. v. Denham*, 327 F.Supp. 763, 170 U.S.P.Q. 326 (S.D.N.Y. April 30, 1971) (Bonsal, J.)

Motion for preliminary injunction in action for copyright and trademark infringement and unfair competition. Plaintiff, a publisher of a line of multiple page greeting card booklets, alleged that defendant copied the booklets, albeit using different characters, and sold them in direct competition.

Held, motion granted.

The Court found that defendant "imitated the format of" plaintiff's booklets, that prospective purchasers would believe that both parties' booklets were produced by "a single company which wished to feature more than one character in its line of booklets," and that defendant's trade show use of a display rack for its booklets which was identical to plaintiff's retail rack "indicates that the defendant intends to identify its product as closely as possible with [plaintiff's]." Concluding that defendant's activities clearly constituted unfair competition, the Court granted preliminary relief without considering the allegations of copyright and trademark infringements.

390. *Leon B. Rosenblatt Textiles Ltd. v. M. Lowenstein & Sons, Inc.*, 321 F.Supp. 186, 169 U.S.P.Q. 161 (S.D.N.Y. August 10, 1970) (Cooper, J.)

Motion for preliminary injunction in action for infringement of copyright in fabric design.

Held, motion granted.

1. *Absence of copyright notice*: Defendant urged that plaintiff's failure to affix notice of copyright to either the design or selvege of certain bolts of its fabric comprised an abandonment of copyright. However, the Court was "overwhelmingly convinced that the omissions were limited to a small percentage of plaintiff's fabric [and] that such omissions were by accident or mistake within the meaning of [17 U.S.C. § 21 — providing that omission of notice "by accident or mistake" from a "particular copy or copies" will not invalidate a copyright]. In the latter connection the Court noted an affidavit of plaintiff's president which laid the omission of notice on some yardage to the shifting of the fabric on a printing machine.

The Court noted that under § 21 the accidental omission of notice will preclude recovery of damages from an innocent infringer who was misled by the omission, but, added the Court, this section "does not grant absolute immunity from injunctive relief." (The Court also noted that defendant was apparently not misled by the omission of notice.)

2. *Sufficiency of copyright notice*: Defendant also alleged that the copyright notice which did appear on the selvege of most of plaintiff's fabric was inadequate for failure to repeat the notice for every repeat of the design. Concluding that plaintiff's notice was sufficient, the Court said:

The design does not, as defendant alleges, repeat every 8¾ inches merely because one feature of the overall complex design so repeats; rather, we are of the opinion that a repeat or copy of this

design within the meaning of the notice requirement of 17 U.S.C. § 10 occurs only upon each repeat or copy of the entire 18 inch design. Notice is required at least once on each turn of the roller; that is met here.

391. *Lauratex Textile Corp. v. Citation Fabrics Corp.*, 328 F.Supp. 554, 171 U.S.P.Q. 42 (S.D.N.Y. June 15, 1971) (Croake, J.)

Motion for preliminary injunction in action for infringement of copyright in a flowers, birds and trees textile design. Plaintiff admitted that its design was a "near copy" of a prior design and that such prior design is in the public domain. However, plaintiff claimed to have added new features of its own, "including a new layout, a double border, and new color combinations." Defendant claimed that its challenged design was also based on the public domain prior design, that plaintiff's copyright only covered the new elements added by it, and that defendant's own variations on the prior design were different from plaintiff's. Defendant also challenged plaintiff's copyright.

Held, motion denied.

1. *Validity of plaintiff's copyright*: For the purposes of the motion, the court assumed the validity of the plaintiff's copyright, stating that "the juxtaposition of flowers, birds and bees is well-traveled terrain in design concept, and it does not take much in the way of variation to merit a new copyright."

2. *Infringement*: The court found that plaintiff failed to make a sufficient showing of probable success on the merits to warrant preliminary relief. The court noted that plaintiff's copyright was limited to the elements added to its public domain predecessor and that "if plaintiff can get a valid copyright by making a few minor variations, then defendant too, can get a valid copyright by making a few more variations on the pattern." The court concluded that "defendant's fabric is far more easily distinguished from plaintiff's than plaintiff's is from [the public domain work]."

392. *Warner Bros.-Seven Arts, Inc. v. Kalantzakis*, 326 F.Supp. 80, 170 U.S.P.Q. 228 (S. D. Texas, April 21, 1971).

Action for infringement of performing right in musical compositions.

The court held that the president of the corporation which owned the club at which the infringing performances were given was jointly and severally liable with the corporation. Noting plaintiff's evidence

that the individual defendant controlled the daily activities of the club and utilized its corporate owner, of which he was the principle stockholder, for his personal benefit, and that the individual defendant failed to take any corrective action after several warnings of infringement from ASCAP, the Court said:

It is well established that, if an officer, director or stockholder of a corporation participates in the actual infringement of a copyright then that person is subject to liability with the corporation as a joint tort-feasor. Additionally, when an officer uses a corporation as an instrument to carry out a deliberate infringement or to escape personal liability, he can be held individually liable.

2. State Court Decisions

393. *Liberty/U.A., Inc. v. Eastern Tape Corp.*, 170 U.S.P.Q. 351 (N. Carolina Ct. App. April 28, 1971) (Graham, J.)

Appeal from temporary restraining order in action for unfair competition (tape piracy).

Plaintiff engages in the manufacture and sale of phonograph records, in the course of which it enters into exclusive contracts with performing artists. Defendant acquired copies of plaintiff's recordings and electronically transcribed them onto tapes which it then sold in competition with plaintiff.

Held, affirmed.

Noting that defendant's appropriation of plaintiff's initiative, skill and expense as embodied in the recordings allowed defendant to "circumvent a great portion of the cost of engaging in the record business" and thereby created a substantial competitive advantage over plaintiff, the Court held that defendant's activities constituted enjoined unfair competition.

The Court held that the landmark decision in the *International News* case [*I.N.S. v. Assoc. Press*, 248 U.S. 215 (1918)] was "particularly applicable" to the situation at bar. Although defendant argued that most courts have agreed that *International News* must be limited to its own particular state of facts, the court said that "it nevertheless appears that the conduct of defendant . . . is so remarkably similar to the conduct condemned in [*International News*, namely the copying of news gathered by plaintiff and its sale in competition therewith] as to bring it within even a limited application of the principles of that case."

Defendant also argued that the rationale of the Supreme Court decisions in *Sears* and *Compco* [*Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964)] — holding the copying of unpatented products to be un-enjoinable at state law on grounds of conflict with federal public domain policy] precluded relief. The Court held to the contrary upon the authority of other recent tape piracy cases and the distinction between appropriation and copying of a product:

We find the numerous decisions distinguishing the *Sears* and *Compco* cases from cases similar to the one at hand to be sound. Defendants here are not copying a design or concept. They have not obtained the same artist to record the same song in an identical manner. This type of "copying" would presumably be protected by the decisions of *Sears* and *Compco*. Conduct of that sort, however, is a far cry from appropriating, for use in competition with plaintiff, the very product which plaintiff produced with its own resources.

The Court also held that a North Carolina statute which precluded common law copyright in, and restrictions on the use of, distributed phonograph records did not preclude relief:

The above statute was enacted in 1939. Apparently record piracy did not become a problem until sometime later. . . . It is unlikely that in 1939 the legislature had heard of this type of conduct, and we cannot conceive that one of its purposes in enacting G.S. 66-28 was to make legitimate such unfair competitive practice.

G.S. 66-28 was enacted shortly after the Federal District Court for the Eastern District of North Carolina held that Fred Waring had a common law property right in his orchestra's recordings and could prevent defendant from playing the recordings over a radio station without his permission. *Waring v. Dunlea*, 26 F.Supp. 338, 41 USPQ 201 (E.D.N.C. 1939). The effect of G.S. 66-28 was to overrule the *Waring* decision by eliminating any common law right to restrict the use of a recording sold for use in this State. However, we interpret "use," as employed in the statute, to mean the use for which a recording is intended; i.e., the playing of the recording. Thus, under the statute, any record sold in commerce for use in this State may be played privately, publicly, and commercially without restriction. It does not follow, however, that the performance contained on the record can be re-recorded onto another record and the re-recording sold in competition with the original producer.

To so hold would, in our opinion, give a construction to the statute that was never intended.

3. *Also of Interest*

394. *L.G. Balfour Company v. Federal Trade Commission*, 169 U.S.P.Q. 693 (7th Cir. April 5, 1971) (Kerner, J.)

Petition for review of an order entered by the F.T.C. finding petitioners guilty of violating Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition in the national college fraternity insignia and national high school class ring markets.

In the course of a lengthy opinion dealing with the monopolistic and related practices of petitioner, the court observed that while "the mere accumulation of patents or copyrights does not in itself constitute unlawful monopolization . . . [and] this principle is equally applicable to trademark law . . . , none of the cases cited by petitioner stands for the proposition that the accumulation of patents or copyrights [and hence trademarks] may never constitute a violation of the antitrust laws." The court thus concluded that petitioner's accumulation and enforcement of "official jewelers' contracts — admittedly exclusive dealing contracts" with national fraternities, when combined with petitioner's monopoly power, was anti-competitive and an unfair method of competition which could not be justified on the grounds of maintaining the trademarks in the fraternities' insignias.

395. *Marcus Advertising, Inc. v. M. M. Fisher Associates, Inc.*, 170 U.S.P.Q. 244 (7th Cir. June 1, 1971) (Castle, J.)

Appeal from directed verdict for defendant in action for misappropriation of an advertising slogan.

Held, affirmed.

Although noting that "a property right in an idea may exist independently of and notwithstanding the copyright statutes," the court concluded that "there was nothing new, novel or unique" about the idea expressed in the slogan submitted by plaintiff to defendant. The "associated image" conveyed by the words of plaintiff's slogan had been earlier widely communicated to the public and it was only the idea of this word association, not plaintiff's literal slogan, which defendant used. Defendant had a right to use that idea, said the court; "it had been freely committed to the public domain."

396. *May v. Paramount Pictures Corp.*, N.Y.L.J. March 11, 1971 at 2 col. 5 (Sup. Ct. N.Y. Co. 1971) (Saypol, J.)

Plaintiff sought to enjoin the release of a motion picture in which she co-stars and for which she wrote the play and directed, and money damages for breach of her editing rights as director. Plaintiff asserted that defendant motion picture company usurped her editing priorities by making certain revisions and cutting certain scenes and that this was injurious to her reputation because the finished work is an "unintended . . . emasculated" version of her contemplated work. On plaintiff's motion for a preliminary injunction, *held* denied. Noting defendant's contractual right (with the film's producers as known to and formally acknowledged by plaintiff) to "cut, edit, adapt, change . . . the picture . . . as [defendant] in its sole discretion may deem desirable" and the "economic disadvantage" which would enure to defendant, the court found that preliminary injunctive relief "is not warranted here." On plaintiff's alternative motion and defendant's consent, a quick trial was ordered.

397. *Desmond v. 20th Century Fox Record Corporation*, 321 N.Y.S. 2d 45 (N.Y. Sup. Ct., App. Div. 1st Dept., May 13, 1971) (Per Curiam).

Plaintiff recording artist claimed that defendant record company violated N. Y. Civ. Rights L. § 51 (Right of Privacy) by using his name and picture without his authorization in the advertisement and sale of an LP record album of his songs. Plaintiff also claimed that the album was of inferior quality and degrading to his reputation. On defendant's appeal from order for plaintiff, *held* reversed. The Court held that since the plaintiff's complaint was for damages for injury to his reputation, the one year Statute of Limitations of CPLR 215 barred the suit. Alternatively, the court held that a recording agreement between the parties clearly gave the defendant the right to reproduce sound recordings of any form, type, size or speed of plaintiff's performances (the court pointing to terms of the agreement and to trade custom which made it clear defendant was not limited to the distribution of 45 RPM records) and to use plaintiff's name and picture in connection therewith "provided, of course, it acted fairly without any material deviation or deletion in the composition of plaintiff's performances." Finding that plaintiff failed to show any evidence of unfair dealing or distortion, the Court held that defendant's cross motion for summary judgment should have been granted.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. U.S. Publications

398. American Bar Association. *Section of Patent, Trademark and Copyright Law*. 1971 Committee reports to be presented at the annual meeting to be held July 2-7, 1971, New York, N.Y. Editor: Beverly A. Vandenburg. Chicago, American Bar Center [1971] 312 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 for protection of industrial designs, neighboring rights, authors, and Government relations to copyrights.

399. GREENBERGER, MARTIN, ed. *Computers, communications, and the public interest*. Baltimore, Johns Hopkins Press [1971], 315 p.

"An edited record of the lectures and discussion in a series of symposia held jointly by The Johns Hopkins University and The Brookings Institution in Washington, D.C., during the period of September, 1969 to May, 1970." Of particular copyright interest is the symposium on "Property Rights Under the New Technology," with Professor Ralph S. Brown, Jr., as speaker, Mr. Caryl P. Haskins as moderator, and Professor Benjamin Kaplan and Mr. Dan Lacy as principal participants.

400. NORDHAUS, RAYMOND C. *Patent, trademark and copyright infringement; issues, investigation and litigation*. Chicago, Jural Publishing Co. [1971] 359 p.

A work which is designed for the practicing attorney and is divided into the following five parts: (I) principal issues of infringement, (II) principal issues of validity, (III) principal issues of enforceability, (IV) investigation and action regarding infringement, and (V) litigation practice and procedure.

401. ROBERTS, MATT. Copyright: a selected bibliography of periodical literature relating to literary property in the United States. Metuchen, N.J., Scarecrow Press, 1971. 416 p.

"The bibliography includes 6,214 citations gathered from approximately 500 periodicals." The subjects are divided into 24 sections and the entries are arranged in chronological order within each section. The cut-off date of the bibliography is December 31, 1968.

2. Foreign Publications

402. LIMPERG, TH. Bescherming van vormgeving tegen plagiaat; een handleiding voor de praktijk. Amsterdam, Agon Elsevier, 1971. 244 p.

A practical guide, written for use by designers, industrialists and lawyers, to the extent of protection granted designs (shapes) with regard to unauthorized copying as found in the Dutch copyright law of 1912, trademark and unfair competition legislation, court decisions, and under the Benelux agreements.

403. PETER, FRANZ WILHELM. Das Stockholmer Protokoll für die Entwicklungsländer; Gefahr für das internationale Urheberrecht. [Frankfurt am Main, Börsenverein des Deutschen Buchhandels, 1970]. 80 p. (Schriftenreihe des Börsenvereins des Deutschen Buchhandels, Bd. 5).

A critical account of the Stockholm Protocol Regarding Developing Countries, the developments leading to and following the Stockholm Conference, reactions, particularly in the German Federal Republic, to the Protocol and the events which followed, and proposals for "effective" aid to developing countries.

404. RÖDER, HEIN. Schutz des Werktitels. Rechtsvergleichende Untersuchung des Titelschutzes in Belgien, Deutschland, Frankreich, Italien, Österreich und der Schweiz. Köln, C. Heymann, 1970. 159 p. Schriftenreihe zum Gewerblichen Rechtsschutz, Bd. 20).

A comparative study of the type and extent of protection given titles under the laws of unfair competition, trademarks and copyright in Belgium, the German Federal Republic, France, Italy, Austria and Switzerland.

B. LAW REVIEW ARTICLES

1. United States

405. American Patent Law Association. *Spring Meeting, Universal City, Calif., May 6-7, 1971*. International copyright — Tape piracy. (*APLA Bulletin* 362-409, June 1971.)

A transcript of those discussions at the meeting which dealt firstly with some of the developments in the past few years in the field of international copyright, and, secondly, with recent legislative and judicial developments relating to unauthorized reproduction of sound recordings.

406. BURKE, TERENCE J. Software protection: patents, copyrights, and trade secrets. (35 *Albany Law Review* 695-717, no. 4, 1971.)

A review of the current status of applicable law for the protection of computer programs. A conclusion is reached that no single form of protection will guarantee a complete solution to the problem of securing such protection so that the nature of the software item must be considered before determining which form of protection is most appropriate.

407. DERENBERG, WALTER J. The twenty-fourth year of administration of the Lanham Trademark Act of 1946. Washington, Bureau of National Affairs, 1971. 43 p. (170 Patent, Trademark and Copyright Weekly Reports, no. 12, pt. II, July 12, 1971.)

Of interest to the copyright bar is the section on "Unfair competition and the 'Sears-Compco' doctrine."

408. FAIRCLOUGH, MICHAEL J. One copyright, under *Goodis*, divisible? . . . (1970 *Utah Law Review* 637-645, Sept.)

A critical comment, being submitted to the Nathan Burkan Memorial Competition, on *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 18 BULL. CR. SOC. 34, Item 10 (2d Cir. 1970).

409. Proposed agreement between National Cable Television Association and Committee of Copyright Owners. (*BNA's Patent, Trademark & Copyright Journal* D1-D2, no. 32, June 17, 1971.)

The text of recommendations which representatives of copyright owners and the NCTA agreed on June 14, 1971, to submit

to the Congress and the FCC for a solution of the CATV copyright and related communications problems. The agreement provides, in part, for compulsory licensing of copyrighted programs and for continued recognition of copyright exclusivity in the top 50 television markets.

410. SINCLAIR, KENT, JR. Liability for copyright infringement — handling innocence in a strict-liability context. (58 *California Law Review* 940-987, no. 4, June 1970).

"This Comment [awarded first prize in the 1970 Nathan Burkan Memorial Competition at the University of California School of Law, Berkeley] written during the pendency of major congressional reform of the Copyright Act, urges a reconsideration of the law's treatment of innocent infringers and proposes a system of protections which serves the fundamental purposes of copyright protection while safeguarding and encouraging the widest possible dissemination of ideas and creative works."

411. WETZEL, JAMES M. and RAYMOND P. NIRO. The look of *Lear* — an advocate's view. (46 *Notre Dame Lawyer* 475-486, no. 3, Spring 1971.)

A critique of the decision in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), which is interpreted as having the effect of freeing from challenges of validity only "those licenses which result from litigation, where the issue of validity has been judicially decided." According to the authors, the only avenue for attacking the basis of the *Sears* and *Compco* decisions, and allaying the fears from the dicta of *Lear*, appears to be the pending McClellan patent revision bill and the Scott amendments to that bill.

2. Foreign

1. English

412. Advisory Group of Governmental Experts on the Protection of Computer Programs, *Geneva, March 8 to 12, 1971*. Report. (10 *Industrial Property* 64-69, no. 3, Mar. 1971.)

The purpose of the meeting, organized by WIPO, was to advise the International Bureau of WIPO (1) on the preparation of a study of the form of legal protection of computer programs at

the national level that is most appropriate both from the point of view of the developing countries and from that of the producers of software; and (2) as to what new international arrangements or modifications of existing arrangements might be necessary once a form of protection is adopted.

413. Committee of Experts for the Protection of Type Faces. *5th meeting, Geneva, February 22 to 26, 1971*. Note. (10 *Industrial Property* 121-122, no. 5, May 1971.)

The note was prepared by the International Bureau of WIPO on the basis of the documents of the meeting, which was chaired by Professor Ulmer, and Mrs. Bognár (Hungary) and Miss Ringer (U.S.A.) were Vice-Chairmen. A list of participants appears at the end of the note.

414. DITTRICH, ROBERT. On the delimitation of the repertoire. (*EBU Review* 51-58, no. 126B, Mar. 1971.)

A translation of a discussion of the delimitation between "small" and "grand" rights under Austrian laws, which first appeared under the title "Zur Abgrenzung der 'kleinen' und der 'grossen Rechte.'" (20 *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 1-8, no. 1, Jan.-Feb. 1971.) See 18 BULL. CR. Soc. Item 194.

415. KAWAMURA, KATSUMICHI. A report on the copyright problems of video packages in Japan. (*EBU Review* 50-55, no. 127B, May 1971.)

An outline of some of the copyright problems facing commercial enterprises in Japan involved to some extent in the business and distribution of "video packages," a term which is used instead of "video cassettes," because it "includes not only cassette tapes but also open-reel video tapes and other forms of video recordings."

416. NOMURA, YOSHIO. Letter from Japan. (7 *Copyright* 91-95, no. 5, May 1971.)

A description of "the follow-up measures necessary for the enforcement of the new [Japanese Copyright] Law and related matters (Part A) and some court decisions which will be of interest to the reader (Part B)."

417. NOMURA, YOSHIO. The new Copyright Act in Japan. (*EBU Review* 42-50, no. 126B, Mar. 1971.)

"The purpose of the present article is to describe and comment on the new Copyright Act [which came into force on January 1, 1971] with special reference to broadcasting."

2. In English, French and Spanish

418. DESBOIS, HENRI. La conférence diplomatique de revision des Conventions de Berne et de Genève. (*Revue Internationale du Droit d'Auteur* 2-67, no. 68, Apr. 1971.)

An analysis of the final draft texts for revision of the Universal and Berne Copyright Conventions, drawn up by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union, respectively, during September 1970, and a comparison of the texts with the preliminary versions drawn up by two ad hoc preparatory committees during May 1970, and especially with the 1967 Stockholm Protocol. The final drafts will serve as a basis for the deliberations of the Diplomatic Conference that will revise the two Conventions in Paris in July 1971.

419. FRANCON, ANDRE. Des limitations que les droits de la personnalité apportent à la création littéraire et artistique. (*Revue Internationale du Droit d'Auteur* 148-205, no. 68, Apr. 1971.)

A study of the limitations on literary and artistic creation, under the French Act of July 17, 1970 (right of privacy law), arising out of "conventional" and modern forms of protection of personality rights.

420. LOKRANTZ-BERNITZ, ANNIKA. Les télé-satellites et le droit d'auteur. (*Revue Internationale du Droit d'Auteur* 68-147, no. 68, Apr. 1971.)

Abridged versions of a Swedish article on copyright problems in connection with communications satellites published in *NIR* 295-332, 4th quarter 1969. Consideration of the provisions of the Swedish copyright law has been deleted from the abbreviated versions. See 18 *BULL. CR. Soc.* 290, Item 221 (1971).

3. In German

421. ADAM, ROBERT. Fortschritte des Kabelfernsehens in den USA. Neue Möglichkeiten des Wettbewerbs zu den Netzwerken und Fernsehstationen. (15 *Film und Recht* 157-158, no. 5, May 15, 1971.)

A brief report on the current status of CATV in the United States.

422. BRUGGER, GUSTAV. Rechtsfragen bei neuen Verfahren der elektronischen Bildaufzeichnung und Bildwiedergabe (sogenannte audiovisuelle Verfahren). (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-22, no. 56, 1970.)

A legal analysis of new systems for visual recording and replay (audio-visual systems) with respect to their impact, if any, "on the clearly defined traditional exclusive rights of copyright owners, i.e., the rights of reproduction, distribution, transmission, and public performance," under the copyright law of the German Federal Republic. Includes French and English summaries.

423. DITTRICH, ROBERT. Gedanken zum österreichischen Filmurheberrecht. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 103-113, no. 59, Feb. 15, 1971.)

A comment on classifying filmed television programs under Austrian copyright law as motion pictures insofar as the protection of the rights of the producer are concerned.

424. DITTRICH, ROBERT. Die Weiterentwicklung des österreichischen Urheberrechts. (*Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil 50-54, no. 2, Feb. 1971; 78-87, no. 3, Mar. 1971.) Contents: 1. T. Reformbestrebung. 2. T. Rechtsprechung.

An analysis of those revisions to the Austrian copyright law currently being proposed to facilitate that country's adherence to the Rome Neighboring Rights Convention, and of pertinent court decisions.

425. DÜNNWALD, ROLF. Internationale Aspekte der privaten Überspielung in Ton und Bild. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 153-163, no. 59, Feb. 15, 1971.)

A discussion, with French and English summaries, of the problem of private copying of copyrighted works, performances, as well as video and sound recordings. The provision of the West German copyright law, which requires manufacturers of recording devices to pay reasonable compensation in favor of copyright owners, is regarded as having proven to be a workable solution to the problem. And, while the international conventions favor a similar solution, only the German Federal Republic has adopted it. The author concludes that joint endeavors of copyright societies and associations of other interested persons will be necessary if other legislatures are to follow this "commendable example."

426. FRIEDL, GERHARD, GERHARD FROTZ and FRITZ SCHÖNHERR. Berühren Rundfunksendungen musikalischdramatischer Bühnenwerke unter Benützung von Schallträgern stets ein "kleines" Recht? (20 *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 34-38, no. 2, Mar.-Apr. 1971.)

The proposition, expounded by Robert Dittrich in his article "Zur Abgrenzung der 'kleinen' und der 'grossen Rechte'" that the broadcast of a musico-dramatic work with the use of sound recordings *always* involves small rights under Austrian laws is refuted.

427. HILLIG, HANS-PETER. Urheberrechtliche Probleme der Zusammenarbeit Zwischen Fernsehsendeunternehmen und Museen. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 23-42, no. 56, 1970.)

An article on copyright problems connected with the production of television films in, and with the lending of television films to, museums under the copyright law of the German Federal Republic. Includes French and English summaries.

428. HIRSCH BALLIN, E. D. "Mephisto." (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 21-33, no. 59, Feb. 15, 1971.)

A critical commentary, with French and English summaries, on a decision by the German Federal Supreme Court which upheld an order by an appellate court forbidding dissemination of a novel by a deceased author, and the exercise of any copyright subsisting in that work. The novel in question was found to contain a "dis-

torted description of a deceased person's life" even though the author had written a disclaimer stating that "all characters in this novel are representing typical figures and not portrayals."

429. JÖSTLEIN, HANS. Unruhige Kunst aus urheberrechtlicher Sicht. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 111-116, no. 56, 1970.)

A contribution to the discussion of the definition of the term "Kunstwerk" (work of art) from the copyright point of view. Includes French and English summaries.

430. LÖGDBERG, AKE. Das Urheberrecht neuerer Zeit in den nordischen Staaten. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 81-94, no. 56, Mar. 15, 1970.)

A philosophical essay on the development of copyright in Scandinavia. Includes French and English summaries.

431. NORDEMANN, WILHELM, and PAUL WOLFGANG HERTIN. Die juristische Datenbank in urheber- und wettbewerbsrechtlicher Sicht. (24 *Neue Juristische Wochenschrift* 857-862, no. 20, May 18, 1971.)

A discussion of legal problems involved in electronic data processing of legal materials from the point of view of copyright and unfair competition in the German Federal Republic.

432. RIEDEL, HERMANN. Die musikalische Bearbeitung—Studie über Musik und Musikurheberrecht. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht*, no. 55 (1970), 169-191; no. 56 (1970), 161-240; no. 57 (1970), 189-234; no. 58 (1970), 141-200; no. 59 (1971), 165-203.)

A treatise on music and musical copyright in the German Federal Republic, with special reference to arrangements.

433. SAMSON, BENVENUTO. Die moderne Kunst, die Computer-"kunst" und das Urheberrecht. Zugleich kritische Notizen zu Max Kammers Buch über "Das urheberrechtlich geschützte Werk." (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 117-148, no. 56, 1970.)

A survey of copyright problems connected with the development of modern art (painting, music, and literature, especially

poetry) which is characterized as being at the same time a critique of Max Kummer's work (see 16 BULL. CR. SOC. 58, Item 45, 1968). Included in the survey is the question whether a computer program may or may not be considered a scientific work or a work of art and whether copyright protection includes the performance of the program as a creation of the programmer. With French and English summaries.

434. SCHULZE, ERICH. Förderung des Welturheberrechts durch Entwicklungshilfe. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 95-109, no. 56, 1970.)

A brief history of international efforts to make copyright concessions to developing countries, and various reactions to these efforts, beginning with the Stockholm Protocol and ending with the joint meetings of the Berne Permanent Committee and the Intergovernmental Copyright Committee in December 1969.

435. VOGT, WINOLD. Urheberrechtsnovelle und Bibliothekstantieme. (*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 5-20, no. 59, Feb 15, 1971.)

A critical comment, with French and English summaries, on amendments to the copyright law proposed by the West German parliamentary parties, CDU and SPD/FDP, according to which public libraries would in the future be required to pay a so-called library royalty for the lending out of books, with the proceeds used mainly in social security measures for the benefit of writers. A conclusion is reached that the "writers' objectives do not lie on a copyright law level, but on the level of social welfare law."

4. In Italian

436. FRAGOLA, AUGUSTO. Problemi giuridici delle videocassette. (19 *Rassegna di Diritto Cinematografico Teatrale e della Radiotelevisione* 140-145, no. 6, Nov.-Dec. 1970.)

An examination of some of the legal problems that may arise under Italian laws through the production, manufacture and distribution of video-cassettes.

C. ARTICLES PERTAINING TO COPYRIGHT
IN TRADE MAGAZINES

1. United States

437. A Century of copyright, an exhibit. (28 *Quarterly Journal of the Library of Congress* 144-153, no. 2, Apr. 1971.)

A selection, by Warren McKay of the Copyright Cataloging Division, of copyright deposits from an exhibition of some 80 items drawn from the collections of the Library of Congress and displayed in the Library's Great Hall from July 8 through August 20, 1970. The items in the exhibit, which was arranged under the direction of Herbert J. Sanborn, Exhibits Officer of the Library, and coordinated by Donald F. Reines of the Reference Division, Copyright Office, included books, music, banners, posters, maps, photographs, documents, computer programs, and motion pictures, tracing the development of the copyright law.

438. BROWNE, DON R. The BBC and the pirates: a phase in the life of a prolonged monopoly. (48 *Journalism Quarterly* 85-99, no. 1, Spring 1971.)

"The pirates may have achieved a victory of sorts in that they forced the BBC to commit itself to local radio and the fourth service. But limited resources may demand different solutions to future challenges."

439. COLE, JOHN Y. Of copyright, men, and a national library. (28 *Quarterly Journal of the Library of Congress* 114-136, no. 2, Apr. 1971.)

A history of the copyright deposit system in the United States and of the role it played in the development of the Library of Congress as the national library.

440. Government easing attitude toward private enterprise in use of federal information. Information industry still a name in search of an identity—report on the third annual IIA meeting. (199 *Publishers' Weekly* 26-30, no. 15, Apr. 12, 1971.)

A report on the meeting of the Information Industry Association, held in Lancaster, Pa., March 24-26, 1971. On the question of proprietary rights which "remain the great bugaboo of the in-

formation industry," the "consensus of the assembled lawyers at the IIA proprietary rights committee seemed to be that though they would welcome passage of the copyright revision bill, post haste, they do not have, nor do they anticipate, statutory relief from most of the information industry's problems concerning rights in data."

441. HENNESSEY, MIKE. France—the birthplace of performing rights. (83 *Billboard* 51, no. 23, June 5, 1971.)

An interview with Jean-Loup Tournier, director general of the French performing rights society, SACEM, in which he comments on the history and present status of the society, and includes a few views on the international copyright situation and possible problems relative to video-cassettes.

442. JOVANOVICH, WILLIAM. The Universal Xerox Compiler Machine. (40 *The American Scholar* 249-255, no. 2, Spring 1971.)

A brief, philosophical essay on the concept of copyright as property and the potential effect of xerography on that concept. A conclusion is reached "that the widespread use of xerography will not devalue literature . . . nor will it turn to antiquarianism the profession of publishing . . . because the act of copying is indiscriminate, unselective, uncompetitive . . . [and] is not a medium of art."

443. KIM, CHIN. Librarians and copyright legislation. (2 *American Libraries* 615-622, no. 6, June 1970.)

An article on the activities of librarians and the American Library Association in the enactment of the 1891 Act and the enactment and proposed revisions of the 1909 Act, preceded by a brief sketch of the development of major copyright legislation in the United States and Great Britain.

444. LOTTMAN, HERBERT R. Report from Cannes; A-V Conference: an industry not quite born. (199 *Publishers' Weekly* 27-31, no. 20, May 17, 1971.)

A report on the discussions at the First International Cartridge TV, Videocassette and Video Disc Conference held in Cannes from April 19 to 23, 1971. The discussions include a number of legal problems such as protection against piracy and copyright.

445. MILES, JAMES. Survey of ownership and copyrights of university and college-produced instructional materials. (23 *Journal of the University Film Association* 62-66, no. 2, 1971.)

Results of the survey were first reported at the "Seminar on Copyright and Residual Implications of AVR Software," held in Salt Lake City, Utah, February 3-5, 1971. It "is not a scientifically-designed survey" and "has merely been tabulated and certain un-edited comments from respondents have been added."

446. MOUNT, DOUGLAS N. Copyright: the situation now. (200 *Publishers' Weekly* 24-27, no. 1, July 5, 1971; 46-48, no. 2, July 12, 1971.)

A two-part report on the Association of America's copyright seminar-workshop, held June 2-3, 1971, in New York. The first report "included an explanation of how the present (1909) law works, some of the things that are wrong with it, and the dismal state of efforts to revise it." The second report "presents the views of three lawyers on the new communications technology and copyright, recent and pending developments in international copyright, and the efforts of . . . the U.S. Office of Education to extend limited copyright protection to publishers in order to encourage materials." Also, the first report includes summaries of informative speeches by several members of the Copyright Office staff "who comprise[d] a sort of act on how to get and keep copyright."

447. RINGER, BARBARA A. Film and copyrights. (23 *Journal of the University Film Association* 35-43, 61, no. 2, 1971.)

Remarks made at the Annual Conference of the University Film Association, held at the Ohio State University in August 1970. In addition to a discussion of copyright problems and pitfalls in connection with films, the remarks are concerned with the nature of copyright, the inadequacies of an outdated copyright law, and some of the difficulties faced in revising it. Miss Ringer closes with a statement that "the copyright law as a concept is just about the last bastion of the individual creator left in society."

448. SIEBERT, FRED S. Property rights in materials submitted by satellites. (48 *Journalism Quarterly* 17-25, no. 1, Spring 1971.)

"The author offers five steps toward establishing international order to protect and facilitate the use of intellectual materials for satellite transmission and broadcasting."

449. RUDD, BENJAMIN W. Notable dates in American copyright, 1783-1969. (28 *The Quarterly Journal of the Library of Congress* 137-143, no. 2, Apr. 1971.)

An attempt to provide a chronological, thumbnail sketch of the highlights in the development of copyright law in the United States.

450. SMITH, ROGER H. A copyright commission in the public interest. (199 *Publishers' Weekly* 35, no. 20, May 17, 1971.)

An editorial comment on the desirability of establishing a public commission composed of a jurist, a representative of users of copyrighted works and a representative of copyright owners which would be empowered to issue a compulsory license for archival material that remains under copyright protection.

NEWS BRIEFS

451. ANTI PIRACY BILL. The record piracy bill, S. 646 (see 18 BULL. CR. SOC. 231), which had passed the Senate on April 29, was reported out of the Subcommittee on Patents, Trademarks, and Copyrights of the House Judiciary Committee on July 1 with an amendment which would terminate the legislation by December 31, 1973, or earlier if the copyright general revision bill, S. 644, should pass before that date.

452. MODEL LAW FOR DEVELOPING COUNTRIES ON INDUSTRIAL DESIGNS.

The English edition of the *Model Law for Developing Countries on Industrial Designs* has now been published. This third model law is part of a series of brochures published previously, the first of which dealt with inventions and the second with marks, trade names and acts of unfair competition.

The model law on industrial designs is published in the same form as the previous model laws, in a paper bound volume of 88 pages, size 21,5 x 28 cm. Price 12 Swiss francs or US \$3.00.

The Spanish edition of this model law on industrial designs is now also available. Both may be ordered from WIPO-Berne, at Geneva, Switzerland.

INDEX

Volume 18. October 1970–August 1971

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

	Item	Page
AUSTRALIA		
Copyright Act, No. 63 of 1968	240	317
HUNGARY		
Copyright Act No. 111 of 1969, effective January 1, 1970.		
Italian translation	321	376
IRAN		
Law on the Protection of the Rights of Authors, Composers and Artists, of January 12, 1970, effective 15 days after publication on February 10, 1970.		
WIPO translation	322	376
JAPAN		
Copyright Law No. 48 of May 6, 1970, effective January 1, 1971.		
Provisional translation	6	29
Same, as communicated to WIPO	385	439
MOROCCO		
Act No. 1-69-135 of July 29, 1970, relating to Protection of Literary and Artistic Works	241	317
Same, French version	242	318
UNITED STATES		
Public Law 91-419, September 25, 1970.		
To prevent the unauthorized manufacture and use of the character "Johnny Horizon"	5	29
Public Law 91-555, December 17, 1970.		
Extending duration of copyright protection in certain cases (to December 31, 1971)	107	229

CONGRESS	Item	Page
House (91st Congress, 2nd Session).		
Hearings, April 23, 28, 30, 1970. Foreign policy implications of satellite communications, before the Committee on Foreign Affairs	3	29
H. Rept. 91-1621, November 24, 1970. To accompany S.J.Res. 230, extension of duration in certain cases	108	229
Same, Debate	109	229
H.R. 19926, December 8, 1970. To amend the Communications Act of 1934, to grant jurisdiction over CATV to the Federal Communication Commission	110	230
Tiernan, Robert O. Extension of remarks on introducing H.R. 19926, December 8, 1970	111	230
Senate (91st Congress, 2nd Session)		
S. Rept. 91-1214, November 22, 1970. Annual report of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary for the first session, 91st Congress	4	29
S. 4592, December 15, 1970. A bill to amend title 17, to provide for limited copyright in sound recordings. (In full.)	112	230
McClellan, John L. Remarks on introducing S. 4592, December 18, 1970. (In full.)	113	232
House (92nd Congress, 1st Session).		
H.R. 35, January 22, 1971. A bill to authorize and direct the Librarian of Congress to establish and maintain a library of television and radio news programs. Similar to H.R. 17010 and S. 3720 introduced April 15, 1970	226	313
H.R. 670, January 22, 1971. A bill to amend the Communications Act of 1934, to forbid subscription broadcast of regular programs or sports events and feature films until after they have been shown on regular programs	227	313
H.R. 843, January 22, 1971. A bill relating to tax treatment of transfers of rights. Identical to H.R. 15615 of January 29, 1970	228	313
H.R. 6718, March 24, 1971. A bill to amend the Communications Act of 1934, to ban sports from closed circuit television	302	371

	Item	Page
H.R. 6927, March 30, 1971. A bill to amend title 17, to provide for the creation of a limited copyright in sound recordings. Companion bill to S. 646 of February 8, 1971	303	371
H.R. 6992, March 30, 1971. Similar to H.R. 6718	304	371
H.R. 7127, April 1, 1971. Identical to H.R. 6718	305	372
H.R. 7679, April 22, 1971. Identical to H.R. 6718 and H.R. 7127	307	372
H.R. 7680, April 22, 1971. Identical to H.R. 6718, H.R. 7127 and H.R. 7679	308	373
H.R. 7962, May 3, 1971. Identical to H.R. 6992, previously introduced	309	373
H.R. 8060, May 4, 1971. Identical to H.R. 6992, and H.R. 7962	310	373
H.R. 8061, May 4, 1971. Identical to H.R. 6992, H.R. 7962, and H.R. 8060	311	373
H.R. 8102, May 5, 1971. Identical to H.R. 6718, H.R. 7127, H.R. 7679, and H.R. 7680	312	374
H.R. 8812, June 1, 1971. A bill to amend title II of the Social Security Act, to exclude as excess earnings in certain cases income from sale of copyrights, etc.	367	431
H.R. 9103, June 14, 1971. A bill to modify sec. 170(e) of the Internal Revenue Code, to permit deductions for certain contributions of literary or similar properties to public institutions	368	431
H.R. 9424, June 24, 1971. Identical with H.R. 8812	370	432
H.R. 9505, June 29, 1971. Similar to H.R. 9103	371	432
Dorn, William Jennings Bryan. Remarks on introducing H.R. 7127, April 1, 1971	306	372
Reid, Ogden R. Remarks on introducing H.R. 9103, June 14, 1971	369	432
Waldie, Jerome R. Insertion in the record of a "white paper" on CATV by Donald V. Taverner	372	432
Senate (92nd Congress, 1st Session)		
S. 644, January 26, 1971. A bill for the general revision of the Copyright Law. S. 543 as amended	229	314
S. 646, January 26, 1971. A bill to provide for limited copyright in sound recordings. Identical to S. 4592 of December 15, 1970	231	314
S. 647, January 26, 1971. The Unfair Competition bill. Identical to S. 766, 91st Congress	233	315

	Item	Page
S. 792, February 17, 1971. A bill to amend the Communications Act of 1934. (Jurisdiction of the FCC over CATV.)	235	315
S. 1435, April 1, 1971. A bill to amend the Communications Act of 1934, to ban sports from closed circuit television. Similar to the House bills	315	374
S. Rept. 92-72, April 20, 1971. To accompany S. 646. Creation of a limited copyright in sound recordings	317	375
S. Rept. 92-74, April 20, 1971. Annual Report of the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, for the 91st Congress, 2nd Session	318	375
S.J.Res. 132, July 15, 1971. Extending duration of copyright protection in certain cases (to December 31, 1972)	373	433
S. Rept. 92-277, July 21, 1971. A report on the most recent extension measure	375	434
S. 1866, May 14, 1971. Private bill to grant copyright to Trustees under the Will of the late Mary Baker Eddy in "Science and Health, with Key to the Scriptures,"	376	434
S. 1883, May 17, 1971. A bill to provide a formula for taxing multistate tax payers, including a section involving copyrights and copyright royalties utilized in a state	377	435
S. Rept. 92-280, July 21, 1971. A favorable report on S. 1866 as amended by the Copyright Office	378	435
McClellan, John L. July 15, 1971. Remarks on introducing S.J.Res. 132	374	433
McClellan, John L. February 8, 1971. Remarks on introducing S. 644	230	314
McClellan, John L. February 8, 1971. Remarks on introducing S. 646	232	315
McClellan, John L. February 8, 1971. Remarks on introducing S. 647	234	315
Pastore, John O. February 17, 1971. Remarks on introducing S. 792	236	316
Senate. Remarks, April 29, 1971. On the introduction of S. 646 (creation of a limited copyright in sound recordings)	313	374
Senate. Debate. July 22, 1971. On S. 1866	379	435

	Item	Page
Scott, Hugh. April 30, 1971. Remarks on the passage of S. 646	314	374
Stevenson, Adlai E., III. April 7, 1971. Remarks on introducing S. 1435	316	375
BUREAU OF CUSTOMS		
Notice of proposed rule making, December 19, 1970	114	237
DEPARTMENT OF TRANSPORTATION		
41 CFR Ch. 12, March 10, 1971. Notice of proposed rule making including rights in data resulting from performance of government contract	320	376
FEDERAL COMMUNICATIONS COMMISSION		
47 CFR Part 73, January 20, 1971. Television programs produced by non-network suppliers, availability to commercial stations and CATV. Further notice of proposed rule making	237	316
47 CFR Part 74, January 20, 1971. CATV Systems. Maintenance of program logs for cablecasting. Notice of proposed rule making	238	317
47 CFR Part 74, January 20, 1971. Television broadcast translator stations. Notice of proposed rule making	239	317
LIBRARY OF CONGRESS		
Annual report of the Librarian for the year ending June 30, 1970, including the Annual Report of the Register of Copyrights	381	436
COPYRIGHT OFFICE		
Title 37, Ch. II, F.R. Docket 71-6710, May 4, 1971. Amendments concerning deposit copies of motion pictures	319	376
Change in Copyright Office Regulations Deposit for registrations of motion pictures. (In full.)	384	438
NATIONAL CENTER FOR EDUCATIONAL COMMUNICATION		
<i>Office of Education.</i> Copyright Program. USOF contracts and grants	382	436
NATIONAL INSTITUTE OF HEALTH		
NIH Copyright Policy, June 18, 1971	383	437

CONVENTIONS, TREATIES AND PROCLAMATIONS

	Item	Page
European Agreement Concerning Programme Exchanges by Means of Television Films		
Accessions and ratifications as of January 1, 1971	243	319
European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories.		
Accessions and ratifications as of January 1, 1971	243	319
European Agreement on the Protection of Television Broad- casts.		
Accessions and ratifications as of January 1, 1971	243	319
International Union for the Protection of Literary and Artistic Works (Berne Convention).		
Membership of administrative bodies, Member States		,
Accessions and Ratifications as of January 1, 1971	245	319
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organiza- tions.		
Accessions and ratifications as of January 1, 1971	245	319
Ad Hoc Committee for the Revision of the Berne Con- vention, Geneva, May 19-21, 1970, Report	7	31
Extraordinary Session, Permanent Committee, Geneva, September 2-11, 1970, Report	116	238
UNESCO. International Arrangements in the Space Com- munication Field, Meeting of Governmental Experts, December 2-9, 1969, Paris. Report	246	319
Universal Convention.		
Intergovernmental Committee, Extraordinary Session, Geneva, September 2-11, 1970	115	238
Ad Hoc Committee for Revision, Geneva, May 19-21, 1970, Report	8	31
Hungary, accession	323	378
Mauritius, communication re extension of United King- dom accession	324	378
World Intellectual Property Organization (WIPO).		
Member States, as of January 1, 1971	247	320

DECISIONS

	Page
Abli, Inc. v. Standard Brands Paint Co., 168 U.S.P.Q. 553 (D. Cal. Dec. 23, 1970)	336
Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 170 U.S.P.Q. 65 (2d Cir. April 21, 1971)	440
Berenstain v. Columbia Broadcasting System, Inc., N.Y.L.J. Jan 8, 1971, at 18, col. 2 (Sup.Ct. N.Y.Co. 1971)	344
Boltons Trading Corporation v. Killiam, 320 F.Supp. 1182, 168 U.S.P.Q. 424 (S.D. N.Y. Dec. 21, 1971)	329
Bouton v. World Publishing Company, N.Y.L.J. Dec. 11, 1970, at 18, col. 2, (Sup.Ct. N.Y.Co. 1970)	266
Capitol Records, Inc. v. Spies, 167 U.S.P.Q. 489 (Ill. App. Ct. Oct. 22, 1970)	252
CMI Corporation v. Standard Havens Systems, Inc., 168 U.S.P.Q. 571 (D. Okla. Jan. 27, 1971)	261
Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, 167 U.S.P.Q. 754 (S.D. N.Y. Oct. 27, 1970)	247
Columbia Broadcasting System, Inc. v. Spies, d/b/a Tape-A-Tape Tape Sound Reproduction Company, 167 U.S.P.Q. 492 (Ill. Cir. Ct., Oct. 19, 1970)	249
Computer Searching Service Corporation v. Ryan, 439 F.2d 6, 169 U.S.P.Q. 3 (2d Cir. March 2, 1971)	442
Concord Fabrics, Inc. v. Generation Mills, Inc., 169 U.S.P.Q. 470 (S.D. N.Y. March 9, 1971)	382
Couleur International Ltd. v. Opulent Fabrics, Inc., 330 F.Supp. 152, 169 U.S.P.Q. 294 (S.D. N.Y. March 3, 1971)	384
Covington Fabrics Corp. v. Artel Products, Inc., 328 F.Supp. 202, 169 U.S.P.Q. 26 (S.D. N.Y. Feb. 2, 1971)	384
Dekar Industries, Inc. v. The Bissett-Berman Corporation, 434 F.2d 1304, 168 U.S.P.Q. 71 (9th Cir. Nov. 19, 1970)	254
Desmond v. Twentieth Century Fox Corporation, N.Y.L.J. July 22, 1970, at 2, col. 4 (Sup.Ct. N.Y.Co. 1970)	66
Desmond v. Twentieth Century Fox Corporation, 321 N.Y.S.2d 45 (N.Y.Sup.Ct., App. Div. 1st Dept., May 13, 1971) per curiam	450
Donahue v. United Artists Corporation, 33 Cal. Rptr. 131, 2 Cal. App.3d 794 (Ct. App. Dec. 18, 1969)	340
Educational Sales Program, Inc. v. The Dreyfus Corporation, N.Y.L.J. Dec 14, 1970, at 19, col. 2 (Sup.Ct. N.Y.Co. 1970)	255
Firm Amusement Corporation c. Metro-Goldwyn-Mayer, Inc., 317 N.Y.S.2d 186 (Sup.Ct. N.Y.Co., Oct. 29, 1970)	336
Goodis v. United Artists Television, Inc., 425 F.2d 397, 165 U.S.P.Q. 3 (2d Cir. March 9, 1970)	34
Greenfield v. Magazine Mgt. Co., Inc., N.Y.L.J. Jan 20, 1971 at 2, col. 2 (Sup.Ct. N.Y.Co. 1971)	344
Grumbach, Matter of, (Simon & Schuster, Inc.), N.Y.L.J. Oct. 5, 1970, at 19, col. 2 (Sup.Ct. N.Y.Co. 1970)	65
Hearst Corporation v. Shopping Center Network, Inc., 307 F.Supp. 551, 165 U.S.P.Q. 1 (S.D. N.Y. Oct. 24, 1969)	243

	Page
Herbert Rosenthal Jewelry Corp. v. Grossbardt, 436 F.2d 315, 168 U.S.P.Q. 193 (2d Cir. Dec. 21, 1970)	321
Herbert Rosenthal Jewelry Corp. v. Zale Corporation, 323 F.Supp. 1234, 169 U.S.P.Q. 393 (S.D. N.Y. Feb. 22, 1971)	385
Jones v. Spindel, 177 S.E.2d 187 (Ga.Ct.App. July 16, 1970)	340
Kalb v. Metro-Goldwyn-Mayer, N.Y.L.J. April 14, 1971, at 19, Col. 4 (Sup.Ct. N.Y.Co. 1971)	387
Lauratex Textile Corp. v. Citation Fabrics Corp., <i>not yet reported</i> (S.D.N.Y. June 15, 1971)	446
Leon B. Rosenblatt Textiles Ltd. v. M. Lowenstein & Sons, Inc., 321 F.Supp. 186, 169 U.S.P.Q. 161 (S.D. N.Y. Aug. 10, 1970)	445
Leopold v. Levin, 259 N.E.2d 250 (Ill. Sup.Ct. May 27, 1970)	258
Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago, 320 F.Supp. 1303, 168 U.S.P.Q. 559 (N.D. Ill. Dec. 22, 1970)	331
L. G. Balfour Company v. Federal Trade Commission, 169 U.S.P.Q. 693 (7th Cir. April 5, 1971)	449
Liberty/UA, Inc. v. Eastern Tape Corp., 170 U.S.P.Q. 351 (N.Car. Ct. App. April 28, 1971)	447
Mann v. Trans-Lux Corp., N.Y.L.J., Sept. 15, 1970, at 2, col. 3 (Sup.Ct. N.Y.Co. 1970)	61
Mann v. Warner Bros. Inc., <i>not yet reported</i> (S.D. N.Y. August 31, 1970)	63
Marcus Advertising, Inc. v. M. M. Fisher Associates, Inc., 170 U.S.P.Q. 244 (7th Cir. June 1, 1971)	449
Marvin Worth Productions v. Superior Film Corporation, 319 F.Supp. 1269, 168 U.S.P.Q. 693 (S.D. N.Y. Sept. 30, 1970)	43
May v. Paramount Pictures Corp., N.Y.L.J., March 11, 1971, at 2, col. 5 (Sup.Ct. N.Y.Co. 1971)	450
Nathan v. Monthly Review Press, Inc., 309 F.Supp. 130, 165 U.S. P.Q. 549 (S.D. N.Y. Dec. 24, 1969)	49
O'Hara v. Gardner Advertising, Inc., 300 N.Y.S.2d 441, 32 A.D.2d 632 (Sup.Ct. App.Div. 1st Dept. May 22, 1969)	265
Pearson v. Dodd, 410 F.2d 701 (D.C. Cal. Feb. 24, 1969)	261
Picchione v. Commissioner of Internal Revenue, 167 U.S.P.Q. 110 (U.S. Tax Ct., July 15, 1970)	55
Picture Music, Inc. v. Bourne, Inc., 314 F.Supp. 640, 167 U.S.P.Q. 348 (S.D. N.Y. July 6, 1970)	324
Prather v. News Paperbacks, Inc., 446 F.2d 338, 170 U.S.P.Q. 378 (5th Cir. June 22, 1971)	443
Riback Enterprises, Inc. v. Denham, 327 F.Supp. 763, 170 U.S.P.Q. 326 (S.D.N.Y. April 30, 1971)	444
Roberts v. Dahl, 168 U.S.P.Q. 428 (Ill. Cir. Ct. Jan. 21, 1971)	337
Runge v. Lee, 441 F.2d 579, 169 U.S.P.Q. 388 (9th Cir. March 26, 1971)	379
Sinatra v. The Goodyear Tire & Rubber Co., 435 F.2d 711, 168 U.S.P.Q. 12 (9th Cir. Nov. 20, 1970)	239
Slifka v. Citation Fabrics Corp., 329 F.Supp. 1392, 169 U.S.P.Q. 545 (S.D. N.Y. March 23, 1971)	383

	Page
Smith v. Goro, N.Y.L.J. Nov. 6, 1970, at 18, col. 2 (Sup.Ct. N.Y.Co. 1970)	67
Standard Industries, Inc. v. Tigrett Industries, Inc., 397 U.S. 586, 165 U.S.P.Q. 289 (U.S.Sup.Ct. April 20, 1970) <i>per curiam</i>	253
State v. Wright Hepburn Webster Gallery, Ltd., N.Y.L.J. Sept. 30, 1970 at 18, col. 2 (Sup.Ct. N.Y.Co. 1970)	57
Tape Industries Association of America v. Younger, 316 F.Supp. 340, 166 U.S.P.Q. 468 (D. Cal. 1970)	52
Tape Industries Association of America v. Younger, 168 U.S.P.Q. 609 (U.S.Sup.Ct. Feb. 22, 1971)	321
Thomas Wilson & Company, Inc. v. Irving J. Dorfman Company, 433 F.2d 409, 167 U.S.P.Q. 417 (2d Cir. Oct. 16, 1970)	40
United States v. American Society of Composers, Authors and Publishers, 168 U.S.P.Q. 426 (S.D. N.Y. Dec. 21, 1970)	323
Warner Bros.-Seven Arts, Inc. v. Kalantzakis, 326 F.Supp. 80, 170 U.S.P.Q. 228 (S.D. Tenn. April 21, 1971)	446
Wiseman v. Massachusetts, 26 L.Ed.2d 546 (July 15, 1970)	32

A U T H O R S

Item*	Item*
Adam, Robert 421	Cramer, Edward M. 63
Alpert, Arthur 51	Crisman, Thomas L. 349
Anello, Douglas A. 60	Cupis, Adriano de 216
Arnold, Tom 270	Dalfen, C. M. 352
Atwood, John F. pp. 1-22	Danielius, Hans 47
Baker, Warren E. 60	Dannay, Richard 32
Barker, Ronald E. 94, 95, 96, 97	Denniston, Lyle 64
Barnett, Howard J. 143	Derenberg, Walter J. 33, 272, 407
Bartels, Daghild 190	Desbois, Henri 418
Baughman, M.D. 52	Diamond, Sidney A. 65
Baumgarten, Jon A. (<i>case digests</i>) pp. 32-69, 239-267, 321-344, 379- 387, 440-450	Dittrich, Robert 194, 195, 283, 295, 357, 414, 423, 424
Beilharz, Manfred 268	Dock, Marie Claude 183
Bender, David 28	Dugan, Michael A. 129
Benjamin, Curtis B. 53, 54	Dünnwald, Rolf 182, 425
Bergström, Svante 220	Edlbacher, Oskar 296
Berk, Lee Eliot 263	Ehrlich, Heyward 66
Bernitz, Annika L. 221, 420	Fabiani, Mario 43
Bilainkin, George 99	Fairclough, Michael J. 408
Birrell, Augustine 264	Feige, Gerhard 196, 197
Blum, Arno A. 193	Feinberg, Barry H. 344
Bodenhausen, G. H. C. 281	Felsman, Robert A. 349
Botein, Michael 144	Ferrara-Santamaria, M. 362
Boytha, György 160, 191, 192	Findlater, Richard, ed. 336
Brack, Ray 56	Finkelstein, Herman 67, 68
Brennan, Thomas 50	Fragola, Augusto 44, 436
Breyer, Stephen 145	Francon, Andre 137, 186, 419
Brilioth, Erik G. 46	Freitas, Denis de pp. 304-312
Browne, Don R. 438	Freund, Peter 40
Brugger, Gustav 422	Friedl, Gerhard 426
Brylawski, E. Fulton pp. 357-370	Fromm, Friedrich Karl 139
Burke, Terence J. 406	Frotz, Gerhard 426
Burnitz, Dave 57	Galantiere, Lewis 69
Carnahan, Wm. H. 29	Galtieri, Gino 142
Cary, George D. 30, 58, 59, 273	Gamm, Eva von 198
Celler, Emanuel 146	Gamm, Otto F. von 198
Chakroun, Abdullah 161	Gautreau, Michel 138
Chamberlain, Betty 22	Geston, Mark S. 34
Christensen, Gary I. 134	Goldsmith, Harry 345
Clapp, Verner W. 62	Goldstein, Paul 148
Cole, John Y. 439	Goodfriend, James 70
Cooper, Jay L., ed. 333	Gorelick, R. 162
Cornu, Gérard 138	Gotlieb, Allan E. 353
	Greenberg, Edward 143

* Page (p.) numbers relate to articles published in Volume 18.

Item*	Item*
Greenberger, Martin, ed. 399	Ljungman, Seve 48
Grover, Stephen 113	Locker, Horst 201
Hadl, Robert D. pp. 183-228	Lödgborg, Ake 364, 430
Harris, Michael 274	Lottman, Herbert R. 444
Hazan, Victor pp. 23-28	Luby, Stephan 202
Hendershot, Thomas R. 346	MacLean, Ann W. 151
Hennessey, Mike 441	Masouyé, Claude 165, 285
Hertin, Paul W. 431	Mast, Heribert 358
Hillig, Hans-Peter 427	Mathews, John D. 60
Hindley, B. V. 337	McCartan, Edward F. 76
Hirsch Ballin, E. D. 428	McClellan, John L. pp. 232-237
Holder, John E. 349	McDonald, Bruce C. 338
Hope, Henry W. 349	McFarlane, Gavin 152
Huang, Paul T. H. 267	McGrath, Wm. J. 265
Huang, Thomas U. S. 347	McKay, Warren, ed. 437
Ionasco, Aurelian 38	Medlock, Jr., V. B. 349
Ionasco, Ovidiu 39, 363	Mentha, Benigne 166, 167, 168
Johannes, Hartnut 199	Messinger, Barry W. 277
Johnson, Albert C. 273	Miles, James 445
Johnson, Charles F. pp. 91-181	Milgrim, Roger M. 348
Johnson, Leland L. 131	Mimasaka, Taro 77
Jostlin, Hans 429	Mirisch, Robert A. 274
Joubert, Claude 184	Möhring, Philipp 339
Jovanovich, William 442	Mortenson, Robert 78
Kaiser, Ronald 284	Mouchet, Carlos 169
Karp, Irwin 72	Mount, Douglas N. 446
Katzenberger, Paul 140	Mullally, Donald P. 153
Kawamura, K. 415	Muttenberg, Rene 24
Keplinger, Michael S. 185	Nawalavic, Frank J. 278
Kim, Chin 443	Neufisher, Karl 205
Komen, A. 136	Neumann, Hans-Wolfgang 206
Knop, Frank 190	Nicolini, Kate 339
Knowles, Jr., Clayton P. 149	Nimmer, Melville B. 154
Krasilovsky, M. Wm. 275	Niro, Raymond P. 411
Kreshner, Richard W. 134	Nixon, F. G. 355
Krieger, Albrecht 358	Nomura, Yoshio 170, 416, 417
Kuney, Joseph H. 91	Nordemann, Wilhelm 139, 187, 203, 204, 297, 356, 431
Lanouette, Wm. J. 73	Nordhaus, Raymond C. 400
Latman, Alan 276	O'Brien, Denis 340
Lawson, Alexander S. 332	Oekonomidis, Demetrius 25, 41, 207
Lee, Edward G. 354	O Hannrachin, F. 171
Leinveber, Gerhard 200	Olenhusen, A. G. von 359, 360
Leonelli, Leonello 217	Oliveira Ascensao, J. de 172
Limperg, Th. 402	Oppenheim, S. Chesterfield 273
Lissner, Will 74	
Livingstone, Wm. 75	

* Page (p.) numbers relate to articles published in Volume 18.

Item*	Item*
Padellaro, Giuseppe 141	Siebert, Fred S. 448
Palagyi, Robert 173	Sinclair, Jr., Kent 410
Park, Rolla E. 132	Smith, Archie 134
Paslay, James B. 35	Smith, Roger H. 86, 450
Passano, W. M. 79	Soans, Cyril A. 266
Patterson, L. R. 62, 80, 102	Soltysinski, S. J. 176
Peter, Franz W. 403	Spiegel, Irwin O., ed. 333
Pisar, Samuel 133	Spirer, Julian H. 156
Plaisant, Robert 174	Sterling, J. A. L. 167
Püschel, Heinz 27	Stern, Herman J. 361
Rayward, W. Boyd 82	Stojanovic, Michailo 177
Rebello, Luiz F. 188	Strauss, Jr., Leo 157
Recht, Pierre 42	Strode, Joseph A. 158
Ricks, Jay E. 134	Strömholm, Stig 269
Rie, Robert 208	Strunkmann-Meister, K. E. 298
Riedel, Hermann 432	Sullivan, Robert C. 87, 88
Ringer, Barbara A. 50, 83, 134, 286, 291, 447	Taylor, Joe D. 36
Roberts, Matt 84, 401	Taylor, Jr., Reese H. 134
Röder, Hein 404	Tedeschi, G. 178
Rodriguez Fraguas, J. L. 287	Thomas, Geoffrey L. 37
Rothenberg, Stanley pp. 422-430	Thurman, Ronald V. 211
Rotkirch, Holger 222	Tillman, Winfried 358
Rudd, Benjamin W. 449	Timar, Istvan 179
Ruggieri, Bernard J. 134	Troller, Alois 219
Runge, Kurt 209	Ulmer, Eugen 180, 181, 212, 213, 288
Samson, Benvenuto 210, 433	Ungern-Sternberg, J. von 214
Samuelson, Robert J. 85	Vaksberg, Arkady 294
Sanctis, Valerio de 218, 290	Verkade, D. W. F. 136
Savatier, Rene 189	Verona, Albert 215
Schildhause, Sol 60	Verrill, Jr., Chas. O. 159
Schönherr, Fritz 426	Vogt, Winold 435
Schrader, Dorothy M. 280	Wallace, William pp. 293-303
Schulman, John pp. 397-421	Weil, Benjamin H. 91
Schulze, Erich 292, 434	West, Stanley 92
Segretin, Marc 293	Wetzel, James M. 411
Seipel, Peter 223	Wigren, Harold E. 93
Shewcroft, J. 175	Woodward, Jr., Charles C. 134

* Page (p.) numbers relate to articles published in Volume 18.

SUBJECT MATTER

(All numerals refer to Items)

Ad interim copyright, 280
Africa, book trade, 100; CISAC symposium, 289
Agreement, forms, music industry, 333
American Bar Association, committee report, 398
American Chemical Society, policy, 91
American Patent Law Association, tape piracy, 405
Antitrust, withholding music license, 119
Arbitration, book contract, 19; guide, 345
Armed Services, data law, 265
Art, counterfeit, 16; forgeries, 178; modern (Ger. Fed. Rep.), 432; work made for hire, 65, 147, 251
ASCAP, 67; license, 250
Association of America, seminar, 446
Association of American Publishers, 49, 50
Audio visual systems, developments, 225, 274; German law, 422
Augustine Birrell, "Seven Lectures," reprinting, 264
Australia, new law, 175, 240
Austria, class, television program (Ger.) 423; law, films, 283; law (Ger.) 357; Art. 94 (Ger.) 195; Sec. 1, Para. 1 (Ger.) 295; "small" and "grand" rights, 426, 414; publishers' rights, 296; Rome Treaty (Ger.) 424
Authors' rights, reprints, 74; USSR, 294
AVRP, 225
Berne Convention, Brazil-Greece, 184; developments, 1969, 164; report, 245; revision 7, 116, 281, 418
Bibliography, 267, 401
BIRPI, university survey, copyright courses, 26
Books, industry, 54; infringement, 388
Brazil, Berne Convention, 184
British Book Development Council, report, 23
Broadcasting, piracy and BBC, 438
Bureau of Customs, regulations, 1; proposed rule making, 114
Burger, Chief Justice W. E., speech reprints, 64
Byron's "Cain", pirated editions, 78
CATV 37, 372; developments (PLI) 134; FCC bill, 110, 235, 236; FCC, 85, 86; hearings, 343; regulations, 111, 145, 146, 149, 155; franchise agreement, 153; Ger. Fed. Rep., 205; industry views, 60; music, royalties, 68; NCTA agreement, 409; presidential study, 61; policy, 78; potential impact 132; Senate report 318; Spain, 287; Switzerland, 361; U.S. (Ger.) 421

- Century of Copyright, A, exhibit, 437
- China (People's Republic), law, 347
- Chronology, developments in copyright, 449
- CISAC, African symposium, 289; international convention report, 290
- Common law copyright, 278
- Compulsory license, public commission, 450
- Computer, 76; bibliography, 129; copying, 185; Ger. Fed. Rep., 431; infringement, 387; programs, patents (Swedish) 223; program protection, 349, U.K. 152, (Ger.) 211, East German review (Ger.) 197; software, WIPO meeting Geneva, 300; symposia, 399; technical data (Ger.) 194; technology, development, UN report, 135; WIPO study, 412
- Configuration, registration, 346
- Contract, book, breach of, 128; film exhibition, 256; publishing (Ger.) 359; rights, television series, 10
- Copying, private, Ger. Fed. Rep., 425
- Copyright, history, 62, theory 42, in Jewish law, 2
- Copyright Office, fraud on, 32; report, 381
- "Creative musician", rights, 263
- Criminal provisions, comparative study, 183
- Czechoslovakia, law, 176, performing artist, 202
- Data, government contract, 320
- "Dark Passage", 10
- Defamation, public official, 279
- Design, infringement, 326, 327, 328, 329; lace, 11, fabric, 390, jewelry, 330, type design, 332
- Developing countries, 47, 434; UCC revision, 161; UN computer report, 135; WIPO, industrial design, 452
- "Dirtymouth", 12
- Domaine public payant, 169
- Donald C. Brace Memorial Lectures, 1st, 154; 2nd, 365
- "Droit de suite", 174, Ger. Fed. Rep. (Ger.) 190, 360
- East-West relations, 133
- Economic Council of Canada, recommendations, 335, 337, 338
- Educational aids, protection (Fr.) 187
- Educational television, 83
- Educational use 90, 93; under revision, 151; video taping, infringement, 36
- Electronic video recording (EVR) 284
- European Common Market, motion pictures, 362
- Extension of duration, bill, 373, 374, 375
- Fair use, 12, 93

- Federal Communications Commission, CATV, 155, administration, 159; hearings, 343; regulations, 131, 145, 146, 149, 237, 238, 239; suspension of rule making, 380; survey, televised films, 103; Order, Sec. 5, 394
- Federal Unfair Competition Bill of 1971, 233, 234
- First amendment, 148
- Forms, music industry, 333
- Formosa, unauthorized reprints, 23
- Fox, Harold G., memorial, 291
- France, law, composers and performers (Fr.) 138; manual (Fr.) 137; protection of free-lancer, 189; right of privacy (Fr.) 186
- Free lance worker, protection, France (Fr.) 189
- "Fugitive, The", 10
- German Democratic Republic, law, textbook, 27 unauthorized reproduction, 40
- German Federal Republic, law (Ger.) 139; (Ger.) 195; Art. 26 (Ger.) 140, (Ger.) 210; Sec. 85 (Ger.) 199; audio visual systems, 422; commentary (Ger.) 339; designs, 298; revision (Ger.) 200, (Ger.) 356; assignment, 204; CATV, 205; computer, 431; contract (Ger.) 198, 203; publishing, 359; droit de suite, 360; GEMA proposal, revision (Ger.) 200; "Mephisto" decision, 428; modern art, 433; musical work, 432; playwrights (Ger.) 268; right of personality (Ger.) 206; work of art (Ger.) 201
- Goodis v. United Artists*, 271, 341, 408
- Greece, Berne Convention, 184
- Greeting card booklet, infringement, 389
- Guide, arbitration, 345; design law, Netherlands (Dutch) 402; infringement, 400; inventory property UK, 340
- Guidelines, USOE, 382; NIH, 383
- "Have a Happy", 127
- History, copyright, 264, 365, 437, 443
- Hungary, developments (Ger.) 191; law, 173, 179, (It.) 321; UCC, 323
- Idea, sales training, 124
- Importation, Bureau of Customs' role, 1
- Indivisibility, 158
- Industrial property, France (Fr.) 160
- Information Industry Association, report, 440
- Infringement, animation, 118; book, 12, 326, 386, 388; booklet, 389; common law copyright, 257, 258; computer service, 387; design, 326, 327, 328, 329, 391, innocent, 410; jewelry, 249, 330; label, 121; lace, 11; performing right, 392; preliminary injunction, 276; tape recordings, 120

- International conventions, CISAC report, 290; non-WIPO, 243; private law, 364; record piracy, Paris meeting, 299; revision, Paris, 1970, 106; 288, 418; Washington recommendations, 180, 181
- International copyright, 94, 95, 96, 97; East-West relations, 133; new technology 224; phonograms, 350; socialist countries, developments (It.) 218
- International Cartridge TV, Videocassette, Video Disc Conference, Cannes, 444
- International Music Industry Conference, Second, 55, 130
- Invasion of privacy, conversion of senatorial records, 126; personal history, crime, 125
- Iran, Law, 322
- Ireland, Republic of, performers' rights, 171
- Israel, law, 193
- Italy, video cassettes (It.) 436, (It.) 217; law, administration (It.-Fr.) 142; letters and portraits (It.) 216; motion picture rights, 44; textbook (It.) 141
- Japan, law, 6, 385, broadcasting, 417; court decisions, 416; publishing, 77; revision, 170; video "package", 415
- Jean Geiringer Memorial Lecture on International Copyright Law, Ninth, 224
- Jewelry, infringement, 249, 330
- Jewish law, ancient, 2
- "Johnny Horizon", law, 5
- Judicial developments, U.S., 291
- Jurisdiction, 252
- Korea, market development, 23
- Label, disclaimer, tape, 121; protection, 255
- Lanham Trademark Act, 23rd year report, 33; 24th year report, 407
- Lending, television films, Ger. Fed. Rep., 427
- Libel, 126
- Libraries, photocopying, 334; record copying, 275; royalties (Ger. Fed. Rep.) 435; television-radio news, 226; U.S.-Gr. Br. legislative history, 443
- License, royalties, 150
- Manufacturing clause, 280
- Mauritius, UCC, 324
- Monopoly, fraternity insignias, 394
- Moral right (Ger.) 209
- Morocco, law, 241, 242, analysis, 292

- Motion picture, deposit, 319; European Common Market, 362; injunction against release, 396; registration, Copyright Office, 384; sound track, protection, 301
- Musical composition, copyright owner, 251
- Music, agreements 333; foreign income, 157; identity, comparative law, 46; industry, protection (Ger. Fed. Rep.) 432
- Music Operators of America, 56
- Nathan Burkan Memorial Copyright Essays, 151, 277, 410
- National Cable Television Association, Agreement, 409
- Netherlands, The, guide, design law (Dutch) 402; law, manual (Dutch) 136
- NIH, copyright policy, 383
- Notice, Picasso sculpture, Chicago, 254; serial publication, 341
- Oklahoma Deceptive Trade Practices Act of 1965, constitutionality, 261
- Passing off, performance and style, 117
- Patent, U.S. 266; validity, 122
- Performance rights 35; infringement, 392
- Performer's rights, 20
- Phonograms, protection, 350
- Photocopying, 442; libraries, 84, 87, 88, 334
- Photograph, right of privacy, 262
- Picasso Chicago sculpture, 254
- Piracy, broadcasting, effect on BBC 438; tape, 14, 342, 444; record, bill, 451
- Plagiarism, 259
- Portugal, law, 45, 172, (Fr.) 188
- Practising Law Institute, CATV seminar, 134
- Private law, and international conventions, 364
- Protection, art, 22, 43; Sweden, 48
- Public commission, compulsory license, 450
- Public lending right, 101, 336
- Public official, defamation, 279
- Publishers rights, Austria, 296
- Quotation, right of, comparative law, 25
- Record piracy, 70, 75, Paris meeting, 299
- Renewal right, magazine contribution, 72
- Reproduction rights, 29, 282
- Revision, U.S., 30, music industry, 58, 59; taped correspondence, 57; hearings, reprints, 104
- Right of privacy, France (Fr.) 186, 419; (Ger.) 209; documentary film, 17, 18; obscure persons, 21; photograph, 262; use of name and picture, 397
- Right of personality, Ger. Fed. Rep. (Ger.) 206

- Right of quotation, Ger. Fed. Rep., 41
- Right, republishing, 13
- Rights, "small", "grand", Austria, 414
- Rome Neighboring Rights Convention, Austria (Ger.) 424
- Royalties, 150, patent license, 122
- Rumania, films, 38, 39, 363
- SACEM, 441
- Satellite communication, 285, 448; conference, 351, 352, 353, 354, 355; direct broadcast, regulation, 34; hearings, 3; international agreements, UCC, 246; neighboring rights, 165; problems, 221, 222; Rome Convention (Ger.) 214; Swedish law, 420
- Scientific book, 53
- Scandinavia, development of law, 430; concept of "work" (Swedish) 269
- Sears, Roebuck & Co. v. Stiffel and Compco Corp. v. Day-Brite*, 20, 123, 273, 277, 346, 348, 393, 407, 411
- Slogan, misappropriation, 395
- "Small rights", Austria, 426
- Software, protection, 28, 406; Salt Lake City seminar, 445
- Sound recordings, Austria, 426; protection, U.S. bill, 112, 113, 231, 232; 303, 313 314, 317
- Sound track, motion picture, copyrightability, 301
- South Africa, compulsory license provision, American work, 156
- Spain, CATV, 287
- Sports, closed circuit television, U.S. bills, 227, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 315, 316
- Stage manager, as author, German law (Ger.) 296
- Stockholm Protocol, 207; (Ger.) 403; 434; international developments, 47; INTERGU (Ger.) 163; origins, 105; West German debates, 168
- Sweden, revision, (Swedish) 220; satellite law, 420
- Switzerland, CATV, 361; law, right of personality (It.), 219; license agreement, 24
- Tape piracy, 248, 342, 393; APLA, 405; Cannes report, 444
- Taxation, 15, 377; bill, transfers, 228; bill, 367, 368, 369, 370, 371
- Technical works, seminar, 71
- Technology, new, 224
- Television, evolution, 51; program classification, Austrian law (Ger.), 423
- "Titticut Follies", 9
- Title, protection, 260, 277, (Ger.), 404
- Trade secret, 128; software, 28; *Lear v. Adkins*, 270, 344, 348, 411
- Translation, protection, 192
- Translator, recognition, 69
- Type design, 332, WIPO, 413

- Unauthorized recording, German law (Ger.), 182
- Unauthorized reproduction, Formosa, Taiwan, 98; recording, 31; music, by teachers, 63
- UNESCO, phonograms, 350
- Unfair competition, label, 121; monopoly, 394; seminar, 273; state law, 386; tape recordings under disclaimer, 121; use of phrase, 127
- Union of Soviet Socialist Republics, authors' rights, 294, law, 162, 176; 191
- United Kingdom, computer, 152; inventory guide, 340
- United Nations, computer technology, 135
- United States, deposit system, 439; developments, survey, 272, 366, chronology, 449; law, extension of duration, 107, 108, 109, 373, 374, 375; patent system, 266; revision, 145, 146, 365; bill, 229, 230; German review, 208; study, 167
- Universal Copyright Convention, developing countries, 161; Hungary, 323; Mauritius, 324; revision, 8, 115, 244, 418; satellite communications, 246; texts 1952-1971 compared, 286
- University Film Association, conference, 447
- Video cassettes, 274, Cannes conference, 444; Italy (It.) 436; Japan, 415
- "Voicependence Club," tape recording, 57
- Washington Recommendations, Berne Convention (Ger.), 212, 213
- "Work", Scandinavian philosophy (Swedish), 269
- Work of Art, Ger. Fed. Rep., 429
- Work for hire, 65, 147, 251
- World Intellectual Property Organization (WIPO), 166, (Ger.), 358; computer software, Geneva meeting, 300; computer protection, 412; developing countries, industrial designs, 452; general report, 247; phonograms, 350; type faces, protection, 413
- "Yellow Submarine, The", 118
- Yugoslavia, law, 177; (Ger.), 215

CORRECTIONS.

In E. Fulton Brylawski's article, *Copyrightability of Motion Picture Sound Tracks*, 18 BULL. CR. Soc. 357, Item 301 (June 1971), at page 361, line 10 should read:

has been extended to phonograph records and should now be logically

In the same article, at page 365, footnotes 21 and 22 should read:

21. *Jewelers' Mercantile Agency Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N.Y. 241, 49 N.E. 872 (1898).
 22. A contrary view was expressed in *Brandon Films v. Arjay Enterprises*, 33 Misc.2d 794, 230 N.Y.S.2d 56 (1962), wherein the foreign distribution of a motion picture was held not to be a publication.
-