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



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19 No. 1

OCTOBER, 1971

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

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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

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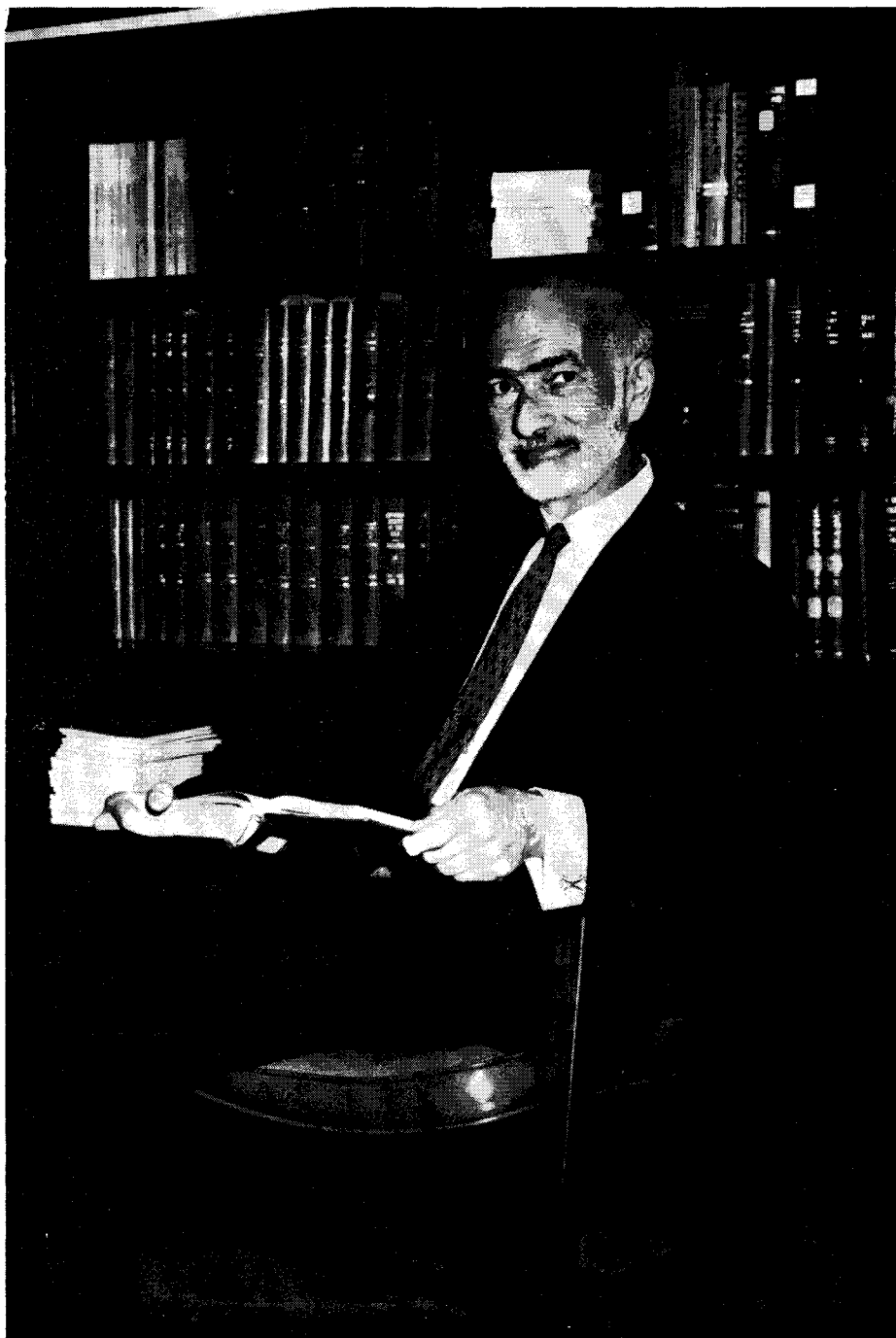
THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Leonard Zissu, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Paul Gitlin, *Treasurer*; Morton D. Goldberg, *Secretary*; Alan Hartnick, *Assistant Treasurer*; Bernard Korman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

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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: 19 BULL. CR. SOC. page no., Item (1971).



Photograph by The Library of Congress

ABRAHAM L. KAMINSTEIN
The Sixth United States Register of Copyrights

PART I.

ARTICLES

1. A TRIBUTE TO ABRAHAM L. KAMINSTEIN

From the Society:

The retirement of Abraham L. Kaminstein from his office as Register of Copyrights on August 31, 1971 is an event of commemoration. His administration marks a high, perhaps the highest point in the history of that office in respect of public service to the cause of copyright. In continuing the accomplishments of Arthur Fisher, his distinguished predecessor, Mr. Kaminstein has brought to the office of Register a high skill and dedication manifested by unparalleled constructive activity in this country and abroad. The prodigious undertakings of his administration for the proposed copyright revision legislation still under congressional consideration and for the proposed modifications of the Universal Copyright and Berne Conventions now also closer of realization are deserving of our highest accolades. His unstinted cooperation with this Society, the public and others interested in copyright has been unique. His sacrifice has been great. We wish him well and trust that his great service in copyright will be continued in his future endeavors.

LEONARD ZISSU
*President, The Copyright
Society of the U.S.A.*

From The Librarian of Congress:

When it devolved upon me, as Librarian of Congress, late in 1960, to appoint a new Register of Copyrights to succeed Arthur Fisher, it was my great good fortune to have, fully prepared and ready to take on the responsibilities and opportunities of that office, Abraham Kaminstein—Kami, as he is familiarly and affectionately known to all of us.

Kami came to the headship of the Copyright Office with ideal qualifications, both professionally and personally. Behind him were 23 years of responsible government service as a lawyer and administrator, with a well-earned record of outstanding ability and devoted performance.

For the last 13 of those 23 years he had been the Chief of the Examining Division in the Copyright Office and also, during the last year of his predecessor's regime, the Deputy Register of Copyrights. He had already attained preeminence in the world of copyright. And no less impressive than the high esteem in which he was held by his colleagues and his public clientele was their deep affection for Kami as a human being.

As the Register of Copyrights, Kami took up zestfully the challenging program for general revision of the copyright law begun by Arthur Fisher. He labored assiduously and skillfully in sorting out the many problems to be dealt with and exploring possible solutions; in eliciting the concerns and views of the various interest groups, and bringing them together to seek mutual understanding and reconciliation; and in formulating and presenting the proposed legislation. It is no doubt a major disappointment to him that, as he relinquishes his office after a decade, the monumental revision effort has not yet come to full fruition. Even so, he may take satisfaction in knowing that the work toward revision has already had great impact in giving direction to the thinking of copyright scholars for the present and for some time to come, and revision itself may still be accomplished in the wake of Kami's departure.

During Kami's regime the work of the Copyright Office grew steadily. The volume of copyright registrations climbed from about 247,000 in 1961 to almost 330,000 in this last year. The performance of the daily operations of the Copyright Office related to registrations is not the dramatic kind of activity that catches the public eye, but we who are concerned with these central functions of the Office take pride in the record of smooth and efficient performance of these public services under Kami's leadership.

On the international front, Kami's decade closes with a landmark achievement: the revision of the Universal Copyright Convention and the corresponding revision of the Berne Convention. The Protocol Regarding Developing Countries attached to the 1967 Stockholm revision of the Berne Convention evoked so much contention as to threaten the whole structure of copyright relations between developed and developing countries. The efforts made since then to resolve the disputes, in which Kami and the other representatives of the United States played a leading role, have now culminated in the revisions of the two conventions that promise to bring in a new era of fruitful harmony in international copyright relations.

But with all these achievements to his credit, I believe that Kami will be remembered even more for his human qualities, for his even dis-

position, his calm and sure demeanor, his patient and sympathetic consideration for all who worked with him or sought his help. As he leaves his office, he takes with him the abiding affection of all who knew him as the Register of Copyrights, as well as their profound respect and gratitude for a job well done.

L. QUINCY MUMFORD
Librarian of Congress

From Senator McClellan:

I am pleased to join The Copyright Society of the U. S. A. in recognizing the significant contribution of Abraham L. Kaminstein to the copyright system, culminating in his distinguished service as Register of Copyrights.

The first association of the Senate Subcommittee on Patents, Trademarks and Copyrights with Mr. Kaminstein occurred in 1957 when he authored the study on the "Divisibility of Copyrights" that was published by the Subcommittee as part of the series of research studies on copyright law revision. In 1965 he was the opening witness at the Subcommittee's hearings on the revision bill. During the intervening years it was under his leadership and guidance that many contested issues were resolved and a draft revision bill was prepared for introduction in the Congress.

Although Mr. Kaminstein leaves office before the Congress has completed action on the revision bill, his role has been a major one in preparing the foundation for the ultimate enactment of a modern copyright law in this country.

JOHN L. MCCLELLAN
Chairman,
Senate Subcommittee on Patents,
Trademarks and Copyrights

From Congressman Kastenmeier:

Readers of the BULLETIN are aware of the August 31st retirement of Abraham L. Kaminstein, the Register of Copyrights. The Congress, including the House Copyright Subcommittee of which I am Chairman, must also reluctantly take note of this unwelcome occasion.

Having guided the progress of the Copyright Office since his appointment as Register in 1960, Kami became the central figure in the preparation of copyright law revision legislation processed by my Subcommittee. The revision program had its inception in 1955 when Congress appropriated funds for study. The first phase ended in 1961 with the publication of the Register's comprehensive report. The

second phase involved extensive meetings, discussion and debate within the copyright community. Then followed my own encounter with Kami in the course of 22 days of public hearings and 51 executive sessions of the Subcommittee, all of which culminated in April 1967 in the enactment by the House of Representatives of a copyright law revision statute. Consummation of the revision has to date been frustrated by the inability of the Senate to act.

In the course of our association, the Register stood revealed as a profound scholar, amiable and witty but never superficial, with infinite patience, a dogged staying power, and a real capacity to recognize reality and make the best of it.

To say that we shall miss Kami understates the case. In recent years the copyright law revision project has come to be embodied in and personified by him so that it will seem odd to encounter the former without the latter. The copyright community knows that I do not disparage the arduous and excellent labors of his Deputy and successor, George D. Cary, or of the Copyright Office staff as a whole, when I say that Kami's character and spirit have pervaded and unified the work of revision and made possible the passage by the House of the 1967 bill. Indeed, our continuing activities in the furtherance of revision will be reinforced by the example of Kami's leadership.

ROBERT W. KASTENMEIER,
Chairman,
Copyright Subcommittee,
House Committee on the
Judiciary

From Assistant Secretary Braderman:

Abraham Kaminstein and I have had a close and regular association since 1965, when, as Deputy Assistant Secretary of State for Commercial Affairs and Business Activities, I became involved in the international policy aspects of the copyright field.

In addition to our mutual participation in a number of international copyright conferences, he has regularly provided me with valued counsel and advice on matters concerning U.S. foreign policy in the field of intellectual property. He has represented the U.S. with great distinction at a number of international copyright conferences and has always had the high respect and warm affection of those privileged to know him.

Following the Stockholm Conference in 1967, Mr. Kaminstein led the effort to bring order out of the chaos of multilateral copyright rela-

tions. This leadership has been largely responsible for the much needed revision of the Universal and Berne Copyright Conventions. This constructive revision will preserve the copyright proprietors' basic rights while at the same time facilitating the access of developing countries to much needed educational and cultural material. The orderly revision of these conventions is a tribute to Mr. Kaminstein who has contributed so much to making the U.S. a leader in the world copyright community.

Mr. Kaminstein's selfless and untiring efforts to seek a reform of the U.S. copyright law and his great contributions to the development of international copyright have earned him the esteem and admiration of all of us who have had the pleasure of knowing him.

EUGENE M. BRADERMAN

*Deputy Assistant Secretary of State
for Commercial Affairs and Business
Activities*

From Director Ulmer of the Max-Planck-Institute, Munich:

The retirement of Abraham Kaminstein as Register of Copyrights gives copyright experts in foreign countries, who were closely associated with him in international copyright, a welcome opportunity to pay tribute to his many accomplishments and to him as an outstanding personality.

In the international sphere, Mr. Kaminstein participated first as head of the American delegation at the Diplomatic Conference at Rome, 1961, at which the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was concluded. Even at this, his first international meeting, his unusual grasp of the problems of international copyright was apparent. Mr. Kaminstein left no doubt on that occasion that it was questionable whether the United States could join a convention, which was based on the protection of three groups of rights whose status under copyright as so-called "neighboring rights" was based mainly on European concepts. Nevertheless, he made valuable and constructive proposals. For this reason, I observed in my report at the closing of the Conference, which was published in the German publication *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*: "A special word of recognition is due to the delegation of the United States, led by the new Register of Copyrights, Mr. Kaminstein, which, through its intelligent and tactful bearing, greatly enhanced the work of the Conference."

Numerous other international meetings in which Mr. Kaminstein participated followed. Especially important was the cooperation between the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Permanent Committee of the Berne Union. It was due to the initiative and efforts of the late Arthur Fisher, Mr. Kaminstein's predecessor, that both Committees regularly held joint meetings, to discuss topics of mutual interest to both groups. Mr. Kaminstein greatly contributed to the continuation of this important tradition for the benefit of these two great multilateral Conventions. At the Intellectual Property Conference in Stockholm (1967), it became apparent how regrettable it was that the United States, despite its interest and stake in the high level international copyright protection established by the Berne Convention, did not belong to that Union and that, therefore, Mr. Kaminstein at the Stockholm Conference on the revision of Berne was confined to the role of "observer." The negotiations regarding the "protocol" for the benefit of developing countries would, presumably, have taken a different course if an active participation of the USA would have been possible.

However, in overcoming the subsequent crisis of international copyright, which had been brought about by the protocol, the American delegation, under the leadership of Mr. Kaminstein, played a decisive role. It was upon its proposal that the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union decided to appoint a "joint study group" for the further study of questions of international copyright. The meeting of this study group in the fall of 1969 in Washington, at which Mr. Kaminstein was elected honorary president, and the so-called Washington Recommendation which was there adopted have paved the way for the Diplomatic Conferences, which took place in Paris in July of this year. There, solutions were proposed and adopted simultaneously revising both the UCC and the Berne Conventions. These solutions, we believe, take into consideration the legitimate demands of the developing countries, without imposing too far-reaching sacrifices on the part of authors and publishers in developed countries.

In the conference for the revision of the Universal Convention, Mr. Kaminstein was nominated *Rapporteur général*. The detailed report which he submitted, assisted by Barbara Ringer, the Assistant Register of Copyright, must be considered a masterpiece, which will be of great value and of permanent significance in the interpretation of the revised UCC.

In our close cooperation with Abraham Kaminstein, we not only benefitted from his vast experience and the wisdom of his advice. We

also learned to admire him as a fine and noble human being, and to appreciate his tact and high sense of duty in conducting all negotiations. Our heartiest wishes accompany him into his retirement; all of us hope to maintain our close ties with him and to benefit from his never-failing counsel for a long time to come.

[Professor Dr.] EUGEN ULMER
Director,
Max-Planck-Institut
für Ausländisches und Internationales
Patent-, Urheber und Wettbewerbsrecht,
Munich

*"Recollection of Kami" from the new and
Seventh Register, George D. Cary:*

Kami's contribution to the development of copyright is well known to all those who have followed his career in the Copyright Office. So it would be gilding the lily for me to dwell upon this facet of his career. Instead, I should like to speak of that aspect of the man that will linger the longest in my personal memory, namely, the great humanity which constantly revealed itself.

Kami and I came to the Copyright Office within a few months of each other and this long and close association is one of the great pleasures of my life. In those days, Kami's first endeavor was to make a reality of a reorganization of the operating structure of the Office which had just been put into effect by Sam Warner, the then Register. In such a type of situation, an outsider more often than not starts off with two strikes against him. But in his quiet and unobtrusive way, Kami soon won the admiration and respect of the staff. He was never one to fire off a new order in the midst of sound and fury. He quietly explained the new procedure involved to those who had the need to know, while at the same time making certain that the entire staff of the Division was kept informed of the changes.

In dealing with his staff he had an aura of gentleness, which, combined with his enormous sense of fairness, served to keep the organization on an even keel. He also possessed a rare gift which made working with him such a pleasure, namely a quiet subtle sense of humor. At the height of the many tedious sessions necessary in the resolution of conflicting views on controversial sections of the revision bill, the mounting tension of the participants was often quelled by one of Kami's brief notes of humor. For example, in one session, two

participants representing conflicting points of view, although procedurally addressing the chair, were in fact urging their views upon each other. Kami, who was always aware of the fleeting nature of time, put an end to the protracted discussion by quipping: "Gentlemen, I suggest that you two exchange briefs after the meeting," which dispelled the time consuming arguments with a loud burst of laughter.

Kami would have delighted Diogenes. Scrupulously honest himself, he expected the employees of the Office to be like Caesar's wife. He was at all times aware that a public servant could not afford to take sides with private interests, but must constantly have uppermost in his mind the public interest. This frequently revealed itself in another way during the Christmas holiday season, when grateful patrons of the Office frequently sent tokens of their appreciation in the form of flowers, boxes of candy or fruit and the like. The perishable items were usually distributed to local charitable organizations or hospitals. Other gifts were returned with thanks, but on one occasion Kami was puzzled. This concerned receipt of a box containing numerous packages of chewing gum. The circumstances under which it was received made returning it a rather delicate matter, so the problem was finally resolved by passing out the gum to the staff, with each receiving a single stick.

Sometimes Kami's sense of gentleness could be misleading, and, especially where a matter of principle was involved, outsiders found he could be rather stubborn. On one occasion I recall that a distinguished attorney invited Kami and me to a luncheon meeting. The individual concerned had no matter pending with the Office and no business was discussed. It was one of those occasions where he happened to be in the city on other business, and having a great personal regard for Kami, wanted to spend a few social moments in meal time discussion. At the end of the luncheon, Kami, as was his custom, pulled some bills from his wallet and passed them over to the host as his share of the total bill. The attorney remonstrated and facetiously attempted to convince Kami that certainly he would not be compromised by a mere lunch. When Kami persisted, the gentleman finally told him that if he insisted on leaving the money on the table, it would wind up as a tip to the waiter. I feel certain that the waiter must have been amazed at the size of the tip on the table when we had left.

Kami also possesses the almost enigmatic quality of being able to view problems with a sense of reality that is not often excelled. At the beginning of the copyright revision program, when one frequently heard glowing prophecies of early enactment, he was quick to see that a project with such vast implications would be as slow-moving as a glacier, and that forward progress would be made only after much long and

arduous work. Time, of course, has proven him so right. It is unfortunate to learn that he seeks retirement before the revision bill becomes law. I know how long and tirelessly he has worked to formulate the bill and to seek to navigate it through the many rocks and shoals before finally reaching the harbor of enactment. It is a case of so near and yet so far, but whatever its fate, I believe the many persons involved in the many years of work can join me in a hearty "Well done" to him for the years of toil which he has devoted to the project.

However, as he departs from us officially, we can all share the satisfaction that must be his in the recent successful efforts to amend the Universal Copyright Convention. He was among the first to recognize the great danger to world copyright when the Stockholm Protocol was signed some years ago and it was his clarion call and his efforts to find a solution that were largely responsible for the present optimism that now exists in this area of world copyright. This achievement alone is monumental enough for the ordinary man to take into retirement with great satisfaction. But if I know Kami, he will refuse any special credit for the result, preferring to suggest that it was the outcome of the reasonable activities of many persons, both in the U.S. and abroad. That is typical of him and in itself speaks volumes for the man we honor here.

GEORGE D. CARY
Register of Copyrights.

The GEMA Medal:

In a ceremony at the German Embassy in Washington, D.C., on Wednesday, May 5, 1971, Abraham L. Kaminstein received the Richard Strauss Medal, awarded by GEMA (the German Society for Performing and Mechanical Reproduction Rights in Music). Established in 1953 to commemorate the founding of the first German Society of Authors, the Strauss Medal is presented to individuals who have distinguished themselves through exceptionally meritorious services in the field of copyright. Mr. Kaminstein was the first of five Americans to be so honored this year.¹

Minister Hans Heinrich Noebel of the German Embassy, in presenting the medal, referred to Mr. Kaminstein's selfless and untiring efforts to seek both a reform of copyright protection in the United States and his great contributions to the development of international copyright. Dr. Heinz Urban, representing GEMA, spoke of the history of the

1. Other members of the U.S. Copyright Bar who were medallists were Professor Walter J. Derenberg, Herman Finkelstein, Sydney M. Kaye, and Harold Orenstein.

medal and emphasized the appropriateness of its being awarded to an American who has been instrumental in making the United States a leader in the world copyright community

Mr. Kaminstein received his B.S.S. degree from the College of the City of New York and the LL.B. and LL.M. degrees from Harvard Law School, where he was a Research Fellow. He began his Government career in 1937, joined the Copyright Office in 1947 and succeeded the late Arthur Fisher as Register of Copyrights on December 24, 1960.

A Kaminstein Bibliography:

The Society is indebted to Benjamin W. Rudd, Librarian and Attorney Advisor of the United States Copyright Office, for the following compilation.

A. L. KAMINSTEIN, REGISTER OF COPYRIGHTS FOR THE
YEARS 1960 TO 1971

A Selected List of Articles, Addresses and Reports,
compiled and annotated by Benjamin W. Rudd

Address before the Copyright Luncheon Circle, Overseas Press Club, New York City, New York, on Friday, November 16, 1962. [Washington ? 1962] 4 p.

An address about the status of the general revision program and about the future plans of the Copyright Office in regard to the program.

Annual report[s] of the Register of Copyrights [64th-74th] for the fiscal year[s] ending June 30, 1961-[June 30, 1971] Washington, Library of Congress, 1961-[71] 11 v.

These reports, which are reprinted from the Annual reports of the Librarian of Congress, in addition to an account of Copyright Office business, contain surveys of administrative, legislative and judicial developments in the field of copyright for the respective fiscal years.

Closing session of the hearings in the House of Representatives on the copyright revision bill. Copyright Society of the U.S.A. Bulletin, v. 13, no. 2, Dec. 1965: 97-113.

Statement made to the Subcommittee on Patents, Trademarks, and Copyrights of the House Judiciary Committee on H.R. 4347, September 2, 1965.

Closing session of the hearings in the House of Representatives on the Copyright Revision Bill—statement of the Register of Copyrights to

Subcommittee No. 3, House Committee on the Judiciary on H.R. 4347, September 2, 1965. Bulletin of the Copyright Society of the U.S.A., v. 13, no. 2, Dec. 1965: 97-122.

The statement also appears in *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Bills, for General Revision of the Copyright Law . . . Before Subcommittee No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., ser. no. 8, at 1857-73 (1966).*

Copyright and registration of maps. Surveying and Mapping, v. 13, no. 2, Apr.-June 1953: 182-184.

A brief exposition of the steps necessary to secure copyright protection for maps.

©: key to universal copyright protection (Article III: Formalities). In Kupferman, Theodore R. and Mathew Foner, editors. Universal Copyright Convention analyzed. New York, Federal Legal Publications, 1955.

An analysis of the provision on formalities of the Universal Copyright Convention. The Register was adviser to the United States Delegation at the Paris meeting of the Committee of Experts in 1951, at which the Preliminary Draft of the Convention was prepared.

Copyright formalities — Article III [Universal Copyright Convention]. Bulletin of the Copyright Society of the U.S.A., v. 2, no. 4, Feb. 1955: 89-92.

An abridged version of the article entitled "©: key to universal copyright protection," which appeared in the Kupferman & Foner compilation "Universal Copyright Convention analyzed" (New York, 1955).

Copyright in photographs. Special Libraries, v. 48, no. 9, Nov. 1957: 422-426.

An historical sketch of the development of copyright protection for photographs in the United States, how to secure such protection, and a brief mention of the fair use problem this protection raises for libraries.

Copyright law revision. Bulletin of the Copyright Society of the U.S.A., v. 9, no. 1, Oct. 1961: 9-10.

Opening remarks at the Copyright Symposium on General Revision of the Law, American Bar Association, St. Louis, Missouri, August 5, 1961.

Copyright Office developments. American Bar Association. Section of Patent, Trademark and Copyright Law. Summary of proceedings, New York, N.Y., August 8-12, 1964. (Copyright Symposium, Appendix A): 69-73. Reprinted in 12 BULL. CR. Soc. 3, Item 1 (1964).

The crisis in international copyright. Paper delivered on January 16 at a meeting of the Association of the Bar of the City of New York. Publishers' Weekly, v. 193, no. 6, Feb. 5, 1968: 35-37.

A critical evaluation of the Stockholm Protocol Regarding Developing Countries and a proposal for "constructive alternatives" to the Protocol.

The current status of U.S. copyright law revision: an experiment in legislative technique. Bulletin of the Copyright Society of the U.S.A., v. 13, no. 6, Aug. 1966: 371-377.

Address at the American Bar Association Copyright Division Luncheon in Montreal, Canada, on August 9, 1966.

Divisibility of copyrights. With supplements by Lorna G. Margolis and Arpad Bogisch. June 1957. Committee Print. Copyright Law Revision; studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, Second session, pursuant to S. Res. 240. Study No. 11, at 1-81.

One of a series of studies prepared for the Copyright Office under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code), with invitations to interested persons to submit statements of their views. The study, which was reprinted in the Arthur Fisher Memorial edition of *Studies on Copyright*, v. 1, at 623-87, (1963), outlines the origin and application of the theory of indivisibility, the legislative effort to make copyright divisible, the theories of divisibility, and the efforts of the courts to resolve the issue.

The general revision program. Bulletin of the Copyright Society of the U.S.A., v. 10, no. 2, Dec. 1962: 81-83.

Address before the Copyright Luncheon Circle at the Overseas Club, New York City, on November 16, 1962, on the status of the program for revision of the copyright law.

Global copyright: recent international copyright conferences in Africa, Europe, and Asia. *Bulletin of the Copyright Society of the U.S.A.*, v. 11, no. 4, April 1964: 225-233.

An article on the African Study Meeting on Copyright, Brazzaville Congo, August 5-10, 1963; a Meeting of a Committee of Experts on the Stockholm Conference of Revision of the Berne Union in Geneva, Switzerland, in November 1963; and the Joint Meeting of the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union in New Delhi, in December 1963.

Mr. Kaminstein represented the United States as an Observer at Brazzaville and Geneva, and as Representative at New Delhi.

International copyright and the Stockholm Conference. *APLA Bulletin*, Oct.-Nov., 1967: 493-499.

An address delivered at a luncheon session, on October 12, 1967, of the Annual Meeting of the American Patent Law Association. The Register painted "a broad picture of how the Stockholm Conference seems likely to affect the future of international copyright law," with special emphasis on the Protocol Regarding Developing Countries.

Introduction: Viewpoints on general revision of the copyright law. American Bar Association. Section of Patent, Trademark and Copyright Law. Summary of proceedings, Chicago, Illinois, August 9-15, 1963 (Copyright Symposium, Appendix A): 65-66.

Reprinted in 11 *BULL. CR. Soc.* 3, Item 3 (1963).

The McClellan-Celler Bill for general revision of the United States Copyright Law. *New York Law Forum*, v. 10, no. 2, June-July 1964: 147-154. "Symposium on Copyright, part 2."

An analytical summary of S. 3008, 88th Cong., 2d Sess. (1964), which was also introduced in the House of Representatives as H.R. 11947.

Maps, charts and copyright. *Special Libraries*, v. 51, no. 5, May-June 1960: 241-243.

A brief presentation of the historical background of copyright protection of maps in the United States, the requirements of the existing law for such protection, and some of the problems of the librarian in dealing with copyrighted maps.

Programma della revisione generale della legislazione sul copyright dal 1961. *Il Diritto di Autore*, v. 36, no. 3, July-Sept. 1965: 394-404.

An Italian translation of the Preface from the Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, which appeared as Part 6 in the "Copyright Law Revision" series.

Register of Copyrights Kaminstein explains vital provisions. *Bulletin of the American Guild of Authors and Composers*, v. 1, no. 1, Dec. 1963: 1, 3.

An explanation of some of the recommendations of the *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, published in July 1961 as a House Committee Print.

Remarks at meeting held under the auspices of the Senate Subcommittee on Patents, Trademarks, and Copyrights, April 18, 1968. [Washington, 1968] 10 p.

A summary of the position of the Copyright Office with respect to proposals for a temporary copyright moratorium as to new technological uses and, also with respect to the whole program for general revision of the copyright law. A "barebones" or "skeleton" approach is urged as "the only hope for general revision within the next twenty years or more."

Report of the Register of Copyrights on the general revision of the U.S. Copyright Law. July 1961. 87th Cong., 1st Sess., House Committee Print. Washington, U.S. Govt. Print. Off., 1961. 160 p. (Copyright Law Revision, [pt. 1]).

The report, which is the culmination of a program of studies by the Copyright Office preparatory to a general revision of the copyright law, contains the tentative recommendations of the Copyright Office for revision of the law. It was issued for the purpose of inviting all interested persons to submit comments and suggestions to the House Judiciary Committee.

Statement by the Register for the United States Delegation at Geneva. *Bulletin of the Copyright Society of the U.S.A.*, v. 15, no. 3, Feb. 1968: 157-161.

An address, made on behalf of the U.S. Delegation to the Joint Meeting of the Permanent Committee of the Berne Union and the Intergov-

ernmental Copyright Committee at Geneva in December 1967. The statement, which followed immediately after the Indian Delegation had proposed the setting up of a working group to study revisions of the U.C.C., includes among other points, a statement that the Stockholm Protocol made adherence by the United States to the Berne Convention impossible in the foreseeable future.

Statement of the United States Delegation on the Berne Convention. (Intellectual Property Conference of Stockholm, 1967. Document No. S/285, July 8, 1967.) 4 p.

Reprinted in 14 BULL. CR. SOC. 435, Item 346 (1967).

The statement concludes with the hope "that, while demonstrating the flexibility and vigor necessary to accommodate very different situations in Member Countries, the Berne Convention also continues to display the strength necessary to preserve the purpose of copyright itself."

Supplementary report of the Register of Copyrights on the general revision of the U.S. Copyright Law: 1965 revision bill. May 1965. 89th Cong., 1st Sess., House Committee Print. Washington, U.S. Govt. Print. Off., 1965. 338 p. (Copyright Law Revision, pt. 6).

A detailed explanation of H.R. 4347 and the companion bill, S. 1006, 89th Cong. Included as an appendix is a comparative table consisting of a section-by-section reprint of the present law (the 1909 Act, as amended), the 1965 and 1964 bills, and the preliminary draft of 1963.

United States Copyright Law revision and international copyright. [With French summary.] NIR, no. 2, 1967: 172-177.

An historical survey of United States Copyright Law revision in which a plea is made for international cooperation in seeking a solution to copyright problems created by new technology.

The Universal Copyright Convention. Journal of the Federal Communications Bar Association, v. 13, no. 2, 1953: 62-66.

A brief comparison of the Universal Copyright Convention with the Berne Convention in which is discussed the effect that ratification of the U.C.C. will have on the United States and on the production of books, music, motion pictures, and the like.

2. TV CASSETTES — A NEW FRONTIER FOR PIONEERS AND PIRATES

By GERALD MEYER*

TV cassettes, hailed as being equal in importance to such earlier phases of the communications revolution as television, CATV, and long-playing records, promise — or threaten depending on where you stand — to replace such established technologies as television stations, movie theatres and cable television. These cassettes are also called video cassettes, TV cartridges, disc television, video discs, holotape cartridges and have many other names which identify diverse technologies used by the various manufacturers of equipment. They all have this in common — they are compact devices which store visual and audio material for playback through a television receiver. When the device is connected to a television set by means of an appropriate adapter, the material becomes visible and audible on the set. Since, as we shall seek to demonstrate, the precise form of the technology is irrelevant from the viewpoint of copyright law, we shall use in this article the term "TV cassette" as being interchangeable with all of the aforementioned names and technologies.¹

This new device, while only the latest step in the "technological revolution" encounters substantially more scepticism than its predecessors. Indeed, when we first entered the era of science and technology, it seemed to us like entering the gates of a better world. Now, however, as we have reached the present advanced stage of this era, we have come to realize that, in many instances, the amazing new scientific discoveries and technological developments carry with them unforeseen pitfalls and dangers. Vested interests find their economic positions threatened by new technologies. New technologies in turn, seek to push ahead

* Member of the New York Bar and a partner of the law firm of Phillips, Nizer, Benjamin, Krim & Ballon. (This article is an extended version of a paper delivered by Mr. Meyer at the First International Symposium of TV Cassettes on October 13, 1970, in Los Angeles, California.)

1. There are presently at least 20 different technologies in various stages of development, most of which are incompatible with each other so that a cassette suitable to be connected to one type of adapter will not fit any other. For a good description of the technologies used by manufacturers see the article by R. K. Field: *In the Sixties it was TV; in the Seventies, Video Cassette*—New York Times, July 5, 1970, Sec. 3, p. 1. See also *Video Cassette Sourcebook* published by Television Digest, Washington, D.C., 1971.

in disregard of legitimate rights which must be preserved as the foundation for serving society by new as well as by old devices.

Thus, producers claim adequate economic rewards for creating the "software" which the new "hardware" carries to the consumers. The consumers in turn, seek access to both hardware and software at minimal cost to themselves and accuse the producers of monopolistic and exclusionary tactics.

The principal contribution which the copyright lawyer can make to a solution of these controversies is to issue the following words of caution:

Our society is prone to the technocratic illusion that technological efficiency in and by itself results in progress of our civilization. This myopic view, however, disregards the insights gained during recent years in such fields as ecology and environmental improvements where experience has shown that an expansion of technical facilities alone will not necessarily enhance the quality of life and may even destroy the very goals which technology is supposed to serve.

This is especially true in the field of communications where the technical device is merely the carrier, a vessel which may or may not contain the substance which makes it worthwhile being carried. Copyright concerns itself with that substance.

It is, of course, easier to discuss broad principles of philosophy than to apply the 1909 Copyright Act to TV cassettes, a statute adopted at a time when most of our modern communication devices were not even dreamed of.

Where TV cassettes are concerned we have no court decisions to guide us, and there is even a paucity of law review articles written on the subject.² We will have to travel here over a territory which is largely uncharted. Yet it is incumbent upon a practicing lawyer, if he is to fulfill his function, to guide his clients even over uncharted roads, and to

2. See the pioneering study of Harris and Mirisch: *Video Cassettes and the Law*, Beverly Hills Bar J., Summer 1970, p. 18; see also the papers by Walter J. Derenberg and Barbara A. Ringer on *The Legal Aspects of Video, Cassette, Cartridge and Disc, Copyright and Proprietary Rights*, delivered at the New Medium Conference, New York University, May 13, 1971 (recorded and available for purchase as audio cassettes); see also studies in the closely related field of video tapes, in particular: Fritch, *Some Copyright Implications of Video Tapes*, ASCAP Copyright Law Symposium (1963), p. 87; Lloyd, *Disk Television*, 34 U. of Chi. L. Rev. 686 (1967); Meagher, *Copyright Problems Presented by a New Art*, 30 N.Y. U. L. Rev. 1081 (1955), Taylor, *Off-The-Air Video Taping for Educational Purposes*, YAG L. Rev., Spring 1970, p. 90; Needham, *Tape Recording, Photocopying and Fair Use*, ASCAP Copyright Law Symposium (1958), p. 75.

advise them how to do what is right, how to avoid legal traps, and how to protect the fruits of their creations. In doing so, we shall have to follow the time-honored road of analogy with precedents in related fields and shall examine the general principles of copyright law expounded by the courts in interpreting the old statute and in applying it to novel situations.

I. General Principles of Copyright Law Governing its Application to Novel Technological Devices.

The courts have held that a copyright holder is not given control over all possible uses of his copyrighted work.³ Instead, the Copyright Act enumerates several specific "rights" that are made "exclusive" to the holder of the copyright.⁴ Nor does the Copyright Act contain a definition of "infringement" as such. Rather, infringement is delineated in a negative fashion by an enumeration of rights exclusive to the copyright holder. It is only if a person puts a copyrighted work to a use within the scope of one of these enumerated "exclusive rights" without authorization from the copyright holder that a person infringes a copyright. Contrariwise, if he puts the work to a use not enumerated in § 1, he does not infringe.

But how are we to delineate the scope of the copyright holder's exclusive right, where a person uses a modern technological device? Obviously, TV cassettes are not uses which we may find in the nomenclature of the 1909 Copyright Act. Nor is the act of communicating a copyrighted work by means of TV cassettes a "use" in the conventional sense or a method of communication envisaged by Congress when it enacted the law in 1909.

Yet, the principle as summarized by Judge Mack in the landmark case of *Jerome H. Remick & Co. v. American Automobile Accessories Co.* has never been questioned that "the statute may be applied to new situations not anticipated by Congress, if fairly construed, such situations come within its intent and meaning" and that while "statutes should not be stretched to apply to new situations not fairly within

3. See, e.g., *Fawcett Publications v. Elliott Publishing Co.*, 46 F. Supp. 717; *Hayden v. Chalfont Press, Inc.*, 281 F. 2d 543, 547, 548.

"The fundamental [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged. . . ." Kaplan, *AN UNHURRIED VIEW OF COPYRIGHT* 57 (1967).

4. *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions.”⁵

Obviously, it is easier to posit broad principles than to apply them to specific cases. Thus, in seeking to delineate the scope of the Copyright Act with respect to new situations, the courts over the last 100 years have followed a crazy quilt pattern and have covered a wide range from a most liberal application of the copyright statutes to such new methods of infringement as photographs,⁶ motion pictures,⁷ radio⁸ and television broadcasting,⁹ reception and retransmission of broadcasts into hotels,¹⁰ and wire transmission of copyrighted material,¹¹ to an almost incomprehensibly narrow construction of the statute when they dealt with piano rolls,¹² phonographic records¹³ and CATV.¹⁴

5. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556 (1925).
6. *Edison v. Lubin*, 122 Fed. 240, 242 (3d Cir. 1903).
7. *Patterson v. Century Productions, Inc.*, 93 F. 2d 489 (2d Cir. 1937), cert. denied 303 U.S. 655 (1938); *Tiffany Productions, Inc. v. Dewing*, 50 F. 2d 911 (D. Md. 1931); *Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); 3 F. Supp. 66 (D. Mass. 1933) (on remand).
8. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556 (1925); *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 141 F. 2d 852 (2d Cir. 1944), cert. denied 323 U.S. 766 (1944); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D. N.J. 1923); *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829 (S.D.N.Y. 1926); *Law v. National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943); *Select Theatres Corp. v. The Ronzoni Macaroni Co.*, 59 U.S.P.O. 288 (S.D.N.Y. 1943).
9. *Robertson v. Batten, Barton, Durstine & Osborne, Inc.*, 146 F. Supp. 795 (S.D. Cal. 1956); *Davis v. DuPont de Nemours & Company*, 240 F. Supp. 612 (S.D.N.Y. 1965).
10. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Society of European S.A.A.C. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937).
11. *Harms, Inc. v. Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), aff'd sub. nom. *Leo Feist, Inc. v. Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).
12. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).
13. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 661 (2d Cir. 1955); *Fritch, op. cit.*, fn. 2, at 91.
14. *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968), holding that the retransmission of local and marginally local broadcast signals by cable systems which did not use microwaves or originate programs, was not a copyright infringement. The question of whether CATV importation of distant signals constitutes a copyright infringement is now *sub judice* in *Columbia Broadcasting System, Inc. v. Teleprompter Corp.* (S.D.N.Y. Dkt. No. 64-3814).

Yet even in *Fortnightly* the Supreme Court, while refusing to find infringement in the unauthorized retransmission by CATV of local and marginally local television broadcast, gave at least lip service to the principle that a court's "inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute," the Court noted, "that was drafted long before the electronic phenomena with which we deal here," and the Court agreed that we "must read the statutory language of 60 years ago in the light of drastic technological change."¹⁵

What then are the guidelines which may be distilled from the courts' decisions as to the criteria which they will apply when confronted with a novel technological device for the exploitation of a copyrighted work such as TV cassettes?

We submit that there are three basic tests which the courts have applied: 1. *Technological* similarity between the new device and those known at the time the Copyright Act was adopted.¹⁶ 2. *Quantitative* evaluation of the impact of the new device on the creation and use of copyrighted works compared to conventional methods of exploitation.¹⁷ 3. *Functional* analysis of the new mechanism in order to determine whether under present conditions it plays a part within the framework of social and economic realities akin to those envisaged by the statute.¹⁸

In view of the firm position taken by the Supreme Court in favor of the functional interpretation of statutes it is incumbent upon us to apply this functional test to TV cassettes and to explore the role which they will play within the framework of the industrial and economic reality of the television field. Doing this, we cannot fail to notice the close resemblance of TV cassettes to motion pictures insofar as their use as program material for television in the broadest sense is concerned.

15. *Ibid.* at p. 395.

16. *Wood v. Abbott*, 30 Fed. Cas. 424 (No. 17983; S.D.N.Y. 1866); *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903); *Fritch, op. cit.* fn. 2 at p. 92.

17. *Fortnightly Corporation v. United Artists Television, Inc.*, 377 F. 2d 872 (1967), reversed 392 U.S. 390 (1968).

18. *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968). The Supreme Court in *Fortnightly* has firmly embraced the third of the abovementioned tests, i.e., the "functional" one saying that "resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception." Such functional interpretation of the statute is, of course, not a recent invention. Indeed, as early as 1911 Justice Holmes held in *Kalem Co. v. Harper Bros.*, 225 U.S. 55 that a film was a "dramatization" of a novel within 'the meaning of the copyright law':

"The essence of the matter . . . is not the mechanism employed, but that we see the event or story lived."

It seems to us that the functional features which motion picture films and TV cassettes have in common, is (a) that both permit the recording of images and sounds fixed in a tangible medium, (b) that multiple copies may be produced from such a recording, and (c) that each of these copies, when used with appropriate equipment, will convey the illusion of pictures in motion with accompanying sound. Similarly, if we compare both technologies from the broader viewpoint of mass communications, we find that motion picture films and TV cassettes fulfill an identical program communication function.

Such function is fulfilled in the home when we insert the film into a movie projector and project the movie on a screen, and, similarly, when we connect the cassette to an adapter for viewing on a television set. The same similarity of function can be observed when either of the two devices is used for the transmission of a program from a central point to a multiplicity of viewers such as from a radio station to its audience or from a cable system to its subscribers. In both situations either a film or a cassette may be used in the studio to convert a program into electronic impulses for transmission through the airwaves or by cable, to the home television sets where it will become visible and audible.

For all of these purposes, motion picture films and TV cassettes are interchangeable as to their program communication function. It is due to that complete functional identity that TV cassettes should be, and, we feel, will be, treated under copyright law in the same manner as motion pictures.

The irrelevancy under copyright law, of the physical form in which the motion picture is embodied is also stressed in the Report of the Senate Committee on the Judiciary of April 20, 1970 (Report No. 92-72, 92nd Cong. 1st Sess.), to accompany S. 646, a bill for the creation of limited copyright in sound recordings against unauthorized duplication. In said report the Senate Committee explains that new legislation is not required to protect sound tracks which are part of a motion picture because motion pictures are already protected under present law against unauthorized reproductions and this is so, the report explains further, whatever the physical form of the reproduction:

"Under the existing title 17, 'motion pictures' represent a broad genus whose fundamental characteristic is a series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images. Under this concept *the physical form in which the motion picture is fixed — film, tape, discs, and so forth — is irrelevant*, and the same is true

whether the images reproduced in the physical object can be made out with the naked eye or require optical, electronic, or other special equipment to be perceived." (emphasis supplied)

II. The Distinction Between the Property in the TV Cassette as a Material Object and the Intangible Right to Its Intellectual Contents.

In order to understand the legal status of TV cassettes under copyright law it is also important to keep in mind that copyright as an intangible property right is distinct from the property in the material object copyrighted (Copyright Act § 27). The distinction here is between the "copyright", i.e., the aggregate of the author's exclusive incorporeal rights¹⁹ in respect to his copyrighted creation such as a novel, a drama or a motion picture photoplay, and the physical chattels, such as books in which the novel or drama is printed, or the film print on which the motion picture is given tangible form. The subject matter of the author's exclusive rights under copyright law is not the material object, not a particular book or cassette but his original intellectual conception which is embodied therein.

Consequently, if a cassette is made of a copyrighted motion picture with the permission of the copyright owner, it neither adds nor detracts from the pre-existing copyright in the motion picture. In such case it merely transfers the series of related images from the frames of the film into magnetic impulses on a tape or video disc or other device so that they may be played back on a machine to impart to the viewer the same impression of motion and sound which a positive print of the film could have imparted by means of a projector. In such cases there is no new act of artistic creation involved but simply a change of physical embodiment.

Suppose, however, that the cassette does not record a pre-existing copyrighted work but that it records a new play or a show not theretofore published and copyrighted. In such case, the cassette itself is a new work raising the question as to whether it is copyrightable, and if so, what the requirements for securing a copyright therein are.

III. Copyrightability of TV Cassettes.

Section 4 of the Copyright Act provides that the works for which copyright may be secured "shall include all the writings of an author."

19. *Holmes v. Hurst*, 174 U.S. 82 (1899); *Remick Music Corp. v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523 (D. Neb. 1944); *aff'd* 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809 (1947).

It follows that since motion pictures have been recognized as "writings" protectible under the constitutional power of Congress to legislate in this field²⁰ and are specifically listed in §5 of the Copyright Act²¹ as protectible works, TV cassettes, if we consider them to be similar to motion pictures as we do, should be similarly considered as "writings".²²

Section 5 of the Act deals with the classification of works for copyright registration and provides that the application for copyright registration shall specify to which of a list of stated classes the work is claimed to belong. Said classes, since the Townsend Amendment of 1912 (Act of August 24, 1912; 37 Stat. 488 c. 356) include motion picture photoplays (Class L) and motion pictures other than photoplays (Class M), but, of course, do not mention TV cassettes or video tapes or any other category into which they may be filled as a matter of semantic categorization. Yet the second paragraph of § 5 which follows the list of classifications states expressly that the "above specifications shall not be held to limit the subject matter of copyright as defined in § 4" In other words, the list of § 5 is illustrative, rather than limitative. Accordingly, its failure to mention TV cassettes does not disqualify them from being copyrighted as long as they qualify as "writings" and as long as they may be fitted reasonably into one of the classes specified in the statute or, it would seem, even should they defy such categorization, under the catch all phrase of the second paragraph of § 5.²³

Indeed, since 1961 the Register of Copyrights has accepted copyright registrations for magnetic video tapes.²⁴ The tape in question consisted

20. See U.S. Const., Art. I, §8, cl. 8.

21. Act of Aug. 24, 1912, 37 Stat. 488, c. 356 (Townsend Amendment); see NIMMER ON COPYRIGHT, §12.21; *Metro-Goldwyn-Mayer D. Co. v. Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932), 3 F. Supp. 66 (D. Mass. 1933) (on remand); *Tiffany Productions v. Dewing*, 50 F. 2d 911 (D. Md. 1931); Meagher, *op. cit.*, fn. 2, p. 1090.

22. Cf. Fritch, *op. cit.*, fn. 2, pp. 92-96; Lloyd, *op. cit.*, fn. 2, p. 692.

23. Meagher, *op. cit.*, fn. 2, at p. 1090. See, however, Ringer and Gitlin, COPYRIGHTS (1965), pp. 8, 9, who caution that "as a practical matter, a work must be fitted into one of the thirteen categories of copyrightable works specified in the statute in order to be protected under it."

24. Colby: *An Historic "First"—Copyright Office Accepts Magnetic Video Tape for Registration*, 8 BULL. CR. SOC. 205 (1961). The decision of the Copyright Office seems to be a sound one to us. Revision Report No. 10-11 indicates that this decision was based on the belief that video-tapes are merely a technological improvement of motion pictures. Cf. Fritch, *op. cit.*, fn. 2, p. 94. To such argument of technological similarity we would add the one that appears to us the decisive one, *i.e.*, that of functional similarity.

of a recording of a Gian Carlo Menotti opera. Interestingly enough, the registration was made under the motion picture classification,²⁵ and not as a dramatic-musical composition under Class D of § 5. It thus appears that the copyright in question was registered with respect to the work as taped and not to the underlying work, the opera which presumably had been previously published and continued to enjoy its own separate copyright as a dramatic-musical composition, or, if not previously published, its common law copyright.

We are not aware of any significant technical or *functional* difference between video tapes and cassettes. Since cassettes, tapes and motion pictures are simply different mechanical methods permitting the performance of pictures in motion with synchronized sound, no reason is apparent why the position of the Copyright Office should differ where TV cassettes are concerned.²⁶

IV. Copyright Notices on TV Cassettes.

TV cassette producers and their counsel will do well to remember that copyright protection under the Copyright Act is not secured by registration of the work with the Copyright Office but "by publication thereof with the notice of copyright as required" by the statute.²⁷ The Act provides that said notice "shall consist either of the word 'Copyright', the abbreviation 'Copr.', or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical or dramatic work, the notice shall include also the year in which the copyright was secured by publication."²⁸ While a TV cassette is,

25. Under the regulations of the Copyright Office (Sec. 202.15), a single application Form L-M is available for registration of work in classes L (Motion Picture Photoplays) and M (Motion Pictures other than Photoplays):

(a) *Photoplays (Class L)* This class includes published or unpublished motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, short subjects and animated cartoons having a plot.

(b) *Other than Photoplays (Class M)* This class includes published or unpublished non-dramatic films such as newsreels, travelogs, training or promotional films, nature studies, and filmed television programs having no plot.

26. Miss Barbara A. Ringer, Assistant Register of Copyrights, in her *aforecited* (fn. 2) paper delivered at the New Medium Conference at New York University on May 13, 1971, stated that "a cassette is not different from a tape or a disc. The mere fact that it is enclosed in a box does not make it different under copyright law."

27. Copyright Act, §10 (17 U.S.C. §10).

28. Copyright Act, §19 (17 U.S.C. §19).

strictly speaking, not a printed work, it would seem appropriate that just as in the case of motion pictures where it has been argued that they are "printed" by a photographic process,^{28a} the copyright notice should indicate the year of the work's publication and the name of the copyright proprietor.²⁹

Harris and Mirisch remind us³⁰ that if the cassette contains a tape or film which already has been produced and which is merely being transferred from a motion picture print for showing in cassette form it should carry the original copyright notice and will be protected under the former registration. By the same token, if the cassette constitutes the first publication of the work, an appropriate copyright notice bearing this date of first publication should be inserted.

Following the custom established for motion picture prints, the notice should appear at the beginning of the pictorial presentation following the title frames.³¹

Harris and Mirisch argue³² that the notice of copyright should be placed in such a manner and location as to give reasonable notice of the claim of copyright, and recommend for that purpose that the notice be placed on the TV cassette itself as the most conspicuous place for apprising the user of the copyright claimed. It is hard for any lawyer to quarrel with what might be superabundance of caution, which with little trouble and at small expense would give warning to even the most careless potential infringer. Yet, it may be observed that said precaution would go beyond any express requirement of the statute and that the metal drums in which motion picture film prints are usually packed and transported, do not carry a copyright notice since copyright holders in motion pictures rely on the notice appearing in the pictorial film sequence itself.

28a. NIMMER ON COPYRIGHT, §85.1.

29. Rubin, *Copyright Law Revision and Motion Pictures*, 3 Beverly Hills Bar Journal 6 (1969), contains a thorough review of the puzzling legal and practical problems raised by the copyright notice requirement of the statute when applied to motion pictures.

30. *Op. cit.*, fn. 2, p. 48.

31. Rubin, *op. cit.*, fn. 29, at p. 7 recommends that the notice be placed at the bottom of one of the frames constituting the so-called "title cards", which, he further notes, does not necessarily mean the card on which the title of the picture appears but which may be any of the cards on which the various credits are given to the personnel involved in the production of the picture.

32. *Op. cit.*, fn. 2, at p. 48.

V. Infringement of TV Cassettes,

(a) *Unauthorized Reproductions of TV Cassettes*

Suppose that all formalities have been duly complied with and that a copyright exists in the cassette, either because a new copyright has been secured where the cassette records a new and copyrightable creation of its producer or by virtue of a copyright in a pre-existing work which has been recorded on the cassette. What are the rights of the copyright owner against unauthorized uses thereof?

Thus, the program contents of cassettes may be reproduced, taped, and retaped on other cassettes or on video tape or even on film, and the reproductions so obtained may be sold or rented for home use or performed in theatres, clubs, and educational institutions. TV cassettes may also be broadcast by radio or television stations either to the public in general or to a group of subscribers by way of Pay-TV. They may be "cablecast" by CATV as part of a cable system's program originations and again this may be done for the benefit of all of the systems' subscribers or to a more limited group of homes who pay a special charge for each program or for a cable channel carrying special programs. In fact, the very characteristics of easy circulation and multiple uses which make cassettes such a revolutionary new technology, also multiply the opportunities for pirates to deprive copyright owners of the rewards for their creativity.

Under these circumstances, what protection does the copyright owner enjoy under the Copyright Act?

Among the exclusive rights which the Copyright Act of 1909 has specifically secured to the holder of copyright (17 U.S.C. § 1(d)) are those to "... perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever." With respect to *non-dramatic* literary works, the Act grants substantially the same rights except that the performance, to be an infringement, must not only be one in public, but also one *for profit*. (17 U.S.C. § 1(c).)

The broad language used by Congress as early as 1909 is significant in the light of earlier restrictive court adjudications which had interpreted the word "copy" used in prior statutes as being limited to a production or reproduction as a written or printed record in intelligible

notation.^{32a} In the *Apollo* case which was decided prior to the enactment of the Copyright Act, the Supreme Court held that perforated piano rolls were not intelligible to the human eye and were not "copies" within the meaning of the 1891 copyright statute.

Although never expressly overruled by subsequent court decisions, the *Apollo* case has been widely criticized,³³ frequently distinguished and limited to situations close to that case.³⁴ While the controversy regarding the soundness and continued precedential value of the *Apollo* case in interpreting Section 1(a) of the Copyright Act will, no doubt, fascinate scholars still for years to come, the recording of TV cassettes, in our opinion, falls plainly under subsections (c) and (d) of Section 1 of the Act which by the use of clear language have overruled the *Apollo* case.³⁵

Our opinion is supported by the legislative history of Section 1(d) where we find that the House Committee's report recommending the adoption of the Copyright Act of 1909 (Report No. 2222, 60th Cong., 2d Sess. 1909) in discussing that section mentions the making of a stenographic record of authorized theatre performances which would thereafter be employed to produce unauthorized stage or film performances. It seems to us that the stenographic transcript, a then common method of piracy, was selected by the Committee Report as an illustration of a notation not intelligible to the human eye which under the Act would become an infringement under the new Section 1(d). A TV cassette is technologically more advanced than a stenographic transcript but it fulfills in our day a comparable function.

In any event, even in 1909, the theatrical producer was only one of the copyright proprietors upon whom a hardship was imposed by the earlier copyright statute.³⁶ The legislature's technique in 1909 of

32a. See *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

33. *Metro-Goldwyn-Meyer D. Corp. v. Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932), 3 F. Supp. 66 (D. Mass. 1933) (on remand).

34. *Tiffany Productions v. Dewing*, 50 F.2d 911 (D. Md. 1931); *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556 (1925).

35. Fritch, *op. cit.*, fn. 2, p. 124; NIMMER, *op. cit.*, §109.4.

36. The House Committee's Report recommending the adoption of the Copyright Act (Report No. 2222, 60th Cong., 2d Sess. 1909), quoted from a message of President Theodore Roosevelt to Congress in December 1909:

"Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public. . . ."

defining the copyright owner's rights by a long list of synonyms and the sweeping language used by it, indicates the purpose of the legislative draftsmanship, namely, to overrule the *Apollo* case at least with respect to dramatic works and to encompass within the protection of the law any manner and any method of reproduction and performance, including those developed by modern technology.³⁷

One of the reasons why the *Apollo* case has continued to haunt the courts even after 1909 is that § 1(d) was made applicable to *dramatic* works only leaving open the question of whether the making of reproductions not intelligible to the human eye, of *non-dramatic* works, constituted an infringement.³⁸ The controversy as to whether *non-dramatic* works are protected against the making of records and transcriptions thereof and of unauthorized performances thereof was laid to rest, however, in 1952, when the Act was amended,³⁹ granting the copyright owner of a "literary non-dramatic" work the same rights previously granted to owners of dramatic works except that the public performance under 1 (c) must be one for profit.⁴⁰

Our interpretation of the statute is also consistent with the protection granted by the courts to motion pictures against their being infringed by the making of unauthorized prints and use of their story contents.⁴¹

37. Accord: Fritch, *op. cit.*, fn. 2, pp. 123, 124; *Universal Pictures Co. Inc. v. Harold Lloyd Corp.*, 162 F. 2d 354 (9th Cir. 1947); in *Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co.*, 59 F. 2d 70, 73 (1st Cir. 1932), the Court said:

"The words in subsection (d), any transcription or record thereof, reasonably include a motion picture photoplay depicting the drama or dramatic work. . . ."

38. *Corcoran v. Montgomery Ward & Co.*, 121 F. 2d 572 (9th Cir. 1941).

39. Act of July 17, 1952; 66 Stat. 752.

40. Fritch, *op. cit.*, fn. 2, at p. 129, expresses the opinion that while "the recording and performing rights of Section 1(d) clearly would prevent the unauthorized reproduction and exhibition of a copyrighted tape provided it was a dramatic production" . . . "[o]nly an uncomfortable distortion of language could label [non-dramatic productions] 'literary' works to fit the language of Sectio[n] 1(c)." Nimmer, §109.4, calls the question "debatable" but argues that "since lectures, sermons and addresses are all characterized as non-dramatic literary works under §1(c) it should follow that documentary films which are in a sense illustrated lectures or addresses should come within the same classification." See also *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 183, 215 (S.D.N.Y. 1966), *aff'd* 377 F. 2d 872 (2d Cir. 1967), *rev'd* on other grounds 392 U.S. 390 (1968).

41. *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F. 2d 354, 359 (9th Cir. 1947); *Cardinal Films, Inc. v. Republic Pictures Corp.*, 148 F. Supp.

In respect to tapes, the only case decided so far is *Walt Disney Productions v. Alaska Networks, Inc.*,^{41a} where the Court held that a cable system in Alaska which had taped copyrighted television shows off the air in Seattle, Washington, and had transmitted the taped shows to its subscribers in Alaska, had violated Section 1 (d) of the Copyright Act, both in that it had made tape "capable of being sold to any cable television system with the proper equipment" and in "the dissemination of the programs through defendant cable systems."⁴²

Based on the legislative history and broad language used by the statute and its construction by the courts in applying it to motion pictures and tapes, we conclude that the unauthorized reproduction of a copyrighted TV cassette such as by retaping it, constitutes an infringement under the Copyright Act.

Our opinion in this respect is reinforced by the already mentioned recent pronouncement of the Senate Judiciary Committee in its report No. 92-72 to accompany the bill S. 646. In said report, the Senate Judiciary Committee explains why it excluded "the sounds accompanying a motion picture" from the scope of its proposed legislation for copyright protection of sound recordings against unauthorized reproduction as follows:

156, 157 (S.D.N.Y. 1951); *Rohauer v. Friedman*, 306 F. 2d 933 (9th Cir. 1962); *Independent Film Distribution, Ltd. v. Chesapeake Industries, Inc.*, 250 F. 2d 951 (2d Cir. 1957), 953, 954.

41a. 310 F. Supp. 1073 (W.D. Wash. 1969).

42. NIMMER, *op. cit.*, §25.3 takes the position that magnetic tape "produces the effect of 'motion pictures' no less than does motion picture film and hence is equally entitled to such designation under Secs. 5(1) and (m)." However, he also expresses the thought that *Walt Disney Productions v. Alaska Television Network* is by implication contrary to this thesis in that it suggests that video tape constitutes a "record" not a copy; accordingly, Nimmer argues that "the denial of copyrightability to phonographic records may be equally applicable to video tape . . ." because they do not readily fit into any §5 classification. We do not read such implication into the *Walt Disney* decision since the reference of the judge in that case was not based on a finding that the defendant made a "copy" in violation of §1(a) or that a TV cassette is a technological device comparable to a phonographic "record", but rather that the "preparation of the video tapes of the copyrighted materials infringed upon the rights of the copyright owner under 17 U.S.C. §1(d). . . ." Whatever the law may be concerning audio tapes and phonographic records, we feel that the functional similarity between motion picture films, video tapes and TV cassettes overrides any semantic or technological similarities with devices other than motion pictures.

"The exclusion reflects the committee's opinion that soundtracks or audio tracks are an integral part of the 'motion pictures' already accorded protection under subsections (l) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an *infringement of copyright in the motion picture*. This is true whatever the physical form of the reproduction, whether or not the reproduction also includes visual images, and whether the motion picture copyright owner had licensed use of the soundtracks on records." (Emphasis supplied.)

(b) *Unauthorized Performances of TV Cassettes*

The exclusive right of making a performance⁴³ of a copyrighted work is separate from that of authorizing a transcription or record thereof.⁴⁴ In other words, the mere fact that the making of the TV cassette has been authorized by the copyright owner, does not mean that its public performance has been authorized. Thus, in *Chappel & Co. v. Middletown Farmers Market and Auction Co.*⁴⁵ it was held that the unauthorized *playing* of copyright compositions from an *authorized phonographic recording*, over defendant's loudspeaker system to its customers in a merchandise market constituted a copyright infringement. By application of the same reasoning, it follows that if a theatre without a license from the copyright owner should exhibit or if a television station should broadcast or if a cable system should originate⁴⁶ a copyrighted work contained in a TV cassette, they would be infringers.

The question of what is a *public* performance is well settled under the Copyright Act although not always easy in its practical application. Thus, broadcasting by radio and television has been held to be a public

43. There can be no doubt that the insertion of a cassette into equipment which makes the copyrighted work visible and audible to those who view it and listen to it, constitutes an act of "performance" within the meaning of the statute.

44. Cf. *Remick Music Corp. v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523, 534, 535, 536 (D. Neb. 1944), aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809 (1947).

45. 334 F. 2d 303 (3d Cir. 1964).

46. When a cable system originates a program, the copyright law controversy regarding the retransmission of copyrighted works which was before the Supreme Court in the *Fortnightly* case and which awaits adjudication in the *CBS* case, see *supra* fn. 14, is not involved. The cable industry has acquiesced in its liability for the origination of copyrighted programs.

performance although the receiving sets are located in private homes;⁴⁷ and the same was held in the case of a cable system originating programs by means of tapes.⁴⁸

Difficulty in drawing the line between public and private performances arises sometimes when the performance takes place in clubs or at social gatherings. In *Metro-Goldwyn-Mayer D. Corp. v. Wyatt and Maryland Yacht Club*,⁴⁹ the Court held that the exhibition of a motion picture at a social club for its members and their guests to which the "public" was not admitted, was not a public performance. On the other hand, in *Lerner v. Schechtman*,⁵⁰ the Court held a performance to be a public one where the establishment in question was more a commercial night club operation than a "club" within the common definition.⁵¹

The determination as to whether a public performance is one "for profit" has also been the subject matter of much case law. As already mentioned, the importance of this distinction is that under the Copyright Act an unauthorized public performance of a non-dramatic literary work or of a musical work is an infringement only if it is made "for profit." (§1 (c) and (e)). A public performance is clearly one "for profit" where TV cassettes are used for Pay-TV or cable originations upon payment of a special charge on a per program basis. However, it has also been held that the performance of musical compositions in dance halls is for profit although no money is taken at the door. *Herbert v. Shanley & Co.*⁵² Profit-making performances were found to exist in restaurants, nightclubs, hotels, ballrooms, theatres and broadcasting stations,⁵³ even where the broadcaster was a non-profit radio

47. *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556 (1925); *Law v. National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943).

48. In *Walt Disney Productions v. Alaska Television Network, Inc.*, *supra*, fn., 42, the court found that the defendants had infringed §1(d) not only in that they had made unauthorized tapes of plaintiff's copyrighted motion pictures but also in that they had "disseminated" them as programs through defendants' cable systems.

49. 21 C. O. Bull. 203 (D. Md. 1932).

50. 228 F. Supp. 354, 358 (D. Minn. 1964). See also, *Lerner v. Club Wanderer, Inc.*, 174 F. Supp. 731 (D. Mass. 1959).

51. For a discussion of the criteria for a public performance see Lloyd, *op. cit.*, fn. 2, at p. 694; Taylor, *op. cit.*, fn. 2, at p. 90.

52. 242 U.S. 591 (1917).

53. For a good collection of leading cases on the subject see the note: "Copyright Law: Broadcast of Phonograph Records Held a 'Performance for Profit' . . ." etc. in 49 Minnesota L. Rev. 578 (1965); see also Derenberg, Copyright Law, 35 N.Y.U. L. Rev. 650, 661 (1960).

station carrying commercial advertising for some of its programming although the program in litigation was transmitted on a sustaining basis.⁵⁴

Applying these precedents to TV cassettes, it seems to be clear that where they are used to originate a program on a television station or cable system, the performance is one for profit regardless of whether a separate charge is being made for its reception. The profit motive and commercial benefit derived from the use of the program as well as its competitive impact on potential other users make it eminently reasonable to require that the consent of the copyright owner be secured prior to such performance.

VI. Use of Copyrighted Materials in the Production and Performance of TV Cassettes

We have concluded earlier that a TV cassette is functionally similar to a motion picture and that as such it is a copyrightable work (provided, of course, that it possesses the required degree of originality for copyrighting), and that, accordingly, it may not be retaped or otherwise reproduced without the consent of the copyright owner.⁵⁵ Similarly, other copyrighted works, be they motion pictures, dramas, documentary films, musical compositions or taped television shows, are protected against their unauthorized use in the production of a TV cassette. Indeed, having found that a cassette reproduces the work which it embodies, and makes a record or transcription thereof within the meaning of §1(c) and (d) of the Copyright Act, such reproduction requires the consent of the copyright owner of the work.

Infringement exists not only where the cassette faithfully reproduces an existing work, such as a copyrighted motion picture,⁵⁶ but also where a cassette producer uses the plot of a work, say a novel, and employs action and accompanying sound for an audiovisual presentation thereof fixed on tape. In the latter case he would infringe on

54. *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2d Cir. 1944).

55. See *supra* under IV (a).

56. But see Lloyd, *op. cit.*, fn. 2, at p. 689 presenting the view as "arguable" that "the manufacture of a video disk, though made from a motion picture film would not appear to be an infringement . . ." since it is not a "copy" within the meaning of Section 1(a) of the Copyright Act in the light of the *Apollo* decision. Our disagreement with this conclusion is based on our view that insofar as dramatic and non-dramatic works susceptible of performance are concerned, the *Apollo* case has been overruled by §1(c) and (d).

the exclusive right of the author of the novel to dramatize it under §1(b) of the Act.⁵⁷

Furthermore, as we read §1 (d), it would be an infringement to perform an *unlawfully* reproduced cassette, regardless of whether the performance takes place in public or in private. This conclusion follows from the provision in §1 (d) that it is the author's exclusive right to perform a record or transcription of a dramatic work without coupling this provision with the words "publicly" or "in public" as the same subsection does when it speaks of the public performance of copyrighted works in general. Consequently, we feel that any performance of such a cassette would be an infringement under the statute and the cases holding that private performances of copyrighted works in social clubs are not infringements, would not apply to situations where an unlawfully produced cassette is used for the performance.⁵⁸

On the other hand, if the cassette is an *authorized* reproduction, then only a *public* performance thereof if it is a dramatic work and a public performance for profit if it is a non-dramatic literary work, would be an infringement.⁵⁹ By the same token a *private* performance by one having lawful possession thereof would normally not be a performance requiring consent of the copyright owner under §1(c) and

57. *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); see also *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 213 Fed. 374 (S.D.N.Y. 1914), *aff'd* 220 Fed. 448 (2d Cir. 1915); *Metro-Goldwyn-Mayer Distr. Corp. v. Bijou*, 3 F. Supp. 66 (D.C. Mass. 1933).

58. See footnote 59.

59. See *supra* under IV (b).

The Court in *Metro-Goldwyn-Mayer D. Corp. v. Wyatt*, 21 C. O. Bull. 203 (D. Md. 1931), at p. 203 stated in its oral opinion that it was "inclined" to the view that the word "publicly" in the first clause of Section 1(d) controlled also the phrase "and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever", appearing at the end of Section 1(d). The Court concluded from such observation that the performance of a motion picture must be a public one in order to be an infringement. It should be noted that the motion picture film in that case was an authorized reproduction and that the court found the performance in the case before it not to have been a public one. In any event, we find that the reasoning of the Court in *Wyatt* goes far beyond what was necessary for its holding and that the text of Section 1(d) does not support the dictum of the Court. Indeed, the section begins with the phrase "To perform or represent the copyrighted work publicly if it be a drama . . ." and continues after a semicolon: "to make or to procure the making of any transcription or record thereof by or from which in whole or in part, it may in any manner or by any method be exhibited, per-

(d), since that is the very purpose of its production, i.e., to be sold or leased for a private performance.⁶⁰

Suppose, however, a cassette is lawfully produced with the consent of the copyright owner but that it nevertheless reaches the possession of a person in a manner not intended by the copyright owners. This may occur where cassettes are lost or stolen or retained in violation of rental agreements beyond the time period of the rental. Or suppose the cassette is sold "for home use only" and the purchaser uses the cassette for a commercial rental business. Do any of these acts constitute a violation of the copyright owner's exclusive right under §1(c) and (d)? They undoubtedly would if they lead to *public* performances.⁶¹ But what if the performance happens to take place in the privacy of a home on an ordinary television set?

formed, represented, produced or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever . . ." In our view this text by carefully avoiding the word "publicly" when referring to an unauthorized transcription or record, draws a distinction between the ordinary case of a public performance of a copyrighted work and the special situation where an unauthorized transcription or record of the work has been made in which latter case it is unlawful to "exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever", i.e., regardless of whether in public or private.

We have more doubts regarding the interpretation of subsection (c) in which the provision regarding the making of a transcription and record of a non-dramatic literary work uses different language and is followed immediately by the reference to playing and performing it "in public for profit." See NIMMER, *op. cit.*, §109.4. See also Fritch, *op. cit.*, fn. 2, p. 122, noting that since non-dramatic works and musical compositions are infringed only if they are publicly performed "for profit", a home viewer "would be liable only when an unauthorized videotape of a dramatic work" is involved.

60. Compare the patent cases holding that where it is in the essential nature of a patented thing that it be used or sold for use by others, then a sale of the thing by the patent owner will carry with such sale the right to use it without further permission of the patentee. See, e.g., *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961) and 377 U.S. 476 (1964). These cases are an extension of the common law maxim that a grant impliedly includes that without which the thing expressly granted would be useless to the grantee.
61. See the motion picture "bicycling" cases holding that where a film had been licensed for exhibition in a particular theatre or on a particular date, the exhibition thereof in a different theatre or on a different date constituted not just a breach of contract but a copyright infringement. *Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co.*, *supra*, fn. 7; *Tiffany Productions, Inc. v. Dewing*, *supra*, fn. 7.

In *Patterson v. Century Productions, Inc.*,⁶² it was held by Judge Chase (with Judges Learned Hand and Augustus V. Hand concurring) that the projection of a non-dramatic motion picture was a violation of §1(a) of the Copyright Act because “. . . when the film was shown the defendants who did that made an enlarged copy of the picture. It was to be sure temporary but still a copy while it lasted.”

The importance of the *Patterson* doctrine to TV cassettes is that when the picture of the copyrighted work embodied in the cassette is projected on a screen, it constitutes an infringement if done without the consent of the copyright owner because the making of a “copy”—unlike a performance—is an infringement regardless of whether the copying takes place in public or in private, in a theatre or in a home, and regardless of whether it is done for profit or not. Of course, a lawfully circulated cassette carries with it the implied consent of the copyright owner that it be used on the lawful possessor's home television set.⁶³ In such case, the “copy” and its use are licensed by the copyright owner. On the other hand, the *Patterson* case would cover such situations as the distribution to the public for home use, of stolen or otherwise illegally obtained cassettes. It may also be helpful in situations where a cassette is rented to a user under an agreement and perhaps with an express notice on the cassette, that it is rented only for a single use at the home of the renting party and not for multiple playings there or at the homes of others. While the validity of equitable servitudes in the sale of chattels and of restraints in rental agreements is not free from doubt,⁶⁴ the *Patterson* case may be resorted to

62. 93 F. 2d 489 (2d Cir. 1937), cert. denied 303 U.S. 655 (1938). The *Patterson* case involved the performance of a film showing wild animal scenes without a dramatic plot. The case was decided prior to the amendment of §1(c), see *supra*, fn. 39, which protected non-dramatic literary works against the making of an unauthorized transcription or record thereof. For a thorough discussion of the *Patterson* case see Sargoy, Comments submitted to the Copyright Office on *Limitations of Performing Rights*, Committee Print, 86th Cong., 1st Sess., 1960.

63. See *supra*, fn. 60.

64. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433 (1937); *RCA Manufacturing Company, Inc. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940); *Nadell & Co. v. Grasso*, 175 C.A. 2d 420, 346 P. 2d 505; see California Civil Code §680. See also *Pratte v. Balatsos*, 113 A. 2d 492 (S.C. New Hampsh. 1955); *National Skee-Ball Co., Inc. v. Seyfried*, 158 A. 736 (Ch. N.J. 1932); *Clairel, Inc. v. Cody's Cosmetics, Inc.*, 231 N.E. 2d 912 (Supr. J. Ct. Mass. 1967) and the case notes in 9 De Paul L. Rev. 288 and 12 Stanford Law Review 860.

under the copyright law for the protection of the copyright owner whenever its application does not conflict with other branches of the law, such as the anti-trust laws or common law principles against restraints in alienation.⁶⁵

The above discussion applies to the use of cassettes lawfully recorded by commercial manufacturers. Still to be explored, however, is the legal status of a practice which is certain to develop once cassette *recorders* will become available for home use. Let us assume that a private party uses his cassette machine at home to record a television show so that he may replay it in the future at his pleasure.⁶⁶ Under the circumstances and considering the competitive consequences of such recording, a consent by the copyright owner cannot be implied and in many cases will be negated by express statements accompanying the broadcasting of the program.

The Copyright Act places an absolute prohibition on the making, production, reproduction and performance of transcriptions or records of dramatic and of literary non-dramatic works (§1(c) and (d)). The statute appears to be peremptory and not subject to any exceptions. Yet, a similarly absolute prohibition exists against the making of a "copy" of a copyrighted work under §1(a). Nevertheless, the libraries are full of readers, including copyright lawyers, who copy by hand, typewriter, and photocopy machine, copyrighted materials, availing

65. In *Bobbs-Merrill v. Straus*, 210 U.S. 339 (1908), it was held under a prior copyright statute that, notwithstanding price restrictions placed by the copyright owner on the resale of books, the purchase of a book once sold with authority of the owner of the copyright, may sell it again without regard to the restriction and that holding has been codified in §27 of the Copyright Act of 1909. At the same time, the courts have held in patent cases that while a patentee may not restrict the use of a patented thing in such a manner that it would be useless to the grantee (see Walker on Patents, Seller Ed. Sections 366, 371), the patent owner may grant licenses limited to specified uses in a defined field. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 180, 181 (1937), on 305 U.S. 124 (1938); *Westinghouse Electric Mfg. Co. v. Cutting & Wash. R. Corp.*, 294 Fed. 671 (2d Cir. 1923).

66. We shall not discuss here the very interesting question under copyright law whether live television shows are protected by common law copyright or whether such copyright is lost by divestitive publication. See Fritch, *op. cit.*, fn. 2, p. 108 *et seq.* See also below under VIII. This question is not one peculiar to the development of cassettes, although the case of reproducing television shows by means of cassettes off-the-air may well precipitate court cases dealing with this issue.

themselves of an equitable rule of reason generally referred to in copyright law as "Fair Use".⁶⁷

The Fair Use doctrine has been defined in its broadest terms, as the doctrine which "means that in some circumstances where the use is reasonable and not harmful to the copyright owner's rights, copyrighted material may be used to a limited extent without permission."⁶⁸ The difficulty in applying this common sense rule is that, as the House Judiciary Committee observed in its Report on Copyright Law Revision,⁶⁹ no real definition of the concept has ever emerged although the courts have ruled upon the Fair Use doctrine over and over again. "Indeed", the House Committee said in the cited Report, "since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case asking the question must be decided on its own facts."

Among the criteria for balancing the equities to determine the fairness of the use, the House Report mentions the following:

- "(1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

It is apparent that all of the mentioned criteria would battle against the application of the Fair Use doctrine to our situation. Indeed, as to the "nature of the work", the most likely candidates for home tapings on cassettes of broadcasts off the air, are the popular television entertainment shows, such as motion picture features, television series, specials, etc., all of which have in common that their amortization and profit potential depend on repeat showings before the largest possible audience and the use of which would be far remote in purpose and

67. See Latman, *Fair Use of Copyrighted Works* (Copyright Law Revision Study No. 14, 1958) and the Comments and Views submitted on said study by Derenberg in the Committee Print, 86th Cong., 1st Sess., 1960. See also for a good summary of the law of fair use and a recent application of the rule, *Marvin Worth Productions v. Superior Film Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970).

68. Circular 20, Copyright Office, Aug. 1969. See Taylor, *op. cit.*, fn. 2, p. 97.

69. Report No. 83, House of Representatives, 90th Cong., 1st Sess., p. 29 *et seq.*

character from the Fair Use precedents of excerpts made by students in libraries from scholarly publications for research purposes.

Similarly, the test of the "substantiality of the portion used" will most likely negate the presence of "fair use" here since the recording will include in most cases the whole of the work except for the advertising commercials accompanying it. Finally, "the effect of the use upon the potential market for or value of the copyrighted work" will be an adverse competitive impact on future television viewing of the same program. Indeed, if many homes will record and replay the program, the audience, for its repeat performances on the air, will necessarily be diminished. Advertisers in such case will not be willing to pay for sponsoring repeat showings and television stations will not be willing to pay copyright owners for a license to broadcast it.⁷⁰ At the same time, prohibiting a home-owner to record a program on his own equipment for his own private and noncommercial use, will probably be highly unpopular with the public and hard to police. Yet lack of popularity and difficulty of enforcement are hardly sufficient reasons for permitting a use which is prohibited by statute, and unfair to copyright owners. The reduction in demand for legitimately produced cassettes for home use, would inevitably discourage the production of such cassettes and, consequently, the availability of a sufficiently wide diversity of programs available for sale to the public. Perhaps a legislative solution of the problem could be found by imposing a compulsory license on copyright owners for the recording of their works by cassettes for home use in return for which license they would be compensated by a royalty levied on the sale of the recording machine. The proceeds of such royalty would be distributed to copyright owners through the intermediary of authors' societies and associations of copyright owners.⁷¹

70. In *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S.D.N.Y. 1914), the court formulated the Fair Use Test in the famous Mutt and Jeff case as follows:

"One test which, when applicable, would be ordinarily decisive, is whether or not so much . . . has been reproduced as will materially reduce the demand for the original."

71. See for such a solution abroad: §53(5) of the German Copyright Law of 1965 which provides for the payment of a percentage royalty (not to exceed 5% of the sales price) where a machine is sold which may be used for the recording of audio-visual works for personal use. See Brugger, *Rechtsfragen bei Audiovisuellen Verfahren* (Legal Questions arising from Audio-Visual Processes) published in UFITA, 1970, p. 2.

VII. Interpretation of Prior Copyright Licenses.

A question which no doubt will arise as soon as the use of TV cassettes will become a generally accepted means of distributing copyright material, is whether prior copyright licenses include or exclude the right to use it in TV cassettes.

To illustrate this point: Suppose a prior license has been granted by the copyright owner to use a copyrighted work for motion pictures or television or for both. The grant does not specify whether it includes the right to record the work on tape or to make a TV cassette of the work or to make a movie first on film and then transfer it to tape or into a cassette. The question arises whether the grant includes any of the above mentioned rights or whether the copyright owner retained these rights for himself and even if he retained them, whether he may grant to others the right to produce a cassette and exploit it in competition with motion pictures and television programs produced by the first grantee?

We cannot deal here exhaustively with this interesting question which is a mixed one of copyright and contract law. The problem of interpreting old grants of rights to newly developed methods of exploitation is, of course, not peculiar to cassettes and has arisen in such situations as conflicts between grants of dramatic rights with movie rights,⁷² silent films with sound films rights⁷³ and movie rights with television rights.⁷⁴

Thus, in the leading case of *Harper Bros. v. Klaw*,⁷⁵ the Court expressed the view that moving pictures which had been in their infancy when the license contract in question was made were "an accretion or unearned increment conferred of late years upon the copyright owners by the ingenuity of many inventors and mechanicians." However, the Court also found that there was an implied negative covenant on the part of the grantors not to use the ungranted portion of the copyright to the detriment, if not destruction, of the grant made to the licensee.

As we had occasion to observe when we dealt with the application of old statutes to new technologies, there are two basic attitudes on the part of courts which determine their approach to resolve questions

72. *Manners v. Morosco*, 252 U.S. 317 (1920); *Klein v. Beach*, 232 Fed. 240 (S.D.N.Y. 1916), aff'd 239 Fed. 108 (2d Cir. 1917).

73. *Kirke LaShelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79 (1933); *L. C. Page & Co. v. Fox Film Corporation*, 83 F. 2d 196 (2d Cir. 1936).

74. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F. 2d 150 (2d Cir. 1968).

75. 232 Fed. 609 (S.D.N.Y. 1916).

of this kind whether they involve the construction of statutes or of contracts: one attitude which will lean toward a restrictive approach and will tend to hold that a license of rights in a given medium includes only such uses as fall strictly within the unambiguous core meaning of the term. Such a construction will tend to exclude any uses which lie within what Nimmer has called "the ambiguous Penumbra."⁷⁶

Opposed to this view is the more expansive interpretation which holds that the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license.⁷⁷

This latter view was expounded in the recent case of *Bartsch v. Metro-Goldwyn-Mayer, Inc.*,⁷⁸ where the Court held that the grant by the owner of a copyright in a musical play to a motion picture company of the right "to copyright, vend, license and exhibit such motion picture photoplay throughout the world" included the right to *televise* said motion picture.

At first sight, the many decisions rendered by the courts, especially under the laws of the State of New York, appear to be in hopeless conflict. Yet it is possible to abstract from the apparent chaos a few guidelines which may be helpful in applying the law to the new art of TV cassettes:

1. First of all it is advisable to examine and analyze—as we would in any case where we are called upon to interpret a contract—the language of the grant and to ascertain the intentions of the parties insofar as they may be gleaned from language of the instrument, following the usual rules of construction in the field of contracts.⁷⁹

2. In the event of ambiguity of language it will be necessary, again consistent with the general law governing the interpretation of contracts and within the bounds of the parol evidence rule, to go outside of the instrument itself and ascertain the intention of the parties by looking at extraneous evidence.

76. NIMMER, *op. cit.*, §125.3 (1964). See also, Warner, *Radio & Television Rights* §52 (1953).

77. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, *supra*, fn. 74. See the collection of cases in NIMMER, *op. cit.*, §125.3. As Cohn puts it in his article *Old Licenses and New Uses*, 19 Law and Contemp. Problems 184 (1954) at p. 199:

"The problem is created, not by the cupidity and contrariness of the parties, nor by the ambiguity of language, but by the advent of an unforeseen circumstance freighted with important economic significance."

78. 391 F. 2d 150 (2d Cir. 1968).

79. *Cf. Manners v. Morosco*, 252 U.S. 317 (1920).

3. Where the prior transfer is made with reference to the whole copyright or to a substantial bundle of rights thereunder, it may be assumed that the new use was meant to be included in the earlier assignment. On the other hand where an exclusive license has been granted for a specific use and the new use by the owner or by a subsequent licensee of the owner could have been reasonably expected to occur, then such new use should not be deemed to have been included in the prior grant.⁸⁰

4. Where the new use was known, at the time the earlier grant was made, the failure of such grant to mention it specifically creates a presumption that the new use was not to be included in the grant.⁸¹ In this context the date of the prior grant should be examined because a grantor will not be charged with the duty of expressly saving a particular use when he could not know that the use had been invented.⁸² Furthermore, in determining whether the parties had reason to know of the invention's existence and whether it would be fair to charge both or either of the parties to the prior grant with knowledge of the new medium, the courts will take into consideration the degree of sophistication of the parties in dealing with such matters.⁸³

5. In all cases, an important factor to consider in conjunction with all those aforementioned, is the extent to which the new use is competitive to the old one and whether it would make it inequitable to permit the grantor to benefit from the new use to the detriment of the first licensee.

VIII. TV Cassettes Under the Copyright Law Revision Bill now Pending in Congress.

The first comprehensive revision of the copyright law since 1909 is now pending in Congress.⁸⁴ Indeed it has been pending there for

80. See Cohn, *op. cit.*, *supra*, fn. 77, at p. 201.

81. *Klein v. Beach*, 232 Fed. 240 (S.D.N.Y. 1916).

82. *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79 (1933); *Frohmman v. Fitch*, 164 App. Div. 231 (1st Dept. 1914).

83. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, cert. denied 351 U.S. 926 (1956).

84. S. 644, 92d Cong.; see also the predecessor bills S. 543 and H.R. 2512, 90th Cong. For a comprehensive exposition and explanation of the provisions contained in the predecessor bill H.R. 2512, see Report No. 83, 90th Cong., 1st Sess., House of Representatives, March 8, 1967. For the history of copyright law revision, see Goldman, *The History of the U.S.A. Copyright Law Revision from 1901-1954* (Committee Print, 86th Cong., 1st Sess., 1960).

more than ten years and whether it will ever become the law of the land has become a matter of increasing doubt and concern among those who feel that a thorough legislative overhaul of the antiquated Copyright Act of 1909 has been overdue for a long time. While the delays in the adoption of the revision bill are due to a number of hotly debated controversies which still remain unresolved, the enactment of the clarifications and non-controversial technical provisions which said Bill contains, would be of great aid to authors, copyright owners and all those who use copyrighted materials.

Among the provisions of the Revision Bill which we would like to mention here briefly because, if enacted, they will clarify the law applicable to TV cassettes, are the following:

First of all, many of the definitions contained in the Bill are sufficiently flexible to cover all newly developed methods for the exploitation of copyrighted works.

Thus, §101 of the Bill defines "copies" as material objects "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 definition of "device," "machine," or "process" is defined in turn, as "one now known or later developed."

"Motion pictures" are defined as "audio visual works consisting of a series of related images, which, when shown in succession, impart an impression of motion, together with accompanying sound, if any." "Audio visual works" are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."

To "perform" a work will mean under the Bill, "to recite, render, play, dance, or act it, either directly or by means of any device or process, or in the case of a motion picture or other audio visual work, to show its images in sequence or to make the sounds accompanying it audible."

To perform or display a work "publicly" means among other things, "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Under this definition, performances in clubs and schools would be public performances.

The above quoted provisions of the Revision Bill would codify what we have found to be the present law, namely that TV cassettes are motion pictures and protected as such under the copyright law against reproduction or public performance without the consent of the copyright owner.

A basic condition of copyright protection under the Bill is that a work be fixed in a "tangible medium of expression" and this medium may be one "now known or later developed."⁸⁵ By anticipating the development of new media, the question of whether a new technology is covered by the law will have become moot.

The Bill also specifies that live television broadcasts may be copyrighted while being recorded at the same time.⁸⁶ On the other hand, live broadcasts which are not simultaneously recorded are not included in statutory copyright protection under the Bill, but will continue to be subject to protection under state statutes or common law, until fixed in tangible form.⁸⁷

The Bill further states and confirms the principle that where the copyright owner has transferred ownership of a particular copy of his work, the person to whom the copy is transferred is entitled to dispose of it by sale, rental or any other means.⁸⁸ On the other hand, the Bill makes it clear that the aforesaid privileges do not apply to someone who merely possesses a copy without having acquired ownership of it.⁸⁹ Thus said privileges do not extend to any person who has acquired possession of the copy from the copyright owner by *rental, lease, loan* or otherwise. The House Report cites as "a familiar example, a person who has rented a print of a motion picture from the copyright owner." Such person would have no right to rent it to someone else without the owner's permission.⁹⁰ This provision of the Bill will lay to rest the problems which we discussed under present law, whether the copyright owner may restrict the use of cassettes when he sells or rents them to third parties. Under the Bill, only the owner of the

85. House Report No. 83, *op. cit.*, *supra*, fn. 84, at pp. 15 and 97; S. 644, §102.

86. *Ibid.*

87. House Report No. 83, *op. cit.*, *supra*, fn. 84, pp. 18 and 98. See S. 644, §301(b)(1). Fixation in a tangible medium of expression rather than "Publication", the amorphous concept which has led to so many diverse and sometimes contradictory interpretations in the present law, will be the dividing line between common law copyright and statutory copyright under the new Bill.

88. S. 644, §109.

89. S. 644, §109.

90. H.R. 83, *op. cit.*, *supra*, fn. 84, at p. 40.

cassette, not a lessee or other possessor of the cassette, could rent it or lend it to others.⁹¹

It is thus apparent that many of the problems under present law which we have labored to discuss in this article will vanish once the Bill is enacted into law. Indeed, this article could have been reduced to perhaps one tenth of its length if the Bill had already superseded the old Act. We make this point not to regret the reduced services which copyright lawyers will be called upon to render under the Bill, but rather to compliment its draftsmen, especially the staff of the Copyright Office as well as the members of the House and Senate Committees and their staffs, for their astuteness in spotting the sore points which trouble the copyright owners and the users of their works under the present law, and for their ingenuity in resolving the issues in what we believe to be a generally fair and equitable manner.

IX. TV Cassettes, CATV, Pay-TV, Cablecasting and Pay Cable.

TV cassettes, CATV,⁹² Pay-TV,⁹³ Cablecasting,⁹⁴ and Pay Cable⁹⁵ have in common that they are all devices to bring programs to members of the public and that they are supported by payments made by their viewers. Unlike television broadcasting, they are all separated from the heretofore dominant economic factor in television programming—support by commercial advertisers.

They further have in common that each of these methods of communication is at the threshold of being made available to the public

91. Under §106 of the Bill, the rental, lease or lending of copies of the copyrighted work is the exclusive right of the copyright owner.

92. CATV "means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service." FCC Reg. §21.710(a).

93. Pay-TV (also referred to as subscription television) consists of the transmission of signals over the air in "scrambled" form by television stations to be viewed intelligently by those having "unscrambling" devices attached to their sets. See FCC Fourth Report & Order, Dkt. No. 11279, released Dec. 13, 1968.

94. Cablecasting means programming distributed on a CATV system which has been originated by the CATV operator. FCC Reg. §74.1101(j).

95. Pay Cable means cablecasting to subscribers in return for either a monthly charge for special channels or special per program charges. See FCC Reg. §74.1121(a).

on a large scale.⁹⁶ Yet, it is our opinion that the TV cassette, although the latest comer in the race for the television home's dollar, has an excellent chance to outrace the other contestants. In this connection it may be observed that if Pay-TV and Cablecasting have so far been laggards, this delay has not been due to any difficulty in technical development or lack of demand by the public, *but primarily to restrictive government regulations imposed by the Federal Communications Commission.*

Thus, the type of programs which may be shown on Pay-TV and by Pay Cable, are *severely restricted by FCC regulations.*⁹⁷ Said restrictions which are intended to prevent the "siphoning" of programs from "Free-TV" provide, in substance, that feature films may not be shown on Pay-TV and Pay Cable, if they had their general release in theatres more than two years prior to their cablecast (except that during one week of each calendar month, one feature film may be shown, the general release of which occurred more than ten years previous to the Pay-TV showing a cablecast). Said regulations also forbid the showing of any television *series* on either Pay-TV or on cablecasts for which a special charge is made. It is believed by many knowledgeable observers in the television program field that these restrictions may render Pay-TV and Pay Cable unable to secure sufficient programs in order to make their operations attractive to their subscribers and profitable to their operators.

TV cassettes, on the other hand, when used on home television sets, are not subject to any of the aforesaid regulations. Nor would the FCC, which asserts its jurisdiction over CATV, Pay-TV, Cablecasting and Pay Cable, on the basis of the Communications Act (47 U.S.C. 151 et seq.), appear to have any authority to regulate the production of TV cassettes and their sale or rental to private homes. As we have seen, cassettes use adapters to home television sets for the purpose of producing "television" programs on home receivers. Yet, they in no way involve communications by wire or radio which is the basis on which the Commission asserts its jurisdiction.⁹⁸

96. Pay-TV operations have been authorized by the Fourth Report and Order (1968). Cablecasting and Pay Cable have been authorized by the FCC's First Report and Order released Oct. 27, 1969, 20 FCC 2d 201 as modified by a Memorandum Opinion and Order released July 1, 1970.

97. FCC Regs. §§74.643(b); 74.1121(a).

98. §2 of the Act (47 U.S.C. §152) states that the "provisions of this Act" shall apply to "all interstate communications by wire or radio . . . and to all persons engaged . . . in said communications."

Accordingly, programs which under the FCC's regulations are now inaccessible to a homeowner on Pay-TV or Pay Cable, may be purchased or rented to the same homeowner by means of TV cassettes. It is obvious that the absence of such restrictive regulations will give a tremendous competitive advantage to TV cassettes. In other words, legal and administrative impediments have created a vacuum which, as a matter of basic economics, will be filled by competing devices not subjected to such impediments.

Another striking example of the interplay of law and economics creating a vacuum for TV cassettes to fill is CATV. The delayed growth of CATV, where few systems have so far been built in the top television markets, is due, as everyone will agree, to the controversy between copyright owners, CATV operators and television stations, regarding the applicability of the copyright law to the retransmission by cable systems of broadcasts containing copyrighted materials. The inability of copyright owners to protect their programs against unauthorized retransmissions by CATV has led the FCC to place severe restrictions on the importation of distant signals into the 100 top markets in order to prevent chaos in the television program market.⁹⁹ This development which is distressing to program suppliers, CATV systems, and the public alike, would never have taken place if the controversy between copyright owners and CATV users of their programs could have been resolved on the basis of traditional American copyright principles, i.e., within the framework of a free competitive market in which a willing seller and willing buyer would negotiate in their own economic interests for licenses. If that had been required by statute or court adjudication, rigid regulations enforced by governmental agencies would have been unnecessary and the choice of programs left to the individual user.

Even if the FCC should make true its recently announced intention¹⁰⁰ to relax the restrictions on distant signals, the uncertainties of copyright law revision in the Congress and of the copyright infringement action pending in court,¹⁰¹ will discourage investors and banks to commit the multibillion dollar investment necessary to wire the nation with CATV cables, before the copyright question is finally resolved.¹⁰²

99. First Report and Order, 38 FCC 683 (1965); Second Report and Order, 2 FCC 2d 725 (1966).

100. Letter of Dean Burch, Chairman of the FCC, addressed to the Congress, August 5, 1971, published in TV Digest, August 11, 1971.

101. *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, *supra*, fn. 14.

102. For a perceptive economic study of CATV and the use of copyrighted programs by cable systems, see Johnson, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION, The Rand Corporation, 1970.

When future historians will look at the development of television in the United States during the nineteen hundred seventies, they may well note a spectacular advance of the use of TV cassettes and a stunted growth of CATV, Pay-TV, Cablecasting and Pay Cable, in spite of the promise for large scale use which the technical efficiency of these means of distribution once seemed to justify.

The lesson for TV cassettes and for producers as well as for the public is plain. Fortunately, there do not seem to be any legal or regulatory thunderclouds on the horizon which may stifle the growth of TV cassettes.

Conclusion

The social purpose of requiring copyright payment for the use of copyrighted works is to stimulate, in the public interest, the production of literary and artistic works by granting to their creators the right to profit by them.¹⁰³ To the extent that the full measure of this right is curtailed by antiquated legislation, restrictive court interpretations, and attempts at social engineering by administrative agencies, the encouragement intended by copyright is diminished and the growth of communication media depending on them, is stunted. It is only through a strengthening of this encouragement, through developing and expanding copyright protection as a full-fledged partner and not as a poor cousin of technological progress, that we can stimulate creativity and thereby, hopefully, make TV cassettes not only a new medium, but a medium which will carry a meaningful message.

103. *Mazer v. Stein*, 347 U.S. 201 (1954).

3.

BEYOND COPYRIGHT

By RICHARD WINCOR*

Incorporeal property, to its critics a contradiction in terms, is one of the chief treasures of mankind. Somehow it eludes juristic analysis, at least anything like consensus; there are so many theories concerning its nature, so little agreement even on what its subdivisions ought to be named, that reasoned dialogue itself is impeded by underlying assumptions of which the protagonists are not always aware. And of all the related systems, copyright is the frailest.

On the eve of the Munich 1972 Olympics, it may be fitting to reconsider some aspects of industrial and intellectual property. The games at Munich are an example of how much everything has changed since Picard suggested adding a fourth category of rights to the three of the Roman law, and Kohler proposed *Immaterialgüterrechte*.¹ Television rights to the Olympics have been sold, but the games are not copyrighted, and the signals constitute the *res* that should be protected against poaching.² Incorporeal property in the main has been protected by reflex reaction against piracy with the invention of new media. There are specific rights and remedies without much point of view. Here for example is a little resolution that goes very well, but not far enough, passed by the Germanic Diet on 9th November 1837:

"Art. 1. Literary productions of every kind, as well as works of art, whether already published or not, shall not be multiplied by mechanical means, without the consent of the authors or artists, or those to whom they may have transferred their rights.

"Art. 2. The rights above mentioned shall pass to the heirs or representatives of the authors or artists, or those to whom they have been transferred; and when he who brought out the work, or he who is the editor, is named, this right shall be recognized and protected in all the States of the Confederation for a period of ten years at the least."³

This covers the print media but not much more. Technology has been the chief spur to protection in spite of theories devised after the

* Mr. Wincor is presently Resident Counsel in London of the Firm of Coudert Brothers.

1. Ladas, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* (Macmillan, 1938), Vol. I, pp. 9-10.

2. See Tebbell's dispatch from Helsinki in the *Saturday Review* of 9th August, 1969.

3. Cited in Lowndes, *AN HISTORICAL SKETCH OF THE LAW OF COPYRIGHT* (Saunders & Benning, London, 1840), Appendix at p. 122.

event, with political notions intruding in ways that are not always germane. From the older authorities such as *Millar v. Taylor*⁴ and *Drone's treatise*⁵ to the more recent analyses by Radojkovic,⁶ Kase⁷ and Krishnamurti,⁸ the approach has tended to be responsive to particular facts. Somebody invents printing and outcry ensues. Satellites are devised and learned congresses meet. Romanticism about authors collides with pseudo-history about the evils of monopoly. Even the terms used, copyright, quasi-copyright, quasi-property, literary property, *droit d'auteur* and others reflect more than inconsistency, something like a straining at the leash of old concepts.

With conservation much in the news, there is something to be said for the conservation of intangible property. Especially with industrialized western nations, but increasingly everywhere, this form of asset looms large, financially and culturally too. Trademarks, for example, can be worth more than all of the other assets of their company owners. Trade secrets are so valuable they create espionage agents. Copyrights grow into major industries. Perhaps there are new forms of incorporeal property that deserve recognition. If they deserve recognition, it ought to be under generally accepted principles of logic and industrial usage rather than the domestic laws of any particular nation. Logic and trade custom set the minimum ground rules; then in the degree desired, each country can give them a local habitation and a name. The desired process was suggested long ago by Scrutton⁹ on a point of Anglo-American law:

"Whether or not there is now a common law copyright after publication in cases not provided for by Statute, might be a question of importance in case of the discovery or invention of a new species of literary property. To this the common law might apply, not as founded on ancient custom, but in its character of judicial legislation as pointed out by Lord Lyndhurst, who says: 'The common law applies itself to the varying circumstances of the time, and extends to every new species of property that spring up, the same protection that it has afforded to property previously existing'."

History has not borne out all of Scrutton's pronouncement, but he points the way. The desideratum is growth, not so much with discovery

4. (1769) 4 Burr. 2303.

5. A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (Boston, 1879).

6. *Copyright: A General Survey* (Copyright, Geneva, March 1965).

7. *Copyright in Czechoslovakia*, Vol. 14 No. 1, Copyright Bulletin, Oct. 1966.

8. *Copyright—Another View*, Vol. 15 No. 4, Copyright Bulletin, April 1968.

9. THE LAW OF COPYRIGHT (Wm. Clowes and Sons Limited, London, 1903), p. 49.

or invention of new recording devices but "of a new species of literary property." To that relatively unmarked target we must turn our attention. An anatomy of the property itself is overdue.

But how much that is intangible can be property at all? This classic question is unresolved. There is no point reviewing what a divided House of Lords said in the old English cases, or collating authorities from Eastern Europe or India. If we are going to stick with logic and trade custom we can even move quickly past some of the standard indicia, that property is susceptible of being assigned, or put into trust, or impounded by creditors. We come round, instead, to a pragmatic test: what men do in the market place. And the key here is licensing agreements.

When professionals year after year enter into contracts for the licensing of intangible rights — one uses "licensing" because outright assignments are less frequent — then something is there as the subject of the license, because people consider it so. Perhaps everyone making these contracts is deluded, but the apparition has become real to enough people so that it can be said to exist. More likely than not, however, there is no delusion at all; people would not book reservations at the same inn year after year if it were nothing more than an address in the country.

Accordingly if professionals contract to pay royalties for the use of names, or fragments of original compositions, or other intangibles, there is a fair presumption that some form of property is involved. At the other end of the spectrum, playwrights do not usually make agreements with drama critics against publishing how their murder mysteries turn out at the end, so that if there can be any right to prevent this sort of unhelpful disclosure, it will be something in tort, similar to the old English action on the case, and not an action for trespass upon property. Therefore for want of anything better, and subject to a great many exceptions, let us consider the general custom of making licensing agreements the hallmark identifying something intangible as property. The community accepts it as such, and there is no need to pretend that authority for it can be found anciently in the realm from time immemorial. It exists now. That it differs from other property in no way thrusts it into limbo, especially in an age when the use of property in general is more and more regulated. If industry treats it seriously, jurisprudence can give it consideration.

Measured by this rough test, in what products do the copyright industries conduct traffic? Not merely copyrights. A hard look into the microscope reveals new forms of life that invite classification. Incorporeal

property assumes many shapes, some shifting suddenly from one into another. Some of these shapes are familiar. Others are not. They look like service marks, or trade secrets, or something else, but whatever their characteristics, they defy orthodox classification and go beyond copyright.

There, perhaps, lies an answer to an old question. Are authors' rights a form of property? The answer is that the question is wrong. We are not only dealing with authors. We are not even confined to rights that require for exploitation the greatest possible disclosure, as books and plays generally do. Originality is not always a condition of protection. There is a *mélange*, rather, of different rules because different doctrines exist side by side here, and in the right circumstances may supplement one another.

This last point is crucial, and will be illustrated in what follows. For the moment it can be said that in spite of authority in some countries to the effect that seeking one form of protection precludes coming round the side door for another,¹⁰ logic and trade custom suggest the contrary.¹¹ Not all things need to be interdependent; the same man can be a judge and an author, and if he leaves the bench, he still may go on writing.

Going "beyond copyright" leads somewhere else by the sheer sense of it. Some effort ought to be made to map out the whole province in which the copyright industries conduct dealings. What things are customarily made the subject of licensing agreements and regarded as property? As a beginning we must exclude patents and design patents because they are not generally licensed in the copyright industries. Mere ideas too, for the different reason that they are in the public domain, can be ruled out even though claims for their misappropriation occasionally are settled in special circumstances. What remains, as incorporeal property, is the object of this search.

I suggest that five categories of intangible product are customarily dealt with sufficiently to meet the proposed test. Putting aside for the moment what legal doctrines apply, and looking only at the commodity itself as people generally do, they are original works, emblems, performances, secrets and transmissions. The next thing is to sketch out each of these forms briefly, and to consider what theory of law may be most fittingly applied.

10. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964).

11. See Callmann, *UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* (3d Ed., Callaghan & Co. 1969) Sec. 60.4.

1. *Original Works*. This is the traditional "copyright" created by an author. The category includes not only works of art, but compilations of otherwise unprotected data such as certain directories and computer products. Here the creative process is what invests the intangible with property attributes. Suddenly the alchemist makes gold out of common metals. A public domain story or set of facts turns into an original book or script.

Each different adaptation becomes a new work if there is enough originality in it. Translations of a novel into different languages, adaptation for television, musical versions for the stage, all of them fit this category even though clearance of underlying rights in the ancestral version may be required as conditions of their use.

Copyright law suits this category of incorporeal property. The trouble has been that it leaves off here, and requires auxiliaries.

2. *Emblems*. In this class are the separate elements that collectively make up the compound in the first category. When one or more of these elements is extracted and takes on independent life and value of its own, it becomes an emblem or insignia that identifies the larger work with its maker or user. Examples are theme songs and format devices, but in some cases the extracted elements go beyond identifying the source and become valuable in themselves. The best example of this stronger compound is the established fictional character recognizable to an audience even under a different name because of one or two touches that, in G. K. Chesterton's phrase "make him a giant." Sherlock Holmes, for example, never would say "Bah, humbug." Even a style of speaking may stand on the threshold of property, as with the celebrated Mrs. Malaprop. Not everything in this category, however, results from a creative act. Some recurring devices become property because they are hammered into it. The commodity is hawked or trumpeted into the public consciousness as with station call letters, or chimes.

Here the appropriate legal rules would be those applicable to service marks. Actually, one must go a little way beyond that to take into account those elements that do more than identify, the Holmes sodality. With such distinctive marks, likelihood of consumer confusion has no relevance. To escape the need for it, we may rely on the "dilution doctrine" which originated in Germany and exalts certain marks to property status by removing the need to prove likelihood of confusion when protecting them against use by others. The doctrine finds theoretical acceptance in some jurisdictions in the United States.¹²

12. See Callmann, *op. cit.*, *supra*, Sec. 84.2.

There is no logic in the position that membership in one of these first two categories precludes membership in the other. A theme song or verse may be under copyright and then continue to identify a series of educational cassette programs after the copyright expires. Conceptually what happens is that the same asset turns into a different kind of intangible property. At the worst it loses only half status; once it was copyright and service mark both together, now it is only a sort of hall-mark, not a Breughel as well.

Conversely a mark may be so elaborately fashioned as to be a work of art. I would pay entrance fees for a look at the city coat of arms in Bruges or Ghent even if signs were hung up naming the cities. The public go on paying to see Sherlock Holmes in new stories.

Logic suggests that in cases of this kind, the property in a mark may survive its copyright period and be protected in ways suited to its nature, including registration under the domestic laws of the countries where its potency endures. Emblems are licensed extensively, and should be considered property.

3. *Performances.* Here the interpreter acquires his own bardic protection by performing another's stock in trade. New methods of recording suggest what are sometimes called "neighboring rights." There is an old recording of Beethoven's *Archduke* which is unlike anything of its kind. The actual rendition is a form of property. There have even been notions that "style" is protected, but with recorded performance there can be little question. Do we come close here to the case of the Munich Olympics? Beethoven is in the public domain, but at Munich the broadcasters are not enacting a performance. The law of unfair competition insufficiently governs this area. The performance is property.

Once again a question arises whether property in this category can co-exist with property in another. Again, no logic debars it. A performer's reading of a copyright passage may serve also as the emblem for a series of concert films. The other way round, a tawdry identifying device may be recorded in some inspiring performance by masters. Our categories are not mutually exclusive.

4. *Secrets.* With unpublished material or information there does not have to be any creative act at all. Neither is there any trumpeting of the product, nor any performance. The owner is a kind of door-keeper, guarding what came his way legitimately but through no particular fabrication of his own. There are particular secrets and more generic intelligence in the form of "know-how." A license to perform magic tricks on television is one example of treating secrets as property.

But there is a better one, the entire corpus of unpublished material which its owners choose not to disclose. Private diaries, letters, photographs as well as manuscripts are a classic form of property before publication. In due course new owners may decide to publish. So it went with the celebrated Boswell Papers found at Malahide Castle, which lay hidden for nearly two centuries and only recently have been made available to the public. With Boswell there was a creative act. With other documents there may be nothing of consequence at all. What lies in the papers, not the artistic form in which the intelligence is cast, is the thing of value.

Anglo-American jurisprudence protected this property under the common law. The old "common law copyright," or its statutory successor, complements the law of trade secrets in this category. Where the intelligence is in a form insufficient for copyright, the secret may be protected only under conditions where another element is present, an agreement or a fiduciary obligation not to disclose. Some secrets deserve better status as property.

That in rare instances public policy may require their disclosure is no extinction of their inherent property status. Other property whose entire usefulness is disclosure may be concealed in the public interest by local censorship. Limitation may have the effect of eradication without changing the original status of a secret eventually published, or a play eventually banned.

Once again, categories may overlap and multiple forms of property co-exist in the same material. If Boswell's heirs chose to keep within the family some of his more picturesque activities, and the secret were lost, they still would have had copyright to prevent publication of his writings until they relented.

5. *Transmissions.* And now at last we return to the Munich Olympics. Images are the property here, just as sounds would be the property with radio broadcasting. What is remarkable is that the image subjects in themselves are not really a new form of property, being events in the public domain to which only a limited audience has access, but the images and sounds in the form of signals to distant audiences ripen into something rich and strange. The rights owners are carriers, in essence. Still, there is this difference, that the contents of their equivalent of trucks and ships becomes transformed, by lawful acquisition, into an article in which they own title. Thereafter they may contract further arrangements involving boosters and relays. Once again, they are dealing in something which at least part of the civilized community considers property.

Just what is the asset here? Long distance access, in terms of the viewer. That sort of reply, however, is too functional. It ignores the *res*, the magic trick itself, the series of signals protected against poaching. The Olympics themselves become property for a brief time, by being transported.

The applicable law is a matter for international convention. What will emerge is unlikely to be couched in property terms; signatories will be pledging themselves to fair dealing and good conscience. That is all very well, but there is no reason to rule out new forms of property as an adjunct concept. Television rights to an event not under copyright are dealt with as property.

They come close to the subjects of other categories, bringing access to a captured performance, but in this case by amateurs, bearing even some of the characteristics of a secret disclosed only to a limited few, but different in that there is almost no time lag between the event and its reception, so that simultaneity via signal is of the essence. Perhaps courier, then, is a better name for the rights owner.

These five suggested categories suggest now a few closing reflections concerning their nature. A main point is that two or more of them may encompass the same property, whether at the same time or at different times. In logic and by custom, an original work may serve also as an emblem, or be a valuable secret; transmission may cover the same ground as performance, or all five may go separate ways and have nothing to do with one another. As a juristic concept, the law applicable to each ought to recognize the possibility of coexistence when the facts fit.

That one form can become something else, however, is a different thing from saying that they are all alike. Actually they are rather different, as is easily shown by a brief review of how they come into existence.

With original works, there is a point at which the alchemist creates gold out of common metals.

With emblems, there is a point at which the trumpeter impresses recognition upon the public, sometimes as the result of creativity but more often by sheer volume.

With secrets, there is a point when the door-keeper takes up his stance as guard over something that was placed under his custody, frequently nothing more.

With performances, the point comes earlier on, when the bard pursues his calling in respect of a particular composition, which he interprets.

With transmissions, there is a point when the courier collects his packet of signals, or perhaps in this case when he contracts to do so.

With each point in time, as outlined, there is a change from nothing to something in terms of property, with the sudden result that what a moment earlier was available to the world, now hardens into a complex of rights. More likely than not this will rarely occur, but that it can occur at all, and occasionally does, suggests that there are new forms of incorporeal property which exist and coexist in a variety of subjects that professionals license out by contract.

And so it is not good enough to go on talking about copyright in the communications industries. This little study can be only a beginning. Perhaps others may suggest new classifications, as zoologists do, and enlarge the scope of incorporeal property. The main thing is to identify new subjects. Then they can be given names, and rules for their behaviour can be agreed. Copyright, however, is only one among several species. When jurists are willing to look beyond it, in the spirit of Lord Lyndhurst's dictum, they may find things that reward exploration of the intangible.

One point, finally, never will be resolved, the meaning of "to exist" in any discussion of things incorporeal. Whether Mozart's *Prague Symphony* would exist if all recordings and scores of that work were destroyed, and everyone who knew it by memory died off, is a question not even the most skilled of musicians can answer.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

I. United States of America and Territories

4. U.S. CONGRESS. HOUSE. *Hogan, Lawrence J.*

Controversy over copyrights. *Congressional Record*, vol. 117, no. 112 (July 20, 1971), pp. E7969-E7970.

Representative Hogan remarks about the controversy over the revision of the copyright law and commends to his colleagues' attention an article from the February 24, 1971, issue of *Variety* which he describes, in part, as "an introduction to some of the fundamental arguments in favor of statutory changes." The article, by A. N. Feldzamen, entitled "Why not a federal commission to govern shifting copyright values?," is inserted in its entirety into the *Record*, and proposes an "approach based on principle and purpose, rather than on competing interests." This might be done by the establishment of a regulatory commission and the enactment of a "general law, outlining main purposes and methods . . . to guide the commission."

5. U.S. CONGRESS. SENATE.

S. 2427. A bill to amend the Communications Act of 1934 to provide for the regulation of community antenna television systems. Introduced by Mr. Williams, August 4 (legislative day, August 3), 1971, and referred to the Committee on Commerce. 3 p. 92d Cong., 1st Sess.

Provides, among other things, for local program origination, governmental and educational access, public service programs, and possible two-way communications. See Item 6, *infra*.

6. U.S. CONGRESS. SENATE. *William, Harrison A., Jr.*

S. 2427. A bill to amend the Communications Act of 1934 to provide for the regulation of community antenna television systems. *Congressional Record*, vol. 117, no. 125 (daily ed. Aug. 4, 1971), pp. S13065-S13066.

Senator Williams' statement on his introduction of S. 2427, which he "believe[s] would establish a coherent nationwide format to pro-

mote the orderly growth of cable television in a manner consistent with the legitimate rights of broadcasters, and the best interests of the public . . . Furthermore, it would establish clear national long-range policy for the FCC to follow in exercising its authority [over CATV]. This policy would establish cable television as a public utility." The text of the bill appears at the end of the statement.

7. U.S. CONGRESS. SENATE. *U.S. Federal Communications Commission.*

Summary submitted to Committee [on Commerce], August 5, 1971. *Congressional Record*, vol. 117, no. 127, pt. II (daily ed. Aug. 6, 1971), pp. S13628-S13637.

A series of proposals for regulation of various aspects of cable television, including importation of distant signals, use of nonbroadcast cable channels, jurisdictional responsibilities of Federal, State and local governments, among other things, are inserted into the *Record* by Senator Pastore, Chairman of the Committee on Commerce. The Commission states that its "objective throughout has been to find a way of opening up cable's potential to serve the public without at the same time undermining the foundation of the existing over-the-air broadcast structure." Also, the Commission expresses the belief that cable regulation and copyright can be separately considered.

2. Foreign Nations

8. AUSTRALIA. *Laws, statutes, etc.*

Loi de 1968 sur le droit d'auteur. *Revue Internationale du Droit d'Auteur*, no. 69 (July 1971), pp. 104-209.

A French translation, by BIRPI, of the Australian copyright law of 1968, entered into force on May 1, 1969.

9. BELGIUM. *Laws, statutes, etc.*

Extract from the Law of October 10, 1967, containing the Civil Procedure Code. *Copyright*, vol. 7, no. 7 (July 1971), p. 124.

The extract consists of an English translation of chapter VIII of the Law of October 10, 1967 and deals with the regulation of seizure of infringing materials in patent and copyright cases. Pursuant to section 5 of the law, chapter VIII entered into force on November 1, 1970.

10. IRAN. *Laws, statutes, etc.*

Loi sur la protection des droits des auteurs, des compositeurs et des artistes. *Revue Internationale du Droit d'Auteur*, no. 69 (July 1971), pp. 209-213.

A French translation, by WIPO, of the Iranian copyright law of 1970.

11. JAPAN. *Laws, statutes, etc.*

Loi de 1970 sur le droit d'auteur. *Revue Internationale du Droit d'Auteur*, no. 69 (July 1971), pp. 213-246.

A French translation, by WIPO, of the Japanese copyright law of 1970, effective January 1, 1971.

12. MALAYSIA. *Laws, statutes, etc.*

Loi de 1969 sur le droit d'auteur. *Revue Internationale du Droit d'Auteur*, no. 69 (July 1971), pp. 246-261.

A French translation, by WIPO, of the Malaysian copyright law of 1969, effective August 1, 1969.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

13. DIPLOMATIC CONFERENCE FOR THE REVISION OF THE BERNE CONVENTION, *Paris, July 5-24, 1971.*

Documents, *Copyright*, vol. 7, no. 8 (Aug. 1971), pp. 135-161.

Contents: I. Paris Act. II. General report on the Conference.

III. List of participants. IV: Bureau of the Conference.

"The purpose of the Conference was on the one hand to revise the provisions relating to developing countries contained in the Stockholm Act (1967) of the Convention, and on the other hand to introduce in the final clauses of the said Act the modifications consequent upon that revision."

14. HUNGARY — U.S.S.R.

Exchange of notes concerning the prolongation of the validity of the Convention on the Reciprocal Protection of Copyright. *Copyright*, vol. 7, no. 7 (July 1971), p. 123.

The notes, dated March 2, 1971, confirm an agreement by the two parties to prolong the validity of the Convention concluded on November 17, 1967, for a period of seven years, beginning on January 1, 1971 and extending until January 1, 1978. See 15 BULL. CR. Soc. 178, Item 118 (1968).

15. UNIVERSAL COPYRIGHT CONVENTION. *Revision, 1971.*

Universal Copyright Convention as revised at Paris on 24 July 1971. *BNA's Patent, Trademark & Copyright Journal*, no. 41 (Aug. 19, 1971), pp. D1-D7.

The English text of the newly revised Convention.

Note: This BULLETIN will publish the revised Convention and the Report of the Rapporteur in its December 1971 issue, in their entirety.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

16. *Lee v. Runge*, 171 U.S.P.Q. 322 (U.S. Supreme Court, Oct. 19, 1971). For decision below, see 169 U.S.P.Q. 388 (9th Cir. 1971), 18 BULL. CR. Soc. 379, Item 325 (1971).

Petition for writ of certiorari *held*, denied.

Mr. Justice Douglas dissented, arguing that the Court should consider whether the patent standard of "novelty" is constitutionally required of copyrightable subject matter. The groundwork for such inquiry was laid by the Supreme Court itself in its 1966 patent decision in *Graham v. John Deere Co.*, 383 U.S. 1 (considering the constitutional reference to the promotion of societal progress — a reference textually applicable to the copyright power of Congress as well as to patents — to impose a limiting standard on patentability), and Justice Douglas' dissent bears out Prof. Nimmer's forecast that the *John Deere* decision suggested the possibility of a "startling departure" from the traditional "originality" standard of copyright.*

Owing to the significance of Justice Douglas' challenge to the well-established and, in his words, "longstanding . . . pattern of statutory construction" ** requiring only "originality" — i.e., independent creation — for copyright protection, and considering the possible support for this challenge in *John Deere*, the BULLETIN here reprints his dissenting opinion in full:

MR. JUSTICE DOUGLAS, dissenting.

Petitioner infringed respondent's copyright and a verdict was rendered against her. Petitioner argued that because the congressional power over copyrights and patents stemmed from the same

* See NIMMER ON COPYRIGHT §10.1 at 33 n. 7 (a).

** There are some early decisions which appear to append a "novelty" standard to copyright. See *Id.* at 34 n. 15.

constitutional provision, they both should be governed by the same standard. Thus, petitioner contended that the copyright was invalid because the book in question lacked "novelty," but the Court of Appeals rejected this argument saying that the appropriate standard for a copyright was "originality" and that the respondent's book met this criteria.¹ The standard of copyrightability presents an important question concerning the scope of Congress' enumerated powers. It has not heretofore been decided by this Court² and, arguably, it was wrongly decided by the courts below.

In 1961, respondent published and copyrighted a book entitled *Face Lifting by Exercise*. This book explained how isometric facial exercises could be used to preserve the appearance of youth. It was based on respondent's study of anatomy, physical therapy and magazine and newspaper articles, but there is nothing in the record to indicate that the ideas it contained constituted anything more than "selecting the last piece to put into the last opening in a jigsaw puzzle." *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 335, 65 USPQ 297, 301. It was merely a repetition of the existing state of the art. During 1962, petitioner was employed in respondent's beauty salon and we may assume that it was during this time that petitioner first read respondent's book and learned of respondent's facial exercises. In 1965, petitioner published *The Joyce*

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1. *Runge v. Lee*, 441 F.2d 579, 581, 169 USPQ 388, 390 (CA 9 1971):

"The standard of 'novelty' urged by appellants is applicable to patents, but not to copyrights. The copyright standard is one of 'originality':

'The requirements for the "originality" necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something "recognizably his own" to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required.'"

Quoting *Doran v. Sunset House Dist. Corp.*, 197 F.Supp. 941, 944, 131 USPQ 94, 97 (SD Cal. 1961), *aff'd* 304 F.2d 251, 134 USPQ 4 (CA 9 1962).

2. *Mazer v. Stein*, 347 U.S. 201, 100 USPQ 325, dealt only with the statutory standards for copyrightability because the constitutional questions were not raised until oral argument. Respondent's reliance upon *Mazer* as an expression of the constitutional standards, for copyrights is misplaced therefore. Those cases in which we have considered the constitutional ramifications of the copyright power have not dealt with the standard of copyrightability. E. g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53. See also Note, 68 Harv. L. Rev. 517 (1955).

Lee Method of Scientific Facial Exercises. It contained a system of facial exercises strikingly similar to respondent's and, even though it was unquestionably expressed in petitioner's own language, we may safely conclude that it was based on respondent's book. An action for copyright infringement was made out, therefore, if the respondent's copyright was valid and if it embraced the ideas in her book.

The constitutional power over copyrights is found in the same clause that governs the issuance of patents: "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." Art. I, § 8, cl. 8. Many of the same interests underlie both grants of power. The Federalist No. 43. While this Court has not had many occasions to consider the constitutional parameters of copyright power, we have indicated that the introductory clause, "To promote the Progress of Science and useful Arts," acts as a limit on Congress' power to grant monopolies through patents. In *Graham v. John Deere Co.*, 383 U.S. 1, 5-6, 148 USPQ 459, 462, we said:

"The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the Sixteenth and Seventeenth Centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.' It was written against the backdrop of the practices eventually curtailed by the Statute of Monopolies of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of the useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of * * * the useful Arts.' This is the standard expressed in the Constitution and it may not be ignored. And it is in this light that patent 'validity requires reference to a standard written into the Constitution.'" (Citations omitted.)

In *Mazer v. Stein*, 347 U.S. 201, 219, 100 USPQ 325, 333, we indicated that the copyright power is also governed by this same introductory phrase: "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 useful Arts.'" See also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249. In other contexts, we have also shown that patents and copyrights stand on the same footing. E.g., *United States v. Paramount Pictures*, 334 U.S. 131, 158, 77 USPQ 243, 253; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 401, 44 USPQ 607, 611. No reason can be offered why we should depart from the plain import of this grant of congressional power and apply more lenient constitutional standards to copyrights than to patents.³ Indeed, for reasons which will later be considered, a copyright may have to meet greater constitutional standards for validity than a patent. The limitations set forth in *Graham v. John Deere Co.*, therefore apply with at least equal force to copyrights. Cf. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59.

An author's "Writing" or an inventor's "Discovery" can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain. The congressional power to grant monopolies for "Writings and Discoveries" is likewise limited to that which accomplishes the stated purpose of promoting "the Progress of Science and useful Arts." No distinction is made in the constitutional language between copyrights and patents and I would not create one by judicial gloss. Where, as here, a writer has published a book which compiles and applies information available to all men, should that writer have a monopoly on the ideas in that book through a copyright issued merely because the words used were the author's own?

3. Statutory support for the distinction made by the courts below is, at best, flimsy. It is true that the standards of "novelty," 35 U.S.C. § 102, and "non-obviousness," 35 U.S.C. § 103, are embodied in the patent statutes. "Originality," however, is not set forth in the copyright laws as a sufficient measure of copyrightability and it owes its development solely to the courts. E.g., *Du Puy v. Post Telegram Co.*, 210 F. 883 (CA 3 1914); *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (CA 2 1903). A longstanding, but erroneous, pattern of statutory interpretation may not be spared from the force of a constitutional mandate by reason of its longevity. *Erie R. Co. v. Tompkins*, 304 U.S. 64.

Patents which did not serve the broad goals of furthering scientific advancement and bettering the lot of mankind (*Great Atlantic & Pacific Tea Co. v. Supermarket*, 340 U.S. 147, 154-155, 87 USPQ 303, 306-307, concurring opinion) have been held invalid because they lacked utility, did no more than combine existing inventions, were obvious to someone schooled in the art, or sought to monopolize ideas within the public domain. *Graham v. John Deere Co.*, *supra*; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, *supra*; *Hotchkiss v. Greenwood*, 11 How. 248. It is not obvious that respondent's system of facial exercises was patentable under these standards. It arguably amounted to nothing more than an application of existing knowledge based upon sources available to all men. We have repeatedly held that patents so devoid of novelty were invalid. To create a monopoly under the copyright power which would not be available under the patent power would be to betray the common birthright of all men at the altar of hollow formalisms.

The application of the constitutional standard of "novelty" will not "invalidate the copyright in a substantial portion of all literary works, where novelty as distinguished from originality is a very rare commodity," as one commentator has suggested.⁴ If Johann Spies' *Historia von Dr. Johann Fausten*, Christopher Marlowe's *The Tragical History of Dr. Faustus*, Goethe's *Faust* and all the other countless operatic, symphonic, dramatic and literary versions of the Faustian legend were published for the first time today, copyright protection could well be extended to all. "[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea — not the idea itself." *Mazer v. Stein*, *supra*, at 217, 100 USPQ at 333. The manner in which the words or musical notes are combined to recount the Faustian legend could well satisfy the constitutional requirement of novelty even though the broad ideas they describe may be part of the public domain. This

4. M. Nimmer on Copyright 33 n. 7a (1971). Professor Nimmer seems to have retreated somewhat from this view, however. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U. C. L. A. L. Rev. 1180 (1970). Even if it were assumed that the application of the "novelty" standard curtailed the monopoly afforded by the copyright, it has recently been demonstrated that this would not seriously affect the publishing industry nor would it disserve the interests underlying the copyright power. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970).

question is not before us in the present case, however, because the manner of expression used by petitioner was unquestionably her own and it was only the ideas of respondent that were used.⁵

Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U. C. L. A. L. Rev. 1180 (1970). The framers of the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by the original Constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas. The "public interest in having the fullest information available on the murder of President Kennedy," for example, led one court to conclude that photographs of the assassination were not entitled to the full range of copyright protection. *Time, Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130, 146, 159 USPQ 663, 675 (S.D. N.Y., 1968). The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatise and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.

Application of the novelty standard does not require that a person whose literary work is used by another be left without a remedy. We deal here only with the extent of Congress' enumerated constitutional powers. Quite different questions would be raised by actions for unfair competition or conversion of a common law property interest. *International News Service v. Associated Press*, 248 U.S. 215. Similarly, different questions would be involved had Congress acted pursuant to other enumerated powers. Cf. *Missouri v. Holland*, 252 U.S. 416. The respondent's rights are limited to that which is necessary to "promote the Progress of Science and useful Arts." This requires a level of "Novelty" which respondent arguably has not satisfied.

I would grant certiorari and set the case for argument.

[*Ed. Note:* In considering the Douglas opinion, the reader's attention is directed to the Ninth Circuit Court of Appeals' analysis of the dis-

5. I recognize that if copyright protection prevented only literal copying, the clever plagiarist could avoid its sanctions by changing irrelevant words. Protecting the manner of expression, however, cannot be allowed to become the tail that wags the dog.

tion and balance assertedly struck by Congress "between protection and competition under the Patent Act and Copyright Act" in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 170 U.S.P.Q. 557; 1971, digested in this issue of the BULLETIN at Item 22, below, and to the re-ordering of various "substantive and procedural prerequisites" therein discussed which might accompany the application of a novelty standard to copyright.

Apropos of Justice Douglas' citation of *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), one might also consider the extent to which a novelty standard (or an objective standard of whether a work "promote[s] the Progress of Science and Useful Arts") might, in the area of artistic and intellectual endeavor, become an invitation to judicial scrutiny of artistic or literary merit, or even the extent to which the "novelty" and societal progress standards might act in opposition. In *Bleistein*, Justice Holmes said:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Of collateral interest in Mr. Justice Douglas' dissent is his citation of *International News Service v. Associated Press*, 248 U.S. 215 (1918) as apparently viable authority in "actions for unfair competition or conversion of a common law property interest." Justice Douglas' views were presumably represented in Justice Black's opinions for the Court in *Sears, Roebuck & Co. v. Stiffel Company*, 376 U.S. 226 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), and at least one appellate court has held *Sears* and *Compco* to have "clearly overruled" the *I.N.S.* case in relevant part. *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967).

The *I.N.S.-Sears* and *Compco* controversy also brings to mind that the lower court decisions in the latter cases were arguably reversible solely by reason of inadequate showings of secondary meaning in the copied product features. Considering Justice Douglas' insistence that

the *Runge* defendant's "manner of expression . . . was unquestionably her own and . . . only the ideas of [plaintiff] were used," and noting that the charge to the jury in *Runge* was phrased more in terms of misappropriation of effort than in terms of appropriation of expression (see 169 U.S.P.Q. at 390), it is similarly arguable that *Runge* was properly reversible for the simple failure of the lower courts to distinguish between protected "expression" and freely available "ideas." Again, reference is made to the *Kalpakian* case digested below.

J.A.B.]

17. A COMMENT ON THE DOUGLAS DISSENT IN *LEE V. RUNGE*.

By MELVILLE B. NIMMER*

Mr. Justice Douglas in his provocative dissent in *Lee v. Runge*,¹ is probably right in his suggestion that the case was wrongly decided by the Court of Appeals for the Ninth Circuit.² But the reasoning by which he reaches that conclusion, if followed in succeeding cases, could do great injury to the law of copyright.

The Douglas dissent treats as if they were the same what are in fact two quite different concepts. One is the distinction between originality and novelty;³ the other is the dichotomy between an idea and its expression. With respect to the idea-expression dichotomy, the Douglas dissent seems to me to be on solid ground. Even if Lee copied from Runge the particular facial exercises contained in the Runge book, as long as Lee's manner of describing those exercises (i.e., her "expression") was not copied from Runge (as apparently it was not), then Lee has not copied any *protectible* aspect of the Runge book. Facts are quite properly treated as non-protectible "ideas." No one can claim to be the author of a fact, even if he is the first to discover such fact. A newspaper reporter cannot claim a copyright monopoly in the facts contained in his news story, even if he is the first to discover such facts, though he may claim copyright in the particular expression he uses to describe such facts.⁴ So with the treatment of the human body in order to obtain certain physical results. A cardiac specialist who discovers a particular

* Professor of Law, University of California, Los Angeles.

1. 92 S. Ct. 197 (1971).

2. 441 F.2d 579 (9th Cir. 1971).

3. In essence "originality" means independent creation without copying from others; "novelty" means first of its kind. For a more complete explanation see NIMMER ON COPYRIGHT [hereinafter "Treatise"], §10.1 (1971).

4. See Treatise, §29.

method for treating heart patients has discovered certain "facts" about the nature of the body. He may, if he writes a book describing his method, claim copyright in his form of expression. He cannot claim copyright in the method per se, so as to prevent others from writing books describing the same method. The treatment of facial muscles is entitled to no different copyright status than is the treatment of heart muscles. Justice Douglas seems to be quite correct when he suggests that copyright protection for "ideas" (including facts) would present serious first amendment problems.

The error in the Douglas opinion arises in his assumption that copyright protection for works which are original, but not novel, somehow constitutes the protection of ideas. He apparently falls into this error by assuming that anything less than a word for word copying should be regarded as the copying of an "idea" and hence not copyright infringement.⁵ It is quite understandable that Justice Douglas reaches this conclusion in a case such as *Lee v. Runge*, where the underlying concepts are themselves factual, and not the creation of authorship. Since there is nothing either original or novel in a copyright sense in facts per se, the only protectible aspect of a factual work may lie in its literal expression. With respect to literal, word for word expression, it is unlikely that two different people will independently choose the same words. Thus originality without novelty will almost never exist, and hence a standard of novelty will not appreciably differ from a standard of originality. But if the standard of novelty rather than originality generally prevailed, authors or nonfactual works would be put at a great disadvantage. Copyright if it is to be meaningful must protect an author's nonfactual, creative concepts on a somewhat more abstract level than merely his exact words. As Learned Hand long ago observed: copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."⁶ Such protection for something less literal than the author's precise words, does not mean that the author may claim copyright in the more abstract formulations of his ideas.⁷ It is those abstract formulations which constitute non-

5. The Douglas opinion does, at footnote 5, recognize the danger to proper copyright interests in prohibiting only word for word copying. Justice Douglas meets this with the Delphic warning that "manner of expression . . . cannot be allowed to become the tail that wags the dog."

6. *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930).

7. For a discussion of the "abstractions test," and the manner in which the more abstract and non-protectible "ideas" are distinguished from their more specific and protectible "expression," see Treatise, §143.11.

copyrightable ideas. I have argued elsewhere why it seems to me that first amendment values and copyright values are both adequately served by the idea-expression dichotomy recognized under the law of copyright.⁸ I can do no more here than to state the conclusion that the "market-place of ideas" essential to first amendment values does require a free commerce in abstract ideas, but not in the more specific formulations of an author (e.g., a plot's sequence of events, interplay of characters, etc.) even if such formulations as copied fall below the specificity of word for word copying. If something somewhat less specific than an author's exact words may nevertheless constitute his protectible "expression," and not merely his non-protectible "idea," it follows that the original, but possibly non-novel components of an author's work (e.g., a plot's sequence of events that may have been anticipated in some prior work) may be protected by copyright without protecting his "ideas." I would suggest, then, that it is neither inconsistent, nor a "retreat" to regard the non-copyright status of "ideas" as required by the first amendment while at the same time defending the originality standard of copyrightability.

Justice Douglas further argues that the copyright clause of the Constitution requires a uniform standard of novelty for both patents and copyright. He states: "No reason can be offered why we should depart from the plain import of this grant of congressional power and apply more lenient standards to copyrights than to patents."⁹ But precisely such a reason was offered by Judge Jerome Frank in an extensive discussion of the distinction between the meaning of the words "authors" and "inventors" as found in the copyright clause of the Constitution.¹⁰ Moreover, as Judge Frank pointed out, while a copyright is easier to obtain than a patent, because of the lower standard of originality rather than novelty, it is more difficult to enforce. A copyright owner in an infringement action must prove that similarity is due to copying, while a patent owner need merely prove similarity in the defendant's work, even if due to independent creation. If equality of treatment is to be the guiding principle, then requiring a higher (novelty) standard of copyrightability should be accompanied by the lower (independent creation) test of infringement.

8. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA Law Rev. 1180, 1189 (1970). An earlier version of this paper was delivered before the Copyright Society of the U.S.A. as the Inaugural Donald C. Brace Memorial Lecture, and appears in 17 BULL. CR. SOC. 255, Item 109 (1970).

9. 92 S. Ct. at p. 199.

10. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951).

Justice Douglas' conclusion that a standard of novelty would "not 'invalidate the copyright in the substantial portion of all literary works,'" is again based upon his premise that only word for word copying does or should constitute infringement. But if copying on a slightly more abstract level constitutes infringement, then his conclusion appears incorrect. I can attest that some twenty years of copyright practice has convinced me of the frequency with which authors working independently of each other strike upon the same plot patterns on a level that falls on the expression side of the idea-expression dichotomy. The Douglas allusion to the Faustian legend seems to me to miss the point. It is true that "copyright protection could well be extended to all" of the succeeding versions of the Faust story because each added some new (novel or original) element. But if the first version were protected by copyright, succeeding versions would constitute an infringement of such copyright (under either a novelty or originality standard), since each such succeeding version incorporated sufficient material from the first, even without word for word copying, as to constitute a taking of "expression" rather than mere idea. Would anyone claim that Messrs. Lerner and Loewe could have written and presented "My Fair Lady" without having obtained a copyright license from the Shaw Estate even if there were no word for word copying of dialogue from "Pygmalion"?¹¹

One wonders whether the concluding paragraph in the Douglas opinion, with its reference to the *International News v. Associated Press* case suggests that Mr. Justice Douglas regards the doctrine of *Sears and Compco*¹² as inapplicable in the copyright sphere. This seems incompatible with his major theme of equal treatment as between patent and copyright. It may be that he regards federal preemption under *Sears and Compco* as inapplicable because he regards the standard of originality as constitutionally impermissible, and hence not an area as to which Congress could either legislate or preempt.

Notwithstanding the objections voiced above, the Douglas opinion is valuable because it poses fundamental issues which the copyright bar

11. But Shaw's "Pygmalion" would not have constituted an infringement of the Greek myth "Pygmalion and Galatea" even if the latter were protected by copyright. The similarity between Shaw and the Greek tale is clearly sufficiently abstract as to fall on the "idea" side of the idea-expression dichotomy.
12. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964). See Nimmer, *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF LAW PERTAINING TO LITERARY, MUSICAL AND ARTISTIC WORKS*, 447-474 (West Pub. Co., 1971).

tends to take for granted. It forces us to re-think some of our first principles. This cannot but be desirable. Even more valuable is his explicit recognition for the first time in any judicial opinion that the first amendment does have an application in the copyright sphere. But this is only a forerunner of what is yet to come. We may confidently expect that Mr. Justice Douglas' great contributions to first amendment theory will find thoughtful expression in its application to copyright as in its application in other spheres. In doing so there is reason to hope that, as a noted author in his own right, he will demonstrate an understanding of the needs of authorship¹³ as well as of those of free speech.

18. *Picchione v. Commissioner of Internal Revenue*, 169 U.S.P.Q. 65 (1st Cir. March 12, 1971) (Aldrich, J.), *cert. denied*, 171 U.S.P.Q. 321, Oct. 12, 1971. *For decision below, see* 167 U.S.P.Q. 110 (Tax Ct. 1970), 18 BULL. CR. SOC. 55, Item 15 (1970).

Appeal by taxpayer against decision for respondent Commissioner of Internal Revenue in petition against determination of deficiencies in taxpayer's federal return.

Petitioner devised and copyrighted a new bookkeeping record book and, in 1946, sold the rights to a corporation owned by him in return for specified royalties. In 1952 petitioner's right to future royalties was transferred to a trust, the trustee being directed to accumulate income for a period and then pay the net income to petitioner for life. The first payment from the trust was made to petitioner in 1964. In his 1964, 1965 and 1966 returns petitioner reported this income from the trust as long term capital gain but the respondent held these receipts to comprise ordinary income and this was upheld by the Tax Court.

In 1946, at the time petitioner sold his rights to the corporation, copyrights were considered capital assets so long as they were not held for sale to customers in the ordinary course of business. The Revenue Acts of 1950 and of 1954 amended the definition of capital asset to ex-

13. Justice Douglas suggests that Professor Breyer in his article *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970) has "demonstrated" that a curtailment of copyright "would not seriously affect the publishing industry nor would it disserve the interests underlying the copyright power." 92 S. Ct. at p. 200, *ftnt.* 4. In appraising the persuasiveness of of the Breyer thesis, Justice Douglas and others will find it profitable to consult the soon to be published article, Tyerman, *The Economic Rationale For Copyright Protection For Published Books: A Reply to Professor Breyer*, 18 UCLA L. Rev. 1100 (1971). The Tyerman article was the 1971 first prize winner in the Nathan Burkan Competition at UCLA and the national Nathan Burkan Competition for 1971.

clude copyrights under "the general circumstances . . . in this case." Both amending acts provided that:

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

Petitioner, equating the word "held" in the definition of capital assets with "owned," asserted that the amended definition of capital assets applied only to copyrights transferred after the date of amendment and not to copyrights not owned by a taxpayer in a post-amendment taxable year. The Tax Court held, however, that the new definition of capital assets must be used "in determining the character of all payments received in taxable years" beginning after the amendment.

Held, affirmed.

Although stating that "the language of the effective date provision will probably bear both meanings the parties advance," the court — relying on the structure of the Code provisions in question and legislative history — held the Commissioner's interpretation as sustained by the Tax Court to be the proper one.

The court added:

We remark, in passing, that we are not persuaded of the relevancy of taxpayer's references to certain cases where the Court said that retrospective application of tax laws should be made only when there is a clear congressional mandate . . . [These] cases involve the application of statutes to income received in years prior to their enactment. Here we are considering only the taxation of income received subsequent to the adoption of the statute, a far less drastic imposition. By the same token we are not persuaded that the Tax Court's interpretation of the statute makes it unconstitutional. Retrospective taxation, even to the extent of applying a statute to impose new tax burdens on taxable events that occurred prior to the enactment of the statute, is not necessarily unconstitutional . . . To be unconstitutional, the result must be so harsh and oppressive as to amount to a denial of due process . . .

No constitutional question is even raised by changing the definition of capital assets, and hence the tax rate, applicable to subsequent receipts. Taxpayer has no constitutional right to have all income flowing from his 1946 sale of the copyright taxed under the revenue laws in effect at that time regardless of when the income is received. Tax liability is not a contract . . . Nor has the Government ever

represented that future years would not bring changes in the tax laws. Such changes are as inevitable as taxation itself. When a taxpayer chooses to spread the realization of income from a transaction over a number of years, as taxpayer did here, the Government does not violate due process by taxing that income under the revenue laws in effect in the year in which it is received and reported.

19. *Computer Searching Service Corp. v. Ryan*, 171 U.S.P.Q. 321 (U.S. Sup. Ct. Oct. 12, 1971). *For decision below*, see 169 U.S.P.Q. 3 (2d Cr. 1971), 18 BULL. CR. SOC., 442, Item 387 (1971).

Petition for writ of certiorari *held*, denied.

20. *Gershwin Publishing Corporation v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. May 24, 1971) (Anderson, J.). *For decision below*, see 312 F.Supp. 581, 165 U.S.P.Q. 543 (S.D.N.Y. 1970), 17 BULL. CR. SOC. 427, Item 219 (1970).

Appeal from summary judgment for plaintiff in action for copyright infringement (ASCAP "test case"). Defendant ("CAMI") dually (i) manages and secures bookings for concert artists, and (ii) "organizes, nurtures and maintains" local community associations which sponsor concert series for such artists in communities too small to support a commercial promoter. CAMI's system is such that it is aware of the titles of the musical compositions to be performed at the association programs, but "deliberately" does not attempt to secure copyright clearance for such performances. CAMI asserted that it is in no way responsible for any infringements which might occur at such concerts, but the lower court found for plaintiff because CAMI "caused the . . . infringement . . . by organizing, supervising and controlling the [local association; and] is liable because it knowingly participated in the infringement." In the specific controversy in question, a song in the ASCAP repertory owned by the named plaintiff was performed by one of CAMI's artists publicly for profit at a concert sponsored by the Port Washington Community Concert Association (one of CAMI's local groups).

Held, affirmed.

Noting that the Copyright Act holds accountable "any person [who] shall infringe the copyright" (7 U.S.C. § 101) without defining the "kind or degree of participation" required for liability, the court observed that persons other than the immediate actor (e.g., performer) had been held liable (i) as "contributory" *copyright infringers* (persons "who, with

knowledge of the infringing activity, induce, cause or materially contribute to the infringing conduct of another");* and (ii) as "vicarious" infringers.

In the case of "vicarious infringement," the court noted that "no actual knowledge that [the] copyright monopoly is being impaired" is required, and continued:

Although vicarious liability was initially predicated upon the agency doctrine of respondent superior . . . this court recently held that even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co.* [316 F.2d 304 (2 Cir. 1963)]; Comment, 64 Mich. L. Rev. 1172, 1175-78 (1966). There the defendant department store (Green) was held accountable for the infringing sale of pirated records manufactured and sold by its retailing concessionaire (Jalen). Under the terms of the concession agreement Green retained the ultimate right of supervision over the conduct of Jalen and received as rental a percentage of the concessionaire's gross sales. This court attached no special significance to the technical classification of the Green-Jalen relationship. Rather it found the policies of the copyright law would be best effectuated if Green were held liable, even in the absence of actual knowledge that the copyright monopoly was being impaired, for its failure to police the conduct of the primary infringer.

The court concluded that the lower court "properly held CAMI liable as a vicarious and a contributory infringer." The court said:

With knowledge that its artists included copyrighted compositions in their performances, CAMI created the Port Washington audience as a market for those artists. CAMI's pervasive participation in the formation and direction of this association and its programming of compositions presented amply support the district court's finding that it "caused this copyright infringement." Although CAMI had no formal power to control either the local association or the artists for whom it served as agent, it is clear that the local association depended upon CAMI for direction in matters such as this, that CAMI was in a position to police the infringing conduct

* See, for "contributory" infringement, *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 169 U.S.P.Q. 89 (1971), digested in Item 26 below (Ed.).

of its artists, and that it derived substantial financial benefit from the actions of the primary infringers. CAMI knew that copyrighted works were being performed at the Port Washington concert and that neither the local association nor the performing artists would secure a copyright license. It was, therefore, responsible for, and vicariously liable as the result of, the infringement by those primary infringers.

21. *Monogram Models, Inc. v. Industro Motive Corporation*, 171 U.S.P.Q. 266 (6th Cir. Sept. 17, 1971) (Brooks, J.).

Defendant's appeal from summary judgment for plaintiff in action for infringement of copyright in two plastic scale model airplane kits. Plaintiff registered one of its models in Class A (listing under "Title": "F105 Thunderchief, being a container and instruction sheet for the assembly of a scale model . . .") and the other in Class G (listing under "Nature of Work": "Scale Model Airplane").

Held, reversed and remanded.

The Court of Appeals affirmed the trial court's holding that plastic scale model airplanes are susceptible of copyright, but vacated plaintiff's judgment and remanded the case for fuller development and resolution of certain material questions involving the scope of registration, compliance with notice requirements and infringement.

1. *Copyrightability*: Noting that the courts have held "either by assuming sub silentio or through the use of legal fiction" that the reference to "writings of an author" in 17 U.S.C. § 5 "is not to be literally construed so as to restrict the scope of copyrightable subject matter," and that copyright has been sustained for "writings of an author as far removed from a literal definition of 'writings' and 'author' as miniature statues of religious shrines . . . [and sculpture] . . . a doll . . . in the form of a chimpanzee . . . a filigreed room divider . . . costume jewelry . . . plastic dogs . . . used as coin banks . . . red flat [inflatable] plastic bags with decoration and faces . . . a model hobby horse . . . a sculptural artificial lilac flower (the list goes "on and on" added the court), the court felt "compelled to affirm the holding that scale plastic model airplanes are proper subject matter for copyright protection."

In a footnote, the court noted certain portions of Justices Douglas' and Reed's opinions in *Mazer v. Stein* [347 U.S. 201 (1953)] and stated that "[S]ince this appeal does not raise a constitutional challenge we allude only to the fact that there has been some . . . concern expressed that the grant of Congressional power provided in Article I, § 8 of the

Constitution is perhaps not as broad as has been exercised in the Copyright Act."

2. *Infringement*: In response to a "general question" on interrogatory, defendant stated that it had copied elements of plaintiff's models. In affidavit, however, defendant explained specific similarities between the parties' goods as "technical or standard trade methods commonly used by all manufacturers of plastic model airplanes." The court held:

While there was a general admission of copying, the fact that scale models were of the same actual airplanes* and that similarities were explained in terms of common industrial practices tends to raise a genuine issue of fact as to whether the similarities were simple resemblances, being a natural by-product of the expression of identical ideas, or copyright infringement.

3. *Other*: The court held that factual questions precluding summary judgment also existed as to (i) whether plaintiff's registrations covered the actual models or only the assembly instruction sheet and decorative packaging; (ii) possible manufacture [sic] without copyright notice; and (iii) adequacy of copyright notice. As to point (ii), the court stated in footnote 2 that "a basis for this question arises because it appears from the record that over two years elapsed between" first publication and registration.

22. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 170 U.S.P.Q. 557 (9th Cir. July 7, 1971) (Browning, J.).

Plaintiff's appeal from denial of its motion for an order holding defendants in contempt of consent decree entered in action for copyright infringement. Plaintiff charged defendants with infringement of copyright in a jewel-encrusted bee-shaped jewelry pin. The parties entered into a consent decree in settlement of the action which provided that plaintiff's copyright was valid, that defendants had manufactured an "alleged[ly] . . . similar" pin, and that defendants were enjoined from copying plaintiff's pin. Defendants subsequently marketed another jeweled bee pin and plaintiff sought to hold them in contempt of the decree. The lower court, finding that defendants' pins were the result of independent creation and study and that the parties' pins were not

* See also, on similarities in appearance resulting from a common physical source, *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F. 2d 738, 170 USPQ 557 (9th Cir. 1971), digested at Item 22 (par. 2) below. (Ed.)

"substantially similar" other than by reason of the fact that both "do look like bees," denied plaintiff's motion.

Held, affirmed.

1. *Estoppel Effect of Consent Decree*: The court accepted, for the purposes of this case, the parties' assumption that defendants were bound to accept the validity of plaintiff's copyright by their concession of same in the consent decree, but "expressly save[d] the question whether the line of cases upon which this assumption is based . . . survived *Lear, Inc. v. Adkins*, 395 U.S. 653, 162 U.S.P.Q. 1 (1969) [Licensee estoppel denied in patent case]* . . .

2. *Scope of Copyright Protection*: [Because of the relevance to Mr. Justice Douglas' dissent in *Lee v. Runge*, digested in Item 16 above, this portion of the court's opinion is reprinted in full except for citations. Cf., however, the court's possible equation of patent and copyright estoppel noted in par. 1 above]

Plaintiff contends that its copyright registration of a jeweled bee entitles it to protection from the manufacture and sale by others of any object that to the ordinary observer is substantially similar in appearance. The breadth of this claim is evident. For example, while a photograph of the copyrighted bee pin attached to the complaint depicts a bee with nineteen small white jewels on its back, plaintiff argues that its copyright is infringed by defendants' entire line of a score or more jeweled bees in three sizes decorated with from nine to thirty jewels of various sizes, kinds, and colors.

Although plaintiff's counsel asserted that the originality of plaintiff's bee pin lay in a particular arrangement of jewels on the top of the pin, the elements of this arrangement were never identified. Defendants' witnesses testified that the "arrangement" was simply a function of the size and form of the bee pin and the size of the jewels used. Plaintiff's counsel, repeatedly pressed by the district judge, was unable to suggest how jewels might be placed on the back of a pin in the shape of a bee without infringing plaintiff's copyright. He eventually conceded, "not being a jeweler, I can't conceive of how he might rearrange the design so it is dissimilar."

If plaintiff's understanding of its rights were correct, its copyright would effectively prevent others from engaging in the business

* The court's possible equation of copyright validity estoppel with patent estoppel should be considered in connection with its careful distinction of the copyright and patent monopolies noted below. (Ed.)

of manufacturing and selling jeweled bees. We think plaintiff confuses the balance Congress struck between protection and competition under the Patent Act and the Copyright Act.

The owner of a patent is granted the exclusive right to exploit for a period of seventeen years (a maximum of fourteen years for design patents) the conception that is the subject matter of the patent . . . The grant of this monopoly, however, is carefully circumscribed by substantive and procedural protections. To be patentable the subject matter must be new and useful, and represent a nonobvious advance — one requiring “more ingenuity and skill than that possessed by an ordinary mechanic acquainted with the business”; an advance that would not be obvious to a hypothetical person skilled in the art and charged with knowledge of all relevant developments publicly known to that point in time . . . A patent is granted only after an independent administrative inquiry and determination that these substantive standards have been met. 35 U.S.C. § 131. This determination is subject to both administrative and court review. 35 U.S.C. §§ 134, 141, 145, 146.

Copyright registration, on the other hand, confers no right at all to the conception reflected in the registered subject matter. “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only the expression of the idea — not the idea itself.” . . . Accordingly, the prerequisites for copyright registration are minimal. The work offered for registration need only be the product of the registrant. So long as it is not a plagiarized copy of another’s effort, there is no requirement that the work differ substantially from prior works or that it contribute anything of value. “The copyright protects originality rather than novelty or invention” . . . A copyright is secured simply by publishing the work with the required notice, 17 U.S.C. § 10, and registration is accomplished simply by filing a claim and depositing copies of the work with the Register of Copyrights, 17 U.S.C. §§ 11, 13. There is no administrative investigation or determination of the validity of the claim.

A certificate is refused only if the object falls outside the broad category of matter subject to copyright registration. 17 U.S.C. §§ 4-5. A copyright affords little protection. It confers “only ‘the sole right of multiplying copies.’ Absent copying there can be no infringement of copyright.” . . . Because the registrant’s protection is limited and the social cost therefore small, the life of the copyright is long and, under current proposals, potentially even longer — now

twenty-eight years plus a renewal period of twenty-eight more, and, under Copyright Revision Bill § 543, 91st Congress, 1st Session, the life of the author plus fifty years.

Obviously a copyright must not be treated as equivalent to a patent lest long continuing private monopolies be conferred over areas of gainful activity without first satisfying the substantive and procedural prerequisites to the grant of such privileges.

3. *Copying*: The court observed that "because copyright bars only copying," the case might be disposed of on the district court's finding that defendants did not copy plaintiff's pin and noted the credible and substantial evidence of independent creation, the possible attribution of similarities to a common source ("both [parties] pins [being] lifelike representations of a natural creature"),* and differences in the appearances of the parties' bees "notably in the veining of the wings." However, the court felt that it seemed "unrealistic to suppose that defendants could have closed their minds to plaintiff's highly successful jeweled bee pin as they designed their own" and thus it considered this resolution "not entirely satisfactory" in view of the principle that actionable copying "may be the result of subconscious memory derived from hearing, seeing or reading the copyrighted work at some time in the past."

4. *"Expression" vs. "Idea"*: The court preferred to base its affirmance on the ground that any copying involved only the "idea" of a jeweled bee pin. The line between "expression" and "idea," noted the court, must consider "preservation of the balance between competition and protection" underlying the patent-copyright scheme and distinction and, even to the extent an "idea" is inseparable from its "expression," its copying may not be precluded. The court said:

A copyright . . . bars use of the particular "expression" of an idea in a copyrighted work but does not bar use of the "idea" itself. Others are free to utilize the "idea" so long as they do not plagiarize its "expression."

The critical distinction between "idea" and "expression" is difficult to draw . . . At least in close cases, one may suspect, the classification the court selects may simply state the result reached rather than the reason for it. In our view, the difference is really one of degree as

* See also, on similarities in appearance resulting from a common physical source, *Monogram Models, Inc. v. Industro Motive Corporation*, 171 U.S.P.Q. 266 (6th Cir. 1971), digested at Item 21 (par. 2) above. [Ed.]

Judge Hand suggested in his striking "abstraction" formulation in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121, 7 USPQ 84, 86-87 (2d Cir. 1930). The guiding consideration in drawing the line is the preservation of the balance between competition and protection reflected in the patent and copyrighted laws.

What is basically at stake is the extent of the copyright owner's monopoly — from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an "idea" that defendants were free to copy. Plaintiff seems to agree, for it disavows any claim that defendants cannot manufacture and sell jeweled bee pins and concedes that only plaintiff's particular design or "expression" of the jeweled bee pin "idea" is protected under its copyright. The difficulty, as we have noted, is that on this record the "idea" and its "expression" appear to be indistinguishable. There is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both.

When the "idea" and its "expression" are thus inseparable, copying the "expression" will not be barred because protection for the "expression" in such circumstances would confer a monopoly of the "idea" upon the copyright owner free of the conditions and limitations imposed by the patent law.

23. *Siegel v. Chicken Delight, Inc.*, 171 U.S.P.Q. 269 (9th Cir. Sept. 9, 1971) (Merrill, J.).

In an antitrust class action brought by Chicken Delight franchisees against the alleged imposition of tying arrangements by their franchisor in violation of Section 1 of the Sherman Act, the court stated with respect to copyright:

1. In response to defendant's claim that a trademark cannot be considered a tying item distinct from the products it represents because trademark rights do not exist in gross, but only appurtenant to an established business: "But [this principle of appurtenance does] not mean that a trademark and the product a business it identifies are one and the same; it mean[s] simply that, *unlike a copyright or patent*, a trademark does not confer [exclusionary rights] unless the owner himself uses the mark in connection with an established business."

2. "Just as the quality of a copyrighted creation cannot by a tie-in be appropriated by a creation to which the copyright does not relate" . . .

so tie-ins accomplished by trademark licensing or franchising and designed to "extend the trademark to common articles (which the public . . . has no reason to connect with the trademark) . . ." are subject to antitrust considerations.

3. In concluding that defendant's "unique" trademark and demonstrated ability to impose tie-ins established sufficient market power in defendant to bring it within the ambit of the Sherman Act:

It is now clear that sufficient economic power is to be presumed where the tying product is patented or copyrighted. . . .

Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trademark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accordingly we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trademark.

24. *Walt Disney Productions v. U.S.*, 170 U.S.P.Q. 444 (D. Cal., May 17, 1971) (Real, J.).

Action to recover federal income taxes paid. Plaintiff claimed that its costs in creating certain motion picture film negatives (used to make positive film prints rented to exhibitors) were subject to an investment credit allowance under the Internal Revenue Code.

Held, for plaintiff.

1. *Useful Life*: Noting that (i) plaintiff's films were oriented to "family entertainment" (i.e., having "appeal to adults as well as children") and "as such . . . are not . . . 'dated material', i.e., subject matter with a life span limited by its content"; (ii) that most of plaintiff's films in fact had demonstrated an earning capacity greater than eight years; (iii) that many of plaintiff's films had been reissued for theatre and television, after original exhibition; and (iv) that "plaintiff was planning ahead [as] is evidenced by [its production of films for television] in the black and white era of that medium . . . in color in anticipation of color television reception . . .," the court held that each of the motion picture negatives in question had an estimated useful life of eight years or more when placed in service (thus meeting an investment credit property criterion under 26 U.S.C. § 48). The court added:

Defendant points to the depreciation method of income forecast permitted by the Internal Revenue Code as binding upon plaintiff.

Depreciation and its use as a "tax shelter" has a sufficient history to make one thing clear — that depreciation — as permitted by the tax laws — really has no true relationship to the life of the item depreciated — either useful or otherwise. To apply depreciation method as a binding determination of "estimated useful life" required by the investment credit provisions of the Internal Revenue Code without specific limitation by the legislature is unrealistic and this Court declines the invitation to so legislate.

Defendant is not prejudiced by such a ruling since it is entitled to recapture of investment credits in the event plaintiff's useful life estimates prove to be erroneous. 26 U.S.C. § 47.

2. *Tangible Personal Property*: The court held that the motion picture negatives were "tangible personal property" within the meaning of 26 U.S.C. § 48 (defining property subject to investment credit).

Defendant relied upon Treasury Regs. § 1.48-1(f) in disallowing the credit:

(f) *Intangible property*. Intangible property, such as patents, copyrights, and subscription lists does not qualify as section 38 property. The cost of intangible property, in the case of a patent or copyright, includes all costs of purchasing or producing the item patented or copyrighted. Thus, in the case of a motion picture or television film or tape, the cost of the intangible property includes manuscript and screenplay costs, the cost of wardrobe and set design, the salaries of cameramen, actors, directors, etc., and all other costs properly includible in the basis of such film or tape.

The court held, however, that (a) the Regulation was not persuasive on the issue as it was of doubtful validity in departing from "the ordinary meaning of tangibility":

Defendant in urging upon the Court the binding effect of the above-quoted language misconstrues the function of the Secretary of the Treasury in two important respects: (1) The Congress gave the Secretary the power to promulgate regulations "to carry out the purposes of the Act", not to define or redefine eligible property, and (2) the determination of what is or what is not "tangible personal property", within the meaning of the investment credit provisions of the Internal Revenue Code, is for the Court, not the Secretary of the Treasury. Within its constitutional powers, the Congress could have limited the definition of "tangible personal property"

for tax purposes. It did not do so. Our only alternative is to assume the Congress intended the application of the ordinary meaning of tangibility. The Secretary has no power to create a new substantive definition omitted by the legislature.

The motion picture negatives here certainly are tangible — weighing between 27 and 51 pounds, between 5000 and 11,800 feet in length, and capable of being seen and touched. The negatives are physically used in the manufacture of prints which are plaintiff's stock in trade to its consumers. It is this use which establishes the eligibility as "tangible personal property".

and (b) that the Regulation ignored the fundamental distinction between copyright in a material object and the object itself:

When the Secretary includes in cost of copyright or patents, the "costs of purchasing or producing the item patented or copyrighted," he misconstrues the very nature of patents and copyrights.

A copyright, when secured in accordance with applicable laws is the right to multiply copies of a literary, intellectual or artistic property. Nowhere in the constitutional or statutory scheme does the law create a right by copyright in the property. It is an incorporeal (intangible) right existing independently from the corporeal (tangible) property out of which it arises.

Certainly that right has value — often exceeding the intrinsic value of the tangible property copyrighted. That copyright is a separate property right treated differently for accounting purposes than the copyrighted property is recognized by the Internal Revenue Code, 26 U.S.C. § 861 (a) (4); 26 U.S.C. § 1221 (3). To accept defendant's interpretation of copyright property would exclude "tangible personal property" where the owner of the property in order to guarantee to himself the exclusive right to reproduce the "tangible personal property" obtains a patent or copyright. The fallacy of the major premise is obvious.

Defendant argued that the above Regulation might be read as applicable "only to 'prototypes', i.e., the creation of a sample of a work to determine its workability." Without deciding the validity of this limitation, the court held that it could not operate here as the negatives are "not . . . prototype[s] — experimental film . . . [but] are the vehicle for [the] creation of plaintiff's stock in trade — [they are] *tool[s]* together with the reproduction processes which allow plaintiff to produce its inventory."

3. Allowable Costs:

Although not briefed to the Court, there is a question of allowable costs for creation of the motion picture negatives. It is the view of the Court that costs allowable for computing the investment credit are only those costs which are directly related to the finished negative. To arrive at such allowable costs, the Court finds that those costs which are not affected by the footage shot, i.e., talent on a per picture basis, costs for scenery which must be expended whether the finished product is 5000 or 6000 feet of negative, etc. Therefore, such costs as may involve hourly labor — grips, extras, etc. — shall be allowed only in relationship the final footage of negative to be used for production of positive prints bears to the total footage shot. This arises primarily from the concern of the Court that to rule otherwise would reward inefficiency in motion picture production and certainly the cut negative cannot meet the "life span" requirements established by Congress. None of the rejected footage would qualify.

25. *Charter Fabrics Inc. v. Hale Fabrics Corp.*, 171 U.S.P.Q. 190 (S.D. N.Y. July 23, 1971) (Lasker, J.).

Motion for preliminary injunction in action for infringement of copyright in chevron-type textile design.

Held, motion denied.

The court found that plaintiff's failure to show a reasonable probability of succeeding on the merits precluded temporary relief. This failure consisted of (a) an apparent lack of "substantial similarity" between the parties' designs as measured by the test of an ordinary observer:

Indeed, the disparities are sufficiently apparent to the untutored eye that no "attempt" need be made to discover them. Important as the common chevron element may be, the interstitial material dominates each fabric and distinguishes each from the other. Even the less important chevron theme is not identically pursued in the respective fabrics, the angles of one differing from the other, and plaintiff's chevrons consisting of only two bars while defendant's consist of three — a larger bar of one color bounded by two bars of a second color. The fact that one version of defendant's fabric is printed in black and brown as is plaintiff's fabric (other versions of defendant's fabrics being printed in widely different colors) does not overcome the distinction between the patterns.

and (b) the lack of any contradiction of defendant's designer's credible affidavit of independent creation and lack of prior knowledge of plaintiff's design. This is not a case, said the court, "in which the designs are 'sufficiently intricate so that independent genesis of the two products would have been impossible'."

26. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 169 U.S.P.Q. 89 (S.D.N.Y. Feb. 9, 1971) (McLean, J.). *For earlier related decision, see* 256 F.Supp. 399, 150 U.S.P.Q. 523 (S.D.N.Y. 1966), 14 BULL. CR. SOC. 186, Item 94 (1966).

Action to recover statutory mechanical royalties under sections 1(e) and 101(e) of the Copyright Act. Plaintiffs are proprietors of copyrights in four musical compositions recorded by the named defendant ("Mark-Fi") on one record without payment of negotiated or statutory royalties. Mark-Fi and its principal owner were never served and several other defendants settled with plaintiffs, leaving only Mark-Fi's advertising agency (Metlis) and one of the agency's former employees (Bruce) to stand trial.

Held, judgment for plaintiffs.

1. *Infringement — Parties Liable:** Noting that "the fundamental doctrine that one who knowingly participated in or furthers a tortious act is liable with the prime tortfeasor" is applicable in suits for copyright infringement, the court held defendants Metlis and Bruce to have infringed plaintiffs' copyrights. The court found that Bruce acted not only as an employee of Metlis, but also handled the distribution and manufacture of Mark-Fi's record and was "in effect" a partner in Mark-Fi and, further, that he knew of the piracy. As to Metlis, the court found that its work in arranging for radio advertising of record "was a participation in and a furtherance of" the infringement, and that it was bound, as employer, by Bruce's culpable knowledge.

2. *Satisfaction:* Defendants maintained that plaintiffs were required to apply amounts received from the settling defendants in partial satisfaction of their claim under N.Y. Gen. Obligations Law § 15-103, providing:

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint,

* See generally, *Gershwin Publishing Corporation v. Columbia Artists Management, Inc.*, 443 F. 2d 1159 (2d Cir. 1971), digested in Item 20 above. (Ed.)

or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

However, the court held that plaintiffs were entitled to judgment against defendants for the full amount of royalties due. In reaching this conclusion the court (i) considered it "doubtful" that the New York statute was applicable to this action "brought to enforce an obligation arising under a federal statute"; and (ii) found that the amounts paid by the settling defendants were not paid "in whole or in partial satisfaction of their obligations" within the terms of Section 15-103. The court said:

These defendants did not permit [sic.; admit?] any obligation to plaintiffs. They each paid \$1,000 to buy their peace in this litigation. The \$1,000 appears to have been an arbitrary sum, fixed without reference to what plaintiffs might be able to prove as to the amount of royalties due, either from the settling defendants or from Metlis and Bruce, amounts which are not necessarily the same.

3. *Attorneys' Fees*: The court refused the discretionary award of counsel fees "bearing in mind that by virtue of the settlement, each plaintiff will [recover] in excess of statutory royalties" and considering that the burden of the judgment would probably fall entirely on Matlis (Bruce's attorney, who originally answered for him and was requested by the court to continue representation to avoid default, stated that he had not seen Bruce in the last five years) "who, in a sense, was victimized by [Mark-Fi] and Bruce, as plaintiffs were . . ."

2. State Court Decisions

27. *Legros v. Jeppson*, 171 U.S.P.Q. 426 (Sup. Ct. N.Y. Co. July 7, 1971) (Korn, J.).

Action for libelous statements in a book wherein defendant moved to dismiss on the basis of the statute of limitations. The court noted that "the issue is the date of publication [of the book] or the time of accrual of the complaint." Plaintiff asserted that the date of publication claimed in defendant's application for copyright registration was conclusive of the publication date for the libel action, but the court held this erroneous as "publication for the purpose of defamation and for the purpose of copyright may not tender the same legal issue . . . In

sum, the date stated in the copyright affidavit [i.e., the affidavit of domestic manufacture in Form A] would appear to be merely one of the factors to be considered in determining the date, when, according to the practice in the trade, publication is deemed to have occurred." *

Plaintiff also sought to have the publication date in the copyright application treated as a defense to the limitations claim on the basis of equitable estoppel, but the court held that no "direct demonstrable relation" between the application claim and plaintiff's failure to act was conclusively shown on the motion, stating in part:

[It is not] established that the copyright application is the sole source of information in the industry as to publications and time of publication. In the context here, if [plaintiff's] inquiry of the Copyright Office was merely accidental or coincidental, it would be insufficient to invoke equitable estoppel.

Concluding that factual issues remained in connection with the positions of both parties, the court denied the motion to dismiss with leave to the parties to plead their respective defense of limitations and claim of estoppel.

28. *Lyle Stuart, Inc. v. Pinnacle Books*, 171 U.S.P.Q. 444 (Sup. Ct. N.Y. Co. Sept. 23, 1971) (Nadel, J.).

Motion for preliminary injunction in action for unfair competition. Plaintiffs published a best-selling "sexual how-to book" entitled "The Sensuous Woman" in hardcover and paperback, and subsequently published a best-selling sequel entitled "The Sensuous Man" in hardcover, with paperback publication scheduled for January, 1972. Plaintiffs spent "substantial sums" in promoting both works and planned further promotion.

Defendant plans to publish a paperback entitled "The Sensual Male" and issued promotional material containing such statements as "If you've read 'The Sensuous Woman' then you must read [defendant's book]"; "[Our] book is sort of a companion to 'The Sensuous Woman' "

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- * The court reviewed various cases involving the accrual of libel claims upon publication, including *Gregoire v. G. P. Putman's Sons*, 298 N.Y. 119 (1948) (cause of action arises "When the finished product is released by the publisher for sale in accord with trade practice"); *Zuck v. Interstate Publishing Corp.*, 317 F. 2d 727 [2d Cir. 1963] (cause accrues on actual "on sale" date despite "cover" or "announced" dates); and *Osmers v. Parade Publication, Inc.*, 234 F. Supp. 925 [S.D.N.Y. 1964] ("What is really determinative is the earliest date on which the libel was substantially and effectively communicated to a meaningful mass of readers").

and, although defendant's book never appeared in hard cover, "First time in paperback."

Held, motion granted.

1. *Promotional Misrepresentations*: The court held that defendant's promotional references went "beyond merely comparing defendants' book with . . . plaintiffs'" and appeared intended to "misrepresent defendant's book as a sequel to 'The Sensuous Woman' and thereby pass it off as 'The Sensuous Man'."

2. *Title Piracy Per Se*: The court held that defendant's mere use of the title "The Sensual Male" in and of itself appeared to violate plaintiffs' rights and justified preliminary relief.

A. *Theory of Action*: The court noted that although "the copyright of a literary work does not give the owner of the copyright an exclusive right to the title of the work . . . if the title . . . has acquired secondary meaning, the owner of the work is entitled to protection against another's use of that title or an imitation thereof." (Although the court does not mention the criterion of likelihood of confusion at this point, it raises this requirement in the definition of secondary meaning noted below).

B. *Secondary Meaning*: Stating that "for the title of a work to acquire such a secondary meaning, the title must become so associated with the owner's work that one would be likely to confuse another work bearing . . . a similar title with the involved work," the court found that the wide promotion and great success of plaintiffs' books left "little question [but that there is a] strong association in the minds of the public between the plaintiff's titles and their books."

C. *Likelihood of Confusion*: The court concluded that the "title, substance and format" of defendant's book so resembled that of plaintiffs' as to create the requisite likelihood of confusion. The court said:

The similarity between the title "The Sensuous Woman" and the title "The Sensual Male" may not in and of itself constitute justification for granting a preliminary injunction, for these two titles are easily distinguishable with regard to the sex indicated and to the qualities attributed thereto.

The title "The Sensuous Man" is however, not so easily distinguishable from the title "The Sensual Male". There is a similarity of sound, as well as a similarity of meaning (to the extent that both deal with suggested sense qualities of men) between the titles. These

similarities, coupled with the fact that both books are in the "sex how-to" field, extend the likelihood of confusion.

Although conceding that "few conclusions" could be drawn concerning the relationship between the "format" of defendant's paperback "Sensual Male" and plaintiffs' paperback "Sensuous Man" because the latter was yet to be published, the court held that "since the public has come to expect the subsequent publication of successful hardcover books in paperback . . . the public, in view of the . . . similarities in title and subject . . . would predictably mistake the defendant's book for the expected paperback publication of 'The Sensuous Man'."

D. Propriety of Preliminary Relief:

In the publishing field, the timing of the release of paperback editions of hardcover books is important to achieve the maximum sales potential of each edition. The release of the defendants' book at this time, and the noted confusion that would occur as a result thereof would expose the plaintiffs to irreparable injury to their reputation and business. The fact that Stuart has succeeded in cultivating a national reputation for publishing books involving sexual activity does not impair Stuart's right to protect that reputation. Without judging the artistic or creative merits of such a reputation, it is, in today's market, of considerable economic value. Stuart's reputation is thus entitled to be protected from association with an unknown work which may not meet the particular standards of Stuart's publications. This is especially so since the potential association in question is between the defendants' unknown book and the plaintiffs' books which have established themselves as national best sellers. Furthermore, it would be impossible to accurately assess the substantial damages that the plaintiffs would sustain upon the publication of the defendants' book.

PART V.

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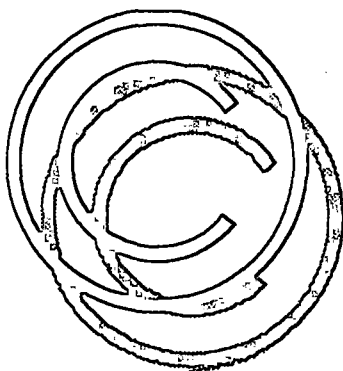
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BULLETIN
OF THE
COPYRIGHT SOCIETY
OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19, NO. 2

DECEMBER, 1971

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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

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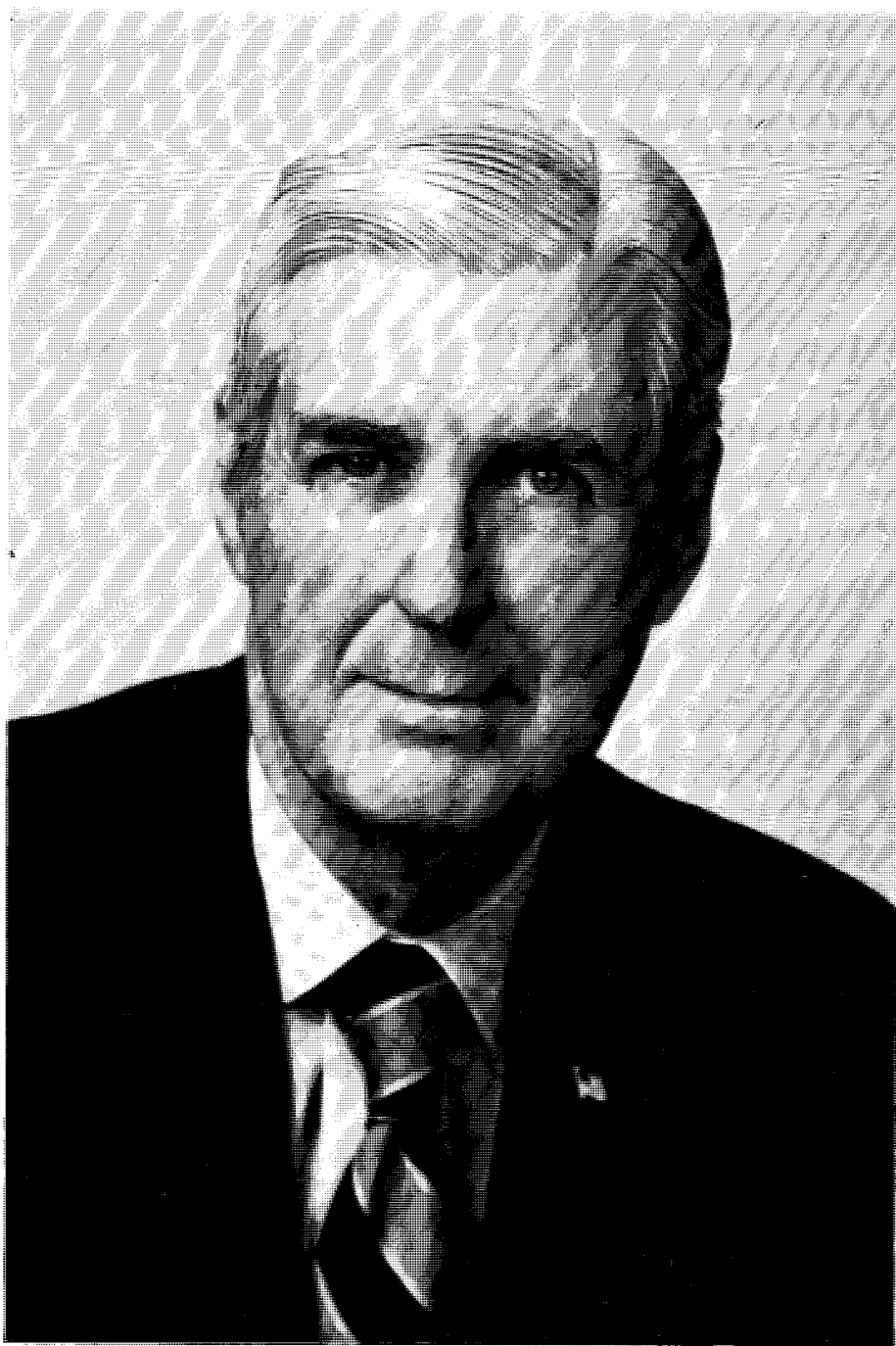
THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Leonard Zissu, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Paul Gitlin, *Treasurer*; Morton D. Goldberg, *Secretary*; Alan Hartnick, *Assistant Treasurer*; Bernard Korman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

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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: 19 BULL. CR. SOC. page no., Item (1971).



THE HONORABLE GEORGE D. CARY
The Seventh United States Register of Copyrights

GEORGE D. CARY NAMED REGISTER OF COPYRIGHTS

L. Quincy Mumford, the Librarian of Congress, has appointed George D. Cary as Register of Copyrights. Mr. Cary, who had been Deputy Register of Copyrights since 1961, succeeds Abraham L. Kaminstein, who retired August 31, 1971.

The newly appointed Register originally joined the staff of the Copyright Office in April 1947 as an attorney, and thereafter, prior to his appointment as Deputy Register of Copyrights in 1961, served successively as Assistant Chief of the Examining Division, Principal Legal Advisor, and General Counsel. His 24-year career in the Copyright Office spans several fields of activity, including legal, legislative, administrative, and international affairs.

Born in St. Louis, Missouri, on June 7, 1911, Mr. Cary was educated in the public schools of St. Louis and Birmingham, Alabama, and received a B.S. in Economics from the Wharton School of Finance of the University of Pennsylvania in 1932. In 1938 he received a J.D. degree from the George Washington University and in 1942 an LL. M. degree from Georgetown University.

The author of many articles on copyright law appearing in various journals both in the United States and abroad, Mr. Cary has lectured extensively on copyright and teaches a copyright law course at the National Law Center of the George Washington University.

He is a member of the Alabama and the District of Columbia Bars, the Federal Bar Association, and the American Bar Association. During World War II he served as a Naval Intelligence Officer for over 4 years. At the time of his recent retirement from the Naval Reserve, he held the rank of Captain.

PART I.

ARTICLES

57. THE ECONOMIC RATIONALE FOR COPYRIGHT PROTECTION FOR PUBLISHED BOOKS: *A Reply to Professor Breyer.**

By BARRY W. TYERMAN**

*There is one thing better than a cheap book,
and that is a book honestly come by.*¹

I. INTRODUCTION

Two notions have traditionally been advanced as the policy basis for the laws providing statutory copyright protection for published

* This article is the 1971 first prize essay in the National ASCAP Nathan Burkan Memorial Competition. In awarding this honor, the judges of the 1971 contest, The Hon. Samuel Freedman, Chief Justice of Manitoba, The Hon. George Rose Smith, Associate Justice, Supreme Court of Arkansas, and The Hon. William M. McAllister, Associate Justice, Supreme Court of Oregon, wrote, for the *Foreword* to the published Symposium as follows:

"... Law is a many-splendored thing, and copyright law, when attractively presented, can assuredly be one of its splendors. To have dwelt in a world concerned with authorship, creativity, infringement, piracy, fair use, software, *Sears Roebuck v. Stiffel*, *Compco v. Day-Brite*, to name but a few of its many facets, has brought with it a fascination of its own.

"It is perhaps pertinent to note that this very world of copyright law recently faced a direct challenge. Writing in the December, 1970 number of the *Harvard Law Review*, Professor Stephen Breyer questioned the validity of the cause for copyright and indeed suggested that 'it would be possible . . . to do without copyright.' This frontal attack by a scholar must have sent a chill down the spine of many a person who looks to copyright law for the implementation of the Constitutional objective of promoting 'the progress of useful Arts.' Professor Breyer's challenge had to be met.

"Mr. Barry W. Tyerman, a student at the University of California School of Law (Los Angeles), in an essay to which the Panel has awarded the first prize, has significantly and memorably met that challenge. His paper focuses upon the essential features of Professor

(footnote continued on next page)

books.² The first, which may be called the moral rationale, asserts that an author is entitled to the "fruits of his labors" and that the copyright law merely protects the author from unauthorized interference with this intellectual property right.³ The second, the so-called economic rationale, maintains that copyright protection, by granting the right to commercially exploit a particular literary work for a limited time free from the burden of competition by a copier, encourages authors to write and publishers to publish.⁴ The validity of these dual purposes for copyright in books has been relatively uncontested up to the present day.⁵

Breyer's case and then proceeds to furnish a reasoned reply to each of them in turn. His essay is lucidly presented and well argued. There is an absence of pretentiousness or overstatement; he lets the facts tell their own story, and they carry an eloquence of their own. Mr. Tyerman has done more than write an essay. He has rendered a service to a cause."

The Society is privileged to publish the foregoing and Mr. Tyerman's article by permission of ASCAP, and of the Regents of the University of California, the essay having been published first in 18 UCLA Law Review 1100-1125 (1971).

- ** B.S. 1967, M.B.A., J.D. 1971, University of California, Los Angeles. Member, California Bar; associated with Irell & Manella, Los Angeles.
- 1. James Russell Lowell, President of the American Copyright League in 1885, quoted in G. PUTNAM, *THE QUESTION OF COPYRIGHT* 418 (1896) [hereinafter cited as *QUESTION*].
- 2. The federal copyright law grants the holder of the copyright in a book the exclusive right to copy. 17 U.S.C. §§ 1(a) (1964). See generally M. NIMMER, *COPYRIGHT* § 13 (1971) [hereinafter cited as *NIMMER*]; B. RINGER & P. GITLIN, *COPYRIGHTS* 21-22 (1965) [hereinafter cited as *RINGER & GITLIN*].
- 3. "That authors and inventors have, according to the practice among civilized nations, a property in the respective productions of their genius is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence." Henry Clay, report submitted with S. 223, 24th Cong., 2d Sess. (1837), reprinted in *QUESTION*, *supra* note 1, at 33-34. See *id.* at 37, 83-87, 317-23; NIMMER, *supra* note 2, §§ 3.1, 5.4, 48; Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 422 (1966) [hereinafter cited as *Hurt & Schuchman*]; HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS. *REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW* 4 (Comm. Print 1961).
- 4. B. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 9 (1967); T. MACAULAY, *SPEECHES ON COPYRIGHT* 25 (C. Gaston ed. 1914); R. SHAW, *LITERARY PROPERTY IN THE UNITED STATES*, 33 (1950).
- 5. But see Hurt & Schuchman, *supra* note 3, at 421; Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (new series 1934) [hereinafter cited as *Plant*].

However, in a recent article⁶ Professor Stephen Breyer of the Harvard Law School has questioned these justifications, arguing: (1) that the personal interests of an author in the product of his efforts do not justify granting him the copyright "monopoly"⁷ and that, in any event, these interests can be adequately protected by alternate means;⁸

That the justifications for copyright protection have been relatively uncontested does not mean that the precise mechanics for achieving these ends have not been subject to significant debate. For example, as long ago as 1877, when the British Copyright Convention was studying revision of that country's domestic copyright law, a proposal was made for an "open publishing" copyright system whereby any publisher could acquire the non-exclusive privilege to publish editions of an author's work by agreeing to pay the author a compulsory royalty. QUESTION, *supra* note 1, at 67. See also *id.* at 217-19.

6. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) [hereinafter cited as Breyer]. Professor Breyer's article has been cited with approval by Justice Douglas in *Lee v. Runge*, 92 S. Ct. 197 (1971) (dissenting opinion; denial of cert.).
7. It is technically inaccurate to characterize the interest granted by the copyright laws as a "monopoly":

It is sometimes attempted to stigmatize copyright as *monopoly*, and writers of loose and careless habit sometimes speak of copyright as monopoly. It is no more monopoly than is the ordinary ownership of a horse or a piece of land. Blackstone says that a monopoly is—

A license or privilege . . . whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.

The law dictionaries define it in the same way. A monopoly takes away from the public the enjoyment of something which the public before possessed. Neither copyright nor patent does this, for neither can be applied to anything which is not *new*; neither can be applied to anything which the public before possessed. The author and inventor must produce something new in order to be entitled to copyright or patent.

QUESTION, *supra* note 1, at 86 (emphasis original).

Copyrights may also be distinguished from patents in this regard, in that a patent does in fact dispossess the public of a valuable previously extant right—*i.e.*, the right to independently create the invention—whereas a copyright does not. See Hurt & Schuchman, *supra* note 3, at 422-23.

8. See Breyer at 284-91, especially at 291. There are basically three non-economic interests of an author to be protected: (1) the paternity right—the right to be identified as the creator of a particular work and not be subject to plagiarism; (2) the integrity right—the right to protection from alteration of one's work; and (3) the publication right—the right to deter-

and (2) that the publishing industry could possibly function quite profitably and in a manner more beneficial to the interests of the book consuming public without the artificial protection provided by the copyright laws.⁹ It is Breyer's conclusion that there is probably insufficient information concerning the publishing industry presently available to justify the immediate repeal of the copyright laws, but that any revision of these laws to extend the protection of copyright would be unjustifiable in light of the doubt surrounding the moral and economic theories advanced to support the existing protection.¹⁰

Notwithstanding the impressive documentation and careful thought obviously involved in the preparation of the article, a number of serious weaknesses in Professor Breyer's argument become evident upon critical analysis. From a purely academic viewpoint these shortcomings could be overlooked as merely the product of inadequate information and the entire thesis dismissed as an interesting exercise in creative economic conjecture. However, with the issue of extension or revision of the federal copyright law currently before the Congress,¹¹ a discussion which questions the fundamental policies underlying the federal copyright structure has immediate practical importance. Despite Breyer's personal disclaimer of any certainty as to his conclusions,¹² it is not impossible that an overzealous legislator might draw upon the Breyer argument to strike down proposed copyright revisions in areas totally unrelated to copyright in books or even to justify cutting back on the existing copyright protection for books.¹³

mine whether or not to publish at all. Hurt & Schuchman, *supra* note 3, at 424. Breyer argues that tort law could adequately provide the necessary protections. Breyer at 291.

9. See Breyer at 291-322, especially at 321-22.

10. *Id.* at 284, 322-23.

11. The copyright revision bill, S. 543, 91st Cong., 1st Sess. (1969) is the culmination of many years of effort and frustration on the part of proponents of copyright revision. Although no final action has yet been taken on the current version of the Bill, P.L. 91-555 provides interim protection until December 31, 1971 for copyrights now in their renewal term that otherwise would expire before the end of 1971. A more complete history of the plight of copyright revision in the Congress is contained in Nimmer, *Two Copyright Crises, Foreword to Project—New Technology and the Law of Copyright, Reprography and Computers*, 15 U.C.L.A. L. REV. 931 (1968).

12. "Taken as a whole, the evidence now available suggests that, although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it." Breyer at 284.

13. Breyer himself applies the conclusions of his analysis of copyright in books to computer programs. *Id.* at 338-50.

It is the goal of this Article to respond to Professor Breyer, specifically with respect to the question of the economic necessity for maintaining copyright protection for published books. The Article begins with a brief summary of the main elements of Professor Breyer's economic analysis of a hypothetical publishing industry without copyright protection. Next, the Article develops a detailed analysis of some of the major gaps in Professor Breyer's argument. The conclusion of the Article is that the existing federal copyright structure provides a relatively efficient, and, most importantly, time-proven system for ensuring both that authors find it intellectually and financially profitable to write, and that the American publishing industry is capable of producing a broad spectrum of book titles, and not merely a few commercially popular books.¹⁴ Thus, considering the crucial role that printed material plays in an enlightened democratic society, it is essential that copyright protection for published books be continued in substantially its present form.¹⁵

II. PROFESSOR BREYER'S THESIS:

THE PUBLISHING INDUSTRY WITHOUT COPYRIGHT

A. *The Costs of Removing Copyright Protection for Published Books*

The traditional economic argument for copyright protection for published books begins with the uncontestable premise that were publishers free to compete in the production and sale of individual book titles, the cost of producing a particular book would be much lower for a copier than for the initial publisher.¹⁶ Because he could avoid many of the costs incurred by the initial publisher such as author royalties, editing, typesetting¹⁷ and promotion, a copier could underprice

14. For recent statistics on the broad range of books produced in the United States, see PUBLISHERS' WEEKLY, Feb. 8., 1971 at 50-53.

15. See *The Overall Market for Graphics, 1970-1990*, PUBLISHERS' WEEKLY, Nov. 2, 1970 at 39-40 (remarks of Charles R. Cook, U.S. Dept. of Commerce, New York City, Oct. 12-14, 1970).

16. Breyer at 294; Hurt & Schuchman, *supra* note 3, at 425.

17. It is an interesting, and as yet unsettled, question whether the photographic reproduction and sale of book typography may constitute actionable unfair competition. If ordinary typography is sufficiently original to be constitutionally eligible for copyright protection as the work of an author, then since Congress could have provided copyright protection for typography any state law protection based upon a misappropriation theory would be invalid on the preemption theory of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting*,

the initial publisher and frequently make it impossible for the latter to recover his fixed costs.¹⁸ The argument concludes that many publishers faced with this threat would be hesitant to undertake the production of certain books of marginal potential profitability, to the detriment of society.¹⁹

Professor Breyer, on the other hand, while recognizing the cost advantage that a subsequent copier would likely enjoy,²⁰ argues that several factors would combine in the absence of copyright protection to guarantee publishers a return sufficient to make production of most books economically justifiable.²¹ According to Breyer, two countervailing forces would tend to minimize any loss of publisher's revenues that might result from repeal of copyright protection.²² First, in many cases, the initial publisher would realize a substantial "lead time" (time between initial publication and publication of a copy edition) free from the competition of copiers which would enable him to recover both his

Inc., 376 U.S. 234 (1964). See NIMMER, *supra* note 2 §§34-35. But see *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967) (holding for purposes of a preliminary injunction that a photographic copy of typography constitutes a "misappropriation" form of unfair competition). In any event, Breyer assumes (and it will be assumed here for analysis) that under a no copyright system a copying publisher would be legally free to photographically copy and sell the pages of any printed material without incurring legal liability on any theory. Breyer at n. 57.

18. *Id.* at 294; Hurt & Schuchman, *supra* note 3, at 425.

19. MARKHAM, *An Economic Analysis of the New Information Technologies*, AMERICAN TEXTBOOK PUBLISHERS' INSTITUTE AND AMERICAN BOOK PUBLISHERS' COUNCIL, AN ECONOMIC-MEDIA STUDY OF BOOK PUBLISHING 12 (1966).

20. See Breyer at 294-99. Breyer draws upon STANLEY B. HUNT & ASSOC., 1968 ANNUAL SURVEY OF THE TEXTBOOK PUBLISHING INDUSTRY to formulate an example of a typical cost advantage. For an unillustrated 400-page college text, expected to sell 5,000 copies at \$6.00 retail, \$4.80 wholesale, Breyer calculates the variable cost per copy to be \$2.00 for the initial publisher and \$1.23 for a copying publisher. Breyer at 294-95. For a higher cost book, a 900-page elementary or high school text, with color illustrations, expected to sell about 150,000 copies at a retail price of \$7.00 per copy, Breyer finds a greater cost advantage to the copier, his variable cost being \$2.20 per copy as compared to \$3.20 per copy for the initial publisher. *Id.* at n. 67. In the case of the tradebook, the cost advantage would be smaller because the cost of retailing is generally greater for tradebooks than for texts. For a 400-page hardbound novel expected to sell 5,000 copies at \$7.00 retail and \$4.00 wholesale the variable costs would be \$2.00 per copy for the initial publisher and \$1.17 per copy for the copier. *Id.* at n. 67.

21. Breyer at 299-308.

22. *Id.* at 299-302.

fixed costs and a profit sufficient to make the venture financially worthwhile.²³ Second, the fear that publishers would retaliate against copiers by producing "fighting editions" to be marketed at a price below the copier's costs would tend to limit copying to a few high-volume titles.²⁴

Notwithstanding the possible existence of these forces, Breyer recognizes that they would not be present in all instances in sufficient magnitude to sustain existing publisher revenues and maintain current levels of book production.²⁵ He contends, however, that alternative means of supplementing publisher revenues could be developed that would close any financial gap and assure production of books of even unpredictable popularity.²⁶ In this regard, Breyer makes two specific suggestions. First, he argues that a group of individuals, anxious to assure the publication of a particular book, could organize to contract in advance of publication to buy a specified quantity of that book.²⁷ This would guarantee the publisher that he would sell enough copies of the book to recover, at a minimum, his costs, even in the face of possible competition from copiers. Secondly, Breyer suggests that government subsidies to authors and publishers could be allocated to provide an economic incentive for the production of books which otherwise might not be published because of the threat of copying.²⁸

23. *Id.* at 299-300.

24. *Id.* at 300-01; Hurt & Schuchman, *supra* note 3, at 428. "The mere threat of retributive behavior by the first publisher should be sufficient to deter the copier until the first edition is sold out and the first publisher has made his profit." *Id.*

25. Breyer at 302.

26. *Id.* at 302-08.

27. *Id.* at 302-06; Hurt & Schuchman, *supra* note 3, at 428.

28. Breyer at 306-08. Professor Breyer argues that in addition to helping maintain publisher revenues, government subsidies would be able to take into account the "spillover" effects of book production: "The government may pay for a work containing a scientific theory, for example, that radiates benefits far beyond the circle of its readers. Because the sales revenue that such a book generates may not cover its costs, its subsidy by the government is necessary and desirable." *Id.* at 307. It may be, however, that these "spill-over" benefits are presently taken into account by persons who purchase the underlying *ideas* rather than the *expression* in book form.

It has been argued that authors already, in effect, receive a government subsidy by virtue of the "income averaging" provisions of the Internal Revenue Code. INT. REV. CODE OF 1954 §§ 1301-05. See Hurt & Schuchman, *supra* note 3, at 424. However, the special treatment that the federal tax laws previously afforded certain income from literary, musical and artistic compositions was terminated by the Revenue Act of 1964. See 4 P-H 1971 FED. TAXES ¶ 33,073.

Nevertheless, Breyer concedes that some decline in publishing revenue would inevitably result from the abolition of copyright protection for published books, although he maintains that the loss would probably be significant only for certain high volume works, the most likely targets for copiers.²⁹ In attempting to determine the ultimate cost to society of this decline in publisher revenue, Breyer projects the likely impact on each of the three primary submarkets of the publishing industry: college texts, "elhi" texts (textbooks to be used in elementary and high schools) and tradebooks.³⁰

For several reasons, he concludes that a modest decline in college text publishing revenues would probably not result in significant harm to society.³¹ Average profits in that submarket are currently higher than in manufacturing generally, and arguably any loss in revenue could be absorbed without cutting book production.³² Furthermore, even though royalties of college text authors might be reduced somewhat in response to a decline in publishing revenues, thereby lessening the motivation of some authors to write college texts, the potential harm to society would likely be mitigated by the "spillover benefits" that could accrue, such as an increase in the time devoted to college teaching and the writing of scholarly articles.³³ Finally, Breyer points out that in the college text area there are built-in alternative incentives, such as professional recognition and prizes, which could be used to motivate the production of college texts in the absence of the incentives provided by copyright protection.³⁴

Regarding the production of "elhi" texts, Breyer foresees a greater possibility of harm to society from the abolition of copyright protec-

29. Breyer at 309.

30. Revenues in the book publishing industry are divided roughly as follows:

General tradebooks	37 percent
Textbooks	29 percent
Reference books	20 percent
Professional books	10 percent
Religious books	4 percent

Strauss, *Long-Range Prospects in Book Production*, PUBLISHERS' WEEKLY, Dec. 14, 1970, at 28, 30 [hereinafter cited as Strauss]. The textbook publishing revenue is further divided, approximately 40 percent to college texts and 60 percent to "elhi" texts. 1967 CENSUS OF MANUFACTURERS 3.

31. Breyer at 309.

32. *Id.* at 309-10.

33. *Id.* at 309.

34. *Id.* Hurt & Schuchman, *supra* note 3, at 424.

tion.³⁵ Profits in that submarket are considerably lower than in college texts, hence publishers would be correspondingly less able to absorb any resulting loss in revenue.³⁶ Since even a highly successful elhi text produces only a modest income for its authors, these individuals are likely to be highly sensitive to any decrease in revenue.³⁷ Furthermore, because most elhi texts are written by teams of specialists, it is improbable that the abolition of copyright would result in spillover benefits to society comparable in value to the concurrent loss in book production.³⁸ Unless the buyers of elhi texts could organize, perhaps by school district, to guarantee publishers recovery of their fixed costs, the abolition of copyright protection could result in a serious decline in the production of these books with very little offsetting benefit.

With respect to tradebooks, Breyer argues that any decline in publisher revenues that might result from copyright abolition, including some loss in subsidiary rights, would probably be insufficient to deter publication of high volume works:³⁹ publisher revenues would still be adequate to cover the fixed costs.⁴⁰ Furthermore, although author royalties might fall somewhat in response to a drop in publisher revenue, Breyer posits that the authors of best-sellers are not particularly sensitive to changes in their income and thus would probably continue to write even without copyright protection.⁴¹ While conceding that the publication of tradebooks of unpredictable popularity would be a greater gamble absent copyright protection, Breyer argues that it still cannot be concluded that society would suffer greatly in this area.⁴² According to Breyer, the number of unpredictable manuscripts is small.⁴³ Furthermore, there is no proof that those writers that might be driven out of the tradebook field by the removal of copyright protection for published books would not serve society just as valuably in alternative occupations.⁴⁴

35. Breyer at 310.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 310-11.

40. *Id.* at 311.

41. *Id.* at 311-12. *But see id.* at 322, where Breyer reiterates the uncertain nature of his conclusions, and of this one in particular.

42. *Id.* at 312.

43. *Id.* at 312 & n. 121.

44. *Id.* at 312.

B. *The Benefits to Society from Removing Copyright Protection for Published Books*

Balanced against the problem of maintaining publisher revenues, author royalties and the overall level of book production, are three benefits which Breyer maintains would accrue to society from the abolition of copyright protection for books: (1) reduced prices and increased distribution, (2) reduced permissions costs, and (3) reduced market power of publishers.⁴⁵

Breyer asserts that the most significant benefit to be realized is a reduction in book prices and consequent expansion of distribution, resulting from the competitive pressure applied by copiers.⁴⁶ According to Breyer, *best-selling* tradebooks would be most likely to attract the competition of a copier, and therefore to undergo a reduction in price.⁴⁷ Since less popular tradebooks with limited circulations probably could only be profitably published by one firm, they would not be the object of significant competition and accompanying price reduction.⁴⁸ The abolition of copyright would have its greatest impact, however, in the textbook field because of the current absence of effective competition and corresponding high prices in that submarket.⁴⁹ A reduction in the price and increase in the circulation of textbooks would be particularly valuable to society because of the secondary benefits that flow from the distribution of educational materials.⁵⁰

An additional benefit to society that Breyer asserts would result from the abolition of copyright protection is the elimination of the high transaction costs involved in obtaining permission to reproduce copyrighted material.⁵¹ Presently, at least in theory, unless a person receives prior permission from the copyright owner, a substantial copying of the work constitutes an infringing act.⁵² Under a no copyright system, on the other hand, anyone who so desired would be able to copy published material at will.⁵³ Finally, Breyer argues that the abolition of copyright protection for published books would benefit society by limit-

45. *Id.* at 313-21.

46. *Id.* at 313-16.

47. *Id.* at 313.

48. *Id.* at 314.

49. *Id.* at 314-15. *But see* text accompanying note 137 *infra*.

50. Breyer at 315-16.

51. *Id.* at 316-18.

52. *Id.* at 316.

53. *Id.*

ing the ability of publishers to accumulate exclusive licenses to publish, and hence the power to restrict competition in the industry.⁵⁴

III. ANOTHER VIEW OF THE PUBLISHING INDUSTRY WITHOUT COPYRIGHT: THE SHORTCOMINGS OF PROFESSOR BREYER'S ARGUMENT

Having laid a foundation by summarizing the primary elements of Breyer's thesis, it is now possible to turn to a more detailed examination of several difficulties with the economic argument for abolition of copyright protection for published books. Because of the dearth of documented information concerning the book publishing industry, much of this critique (and indeed much of that which it criticizes) is of necessity based on conjecture. But considering the practical importance of the issues involved, a well-reasoned speculative inquiry, tempered with a continuing awareness of the uncertainty surrounding many of the conclusions reached, is preferable to no inquiry at all.

A. *Could Existing Book Production Really Be Maintained?*

1. The "Lead Time" Myth

Professor Breyer draws upon two analogies to support his contention that the "lead time" advantage which an initial publisher will have over a subsequent copier will be a substantial factor in maintaining his revenue at levels sufficient to make publishing worthwhile. First, Breyer compares his hypothesized American publishing industry after copyright abolition to the nineteenth century market in the United States for the unprotectable works of British authors.⁵⁵ He points out that during that period American publishers were willing to pay substantial royalties for early proofs of works of British authors, not protectable in the United States under the then existing copyright structure, ostensibly because they could sell enough copies in the lead time before a pirate edition could be published to recover their costs and make some profit.⁵⁶ However, for a number of reasons, this analogy is not very helpful in speculating about the probable effect of abolition of copyright protection for books. First, even though a few days lead time could have meant the difference between profit and loss on some books in the nineteenth century,⁵⁷ Breyer himself recognizes that today it would probably take "a

54. *Id.* at 318-21.

55. *Id.* at 282-83, 299-300.

56. *Id.* at 299-300.

57. *Id.* at 300.

few months" after publication for any book to recover its fixed costs.⁵⁸ In addition, Breyer's estimate that an initial publisher would have a six to eight week lead time advantage over a copier⁵⁹ appears to be questionable. Advances in book publishing technology have seriously diminished the time (and cost) that would be required to copy a given book;⁶⁰ existing techniques of photographic reproduction would enable a copier to produce an inexpensive but high quality copy within a matter of hours after the initial publication.⁶¹ Extensive distribution to retail outlets could be effected with remarkable rapidity. Consequently, it is doubtful that for any meaningful number of books a significant lead time still exists.⁶²

58. *Id.*

59. *Id.*

60. See H. BAILEY, *THE ART AND SCIENCE OF BOOK PUBLISHING 187-94* (1970) [hereinafter cited as BAILEY]; STRAUSS, *Lannon's Fluxions for a Technology in Flux*, PUBLISHERS' WEEKLY, Oct. 12, 1970 at 46 [hereinafter cited as *Technology*]; *Book Markets for the 1970s*, PUBLISHERS' WEEKLY, Nov. 23, 1970 at 13-19 [hereinafter cited as *1970 Markets*]. No longer would a copier be required to expend the time and money necessary to set new type for a particular book. See note 17 & accompanying text *supra*.

61. A graphic example of the speed with which an inexpensive, high quality copy edition could be published is provided by Professor David Kaser of the University of Pennsylvania, in his book documenting the problem of pirating of English books in Taiwan:

"*Death of a President* was published in New York on April 7, 1967, and within eleven days a pirated edition had already been issued by the Tung Hai Book Company in the down-island Formosan city of Taichung. The New York price was U.S. \$10 and the Taichung list price was N.T. \$100 (U.S. \$2.50) The first four hundred copies of the Taichung piracy were put into the Tapei markets on the morning of April 21, and some sixty copies sold immediately." D. KASER, *BOOK PIRATING IN TAIWAN* 148 (1969).

Even in the nineteenth century, laboring under the handicap of primitive printing techniques, American pirates were able to produce copy editions of the uncopyrightable works of English authors with phenomenal speed. For example, Sir Walter Scott's *Feveril of the Peek* was published within 21 hours of the time the early sheets were received from England. J. HARPER, *THE HOUSE OF HARPER* 23 (1912). An American edition of Byron's *Don Juan* was printed and on sale within 36 hours of receipt of the advance sheets. E. BRADSHAW, *MATHEW CAREY* 87 (1912).

It may, in fact, be that publishing technology has so advanced that the human decision that a particular title is sufficiently popular to justify production of a copy edition would take longer than the actual production of that copy once the decision to copy had been reached.

62. See text accompanying notes 71-75 *infra*.

The second part of the "lead time" argument posited by Breyer is that book consumers are for the most part insensitive to price, and would therefore be generally unwilling to wait even a short time for a cheaper, copy edition of a particular book.⁶³ To substantiate this conclusion, Breyer compares the market for hardcover copies in a no-copyright publishing industry with the current market for paperback editions of popular tradebooks.⁶⁴ But in pointing out that people are frequently not willing to wait for a paperback edition (and therefore presumably would not wait for a copy edition), Breyer ignores the fact that paperbacks and hardcovers of the same title are basically not substitute products;⁶⁵ for whatever reason (*e.g.*, snob appeal, convenience, etc.), many individuals will choose to purchase a hardcover book, notwithstanding the immediate or imminent availability of a cheaper paperback edition.⁶⁶ On the other hand, if copyright protection were removed, the books marketed by copiers would not be exclusively paperbacks, but rather would include high quality hardcover editions. Furthermore, the lead time between initial publication and publication of a copy would be appreciably less than the time that now passes between publication of a hardcover and publication of the paperback edition — the latter delay being purely a function of contractual agreement (and typically ranging from a few weeks to more than a year), while the former is limited only by the state of publishing technology (and could be as brief as a few hours).⁶⁷ Consequently, it is probable that book purchasers would be far more willing to wait a brief period for a bargain hardcover copy than they are currently willing to wait for publication of a paperback edition of a particular title.⁶⁸

Moreover, the alleged price insensitivity of book *consumers* may be largely irrelevant since to a great degree it is book *distributors* (who as a group tend to be much more price conscious), and not the public, who actually determine the character of the retail market for most

63. Breyer at 300.

64. Breyer at 300.

65. For a discussion of the concept of a "substitute product", see P. SAMUELSON, *ECONOMICS* 423 (1967) [hereinafter cited as SAMUELSON]. See also BAILEY, *supra* note 57, at 141-42, 168.

66. O. CHENEY, *ECONOMIC SURVEY OF THE BOOK INDUSTRY, 1930-1931*, at 107 (1960) [hereinafter cited as CHENEY REPORT].

67. *Id.*; BAILEY, *supra* note 59, at 138-42.

68. It is possible, however, that there might be some "snob" appeal associated with purchasing an "authorized edition." See Breyer at note 83. See also Hurt & Schuchman, *supra* note 3, at 428-29.

books.⁶⁹ Thus, if a copier could offer copies of a particular book at a price significantly below that offered by the initial publisher, many retailers would be willing to tolerate a slight delay in stocking that book in return for the prospect of a greater profit margin on the eventual sale to the public.⁷⁰

Finally, if the notion of a lead time advantage has any continuing validity in today's publishing world, it could only be of any real significance in the publication and sale of a best-selling tradebook.⁷¹ The lead time sales volume of a tradebook of lesser popularity (and the great majority of published tradebooks fall in this category)⁷² would probably be insufficient to allow recovery of even fixed costs.⁷³ In the area of textbook publishing, the largest single portion of the book market,⁷⁴ where it often takes several years to recover the high fixed costs of publication, the lead time factor would be insignificant and the cost advantage to subsequent copiers great.⁷⁵

In any event, it is likely that any lead time advantage that might still exist will vanish completely with future advances in book publishing technology.⁷⁶ In the extreme, it has been suggested that in the not too distant future books will be produced at the command of the book buyer, the text of each book being stored in central computer banks for instant retrieval and reproduction at remote terminals in the private

69. See BAILEY, *supra* note 59, at 40-41; CHENEY REPORT, *supra* note 66, at 87-88.

70. See Breyer at 295-97.

71. *Id.* at 300.

72. See BAILEY, *supra* note 59, at 169, 180; Breyer at 300.

73. Breyer states that copying publishers would probably not find it attractive to copy low volume tradebooks. Breyer at 301. For some representative sales vs. time curves for general tradebooks, see CHENEY REPORT, *supra* note 66, at 84-86.

74. See note 30 *supra*.

75. Breyer estimates it would take two to three years to recover the fixed costs of publishing an average textbook. Breyer at 300.

76. See generally BAILEY, *supra* note 59, at 187-94; Gardner, *The Future Isn't What It Used to Be*, PUBLISHERS' WEEKLY, Jan. 11, 1971 at 42 [hereinafter cited as *Future*]; *Technology*, *supra* note 59, at 46.

Tomorrow's competition will not be letterpress *vs.* offset or hot type *vs.* cold type. Instead, it will be the grizzly graphic arts *vs.* micrographics, holography, lasers, facsimile transmission, electronic video recording, community antenna television, picturephone, electrostatics, telecommunications, computerized data banks, [and] interactive terminals . . . to name some of the leading contenders for what used to be a nice, secure, static business.

Future at 43.

home.⁷⁷ In such a system, the initial publisher's⁷⁸ lead time advantage would be virtually nonexistent, since immediately after publication the copier would be free to store the contents of the book in his computer bank. The cost of storage would be minimal and no physical copies would have to be made prior to sale, so the copier would enjoy an even greater cost advantage and practically no risk. Although this instant book retrieval system is the extreme case, it is not beyond the reach of existing technology and may be indicative of the nature of the book publishing industry of the coming decades.

In sum, it would be unsound to abolish copyright protection for published books in reliance on an analogy which is based on the nineteenth century economics of the industry, of only questionable validity in today's publishing market, and likely to be rendered totally inapplicable in the near future.

2. The Fear of Retaliation

Professor Breyer argues that the volume of book copying in a publishing industry without copyright would be at least partially constrained by the fear of retaliation against the copier by the initial publisher.⁷⁹ Once again Breyer relies on an historical comparison to support his contention, pointing out that in the nineteenth century publishers protected themselves from copiers by publishing occasional "fighting editions" to sell below the copier's costs. In the period of history to which Breyer alludes, however, there was a "tacit understanding among the larger publishers in America that the books published by one

77. Science fiction writer Arthur Clarke has developed the following scenario for an electronically-generated graphic communications system:

Within 10 years . . . many households will be equipped with communications consoles. The console will consist of a television camera, a TV screen, a computer terminal, microfilm facilities, and a newspaper facsimile receiver—all linked to computers which, in turn, will be linked to communications satellites . . . Any newspaper in the world, from the *Wall Street Journal* to *Pravda*, would be available to any user of the console, no matter where he lives. And, thanks to microfilm storage and retrieval, any newspaper ever printed (back to the 18th century) would also be available, as well as any book, magazine or pamphlet worth saving. Such material would be called up from a global electronic library—a central data bank linked to the total electronic nervous system of the world.

Reprinted in *Future*, *supra* note 76, at 42. See also BAILEY, *supra* note 59, at 191-92.

78. It would probably be more appropriate to denote such a person an "information processor" rather than a "publisher."
79. Breyer at 300-01.

should not be pirated by another.”⁸⁰ Since there was this gentlemen’s agreement with reference to uncopyrightable material, and since the great majority of books *were* protected by copyright, the “fighting edition” was only a limited tool to restrain the occasional copier.⁸¹ Breyer’s system of a publishing industry without copyright protection, on the other hand, would encourage publishers to copy and sell *any* book.⁸² There would be no equivalent of the “trade courtesy” which suppressed copying in the past, and any stigma that might once have attached to book “pirating” would probably be removed by the legislature’s act of repealing copyright protection. Under these circumstances it is unlikely that “fighting editions” would prove to be the significant deterrent to book copying that they might have been in the nineteenth century.

An analysis of the example suggested by Breyer to support his “retaliation” argument exposes a further defect in his reasoning:

When, for example, a copying publisher recently put out an \$8.50 edition of a book about ancient houses, the book’s original publisher responded with a new edition priced at \$4.00 and, because of his better established distribution channels, drove the copier from the market.⁸³

It is difficult to discern Breyer’s point. Obviously a publisher selling at less than half the price set by a copier will, “better established distribution channels” or not, sell many more books than the copier. The important question, however, is how many times could a publisher sell drastically below his costs to drive out a copier and still remain financially solvent? It is no answer to say that a publisher could subsidize production of these “fighting editions” from the excess profits earned on his other titles.⁸⁴ Because of the low entry barriers facing potential copiers,⁸⁵ there would be a surplus of entrepreneurs waiting to publish

80. Plant, *supra* note 5, at 173. See also Frase, *The Economics of Publishing-Discussion*, 56 AM. ECON. REV. 433, 437 (1936) [hereinafter cited as Frase].

81. Plant, *supra* note 5, at 173. Even during this period, however, publication of a “fighting edition” was frequently not enough to deter pirate publishers from continuing their copying activities. See C. WEBER, *NINETEENTH-CENTURY ENGLISH BOOKS* 42-43 (1952).

82. In fact, no benefit would accrue to the consumer under Breyer’s model *unless* such copying actually took place.

83. Breyer at 301.

84. A similar kind of cross-subsidization activity in book publishing is discussed in the text accompanying notes 20, *supra* and 129-32 *infra*.

85. BAILEY, *supra* note 59, at 69-70; R. TARAPOREVALA, *THE AMERICAN BOOK INDUSTRY* 18-21 (1966) [hereinafter cited as TARAPOREVALA]; Hurt & Schuchman, *supra* note 3, at 427; 1970 *Markets*, *supra* note 59, at 18. See also note 152 *infra*.

and market copy editions. Thus, there would be no safe haven in which the initial publisher could produce a book free from competition in that title and make the profits necessary to finance the production and sale of "fighting editions" of other titles.⁸⁶ Faced with an endless chain of potential competitors, the initial publisher would be unable to long continue the publication of loss editions and might instead find it more profitable to become a copier himself.⁸⁷

3. The Possibility of an Initial Publisher and a Copier Profitably Co-existing in the Production and Sale of a Single Title

That competition in the sale of [high volume tradebooks] is feasible is suggested by existing competition in the sale of popular government documents, such as the *Warren Report*, or of classics in the public domain, and by the fact that publishers paid popular nineteenth century English writers substantial royalties despite the lack of copyright protection.⁸⁸

The fallacy in comparing competition in the publication and sale of original tradebooks in the absence of copyright protection to competition in the publication and sale of government documents and classics in the public domain lies in the fact that in neither of these latter areas is *any* publisher required to pay an author royalty.⁸⁹ Consequently, costs are lower for *all* publishers and a "copying" publisher⁹⁰ does not enjoy any significant cost advantage over the first publisher.⁹¹ In addi-

86 See text accompanying notes 129-32 *infra*; CHENEY REPORT, *supra* note 66, at 134-35.

87. The obvious ramification of this phenomenon would be an overall reduction in the number of titles published.

88. Breyer at 302.

89. Section 8 of the federal copyright law provides in part: "No copyright shall subsist in the original text of any work which is in the public domain . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof . . ." 17 U.S.C. § 8 (1970).

See generally NIMMER, *supra* note 2, § 66; RINGER & GITLIN, *supra* note 2, at 19; HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 83, 90th Cong., 1st Sess. 20-23 (1967); BERGER, COPYRIGHT IN GOVERNMENT PUBLICATIONS (Copyright Law Revision Study No. 33, 1961).

90. It is probably more accurate to call this individual a "second publisher" rather than a "copier."

91. The copying publisher will be able to avoid typesetting costs, but these fixed costs may become minimal on a per unit basis if spread over a large number of reproductions. See Breyer at 295.

tion, the government documents in question and the classics of literature have a fairly certain demand, both as to magnitude and duration.⁹² Since no publisher has a significant cost advantage, any publisher with patience is likely to recover his costs eventually.

Furthermore, the mere fact that a number of different editions of a single work could be produced at a profit would not necessarily mean that society would benefit from this concurrent publication.⁹³ The potential problem posed by a proliferation of duplicative publications was aptly pointed out by the Cheney Report in its analysis of the American publishing industry: "The competition between editions of the best books of all time is becoming keen and unnecessarily so. The deliberate duplication of lists in low-priced editions is not a service to the public but a destructive burden on the bookseller."⁹⁴ Competition between editions would emphasize collateral matters such as binding, illustrations and cover art, as publishers and copiers vainly attempted to differentiate their products in the public eye. The inevitable result would be mass confusion on the part of the book purchaser with little offsetting benefit.

The fact that high royalties were paid to British authors in the nineteenth century by no means assures the profitable co-existence of an initial publisher and a copier in the future production and sale of any particular title. There are a number of factors, discussed earlier, such as the "lead time"⁹⁵ and "retaliation"⁹⁶ notions, which distinguish the restrained competition in that period from the unrestricted competition that would exist in a no-copyright publishing environment. Furthermore, there is no evidence that a profit was ever realized on the production and sale of the unprotectable British works. It is possible that these editions were actually published at a loss to enhance the name of the publishing house, this loss being compensated for by increased

92. CHENEY REPORT, *supra* note 66, at 91-92.

93. The specific benefits which Breyer claims society will realize from copyright abolition are discussed in text accompanying notes 122-54 *infra*.

94. CHENEY REPORT, *supra* note 66 at 92. This sentiment has been reiterated recently:

Someone should exercise some control over those paperback book publishers . . . which literally glut the market by issuing hundreds of titles in quantities of hundreds of thousands without promotion . . . and with practically nothing behind those titles except the hope and the prayer that the good old wholesaler will take care of them.

Yellen, *A Look at Mass Marketing in the 1970's*, PUBLISHERS' WEEKLY, Aug. 24, 1970, at 31.

95. See the text accompanying notes 55-78 *supra*.

96. See the text accompanying notes 79-87 *supra*.

sales of other titles, the great majority of which were protected by the copyright laws.

In any event, Breyer concedes that this simultaneous profitable publication would only be possible for best-selling tradebooks and not for textbooks or tradebooks of less predictable popularity.⁹⁷ Consequently, unless alternative means could be developed to maintain adequate levels of revenue for initial publishers, the serious threat of a reduction in the number of book titles produced would make removal of copyright protection for published books unjustifiable.

4. The Alternative Methods of Maintaining Publisher Revenues

Professor Breyer suggests two possible means of compensating publishers for any loss in revenue that might result from abolition of copyright protection for published books: (1) prepublication purchasing commitments by organized groups of buyers; and (2) direct government subsidies to publishers and authors.⁹⁸

With respect to the first alternative, Breyer recognizes some of the many problems that would prevent these organizations of buyers from being an effective solution to the problem of assuring continued high levels of book production.⁹⁹ First, the administrative costs involved in organizing groups of buyers to make these prepublication commitments would cancel out much of the benefit obtained.¹⁰⁰ To be sure, in certain areas there are already existing groups, such as school districts in the textbook field, which could perform the organizing function with little additional cost.¹⁰¹ In many areas, however, notably the general tradebook field, groups of sufficient size could not readily be formed without incurring excessive costs.¹⁰² A second problem with this alternative is that

97. Breyer at 302.

98. *Id.* at 302-08.

99. *Id.* at 302-06.

100. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 15 (1960).

101. Breyer at 305-06.

102. It is doubtful that book clubs could adequately perform this organizing function because their members are generally interested only in books of proven popularity.

the group purchasing advocated by Breyer would require delegation of buying authority, with resultant anticompetitive effects and discouragement of individual choice.¹⁰³ Third, buyers would often be reluctant to commit themselves to the purchase of a book before they had even had an opportunity to examine the completed work.¹⁰⁴ This is closely analogous to the problem encountered in the financing of legitimate stage productions, where investors normally will not commit their capital to a particular venture before they have viewed at least a rough production of the finished work.¹⁰⁵ The effect on book publishing generally would be that many books of borderline merit and popularity (at least in advance of publication) would not be published for failure to attract the necessary prepublication subscription.¹⁰⁶ A fourth problem is one traditionally encountered in the organization of any group activity, the possibility that certain persons would "freeload" by failing to bear their fair share of the prepublication commitment.¹⁰⁷ This is basically a corollary to another problem which would be involved in organizing groups of buyers to finance a literary venture: the resultant inequitable allocation of the social costs of book production. As long as there is a financial premium to be had by waiting for the eventual publication and copying of the book, certain individuals, who may be indifferent to the publication of the book at the higher prepublication price, will find

103. See Alchian, *The Economics of Book Publishing—Discussion*, 56 AM. ECON. REV. 433, 438 (1966).

104. Breyer at 303.

105. A recent article described the problems involved in obtaining financing once a satisfactory literary property has been acquired:

The producer then begins an unending series of auditions for backers. Sometimes, a show will audition more than a hundred times, as *Kiss Me Kate* did. During auditions, the show is revised some more to please backers or theater party reps.

At long last the producer has gathered enough money to start production. This does not mean he has enough money to produce. But theater people are optimists; they hope that once they go into rehearsal, other investors, particularly record companies, will spot the merits of their property and loosen up. Topper, *Rock and Roll, Dead, Takes Over Broadway*, ROLLING STONE, December 23, 1971, at 6.

See generally W. BAUMOL & W. BOWEN, *PERFORMING ARTS—THE ECONOMIC DILEMMA* (1966); Yamin, *Legal Problems in Broadway Theatrical Productions*, 7 PUBLISHING, ENTERTAINMENT, ADVERTISING LAW QUARTERLY 133 (1967).

106. This is particularly true since so many books do not receive public acclaim and economic success until several years after publication. See CHENEY REPORT, *supra* note 66, at 151-52.

107. See Breyer at 303-04.

it advantageous to wait until the book is published and let others bear these costs.¹⁰⁸ If there is a significant amount of freeloading, the ability to organize will be lessened and overall book production decreased.¹⁰⁹

The second alternative suggested by Breyer to maintain publisher revenues, direct subsidies to authors and publishers by the government, has several major deficiencies which also render it unacceptable.¹¹⁰ First, there is a serious danger that the government might only subsidize utilitarian literary works, for example those of a scientific nature, to the derogation of "pure" literature.¹¹¹ In addition, as in any situation in which the government is heavily relied upon for financial backing, substantial subsidies for book publication might lead to a loss of literary independence or even outright censorship.¹¹²

5. The Plight of the Author Without Copyright Protection

Professor Breyer, in postulating his mythical book publishing world without copyright protection, evidences a curious insensitivity to the plight of the textbook and tradebook author. Though it may be that the cool objectivity of scholarly economic analysis inevitably appears callous, Breyer in several specific instances conducts his inquiry with, at best, indifference to the peculiar interests of writers. For example, in setting up the framework for his analysis, Breyer, after a few caveats,¹¹³ determines to phrase the discussion primarily in terms of the interests of the book publisher.¹¹⁴ Although this position may be justifiable on grounds of convenience, greater care should be taken to point up the marked ways in which the interests of authors and publishers differ. Perhaps most of these differences stem from the fundamental reality that an author "has only one egg in his basket whilst the publisher has a

108. *Id.*

109. Breyer argues that there would be few cases of a decline in book production attributable to the free-loading problem if negotiations between potential book buyers were costless. *Id.* at 304. The argument is that no one would understate his preference value for a particular book if this would lead to a book not being produced. Of course, negotiations are far from costless, and the cost increases with the size of the group to be organized. See note 100 *supra*.

110. Breyer at 306-08.

111. Breyer himself recognizes this potential problem: "It may prove particularly difficult to persuade Congress to increase appropriations to support novels, for instance, or religious biographies." *Id.* at 308.

112. *Id.* at 308 and n.103; Frase, *supra* note 80, at 436-37.

113. See, e.g., Breyer at 292.

114. *Id.*

score;" ¹¹⁵ that is, an author rests his immediate financial position on the success or failure of a single literary venture, whereas a publisher may "sow many seeds" in the hope that a few will prove profitable.¹¹⁶ As a consequence, conclusions reached in a macroscopic analysis of the book publishing industry, from the viewpoint of the publisher, may be of little value in determining the impact at the microscopic level on the individual author. Actions favorable, or at least indifferent, to the interests of the publisher may be disastrous to many writers. In addition to this general difference in perspective, author and publisher interests may diverge on a number of specific issues which will be discussed later.¹¹⁷

The peculiar attitude which Breyer exhibits concerning the interests of the individual author is perhaps best exemplified by a passage from his discussion relating to the potential effect of a decline in publisher revenues on the production of high-volume tradebooks:

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.¹¹⁸

Certainly if one assumes an income level so high that an individual is relatively insensitive to incremental changes in income, motivating factors other than money may well determine that individual's performance.¹¹⁹

115. Letter from George Bernard Shaw to G.H. Thring, November 22, 1932, reprinted in G.H. THRING, *THE MARKETING OF LITERARY PROPERTY* at xviii-xix (1933). "To the author, his book is the very essence of his being—very often his only throw of the dice for current prosperity. To the publisher, the book is just one of a number of troubles and one chance out of many to gain profit—or to lose it." CHENEY REPORT, *supra* note 66, at 131-32.

116. CHENEY REPORT, *supra* note 66, at 131-32.

117. See text accompanying notes 146-51 *infra*.

118. Breyer at 311-12. *But see id.* at 322.

119. The publicity given to the phenomenal incomes earned by a few highly successful authors tends to give the public a distorted impression of the financial rewards of authorship generally. "It is a rare book that can have a sale in the 10-thousand to 15-thousand range, giving the writer the kind of reasonable profit that will encourage more of the same effort. Today the novel is all top or all bottom: the best seller of 30-thousand to 100-

However, one must wonder how long a best-selling author's income would remain "comparatively large" in the absence of copyright protection, and whether his indifference to a decline in income would continue were his income to slide down into more worldly figures.

In any event, it is not the small class of best selling authors that is our sole, or even primary, concern. Rather, equal attention should be focused on the little known author who has met with mixed popular success in his published works or who is just now in the process of soliciting publication of his first book (a position every best selling author was presumably in at some time in his career). Under the current copyright system, publishers are willing to gamble on the publication of some of these unpredictable quantities with the knowledge that the payoff on the occasional popular success will make up for the losses on a number of commercial "failures."¹²⁰ The abolition of copyright protection, however, would decrease greatly the willingness of a publisher to undertake the publication of a borderline book, since he would still bear all the costs of the "failures," but only receive a severely diminished return on the few "winners." As a result of this more cautious attitude on the part of publishers, many new authors — including potential best-selling authors —¹²¹ would be discouraged from writing, for fear that they would be unable to find a house to print their completed work. Authorship could easily degenerate into an elitist avocation, restricted to authors of either proven commercial popularity or great wealth, an unfortunate situation indeed for a society which prides itself on encouraging the free interchange of ideas.

B. *Would Society Really Benefit Significantly From the Removal of Copyright Protection for Published Books?*

The preceding discussion has shown that the abolition of copyright protection for published books might result in a significant decline in publisher revenue, author royalties and overall book production. It re-

thousand copies or a non-seller of 2-thousand to 5-thousand." Fleming, *The Novelist as Journalist*, THE NEW YORK TIMES BOOK REVIEW, July 21, 1968, at 2.

120. See text accompanying notes 129-31 *infra*.

121. Although Breyer states that "one simply cannot predict whether the marginal writer will produce a more or less valuable social product in [another occupation]," he fails to explain how one can determine which new authors will be marginal, and which exceptional without affording them an opportunity to write and profitably publish. Breyer at 312. Undoubtedly, many good authors wrote and published for a number of years before their talent was recognized by the public.

mains to determine whether this reduction would in fact be counter-balanced by the benefits which Professor Breyer asserts society would reap from this action: (1) reduced prices and wider distribution of books, (2) reduced permissions costs, and (3) reduced market power of publishers.¹²²

1. Prices and Distribution of Books

It is probable that the abolition of copyright protection for published books would have an effect on prices and distribution exactly opposite that claimed by Breyer;¹²³ that is, higher prices and reduced distribution. It has already been seen that copyright abolition, by reducing publisher revenues and author royalties, might reduce the total number of titles published.¹²⁴ Furthermore, initial publishers, conscious of potential entry into the market by copiers, would probably reduce the magnitude of their first printings, so as not to be caught with huge inventories were a copier to eventually step in. The combination of these factors could result in an overall reduction of both the number of titles and the total number of books of each title distributed.

Removing copyright protection might also have the effect of increasing the price of books, at least for a period. Since the magnitude of initial print runs would probably be reduced, the base over which to spread the fixed publication costs would be diminished and the fixed cost per unit increased proportionately.¹²⁵ Furthermore, if we accept Breyer's notions of a lead time advantage for the initial publisher and a generally price insensitive book-consuming public,¹²⁶ it would seem that a rational initial publisher would *raise* his prices during the lead time to maximize his monopoly profits, *i.e.*, the profits realized during the period in which he is free from the competition of a copier.¹²⁷ If most book consumers are, as Breyer claims, relatively unresponsive to price changes, they would still be willing to buy the book immediately after first publication, rather than wait for a later copy edition.¹²⁸ It may be that this kind of "hit-and-run" profit-taking would be the only

122. See text accompanying notes 45-54 *supra*.

123. That this might be the case is indicated by the fact that the introduction of United States copyright protection for works of British authors actually resulted in a decrease in book prices. See QUESTION, *supra* note 1, at 168-69.

124. See text accompanying notes 55-121 *supra*.

125. See QUESTION, *supra* note 1, at 68.

126. See text following note 62 *supra*; Breyer at 299, 300.

127. See SAMUELSON, *supra* note 65, at 468-69, 617.

128. Breyer at 300. But see text accompanying notes 63-70 *supra*.

means by which an initial publisher could exist in a no-copyright book publishing industry.

In his analysis of the book publishing industry by individual sub-market, Breyer contends that prices of tradebooks with wide circulation would fall significantly, placing great emphasis on the fact that "[e]ven though the cost of producing a copy of a book declines radically as its circulation increases, hardbound editions of widely circulating bestsellers presently are priced no lower than those of other tradebooks."¹²⁹ However, this reasoning fails to give account to the "cross-subsidization" phenomenon and its importance to the book publishing industry. One important reason that the price of a best-selling tradebook does not fall significantly as sales rise is that the excess profits from the sale of that particular title are necessary to subsidize the production of the many losing ventures that the publisher undertakes.¹³⁰ As has been pointed out,¹³¹ were publishers deprived of the opportunity to earn these "super-profits" on best-sellers, they would be less willing to undertake the production of the borderline book. This problem would be compounded by anticipated future decreases in tradebook profitability attributable to increased competition from developing media and alternate forms of leisure time activity.¹³²

In the textbook field, Breyer relies on the generally high profit margins of publishers to conclude that a great price reduction could

129. Breyer at 313. Experts anticipate that the opportunity for significant cost spreading will decrease in the future as the print runs for books become shorter. See BAILEY, *supra* note 59, at 185; 1970 *Markets*, *supra* note 59, at 13.

130. [Copyright permits the publisher] to profit substantially on some books (where other publishers would otherwise jump in and divide the market) so as to pay for those books that produce losses. That is, the monopoly right permits the publisher to take risks that he would not take if his more successful books were subject to reprinting without permission and without fee. Thus the copyright promotes the public interest by encouraging a great variety of books to be published, many of them economically marginal, in the hope that some will be highly profitable, and it does this without causing significantly higher book prices on account of monopolistic pricing.

BAILEY, *supra* note 59, at 169. See also text accompanying note 80 *supra*; QUESTION, *supra* note 1, at 72.

131. See text accompanying note 120 *supra*.

132. "Home facsimile, CATV, commercial television, video tapes, increasing travel and competition for the customer's time from other recreational activities will all tend to depress the growth of tradebooks." Strauss, *supra* note 30, at 31 (quoting from the Battelle Report). See also 1970 *Markets*, *supra* note 59, at 18.

occur without a significant decline in book production.¹³³ However, there are several problems with his reasoning. First, although profit margins are comparatively high, the textbook field is the area of the book publishing industry with the smallest lead time advantage and the greatest cost advantage to a copying publisher.¹³⁴ Consequently, the threat of intervention by a copier and the corresponding hesitancy to undertake a questionable venture are also the greatest. Second, the high profit margins on the sale of textbooks may be indicative of the same type of cross-subsidization which is at least partially responsible for the relatively high prices of best selling tradebooks;¹³⁵ that is, publishing firms may be using the excess profits from their textbook sales to compensate for their losses in the tradebook markets. Once again, denying the publisher the opportunity to realize these "super-profits" could jeopardize the publication of marginal tradebooks.¹³⁶ Finally, there are indications that in the future the textbook submarket will hold a declining share of the total book market, and that as a result there will be increased competition in this field and a downward pressure on profit margins.¹³⁷

2. The Transaction Cost of Obtaining Permission to Reproduce

A second burden that a copyright system can impose upon both readers and producers consists of high "transaction costs" — the administrative costs incurred in obtaining permission to copy a work.¹³⁸

As Breyer himself recognizes, very little benefit attributable to reduced permission costs would actually be realized by society on the abolition of copyright protection.¹³⁹ Presently, a liberal "fair use" doctrine and the rarity with which a strict permission requirement is actually enforced combine to keep these transaction costs at a minimum.¹⁴⁰

133. Breyer at 314-15. It may be that the figures upon which Breyer relies are unrealistically high. See BAILEY, *supra* note 59, at 92-93; 1970 *Markets*, *supra* note 59, at 19.

134. Breyer at 297.

135. See text accompanying notes 129-31 *supra*.

136. See text accompanying note 132 *supra*.

137. See 1970 *Markets*, *supra* note 59, at 15-16. See also Smith, *Higher Education's Financial Crisis*, PUBLISHERS' WEEKLY, Dec. 14, 1970 at 20. But see Strauss, *supra* note 30, at 30.

138. Breyer at 316.

139. *Id.* at 316. But see *id.* at 318 (n.147 & accompanying text), 330.

140. See generally NIMMER, *supra* note 2, § 145; RINGER & GITLIN, *supra* note 2, at 30; Cohen, *Fair Use in the Law of Copyright*, ASCAP COPYRIGHT LAW SYMPOSIUM NUMBER SIX 43 (1955); LATMAN, FAIR USE IN COPYRIGHTED WORKS (Copyright Law Revision Study No. 14 (1961)). But cf. Nathan, *Rights and Permissions*, PUBLISHERS' WEEKLY, Nov. 2, 1970, at 36.

Furthermore, fundamental changes in the nature of book publishing in the future may in fact necessitate a *strengthening* of the requirement of an accounting to copyright holders for use of their material.¹⁴¹ As was pointed out earlier, the industry is currently in the midst of an era of unprecedented technological change, which may culminate in the total obsolescence of the conventional published book.¹⁴² If books are eventually printed not in the conventional manner, but rather, as has been suggested, at the command of the individual book buyer, the author and publisher will have little left to compensate their efforts other than the right to demand payment for the permission to reproduce a particular title.¹⁴³ Any transaction costs involved in granting these permissions could be minimized by creating a computerized clearing house for

141. See generally BAILEY, *supra* note 59, at 187-94.

Publishers must find better ways of making their publications conveniently available, especially for educational purposes, but it will be unfortunate indeed if the desire of educators and others to gain free access to certain materials causes a weakening of copyright and a consequent reduction of publishers' willingness to risk publication of marginal projects.

Id. at 169.

142. See text accompanying notes 76-78 *supra*. "The concept of a 'reactive' medium or user control of his information environment, will make present publishing media as archaic as stone tablets within the next 20 years." *Future*, *supra* note 76, at 43.

But see Strauss, *supra* note 30, at 28. "[B]ooks are an established graphic arts product form which despite many threats, pressures and forecasts to the contrary, will continue to exist in about the same physical configuration well into the 21st Century." *Id.* at 29.

143. The payments for permission to copy may well become the largest part of a publisher's income, and unless the publisher can control the image and receive appropriate payment, he will go out of business. Thus it is essential to provide means, under a firm copyright law, to service requests for copying permission efficiently and quickly, and at appropriate fees. Otherwise the book image, so easily stolen, will be lost altogether.

BAILEY, *supra* note 59, at 191.

Technological advances have already had a tremendous impact in the reference book area, where microform publishing (the generic term for the various means of photographically reducing and storing printed matter for later viewing or reproduction) has captured a substantial portion of the market. See 1970 *Markets*, *supra* note 59, at 17; *Future*, *supra* note 76, at 43. The University of Toronto Press has recently adopted the practice of publishing all its new titles and new editions simultaneously in standard microfiche and traditional book form. *Currents—Simultaneous Microfiche*, PUBLISHERS' WEEKLY, Dec. 14, 1970, at 10.

copyright permissions, structured along the lines of the existing music copyright clearing houses, ASCAP and BMI.¹⁴⁴

3. The Market Power of the Book Publishers

Copyright may also injure the public by allowing publishers selling *different* books to restrict competition within the industry [The power to accumulate exclusive licenses to publish may] allow a few publishers to build "stables" of popular writers . . . attract other writers with valuable manuscripts and make it more difficult for a newcomer to obtain the promising manuscripts necessary to become established in the publishing industry. If, as a result, new entry becomes difficult, well-established publishers may find that they have obtained the power to raise their prices and to resist authors' demands for higher royalties. Any such power can curtail book circulation (by raising prices) and may even limit the number of titles produced (by restricting royalties).¹⁴⁵

Breyer's market power argument is based on a misconception of the relative roles and interests of authors and publishers. As was pointed out earlier,¹⁴⁶ the goals of publishers and authors are frequently inconsistent. Normally, the primary goal of the publisher is to operate a profitable business, and, consequently, costs are a critical concern.¹⁴⁷ The author, on the other hand, typically operating under a royalty agreement with the publisher, has as his single financial objective maximization of book sales, and may be, for the most part, totally indifferent to cost considerations.¹⁴⁸ In the typical situation, a publisher's profits on a particular book will be maximized at a lower level of output than that at which sales, and hence author royalties, peak.¹⁴⁹ As a result, there is

144. See *Prototype Project for Copyrights and Computers*, PUBLISHERS' WEEKLY, July 31, 1967, at 35; *Feasibility Study on Clearinghouse for Copyrights and Computers*, PUBLISHERS' WEEKLY, Sept. 4, 1967, at 33; BAILEY, *supra* note 59, at 192-93.

145. Breyer at 318-19 (emphasis original).

146. See text accompanying notes 106-09 *supra*.

147. See generally BAILEY, *supra* note 59, at 19-20; Horvitz, *The Pricing of Textbooks and the Remuneration of Authors*, 56 AM. ECON. REV. 412 (1966). On the contrary, one commentator has stated that top publishing management is "relatively indifferent to production costs." *1970 Markets*, *supra* note 59, at 19.

148. Horvitz, *supra* note 147, at 415-16.

149. *Id.* But cf. BAILEY, *supra* note 59, at 153.

continuing pressure placed by authors on publishers to increase sales, for example, by providing additional funds for promotion and advertising.¹⁵⁰ An author has a strong incentive to take his manuscript to the publisher from whom he is most likely to be able to demand output maximization. Conversely, it is unlikely that a rational author would, as Breyer asserts, be attracted to a large publisher with a "stable" of writers, since he would probably be in an extremely unfavorable bargaining position in terms of achieving his chief goal of maximizing sales. An empirical study of the direction and reasons for author shifts from one publisher to another lends support to the view than an individual author changing publishers is more likely to shift to a smaller publisher than to a large, well-established publisher with a "stable" of popular writers.¹⁵¹

In any event, there is no indication that there is significant anti-competitive concentration or accumulation of market power in the book publishing industry.¹⁵² In fact, competition in the industry has been so vigorous in recent years that few publishers would have been able to realize a profit on the sale of tradebooks without the substantial payments received for subsidiary rights.¹⁵³ Abolition of copyright protection could actually result in an *increase* in industry concentration, since smaller houses would be financially less able to survive the decline in revenue which would result.¹⁵⁴ Finally, if concentration of market power

150. Horvitz, *supra* note 147, at 416-17.

151. See CHENEY REPORT, *supra* note 66, at 147-50. An interesting summary of some of the factors that an editor will stress in an effort to persuade an author to bring a manuscript to his publishing house is contained in BAILEY, *supra* note 59, at 28-29. See also *id.* at 153; A. LINDEY, ENTERTAINMENT PUBLISHING AND THE ARTS—RECENT DEVELOPMENTS 9 (1971).

152. With its multitude of firms, low barriers to entry and high degree of competition, publishing has been described as "Adam Smith's kind of industry." Lacy, *The Economics of Publishing*, DAEDALUS, Winter, 1963, at 45. See also TARAPOREVALA, *supra* note 85, at 18-21; Hurt & Schuchman, *supra* note 3, at 427. But see C. BOUND, A BANKER LOOKS AT PUBLISHING (1950): "[P]ublication of books in this country is concentrated in a relatively few houses." *Id.* at 8.

153. BAILEY, *supra* note 59, at 180; Frase, *supra* note 80, at 437.

154. A similar argument was made in the nineteenth century with respect to the probable impact of a proposal for compulsory licensing of book publishing:

Open competition of this kind would in the end result in crushing out the smaller publishers, and in concentrating the business in the hands of a few houses whose purses had been long enough to carry through the long and unprofitable contests that would certainly be the first effect of such legislation.

QUESTION, *supra* note 1, at 68-69.

should become a problem in the future, it should be dealt with by means of the federal antitrust laws, rather than by the drastic remedy of repealing the statute which has so adequately served the interests of the profession and society in the past.

IV. CONCLUSION

The abolition of copyright protection for published books would have a serious detrimental effect on authors, publishers and our society, which relies so heavily on the printed word for communication and entertainment. Many publishers are presently only able to operate profitably because of the substantial payments made for the use of copyrighted material in other media. Despite widespread public understanding to the contrary, few authors receive extraordinary compensation for their efforts. If competition between duplicate editions of a single title were added to existing inter-book competition and competition from other media, it is doubtful that the present high levels of book production could be maintained. Consequently, considering the tenuous nature of any benefit to be obtained by its repeal, the existing copyright protection for published books should be continued in substantially its present form.

Of course, the conclusion of this Article is not that the existing copyright law is inviolable and should be immune from critical inquiry. In fact, with the Congress currently considering possible copyright revision, it is crucial that vigorous debate be carried on concerning all aspects of the law. Economic analysis is only one tool which may be helpful in that endeavor. The present congressional action provides a long-awaited opportunity for a careful evaluation of the entire federal copyright structure, and where a clear and convincing case for revision exists there should be no hesitancy to act.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

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

Private Law 92-60, 92nd Congress, S. 1866, December 15, 1971.
An Act for the relief of Clayton Bion Craig, Arthur P. Wuth, Mrs.
Lenore D. Hanks, David E. Sleeper, and DeWitt John. 1 p.
The "Science and Health" law.

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

Public Law 92-140, 92nd Congress, S. 646. October 15, 1971.
An Act 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. 2 p. (85 STAT. 391).

Section 1 of this new law amends title 17 U.S.C. to provide
for a limited copyright in sound recordings in order to protect them
against unauthorized duplication. That section will become effective
on Feb. 15, 1972. Section 2, which is effective immediately, amends
section 101 (e) of title 17 to provide additional remedies (including
criminal prosecution in certain cases) where copyrighted works are
unlawfully used in sound recordings. The full text follows:

*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, reproduc-
tions 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 di-

rectly 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 reproductions made by transmitting organizations exclusively for their own use."

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings."

(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 © (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 of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

(e) 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. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Repro-

ductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions', and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1 (e) and 101 (e) of this title."

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) **INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.**—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice."

SEC. 3. This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copy-

righted on and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

Approved October 15, 1971.

Legislative History:

HOUSE REPORT No. 92-487 (Comm. on the Judiciary).

SENATE REPORT No. 92-72 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 177, (1971):

Apr. 29, considered and passed Senate.

Oct. 4, Considered and passed House, amended.

Oct. 6, Senate agreed to House amendments.

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

Public Law 92-170, 92nd Congress, S.J. Res. 132, November 24, 1971. Joint resolution extending the duration of copyright protection in certain cases. 1 p. (85 STAT. 490).

The seventh interim extension law providing for the automatic extension of copyrights in their renewal term that would otherwise have expired prior to December 31, 1972 until that date.

The text follows:

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.

Approved November 24, 1971.

The Copyright Office has issued the following explanatory notice concerning P. Law 92-170:

A recent Act of Congress, P.L. 92-170, 92nd Congress, First Session, extends the length of all copyrights now in their *second* term that would expire before December 31, 1972. Under the Act

these copyrights will continue in force through *December 31, 1972*. The extension is *automatic* and does not require any action in the Copyright Office.

Six earlier Acts (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) had already extended the second term of copyrights scheduled to expire between September 19, 1962, and December 31, 1971, to the end of 1971. The new Act extends the total duration of those copyrights for another year, to December 31, 1972, as shown in Example 1 below. The new Act also extends any second-term copyright that was scheduled to expire during 1972 to December 31, 1972, as shown in Example 2 below.

Examples:

1. A work that was first entered for copyright on October 5, 1907, and renewed in 1935, would normally have fallen into the public domain on October 5, 1963. The first Act extended the copyright to December 31, 1965; the second Act extended it to December 31, 1967; the third Act extended it to December 31, 1968; the fourth Act extended it to December 31, 1969; the fifth Act extended it to December 31, 1970; the sixth Act extended it further to December 31, 1971; and P.L. 92-170 now extends the copyright to December 31, 1972.
2. A work that was first copyrighted on April 10, 1916, and renewed in 1944, would normally have fallen into the public domain on April 10, 1972. The new Act now extends this copyright to December 31, 1972.

61. U.S. CONGRESS. HOUSE. *Committee on the Judiciary. Subcommittee No. 3.*

Prohibiting piracy of sound recordings. Hearings, Ninety-second Congress, first session, on S. 646 and H.R. 6927 . . . June 9 and 10, 1971. Washington, U.S. Govt. Print. Off., 1971. 123 p.

"Serial no. 7."

The hearings on the companion bills which became Pub. L. 92-140.

62. U.S. CONGRESS. HOUSE

Prohibiting piracy of sound recordings. *Congressional Record*, vol. 117, no. 146 (daily ed Oct. 4, 1971), pp. H9033-H9035.

The debates in the House on the motion of Mr. Kastenmeier that the House suspend the rules and pass the record piracy bill, S. 646, as amended. "The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed."

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

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. Kastenmeier, November 3, 1971. 5 p. (92d Cong., 1st Sess., H.R. Rep. No. 92-604).

On a division of 12 votes for and 6 votes against, a motion was adopted to report the Christian Science bill, S. 1866, with a technical amendment, favorably to the House.

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

Copyright protection in certain cases. Report, together with dissenting views, to accompany S. J. Res. 132, submitted by Mr. Celler, November 3, 1971. 5 p. (92d Cong., 1st Sess., H.R. Rep. No. 92-605).

A favorable report on this seventh in a series of interim extensions to continue temporarily the renewal term of expiring copyrights pending enactment of a general revision law, with strong dissenting views by the chairman of Subcommittee No. 3 of the House Judiciary Committee, Mr. Robert W. Kastenmeier.

65. U.S. CONGRESS. HOUSE.

For the relief of Clayton Bion Craig et al. *Congressional Record*, vol. 117, no. 175 (daily ed. Nov. 16, 1971), p. H11079.

Proceedings in the House upon passage, on the call of the private calendar, of the "Science and Health" bill, S. 1866, with a committee amendment.

66. U.S. CONGRESS. HOUSE.

Copyright protection in certain cases. *Congressional Record*, vol. 117, no. 174 (daily ed. Nov. 15, 1971), pp. H11031-H11034.

The proceedings in the House on the suspension of the rules and the passage of the seventh extension measure, S.J. Res. 132 by a record vote of 300 yeas to 49 nays. The measure now goes to the White House.

67. U.S. CONGRESS. HOUSE.

For the relief of Clayton Bion Craig et al. *Congressional Record*, vol. 117, no. 175 (daily ed. Nov. 16, 1971), p. H11079.

Proceedings in the House upon passage, on the call of the private calendar, of the "Science and Health" bill, S. 1866, with a committee amendment.

68. U.S. CONGRESS. SENATE.

Creation of a copyright in certain recordings. *Congressional Record*, vol. 117, no. 148 (Oct. 6, 1971), p. S. 16005.

The proceedings in the Senate on the calling up of the record piracy bill, S. 646, and the Senate concurrence in the House amendments, thus clearing the bill for the White House.

69. U.S. CONGRESS. SENATE.

Relief of certain persons. *Congressional Record*, vol. 117, no. 193 (daily ed. Dec. 10, 1971), pp. S21142-S21146.

The proceedings in the Senate on the "Science and Health" bill, S. 1866, during which the Senate agreed to the House amendments and cleared the bill for the President.

70. U.S. Copyright Office.

Copyright for sound recordings. Washington, D.C. [1971] 10 p. (Circular 561).

A new circular which explains the terms of Public Law 92-140 to permit copyright protection for certain sound recordings under prescribed conditions and how to secure statutory copyright in such recordings.

71. U.S. Copyright Office.

73d annual report of the Register of Copyrights for the fiscal year ending June 30, 1970. Washington, Library of Congress, 1971. 28 p.

"Reprinted from the *Annual Report of the Librarian of Congress*, for the fiscal year ending June 30, 1970."

72. UNITED STATES. Department of the Interior. Office of the Secretary.

[43 CFR Part 25] Use of Johnny Horizon symbol: notice of proposed rule making. October 20, 1971. [F.R. Doc. 71, filed 11-3-71] *Federal Register*, vol. 36, no. 213 (Nov. 4, 1971), pp. 21207-21208.

Interior Department proposed rules on commercial manufacture, reproduction and use of the symbol, with written comments, suggestions, or objections with respect to them to be submitted by December 16, 1971. See 18 BULL. CR. SOC. 29, Item 5 (1970).

2. Foreign Nations

73. CHILE. *Laws, statutes, etc.*

Law on intellectual property. (No. 17,336, of August 28, 1970). *Copyright*, vol. 7, no. 11 (Nov. 1971), pp. 210-221.

The WIPO translation of the new Chilean copyright law.

74. LIBYA. *Laws, statutes, etc.*

Legge sul diritto d'autore del 16 marzo 1968. *Il Diritto di Autore*, vol. 42, no. 3 (July-Sept. 1971), pp. 361-372.

An Italian translation of the Libyan Copyright Law of March 16, 1968.

75. MALTA. *Laws, statutes, etc.*

The Copyright Board Proceedings Regulations, 1970. (No. 2, of 1970). *Copyright*, vol. 7, no. 9 (Sept. 1971), pp. 170-171.

Regulations established pursuant to section 17 of the Maltese Copyright Act, 1967.

76. MALTA. *Laws, statutes, etc.*

The Copyright (International Conventions) Regulations, 1970. (No. 1, of 1970). *Copyright*, vol. 7, no. 9 (Sept. 1971), pp. 169-170.

An order extending the Maltese Copyright Act 1967 to members of the Berne and Universal Copyright Conventions.

77. MALTA. *Laws, statutes, etc.*

The Copyright (Sound recordings) Regulations, 1970. (No. 3, of 1970). *Copyright*, vol. 7, no. 9 (Sept. 1971), pp. 171-172.

Regulations pertaining to mechanical reproduction made pursuant to section 16 of the Maltese Copyright Act, 1967.

78. Portugal. *Laws, statutes, etc.*

Decreto-legge n. 46980.—Codice del diritto d'autore entrato in vigore il 2 maggio 1966. *Il Diritto di Autore*, vol. 42, no. 3 (July-Sept. 1971), pp. 373-416.

An Italian translation of the Portuguese Copyright Code which entered into force on May 2, 1966.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

79. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. *BNA's Patent, Trademark & Copyright Journal*, no. 53 (Nov. 18, 1971), pp. D1-D2.

By the terms of the convention, each contracting state agrees to protect producers of sound recordings against the unauthorized making and importation of duplicate recordings. The convention will remain open for signature until April 30, 1972, and will enter into force three months after it is ratified by five states.

80. Diplomatic conference on the protection of phonograms (Geneva, October 18 to 29, 1971). *Copyright*, vol. 7, no. 12 (Dec. 1971), pp. 240-255.

Contents: I. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. II. Report, presented by Joseph Ekedi Samnik, general rapporteur. III. List of participants. IV. Bureau of the Conference.

81. THE NORDIC DESIGN LAWS. *Industrial Property*, vol. 10, no. 9 (Sept. 1971), pp. 223-238.

The unified text, based on translations provided by the Danish, Finnish, Norwegian and Swedish Patent Offices, of the following four laws: Denmark Designs Act 1970, No. 218 of May 27, 1970, Finland Registered Designs Act, No. 221/71 of March 12, 1971, Norway Designs Act, 1970, No. 33 of May 29, 1970, and Sweden Design Protection Act, No. 485 of June 29, 1970.

PART IV.

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

82. *Puddu et al v. Buonamici Statuary, Inc.*, 450 F.2d 401, 171 USPQ 709 (2d Cir. November 3, 1971) (Friendly, J.).

Plaintiffs' appeal from dismissal of action for infringement of copyright in certain statuary. The lower court dismissed the complaint on the alternative grounds (i) that plaintiffs' statuettes were not sufficiently different from a prior public domain line as to meet the requirement of originality; and (ii) insufficiency of copyright notice.

Held, affirmed.

A. Copyright

1. *Originality*: Noting that the originality required by copyright demands only independent creation, the court held it could not affirm the dismissal for lack of originality:

Plaintiff's employee . . . testified without contradiction that he had sculpted all the copyrighted statuettes "from scratch." While there is a strong family resemblance between the copyrighted and [prior] uncopyrighted models, the differences suffice to satisfy the modest requirement of originality . . .

The court also noted that while the lower court had relied upon minor differences between the parties' statuettes, this would not support dismissal unless such differences negated a finding of infringement (a conclusion the lower court did not make). The court said:

The tests for eligibility for copyright and avoidance of infringement are not the same. Originality sufficient for copyright protection exists if the "author" has introduced any element of novelty as contrasted with the material previously known to him. Introduction of a similar element by the copier of a copyrighted design will not avoid liability for infringement if "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."

2. *Notice*: One group of plaintiffs' statuary was marked with a notice the lower court found to be wholly illegible. The appellate court held this supported by the record.

A second group of statuary was legibly marked with the © symbol and the designation "ARP". These statuettes bore additional markings which the lower court felt were "presumably [plaintiff's full] name, but which [the court] could not decipher, even with the aid of a powerful reading glass."

Although plaintiff had duly filed a certificate of doing business under the fictitious name "ARP," the Court of Appeals held that this was insufficient to satisfy the notice requirements under the line of cases sustaining initial or trademark substitutes for the proprietor's name. The court said:

In *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 436 F.2d 315, 317-19 (2 Cir. 1970), our latest discussion of questions like those raised here, which was not cited in the briefs of either side, we pointed out that the 1954 amendment of the first sentence of §19, made for another purpose, had the unintended effect of enabling copyright holders to argue that trademarks or initials could qualify under the first sentence, although the clear antinomy in the second sentence made it apparent that, in order to satisfy that, the full name must somewhere appear. . . . We [also] noted . . . that "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." . . . But these cases are clearly inapplicable here, since there was no proof that ARP was "a well-advertised or widely known trademark or trade name." . . . The filing of a certificate permitting Puddu to do business under the assumed name of "ARP" is a long way from the proof held sufficient in these prior cases. We thus cannot say that, even as to the 1964 line, the appellant has complied, "in substance" with the requirements of §19.

Plaintiffs argued that the failure to comply with the notice requirements could not be deemed fatal because as a result of prior litigation, defendants were well aware of the meaning of "ARP" before the alleged copying. The Court of Appeals held that such knowledge could not

save plaintiffs' claim, despite decisional and commentary support to the contrary. The court said:

In *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, supra . . . we indicated skepticism with respect to the broad dictum in the per curiam opinion in *Dan Kasoff, Inc. v. Novelty Jewelry Co.*, 309 F.2d 745, 746 (2 Cir. 1962), that defendants who are "wholly aware of the existence of copyright" can never "assert insufficiency of notice." That and similar statements in district court opinions fail to take adequate account of the plain language of §10 and also of *Thompson v. Hubbard*, 131 U.S. 123 (1889). The Supreme Court there held that, under the Copyright Act of 1874, failure to state the name of the copyright holder was fatal even in the extreme case of an infringement action against a previous owner of the copyright which had transferred it to the plaintiff. The Court said, "This right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard [the plaintiff] are only those prescribed by Congress." 131 U.S. at 151 (citations omitted). Although the Act of 1874 made the notice a condition of bringing an action for infringement rather than of copyright, we cannot perceive that to be a material distinction; indeed the Court in *Hubbard* cited earlier copyright acts where, as in the present statute, notice was made a condition on the copyright itself. Although Professor Nimmer states that even illegible notices may be good "as against infringers who managed to decipher them or who should have been put on inquiry by the illegible printing, or who had actual notice of the plaintiff's copyright," Nimmer, Copyright §90.4, only three of the seven decisions cited can be said to support this proposition. Whatever may be the precise scope of the principle on which the appellants rely, it does not go so far as to confer copyright protection when the "name" of the copyright holder is so illegible and the initials are so far from constituting a name, as the district court permissibly found here.

The court also held that Section 21 of the Copyright Act, dealing with accidental omission of notice from particular copies, could not benefit plaintiffs as "a mistake of law is not within the purview of §21 . . . [and] deliberate use of a notice which does not meet the requirements of the Act will not be saved by §21. . . ."

B. *Unfair Competition:* The Court held that certain unspecified unfair competition claims of plaintiff were inadequate under *Sears* and

Compco "since plaintiff did not press a claim based on confusing labeling but only . . . based on copying."

83. *Rice et al. American Program Bureau et al.*, 446 F.2d 685, 170 USPQ 545 (2d Cir., July 8, 1971) (Clark, J.). *For later related decision, see Item 86, infra.*

Cross-appeals, from preliminary injunction for plaintiffs in action for copyright infringement. Plaintiffs, the authors, publishers and copyright proprietors, performers and recorders of the "rock opera", Jesus Christ, Superstar, sought to enjoin The American Rock Opera Company and its booking agent, the named defendant, from certain concert performances of the musical compositions embodied in the opera. The named defendant had entered into a license agreement with ASCAP covering "non-dramatic renditions of the separate musical compositions copyrighted by ASCAP members" and the defendants contended that their performances were sanctioned thereunder.

The lower court enjoined the defendants from "advertising the presentation, presenting or performing the copyrighted opera Jesus Christ Superstar, save for 'the singing of not more than two (2) of the individual musical compositions which have been separately copyrighted as musical compositions * * * or not more than two (2) other individual songs from the opera during any one concert.'"

Held, modified.

The Court of Appeals modified the injunction so as to enjoin the defendants from presenting "(1) the opera in its entirety; (2) the songs or excerpts therefrom when accompanied by either words, pantomime, dance or visual representation of the work from which the music is taken; and (3) fragments or instrumental selections when accompanied by words, dialogue, costumes, dramatic action or visual representation (such as motion picture) of the work of which the music forms a part."

The Court considered this modification required by its analysis of the scope of the ASCAP license, stating:

ASCAP came into being to aid its members to police the exclusive right granted copyright owners under 17 U.S.C. §1(e) to perform publicly for profit their musical compositions. Feeling that they could themselves police and license dramatic plays, musical comedies or operas, ASCAP was only authorized to license non-dramatic performing rights. * * * As a consequence, members or owners reserved to themselves the right of "performance of musical plays and dramatico-musicals in their entirety" or any part of the

same on the legitimate stage. ASCAP, therefore, limited the licenses it issued on its repertoire to the "non-dramatic rendition of the separate musical compositions copyrighted by members of the Society." ASCAP included in its license three excluded dramatic categories [§ 3(a)]: (1) the overall work, (2) excerpts when accompanied by words, dance, pantomime, visual representation, and (3) fragments or instrumental selections accompanied by words, costumes, dialogue, scenery, etc. (which are apparently not here included). These provisions parallel § 1(b) of the member-ASCAP agreement, which reserves to the member the *performance* of "musical plays and dramatico-musical compositions in their entirety" or any part thereof on the *legitimate stage*. Non-dramatic performances of separate numbers, songs, etc. are not reserved. Through these provisions ASCAP only licenses the presentation of the separate songs in its repertoire. This includes the lyrics of the particular song . . . but does not permit the use of words, dance, pantomime or visual representation that might aid in telling the plot of the overall play or opera.

* * *

In short, ASCAP receives the right to license the separate songs, including their lyrics, but not the opera in its entirety or any part of it on the legitimate stage. In keeping with this clear restriction, ASCAP has limited its license [as above] * * *.

Applying these criteria to the facts found by the District Court here, we conclude that appellants cannot perform the overall opera *Jesus Christ Superstar* nor advertise that their program consists of that opera or any adaptation thereof. Appellants can present separate songs, fragments of songs, or excerpts from the opera including the lyrics in the original works but cannot accompany such songs or excerpts with words, pantomime, dance, costumes, or scenery that will lend a visual representation of the work from which the music is taken. The record indicates that no instrumental selections are included in the opera. If there are such selections, they may be presented without words, dialogue, costume, stage action, dramatic action, scenic accessory or visual representation (motion picture or otherwise) of the work of which such music forms a part.

The Court referred to the possibility that the sequential performance of all the songs from plaintiffs' opera without accompanying words, costumes and scenery might so develop the plot of the opera as

to be "dramatic" in form or a presentation of the opera "in its entirety." However, added the Court:

. . . we have no proof of this here and until there is proof, we cannot so hold. Each of the songs of the opera are separately copyrighted, and these are the "rights" which ASCAP received from the member or owner. At this preliminary stage when the proof is on the papers alone, it cannot be concluded that the mere singing of the songs—without more—would fall within the license's excluded category. Under appellees' interpretation, the license granted appellants nothing; we are not persuaded that the ASCAP membership has engaged in such a useless exercise.

Judge Smith dissented.

84. *Riback Enterprises, Inc. v. Denham et al.*, 452 F.2d 845, 172 USPQ 33 (2d Cir., November 26, 1971) (Feinberg, J.). *For decision below, see* 327 F.Supp. 763, 170 USPQ 326 (SDNY 1971), 18 BULL. CR. Soc. Item 389 (1971).

Defendants' appeal from grant of preliminary injunction for plaintiff in action for copyright and trademark infringement and unfair competition. Plaintiff secured a preliminary injunction against the defendants' sale of "greeting card booklets which have the same format as [plaintiff's] greeting card booklets." The lower court based its decision solely on unfair competition, finding that "the defendants have imitated the format of [plaintiff's] booklets in [defendants'] booklets, and . . . a prospective purchaser of greeting card booklets would believe that both sets of booklets were produced by a single company which wished to feature more than one character in its line of booklets." The lower court also noted that defendants' trade show use of a display rack identical to the one used by plaintiff in its retail outlets indicated that defendants "intend[ed] to identify their product as closely as possible" with plaintiff's.

Held, reversed.

The court held that the absolute prohibition on defendants' sale of their booklets based upon unfair competition in the similarity of format was improper under *Sears* and *Compco*:

[P]laintiff has no more right to keep defendants from selling greetings cards because they imitate the format of its GRINLETS than Stiffel Company or Day-Brite [plaintiffs in *Sears* and *Compco*] had to prevent competitors from selling imitations of their pole lamps and lighting fixtures. We do not mean to suggest that defendants

may with impunity pass-off their cards as [plaintiff's]. Indeed, in *Sears* the Court expressly noted just the opposite. . . . In the present case, however, the evidence of intentional passing-off is insufficient to sustain the injunction. The display stand used by defendants at the Gift Show may have been similar to plaintiff's, but it was apparently a conventional type. Moreover, the identity of [defendants] as the manufacturer and distributor of [their booklets] was clearly indicated on the back of each card, where the buyers at the Gift Show would look for it. In any event, the injunction was not limited to mislabeling or to requiring "those who make and sell copies to take precautions to identify their products as their own." *Compco*, 376 U.S. at 238, 140 USPQ at 530-531. The injunction instead impermissibly cut off all sales of [defendants' booklets] and must be set aside."

Plaintiff argued on appeal that the injunction was warranted because one of the defendants was a former employee of plaintiff whose participation in defendants' activities was in breach of a fiduciary obligation. However, the Court of Appeals noted that the lower court's award of preliminary relief was not based on such a theory, and "in any event, the injunction could not be defended on the basis of a breach of fiduciary duty since the court found no use of trade secrets, and preliminary . . . relief was sought after [the defendant in question] had terminated its relationship with [plaintiff]."

85. *Norman v. Columbia Broadcasting System, Inc., et al.*, 172 USPQ 7 (S.D.N.Y. October 27, 1971) (Levet, J.).

Action for copyright infringement. Plaintiff, author of a biography of the well-known poet Ezra Pound, charged that the named defendant's television show entitled "In Search of Ezra Pound" infringed the copyright in his work.

Held, complaint dismissed.

1. The court examined a chart of 148 parallel references to portions of the parties' works which had been compiled by plaintiff. In each case, the court found the comparisons insufficient to sustain the claim of infringement.

In some cases the parallel references referred to the parties' use of photographs of the same scene and the court found that plaintiff had no exclusive rights to use of the photograph (e.g., because obtained from public sources) or that other photographs of the same scene were available to defendant.

In cases of alleged infringement of plaintiff's text, the court variously found that defendants' material consisted of "historical facts," and that defendant copied "neither fact nor mode of expression" from plaintiff, or that there was no "similarity of language" in expressing the same fact; that defendants' material was based upon or derived from independent sources; and that certain language used by both parties was the language of published contracts entered into by Pound in respect of which plaintiff had no exclusionary rights.

In connection with the above findings, the court relied upon prior judicial comments on limitations in biography copyright based upon their fact-historical nature [*Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) and *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2 Cir. 1966), cert. denied 385 U.S. 1009 (1967)]. The court noted that "at times one or more descriptive words used in plaintiff's book [may have been] utilized to describe the same thing in defendants' telecast but in no material respect are the same words gathered together to show that the copyrighted work was copied."

The court also noted Judge Moore's (in *Rosemont*) criticism of the Seventh Circuit Court decision in *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (1950) (copyright protection accorded to disparate "facts" where alleged copier does not exercise independent effort in discovering and compiling same):

" * * * we, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. *Oxford Book Co. v. College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. See Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569, 1584 (1963) (criticizing *Toksvig v. Bruce Publishing Co.*, supra)."

2. The court also found that "plaintiff's claim that defendants have infringed upon his work by reason of using identical sequences is without merit since the continuity of plaintiff's biography . . . is [almost wholly] chronological." The court quoted the language of Judge Learned Hand in *Myers v. Mail & Express Company*, 36 C.O. BULL. 478, at 479 (S.D.N.Y. 1919):

" * * * not only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chrono-

logically,—or at least, such is the convention,—the order in which the facts are reported must be the same in the case of a second supposed author. There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship, for indeed, history depends wholly upon a selection from the undifferentiated mass of recorded facts.”

3. Based upon the foregoing, the court ordered the complaint dismissed, observing that “plaintiff has based his complaint upon ‘erroneous understanding of the extent of copyright protection’ and partly upon the conviction ‘so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.’”

86. *The Robert Stigwood Group Limited et al. v. Sperber d.b.a. The Original American Touring Company, et al.*, 332 F.Supp. 1206, 171 USPQ 684 (S.D.N.Y. August 26, 1971). For earlier related decision, see Item 83, *supra*.

Motion for preliminary injunction in action for copyright infringement and unfair competition. Plaintiffs are the authors and the owners of copyright (and their licensees) in the rock opera, “Jesus Christ, Superstar”.

Defendants presented concert performances of twenty of the twenty-three songs in the opera, interspersed with some musical-religious works not from the opera. Defendants performed the “Superstar” compositions in their opera-version sequence, but “without conventional dramatic rendition, scenery, costumes or the other usual trappings of operatic performance.” All of defendant’s performances were given for promoters operating under the ASCAP license for performance of “non-dramatic renditions” of ASCAP compositions, but plaintiffs argued that the sequential performances of the compositions “create[d] a dramatic effect which render[ed] defendants’ performances dramatico-musical productions [outside the ASCAP license] infringing upon plaintiffs’ copyright.”

Both parties relied upon *Rice v. American Program Bureau*. Item 83, *supra*.

Plaintiff proprietors, whose licensees performed the opera under the name “The National Touring Company,” also sought to enjoin defendants from (i) using the name “The Original American Touring Company” in their performances of the Superstar compositions; and

(ii) from promoting their performances by reference to the title of the rock opera.

Held, motion denied in part and granted in part.

A. *Copyright*: Noting that the Court of Appeals in *Rice* stated that the sequential performance of the Superstar compositions might, without more, "develop the overall plot of the opera, and thus . . . be [outside the ASCAP license] 'dramatic' or . . . a presentation of the opera in its 'entirety'." The court held that, as in *Rice*, no *proof* was offered to support such a conclusion. Plaintiffs' mere "conclusory" assertions, held the court, were insufficient to obtain preliminary relief.

B. *Unfair Competition*:

1. *Use of "Original American Touring Company"*: The court held that plaintiffs had not sufficiently demonstrated the likelihood of confusion required for relief. "What little evidence [they] adduced," added the court, were "substantially offset by numerous [of defendants' exhibits . . . demonstrating that the public mind as reflected in press accounts has distinguished plaintiffs' and defendants' respective productions."

2. *Promotional References to "Superstar"*: Referring to the holding in *Rice* that the ASCAP license does not include a right to advertise that a performance "consist of the entire work, or even an adaptation thereof," the court held that defendants should be enjoined from "directly or indirectly advertising or in any way representing any presentation as being from "Jesus Christ Superstar" or any song, instrumental selection or excerpt as taken therefrom in whole or in part." The court then added:

The Court intends this injunction to prohibit the use of the title of the opera in the advertisements for defendants' concerts. However, it is the view of the Court that the *Rice* decision would not preclude defendants from identifying the individual song titles in the publicity for their performances. Thus, the injunction does not prohibit advertising of that nature.

87. *Loomskill, Inc. v. Stein & Fishman Fabrics Inc.*, 332 F.Supp. 1288, 172 USPQ 5 (S.D.N.Y., October 20, 1971) (Pollack, J.).

Action for copyright infringement and unfair competition. Plaintiff sought to enjoin defendant from manufacturing or selling textiles imprinted with alleged infringements of plaintiff's design.

Held, judgment for plaintiff.

The court found that defendant's design was derived from prior exposure to plaintiff's. However, added the court, "the source of defendant's inspiration does not . . . necessarily determine the legal issue [since the] 'ultimate test' of infringement . . . [is] 'whether an average lay observer would find a substantial similarity in the designs, recognizing the copy as an appropriation of the copyrighted work.'"

Under this test, the court held that defendant's design was an infringement of plaintiff's copyright and that defendant's creation and marketing of its design constituted "inequitable conduct, unfair trade practice and unfair competition amounting to a misappropriation of both plaintiff's goodwill and the benefit of plaintiff's skill and expenditures in the development and promotion of its distinctive design and color combinations."

88. *Famous Music Corporation et al. v. Maholias*, 171 USPQ 640 (E.D. Wisc. Oct. 13, 1971) (Gordon, J.).

Action for copyright infringement wherein defendant moved to join ASCAP as an indispensable party.

Held, motion denied.

The court noted that plaintiffs alleged ownership of the copyrights in issue and that ASCAP is "only a licensing agent." "Since the principles are parties to the law suit," said the court, "it is not clear why the agent must be brought in." The court relied upon a 1943 decision which resolved a similar issue adverse to the defendants' position [*Leo Feist, Inc. v. Young*, 138 F.2d 972, 59 USPQ 450 (7th Cir.)] in denying the application.

89. *Hub Floral Corporation v. Royal Brass Corporation et al.*, 171 USPQ 544 (E.D.N.Y. July 12, 1971) (Bruchhausen, J.).

Action for infringement of copyright in a decorative planter. After registering its planter as an unpublished work of art, plaintiff reproduced and sold copies thereof without making a new deposit in the Copyright Office.

The court held that plaintiff's failure to comply with Sections 12 and 13 of the Copyright Act by effecting a new deposit after publication deprived it of standing to sue, and dismissed the action "without prejudice to plaintiff to correct the defect . . ."

90. *Mattel, Inc. v. Nancy Ann Storybook Dolls, Inc., et al.*, 171 U.S.P.Q. 30 (N.D. Cal., June 9, 1971) (Peckman, J.).

Plaintiff's motion for preliminary injunction in action for copyright and trademark infringement and unfair competition. Plaintiff created and sold, under the name "Rock Flowers", a group of dolls costumed as rock recording artists, together with "distinctively ridged" record discs, connecting stands (for attaching the doll to the center of the discs during playing) and specially designed packaging for these items. Plaintiff also printed and distributed a copyrighted catalog illustrating its dolls and accessories. Defendant marketed, catalogued and sold a similar doll combination under the name "The Rolling Pebbles."

Held, motion granted.

The court held (i) that textual and pictorial matter in defendants' catalog, and pictorial matter on the packaging for defendants' dolls constituted a prima facie infringement of plaintiff's catalog; and (ii) that defendants' dolls infringed the illustrations appearing in, and protected as copyrightable component parts of plaintiff's catalog; more specifically, the court found that the dolls infringed plaintiff's exclusive right under the Copyright Act "to make other versions" of its illustrations.

The court also held that defendants' containers "are confusingly similar in design and appearance with plaintiff's . . . doll containers for [its] Rock Flowers and there is a likelihood of customer confusion and passing off . . . which constitutes unfair competition. . . ."

2. State Court Decisions

91. *Press Publishing Company, trading as Atlantic City Press v. Atlantic County Advertiser, Inc., et al.*, 172 USPQ 27 (N.J. Sup. Ct., Nov. 1, 1971) (Per Curiam). *For decision below, see* 164 USPQ 533 (N.J. Super. Ct., 1969), affirmed, 113 N.J. Super. 228 (1971), 17 BULL. CR. SOC. 304, Item 121.

Appeal from dismissal of complaint in action for unfair competition. Plaintiff prepared and published advertisements in its daily newspaper for advertising customers. Defendants copied and published these advertisements, for the same customers, in its weekly shopping guide. The trial court dismissed the complaint on the grounds there was no unfair competition as a matter of law, and the intermediate appellate court affirmed.

Held, affirmed.

The trial court's opinion stated that "the advertising [in question] is not protected by Federal copyright statutes." The N.J. Supreme Court noted that this was an "unclear" statement as it did not speak to whether "the advertisements were copyrightable but had not been copyrighted by plaintiff or that [they] were not copyrightable by anyone."

The court affirmed the dismissal on the grounds that *Sears* and *Compco* precluded state relief against the copying, whether or not the advertisements were capable of copyright. The court said:

It appears plain, since [*Sears* and *Compco*], that, as stated in *Compco*, "... when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I §8, cl. 8 of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." . . .

It may well be, despite statements of both counsel to the contrary at oral argument, that these advertisements were copyrightable [as they] arguably contain the elements of originality and creativity at least to the minimal degree required. . . .

The largely identical case of *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), holds that advertisements prepared by a newspaper for an advertising customer could not be copyrighted by the newspaper, but only by the advertiser, who is the owner thereof for such purpose, absent an agreement to the contrary. . . .

In the case at bar, the record indicates that plaintiff had not copyrighted its publication. If it had and the copyright validly covered the advertisements in question, its only remedy would have been a suit for infringement, which is committed to the exclusive jurisdiction of the federal courts. 28 U.S.C.A. §1338. Assuming that the advertisements were copyrightable and, for present purposes only, that [a purported] assignment of the advertisers' rights to plaintiff was valid and effective, these advertisements could have been, under the rationale of *Brattleboro*, copyrighted by plaintiff. Having failed to do so, it forfeited any rights to which it might have been entitled and the advertisements were, as set forth in *Sears*, *Roebuck* and *Compco*, in the public domain by reason of federal policy and were properly copied by defendants without liability. The same result follows if the advertisements were not copyrightable by anyone. State unfair competition law could not validly dictate the contrary.

Also of Interest:

92. *Tomlin v. Walt Disney Productions*, 171 USPQ 415 (Cal. Dist. Ct. App., June 21, 1971) (Compton, J.).

Plaintiff's appeal from summary judgment for defendant in action for unfair competition (title piracy). Plaintiff is the author of a song entitled "The Love Bug Will Bite You (If You Don't Watch Out)," alleged to have become popularly known simply as "The Love Bug", which he assigned to a music publisher in 1937 under an agreement renewed in 1964. Defendant is the producer of a motion picture concerning a "Volkswagen automobile with human attributes" entitled "The Love Bug."

Plaintiff asserted that the words "The Love Bug" had acquired a secondary meaning associated with his song* and sought general and exemplary damages and injunctive relief by reason of defendant's alleged misappropriation thereof. The lower court granted summary judgment for defendant on the grounds that (i) plaintiff lacked standing; (ii) there was no likelihood of confusion between the parties' works; and (iii) federal law pre-empted the state court's power to grant the relief requested.

Held, affirmed.

I. *Standing*: The appellate court agreed that plaintiff was not the real party in interest in the suit, as all rights in the title of his musical composition, including rights deriving from the attachment of secondary meaning, belonged to plaintiff's publisher under their publishing agreement. The court said:

[I]n 1937, Tomlin executed a contract with his publisher by which he assigned his rights in the composition "The Love Bug Will Bite You (If You Don't Watch Out)." This assignment included the "Title, words and music thereof." In 1964, Tomlin executed a renewal agreement with the successor of the original publisher.

Tomlin now contends that at the time of the original contract the title had not acquired a "secondary meaning," the song being as yet unpublished, and therefore he did not assign his "cause of

* "At . . . oral argument [plaintiff's] counsel . . . suggested a possible 'secondary' identification with Tomlin as a performer as distinguished from an identification with the composition. This contention, however, is answered by *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 168 USPQ 12 [9th Cir., 1970], 18 BULL. CR. SOC. 239, Item 117 (1971)]." (Footnote, except as indicated, by the court.)

action" in the instant case. He further contends that a clause in the renewal agreement granting to the publisher the right to make changes in the title is implied recognition that he had originally reserved certain rights to the title. In any agreement whereby a composer sells his rights in an unpublished work, the expectation or at least the hope of parties is that the composition will achieve great popularity and value. An unqualified assignment of the rights to such composition would include such expectancy.

The contracts here were unambiguous. The song, including the title, became the property of the publisher. An accretion in the value of the property, including the acquisition of a secondary meaning for the title, necessarily belonged to the owner, to wit, the publisher.

II. *Federal Pre-emption*: The court extensively discussed the effect of *Sears* and *Compco* upon the common law action for title piracy and held that such an action could not *preclude* the use of a title which had acquired secondary meaning, nor award damages for the appropriation of such a title, but could only require a subsequent user "to take precautions [e.g., by 'identifying the source of its work or disclaiming any connection with plaintiff's work'] to prevent public confusion as to source" and award special damages for a failure to take such precautions.

A. The court found that, in light of the "weak" nature of the oft-used title "The Love Bug", the full title of plaintiff's composition, and the disparity between the media involved and the parties' businesses, plaintiff had failed to establish the requisite secondary meaning and likelihood of confusion to support the limited relief available under *Sears* and *Compco*.

93. *Miller et al. v. Kimberly-Clark Corporation*, 172 USPQ 23 (E.D. Wisc., October 22, 1971) (Gordon, J.).

Plaintiff sought a declaratory judgment that an agreement entered into with his former employer (the defendant) was invalid and unenforceable. The agreement precluded plaintiff from disclosing "information and knowledge" acquired and not generally known while he was employed by defendant.

Held, complaint dismissed for lack of federal court jurisdiction.

The court said, in part: "The exacting requirements of the patent and copyright laws have been interpreted as evidencing a national policy

favoring competition [citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964)]. However, that national policy does not, without more, justify the court's accepting jurisdiction over an employment contract dispute which is otherwise cognizable in a state court."

PART V.

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A comprehensive and valuable addition to this encyclopedic guide to modern practices, techniques and tactics used in preparing and trying cases, with model programs for the handling of all types of litigation.

97. NIMMER, MELVILLE B. Cases and materials on copyright and other aspects of law pertaining to literary, musical and artistic works. St. Paul, West Publishing Co., 1971. 828 p. (American Casebook Series.)

An up-to-date casebook on copyright and related subjects such as unfair competition, protection of ideas, defamation, invasion of

privacy, right of publicity, and performers' rights. The cases are for the most part reproduced in their entirety, except for the deletion of "extraneous" portions of the decisions. Appendices include the text of the Copyright Act, parallel reference tables, and Copyright Office regulations.

98. *ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE*. Editors: Allen Kent and Harold Lancour. Assistant editor: William Z. Nasri. Vol. 6: Copying to Departmental libraries. New York, Marcel Dekker, Inc. [1971] 683 p.

Under the topic "Copyright" there are a number of contributions representing various points of view. The contributors, in the order of their contributions, are Messrs. J. Clement Harrison, William Z. Nasri, Abe A. Goldman, Lyman Ray Patterson, Curtis G. Benjamin, J. H. Kuney, Charles G. Gosnell, Michael A. Duggan, Allen Kent, and Dan Lacy.

99. *SHEMEL, SIDNEY, AND M. WILLIAM KRASILOVSKY*. This business of music. Edited by Paul Ackerman. Rev. and enl. ed. New York, Billboard Publications [1971] 575 p.

A revised and enlarged edition of a comprehensive reference book covering legal and economic aspects of the music and recording industries, with numerous sections on domestic and international copyright protection. See 12 BULL. CR. SOC. 174, Item 60 (1965).

100. *SHERVIS, KATHERINE*. Legal and political aspects of satellite telecommunication, an annotated bibliography. Abstracted by Herb Berkowitz [and others]. Abstracts edited by Linda Mangum. Computer programming by Richard Wolfe and Roger Voytecki. Under the guidance of Professor Delbert D. Smith. Madison, EDSAT Center, University of Wisconsin, June 1971. 126 p.

"Includes works on global, regional and domestic satellite systems, both proposed and operative, and on problems of international organization, cooperation and regulation." The bibliography is made up of three parts: (1) a list of abstracted reference to books, parts of books, journal articles, conference papers, news items and unpublished papers; (2) an author index; and (3) a subject index, i.e., a KWOC (Key Word Out of Context) index which is generated by the computer permutation of significant words within the titles and of supplementary key words.

2. Foreign Publications

101. INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967. *Records*, June 11-July 14, 1967. Geneva, 1971. 2 v. (1588 p.). At head of title: World Intellectual Property Organization (WIPO).

"These *Records* . . . contain [among other materials] all the official documents in relation to the Conference which were issued before and during the Conference."

102. PLAISANT, ROBERT. *Le droit des auteurs et des artistes executants*. Paris, J. Delmas [1970] 409 p. (Documents actuels.)

A practical guide to copyright and performers' rights in France. Annexes include texts of laws, of international conventions to which France is a party, and of standard contracts established by French author and other organizations dealing with exploitation of copyrighted works.

103. STERN, HERMAN J. *Die Weiterverbreitung von Radio- und Fernseh-sendungen; zur Frage ihrer urheberrechtlichen Zulässigkeit und praktischen Durchführbarkeit*. Zürich, Schulthess, 1970. 135 p. (Zürcher Beiträge zur Rechtswissenschaft, n.F., Heft 343.)

Originally presented as the author's thesis, Zürich.

A comprehensive study on the legal aspects of telecommunications under the Berne Convention and the Rome Convention on Neighboring rights as well as under the national legislation of Switzerland. Includes a comparative survey of the legal situation in a number of Berne Union countries and in the United States.

104. TROLLER, ALOIS. *Immaterialgüterrecht: Patentrecht, Markenrecht, Urheberrecht, Muster- und Modellrecht, Wettbewerbsrecht*. 2., überarb. und erweiterte Aufl. Basel, Helbing & Lichtenhahn, 1968-71. 2 v. (1272 p.)

The second, revised and expanded edition of a comprehensive textbook of Swiss intellectual property law, encompassing patents, trademarks, copyright, designs and models, and unfair competition.

105. WORLD INTELLECTUAL PROPERTY ORGANIZATION. *Current trends in the field of intellectual property*; series of lectures organized by

the World Intellectual Property Organization in Montreux, June 1971. Geneva, 1971. 399 p.

Title also in French.

Partial contents. — Droit d'auteur: Développements récents et perspectives d'avenir sur le plan national dans les pays francophones, par Jean-Loup Tournier. — Copyright: Recent developments and future prospects on the national level in English-speaking countries, by Barbara Ringer. — Droit d'auteur: Développements récents et perspective d'avenir sur le plan national dans les pays autres que les pays francophones et anglophones, par Valerio de Sanctis. — Urheberrecht: Neuere Entwicklungen und Zukunftsaussichten im Internationalen Bereich: Revision der Berner Übereinkunft und des Welturheberrechtsabkommen, von Eugen Ulmer. — Droit d'auteur: Développements récents et perspectives d'avenir sur le plan international dans le domaine des satellites de communication, par Georges Straschnov. — Copyright: Recent developments and future prospects on the international level in the field of phonograms and video-cassettes, by Stephen Stewart.

There are twenty-six lectures in all, reproduced in the languages in which they were delivered, of which only those lectures dealing with copyright are given in the contents of this entry.

B. LAW REVIEW ARTICLES

1. United States

106. BOTEIN, MICHAEL. Cable TV: a one-degree thaw in the freeze? *New York Law Journal*, Nov. 29, 1971, p. 1, cols. 1-2; p. 4, cols. 1-3.

An analysis of recent developments relative to the regulation of community antenna television systems and a prognosis as to the success of some of the provisions of a compromise agreement worked out by FCC Chairman Burch and Office of Telecommunications Policy Director Whitehead, and signed by cable and broadcasting interests on November 11.

107. CARGILL, OSCAR, and PATRICK A. MORAN. Copyright duration v. the Constitution. *Wayne Law Review*, vol. 17, no. 3 (July-Aug. 1971), pp. 917-929.

"This Article questions the constitutionality of Senate bill 644 on two grounds. First, the bill is aimed solely at the economic

betterment of authors and established publishers and relegates the betterment of the general public, through the opportunity for competitive — and therefore less expensive — publishing of literary works, to a secondary position — a use of congressional power inimical to the intention of the Founding Fathers. Second, a copyright duration based on the lifespan of each individual author is not 'limited' within the meaning given that term by the Constitutional Convention in drafting the copyright clause."

108. Copyright protection for mass-produced, commercial products: a review of the developments following *Mazer v. Stein*. *University of Chicago Law Review*, vol. 38, no. 4 (Summer 1971), pp. 807-825.

"This comment [entered in the Nathan Burkan Memorial Competition] will examine the substantive problems raised by *Mazer*, focusing particularly on the idea-expression distinction, which is central to the entire concept of copyright protection. This survey will then be used as a basis for re-examining the *Mazer* decision itself."

109. DAVIS, RICHARD F. Sequel rights: federal copyright protection of fictional characters. *Performing Arts Review*, vol. 2, no. 2 (1971), pp. 315-348.

A study of "whether one who takes a character alone or with other elements of a prior work and uses it without consent in a new work has 'infringed' the copyright in the prior work in which the character first appeared." An expansion of the Copyright Act is favored "to expressly encompass fictional characters in the sequel situation."

110. DERENBERG, WALTER J. Copyright law. (1970/71 Annual Survey of American Law, 515-526, 1971.)

The 1970/71 annual survey of legislative, international, administrative and judicial developments in the United States in the field of copyright law.

111. FOSTER, STANLEY H. Comments on *Painton & Company v. Bourns, Inc.* *Journal of the Patent Office Society*, vol. 53, no. 11 (Nov. 1971), pp. 732-742.

Comments on both the district court and appellate decisions, 309 F.Supp. 271 (S.D.N.Y. 1970), *rev'd*, 442 F.2d 216 (2d Cir. 1971),

involving mainly the question of the enforceability of trade secret contracts.

112. GOLDSTEIN, PAUL. The competitive mandate: from *Sears* to *Lear*. *California Law Review*, vol. 59, no. 4 (June 1971), pp. 873-904.

A provocative article on the Supreme Court's approach to the economy's governing competitive principles "in a series of cases involving administration of the monopolies effected by the state law of trade secrets, common law copyright, unfair competition, and contract."

113. GRANT, DONALD. The doctrine of droit moral: its place in American copyright law. *Howard Law Journal*, vol. 16, no. 3 (Spring 1971), pp. 539-552.

"It is the purpose of this paper to examine the European practice of the droit moral, the underlying economic basis for the present American practice and the present status of the American law of copyright as an equivalent to droit moral."

114. HOWARD LAW JOURNAL COPYRIGHT SYMPOSIUM, *April 22, 1970*. Proceedings. *Howard Law Journal*, vol. 16, no. 3 (Spring 1971), pp. 439-491.

The symposium has as its subject "Copyright Law As It Relates to Entertainers." The panelists are Mr. Donald Byrd, Chairman of the Department of Jazz Studies at Howard University School of Music, Mr. Spencer H. Boyer, Professor of Copyright, Trade-Marks and Patents at Howard University School of Law, Mr. Sheldon I. Cohen, who has represented the National Committee for the Recording Arts since January 1967, Mr. Arthur Levine, Assistant Chief of the Examining Division of the Copyright Office and John W. Days, Esq.

115. IANDIORIO, JOSEPH S. *Which Wei did they go?* *Journal of the Patent Office Society*, vol. 53, no. 11 (Nov. 1971), pp. 712-731.

An article, prompted by the filing of a petition for certiorari in the case of *In re Benson and Tabbot*, 441 F.2d 682 (C.C.P.A. 1971), which is described as "the first case in which a program for a computer was clearly disclosed and claimed as the invention." While none of the other decisions of the CCPA that deal with issues germane to the patentability of programs, beginning with

In re Prater and Wei and including decisions both before and after *Benson*, is based on an application which specifically discloses and claims a program, the writer questions whether that fact is a distinction which alone qualifies *Benson* as the proper vehicle for placing the issue of the patentability of computer programs before the Court.

116. JONES, JOANNE GARLAND. Community antenna television v. copyright rights, an unresolved controversy. *Howard Law Journal*, vol. 16, no. 3 (Spring 1971), pp. 553-574.

"The efforts of the Courts, the Federal Communications Commission and the Congress in grappling with the formidable problems involved in reconciling the conflicting interests [between CATV and copyright owners or proprietors, and commercial t-v broadcasters], and in attempting to solve the ultimate issues is the subject of this article."

117. LETSON, LAURENCE R. Computer program protection in three British Commonwealth countries: what can U.S. learn? *Idea*, vol. 15, no. 2 (Summer 1971), pp. 304-321.

An "investigation of the patent protection available on computer programs in each of the three most highly industrialized British Commonwealth nations [*i.e.*, the United Kingdom, Canada, and Australia]." In conclusion, "the judiciary and patent bar of the United States cannot blindly ignore the positions of other highly industrialized countries when considering the question of patentability of computer programs."

118. LIBERMAN, HOWARD M. Common carrier CATV: problems and proposals. *Brooklyn Law Review*, vol. 37, no. 3 (Spring 1971), pp. 533-549.

A case is made for the regulation of CATV systems as common carriers with the gradual development of "a regulatory scheme . . . in which broad federal standards will be established by the federal agency and purely local problems will be handled by the cities and states."

119. LYONS, PATRICE ANN. International regulation of television signals. *Performing Arts Review*, vol. 2, no. 2 (1971), pp. 271-313.

A study of the "regulation of satellite transmissions . . . [in] international situations, including domestic or regional situations

which become internationalized when a given signal is not confined to a previously designated area, but spills over national boundaries."

120. MARVIN, CHARLES A. The author's status in the United Kingdom and France: common law and the moral right doctrine. *International and Comparative Law Quarterly*, 4th ser., vol. 20, pt. 4 (Oct. 1971), pp. 675-705.

"This article is a first attempt to compile statute and case law indicating what the British author's personal rights in relation to his work are. For this reason, cases will be discussed in detail and not relegated to the footnotes. The article compares British with French law in order to clarify where the differences lie between a common law and a moral right approach to protection afforded the author and his work, and in order to provide a basis for recommending changes in British copyright law."

121. WASSERMAN, ANDREA WEINER. Protection for pirates? Lack of statutory and common law safeguards against copying in the fashion industry. *Suffolk University Law Review*, vol. 5, no. 2 (Winter 1971), pp. 487-503.

A discussion of the lack of effective design protection in the fashion industry with the conclusion that there is no apparent reason why that section of the copyright law which deals with "works of art and artistic craftsmanship" has to be revised in order to justify a judicial decision favorable to copyright protection for a dress design.

2. Foreign

1. In English

122. GRASSI, ALESSANDRO. Television sports transmissions. *EBU Review*, no. 129B (Sept. 1971), pp. 64-67.

"The present paper refers essentially to the position in Italian legislation, theory and case law. Its purpose is merely to outline the legal problems associated with the television coverage of sporting events and some of their possible solutions, which are to be examined in the light of various national legislations."

123. Has the International News Service case survived *Sears and Compco*? *BNA's Patent, Trademark & Copyright Journal*, no. 24 (Apr. 22, 1971), pp. C1-C5.

An analysis of the preemption effect of *Sears-Compco* on the misappropriation doctrine of the *INS* case as reflected in court decisions, and of the possible effect on the courts of sections 301 (a) and (b) of the proposed copyright revision bill, S. 644, and the McClellan record piracy bill (S. 647). The article concludes that "in the absence of a clarifying decision by the Supreme Court, or the enactment of new federal legislation, continued conflict is inevitable."

124. MCFARLANE, GAVIN. International copyright: the crisis resolved? *The Solicitors' Journal*, vol. 115, no. 35 (Aug. 27, 1971), pp. 651-652.

A brief survey of the international copyright movement from the Stockholm Conference in 1967 to the revisions of the Berne and Universal Copyright Conventions in July 1971.

125. RADOJKOVIC, ZIVAN. Translation rights and translators' rights. *Copyright*, vol. 7, no. 10 (Oct. 1971), pp. 190-201.

A comparative examination of the distinction between the concept of translation rights and that of translators' rights, "in order to draw attention to the characteristics and origins of these two categories of rights."

126. Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. *3d Session, Geneva, November 1 and 2, 1971*. Report, submitted by the Secretariat and adopted by the Committee. *Copyright*, vol. 7, no. 11 (Nov. 1971), pp. 206-209.

Among the subjects on the agenda were the question of compatibility between the new Convention on the Protection of Phonograms and article 22 of the Rome Convention, and copyright and neighboring rights problems raised by transmission via space satellites. Appended are the text of a resolution in regard to the problems of space satellites, and the list of participants.

127. MOUCHET, CARLOS. Some notes on copyright in Latin America. *Copyright*, vol. 7, no. 11 (Nov. 1971), pp. 223-232.

A survey of legislative developments and trends, author societies, trends in legal doctrine, and prospects in the field of copyright in Latin America.

128. The WIPO design model law. *Industrial Property*, vol. 10, no. 9 (Sept. 1971), pp. 249-253.

A description of the general features of the design model law prepared by BIRPI/WIPO.

129. UGGLA, CLAES. The Swedish Design Protection Act. *Industrial Property*, vol. 10, no. 9 (Sept. 1971), pp. 241-243.

A brief analysis of the new law which came into force in Sweden on October 1, 1970.

2. In French

130. FRANCON, ANDRE. Letter from France. *Copyright*, Vol. 7, no. 9 (Sept. 1971), pp. 173-180.

A survey of legislative, judicial and international copyright developments in France during recent years.

131. RADOJKOVIC, ZIVAN. Révision des conventions internationales sur le droit d'auteur. *Il Diritto di Autore*, vol. 42, no. 3 (July-Sept. 1971), pp. 345-360.

A brief survey of the background of and preparatory work for revision of the Berne and Universal Copyright Conventions followed by a brief comparative analysis of the proposed changes in each Convention.

3. In German

132. DIETZ, ADOLF. Büchereitantieme und Schriftstellerfonds im Ausland. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 6 (June 1971), pp. 301-305.

A brief survey of the legal situation in Scandinavia, and the trends in the Netherlands and Great Britain, with respect to a

lending right, written in the light of discussions taking place in the German Federal Republic over the establishment of an authors' fund to be tied in with a broadening of the existing provisions of section 27 (Lending of Copies) of the Republic's copyright statute.

133. HANDL, JOSEF. Die Pariser Revisionskonferenzen zum Urheberrecht. Kompromisslösungen für die Beziehungen zu den Entwicklungsländern. *Film und Recht*, vol. 15, no. 9 (Sept. 15, 1971), pp. 286-292.

A report on the two diplomatic conferences held in Paris in July 1971, for the purpose of revising the texts of the Berne and Universal Copyright Conventions, with a brief analysis of the compromises secured for the benefit of the "intermediate" and "developing" countries.

134. HANDL, JOSEF. Vortragsreihe über die jüngste Entwicklung auf dem Gebiete des Urheberrechts. Kurzbericht über OMPI-Tagung in Montreux. *Film und Recht*, vol. 15, no. 7 (July 15, 1971), pp. 234-237.

A brief summary of the copyright lectures delivered at Montreux, Switzerland, as part of the WIPO Lecture Series, which dealt with current and future developments in the field of intellectual property in the national as well as international sphere. Included among the topics were satellites, protection of sound recordings, and video-cassettes.

135. HARTWIEG, OSKAR. Die künstlerische Darbietung; eine Entgegnung auf die Erwiderung von Dünnwald in *GRUR* 1970, 274 ff. *Gewerblicher Rechtsschutz und Urheberrecht*, vol. 73, no. 4 (Apr. 1971), pp. 144-148.

A rebuttal to Rolf Dünnwald's comments on the author's article "Die 'Gemeinschaft' von Interpret und Hersteller," which dealt with possible conflicts under the copyright law of the German Federal Republic between the rights of the performer and the rights of the producer of sound recordings.

136. NEUMANN-DUESBERG, HORST. Verwechslung des Urheberpersönlichkeitsrechts mit dem allgemeinen Persönlichkeitsrecht. *Neue*

Juristische Wochenschrift, vol. 24, no. 37 (Sept. 14, 1971), pp. 1640-1642.

A critical note on a recent decision of the Supreme Court of the German Federal Republic which, according to the author, failed to distinguish between protection, under the copyright statute, of the author's right of personality in connection with his work, and his general right of personality.

137. OLENHUSEN, A. GOTZ VON. Urheberrecht und Entwicklungshilfe. Zugleich Besprechung der Werke von Franz-Wilhelm Peter, Das Stockholmer Protokoll für die Entwicklungsländern, und Erich Schulze, Förderung des Welturheberrechts durch Entwicklungshilfe. *Film und Recht*, vol. 15, no. 9 (Sept. 15, 1971), pp. 296-298.

A comment on two books by Franz-Wilhelm Peter and Erich Schulze, respectively, dealing with the Stockholm Protocol Regarding Developing Countries, viewed in the light of the revisions to the Berne and Universal Copyright Conventions promulgated in Paris in July 1971.

138. ULMER, EUGEN. Einspeicherung und Wiedergewinnung urheberrechtlich geschützter Werke durch Computer-Anlagen. *Gewerblicher Rechtsschutz und Urheberrecht*, vol. 73, no. 7 (July 1971), pp. 297-303.

A discussion of the legal problems involved in the storage and retrieval of copyrighted works in computer data banks, with special reference to the copyright law of the German Federal Republic.

139. ULMER, EUGEN. Die Revisionen der Urheberrechtsabkommen. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 10 (Oct. 1971), pp. 423-446.

A report on the diplomatic conferences held during July 1971 for the purpose of revising the Berne and Universal Copyright Conventions, with a comparative analysis of those provisions giving special concessions to developing countries. Appended are the pertinent provisions of both conventions in English and French in parallel columns.

140. WALTER, MICHEL M. Die Film- und Funkberichterstattung über Tagesereignisse; Gedanken zum geltenden und künftigen öster-

reichischen Urheberrecht. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 8/9 (Aug.-Sept. 1971), pp. 384-392.

A critical comment, described in a footnote as comprising also a critique of a recent decision of the Austrian Supreme Court, on the limitations placed on author's rights by some of the fair use provisions of the Austrian copyright law dealing with the use of copyrighted literary and musical compositions on films and broadcasts for purposes of news reporting. Revised texts of pertinent provisions of the copyright law are suggested as possibly giving authors more adequate protection for use of their works in newsreels and films.

4. In Italian

141. FERRARA SANTAMARIA, MASSIMO. Le regole generali dell' industria e del commercio cinematografico. *Rassegna di Diritto Cinematografico*, vol. 20, no. 1-2 (Jan.-Apr. 1971), pp. 1-3.

An account of the various steps involved in the production, manufacture, registration, licensing and utilization of motion picture films produced for commercial purposes and the different rights affected by each step in the evolution of the motion picture.

142. LOI, SALVATORE. Diritto di autore dello Stato e degli enti. *Il Diritto di Autore*, vol. 42, no. 3 (July-Sept. 1971), pp. 281-294.

A legislative history of the provisions of sections 11 and 29 of the Italian copyright law which deal with copyright in works of the State, of local governments and of non-profit organizations in Italy. Includes a discussion of the situations under which such copyright is secured, and of the present-day application of these provisions.

143. SANTORO, EMANUELE. Cenni in margine ad un "Incontro" sui limiti alla creazione artistica derivanti dalla tutela dei diritti di personalità. *Il Diritto di Autore*, vol. 42, no. 3 (July-Sept. 1971), pp. 295-304.

A marginal note on the extent to which protection of the right of personality limits artistic creation.

5. In Swedish

144. AHLUND, CHRISTIAN. Upphovsrättsliga relationer med Sovjetunionen; en principdiskussion. *NIR*, 1971, no. 2, pp. 125-154.

A discussion of the foreign copyright relations of the U.S.S.R.

145. KARNELL, GUNNAR. "Den obetydliga importträtten"—des innebörd och skydd; reflexioner kring ett upphovsrättsligt straffbud. *NIR*, 1971, no. 3, pp. 284-299.

An article on infringement of copyright by importation in Sweden.

146. SVENSSON, CARL ANDERS. Skydd mot slavisk efterbildning av produkter? *NIR*, 1971, no. 3, pp. 300-312.

An article which discusses the pros and cons of special protection against misappropriation of styles and designs under Swedish laws.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

147. AAP: a progress report to the industry. *Publishers' Weekly*, vol. 200, no. 15 (Oct. 11, 1971), pp. 30-34.

An article on the Association of American Publishers' membership meeting on September 22, 1971, in New York. Among the reports and discussions were those on the copyright problems of revision and photocopying, with Curtis G. Benjamin of McGraw-Hill, chairman of the Copyright Committee, speaking on photocopying, and Robert W. Frase, vice-president of AAP and director of its Washington operations, speaking on the copyright bills.

148. BACHRACH, MORTON W. OE's new copyright policy. *American Education*, vol. 6, no. 7 (Aug.-Sept. 1970), pp. 28-29.

A brief exposition of the copyright guidelines which were issued by the United States Office of Education and which appeared in the *Federal Register* on May 9, 1970. See 17 BULL. CR. Soc.

149. CHORUSH, BOB. Feds are leaning on bootleggers. *Rolling Stone*, no. 93 (Oct. 14, 1971), pp. 10, 12.

An article on some of the bootleg record operations in California and on recent law suits, involving claims for huge damages, against record stores, bootleggers and recording companies.

150. DESSAUER, JOHN P. Canned video. *Publishers' Weekly*, vol. 199, no. 3 (Jan. 18, 1971), pp. 32-34.

A follow-up of "PW's coverage of a recent meeting on the emerging video record industry (January 4) with an outline of competing systems and possible implications for publishers."

151. ELLSWORTH, RALPH E. Library information machines not to undercut authors. *Authors Guild Bulletin*, Oct.-Nov. 1971, pp. 5-6.

"Excerpts from an address delivered by the Director of Libraries of the University of Colorado at the annual meeting of the Association of American University Presses held in Tucson, Arizona, in May, 1971."

152. HAMILTON, THOMAS J. Pact will prohibit piracy of records. *The New York Times*, vol. 121, no. 41, 551 (city ed. Oct. 29, 1971), p. 26.

An article on a press conference held in Geneva on October 28, 1971, by Bruce Ladd, United States representative to an international conference for the protection of sound recordings, at which an agreement was reached on an international convention for such protection. The reaction in the United States to the agreement by spokesmen for the industries affected by record piracy is described as reflecting "cautious optimism."

153. HARVEY, WILLIAM B. Orphans of the storm. *Scholarly Publishing*, vol. 1, no. 3 (Apr. 1970), pp. 299-305.

A proposal is made for "[c]o-operative harnessing of new technology" which could help keep more scholarly books, falling out of print every day, on publishers' lists. Some of the fair use provisions of the U.S. copyright revision bill are quoted.

154. Heat's on cables for compromise; Whitehead, resuming mediation with Burch's assent, meets all three disputants—with CATV in the middle. *Broadcasting*, vol. 81, no. 19 (Nov. 8, 1971), pp. 16-18.

An article on a "proposed compromise" offered recently by Clay T. Whitehead, director of the Office of Telecommunications Policy, to representatives of copyright owners, CATV operators and broadcasters. The text of the proposal is printed in its entirety.

155. JEANNERET, MARSH. Copyright and the scholar. *Scholarly Publishing*, vol. 1, no. 3 (Apr. 1970), pp. 227-228.

An editorial which emphasizes the need for accommodation between the "scholarly publisher and the scholarly author" on an equitable basis, as a solution to the copyright problems created by widespread photocopying and computerized information storage and retrieval systems.

156. JEANNERET, MARSH. Information retrieval and the decision to publish. *Scholarly Publishing*, vol. 1, no. 3 (Apr. 1970), pp. 229-243.

"Unrestricted access by computer to published knowledge will impair the incentive to create new works. Some form of compulsory licensing is required—most logically at the input stage."

157. JEHLE, FAUSTIN F. Typographic copyright, public domain, and unfair competition. *Scholarly Publishing*, vol. 1, no. 3 (Apr. 1970), pp. 255-258.

A discussion of the question whether a publisher must abandon all protection of his investment in design and typesetting if the content of a work is in the public domain.

158. KARP, IRWIN. Downgrading the protection of international copyright. *Publishers' Weekly*, vol. 200, no. 13 (Sept. 27, 1971), pp. 143-147.

After a brief survey of the Background of the 1971 revisions of the Berne and Universal Copyright Conventions, the basic changes in the latter Convention are critically analyzed with a conclusion that ratification of the revised Convention by the Senate might have serious effects on authors' rights.

159. KNOX, WILLIAM T. Cable television. *Scientific American*, vol. 225, no. 4 (Oct. 1971), pp. 22-29.

A general article which explores the phenomenal growth of cable television and the potential broad-band communications

services offered by cable technology to CATV subscribers in addition to the retransmission of television signals. The solution of the many controversial issues, present and future, are cited as ultimately determining the development of CATV.

160. KUDRIAVTSEVA, G. A. The principle of freedom of translation in Soviet copyright law. *The Soviet Review*, vol. 12, no. 1 (Spring, 1971), pp. 52-64.

After analyzing the evolution of Soviet law and decisions pertaining to the principle of freedom of translation, the conclusion is reached that "it is clearly undesirable to make translations of works needed by the Soviet reader, which have first appeared outside the USSR, dependent upon permission by authors abroad, and, more often, upon permission granted by the enterprises that are their legal assignees. This is one of the principal factors that, in our view, is an obstacle to Soviet affiliation with the international convention. . . . It would seem to be more correct to regulate our legal relations with foreign authors by concluding bilateral or multilateral regional agreements."

161. LACY, DAN. The © quagmire. *Saturday Review*, vol. 54, no. 48 (Nov. 27, 1971), pp. 24-28.

The senior vice-president of the McGraw-Hill Book Company maintains that "[a]lthough Congress is bored with copyright, there are few challenges before it that are more important for the long run," as he makes a strong case for the enactment of "a modern copyright law."

162. LYDON, CHRISTOPHER. Cable TV accord sets its growth; compromise is gained with support of White House—broadcasters agree. *The New York Times*, vol. 121, no. 41,564 (city ed. Nov. 11, 1971), pp. 1, col. 1, 83, cols. 14.

An article on a "reluctant" agreement reached between the broadcasting and cable television industries on November 11 which "appeared . . . to have resolved a five-year struggle over the future of electronic communications. . . . The agreement, in brief, authorizes cable companies for the first time to offer big-city audiences two out-of-town broadcasts, in addition to all the local broadcast channels and the cable system's own original programming. In the 50 biggest cities, however, copyright restrictions will greatly narrow the choice of out-of-town imports."

163. MOOERS, CALVIN N. Copyright seen best program protection, covers unauthorized use, translations. *Computerworld*, vol. 5, no. 41 (Oct. 13, 1971), p. 28.

Among other things, it is recommended that instead of attempting to copyright program tapes or cards, as has been the approach in the past, "the focus should be on the listing of the computer program, and that this printed text should be used as the published copy for copyright."

164. MOUNT, DOUGLAS N. Get yourself a lawyer. It's the only way to understand who owns what in the seething A/V impasse. *Publishers' Weekly*, vol. 199, no. 9 (Mar. 1, 1971), pp. 29-32.

An article on the proceedings of a seminar on "Copyright and Residual Implications of AVR Software," held recently at Salt Lake City with Brigham Young University as host and the Entertainment Law Institute of the Law Center at the University of California the co-sponsor. Includes summaries of the addresses by Professors Irwin Spiegel, Melville Nimmer, Irwin Karp, Dean Fred Seibert, and Peter Guber.

165. NATIONAL MUSIC PUBLISHERS' ASSOCIATION. Video cassettes. *Performing Arts Review*, vol. 2, no. 3 (1971), pp. 511-521.

A preliminary informational memorandum which outlines the present status of the industry concerned with cassettes, cartridges, and discs, and also explores some possible approaches to licensing music for such audio-visual devices.

166. RINGER, BARBARA A. International copyright turns another corner. *Publishers' Weekly*, vol. 200, no. 19 (Nov. 8, 1971), pp. 22-25.

An article by the Assistant Register of Copyrights on the "twin diplomatic conferences, held in Paris in July 1971, for the basic purposes of undoing the mistakes of Stockholm." The article concludes with a strong plea for ratification by the Senate of the Universal Copyright Convention as revised at the Paris conferences.

167. SHARP, ROY C. Licensing the photocopier. *Scholarly Publishing*, vol. 1, no. 3 (Apr. 1970), pp. 245-253.

A proposal is made for the statutory creation of a new, assignable photocopying right in various western countries. The pro-

positional envisages a "per use" licensing system which would be made possible by the adoption of International Standard Book Numbering (ISBN) and the possible introduction of an International Standard Periodical Numbering (ISPN) coupled with computer use for accounting purposes. The collection and distribution of fees would be the function of a central collection agency established and operated by a joint board of authors, publishers, and librarians.

168. SMITH, E. STRATFORD. The emergence of CATV: a look at the evolution of a revolution. Reprinted from the *Proceedings of the IEEE*, vol. 58, no. 7 (July 1970), pp. 967-982.

Included in this account of the historical development of CATV and attempts at its regulation is an economic, political, legal, and social appraisal of the potential of cable technology.

169. SMITH, ROGER H. New copyright challenge to cable television. *Publishers' Weekly*, vol. 200, no. 15 (Oct. 11, 1971), p. 40.

An editorial on a copyright infringement action, brought in 1964 by Columbia Broadcasting System and others against Teleprompter Corporation, a CATV system, which went on trial September 22 in the United States District Court for the Southern District of New York. The conclusion is that the "alternative to a CBS success will be that CATV, now acting like a bandit, will start behaving more and more like one."

170. SMITH, ROGER H. A new deal in int'l copyright? *Publishers' Weekly*, vol. 200, no. 19 (Nov. 8, 1971), p. 33.

An editorial on the Paris revisions of the Berne and Universal Copyright Conventions with a warning that "to refuse to recognize the wisdom of the Paris texts would be to drive the situation back to the potential chaos of Stockholm-approved world piracy."

171. SOPHAR, GERALD J. Williams and Wilkins vs. The United States Government. *Newsletter of the American Society for Information Science*, vol. 9, no. 5 (Sept.-Oct. 1970), pp. 1, 4.

An article on the *Williams & Wilkins* copyright infringement case which had been heard in the Court of Claims between September 9 and 16, 1970, and is awaiting decision. A conclusion is stated that "a strong possibility exists that the case may finish

up in the Supreme Court, where the Court may make its decision on wider considerations than just the facts and the law."

172. The Record pirates. *Newsweek*, Oct. 5, 1970, pp. 70-71.

An article on the "serious" situation with respect to the unauthorized duplication of tapes and records. The record industry is pictured as wanting new legislation which would permit the copyrighting of sound recordings.

173. U.S. National Bureau of Standards. The case for invisible copies, by Michael S. Keplinger, National Bureau of Standards. *Proceedings of the 33rd Annual Meeting of the American Society for Information Science, October 11-15, 1970*, pp. 241-243.

An abridgement of a paper on the problem of control of the use of copyrighted works in computerized information storage and retrieval systems. "The solution suggested in this paper is based on the conclusion that, under current decisional law, input to a computer system can be considered copying and hence constitutes copyright infringement."

174. WORSNOP, RICHARD L. Cable television: the coming medium. Washington, Congressional Quarterly, Inc., 1970, pp. 669-686. Educational Research Reports, vol. 2, no. 10, Sept. 9, 1970.

Contents. — Challenge posed by cable television. — A new medium: its origin and growth. — Debate on how to regulate cable TV.

A thumbnail sketch of the development of CATV and the varied problems it poses, including the "complexities arising over copyright payments."

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175. BARKER, RONALD E. Copyright. *The Bookseller*, no. 3421 (July 17, 1971), pp. 130-135; no. 3425 (Aug 14, 1971), pp. 1204-1209; no. 3426 (Aug. 2, 1971), pp. 1294-1298.

Contents. — pt. 1. Berne and U.C.C. Conventions under review. — pt. 2. The revision of the Stockholm Act. — pt. 3. The new international conventions.

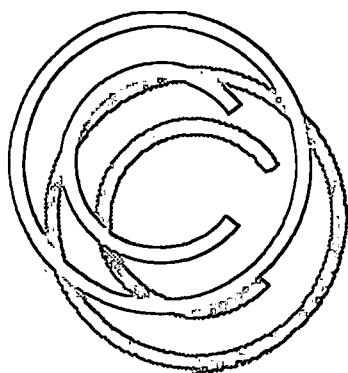
A three-part report on the simultaneous Diplomatic Conferences for Revision of the Berne and Universal Copyright Conventions which took place in Paris from July 5 to 24, 1971.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19, NO. 3

FEBRUARY, 1972

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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

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: 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: 19 BULL. CR. SOC. page no., Item (1972).

ANNOUNCEMENT FROM THE COPYRIGHT OFFICE

Registration for Foreign Sound Recordings

Copyright for Sound Recordings in General

Public Law 92-140 amends the United States Copyright Law to provide for the protection of sound recordings against their unauthorized reproduction and distribution to the public. It pertains to sound recordings fixed and published on or after February 15, 1972. To secure protection, the published copies of a sound recording must bear a notice of copyright consisting of the symbol © (the letter P in a circle), the year of first publication of the sound recording, and the name of the copyright owner. After the sound recording has been published with the copyright notice, the copyright claim is to be registered in the Copyright Office. For further information, please see Circular 56, which is available free on request from the Copyright Office.

Foreign Sound Recordings

Copyright registration may be made for sound recordings the authors of which are citizens of the foreign countries listed below. These are the countries to which protection under the United States copyright law is extended by proclamations of the President evidencing special bilateral copyright relations between the United States and the particular foreign country.

To be eligible for registration, the sound recording must have been fixed and published on or after February 15, 1972, and all published copies must bear the required notice of copyright.

Registration for sound recordings the authors of which are foreign citizens, and which are first published in a foreign country, is made by sending to the Register of Copyrights, Library of Congress, Washington, D.C. 20540, one complete copy of the best edition of the published sound recording, together with an application on Form N duly completed and signed, and a fee of \$6. (Under certain conditions, registration for a foreign work may be obtained without payment of the fee.

COUNTRIES DESIGNATED IN PROCLAMATIONS
OF THE PRESIDENT OF THE UNITED STATES

Argentina	Israel
Australia	Italy
Austria	Luxembourg
Belgium	Mexico
Brazil	Monaco
Canada	Netherlands
Chile	New Zealand
China	Norway
Costa Rica	Philippines
Cuba	Poland
Czechoslovakia	Portugal
Denmark	Romania
Finland	South Africa
France	Spain
Germany	Sweden
Greece	Switzerland
Hungary	Thailand
India	United Kingdom
Ireland	

PART I.

ARTICLES

176. CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORIZED DUPLICATION OF THEIR PHONOGRAMS.

By ABRAHAM L. KAMINSTEIN*

The Diplomatic Conference was convened by UNESCO and WIPO in accordance with the directions of both governing bodies of the UCC and Berne Union. The meeting itself was held at the Palais de Nations, the site of the old League of Nations, in Geneva from October 18-29, 1971. The basis for the discussions was the draft prepared by the Committee of Experts in Paris from July 1-5, 1971.

After selecting Pierre Cavin, Head of the Delegation of Switzerland, as President of the Conference, the meeting selected William Wallace, head of the U. K. Delegation, as Chairman of the Main Commission. Wallace is a leading expert in the international copyright field and was responsible for starting the entire train of events that led to the meeting.

The meeting opened with a general discussion. Some delegates stressed the need for the Convention and also said that it should be as simple as possible so that all states could ratify it. Most of the delegations favored, in principle, the draft submitted to the Convention. Others stressed the fact that the state have a choice on the means of assuring the protection and that this be reflected in the conditions to be provided for accession, that the proposed convention be based on the principle of reciprocity and non-retroactivity, and that the criterion of nationality of the producers should be the sole criterion. Developing countries stressed the need of compulsory license similar to that established in Paris recently at the revisions of the UCC and Berne Conventions.

TITLE AND PREAMBLE

Due to the feeling that the Convention should follow the language of the Rome Convention on Neighboring Rights of 1961, it was de-

* Abraham L. Kaminstein, recently retired Register of Copyrights, U.S. Copyright Office, was an Observer at the UNESCO/WIPO meeting on behalf of The Copyright Society of the U.S.A. This is his report to the Society.

cided to use "phonograms", cumbersome as it was, instead of the simpler "records". For another reason it was decided to not use the word "piracy" because of the obvious connotations.

The Preamble referred to four things: 1) the widespread and increasing piracy; 2) the necessity of the protection of the producers of records; 3) thanking UNESCO and WIPO for the preparatory work in the field; and, 4) not wanting to impair any other international agreements and particularly the Rome Convention.

Article 1

This Article was originally placed at the end of the prior draft of the Convention just before the final clauses. In a short discussion it was decided to place definitions at the beginning of the Convention.

The Article has four clauses. The first clause reads:

- (a) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

The language of this first clause is patterned after Article 3 of the Rome Convention and it uses the same wording. It raises several problems. Since this is confined to aural fixations the problem arises on the application to the sound tracks of motion pictures and other audio-visual works where the sound track is fixed simultaneously with the visual recording. There were two views. Under the first, the sound track constitutes the original material for the recording so that it constitutes a recording of a record within the meaning of the Convention. They argued that the sound tracks are almost invariably added or altered. The second view held that the sounds embodied in the recording produced from the sound track come from an audio-visual work which does not have a separate character and so *cannot* qualify as a record under the new Convention, but has protection as part of the original audio-visual work. They also argued that the Convention only provides for minimum standards of protection and each state can protect sound tracks as recordings under its own national legislation.

- (b) "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

Clause (b)

This clause says the person protected is the one who first fixes the sounds of a performance on a record. One of the problems raised by

this wording is whether "an exclusive aural fixation" should be regarded as a record even though it were made as an ephemeral recording by a broadcaster. After considering this question the meeting decided that ephemeral recordings should come under the provisions of the Convention.

- (c) "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

Clause (c)

The meeting considered the meaning of the word "indirectly" and said that this meant any copying by a machine even if it were taken from a broadcast of a record or some copy of a record. At the same time, the meeting decided that any recording imitating or simulating the sounds of the original recordings was not covered by the Convention.

There was a long discussion on the meaning of "substantial part", and this was carried over to the plenary. The difficulty was caused by the use of the word "substantial" in the U. K. statute as well as the statutes of former British dependencies. The meeting decided that this should be interpreted as expressing not only a qualitative but a quantitative evaluation. This is especially important because the long-playing records or tapes have ten or twelve songs on each disc or tape. What happens if only one song is copied? As I remember it, Wallace, the head of the U. K. Delegation, speaking personally at the plenary, said in such cases a court in the U. K. might hold that one song or a part of a song, $\frac{1}{2}$ or $\frac{1}{4}$ of a song, would meet the test of substantiality. After some further discussion, par. 40 in the DRAFT REPORT was changed in the final REPORT to read:

41. The Conference also expressed the view that the adjective "substantial," which appears in the definition of "duplicates" of a phonogram, expresses not only a quantitative but also a qualitative evaluation; in this respect, quite a small part may be substantial.

- (d) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.

Clause (d)

This definition was added by the Conference on the suggestions by Argentina, Mexico, U.S., and Kenya.

A first question here was whether there should be a reference to "commercial" purposes. It was thought best not to include any specific reference to commercial intentions, relying on the definition, in light of the general purposes of the Convention. There was also a general feeling that to do so could raise other problems, e.g., a non-profit organization or a state could want to duplicate records for school use.

The meeting considered citing examples of various acts which might fall under the definition of being "offered directly or indirectly to the public." The only example that the meeting could agree on was "the supply of duplicates to a wholesaler for the purpose of sale to the public, directly or indirectly."

Article 2

The Convention is based on the principles of "national treatment" and of "reciprocity". Without the principle of legal reciprocity we would have difficulty securing Senate ratification.

Article 2 defines who could be protected, what they are protected against and the scope of protection. This article also requires that states joining the Convention must have a law giving the same rights to their own citizens. Fortunately, such a law was passed and signed by the President on October 15, 1971 (Public Law 92-140). Under the principle of reciprocity, protection is limited to producers of records in States who are members of the Convention. They will be protected against the making of records by others without their consent and also against the importation from other countries and the distribution of such records.

The criterion of the protection is nationality of the producer, subject to Article 7(4).

In the first draft submitted to the Convention, the word "manufacture" was used in referring to the making of duplicates. This was stricken and "making" substituted because of the implications of manufacturing which might lead people to conclude that "manufacturing" implied that certain other forms of reproduction would be tolerated.

"Consent" could be given, under the domestic law, either by the "original producer or by his successor in title or by the exclusive licensee" as stated in the Report.

Article 3

Article 3 states the means of enforcement. Some states protect records in various ways: some by means of copyright, others as a matter of

neighboring rights, and still others as a matter of unfair competition or under the penal law. Article 3 leaves it to each state as to which of the four methods it prefers.

Article 4

Article 4 deals with duration and fixes a minimum term of 20 years. In case the state protects records under the law of unfair competition, the meeting and Report indicated that they felt this protection should, in principle, last at least 20 years.

Since Article 4 as originally suggested by the Committee of Experts started the duration when the record was first fixed and Article 5 said when first published, the two articles are inconsistent. Article 4 is consistent with Article 14 of the Rome Convention. The new U.S. statute fixes the period of protection from the year of first publication.

At the suggestion of the U.S., Article 4 was amended to read when the phonogram was first fixed *or* the year in which the phonogram was first published.

Article 5

This Article applied only to states which require a notice. Since very few states require a notice, the impact of this Article affects mainly the United States. The Article provides that the notice shall consist of the symbol © accompanied by the year of first publication and shall include the name of the producer. This notice may be placed in such manner as to give reasonable notice of claim of protection on the record itself or the container. The Convention requires where the duplicates or the containers do not identify the producer, his successor in title or the *exclusive* licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

Article 6

Article 6 provides for a compulsory license. After some discussion on the floor as to whether there should be a compulsory license, agreement was reached that the Convention should contain such a clause, plus certain restrictions. In no case should the compulsory license provision go further than the Paris revision of the UCC and Berne Conventions.

Article 6 also provides a definition of fair use. It does *not* provide for "secondary rights", i.e., public performances or broadcasting. It also does not affect private taping that is not sold commercially. Article 6 reads as follows:

Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

- (a) the duplication is for use solely for the purpose of teaching or scientific research;

This paragraph limits the compulsory license to the purpose of teaching or scientific research.

- (b) the license shall be valid for duplication only within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates;

Clause (b) limits the license to the territory of the state under whose authority the license was granted and prohibits the export of duplicates.

- (c) the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, inter alia, the number of duplicates which will be made.

Article 6 proved so difficult that it was the only article that required a Working Group to prepare a draft. Among the questions was the question of equitable remuneration and who should fix the remuneration and also whether there should be anything about the number of duplicates made by the infringer. After a long discussion the meeting decided to say nothing at all about any specific number of copies. The feeling was that if you mentioned a specific number of copies the infringer would feel at liberty to make the full number of copies.

It should be noted that all the conditions in all three clauses of Article 6 have to be met before a compulsory license can be used.

Article 7

Article 7 has three clauses. The first reads:

- (1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers,

to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.

This clause was intended to protect other Conventions like the UCC, Berne, Rome, Paris (insofar as the unfair competition aspect) on the international level. The worry here was partly due to the overlapping with the Rome Convention. It might be argued that any other Convention dealing with either records or performers or broadcasting would inevitably affect the Rome Convention. There was also the feeling that the new Convention itself injured performers and also especially the proposed satellite Convention would be harmful to both the performers and the authors.

On the domestic level this clause permits the United States to apply the decisions on record piracy and the common law.

(2) It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

This clause was intended to induce those states which do not have anything in their own law to protect performers to enact such legislation. The meeting felt that if the producer of the record exercises a right given to him by the Convention and has a right of suit against the infringer and does not sue, and the contract between the producer and the performer does not give the performer the right to take action directly against the infringer, the producer of the records has a moral obligation to sue. The meeting also felt that the contracts should contain a clause permitting the performer to sue directly where the record producer does not.

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

This is the clause dealing with retroactivity. The argument here is that some countries, especially France, and other countries which already protect the records would have liked to say this provision extended to cover all records fixed before the date the Convention entered into force. It was decided that they could still do this but as a matter of principle no state was obligated to do this under the Convention.

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place

of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

Clause (4) provides that the principle of nationality is generally applicable, but that certain states, mainly the Scandinavian countries, may apply the criterion of first fixation rather than the criterion of the nationality of the producer by filing a notification to that effect with WIPO.

FINAL CLAUSES

Articles 8, 9, 10, 11, 12 and 13

Outside of the technical subjects the most interesting controversy was the subject of administration. The Rome Convention had a triad of UNESCO, BIRPI and ILO as a Secretariat for an Intergovernmental Committee. It was decided that no Intergovernmental Committee similar to that in the UCC or in the Rome Convention was necessary. Following a proposal submitted by the U.K. suggesting that WIPO be given both the secretariat and depository functions, UNESCO as well as the ILO was brushed aside. The Main Commission decided to give WIPO the entire control but it was Friday afternoon, and everybody was intent on getting away for the weekend and so the meeting went too far. They gave WIPO not only the administrative functions but by a close vote they also designated WIPO as the depository for the Convention.

Since the object of the meeting was to attract as many countries as possible, the next time the Main Commission met, on Tuesday, it was realized that some countries were not members of the Berne or the UCC or the Paris Conventions, so with no opposition a decision was made to designate the United Nations as the depository. There was no question that WIPO would be more efficient than any other organization but it was thought better to have the United Nations the depository with WIPO transmitting the information to the States. WIPO had tried to "grab" the administration of the UCC when the UCC was amended in July in Paris. It failed at that time, partly because many of the countries were represented by people who were representing their country at UNESCO. At Geneva the entire atmosphere was different and UNESCO was delegated to a subordinate role. This marks the ascendancy of WIPO over UNESCO which almost everybody saw was logical because WIPO handles much more than copyright and it has become more dynamic.

Article 8

Article 8 is self-explanatory providing that WIPO with the help of the UNESCO and the ILO (within their competence) keep the States informed and conduct studies, etc.

Article 9

Article 9 specifies that the Convention shall be deposited with the UN and opens the door to any State that is a member of the UN or any specialized agency of the UN or the International Atomic Energy Commission or any State which is a party to the International Court of Justice to become a member.

Clause 4 of Article 9 provides that at the time any State joins the Convention its domestic law must be in a position to give effect to the provisions of the Convention.

Article 10

Article 10 provides that no reservations to the Convention are permitted. The provisions of Article 7 are not regarded as a reservation.

Article 11

Article 11 provides for the entry into force, i.e., the Convention will become effective three months after the deposit of the fifth ratification.

Clause 2 of Article 11 also provides that with respect to each State ratifying that the Convention will enter into force three months after the date in which WIPO notifies other States.

Article 11 also provides for notification and accession of the territories for which States are responsible.

Article 12

Article 12 provides the mechanism for denunciation of the Convention. The denunciation will take effect 1 year after the date on which the United Nations receives the notification.

Article 13

Article 13 provides that the Convention shall be signed in English, French, Russian, Spanish, all four texts being equally authentic. There is also a provision that WIPO can establish other official texts including Arabic, Dutch, German, Italian, and Portuguese after consultation with the interested governments.

177. COPYRIGHT FOR SOUND RECORDINGS – *Another Milestone in the Protection of Intellectual Property.*

By ERNEST S. MEYERS*

The Copyright Law (Title 17 of the United States Code) was amended on October 15, 1971 (Public Law 92-140) to mark the first recognition in American copyright law of sound recordings as copyrightable works. The amendment provides for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication. Sound recordings qualifying for copyright protection under this amendment must be fixed and published with the statutory copyright notice on and after February 15, 1972. The amendment also provides that infringers of copyrighted sound recordings shall be subject to the provisions of title 17 dealing with infringement of copyrights generally and, in the case of willful infringement for profit, to criminal prosecution pursuant to section 104 of title 17. The strengthened penalties also became available to the proprietor of the copyrighted musical works in the unauthorized recordings upon the effective date of the amendment, October 15, 1971.

The operative life of the amendment with respect to sound recordings ends on December 31, 1974. Copyrights in sound recordings secured within the period February 15, 1972 to December 31, 1974 will endure for 28 years from the date of first publication and will be entitled to renewal for 28 years. By January 1, 1975, the protection of sound recordings will, it is hoped, be part of the general revision of the Copyright Law currently under consideration by the Congress.

Background.

Prior to 1962 there existed a widespread practice of counterfeiting phonograph records, including labels, produced by legitimate phonograph record manufacturers. The counterfeit product was sold in interstate commerce in competition with the genuine article. In 1960 it was estimated that this practice drained more than 20 million dollars annually from the legitimate industry. To meet this problem the Congress enacted a law in 1962 to provide criminal penalties for interstate trafficking in phonograph records bearing forged or counterfeit labels.

* Member of the New York and District of Columbia Bars and partner of the firm of Laporte & Meyers; General Counsel of the Recording Industry Association of America. The new law is printed in full, 19 BULL. CR. SOC. 129, Item 59 (December 1971).

With the advent of technological advances in tape production and the introduction of prerecorded tapes, record pirates expanded their operations to the unauthorized duplication of prerecorded tapes produced by the legitimate record industry.

Beginning in 1966, nine states (New York, California, Arkansas, Arizona, Tennessee, Texas, Florida, Washington and Pennsylvania) enacted legislation prohibiting the unauthorized "dubbing" of phonograph tapes and records and "theft" of recorded performances. A long line of significant decisions in both the federal and state courts also condemned the unauthorized duplicating or pirating of recorded performances, generally on the grounds of unfair competition. (The Federal Trade Commission determined in 1919 that the unauthorized duplication of piano rolls constituted appropriation of the ingenuity, labor and expense of the originator and was an unfair method of competition under Section 5 of the Federal Trade Commission Act.) However, even when a civil case was brought to a successful conclusion, the remedies available were found to be limited. It has been estimated by reliable trade sources that the annual volume of piratical tape recordings is now in excess of \$100,000,000. This drain on the legitimate recording industry cannot be over-emphasized when the same trade sources report that legitimate tape records account for only 300 million dollars annually. In addition to depriving the legitimate recording industry of substantial income, the pirates do not pay royalties to the performing artists and musicians nor contribute to their pension and welfare funds. Moreover, it is obvious that federal and state governments also lose tax revenues.

On the broader scene, it was the objective of the Rome Convention (1961) to provide for the protection of performers, producers of phonograms, and broadcasting organizations against unauthorized reproduction at the international level. However, the Rome Convention has not yet been widely accepted; only 12 countries have thus far ratified it. It is estimated that 200 million dollars worth of pirated recordings are being made and sold throughout the world each year. Such unauthorized duplication of legitimate recordings has presented a serious problem for every country that has a national music culture and recording industry. As a consequence, several countries, including the United States, favored the negotiation of a new Convention limited to the protection of producers of phonograms which might thereby obtain broader acceptance. The result was the negotiation and signing on October 29, 1971 in Geneva of a new international instrument entitled the "Convention For The Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms." The key provision of the Geneva Convention is Article 2, whereby each contracting nation agrees to pro-

hibit the manufacture, importation and distribution to the public of unauthorized sound recordings. The means of protection by which the treaty is to be implemented is to be a matter for the domestic law of each ratifying nation, but must include one or more of the following means: Copyright protection (e.g., United Kingdom and now the United States), neighboring rights protection (e.g., Italy); protection under the law of unfair competition (e.g., France); protection by means of penal sanctions (e.g., Japan).

Against the background of practices which have been condemned and characterized as "piracy", "misappropriation", "business immorality" and "outright theft", the Congress enacted Public Law 92-140. No wonder Congress described this extension of statutory protection to sound recordings as being "overdue". This amendment to the Copyright Law provides the implementing domestic legislation necessary for the United States to ratify the Geneva treaty.

Copyright For Sound Recordings

Public Law 92-140 grants to the owner of the copyright in a sound recording the exclusive right 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. "Sound recordings" are defined as works "that result from the fixation of a series of musical, spoken, or other sounds." "Reproductions of sound recordings" are defined as material objects in which sounds are fixed "by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

The reproduction 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 reproductions made by transmitting organizations exclusively for their own use.

The "sounds accompanying a motion picture" are expressly excluded from the scope of the amendment, and thus the amendment is not intended to limit or otherwise alter the rights that exist currently in such works.

The amendment provides that the required notice of copyright on the reproduction of the work 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 the copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known

alternative designation of the owner. However, if the producer of the sound recording is named on the label or container of the reproduction and if no other name appears in conjunction with the notice, his name shall be considered part of the notice. The notice of copyright is to be applied on the surface of the reproduction of the sound recording or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.

The amendment also provides that any person engaging in the unauthorized reproduction of sound recordings shall be subject to the penalties dealing with copyright infringement generally provided for in title 17.

The amendment further provides that it shall not be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before February 15, 1972.

Other Legislative Considerations

The amendment does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining between record producers and performers, as in the case of motion pictures.

The legislative history reveals that, as a class of subject matter, sound recordings are within the scope of the "writings of an author" capable of protection under the Constitution. In this regard, the Senate and House Committees noted their agreement with the opinion of the Register of Copyrights supporting the constitutionality of granting copyright for sound recordings.

Copyright in a sound recording is not a substitute for copyright in a musical composition, dramatic work, or literary work of which a performance or rendition is recorded. Thus, the Copyright Office has announced that it will not accept sound recordings as deposit copies for the purpose of registration of claims to copyright in musical compositions, dramatic works or literary works.

The legislative history also reflects that it is not the intention that the limitations on lending or rental contained in the amendment should apply to the infrequent practice of non-profit libraries to lend sound recordings for a rental fee.

The legislative history further reveals that it is not the intention of the amendment to restrain home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of capitalizing commercially on it.

In connection with the proviso in the amendment which excludes from the protected rights of copyright proprietors of sound recordings, "reproductions made by transmitting organizations exclusively for their own use", the legislative history discloses that the new copyright is not intended to restrict the use of public (non-profit) television or radio programs to any extent or in any way not provided for in the present copyright law. Thus, it is intended that in the case of non-commercial public broadcasters, the proviso is not to be limited solely to reproductions made by the public networks and stations transmitting the same programs, but would also extend to programs produced, duplicated, distributed and transmitted by or through more than one public broadcasting agency so long as it is exclusively for educational use.

It is not intended under the amendment to grant any broader rights than are accorded to other copyright proprietors under title 17. Under this construction, any act that would be considered "fair use" of a recorded musical composition would be considered "fair use" of the recording itself.

It is noteworthy that the amendment had the unqualified endorsement of the State Department, the Department of Justice, Department of Commerce and the Librarian of Congress.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

Editorial Note:

In response to a special request from the U.S. Department of State, the Society is reprinting below the official text of the revised Universal Copyright Convention (Paris, July, 1971), and the General Rapporteur's Report on the Convention (Paris, November 29, 1971). This publication is in recognition of the widespread interest in these documents in the copyright community as expressed to the Department of State.

178. UNIVERSAL COPYRIGHT CONVENTION AS REVISED AT PARIS ON
24 JULY 1971.

The Contracting States,

Moved by the desire to ensure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have resolved to revise the Universal Copyright Convention signed at Geneva on 6 September 1952 (hereinafter called "the 1952 Convention"), and consequently,

Have agreed as follows:

ARTICLE I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

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 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 Convention.

3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provisions of paragraph 1 shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation;

provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.

4. In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States.

5. If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in Article IV, such State shall not be required to comply with the provisions of paragraph 1 of this Article in respect of the second or any subsequent term of copyright.

ARTICLE IV

1. The duration of protection of a work shall be governed, in accordance with the provisions of Article II and this Article, by the law of the Contracting State in which protection is claimed.

2. (a) The term of protection for works protected under this Convention shall not be less than the life of the author and 25 years after his death. However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication.

(b) Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than 25 years from the date of first publication or from its registration prior to publication, as the case may be.

(c) If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified in subparagraphs (a) and (b).

3. The provisions of paragraph 2 shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

4. (a) No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

(b) For the purposes of the application of sub-paragraph (a), if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

5. For the purposes of the application of paragraph 4, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

6. For the purposes of the application of paragraph 4, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

ARTICLE IVbis

1. The rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. The provisions of this Article shall extend to works protected under this Convention 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 Convention, to the rights mentioned in paragraph 1 of this Article. 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

1. The rights referred to in Article I shall include the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions:

(a) If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in a language in general use in the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive licence from the competent authority thereof to translate the work into that language and publish the work so translated.

(b) Such national shall in accordance with the procedure of the State concerned, establish either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, 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 all previous editions of a translation in a language in general use in the Contracting State are out of print.

(c) If the owner of the right of translation cannot be found, then the applicant for a licence shall send copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right of translation is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organization which may have been designated by the government of that State. The licence shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

(d) Due provision shall be made by domestic legislation to assure to the owner of the right of translation a compensation which is just and conforms to international standards, to assure payment and transmittal of such compensation, and to assure a correct translation of the work.

(e) The original title and the name of the author of the work shall be printed on all copies of the published translation. The licence shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if a language in general use in such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licences and does not prohibit such importation and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The licence shall not be transferred by the licensee.

(f) The licence shall not be granted when the author has withdrawn from circulation all copies of the work.

ARTICLE Vbis

1. Any Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may, by a notification deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization (hereinafter called "the Director-General") at the time of its ratification, acceptance or accession or thereafter, avail itself of any or all of the exceptions provided for in Articles Vter and Vquater.

2. Any such notification shall be effective for ten years from the date of coming into force of this Convention, or for such part of that ten-year 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, not more than fifteen or less than three months before the expiration of the relevant ten-year period, the Contracting State 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 Article.

3. Notwithstanding the provisions of paragraph 2, a Contracting State that has ceased to be regarded as a developing country as referred to in paragraph 1 shall no longer be entitled to renew its notification made under the provisions of paragraphs 1 or 2, and whether or not it formally withdraws the notification such State shall be precluded from availing itself of the exceptions provided for in Articles Vter and Vquater at the end of the current ten-year period, or at the end of three years after it has ceased to be regarded as a developing country, whichever period expires later.

4. Any copies of a work already made under the exceptions provided for in Articles Vter and Vquater may continue to be distributed after the expiration of the period for which notifications under this Article were effective until their stock is exhausted.

5. Any Contracting State that has deposited a notification in accordance with Article XIII with respect to the application of this 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 and renew them in accordance with the provisions of this Article with respect to any such country or territory. During the effective period of such notifications, the provisions of Articles Vter and Vquater may be applied with respect to such country or territory. The sending of copies from the country or territory to the Contracting State shall be considered as export within the meaning of Articles Vter and Vquater.

ARTICLE Vter

1. (a) Any Contracting State to which Article Vbis (1) applies may substitute for the period of seven years provided for in Article V (2) a period of three years or any longer period prescribed by its legislation. However, in the case of a translation into a language not in general use in one or more developed countries that are party to this Convention or only the 1952 Convention, the period shall be one year instead of three.

(b) A Contracting State to which Article Vbis (1) applies may, with the unanimous agreement of the developed countries party to this Convention or only the 1952 Convention and in which the same language is in general use, substitute, in the case of translation into that language, for the period of three years provided

for in sub-paragraph (a) another period as determined by such agreement but not shorter than one year. However, this sub-paragraph shall not apply where the language in question is English, French or Spanish. Notification of any such agreement shall be made to the Director-General.

(c) The licence may only be granted if the applicant, in accordance with the procedure in the State concerned, establishes either that he has requested and been denied authorization by the owner of the right of translation, or that after due diligence on his part he was unable to find the owner of the right. At the same time as he makes his request he shall inform either the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization or any national or regional information centre which may have been designated in a notification to that effect deposited with the Director-General by the government of the State in which the publisher is believed to have his principal place of business.

(d) If the owner of the right of translation 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 to any national or regional information centre as mentioned in sub-paragraph (c). If no such centre is notified he shall also send a copy to the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization.

2. (a) 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. The further period shall begin either from the date of the request for permission to translate mentioned in Article I (c) or, if the identity or address of the owner of the right of translation is not known, from the date of dispatch of the copies of the application for a licence mentioned in Article I(d).

(b) Licences shall not be granted if a translation has been published by the owner of the right of translation or with his authorization during the said period of six or nine months.

3. Any licence under this Article shall be granted only for the purpose of teaching, scholarship or research.

4. (a) 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.

(b) Any copy published in accordance with a licence granted under this Article shall bear a notice in the appropriate language stating that the copy is available for distribution only in the Contracting State granting the licence. If the writing bears the notice specified in Article III (1) the copies shall bear the same notice.

(c) The prohibition of export provided for in sub-paragraph (a) shall not apply where a governmental or other public entity of a State which has granted a licence under this Article to translate a work into a language other than English, French or Spanish sends copies of a translation prepared under such licence to another country if:

- (i) the recipients are individuals who are nationals of the Contracting State granting the licence, or organizations grouping such individuals;
- (ii) the copies are to be used only for the purpose of teaching, scholarship or research;
- (iii) the sending of the copies and their subsequent distribution to recipients is without the object of commercial purpose and;
- (iv) the country to which the copies have been sent has agreed with the Contracting State to allow the receipt, distribution or both and the Director-General has been notified of such agreement by any one of the governments which have concluded it.

5. Due provision shall be made at the national level to ensure:

- (a) that the licence provides for just compensation that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the two countries concerned; and
- (b) 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.

6. Any licence granted by a Contracting State under this Article shall terminate if a translation of the work in the same lan-

guage with substantially the same content as the edition in respect of which the licence was granted is published in the said State by the owner of the right of translation or with his authorization, at a price reasonably related to that normally charged in the same State for comparable works. Any copies already made before the licence is terminated may continue to be distributed until their stock is exhausted.

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 Vquater are also fulfilled.

8. (a) A licence to translate a work protected under this Convention, published in printed or analogous forms of reproduction, may also be granted to a broadcasting organization having its headquarters in a Contracting State to which Article Vbis (1) applies, upon an application made in that State by the said organization under the following conditions:

- (i) the translation is made from a copy made and acquired in accordance with the laws of the Contracting State;
- (ii) the translation is for use only in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;
- (iii) the translation is used exclusively for the purposes set out in condition (ii), through broadcasts lawfully made which are intended for recipients on the territory of the Contracting State, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;
- (iv) sound or visual recordings of the translation may be exchanged only between broadcasting organizations having their headquarters in the Contracting State granting the licence; and
- (v) all uses made of the translation are without any commercial purpose.

(b) Provided all of the criteria and conditions set out in subparagraph (a) are met, a licence may also be granted to a broadcasting organization to translate any text incorporated in an audio-

visual fixation which was itself prepared and published for the sole purpose of being used in connexion with systematic instructional activities.

(c) Subject to sub-paragraphs (a) and (b), the other provisions of this Article shall apply to the grant and exercise of the licence.

9. 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 Article V (2) 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.

ARTICLE Vquater

1. Any Contracting State to which Article Vbis (1) applies may adopt the following provisions:

- (a) If, after the expiration of
 - (i) the relevant period specified in subparagraph (c) 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 distributed in that State to the general 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. The 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 proprietor 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. At the same time as he makes his request he shall inform either the international copyright information centre established by the United Nations Educational,

Scientific and Cultural Organization or any national or regional information centre referred to in sub-paragraph (d).

(b) A licence may also be granted on the same conditions if, for a period of six months, no authorized copies of the edition in question have been on sale in the State concerned to the general public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works.

(c) The period referred to in subparagraph (a) 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.

(d) If the owner of the right of reproduction cannot be found, the applicant for a licence shall send, by registered mail, copies of his application to the publisher whose name appears on the work and to any national or regional information centre identified as such in a notification deposited with the Director-General by the State in which the publisher is believed to have his principal place of business. In the absence of any such notification, he shall also send a copy to the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization. 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.

(e) Licences obtainable after three years shall not be granted under this Article.

- (i) until a period of six months has elapsed from the date of the request for permission referred to in sub-paragraph (a) or, if the identity or address of the owner of the right of reproduction is unknown, from the date of the dispatch of the copies of the application for a licence referred to in sub-paragraph (d);
- (ii) if any such distribution of copies of the edition as is mentioned in sub-paragraph (a) has taken place during that period.

(f) 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.

(g) Due provision shall be made by domestic legislation to ensure an accurate reproduction of the particular edition in question.

(h) 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 of translation or with his authorization;
- (ii) where the translation is not in a language in general use in the State with power to grant the licence.

2. The exceptions provided for in paragraph 1 are subject to the following additional provisions:

(a) Any copy published in accordance with a licence granted under this Article shall 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. If the edition bears the notice specified in Article III (1), the copies shall bear the same notice.

(b) Due provision shall be made at the national level to ensure:

- (i) that the licence provides for just compensation that is consistent with standards of royalties normally operating in the case of 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 distributed in the Contracting State to the general public or in connexion with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonable related to that normally charged in the State 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. Any copies already made before the licence is terminated may continue to be distributed until their stock is exhausted.

(d) No licence shall be granted when the author has withdrawn from circulation all copies of the edition in question.

3. (a) Subject to sub-paragraph (b), the literary, scientific or artistic works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

(b) The provisions of this Article shall also apply to reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the State with power to grant the licence; always provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connexion with systematic instructional activities.

ARTICLE VI

“Publication”, as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

ARTICLE VII

This Convention shall not apply to works or rights in works which, at the effective date of this Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.

ARTICLE VIII

1. This Convention, which shall bear the date of 24 July 1971, shall be deposited with the Director-General and shall remain open for signature by all States party to the 1952 Convention for a period of 120 days after the date of this Convention. It shall be subject to ratification or acceptance by the signatory States.

2. Any State which has not signed this 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.

ARTICLE IX

1. This Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession.

2. Subsequently, this 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 Convention by a State not Party to the 1952 Convention shall also constitute accession to that Convention; however, if its instrument of accession is deposited before this Convention comes into force, such State may make its accession to the 1952 Convention conditional upon the coming into force of this Convention. After the coming into force of this Convention, no State may accede solely to the 1952 Convention.

4. Relations between States party to this Convention and States that are party only to the 1952 Convention, shall be governed by the 1952 Convention. However, any State party only to the 1952 Convention may, by a notification deposited with the Director-General, declare that it will admit the application of this 1971 Convention to works of its nationals or works first published in its territory by all States party to this Convention.

ARTICLE X

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood that at the date this Convention comes into force in respect of any State, that State must be in a position under its domestic law to give effect to the terms of this 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 the Universal Copyright Convention;

(b) to make preparation for periodic revisions of this Convention;

(c) to study any other problems concerning the international protection of copyright, in co-operation 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 States party to the Universal Copyright Convention as to its activities.

2. The Committee shall consist of the representatives of eighteen States party to this Convention or only to the 1952 Convention.

3. The Committee shall be selected with due consideration to a fair balance of national interests on the basis 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 whenever it deems necessary, or at the request of at least ten States party to this Convention.

ARTICLE XIII

1. Any Contracting State may, at the time of deposit of its instrument of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General that this Convention shall apply to all or any of the countries or territories for the international relations of which it is responsible and this Convention shall thereupon apply to the countries or territories named in such notification after the expiration of the term of three months provided for in Article IX. In the absence of such notification, this Convention shall not apply to any such country or territory.

2. However, nothing in this article shall be understood as implying the recognition of tacit acceptance by a Contracting State of the factual situation concerning a country or territory to which this Convention is made applicable by another Contracting State in accordance with the provisions of this Article.

ARTICLE XIV

1. Any Contracting State may denounce this Convention in its own name or on behalf of all or any of the countries or territories with respect to which a notification has been given under Article XIII. The denunciation shall be made by notification addressed to the Director-General. 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

A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

ARTICLE XVI

1. This Convention shall be established in English, French and Spanish. The three texts shall be signed and shall be equally authoritative.

2. Official texts of this Convention shall be established by the Director-General, after consultation with the governments concerned, in Arabic, German, Italian and Portuguese.

3. Any Contracting State or group of Contracting States shall be entitled to have established by the Director-General other texts in the language of its choice by arrangement with the Director-General.

4. All such texts shall be annexed to the signed texts of this Convention.

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 Convention on 1 January 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 this Convention.

ARTICLE XVIII

This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected.

ARTICLE XIX

This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected. Nothing in this Article shall affect the provisions of Articles XVII and XVIII.

ARTICLE XX

Reservations to this Convention shall not be permitted.

ARTICLE XXI

1. The Director-General shall send duly certified copies of this Convention to the States interested and to the Secretary-General of the United Nations for registration by him.

2. He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Convention comes into force, the notifications under this 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 (hereinafter called "the Berne Union") and which are signatories to this 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 Berne Convention and the Universal Copyright Convention,

Recognizing the temporary need of some States to adjust their level of copyright protection in accordance with their 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 Berne Union 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 the United Nations Educational, Scientific and Cultural Organization, 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 sub-paragraph (a) shall not

be applicable as long as such State may avail itself of the exceptions provided for by this Convention in accordance with Article Vbis.

(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 Berne Union.

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 this 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 resolution annexed to it, and, in addition, representatives of the following States: Algeria, Australia, Japan, Mexico, Senegal and Yugoslavia.

2. Any States that are not party to the 1952 Convention and have not acceded to this Convention before the first ordinary session of the Committee following the entry into force of this Convention shall be replaced by other States to be selected by the Committee at its first ordinary session in conformity with the provisions of Article XI (2) and (3).

3. As soon as this Convention comes into force the Committee as provided for in paragraph 1 shall be deemed to be constituted in accordance with Article XI of this Convention.

4. A session of the Committee shall take place within one year after the coming into force of this Convention; thereafter the Committee shall meet in ordinary session at intervals of not more than two years.

5. The Committee shall elect its Chairman and two Vice-Chairmen. It shall establish its Rules of Procedure having regard to the following principles:

(a) The normal duration of the term of office of the members represented on the Committee shall be six years with one-third retiring every two years, it being however understood that, of the original terms of office, one-third shall expire at the end of the Committee's second ordinary session which will follow the entry into force of this Convention, a further third at the end of its third ordinary session, and the remaining third at the end of its fourth ordinary session.

(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 needs for continuity of membership and rotation of representation, as well as the considerations set out in Article XI (3).

Expresses the wish that the United Nations Educational, Scientific and Cultural Organization provide its Secretariat.

In faith whereof the undersigned, having deposited their respective full powers, have signed this Convention.

Done at Paris, this twenty-fourth day of July 1971, in a single copy.

PROTOCOL I

Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of Stateless persons and refugees

The States party hereto, being also party to the Universal Copyright Convention as revised at Paris on 24 July 1971 (hereinafter called "the 1971 Convention"),

Have accepted the following provisions:

1. Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the 1971 Convention, be assimilated to the nationals of that State.
2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the 1971 Convention applied hereto.
(b) This Protocol shall enter into force in respect of each State, on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the 1971 Convention with respect to such State, whichever is the later.

(c) On the entry into force of this Protocol in respect of a State not party to Protocol 1 annexed to the 1952 Convention, the latter Protocol shall be deemed to enter into force in respect of such State.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Paris this twenty-fourth day of July 1971, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization. The Director-General shall send certified copies to the signatory States, and to the Secretary-General of the United Nations for registration.

PROTOCOL 2

Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to the works of certain international organizations

The States party hereto, being also party to the Universal Copyright Convention as revised at Paris on 24 July 1971 (hereinafter called "the 1971 Convention"),

Have accepted the following provisions:

1. (a) The protection provided for in Article II(1) of the 1971 Convention shall apply to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organization of American States;
(b) Similarly, Article II(2) of the 1971 Convention shall apply to the said organization or agencies.
2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if provisions of Article VIII of the 1971 Convention applied hereto;
(b) This Protocol shall enter into force for each State on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the 1971 Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Paris, this twenty-fourth day of July 1971, in the English, French and Spanish languages, the three texts being equally

authoritative, in a single copy which shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

The Director-General shall send certified copies to the signatory States, and to the Secretary-General of the United Nations for registration.

179. REPORT OF THE GENERAL RAPPOREUR OF THE CONFERENCE FOR REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION.

Unesco House, Paris 5-24 July 1971

INTRODUCTION

1. It is my honour as General Rapporteur to present the following report of the July 1971 Conference for Revision of the Universal Copyright Convention. The summary records of the work of both the plenary sessions and the Main Commission contain a chronological record of the debates, and my purpose here is not to duplicate that account. It is, instead, to report and analyse the final accomplishments of the Conference, including the text adopted by the delegates and the interpretations given by the Conference of a number of provisions.

2. Unless the context makes it necessary, I shall not attempt to indicate at what point in the Conference a particular discussion took place, or to differentiate between discussions in the plenary sessions and those in the Main Commission. For simplicity's sake, I shall also use an abbreviated formula when identifying specific documents (for example: "UCC/13" rather than "INLA/UCC/13, Paris, 7 July 1971, Original English").

3. The remarkable series of developments and preparatory work leading up to this revision conference are well summarized in the introductory Report prepared by the Unesco Secretariat (UCC/4), and will not be repeated here. The programme of the Conference was based upon a text proposed by the Intergovernmental Copyright Committee at its second extraordinary session held in Paris in September 1970 (UCC/3), and I shall refer to it henceforth as the "IGCC text". Fortunately, the basic system for numbering sections has remained consistent from the 1952 Universal Copyright Convention through the IGCC text to the revised text adopted by the Paris Conference.

4. I shall exercise the prerogatives of my office to make a few personal remarks at the end of this report, but there is something I feel I should say now. Consider the task facing this Conference: to prepare a revised text of a world-wide convention on a highly complex and technical subject; to reconcile widely divergent purposes and needs; to make the revised text as consistent as possible with concurrent revisions in the quite different Berne Copyright Convention; and to do all this in an extremely short time. The successful accomplishment of this task strikes me as extraordinary; noting the absence of the usual bitter speeches about the need for "a spirit of international co-operation", I realized they were not necessary because the spirit was really there. For me, at least, the outcome of the Paris Conference exemplifies a remark of William James that "real culture lives by sympathies and admirations, not by dislikes and disdains".

THE PURPOSE AND ORGANIZATION OF THE CONFERENCE

5. As it emerged from a plethora of preparatory meetings going back to 1966, the basic purpose behind the Paris Conference was less than a complete revision of the Universal Copyright Convention. Essentially its purpose was to satisfy the practical needs of developing countries for ready access to educational, scientific, and technical works, without weakening the structure and scope of copyright protection offered by developed countries under both the Universal Copyright Convention and the Berne Convention. The IGCC text was drafted with this vital but limited goal in mind.

6. Under the Rules of Procedure adopted by the Conference, the plenary sessions and meetings of the Main Commission were held in public. All States party to the Universal Copyright Convention were entitled to send delegates with the right of participation and voting. Non-voting observers could be sent by States members of Unesco or other organizations within the United Nations system, and by various other intergovernmental and international non-governmental organizations. In all, 45 States Party to the Universal Copyright Convention sent delegations, and the Conference was attended by observers from 30 other States, 3 intergovernmental organizations and 16 international non-governmental organizations. The working languages of the Conference were English, French, and Spanish, and in accordance with Rule 29 of the Rules of Procedure, the delegation of the Federal Republic of Germany provided an interpretation into English of its members' statements made in German (UCC/INF. 5).

7. A final list of the participants in the Paris Conference will be found in UCC/INF. 4 and a complete list of its officers appears in UCC/INF. 7. As noted in paragraph 13 of this report, 27 States were empowered to sign the revised Convention.

8. Because of their interrelationship and, in some cases, their interdependence, the Conferences for revision of the Universal Copyright Convention and the Berne Convention, in the words of Resolution No. 1(XR. 2) adopted by the Intergovernmental Copyright Committee at its second extraordinary session on 11 September 1970, were "held at the same time and place". That is, at the generous invitation of Unesco, the two revision Conferences both met at Unesco House in Paris from 5 July through 24 July 1971, but none of their respective sessions were held simultaneously.

9. To avoid overlapping an intricate work programme was drafted by the Secretariat (UCC/INF. 2), and it was possible to adhere to this schedule for the most part. In effect, the UCC Conference met first, with plenary sessions during the morning of 5 July 1971, part of the afternoon of that day, and the first part of the morning of 6 July, and with meetings of the UCC Main Commission for the remainder of the week, beginning on the morning of Tuesday, 6 July, and continuing until late afternoon on Saturday, 10 July. After an opening session on 5 July, the Plenary Assembly of the Berne Revision Conference met again on Monday, 12 July, and the meetings of the Berne Main Commission also started on that day. It then adjourned to allow the UCC Drafting Committee to prepare provisional texts of the articles of mutual concern to the two Conferences, on the basis of decisions already taken by the UCC Main Commission. The UCC Drafting Committee held an all-day session on Tuesday, 13 July, and finished a draft text in an early morning session on Friday, 15 July. The last week was divided between the two Conferences, with formal signature of the two new conventions on Saturday, 24 July 1971. With this tight schedule it is easy to understand the anticipation with which all delegates awaited Bastille Day, 14 July 1971, and the pleasure with which they joined in celebrating the French national holiday.

OPENING SESSION

10. Mr. René Maheu, Director-General of the United Nations Educational, Scientific and Cultural Organization, opened the Con-

ference with an eloquent address (DG/11/6) welcoming the delegates on behalf of Unesco. The Director-General noted the apparent contradiction between the great needs for access to knowledge by countries with scarce resources and the moral and material interest of authors, but expressed his firm personal conviction that, far from being irreconcilable, these aims are actually complementary. He stressed the importance of the Conference's work not only in its potential short-range benefits but also for the progress of mankind. Speaking of culture as "the fullest synthesis of the various activities and creations of the human mind", Mr. Maheu concluded by emphasizing that "Unesco, on whose initiative the Universal Copyright Convention was prepared, and which claims extensive competence and far-reaching responsibilities with regard to the protection of intellectual creation, expects that your efforts will make a decisive contribution to the achievement of one of its essential aims, namely the promotion of the right to culture through the organization of international co-operation".

11. The first act of the opening session was to elect the President of the Plenary Assembly. On the proposal of Ambassador Pio Archi, head of the delegation of Italy, supported by the delegations of Canada, Tunisia, Belgium, the Federal Republic of Germany, Spain, Japan, the United States of America, and the Netherlands, Ambassador Pierre Charpentier, head of the French delegation, was elected President of the Conference by acclamation.

12. In accepting his office, Ambassador Charpentier warmly thanked the Conference for the honour accorded to him and to his country. He then spoke feelingly of the arduous work that lay behind the Conference and of the lessons to be learned from it. The President stressed that, in general, the agreement already achieved on matters of substance represented the limits of possible concessions. In expressing his confidence in the success of the Conference, he reminded the delegates of the one essential condition for that success: that this convention, like any other, must not only be adopted and signed, but must also be widely ratified and implemented.

CREDENTIALS COMMITTEE

13. The Conference then proceeded to elect a Credentials Committee consisting of delegates from seven countries: Argentina, Belgium, Hungary, Japan, Kenya, Lebanon and the United States of

America. The Credentials Committee elected as its Chairman Ambassador José M. G. Alvarez de Toledo, head of the delegation of Argentina, and the Committee submitted its first report on 5 July (UCC/8). As shown in the Committee's reports (UCC/8, UCC/35 and UCC/43), 24 countries presented credentials empowering them to sign the revised convention.

RULES OF PROCEDURE

14. The Draft Rules of Procedure approved by the Intergovernmental Copyright Committee (UCC/2) were adopted without extensive discussion or amendment (UCC/2 Rev.). It was agreed, under paragraph 2 of Rule 4, that any delegation seated provisionally should be required to present its credentials in proper form "before the last plenary session". Under Rule 8, the Conference decided not to bind itself to a requirement that the President and the General Rapporteur of the Conference also serve in these capacities in the Main Commission. As revised, the Rules of Procedure established a Bureau consisting of the President, the nine Vice-Presidents, the General Rapporteur of the Conference, the Chairman and Vice-Chairman of the Main Commission, the Chairman of the Credentials Committee, and the Chairman of the Drafting Committee. The size of the latter committee was initially set at eight elected members and was later enlarged to nine, with the Chairman of the Main Commission and the General Rapporteur also serving in an *ex-officio* capacity.

OFFICERS, COMMITTEES, AND ADOPTION OF AGENDA

15. Upon the proposal of the President of the Conference, nine Vice-Presidents representing the following delegations were elected unanimously: Canada, Czechoslovakia, Denmark, Guatemala, Italy, Japan, Kenya, Mexico and Spain. In my capacity as Co-Chairman of the delegation of the United States of America, I was honoured to be proposed and elected as General Rapporteur.

16. Although the Provisional Agenda (UCC/1) had not envisioned the appointment of a Drafting Committee until the work of the Main Commission was completed, it was agreed that immediate appointment of the Committee would facilitate the Conference's work. Upon the proposal of the President, the Drafting Committee consisted of the delegates of Argentina, Canada, France, India, Kenya, Japan, the Netherlands, Spain and the United King-

dom, in addition to the *ex-officio* membership of the President of the Main Commission and the General Rapporteur.

17. It was later proposed that, because of the complex and extremely close interrelationship between the respective tasks of the UCC and Berne Drafting Committees, those members (including members *ex-officio*) of the Berne Drafting Committee that were not also members of the UCC Drafting Committee be invited to participate as observers in the latter's work on matters of mutual concern. Although there was some sympathy with the Spanish delegate's view that as a rule drafting committees should be small — that indeed the best drafting committee consists of three members of whom one is sick and another is late — there was much support for this proposal and it was accepted without dissent. The UCC Drafting Committee elected as its Chairman Mr. William Wallace, delegate of the United Kingdom, and, as its Vice-Chairman, Mr. W. L. Haardt, head of the delegation of the Netherlands.

18. With the change already noted, the Provisional Agenda (UCC/1), was adopted.

GENERAL OPENING DISCUSSION

19. The President offered the floor to any delegation wishing to make a general statement on the work of the Conference, and no less than twenty accepted his invitation in this order; the United Kingdom, Italy, Belgium, Mexico, the Federal Republic of Germany, the United States of America, France, Cuba, Hungary, Israel, Canada, Japan, Spain, Argentina, Senegal, Uruguay, Switzerland, Kenya, Finland, and Czechoslovakia. As noted by the President at the end of the interventions, the general sentiment in favour of the programme of the Conference was overwhelming. Delegate after delegate praised the long preparatory work that had gone into the IGCC text as thorough, legally sound, and realistic. In many cases the speaker recalled the participation of representatives of his own government in that work. There were constant references to the IGCC text as a fair and reasonable balance, but one that was extremely delicate if not precarious. A recurring theme was the importance of maintaining that balance, and of improving the text on technical matters without introducing excessive or fundamentally different amendments that could upset the entire basis for the carefully co-ordinated compromise between the needs of developing countries and the interests of authors.

20. These points were reiterated so often that the delegate of Spain was prompted to refer to their boring, though welcome, unanimity, and he voiced the hope that the Conference would thus prove to be an orchestra rather than a group of soloists. The delegate of the United Kingdom stressed a point, made earlier by the President of the Conference, that for some countries the compromise embodied in the IGCC text represented almost the extreme limit of the acceptable. Other delegates, including those of Czechoslovakia and Uruguay, indicated that, while favouring the general spirit of the project, they felt themselves free to offer or support clarifying amendments. The delegate of Argentina noted the importance of the efforts being made, but felt that the proposed procedures should be improved to assure that the exceptions as well as the licences lead to the desired educational benefits, and that they do not produce unjustified results or promote special interests that need no protection. The Argentine delegate had therefore proposed some amendments aimed at guaranteeing the proper use of the proposed concessions: to provide an exceptional remedy to situations involving abuse or injustice, and at the same time to assure to authors the effective protection of their fundamental rights.

21. The delegate of Cuba reaffirmed the unshakeable decision of his government to make culture a fundamental patrimonial right and a part of the general wealth of everyone, by recognizing the pre-eminent social function of intellectual workers, to whom the State must assure both material well-being and freedom in order for them to accomplish their mission. However, he felt that the entire legal structure of copyright, as expressed in the International Convention, was based on a system encouraging the exploitation of intellectual workers for the benefit of capitalistic or monopolistic enterprises. Thus, his government favours the freest possible access to works of the mind without any economic or geographic barriers; and, since it is based upon unacceptable legal norms, the present project for UCC revision was, in his opinion, merely a palliative.

22. The delegate of Canada emphasized the great interest of his government in the problems of international copyright and the work of the Conference. This special interest arises from a combination of factors, including the existence within Canada of dual languages and cultures, and the problems of reconciling copyright protection and technological innovations in a country of immense size. To some extent, he suggested, "we are all developing coun-

tries". Canada in particular feels itself to be both developed and developing, and is thus in a unique position to understand the needs on both sides.

23. Speaking as a representative of a country too newly independent to have been represented at the Geneva Conference in 1952, the observer of Senegal stressed the need to make the Universal Copyright Convention truly universal. He urged that, where cultural and economic interests come into conflict, it is only just and right that the latter should yield.

24. The Hungarian delegate recognized the need for a realistic solution, and approved without reservation the present efforts to revise the UCC. At the same time, he felt that the present educational and cultural problems of the developing countries are the result of their former status as colonial dependencies, and that every effort must be made to give their citizens rapid access to works while ensuring the fair remuneration of the authors whose works are used. He announced that the authors of Hungary are prepared to contribute freely to the translation of their works into the national language of any developing country, and that the competent Hungarian authorities are prepared to indemnify the authors of all works used for these purposes.

25. The delegate of the Federal Republic of Germany welcomed not only the just balance achieved in the IGCC text between the needs of developing countries, and of authors, but also the improvement in the general level of protection in the text. He stressed the importance of correlation between the revision of the Universal and Berne Conventions, a point also emphasized by the delegate of Japan.

26. The Japanese delegate regretted that many Asian countries have never become party to either Convention, and expressed the hope that a successful co-ordinated revision of the two Conventions would lead to more ratifications and to the forging of new cultural links between developed and developing countries.

27. The President of the Conference, in summarizing the general discussion, expressed gratification at the obvious spirit of harmonious accord. He urged those governments contemplating the proposal of amendments on matters of substance to consider them in the light of the general agreement that a realistic and workable compromise had already been reached, and warned that any effort to

make fundamental changes could endanger the success of the Conference.

MAIN COMMISSION AND WORKING PARTIES

28. The President of the Conference next called upon the delegates to elect a chairman and two vice-chairmen of the Main Commission. Under Rule 8 of the Rules of Procedure, the Main Commission was, in effect, a "committee of the whole", charged with the responsibility for making "a detailed study of the proposals for revision of the Universal Copyright Convention and the instruments annexed thereto", and for preparing "draft texts for submission to the Conference at a plenary meeting".

29. Upon the nomination of the delegation of the United States of America, supported by the delegations of Belgium, France, the Federal Republic of Germany, India, Italy, Japan, Kenya, Morocco and Spain, the Conference unanimously elected Mr. Rafik Saïd, the head of the Tunisian delegation as its Chairman, and the heads of the delegations of Brazil and the United Kingdom as Vice-Chairmen.

30. Upon taking the chair Mr. Saïd thanked the Conference for its confidence and for the honour done to his country and to him. He recalled that the proposals before the Committee were the result of the efforts of outstanding copyright experts over the course of twelve preparatory meetings, and that a balance had been achieved through goodwill and hard work. Referring to the affirmative tone of the general opening statements, he felt that there was considerable reason for optimism.

31. During the course of its work, and in accordance with Rule 6 of the Rules of Procedure, the Main Commission established three working parties. The first, which was formed primarily to deal with amendments to the translation licence provisions (Article *Vter*) proposed by the delegation of India (UCC/14), but was expanded to include other questions under Articles *Vter* and *Vquater*, was chaired by the Chairman of the Main Commission and consisted of the delegates of Brazil, France, Italy, Kenya, Mexico, Sweden, the United Kingdom and the United States of America. The second, which also involved Article *Vter*, was prompted by a proposal of the delegation of Brazil (UCC/20) concerning the scope of the export prohibition. This group consisted of Brazil, France, the Federal Republic of Germany, Israel, Kenya, the United

Kingdom and the United States of America, and was chaired by Professor Ulmer of the delegation of the Federal Republic of Germany. The third working party dealt with the proposal of the delegation of Kenya (UCC/13) to permit the issuance of a translation licence for broadcasting purposes under certain circumstances. The Chairman of this group was Mr. da Costa of the delegation of Brazil, and included representatives of the following delegations: Brazil, France, Israel, Kenya, Mexico, Switzerland, the United Kingdom, and the United States of America. The results of these working parties will be discussed under the appropriate headings in connexion with Article *Vter*.

32. On 15 July 1971, during the meeting of the Berne Main Commission, a proposal (B/DC/25) was tabled by four African States members of the Berne Union (the Democratic Republic of the Congo, the People's Republic of the Congo, Ivory Coast and Niger). Although Senegal was not listed as one of the sponsors of the proposal, it was identified as such during the discussions. This proposal in general concerned the possibility for developing countries having a common language to obtain a joint licence for translation or reproduction. Because of the need for consistency between the two revised conventions, a Joint Working Party of both Main Commissions to consider this proposal was established under the Chairmanship of Professor Ulmer, Chairman of the Berne Main Commission and delegate of the Federal Republic of Germany. The Joint Working Party consisted of representatives of the following States: Argentina, France, India, Ivory Coast, Kenya, the United Kingdom and the United States of America. The Chairman of the Main Commission of the UCC also participated as an *ex-officio* member. The results of its work as regards the Universal Copyright Convention will be reported below immediately following the discussions of Articles *Vter* and *Vquater*.

THE TITLE AND PREAMBLE

33. The Conference agreed to adopt the suggestion of the Chairman of the Main Commission that the text to be signed be given the following title: "Universal Copyright Convention as revised at Paris on 24 July 1971". This formula was preferred to one that would refer to the revised convention as the "Paris Act", and to a longer formulation such as "Universal Copyright Convention of 6 September 1952, revised at Paris on 24 July 1971". The Conference's decision permitted dropping the word "revised" as it

appeared in a number of articles of the IGCC text, and it was agreed that this deletion should be made throughout. It was understood that, whenever the phrase "this Convention" appears in the Paris text, it refers to the 1971 revision and, wherever it is necessary to differentiate between the two texts, the provision would refer to "the 1952 Convention" and to "this Convention".

34. As to the Preamble, the IGCC text had suggested no changes. However, to take account of the nature of its action in 1971, the Conference agreed to add a paragraph at the end of the Preamble stating explicitly that the Contracting States "have resolved to revise the Universal Copyright Convention as signed at Geneva on 6 September 1952 (hereinafter called 'the 1952 Convention'). . . .".

35. It was also agreed that the phrase "Contracting State", which is used in the Preamble and throughout the body of the text in both the singular and plural, refers to a State Party to the 1971 Convention.

36. The discussions on these points, and the problems of relationships between those States that ratify or accede to the 1971 Convention and those States that are party to the 1952 Convention only, raised the question of whether we are here dealing with one Convention or two. It will be discussed later in this report in connexion with Articles IX and XI.

ARTICLES I-IV

37. Articles I and III were left exactly as they stand in the 1952 text. Article II, which establishes the basic principle of national treatment for both published and unpublished works, had been amended in the IGCC text to include an additional reference to "the protection specially granted by this Convention". The Conference adopted this amendment in both paragraphs (1) and (2) of Article II.

38. In connexion with Article II (3), the observer of Senegal inquired concerning the status of domiciled refugees. It was agreed to defer this question until the discussion of the Protocols attached to the 1952 Convention, including Protocol 1 dealing with the assimilation of refugees and stateless persons. The point will also be discussed in this report in connexion with the Protocols.

39. In connexion with both Article IV and Article V, it was pointed out that the lack of any system of lettering or numbering

the subordinate paragraphs has made referencing difficult. The Conference therefore agreed to make the minor amendments in the 1952 text necessary to remedy this defect.

ARTICLE IVbis

40. The first entirely new article to be discussed by the Main Commission, and one of the most important, was Article IVbis. In accordance with the Washington Recommendation, the basic purpose of the provision is to include in the Universal Copyright Convention an explicit requirement for the protection of "the basic rights constituting the author's economic right", including three rights mentioned by name: reproduction, broadcasting, and public performance.

41. As adopted by the Conference, Article IVbis is intended to give further body and meaning to the obligation, contained in Article I of the Convention, that "each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors . . .". Paragraph (1) of the new article defines these rights as including "the basic rights ensuring the author's economic interests", and these "basic rights" are further defined to include three exclusive rights of the author: the exclusive right to authorize "reproduction by any means", the exclusive right to authorize "public performance", and the exclusive right to authorize "broadcasting". As proposed in the IGCC text, the rights referred to are broad enough to cover reproduction, performance and broadcasting of the work whether it is used unchanged from its original form, or whether the user reproduces, performs, or broadcasts it "in any form recognizably derived from the original".

42. Prompted by a proposal of Argentina (UCC/7), the Conference considered whether the rights enumerated in Article IVbis (1) should be expanded to include the "moral right" of the author: that is, "the right to claim authorship of a work and to oppose any distortion, mutilation or other change in that work, or any interference with the work that might be prejudicial to the author's honour or good name". A number of delegations expressed themselves as favouring the principle that the moral right is one of the most fundamental of the author's rights. On the other hand, the point was made by several delegations, notably that of Italy, that the proposal would mark a radical departure from the 1952 Universal Convention, and that some States now party to the UCC including

the United States of America, Kenya, and others, do not recognize this right under their statutory law. Reference was made to the specific goal of the Washington Recommendation, which was the express recognition of certain "economic" rights or interests of the author but was clearly not intended to extend to the author's moral rights. Fears were expressed that a requirement for recognition of moral rights would be fatal to the entire programme for revising both the Universal and the Berne Conventions.

43. In the final text, the word "economic" was retained, but in the enumeration of specific rights the word "exclusive" was added. Although it was the hope of many delegations that, under this wording, Contracting States would be moved to grant moral as well as pecuniary rights, it was the understanding of the Conference that no State would be obliged, under the 1971 Convention, to grant protection for the moral rights of the author. It was also understood that the words "include" and "including" in Article IV*bis* (1) were not to be interpreted as limitative or exhaustive.

44. A fundamental point of interpretation of the 1971 Convention was referred to several times during the Conference, in connexion with Article IV*bis* and in several other contexts. The Conference agreed the general aim of the 1971 Convention should be that no State that is now party to the Universal Copyright Convention of 1952, and that now respects the fundamental rights of authors, should be required to make any changes in its domestic law as a condition to adhering to the 1971 Convention. Under the new Convention, developing countries would, of course, have an opportunity to introduce compulsory licensing systems in accordance with Articles V*ter* and V*quater*, but it was understood that no country now meeting the obligations of the 1952 Convention and according basic copyright protection would be required to assume new obligations in order to adhere to the 1971 Convention.

45. This point assumed even greater significance during the consideration of a second proposal of the delegation of the Argentine Republic (UCC/7) for amendment of Article IV*bis*. Paragraph (2) of the IGCC text of that article provided that, despite the specification of exclusive rights in paragraph (1), a Contracting State could make exceptions to these rights as long as they "do not conflict with the spirit and provisions" of the 1971 Convention, and provided the State accords "a reasonable degree of effective pro-

tection to each of the rights to which exception has been made". The proposal of Argentina would have limited the right of a State to make exceptions to cases where "the work is to be used in educational establishments for teaching purposes and reaches the recipients free of charge" with the added limitation that, in cases of broadcasting, the stations receive no profit. This was considered too limitative by the Conference, which preferred a more flexible formula, one that was consistent with the spirit of the 1952 Convention and capable of accommodating a great variety of legal systems, economic and social situations, and cultural factors. A proposal included in the comments of the Swiss Government (UCC/5, Annex, p. 11), was also considered, but was not accepted on the ground that it might be interpreted as allowing general compulsory licensing systems for all types of works. The delegation of the Federal Republic of Germany referred to the wording for this provision put forward as Alternative B in the text prepared by the Ad Hoc Preparatory Committee (UCC/4, p. 15), but declared that it regarded the IGCC text as acceptable, if the limits to the exceptions are clearly indicated in this report.

46. The Conference agreed that, subject to very minor drafting changes, the IGCC text should be accepted and that various points raised by its wording should be interpreted as follows:

1. *The exceptions must not "conflict with the spirit" of the 1971 Convention.* It was considered that, in addition to the requirement for "adequate and effective protection" in Article I, the spirit of the Convention also comprehended the convictions expressed in paragraphs 1 and 2 of the Universal Declaration of Human Rights: that everyone has a right "freely to participate in the cultural life of the community", and that everyone equally has a right "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
2. *The "a contrario principle".* Paragraph 83 of the Intergovernmental Copyright Committee Report accompanying the IGCC text (UCC/4, Annex IX, p. 9) stated the view of the Committee that "the inclusion in the Convention of special provisions allowing developing countries to publish certain works and translations under compulsory licences, 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". The Conference adopted this principle, it being understood that a "general system" referred either to a system applying to a specific type of work with respect to all forms of uses, or to a system applying to all types of works with respect to a particular form of use.

3. *The exceptions must not "conflict with the provisions" of the 1971 Convention.* As a corollary to the "*a contrario*" principle, the Conference understood the reference to "the provisions" of the revised convention as referring to Articles *Vter* and *Vquater*. This means that a State not qualifying as a developing country under Article *Vbis* would not be entitled to institute licensing systems similar to those provided in Articles *Vter* and *Vquater*.
4. *The State must accord "a reasonable degree of effective protection" to each of the rights named.* It was understood that, under the second sentence of paragraph 2 of Article *IVbis*, no State would be entitled to withhold entirely all rights with respect to reproduction, public performance, or broadcasting, that where exceptions are made they must have a logical basis and must not be applied arbitrarily, and that the protection offered must be effectively enforced by the laws of the Contracting State.

ARTICLE V

47. Article V of the 1952 Convention, dealing with translation rights, proved to be one of the most difficult problems faced by the 1952 Geneva Conference, and the provision as it now exists in the Universal Copyright Convention in itself represents a delicately balanced compromise. In all of the preparatory meetings leading to the IGCC it was agreed not to tamper with the existing text, and to use it intact as an underpinning for the special translation provisions applicable to developing countries in Article *Vter*.

48. When it first considered the question, the UCC Main Commission adhered to this principle, and only very minor consequential drafting changes were suggested. To conform paragraph (1), the basic clause of Article V establishing the author's exclusive right of translation, to the new Article *IVbis* establishing his other

basic rights, the opening phrase was changed from "Copyright shall include the exclusive right to . . ." to "The rights referred to in Article I shall include the exclusive right of the author to . . .".

49. Following meetings of the Berne Convention Main Commission, however, it became increasingly apparent that there was a need for uniform terminology throughout both Conventions when identifying a language with a country for various purposes. The formula finally accepted, "a language in general use" in the State, will be discussed in detail in connexion with Article *Vter*. The Conference agreed to conform the present language of Article V, which refers to the "national language or languages" of the State, to this new formula, and made minor drafting changes in four places in Article V to accomplish this limited result. It was understood that there was no intention on the part of the Paris Conference to change the interpretation of the phrase as it exists in the 1952 text, and that the only purpose of the change was consistency of terminology.

50. In the third week of the Conference the discussions of the various procedures required for obtaining translation and reproduction licences, during the meetings of the Berne and Universal Convention Main Commission as well as the plenary sessions of the UCC, were among the thorniest and most time-consuming that the delegates had to endure. Article V of the 1952 Convention had established a procedure with respect to translation licences granted under it; the IGCC draft had imported this procedure intact into Article *Vter*, but had diverged from it in connexion with Article *Vquater*, and there were further divergencies in the draft adopted by the Berne Main Commission. Concern was expressed among delegates from developing countries as to how all these variations could be reconciled and implemented in domestic legislation and practice. A proposal to achieve some degree of uniformity by amending Article V, as well as Articles *Vter* and *Vquater*, was put forward by the delegation of the United Kingdom (UCC/39), but was withdrawn in the face of a general reluctance to make further changes in Article V. The delegation of the United Kingdom then submitted a proposal (UCC/41) to achieve some uniformity through an amendment of Article *Vter* alone; this proposal, which was adopted with some changes in detail, will be discussed in connexion with Article *Vter*.

51. The delegate of India, noting that the phrase "due provision shall be made by domestic legislation" in paragraph (d) of

Article V(2) had been changed in equivalent provisions of Article *Vter* and in the draft text of the revised Berne Convention suggested that the words "at the national level" be substituted for the words "by domestic legislation". Again, the reluctance to make material changes in Article V prevailed and the proposal was withdrawn, but amendments were made in Articles *Vter* and *Vquater* to accomplish the result with respect to licences issued under those provisions.

52. Under the language of Article V, a compulsory translation licence may be granted under certain conditions to "any national" of a Contracting State. The delegate of India asked that it be made clear that the term "national" includes legal entities, government bodies, corporate bodies, and other artificial persons. There was no dissent from this interpretation at the Paris Conference, but it was agreed that there was no need to define the term explicitly in the text. The point is discussed in a different context under Article II of the Report of the Rapporteur-General of the 1952 Geneva Conference, where the following interpretation appears: "The President suggested that it was a matter for each Contracting State to interpret the word 'nationals' according to its own rule of law; the Convention was not to be regarded as imposing on any Contracting State the obligation of recognizing for copyright purposes legal and moral persons as well as physical persons, but only requiring that a State should apply the same interpretation to foreign nationals as to its own nationals; for example, a State protecting the works of its own incorporated bodies should protect also the works of such bodies of other Contracting States".

ARTICLE *Vbis*

53. One of the fundamental ideas behind the Washington Recommendation was to have parallel and concurrent revisions of the Universal and Berne Conventions to make limited compulsory licensing systems available for the benefit of developing countries with respect to translations and reproductions. Article *Vbis* is the first of the three new articles in the revised UCC intended to accomplish this goal; its counterpart in the Berne revision is Article I of the Appendix to the Paris Act of the Berne Convention. The purpose of this article is to establish the criteria a State must meet, and the procedural machinery it must observe to take advantage of the special translation and reproduction provisions in the two articles that follow it. Article *Vbis* is the first and probably the most significant, though not the only, provision in the revised text

that raises that most perplexing of problems: What is a “developing country”? The term appears expressly in paragraphs (1) and (3) and by reference in paragraph (5) of Article *Vbis*. Under paragraph (1), any Contracting State “regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations” is entitled, at the time it becomes a party to the Universal Copyright Convention or at any later time, to notify the Director-General of Unesco that it will apply some or all of the provisions of Articles *Vter* and *Vquater*. Under paragraph (2), this notification is effective during the first ten years after the coming into force of the 1971 Convention, and the Contracting States may renew its notification at ten-year intervals thereafter. Paragraph (3) provides that, when the State ceases to be regarded as a “developing country”, it is precluded from making the decennial notification and, following a grace period, from applying the exceptions. The formula contained in paragraph (1) emerged from the report adopted on 27 June 1969 by a sub-committee established by the UCC Intergovernmental Copyright Committee (IGC/SC/6). Although its context was changed considerably by the Washington Recommendation and later events, the formula itself has been accepted without much discussion and has remained basically intact. The operative phrase adopted was the one evolved at Stockholm: “. . . regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations . . .”. Another clause, similar to one adopted at Stockholm and retained in the Berne revision at Paris — “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, . . .” — was not adopted in the 1971 Universal Convention because of the general feeling that it added nothing to the basic criterion.

54. The IGCC text of paragraph (2) of Article *Vbis* had provided that a developing country could renew a notification made under paragraph (1) “during the year preceding the expiration of the relevant ten-year period”. The Conference accepted an amendment offered by the delegation of Japan (UCC/9) to change the renewal period from the year immediately preceding the expiration date to a one-year period “not more than fifteen or less than three months” before expiration. The purpose was to require notification sufficiently in advance of expiration to allow other Contracting States to know definitely whether the ten-year period would expire on a given date or not.

55. In connexion with paragraph (3), the same Japanese proposal (UCC/9) raised a question as to whether the variable grace period allowed after a State has ceased to be developing was not too long and indefinite. Under the IGCC text, to take an extreme example, a State could renew a notification in 1975, cease to be developing in 1976, and yet enjoy the benefits of Articles *Vter* and *Vquater* until 1985. The Conference agreed to retain the IGCC formula, with some clarifying amendments, on the ground that the transition within a country from a developing to a developed stage would be gradual, and that the provision should be flexible enough to allow for gradual adjustments.

56. Paragraph (4) allows for the disposition of copies already made under the exceptions of Articles *Vter* and *Vquater* even after those exceptions have ceased to be applicable. This provoked a discussion as to whether some time-limit should be imposed on this privilege. The Conference rejected the proposal for a definite time-limit, but amended the text to allow distribution only "until their stock is exhausted".

57. The intention of paragraph (5) of Article *Vbis* is to make clear that, where a Contracting State has made a declaration under Article XIII with respect to a dependent country or territory, it could also make a notification under Article *Vbis* on behalf of that country or territory. In line with a proposal by the delegation of Argentina (UCC/7), the text was amended to provide explicitly that the export provisions of Article *Vter* and *Vquater* are fully applicable as between the Contracting State and its dependency in this situation.

THE QUESTION OF MATERIAL RECIPROCITY

58. During the discussion of Article *Vbis* the delegation of Sweden raised a question (UCC/12) as to whether, because the proposed text of the revised Berne Convention contains a provision prohibiting the application of material reciprocity against States availing themselves of the special translation and reproduction licences, the revised text of the UCC should not contain a similar provision. There was no disagreement whatever upon the substance of this matter: the Conference unanimously agreed that material reciprocity could not be applied in this situation. It was also agreed early in the discussion that, if the UCC text was to contain such a provision, it should not appear in Article *Vbis* but in a general

clause later in the Convention text. The question resolved itself into whether the declaration against material reciprocity should go into the text of the Convention or be contained in this General Report.

59. The UCC Main Commission was divided on this question, which was the subject of two special meetings of the Drafting Committee. This Committee produced the draft text of a new article (UCC/24 Rev.) and the draft of a section of this General Report (UCC/28), which had been submitted to the Drafting Committee by the delegation of France (UCC/CR. 1). The Main Commission voted not to include the proposed text of a new Article *VIIbis* in the Convention, with 17 delegations voting against inclusion, ten voting for, and two abstaining from the vote. Thereupon it was decided, without dissent, to include the Drafting Committee's proposed language (UCC/28) in this report, and I am, therefore, indebted to that Committee, and the delegation of France, for the following five paragraphs:

The Conference considered whether the text of the revised convention should or should not include an express provision prohibiting all material reciprocity in respect of a State availing itself of the exceptions mentioned in this Convention – whether these were the special exceptions provided for in Articles *Vter* and *Vquater* in favour of developing countries, or the exceptions of a general nature provided for in Article *IVbis*.

There was general agreement on the following:

- (1) With regard to material reciprocity, no discrimination should be made between the exceptions in Articles *Vter* and *Vquater* and those in Article *IVbis*.
- (2) The fact of a State's availing itself of any exception should in no case permit other Contracting States to reduce the level of protection granted by them to works originating in the State in question.
- (3) The principle of the absence of material reciprocity already exists in the 1952 Convention. It derives from the principle of the assimilation of foreign authors and works to national authors and works.

The fact that such reciprocity is permitted on only one, precisely specified point, viz. the duration of protection, underlines the fact that this constitutes the sole exception to a general prin-

ciple and that where the text is silent, it can only be interpreted in the light of the principle of non-reciprocity.

It therefore appeared that the inclusion of a special article specifying that the fact of a State's availing itself of exceptions would not permit any retaliation under the principle of material reciprocity, could be interpreted as a reversal of the presumption of absence of material reciprocity which governed the 1952 Convention and that consequently, States remaining party to the 1952 Convention alone, would in future be able to interpret that Convention as being governed by the principle of material reciprocity.

To avoid any such interpretation and taking note of a general agreement excluding all possibility of retaliation based on the idea of material reciprocity, the Conference was of the opinion that the inclusion of an article expressly excluding material reciprocity could serve no useful purpose and would only weaken a principle which was generally accepted and which should continue to govern both the present Convention and the Convention of 1952.

ARTICLE Vter

60. As at Geneva twenty years before, the question of translation rights was the most difficult and time-consuming problem the Paris Conference had to face. In the intervening twenty years the nature and complexity of the problem had undergone some fundamental changes, resulting primarily from the emergence of newly-independent nations with immense demands for educational development. These changes are reflected in the differences between Article V, the 1952 provision obligating Contracting States to grant exclusive translation rights but allowing them to grant compulsory licences after seven years under certain conditions, and Article Vter, imposing the same obligations on Contracting States that are developing countries, but allowing compulsory licensing after periods of only one or three years, though under considerably stricter conditions.

61. The basic formula of Article Vter is stated in its opening paragraph: If a Contracting State is a "developing country", under the meaning and conditions of Article Vbis, it may reduce the seven-year period of absolutely exclusive translation rights to three years, and "in the case of a translation into a language not in general use in one or more developed countries" that are party to either text of the UCC, the period can be further reduced to one year.

62. The delegation of India put forward a proposal (UCC/14) to cut the one-year period in half, on the ground that, since only non-exclusive licences into local languages were involved, six months of exclusivity would be long enough to protect the copyright owner's interests. This proposal met with strong opposition from delegations representing developed countries, not only because it disturbed the balance of what was constantly if inelegantly referred to as the "package deal", but also because, as a practical matter, six months was not long enough to allow the author to secure a translator of his own choice and to arrange for preparation and publication of the authorized translation. Following the meeting of a working party on the question, the delegation of India provisionally withdrew its proposal on condition that the Conference accept in principle the proposals of the delegation of Kenya (UCC/13), which now figure in paragraphs (1) and (9) of Article *Vter*.

63. The key to the dividing line between the three-year and one-year periods provided by paragraph (1)(a) of Article *Vter* is whether the translation is "into a language not in general use in one or more developed countries . . .". The meaning of the phrase "in general use" was discussed at several points during the Conference and, as in the case of the meaning of "developing countries", it was apparent that although no rigid definition was possible, no better term could be found. As a starting point, it was suggested without dissent that any language officially identified as one of the national languages of a country would be considered "in general use". The principal problem arises where, although not identified as a national language, a particular language is spoken or read by a significant percentage of the total population of a country, including the populations of regions of a country and of outlying territories. Although a reasonable dividing line for guidance on this question might be the use of a language by ten per cent or more of the total population of a country, it was considered that no percentage figure could be applied arbitrarily, and would necessarily vary in accordance with a wide range of demographic factors including regional and ethnic groupings within a country and other social and political circumstances. In any case, it was clearly understood that for all purposes the three so-called "world languages" (French, English and Spanish) would be considered "in general use in one or more developed countries".

64. It was understood that "developed countries" in this context referred to countries not regarded as "developing countries in

conformity with the established practice of the General Assembly of the United Nations". However, the Conference did not accept a Japanese proposal (UCC/9) to amend the text of Article *Vter* along these lines, on the ground that in borderline cases it might introduce uncertainties.

65. On the other hand, the delegation of Kenya put forward a proposal (UCC/13) which, in effect, defined "developed countries" more limitatively for this purpose and provided a flexible formula to cover certain special situations. Although the Japanese delegation pointed out that it would be unreasonable to make a distinction between languages in general use in developed countries that are UCC Contracting States and languages in general use in developed countries that are not, it was agreed to amend the article in accordance with the Kenyan proposal. Under the text adopted by the Conference, the one-year period would be applicable under Article *Vter* (1)(a) if the translation is into a language not in general use in any developed country that is party to either the 1952 or the 1971 texts of the Universal Copyright Convention. Correspondingly, a new sub-paragraph (b) was added under which it would be possible to alter the effect of sub-paragraph (a) if unanimous agreement could be obtained from all of the developed UCC countries in which a particular language, other than English, French, and Spanish, is in general use.

66. In other words, a developing country can make a translation under paragraph (1)(b) of Article *Vter* within one year rather than three under the following conditions: (1) if the translation is not into one of the three "world languages"; (2) if it is into a language in general use in one or more developed countries party to either the 1952 or the 1971 texts of the Universal Copyright Convention; (3) if these countries unanimously agree among themselves that another period of one year (or more) may be substituted; and (4) if the Director-General of Unesco is notified of the written agreement. It was clearly understood that any such agreement would require formal action at the executive level by each and every one of the developed countries concerned, and that it could stipulate conditions such as, for example, that it applied only to certain types of works such as technical and scientific works. It was also stipulated that in no case could the exclusive right of translation into English, French or Spanish be reduced below the three-year minimum provided in Article *Vter* (1)(a). There were some misgivings, especially upon the part of the Italian delegation,

about the effect of private arrangements, such as those allowed in paragraphs (1)(b) and (4)(c) of Article *Vter*, upon the other States party to a multilateral convention. However, the Conference agreed that, in exceptional cases where a degree of flexibility was needed, these separate arrangements could be justified.

67. During its first discussion of Article *Vter*, the Main Commission considered an amendment offered by the delegation of Sweden (UCC/16) intended to bring the procedure to be followed "if the owner of the right of translation cannot be found" into line with the provisions of Article *Vquater* on reproductions. These differ in some of their details from the procedure outlined in Article V, which was incorporated by reference in Article *Vter* of the IGCC text. Although the Main Commission was, on first consideration, divided on the question and the Swedish delegation withdrew its proposal, the question was reopened and the Swedish proposal was, in substance, eventually adopted.

68. As noted above in connexion with the discussion of Article V, strenuous efforts were made toward the end of the Conference to conform, as much as possible, the various procedures required for the granting of compulsory licences under Article *Vter* and *Vquater* of the 1971 Universal Convention and under Article IV of the Appendix to the 1971 Paris Act of the Berne Convention. Having decided not to change the procedure already established in Article V of the UCC, the Conference agreed to accept a somewhat different procedure with respect to translation licences granted under Article *Vter*, on the basis of a proposal of the delegation of the United Kingdom (UCC/41).

69. The United Kingdom proposal, with certain amendments, was added as sub-paragraphs (c) and (d) of paragraph (1) of Article *Vter*, and establishes essentially the same procedure for the granting of translation licenses under Article *Vter* as that established for the granting of reproduction licences under Article *Vquater*. This procedure will be discussed further in connexion with the latter Article. The only essential difference between the procedures for translation and reproduction licences set forth in Articles *Vter* and *Vquater*, and those prescribed in Article IV of the Appendix to the new Berne text, involve the specific mention in the former of "The International Copyright Information Centre established by the United Nations Educational, Scientific and Cultural Organization".

70. Paragraph (2) of the final 1971 text of Article *Vter*, which had been paragraph (5) of the IGCC text, provides for grace periods following the filing of a request for permission to translate under paragraph (1)(c), or the dispatch of the copies of an application for the granting of a compulsory translation licence under paragraph (1)(d). The rather complicated formula in Article *Vter* can be summarized as follows:

- (1) Where the applicable period under Article *Vter* is three years, no compulsory licence may be granted until a "further period of six months has elapsed" from the date of the request or of the dispatch of the copies of the application; and
- (2) Where the applicable period under Article *Vter* is one year, no compulsory licence may be granted until "a further period of nine months has elapsed".

71. The Conference adopted an amendment proposed by the delegation of Sweden (UCC/16) making clear that publication "by the owner of the translation or with his authorization" during the six- or nine-month period would preclude the granting of a compulsory licence. It was agreed, as a matter of interpretation, that under this provision:

- (1) The formal requests or applications that start the six- or nine-month grace periods running should clearly refer to the grant of a licence under Article *Vter*;
- (2) If the copyright owner has filed a list of the works for which he holds translation rights with the competent authority in the developing country, it cannot be argued under Article V (2)(c) that "the owner of the right of translation cannot be found";
- (3) In cases where the one-year period would have been applicable but the request or application is not filed until after three years, the grace period would be six months rather than nine months.

72. The Main Commission considered the question whether the three-year/six month and the one-year/nine-month periods were concurrent or consecutive. The delegation of India held the view that the three-year/six-month and the one-year/nine-month periods could, in each case, run concurrently or overlap each other. It was,

however, the prevailing view in the Commission that the periods were intended to be consecutive. Under this interpretation, the use of the word "further" implied that it was necessary for the basic period to have run its course before the grace periods under *Vter* (2) could start, and that the absence of the word "further" in the equivalent provision in Article *Vquater* implied that, in the cases of reproduction, the periods could be concurrent.

73. Paragraph (3) specifies that licences under Article *Vter* can be granted only for the purpose of "teaching, scholarship or research". It was the understanding of the Conference that the word "scholarship" in this phrase refers not only to instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges, and universities, but also to a wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject. The Conference also agreed that the word "research" cannot be interpreted to permit the translation, under Article *Vter*, of copyrighted works by industrial research institutes or by private corporations doing research for commercial purposes. However, the Conference declined to accept, as too limitative, a proposal by the delegation of Argentina (UCC/7), that would have confined the effect of Article *Vter* to translations made "for the benefit of official or officially recognized establishments of education or research".

74. Paragraph (4)(a) of Article *Vter*, like its counterpart in paragraph (1)(f) of Article *Vquater* dealing with reproductions, states a fundamental rule underlying both provisions: that copies produced in accordance with a compulsory licence issued under either Article *Vter* or *Vquater* cannot be exported, and that the licence is "valid only for publication in the territory of the Contracting State where it has been applied for". A proposal of the delegation of Argentina (UCC/7), to make the validity of a licence dependent upon both printing and publication in the territory of the licensing State, provoked one of the major controversies of the Paris Conference. The Argentine amendment was not adopted, but, following the meeting and report of a Joint Working Party of the Main Commissions of both the UCC and the Berne Conferences, agreement was reached upon an interpretation to be included in this report. Since it deals with both Articles *Vter* and *Vquater*, this interpretation will be found in a separate section following the report on Article *Vquater*.

75. Under sub-paragraph (b) of Article *Vter* (4), as under the IGCC text, copies published under a licence must bear a notice making clear they are available for distribution only in the licensing State. As proposed by the delegation of the United States of America (UCC/18), the sub-paragraph was amended to require retention of the copyright notice provided in Article III (1) on any copies of a translation published under a compulsory licence.

76. A special problem, arising from the desire of certain developing countries to supply communities of their nationals living in other countries with translations prepared under *Vter*, was raised by a proposal of the delegation of Brazil (UCC/20). There was general sympathy with the aims behind the proposal, but some delegations felt that the matter did not require a textual amendment since it was acknowledged that the sending of individual copies for personal use could not be regarded as "export". Other delegations preferred to have a new provision on the subject, although it was recognized that neither the original proposal (UCC/20) nor a revision of it (UCC/20 Rev.) contained the restrictions and safeguards necessary for general acceptance.

77. When the matter was put to a vote, the Main Commission decided to include a provision on the subject in Article *Vter*, and a working group was appointed to prepare a text (UCC/26). With minor technical amendments the working group's text was accepted by the Conference, and now appears as sub-paragraph (c) of Article *Vter* (4).

78. Under this provision the ban upon exports is inapplicable to cases where a governmental or public entity of a licensing State send copies of a translation abroad, but only: (1) if the translation is not in English, French, or Spanish; (2) if the recipients are individuals or collective groups who are nationals of the licensing State; (3) if the copies are used exclusively for purposes of teaching, scholarship, or research and are sent or distributed "without the object of commercial purpose"; and (4) if the country to which the copies are addressed has agreed to allow their receipt, distribution, or both, and the Director-General of Unesco has been notified of this agreement.

79. The phrase "without the object of commercial purpose", which was finally adopted in preference to "without the object of financial gain", was understood here, as elsewhere, to exclude private enterprises operated for profit-making purposes from engaging

in the permitted activities, but not to preclude public or governmental organizations from making charges intended to recover their costs. It was also considered that, whether or not the country to which the copies are sent is a party to the UCC, it must agree to allow the copies to be received or distributed, and a notification of its agreement must be sent to the Director-General of Unesco.

80. Paragraph (5), which deals with the amount and payment of compensation under compulsory licences, had appeared in the IGCC text, and was retained without any substantial change. A new provision in Article *Vter*, however, is paragraph (6), derived from a proposal of the delegation of Sweden (UCC/16) which in turn was based upon a corresponding provision in Article *Vquater* (2)(c). In effect, it provides for the termination of a licence under Article *Vter* if an authorized translation of the work "in the same language and with substantially the same content" is published "at a price reasonably related to that normally charged in the country for comparable works".

81. Paragraph (7), maintained verbatim from the IGCC text, deals with works "composed mainly of illustrations". It allows for the translation of the text, along with the reproduction of the illustrations, only under the conditions of Article *Vquater*. This provision was interpreted as applying primarily to art books, and it was agreed that the question of whether a given work was "mainly" composed of illustrations should be left to the competent authority.

82. A proposal of the delegation of Kenya (UCC/13) to add to a new Article *Vquinquies*, granting a limited translation right for purposes of broadcasting, was also the subject of much discussion at the Paris Conference. The proposal, which had no counterpart in the IGCC text, and was not part of any previous "package deal", was based on the assumption that Articles V and *Vter* which deal exclusively with the publication of translations would not permit translations for broadcasting unless a special provision to this effect were added. In support of the proposal it was urged that broadcasting is coming to play a more and more important part in the educational programmes of developing countries suffering from shortages of both books and teachers, and that a translation licence for broadcasting is at least as important to these countries as a licence for purposes of publication.

83. At the outset of the discussions there were expressions of support for, or at least in sympathy with, the aims of the proposal. The delegation of Argentina, however, questioned the advisability of dealing with the proposal during the present Conference. Although it appreciated the importance of broadcasting as an educational medium in developing countries, the Argentine delegation felt that, since the question had not been considered during the preparatory meetings, it required more thorough study at the governmental level before being submitted to a revision conference. A number of questions were raised concerning the proposed text, and a working group was established to consider the question in detail. This group reached a provisional accord on general principles, and the delegations of Kenya and the United States of America were asked to formulate a new text (UCC/27). This text, with relatively minor changes by the Main Commission and the Drafting Committee, was adopted by the Conference and appears in the text as paragraph (8) of Article *Vter*.

84. Under paragraph (8)(a), a licence to translate a work that is protected under the 1971 Convention and has been published in "printed or analogous forms of reproduction", may be granted to a broadcasting organization in a developing country party to the UCC under the following conditions:

- (1) The copy from which the translation is made must have been "made and acquired in accordance with the laws" of the licensing State. As stated in paragraph 34 of the Report of the General Rapporteur of the Paris Conference for Revision of the Berne Convention (B/DC/36), this language was interpreted to mean "that the copy must not be an infringing copy according to the laws of that country".
- (2) The sole purpose of the translation must be for broadcasting, and the sole purpose of the broadcasts using the translation must be either "teaching" or "the dissemination of the results of specialized technical or scientific research to experts in a particular profession". The latter formulation was found acceptable after several delegates had expressed dissatisfaction with a mere reference to "research".
- (3) The translation must in fact be used solely for the types of broadcasting just mentioned, and the broadcasts must go to recipients on the territory of the licensing State. As

long as the broadcasts are intended for reception on the State's territory, the license is not affected if listeners or viewers in other countries also receive them.

- (4) The broadcasts may either be "live", in the sense that they are concurrent with the sounds or visual images involved, or they may be made "through the medium of sound or visual recordings". In the latter case, the recordings must be made lawfully and for the sole purpose mentioned in paragraph (2), above. As long as broadcasting takes place, it makes no difference whether it is radio or television and whether it involves terrestrial or satellite relays. The term "sound or visual recordings" includes all types of aural and visual fixations, including films, phonograms, and audio and video tapes in their various manifestations.
- (5) If sound or visual recordings are used for the broadcasts, they can only be exchanged between broadcasting organizations whose headquarters are all in the licensing State. Under no circumstances could these recordings be sent beyond the frontiers of the country, nor could they be the subject of sales, rentals, or licensing arrangements within the country.
- (6) All of the uses of the translation including the broadcasting itself and any exchange of recordings, must be "without any commercial purpose". The Conference agreed that, in the context of broadcasting, the phrase "without any commercial purpose" means that the broadcasting organization itself is not a private corporation operated for profit-making purposes and that no commercial advertising is included in the programme incorporating the translation. It was not, however, intended to preclude the organization from broadcasting commercial advertising at other times, or to exclude the common situation in which the owners of receiving sets are charged a licence fee.

85. Under sub-paragraph (b) of paragraph (8) a licence may also be granted under all of the same conditions for the translation of any text incorporated in an audio-visual fixation which was itself prepared and published for the sole purpose of being used in connexion with systematic instructional materials. Here the subject matter involved consists exclusively of published teaching materials such as, for example, instructional films and video cassettes, film-

strips, slides, and transparencies, combined with some textual element which may be part of a sound track or of an accompanying recording.

86. A point of paramount importance was emphasized several times during the discussions of paragraph (8): the license granted under it can cover only the act of translation, and nothing more. It cannot convey any rights of adaptation, including adaptation of a non-dramatic work to dramatic form, or use in cinematographic works and it does not authorize or sanction the broadcasting of the translation or the making of "ephemeral" or other recordings. These rights rest on other provisions of the Convention and local law, and nothing in paragraph (8) is intended to impinge upon or supersede copyright protection for these rights. The sole purpose of paragraph (8) is to authorize translation for purposes of broadcasting under certain circumstances.

87. Paragraph (9) is the provision governing the important question of the interrelationship between Articles V and *Vter*. It first provides that, where they are not superseded by the special provisions of Article *Vter*, the provisions of Article V shall be fully applicable to all translations made under compulsory licences. This incorporation by reference means several things:

(1) The work translated under a licence must be a "writing". This term has a limited meaning under Article 1 of the Universal Copyright Convention, although its scope is a matter of some dispute. The interpretation most commonly held is that "writings" do not include "musical, dramatic and cinematographic works, and paintings, engraving and sculpture". Under this interpretation, except for the cases of text incorporated in art books and audio-visual fixations, specially dealt with in paragraphs (7) and (8)(b) of Article *Vter*, the article applies only to non-dramatic text matter. The delegation of Kenya expressed the view, however, that dramatic texts can come within the scope of Articles V and *Vter*. The Conference expressly stipulated that the words, lyrics, or text of musical compositions were not covered by the translation privileges of Article *Vter*.

(2) As amended by the Conference, Article V limits the compulsory licence to translations into "a language in general use" in the State granting the licence.

(3) All of the various conditions and safeguards of authors' rights built into Article V are transferred intact into Article *Vter*.

These include the requirements that the original title and name of the author appear on the copies of the translation published under a licence, that the licence is not transferable, that a correct translation of the work is assured, and that no licence shall be granted when the author has withdrawn all copies of his work from circulation. It also means that, except as provided under paragraph (8), the licence can be issued only for limited purposes: "to translate the work and publish the work so translated". Because of the limited definition given to the word "publication" in Article VI of the Universal Copyright Convention, no licence can be granted under Article *Vter* to distribute the work in the form of sound recordings or in any other form except one "from which it can be read or otherwise visually perceived". Under the terms of Article V, no licence to translate can be granted if an authorized translation in the language in question has been published anywhere during the relevant period of exclusivity, and as long as any previous edition of such a translation is still in print.

(4) It was also considered that, where the copyright owner has made a reasonable offer to license a translation, the prospective licensee's refusal will not entitle him to a compulsory licence.

(5) In this context, the Conference expressly agreed that, where the work for which a translation licence is sought is itself a translation of a copyrighted work, permission must be sought from, and denied by, not only the owner of copyright in the intermediate translation, but also the author of the original work on which it is based. This principle would apply equally to any form of adaptation or derivative work incorporating copyrighted material of diverse ownership.

(6) It was also the sense of the Conference that, where a compulsory licence is granted under either Article *Vter* or Article *Vquater*, the author or other copyright owner should be notified expressly of the conditions of the licence, including the conditions involving payment and transfer of the compensation due him. A similar point of interpretation is stated in paragraph 39 of the Report of the General Rapporteur of the Berne Revision Conference (B/DC/36) as obliging the competent authority, in cases where a translation or reproduction licence is to be granted, to "take reasonable steps to ensure that the owner of the right has an opportunity to be aware of the application and to take such measures as may seem to him appropriate". Conversely, where the copy-

right owner is aware of a compulsory licence, paragraph 32 of the Berne Report suggests that, as a condition for terminating the licence by bringing out an authorized edition, "the licensee should be given reasonable notice by the owner of the right of translation, of the publication of a translation authorized by him".

88. Paragraph (9) also deals with the status of a licence granted under Article *Vter* after seven years from the first publication of a work, when any Contracting State, developed or developing, can obtain a compulsory licence under Article V on more liberal conditions than those laid out in Article *Vter*. As the IGCC text had also provided, the licensee in the developing country is given an option: he may simply allow the *Vter* licence to remain in effect or, if he wishes, he may obtain a new licence under Article V by going through all the procedures provided in that Article.

ARTICLE *Vquater*

89. After crossing the stormy seas of Article *Vter*, the Conference seemed to be entering a calm harbour when it got to Article *Vquater*. For the most part the IGCC text remained intact, and the discussions involved the clarification of details and the need to conform the UCC and Berne texts as much as possible.

90. The provisions of Article *Vquater* as a whole are patterned on those in Article *Vter*, but with a number of differences in both substance and form. The substantive differences stem from the different rights involved: translation and publication of the translation of a work on the one hand, and publication of a reproduction of a particular edition of a work on the other. The formal differences stem largely from the fact that, while Article *Vter* is based on Article V and incorporates a number of its provisions by reference, Article *Vquater* stands entirely on its own.

91. Sub-paragraph (a) of paragraph (1) establishes the basic rule for compulsory licensing under Article *Vquater*. If, after a stated period, copies of a particular edition of a work have not been distributed in a developing country, either to the general public or in connexion with systematic instructional activities, a compulsory licence can be obtained to publish that particular edition in the licensing State. The sub-paragraph adopts a two-way standard as to the price charged for the copies: the copyright owner cannot defeat a licence unless he distributes copies "at a price rea-

sonably related to that normally charged in the State for comparable works", but the copies under a compulsory licence must also be distributed at that or a lower price.

92. A basic condition of the licence is that it be granted solely for publication in connexion with "systematic instructional activities". This term is intended to include not only activities connected with the formal and informal curriculum of an educational institution, but also systematic out-of-school education. Although the possibility of the sale of copies reproduced under a compulsory licence was envisaged, it was also recalled that the competent authority in a developing country to whom a request for a licence has been referred would be under a duty to determine that the licence would fulfil the need of specified "systematic instructional activities". A licence would necessarily be refused if such activities were in fact incidental to the actual purpose of the reproduction.

93. Another important condition of sub-paragraph (a) is implicit in the phrase "particular edition". Where a work has been published in successive editions, the relevant time periods are independent for each edition. Thus, a licence to reproduce the latest edition should be refused even if the applicable time periods for earlier editions have expired. Under paragraph (3) of Article *Vquater*, except for audio-visual fixations the works for which licences can be granted are "limited to works published in printed or analogous forms of reproduction".

94. The initial procedure for obtaining a licence under Article *Vquater* is essentially the same as that provided by Articles V and *Vter*: the prospective licence must have made efforts in good faith to negotiate a licence or to find the owner of the right. The remarks made in this report concerning the corresponding provisions in Article *Vter* are equally applicable in Article *Vquater*.

95. Both the delegations of Japan (UCC/11) and the Federal Republic of Germany (UCC/15) proposed, in conformity with the draft text of the revised Berne Convention, to insert, into the provision allowing a licence to issue if a particular edition has ceased to be available in the licensing State, the condition that the edition in question has been unavailable for at least six months. These proposals were adopted, and the provision is now found in sub-paragraph (b) of Article *Vquater* (1).

96. The applicable periods of exclusivity, during which no licence can be issued under Article *Vquater*, for a particular edition,

begin on the date of first publication of that edition. The compromise formula adopted in the IGCC text, which varies the terms in accordance with the nature of the work, remained unaltered by the Conference and is found in sub-paragraph (c). In general the period is five years, but a three-year period is applicable to "works of the natural and physical sciences, including mathematics, and of technology" and the term is seven years for "works of fiction, poetry, drama and music, and for art books".

97. As already noted, there are differences between the procedure for obtaining compulsory licences under Article V and that under Articles *Vter* and *Vquater*. A proposal by the delegation of Argentina to establish a more detailed and elaborate procedure (UCC/7) was withdrawn when it received no support.

98. All three Articles (V, *Vter* and *Vquater*) require that, in accordance with procedures established by the licensing State, the person seeking a licence must establish one or the other of two facts: either (1) that he had requested a licence and his request has been denied; or (2) that after "due diligence" he had been unable to find the owner of the right involved. Paragraph 37 of the Report of the Berne Revision Conference states in this context: "It was understood that the request for authorization addressed to the owner of the right must indicate that, if such authorization is denied, the denial might serve as the basis for applying a [compulsory] licence".

99. Where the owner of the right is known, Article V merely requires the prospective licensee to send him a request and wait for acceptance or denial. Articles *Vter* and *Vquater* add an additional requirement in this case: at the same time he makes his request he must also inform either the International Copyright Information Centre established at Unesco, or "any national or regional information centre which may have been designated in a notification to that effect deposited with the Director-General [of Unesco] by the government of the State in which the publisher is believed to have his principal place of business".

100. Where the owner cannot be found, Article V requires the sending of a copy of the application for the compulsory licence to the publisher whose name appears in the copies, and, if the nationality of the owner of the translation right is known, another copy must be sent "to the diplomatic or consular representative of the State of which such owner is a national, or to the organiza-

tion which may have been designated by the government of that State". Under Articles *Vter* and *Vquater*, the copies of the application must be sent by registered air-mail; in addition to the copy required to be sent to the publisher, another copy must be sent to the officially-designated national or regional information centre or, if there is none, to the Unesco Centre.

101. Despite the awkward drafting problems presented by revising the 1952 Convention, this procedural thicket will probably prove less formidable in practice than it now seems, though its density is increased in some cases by the slightly different requirements of the Paris Act of the Berne Convention. The apparent complexity of the licensing procedures prompted the delegation of India to put forward a proposal (UCC/37) for a new article stating that, an effort in good faith to comply with the requirements would be considered valid even if there were some deviation from the strict letter of the prescribed procedures. However, the Conference did not accept this proposal, either as an amendment or as an interpretation in the Report. It was pointed out that it is the responsibility of the courts in each country to decide the validity of compulsory licences granted by the authorities in that country, and that an interpretation expressly allowing departures from the requirements of the Convention could produce confusion and unfair results.

102. Sub-paragraph (b) of Article *Vquater* (1) provides, in cases where the period of exclusivity is three years, that no licence shall be issued until six months from the date of the request or application. It was the unanimous view of the Conference that, unlike the six- and nine-month periods provided under Article *Vter* (2), the six-month period in Article *Vquater* (1) (d) can run concurrently with the three-year period of exclusivity. However, to be consistent with Article *Vter* (2)(b), and to take account of situations when the six-month period ends after the end of the three-year period, the Conference adopted a proposal of the Swedish delegation (UCC/17) to require denial of a compulsory licence if an authorized edition is distributed in the State during the six-month period.

103. A special problem arises under Articles *V*, *Vter* and *Vquater* with respect to how soon a compulsory licence can be granted in cases where the owner of the right cannot be found, and it is handled differently in each of the articles. Article *V* pro-

vides that "the licence shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application". However, this additional period is not provided in Article *Vter*, since grace periods of six or nine months are already required to elapse following the dispatch of the copies of the application. On the other hand, since the six-month grace period provided in Article *Vquater* can run concurrently with the basic three-, five-, or seven-year periods of exclusivity, paragraph (1)(d) provides that, where the owner cannot be found, "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".

104. It was considered that, upon the coming into force of the 1971 Convention in a particular developing country, a large body of literature published more than three, five, or seven years earlier would theoretically become available for compulsory licensing. It was pointed out, however, that copyright owners in developed countries would have the time between signature of the Convention and the date of its coming into force — three months after twelve States have ratified or acceded to it — plus the additional three months following the time other States deposit their instruments or ratification of accession and the coming into force of the 1971 Convention in them, to make arrangements for granting voluntary licences. The Conference agreed that no prospective compulsory licensee should be permitted to send the requests or applications leading to a compulsory licence for any work until after the 1971 Convention has come into effect in his State.

105. Sub-paragraph (f) of Article *Vquater* (1) combines several of the safeguard provisions found in Articles V and *Vter* in connexion with translations. The copies of the published reproduction must bear the author's name and the title of the particular edition. The requirement, taken from Article V, that the licence shall not be transferable by the licensee, is included in the provision, as is the extremely important stipulation that "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". This provision will be taken up in the next section of the Report.

106. The delegation of the Argentine Republic proposed to amend sub-paragraph (f) by the addition of a clause stating that "any reproduction of the work shall be faithful to the original".

When attention was called to sub-paragraph (g), providing that "due provision shall be made by domestic legislation to ensure an accurate reproduction of the particular edition in question", the Argentine delegation agreed to withdraw its proposal on condition that it was accepted that the meaning of the two statements is the same. There was no dissent from this interpretation.

107. Sub-paragraph (h) of Article *Vquater* (1) contains an important limitation on the compulsory licensing authority with respect to reproductions of translations. As adopted by the Conference, this provision precludes the granting of a licence for the reproduction and publication of a work that is itself a translation from another language in either of two cases: (1) "where the translation was not published by the owner of the right of translation or with his authorization"; or (2) "where the translation is not in a language in general use in the State with power to grant the licence".

108. Under the first of these conditions, a State would be precluded from granting a licence to reproduce a translation that itself had been made and published under the compulsory licensing provisions of Article V or *Vter*. This was partly the sense of a clarifying amendment offered by the delegation of Japan (UCC/11), which would have provided that "A licence to reproduce and publish a translation of a work may be granted only if it does not prejudice the right of the author in the original work provided for in paragraph (1) of Article V". The Conference accepted the principle that, where a reproduction of a translation is involved, licences must be sought from the owners of copyright in both the original text and the translation, and the Japanese delegation withdrew its amendment upon condition that the principle be expressed in this Report.

109. Paragraph (2) of Article *Vquater* establishes several additional conditions governing the granting of compulsory licences for the publication of reproductions:

- (1) The copies distributed under the licence bear the same types of notices as those required in Article *Vter* (4)(b), and discussed in this Report in that connexion.
- (2) The requirements for ensuring that the copyright owner receives just compensation and for its payment and transmittal, parallel those in Article *Vter* (5).

- (3) As in Article *Vter* (6), a compulsory licence can be cut off if authorized copies of the work are made available in the licensing State under certain conditions. In the context of Article *Vquater* (2) (c), the recapture will operate if there is a distribution to the general public or in connexion with systematic instructional activities, at a normal price, of an authorized edition that "is in the same language and is substantially the same in content as the edition published under the licence".
- (4) Again, as in the last paragraph of Article V, the granting of a licence is precluded if the author chooses to withdraw all copies of the edition from circulation.

110. Finally, after stating the general rule that the works subject to compulsory licensing under Article *Vquater* are "works published in printed or analogous forms of reproduction", sub-paragraph (b) of paragraph (3) provides for the assimilation to these works of "audio-visual fixations including any protected works incorporated therein", but only if the fixations were themselves "prepared and published for the sole purpose of being used in connexion with systematic instructional activities". Under sub-paragraph (b), amended in accordance with a proposal of the delegation of the United Kingdom (UCC/10), an audio-visual fixation prepared solely for use in curricular education could be licensed for reproduction in audio-visual form for the same limited purpose, if the reproduction is done from a fixation that itself had been lawfully made. The sub-paragraph also allows the reproduction-publication licence to cover the "translation of any incorporated text into a language in general use" in the licensing State.

111. The presence of references to licences covering translation of text incorporated in an audio-visual fixation both in Article *Vter* (8) (b) and in Article *Vquater* (3)(b) led to some understandable confusion as to the period of years applicable, and this problem was taken up in a proposal offered by the delegation of Japan (UCC/11). The interpretation of the two provisions that emerged is as follows:

- (1) Under Article *Vter* the licence can cover only translation of text for broadcasting purposes. Typically, it would be employed for the translation of the soundtrack of a teaching film or video-tape that had been lawfully acquired on

the market, and the use of the translation in a new ("dubbed") soundtrack or for visible sub-titles.

- (2) Under Article *Vquater* (3)(b), the licensee would reproduce the entire audio-visual fixation, and as part of the process he could translate the soundtrack and reproduce the translation aurally or visually along with his reproduction of the visual images. The periods applicable in that situation would vary depending upon the nature of the work in accordance with Article *Vquater* (1)(c).

112. In the light of this explanation the Japanese delegation withdrew its proposal. It was also the clear understanding of the Conference that under no circumstances would Article *Vquater* (3) (b) serve as the basis for a compulsory licensee justifying reproduction of commercial films or tapes produced for theatrical or other commercial purposes, nor could it justify the reproduction of a cinematographic work based upon a dramatized work of fiction of belles-lettres, since such works were not prepared and published for the sole purpose of use in systematic education.

113. Because of the assimilative nature of sub-paragraph (b) of Article *Vquater* (3), some of the terminology in the earlier provisions sounds a little old when applied to audio-visual fixations. It was understood that, in the context of audio-visual fixation, the concept of "publication" as defined in Article VI included the availability on the open market of copies of fixations incorporating visual images or a combination of sounds and images, which could be bought, leased, or rented. The term "edition" in connexion with audio-visual fixation is considered to refer to a particular version of the work.

INTERPRETATION OF PROHIBITIONS UPON EXPORT AND EXTRA-TERRITORIAL DISTRIBUTION

114. As indicated above in connexion with both Article *Vter* (4)(a) and Article *Vquater* (1)(f), a Joint Working Group of the Main Committee of the Universal Copyright Convention and the Berne Convention was formed to consider a proposal for amendment of the Berne Convention presented by a group of African countries. After discussion by the Joint Working Group, it was tentatively agreed that an interpretation of the problem should be included in the Reports of the two Conferences, and a small joint working party, consisting of the delegations of the Ivory Coast, the

United Kingdom, the United States America, and Kenya, met to prepare a text (UCC/32 Add. 1). With certain amendments this text was accepted by the Conference, and appears as paragraphs 115 and 116 of this Report.

115. It follows from the provisions of Article *Vter* (4)(a) and of Article *Vquater* (1)(f) prohibiting the export of copies and prescribing that the licence shall be valid only for publication in the territory of the Contracting State where it has been applied for, that these provisions are considered as prohibiting a licensee from having copies reproduced outside the territory of the Contracting State granting the licence. However, it is considered that this prohibition does not apply under the following conditions:

- (a) the Contracting State granting the licence has within its territory, no printing or reproduction facilities, or, such facilities exist but are incapable for economic or practical reasons of reproducing the copies;
- (b) the country where the work of reproduction is done is a member of the Berne Union or a party to the Universal Copyright Convention;
- (c) all copies reproduced are sent to the licensee in one or more bulk shipments for distribution exclusively in the licensee's country and the contract between the licensee and the establishment doing the work of reproduction so requires, and provides further that the establishment guarantees that the work of reproduction is lawful in the country where it is done;
- (d) the licensee does not entrust the work of reproduction to an establishment specially created for the purpose of having copies reproduced of works for which a licence has been granted under Article *Vter* or Article *Vquater*; and
- (e) all copies reproduced bear a notice in accordance with Article *Vter* (4)(b), and Article *Vquater* (2)(a).

It is also understood that the foregoing conditions only apply to works published in printed or analogous forms of reproduction and to the incorporation in audio-visual fixations of translated texts.

It was further understood that this paragraph does not require any country in which the copies are reproduced to permit what would otherwise be an infringement of copyright.

116. It was generally accepted that nothing in Article *Vter* and *Vquater* prohibited a compulsory licensee from employing a translator in another country, or other compulsory licensees, licensed to publish a translation in the same language in other countries, from using the same translation, assuming, of course, that the translation has not already been published. The same interpretation applies with respect to persons entrusted with doing the preparatory editorial work.

ARTICLES VI, VII AND VIII

117. These three articles deal respectively with the meaning of "publication", with the Convention's lack of retroactive effect upon the protection of works already permanently in the public domain of a Contracting State, and with matters of signature, ratification, and accession. They had at no time figured in the preparatory work of the Conference, and were accepted verbatim by the Conference without debate.

ARTICLE IX

118. Article IX of the 1971 Convention looks at first glance like just one more "back-of-the-book" provision, but its importance to the Universal Copyright Convention and its future cannot be overestimated. This is the provision that regulates relations between, on the one hand, States party to the 1952 text who never accede to the 1971 text and, on the other, States who accede only to the 1971 text. Since this is the first revision of the Universal Copyright Convention, the pattern for Article IX being set in the 1971 text seems likely to last as long as there is a UCC.

119. The first two paragraphs of Article IX attracted no discussion, and were adopted by the Conference without change from the IGCC text. Paragraph (1) simply provides that the 1971 Convention will come into effect three months after twelve States have deposited their instruments of ratification, acceptance or accession, and paragraph (2) adds that thereafter the Convention will come into force in a State three months after its instrument has been deposited.

120. Paragraph (3), which was also accepted without debate, does deserve special note. In effect it provides that, if a State is not party to the 1952 Convention and accedes to the 1951 Convention, it automatically becomes a party to the 1952 Convention and that, after the 1971 Convention comes into force, no further acces-

sions to the 1952 Convention alone will be possible. This assures the existence of a common text between any two UCC members, thus providing a legal basis for their mutual copyright obligations, but at the same time allows the 1971 text eventually to supersede the 1952 text as it attracts more and more ratifications and accessions.

121. The problem for developing countries at Paris was, to the fullest extent possible, to gain assurance that developed UCC countries would allow the provisions of Articles *Vbis*, *Vter* and *Vquater* to be applied to their works. The IGCC text sought to provide some assurance by a system under which a developed country party only to the 1952 Convention could make a formal notification that it would not allow the 1971 Convention to be applied to its works; the negative implication would have been that the failure to file the notification meant that the 1971 Convention could be applied.

122. To the expressed regret of several delegates, this scheme did not survive at the Paris Conference. The objections to it were judicial in nature, based on the principle that under no circumstances can a State be bound or be presumed to be bound, by a text it has not accepted.

123. It was apparent at the 1971 Conference that the views on this point were too strong to allow for adoption of the formula of the IGCC text, and an alternative plan was put forward jointly by the delegations of Austria, Denmark, Finland, Japan, Norway, Sweden and Switzerland (UCC/21), and separately by the delegation of France (UCC/23). These two amendments of paragraph (4), though worded differently, would have reached the same result: where State X is party only to the 1952 Convention and State Y is party to both the 1952 and the 1971 Conventions, their relations are governed by the 1952 Convention; but State X may notify the Director-General of Unesco that it will allow State Y to apply the 1971 Convention to its works.

124. What finally emerged as paragraph (4) of Article IX, after a long debate and three votes, was a formula different from either the IGCC text or the scheme of UCC/21 and UCC/23. Under the final text, a State party only to the 1952 Convention may, by notification, declare that it will admit the application of the 1971 Convention to its works "by all States Parties to this Convention". This formula, which was based on a proposal of the delegation

of the Federal Republic of Germany, does not permit a State party only to the 1952 text to select from among the States party to the 1971 Convention those it will allow to apply the new text to its works.

125. The provisions adopted has the following results where State X is party to the 1952 Convention only, and States Y and Z are party to both the 1971 and (automatically, perhaps) the 1952 text:

- (1) The general rule is that, although the relations between States Y and Z are governed by the 1971 text, their separate relations with State X are each governed by the 1952 text.
- (2) If State X chooses to file a notification allowing States Parties to the 1971 text to apply that text to its works, the privileges must extend to both States Y and Z equally and without requiring any acceptance on their part.
- (3) If State X does make the notification and does not ratify the 1971 Convention, it cannot claim any rights under the 1971 Convention with respect to its own works.

126. At the outset of the debates the delegation of Kenya expressed some hope that, under a system of notifications, developed countries would be able to make notifications accepting the application of the less stringent requirements of the 1971 Convention even in advance of the coming into force of the new Convention. However, the idea of advance notifications, as under Article V of the Stockholm Protocol, was dropped and not revised. It is clear from the text of Article IX (4) as adopted that notifications by States party only to the 1952 Convention allowing the application of the 1971 Convention will have effect only after the 1971 Convention has come into force, and then only with respect to countries bound by it.

127. The main issues during the debates was whether State X, the party to the 1952 Convention, could make its notification selective as to the 1971 countries affected by it. The delegation of France took a position in favour of the principle that, under theories of national sovereignty, a State should be left free to name those countries it would allow to apply the terms of a treaty to which it was not a party. The delegation of the United Kingdom did not feel that this was a serious problem; since no developed country now party to the UCC would be required to change its law to ratify

the 1971 Convention, there would be little reason for them to make a notification of acceptance rather than ratifying the entire Convention. The delegation of the Federal Republic of Germany agreed, noting that the only practical question in this context relates to the liberalization of the compulsory licence for translations of Article V of the 1952 Convention by Article *Vter* of the new Convention.

ARTICLE X

128. This article, which requires States Parties to the Convention to implement its provisions under domestic law, was accepted by the Conference with an amendment proposed by the delegation of Austria (UCC/19). Under the 1952 text a State was obliged to be able to give effect to the terms of the Convention at the time its instrument of ratification, acceptance or accession is deposited. Under the amendment an additional period of at least three months is allowed, that is, to the date when the Convention comes into force in the State. It was understood that, in cases where the constitution of a Contracting State provides that treaties are self-executing, no separate legislation would be necessary to implement any provisions of the 1971 Convention that are, by their nature, susceptible of direct application.

ARTICLE XI AND RESOLUTION CONCERNING ARTICLE XI

129. A problem of both practical and theoretical significance is presented by Article XI, which establishes the Intergovernmental Committee of the Universal Copyright Convention, and the resolution concerning it, which delineates the procedures governing the membership and election procedure of the Committee. It was agreed, from the outset, that the Committee should be enlarged from its present 12 members, and although there were differences as to how it should be composed, a total membership of 18 seemed generally acceptable. The real root of the problem involved the fundamental question of whether we will have one Convention, two separate Conventions, or a system involving two Conventions in one. No absolutely clear-cut answer to this question emerged at the Paris Conference, but the debates and their results lend weight to the following conclusions:

- (1) No one can seriously argue that, following the entry into force of the 1971 Convention, there is only one Universal Copyright Convention.

- (2) Conversely, the action of the Conference on Article IX, and particularly on Article XI, precludes the argument that there will be two completely separate, independent, and legally unrelated Conventions.
- (3) The final result, in general terms, is that there will be two Conventions sharing the same name and a number of the same provisions, and with links between them.

This analysis, which seems to reflect the thinking of most delegations, leads to severe practical problems concerning the composition and membership of the Intergovernmental Copyright Committee administering the Convention of 1971. Under the circumstances there seemed no better solution than the proposed draft of Article XI.

130. Paragraph (1) of Article XI prescribes the duties of the Intergovernmental Committee, and, as amended, its terms of reference comprehend "the Universal Copyright Convention", meaning either or both texts. The delegation of Cuba made clear that it would be required to vote against this Article because of its references, in paragraphs (1)(c) and (4), to the Organization of American States which, in the opinion of the Cuban delegate, in addition to other considerations set forth during the plenary session is not an intergovernmental organization that should be placed on the same footing as Unesco, the Berne Union, or the World Intellectual Property Organization. In a later context, Dr. Saba presented the reasons for including the Organization of American States and pointed out that this organization was mentioned in the 1952 text of the UCC.

Paragraph (2) of the IGCC text had provided simply that "the Committee shall consist of the representatives of eighteen Contracting States". A suggestion made during the first discussion of the problem in the Main Commission produced a text referring to "representatives of eighteen States party to this Convention or only to the 1952 Convention", and this was accepted. A later proposal by the delegation of Brazil aimed at eventually restricting membership on the IGCC to States party only to the 1971 Convention was voted upon and narrowly defeated (15 votes for, 77 against, with two abstentions). The same point was also raised in the context of the resolution accompanying Article XI, and will be discussed below. The remainder of Article XI itself was accepted without much further discussion. In connexion with paragraph (3),

the delegation of Japan emphasized the great importance of balancing the Committee geographically and of increasing Asian membership in the Convention.

131. The result appears to be that, after the coming into force of the 1971 Convention, the Intergovernmental Copyright Committee will, in strict legal terms, consist of two committees merged into one. However, the sittings and work will be done together, and the decisions will be taken in the name of the Intergovernmental Copyright Committee as a single body.

132. Turning to the resolution accompanying Article XI, paragraphs (1), (2) and (3) were adopted without extensive debate. It was the understanding of the Conference that the new 18-member Committee would have no legal standing or competence until the 1971 Convention has come into force.

133. A proposal by the delegations of Brazil and Tunisia (UCC/30) would have added a new paragraph (1)*bis*, reading as follows: "Any States that have not ratified this Convention before the second ordinary session following the entry into force of this Convention shall be replaced by States Parties to this Convention designated by the Committee in conformity with the provisions of paragraph (3) of Article XI". This met with opposition from several delegations, including that of the Federal Republic of Germany, which pointed out that the compulsory exclusion of States Parties to the 1952 Convention only, could justify, and might well produce, separate intergovernmental Copyright Committees for each Convention. When the question was put to a vote, the proposal of Brazil and Tunisia was narrowly defeated (14 votes for, 15 against, with five abstentions).

134. With respect to paragraph (4) of the resolution, it was agreed to amend the IGCC text to provide for two Vice-Chairmen and to have staggered terms of office from the outset. A proposal of the delegation of Italy (UCC/22 Corr. 1) would have added, following expression of the wish that Unesco provide the secretariat of the IGCC, the words: "If possible in liaison with the World Intellectual Property Organization". The Italian delegate recalled that Italy had been in the forefront of proposals to provide special copyright provisions in favour of developing countries, and had supported the idea of a link between the two Conventions for this purpose. Recognizing that a formal link was impossible in the present situation, he nevertheless expressed the hope that the excellent

spirit of co-operation and co-ordinated endeavour now existing between Unesco and WIPO would continue and become even stronger.

135. Mr. Claude Lussier, representing the Director-General of Unesco at the Paris Conferences, reviewed the complex historical, legal, and jurisdictional questions raised by the Italian proposal. He recalled the full and productive co-operation between the secretariats in the past and at the present meeting, and he felt that, if this is what the word "liaison" refers to, no amendment of the resolution is necessary. He reiterated the firm determination of Unesco to continue to assume its full responsibilities in the field of copyright. A number of delegations underlined their satisfaction with the present co-operative work of the two secretariats, and expressed the hope that this cooperation would continue and expand in the years to come. Several delegations, notably those of France and Brazil, expressed their opposition to further formal links between the Berne Union and the Universal Copyright Convention. The United Kingdom delegate, while favouring a single secretariat under WIPO auspices as an ultimate goal, recognized that this was not possible at the present time. The delegation of Italy having declared that it would not insist upon maintaining its proposal, the Conference agreed that, in reporting this debate, the Report should clearly reflect its view that the relations between the Unesco and WIPO Secretariats and the collaboration between the Committees of the two Conventions have been excellent in the past, and its hope that this harmonious and close co-operation should continue in the future.

136. At one of the closing plenary sessions, proposals for amendment of the resolution by the delegations of Israel (UCC/36) and the United Kingdom (UCC/38) were considered together, and with certain amendments the Israel proposal was adopted as paragraph 2 of the resolution. It provides that any State that is not party to the 1952 Convention, and that has not acceded to the 1971 Convention before the first ordinary session of the new intergovernmental Committee, would be replaced by another State to be chosen by the other members of the Committee. The Conference then proceeded to elect six additional members of the new Intergovernmental Committee by acclamation: Algeria, Australia, Japan, Mexico, Senegal and Yugoslavia. The delegation of Israel, while expressing no disagreement with this list, hoped that in the future greater attention would be given to the principle of equitable

geographical distribution, as well as stronger representation from countries in an intermediate stage of development. Several other delegations supported this view, and the delegation of Austria stressed that developed countries with small populations should in future be given more adequate representation on the Committee.

ARTICLES XII-XVI

137. Article XII, dealing with the convening of conferences for future revisions of the Universal Copyright Convention, was amended to give the prerogative of convening a revision conference to the intergovernmental Committee, either at its own initiative or at the request of at least ten States party to the 1971 Convention. A new paragraph was added to Article XIII making clear that the action of a Contracting State, in declaring the Convention applicable to a country or territory "for the international relations of which it is responsible", cannot imply "recognition or tacit acceptance" of any political situation by another Contracting State. The IGCC text of Article XIV, and the original text of Article XV, were adopted by the Conference without change. In paragraph (2) of Article XVI, Arabic was added to German, Italian and Portuguese as one of the languages in which an official text of the Convention is to be established.

ARTICLE XVII AND THE APPENDIX DECLARATION

138. Article XVII and its Appendix Declaration constitute the "Berne Safeguard Clause", one of the major compromises of the Geneva Conference establishing the UCC in 1952. The provision as it now exists makes the Berne Convention predominant over the UCC as between two countries, both of which belong to the two Conventions; and, equally important, it would preclude a Berne country from leaving the Berne Union and relying on the Universal Convention for protection of its works in Berne Union-UCC countries. The IGCC text would remove the latter condition with respect to developing countries, leaving them free, without fear of retaliation or loss of protection, to be party to either or both Conventions.

139. An amendment proposed by the delegation of Portugal (UCC/25) would have gone much further. In effect, it would have removed the danger of retaliation for all Berne members, developed, developing, or in an intermediate stage, by attaching no consequences, under the UCC, if any country chose to denounce the

Berne Convention. This proposal attracted a sympathetic response, but it received little support and general opposition. In withdrawing his proposal the delegate of Portugal reiterated his country's opposition to the system of coercion implicit in the "Berne Safeguard Clause", and declared that Portugal would oppose any future efforts to increase the level of protection under Berne unless they were accompanied by the restoration of a climate of free choice, which he considered essential in international copyright matters. Following this debate the Conference adopted Article XVII and the Appendix Declaration as proposed in the IGCC text, subject to minor drafting amendments.

ARTICLES XVIII-XXI

140. The remaining articles were adopted as proposed in the IGCC text, with a few minor technical amendments.

THE PROTOCOLS

141. The delegation of the Federal Republic of Germany proposed (UCC/29) that, to avoid any doubt as to their application, the Conference adopt two new Protocols, corresponding in effect to Protocols 1 and 2 of the 1952 Convention, to the 1971 Convention. Because of the complex network of interrelationships among the 1952 and 1971 texts and Protocols, this proposal required some intricate revisions, but was accepted in substance by the Conference. It was understood that the meaning of the word "refugees" in Protocol 1 is not capable of precise definition, but that the interpretations given to the term in various international instruments, including the Geneva Convention of 28 July 1951, should be taken into account.

A PERSONAL AFTERWORD

142. Before I lay down my pen as your General Rapporteur I am impelled to express my thanks to all those who have assisted in the preparation of the Report. Those of my own delegation who contributed to it, especially my colleague and close friend, Barbara Ringer, know already of my gratitude, but there are others who deserve some special recognition.

143. I feel a great sense of obligation first of all, to the Unesco Secretariat, including Dr. Saba, Mr. Claude Lussier, and Miss Marie-Claude Dock, the General Secretary of the Conference, for their unfailing courtesy, co-operation and assistance. From my

observation of Miss Dock and her dedicated staff over this and countless earlier meetings, I am convinced that they have learned the secret of how to live indefinitely without sleep, and are not revealing it to the delegates for fear the meetings would then go on 24 hours a day rather than merely fifteen. To anyone who has wondered how mountains of documents magically appear daily in three languages during a meeting like this, I suggest that he take a look behind the scenes at the astonishing amounts of time and effort involved.

144. Next, like a few other old copyright campaigners at this Conference, I am aware that Salle X of Unesco House was haunted by the spirits of some of the great men to whom we owe the existence of the Universal Copyright Convention. To a generation completely unfamiliar with their names, I cannot resist citing a few of them here: Marcel Plaisant, Henry Puget, Plinio Bolla, Antonio Pennetta, François Hepp, Sir John Blake, who was Rapporteur-Général at Geneva and whose report puts this to shame, and finally my friend and mentor, Arthur Fisher.

145. I have announced my early retirement as Register of Copyrights of the United States of America, and the success of this Conference is a good deal more than a source of pride to me. Albert Camus said in 1948:

"Let us suppose that certain individuals resolve that they will consistently oppose to power the force of example; to authority, exhortation; to insult, friendly reasoning; to trickery, simple honour. Let us suppose they refuse all the advantages of present-day society and accept only the obligations that bind them to other men. Let us suppose they devote themselves to orienting education, the press, and public opinion toward these principles. They would be preparing the future. Who can fail to see the positively dazzling realism of such behaviour?"

146. When I come to look again at this Report in the years to come, and reread Camus' moving words at its end, I will not think first of the accomplishments of this Conference, great as they are. Before anything else I will remember the men and women whose dazzling realism at these Conferences has indeed prepared the future of international copyright.

ABRAHAM L. KAMINSTEIN

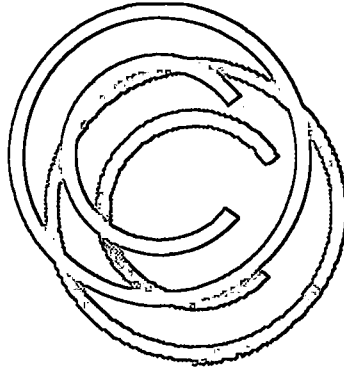
24 July 1971

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19, NO. 4

APRIL, 1972

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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

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ANNOUNCEMENT

UNIVERSAL COPYRIGHT CONVENTION AS REVISED, WITH PROTOCOLS

The President transmitted to the Senate, on March 15, 1972, for its advice and consent to ratification, the Universal Copyright Convention as revised at Paris on July 24, 1971, and the two related Protocols.

The full text of the President's letter of transmittal is set forth below.

THE WHITE HOUSE, *March 15, 1972.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Universal Copyright Convention as revised at Paris on July 24, 1971, together with two related Protocols. I transmit also, for the information of the Senate, the report of the Acting Secretary of State with respect to the Convention.

Essentially, the purpose envisaged in negotiating the Convention was to satisfy the practical needs of developing countries for ready access to educational, scientific, and technical works, without weakening the structure and scope of copyright protection presently offered by developed countries under the two multilateral conventions on copyright.

The 1971 revised Convention represents a fair and effective balance of different interests and will make a significant contribution to the solution of copyright problems. I recommend that the Senate give early and favorable consideration to the Convention and Protocols.

RICHARD NIXON.

In addition to the President's letter, the Report of the Acting Secretary of State to the President dated February 20, 1972, the text of the revised Universal Copyright Convention and of the two related Protocols, and the Report of the General Rapporteur of the Conference for Revision of the Convention held at Paris July 5-24, 1971, appear in a Senate document designated Executive G, 92d Congress, 2d Session.

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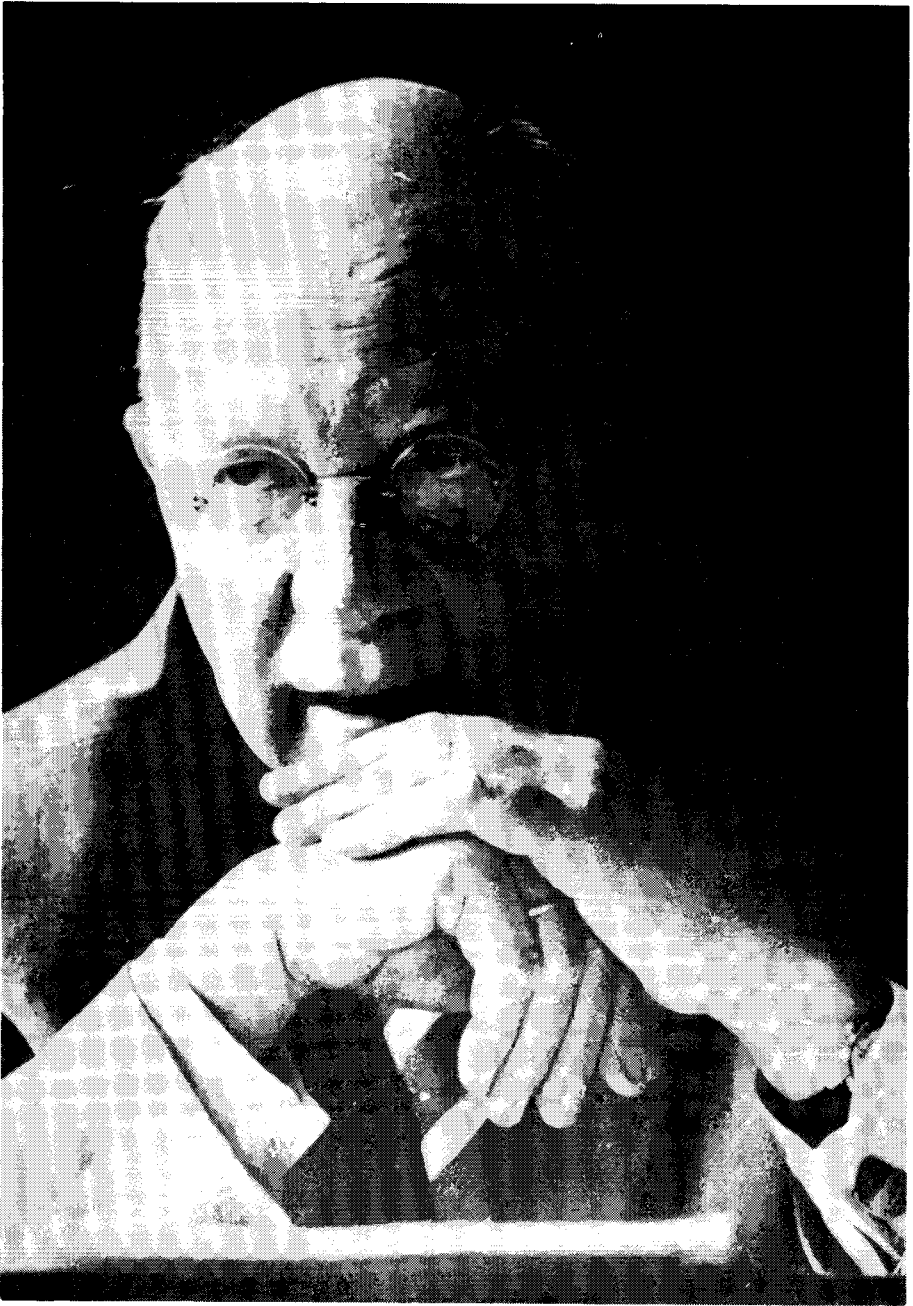
THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011: Leonard Zissu, *President*; Alan Latman and Stanley Rothenberg, *Vice Presidents*; Paul Gitlin, *Treasurer*; Morton D. Goldberg, *Secretary*; Alan Hartnick, *Assistant Treasurer*; Bernard Korman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

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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: 19 BULL. CR. SOC. page no., Item (1972).



PROF. DR. EUGEN ULMER

*Director, Max-Planck-Institut für Ausländisches und
Internationales Patent-, Urheber- und Wettbewerbsrecht,
Munich*

PART I.

ARTICLES

180. INTERNATIONAL COPYRIGHT AFTER THE PARIS REVISIONS — *The Tenth Annual Jean Geiringer Memorial Lecture on International Copyright Law.*

By EUGEN ULMER*

I

The Paris Revisions of the Berne Convention and the Universal Copyright Convention lie behind us. It was during hot July weeks in Paris last year that the conference took place in the UNESCO Building. So far, 30 states have signed the Revised Universal Copyright Convention, and 35 states the Paris Act of the Berne Convention.

My topic today is: international copyright after the Paris Revisions. Let me start, however, by briefly looking back at the Paris conferences. It was the purpose of the revisions to overcome the crisis in international copyright law that had been caused by the Stockholm Protocol for the developing countries. It is beyond question that it is a legitimate interest of the developing countries to have easier access to the literatures of the developed nations for purposes of scholarship, teaching, and research. The limitations on the rights of authors and publishers, however, that were provided for in the Stockholm Protocol, were rather excessive. Therefore, the finding of a reasonable balance was necessary.

In preparation for the revisions, it was a fortunate idea on the part of the American delegation to suggest to the committees of the two Conventions the setting up of an International Joint Study Group. This suggestion was taken up. True, it was not without some apprehension that we set off for Washington in September, 1969. But the result turned out to be better than we had expected. The constructive Washington Recommendation, which contained coordinating proposals for the revision of both the Berne and Universal Copyright Conventions, was agreed upon. Of course, decisive differences in viewpoint were still to be over-

* This lecture was delivered on April 7, 1972, in the Auditorium, Time-Life Building, New York. Prof. Ulmer has represented the Federal Republic of Germany at practically every international meeting dealing with the revisions of the Berne and Universal Conventions; he is a member of both the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and of the Intergovernmental Copyright Committee of the Universal Convention.

come. But more so than in Stockholm, sincere efforts were made by the delegations to reach a mutual agreement.

The basic results of the revisions are well-known. The UCC was extended by securing to authors the fundamental rights of reproduction, public performance and broadcasting as minimum rights. In both Conventions, essentially the same concessions were made to the developing countries. These concessions include limitations upon the rights of translation and reproduction for certain privileged purposes. As compared with the Stockholm provisions, the main difference here is the following: the Stockholm Protocol permitted any encroachment upon the copyright for the purposes of teaching, study, and research. The provisions in question would have made it possible to publish translations and reproductions without contacting the authors and publishers. The only right under the copyright that would have been preserved was the right to remuneration. In contrast to that, the compulsory licenses as provided for in the Revised Conventions do not only require the expiration of certain time limits starting with the first publication of the work, but they also require a request for authorization from the copyright owner and an administrative procedure within the developing country for granting the license and fixing the amount of compensation. Furthermore, the export of copies made under the licenses is prohibited in principle.

All in all, this result is a balance of interests which takes into account the legitimate interests of the developing countries, without imposing a too severe sacrifice upon authors and publishers. To be sure, the need to reach compromises in questions of detail has complicated the regulation to a greater extent than we had originally envisioned. Especially in the developing countries, this may render the understanding of the rules more difficult. We believe, however, that the practical operation should not pose insuperable problems. Particularly, we hope that in the vast majority of cases the mere contacting of the copyright owners will lead to the result that compulsory licenses do not have to be resorted to. Rather, it is hoped that together with the setting up of clearing houses these compulsory license provisions will serve as a driving force inspiring the parties to a liberal licensing practice in which both authors and publishers will make all reasonable efforts to meet the legitimate interests of the developing countries on a voluntary basis.

So far, the Convention texts as drawn up in Paris have not been ratified. However, the United Kingdom, for one, has declared, with regard to the Paris Act of the Berne Convention, that even before ratification it will permit enjoyment of the privileges as laid down in this Act to any developing country that notifies of its intent to apply these rules. Moreover, we hope for a speedy ratification of the Conventions. Delay

could be dangerous. In this context, the major problem will be the ratification by the U.S.A. on the one hand and India on the other. The approval by the Senate of the Revised UCC is, *inter alia*, also a condition precedent to the entry into force of the Paris Act of the Berne Convention and, therefore, for the future of the Berne Union. And the decision facing the New Delhi Parliament is whether India is to pursue her present policy and remain within the multilateral copyright conventions, or whether she will yield to radical pressures and, like the Soviet Union and China, place herself outside the conventions. It is a decision that will not be without influence on the attitude of other developing countries.

II

So much for the Paris Revisions. Turning now to the other world-wide aspects of international copyright law, let us begin with the Berne Convention.

Bénigne Mentha, the distinguished former director of BIRPI, once wrote that through the extension of the Berne Convention by the various revision conferences, a substantive international copyright law had been created, to an extent quite unusual for an intergovernmental agreement. This is doubtless true. The Revision Conferences of Berlin, Rome and Brussels were milestones in the development of international copyright law. Fundamental principles such as the renunciation of formalities, the recognition of the *droit moral*, the extension of the translation right, the minimum protection of fifty years after the author's death, etc., were agreed upon. And above all, technological progress was also taken into account by recognizing the right of broadcasting, the motion picture rights and the right of mechanical reproduction.

The rights under the Convention have been progressively extended, so much so, that we even wonder today whether the aforementioned revisions have not reached a saturation point and whether the future might be more likely to bring about tendencies toward restrictions of copyright in view of the technological developments and the needs of scholarship, teaching, and research. This is true not only for the developing countries. Rather, several member countries of the Berne Union, including particularly Canada and Portugal, claim to hold a kind of intermediary position between developed and developing countries that should be taken into account in future revisions of the Convention.

At times, it has been asserted that even the Stockholm Revision, not only in the Protocol regarding developing countries, but also in the deliberations on the general principles of copyright, was under the influence of such tendencies. In this connection, the motion picture provi-

sions have been referred to; that is, the new Art. 14bis Berne Convention, which contains a presumption to the effect that all rights necessary for the exploitation of the film can be claimed by the producer. Seeing things more realistically, however, this provision has not effected a cut-back. The presumptions do not apply to those countries whose national legislation is based on the film-copyright of the producer. Rather, it applies only to those countries that follow the principle of authorship in the intellectual creators of the motion picture, i.e., particularly the countries of Continental Europe. The legislation of these countries, however, especially the new copyright acts of France, Germany and the Scandinavian Countries, already contain presumptions in favor of the producer that are more far-reaching than the presumptions of Art. 14bis. For in this article, not only the rights of the authors of the pre-existing works, but also the rights of the main authors of the motion picture, particularly of the scenario-writer and the composer, are exempted from the presumptions. Therefore, in practice the presumptions will not result in a deterioration of the authors' rights. They only take careful account of the need to facilitate the exploitation of motion pictures.

Apart from that, the Stockholm Revision, whose results were taken over by the Paris Act, has not only improved the systematic set-up of the Convention. Additionally, it has resulted once more in an extension of the minimum rights. The most important advance achieved in Stockholm was, in my view, the recognition of the right of reproduction. It is true that this right is already recognized in the national laws of the member countries. But what is decisive is the definition of the term "reproduction." This term can be defined in various ways. In the Stockholm Act as well as in the, insofar identical, Paris Act of the Berne Convention, it is to be understood in its broadest sense. Reproduction is the material fixation of the work in any manner or form. From this, it follows that it is immaterial whether the fixation is directly intelligible to the human senses, or whether it is necessary to employ some device in order to make it intelligible. The restriction made in the U.S. following the *Apollo* decision,¹ the scope of which is controversial in certain points, does not apply here. This is, inter alia, of extreme importance in the case of storage and retrieval of copyrighted material by computers. Irrespective of all the other problems that arise in connection with this important innovation, particularly the question as to what facilitations in the access to the protected material should be provided for in view of the interests of the general public, the definition of reproduction is decisive for the question of what is the starting point for the control by the copy-

1. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

right owners. With regard to the member countries of the Berne Union which ratify the Paris Act, it can be stated in principle that the control by the authors and publishers begins at the input stage and not as late as at the output. This is a principle that seems to coincide with the view that is also maintained in the U.S. by the majority of experts.

On the international level, therefore, today as well as in former times, the Berne Convention is called upon to secure a high standard of copyright protection. It is so much the more regrettable that the United States is not a member of the Berne Union. Being a leading power which also in the field of intellectual property has become more and more an exporting country, the U.S. is particularly interested in a high standard of copyright protection. The weight of the Berne Union would be considerably strengthened by a U.S. membership. Looking back upon the Stockholm Protocol, we can say today that the great restrictions upon copyright provided therein would not have come about if the U.S. had been a member country of the Berne Union and if the co-existence of the Berne and the Universal Copyright Conventions had not rendered the defence of the author's rights more difficult.

We are aware of the attempts, dating far back, to win the U.S. over to the Berne Union. Once again in Stockholm, the American delegation indicated the possibility that the U.S. would join the Berne Union after the passing of the Copyright Revision Bill, and we made allowance for this as far as it was possible. But we are aware of the difficulties in the American legislative process. The establishment of a protection period of fifty years after the author's death would certainly mean a decisive rapprochement. What would be left in differences, however, would not only be those as regard formalities and moral rights. Rather, a close look at the American Revision Bill reveals limitations on the rights of public performance and broadcasting that would be inconsistent with the respective provisions of the Berne Convention. However, we must realize that in this vast and powerful country any contemplation of international relations tends to take second place to the necessity of finding a compromise between the authors' and the users' interests, which latter are represented by especially influential groups.

Thus, because of the U.S. in particular, but also because of the other countries which are unable to join the Berne Union, it is to be expected that the Berne and the Universal Copyright Conventions will continue to co-exist for some time to come. The plan for a fusion, for the creation of a common protocol whose acceptance by the contracting states would result in automatic membership of both Conventions, laid before the Joint Study Group in Washington in a comprehensive study by BIRPI,

was an attractive idea, but, unfortunately, it cannot be realized in the present state of affairs.

Our current objective, therefore, as I see it, cannot be fusion. We should, however, intensively pursue the aim of bringing about a rapprochement, a harmonization within certain limits. And indeed, it is already possible to discern important indicators of such an occurrence.

One factor here is the cooperation between the two Committees, the former Permanent Committee that has now become the Executive Committee of the Berne Union, and the Intergovernmental Copyright Committee of the Universal Copyright Convention. The inspiration for this cooperation came from Arthur Fisher, the never-to-be-forgotten former Register of Copyrights of the United States. We had joint meetings in Washington, Geneva and Paris, Munich and London, Madrid and New Delhi. Important results were achieved on these occasions. Inter alia, there was the joint preparation of the Rome Conference on Neighboring Rights, and in the last few years in particular, there has been the taking of common steps for a satisfactory solution of the problems of the developing countries.

The second factor is that the Paris Revision of the two Conventions have led to a further rapprochement. Not only was there a largely joint formulation of the privileges to be accorded to the developing countries. Rather, the basic economic rights of the author, in a like manner as in the Berne Convention, are now also expressly recognized in the Universal Copyright Convention.

There remain differences, of course. They even show up in the exceptions that can be made from these basic rights: the UCC allows a considerably wider latitude here than does the Berne Convention. In addition, they become apparent in the rules on formalities, the term of protection and the moral rights. These are still important differences. But they are not as far-reaching as they used to be.

Further thoughts concerning the world-wide validity of the Conventions relate to the socialist countries of the East.

When we conferred in Stockholm in the summer of 1967 on the Revision of the Berne Convention, we were happy to observe that on the fundamental questions of copyright then, as in the past, there was substantial agreement between the member countries of the West and those of the East, as represented in Stockholm by Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, and Yugoslavia. There are naturally wide differences in matters of economic and sociological impact: in socialist countries, the authors are not faced with private competitive enterprises as their contract-partners, publishers, theater-owners, film producers, record producers, etc.; rather, they have to deal with socialist

organizations which, in law or in fact, have a monopoly in the exploitation of intellectual property. Furthermore, to a large extent, the content of the contracts is determined by model contracts or guidelines, and in most cases there are also binding royalty rates.

However, these are differences which lie essentially outside the scope of the Convention rules. The Conventions guarantee the rights of the authors, and their protection and support continues to be a common concern in the East as well as in the West. Questions were raised in Stockholm, in particular the question of the introduction of a perpetual *droit moral*, where the Eastern member countries were inclined to go further than the majority of the other countries. And there were other problems, especially that of determining the term of copyright, where certain member countries of the East desired a shortening of the fifty-year period. Along the major lines, however, no substantial differences have emerged.

Outside of the multilateral conventions stands the Soviet Union. The differences between Soviet copyright law and the regime of both the Berne Convention and the UCC are considerable ones. For instance, we find a severe restriction of the right of translation, due to the multiplicity of languages in that country and the cultural policy of facilitating the dissemination of works throughout the USSR by means of translations. Apart from that, the *droit moral* is guaranteed to a large extent. The exploitation rights of the authors, however, are considerably restricted by the privileges accorded to the mass media: not only lectures and speeches, but also all published works of literature, science and art may be reproduced in the press, films, radio or television without the author's permission and without payment of a remuneration. Furthermore, the period of protection is limited to fifteen years, counting from the beginning of the year in which the author died, and thus, under our way of calculating, constitutes a protection term of only fourteen years. Finally, the heirs may not receive a sum in excess of fifty percent of the fees that would have been due to the author during his lifetime.

These are differences which, at least for the foreseeable future, seem to stand in the way of the Soviet Union's joining the Berne or Universal Copyright Conventions. The road that can be taken will probably have to run via bilateral agreements. Of particular interest, therefore, is the bilateral treaty that the Soviet Union concluded with Hungary in 1967. It is a most cautious treaty. Similar to the Berne and the Universal Copyright Conventions, it is based upon the principle of national treatment. The aim of guaranteeing a certain degree of material reciprocity, however, is not implemented by providing for minimum rights, but by applying the principle that neither country is obliged to grant a higher

protection than the other; the lower standard of protection is decisive. Nevertheless, the treaty and its practical application in the relations between the two countries have to a certain extent reinforced the protection of the right of translation. This is welcome progress. The fact that this treaty with Hungary, concluded originally for the term of three years, has been extended for another seven years can also be seen as an encouraging sign of the Soviet Union's willingness to conclude further bilateral treaties. A first example of this is a similar treaty concluded with Bulgaria that has come into effect at the beginning of this year.

III

With this, we come to an end of our review of countries throughout the world, and we will now enter upon a consideration of some substantive issues. What subjects are up for discussion in the organizations that administer international copyright? What perspectives can we discern for the future of copyright law?

As far as the two world-wide Conventions are concerned, it seems desirable that after ratification of the Paris results there will be an extended period of stabilization, giving the new rules a chance to prove their effectiveness. Revisions of the main Conventions should only take place at longer intervals. Therefore, only special problems are up for discussion now in the competent bodies of the two Conventions, problems for which recommendations are to be made or special agreements concluded.

Recommendations are intended in the case of photocopies, a highly important problem these days that has been put on the agenda of the Committees of the two Conventions. It is true, recommendations have already been made by a Committee of Experts which convened in Paris in 1968 following an invitation from UNESCO and BIRPI.

But these recommendations are limited basically to the making of photocopies by libraries and scientific institutes. They need revision and supplementation. Particularly, the commercial and industrial area will have to be considered, those numerous cases in which photocopies are made by business enterprises for the use of their staffs. It is especially here that we witness the development that companies which formerly subscribed to a large number of copies of a certain journal have switched to subscribing to just one single copy and filling the needs of their staffs by the making of photocopies. This can threaten the existence of the journals and requires compensation for authors and publishers. It will not be possible, of course, to stop the making of such photocopies. Rather, one will have to come up with a compulsory license which under

all circumstances will guarantee the payment of a remuneration. In Germany, we have gained some experience with this. There, the Copyright Act permits the making of single copies of small portions from published works or articles in newspapers and journals, provided, however, that a remuneration is to be paid where the reproduction takes place for commercial purposes. The remuneration is claimed by a collecting society, the Inkassostelle für urheberrechtliche Vervielfältigungsgebühren, and the proceeds are divided between publishers and authors.

As far as special agreements are concerned, the first one has already been signed. It is the Convention for the Protection of Producers of Phonograms Against Unauthorized Publication of Their Phonograms, signed in Geneva in October 1971. The Convention is directed against record piracy, which has spread in an alarming way during the last couple of years. We are dealing here not only with piracy in some countries in the Middle and Far East. Rather, it is also known that within the United States the losses through piracy that are suffered by the record industry, by authors, and by performing artists are estimated to be about a hundred million dollars per year. In the U.S., an effective protection against the unauthorized reproduction has been set up now by the law of October 15, 1971. The same purpose underlies the international convention that was signed shortly afterwards. However, in order to enable as many states as possible to accede to the convention, the means of protection had to be left open to various choices. No doubt, the most effective protection is the one under a copyright or a neighboring right. But it is also possible to accord protection under the law relating to unfair competition—a concession to the French legal point of view—or by means of penal sanctions—a concession to Japan. With regard to the law relating to unfair competition, it is known in this country in view of the experience under *Sears* and *Compco*,² it is an open question whether the courts will grant effective protection in general and not in special cases only, such as where a confusing similarity is caused. Only where an effective protection is guaranteed in general, will those countries that apply the law relating to unfair competition be able to meet the obligations under the Convention.

In this connection, it is particularly noteworthy that now for the first time in the U.S. a right has been recognized that we on the European Continent count among the neighboring rights. True, in the British law as well as now in the American law, the term "copyright" is used rather than "neighboring right." But the different terminology

2. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225; *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

makes no difference in substance. As can be seen from the provision in the American law governing the exclusion of protection in cases of an independent fixation of similar sounds, the copyright of the producer of phonograms differs from the author's copyright in the same way that our neighboring right differs from our copyright. Besides, we look with great interest upon the efforts that are made in the U.S. to provide for protection of performing artists. There seems to be an opening here for the possibility of a rapprochement towards the Rome Convention on neighboring rights, in whose setting up Mr. Kaminstein, as Head of the American Delegation and as Rapporteur Général of the Rome Conference, so successfully collaborated.

So much for records. Another special agreement is presently being worked on. It concerns television transmission via space satellite. A year ago, a distinguished expert on international copyright law, my friend and colleague William Wallace, gave a report on this subject in his Jean Geiringer Memorial Lecture.³ Therefore, I can be very brief. After his lecture was given, a committee of experts met in Lausanne, Switzerland, in April 1971, and emerged with a Draft Convention to Prohibit the Unauthorized Distribution of Program-Carrying Signals Communicated by Satellites. A further discussion of the Draft by a committee of experts will take place in Paris this May. The purpose is clear: the distribution of the signals without the authority of the originating organization shall be prohibited. It is prohibition against piracy similar to the case of records. But some details are causing problems here. The most difficult question is as to the way in which not only protection of the broadcasting organizations can be guaranteed, but also how protection of the authors can be incorporated into the agreement. It is with good cause that the authors demand protection against distribution in those countries that do not accord copyright protection. If the originating organizations are protected against the unauthorized distribution, then they in turn should be responsible to the authors in one way or another. In order to bring this about, several alternatives have been contemplated. It is being considered, *inter alia*, that the authors have the right to authorize the transmission made by the originating organization or that they can claim a reasonable remuneration from this organization if it permits the distribution in countries that do not accord copyright protection. With regard to copyright law, a basic question is involved here: should the authors—according to the traditional, but today disputed, interpretation of the provisions of the Berne Convention

3. Delivered on March 19, 1971, in New York. See 18 BULL. CR. SOC., no. 4, 293-303 (1971).

about broadcasting — be able only to control the direct communication to the public? That is to say, in the case of the transmission via satellite under the present technical conditions: should they be only able to control the transmission by the earth stations which convert the signals received via satellite into signals destined for conventional receivers? Or should they have control of the transmission of the signals towards the satellites? In my opinion, the latter view must eventually prevail. It must be avoided of course, that remuneration can be claimed twice for one and the same use.

IV

What we have just considered were problems that require regulation in special agreements. In the final portion of my lecture, however, let me now raise the basic question as to what perspectives can be foreseen for the overall development of copyright law. Is there a weakening, or is there in turn a strengthening of copyright protection to be expected?

In an interesting speech she delivered in the course of a WIPO meeting in Montreux, Switzerland, last summer, Barbara Ringer pointed out: "We seem sure to be faced with increasing demands for compulsory licenses." With that remark, she was not only referring to the needs of developing countries in areas of scholarship, teaching and research. Rather, she also pointed to the U.S. Revision Bill⁴ and the proposals contained therein "to add to the traditional statutory royalty for musical recordings, compulsory licenses for juke box performance, cable television transmission, and broadcasts of sound recordings." Moreover, as she went on to say, "suggestions have been advanced for compulsory or statutory licensing with respect to educational broadcasting, input of text into computer systems, the use of photocopying machines," etc. In addition, there is "the increasing use and expansion of administrative bodies aimed at facilitating the widespread dissemination of copyrighted works, and the activities of performing right tribunals and copyright appeal boards."

Besides this trend toward a limitation of the rights by compulsory licenses and a control of their exercise, we find, on the other hand, particularly in Europe, important efforts for a strengthening of copyright protection. The leading factor is a social motivation, the desire to increase the writers' and artists' share in the gross national product, and we observe here an influx of labour law ideas and principles into the copyright law. Let me explain this by referring primarily to the devel-

4. The copyright revision bill, S. 543, 91st Cong., 1st Sess. (1969).

opment in Germany. The new German Copyright Act of 1965 brought about a strengthening of the authors' rights. For instance, the duration of copyright was extended from fifty to seventy years after the author's death (recently the same prolongation was also taken by Israel). The trend toward a strengthening of copyright protection has even increased since the enactment of the aforementioned statute. The statute still contained the traditional provision that portions of works, as well as works of small extent, could be incorporated into collections that were intended for religious, school and instructional use — i.e., primarily into school books for pupils — without granting the author a right to remuneration. The Bundesverfassungsgericht, our Constitutional Court, declared this provision unconstitutional because it runs counter to the basic guarantee of property as laid down in the Constitution. Under the Court's holding, the statutory permission of reproduction in such collections could not be objected to. In any event, however, the author must be paid a reasonable remuneration. Where editors, publishers and printers make money from the collection, the Court concluded, the authors cannot be expected to make available their works free of charge. Therefore, a compulsory license will take the place of the former provision.

Beyond this, there are plans for a revision of the Copyright Act. Following a demand by the writers, an extension of the public lending right is intended. In contrast to the present situation, the authors shall have a right to remuneration not only against commercial libraries lending out the copies, but also against non-profit libraries, state libraries, university libraries, etc., that are much more important in practice. The claims for remuneration shall be made by a collecting society. However, this society is expected to pay only a part of the proceeds to the individual authors and to put at least fifty percent into a social fund out of which payment for sickness and old age benefits will be made. The idea of creating such social funds for authors as an equivalent for the lending through libraries is not altogether new. It was first realized in the Scandinavian countries. Today, the introduction of a public lending right is also being considered in the United Kingdom, in the Netherlands and in Austria. What is new in the German proposal, however, is the legal construction that the *claims* are derived from the copyright but that the *proceeds* are collectivized to a substantial degree. On the same level is the intended extension of the *droit de suite* in Germany. Our present statute already contains a *droit de suite* provision. However, it limits the artists' claim to a participation in the proceeds from a sale of the originals of their works to a share of one percent. Now it is proposed that this share be increased to five percent and the exercise of the claims be guaranteed by obligating art dealers and auctioneers to supply infor-

mation about their sales. Here, too, the idea of a collective solution is evident: the artists' rights shall be exercised by a collecting society, and this society is expected to pay only part of the proceeds to the artists whose originals are sold, whereas the rest shall be put into a social fund.

The two trends that I have reported in brief outline point in different directions. However, they need not necessarily exclude each other, and at closer examination they have the feature in common that they both contain a social approach and a collective element. The trend toward limiting the scope of copyright through compulsory licenses is due to technological development, the increasing need for access to information and the demands of scholarship, teaching and research. Although the compulsory licenses as such need not impair the authors' financial interests, nevertheless, caution is advised in this regard. With good reason, this was pointed out by Barbara Ringer in her speech. In view of the danger that the author may find himself engulfed in compulsory licensing systems, societies, tribunals, etc., it is necessary, she said, to enact or strengthen provisions protecting the moral and pecuniary rights of the authors. This is certainly true in particular also with regard to the moral rights. In addition, I would like to add: compulsory licenses make it necessary that the remuneration due for the use of a work is fixed either by statute, or, where the statute speaks only of a reasonable remuneration, that in case of dispute it is fixed by a tribunal. Strictly speaking, this is inconsistent with the system of a free market economy, in which the prices are governed by the free play of supply and demand. Therefore, contractual arrangements should continue to be the normal case. Compulsory licenses should only be provided for in exceptional cases, where the fixing of the remuneration could be determined by the prices that are normally agreed upon in license contracts. I do not believe, therefore, that the time has come to contemplate the introduction of compulsory licenses also in cases of storage and retrieval of protected works by computers. There is certainly a need for the facilitation of the access to protected material. But a system of clearing houses would be more preferable. In any event, one should await the results that are reached by way of contractual agreements. The greater the willingness of authors and publishers to grant licenses, the greater the possibility of avoiding a system of compulsory licenses.

Speaking on the other hand of the tendency toward a strengthening of copyright protection, it would seem a legitimate end to secure to the authors that share in the gross national product that corresponds to their creative activity. It seems natural that here, too, as in labor law, a collective element is gaining ground. This element already may be

seen in the common administration of performance and mechanical reproduction rights through collecting societies. Also, there seems to be a likelihood of the establishment of collective royalty agreements, for instance on royalties that are paid by the broadcasting organizations to their staff members and free-lance collaborators. However, there should also be limits here: The idea of deriving rights from the authors' copyright, while at the same time putting a substantial part of the proceeds from these rights into social funds, constitutes a first attempt at establishing a sort of social security for authors. I am convinced, however, that in the long run the two legal aspects will have to be separated. The very nature and essence of copyright is to secure to the individual author the fruits of his labour. If, beyond that, one wants to establish funds for the authors as a group, then this should be carried out by way of social, and not by way of copyright legislation.

In summary, one must conclude that the task of finding a just balance between the interests of the authors and the interests of the various groups of users and the general public will render copyright legislation more difficult in the future. The U.S. Revision Bill and the compromises contained in it for the purpose of working out a balance of interests demonstrate this with particular clarity. The principles of copyright, however, must be preserved, particularly the purpose which, together with the social impact, is described in a classical manner in the American Constitution: "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."

181. VESTING DATE OF THE RENEWAL COPYRIGHT INTEREST.

By DOROTHY M. SCHRADER*

I. *Introduction*

Duration of copyright in the United States is computed from publication of the work or, in the case of certain unpublished works, registration of the claim to copyright. The basic term is twenty-eight years from publication (or registration in the case of unpublished works) with the possibility of "renewal" of the copyright for a second term of twenty-eight years on the part of designated statutory classes, upon timely filing of an application with the Copyright Office during the twenty-eighth year of the first term.¹

In the absence of a contrary agreement, the renewal term redounds to the benefit of the author of a personal work, or to designated successor classes if the author is dead. The right of the proprietor of the first term is terminated at the expiration of that term, and the copyright

* Dorothy M. Schrader is Assistant Chief of the Examining Division of the Copyright Office.

1. Section 24, the duration and renewal provision reads, in pertinent part, as follows:

DURATION: RENEWAL AND EXTENSION. — The copyright secured by this title shall endure for twenty-eight years from the date of first publication. . . . [the first proviso entitles the proprietor to renew in four special cases; the second proviso applies in the case of "personal" works; both provisos establish the same renewal mechanism — the difference lies in the appropriate claimants].

And provided further, That in the case of any other copyrighted work [than that covered by the first proviso] . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin, shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. 17 U.S.C. Sec. 24 (1964).

Unless stated otherwise, future references to a section of a statute will refer to Title 17, The Copyright Code, 17 U.S.C. Sec. 1-215 (1964).

reverts to the author, if living, or to designated successor classes. The author may convey his interest in the renewal term even prior to the twenty-eighth year of the first term,² but the contract binds only the author, unless the successor classes join in the contract. Therefore, the death of the author before the 28th year of the original term defeats the rights of his assignees.

This renewal-reversionary system of duration is unique. It exists only under United States law.³ Other countries generally base the term of copyright on the life of the author plus a fixed term of years. Life plus fifty years is common. Under this system there is a single, continuous term of copyright.⁴

Since only 15 per cent of all copyrights are renewed for the second term,⁵ the renewal system of the United States has the advantage of opening up the public domain for the large body of works 28 years after first publication. The copyright notice assists in informing the public when a work enters the public domain because the year date of publication is required for most works.⁶

The renewal system has the disadvantages that accrue to formalities: unless the proper claimant acts timely, the work will be thrown ir-

2. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

3. The Philippines has a renewal system that is based on that of the United States, but it differs significantly in that it lacks the reversionary feature. B. Ringer, Study No. 31, "Renewal of Copyright," in *Copyright Law Revision Studies*, Committee Print (1961) at 204-05.

4. The copyright revision bill now pending in Congress would establish a life-plus-fifty system with a reversion feature that would permit termination of copyright transfers and licenses after a 35-year period. S. 644, 92nd Cong., 1st Sess. (1971). Since terminations of a grant may be effected within a five-year period and new grants would not necessarily be made immediately, the seeds of a new "vesting issue" existed. However, Section 203 (termination of transfers and licenses) and Section 304 (duration of subsisting copyrights) explicitly provide that future rights that revert upon termination of a grant become vested on the date the notice of termination has been served. H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) at 94. For a review of the duration and reversion provisions of the pending revision bill, see the same House Report at 90-95 and 100-110. This Report accompanied H.R. 2512, 90th Cong., 1st Sess. (1967), which contains provisions similar to the pending bill, S. 644.

Even if the revision bill is enacted, the vesting problem of the present law will continue for nearly 28 years since subsisting copyrights will be subject to the present renewal system.

5. H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967) at 103.

6. Sec. 19, 17 U.S.C. An optional form of notice for Classes F-K (maps, works of art, technical drawing, photographs, and prints) dispenses with the year date.

revocably into the public domain.⁷ It is essential that the proper statutory claimant file his application for renewal with the Copyright Office during the twenty-eighth year of the first term. If the application is late by even one day or is filed in the name of the wrong claimant, copyright protection ceases upon expiration of the first term.⁸ Inevitably some copyrights are lost through inadvertence, and the sacrifice this demands of authors is considered to outweigh the advantages of a renewal system, particularly in view of the complexity and ambiguity of the present statutory provisions for renewal.⁹ For these reasons, proposals for revision of our copyright law for the last 50 years have almost without exception recommended the life plus "X years" system.

One of the most important facets of our renewal system has received only slight scholarly attention and has been adverted to in only a few judicial decisions. This is the date on which the renewal interest becomes fixed.

It is now settled that an author may convey his renewal interest in futuro at any time during the first term of copyright.¹⁰ The conveyance must clearly include the renewal term, but if it does, the contract binds the author *provided* that he is living when the renewal interest vests. On the other hand, if the author is dead when the renewal interest vests, the next statutory class having living members becomes entitled to the renewal interest and the rights of the author's assignees are defeated.

But does the renewal interest vest on the first day of the twenty-eighth year, which is the first time that a valid application to claim the renewal term can be filed? Does it vest on the day that a valid application to claim the renewal term has in fact been filed? Or, does it vest only on the first day of the twenty-ninth year, the day the second, or renewal term of copyright begins?

The purpose of this article is to examine each of these possibilities and to ascertain which one probably represents the correct solution. The vesting date of the renewal interest can be very important because a variety of events may occur — death, marriage, divorce, birth of children, execution of a will, revocation of a will — that affect the proper statutory claimants. These events may occur after one, but not the three possible vesting dates, has passed.

7. *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 912 (2d Cir. 1921).

8. S. Ladas, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* (1938) at 773; A. Weil, *AMERICAN COPYRIGHT LAW* (1917) at 370; *HOWELL'S COPYRIGHT LAW* (4th ed. Latman 1962) at 115; Bricker, "Renewal and Extension of Copyright," 29 *So. CALIF. L. REV.* 23, 26 (1955).

9. *Supra*, note 5 at 100-103.

10. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

A claim to the renewal term in a work by John Steinbeck was filed in his name on the very day that he died. Edna Ferber died during the twenty-eighth year of the copyright in "Saratoga Trunk" and after the renewal had been duly registered in her name. Did the deaths of Steinbeck and Ferber invalidate the renewal registrations that had been made? Or were the renewal interests vested on the date of registration so that the rights of any succeeding statutory class were cut off and rights of the authors' assignees validated?¹¹

This article takes the position that the renewal interest vests upon timely application to the Copyright Office by the proper statutory claimant. The subsequent death of that claimant does not affect the renewal interest. The succeeding statutory classes are cut off by the valid renewal registration, and the rights of any assignees are fixed on the date of registration.

Some definitions are essential. The terminology of renewal cases tends to be somewhat loose, and the semantic problem exists even on the level of Supreme Court decisions. For the purposes of this article, "right of renewal" means the possibility of submitting an application to claim renewal, which arises only during the twenty-eighth year of the first term; "renewal period" means the twenty-eighth year itself; "renewal term" means the second twenty-eight year term of copyright; "renewal expectancy" means the executory interest of a prospective renewal claimant; and "renewal interest" (or "renewal rights") means the property right created by Section 24 of the copyright statute.

II. *History of the Renewal Provision*

The very first copyright statute, the English Statute of Anne,¹² contained a renewal provision. Copyright was granted for 14 years with the possibility of renewal on behalf of the author for another 14-year term. The statute was clear that the author had to survive the entire first term in order to obtain the renewal for himself and his heirs.¹³ If the author

11. It is also possible that authors of the stature of Steinbeck and Ferber were able to retain the original copyright in their own possession as well as the renewal interest. In this case, if the renewal interest vests before the renewal term commences and the author has also died, the renewal interest naturally goes to the author's estate.

12. 8 Anne, c. 19 (1710).

13. The Statute of Anne reads in pertinent part:

Sec. XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

died before expiration of the first term, the copyright terminated with the expiration of the first term. There were no other possible takers of the renewal term but the author.

Although the statute made no reference to assignees, the English courts interpreted the Statute of Anne to permit assignment of the original term and the renewal term. The assignee received the benefit of the renewal only if the author survived until the expiration of the first term.¹⁴

It is clear that the first copyright statute of the United States¹⁵ carried out the same policy as the Statute of Anne in the two respects mentioned: the renewal reverted to the author and his heirs only if the author survived the first term of copyright;¹⁶ the author could assign his renewal expectancy, and the rights of the assignees depended upon survival of the author until the expiration of the first term. This latter construction was not dependent on case law; assigns were specifically mentioned in the Act of 1790, along with executors and administrators. Clearly, the rights of assigns, executors, and administrators were dependent on survivorship of the author. They did not take the renewal independent of the author.

The Act of 1831¹⁷ worked several changes in the renewal system, but the exact scope of the changes is not clear. The proper construction of this Act should not control the present law, but it is not without significance.

The Act extended the length of the first term of copyright to 28 years "with a right of renewal for fourteen more, if, at the end of the first period, the author be living, or shall leave a family."¹⁸ The statute for the first time conferred a right upon the "widow, or child, or children"

14. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 648 (1943).

15. Act of May 31, 1790, ch. 15, 1 Stat. 124.

16. Sec. 1, Act of 1790 reads in pertinent part as follows:

And if, at the expiration of the said term, the author or authors, or any of them, be living, . . . the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years: *Provided*, he or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

17. Act of February 3, 1831, ch. 16, 4 Stat. 436.

18. H. Rept. (by Mr. Ellsworth), Committee on the Judiciary, 7 Register of Debates, pages 119-120 of the Appendix (1830) at 120.

of a deceased author to secure the renewal *independent* of the author.^{18a} For the first time, the renewal system established a successor class that might obtain the renewal. The Act of 1831, as had the Act of 1790, conditioned the renewal upon compliance with formalities within six months of the expiration of the first term.

The statutory language implied that the renewal claimant (either the author or his widow, child, or children) had to survive until the expiration of the first term in order to validate the rights of any assignees. Assigns, executors, and administrators were dropped from the statute because of the inclusion of the widow, child, or children. Despite the deletion of assigns, the Act of 1831 was construed to permit assignment of the renewal expectancy.¹⁹ The assumption has been made that the Act of 1831 also continued the requirement of survivorship of the first term in order to validate the interest of assignees.²⁰

This assumption should not go unchallenged. The inclusion of a statutory successor class (widow, child, or children) coupled with the requirement of complying with formalities *before* the expiration of the original term raises the possibility that if the issue had been litigated, the statute would have been interpreted to require survival of the proper renewal claimant only until the requisite formalities had been completed and not until the end of the first term. The statute did say that the

18a. The renewal provision appeared as Section 2 and Section 3 of the Act of 1831. The text read in pertinent part as follows:

Section 2. That if, at the expiration of the aforesaid term of years, such author . . . be still living . . . or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, . . . or, if dead, then to such widow and child, or children, for the further term of fourteen years: *Provided*, That the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights, be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.

Section 3. *And be it further enacted*, That in all cases of renewal of copyright under this act, such author or proprietor shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

19. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 651-52 (1943).

20. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 651 (1943); Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909," 44 Col. L. Rev. 712, 733 (1943); M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 482.

renewal would be granted "if, at the expiration of the aforesaid term of years" the author "be still living." But the intention of Congress, as evidenced by the Ellsworth Report,²¹ was that the author or his family should receive the renewal term. It is submitted that this intention was not fully carried out by inclusion of the family in the statute unless the author or the family could acquire a vested renewal interest during the original term.

Assume a requirement of survivorship into the second term: if the author survived the original term, he received the renewal term and could provide for his family. But if the author died, he might die close to the expiration of the first term before the family could comply with the formalities that were essential to acquisition of the renewal term.²² The family would then be deprived of the benefit of the renewal even though it was the clear intention of Congress to provide for the family, in the event of the author's death.

In any event, the next general revision²³ altered the language of the renewal provision. The phrase "at the expiration of the aforesaid term of years" was dropped.^{23a} Arguably, the deletion of this phrase was a deliberate act by Congress to remove any question about the significance

21. *Supra*, note 18.

22. The title of the work had to be recorded a second time by the clerk of the District Court in the district where the author or proprietor resided, and "all such other regulations as are herein required in regard to original copyrights" had to be complied with. The formalities pertaining to original copyrights were for deposit of a printed copy of the title, before publication, recordation by the clerk of the district court, deposit of a copy of the work with the clerk within three months of publication, and insertion of a statement referring to recordation of the claim on the title page or page immediately following (or for maps, charts, and music, on the title or frontispiece) of every published copy.

23. Act of July 8, 1870, ch. 230, 16 Stat. 212.

23a. The renewal provision of the Act of 1870 read in pertinent part as follows:

Sec. 87. *And be it further enacted*, That the author, . . . if he be still living, . . . or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.

of survivorship after the statutory formalities have been complied with.²⁴ Unfortunately, no committee report was printed, and the debate in Congress²⁵ did not include any discussion of the renewal provision, let alone discussion of the reason for deletion of the reference to survivorship to the expiration of the original term. Since the Act of 1870 was a general revision, it may be contended that the drafters recognized the inconsistency of an apparent requirement of survivorship when coupled with a requirement of fulfilling statutory formalities before the expiration of the original term. Recognizing the inconsistency, the drafters may have decided to remove even the implied "requirement" of survivorship and clearly to permit the renewal interest to vest upon compliance with the requisite formalities.

An express requirement of survivorship has never been reinstated in the statutory language, and the present statute^{25a} is silent on the point. The statute is clear, however, that the act of registration within the 28th year of the original term secures the renewal term of copyright.

III. *The Renewal Provision in Court*

A brief analysis will be made of the cases that have discussed the vesting date of the renewal interest, and an attempt will be made to position each case in one of three categories,²⁶ in accordance with whichever theory of vesting the opinion supports. I will begin with a 1960 Supreme Court case and the cases decided subsequently.

1) The *Miller* case (1960).²⁷ This Supreme Court decision is the key to the vesting date puzzle. Mr. Justice Douglas stated that "[a]n assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period."²⁸ One interpretation is that the

24. At least one commentator has concluded that the altered language clearly dropped the requirement of survivorship and that the present law is the same; survival of the applicant after renewal registration is not required. Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909," 44 *COL. L. REV.* 712, 733 (1943).

25. The Congressional Globe containing the Debates and Proceedings of the 41st Cong., 2d Sess., Vol. 92 at 2679-2683, Vol. 93 at 2854-2858 and 2872-2880; Vol. 95 at 4819-4827 (1870).

25a. Act of March 4, 1909, ch. 320, 35 Stat. 1075.

26. Either the first day of the 28th year, the date of registration, or the first day of the 29th year.

27. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

28. 362 U.S. at 375.

phrase "renewal period" means the 28th year of the first term.²⁹ If this is correct, *Miller* supports vesting on the first day of the 28th year. No analysis was made by the Court of the effect of registration in relation to the beginning of the 28th year. Although the *Miller* court based its statement on *Fisher v. Witmark*,³⁰ the latter case did not discuss the vesting date of the renewal interest.

The other interpretation is that "renewal period" means the second term of copyright, and the renewal then vests on the first day of the 29th year.³¹

2) *Rose v. Bourne* (1960).³² This case was decided by the appellate court of the second circuit shortly after the *Miller* case. The opinion of the district court was handed down before the *Miller* decision. The lower court and appellate court opinions taken together represent the clearest case support for the view that the renewal interest vests on the date of registration by the proper statutory claimant. The reference in the *Miller* case to "renewal period" was clearly construed by the appellate court in *Rose v. Bourne* to mean the 28th year of the first term.³³ Moreover, by its per curiam affirmance of Judge Dimock in a short opinion, the appellate court may be taken to have subscribed to the theory of vesting clearly articulated by the lower court judge.

Unless defective under the special rule as to expectancies, to which reference will be made later, the *title of the assignee is complete and perfect at the instant the application in the name of the author is registered*.³⁴

3) The *Cresci* case (1962).³⁵ This is another District Court case with language supportive of the registration date as vesting the renewal interest. More than any other case, the fact situation squarely presented the vesting issue to the court. Judge Bryan emphasized the intent of

29. *Rose v. Bourne, Inc.*, 279 F.2d 79, 80 (2d Cir.), *cert. denied*, 364 U.S. 880 (1970); *Davis v. DuPont de Nemours & Co.*, 240 F. Supp. 612, 626 (S.D. N.Y. 1965).

30. 318 U.S. 643 (1943).

31. M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 482-483; *Arlen v. Commissioner*, 155 U.S.P.Q. 665 (Tax Ct. 1967).

32. 176 F. Supp. 605 (S.D.N.Y. 1959), 279 F.2d 79 (2d Cir.), *cert. denied*, 364 U.S. 880 (1960).

33. 279 F.2d at 80.

34. 176 F. Supp. at 610 (emphasis added). The whole of Judge Dimock's opinion should be consulted for its thorough analysis of renewal copyright.

35. *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253 (S.D.N.Y. 1962).

Congress to benefit the author if living when the application for renewal could be made, and he cited *Miller v. Daniels* for this proposition.

It is plain that it was the intention of Congress in enacting the section [24] to provide that the renewal rights of a copyrighted work would *inure to the benefit of the author if living at the time when application for renewal could be made*, and, if not, to his widow or children or the other persons designated in the statute in the appropriate order of succession.³⁶

The plaintiffs argued that the death of the author during the 28th year but after an application for renewal had been made deprived the author's assignees of any interest in the renewal term. Unfortunately, Judge Bryan was unable to decide this point on the merits because the plaintiffs did not have a cause of action under the federal copyright law, but he did comment that the plaintiffs' argument was "of very doubtful merit in the light of the language of [Section] 28."³⁷ He also cited *Rose v. Bourne*.

4) *Davis v. DuPont de Nemours & Co.* (1965).³⁸

Infringement of a new version by one Davis of a story by Edith Wharton was the main issue in this case, but the defendants raised the issue of the validity of the renewal of the Davis play because Mrs. Wharton did not survive into the renewal period.³⁹ The court said, "[i]t is settled that an author's renewal right to his copyrighted work is a mere expectancy and that an assignee of the copyright and the renewal rights retains no interest beyond the initial period of copyright if the author is not alive at the beginning of the renewal period — i.e., the last

36. 210 F. Supp. at 257 (emphasis added).

37. 210 F. Supp. at 259. Section 28 states that copyrights may be assigned, bequeathed, or otherwise transferred by an instrument in writing. The significance of Section 28 on the vesting of renewals is not clear; the judge may have considered that the statutory reference to a bequest was significant. However, Section 28 does not seem significant on the vesting point to this writer. The court did not reach the merits of the vesting issue because a dispute about ownership of the second term does not present a federal question if raised during the original term. There was no diversity of citizenship.

38. 240 F. Supp. 612 (S.D.N.Y. 1965).

39. This issue was raised by mistake because Davis had obtained a separate copyright in his play that was not dependent on the validity of the copyright in the original Wharton work. Possibly, defendants hoped to establish that their television adaptation was based on the Wharton work and that there was no infringement of the Davis version.

year of the initial copyright term.”⁴⁰ Again, the *Miller* Court reference to “renewal period” was construed to mean the last year of the “initial copyright term.” The dictum of this case thus supports vesting on the first day of the 28th year.

5) *Picture Music, Inc. v. Bourne, Inc.* (1970).⁴¹

This most recent case also supports vesting prior to the beginning of the renewal term. “If the author lives into the 28th year of the original period, the renewal copyright, a distinct and separate estate from the original term, vests in him.”⁴² He may, of course, dispose of the renewal by contract before or after the renewal term commences.”⁴³

6) *Arlen v. Commissioner of Internal Revenue* (1967).⁴⁴

This Tax Court case is the only decision following the *Miller* case (or before) to interpret “renewal period” as meaning the second term of copyright. The court assumed a requirement of survival until the expiration of the first term in order to vest the renewal interest in a particular statutory class.⁴⁵ However, the moment the renewal interest vests was irrelevant to the decision. The point the Tax Court wanted to make was that the renewal term was contingent, and this uncertainty furnished the necessary consideration from the composer, Harold Arlen, and his wife to validate the loan from his publisher. Absent this consideration, the loan might have been regarded as a sham to avoid federal income taxes.⁴⁶

The Court apparently consulted only the leading Supreme Court renewal cases (*Fisher*,⁴⁷ *DeSylva*,⁴⁸ and *Miller*⁴⁹); it did not cite other lower court copyright cases interpreting the renewal provision. *Arlen* is

40. 240 F. Supp. 612, 626 (S.D.N.Y. 1965). The court cited the *Miller* case and *Rose v. Bourne*.

41. 314 F. Supp. 640 (S.D.N.Y. 1970).

42. It is essential, however, that valid renewal registration be made during the 28th year or there is nothing to vest; the renewal term would never come into being.

43. 314 F. Supp. 640, 644 (S.D.N.Y. 1970).

44. 155 U.S.P.Q. 665 (Tax Ct. 1967).

45. 155 U.S.P.Q. at 669.

46. It is submitted that the fact that this is a tax case and not a copyright case dilutes its significance on the copyright issue. The comments are clearly dicta, of course. The Court did not consider what effect registration might have.

47. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

48. *De Sylva v. Ballentine*, 351 U.S. 570 (1956).

49. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

the only case that clearly supports vesting of the renewal interest on the first day of the 29th year.

It remains now to consider the cases, touching on the vesting issue that were decided under the Act of 1909⁵⁰ but before the Supreme Court decided *Miller v. Daniels*.⁵¹

7) *White-Smith Music Publishing Co. v. Goff* (1911).⁵²

The proper construction of "old Section 24" (which governed the extension of the term for copyright subsisting when the Act of 1909 came into effect)^{52a} was at issue. The comments that pertain to the vesting question are clearly dicta, but the Court did imply that an assignment made during the 28th year of the original term enabled the assignee to secure a valid renewal registration, apparently whether the assignor survived or not.

[I]n connection with the renewal, the persons who control the right thereto, whether widow, widower, or the author himself, may, during the year prior to the expiration of the existing term nominated in section 24, assign the right to renewal, so that the then proprietor may make the new registration required, and take out the extension in his own name.⁵³

This language seems to support vesting of the renewal interest during the 28th year and probably on the date of registration.

8) *Silverman v. Sunrise Pictures Corp.* (1921).⁵⁴

The Court of Appeals for the second circuit upheld a renewal registered by the next of kin of the author even though the author died testate several years before the 28th year of the first term.⁵⁵ The court

50. Act of March 4, 1909, ch. 320, 35 Stat. 1075.

51. 362 U.S. 373 (1960).

52. 187 Fed. 247 (1st Cir. 1911).

52a. This Section ceased to be effective after July 1, 1937 and was deleted in the 1947 codification of the copyright law. As a result of the addition of the present Section 6 concerning registration of prints and labels, the *present* renewal provision became Section 24 at the time of the codification of the law. Act of July 30, 1947, ch. 391, 61 Stat. 652.

53. 187 Fed. at 249. Notwithstanding the implication of this case, it is now settled that the renewal cannot be filed in the name of the assignee.

54. 273 Fed. 909 (2d Cir. 1921).

55. This case also involved the construction of former Section 24 of the Act of 1909, which read as follows:

That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under

construed the renewal provision as vesting the right to the renewal in the executors only when the testator author held that right at the moment of decease, i.e., during the 28th year.⁵⁶ Since the testator author had died before the 28th year, the court considered that there was the necessary "absence of a will" affecting the renewal interest which enabled the next of kin to claim the renewal as the successor statutory class.⁵⁷ This court considered that the renewal interest vested during the 28th year of the first term.

If, however, the author lives to within the statutory year, he may certainly exercise his [renewal] right, assign it, or bequeath it; *and if he dies in the year, but before registration*, it is for his executors to function.⁵⁸

9) *Tobani v. Carl Fischer, Inc.* (1942).⁵⁹

existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided, however*, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided*, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

Note that "renewal period" was used in this Section to mean the extended term of copyright and not the 28th year of the original term.

56. In this respect, the decision has been superseded by the Supreme Court decision in *Fox v. Knowles*, 261 U.S. 326 (1923), that the executors take the renewal interest independently of the testator-author.
57. The court was obviously straining to reach what it regarded as the proper result. The author's estate had been distributed and the executors ceased to function before it was possible to apply for the renewal. Only two sisters filed a renewal claim, and, unless their application was valid, the copyright expired after the first term.
58. 273 Fed. 909, 913 (2d Cir. 1921) (emphasis added). Thus, the executors not only were thought to be limited to the same right to act as the author, but they could act only if the author had died in the 28th year *without* filing for renewal. This carries the clear implication that the filing of an application fixed the right of the author under the statute and validated the rights of his assignee or legatees. The author's death after registration would not affect the renewal interest.
59. 263 App. Div. 503, 33 N.Y.S. 2d 294, affirmed on other grounds, 289 N.Y. 727, 46 N.E. 2d 347 (1942).

The wife of the author, Tobani, assigned her renewal expectancy for a sum payable within 30 days of the death of her author-husband. However, the wife pre-deceased the author-husband, and the administrator of the estates (the author died 5 years after his wife) sued in a state court to obtain the sum promised to the wife. The defendant-publisher was found liable for the sum promised to the wife because the contract did not contain any implication that payment was conditional upon survivorship of the wife. The Court in its dicta remarked that mere survivorship of the wife vis-à-vis the author-husband would not have helped the publisher anyway. To help the publisher, she had to survive until she applied for renewal registration, which would render her assignments to the publisher of the renewal term lawful and binding.⁶⁰

10) *Fisher v. Witmark* (1943).⁶¹ This landmark Supreme Court case settled probably the most significant question about the U.S. renewal system⁶² next to the present vesting issue: whether the statute permitted assignment of the renewal expectancy. The question was a close one, and Mr. Justice Frankfurter reviewed the history of the renewal provisions from the Statute of Anne to arrive at the answer. Although *Fisher* does not discuss the vesting issue, it must be examined carefully because of the importance attached to language in the case by subsequent courts and commentators considering the vesting issue.

The argument was advanced that Congress had made the renewal term inalienable, at least prior to the 28th year,⁶³ in order to protect

60. 263 App. Div. at 507, 33 N.Y.S. 2d at 298. The opinion of the trial judge does not clarify whether the assignment would have been "lawful and binding" *against the world* if the wife had survived to apply for renewal registration, but that meaning seems implicit. The appellate court affirmed on other grounds.

61. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

62. The question of alienability had not been judicially settled before *Fisher*, notwithstanding the fact that the issue existed under each of the earlier copyright statutes of the United States, a period of more than 150 years. The explanation seems to be that ownership of the renewal term was not very significant before the advent of the mechanical devices of the late 19th century and the 20th century, especially the phonograph, the radio, television and motion pictures, that created a demand for unprecedented amounts of creative matter and prolonged the popularity of copyrighted works. The music industry became particularly concerned about the renewal term, and most of the important renewal cases have involved musical compositions.

63. The assignment in litigation had been separately made by Graff, co-author of the lyrics to "When Irish Eyes Are Smiling," only five years after first publication of the song. The original publication contract also contained

authors in their old age and those naturally dependent upon them — immediate family and relatives. Some support for this theory seemed to exist in the legislative history of the Act of 1909.⁶⁴

However, after its review of the history of the renewal system, the Court concluded that the prior law, from the Statute of Anne until the Act of 1909, permitted authors to assign their renewal expectancies.⁶⁵ Mr. Justice Frankfurter, speaking for the majority, then found that neither the language of the Act of 1909 nor the legislative history supported a conclusion that the policy of alienability of the renewal expectancy was changed.⁶⁶ The majority of the Court refused to find au-

language that might have conveyed the renewal, but this was not pressed as an issue. Also, Graff worked under a general contract for Witmark, but Witmark chose not to argue the employer-for-hire issue in order to settle the alienability issue. Witmark could afford to play for the one issue since it held rights to the renewal term from the widow of the other lyricist, Chauncey Olcott. Even if Witmark had lost the case, it would have been legally entitled to publish the song as co-holder of the renewal term.

Some support for defendants Fisher and Graff's argument seemed to exist in *White-Smith v. Goff*, 187 Fed. 247 (1st Cir. 1911), and in *Silverman v. Sunrise Pictures*, 273 Fed. 909 (2d Cir. 1921). There were references to the possibility of assignment of the renewal *during the 28th year* and implications that the expectancy could not be assigned any earlier. 187 Fed. at 249 and 273 Fed. at 912-913.

64. The House Report accompanying the bill enacted in 1909 contains this passage:

It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right. H.R. Rep., No. 2222, 60th Cong., 2d Sess. (1909) at 14.

Note that "renewal period" was used once in this passage to mean the second term of copyright. Elsewhere on the same page of the Report, "renewal term" was correctly used to mean the second term of copyright.

65. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647-652 (1943).
66. 318 U.S. at 655. The Court found that the "explicit words of the statute give the author an unqualified right to renew the copyright. No limitations are placed upon the assignability of his interest in the renewal." 318 U.S. at 647. The House Report comments, *supra*, note 64, were ex-

thors "congenitally irresponsible" and "so sorely pressed for funds that they are willing to sell their work for a mere pittance."⁶⁷ If the renewal expectancy could not be disposed of when authors needed funds, it might be worth much less to authors. Explicit statutory language would be required to persuade the Court to impose a restraint on free alienability of property interests.

11) *Rossiter v. Vogel* (1943).⁶⁸ The relevant comments by the Court of Appeals for the second circuit are dicta because the lower court grant of summary judgment for plaintiff was reversed. The defendant raised the issue of fraud and failure of consideration on appeal, which defense had been expressly left open by *Fisher v. Witmark*.⁶⁹ The case was remanded for consideration of this issue.⁷⁰

In reaching its decision, the court remarked that *Fisher v. Witmark* settled the law and upheld the validity of an assignment of the renewal expectancy. The assignee could file for the renewal in the name of the proper claimant; a power of attorney would be implied from the mere fact of an assignment.⁷¹ The agreement in litigation was an assignment of the renewal expectancy.

[I]t contained unmistakable language denoting an intention to grant a presently transferable right, although at its execution application had not yet been filed for a renewal of the copyright. The renewal right does not strictly accrue until the filing of an application in the twenty-eighth year of the original term, and the renewal itself does not thereafter become effective until the first day of the twenty-ninth year.⁷²

plained to mean that the Act of 1909, as the existing law, was framed not to deprive the author of his interest in the renewal merely by conveyance of his "copyright." 318 U.S. at 653. Specific language is required to convey the renewal term, which is a separate property interest. But the renewal expectancy is as freely assignable as any other property interest.

67. 318 U.S. at 655.

68. 134 F.2d 908 (2d Cir. 1943), after remand, 148 F.2d 292 (2d Cir. 1945).

69. 318 U.S. 643 (1943).

70. On remand, the lower court found there was a failure of consideration for transfer of the renewal term. (The bill of sale recited a one-dollar consideration, which was never paid.) Therefore, as a court of equity, the trial judge refused to enforce the agreement between the plaintiff and the composer. The Court of Appeals affirmed. 148 F.2d 292 (2d Cir. 1945).

71. 134 F.2d 908, 911 (2d Cir. 1943).

72. 134 F.2d at 911.

The meaning of this passage is not completely free from doubt, but the most likely interpretation is that the comments support vesting of the renewal interest by the act of registration. The Court clearly emphasized the significance of the registration act, and seemed to say that the renewal vests in interest on that date and is reduced to possession on the first day of the 29th year after publication. The use of the phrase "renewal right" is somewhat unfortunate since this phrase is so close to the phrase "right of renewal." The latter definitely refers to the right to apply for renewal registration. Obviously, the Court means something other than the right to apply when it uses the phrase "renewal right" because it says the "renewal right" *accrues upon filing* of an application. Consequently, "renewal right" seems to mean the renewal interest, and this "accrues" or vests upon filing of a valid application during the 28th year of the original term.

12) *Von Tilzer v. Jerry Vogel Music Co.* (1943).⁷³ The composer and lyricist, Von Tilzer and Dillon respectively, of "I Want a Girl Just Like the Girl Who Married Dear Old Dad" had a falling out over the renewal of the work. Von Tilzer claimed an assignment from Dillon of the latter's renewal expectancy; Dillon also assigned the renewal to the defendant. The lower court found that the renewal interest had vested in Von Tilzer because "Dillon was living on the first day of the twenty-eighth year of the original term. . . ." ⁷⁴ The Court of Appeals affirmed *per curiam*.

13) *Carmichael v. Mills Music* (1954).⁷⁵ The prime concern of the court was whether a justiciable controversy existed that could be then brought under the Declaratory Judgment Act. The "renewal rights" had not yet "accrued." In view of a citation to the *Rossiter* case⁷⁶ on the declaratory judgment point, it would seem that the *Carmichael* court has reference to vesting of the renewal interest by filing an application for renewal during the 28th year of the original term. The court found that an actual controversy existed; the plaintiff was seeking to avoid im-

73. 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom*, *Gumm v. Jerry Vogel Music Co.*, 158 F.2d 516 (2d Cir. 1946).

74. 53 F. Supp. at 194. Even though Von Tilzer had failed to record the assignment, it was valid against Vogel because Vogel merely promised to pay royalties during the renewal term. A promise to pay royalties in the future is insufficient to render the promisor a bona fide purchaser within the recording provision of Section 30. *Accord* *Venus Music Corp. v. Mills Music, Inc.*, 261 F.2d 577 (1958).

75. 121 F. Supp. 43 (S.D.N.Y. 1954).

76. *Rossiter v. Vogel*, 134 F.2d 908 (2d Cir. 1943).

pairment of the market value of the renewal expectancy by continuance of the dispute between the parties.

In discussing Section 24, the court said:

if the author is not living at a time one year prior to the expiration of the original term of copyright, then designated successors are entitled to the renewal, and an assignment of a renewal expectancy rests upon the author's survival until the time of the accrual of renewal rights.⁷⁷

If, as it seems, the phrase "accrual of renewal rights" refers to the rights obtained by filing an application for renewal during the 28th year, this case also supports vesting of the renewal interest by the registration act, or at least by the first day of the 28th year.

IV. *The Opposing Theories*

The three possible vesting dates — first day of the 28th year, day of renewal registration, and first day of the 29th year — resolve into two alternative theories. Loose language in several cases may support vesting "during the 28th year" or may refer to the need of the author to live until the "first day of the 28th year."⁷⁸ But these courts simply were not called upon to consider the effect of renewal registration. Renewal registration was an accomplished fact by the time these cases reached a federal court.

The "first day of the 28th year" receives no firm support as a vesting date from commentators.⁷⁹ It is an untenable theory. Unless renewal

77. 121 F. Supp. 43, 45 (S.D.N.Y. 1954).

78. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 190 (S.D.N.Y. 1957), 362 U.S. 373, 375 (1960); *Davis v. DuPont de Nemours & Co.*, 240 F. Supp. 612, 626 (S.D.N.Y. 1965); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 644 (S.D.N.Y. 1970); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191, 194 (S.D.N.Y. 1943).

79. The vesting issue has been thoroughly considered by only a few commentators. Most of the secondary authorities refer in passing to vesting of the renewal interest, and the discussion is very general. The language of a few commentators, as in the case of the courts mentioned in note 78 *supra*, loosely refers to the necessity of survival "until the 28th year," without any analysis of the effect of the registration act. See S. Rothenberg, *LEGAL PROTECTION OF LITERATURE ART AND MUSIC* (1960) at 127; S. Shemel & M. Krasilovsky, *THIS BUSINESS OF MUSIC* (1964) at 69; Note, "Renewal Right—Effect of Assignment Made before Accrual Where Right Accrues to Executor [*Miller v. Daniels*, 158 F. Supp. 188]," 33 N.Y.U. L. Rev. 1027, 1030 (1958); Note, "Renewal: Composer's Assignment Defeated by His Executor [*Miller v. Daniels*, 362 U.S. 373]," 8 U.C.L.A. L. Rev. 203, 205 (1961).

registration is made, the renewal term never comes into being, and renewal registration cannot be made in the name of a deceased person.⁸⁰ It seems pointless to construe the statute so that, if the proper claimant living on the first day of the 28th year dies within that year without applying for the renewal, the right of renewal of succeeding statutory classes is nevertheless defeated.⁸¹ Surely what matters is whether the proper claimant is alive when registration is made.

Therefore, the choice in vesting dates lies between the "date of renewal registration" and the "first day of the renewal term." It is submitted that the cases referring to vesting "during the 28th year" or on "the first day of the 28th year" ⁸² actually support vesting by the act of registration. Certainly, such cases cannot support vesting on the first day of the 29th year.

"First Day of Renewal Term" Theory

The supporters of this theory argue that the history of the renewal provision from the Statute of Anne to the Act of 1909 demonstrates a policy of survivorship until the expiration of the original term. The proper renewal claimant, it is contended, must survive the first term of copyright in order to validate the rights of his assignees and to cut off any rights of a succeeding statutory class.

Professor Nimmer advocates this theory in his treatise on copyright.⁸³ He relies primarily upon his interpretation of the phrase "renewal

80. It is clear that an assignee has no right to apply for renewal in his own name; application must be made in the name of the statutory claimant. 28 ORS. ATTY. GEN. 162, 170 (1910); M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 484.

81. Commentators seem agreed that if the proper claimant dies within the 28th year without applying for renewal registration, the next statutory class having living members becomes entitled to apply for the renewal. B. Ringer, *supra* note 3 at 186; 2 A. Socolow, *THE LAW OF RADIO BROADCASTING* (1939) at 1218; L. Amdur, *COPYRIGHT LAW AND PRACTICE* (1936) at 541; Brown, "Renewal Rights in Copyright," 28 *Cornell L. Q.* 460, 481 (1943).

82. *Supra*, note 78.

83. M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 481-483. Professor Nimmer is by far the most articulate exponent of the first day of the 29th year as the vesting date. His views and his reasoning are therefore given prominence. Indeed, the other commentators that may be regarded as supporters of this theory generally fail to articulate their reasoning and apparently operate on the assumption that the renewal system policy has always required survival until the end of the first term. Generally, such commentators merely refer to a requirement of survival "until the end of the term," and, in some cases, their support of this theory seems tentative

period" in the important statement in *Miller v. Daniels*,⁸⁴ and upon the comments by Mr. Justice Frankfurter in *Fisher v. Witmark*⁸⁵ concerning the history of the renewal provision.

Professor Nimmer believes that "renewal period" was used in the *Miller* case to mean the renewal term rather than the 28th year of the first term. If he is correct in his interpretation, the dictum of the *Miller* case would support the first day of the 29th year as the vesting date, although, as Nimmer says, renewal registration during the 28th year is a condition precedent to enjoyment of the renewal term.

This writer cannot agree with Professor Nimmer's interpretation of the *Miller* case. Since this article takes the view that *Miller* affirmatively supports vesting on the day of renewal registration, the bases for an interpretation contrary to Nimmer will be considered in the next section.

The significance of *Fisher v. Witmark* will be examined now because, in my view, it is silent on the vesting issue.

Professor Nimmer is right to turn to *Fisher v. Witmark* because it does represent the most thorough Supreme Court consideration of the renewal provision and Mr. Justice Douglas in the *Miller* case did cite *Fisher* as support for his crucial comment that an assignment of the renewal is valid against the world if the assignor is alive at the "commencement of the renewal period." Professor Nimmer concludes, in view of the cite to *Fisher*, that "renewal period" must mean the renewal term since the author in the *Fisher* case survived into the renewal term.⁸⁶

Moreover, Nimmer also points out that the Supreme Court in *Fisher* referred to the requirement of survivorship in the Statute of Anne, the Act of 1790, and the Act of 1831 while discussing the continuity of renewal policy. The Court concluded that the present law embodied the same policy on *alienability of the renewal expectancy* as the earlier statutes. Nimmer, while conceding that the statement in *Fisher* regarding continuity of renewal policy was *not* made with refer-

at best. See A. Weil, *AMERICAN COPYRIGHT LAW* (1917) at 365-366; H. Warner, *RADIO AND TELEVISION RIGHTS* (1953) at 263; S. Spring, *RISKS AND RIGHTS IN PUBLISHING AND TELEVISION RADIO MOTION PICTURES ADVERTISING AND THE THEATER* (2d ed. 1956) at 95; A. Shafter, *MUSICAL COPYRIGHT* (2d ed. 1939) at 172-173; R. Dewolf, *AN OUTLINE OF COPYRIGHT LAW* (1925) at 67-68; R. Bowker, *COPYRIGHT ITS HISTORY AND ITS LAW* (1912) at 114.

84. 362 U.S. 373, 375 (1960). See text accompanying notes 27-30, *supra*.

85. 318 U.S. 643, 647-652 (1943).

86. Graff, the author whose renewal interest was litigated, survived into the renewal term. Chauncey Olcott did not survive to renew, and his widow originally took the renewal.

ence to the vesting issue,⁸⁷ nevertheless finds support in the general comment in *Fisher* for his view that the requirement of survivorship in the Statute of Anne, the Act of 1790, and the Act of 1831 continues in the present law.⁸⁸

As Nimmer concedes, the *Fisher* Court made no direct comment on the vesting issue with respect to the present law.⁸⁹ It did refer to the survivorship requirement of the Statute of Anne, the Act of 1790, and the Act of 1831 in its general comments about the history of the renewal provision. But the Court did not even consider the language of the Act of 1870. It did not need to consider that Act because there was no departure in it from the Act of 1831 on the issue of alienability of the renewal expectancy. It is submitted, however, that any court proposing to rule on the vesting issue must consider carefully the altered language of the Act of 1870, which dropped the reference to survival of the author to the expiration of the first term.⁹⁰ The Act of 1870 and the present law both refer merely to the need of the author to be living⁹¹

87. "[T]he *Fisher* opinion repeatedly points to renewal provisions of the Acts of 1790 and 1831 requiring survivorship to the expiration of the original term of copyright, and then concludes (although not with specific reference to this point) that the renewal provision under the present Act was not intended to constitute a substantive departure from earlier law." M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 483.

88. "It is, then, pertinent to note (as did the opinion in the *Fisher* case) that the first copyright law adopted in 1790 and the revision adopted in 1831 both expressly provided that the author must be living at the 'expiration' of the original term of copyright in order to be entitled to obtain the benefits of the renewal term. . . . The Act of 1870, like the present Act, merely required that the author be living in order to obtain the renewal benefits without expressly stating that he must be living at the 'expiration' of the original term. There is, however, no indication of an intent to depart from this requirement as stated in the earlier copyright laws. . . . Moreover, in view of the Court's conclusion in the *Fisher* case that the policy of the renewal provision was merely a continuation of the comparable provisions in the prior laws of 1790 and 1831, it seems necessary to conclude that under the present Act (as well as the Act of 1870), the Author (and each successor class) must survive to the expiration of the original term in order to obtain a vested interest in the renewal copyright term." *Id.* at 482-483.

89. The only comment touching on the vesting issue is the statement that the author is bound by his assignment if he lives into the 28th year of the original term. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943).

90. *Supra*, notes, 23-25 and accompanying text.

91. Nimmer notes this fact but believes that the altered language fails to reflect a deliberate policy change by Congress. M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 482. Unfortunately, there are no printed com-

without indicating clearly when he must be alive to bring the renewal within the province of his estate, should he die subsequently, or of his assignees.

"Day of Renewal Registration" Theory

This theory of the vesting date of the renewal interest is based upon the significance of the registration act under Section 24, the apparent support of *Miller v. Daniels*,⁹² and the clear support in the dicta of most copyright cases touching on the vesting issue.⁹³

The statutory language of the present law does not clearly establish a requirement of survivorship into the renewal term in order to vest the renewal interest. Indeed, Section 24 seems to imply that the renewal interest vests upon registration of the renewal claim. The statute provides that the author, if living, may renew the copyright in his work for a second term of 28 years. The question is: when must he be living? Obviously, the fact that he is living before the 28th year of the first term is irrelevant. He cannot renew his copyright before the first day of the 28th year. That is crystal clear. But is it of any greater significance that he is living on the first day of the renewal term? After all, if he failed to register his claim during the 28th year, he has no renewal term. His work would be in the public domain if only *he* could renew and failed to do so.

It is submitted that the date of compliance with the registration formality establishes the natural vesting date. This interpretation of the statute makes the most sense: the act that extends the copyright for a second 28 year term should also vest the renewal interest so that legal

mittee reports available for the Act of 1870, and the Reports accompanying the general revision of 1909 are silent on the vesting issue. H.R. Rep. No. 7083, 59th Cong., 2d Sess. (1907), to accompany H.R. 25133; S. Rep. No. 6187, 59th Cong., 2d Sess. (1907), to accompany S. 8190; and H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) to accompany H.R. 28192. It should be clear that the phrase "be still living" or equivalent is essential to make clear that the children, for example, take the renewal *only* if the author is deceased.

92. 362 U.S. 373, 375 (1960).

93. *Rose v. Bourne, Inc.*, 176 F. Supp. 605, 610 (S.D.N.Y. 1959), 270 F.2d 79, 80 (2d Cir.), *cert. denied*, 364 U.S. 880 (1960); *Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943), *after remand*, 148 F.2d 292 (2d Cir. 1945); *Tobani v. Carl Fischer, Inc.*, 263 App. Div. 503, 504, 33 N.Y.S. 2d 294, 296, *aff'd on other grounds*, 289 N.Y. 727, 46 N.E. 2d 347 (1942); *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 257 (S.D.N.Y. 1962); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 913 (2d Cir. 1921); *Carmichael v. Mills Music*, 121 F. Supp. 43, 45 (S.D.N.Y. 1954).

relationships are determined by that act. The act that gives life to the second term should also vest the renewal interest. Of course, the renewal would not be reduced to a possessory interest until the second term had actually begun.

This analysis of the operation of the renewal system accords with general property concepts. During the original term of copyright, the author and the statutory successor classes enjoy contingent interests in the renewal term that are freely assignable. The contingent interest of the author is defeated by his death before the renewal interest is fixed by registration during the 28th year. In the case of the successor classes, their contingent interests may be defeated not only by death of the members of the particular class, but also by valid renewal on the part of members of a preceding class.

On the first day of the 28th year, the interest of the author remains contingent, except that he has a present right to apply for the renewal and thus vest the renewal interest.

The renewal is vested by the act of timely registration in the name of the proper statutory claimant. It is vested in the sense that the claimant then holds a fixed right to future enjoyment of the renewal term.^{93a} This right is not subject to defeasance by any subsequent event. Of course, the statutory claimant may have already assigned his right to the renewal term.

One practical objection to the "first day of the renewal term" as the vesting date is that there will be instances where the proper claimant dies shortly before the expiration of the original term, leaving no time for the next statutory class to apply for the renewal. Proper application must be made by the then entitled statutory renewal claimant to the Copyright Office within the 28th year of the original term in order to extend the copyright. If the renewal vests only on the first day of the 29th year, fewer copyrights can be extended and the marketability

93a. According to *CORPUS JURIS SECUNDUM*, the term "vested" may refer to "fixation of a present right to either the immediate or future enjoyment of property, and, while the term may mean either the vesting in interest or the vesting in possession, its prima facie meaning is vesting in interest." 92 C.J.S. 2d at 1003. Further, although the term "vested" may refer to divestible rights or interests as well as indefeasible interests, the law favors the vesting of estates at the earliest possible time, unless the contrary is clearly expressed. 31 C.J.S. 2d, Sec. 5 at 17-18. It is submitted that the copyright statute does not clearly provide that the renewal interest is indefeasibly vested only on the first day of the 29th year.

of all renewal expectancies is impaired since it is less certain that any particular expectancy will come to fruition.⁹⁴

The Copyright Office takes the position on the basis of the authorities that it is authorized to enter renewal claims only on behalf of the proper statutory claimant.⁹⁵ For example, if the author is living throughout the 28th year, the renewal application must be made in his name. Registration cannot be made for all possible future claimants to take care of the possibility of the author's death.⁹⁶

Any argument that the Copyright Office should accept applications from all potential claimants⁹⁷ seems untenable. A practice of accepting all claimants contravenes the authority of the Attorney General's Opinion on the correct practice for the Copyright Office.⁹⁸ It would open up the registration records to voluminous contingent claims and would thus sharply reduce the value of the registration system. Most significantly, there is the barrier of the statutory language itself. Next to the author, the most common renewal claimant is the widow of the author, but surely it is clear that the "widow" cannot apply for renewal of the copyright unless her author-husband is dead. The "widow" is entitled to apply for renewal; the "wife" of the author is not entitled. Obviously, one is not a "widow" until the author-husband is dead.

The case support for the day of registration as vesting the renewal interest seems very persuasive, if the statutory language does not settle the vesting issue.

One must begin with *Miller v. Daniels*.⁹⁹ The dicta of Mr. Justice Douglas goes a long way toward resolution of the vesting issue, if we can agree on the meaning of "renewal period." This writer holds the view that this phrase means the 28th year of the original term. This in-

94. It is true that even under the registration act theory of vesting, the proper claimant may simply fail to apply and may die close to the expiration of the first term. I see an important distinction between a deliberate failure to act by the only proper party and the failure of the renewal that may occur by an act of fate under the "renewal term" theory even though the proper statutory claimant did act in a timely fashion to comply with the statute.

95. 28 OPS. ATTY. GEN. 162 (1910).

96. In a case of uncertainty whether the author is alive, the Copyright Office will accept an application from the next statutory class having living members.

97. Professor Nimmer suggests that potential claimants should apply for renewal during the 28th year, but he also notes the policy of the Copyright Office not to accept such contingent claims for registration. M. Nimmer, *NIMMER ON COPYRIGHT* (1971 ed.) at 483-484.

98. *Supra*, note 95.

99. 362 U.S. 373 (1960).

terpretation finds support in the renewal copyright cases after *Miller*¹⁰⁰ and, indeed, in the lower court opinion in the *Miller* litigation,¹⁰¹ which surely cannot be discounted.

The lower court judge made a statement similar to that later made by Mr. Justice Douglas, but the lower court opinion is clear on the point. The judge considered that *Fisher v. Witmark* held an assignment was "valid and binding as against the author or his subsequent assignees if the author survives until the twenty-eighth year of the original copyright term."¹⁰²

At a later point, the judge was even more explicit; he refers to the 28th year as the time when the author becomes "vested with an absolute power to renew."

In the light of the policy of the act with respect to renewal right, "expectancy" means that any right to renewal which the author may have is entirely contingent upon the author's *survival until the commencement of the twenty-eighth year*. Since this is so, an author's assignment of his renewal rights *in futuro* can effectively transfer such rights to the assignee only if the author survives until the commencement of the twenty-eighth, or last, year of the original term. If the author survives he becomes vested with an absolute power to renew under the statute, and the prior contingent assignment in turn vests such renewal rights in the assignee.¹⁰³

In affirming this decision, the Supreme Court in no way cast doubt on the clear statement that the renewal interest vests during the last year of the first term. This writer adds the proviso that it vests upon

100. We have seen that the appellate court in *Rose v. Bourne*, 279 F.2d 79, 80 (2d Cir. 1960) cited the *Miller* decision reference to "renewal period," and carefully defined that period as beginning on a specific date, April 24, 1950, which was the first day of the 28th year of the copyright in litigation. In *Davis v. DuPont de Nemours & Co.*, 240 F. Supp. 612, 626 (S.D.N.Y. 1965), the court carefully defined "renewal period" as "the last year of the initial copyright term." Moreover, the law review case notes on the *Miller* case understood "renewal period" to mean the 28th year. See Note, "Renewal: Composer's Assignment Defeated by his Executor. . .," 8 U.C.L.A. L. Rev. 203, 205 (1961); McKenzie, "Renewal Rights—Executor's Right to Renew Where Author Has Assigned Renewal Rights. . .," 63 W. Va. L. Rev. 173, 173-174 (1961). But see, the Tax Court case, *Arlen v. Commissioner*, 155 U.S.P.Q. 665 (Tax Ct. 1967).

101. 158 F. Supp. 188, 190 (S.D.N.Y. 1957).

102. 158 F. Supp. at 190.

103. 158 F. Supp. at 192. (emphasis added).

valid application for renewal registration to the Copyright Office, which can be made only during that last year of the first term.

The support of dicta in other copyright cases for the day of registration as the vesting date has already been noted.¹⁰⁴ The facts of the *Cresci* case raised the vesting issue precisely: the author had died within the 28th year of the original term but after renewal registration had been made in his name. Although no decision could be made on the merits, the judge clearly regarded the registration act as the crucial factor and saw very little, if any, support in authority for the argument that the death of the author had invalidated the renewal registration made in his name.

Finally, very considerable support exists for the day of registration as the vesting date of the renewal interest in the writings of noted commentators on copyright.¹⁰⁵ Admittedly, the vesting issue is the subject of only brief analysis by such supporting commentators, but the same comment applies, with the exception of Professor Nimmer, to supporters of the first day of the 29th year as the vesting date.

V. Conclusion

The ever burgeoning, voracious appetite for literary, dramatic, and musical works to satisfy the entertainment needs of our "affluent

104. *Supra*, note 93.

105. B. Ringer, "Renewal of Copyright," *supra* Note 3 at 186; Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909," 44 Col. L.Rev. 712, 733-34 (1943); Brown, "Renewal Rights in Copyright," 28 Cornell L.Q. 469, 473, 481 (1943); HOWELL'S COPYRIGHT LAW (4th ed. Latman, 1962) at 121; L. Amdur, COPYRIGHT LAW AND PRACTICE (1936) at 541; 2 A. Socolow, THE LAW OF RADIO BROADCASTING (1939) at 1218; Henn, "'Magazine Rights'—A Division of Indivisible Copyright," 40 Cornell L.Q. 411, 467-68 (1955); Bricker, "Renewal and Extension of Copyright," 29 So. Calif. L. Rev. 23, 26 (1955); Note, "Duration of Copyright Protection," 36 U. Det. L.J. 66, 68 (1958); Note, "Copyright Renewal," 10 Air L. Rev. 198, 204 (1939); Note, "Copyright—Extension of the Copyright Term; A Re-appraisal of American Policy," 8 Vill. L. Rev. 553 (1963); L. Frohlich & C. Schwartz, THE LAW OF MOTION PICTURES (1918) at 549. One is tempted to count two other notable copyright experts as supporters of the day of registration as the vesting date: Stephen Ladas and Professor Chafee. Both suggested that the registration theory was the better resolution of the vesting puzzle. Indeed, Ladas at first seemed to support this strongly, but his comments as a whole are ambiguous. S. Ladas, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938) at 773-74. Professor Chafee in his famous article was posing issues rather than finding answers. Chafee, "Reflections on the Law of Copyright; I," 45 Col. L. Rev. 503, 527 (1945).

society" renders the second 28 year term of copyright protection an important prize for the successful claimant. The copyright statute purports to determine who that claimant shall be, but for at least one hundred years, the statute has been potentially subject to varying interpretations on a question fundamental to all property rights: when does the property interest vest?

This article has explored three possible vesting dates — first day of 28th year, day of renewal registration, and first day of the 29th year. The first two vesting theories merge into one: the renewal surely cannot vest before registration. We have examined the second and third theories primarily, and this article supports the day of renewal registration as the vesting date.

In view of its emphasis upon the act of registration, Section 24 of the present law seems to offer implied support for the day of renewal registration as vesting the renewal interest. This implication is buttressed by the highly significant change in an earlier act, the Act of 1870, which departed from the Statute of Anne, and the first two general copyright statutes of the United States in that it did not specifically require survivorship of the author until expiration of the first term in order to renew the copyright.

This writer entertains some question about the ruling a court would have made on the Act of 1831, which introduced the policy of a successor class to the author that took the renewal independent of the author. The requirement of survivorship of the author until expiration of the first term made sense under the Act of 1790 (and under the Statute of Anne) where the author was the only renewal claimant. Since there was no other statutory class, it made sense to require that the author be alive at least at the beginning of the renewal term.

With the Act of 1831, Congress created a statutory successor class: the widow, or child, or children of the author. The avowed purpose was to provide for the author's family *if he was not alive*. It is submitted that a requirement of survivorship when coupled with a requirement of compliance with formalities six months before the end of the first term would have frustrated this Congressional intention.

Whatever may be the correct construction at this date of the Act of 1831, doubts about the correct vesting date should be settled by the Act of 1870 which dropped the critical phrase "at the expiration of the aforesaid term of years."

If it is considered that the present statute is silent on this survivorship point, it is argued that ordinary rules of law and the natural expectation of the parties to assignments should govern. This was es-

entially the conclusion that the Supreme Court reached in *Fisher v. Witmark*¹⁰⁶ on the issue of assignability: the statute did not require a finding of inalienability, and the Court upheld the common law principles of freedom of contract and alienability of property.

Similarly, if the statute does not clearly require that the proper claimant must survive the first term for vesting of the renewal interest, then the language should be construed to omit such a requirement. The "day of renewal registration" theory avoids uncertainty about fruition of expectancies, enhances the marketability of renewal interests, and saves more copyrights from the public domain.

Although no court has ruled squarely on the vesting issue, several copyright cases contain strong dicta that support the day of renewal registration as the vesting date. It is submitted that no copyright case supports the opposing theory of the first day of the 29th year.¹⁰⁷

The renewal registrations entered in the names of John Steinbeck and Edna Ferber on or before the respective death dates vested the renewal interests in them. Unless they had made assignments of their interests, the renewal copyrights so secured passed into their estates for the benefit of the heirs and legatees.¹⁰⁸ Other authors have the same

106. 318 U.S. 643 (1943).

107. It is, of course, the position of this writer that the Miller case does not support vesting on the first day of the 29th year.

108. The tax consequences of the vesting date of the renewal interest have not been settled, and there is even a dearth of litigation about taxation of copyrights in general.

Taxation of royalty income depends upon the status of the person receiving the income. The general rule is that the income is not subject to capital gains treatment. The income from transfer of a copyright by the author also is not subject to capital gains treatment. However, income can be spread over a period of years by the devices of deferred compensation agreements, sale of the copyright under the installment method, and by income averaging.

When we turn specifically to the renewal interest, the most important tax consideration is that the copyright becomes a capital asset in the author's estate. The estate or the heirs can get capital gains treatment, and the copyright probably will obtain a stepped-up basis equal to the fair market value reported in the estate tax return. Earl and Middleditch, "Copyrights and the Author's Estate," 53 A.B.A. J. 366 (1967). Thus, it may be advantageous in some instances to obtain a high valuation for the purposes of the estate tax which may then be applied as annual depreciation allowances against income from a sale of the copyright. The roadblock to achieving favorable tax treatment is that the copyright may be held to create income in respect of the decedent, disallowing capital gains treatment and depreciation deductions in the ordinary case.

assurance: if they live into the 28th year of the original term and obtain renewal registration, the renewal term is secured and the work will not fall into the public domain, irrespective of a subsequent death of the author.

In order to value the copyright for estate tax purposes, its duration must be determined. If the author has died before the 28th year, valuation should be based on the remaining period of the first term; the renewal term should not be included. If the author dies during the renewal term and has retained control of the copyright, the remainder of the renewal term should be included in his estate.

These cases present no problem regarding vesting of the renewal interest. The problem arises naturally if the author dies during the 28th year. Here the vesting date of the renewal interest may affect the tax incidence. If the renewal interest has not vested in the author by the date of death, logically it would seem that the renewal term would not be included in his estate for tax purposes. But if the renewal interest has vested in the author, then on his death the renewal term must be included in his estate. However, Earl and Middleditch, *supra*, at 367, seem to suggest that the tax would fall on the author's estate if he died within the 28th year, whether he renewed or not, if renewal seemed likely.

The Internal Revenue Service may adopt this view, but its logic escapes this writer. Apparently, the Service has even argued to some attorneys that all income from a deceased author's works is income in respect of a decedent. Pilpel and Greenbaum, "Some Reflections on the Sad Case of the Dead Author," *PUBLISHERS' WEEKLY*, vol. 178, no. 20 (November 14, 1960), pp. 18-19.

One writer has argued that since the renewal is an independent right, it should not be subject to inheritance tax, or, at least, that the courts should distinguish the case where the author leaves no widow or children and determines the inheritor by will, from the case where the widow, children, or next of kin derive the renewal from the statute. Note, "Duration of Copyright Protection," 36 U. Det. L. J. 66, 72 (1958).

PART II.**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****I. United States of America and Territories****182. U.S. COPYRIGHT OFFICE.**

[C.F.R.] Title 37 – Patents, Trademarks, and Copyrights. Chapter II – Copyright Office, Library of Congress. Part 202 – Registration of claims to copyright: Registration for sound recordings. *Federal Register*, vol. 37, no. 29 (Feb. 11, 1972), p. 3055.

Rules for the registration of claims to sound recordings, effective February 15, 1972.

183. U.S. FEDERAL COMMUNICATIONS COMMISSION.

[47 C.F.R. Part 76] Cable television systems. Proposed carriage of sports programs. *FEDERAL REGISTER*, vol. 37, no. 30 (Feb. 12, 1972), pp. 3190-3192. Docket No. 19418; FCC 72-110.

FCC proposal to preserve the blackout rule relative to cable television systems and the carriage of sports programs on such systems. Written comments are invited to be filed on or before March 16 and reply comments on or before April 6.

184. U.S. FEDERAL COMMUNICATIONS COMMISSION.

[47 C.F.R. Part 76] Cable television systems. Proposed importation of radio signals. *FEDERAL REGISTER*, vol. 37, no. 30 (Feb. 12, 1972), pp. 3192-3193.

FCC notice of a general inquiry and interim procedures concerning the importation of radio broadcast signals. Written comments are invited to be filed on or before March 16, 1972, and reply comments on or before April 6, 1972.

185. U.S. FEDERAL COMMUNICATIONS COMMISSION.

[C.F.R.] Title 47 – Telecommunication. Chapter I – Federal Communications Commission. Cable television service; cable television relay service. *FEDERAL REGISTER*, vol. 37, no. 30 (Feb. 12, 1972), pp. 3252-3341.

New rules regulating cable television, released February 3, 1972 and effective March 31, 1972.

186. U.S. POSTAL SERVICE.

[C.F.R.] Title 39 — Postal Service. Part 135 — Fourth class: Books and sound recordings mailed at special rates; permissible enclosures. FEDERAL REGISTER, vol. 37, no. 33 (Feb. 17, 1972), p. 3521.

Amended regulations, effective upon publication in the FEDERAL REGISTER, which deal with permissible enclosures in mailings of books and sound recordings at the special fourth-class and library rates of postage.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS187. **BERNE COPYRIGHT CONVENTION. REVISIONS, 1971.**

Convention de Berne sur la protection des oeuvres littéraires et artistiques du 9 septembre 1886, complétée à Paris le 4 mai 1896, révisée à Berlin le 13 novembre 1908, complétée à Berne le 20 mars 1914 et révisée à Rome le 2 juin 1928, à Bruxelles le 26 juin 1948, à Stockholm le 14 juillet 1967 et à Paris le 24 juillet 1971. *Revue Internationale du Droit d'Auteur*, no. 70 (Oct. 1971), pp. 165-234.

The texts of the newly revised convention in French, English and Spanish.

188. Convention administered by WIPO: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, October 26, 1961); state of ratifications and accessions as of January 1, 1972. *Copyright*, vol. 8, no. 1 (Jan. 1972), p. 19.189. Conventions not administered by WIPO, *Copyright*, vol. 8, no. 1 (Jan. 1972), pp. 22-29.

Contents: Universal Copyright Convention as revised at Paris on 24 July 1971. Universal Copyright Convention (Geneva, September 6, 1972): state of ratifications and accessions as on January 1, 1972. European agreements; state of ratifications and accessions as on January 1, 1972: European Agreement concerning Programme Exchanges by Means of Television Films (Paris, December 15, 1958). European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (Strasbourg, January 22, 1965). European Agreement on the Protection of Television Broadcasts (Strasbourg, June 22, 1960); Protocol to the said Agreement (Strasbourg, January 22, 1965).

190. Intergovernmental Copyright Committee. *11th Session, Geneva, November 3 to 5, 1971.*

Report. *Copyright*, vol. 8, no. 1 (Jan. 1972), pp. 20-22.

191. **UNIVERSAL COPYRIGHT CONVENTION. REVISIONS, 1971.**

Convention universelle sur le droit d'auteur révisée à Paris le 24 juillet 1971. *Revue Internationale du Droit d'Auteur*, no. 70 (Oct. 1971), pp. 235-275.

The texts of the newly revised convention in French, English and Spanish.

192. UNIVERSAL COPYRIGHT CONVENTION. *Unesco Copyright Bulletin*, vol. 5, no. 3 (1971), pp. 3-20.

Contents: Conference for revision of the Universal Copyright Convention, Unesco House, Paris, 5-24 July 1971. Universal Copyright Convention as revised at Paris on 24 July 1971. Protocol 1 annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of Stateless persons and refugees. Protocol 2 annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to the works of certain international organizations. Signatory States of the Universal Copyright Convention as revised at Paris on 24 July 1971, of Protocol 1 annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of Stateless persons and refugees, and of Protocol 2 annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to the works of certain international organizations.

193. U.S. PRESIDENT, 1969- (Nixon)

[CFR] Title 3—The President Proclamation 4116: International Book Year, 1972. [March 13, 1972]. *Federal Register*, vol. 37, no. 51 (Mar. 15, 1972), pp. 5359-5360.

Issued at the request of the Congress by Senate Joint Resolution 149 of December 15, 1971. The proclamation reads in part:

"[W]e must continue to foster the growth of learning and culture by protecting intellectual production through copyright. During the course of this year, the United States and other member countries of the Universal Copyright Convention will be considering adherence to the 1971 revisions of the Universal Copyright Convention, which strengthen international copyright protection for American works and assist developing countries to meet their need for educational materials. At the same time, we should continue our efforts in this country to modernize our own copyright laws."

PART IV.

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

194. *The Robert Stigwood Group Limited et al. v. Sperber et al.*, 173 USPQ 258 (2d Cir., March 17, 1972) (Kaufman, J.) *For decision below, see* 332 F.Supp. 1206, 171 USPQ 684 (S.D.N.Y. 1971), 19 BULL. CR. SOC. 146, Item 86 (1971).

Cross appeals from preliminary injunction in action for copyright infringement and unfair competition. Plaintiffs are the proprietor of copyright in the rock opera *Jesus Christ Superstar*, and its licensee. Defendants booked and presented concerts "consist[ing] of 20 of the 23 songs from *Jesus Christ Superstar*, sung sequentially with one exception, and three additional religious works." Defendants' performances were presented under the name "The Original American Touring Company." Plaintiffs sought to preliminarily enjoin defendants from performing the songs from the opera, referring to *Jesus Christ Superstar* in promotions, and using the name "The Original American Touring Company." The lower court enjoined only the promotional references to the name of the opera and both parties appealed.

Held, order modified.

1. *Defendants' Performances*: Defendant argued that its performances of the songs from plaintiffs' opera were sanctioned under an ASCAP license of non-dramatic performing rights in the compositions. The court held, however, that defendants' performance of substantially all of the songs from *Superstar* in the same sequence as performed in the opera "told the story" as portrayed in the opera and thus constituted a *dramatic* rendition outside the scope of the ASCAP license. The court said in part:

The facts before us vividly paint the dramatic nature of OATC's performance. Nowhere has Sperber disputed the accuracy of Stigwood's Exhibit 3 which is a program of one of OATC's concerts. A comparison between this exhibit and Exhibit 4, which is the list of songs incorporated in the recording of the opera, establishes that 20 of 23 *Superstar* selections are performed

in defendants' concert, all but one in identical sequence as in the copyrighted opera. The conclusion is inescapable that the story of the last seven days in the life of Christ is portrayed in the OATC performances substantially as in *Superstar*. One might appropriately ask why, if OATC did not intend that the same story be told, would it insist on preserving the sequence of the songs presented in *Jesus Christ Superstar*, which when performed in that fashion, tell the story even in the absence of intervening dialogue? As *Rice* [v. *American Program Bureau*, 446 F.2d 685 (2d Cir. 1971) 19 BULL. CR. SOC. 141, Item 83 (1971)] instructed, the lack of scenery or costumes in the OATC production does not ipso facto prevent it from being dramatic. . . . Indeed, radio performances of operas are considered dramatic, because the story is told by the music and lyrics. . . . There can be no question that the OATC concerts, in which singers enter and exit, maintain specific roles and occasionally make gestures, and in which the story line of the original play is preserved by the songs which are sung in almost perfect sequence using 78 of the 87 minutes of the original copyrighted score, is dramatic. And, the admitted desire of defendants to make reference to the opera in its advertisement provides further evidence that the performance is intended to come as close as possible to the original dramatico-musical.

In fashioning the appropriate form of preliminary relief, the court said:

It would not be sufficient merely to enjoin further concerts which follow the format set forth in Exhibit 3. Simply making insignificant changes in sequence that would still not materially affect the performance we have described or interfere with the development of the story, would not be sufficient. Nor would a simple limitation on the number of selections which could be performed suffice. Even the presentation of five or six songs could under certain circumstances, develop an essential portion of the drama, for example, the last two days in the life of Christ, thus infringing on a part of the opera. The sequence of the songs seems to be the linchpin in this case. If the songs are not sung in sequence, i.e., no song follows another song in the OATC concert in the same order as in the original opera, and there are no costumes, scenery, or intervening dialogue, we are confident that the resulting performance could not tell the story of *Jesus Christ Superstar*.

2. *Defendants' Promotional References to Jesus Christ Superstar:*

The appellate court affirmed the lower court's injunction against such references and held that the Supreme Court decisions in *Sears* and *Compco* did not preclude such relief:

Sears and Compco prevent protection outside of the copyright laws, of works which Congress could have protected but chose not to. It may be that titles are not "writings" in the constitutional sense and thus cannot be protected by copyright but can be protected under unfair competition doctrine. In any event, Sears and Compco carved out a specific exemption for trademarks and labels of products which can be protected to prevent deception of the public. That is precisely the situation we have here. Thus, while Sears could manufacture a pole lamp identical to Stiffel's, it could not call it a Stiffel pole lamp. Similarly, OATC may perform songs under the ASCAP license but may not indicate that they are from the opera. . . . Since the title Jesus Christ Superstar may well be associated with the opera as a whole and thus a "secondary meaning" has developed, we agree with the district court that defendants must be enjoined from directly or indirectly advertising or in any way representing any presentation as being from Jesus Christ Superstar or any song, instrumental selection or excerpt as taken therefrom in whole or in part.

3. *Defendants' Use of "The Original American Touring Company":*

The court agreed with the decision below that there was an insufficient showing of likely public confusion to sustain a preliminary injunction against defendants' use of "The Original American Touring Company." The likelihood of confusion, said the court, "is especially slight in view of the inability of [defendants] to make reference to Jesus Christ Superstar in its promotional efforts."

195. *Picture Music, Inc. v. Bourne, Inc.*, N.Y.L.J., April 21, 1972 at 1, col. 7 (2d Cir., April 3, 1972) (Hays, J.). *For decision below*, see 314 F.Supp. 640, 167 USPQ 348 (S.D.N.Y. 1970), 18 BULL. CR. SOC. 324, Item 251 (1971).

Appeal from judgment dismissing plaintiff's claim for declaratory relief as to her ownership of interest in copyright renewal and granting judgment to defendant on its counterclaim for copyright infringement.

In 1933, Walt Disney Productions produced an animated and scored cartoon film entitled "The Three Little Pigs." Defendant's

predecessor (Berlin), with Disney's approval, requested plaintiff's predecessor (Ronell) to assist in adapting part of the score to a popular song. Ronell, in collaboration with a Berlin employee, proceeded to make the appropriate rearrangements to create the popular song "Who's Afraid of the Big Bad Wolf" and for twenty-seven years from first publication thereof accepted a percentage royalty in payment for her services. During the final year of the initial copyright term, Ronell asserted a one-half interest in ownership of the renewal copyright as author of the work and obtained renewal registration on this basis, while defendant secured a renewal registration as proprietor in a work made for hire. (Ronell subsequently authorized publication of a new edition of the song, providing the basis for the counterclaim for infringement.) The lower court held that plaintiff could claim no ownership rights in the renewal and sustained the counterclaim. Although extensively discussing the concept of employment for hire, the lower court appeared to rest its holding on a finding that Ronell's contributions were not sufficiently substantial to constitute authorship, and perhaps on a finding that she implicitly assigned her renewal rights.

Held, affirmed.

The court held that Ronell's contribution constituted a work made for hire within Section 24 (Renewal; first proviso claimants) of the Copyright Act and thus that all renewal rights vested in defendant as proprietor. (The court, therefore, did not discuss the lower court's conclusions respecting substantiality of authorship and assignment.) The court concluded that the principle of rewarding motivational initiative which lies behind according renewal rights to proprietors in the case of works made for hire should not be "frustrated by conceptualistic formulations of the employment relationship" and that "independent contractors" might create works "for hire" within the meaning of the Copyright Act.

The court said:

As this court said in *Shapiro, Bernstein & Company v. Bryan* (123 F.2d 697, 700, 2d Cir., 1941), "when the employer has become the proprietor of the original copyright because it was made by an employee 'for hire,' the right of renewal goes with it, unlike an assignment." The rationale of this doctrine, which is embodied in section 24, has been said to be "that the motivating factor in producing the work was the employer who induced the creation. . . ." In the present case appellant itself says in its brief that "arrangements were made through [Berlin] for a copy of the entire musical score of the film cartoon to be forwarded by Disney with the ex-

press intention of having Ronell create a popular song inspired by the cartoon."

* * *

Appellant argues that we have held that "an essential element of the employer-employee relationship, [is] the right of the employer 'to direct and supervise the manner in which the writer performs his work'" (Donaldson Publishing Co., *supra*, at 643, quoting Nimmer, Copyright sec. 6231, 1964 [now sec. 62.2], 1971) and that that "right" is not found in the present case. However, the trial court found that employees of Berlin did in fact make some revisions in Miss Ronell's work. Moreover, since Disney had control of the original song on which Miss Ronell's work was based, Disney (and Berlin, with Disney's permission), at all times had the right to "direct and supervise" Miss Ronell's work.

The court in Donaldson (*supra*, at 643) listed as among the factors that show that there was no employment for hire, the absence of a fixed salary and the author's "freedom to engage in profitable outside activities without sharing the proceeds with" the alleged employer (*id.*). The absence of a fixed salary, however, is never conclusive (see Brattleboro Pub. Co., *supra*; Nimmer, Copyright section 62.2, 1971), nor is the freedom to do other work, especially in an independent contractor situation (Brattleboro Pub. Co., *supra*). Donaldson was quite different from the present case since it involved another who was the dominant person in the corporation alleged to be his employer. In such a situation it could not be said that his work was done at the "instance" of the corporation.

In short, the "motivating factors" in the composition of the new song, "Who's Afraid of the Big Bad Wolf," were Disney and Berlin. They controlled the original song, they took the initiative in engaging Miss Ronell to adapt it, and they had the power to accept, reject, or modify her work. She in turn accepted payment for it without protest, except as to the amount, for twenty-seven years. That she acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire. We so find, and therefore the right to renew the copyright in the song in 1960 accrued exclusively to appellee, the "proprietor."

196. *Iemelson v. Kellogg Company et al.*, 440 F.2d 986 (2d Cir., April 1, 1971) (*Per Curiam*).

Appeal from decision for defendants in action for misappropriation of confidential information and patent infringement. Plaintiff-appellant

submitted an idea and accompanying artwork for cardboard cut-out masks to defendant Kellogg, which disclaimed interest therein. Plaintiff's submission to Kellogg stated that the artwork was copyrighted (the masks had in fact been previously "published and copyrighted") and that patents were pending (a patent was secured subsequently). Approximately eight years later, and after issuance of the patent, Kellogg did market cereal packages displaying cut-out masks and plaintiff later instituted this suit for unauthorized use of its submission and patent infringement. The lower court directed a verdict for defendants on the unauthorized use claim, and dismissed the patent claim for insufficient evidence.

Held, affirmed in part and remanded in part.

The court affirmed the directed verdict for defendants on the issue of unauthorized use: "The case law is abundantly clear that there is no cause of action for the use of an idea claimed to have been communicated in confidence when that idea has been made public by the issuance of a copyright or patent prior to its use."

The court remanded the issue of patent liability for further findings of fact and conclusions of law.

197. *Hub Floral Corporation v. Royal Brass Corporation et al.*, 454 F.2d 1226 (2d Cir., January 24, 1972) (Mansfield, J.).

Appeal from dismissal of certain counts in complaint for copyright infringement.

Plaintiff designed a certain stylized planting container and contracted with a French company (Tissot) for their manufacture and delivery. Pursuant to the contract, Tissot delivered samples of the planters which plaintiff distributed to its salesmen for use in soliciting orders. Plaintiff also placed photographs of the planter in its catalog.

Plaintiff alleged that Tissot subsequently breached its agreement to deliver production copies of the planter and began to ship copies thereof to the named defendant, which proceeded to sell them. Plaintiff registered its planter as an unpublished work of art and later commenced this action for copyright infringement and unfair competition. The lower court denied plaintiff's motion for a preliminary injunction but granted defendants' cross-motion for dismissal of the copyright infringement claims on the grounds that plaintiff had failed to re-register and deposit its work after publication.

Held, dismissal of complaint reversed.

The court held that, although the Copyright Act does require, as a condition of suit, a new deposit following the "reproduction in copies for

sale" of a previously-registered unpublished work, there had been no such publication in the instant case. The court noted (i) that plaintiff's counsel's statement that plaintiff had been selling its planter was an inadvertent misstatement, corrected by an affidavit of plaintiff's treasurer with personal knowledge of the facts and was not a binding admission; and (ii) that plaintiff's use of the samples and photographs did not comprise a publication requiring a new deposit. In the latter connection the court said:

We also must reject defendants' further contention that Hub's use of photographs and samples of the planter to obtain orders amounted to a publication of the work requiring compliance with §13 of the Copyright Act. It has long been settled that the taking of orders through employment of samples, catalogs, or advertisements of a work does not amount to publication of the work. . . .

There can be no publication of the type referred to in §13 of the Act until the work has been "reproduced in copies for sale", see 17 U.S.C. §12; 37 C.F.R. §202.2(a)(1), former Copyright Office Rules 19 and 23 as cited in *Paterson v. Century Productions*, 93 F.2d 489, 492 (2d Cir. 1937). Here the samples, although used for the purpose of taking orders from dealers, were not sold, nor had other reproductions yet been produced for sale or made available to the public. Since Hub was not in a position to commence realizing the benefits of its unique design and the public had not been provided with reproductions, there was no publication.

198. *Douglas International Corporation et al. v. Baker et al.*, 335 F.Supp. 282, 173 USPQ 144 (S.D.N.Y., May 11, 1971) (Motley, J.).

Motion for preliminary injunction in action for copyright infringement. Plaintiffs, owners of copyright in a book compiling the routines, monologues and commentaries of the late satirist Lenny Bruce and the licensees of dramatic rights therein, alleged that various of the defendants authored, produced and planned to perform a play containing over thirty of the routines appearing in the book.

Held, motion granted.

The court found that defendants' play "employs material from [plaintiffs' book] in such substantial quantity as to constitute a prima facie case of copyright infringement"; and held:

(i) That although the defendant-author of the alleged infringing play might have created an initial version of the script therefor at the

request of plaintiff-proprietor but not as an employee-for-hire, this did not give him the right to use plaintiffs' copyrighted materials:

The court finds it unnecessary to decide whether or not the "works for hire" doctrine applies in this case. Even assuming [the defendant-author of defendants' play] is author-proprietor of the play this would not, without more, give him the right to use plaintiffs' copyrighted materials. . . . The issue in this case is not who has the right to perform defendants' play (plaintiffs do not wish to perform defendants' play); it is whether or not defendants' play infringes upon plaintiffs' copyrighted Book. No written agreement, contract or license has been shown to the court which in any way transferred to the defendants the right to employ any of plaintiffs' copyrighted materials. Without such an agreement, or without excluding the pirated materials, defendants cannot perform the play.

(ii) That even if defendants' play may have been original in part, this "does not allow the defendants to incorporate therein copyrighted materials belonging to plaintiffs";

(iii) That, even assuming much of the allegedly pirated material to have been taken from transcripts of Bruce's court involvements, "the publication of previously copyrighted materials in court transcripts cannot possibly dedicate such material to the public";

(iv) That defendants' assertions that the pirated routines were "stock" or factual situations, or copied from other comedians, or taken from conversations and tape recordings among Bruce, defendant-author and others, were broad, conclusory allegations unsupported by particulars sufficient to sustain the claims; and

(v) That defendants' claim of lack of irreparable injury to plaintiffs lacked merit:

[Defendants'] claim that because plaintiffs would not show them a copy of their play it is not known in what way defendants' play will injure plaintiffs' play. However, the claim in this case is that defendants' play infringes plaintiffs' copyrighted Book and not that it infringes plaintiffs' play. Additionally, the copyright owner of a book has the *right* to produce the book in dramatic form and can sue to enjoin an infringing work even if he is not at that time producing a play.

Finally, it is not necessary that plaintiffs in a copyright infringement action, particularly one involving dramatic works, make a detailed showing of irreparable harm.

199. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers et al.*, 172 USPQ 355 (S.D.N.Y., January 20, 1972) (Lasker, J.). For earlier related decision, see 167 USPQ 754 (S.D.N.Y., 1970), 18 BULL. CR. SOC. 247, Item 119 (1971).

Defendants' motion for summary judgment in action for violation of the antitrust laws. Plaintiff asserted that ASCAP's offering of "blanket" licenses (the right to use any or all works in the ASCAP repertory for a fixed period of time in return for a fee calculated upon a percentage of the licensee's overall revenues for that period) and "per program" licenses (the right to use any or all ASCAP works for one broadcast program for a fee based upon a percentage of the licensee's revenue from that program) constituted illegal price fixing, boycotting and tying arrangements in violation of the antitrust laws. The "blanket" and "per program" licenses were established under ASCAP's amended consent decree entered in a prior lawsuit by the Government for alleged violations of the antitrust laws; however, CBS argued that these licenses required broadcasters to pay royalties not bearing any relationship to the amount of ASCAP music actually used and, considering that users such as CBS could not practically acquire licenses from the individual ASCAP members/copyright proprietors, that ASCAP's system fell short of compliance with the antitrust laws. CBS proposed that ASCAP grant "per use" licenses under which payment would be measured by the actual use of ASCAP music.*

In the instant proceeding, ASCAP moved for summary judgment dismissing the complaint, arguing that in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1, 152 USPQ 375 (1967), 14 BULL. CR. SOC. 379, Item 290 (1967) cert. denied 389 U.S. 1045 (1968) the Ninth Circuit Court of Appeals persuasively rejected the same antitrust claims raised here. In the *K-91* case the Ninth Circuit affirmed the lower court's dismissal of allegations of antitrust violations by ASCAP raised as a defense and counterclaim in a copyright infringement action.

Held, motion denied.

1. In *K-91*, the Ninth Circuit held that ASCAP could not be accused of price-fixing because, under the consent decree, applicants for an

* "Under CBS' proposed per-use license system, a user would pay a lump sum for the right to gain access to ASCAP's pool of musical compositions ('library card right'). During the term of the license, the user would pay an additional fee for each use of music covered by the 'library card' but not licensed directly from individual proprietors. The per-use fee would vary depending on the nature of the use. Broadcasters would also retain the right to deal with individual proprietors directly." [Footnote by the Court].

ASCAP license who do not agree with the fee proposed by ASCAP might apply to the District Court for the Southern District of New York to fix a reasonable fee. The present court, in a footnote, said, however, that "th[is] argument does not meet CBS' contention that a 'reasonable' price . . . fixed by a judge under the decree . . . is not the equivalent of a price determined in the market place." The court added that it expressed no view on this point, holding only that a genuine issue of fact was raised which CBS should have the opportunity to prove.

2. The *K-91* court also based its holding on the fact that ASCAP was not an exclusive licensing agent, its members retaining the right to deal directly with prospective licensees. The present court said, however:

... we are doubtful in any event of the practical value of the "non-exclusive right" under the present system. We are inclined to agree with the court in *Schwartz v. Broadcast Music, Inc.*, 180 F.Supp. 322, 333, 124 USPQ 34 (1959). There Judge Weinfeld observed as to the argument that a user always had the "option" to seek an individual license: "The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real."

3. In *K-91*, the Ninth Circuit found that the potential of ASCAP acting so unreasonably as to violate the antitrust laws was prevented by the terms of the Government's consent decree. "As a potential combination in restraint of trade" said the Ninth Circuit, "ASCAP has been 'disinfected' by the decree." The present court held, however, that operation under the consent decree did not immunize ASCAP from the general application of the antitrust laws, and continued:

Granted that a party is subject to attack under the antitrust laws despite the presence of a consent decree, the question we are presented with in this case is: Under what circumstances may a defendant's activities, previously sanctioned as falling within the rule of reason, be currently judged to be in violation of the antitrust laws? We find a guide to the answer in the Supreme Court's ruling in *Silver v. New York Stock Exchange* [373 U.S. 341 (1963)].

In *Silver*, the New York Stock Exchange had, without giving reason for its action, ordered the discontinuance of direct wire telephone connections between certain members of the New York Stock Exchange and non-members. The result was that one petitioner was forced out of business and another's business was greatly diminished. The issue presented was: "* * * whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive

as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases." *Id.*, at 347. The Court explained that the proper approach in such a case was not an analysis which required either total exemption or non-exemption, but one "which reconciles the operation of both statutory schemes with one another * * *." (at 347). Finding that the Securities Exchange Act contained no express exemption from the antitrust laws, and that therefore the Exchange was only potentially immune in appropriate circumstances, the Court stated:

"Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Id.*, at 357.

The Court held that the Exchange had violated the "minimum extent" rule by having no provision for some method of notice and hearing to a protesting non-member.

ASCAP's operation under the "regulatory system" of the 1950 amended judgment may be reasonably analogized to the Exchange's operation under the Securities Exchange Act. For the purposes of the discussion we may regard the 1950 amended judgment as constituting an implied partial repeal of the antitrust laws. In other words, the 1950 decree sanctions, under the aegis of the rule of reason, activities (i.e., price fixing, group boycotting, tying) which would otherwise be illegal *per se* but for the unusual economic conditions prevailing in the music publishing business. Applying the Silver rationale, the proper approach here is to reconcile the "regulatory system" of the 1950 amended judgment with the antitrust laws, bearing in mind that the regulatory system may be permitted to encroach upon the antitrust laws only to the "minimum extent necessary."

The policy of the consent decree is clear: the maintenance of an orderly market in the music publishing industry. In this context the words of the Solicitor General [in an *amicus* brief presented to the Supreme Court prior to that Court's denial of review in K-91] bear repeating:

"If the market is to *function at all* there *must* be * * * some kind of central licensing system." (emphasis supplied).

Nevertheless, the Silver case informs us that however necessary a regulatory system may be, that regulatory system may remain "exempt" under the antitrust laws only to the minimum extent necessary to preserve its purpose: here the purpose of maintaining

an orderly market. In other words, if CBS can prove that the regulatory system can be amended to operate on a more competitive basis, it would by definition mean that the antitrust laws were being encroached upon more than to the "minimum extent necessary."

The K-91 court was not presented with the issue put before us because there the broadcasters did not propose to the court an alternative form of licensing. The distinction is critical to this motion. Indeed, in K-91 the parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition. . . . Thus the parties in K-91 agreed that no practical alternatives were available to per program and blanket licensing, and none was proposed — which is, of course, the antithesis of CBS's position, and which removed from issue in the K-91 case the very issue here presented. Had the Ninth Circuit been presented with an alternative proposal, it might well be that it would not have found ASCAP to have been "disinfected" by the consent decree. Under the rationale of *Silver*, an "exempt" group is only "disinfected" from the strictures of the antitrust laws while it remains within the boundaries of the "minimum extent" rule.

200. *The Georgie Porgie Company et al. v. Link et al.*, 172 USPQ 656 (S.D.N.Y., August 18, 1971) (Cooper, J.).

Plaintiffs' motion for preliminary injunction in action for infringement of copyright in a dramatic work.

Held, granted.

The court held that the "limited production" and performance of plaintiffs' play on several occasions during one month at an "experimental" theatre "was not an abandonment of the author's rights in the play."

201. *Ferrara, d/b/a Nelson-Hall Company, et al. v. Rodale Press, Inc.*, 172 USPQ 488 (E.D. Pa., January 13, 1972) (Troutman, J.).

Action for copyright infringement. Nelson-Hall secured an exclusive license from the individual plaintiff-authors for publication of their book on nuclear pollution and, after publication, registered claim to copyright in the work in the names of the authors. Subsequently, defendant published a second book by the same authors on the same subject. Nelson-Hall claimed that this work infringed the first-published book and requested the authors to voluntarily join as plaintiffs in an action for infringement. Upon their refusal, Nelson-Hall brought this action, joining

the authors as involuntary plaintiffs under R. 19(a) Fed. Rules Civ. Prac. Defendant moved to dismiss the action on the grounds that joinder was improper, thus requiring the striking of the authors as plaintiffs and the failure of suit for lack of the copyright proprietors as indispensable parties.

Held, motion denied.

The court held that joinder was proper, under Rule 19(a) and the doctrine of *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459 (1926), notwithstanding that the authors were not subject to personal service in the action. The court said:

In *Independent Wireless Telegraph Co. v. Radio Corporation of America* . . . the plaintiff was an exclusive patent licensee, but lacked the power to sue alone in his own name or the name of the patent owner. When the patent owner refused to join as a plaintiff in an action for an injunction against the alleged infringement, the exclusive licensee joined the owner as an involuntary plaintiff. In holding this procedure proper, the Supreme Court stated at page 469:

"It seems clear then on principle and authority that the owner of a patent who grants another the exclusive right to make, use or vend the invention, which does not constitute a statutory assignment, holds the title to the patent in trust for such a licensee, to the extent that he must allow the use of his name as plaintiff in any action brought at the instance of the licensee in law or in equity to obtain damages for the injury to his exclusive right by an infringer or to enjoin infringement of it. * * * Inconvenience and possibly embarrassing adjudication in respect of the validity of the licensor's patent rights, as a result of suits begun in aid of the licensee, are only the equitable and inevitable sequence of the licensor's contract, whether express or implied."

The narrow issue before the Court in *Independent Wireless* was the precise issue which is presently before this Court in the instant case. There, the Court framed the issue at page 469 as follows:

"But suppose the patentee and licensor is hostile and out of the jurisdiction where suit for infringement must be brought, what remedy is open to the exclusive licensee?"

The Court answered this question at page 472, holding that:

"[I]f there is no other way of securing justice to the exclusive licensee, the latter may make the owner without the jurisdiction a co-plaintiff without his consent in the bill against the infringer. Equity will not suffer a wrong without a remedy."

This procedure which must be followed in order to fall within the scope of Independent Wireless is explained by the Court at page 473:

"The owner beyond the reach of process may be made co-plaintiff by the licensee, but not until after he has been requested to become such voluntarily. If he declines to take any part in the case, though he knows of its imminent pendency and of his obligation to join, he will be bound by the decree which follows. We think this result follows from the general principles of *res judicata*."

The Independent Wireless doctrine has been held applicable not only to patent infringement cases but also to cases of copyright infringements. . . . In the instant case, Nelson-Hall has complied with the procedural requirements of Independent Wireless in that it requested the copyright proprietors to voluntarily join in the suit, and upon their refusal to do so, joined them as involuntary plaintiffs. This case is clearly within the purview of the Independent Wireless doctrine. . . .

In concluding its opinion, the court observed:

We are not insensitive to defendant's assertion that an author's right to write books on the subject-matter within his field of expertise should not be restricted. This policy is especially laudable where, as here, the subject-matter involves an area which is of a serious concern to the public welfare. However, the sole issue in this case is whether defendant, Rodale Press, has published a book in which a material and substantial portion has been copied from the copyrighted book so as to constitute an infringement under the copyright laws of the United States. This question is one to be resolved on the merits.

202. *Celestial Arts, Inc. v. Neyler Color-Lith Co., Inc., et al.*, 172 USPQ 434 (E.D. Wisc. Nov. 12, 1971) (Gordon, J.).

Motion to dismiss complaint in action for copyright infringement.

Plaintiff alleged that the president (individual defendant) of the corporate defendant "contracted with" one Burton Sinagub to reproduce and publish copies of certain copyrighted works of art. Plaintiff had previously recovered damages under a consent decree in a suit against Sinagub to which the instant defendants were not party.

Held, motion denied.

1. Defendants asserted that the act of "contracting with" a third party to produce copies did not constitute "infringement" under the

Copyright Act, but the court replied that it is "well settled that all parties who unite to produce counterfeit copies of copyrighted material are liable for damages."

2. Defendants also argued that Sinagub was an indispensable party to the instant proceeding, but the court said:

It is clear that copyright infringement is a tort and that all infringers may be held to be jointly and severally liable for the damages occasioned by the infringement. Accordingly, the plaintiff may sue such infringers as he chooses. . . . The court can frame its judgment in such a manner as to protect the interest of an absent party.

The court also noted that although plaintiff had recovered damages under the consent decree in its prior suit against Sinagub, this did not provide a defense that plaintiff had been fully compensated for its damages since the stipulation underlying the consent judgment in the prior case (i) provided that the damages there awarded were in consequence of the infringing acts of the prior defendants; and (ii) specifically reserved the right to proceed against the present corporate defendant.

203. *Nucor Corporation v. Tennessee Forging Steel Service, Inc. et al.*, 173 USPQ 374 (W.D. Arkansas, March 16, 1972) (Williams, J.).

Action for infringement of common law copyright in building plans.

Held, complaint dismissed. The court found that by distributing approximately thirty sets of the plans to construction bidders without limiting their further circulation, by "permitting any and all interested people to see, visit and inspect the building" constructed therefrom "in all stages of construction" ("the evidence", added the court, "reflects that there is nothing on the plans . . . which would not be readily apparent to any competitor or knowledgeable person touring or observing plaintiff's plants"), and by promotional distribution of thousands of catalogs and reports containing aerial photographs of its building, plaintiff had generally published its plans, divesting common law copyright therein.

204. *Jaeger v. American International Pictures, Inc.*, 330 F.Supp. 274 (S.D.N.Y., March 12, 1971) (Frankel, J.).

Action for violation of author's rights by alleged distortion of motion picture. Plaintiff alleged that he directed and co-authored the script for a motion picture categorized by the court as a "film which appears to be a multi-national addition to the supply of cinematic erotica." The film was produced by a German corporation half-owned by plaintiff.

Said corporation then entered into a distribution agreement with a second German corporation, which assigned its American distribution rights to an American company which in turn assigned same to defendant. Plaintiff further alleged that defendant then began exhibiting an English version of the film "from which major parts of the picture as originally produced in Germany have been eliminated and in which a segment of approximately 25 minutes in length has been inserted [without plaintiff's consent] resulting in gross distortion and mutilation of the original screenplay * * *."

Plaintiff claimed that the attribution of the distorted version to him violated his "literary property" rights and Section 43(a) of the Lanham Act (prohibiting false designations of origin), and that the use of his name in connection with the promotion of the distorted version violated N.Y. Civ. Rts. L. §51 (Right of Privacy-precluding use of another's name for purposes of advertising or trade without consent).

Plaintiff moved for a preliminary injunction, and defendant, asserting a failure to state an adequate claim for relief and the absence of indispensable parties, cross-moved for dismissal.

Held, motion denied.

I. Defendant's Motion to Dismiss:

A. On the Merits: The court said:

Whether or not there is any square counterpart in American law of the "moral right" of artists assertedly recognized on the European continent, *there is enough in plaintiff's allegations to suggest that he may yet be able to prove a charge of unfair competition or otherwise tortious misbehavior* in the distribution to the public of a film that bears his name but at the same time severely garbles, distorts or mutilates his work. It is at least arguable that there is a claim under the Lanham Act, 15 U.S.C. §1125(a), in the charge that defendant represents to the public that what the plaintiff had nothing to do with is the plaintiff's product. . . . Perhaps a similar species of wrong is defined and reachable under the law of New York and other jurisdictions where the film is being shown. [Emphasis added].

B. For Lack of Indispensable Parties:

The court held that the owner of German copyright ("Conti") in the film was not an indispensable party to the action since "German copyright issues are not before the court" and, although defendant argued that plaintiff's complaint raised questions of the rights of the parties flowing from contracts made with Conti, the court replied that "plain-

tiff is not pleading a contract cause of action; he is pleading a variety of tort, an extracontractual right of authors and directors. This is separable from whatever claims [Conti] might have against defendant; thus there is no need that Conti be joined."

The court also held that plaintiff's co-author was not an indispensable party since "his interest will not be adversely affected by the decision here — except in the abstract sense that if plaintiff fails to establish any right of action at all, the precedent may work to his co-author's prejudice."

The court further held that while defendant's assignor ("UPO") *might* be substantially injured by an injunction against the showing of the film *if* the terms of its agreement with defendant conferred a share in the profits of American distribution, defendant had not made a sufficient showing of UPO's actual interest and injury. (Conti, the court had noted, did not receive a share of profits of American distribution and thus did not have a sufficient interest in the outcome of the litigation to be considered indispensable.)

II. *Plaintiff's Motion for Preliminary Relief:*

Notwithstanding its denial of defendant's motion to dismiss on the merits, the court held that plaintiff had not adequately demonstrated probable success on the merits since (i) defendant's agreement with its assignors may have granted the right to make the changes complained of (particularly those provisions of the agreement dealing with modifications introduced by reason of varying national censorship standards); and (ii) the record left substantial doubt as to whether plaintiff could show a *material* mutilation or distortion. In the latter respect the court said:

While it may be doubted that the case should ever turn upon judicial views of the aesthetic merits of erotic movies, the plaintiff, to obtain an injunction or to recover any more than nominal damages, will probably have to show either that the substitutions of which he complains are markedly inferior to what he produced or that they, although not inferior, do not fit in with the movie as an artistic whole. . . . Plaintiff's cases which seem to hold that false attribution is *per se* an enjoynable violation of an author's rights . . . do not require a contrary conclusion. Those were all cases involving the work of a single author (in the case of Granz [v. Harris, 198 F.2d 585 (2d Cir. 1952)] a group of musicians speaking as one through their leader) and the considerations there differ substantially from those in a large-scale collaborative work like a movie.

The court also concluded that a "balancing of the equities" precluded the award of extraordinary relief:

The reputation [plaintiff] seeks to protect may well be a valuable asset both in his own legitimate judgment and on more impersonal and objective criteria. Nevertheless, in the materials thus far presented, this remains a matter only of his own, possibly partial assertion. On the other side, there are powerful arguments showing the severe injury defendant would suffer from the granting of injunctive relief at this time. It is shown without dispute that distribution of the film started last October. Between then and the commencement of this lawsuit, defendant incurred costs of almost \$150,000. Thereafter, in a continuing course of distribution efforts, defendant expended another \$95,000 or so from the commencement of the lawsuit to the motion for a preliminary injunction. The movie is now playing or booked for exhibition in some 135 theatres. The cessation of these activities under a preliminary restraint would have obviously substantial and very likely irreparable impact upon defendant and many other interests. [The court also noted that "the plaintiff has not been notably prompt in the assertion of his rights."]

205. *Screen Gems-Columbia Music, Inc., et al. v. Metlis & Lebow Corp. et al.*, 172 USPQ 261 (2d Cir., January 4, 1972) (Hays, J.). *For decision below*, see 169 USPQ 89 (S.D.N.Y. 1971), 19 BULL. CR. SOC. 86, Item 26 (1971).

Appeal from judgment for plaintiffs in action for copyright infringement. The named defendant limited its appeal to the assertion that the trial court should have reduced the judgment against it (for infringement of mechanical rights) by amounts paid in settlement of the suit by three co-defendants before trial.

Held, modified.

The court held that since all the defendants were involved in only the promotion and sale of the infringing record, only a single infringing act or "wrong" was involved for which all the defendants were jointly and severally liable, and that a plaintiff's recovery from some such defendants reduces the liability of the others. The court distinguished a prior mechanical rights case imposing several and separate liabilities on multiple defendants as involving two infringing acts — manufacture as well as sale. The court said:

Copyright infringement is in the nature of a tort, for which all who participate in the infringement are jointly and severally liable. . . . Under elementary principles of tort law a plaintiff is entitled to only one recovery for a wrong. Payments made in partial satisfaction of a claim are credited against the remaining liability. . . .

[T]he district court held, that since the settling defendants had not admitted any liability, it could not be said that the settlement was in partial satisfaction of an obligation. However, as the Restatement of Torts, Second, says:

"Payments made by any person in compensation of a claim for a harm for which others are liable as tortfeasors diminish the claim against them *whether or not the person making the payment is liable to the injured person, and whether or not it is so agreed at the time of payment.*" (Emphasis supplied.) Restatement (Second) of Torts, §885 (3) (Tentative Draft No. 16, 1970).

The confusion about the application of the foregoing principles has apparently been caused largely by the decision of this court in *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 115 USPQ 36 (2d Cir. 1957), cert. denied, 355 U.S. 952, 116 USPQ 601 (1958), which held that where one defendant had manufactured the infringing records and another had sold them, their liability was several, and separate recoveries could be had against each. That case is to be limited to its facts. Its rationale was that manufacture and sale were separate infringements, because the Copyright Act refers, in Section 101(e), to "infringement of such copyright by the unauthorized manufacture, use or sale of" phonograph records. As the court noted in the later case of *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 137 USPQ 275 (2d Cir. 1963), *Goody* did not present "the possibility of double recovery for a single sale," *id.* at 309, 137 USPQ at 278-279. We hold that the Copyright Act allows only a single recovery for a single sale; where multiple defendants are all involved with sales, as are *Metlis & Lebow* and the settling defendants here, their liability is joint and several and recovering from one reduces the liability of the others.

206. *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278, 173 USPQ 188 (S.D.N.Y., May 19, 1971) (Motley, J.).

Motion for preliminary injunction in action for infringement of copyright in textile design.

Held, motion denied.

1. The court stated that the liberal rule of awarding preliminary relief in copyright infringement actions without detailed showings of irreparable harm did not lessen plaintiff's burden of demonstrating probable success on the merits, nor dispense with judicial consideration of the "need" for this extraordinary remedy.

2. Considering the following, the court denied the motion "in the exercise of its discretion":

(a) In August, 1970 plaintiff's lawyer wrote to defendant alleging infringement of copyright and defendant's attorney responded with a request for information concerning the particulars of plaintiff's copyright. This request was never answered and not until approximately seven and one-half months later did plaintiff commence suit. The court held that plaintiff's delay brought the equities of the case in favor of defendant and militated against the need for preliminary relief:

Plaintiff's claimed need for immediate relief is undercut by the slow pace with which plaintiff has sought to obtain it. Plaintiff's dilatoriness is unexplained, and is, indeed inexplicable in view of its arguments regarding the short life of designs and the consequent urgent need for relief. It would seem to this court the plaintiff's argument that a design's life is brief cuts both ways. To begin with, it accentuates the inordinate time plaintiff took to seek the temporary injunction. It also makes clear that such an injunction would amount in substance to the ultimate relief sought in the action — a further factor weighing against the granting of this extraordinary remedy. . . .

(b) The court also noted that money damages for plaintiff's claimed injuries "would not be impossible to compute" and, if defendant were found liable, would provide adequate remedy.

(c) The court also noted that defendant had submitted approximately four yards of what it claimed to be material, bearing the design in question, produced by plaintiff and bearing no notice of copyright. While this "small quantity" of material could not comprise a basis for finding a fatal publication without notice, said the court, "still it does raise an important factual question" which might preclude preliminary relief.

2. Also of Interest

207. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers et al.*, 53 F.R.D. 231 (S.D.N.Y., July 16, 1971) (Lasker, J.). *For earlier related decision*, see 167 USPQ 754 (S.D. N.Y. 1970), 18 BULL. CR. Soc. 247, Item 119 (1971); *for decision on defendants' motion for summary judgment*, see Item 199, *supra*.

In its action against ASCAP and BMI for alleged violations of the antitrust laws by refusing to grant "per use" licenses for use of music in the performing rights societies' repertories, BMI answered with a general denial* and ASCAP with a general denial, affirmative defenses and counterclaims. BMI subsequently moved for an order that defendants' liability be tried separately and prior to all other issues, while co-defendant ASCAP opposed the motion on the grounds that its affirmative defenses and counterclaims raised issues "inextricably related to" resolution of the complaint and required simultaneous trial. This motion not yet being decided, plaintiff moved for an order extending its time to answer and object to ASCAP's interrogatories insofar as they related only to issues raised by the ASCAP counterclaims and defenses. *Held*, motion granted.

...to require CBS to answer or object to the interrogatories of ASCAP relating to its affirmative defenses and counterclaims at this time [i.e., prior to resolution of BMI's prior motion for severance] would impose an unnecessary burden on CBS and might delay completion of discovery on other matters. ASCAP will not be prejudiced by the granting of CBS' motion, since CBS will be required to answer or object to the interrogatories at an appropriate time.

208. *Sterner v. U.S.*, 434 F.2d 656 (Ct. Claims, December 11, 1970) (*Per Curiam*).

Action to recover for copyright infringement and breach of implied contract. Plaintiff developed a "program" for the prompt on-scene medical care and removal of accident victims and related first-aid devices. In a prior proceeding the court found no infringement and dismissed the copyright claim. The court now *held*, that plaintiff had failed to show the existence of an implied contract by the Government to pay for the

* BMI also originally asserted a counterclaim for infringement, which was later abandoned upon the granting of relief requiring CBS to pay BMI royalties *pendente lite*. See *Columbia Broadcasting System v. ASCAP*, 167 USPQ 754 (S.D.N.Y. 1970), 18 BULL. CR. Soc. 247, Item 119 (1971).

use of plaintiff's program, and granted summary judgment to defendant. The court said:

... we find that no consensual agreement to use or pay for plaintiff's ideas or products can be implied from the conduct of or the correspondence between the parties. . . . [T]he most that can be said is that plaintiff wrote various letters in which he tried to persuade the Government to purchase his first-aid products and accompanying instructions. However, none of plaintiff's products were ordered by the Government, and we find nothing in the correspondence which indicates that the Government promised to use or pay for plaintiff's . . . program. . . .

"Even if it is assumed that plaintiff had some protectible legal interest in the concepts he has espoused", added the court, "he has placed these ideas in the public domain by publishing them. Thus, the use of the ideas is unrestricted."

209. *Shepard et al. v. Comr. Internal Revenue*, 173 USPQ 34 (Tax Ct., February 9, 1972) (Atkins, J.).

Petition in which the court held that certain sums received by inventor were taxable as capital gains as constituting payments for technology sold to patent licensee. The court said, *inter alia*:

In construing agreements where no provision has been made with respect to the termination of payments called for by such agreements, the courts have held that where such an agreement relates to a license under a patent or a copyright, the expiration of the patent or of the copyright constitutes an implied termination date. . . . no such termination date may be implied where such an agreement relates to a trade secret, even when the subject of such an agreement becomes public knowledge. [In such cases, payment may continue co-extensive with use.]

PART V.

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

210. **BOOK PUBLISHING IN THE U.S.S.R.**; reports of the delegations of U.S. book publishers visiting the U.S.S.R., October 21-November 4, 1970; August 20-September 17, 1962. 2d ed., enl. Cambridge, Harvard University Press [1971] 182 p.

"The report of the 1970 delegation supplements and brings up to date the material from the report of the 1962 delegation which was first published in 1963 under the same title." See 10 BULL. CR. Soc. 198, Item 218 (1963).

211. **SLOAN COMMISSION ON CABLE COMMUNICATIONS.**

On the cable: the television of abundance, report. New York, McGraw-Hill [1971] 256 p.

A report, dealing with the significance of cable television for the home viewer, by a commission composed of sixteen distinguished economists, scientists, educators and public figures under the chairmanship of Dr. Edward S. Mason. The report covers historical, technological, political, social, economic, regulatory and other aspects of CATV, and makes a number of recommendations. Chapter 5, captioned "Cable in transition" is devoted, for the most part, to copyright issues.

2. Foreign Publications**1. In English**

212. **STUART-STUBBS, B.**

Purchasing and copying practices at Canadian university libraries; two studies performed for the Canadian Association of College and University libraries, Committee on Copyright Legislation. [Ottawa] Canadian Library Association, 1971. 46 p.

The results of the two studies were obtained by the solicitation of relevant information from member libraries of the Canadian Association of University Libraries between January and April 1971.

The purpose of the studies was the collection of information relating to those aspects of library activity which would most clearly be affected by copyright law revision.

2. In Spanish

213. DESANTES, JOSE MARIA.

La relación contractual entre autor y editor. Pamplona [Spain], Ediciones Universidad de Navarra, 1970. 298 p. (Cuadernos de trabajo de periodismo, 14).

A treatise on the contractual relationship between author and publisher, with special attention to Spain.

B. LAW REVIEW ARTICLES

1. United States

214. BALLOU, PETER. Record piracy and copyright: present inadequacies and future overkill. *Maine Law Review*, vol. 23, no. 2 (1971), pp. 359-417.

"This comment explores different types of piracy from both a legal and an economic point of view, and suggests that raising the status of some of the economic distinctions to legal distinctions may well serve the public interest better than the present legal distinctions or those proposed in the Copyright Revision Bill." Part five of the comment, a modified version of which was awarded first prize in the Nathan Burkan Memorial Competition at the University of Maine School of Law, is a discussion of the provisions of the revision bill governing sound recordings.

215. BOTEIN, MICHAEL. The 4th report and order on cable television. *New York Law Journal*, vol. 167, no. 33 (Feb. 17, 1972), p. 1, cols. 3-4, p. 4, cols. 1-5; no. 34 (Feb. 18, 1972), p. 1, cols. 4-5, p. 4, cols. 1-4.

An analysis of the FCC "long-awaited" rules regulating cable television which were adopted on February 3. The analysis is divided into the following topics: (1) Background to report; (2) Cable use of broadcast signals; (3) Cable use of non-broadcast signals; (4) Federal, state, and local regulatory relationships; and (5) The legality of the rules.

216. BRILLIANT, ANDREW P. Cable television: a regulatory dilemma. *Boston College Industrial and Commercial Law Review*, vol. 13, no. 2 (Dec. 1971), pp. 326-368.

A critical student note on FCC regulation of CATV which is described as being "designed to protect the monetary interests of competing industries" with concomitant neglect of promotion of the public interest. A conclusion is reached that public "acceptance of CATV will not be achieved until effective statutory regulation designed to promote the interests of the public, not those of the television industry, is established on a national scale."

217. The "Copying-misappropriation" distinction: a false step in the development of the *Sears-Compco* pre-emption doctrine. *Columbia Law Review*, vol. 71, no. 8 (Dec. 1971), pp. 1444-1473.

An article, adapted from an essay that won first prize in the 1971 Nathan Burkan Memorial Competition at Columbia University School of Law, which attempts to show that the "copying-misappropriation" distinction "bears no relation to the policies that underlie the holding in *Sears-Compco*," with special emphasis on record piracy cases. One of the conclusions reached is "that legislation specifically addressed to the problem of pre-emption may prove helpful in alleviating some of the difficulties that have been discussed" in the article.

218. Copyright exclusivity safeguarded by FCC rules on cable television. *BNA's Patent, Trademark & Copyright Journal*, no. 63 (Feb. 3, 1972), pp. AA1-AA3.

An article on the announcement by the Federal Communications Commission, on February 3, of comprehensive rules for the regulation of CATV. In presenting the new rules, which, among other things, provide exclusivity for syndicated as well as for network programs, FCC chairman Burch says the commission is hopeful that they will facilitate general revision of the copyright law. The text of a strong dissenting opinion by Commissioner Nicholas Johnson is given at the end of the article.

219. Correspondence between FCC and Senator McClellan released. *BNA's Patent, Trademark & Copyright Journal*, no. 64 (Feb. 10, 1972), pp. A3-A4.

"FCC Chairman's letter to Senator McClellan concerning CATV and Senator's reply indicate that adoption of CATV Rules will facilitate enactment of Copyright Revision Bill."

220. FINKELSTEIN, HERMAN. Copyright problems on campus. *The College Counsel*, vol. 6, no. 1 (1971), pp. 203-219.

In a discussion of aspects of copyright protection of interest to the academic profession, the General Counsel of ASCAP makes a strong case in support of the rights of authors.

221. GARNER, MELVIN. The future of record piracy. *Brooklyn Law Review*, vol. 38, no. 2 (Fall 1971), pp. 406-427.

"This Note explores the history of record piracy and attempts to analyze the various equitable grounds that have been used to enjoin it in light of . . . recent developments and recent Supreme Court cases. Also, an amendment to the Copyright Act and a possible solution, short of revision of the Copyright Act, are discussed."

222. HOLBROOK, LANNY R. Copyright infringement and fair use. *University of Cincinnati Law Review*, vol. 40, no. 3 (Fall 1971), pp. 534-547.

"This Note [which is an edited version of the essay that received first prize in the Nathan Burkan Memorial Competition at the University of Cincinnati, 1970] will attempt to shed some light on the elements which contribute to the determination of whether the interests of society or the creator should prevail. The violation of an author's exclusive right to his work is termed an infringement, and the normal defense to an alleged infringement is the common law doctrine of fair use. Consequently, this Note will define and analyze the requisite elements of an infringement action, and evaluate the origin and development of the fair use doctrine in an attempt to delineate its permissible boundaries."

223. KRITZER, PAUL E. Copyright protection for sports broadcasts and the public's right of access. *Idea*, vol. 15, no. 3 (Fall 1971), pp. 385-404.

A student paper which was chosen to represent the Georgetown University Law Center and received the Patent Office Society Student Award for 1971. The "paper investigates two contemporary thrusts in American copyright law. One is the angry demand of millions for access to see or hear sports events of paramount public interest broadcast on the commercial airwaves. The other thrust

is the plea by sports promoters who sell broadcast rights to their events for protection against cable television (CATV)."

2. Foreign

1. In English

224. BOYTHA, GYORGY. The New Regulation of Hungarian Copyright Law. *Hungarian Law Review*, no. 2/1969, 1/1970, pp. 5-24.

A history and analysis of the Hungarian Act III of 1969 on copyright.

225. ULMER, EUGEN. The revisions of the copyright convention. *EBU Review*, no. 130B (Nov. 1971), pp. 86-98.

An English version of a report on the July 1971 diplomatic conferences for revision of the Berne and Universal Copyright Conventions that was first published in the October 1971 issue of GRUR Int. under the title, *Die Revisionen der Urheberrechtsabkommen*. See 19 BULL. CR. SOC., no. 2, p. 165 (Dec., 1971).

226. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. *Secretariat*. Study of comparative law: protection of producers of phonograms. *Unesco Copyright Bulletin*, vol. 5, no. 3 (1971), pp. 22-56.

"This study takes in . . . certain general aspects of . . . protection taking into account more particularly the factors considered by the Committee of Governmental Experts on the Protection of Phonograms at their meeting held in Unesco House from 1-5 March 1971, during which they prepared a draft convention to which reference is frequently made in this document.

"The Secretariat of Unesco based its study on the material at its disposal, i.e., solely on the legislative texts which have already been published in the *Copyright Laws and Treaties of the World*."

227. WORLD INTELLECTUAL PROPERTY ORGANIZATION. *Copyright*, vol. 8, no. 1 (Jan. 1972), pp. 2-6.

Contents. The World Intellectual Property Organization in 1971. Table of member states as of January 1, 1972. Membership of the administrative bodies.

2. In English, French and Spanish

228. FREITAS, DENIS DE. Reproductions for private use, and for educational and library purposes. *Revue Internationale du Droit d'Auteur*, no. 71 (Jan. 1972), pp. 30-57.

A critique of the fair dealing provisions of the U.K. copyright statute, with references to fair use provisions of several other Berne member states. Proposals for consideration and further discussion are made for revision of the U.K. Act by abolishing the present right of a copyright owner to control reproduction for private use, establish a fund to pay copyright owners for such use, and establish a compulsory licensing system for licensing reproduction right for educational purposes and for libraries.

229. MAYER, MICHAEL F. A decline of protection for creative rights? *Revue Internationale du Droit d'Auteur*, no. 70 (Oct. 1971), pp. 46-77.

A critical discussion of judicial trends in American copyright law which are described as "hostile to the rights of copyright owners and parties with a creative interest in intellectual properties." Three areas in particular are noted, viz., CATV, protection of sound recordings, and "interpretation of author's rights."

3. In French

230. LEBRUN, PHILIPPE-Fr. Brevets, marques de fabrique et de commerce, licenses de fabrication, droits d'auteur, know-how et services intellectuels en général; situation de l'assujetti étranger vis-à-vis de la T. V. A. belge. *Revue de Droit Intellectuel, l'Ingénieur-Conseil*, vol. 61, nos. 7-9 (July-Sept. 1971), pp. 113-122.

An analysis of applicable legal texts to determine under what conditions foreign entities, not domiciled or doing business in Belgium, but rendering services of an intellectual nature inside that country through assignments or licensing of patents, trademarks, copyrights or scientific know-how, are liable for the Belgian added value tax.

4. In French, English and Spanish

231. FERNAY, ROGER. Paris 1971, ou les aventures d'un "package deal." *Revue Internationale du Droit d'Auteur*, no. 70 (Oct. 1971), pp. 2-45.

An account of the historical background of the Paris conferences for revisions of the Berne and Universal Copyright Conventions and the writer's reactions to the proceedings and results of the conferences.

232. PLAISANT, ROBERT. Propriété intellectuelle et communications par satellites. *Revue Internationale du Droit d'Auteur*, no. 70 (Oct. 1971), pp. 78-121.

A discussion of copyright problems raised by communications satellites.

233. TOURNIER, JEAN LOUP. Droit d'auteur et redevances en matière de vidéogrammes. *Revue Internationale du Droit d'Auteur*, no. 71 (Jan. 1972), pp. 4-29.

An attempt "to do away with the myths which surround the videogram, under which heading . . . [are included] the various types of audio-visual recordings currently available on the market or under preparation, such as video-discs, video-cassettes, video recordings, and so on." For this purpose the subject is considered first from the legal standpoint, and then from the economic and contractual standpoint, in order "to determine whether or not the audio-visual phenomenon raises, as some claim it does, a new legal problem."

234. VAKSBERG, ARKADY. Le droit d'auteur sur les films cinématographiques en Union Soviétique. *Revue Internationale du Droit d'Auteur*, no. 71 (Jan. 1972), pp. 58-121.

"This article will be devoted exclusively to a consideration of those aspects of cinematographic copyright [in the Soviet Union] which are dealt with by Federal legislation and which are the subject of identical solutions in all the Federal Republics." In French, with English and Spanish translations.

5. In German

235. DITTRICH, ROBERT. Das internationale Abkommen zum Schutz der Hersteller von Tonträgern. *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht*, vol. 20, no. 6 (Nov.-Dec. 1971), pp. 141-144.

An analysis of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

236. HANDL, JOSEF. Internationale Tonträger-Konvention. Arbeiten zur Vorbereitung der diplomatischen Oktober-Konferenz in Genf. *Film und Recht*, vol. 15, no. 11 (Nov. 15, 1971), pp. 343-348.

A report on the preliminary discussions and considerations preparatory to the Diplomatic Conference of States held in Geneva, Oct. 18-29, 1971, with the object of establishing an international convention for the protection of phonograms against unauthorized duplication. Some of the points considered dealt with the defining of terms, type of protection to be given, formalities, and the convention's relationship with other international conventions.

237. SAMSON, BENVENUTO. Das "Folgerecht" muss verbessert werden; für ein allgemeines Recht auf Auskunft. *Zeitschrift für Rechtspolitik*, vol. 4, no. 12 (Dec. 1971), pp. 279-280.

A critical comment on a decision of the West German Federal Supreme Court in a case involving the "droit de suite." The commentator makes a case for improving sec. 26, (droit de suite) of the West German copyright law by providing that information be given to copyright owners whenever the original of an artistic work is resold.

6. In Swedish

238. KARNELL, GUNNAR. Begreppet verk i upphovsrätten; en bobanmälan och nagra reflexioner. *NIR*, no. 4 (1971), pp. 368-379.

A review of *Upphovsrättens verksbegrepp*, by Stig Stromholm (Stockholm, 1970), which is a philosophical study of the "work" concept according to copyright law. See 18 BULL. CR. SOC. 347, Item 269 (1971).

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

239. BERG, SANFORD V. Copyright, conflict, and a theory of property rights. *Journal of Economic Issues*, vol. 5, no. 2 (June 1971), pp. 71-79.

A brief essay on the role of conflict in determining the form and efficiency of property rights in the following three problems in copyright law affecting educators: television, reprography, and computers.

240. Court ruling threatens photocopying. *Chemical & Engineering News*, Mar. 6, 1972, p. 14.

An article on the report by Commissioner James F. Davis to the United States Court of Claims in which he ruled in favor of William & Wilkins Co. in its infringement action against the United States arising out of the photocopying practices of the National Institutes of Health and the National Library of Medicine.

241. KNOX, WILLIAM T. Cable television. *Scientific American*, vol. 225, no. 4 (Oct. 1971), pp. 22-29.

A historical sketch of the evolution of cable television, with a discussion of the controversial questions of regulation, ownership and copyright.

242. LORENZ, JOHN G., AND OTHERS. The Library of Congress abroad. *Library Trends*, vol. 20, no. 3 (Jan. 1972), pp. 548-576.

This article on the scope of the Library of Congress abroad includes a section on the role of the Copyright Office in international activities.

243. PILPEL, HARRIET F. AND ALAN U. SCHWARTZ. You can do that. *Publishers' Weekly*, vol. 201, no. 1 (Jan. 3, 1972) pp. 30-32.

An article dealing with privacy and the need for an American equivalent of the *droit moral* concept.

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244. PILPEL, HARRIET F. AND ALAN U. SCHWARTZ. A deep, legal look into the crystal ball. *Publishers' Weekly*, vol. 201, no. 15, part II, Centennial Issue (April 10, 1972), pp. 82, 84, 85.

An article containing some reflections on the crisis of the book in the 21st century.

245. RAYMONT, HENRY. McGraw-Hill's woes could help speed copyright law reforms. *The New York Times*, vol. 121, no. 41,687 (City ed. Mar. 13, 1972), p. 24.

An article devoted largely to assessments by Representative Robert W. Kastenmeier, chairman of Subcommittee No. 3 (patents, trademarks, and copyrights) and Abraham L. Kaminstein, recently retired Register of Copyrights, of the impact on pending copyright legislation of the publishing scandals surrounding William Red Fox and Clifford Irving.

246. SAMUELSON, ROBERT J. CATV ruling may cut out 50 big areas. *The Washington Post*, vol. 95, no. 50 (Jan. 24, 1972), p. A1, col. 1; A14, cols. 1-7.

An article on forthcoming FCC rules for regulation of cable television and on the arguments pro and con in connection therewith, including the copyright controversy.

247. WAGNER, SUSAN. Government loses photocopying suit. *Publishers' Weekly*, vol. 201, no. 9 (Feb. 28, 1972), pp. 48-49.

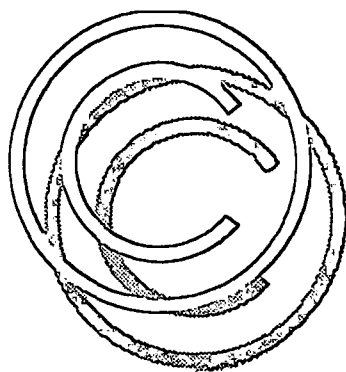
An article on the recent report by Commissioner James F. Davis to the U.S. Court of Claims in the case of *William & Wilkins Co. v. United States*.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19, NO. 5

JUNE, 1972

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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

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011; Morton David Goldberg, *President*; Paul Gitlin and Sigrid Pedersen, *Vice Presidents*; Alan J. Hartnick, *Treasurer*; Bernard Korman, *Secretary*; David Goldberg, *Assistant Treasurer*; Elizabeth Barad, *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: 19 BULL. CR. SOC. page no., Item (1972).



THE HONORABLE THEODORE R. KUPFERMAN
*Justice, Appellate Division, Supreme Court
of the State of New York*

PART I.

ARTICLES

248. COPYRIGHT AND JUDGES — *The Third Donald C. Brace Memorial Lecture on Copyright Law.*

By THEODORE R. KUPFERMAN*

While we have all been concerned with the legislative phase of copyright in recent years,¹ perhaps less thought has been given to judicial interpretation, except by the direct litigants.

* This lecture was delivered on May 4, 1972 in the New York University School of Law, New York City. Mr. Kupferman is a Justice of the Supreme Court of the State of New York. He was a member of the U.S. House of Representatives, 1966-1969; former member, Board of Trustees and Secretary, The Copyright Society of the U.S.A.; Editor, Commerce Clearing House publication "Seven Copyright Problems Analysed"; Co-Editor, "Universal Copyright Convention Analysed."

1. Last year's Donald C. Brace Memorial Lecture, "The Battle of the Books Revived — Copyright Law Revision in the Year 1971" by John Schulman, 18 BULL. CR. SOC., page 397, item 365, August 1971, went into detail on the subject and at footnote 60 listed all study references.
Congressman Robert W. Kastenmeier of Wisconsin, Chairman of the House Judiciary Committee's Subcommittee on Patents, Trademarks and Copyrights, who shepherded the Copyright Law Revision Bill, H.R. 2512 of the 90th Congress, through the House of Representatives in 1967, gave a talk entitled "Revision Revisited" at the Copyright Luncheon Circle on May 9th, 1969, bringing the legislative phase up to date, and it was printed as item 202 of the June 1969 issue of the Bulletin of the Copyright Society, Vol. 16, No. 5, pages 269-277.

Since then, we have, among other things, had Copyright Revision Bill Sen. 644, 92nd Cong., 1st Sess.; see Cong. Rec. Monday, February 8, 1971, Vol. 117, No. 13. There have been copyright extensions of renewals pending a new law, from September 19, 1962 to December 31, 1972; see Public Law 92-170 for the latest.

There has been enacted Limited Copyright protection for Sound Recordings; Public Law 92-140, 85 Stat. 391 (Sen. 646, 92nd Cong.) signed by the President on October 15, 1961; see "Prohibiting Piracy of Sound Recordings," House Report No. 92-487, 92nd Cong. 1st Sess.; Hearings on June 9 and 10 on Sen. 646 and H.R. 6927 before Subcommittee No. 3 of the House Judiciary Comm.; Copyright Office Circular 56 (1972) covers sound recordings.

Dan Lacy analyzed the legislative situation in the "The © Quagmire," Saturday Review, November 27, 1971, pp. 24-28.

I shall not soon forget the brilliant and cogent argument made in opposition to the proposed copyright revision bill on the floor of the House of Representatives on April 6, 1967 by my then colleague from North Carolina, Hon. Basil Whitener,² as to the value of copyright. He repeated the lyrics of a musical composition then current in the jukebox of his home town, emphasizing a different word in each line:

"My Baby Does the Hanky-Panky
My *Baby* Does the Hanky-Panky
My Baby *Does* the Hanky-Panky
My Baby Does *the* Hanky-Panky
My Baby Does the *Hanky-Panky*."

Are Judges so well informed?

The President of The Copyright Society of the U.S.A., Leonard Zissu, and I were on opposite sides of the "Sam Spade"³ case years ago. I was in the legal department of Warner Bros. Pictures and worked with Morris Ebenstein and Harry R. Olsson, Jr. to vindicate the broadcasting rights of Warner Bros. in Dashiell Hammett's "The Maltese Falcon" and its leading character Sam Spade, against the Columbia Broadcasting System and some sponsors who had the Sam Spade program on radio and, among other things, had presented a show called "The Kandy Tooth," which, I was convinced, was a paraphrase of the "Maltese Falcon."

There were many preliminary skirmishes,⁴ and then I left Warner Bros. to go to the legal department of the National Broadcasting Company. One day I met Leonard, and I asked him how the case was going. He said he had tried it in Los Angeles several weeks before, and was worried. Would the judge be persuaded by the well-publicized Dashiell Hammett involvement in some left-wing Federal Court proceedings in the Southern District of New York? Hammett had refused to answer questions and produce books and records in a matter of forfeiture of bail for fugitive officers of the Communist Party who had been convicted of

2. Cong. Rec. 90th Cong., 1st Sess., April 6, 1967, page 8597, col. 3, vol. 113, Part 7. I took part in that debate at page 8603. The final vote on the copyright revision bill took place on April 11, 1967 and is set forth at page 9021.

3. Warner Bros. v. Columbia Broadcasting System, et al., 216 F.2d 945 (9th Cir. 1954), 29 BULL. OF COPYRIGHT OFFICE 462; *cert. denied*, 348 U.S. 971.

4. See, e.g., Hammett v. Warner Bros. Pictures, Inc., 176 F.2d 145 (2nd Cir. 1949), 27 BULL. OF COPYRIGHT OFFICE 227.

violating the Smith Act.⁵ Would these ideological questions affect the result of important copyright issues, such as "character rights"⁶ and infringement? Leonard won that case,⁷ which I still think he should have lost despite his great ability. No one has suggested that the ideology worked the other way.

Recently, I stayed in town over a weekend to attend a dinner honoring Abraham Lincoln's memory, and, as a result, they found me at home for a hearing on a stay of an injunction against Time, Inc. Time planned to publish excerpts from Clifford Irving's allegedly Howard Hughes-authorized biography, in order to show that the book was a fake.

Originally, Rosemont Enterprises, Inc.⁸ had sued Time Incorporated, McGraw-Hill, Irving, and others to stop the publication of the proposed book and also the pre-publication magazine abridgement on the ground that they had exclusive rights in the Hughes material. The matter had come before Judge Culin in the Supreme Court with respect to the question of an injunction, but by agreement of all parties, further proceedings had been postponed while Time and McGraw-Hill investigated the authenticity of the Clifford Irving book. When Time, Inc. finally determined that Irving had imposed upon his publishers, they cancelled their arrangement for the abridged magazine version that was to run in Life Magazine, and planned an article entitled "Con Man of the Year" for the same issue going to press on February 13, to prove that the manuscript was a fake by comparing it with similar passages in a Noah Dietrich manuscript.⁹

Rosemont, which claims all rights in all Hughes material, pressed for its temporary injunction and was joined by McGraw-Hill, which ob-

5. *United States v. Fields, Hammett, et al.*, 193 F.2d 92 (2nd Cir. 1951), *cert. denied*, 342 U.S. 894.

6. See Leon Kellman, "Legal Protection of Fictional Characters," 25 *BROOKLYN LAW REV.* 3 (December, 1958).

7. 102 F. Supp. 141 (S.D. Calif. 1951, William C. Mathes), *aff'd* 216 F.2d 945. See Notes 3 and 4, *supra*.

8. For background on *Rosemont*, see *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2nd Cir. 1966), ASCAP, Copyright Law Symposium Vol. 19 (1971), "Copyright and the First Amendment: A Gathering Storm?" by Lionel S. Sobel, 43, 44.

See also *Rosemont Enterprises, Inc. & Howard R. Hughes v. Choppy Productions, et al.*, App. Div. First Department, N.Y.L.J., Wednesday, May 17, 1972, p. 17, col. 2, regarding right of privacy and temporary injunction against the use of Hughes' picture on a T-shirt; *N.Y. TIMES*, Feb. 15, 1972, page 28, col. 1.

9. Noah Dietrich and Bob Thomas, "Howard, The Amazing Mr. Hughes" (Fawcett Publications, March 1972).

jected to the Time-Life group cancelling the agreement and then publishing excerpts.¹⁰ Judge Culkin granted a temporary injunction,¹¹ and Time, Inc. sought a stay, and the hearing came before me at home. I granted an interim stay to the extent of allowing no more than four comparative passages not to exceed 1000 words from the Irving material. This stay was pending consideration by the full court the following week,¹² but in practical effect really determined the issue, because all Time planned to do was what my stay permitted, and it would be a *fait accompli* by the time of full consideration.¹³

When he heard what my ruling would be, David I. Shivitz, the attorney for Rosemont, asked how I could substitute my judgment for that of the judge at Trial Term who had lived with the case for so many weeks. Normally, I would prefer not to second-guess a trial judge, but I told Mr. Shivitz and the other attorneys present that, while I yielded to Judge Culkin on criminal law matters,¹⁴ literary property was a different situation.

I had decided the interim stay matter on the basis of the people's right to know, and what constituted fair use. A recent case which Time, Inc. had lost in the Southern District¹⁵ had quite an effect on my conclusion. "Six Seconds in Dallas", a book by Josiah Thompson, discussed the assassination of President Kennedy and the consequent investigation. I had been greatly interested in the subject when I was in Congress, having introduced a resolution for further investigation of the Warren Report¹⁶ on the ground that the investigation and study had not

10. In general, on McGraw-Hill, see New York Times, Monday, March 13, 1972, page 24, "McGraw-Hill's Woes Could Help Speed Copyright Law Reforms."
11. Index No. 800/72, Supreme Court, New York County, Rosemont Enterprises v. McGraw-Hill Book Company, et al.; SUNDAY TIMES, February 13, 1972, page 1, col. 3.
12. The Full Court stated as follows: "Motion for a stay granted only to the extent directed by Kupferman, J. in the stay affixed to the motion, and in all other respects denied. Order filed." NEW YORK LAW JOURNAL, Friday, February 25, 1972, page 2, col. 1, App. Div. First Dept.
13. The New York Times on Monday, February 14, 1972, page 20, printed its own comparison.
14. See People v. Ward, 37 A.D. 2d 174, 177-178 (App. Div. First Dept., 1971), NEW YORK TIMES, Thursday, June 17, 1971, p. 45, col. 3.
15. Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968); see Lionel S. Sobel, 19 Copyright Law Symposium at 46, *op. cit.* note 8. The Josiah Thompson book was published by Bernard Geis & Associates, 1967.
16. Report of the Warren Commission on the Assassination of President Kennedy (N.Y. TIMES Edition, McGraw-Hill, 1964). My Resolution is H.R.

really been finished.¹⁷ Of course, no discussion of the assassination can be complete without reference to the Zapruder 16 mm film, taken at the instant of the shooting by an amateur watching the procession, which film was purchased by Time, Inc. I had, as a Congressman, examined the film and the individual frames. Thompson had charcoal drawings made as exact copies of frames in the film and included them for reference in the book. This was held to be fair use, and I thought the analogy was quite apt for taking passages for comparison purposes from the Irving book. Thompson had been retained by Life Magazine and had access by virtue thereof, just as Life had access by reason of its original deal with McGraw-Hill on the Irving material.

Of course, it all depends on how you look at these situations. Chief Judge Stanley H. Fuld of the Court of Appeals told an annual meeting of the New York State Bar Association about a

“computer that was asked to translate a phrase from English into Russian and back again into English. For its task, the computer was given this quotation from the Bible:

‘The spirit is willing, but the flesh is weak’.

Lights flashed, tapes spun and the machine typed:

‘The whiskey is o.k., but the meat is spoiled.’ ”¹⁸

We recently had a case in my own Court where obviously the attorneys for the plaintiff were not members of The Copyright Society of the U.S.A. The plaintiff designed drapery, and the defendant manufactured drapery. Plaintiff claimed to have created a fabric design, which it gave to the defendant to manufacture, and there was a written agreement that the defendant was to manufacture the design exclusively for the plaintiff and for no one else. In violation of this agreement, the defendant used the design for another party. A motion was made to dismiss the complaint on the ground that, without a commitment by the plaintiff to purchase any amount of drapery, there was no consideration for the contract, and the motion was granted with leave to replead. An

Cong. Res. 1023, 89th Cong. 2nd Sess. See Cong. Rec., Sept. 28, 1966, page 24157, Vol. 112, Part 18, 89th Cong. 2nd Sess. App. E of the Thompson book has my correspondence with the President, the General Services Administration and Burke Marshall, Esq., in a futile attempt to see the X-rays and photographs of the Kennedy body.

17. See, in general, “Accessories After the Fact” by Sylvia Meagher (Bobbs-Merrill, 1967).

18. NEW YORK STATE BAR JOURNAL, April 1967, Vol. 39, No. 2, page 100.

amended complaint followed with the same allegations plus a second cause of action for unjust enrichment, and again the complaint was dismissed.¹⁹ In my dissent, I went into a discussion of common law copyright; and that little originality was necessary for copyright to accrue. I also showed the possibility of a cause of action based on the submission of an idea.²⁰ I even pointed out that one case went to the United States Supreme Court, before it was realized that it was a copyright case, but there was no cause of action based on copyright.²¹ All this, however, was to no avail because the matter was determined on a simple contract lack of consideration basis.

Reading the recent *Van Valkenburgh* decision in the Court of Appeals reminded me of two cases involving similar issues, where I appeared on both sides of the question and lost both.

As you know, the *Van Valkenburgh* case²² involved an electricity and electronics how-to-do-it encyclopedia with a best efforts contract clause by the publisher. When the publisher could not agree on a new deal with the author for an updated version, the publisher made more favorable arrangements with a lesser royalty to the new authors. The court held that you cannot close off the right of a publisher to put out a similar competitive work, and a reference was granted to see if, in fact, there was damage. Chief Judge Fuld dissented and would have given injunctive relief.

In *Nelson v. Mills*,²³ I worked with Samuel Jesse Buzzell on behalf of Mills Music, Inc. to defend that publisher of the song "Red Roses for a Blue Lady." Another composing team had previously submitted and had published by the same publisher a song called "Red Roses for My Blue Baby," which song had no success. "Blue Lady," with Guy Lombardo and Vaughn Monroe as the artists making it popular, became a hit and is today a standard. The authors of "Blue Baby" were successful against the publisher.

At about the same time, I was working with Bernard A. Grossman, representing Maceo Pinkard against Robbins Music Co.²⁴ Pinkard years

19. *Souveran Fabrics Corp. v. Virginia Fibre Corporation*, 37 A.D. 2d 925, 325 N.Y.S. 2d 973 (App. Div. First Dept., 1971).

20. *Ibid.*, 37 A.D. 2d at 926, 325 N.Y.S. 2d at 974.

21. *Pecheur Co. v. National Candy Co.*, 315 U.S. 666 (1942); see, Copyright Protection for Commercial Prints and Labels, 33 SO. CALIF. LAW REV. 1963 [1960], NEW YORK LAW JOURNAL, May 10 and 11, 1960.

22. *Van Valkenburgh v. Hayden Pub. Co.*, 30 N.Y. 2d 34 (1972).

23. 278 App. Div. 311, 104 N.Y.S. 2d 605, 28 BULL. COPYRIGHT OFFICE 362 (First Dept. 1951) *aff'd without op.* 304 N.Y. 966 (1953).

24. *Pinkard v. Robbins Music Corp.*, 278 App. Div. 818 (First Dept. 1951), *aff'd without op.*, 304 N.Y. 563 (1952).

before had written a song called "Sugar," which was successful. He still had the publishing rights, and during the second World War with the sugar shortage, entered into a publishing agreement with Robbins to take advantage of the possible exploitation. Robbins did very little except to publish copies and catalogues, but came out with a hit song called "Candy." This case was dismissed, although the dissent in the Appellate Division (3-2) said it should have gone to the jury. I am still trying to find out how I could be on both losing sides of the same issue.

There was one case where I called the decision in the Appellate Division exactly. One of the leading cases on the subject of unpublished material giving a common law right of first publication without regard to any limitation of time is *Chamberlain v. Feldman*.²⁵ You will recall that in 1945 Feldman bought an original Mark Twain manuscript, holographic and signed, at an auction sale. It was called "A Murder, A Mystery, and A Marriage." Feldman wanted to publish this unpublished manuscript. The estate of Samuel Clemens claimed the right of first publication. I was then working in the Appellate Division, First Department, as law secretary to the Presiding Justice, David W. Peck.²⁶ The Bench for that case was Peck, Van Voorhis, Shientag, Glennon and Cohn. I guessed that it would be 3-2 to maintain for the estate the right of first publication. Peck, Van Voorhis and Shientag were authors and intellectuals. Glennon and Cohn were journeymen printers. The case came out as I predicted, and was affirmed by the Court of Appeals.

Another case of great interest involving a judge's approach was *Arnstein v. Porter*²⁷ in the 2nd Circuit Court of Appeals. You may recall that Arnstein was an itinerant music instructor who sued quite a

25. 300 N.Y. 135, 89 N.E. 2d 963, 27 BULL. OF COPYRIGHT OFFICE 94 (1949) affirming 274 App. Div. 515, 84 N.Y.S. 2d 713, 26 Bull 79 (First Dept. 1948) (3-2 decision). On perpetual protection for unpublished writings, see Note "The 'Copying-Misappropriation' Distinction: A False Step in the Development of the Sears-Compco Pre-Emption Doctrine," 71 COL. L. REV. 1444 at 1448.

26. Judge Peck differed with my reasoning on the rights of a co-owner of a copyright. In an article in 19 ST. JOHN'S LAW REVIEW 95 (April, 1945), "Copyright Co-Owners," I suggested that co-owners of copyright should have equal rights to fend for themselves on a laissez-faire basis without accounting. In *Jerry Vogel Music Co. v. Miller Music, Inc.*, 272 App. Div. 571 (First Dept., 1947) *aff'd without op.*, 299 N.Y. 782 (1949), Judge Peck decided that there should be accounting and that copyright co-owners should not be "... finessing against each other in licensing the work." 272 App. Div. at 574. On reflection, he was right.

27. 154 F.2d 464, 25 BULL. COPYRIGHT OFFICE 11, *cert. denied*, 330 U.S. 851 (1947).

few people for infringement and usually lost on summary judgment. Warner Bros. Pictures, where I was working, had produced a motion picture entitled "Night and Day," a fictional — and I do mean fictional — story of the life of Cole Porter, starring Cary Grant. They were, therefore, interested in the outcome of the case because a number of the musical compositions sued upon were in the film. To give you an idea of the type of claim involved, Arnstein contended that "Don't Fence me In" by Cole Porter was stolen from his "A Modern Messiah," a dirge about Franklin D. Roosevelt's passing. Arnstein, as usual, lost on summary judgment in the District Court, but in the Circuit Court, Judge Jerome Frank decided that there ought to be a trial. It was a 2-1 decision and the dissent pointed out that Arnstein had made the mistake of attaching comparison recordings for the appeal, and, obviously, there was no similarity, stating: "Consequently, I do not think we should abolish the use of the intellect here even if we could."²⁸ However, as a result of Judge Frank's approach, I had the opportunity of watching Samuel Silverman, former Surrogate, now Justice of the New York State Supreme Court in the First District, trying and winning the case for Cole Porter.²⁹

I think my reaction to Judge Frank's decision reversing summary judgment can best be found in my analysis of the talk that he gave at a Columbia Law Review dinner. In comparing a judge interpreting legislation with a musician interpreting the written music, he said it depended on how you looked at it and told the following:

There is a story of Miss Goodlooks, the chorus girl, who, in an emergency, acted Ophelia. In the players' scene, you will recall, Hamlet asks Ophelia, "Are you chaste, my lady?" and (so the text reads) she answers, "Chaste, my lord?" But Miss Goodlooks said, "Chaste, My Lord!" When chided, she remarked, "Well, that was my interpretation of the part." Of course, no judge should thus let his personality run riot. Nevertheless, there are many legitimately different ways of reading Shakespeare.

I remember, the next day relating the story to the director of censorship at Warner Bros., Albert Howson, who was a former Shakespearean actor. He looked at me in a puzzled way and said, "It wasn't in 'Hamlet'." Suddenly, I began to understand Judge Frank's opinions.

28. *Ibid.*, 154 F.2d at 176 (Clark, J.).

29. 158 F.2d 795, 26 BULL. OF COPYRIGHT OFFICE 35, (per curiam).

This speech and story was later published in the *Columbia Law Review*³⁰ without any citation for "Hamlet".

Another story told about Judge Frank is that one of his law clerks tried to reduce the length (but not the breadth) of his judge's opinions and gave the judge a good precis to use in its place. Judge Frank found it acceptable and said "Add it on at the end."³¹

Some of you may recall the late federal judge William Bondy who used to try musical copyright cases.³² He was stone deaf (so was Beethoven), and in order to do a comparison of the music, he had his law clerk³³ who had played in the Harvard band, play him the music on a trombone.

Even such an authority as the late Supreme Court Justice Felix Frankfurter, the "Happy Hot Dog"³⁴, could make a mistake in the field of copyright. He wrote the opinion in the leading copyright renewal case *Fisher v. Witmark*³⁵, in which last year's Brace Memorial lecturer, John Schulman, was on the losing side of the 5-3 decision. You will recall the determination was that the renewal expectancy could be assigned in advance, and if the party making the assignment survived into the renewal year, the transfer was complete. As part of the justification for the decision, Mr. Justice Frankfurter used the fact that many assignments of renewal expectancies had been made. His statement that assignments had to be recorded was erroneous.³⁶ Recording is done for protection against subsequent bona fide purchasers.³⁷

I had the opportunity, when I was first admitted to the Bar, to watch the trial in the case of *McConnor v. Kaufman*³⁸ involving an infringement suit by the author of a play called "Sticks and Stones"

30. "Words and Music: Some Remarks on Statutory Interpretation" by Jerome Frank, 47 *COL. L. REV.* 1259, 1264.

31. The Lawyer's Bookshelf, Book Review, *N. Y. LAW JOURNAL*, Friday, September 24, 1971.

32. Among his many decisions in the Southern District of New York was *Von Tilzer v. Jerry Vogel Music Co.*, 53 *F. Supp.* 191 (1943).

33. Alvin H. Kaufer, Esq., my old law school classmate, now Assistant Corporation Counsel of the City of New York.

34. See Asch, "The Supreme Court and Its Great Justices," Chapt. 11 (Arco Pub., 1971).

35. 318 U.S. 643 (1943). See Tannenbaum, "Practical problems in Copyright," "7 Copyright Problems Analyzed" (C.C.H. 1952), p. 11, reprinted in "Copyright Problems Analyzed" (Fred B. Rothman & Co., 1966).

36. 318 U.S. at 658, see Kupferman "Renewal of Copyright — Section 23 [24] of the Copyright Act of 1909," 44 *COLUMBIA L. REV.* 712, footnote 107.

37. 17 U.S.C. § 30; see Kupferman, *Ibid.*, at p. 730.

38. 49 *F. Supp.* 738 (S.D.N.Y. 1943).

against George S. Kaufman and Moss Hart who wrote "The Man Who Came to Dinner". You will recall this was the story of Alexander Woolcott, known in the play as Sheridan Whiteside. Howard E. Reinheimer tried the case for the defendants and was successful. I was not certain that the result was the correct one. It seemed to me that the access was clear, and that, despite his personal friendship with Woolcott, it was quite possible that Kaufman had gotten some ideas from the plaintiff. Nonetheless, I was intrigued by the opinion of Judge Galston, which was affirmed *per curiam*.³⁹ In both plays, calves' foot jelly was brought to the person incapacitated. Judge Galston found nothing significant in this, calling it "a time honored gift to an invalid."⁴⁰ On the other hand, in the decade of the forties, he seemed perplexed, and he stated so in his opinion, as to why Ginger Rogers should be referred to in both plays. Nothing better illustrates, in my opinion, the fact that a judge's background and experience determines his approach to a problem.

Incidentally, to show you how I think in copyright terms, the first trial that I had when I was appointed to the Supreme Court in 1969, was one I called "The Woman Who Came to Dinner" case.⁴¹ A woman sued for negligence in that she slipped on champagne and broke her leg at a wedding party. The defense was that she had not been invited. When she was asked what the first thing was that she had done when she came into the reception room, she answered, "I went and got some chopped liver". Fortunately, the case was settled.

Actually, the only judge we knew as a serious student of copyright law⁴² was the former Chief Judge of the Federal District Court in Los

39. 139 F.2d 116 (2nd Cir. 1943).

40. 49 F. Supp. at 743.

41. Adele Levy v. Kay Caterers of Forest Hills, N. Y. County Trial Term, Part IX, N. Y. LAW JOURNAL, March 10, 1969.

42. Among his many law review articles were "Intent and Related Problems in Plagiarism," 33 SO. CALIF. L. REV. 233 (Spring, 1960); "Some Observations on 'Publication' in the Law of Copyright," 5 BULL. CR. SOC. 329 (August, 1958). Despite his erudition, Judge Yankwich could still make copyright errors. In S. C. Johnson & Son v. Drop Dead Co., 210 F. Supp. 816 (S.D. Calif. 1962), he wrote, ". . . three conditions are necessary to secure copyright: The deposit before publication of the printed title of the book; the insertion of the notice on the title page or the next page of the book; and the deposit of a copy of the book within three months after publication." at page 817.

Of course, he may have been thinking of the Copyright Law before the Act of 1909, but it doesn't apply.

Angeles, California, Leon R. Yankwich, who was many times a guest of The Copyright Society of the U.S.A.

Here in the Second Circuit, despite the tremendous volume of litigation and the doctrine of abstention,⁴³ we find the Federal courts getting themselves involved in many State court jurisdictional areas,⁴⁴ while at the same time deliberately renouncing a traditional area of copyright jurisdiction.

Despite clear precedent for ruling on the question of who owns renewal rights⁴⁵, copyright lawyers have been turned out of the federal courts on the question of who owns a copyright renewal.⁴⁶ We all know that a substantial amount of the copyright controversy at the present time is on the question of renewal rights, because the substantial works are the ones for which renewals are filed, and, where the rights are valuable, they are worth fighting over.

Let me make one thing perfectly clear: I am not criticizing judges, I am only presenting a problem. I have always found copyright to be the most interesting area of the law, not only because it presents the drama of legal interaction, but because the material around which all this revolves is in itself dramatic. A dispute over a trust fund cannot possibly have the same attraction.

Judges cannot know everything. They have to be educated. I want to commend ASCAP and Herman Finkelstein for their record on this score. The Nathan Burkan awards competition⁴⁷ for law students not

43. See *Reid v. Bd. of Education of the City of New York*, 453 F.2d 238 (2d Cir. 1971), Cf. *Younger v. Harris*, 401 U.S. 37 (1971), but see *Haines v. Kerner*, 40 U.S.L.W. 4156 (per curiam, 1972).

44. On March 12, 1971, Chief Justice Warren E. Burger stated to the National Conference on the Judiciary meeting in Williamsburg, Virginia:

"We should never forget that under our federal system, the basic structure of the courts of this country contemplated that state courts would deal with local matters while federal courts would serve a limited and narrow function. I hope we will never become so bigoted as to think that state judges are any less devoted to the principles of the federal Constitution than other judges and lawyers."

45. E.g., *Venus Music v. Mills Music*, 261 F.2d 577 (2nd Cir. 1958). See in general on Renewal, Kupferman op. cit. fn. 36.

46. *T. B. Harms v. Eliscu*, 399 F.2d 823 (2nd Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *Muse v. Mellin*, 339 F.2d 888 (2nd Cir. per curiam 1964).

47. I had the privilege of taking part with two other Congressmen who had as law students won this award, Rep. Robert G. Stephens, Jr. (Dem., Ga.) and Rep. Wendell Wyatt (Rep., Oregon) under the Chairmanship of United States Supreme Court Justice Byron White, in judging the Sixteenth National Competition (1968). The most recent publication covers the 19th national competition (1971) cited elsewhere herein at ftns. 8 and 15.

only brings new knowledgeable young people into the profession, but the judges who make the awards instruct themselves in the process.

This Society is also dedicated to the task of education, but it needs more support. I suggest we change the name of the Copyright Bulletin, which Walter J. Derenberg edits to perfection, to "Everything You Always Wanted to Know about Copyright but Were Afraid to Ask."

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

249. U.S. FEDERAL COMMUNICATIONS COMMISSION.

[CFR Title 47 Telecommunication. Chapter I Federal Communications Commission] Part 73 Radio broadcast services. Part 74 Experimental auxiliary, special broadcast, and other program distribution services. Showing of sports events on over-the-air subscription television or by cable casting. *Federal Register*, vol. 37, no. 65 (Apr. 4, 1972), pp. 6738-6744.

FCC amendment concerning "siphoning" of "live" broadcasts by subscription television or by cablecasting.

250. U.S. NATIONAL CENTER FOR EDUCATIONAL COMMUNICATION. COPYRIGHT ADMINISTRATOR.

U.S. Office of Education: Copyright program information. [Rev. Feb. 1972. Washington, U.S. Govt. Print. Off., 1972] 11 p.

A revision of a pamphlet "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 18 BULL. CR. Soc. 436, Item 382 (1971).

251. U.S. CONGRESS. *Senate*.

S.J. Res. 247. A joint resolution extending the duration of copyright in certain cases. Introduced by Mr. McClellan, June 20 (legislative day, June 19), 1972, and referred to the Committee on the Judiciary. 1 p. (92d Cong., 2 Sess.)

This resolution would continue until Dec. 31, 1974, the renewal term of any copyright subsisting on the date of approval of the resolution, or the term as extended by previous extension measures. Senator McClellan's remarks are reprinted below:

MR. MCCLELLAN. Mr. President, as chairman of the Subcommittee on Patents, Trademarks, and Copyrights I introduce a joint

resolution to extend the duration of copyright protection in certain cases.

The purpose of this legislation is to continue until December 31, 1974, the renewal term of any copyright subsisting on the date of approval of the joint resolution, or the term as extended by previously enacted public laws, where such term would otherwise expire prior to December 31, 1974. The justification for the prolongation of the renewal term of copyrights is that the pending legislation for the general revision of the copyright law includes a proposed increase in the length of the copyright term. The Congress has repeatedly expressed its will that the owners of expiring copyrights should not lose the benefits provided in the proposed new copyright law only because of the unfortunate circumstances which have delayed final action by Congress on the copyright bill.

Any substantial progress by the Congress on copyright revision legislation has been virtually impossible during the past several years because of the protracted delay of the Federal Communications Commission in adopting new cable television rules. A resolution of the cable television copyright issues was necessarily dependent upon the determination of the many regulatory issues. The FCC rules became effective on March 31 and it was only on June 16 that the Commission completed action on petitions for reconsideration of the rules. The completion of the Commission proceedings now paves the way for real progress in the Congress on the copyright bill.

It is apparent that adequate time does not remain in this Congress for the processing of this complex legislation. I presently know of no reason why the Subcommittee on Patents, Trademarks, and Copyrights cannot promptly report a revised bill in the next Congress. It shall be my intention to bring that bill to the floor at the earliest feasible date. Because certain provisions of the bill are highly controversial it is uncertain if it can be enacted into law during the first session of the 93d Congress. It will also be necessary to allow the Copyright Office a period of time to prepare for the administration of the new law and consequently the effective date of the legislation will have to be several months after its enactment. Under these circumstances it appears advisable to provide that the temporary extension of copyrights should continue until December 31, 1974.

The pending version of the copyright revision legislation, S. 644, other than for perfecting amendments, is identical to the text of

the bill reported favorably by the subcommittee in the 91st Congress. The subcommittee has already determined its position on each of the many issues and in the absence of significant new developments I do not believe there is any necessity to repeat this detailed consideration. I know of no issue on which additional hearings are necessary.

One provision of the bill that will require some modification is the cable television section. The section approved by the subcommittee contains a coordinated resolution of copyright questions and of those regulatory issues that are necessarily related to copyright matters. The new rules of the FCC are generally consistent with the recommendations of the subcommittee and it is anticipated that the regulatory provisions now contained in S. 644 will be eliminated. The subcommittee determined that all cable television systems should be subject to the copyright law and that the statute should grant such systems a compulsory license, subject to certain limitations relating to program exclusivity and sporting events, to carry the programs transmitted by specified broadcast signals. The subcommittee also approved a statutory CATV royalty schedule and established in chapter 8 of the legislation a copyright royalty tribunal to provide for periodic impartial review and adjustment of royalty rates.

Since the subcommittee action there have been two important CATV judicial decisions. In *Columbia Broadcasting System, Inc. against TelePrompster, Inc.* a Federal district court interpreted the existing copyright statute as not applying to the secondary transmissions of a cable system even if the system is transmitting distant signals, using microwave, inserting advertising or originating its own programs. Previously the U.S. Supreme Court in *United Artists against Fortnightly* held that the activities of the cable system involved in that litigation did not constitute violation of the copyright law. Since the CBS case is now on appeal I do not wish to discuss the merits of that decision. The decision in that case does not change my opinion that cable systems should be under the provisions of the copyright law.

In another important cable television decision a sharply divided Supreme Court, in which there was no majority opinion, upheld the authority of the Federal Communications Commission to require certain cable systems to originate their own programs regardless of whether there is sufficient public demand to make such

programming feasible. I have long felt that the action of the Commission was a dubious extension of its jurisdiction under the Communications Act and even if authorized by the Communications Act was not sound policy under existing conditions. The deciding vote in the Supreme Court was cast by the Chief Justice. I concur in his view that "I am not fully persuaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations." It is currently unclear what immediate action on this issue will be taken by the Commission. It may be appropriate for the question of mandatory origination to be further reviewed in conjunction with the resolution by the Congress of the remaining cable television issues.

The only other issue in the revision bill concerning which there has been significant developments subsequent to the action of the subcommittee concerns photocopying by libraries and other non-profit institutions. A Commissioner of the Court of Claims has rendered the first judicial interpretation of the application of the Copyright Act of 1909 to library photocopying. He held that the systematic and widespread duplication of articles from copyrighted periodicals by the National Library of Medicine constituted infringement of copyright. Since this case is also on appeal I again shall refrain from discussing the substance of the litigation. I observe only that the subcommittee anticipated this problem and had consequently added a special library photocopying section to the revision bill.

The subcommittee has been advised that the representatives of authors and book and periodical publishers are now meeting with library associations and other nonprofit users to explore whether agreement can be reached on the photocopying section of the copyright bill. I also understand that there is some prospect of discussions among interested parties on other issues of the bill. I have instructed the counsel of the subcommittee to prepare a modified version of the pending bill for consideration of the subcommittee in the 93d Congress. Therefore, it is to be hoped that any discussions among the parties will proceed expeditiously so that the outcome of these deliberations may be known in sufficient time to be considered in the draft being prepared by the subcommittee staff.

252. U.S. CONGRESS. *Senate*.

S.J. Res. 247. A joint resolution extending the duration of copyright protection in certain cases. *Congressional Record*, vol. 118, no. 100 (daily ed. June 20, 1972), pp. S9772-S9773.

2. Foreign Nations

253. NIGERIA. *Laws, statutes, etc.*

Copyright Decree 1970. (No. 61). *Copyright*, vol. 8, no. 3 (Mar. 1972), pp. 67-73.

"This Decree came into force on December 24, 1970."

PART III.**CONVENTIONS, TREATIES AND PROCLAMATIONS****254. INTERNATIONAL COPYRIGHT UNION.**

Signatory countries of the Paris Act (1971). *Copyright*, vol. 8, no. 2 (Feb. 1972), p. 36.

Thirty-five countries that have affixed signatures, subject to ratification, to the Paris Act of the Berne Convention on or before January 31, 1972.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions.

255. *The Williams & Wilkins Company v. The United States*, not yet reported (U.S. Ct. Claims, February 16, 1972) (Davis, Commissioner).

On February 16, 1972 Commissioner Davis filed his report in the *Williams & Wilkins* case, the first decision squarely considering the property of library photocopying under the existing Copyright Act [see generally, e.g., Varmer, "Photoduplication of Copyrighted Material by Libraries," *Copyright Law Revision Study No. 15* (U.S. Gov't Pr. Off. 1959)].

The *Williams & Wilkins* report, now on appeal to the full court, is certain to have direct effect on the pending program for revision of the U.S. Copyright Laws. It is also of general relevance to the overall issue of reconciling technological progress with the copyright laws, particularly in the areas of historically "accepted", or ignored, copying practices tracing their origin to an era preceding the development of today's reprographic techniques and equipment. Accordingly, the full 32 page opinion of Commissioner Davis deserves thorough consideration, precluded here by limitations of space. However, the BULLETIN here reprints a valuable digest of the Commissioner's Report prepared by Williams & Wilkins.

DIGEST OF OPINION OF COMMISSIONER DAVIS

This is a copyright infringement suit under 28 U.S.C. §1498 (b).¹ Plaintiff alleges that defendant's Department of Health, Education and Welfare, through its agencies, the National Institutes of Health (NIH) and the National Library of Medicine (NLM), has infringed plaintiff's copyrights in medical journals by making unauthorized photocopies of articles from such journals. This suit is one of first

1. Prior to 1960, § 1498 provided only for patent infringement suits against the United States. In 1960, Congress amended § 1498 to make the United States liable also for copyright infringement. This is the first copyright case to reach trial in this court.

impression; raises long troublesome and much-discussed issues of library photocopying of copyrighted materials; and requires for resolution the "judgment of Solomon" if not also the "dexterity of Houdini." I hold that defendant has infringed plaintiff's copyrights and that plaintiff is entitled to recover "reasonable and entire compensation" as provided by §1498 (b).

SYNOPSIS OF MATERIAL FACTS

Plaintiff, though a relatively small company, is a major publisher of medical journals and books. Plaintiff publishes 37 journals, dealing with various medical specialties. The four journals in suit are *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. *Medicine* is published by plaintiff for profit and for its own benefit. The other three journals are published in conjunction with specialty medical societies which, by contract, share the journals' profits with plaintiff. The articles published in the journals stem from manuscripts submitted to plaintiff (or one of the medical societies) by physicians or other scientists engaged in medical research. The journals are widely disseminated throughout the United States (and the world) in libraries, schools, physicians' offices, and the like. Annual subscription prices range from about \$12 to \$44; and, due to the esoteric nature of the journals' subject matter, the number of annual subscriptions is relatively small, ranging from about 3,100 (*Pharmacological Reviews*) to about 7,000 (*Gastroenterology*). Most of the revenue derived from the journals come from subscription sales, though a small part comes from advertising.

NIH, the Government's principal medical research organization, is a conglomerate of institutes located on a multi-acre campus at Bethesda, Maryland. Each institute is concerned with a particular medical specialty, and the institutes conduct their activities by way of both intramural research and grants-in-aid to private individuals and organizations. NIH employs over 12,000 persons—4,000 are science professionals and 2,000 have doctoral degrees. To assist its intramural programs, NIH maintains a technical library. The library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. The library is open to the public, but is used mostly by NIH in-house research personnel. The library's budget for 1970 was \$1.1 million.

The NIH library subscribes to about 3,000 different journal titles, four of which are the journals in suit. The library subscribes

to two copies of each of the journals in suit. As a general rule, one copy stays in the library reading room and the other copy circulates among interested NIH personnel. Demand by NIH research workers for access to plaintiff's journals (as well as other journals to which the library subscribes) is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. Usually, researchers request photocopies of articles to assist them in their ongoing projects; sometimes photocopies are requested simply for background reading. In any event, the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

Four regularly assigned employees operate the NIH photocopy equipment. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was \$86,000 and the library filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages. On the average, a journal article is 10 pages long, so that in 1970, the library made about 93,000 photocopies of articles.

NLM is located on the Bethesda campus of NIH. Congress declared its purpose to be "****to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health****." NLM is a repository of much of the world's medical literature. NLM is in essence a "librarians' library." As part of its operation, NLM cooperates with other libraries and like research-and-education-oriented institutions (both public and private) in a so-called "interlibrary loan" program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the "loans" usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. The term "loan" therefore is a euphemism when journal articles are involved. NLM's loan policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning. The Code provides that each library, upon request for a loan of materials, shall decide whether to

loan the original or provide a photoduplicate. The Code notes that photoduplication of copyrighted materials may raise copyright infringement problems, particularly with regard to "photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication." (Emphasis in original text.) NLM, therefore, will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue. NLM, as well as other libraries, justifies this practice on the basis of a so-called "gentlemen's agreement," written in 1935 by the National Association of Book Publishers and the Joint Committee on Materials for Research (representing the libraries), which states in part, "A library***owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction****of a part thereof* to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research***." (Emphasis supplied.) Each photocopy reproduced by NLM contains a statement in the margin, "This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original."

In 1968, a representative year, NLM received about 127,000 requests for interlibrary loans. Requests were received, for the most part, from other libraries or Government agencies. However, about 12 percent of the requests came from private or commercial organizations, particularly drug companies. Some requests were for books, in which event the book itself was loaned. Most requests were for journals or journal articles; and about 120,000 of the requests were filled by photocopying single articles from journals, including plaintiff's journals. Usually, the library seeking an interlibrary loan from NLM did so at the request of one of its patrons. If the "loan" was made by photocopy, the photocopy was given to the patron who was free to dispose of it as he wished. NLM made no effort to find out the ultimate use to which the photocopies were put; and there is no evidence that borrowing libraries kept the "loan" photocopies in their permanent collections for use by other patrons.

Defendant concedes that within the pertinent accounting period, NLM and the NIH library made at least one photocopy of each of eight articles from one or more of the four journals in suit. Defendant also concedes that plaintiff is the record owner of copyright registrations on the journals. That would appear to end the

matter in plaintiff's favor, for §1 of the copyright statute (17 U.S.C.) says that the copyright owner "****shall have the exclusive right: (a) to print, reprint, publish, copy and vend the copyrighted work****": and §3 of the statute says that, "****the copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." Simply stated, this means that each article in plaintiff's journals is protected from infringement to the same extent as the entire journal issue.²

Despite plaintiff's prima facie showing of infringement, the Government and its amici raise a host of arguments why the libraries should not be held liable for infringement. The arguments boil down to five defenses: (a) nonownership of copyright, (b) real party in interest, (c) noninfringement, (d) fair use, and (e) license.

THE GOVERNMENT'S DEFENSE

The Nonownership Defense.

[Editor's Summary: Defendant argued that plaintiff did not own the copyrights in the various articles published in its journals because the authors did not assign the copyrights in writing and were not paid for the articles. The Commissioner rejected this defense on the ground that it is established by custom that a journal publisher obtains the copyright when the manuscript is accepted for publication. Furthermore, it was noted that the authors are rewarded by publication because it enhances their long-term professional and economic opportunities.]

Implicit in defendant's position on this issue is the notion that it is unfair for plaintiff to derive monetary profit from the work of medical researchers who do not share that profit directly with plaintiff. What defendant overlooks is that with respect to most of plaintiff's journals (and three of the four in suit), profits derived from the journals go in large measure to medical societies for which

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2. One argument made by defendant to justify the copying of single articles from plaintiff's journals is that each article is but "part" of a journal issue, which in turn is but "part" of a journal volume; and, accordingly, defendant says, its libraries have not copied an "entire" copyrighted work. Section 3 of 17 U.S.C. fully meets that argument, for it is undisputed that plaintiff could publish and seek copyright registration on each article separately. Section 3 (of the Copyright Act) does away with the necessity of taking a copyright on the contributions of different persons in a single publication****.

the journals are published. The American Gastroenterological Association (AGA) and the American Association of Immunologists (AAI) get 50 percent of the profits from *Gastroenterology* and the *Journal of Immunology*, respectively; and the American Society of Pharmacology and Experimental Therapeutics (ASPET) gets 90 percent of the profits from *Pharmacological Reviews*. Most of plaintiff's journals, therefore, operate for the benefit of the medical profession itself, which, in the long run, is for the benefit of the public. In any event, plaintiff's profits are not great, and at best, simply compensate plaintiff for the services it renders as a publisher in a free-enterprise system where income is derived by risking capital to print and disseminate. *E.g.*, in 1968, profit from *Pharmacological Reviews* was \$1,154.44 (on sales of about \$40,000), of which \$1,039 went to ASPET and \$115.44 went to plaintiff. In 1969, *Pharmacological Reviews* lost money. Also, in 1969, net income from *Gastroenterology* was \$21,312.08 (on sales of about \$245,000), and \$11,532.35 of that amount was offset by losses the previous year, leaving a balance of \$9,779.73. The balance was split between plaintiff and AGA, plaintiff getting \$4,889.86.

In short, absent private publishers whose efforts provide for dissemination of 95 percent of the current medical literature, most of the findings of medical research would go unpublished and undissemminated; or at least the burdens of publishing and disseminating would fall upon other organizations, one of which would no doubt have to be the Government.³

The Real-party-in-interest Defense.

[Editor's Summary: Defendant argued that with respect to two of the journals in suit, the contract language between the plaintiff and the professional societies who sponsored these journals required the Societies to be joined as plaintiffs. The Commissioner rejected this defense.]

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3. The UCLA Project discusses the problems which would be created if, through failure of private publishers, the Government takes up the slack in medical publishing. Among the problems might be "government influence over the content of writings," implicit in which is the "****danger of government censorship***. Many scientific journal articles are presently subjected to scrutiny by panels of scientists who determine 'publishability' independently of the editors of journals. Retaining such an evaluative process would allow professional scientists in the author's field, rather than bureaucrats, to decide what is published."

The Noninfringement Defense.

[Editor's Summary: Defendant argued that its acts of copying did not violate the copyright owner's exclusive right "to copy" the copyrighted work as provided in §1 of the Copyright Law. This argument was based on an historical analysis of the evolution of copyright legislation in this country. The Commissioner concluded that defendant had the burden "to show that Congress intended the statute to mean something other than what it plainly says. Defendant has not carried that burden." Part of defendant's rejected argument was that the libraries were somehow not violating the Copyright Law because they were making only single copies. The Commissioner rejected this argument in the section which follows.]

Defendant's contention that its libraries make only "single copies" of journal articles, rather than multiple copies, is illusory and unrealistic. Admittedly, the libraries as a general rule, make only one copy per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short time-span. *E.g.*, the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called "single copying" practice on plaintiff's legitimate interests as copyright owner are obvious. The Sophar and Heilprin report (Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc. for H.E.W.) puts it in terms of a colorful analogy: "Babies are still born one at a time, but the world is rapidly being overpopulated."

Finally, and in any event, there is nothing in the copyright statute or the case law to distinguish, in principle, the making of a single copy of a copyrighted work from the making of multiple copies. The first copyright statute (Act of 1790) provided in §2 that it was infringement to make "any *copy* or *copies*" (emphasis supplied) of a copyrighted work. Nothing in the later statutes or

their legislative histories suggests that Congress intended to change that concept. And the courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement.

The "Fair Use" Defense.

Defendant contends that its copying comes under the doctrine of "fair use" of copyrighted works. "Fair use," a judicially created doctrine, is a sort of "rule of reason" applied by the courts as a defense to copyright infringement when the accused infringing acts are deemed to be outside the legitimate scope of protection afforded copyright owners under 17 U.S.C. §1. What constitutes "fair use" cannot be defined with precision. Much has been written about the doctrine, particularly its rationale and scope. Some courts have held that the doctrine is but an application of the principle *de minimis non curat lex* and, as plaintiff puts it, "comes into play only when a relatively small amount of copying takes place." Principal factors considered by the courts in deciding whether a particular use of a copyrighted work is a "fair use" are (a) the purpose of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for his work. While these criteria are interrelated and may vary in relative significance, the last one, *i.e.*, the competitive character of the use, is often the most important. *E.g.*, it has been held "fair use" to copy excerpts from literary works for purposes of criticism or review. However, it is not "fair use" to copy substantial portions of a copyrighted work when the new work is a substitute for, and diminishes the potential market for, the original. And it has been held that wholesale copying of a copyrighted work is never "fair use", even if done to further educational or artistic goals and without intent to make profit.

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that

plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement. *Macmillan Co., supra*. Section 1498 of title 28 U.S.C. provides for payment of "reasonable and entire compensation." Moreover, damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles. While it may be difficult (if not impossible) to determine the number of subscription sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber, or at least is a potential source of royalty income for licensed copying. Plaintiff has set up a licensing program to collect royalties for photocopying articles from its journals; and among the licensees have been libraries, including a Government library.⁴ Also, there is evidence that one subscriber cancelled a subscription to one of plaintiff's journals because the subscriber believed the cost of photocopying the journal had become less than the journals' annual subscription price; and another subscriber cancelled a subscription, at least in part because library photocopies were available. Loss of subscription (or photocopying royalty) income is particularly acute in the medical journal field. The record shows that printing preparation costs are 50-65 percent of total cost of publication and that the number of subscriptions is relatively small. This simply means that any loss of subscription sales (or royalty income) has the effect of spreading publication costs over fewer copies, thus driving up steeply the unit cost per copy and, in turn, subscription prices. Higher subscription prices, coupled with cheap photocopying means probable loss of subscribers, thus perpetuating a vicious cycle which can only bode ill for medical publishing.

Defendant's amici fear that a decision for plaintiff will be precedent for plaintiff's seeking injunctions against non-Government libraries, pursuant to 17 U.S.C. §101(a), thereby interfering with

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4. There is no agreement, even among libraries and Government agencies, of what constitutes "fair use" in institutionalized photocopying. The Library of Congress will not photocopy copyrighted materials without permission of the copyright owners. Many other libraries follow the General Interlibrary Loan Code and engage in "single copy" photocopying. The U.S. Office of Education, through its Education Resources Information Center (ERIC) makes available current educational and research-related materials. ERIC will not copy copyrighted materials without permission of the copyright owner.

the free flow of technical and scientific information through library photocopying. On the basis of this record and representations made by plaintiff's personnel and counsel, that fear does not appear to be justified. Plaintiff does not seek to *enjoin* any photocopying of its journals. Rather, it merely seeks a reasonable royalty therefor.⁵ Its licensing program would so indicate for, as far as the record shows, plaintiff will grant licenses to anyone at a reasonable royalty. No doubt, plaintiff would prefer that all of its journal users be subscribers. However, plaintiff recognizes that this is unrealistic. Some articles in its journals are in greater demand than others, and many journal users will not consider it economically justifiable to subscribe to a journal simply to get access to a few articles.

Implicit in plaintiff's licensing program, therefore, is the idea that it is in the best interest of all concerned that photocopying proceed without injunction, but with payment of a reasonable fee. That would appear to be a logical and commonsense solution to the problem, not unlike the solution provided by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the field of music and the performing arts.

Defendant says that photocopying by NLM and the NIH library is "reasonable and customary" because it complies with a longstanding practice of libraries to supply photocopies of parts of scientific works to persons engaged in scholarly research, and is consistent with the terms of the "gentlemen's agreement," earlier noted. The "gentlemen's agreement," drafted in 1935, was the product of meetings and discussions between representatives of the book

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5. In his opening statement at trial, plaintiff's counsel said (emphasis supplied):

The case has nothing to do with the stopping of photocopying. The Commissioner knows that an injunction is not available in this court, *nor is plaintiff, in any case, seeking to curtail this use of its articles.* Similarly, William M. Passano, plaintiff's Chairman of the Board, stated in a hearing before a Senate committee:

We feel that it is unrealistic and not in the public interest to consider restricting in any way the use of photocopying devices. They serve a useful purpose in the dissemination of knowledge. Since we, as publishers, are in that business, we certainly don't want to see the spread of knowledge curtailed.

To us the only solution to the problem is a simple system of royalty payments with a minimum of red tape.*** (Hearings on Copyright Law Revision before the Patents, Trademarks and Copyrights Subcomm. of the Senate Comm. on the Judiciary, 90th Cong. 1st Sess. 976 (1967).)

publishing industry and libraries. The representatives were interested in working out a practical accommodation of the conflict between (a) the legitimate interest of copyright owners not to have their works copied without compensation and (b) the needs of scholars and research workers for copies of parts of copyrighted works for private use in pursuit of literary or scientific investigation. The "agreement" was in effect a promise by the book publishers not to interfere with library photocopying under three conditions: (i) the library must warn the person for whom the photocopy is made that he is liable for any copyright infringement by misuse (presumably by making further photocopies), (ii) the photocopying must be done without profit to the library and (iii) the amount copied must not be so substantial as to constitute an infringement. The third condition is implicit in the "agreement" which says:

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. *Extensive quotation is obviously inimical to the author's interest. ***It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photocopying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted.* (Emphasis supplied.)

The "gentlemen's agreement" does not have, nor has it ever had, the force of law with respect to what constitutes copyright infringement or "fair use." So far as this record shows, the "agreement" has never been involved in any judicial proceedings. Nevertheless, the "agreement" is entitled to consideration as a guide to what book publishers and libraries considered to be "reasonable and customary" photocopying practices in the year 1935. It has little significance, however, to this case. The agreement was drafted on behalf of a book publishers' organization which is now defunct and to which plaintiff never belonged. In fact, it appears that no periodical publishers were represented in the organization at the time the agreement was drafted; and, consequently, the "agree-

ment" cannot speak for their interests or problems. Furthermore, the "agreement" was drafted at a time when photocopying was relatively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed character. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology. Prof. Nimmer in his treatise COPYRIGHT capsules the point:

Both classroom and library reproduction of copyrighted materials command a certain sympathy since they involve no commercial exploitation and more particularly in view of their socially useful objectives. *What this overlooks is the tremendous reduction in the value of copyrighted works which must result from a consistent and pervasive application of this practice.* One who creates a work for educational purposes may not suffer greatly by an occasional unauthorized reproduction. But if every schoolroom or library may, by purchasing a single copy, supply a demand for numerous copies through photocopying, mimeographing or similar devices, the market for copyrighted educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is largely undercut in the name of fair use. [Emphasis supplied.]

In any event, the "gentlemen's agreement" by its own terms condemned as "not***fair" the making of photocopies which could serve in "substitution" for the original work, and further noted that "orders for photo-copying which, by reason of their extensiveness or for any other reasons" could serve as duplicates of the original copyrighted work "should not be accepted." Thus, the most that can be said for the "gentlemen's agreement" is that it supported (and probably still supports) the proposition that it is "reasonable and customary" (and thus "fair use") for a library to photocopy for a patron a part of a book, or even part of a periodical article, such as a chart, graph, table, or the like, so long as the

portion copied is not practically a substitute for the entire original work. Other instances of library photocopying may also be "fair use." *E.g.*, a library no doubt can replace damaged pages of copyrighted works in its collection with photocopies; can make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloging or the like; or can supply attorneys or courts with single photocopies for use in litigation. In all those instances, and probably many more which might come to mind on reflection, the rights of the copyright owner are not materially harmed. The doctrine of "fair use" and the "gentlemen's agreement," however, cannot support wholesale copying of the kind here in suit.

Defendant also contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; that it is in the public interest that they do so because any harm to copyright owners is minimal compared to the public benefits derived therefrom; and that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. That argument is not persuasive. In the first place, defendant concedes that its libraries photocopy substantially more material than scholars can or do copy by hand. Implicit in such concession is a recognition that laborious handcopying and rapid machine photocopying are totally different in their impact on the interests of copyright owners. Furthermore, there is no case law to support defendant's proposition that the making of a handcopy by scholars or researchers of an *entire* copyrighted work is permitted by the copyright laws. Certainly the statute does not expressly permit it; and no doubt the issue has never been litigated because, as a practical matter, such copying is *de minimis* and causes no real threat to the copyright owner's legitimate right to control duplication and dissemination of copyrighted works. The photocopying done by NLM and the NIH library, on the other hand, poses a real and substantial threat to copyright owners' legitimate interests.

Finally, defendant says that it is unconstitutional to construe the copyright law so as to proscribe library photocopying of scientific or technical writings because such photocopying is consonant with the constitutional purpose of copyright "to promote the progress of science." That argument misses the mark. Article I, section 8, clause 8, of the U.S. Constitution grant to Congress the "Power ***To Promote the Progress of Science***by securing for limited Times to Authors***the exclusive Right to their***Writings***."

The word "Science" is used in the sense of general knowledge rather than the modern sense of physical or biological science. Congress has exercised its constitutional power by enacting, and revising from time to time, copyright statutes which are the method of, and provide a *system* for, achieving the constitutional purpose. The system "promotes progress" by encouraging authors to write and publicly disclose their writings; by inducing publishers and entrepreneurs to invest risk capital in the dissemination of authors' writings; and by requiring other authors to create new writings, rather than plagiarize the old, all of which is in the public interest. Congress has broad discretion under the Constitution to prescribe the conditions under which copyright will be granted, the only express restriction being that any "exclusive right" must be for a "limited time." Nothing in the present statute, its legislative history or the case law suggests that Congress intended to exempt libraries or others from liability for wholesale copying of copyrighted works, whatever be the purpose or motivation for the copying.

The License Defense.

[Editor's Summary: Defendant contended that with respect to some of the articles it had an implied license to copy because the work upon which the articles were based was supported in part by grants from the Public Health Service. This argument was rejected because of the stated policy of the Public Health Service prior to July 1, 1965 "under which it reserved neither title to, nor any rights whatsoever in, publications stemming from Public Health Service grants".

The Commissioner also rejected the argument that an express license to copy existed for one grant supported article because it was published after the policy was changed on July 1, 1965 to provide such licenses to the Government. The basis for the rejection was that the article was written prior to July 1, 1965 and that no substantive changes in the article were made after that date.]

It is pertinent to note that resolution of this issue in plaintiff's favor should be of minor practical consequence to the Government's future copying of articles stemming from Public Health Service-funded research. The Sophar and Heilprin report found that 85 percent of the material photocopied by U.S. libraries is less than 5 years old, and 90 percent is less than 10 years old. Since the Public Health Service's express license policy is nearly 7 years old, most of the Government's prospective copying (as well as its

copying for the past year or so) of articles stemming from grant-funded research, will be of articles which resulted from grants awarded subsequent to July 1, 1965, and will therefore be royalty-free.

ANCILLARY MATTERS

Several other points raised by the parties merit comment. Defendant notes that the National Library of Medicine Act by which NLM was created provides that the Secretary of Health, Education, and Welfare, through NLM, shall "make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate***"; and that the Medical Library Assistance Act of 1965 provides that grants be made to medical libraries for, among other things, "acquisition of duplicating devices, facsimile equipment***and other equipment to facilitate the use of the resources of the library." Defendant suggests that by those statutory provisions Congress intended to exempt NLM and other grantee libraries from the copyright laws. As defendant puts it, "***the only reasonable interpretation (of the statutes) is that Congress knew that fair use would exempt such libraries from copyright infringement in the established use by libraries of such (photocopy) equipment." There is no merit to this. Nothing in the statutes or their legislative histories says anything about the copyright laws, and it cannot be inferred that Congress intended the statutes to be in derogation of the copyright laws, absent an express indication to the contrary. No court has ever held that "fair use" applies to library wholesale photocopying; nor has there been a uniform and unchallenged policy among libraries and other institutionalized photocopiers on the bounds of "fair use." Thus, it makes no sense to impute to Congress an intent for which there is no sound basis in judicial decision, or otherwise. The fact that the statutes authorize the libraries to make use generally of photocopying equipment and procedures, is not controlling or even very significant. Much material in library collections is either not copyrighted or is material on which the copyright has expired; and in either event, the material is in the public domain and can be freely copied.

Furthermore, the record shows that NLM, from the beginning, has been concerned about complying with the copyright laws and has never considered itself exempt therefrom. In 1957, NLM's Board of Regents discussed the library's photocopying practices and

deemed them to create vexing copyright infringement problems. The Director of NLM was of the opinion that "sooner or later" the problems would bring "a test of the issue in the courts."

Defendant suggested at trial that payment of compensation to plaintiff for photocopying its journals would create a continuing undue and oppressive administrative and financial burden on NLM and the NIH library. Defendant has not pressed the point in its brief, perhaps because it is clear that plaintiff's right to compensation under 28 U.S.C. §1498(b) cannot depend on the burdens of compliance. Nevertheless, defendant's point merits comment since courts should be mindful of the practical consequences of their decisions. Based on this record, defendant's fears are not justified. Both NLM and the NIH library already have administrative procedures by which they keep detailed records of photocopying. Both libraries require that written request slips be submitted by requesters of photocopies. The slips are a permanent record of the journals and pages photocopied. It would seem a routine, albeit tedious, matter to cull from those records the information necessary to calculate a reasonable royalty on the basis of the number of articles copied, or perhaps to come up with an acceptable formula for establishing a blanket annual royalty payment. Indeed, the evidence suggests that this is so. In 1967, NLM temporarily stopped photocopying articles from plaintiff's journals, as a result of plaintiff's charge of copyright infringement and requests for a reasonable royalty. NLM was able, as a practical matter, to flag all requests for photocopies from plaintiff's journals from April 27, 1967 to May 29, 1967, in order to refrain from copying them. On about May 29, 1967, photocopying was resumed and was monitored for about 90 days. Satisfied that the 90-day period was a representative sample, NLM found that it would have paid plaintiff about \$250-\$300 if it had acceded to plaintiff's request for royalty payment. The Director of NLM testified that, in his opinion, this was a "very small sum—surprisingly small sum." Similarly, the NIH librarian testified that payment of royalties for photocopying "has nothing to do with the operation of the library in the fulfillment of***its function. It is an economic and budgetary consideration and not a service-oriented kind of thing."

Nor does it appear that payment of royalties to other publishers will create an undue or oppressive administrative burden. The Sophar and Heilprin report notes, that based on a study of the photocopying practices of U.S. libraries, less than 1,000 publishers provide the material photocopied by libraries, and that about

5 percent of that number provide about 40 percent of the material copied. This simply means that nearly half of the materials photocopied emanate from about 50 publishers. No doubt, the materials photocopied by NLM and the NIH library come from an even smaller number of publishers since those libraries are highly specialized. In any event, by using modern management practices including computers and the like, it would appear that NLM and the NIH library can, with minimum disruption, cope with the necessary record keeping.

CONCLUSION OF LAW RECOMMENDED BY THE COMMISSIONER
TO THE COURT

Upon the foregoing findings of fact and opinion which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover reasonable and entire compensation for infringement of copyright, and judgment is entered to that effect. The amount of recovery will be determined in further proceedings before a trial commissioner pursuant to Rule 131(c).

256. *Imperial Homes Corporation v. Lamont et al.*, 458 F.2d 895, 173 USPQ 519 (5th Cir., April 13, 1972) (Clark, J.).

Appeal from judgment for defendant in action for copyright infringement. Plaintiff registered claim to copyright in a set of architectural drawings for a certain home design, and constructed model homes therefrom which it opened to the public. Plaintiff included the floor plan from the drawings in a promotional brochure and "duly noted in the brochure that it claimed a copyright right on the floor plan, but [made] no effort . . . to copyright the . . . brochure." Defendants visited one of plaintiff's models and "made detailed observations and measurements." The lower court also found that defendants obtained a copy of plaintiff's brochure. Defendants then developed a set of construction plans for building a home "substantially similar" to plaintiff's model, and later constructed a home therefrom.

In plaintiff's action to enjoin dissemination or use of defendants' allegedly infringing plans and to recover damages and profits, the lower court found for defendant, holding that by reproducing its floor plan in its promotional brochure, plaintiff had "abandoned and waived" copyright therein. The trial court also declined to decide whether defendants copied plaintiff's floor plan in preparing their own plans, concluding that such copying would not constitute infringement.

Held, reversed and remanded.

1. *Copyrightability*: The court observed that "the architect who originates a set of blueprints for a dwelling is as much an author for copyright purposes as the writer who creates an original novel or the dramatist who pens a new play." Noting that the criterion of "authorship" requires original effort, the court added that the copyright doctrine of originality "does not extend so far as to require that novelty or invention which is the sine qua non for patent protection."

2. *Abandonment*: Describing the trial court's holding that publication of the floor plan in plaintiff's promotional brochure abandoned plaintiff's rights as "both novel and erroneous", the Court of Appeals reversed the judgment below. Noting that a basic right accorded to a copyright proprietor is the right to make and publish copies of his work, the court concluded that it "would be illogical to permit the enjoyment of these expressly accorded privileges to destroy the efficacy of the whole protection intended." The court added:

Abandonment can only be shown by proving the copyright proprietor intended to surrender the rights in a work he so deliberately perfected. Rather than the publication of the instant booklet evincing abandonment, the opposite intention is disclosed, because in the brochure Imperial expressly claimed that the floor plan design was the subject of a copyright.

3. *Infringement*: The court held that *if* defendants were shown to have copied plaintiff's floor plan in preparing their construction plans, an infringement would have occurred, and remanded the case with instructions to make a finding on this issue. Referring to the Supreme Court's 1897 decision in *Baker v. Selden* (101 U.S. 99) the court said:

In terms of an architectural drawing the *Baker v. Selden* rationale would assert that no architect who copyrights his blueprints could thereby acquire a monopoly on the right to build a house with 2 x 4s or with a pitched roof or with a slab foundation or any other particular feature, no matter how unique. The court was concerned that copyright privileges might result in vesting exclusive use rights which only a patent could confer. We therefore interpret this decision as holding that a descriptive copyright may not extend an exclusive right to the use of the described art itself lest originality of description should preempt non-novel invention. Thus, no copyrighted architectural plans under §5 (i) may clothe their author with the exclusive right to reproduce the dwelling pictured. How-

ever, nothing in *Baker v. Selden* prevents such a copyright from vesting the law's grant of an exclusive right to make copies of the copyrighted plans so as to instruct a would-be builder on how to proceed to construct the dwelling pictured.

257. *United States of America v. Loew's Incorporated, et al.*, not yet reported (S.D.N.Y., May 31, 1972) (Palmieri, J.).

Petition for declaration of non-violation of prior judgment or, in the alternative, a one-year exception thereto. Petitioner, Columbia Pictures Industries, Inc., is subject to an anti-trust decree prohibiting it from "performing or entering into any license in which the right to exhibit one [motion picture] feature is conditioned upon the licensee's taking one or more other features." Petitioner proposed to develop a motion picture production and exhibition venture called "Repertory Cinema" or "Movie of the Month," described by the court as follows:

The proposed repertory cinema concept is based upon literary works and stage productions which have been previously published or produced, and critically acclaimed. The enterprise expects to attract a sophisticated patronage now deprived, either for geographical reasons or scarcity of product, of this type of cinema entertainment . . . As a result of these efforts the petitioner suggests that besides nourishing a special segment of the moving picture public, the standard of moving picture production would be improved by the avoidance of banality and vulgarity and the appeal to higher intellectual and cultural standards. There is, of course, no assurance that repertory cinema will be successful and the petitioner appears to be assuming considerable risk in launching this venture . . . The licensing [under the concept] would be to a single theatre on two regularly scheduled days per month (for as many months as the number of pictures in the series) and it would be combined with an offer to the public to subscribe in advance to the entire program of films on the basis of guaranteed seating and the exhibition of one picture per month. Every exhibitor who desires to sponsor the Repertory Cinema will be given a competitive opportunity to do so.

The pattern of licensing would cover exhibition markets throughout the country and it is expected that it would take approximately 8 months for the repertory to have run its course with respect to each film. It is only when the repertory has been completed that the film will become available to other exhibitors . . . The petitioner proposes to finance half of the production costs of

each of the motion pictures and to pay all of the national advertising expenses involved . . . Essential to the proposed repertory cinema plan is the requirement that the participating theatres license all of the 8 to 12 pictures irrespective of the theatres' possible disinterest in some of the pictures. Upon the hearing it was made plain by the witnesses for the petitioner that the merchandising of the repertory cinema plan was based upon exclusivity of exhibition and that this was a *sine qua non* of the plan. Thus, a theatre will not, at least initially, be able to license any one picture in the group or less than the entire group. [Although the motion pictures will be based upon themes] there is no dispute about the fact that each picture will be a separate production based upon the work of a different author or playwright and with its own director and cast of actors and actresses. Each of the pictures will, presumably, be separately copyrighted.

Petitioner sought a declaration that its proposal would not violate the prior decree or, alternatively, a one-year period of relief allowing introduction of the program. The Government opposed the petition on the grounds that the proposal was in clear violation of the prior decree and in opposition to various decisions condemning motion picture block booking as an unlawful tying device in violation of the anti-trust laws.

The court concluded that "no definitive conclusions" could yet be drawn as to the reconciling of this new device with the anti-trust laws and, opining that "felicitous cultural purposes" might be attained by Repertory Cinema "which should not be thrust aside out of hand," held that the one-year trial period should be allowed. The court said:

The Supreme Court stated in *United States v. Loew's Incorporated*, 371 U.S. 38, at 49-50 (1962), that "there may be rare circumstances in which the doctrine we have enunciated under §1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted tying products is inapplicable. However, we find it difficult to conceive of such a case, and the present case is clearly not one."

I suggest that this innovative repertory cinema concept may well be such a rare occasion. A conclusion that would strike down the petitioner's laudable purposes out of hand on the ground of its anti-competitive implications would be simplistic and short-sighted. I have therefore concluded to grant the petition conditionally and for a limited period in order to determine precisely what, if any, anti-competitive elements are in fact involved.

The subscribers to repertory cinema are like a club or association of persons interested in producing and exhibiting classic literary works as motion pictures for their own benefit.

The problem arises here only because the petitioner and its subscribers require physical facilities to exhibit the motion pictures to be produced. If they had such facilities no legal problem would exist. Because the facilities must be found for the subscribers, a problem is created. It must be stressed that the petitioner is not seeking to engage in the traditional licensing of motion pictures to exhibitors. The marketing practices sought to be undertaken by repertory cinema are new and radically different from those of the pre-Paramount era. The *Paramount* decrees struck down licensing practices which imposed a number of anti-competitive restraints upon the licensees' right to conduct their exhibition businesses. The court appraised these practices against the background of the motion picture industry as it was then conducted. The repertory cinema concept was never considered by the *Paramount* court in 1948. The concept is of very recent origin and this court is now asked to determine whether the rules formulated in the past for different purposes are so rigid and so clear that they can leave no room for the development of repertory cinema. This court believes that only a period of experimentation can provide a reliable answer. It is for this reason that this court is disposed to grant a one year exception to the decree to permit an experimental test of the concept. The matter can then be reexamined in the light of the experience which will have accrued and appropriate measures taken if any anti-competitive consequences appear to have resulted.

In taking this view of the matter, it must be stressed that on its face the project does not involve the risk of a plunge into a pre-*Paramount* situation. None of the undesirable licensing practices there involved can be expected to be repeated. The licensee-exhibitor fulfills a passive role under the repertory cinema project. The two days a week contemplated for exhibition are notoriously poor business days in the exhibition business. The licensee will have a ready-made, pre-sold audience whom he does nothing to attract to his theatre. He is not exploiting the motion picture. It is being exploited and advertised for him by the repertory cinema entrepreneurs. The potential audience will be approached, their interest solicited and stimulated and ticket applications distributed and processed by means of a national sales campaign totally unrelated to any efforts or expenses on the part of the licensee exhibitor.

Additionally, this court is persuaded that there is little likelihood that the films contemplated by petitioner would ever be produced without such a plan as the one proposed. Film product has continued for some time to be in short supply. The loss of these films would be an eventual loss to the entire industry. The patrons these films would attract are those who are largely alienated by the type of film product now generally exhibited and which is apparently intended to appeal to the younger patrons. The older patrons who hopefully would be attracted back to the motion picture theatres by this plan can be a source of benefit to the exhibitors generally, to the extent that their alienation can be overcome.

Apart from all that has been said, one cannot overlook the considerable public interest in the outcome of this petition. The putative subscribers to repertory cinema are not represented here, but it is clear that if they were, they would urge that the proposed plan would provide a service to a segment of the public which wishes to patronize films based upon classical themes and which now has nowhere to go. In construing the *Paramount* decrees this court has frequently had occasion to allude to the overriding public interest in seeking to make an equitable adjustment between competitive conflicts. In this instance that public interest would appear to weigh heavily in support of a trial period of repertory cinema. The deep-rooted concept of competitive freedom and the principles of the antitrust policy against monopoly and competitive dominance can more appropriately find their parameters in this context after the commercial characteristics of this plan are ascertained, tried and tested. Antitrust concepts are not intended to be inflexible. They are susceptible of rational adjustment after careful analysis.

258. *Consolidated Music Publishers, Inc. v. Hansen Publications, Inc., et al.*, 173 USPQ 658 (S.D.N.Y., March 24, 1972) (Weinfeld, J.).

Motion for preliminary injunction in action for copyright infringement. Plaintiff alleged that defendants' guitar self-instruction book infringed its similarly-proposed book.

Held, motion granted.

1. *Copyright Validity*: The court found that plaintiff's book was substantially differently organized from a certain prior work and shared "little similarity" with the textual content of such work (being different in arrangement, presentation and language therefrom). Thus, the court

concluded, plaintiff's book satisfied the "originality" requirements of independent creation.

2. *Infringement*: Access was undisputed. Upon "analytical examination," the court found that substantial similarities between the parties' books in both language and organization warranted an inference of deliberate copying. The court said:

Analytical examination of the two works, fortified by exhibits containing illustrative material taken from them, shows close similarities in language—in some instances so close as to be substantially identical and to compel the inference that one must have been copied from the other. . . .

The parallelisms of text are the more striking and significant when it is recalled that the instructions are addressed directly to the pupil in a personal vein. The writing is imaginative in tone and style. Comparison of the two books readily reveals that defendant's book flagrantly copies the textual language of plaintiff's book. The minor changes, additions and paraphrases expose rather than conceal the plagiarism; they emphasize the deliberateness of the copier's action. The instances of similarity of language are so numerous that defendant's claim they are merely the incidental use of common descriptive terms of instructions challenges common experience. A finding of infringement might well rest on the defendant's copying of the verbal text, irrespective of the other contents of its book.

Plaintiff, however, offers additional proof. The structure and organization of defendant's book is so close to the structure and organization of plaintiff's as to warrant, also on this ground, a finding of copying. Viewed in conjunction, the similarities of language and the parallelisms of form are so pervasive and substantial as to give rise to a strong inference of deliberate copying; any denial of copying falls of its own weight.

3. *Preliminary Relief*: Noting that a copyright owner will usually be presumed to suffer irreparable harm upon interference with his exclusive rights, the court concluded that plaintiff "has made out a prima facie case of infringement and a reasonable probability that it will prevail on the merits, and this is sufficient to entitle it to a preliminary injunction."

259. *International Tape Manufacturers Association v. Gerstein, et al.*, BNA, PTCU No. 83 at D-1/9 (S.D. Fla., June 12, 1972, Layton, J.).

It has recently been reported that the United States Supreme Court has granted review of the issue of the extent to which the recently-enacted amendment to the Copyright Law providing for a limited copyright in sound recordings precludes state-court protection of recordings fixed before February 15, 1972 (the operative date of the amendment). *Goldstein v. California*, previously unreported, No. 71-1192 (May 31, 1972); see BNA, PTCU No. 80 at A-9.

The import of this question transcends the music/record industry, since it involves consideration of the extent to which the "misappropriation" concept of the *International News Service* case, 248 U.S. 215 (1918) survives the subsequent Supreme Court decisions in *Sears and Compco*, 376 U.S. 225, 234 (1964).

In light of the significance of this issue, the BULLETIN here reprints in full a recently-announced opinion of the District Court for the Southern District of Florida on the question.

Plaintiff, an unincorporated voluntary association, has brought this class action seeking declaratory and injunctive relief from future criminal prosecutions threatened under the provisions of a Florida statute. Plaintiff alleges that such imminent prosecutions would result in the instigation of harassing and vexatious litigation and cause it irreparable harm. Defendants are the State Attorneys, who are responsible for prosecutions initiated pursuant to the challenged Florida Statute. Plaintiff contends that the Florida statute is in conflict with Federal copyright law and is, therefore, void pursuant to the Supremacy Clause of the Constitution. It seeks a permanent injunction restraining defendants from initiating any proceedings to enforce this allegedly unconstitutional section of the Florida penal code. Furthermore, it seeks a declaratory judgment that the Florida statute is unconstitutional.

Federal jurisdiction is claimed pursuant to 28 U.S.C. §§1338, 2201-02, 2281-84.

On March 2, 1972, this Court granted plaintiff's motion to designate this action as a class action and entered a temporary restraining order against defendants, prohibiting them from enforcing the provisions of the challenged Florida Statute. Defendants have filed motions to dismiss the complaint and dissolve the order.

Plaintiff is engaged in the business of making and selling sound recordings in the form of discs and tapes. It purchases on the open

market disc phonograph records and tapes which have been manufactured and sold through usual commercial channels by record companies. It then makes tape recordings of these sound recordings, and uses these tapes to manufacture additional copies of the recordings which it markets and sells, affixing to each recording a label containing the title of the original sound recording and the name of the recording artist whose performance has been copied.

The Florida statute, which became effective on October 1, 1971, makes it a criminal offense to engage in such "piracy" of sound recordings by selling the copies for profit:

"It is unlawful to:

1. Knowingly and willfully, without the consent of the owner, transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold for profit, such article on which sounds are so transferred.

2. Sell any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner. (b)(2) As used in this Section . . . 'Owner' means the person who owns the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived."¹

The Constitution provides that Congress has the power to grant and regulate copyrights:

"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."²

Title 17 of the United States Code contains the statutes which Congress has enacted pursuant to its powers derived from the Constitution. Public Law 92-140 is the latest amendment to Title 17. 92-140 consists of three sections which made several changes in the provisions of Title 17.

1. Fla. Stat. ch. 71-102 § 543.041.

2. U. S. Const. Art. I, § 8, cl. 8.

The first change added subsection (f) to 17 U.S.C. §1 — exclusive rights as to copyrighted works — which permits only the owner of a copyrighted sound recording to reproduce it for sale:

“Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(f) to reproduce and distribute to the public by sale or other transfer of ownership . . . 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.”

17 U.S.C. §§ 19 and 20 — notice; form — were amended to prescribe the form of notice of a copyright on a published sound recording, as required by 17 U.S.C. § 10.

17 U.S.C. §§26 — terms defined — was also amended:

“[A] reproduction of a [sound recording] shall be considered a copy thereof. ‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds. . . . ‘Reproductions of sound recordings’ are material objects in which sounds . . . are fixed by any method now known or later developed, and from which sounds can be . . . reproduced . . . and include . . . discs or tapes for use in mechanical music-producing machines.”

Section 2 of 92-140 added a new subsection of 17 U.S.C. §101 — infringement — which stated that unauthorized use of copyrighted sound recordings was an infringement:

“(e) [D]iscs or tapes for use in mechanical music producing machines adapted to reproduce copyrighted works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically . . . and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accord with all provisions of this Title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this Title.”

Section 3 of 92-140 provided the effective dates for the provisions of the amendments to Title 17:

"This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of Title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in Title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way the rights with respect to sound recordings fixed before the effective date of this Act."³

Prior to determining the merits of the substantive issues which plaintiff raises in the case at bar, substantial jurisdictional questions raised by defendants must be adjudicated. These challenges attack the standing of the plaintiff, the underlying federal jurisdiction, declaratory judgment jurisdiction and injunctive jurisdiction. Finally, should the first four challenges fail, defendants contend that this Court should abstain from exercising its jurisdiction.

STANDING

The defendants argue that the plaintiff lacks standing to prosecute this action because it is not the real party in interest as defined by the Federal Rules.⁴

The Supreme Court has held that the question of standing is not related to the precise nature of the legal interests asserted by a plaintiff. A determination of the legal interests lies within the scope of a ruling on the merits of the case.⁵ To demonstrate standing, a plaintiff must show that he has (1) such a personal stake in the controversy as to assure adverseness, and (2) injury or threat of injury to an arguably legally recognized, rather than a personal, in-

3. 92-140 was enacted on October 15, 1971. February 15, 1972, is the date on which section 1 of 92-140 took effect. The reason for the January 1, 1975 cut-off date is "to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment," according to House Report No. 92-497, dealing with 92-140.

4. Fed.R.Civ.P. 17(a): Every action shall be prosecuted in the name of the real party in interest.

5. *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970).

terest.⁶ Plaintiff has demonstrated its personal stake through its involvement in this and other suits. It is clearly threatened with injury by the initiation of prosecutions pursuant to the provisions of the Florida statute. Therefore, the plaintiff has standing to prosecute this action and the first contention of the defendants must be dismissed.

UNDERLYING FEDERAL JURISDICTION

The defendants argue that there is no jurisdictional statute providing for federal jurisdiction in the case at bar.

Generally, a plaintiff in a copyright suit argues either that he is entitled to a copyright, or that a copyright which he owns has been infringed. In the case at bar, plaintiff raises neither contention. Here, defendants claim that in their absence, there is no federal jurisdiction pursuant to 28 U.S.C. §1338,⁷ and that this Court must dismiss the suit. This Court is not persuaded by defendants' reasoning.

Congress has expressed an interest in preserving for authors certain rights with respect to the control of the dissemination of their works and the rewards attained from such distribution. It also has regulated the works entitled to such protection, and the time within which those works may be protected. While not necessarily preempting the field, Congress has clearly manifested an interest extending to the entire breadth of copyright protection provided by both the federal and state systems.

Under such circumstances, this Court feels that there may be an inherent jurisdiction covering the entire field of copyrights lodged in the district courts, which, while not exclusive, may permit federal courts to hear such cases as those filed by plaintiff in the instant action.⁸ This result may occur even where state law governs the entire disposition of the substantive issues presented by the case.⁹

6. *Flast v. Cohen*, 392 U.S. 83, 99, 102 (1968). See, *Barlow v. Collins*, 397 U.S. 159 (1970); *United Federation of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 902 (1969); *National Motor Freight Traffic Assn. v. United States*, 372 U.S. 246 (1963).

7. 28 U.S.C. § 1338:

"The district court shall have original jurisdiction of any civil action arising under any act of Congress relating to . . . copyrights. Such jurisdiction shall be exclusive of the courts of the states. . . ."

8. *Union Pacific Ry. Co. v. Woodahl*, 308 F. Supp. 1002 (D. Mon. 1970).

9. *Int. Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 576, 580-81 (1st Cir. 1956). See, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

The fact that the plaintiff in the case at bar does not claim a copyright is not dispositive of whether jurisdiction is present pursuant to § 1338. Clearly, Title 17 U.S.C. §§ 1-215 is an "act of Congress relating to . . . copyrights." § 1338 does not require that only the plaintiff allege either the validity of a copyright or the infringement of that copyright; rather, it deals with subject matter solely. Because 92-140 expressly deals with sound recordings, and specifically states that it affects no changes respecting the rights regarding sound recordings published prior to the effective date of the act, this Court must have jurisdiction to hear claims based on rights as they existed, both prior to the act and subsequent to it. Furthermore, once it is determined that this Court has jurisdiction to hear the case, then pursuant to the rule of "pendent jurisdiction," the other issues raised by the case fall within the purview of this Court.¹⁰ Since the jurisdiction rests on § 1338 rather than § 1331, no jurisdictional amount is required.

Finally, even though this issue was not argued before this Court, the Supreme Court's recent landmark decision of *Lynch v. Household Finance Corp.*¹¹ may provide for jurisdiction pursuant to 38 U.S.C. § 1343(3).¹² In that case, the Court abolished any jurisdictional distinction based on categorizing the affected rights of a plaintiff as a "property" right or a "personal" right. Since the Florida statute may deprive plaintiff of property rights provided by federal copyright legislation, it would seem that this Court has jurisdiction to hear the case at bar. Therefore, this Court has subject matter jurisdiction over the case at bar and the second contention of the defendants must be dismissed.

10. *Osborn v. Bank of United States*, 9 Wheat. 738 (1824), was the first case to enunciate this principle. Its most recent refinement, *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), holds that pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" which "would ordinarily be [tried] in one judicial proceeding."

11. 40 U.S.L.W. 4335 (U.S. March 23, 1972).

12. "The district courts shall have original jurisdiction . . . :

(3) To redress the deprivation, under color of any State law, . . . of any right, privilege or immunity secured by . . . Any Act of Congress providing for equal rights of citizens or persons within the jurisdiction of the United States. . . ."

Declaratory Judgment Jurisdiction

Defendants further contend that this Court cannot enter a declaratory judgment against them because the case presents no actual controversy as required by 28 U.S.C. § 2201.

In its complaint, plaintiff did allege that its members were in danger of being prosecuted in Florida. Based upon the business of the plaintiff and the interrelationship between the federal and state statutes in question, an actual controversy does in fact exist.¹³

On its face, the Florida statute does apply to sound recordings fixed and published both before and after the effective date of 92-140. Although it is possible for state courts to construe state statutes to avoid conflicts with federal statutes, such possibilities go towards the advisability of abstention, not the lack of jurisdiction.

Even though the plaintiffs are not claiming that they have a statutory right to "pirate" sound recordings, they do claim that the federal law immunizes them from the non-federal claim which the defendants have set forth under the Florida statute. The case law regarding anticipated federal defenses in a declaratory judgment proceeding is not entirely clear. However, the rule in Florida appears to be that a declaratory judgment suit based on an anticipated federal defense is a proper basis for federal jurisdiction. In the case of *Zaconick v. City of Hollywood*,¹⁴ plaintiff sought declaratory relief pursuant to the Declaratory Judgment Act upon the theory that an ordinance of the defendant would violate plaintiff's constitutional rights. The court held that jurisdiction existed because federal constitutional questions had been raised:

"It is admitted that there is no diversity of citizenship; but it is obvious that the suit is one which arises under the Federal Constitution . . . A substantial and material Federal constitutional question is involved, and therefore diversity of citizenship is not required. The existence of concurrent jurisdiction in the state courts does not deprive this Court of jurisdiction."¹⁵

Therefore, this Court may issue a declaratory judgment in the case at bar, and the third contention of the defendants must be dismissed.

13. This Court feels that in view of cases such as *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and *National Student Asso. v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969), *Feldman v. Ervin*, 128 F. Supp. 822 (S.D. Fla. 1955) is of questionable vitality.

14. 85 F. Supp. 52 (S.D. Fla. 1949).

15. *Ibid.*, 54-55.

Injunctive Jurisdiction

Defendant also argues that this Court in reliance on *Atlantic C.L.R. Co. v. Engineers*¹⁶ is prohibited from granting the injunctive relief here sought by plaintiff.¹⁷

In that case, the defendant began picketing a switching yard owned and operated by plaintiff. After being refused an injunction in federal court, the plaintiff succeeded in obtaining an injunction in state court. The Supreme Court in a separate action concluded that the defendant had a federally protected right to picket, which could not be interfered with by state court injunctions. Defendant filed a motion to dissolve the injunction, but the state court refused, holding that the Supreme Court decision was not controlling. Defendant then requested the federal court to issue an injunction against enforcement of the state court injunction. The District Court granted the injunction, which defendant argued was proper either "to protect or effectuate" the district court's original denial of an injunction, or as "necessary in aid of" the district court's jurisdiction.

In holding that the federal injunction was improper, the Supreme Court stated that:

"[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. . . . Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this court."¹⁸

It also held that:

"[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear."¹⁹

16. 398 U.S. 281 (1970).

17. 28 U.S.C. § 2283:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

18. *Ibid.*, 287.

19. *Ibid.*, 294.

However, defendants' reliance on *Atlantic* is misplaced. In the case at bar, we are not asked to enjoin state court proceedings, because none have been initiated. We are asked to enjoin state officials from initiating prosecution pursuant to a state statute allegedly in conflict with federal law. Such injunctions have been permissible since the case of *Ex Parte Young*:²⁰

"The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governing capacity. It is simply an illegal act upon the part of a state official in attempting by use of the name of the state to enforce a legislative enactment which is void, because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." ²¹

This doctrine has been subjected to many legislative and judicial restrictions over the years.²² However, under the most recent authorities,²³ a single judge court has been held to have jurisdiction to enjoin the operation of a state statute in situations where a plaintiff claims that the state statute conflicts with a federal statute by virtue of the Supremacy Clause of the Constitution.

In the *Swift* case, plaintiffs sued in district court to enjoin enforcement of a state statute requiring labelling of their product, contending that the statute violated the Commerce Clause, the 14th Amendment and federal labelling requirements. A three-judge district court dismissed on the merits in both its single and three-judge capacities.

In defining §§ 2281-84 jurisdiction, the Supreme Court stated that while three judges must necessarily be convened when the

20. 209 U.S. 123 (1908).

21. *Ibid.*, 159-60.

22. Pursuant to 28 U.S.C. §§ 2281-84, three judge courts are generally required before a state enactment may be enjoined.

23. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

complainant alleged Due Process, Equal Protection, Commerce Clause, or Contract Clause arguments, there remained a substantial question as to whether the language "upon the ground of the unconstitutionality of such statute" meant that conflicts between state and federal statutes must also be decided by three-judge courts.²⁴

The Supreme Court held that one judge courts were proper forums for such cases:

"The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281 * * * [2281] requires a three-judge court in order to restrain enforcement of a state statute 'upon the ground of the unconstitutionality of such statute.' Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause, the words 'upon the ground of the unconstitutionality of such statute' would appear superfluous unless they are read to exclude some types of such injunctive suits. For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular ground. It is thus quite permissible to read the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunctive suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single judge court."²⁵

Therefore, it is apparent that insofar as the plaintiff's argument consists of the federal/state statutory conflict, this Court has jurisdiction to hear the case and enjoin the defendants from initiating prosecutions pursuant to the Florida statute. Accordingly, the fourth contention of the defendants must be dismissed.

24. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

25. *Swift*, 122, 126-27. Accord, *Fitzgerald v. Catherwood*, 388 F.2d 400, 407 (2nd Cir. 1968).

Abstention

Defendant's last preliminary argument is that this Court should abstain from deciding the case at bar. The abstention doctrine has been interpreted by courts to mean that federal courts should avoid the decision of federal constitutional and supremacy questions where the underlying issues may reasonably be resolved in pending litigation by interpretations of unsettled state law.²⁶

Defendants contend that abstention in the case at bar is required by the recent decisions of the Supreme Court in the *Younger v. Harris* cases.²⁷ Those cases, however, are not entirely controlling because in each of them, defendants had been indicted or arrested by state authorities prior to instituting actions in federal courts. Under such circumstances, federal intervention would have interrupted the normal process of orderly state criminal proceedings.²⁸

Moreover, plaintiff's reliance on *Perez v. Campbell*²⁹ is equally misplaced, because in that case the construction of the state statute was clearly settled. In addition, plaintiff has not alleged either a chilling effect on its First Amendment rights, or a bad-faith prosecution.³⁰

There are generally four basic reasons which support abstention: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket.³¹

In view of the all-encompassing language of the Florida statute, this Court seriously doubts either that the case may be disposed of on questions of state law or that the federal docket congestion will be measurably eased if this Court abstains. This Court also feels that the activities of the plaintiff are national in scope, suggesting that some nationally uniform regulation is desirable rather than a patch-work quilt of contrasting state regulations.³² In addition, the

26. *E.G., Ry. Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941).

27. 401 U.S. 37 et seq. (1971).

28. *Younger*, 41:

"We express no views about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."

29. 402 U.S. 637 (1971).

30. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

31. *Wright, Handbook of the Law of Federal Courts*, 196-208 (1970).

32. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

interests of Florida in the case at bar are not peculiar to that State because of economic or historic interests.³³ At the same time, the interest of the federal government in the subject matter covered by the case at bar is unusually strong.³⁴

For all these reasons, this Court has determined that abstention in this case is neither necessary nor desirable. Therefore, the last preliminary argument of the defendants is dismissed.

Before turning to a consideration of the complex substantive issues presented by this litigation, it is desirable to discuss at some length the statutory and case law dealing with copyright protection and, in particular, its application to sound recordings prior to the enactment of the Florida statute and federal amendments in question.

Prior to the enactment of 92-140, the authorities held that sound recordings were not copyrightable;³⁵ thus, the owner of a master disc could not look to the federal copyright laws for protection against the making of copies from a copy of the master disc.³⁶

As a result, master disc owners turned to the several states to obtain protection, seeking refuge in the laws of unfair competition.

The unfair competition arguments were bottomed on the holding of the Supreme Court in the case of *International News Service v. Associated Press*.³⁷ In that case, both parties were competitors engaged in the worldwide gathering and distribution of news. Both International News Service (INS) and Associated Press (AP) assessed each newspaper member of its group the costs of providing the service, and required that the news received by members from the organizations not be furnished to non-members prior to publication. AP filed suit to prevent the "pirating" of its news by INS through

33. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Parker v. Brown*, 317 U.S. 341 (1943); but see, *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

34. 17 U.S.C. §§ 1-215; U.S. Const. art. I, § 8, cl. 8.

35. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1909). *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2nd Cir. 1955), Judge Learned Hand dissenting.

36. Before 92-140 was enacted, 17 U.S.C. § 1(e) did provide that a manufacturer making copies from copies of a master disc had to pay a royalty to the copyright owner of 2¢ per record. In view of the great costs incurred in manufacturing master discs — studio orchestras, recording artist contracts, electronic mixing, arrangements — imposition of such a small fee was clearly no effective deterrent to the practice of making such copies. House Report No. 92-497 stated that the volume of business conducted by "pirates" exceeds \$100,000,000 per year.

37. 248 U.S. 215 (1918).

inducing AP members, by bribery and other means, to furnish news prior to publication, and the copying of AP news contained in early editions and transmitted to INS members.

While recognizing that AP did not have a copyright in the news it gathered and distributed, the Supreme Court, relying upon its equitable powers, held that INS had been engaging in unfair competitive practices which it might be enjoined from continuing:

"[D]efendant . . . admits that it is taking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money, and that [INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of [AP's] members is appropriating to itself the harvest of those who have sown. Stripped of all its disguises, the process amounts to an unauthorized interference with the normal operation of [AP's] legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to [INS] in the competition because of the fact that it is not burdened with any part of the expense of gathering news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."³⁸

Nor was the court persuaded by the fact that elements of misrepresentation by INS as to the source of its news were lacking:

"It is said that the elements of unfair competition are lacking because there is no attempt by [INS] to palm off its goods as those of [AP]. . . . But we cannot concede that [argument]. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as *quasi* property for the purposes of their business because they are both selling it as such, [INS's] conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of [AP], it substitutes misappropriation in the place of misrepresentation, and sells [AP's] goods as its own."³⁹

38. *Ibid.*, 239-40.

39. *Ibid.*, 241-42. But see the dissent of Holmes, J., 248, holding that AP was merely entitled to have INS give credit to the source of its information. See also the extensive dissent of Brandeis, J., 248-67.

Thus, the Supreme Court held that a quasi-property right in the dissemination of news collected by AP could be protected against unauthorized use by a competitor under the law of unfair competition.

The validity of the result reached in *International News Service* has been severely questioned in light of recent judicial decisions handed down by federal court.⁴⁰ Two cases in particular may have undermined the legality of certain state unfair competition statutes regulating uncopyrightable works: *Sears, Roebuck & Co. v. Stiffel Co.*⁴¹ and *Compco Corp. v. Day-Brite Lighting, Inc.*⁴²

In the *Sears* case, Stiffel Company had secured design and mechanical patents on a "pole lamp." The commercial success of the lamp caused Sears to market a substantially identical lamp, at a much reduced price. Finding the patents invalid for want of invention, the District Court nevertheless held Sears guilty of unfair competition under state law, enjoining it from selling lamps "confusingly similar" to those manufactured by Stiffel, and assessing damages against Sears. The Court of Appeals for the 7th Circuit affirmed the decision.

In reversing the appellate court, the Supreme Court held that a state's unfair competition laws cannot impose liability for, or prohibit copying of, an article unprotected by a federal patent and be consistent with the federal laws:

"Obviously a State could not, consistent with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. * * * Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws. * * * To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public." ⁴³

40. E.g., *Columbia Broadcasting System, Inc. v. De Costa*, 377 F.2d 315, 318 (1st Cir. 1967).

41. 376 U.S. 225 (1964).

42. 376 U.S. 234 (1964).

43. *Sears*, 231-32.

The Court did say, however, that a state could require that unpatented goods be labelled "or that other precautionary steps be taken" ⁴⁴ to prevent confusion as to the identity of the manufacturer.⁴⁵

In the *Compco* case, Day-Brite had secured a design patent on a reflector. *Compco* marketed a substantially identical fixture. Finding the design patent invalid, the District Court, nevertheless, held that *Compco* had been guilty of unfair competition under state law. The Court of Appeals for the 7th Circuit affirmed the decision.

In reversing the appellate court, the Supreme Court held that:

"[W]hen an article is unprotected by a patent or a copyright, State law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." ⁴⁶

Although both *Sears* and *Compco* were suits involving invalid patents, the language of *Compco* specifically includes copyrights within the scope of its decision limiting the sweep of state unfair competition laws. The interrelationship between *International News Service* on the one hand, and *Sears* and *Compco*, on the other, is of crucial importance in understanding the legislative intent behind the enactment of Public Law 92-140. Because sound recordings as such were not afforded federal copyright protection, and since *Sears* and *Compco* seemed to undercut *International News Service* by prohibiting states from providing effective civil or criminal remedies to sound recording owners, Congress chose to place sound recordings within the ambit of protection provided by the federal copyright laws:

"The purpose of [the bill] is twofold. First, Section 1 of the bill creates a limited copyright in sound recordings, as such, making unlawful the unauthorized reproduction and sale of copyrighted sound recordings. * * * [T]his right is applicable only to sound recordings fixed, published, and copyrighted on or after the effective date of the legislation and before January 1, 1975.

44. *Ibid.*, 232.

45. E.g., *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 120 (1938).

46. *Compco*, 237.

"Second, Section 2 of the bill provides that persons engaging in the unauthorized use of copyrighted musical works in records shall be subject to all the provisions of Title 17 dealing with infringement of copyrights and, in the case of willful infringement for profit, to criminal prosecution pursuant to Section 104." ⁴⁷

The plaintiff argues that since 92-140 stated that "nothing in Title 17, United States Code, as amended by . . . this act shall be applied retroactively", this Court must determine the rights of the respective parties as they existed both prior to and subsequent to the passage of 92-140. There are three main questions presented to this Court for resolution by the case at bar: (1) is the Florida statute unconstitutional when applied to copies of sound recordings published prior to effective date of 92-140; (2) is the Florida statute unconstitutional when applied to copies of sound recordings published subsequent to the effective date of 92-140; and (3) can the statute be interpreted in any manner to avoid its unconstitutionality.

Constitutionality Prior to February 15, 1972

Defendants contend that since Public Law 92-140 expressly stated that it did not affect rights regarding sound recordings fixed prior to February 15, 1972, then judicial decisions holding that remedies existing under state laws prior to the enactment of the copyright amendments were not preempted by the Constitution and remained unaffected by the amendments.⁴⁸

In the case of *Tape Industries Association of America v. Younger*,⁴⁹ a California statute almost identical to the Florida statute was challenged by a plaintiff similar to that in the case at bar. The plaintiff sought a declaration that the California statute was unconstitutional, and an injunction to restrain its enforcement. Plain-

47. House Report No. 92-487.

48. 17 U.S.C. § 101(e) set forth the federal rights existing prior to the enactment of 92-140. These were that an owner of a musical copyright who had permitted the musical reproduction of the work on discs or tapes could in a civil action obtain an injunction against the unauthorized use of the recording and recover in lieu of damages and profits, a royalty of 2¢ per copy manufactured, as provided in 17 U.S.C. § 1(e). However, if a person made mechanical reproductions without the consent of the copyright owner, and paid a royalty of 2¢ per copy to the owner, no civil action would lie against him.

49. 316 F. Supp. 340 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971).

tiff relied on *Sears and Compco*, while defendant relied on *International News Service*. In rejecting the plaintiff's arguments, the Court held that there was an important distinction between imitating a record and physically appropriating the record:

"[P]laintiffs 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 in the records and then had expended the necessary sums to copy and imitate the sounds on their own tapes." ⁵⁰

Finding that the California statute was directed only against the physical misappropriation of sound recordings, the Court held that no conflict existed with either *Sears and Compco* or federal regulation of the copyright field:

"When all of the facts of the case here are considered, we are driven to the conclusion that [the California law] is a tolerable and permissible state regulation directed against theft and appropriation of a salable product, and does not unconstitutionally intrude on the Federal policies enunciated in the Copyright Clause. . . . and in Federal Copyright legislation . . ." ⁵¹

The Court must have reasoned that since *Sears and Compco* did not present the factual issue of physical misappropriation, but rather was based on imitation, neither case required that a contrary result be reached in *Tape Industries*.

With deference, this Court disagrees with the conclusions stated in *Tape Industries*, because it cannot accept the distinction drawn between physical appropriation and copying. If Sears had gone to a store and bought a Stiffel lamp, then made a mold thereof, using the mold for the production of Sears lamps, we would, in this Court's view, have been presented with a situation exactly analogous with *Tape Industries*. If that situation had been presented to the

50. *Ibid.*, 350.

51. *Ibid.*, 351. That Court also held that it made no difference whether the California statute was deemed a larceny statute or an unfair competition statute.

Sears Court, the result in that case would probably not have been the least bit affected. The focus of both *Sears* and *Compco* was the artificial creation of patent or copyright protection afforded to unpatentable or uncopyrightable works, not the manner in which the works were reproduced. Although *Compco* permitted state regulation to eliminate confusion as to the source of the work, it did not permit states to prohibit individuals from reproducing the work.

Thus, to this Court's way of thinking, the California statute as construed by that Court did intrude upon the federal copyright policies by prohibiting the dissemination of works which could not be afforded copyright protection,⁵² and should have been held invalid.

This Court does not believe that each and every state unfair competition law as applied to reproduction of sound recordings fixed prior to February 15, 1972, is invalid; however, it does hold that state criminal statutes, such as those enacted by Florida and California, are necessarily invalid because they are contrary to the intent of the federal copyright legislation as interpreted by the Supreme Court,⁵³ even if Congress has not preempted the entire field.⁵⁴

Defendants also rely on the case of *Tape Head Co., Inc. v. R. C. A. Corp.*,⁵⁵ in which the District Court had granted a preliminary injunction against defendants prohibiting them from filing legal or equitable actions against plaintiff tape pirates. The Court of Appeals stayed the injunction, holding that Public Law 92-140 did not preempt the field of sound recordings:

"The basic premise of plaintiffs is that Congress, in making the mentioned Act pertaining to recordings effective February 15, 1972, thereby manifested an intention to grant persons in

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52. In addition, if the plaintiff in the case had purchased, rather than stolen, the records which they reproduced, it is questionable whether a "larceny" was committed. See, *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968), reh. den. (1968), which held that a person who has copied an unpatented product sold under a trademark, and refers to that trademark in his advertisements, is not liable to unfair competition laws, so long as the ads do not contain misrepresentation which might confuse purchasers as to the source of the product. See, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965).
53. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Fitzgerald v. Catherwood*, 388 F.2d 400 (2nd Cir. 1968), cert. denied, 391 U.S. 934 (1968).
54. This result is common in the joint regulation of commerce by federal and state authorities.
55. No. 71-1714, December 3, 1971, 10th Cir.

the position of the plaintiffs a *carte blanche* right to copy these records free of any restrictions existing under various state laws, common or statutory. The enactment served to make the copyright effective February 15, 1972, and a side effect or implied consequence that Congress thereby preempted this field prior to February 15, 1972, does not follow. In fact, the Act itself provides that its terms should not be applied retroactively or 'be construed as affecting in any way rights with respect to sound recordings fixed before the effective date of this Act.' Thus, it cannot be said that any actions commenced by defendants prior to that date are void and abortive. It is highly questionable from the authorities presented that plaintiffs have, as a result of the Act of Congress, acquired a right to convert and use these recordings with immunity prior to February 15, 1972." ⁵⁶

The Court held that *Sears* and *Compco* were not applicable because:

"The articles [lamps] differ from ideas or compositions, and the Supreme Court has not held that persons who appropriate material such as is here involved are forever immune from suit." ⁵⁷

Again, this Court respectfully disagrees with the reasoning expressed by the *Tape Head* Court. While conceding that Congress may not have preempted all state laws, common or statutory, regulating the dissemination of sound recordings, it does not follow that the absence of preemption validates each and every such state law. A state law rendering criminal the unauthorized manufacture and sale of sound recordings flies in the face of *Sears* and *Compco*, regardless of whether Congress has preempted the field.

In addition, plaintiffs do not have *carte blanche* right to copy these records free of any restrictions under state law: at the very least, they must carefully label their product to avoid confusion as to source. Furthermore, contrary to the characterization of the Court, Public Law 92-140 has not given plaintiffs a new and broadened right to convert and use sound recordings fixed prior to February 15, 1972. The amendments merely retained the status quo as existed prior to the enactment of the law.

56. *Ibid.*, 7-8.

57. *Ibid.*, n. 1, 8.

The fact that *Sears* and *Compco* dealt with appropriated articles while *Tape Head* dealt with ideas or compositions is not significant. If the Stiffel pole lamp was unpatentable, and Sears had obtained access to the plans and designs of the lamp, then the fact that Sears would have copied the idea rather than the article itself would not have made a difference in the result of that case. Finally, the fact that the Supreme Court has not immunized manufacturers of unauthorized reproductions of uncopyrightable works from suit, in no way means that state laws, such as the Florida statute, are valid exercises of the state police power.

Defendant also relies on the case of *Duchess Music Corporation v. [Rosner]*, 173 USPQ 278 (1972), PTCJ No. 71, A-1⁵⁸ in which plaintiff owners of copyrights in musical compositions which had been fixed into sound recordings prior to February 15, 1972, sought to enjoin defendant music pirates. In reversing the District Court, the Court of Appeals held that the defendants could not use the compulsory license provisions of the federal copyright laws as a vehicle for copying recorded sounds manufactured by plaintiff:

"The statute provides that anyone who properly invokes the license provisions 'may make similar use of the copyrighted work.' [Defendant] admits that she duplicated [plaintiff's] copyrighted compositions. She does not make 'similar use' of them, she makes exact and identical copies of them. This is clearly outside the scope of the compulsory license scheme."⁵⁹

This interpretation of the compulsory license provision is based on the misconception that because an underlying musical composition is copyrighted, the unauthorized reproduction of the performance embodied in the sound recording of that composition is, and ought to be, prohibited by the federal copyright laws.

If the law were as that Court stated, then record pirates could not exist. In fact, the law is not what the Court stated.⁶⁰ The

58. No. 71-1854, March 13, 1972, 9th Cir. Plaintiff here cites the case to show that federal preemption in the field existed prior to Public Law 92-140. Since the decision of that Court does not mandate that result, and since this Court does not feel that resolution of the preemption issue is necessary for the proper disposition of the case at bar, this Court does not decide that issue.

59. *Ibid.*, 8.

60. The legislative history of the federal act shows that the *Stern* interpretation of the law is inaccurate. The House Committee Report, 92-487, stated that if record pirates: "satisfy the cla[i]m of the owner of the musical copy-

Court held that *Sears* and *Compco* did not apply because defendant duplicated the records and tapes, thus "stealing" the work of others:

"*Sears* and *Compco* do not sanction [defendant's] outright appropriation, in violation of copyright, of actual performances contained on [plaintiff's] records. [Defendant] may, of course, record [plaintiff's] songs, when she hires musicians, artists, and technicians. Instead, she steals the genius and talent of others. She deceives others into thinking that her tapes represent her own work." ⁶¹

For reasons previously stated, this Court is not persuaded that the arguments founded upon outright appropriations affect the *Sears* and *Compco* holdings. It may very well be that the practice of pirating sound recordings is unsavory or underhanded; yet, the federal law clearly permitted such practices prior to the enactment of 92-140. While Congress may not have preempted all state laws regulating unauthorized reproduction of sound recordings published prior to February 15, 1972, the Florida statute is invalid because it affords protection prohibited by *Sears* and *Compco*, and the federal

right, [they] can and do engage in widespread unauthorized reproduction of phonograph records and tapes without violating federal copyright law." The Librarian of Congress wrote to the Committee that for controlling music pirates:

"[N]either the present Federal copyright statute nor the common law or statutes of the various states are adequate for this purpose."

The State Department wrote that:

"[A]t present, there is no federal statute that expressly prohibits commercial traffic in unauthorized duplication of legitimate sound recordings."

Nimmer on Copyright, 430-71 (1970) states:

"Assuming such a record pirate duly serves a notice of intent to use, and pays the compulsory license royalties, the somewhat astounding result is that he is not an infringer under the Copyright Act. . . . All of the other elements [except the copyright in the musical composition itself] contained in the original record which he has without authority duplicated are not copyrightable, and hence his use of such elements does not give rise to an action for copyright infringement.

61. [Rosner], 9. If in fact defendant does deceive others into thinking that her tapes represent her work, then state unfair competition laws may require labelling to show the source of the product. To the extent that cases cited by the Court of Appeals support the view that such copying as defendant manufactured was prohibited by federal law, this Court holds that those cases are contrary to and undermined by both *Sears* and *Compco*.

copyright scheme; therefore, it is unconstitutional by virtue of the Supremacy Clause.

Constitutionality Subsequent to February 15, 1972

Defendants strenuously argue that there is no preemption of the field by the federal government regarding sound recordings fixed and published after the effective date of 92-140. First, defendants contend that the federal and state laws are not facially in conflict because a party would not incur the penalty of the one law by obeying the dictates of the other. In light of the absence of an actual repugnancy between the acts, and the stated Congressional purpose to exercise its paramount authority, the defendant contends that the state law should not be set aside, especially when that law is enacted under the police powers of the state.

As previously discussed, Congress has permitted states to regulate copyright to some extent, and this Court finds neither the intent on the part of Congress nor the necessity in interpreting Title 17 as amended by Public Law 92-140 to preempt the field. However, the absence of federal preemption does not in itself validate state statutes regulating the field.

In the case of *Hines v. Davidowitz*,⁶² the Supreme Court was faced with issues similar to those raised by the case at bar. Both a state and the federal government had enacted similar laws regarding a single subject which provided for differing regulatory schemes and criminal penalties. In attempting to determine whether the federal statute had preempted the state statute, the Court stated:

"There is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every Act of Congress. This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal formula. Our primary function is to determine whether, under the circumstances of this particular case, [the

62. 312 U.S. 52 (1941).

state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶³

The Court went on to state that:

“The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.”⁶⁴

Clearly, there are two gross conflicts between the federal and state statutes involved in the case at bar. The federal statute provides for a twenty-eight year copyright, with a permissible twenty-eight year extension,⁶⁵ while the state statute contains no time limitation at all. In addition, the federal statute provides for very elaborate notice and registration requirements.⁶⁶ Such requirements prevent inadvertent infringements and the initiation of fraudulent copyright claims. The state statute, however, contains no notice or registration requirements. Under the state statute, an innocent copier could be convicted of selling copies of a sound recording regardless of whether the master disc had been copyrighted. The same result would accrue even if the copying occurred more than fifty-six years after the master disc had been fixed.

In the face of these conflicts, the defendants argue that any discrepancy between the statutes cannot occur until February 15, 2000, twenty-eight years after the earliest possible sound recording copyrighted under 92-140 might fall into the public domain. Even if this argument were correct, its thrust would go only to the question of whether this Court should at this time exercise its jurisdiction, and not whether the state statute is inconsistent with federal law.

Defendants also contend that the federal act on its face limits its effect to sound recordings published prior to January 1, 1975.⁶⁷ This argument, too, is irrelevant to the existence of inconsistencies between the two statutes.

63. *Ibid.*, 67.

64. *Ibid.*, 70.

65. 17 U.S.C. § 24. After the termination of the copyright period, the work enters the “public domain” and may be freely copied by anyone without suffering any consequences for infringements.

66. E. G., 17 U.S.C. §§ 10, 13, 14, 19, 20, 30, 31.

67. 92-140, § 3.

These two arguments are bottomed on a third argument which defendants have not specifically raised but which must be considered by this Court: the Florida statute by inference adopts and incorporates provisions of the federal copyright laws dealing with duration, notice and registration.

This Court recognizes that it must interpret state statutes by assigning to them their most reasonable meaning in light of general usage of their words and the legislative intent of their authors.⁶⁸ This duty is especially important where a possible conflict between state and federal law exists,⁶⁹ because a state law incompatible with federal legislation must yield to that legislation.⁷⁰ This is so even though the state had no intention of frustrating the federal law.⁷¹

Applying these principles to the construction of the Florida statute, this Court is unable to hold that the Florida statute by inference adopted and incorporated the body of the federal copyright laws. Had this result been the intention of the legislature, it could have easily so stated within the act itself. Even if this result were the intention of the legislature, this Court is not at all convinced that statute would be constitutional. At any rate, the Florida statute is merely an attempt to halt piracy of records, and not an effort to erect an entire scheme of copyright protection. Therefore, this implied argument of the defendants must be dismissed. The Florida statute as applied to sound recordings published subsequent to February 15, 1972, is unconstitutional by virtue of the Supremacy Clause.

Can the Statute Be Constitutionally Interpreted?

Defendants argue that the master disc owners have a common law copyright in their recorded sounds which can be protected by

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68. A statute should be construed, if possible, to avoid doubts as to its constitutionality; *United States v. C.I.O.*, 335 U.S. 106 (1947), *United States v. Harriss*, 347 U.S. 612 (1954), *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963). A statute should be given a sensible construction that will effectuate the legislative intent and avoid absurd results; *C.I.R. v. Bilder*, 289 F.2d 291 (3rd Cir. 1961), rev. on other grounds, 369 U.S. 499 (1962), *American Dredging Co. v. Local #25*, 338 F.2d 837 (3rd Cir. 1964), cert. denied, 380 U.S. 935 (1967), *Chemical Bank v. New York Trust Co. v. S. S. Westhampton*, 358 F.2d 574 (4th Cir. 1965), cert. denied, 383 U.S. 921 (1966).
69. *Joseph E. Seagrams & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), reh. den., 384 U.S. 967 (1966).
70. U.S. Const. art. 6, cl. 2; *Sperry v. State of Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).
71. *Perez v. Campbell*, 402 U.S. 637 (1971).

state unfair competition laws, civil or criminal in nature, and that the Florida statute is such a law. This argument raises complex issues of law and must be carefully considered.

While a person seeking to publish his work must proceed through the provisions of Title 17 if he wishes to obtain copyright protection, the federal law specifically permits the retention of common law copyright by the owner of an unpublished work:

“Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.”⁷²

This statute permits states to have jurisdiction to hear cases dealing with infringements of common law copyrights, and to regulate such infringements through their own laws.⁷³ Therefore, if the Florida statute deals with prosecutions for violations of common law copyright, it in no way affects the federal copyright scheme, and may be permissible as an exercise of the state’s police power.

Defendants argue that the sound recordings fixed and published prior to February 15, 1972, and those which are fixed and published subsequent to February 15, 1972, but are not copyrighted pursuant to Title 17 as amended, have not lost their common law copyright.

The rights given to an owner of a common law copyright are limited in nature. The owner has the right to be the first person to publish the work, and there is no time period in which he must exercise that right, or forfeit it:

“Since the only right the author has under common law copyright is the right of first publication, common law copyrights are lost through publication; and if the right of the author is not preserved promptly by a proper compliance with the [federal] statute whereby the statutory copyright is secured, all rights are lost through publication.”⁷⁴

72. 17 U.S.C. § 2.

73. *Press Publishing Co. v. Monroe*, 73 F. 196 (1st Cir. 1896); *White v. Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950); *Berry v. Hoffman*, 189 A. 516, 125 Pa. Super. 261 (1937); *Kartlander v. Bradford*, 190 N.Y.S. 311, 116 Misc. 664 (1921).

74. *DeSilva Construction Corp. v. Herrald*, 213 F. Supp. 184, 194 (M.D. Fla. 1962).

Therefore, the relevant inquiry is whether the authorized dissemination of sound recordings not copyrighted pursuant to Title 17 constitutes a "publication" of that recording.

Clearly, the limited dissemination of a work by performance does not constitute a publication of that work sufficient to deprive the owner of his common law copyright.⁷⁵ Equally clearly, at some point, the nature of the dissemination by performance is so great as to deprive the owner of his common law copyright in the underlying work, and constitute an abandonment of the right to reproduce the performance.⁷⁶ The difficulty arises in determining whether the publication in each case constituted a "general publication" or a "limited publication."

Defendant relies on the case of *King v. Mister Maestro, Inc.*⁷⁷ In that case, Dr. King sought a preliminary injunction restraining defendant from selling phonograph records containing parts of speeches he had made in Detroit and Washington, D. C. Prior to delivering the Washington speech, Dr. King had complied with a request to make a text of his remarks available to the press. His speech was broadcast by television and radio, and recorded for newsreels. Defendant made a phonograph record containing part of both speeches and began selling copies to the public.

In holding that Dr. King had not published the speech so as to lose his common law copyright, the Court, quoting Nimmer, stressed that:

"[A] *sine qua non* of publication should be the acquisition by members of the public of a possessory interest in *tangible* copies of the work in question. . . ." ⁷⁸

75. *Ferris v. Frohman*, 223 U.S. 424 (1912); *Allen v. Walt Disney Prods.*, 41 F. Supp. 134 (S.D.N.Y. 1941); *Mills Music v. Cromwell Music*, 126 F. Supp. 54 (S.D.N.Y. 1954). See also, *William A. Meir Glass Co. v. Anchor Hocking Glass Corp.*, 95 F. Supp. 264 (W.D. Pa. 1951).

76. *R.C.A. Mfg. Co. v. Whiteman*, 114 F.2d 866 (2nd Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950); *Egner v. E. C. Schirmer Music Co.*, 48 F. Supp. 187 (D. Mass. 1942), *aff'd*, 139 F.2d 398 (1st Cir. 1943), *cert. denied*, 322 U.S. 730 (1944). It is important to note that *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2nd Cir. 1955), on which defendants heavily rely was decided prior to *Sears and Compco*.

77. 224 F. Supp. 101 (S.D.N.Y. 1963).

78. *Ibid.*, 107.

The Court contrasted its factual situation with that presented by the case of *Public Affairs Associates, Inc. v. Rickover*,⁷⁹ in which the defendant had gone:

“* * * beyond customary sources of press or broadcasting in distributing the addresses to any interested individual. * * * Since the distribution was not limited in any way to a particular group, no question exists in this case as to the extent of any limitation so as to avoid ‘publication’ in the copyright sense. Anyone was welcome to a copy. Nor do we have any problem as to limited use of the addresses by the press for fair comment. The press was free to use the speeches in whole or in part for their news value. But such ephemeral use is far different from the unlimited distribution to anyone who was interested. * * *”⁸⁰

The Court also noted that such speeches are news items of the first magnitude, and that the public’s right to hear such speeches should not extinguish the author’s common law copyright.⁸¹

This Court believes that the *Rickover* case is more analogous to the case at bar than the *King* case for several reasons. First, the master disc owners make no attempt to limit the distribution of the sound recordings which they manufacture. Second, the master disc owners make tangible reproductions of performances embodied in sound recordings. Third, there is no news value in the sound recordings issued by record companies or record pirates. Therefore, this Court holds that authorized dissemination of recorded sounds manufactured from a master disc constitutes a “general publication” of both the underlying composition and the performance sufficient to deprive the owner of any common law copyright to which he might have been entitled.

Once the records and tapes are generally distributed to the public, the performances embodied within the recorded sounds lose common law copyright protection. As a result, it is impossible to save the challenged Florida statute by limiting its effect to recorded sounds in which common law copyright exists for the obvious reason that there are no recorded sounds in which common law copyright exists. Therefore, defendants’ argument that the Florida statute can permissibly regulate common law copyright must be denied because

79. 177 F. Supp. 601 (D.D.C. 1960), rev. 284 F.2d 262 (D.C. Cir. 1960), rev., 369 U.S. 111 (1962).

80. *Rickover*, 284 F.2d 270-71.

81. *King*, 107-08.

there is no common law copyright to persons who distribute such sound recordings.

Having determined that the challenged Florida statute is unconstitutional when applied to copies of sound recordings published both prior to and subsequent to the effective date of Public Law 92-140, and having decided that the challenged statute cannot be interpreted in any way which might avoid its unconstitutionality, this Court holds that the relief sought by the plaintiff will be granted and that sought by the defendants will be denied.

(1) The Florida statute is declared unconstitutional.

(2) Defendants are permanently enjoined from initiating prosecutions pursuant to the Florida statute.

Submit order.

260. *Universal Athletic Sales Company v. Salkeld et al.*, 173 USPQ 790 (D.Pa., April 13, 1972) (Knox, J.).

Motion for preliminary injunction in action for infringement of copyright of wall charts and training manuals illustrating the use of plaintiff's gymnasium equipment. The court outlined the factors to be considered in determining a motion for preliminary relief in copyright litigation:

In passing upon a motion for preliminary injunction in such a case, we are to consider the following factors:

(1) Ownership of copyright

(2) Copying of the copyright material by the defendants which in turn leads to two inquiries:

(a) Is there substantial similarity?

(b) Did the defendant have access to the material?

(3) Likelihood of plaintiff's success on the merits — has plaintiff made out a prima facie case for relief?

(4) Irreparable injuries to the plaintiff if preliminary injunction is not issued. [The court subsequently stated that "where copyright materials are used in substantial quantity, no detailed showing of irreparable harm is needed;" and "the weight of authority . . . is that where there is a prima facie case of infringement there need not be a detailed showing of irreparable harm."]

(5) Comparative hardship to the defendant resulting from the issuance of the preliminary injunction.

and *held*, motion granted.

In discussing the issue of substantial similarity, the court noted that the "ordinary observer" test was to be applied and commented:

Viewing the charts from this standpoint, we readily agree with plaintiff that much of defendants' work was copied from plaintiff's copyrighted work and many of the figures are obviously a mirror image of plaintiff's figures. Many of the figures on each chart are in the same position but where plaintiff's figure faces to the right, the corresponding figure in defendants' chart faces to the left. While *this might reduce the chance of obvious similarity being apparent at a first glance and therefore this method may have been used for this purpose*, nevertheless a study of the figures convinces us that there is substantial similarity. Other similarities are pointed out in plaintiff's brief . . . and the court finds them to be true. We particularly note the positions of the various arms and legs *where the exerciser is not at the moment using that member and the position is immaterial*. [Emphasis added.]

261. *Columbia Broadcasting System, Inc. v. Custom Recording Company, Inc., et al.*, 171 USPQ 502 (S. Carolina Ct. Comm. Pleas, Sept. 25, 1971). Motion for preliminary injunction in action for tape/record piracy. *Held*, motion denied. The court held that plaintiff had failed to make a sufficient showing of irreparable injury to warrant a preliminary injunction and that a balancing of the equities did not indicate the appropriateness of extraordinary relief. The court said:

It is well settled in South Carolina that "the issuance of a temporary injunction is a drastic remedy," . . . and that "injunctions should only be granted where some irreparable injury is threatened for which the parties have no adequate remedy at law." . . .

The only possible damage which will result from a denial of plaintiff's motion is a loss of profits which will be readily ascertainable and recoverable and hence such damages are not irreparable. . . .

Also, it is significant in this regard that defendants have presented [an] affidavit . . . which shows that all copyright royalties due under the Federal Copyright Act (Title 17, U.S.C.) were paid by defendants to the composers of every copyrighted musical composition

used by defendants, and this affidavit refers to financial and production records kept by defendants to facilitate the payment of the federal copyright royalties. It is apparent that such records provide a certain record for the determination of defendants' activities.

....

It is apparent to this court that the issuance of a temporary injunction would not serve "to preserve the existing status" in the present case. The defendant Custom Recording Co. has been in the business of manufacturing tape cartridges for approximately a year, and plaintiff has undoubtedly been aware of this activity. Therefore, plaintiff should not now be heard to complain that it will suffer irreparable damages unless defendants' entire business activity is immediately and severely restricted. Additionally, defendant Custom Recording Company employs approximately thirty-five (35) full time employees, and the issuance of a temporary injunction will greatly jeopardize the jobs of these people.

In *dictum*, the court stated that the sale of recordings did not constitute a divestive publication of the performance embodied therein:

The sale of a recording is a publication such as divests the common law copyright (which is reposed in the artist until said publication) *if the thing published can be copyrighted under the copyright statute*. Therefore, while the musical composition can be copyrighted, the performance by the artist of that composition cannot be and, therefore, sale of the recorded performance does not constitute a performance such as divests the artist of his common law copyright. [emphasis added]

2. State Court Decisions

262. *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Company, Inc., et al.*, 173 USPQ 740 (N.Y. Ct. App., February 10, 1972) (Bergan J.). *For decisions below, see, Van Valkenburgh, Nooger & Neville, Inc. v. John F. Rider Publisher, Inc.*, 16 Bull. Cr. Soc. 134, Item 85 (Sup. Ct. N.Y. Co., 1968), *affirmed in part and modified in part, sub. nom., Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Company, Inc.*, 33 A.D. 2d 766 (N.Y. Sup. Ct. App. Div. 1st Dept., 1969), 17 Bull. Cr. Soc. 438, Item 228 (1970).

Action for unfair competition and breach of contract. Defendants were the publishers of plaintiff's multi-volume treatises on electricity.

Plaintiff alleged that defendants violated their duties to plaintiff by arranging the creation of a competing set of works (the "Mileaf" books) and publishing same under circumstances designed to supplant the sale of plaintiff's books.

The trial court (i) found that the defendant publisher stood in a fiduciary relationship with plaintiff and failed to act in conformity with that relationship; and (ii) permanently enjoined defendants from further publishing the Mileaf books and directed an accounting for profits. The Appellate Division (i) found that the relationship between the parties was not fiduciary, but one of simple contract and "purely commercial" in nature, that defendants had not breached their implied contractual obligation of good faith, but that defendants had breached their express contractual obligation to use their "best efforts" to promote plaintiff's books; and (ii) directed a hearing on the question of money damages, awaiting temporary injunctive relief pending that determination.

Held, affirmed.

I. A majority of the Court of Appeals held that a publisher is generally free to publish competing works, but that this freedom might be limited at some point "manifestly" and foreseeably harmful to the owner of the first-contracted-for book and inconsistent with the publisher's obligations under that contract. The majority affirmed the Appellate Division's disposition *en toto*, stating in part:

There is implicit in all contracts—for book publishing or house building—an implied covenant of fair dealing and good faith. . . .

It has already been observed that in this contract there was an undertaking by the publisher to use its "best efforts" to promote the author's works. Such a contract does not close off the right of a publisher to issue books on the same subject, to negotiate with and pay authors to write such books and to promote them fully according to the publisher's economic interests, even though those later publications adversely affect the contracting author's sales. . . .

By analogizing the Federal cases growing out of patent and copyright licensing agreements which are governed by parallel principles, it will be observed that licensees are not deemed to limit themselves in their usual business enterprise to the promotion of the licensor's product, absent specific agreement to this effect; and an agreement to use due diligence or best efforts does not alone limit their activity to the licensor's interests.

. . . .

But this general freedom of action of the publisher to produce competing works is not necessarily the answer to this litigation. Although a publisher has a general right to act on its own interests in a way that may incidentally lessen an author's royalties, there may be a point where that activity is so manifestly harmful to the author, and must have been seen by the publisher so to be harmful, as to justify the court in saying there was a breach of the covenant to promote the author's work.

This, of course, is essentially a fact value question and here the Appellate Division has found that there was a narrow breach in the failure of the publisher to use its best efforts. It did not find a breach of the implied condition of fair dealing. The Appellate Division specifically found that money damages resulting from the breach of this specific undertaking by the publisher in promotion of the author's work would afford "adequate relief".

II. Two judges, arguing that "the only way to insure the plaintiff's unimpeded access to the market for its books and to prevent the defendant from taking advantage of its wrong — by replacing the plaintiff's books with its own — is by enjoining the further distribution of the defendant's books," partially dissented and would have sustained the award of permanent injunctive relief. (Opinion by Judge Fuld).

3. *Also of Interest*

263. *Choisser Research Corp. v. Electronic Vision Corp.*, 173 USPQ 234 (Cal. Super. Ct., February 28, 1972) (Welsh, J.).

Action to recover royalties due under agreement for exploitation of an unpatented process, found by the court to contain trade secrets. In finding for plaintiff, the court *held*:

(1) That an agreement to pay royalties for use of an unpatented process including trade secrets is valid, enforceable and not void under *Lear v. Adkins*, 395 U.S. 653 (1969) or *Sears and Compco*; and

(2) That any obligation to pay royalties under such a license terminates with the end of the "useful life" of the trade secrets (herein, disclosure).

PART V.

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An article on the continuing growth of "tax-subsidized" publishing by the Federal Government. Miss Wagner concludes that "[i]t might take new copyright and other legislation to turn government publishing around in favor of heavier and significant participation by commercial publishers."

NEWS BRIEFS

316. DRONE ON COPYRIGHT REPRINTED. A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States, by Eaton S. Drone, originally published in 1879, has been reprinted in facsimile by Rothman Reprints Inc.

This classic reference work is available from Rothman Reprints Inc., 57 Leuning Street, South Hackensack, New Jersey 07606. The price is \$35.00.

317. BULLETIN ON COPYRIGHT COURT DECISIONS AVAILABLE. The Copyright Office's *Decisions of the United States Courts Involving Copyright, 1969-1970*, compiled and edited by Benjamin W. Rudd, is for sale by the Superintendent of Documents, Washington, D.C. 20402, at a price of \$4.25.
318. REPORT OF THE REGISTER OF COPYRIGHTS PUBLISHED. The 14th *Annual Report of the Register of Copyrights* for the fiscal year ending June 30, 1971 has been published. The Report includes summaries of the year's business, administrative, legislative, and judicial developments, international developments, and tables.
319. LOUISIANA ANTI-PIRACY BILL AWAITS GOVERNOR'S SIGNING. A disc and tape anti-piracy law aimed at duplicators, wholesalers and retailers, passed the State Senate on July 5 and is awaiting the signature of Gov. Edwards.
320. SUPREME COURT TO TEST PIRACY LAW. The U.S. Supreme Court has granted a writ of certiorari to defendants Don Koven and Don Goldstein, in *Goldstein v. California*, 71-1192, May 30, 1972, so that it may decide whether unlicensed tape duplicating can be made illegal by California state law.

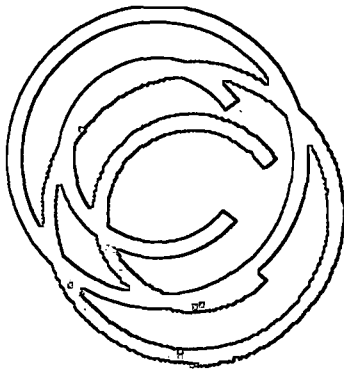
The Supreme Court's decision will affect not only the California anti-piracy law, but similar laws passed in Tennessee, Arkansas, Pennsylvania, Texas, Mississippi, and Virginia.

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 19, NO. 6

AUGUST, 1972

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

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57 Leuning Street, South Hackensack, N. J. 07606

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BULLETIN
OF THE
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OF THE U.S.A.

VOLUME 19
OCTOBER 1971-AUGUST 1972

Published at
NEW YORK UNIVERSITY LAW CENTER

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10011; Morton David Goldberg, *President*; Paul Gitlin and Sigrid Pedersen, *Vice Presidents*; Alan J. Hartnick, *Treasurer*; Bernard Korman, *Secretary*; David Goldberg, *Assistant Treasurer*; Elizabeth Barad, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

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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: 19 BULL. CR. SOC. page no., Item (1972).

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ANNOUNCEMENT

Senate Approves Revised Universal Convention

The United States Senate, on August 14, 1972, approved by a vote of 67 to 0 the Universal Copyright Convention as revised in Paris on July 24, 1971. The United States thus became the second country to do so, the United Kingdom having ratified the U.C.C. revisions in May 1972.

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PART I.

ARTICLES

321. COMMENTS ON THE DRAFT CONVENTION AGAINST
UNAUTHORIZED DISTRIBUTION OF PROGRAMME-
CARRYING SIGNALS TRANSMITTED BY SATELLITES.

By GEORGES STRASCHNOV*

The comments which follow will not systematically bring out the differences between the draft Convention framed by the second Committee of Experts at Paris in May 1972 (hereinafter called the "Paris draft" or simply "draft") and that drawn up by the first Committee of Experts at Lausanne in April 1971 (hereinafter called the "Lausanne draft"). This comparison is made in the report by the second Committee of Experts and it would be superfluous to repeat it. Further, the comments will endeavour to be completely objective and have no regard to the divergent interpretations which some delegations may have given to particular provisions of the Paris draft. These differing interpretations will also be found in the report on the second Committee of Experts. In short, the Paris draft will be commented upon as an independent document without antecedents, but to understand its historical development it is necessary to refer both to the Lausanne draft and the report on the first Committee of Experts, and to the report on the second Committee of Experts.

Title

The chosen title is deliberately neutral, to reflect as closely as possible the fact that the body of the draft does not expressly provide for "protection" of signals and does not require states to prohibit, prevent or punish. There is thus a close correlation between the title and Article II of the draft.

Preamble

Only paragraph (b) calls for brief comments, as the other paragraphs pose no problems of comprehension. Since the reference to "other contributors to the programmes" is in square brackets, it should be pointed

* Dr. Straschnov is the Director of the Department of Legal Affairs of the European Broadcasting Union.

out that paragraph (b) lends itself to two different approaches. Either it is considered that the only persons and organizations which need be mentioned as beneficiaries under a new Convention are those to be found in the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations (hereinafter called the "Rome Convention"); or it is considered that mention should also be made of those not covered by the Rome Convention but who will also benefit from the proposed instrument, i.e. sports promoters and news-film agencies in particular. The square brackets are due to the fact that some delegations wished the preamble to be limited to the persons and organizations referred to in the Rome Convention, while others desired the range to be somewhat wider. Paragraph (b) is moreover to be compared with Article IV(1), Alternative A or Alternative B.

Article I

The purpose of this article is to define the scope of application of the draft. At the same time, however, it makes two specific provisions which are in fact cornerstones of the entire instrument and have made it possible to simplify the list of definitions, and the definitions themselves, in Article I bis. Article I states, first, that the subject matter of the draft is signals which pass through a satellite, with the result that, by implication, the draft covers neither signals before passage through the satellite nor signals which are not transmitted by satellite at all but by other channels, e.g. a terrestrial distribution network using wireless or cable. Second, Article I specifies that the Convention also applies to cases where the emitted signals are fixed, regardless of whether they are fixed prior to emission to the satellite or on reception after passage through the satellite, or even in the satellite itself by means of a remote control storage system.

Article I bis

The key terms employed in the Paris draft are defined, and the definitions call for certain observations:

(i) "Signal", a term which is not defined in the ITU Radio Regulations, means the electronic "carrier" capable of being modulated to transmit a "programme", within the meaning attached to this term in the draft, from the point of origin.

(ii) "Programme" means either a body of images or of images and sounds (Alternative A) or a body of images, of sounds or of images and sounds (Alternative B) which is carried by the signals within the meaning of the preceding definition, intended for distribution as defined in

Article I bis. For the purpose of the draft, the term "programme" applies to both the images (, the sounds) and the combinations of images and sounds which have been produced for ultimate reception by the general public or any segment thereof, and to those originally made without this purpose in mind, e.g. merely for private use. It is immaterial whether the images (, the sounds) or the combinations of images and sounds constituting a "programme" are fixed in a material form or not; in other words, "programme" means a body of visual (, sound) or audiovisual material carried by electronic signals, whether there has been prior recording of the body of material or not. This latter detail corresponds to the general description of the subject matter of the draft as summarized in Article I, which likewise stipulates, as already mentioned above, that fixation or non-fixation of the signals has no legal bearing on the application of the draft.

(iii) The definition of "satellite" approximates to that of "spacecraft" in the ITU Radio Regulations. It is true that the latter definition refers not only to devices permanently located in outer space but also those which spend most of the time there. It is however arguable that the definition of "satellite" in Article I bis of the draft also includes non-geostationary satellites with orbits so elliptical that for a short time during each revolution they are located in atmospheric space. Furthermore, the definition in the draft is wide enough to include both an active satellite which transmits or retransmits signals and a passive satellite which transmits them by reflection.

(iv) The definition of "originating organization" is confined to the person or entity that takes the final decision as to the inclusion of a programme, within the meaning of the draft, in the signals intended to carry it. It accordingly excludes both the "carrier" itself, i.e. the administration or private company (common carrier) which merely owns the equipment that produces and transmits the signals, and the person that makes or orders the making of the programme without being able to decide on its inclusion in the signals, e.g. the cameramen, director or producer. "Originating organization" thus primarily means a broadcasting organization, since it is usually this organization which makes the final decision as to whether a programme is to be carried by signals within the meaning of the draft. In specific cases, however, a party other than a broadcasting organization may be the originating organization, e.g. a firm which decides to have a body of visual or sound and visual material transmitted to another country by signals to receivers situated in the firm's branches ("segment of the general public") by way of publicity for new production models.

(v) The concept of "distribution" is designed to cover any method of transmitting signals, provided that the objective of the transmission is the general public or any segment thereof. Accordingly, the term "distribution" covers not only wireless transmission by conventional transmitter or direct from a direct broadcasting satellite, but also transmission by a physical conductor and, looking to the future, transmission by other methods such as the laser. It must be intended for the general public, and thus excludes telephone communications whether accompanied by the image of the caller or not, the transmission of facsimiles from a photographic agency to a newspaper or between newspapers, and similar cases, from the scope of the Convention. The definition of "distribution" is to be placed beside that of "programme" for, as already indicated above, the signals which transmit a programme must, to be covered by the draft, be intended for distribution, this term being construed precisely in the manner just expounded. The commentary accompanying Article I and that concerning the definition of "programme" make it clear that the distribution can be simultaneous with the emission of the programme-carrying signals or subsequent to such emission where the signals have been recorded after passing through a satellite or being stored in the satellite itself. The question also arises of where the distribution within the meaning of the draft commences, in other words whether the emission of the programme-carrying signals to the satellite is or is not already included in the concept of distribution. The definition proposed in the draft does not settle this problem and leaves the way clear for either a liberal or restrictive interpretation.

Placing Article IX (3) beside the definition of distribution, it is possible to add a further particular: the fact that the distribution is confined to an audience of subscribers does not deprive it of the character of distribution within the meaning of the draft. Regarding the concept of "subscribers", further details are provided under the heading of Article IX.

Article II

Paragraph 1: This is the first substantive article and requires contracting states to consider the distribution of programme-carrying signals unlawful, on the threefold condition that the distribution is made on their territory, that it is not authorized by the originating organization and that the latter is a national of another contracting state. All the essential terms are defined in the preceding article, and Article I also makes it clear that the signals referred to in Article II must have passed through a satellite. The third condition, relating to the "nationality" of the originating organization, establishes the fact that the Paris draft

provides for only one criterion of eligibility for protection under the Convention and does not adopt other criteria such as the location of the transmitting earth station, except for the reservation allowed under Article IX. In accordance with the definition given in the preceding article, the distribution may be made by the satellite itself, and in this case it suffices if the transmissions from the transmitter on board the satellite are receivable by the general public or any segment thereof, on the territory of a contracting state.

Paragraph 1 makes no reference to "protection" of the signals in question or of the originating organization, and does not prescribe what consequences the contracting state is to assign to the unlawfulness of the distribution. This vagueness is deliberate, since it reflects the desire, which is expressed even more clearly in Article III, to allow each contracting state to determine the consequences of the unlawfulness within the context of its domestic legislation.

Paragraph 2: This paragraph moderates the fundamental rule laid down in paragraph 1, and constitutes an exception *jure conventionis* and not merely a reservation of which states may or may not avail themselves at their discretion. The conventional obligation to consider a given distribution unlawful does not exist where a distribution unauthorized by the originating organization derives directly or indirectly from a terrestrial distribution which was authorized by the originating organization. The general language of this exception allows the conclusion that it is immaterial whether the terrestrial distribution originally authorized was or was not made on the territory of a contracting state. The term "derive" is sufficiently vague to suggest that the exception is applicable to both a subsequent and a simultaneous second distribution, an interpretation which is further strengthened by the words "directly or indirectly", though these also have the effect of rendering the exception applicable to a second distribution which does not take the signals directly from an authorized terrestrial distribution but from an intermediate distribution which is likewise unauthorized. In other words, where the first source of the unauthorized distribution is a terrestrial distribution authorized by the originating organization, the unauthorized distribution is not covered by Article II of the draft, irrespective of whether it takes the signals from the lawful distribution immediately (in time or space) or indirectly. It should also be specified that the application of the exception depends on the first lawful "terrestrial" distribution, which by implication means that even if a first, non-terrestrial distribution is lawful this does not render the second distribution deriving therefrom lawful. Accordingly, distribution by a direct broadcast satellite, made by the originating organization itself and

therefore "authorized" by it, cannot be the source of a new distribution in application of the exception provided for in Article II (2).

Article III

Paragraph 1: As stated earlier in the comments on Article II, those who framed the Paris draft desired to leave contracting states maximum freedom regarding the choice of the consequences flowing from the unlawfulness of a distribution made on their territory. It follows that these states must also be given freedom of choice with regard to the means whereby they implement their conventional obligation under Article II. The relevant provision is made in Article III (1), which adds that the measures may be of a civil, penal or administrative character or, needless to say, a combination of these measures.

Paragraph 2: Under this provision any contracting state may provide that the distribution of a programme-carrying signal will not be unlawful after the expiration of a period of 20 years from the end of the year in which the signal was emitted to the satellite. It is worth noting that this is a faculty of which states are at liberty to avail themselves or not, but this faculty does involve a conventional minimum, which is to maintain the unlawfulness of the distribution for a period of at least 20 years. This minimum corresponds to the fact, as already mentioned in connection with Article I and the definition of "programme" in Article I bis, that the distribution may not be simultaneous with the emission to the satellite but subsequent thereto, on the basis of a fixation of the signal made after it has passed through the satellite. In this case it is necessary to know how long the distribution of the signal thus fixed remains unlawful, since contracting states cannot be required to regard the distribution as unlawful in perpetuity.

Another question arising from the period is that of the method by which it is calculated. Is each signal to be considered separately and a specific period of unlawfulness for distribution of this signal determined accordingly, or should the period be calculated from the end of the year during which a given programme was first incorporated in the signals covered by the draft, having no further regard to signals which might be emitted later to the satellite, even though they carry the same programme because it was recorded before or during the first emission to the satellite? Article III (2) has not adopted the idea of a "first emission", since even where an identical programme is included successively in signals emitted to the satellite they are new signals each time and the draft relates to this distribution not of a programme but of the signals carrying this programme. However, this approach offers

no loophole for prolonging the unlawfulness of the distribution artificially, since on the expiry of such period as may have been laid down by national legislation, the distribution of signals carrying a given programme becomes lawful even if other signals have subsequently carried the same programme. The problem of proof may of course arise in practice, but the same problem exists under the Rome Convention, Article 14 of which, concerning the term of protection, provides for a period of not less than 20 years "computed from the end of the year in which the broadcast took place", without preceding the term "broadcast" by the qualification "first". Similarly, emission to the satellite offers the sole basis for calculation of the period for which the distribution is to be considered unlawful, any previous communication to the public of the programme carried by the signal emitted to the satellite, e.g. conventional broadcasting, being without legal bearing as far as the said period is concerned.

Article IV

Alternative A

Paragraph 1: This provision which, unchanged, also forms paragraph 1 in Alternative B, is the counterpart to Article 7 (1) of the recent Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms, of 29th October 1971. The word "law" was however replaced by "legislation" to take the common law of the Anglo-Saxon countries into account. As in paragraph (b) of the preamble, the reference to "other contributors to the programmes" is in square brackets, since agreement was not reached on whether the future Convention should or should not be limited to the groups protected by the Rome Convention. As in the preamble it is sports promoters and newsfilm agencies that are chiefly discernible behind the words "other contributors to the programmes".

Paragraph 2: This provision is divided into two subparagraphs, the first dealing with direct broadcast satellites and the second chiefly with point to point satellites.

Under the terms of subparagraph (a), the originating organization which itself carries out the distribution on the territory of another contracting state by means of an "advance aerial" on board a direct broadcast satellite is responsible, in accordance with its national legislation, vis-à-vis the authors, performers, producers of phonograms and broadcasting organizations whose works, performances, recordings or programmes may have been incorporated in the signal emitted to the direct broadcast satellite. The originating organization bears this responsibility

to the extent that its national legislation grants to authors, performers, producers of phonograms or broadcasting organizations rights in the case of broadcasting, for, in the case of the direct broadcast satellite, it is indeed the broadcasting right which is brought into play by the operation of the transmitter on board such a satellite, since by definition it broadcasts direct into homes and thus broadcasts with conventional power and on a conventional frequency, i.e. receivable by a traditional receiver.

If the satellite used is not a direct broadcast satellite, which means that terrestrial distribution is necessary on the territory of another contracting state for the purpose of reception by the general public or any segment thereof, or if this terrestrial distribution is grafted onto the distribution made by the direct broadcast satellite itself, subparagraph (b) provides that responsibility vis-à-vis authors, performers, producers of phonograms and broadcasting organizations is assumed by the organizations making the distribution, without prejudice of course to any responsibility of the originating organization under subparagraph (a). The distributor's responsibility is regulated in accordance with the national legislation of the state on whose territory the distribution is made and to the extent that this legislation grants rights, in the case of broadcasting or other distribution, to authors, performers, producers of phonograms and broadcasting organizations. Compared with subparagraph (a) the reference to the applicable legislation is broader, in the sense that subparagraph (b) mentions both the rights which may be granted in the case of broadcasting and those which may be granted in the case of other distribution, for while the sole case referred to in subparagraph (a) is that of broadcasting (carried out directly by the satellite), the case to which subparagraph (b) applies may be either broadcasting (terrestrial) or distribution by cable or by another system of communication not covered by the concept of broadcasting but by that of "communication to the public" or any other concept provided for and regulated by national legislation. The applicable legislation is not that of the state of which the distributor is a national but that of the state where the distribution is made, in order to include the case where the distribution is made on the territory of a contracting state but by a distributor that is a national of a non-contracting state.

Paragraph 3: Two hypotheses are contemplated in this provision and each forms the subject of a subparagraph.

Subparagraph (a) refers to the case where the distribution is intended in another contracting state which is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works, or in a contracting state

bound to the state of which the originating organization is a national by a bilateral copyright treaty, but where the distribution of signals in which works are incorporated has not been authorized by their authors or is not otherwise lawful under the legislation of the state where the distribution is made. In this case the Paris draft grants authors the right *jure conventionis* to forbid the originating organization to authorize this distribution. The case under consideration is thus, among others, where the distribution, if it were made, would infringe copyright either because it was not desired by the author or because it did not come within an exception to copyright provided for by the legislation of the state where the distribution takes place.

Subparagraph (b) refers to the case where the distribution is to be made in another contracting state which is not party to one of the two Conventions mentioned nor bound to the state of which the originating organization is a national by a bilateral copyright treaty, and where this distribution does not entitle the authors whose works are incorporated in the distributed signals to remuneration in that other state and is not for a purpose such that the legislation of the state where it is made may, by virtue of Article V of the draft, have been able to consider it as not unlawful even if it was not authorized by the originating organization. In this situation the author can claim from the latter organization, which authorized the distribution, an "appropriate" remuneration, this qualification making it possible to take into account the amount which the author would have obtained for the said distribution, in the state where it takes place, if he had been able to negotiate it freely.

These two subparagraphs of paragraph 3 provide *jure conventionis* either for a right of prohibition or for the right to claim appropriate remuneration in two clearly circumscribed situations. In the second case there is no question of a compulsory licence because this institution is conceivable only where, in principle, the author possesses an exclusive right. Since the distribution is on the territory of a state where, by definition, the author cannot even exercise a right of remuneration, and hence still less an exclusive right of authorization or prohibition, the provisions of subparagraph (b) are not designed to institute a compulsory licence.

Paragraph 4: This provision requires the originating organization *jure conventionis* to inform the authors concerned, before distribution of programme-carrying signals corresponding to either of the hypotheses referred to in paragraph 3, before such distribution is to take place, and they must be informed in such a manner that they have time to exercise either of the prerogatives granted to them in subparagraphs

(a) and (b) of the preceding paragraph. The Paris draft does not provide for sanctions where the author is not informed or is informed too late, but it stipulates that the sanctions will be a matter for the national legislation of each contracting state.

The term "author" used in this and the other provisions of Article IV is to be construed in the broad sense as including assigns as well. Accordingly, the notification provided for in paragraph 4 can be given to the author's assigns with the same legal effect as to the authors themselves, and it can be expected that, at any rate as regards composers and the authors of texts accompanying non-dramatic musical works, the terms and conditions of notification would be laid down by general agreements rather than case by case.

Paragraph 4 bis: As a counterpart to paragraph 4, paragraph 4 bis provides on the same conditions for notification of performers where their performances, intended for distribution in the form of programme-carrying signals in another contracting state, constitute the performance of a literary or artistic work whether or not it has lapsed into the public domain. To facilitate the notification, and by analogy with Article 8 of the Rome Convention, each contracting state may determine the terms and conditions for the notification of performers in the case of collective performances. The object of the notification is not to enable performers to exercise rights that the Paris draft may grant to them *jure conventionis*, as the above-mentioned paragraph 3 does in the case of authors, but to allow them to exercise any rights "they may have" under the legislation of the country of which the originating organization is a national, or under the legislation of the country on whose territory the distribution is to be made.

It is to be noted that neither paragraph 4 nor paragraph 4 bis provides for an exception to the notification requirement in the case of current events reporting, whereas the international Conventions do allow derogations for such reporting in the fields of both copyright and neighbouring rights, in particular by reason of the fact that the identity of the works used in current events is usually unknown in advance to the entity which intends to communicate these events to the public by broadcasting or otherwise. This point is mentioned here on account of the desire expressed during the framing of the Paris draft that this question should be given further consideration.

Paragraph 5: This provision, which is in square brackets as it failed to obtain unanimity, reserves the position of contracting states which consider that emission of programme-carrying signals to a satellite already constitutes broadcasting, and which interpret the international

Conventions and their own national legislations in this way. The provision is thus intended as a safeguard in the sphere of interpretation and is not designed to create any kind of right *jure conventionis*, or to impose any interpretation of a national or international text, and still less to create the obligation to make a double payment, at the moment of emission to the satellite and at the moment of distribution.

Alternative B

Paragraph 1: This provision is identical to paragraph 1 in Alternative A.

Paragraph 2: The provisions of paragraphs 2, 3, 4, 4 bis and 5 of Alternative A are replaced by paragraph 2 of Alternative B, under which the originating organization is to precede the emission of the programme-carrying signals with an indication of the organizations for which the signals are intended, the sanctions for non-compliance with this provision being left to the discretion of the national legislations of contracting states. The term "indicate before" means that the announcement of the programme in the case of purely sound transmissions, or the programme credits in the case of television, must list the organizations for which the signals are intended. This information is thus given at the point of emission to the satellite, whereas the information provided for in paragraphs 4 and 4 bis of Alternative A must be given "before the distribution", which places it either before emission to the satellite if the distribution is simultaneous, or possibly afterwards where the distribution is sufficiently deferred by the making of a recording after the signals have passed through the satellite. The originating organization's obligation to make the said indication before the emission is imposed *jure conventionis*.

Article IV bis

This provision is patterned on Article 7 (3) of the Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms, of 29th October 1971. It means that the entry into force of the Convention in a given state does not, in the absence of legislative provisions to the contrary, alter the legal status of signals which have been emitted to the satellite before such entry into force. Hence, if this state has not made any provision relative to the utilization of programme-carrying signals emitted to a satellite, such utilization, to the extent that it is feasible by means of a fixation, will not be restricted by the need to be authorized by the originating organization.

Article V

Two exceptions to the provisions of the Paris draft are authorized, and can be applied through the national legislation of the contracting state.

First, any contracting state, whether developing or not, may permit the distribution of short excerpts from programmes containing reports of current events if the object of the distribution is to report these events and to the extent justified by the informatory purpose. The terminology employed is in some measure patterned on Article 10 bis (2) of the Berne Convention revised in Stockholm, which was retained unaltered by the Paris Act of this Convention. The concept of current events thus has the same meaning in both texts and is to be interpreted in an identical manner. The term is to be taken as meaning events of public life in the broad sense but, on the other hand, there is no question of considering that a sporting event, whatever its importance (e.g. Olympic Games or World Football Championship), is a current event within the meaning of Article V or of Article 10 bis of the Berne Convention.

Second, any contracting state regarded as a developing country in accordance with the established practice of the United Nations General Assembly may, in its national legislation, permit the distribution of programme-carrying signals if such distribution is solely for the purpose of teaching or scientific research. The term "teaching" undoubtedly includes adult education, but is not to be interpreted so extensively that a sporting event, for example, can form the subject of a distribution thus authorized, on the pretext that the distribution will serve the teaching of the sport whose images modulate the signals emitted to the satellite. The concept of scientific research does not include purely industrial operations, this interpretation being confirmed by that placed on the same term as used in the Paris Act of the Berne Convention and the revised Universal Copyright Convention.

Articles VI, VII and VIII

These provisions call for no comment.

Article IX

Paragraph 1: Subject to the use, which contracting states are allowed to make under certain circumstances, of the reservations provided for in paragraphs 2 and 3 of this same article, no contracting state may make reservations to the Convention, the exceptions referred to in Article V not being reservations in the technical sense.

Paragraph 2: In connection with Article II it was mentioned above that the only criterion of eligibility under the Paris draft is the nationality of the originating organization. This criterion can be replaced by the territorial criterion, in other words, the criterion of the place from which the signals were emitted, if the state making this substitution does so because its national legislation in force on the date of signing the Convention links the unlawfulness of a distribution to the place from which the emission to the satellite was made. The use of the reservation is to be notified to the Secretary General of the United Nations. It is recalled that a corresponding provision appears in the Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms (Article 7 (4)) and also in the Rome Convention (Article 17).

Paragraph 3: The provisions of subparagraph (a) create the possibility of a reservation in respect of the distribution of programme-carrying signals by means of wires, cables or other communications channels, and contracting states may avail themselves of this reservation on specified conditions to be stated below:

1. The legislation of the state concerned, such as it exists on the date of signing the Convention, must either limit or exclude the protection of the signals against their distribution and this must accordingly be an express legislative provision, the silence of the legislature being insufficient to justify the making of the reservation.

2. The distribution which may form the subject of the reservation must be a distribution made by a physical medium of signal transmission, such as wires or cables, since the distribution must be limited to subscribing members of the public, which is technically possible only where there is a physical connection, except in the case of coded microwave distribution, which however is not contemplated by the provision in question. On the other hand, it is not necessary that the subscribers should pay any contribution for the connection;

3. The reservation, which must be notified to the Secretary General of the United Nations, may be made only to the extent and as long as the protection of signals against the said distribution remains limited or denied, which is the reason for subparagraph (b) of paragraph 3, to be discussed below;

4. Though unanimity was not achieved on this point, two supplementary conditions are added in square brackets to restrict the use of the reservation still further:

(i) The distribution in question must take place simultaneously with or after a wireless distribution of the same signals on the territory of the state availing itself of the reservation; or,

(ii) if the distribution in question makes use of signals originally distributed by direct broadcast satellite, the signals deriving from this satellite must be receivable by the general public or any segment thereof on the territory of the state availing itself of the reservation.

The additional conditions referred to in (i) or (ii) above are designed to limit the availability of the reservation to distributions involving a signal which can be or may already have been received on the territory of the same state, either because it has formed the subject of a terrestrial distribution by wireless, i.e. conventional broadcasting, or of a space wireless distribution by the use of a direct broadcast satellite.

Subparagraph (b) requires a state which has availed itself of the reservation to notify the Secretary General of the United Nations within six months of any changes in its national legislation whereby the reservation made under subparagraph (a) becomes inapplicable or more limited in scope, because the new national legislation has ceased to deny protection to signals against distribution by a physical conductor or has partly removed the previous limits to such protection.

Article X

The provisions of this article call for no comment.

322. THE BRITISH PUBLIC LENDING RIGHT*

As publication day of the report of the Working Party set up in March 1971 by the Paymaster-General, Lord Eccles, May 18, 1972 was an historic date. The report, summarised on pages 68-82, makes no recommendations, but is a fact-finding document, drawn up according to the terms of reference. Following publication, the Society of Authors and the Publishers Association issued a joint statement, printed below, which explains what they want done in order to implement PLR.

What happens next?

First, the Minister will invite comments on the report from all interested parties, whether represented on the Working Party or not. Secondly, after he has received and considered these comments—probably by the early autumn—he will have to make up his mind whether or not to take action. If he does decide to act, he is likely to introduce a Government Bill in the next session of Parliament to amend the Copyright Act 1956, under which PLR can be operated. Lastly, it goes without saying that the Society and the Association will do all in their power to persuade him to act, and so correct this long-standing injustice.

JOINT STATEMENT BY THE SOCIETY OF AUTHORS AND THE
PUBLISHERS ASSOCIATION

1. We welcome the publication of the report by the Working Party set up by the Paymaster-General, Lord Eccles, Minister with responsibility for the Arts, in March 1971. We believe it fully meets the strictly defined terms of reference.

2. We now urge the Government to implement the report by introducing, as soon as possible, a Bill to amend the Copyright Act 1956. This will provide the legal basis for PLR and make possible its operation in a practical way.

3. PLR is not patronage or an act of charity towards struggling authors, but the right to receive remuneration for the use of copyright works in the libraries of this country. In 1969 public libraries alone were issuing books at the rate of 650 million loans a year. Other categories of libraries were also lending on a large scale, and the whole process expands year by year.

* Reprinted by permission of THE AUTHOR (London) vol. 83, no. 2 (Summer 1972), pp. 65-82.

4. Statistics indicate that a library book lasts about five years, during which time it will be borrowed (i.e. taken out of the library or consulted on the premises) on average not less than 50 times. It may then be re-bound and borrowed again. No payment is made for this use. The purchase by the library of a single copy, which makes all this borrowing possible, is a totally inadequate return for both author and publisher. It is a matter of common justice to put this right.

5. Ideally, each author should receive a fee related to the number of times his books are borrowed. But there is neither the money, nor the labour, nor the computerised equipment available in libraries, to operate such a scheme accurately in respect of each individual book. Likewise—after the most detailed and exhaustive research—no practicable scheme has been found that would apply to authors whose works are already on the library shelves. The fact that these authors would suffer an injustice is, however, no reason for not starting a scheme that will do justice to authors in future.

6. We have already investigated the Swedish system of sample lendings and the Danish system of stock recording, and found them unworkable when applied to the vastly larger library service—and vastly larger book output—of this country. In addition, although better than no system at all, we do not favour the surcharge system (adding a charge to the published price of a copyright book when sold to a library), one of the two systems described in the report, because it would be complex and expensive to administer.

7. We therefore urge the adoption of the alternative system, *blanket licensing*, which has long proved its worth in relation to performing rights. It is simple, effective, and places no administrative burden on librarians. Under this system, libraries would be licensed to lend copyright works on payment of one annual licence fee per library. The resulting revenue would be distributed—in the case of books—as a percentage of the published price of each copyright work sold to libraries.

8. The mechanics of distribution would be very simple:

- (i) the publisher identifies each book by printing a PLR symbol in an appropriate place, and by inserting a machine-readable slip bearing all necessary information (as printed nowadays on cheques) for processing by computer.
- (ii) when a book is bought by a library, the slip is detached and sent to a clearing house (see below).

9. The clearing house and all necessary administration would be the responsibility of a Lending Right Society, to be called *The Authors and Publishers Copyright Association* (APCA). Its constitution would be based on that of the Performing Right Society, which would act in a similar manner in respect of musical works lent by libraries. It would also be necessary to establish an independent tribunal (on the lines of the Performing Right Tribunal) to safeguard the public interest, and arbitrate in matters of difficulty, e.g. in settling the annual licence fees paid by libraries.

10. To enable authors to be rewarded adequately by PLR, a sum equivalent to about 20 percent of the total amount spent annually on books by all categories of libraries would be required. At present this is about £4 million in respect of national, public, academic, departmental, subscription, industrial, business, professional, and institutional libraries. This calculation takes into account a deduction for non-copyright works, but does not include school libraries. The Working Party has recommended that further consideration be given to the position of schools: but it should be noted that blanket licensing is flexible and capable of operating a variable tariff, applicable to all kinds of lending institutions.

11. About £500,000 (or 2½ percent of current sales to libraries other than schools) would be needed for administration, leaving £3½ million of the suggested £4 million for distribution.

12. This PLR royalty would be divided as to 75 percent to authors, 25 percent to publishers—a division considered equitable by both the Society of Authors and the Publishers Association. This means in practice that an author would receive about the same amount for the lending of a book by a library (however many times this happens) as from a single sale. In other words, he would get what amounts to a double royalty on UK library sales, which are around 8 percent of the total world sales (at published prices) of British books.

13. The publisher participates in PLR because:

- (i) he is the author's essential partner for the production of an original work: he risks his judgment, capital, and reputation in disseminating the work of his author and, by contract, earns an agreed share in the legitimate proceeds.
- (ii) he will bear the cost of identifying books for PLR and of inserting the machine-readable slips.

14. We are not advocating that the cost of PLR be passed on to the library user by a direct borrowing charge. Most people feel that the public library service, which is financed by the rates, should remain "free". Such matters are the concern of the community as a whole, ultimately through Parliament. Authors and publishers simply say that they should not have to go on subsidising libraries by having their work used without proper payment. But it may be of interest that the suggested cost of PLR would represent an addition of less than 1/2p to the rates.

WORKING PARTY REPORT

Below we publish an outline — prepared by Victor Bonham-Carter — of the report by the Working Party set up by the Paymaster-General, Lord Eccles, in March 1971. The report, which was unanimous, was signed on April 10 and published on May 18 by HMSO for the Department of Education and Science (30p). In summarising a document of historic importance to authors, this outline will be indispensable in the arguments and debates ahead.

THE WORKING PARTY

Chairman

Harry T. Hookway Department of Education and Science

Members

Ronald E. Barker, OBE	Publishers Association
Hugh D. Barry	Library Association
Gerald R. Bartlett	Booksellers Association
Victor Bonham-Carter	Society of Authors
Leonard W. K. Brown	County Councils Association
David L.T. Cadman	Department of Trade and Industry
James W. Cockburn	Library Association
David I. Colley	Association of Municipal Corporations
Edmund V. Corbett	Association of Municipal Corporations
Michael Gilbert, TD	Society of Authors
Martyn Goff	Arts Council
Graham C. Greene	Publishers Association
Michael L. Herzig	Department of Education and Science
Arthur C. Jones	Department of Education and Science
Thomas Joy	Booksellers Association
Philippa MacLiesh	Society of Authors
William J. Murison	County Councils Association

Charles Osborne	Arts Council
Joseph N. B. Penny, QC	Arts Council
Peter Phelan	Publishers Association
Donovan T. Richnell	Library Association
Laurence Swinyard	British Copyright Council
William Wallace, CMC	Department of Trade and Industry

Secretary

Peter W. Fulford-Jones Department of Education and Science

At certain of its meetings the Working Party was assisted by Mr. M. Morgan (County Treasurer, Monmouthshire), Mr. M. J. Freegard (General Manager, Performing Right Society Limited) and Mr. P. J. Edwards (Department of Education and Science).

Note: The members of the Working Party were not appointed with powers to commit the organisations they represented and, by their terms of reference, were not required to make recommendations. Nor were they required to express any views on the principle of whether or not a scheme for a public lending right should be introduced.

1. Terms of reference

The task of the Working Party is to consider how an amendment to the Copyright Act 1956 which added lending to the public to the Acts restricted by copyright might be implemented. The Working Party are not required to recommend particular courses of action, but to consider what form the amendment might take, to define possible methods by which it could be implemented and to set forth and compare their detailed implications. The Working Party's conclusions should be embodied in a report to the Paymaster-General, designed to provide a basis for a decision of policy on whether such an amendment to the Act would be a practical and worthwhile step.

2. The nature of the right which would be created

Copyright law is concerned with the right of preventing the unauthorised reproduction or performance of material existing in the field of literature and the arts.

The Copyright Act 1956 recognises two broad classes of works which are entitled to protection:

- (a) original literary, dramatic, musical and artistic works;

- (b) sound recordings, cinematograph films and broadcasts, called in the Act "other subject matter".

Copyright lasts for the life of the author (creator of the work) and for 50 years thereafter. It is also a property right, and the owner may, for example, assign it to another or license the reproduction of the protected work.

PLR could most easily be created by adding "lending to the public" to the restricted Acts specified in Section 2(5) and 3(5) of the Copyright Act. This would not extend to the makers of sound recordings and cinematograph films (see (b) above), but it would of course extend to the authors of the original works embodied in them. This accords with the view that PLR is essentially a creator's right, and would therefore apply to the creators of all kinds of original works – literary, dramatic, musical and artistic.

At present only one scheme exists for giving copyright protection in respect of public lending right. This is the scheme provided for under West German legislation, and applies only to libraries lending for profit. It is understood that proposals are under discussion to extend it to cover free lending, but they are insufficiently advanced to offer practical guidance. The Scandinavian laws (see Appendix II) do not operate under copyright.

3. *"Lending to the public"*

The idea here is that the owner of the physical object (embodying the material protected by copyright) makes it available to others, without transferring the ownership to them – in other words, use unaccompanied by ownership.

"Lending" does not only mean allowing the work to be taken out of the library for use, but making it available on or off the library premises, whether used by members of the community served by the library, by members of the library staff, or by others.

4. *Classification of libraries by category*

5. *Application of PLR to these categories*

(Note: these two sections of the report are summarised together for the purposes of the outline)

(4.1): A library is defined according to the "recommendation concerning the international standardisation of library statistics" set out by UNESCO, as follows:

Library: irrespective of its title, any organised collection of printed books and/or periodicals or of any other graphic or audio-visual materials, and the services of a staff to provide and facilitate the use of such materials as are required to meet the informational, research, educational or recreational needs of its users.

Public libraries

(4.2.i): rate-supported libraries which serve the whole population of a community or region.

(5.1): PLR would apply to all copyright material purchased by these libraries.

University libraries

(4.2.ii): the main or central libraries of universities, and the libraries of departments, colleges, faculties, institutes, halls of residence, students' unions, etc.

Libraries of other institutions of further or higher education

(4.2.iii): libraries of maintained and grant-aided establishments within the meaning of the Education Acts, colleges for the training of teachers, and further education establishments in the private sector.

(5.3): PLR would apply to both these educational categories, except to material privately owned by members of the academic staff and falling outside the control of library staff.

School libraries

(4.2.iv): those in schools of all kinds, whatever the main source from which these schools are financed.

(5.4): schools may purchase and maintain their own stocks, or may be provided wholly or partly by the public library service. Where the public library serves the school in this way, the books so provided will probably mirror fairly closely those on the shelves of the public library itself, particularly in the children's section. For this reason problems would arise if PLR applied: (a) to public libraries' school service stocks but not to the stocks purchased by the schools themselves; or (b) to books on public libraries' shelves but not to those which public libraries supplied to schools.

A secondary school will probably have a central library of its own (in the charge of a chartered librarian or a teacher-librarian), and this may be supplemented by departmental or classroom collections. Again the stock will mirror fairly closely that of the public library, and books

will be lent out to children for home reading in the same way as from a public library.

A primary school may likewise have a central library of its own, supplemented by classroom libraries; but collections of the latter type may often constitute the school's sole library provision. In either case the use to which the books are put will be identical.

(5.5): in most schools certain books are provided for class use, through means other than the school library. These include reading schemes, text-books and set texts, commonly provided in multiple copies. The distinction between class books and library books is becoming increasingly difficult to define, and the ways in which both types of books are used vary from school to school.

(5.6): in view of the special problems affecting schools, as outlined above, the subject should receive further study before a decision is reached about the application of PLR to books in schools.

National libraries

(4.2*v*): the four libraries which will form part of the future British Library (the British Museum Library, the National Reference Library of Science and Invention, the National Lending Library for Science and Technology, and the National Central Library); the National Library of Scotland, the Scottish Central Library, and the National Library of Wales. The Library of Cambridge University, and the Bodleian Library, Oxford—though university libraries—also come within this category (see below).

(5.7-5.9): with certain variations, all these libraries serve three principal functions at national level: (i) reference and research; (ii) inter-lending; (iii) preservation for posterity of the national output of books and periodicals. Under (iii) acquisition by legal deposit is enjoyed by the Library of the British Museum, the National Libraries of Scotland and (with minor restrictions) of Wales, and the University Libraries of Cambridge, Oxford, and Trinity College, Dublin. PLR would apply to all the libraries in this whole category with two possible exceptions—the British Museum, where legal deposit is automatic and not a matter of entitlement; and Trinity College, Dublin, which is outside the jurisdiction of British copyright law.

Libraries of Government institutions

(4.2*vi*): those of the Houses of Parliament, the administrative departments of Government, the national museums, nationalised industries, research associations, etc.

(5.10): PLR would apply to this category.

Commercial and subscription libraries

(4.2.vii): e.g. the London Library, Harrods' Lending Library, Lewis's Scientific and Technical Library, and the Law Notes Lending Library: also clubs and other organisations lending records and films.

(5.11): PLR would apply to this category.

Libraries of business and industrial undertakings

(4.2.viii): those of individual firms and corporate bodies in the field of industry and commerce.

(5.12): in principle PLR would apply to this category, but practical difficulties might arise in the case, for example, of a library provided for the use of a single information officer, or for consultation by a few members of a firm's staff. A dividing line would have to be devised relating, perhaps, to the size of the stock, the annual expenditure of the library, or the number of staff needed to service the collection.

Professional and other institutional libraries

(4.2.ix): those of professional associations, societies, and other institutions—including, for example, hospitals and prisons.

(5.13): PLR would apply to this category.

Private collections

(4.2.x): these would only be brought within the definition of "library", when they were so large as to require the appointment of staff to facilitate use.

(5.14): PLR would only apply to such collections, where lending for gain is involved.

Interdependence of libraries

(5.15): in view of the widespread and growing practice of inter-lending between libraries of all kinds, and of the advantages (both cultural and administrative) which derive therefrom, it is necessary to bear in mind that such co-operation could suffer, if some libraries were liable for PLR and others not.

6. Application of PLR to printed and other matter

Books and similar materials

(6.1): in principle PLR would apply to (i) books and pamphlets by single authors; (ii) translations; (iii) books and pamphlets by more than

one author, and composite works generally; (iv) periodicals. Since (iii) and (iv) present special problems, these are discussed in Section 9.

(6.2): Apart from purchasing new copies, acquisition may be by legal deposit (see 5.7-5.9), and by donations and second-hand purchases (see 8.9).

Non-book materials

(6.3): in principle PLR would apply to (i) printed music; (ii) sound recordings on tape and disc; (iii) cinematograph material, including video recordings on tape and disc; (iv) artistic works; for example, art prints, original paintings, photographs, slides and sculpture. (See Section 10.)

Material originating outside the UK

(6.4): in view of obligations under international copyright conventions, it would be necessary to extend PLR to foreign authors who are nationals of the 81 countries with which this country is in copyright relationship. Only in West Germany are British authors at present entitled to claim remuneration for the lending of their works, and then only in respect of libraries lending for profit. Clearly, therefore, it is highly desirable to bring about a more equitable relationship between the UK's obligations and those of other countries as regards PLR.

7. Methods of expressing the value of PLR

(Note: this section deals primarily with books)

(7.1-7.3): two systems are presented—*The Surcharge System* and *The Blanket Licensing System*. Both relate to the value of the sales of copyright works to libraries. Other possible systems, e.g. those based on library loans and library stocks, are rejected for reasons explained in Appendix II.

The Surcharge System

(7.4): this means making an additional charge to the published price of a book when it is sold to a library (i.e. a "library price").

(7.5): theoretically, in a free market, the surcharge might be fixed by the author and publisher for each individual book. However, such a free market surcharge would incur specific disadvantages: (a) the labor and cost of verifying a variety of surcharges during the process of collection; (b) the fact that public libraries are under statutory obligation to provide a comprehensive and efficient service; this would affect their freedom to offset unreasonable price increases by reducing purchases.

(7.6): these difficulties could be avoided by levying uniform surcharge, i.e. a surcharge calculated as a uniform percentage of the published price of each book.

(7.7): assuming a uniform surcharge, the rate might be fixed (and varied) by (i) collective negotiations between the parties concerned, aided (in the case of difficulty) by a tribunal. Alternatively (7.8) (ii) by Ministerial regulation; (iii) by embodying the rate in the Act itself and providing for subsequent variation by means of public enquiry; (iv) by an independent tribunal. The last alternative is preferred.

(7.9): the difficulty of fixing the rate might best be solved by (a) first settling the total sum to be raised; (b) expressing this as a percentage of the total annual expenditure by libraries on copyright works.

The Blanket Licensing System

(7.10): this involves the assignment of PLR by the author to a collecting society, which in turn would issue an annual blanket licence to the libraries concerned, and then distribute a share of the revenue received to each author on some basis related to the sale of his books to those libraries. This system is analogous to the one operated by the Performing Right Society on behalf of composers and music publishers.

(7.11): the terms of the licences might be fixed and varied (a) by collective negotiations between the parties concerned aided (in the case of difficulty) by a tribunal; (b) by an independent tribunal. Again, it might be best (a) first to settle the total sum to be raised; (b) to apportion this sum among the libraries on a pro rata basis, probably related to their annual book expenditure; (c) the collecting society might also follow the example of the Performing Right Society in promulgating tariffs, applicable to the various types of library.

8. Arrangements for collecting and distributing PLR revenue

(Note: this section deals primarily with books)

(8.1): this section should be read in conjunction with Appendix III, which is devoted to a detailed account of collection and distribution methods. Sections 9 and 10 deal with types of material, other than books.

(8.2): the following are essential under either surcharging or blanket licensing: (i) certainty in identifying books qualifying for PLR; (ii) certainty in identifying libraries liable for PLR; (iii) the need to follow certain recognised procedures in respect of all transactions, including those involving foreign suppliers of books.

(8.3): supervision would best be entrusted to a single central agency or collecting society, which may be termed a Lending Right Society

(LRS) and which would employ automatic data processing. Without such an organisation, the libraries would be faced with vast administrative difficulties. It would be desirable (a) for the Act to state that PLR can only be exercised, in relation to each class of material, through a collecting society; (b) for the Government to nominate the relevant collecting societies. Appendix IV contains suggestions circulated by the Society of Authors and the Publishers Association for the establishment of a collecting society in respect of literary works.

The Surcharge System

(8.4-8.5): should the surcharges be paid to the LRS: (a) via the bookseller? (b) direct by the library? If the latter, should they be founded on information supplied by the bookseller or by the library itself?

Again, in what form should the sales information be supplied to the LRS: (a) by duplicate copies of booksellers' invoices to libraries (such invoices to show, inter alia, the International Standard Book Number (ISBN) of each item to facilitate computer processing? (b) by the insertion by the publisher in each book of a machine-readable slip, bearing all the necessary information, and which would be detached and forwarded to the LRS?

As explained in Appendix III, it seems that machine-readable slips would be the more economical method, though further investigation should be made into the feasibility of this proposal.

The Blanket Licensing System

(8.6): collection of revenue would be straightforward, once the licence fees had been agreed. As noted, distribution would be based on the value of authors' library sales. Unlike surcharging, blanket licensing permits the use of statistical sampling although, as indicated in Appendix III, the effectiveness of this device in place of full sales data needs to be established. Duplicate copies of invoices or machine-readable slips would still be needed as the basis upon which revenue would be distributed.

Comparisons of Surcharging and Blanket Licensing

(8.7-8.8):

Surcharging is more precise, with its method of payment book by book, but it requires more administrative effort as to collection, and is likely therefore to be the more costly of the two systems.

Blanket Licensing is simpler and cheaper as to collection. It may be less expensive as to distribution, depending on the use of sampling and the amount of information required for distribution. It is more

flexible in that it can charge different tariffs to different categories of library; and this in turn might alleviate problems of inter-library co-operation (see 5.15).

(8.9): under both systems, the status of donations and second-hand purchases would have to be considered.

(8.10): it would be considerably easier to apply PLR to non-book material under blanket licensing than under surcharging. (See Section 10.)

9. Periodical publications and books by more than one author

(9.1): periodicals and composite works offer problems of great difficulty.

Periodicals

(9.2-9.3): the provision of periodicals is an important part of the services given by many libraries, especially where the periodical is a specialised one. In principle PLR is applicable to periodicals no less than to books.

(9.4): contributors to periodicals are usually paid a fee (not a royalty) if they are paid at all. Where the contributor is a staff reporter, whose salary includes payment for contributions, the periodical rights belong to the proprietor of the periodical (Section 4(2) of the Copyright Act). Where the contributor is freelance, the rights assigned may vary considerably—from permission to publish in a single issue of the periodical concerned to disposal of the entire copyright to the publisher.

(9.5): libraries may acquire periodicals direct from the publisher, but more often from major suppliers operating on a national scale, or by standing orders through local newsagents. Thus publishers have no simple means of knowing how many copies are sold to libraries.

(9.6): this means that, although in this regard blanket licensing would be less intractable than surcharging, it would be difficult under either system to share the proceeds among individual contributors, whether this were done by the collecting society or by the periodical proprietor. Additional difficulties include the need to divide a small amount of money among a large number of contributors to a single periodical, and to take account of the varying lengths of articles and sizes of fee paid for contributions in the first place.

Composite works

(9.7): books under this heading offer few difficulties, if the number of joint authors is small. In contrast anthologies, symposia, and encyclopedias present problems analogous to those of periodicals.

Application of PLR

(9.8): In the absence of a workable solution, it might be necessary to treat periodicals and most composite books as follows: (a) exclude them from PLR; (b) the collecting society might collect money in respect of these materials, but retain it for special purposes, instead of attempting to distribute it to individual authors.

(9.9): in either case, a clear definition would be needed—possibly by reference to the number of authors involved.

10. The application of PLR to non-book materials

(10.1): in 1970-1, only about £500,000 (3.5 percent of the total of public library expenditure of £14.8m on all library materials) was devoted to non-book materials; and of this amount, 50 percent was spent on gramophone records. Nevertheless, there is no reason in principle why PLR should not apply. In practice, owing to the diversity of materials involved, licensing arrangements would probably work best.

Printed music

(10.2): the organisation of the music publishing trade is less homogeneous than that of the book trade. The two main trade bodies—the Music Publishers Association (producers) and the Music Trades Association (suppliers)—do not have mandatory rules, and membership is by no means complete. Market arrangements follow no set pattern; the publisher frequently sells direct to the library as well as to the wholesaler and retailer, with no other party comparable to the book-seller being involved. Since there is only a recommended retail price, it would often be difficult to identify the actual price at which a work was sold.

(10.3): it seems therefore that the only feasible method of applying PLR would be by blanket licensing, based probably on the yearly expenditure on music. Distribution might be difficult, in view of the high cost of administration in relation to the small amount of revenue raised. Recourse to one of the collecting societies, which already act for composers, would no doubt be best.

Sound recordings on disc and tape

(10.4): PLR would apply (as stated in Section 2) to the author of the work and not to the manufacturer or producer of the record or tape. Collection and distribution would best be done by a collecting society, issuing blanket licences to libraries and other lenders of recorded material.

Cinematographic material, including video recordings on tape and disc
(10.5): similar considerations apply as in 10.4 above.

Assignment of rights

(10.6): since composers' rights are often assigned, e.g. to film companies, there is the question as to whether such assignees should participate in PLR. The general practice of the Performing Right Society may be relevant, in that proceeds are distributed as to one-third to music publishers and two-thirds to composer members. This practice may be varied, subject to the limitation that the composer receives half the proceeds whether he owns the copyright or not.

Artistic works

(10.7): these comprise paintings, sculptures, drawings, engravings, photographs and "works of artistic craftsmanship": the term "drawing" includes any diagram, map, chart, or plan. Since such materials are made available by libraries on and off the premises, there is no reason why PLR should not in principle apply—although in practice (as in printed music) difficulties might arise due to the high cost of administration in relation to the small amount of revenue raised.

11. Ways of giving effect to PLR and their expression in amendments to the Copyright Act

(11.1): this section discusses how PLR might be made effective in law.

(11.2): in its simplest form, authors and other creators of original literary, dramatic, musical and artistic works would be granted the free exercise of an additional right, by the addition of the act of "lending to the public" to those acts restricted by Sections 2(5) and 3(5) of the Copyright Act of 1956. The Act would also need to define "lending to the public", and specify that if owners of the new right exercised it collectively, a tribunal would have power to determine disputes as to the terms and conditions, including remuneration, arising between the collective organisation and libraries lending works to the public. The above amendments would constitute the minimum required.

(11.3): if it were decided to restrict the right by laying down the form which any remuneration might take (e.g. by specifying the surcharge or the blanket licensing system), this would need to be stated in the Act, also the method for determining the level of remuneration—whether arrived at by agreement between the parties concerned or determined externally (see 7.8 and 7.11).

(11.4): if it were decided to forbid authors and others to withhold their works from public lending, then the right would effectively be one to remuneration only, and this would likewise have to be stated in the Act. The creation by statute of a Lending Right Society (LRS) as the assignee of PLR would constitute another restriction, and would oblige owners of PLR to exercise it through the Society and in no other way.

Appendix I: Statistics of library numbers and expenditure on printed material

(Note: no attempt is made here to reproduce the detail of the table, as set out in the report, but only the basic information)

<i>Library or lending institution</i>	<i>Expenditure on printed material</i>	
	1969/70	1970/1
1. Public libraries (c. 470 authorities)	12.9	14.3
2. University libraries (c. 90)	3.7	n.a.
3. Polytechnics and other maintained or grant-aided Colleges of Further Education (c. 765)	2.0	2.2
4. Colleges of Education (181)	0.8	0.9
5. Primary and secondary schools maintained by local education authorities* (31,500 in Great Britain)	15.4†	18.3†
6. National and copyright libraries‡	0.8	1.1
7. Other libraries (some 2000, including Government department libraries, and commercial, industrial, institutional and professional libraries)	No statistics available	

* In addition, there are in Great Britain c. 3,600 independent schools, 189 grammar schools receiving DES direct grant, and 28 primary and secondary schools grant-aided by the Scottish Education Department.

† These figures include text-book expenditure.

‡ Cambridge University Library and the Bodleian Library, Oxford, are included in Category 2.

Appendix II: Assessment of PLR remuneration by reference to library loans and library stocks

1. Reference was made in 7.3 to two schemes for PLR, both used in Scandinavia, and both investigated 1966-70 by the Arts Council's Working Party on PLR (referred to as ACWP). The Scandinavian schemes

are not founded on copyright legislation and apply only to their own nationals. These schemes are now outlined and assessed in terms of their possible application in Great Britain.

Payment according to lendings

2. The Swedish scheme. While dues are calculated at a flat rate per borrowing, the total is arrived at by means of sampling.

3. Of about 2,000 libraries involved, 100 are selected each year for sampling; and half of these are changed annually—so that no library has to carry out sampling for more than two years at a time. Book loans are mostly recorded photographically, but in country districts borrowers have to fill in forms. The resulting statistics are collected for the fifth week in every five-week period, and every fifth lending is registered. The sample figures are then grossed up to represent total issues. A reference book is reckoned at four lendings a year. When ACWP studied the scheme, total lendings were in the region of 50-60 million per year. Cost of administration was about 5 percent of the total sum handled (then c. £50,000).

4. ACWP found several objections, some of them voiced in Sweden itself: mainly that the sampling was neither accurate nor representative, and involved too high a degree of estimation; the sample being no more than about one five-hundredth part of the total lendings made. Since this and other objections would be magnified, if applied to the vastly larger and more complex British library service, the scheme was turned down.

Payment according to library stocks

5. The Danish scheme. In 1966, 989 libraries were involved, with a stock of c. 2½ million volumes of copyright books by Danish authors. Each library renders an annual return of this stock, on the basis of which a global total is divided among the authors, and a PLR payment made each year per volume. In 1966-67 the rate per volume was 75 ore (c. 9d). Cost of administration was about 4 percent of the total sum handled (then c. £135,000).

6. ACWP was attracted to this stock-based method, but felt it could only be applied in Great Britain by means of sampling.

7. ACWP organised three trials with the help of librarians in Hove, Cheshire, and Southwark GLC—using a dummy list of 2,000+ copyright titles representative of the main Dewey classifications. These trials showed that the scheme would not work for the following reasons:

(a) whereas manual checking of stock index cards was possible in a small library authority, it was impracticable in a large one. PLR inspectors would seriously interfere with the work of the regular library staff, and the process of checking a large number of cards would be so arduous and monotonous as to call without question for the use of computer routines.

(b) for stock sampling by computer, it would be essential to have sufficient library authorities with full computerised catalogues in order to constitute a representative sample. Only a few library authorities are contemplating such action, so that even in, say, ten years' time, there would be no certainty of a representative sample being available. Moreover, computerisation would only apply to newly added books, not to previously existing stock.

Statistics compiled at point of sale

8. ACWP then suggested a new scheme based on the sales of copyright books to libraries. An adequate sample (75-80 percent in the case of public libraries) might be compiled from information supplied by publishers, library suppliers, and specialist booksellers. The data would be processed by computer, and the administrative cost was expected to be low. However, the method was not tested further, because the scheme in which it was incorporated was rejected on other grounds by the Paymaster-General.

Appendix III: Detailed account of collection and distribution methods

1. This Appendix discusses in detail the various methods outlined in Section 8, together with estimates of cost. The existence of a Lending Right Society (LRS) and the use of automatic data processing are assumed.

2. The LRS might have to undertake the following preliminary operations: (i) list libraries liable for PLR; (ii) devise methods for marking material qualifying for PLR, e.g. a PLR symbol printed in an appropriate place in the book or on the jacket; alternatively the insertion of a machine-readable slip in each book might dispense with the need for a symbol; (iii) devise a method (under surcharging) which showed that the surcharge had been paid; (iv) list booksellers and other suppliers concerned with PLR.

3. The following paragraphs deal with methods applicable to surcharging and blanket licensing. These can only be outlined here—for minutiae, see the report.

Surcharge System Methods

4. Four methods identified, summarised under A-D.

A. Payment through bookseller, involving use of duplicate invoices

5. This is the least mechanised and most costly method, analysed as follows:

- (i) bookseller invoices library, showing surcharges separately. Invoice must contain all the information needed by LRS, which will receive a duplicate copy.
- (ii) library pays bookseller's bill, including surcharges.
- (iii) bookseller, at regular intervals, sends LRS payment covering total of surcharges (less his expenses) plus duplicate invoices.
- (iv) on basis of ISBNs, information prepared by LRS for computer processing.
- (v) information is processed, to determine remuneration to author.

6. Enquiry by questionnaire to booksellers suggest that their expenses might amount to $2\frac{1}{2}$ percent of the value of the library sales involved, i.e. £25 per £1,000 worth of PLR books invoiced.

7. LRS costs were estimated as $1\frac{1}{4}$ percent of PLR library sales.

8. Thus the total administrative cost is $3\frac{3}{4}$ percent—illustrated in relation to a *notional* annual PLR sales figure of £20m, as follows:

<i>PLR sales p.a.</i>	<i>Admin. cost ($3\frac{3}{4}$% of sales)</i>	<i>Surcharge as % of sales income</i>	<i>Surcharge income</i>	<i>Admin. cost as % of surcharge income</i>
£20m	£750,000	5%	£1m	75%
£20m	£750,000	10%	£2m	37.5%
£20m	£750,000	15%	£3m	25.0%
£20m	£750,000	20%	£4m	18.75%

9. Methods B-C-D require the inclusion of a machine-readable slip in each book, containing all the information needed by the LRS.

B. Payment through bookseller, involving use of machine-readable slips

10. Bookseller invoices library, showing surcharges separately, but no duplicate copy needed for LRS. Bookseller sends LRS payment covering surcharges, accompanied only by machine-readable slips (detached from the books) and these would be ready for immediate computer processing.

11. This is a simpler and less costly method than *A*.

12. Book Centre estimates that cost would fall to $2\frac{1}{2}$ percent, hence table would read:

<i>PLR sales p.a.</i>	<i>Admin. cost ($2\frac{1}{2}\%$ of sales)</i>	<i>Surcharge as % of sales income</i>	<i>Surcharge income</i>	<i>Admin. cost as % of surcharge income</i>
£20m	£500,000	5%	£1m	50%
£20m	£500,000	10%	£2m	25%
£20m	£500,000	15%	£3m	16.7%
£20m	£500,000	20%	£4m	12.5%

13. Methods *C-D* progressively transfer functions from bookseller to LRS and library. Owing to differences of procedure, no attempt to compare cost with *B*; but both are likely to be cheaper than *A*, owing to use of machine-readable slips.

C. Payment direct from library to LRS, on basis of information supplied by the bookseller

14. The bookseller would not be required to receive and transmit surcharge money. On selling books to libraries, he would detach the machine-readable slips, sort them into batches according to the libraries supplied, and remit them to the LRS. After processing the slips, the LRS would charge each library the appropriate sum.

D. Payment direct from library to LRS, on basis of information supplied by the library itself

15. The library would detach and forward the machine-readable slips to the LRS, and the bookseller would be excluded from the process.

Blanket Licensing System

16. Once the license fee had been agreed, the collection of money from libraries would be straightforward. Distribution to authors would be calculated by reference to the value of sales to libraries, hence the need for sales information as in surcharging (duplicate invoices or machine-readable slips). Under blanket licensing, sampling is a possible alternative to full sales data, especially as the library is in the hands of a comparatively small number of suppliers, thus making it possible to obtain a substantial sample of sales from a small number of sources. But there are problems: (a) the sample, though large, might be uneven and omit too many specialised books; (b) cost would be determined, not by reference to the small number of suppliers, but by the amount of

information collected; (c) thus cost could only be saved by reducing the size of the sample.

17. If sampling were excluded, blanket licensing might still prove cheaper than surcharging. While the cost of full sales data would be similar under both systems, collection of money from libraries would be cheaper and simpler.

APPENDIX IV: THE AUTHORS' AND PUBLISHERS' COPYRIGHT ASSOCIATION (APCA)

Memorandum submitted by the Society of Authors and the Publishers Association

1. Any PLR scheme, however operated, would require an organisation in which copyright proprietors could vest their public lending right, so that the organisation could deal with libraries liable for PLR.
2. APCA might be founded jointly for this purpose by the Society of Authors and the Publishers Association, who between them represent the proprietors of the vast majority of literary works published in the UK. The Performing Right Society has expressed readiness to act on behalf of copyright proprietors of musical works and is clearly well equipped to do so.
3. Normally an author authorises his publisher (by assignment or exclusive license) to exercise some or all his rights on his (the author's) behalf. This applies to virtually all books published in the UK, regardless of the nationality of the author. A few authors publish their own works, but they are exceptional.
4. For the sake of these authors, and of publishers not members of the Publishers Association, the formation of APCA would be announced in the national press, so that all would have an opportunity to join APCA. This would ensure the completeness of licenses granted by APCA.
5. The Society of Authors represents the majority of those who can be regarded as professional authors. Authors, not members of the Society, would still be covered by the procedure outlined above.
6. The Publishers Association represents more than 95 per cent of the total publishing output of the country. It would be relatively simple for publishers to obtain authority from their authors to vest their public lending right in APCA—initially by an addendum to existing contracts, subsequently by a suitable clause in new contracts.
7. This would spare librarians the impossible task of obtaining permission to lend copyright works from every individual copyright proprietor.

Since more than 30,000 new works are published annually in this country, and some 200,000 copyright works are in print and available for purchase by libraries, this is an important consideration.

8. If the charge for public lending were levied under a blanket licensing scheme, APCA would issue licenses for display in library buildings, indicating that the libraries concerned had the right to lend copyright works. New licenses would be issued annually in recognition of payment for PLR having been made during the preceding twelve months.

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

1. United States of America and Territories

323. U.S. CONGRESS. HOUSE.

H.R. 15215. 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, or similar property. Introduced by Mr. Monogan, May 30, 1972, and referred to the Committee on Ways and Means. 2 p. (92d Cong., 2d Sess.)

Identical with H.R. 9103, introduced by Mr. Reid of New York during the first session of the 92d Congress. See 18 BULL. CR. SOC. 431, Item 368 (1971).

324. U.S. CONGRESS. HOUSE.

H.R. 15578. A bill to protect art collectors by requiring disclosures in connection with the sale of certain fine prints and reproductions. Introduced by Mr. Halpern (for himself, Mrs. Abzug, Mr. Addabbo, Mr. Alexander, Mrs. Chisholm, Mr. Collins of Illinois, Mr. Forsythe, Mr. Fraser, Mr. Gude, Mrs. Hicks of Massachusetts, Mr. Kyros, Mr. Mazzoli, Mr. Mitchell, Mr. Moss, Mr. Ruppe, Mr. Ryan, Mr. Schwengel, Mr. Ware, Mr. Winn, and Mr. Steele), June 19, 1972, and referred to the Committee on Interstate and Foreign Commerce. 3 p. (92d Cong., 2d Sess.)

This bill provides that "it shall constitute an unfair method of competition and an unfair or deceptive act or practice in commerce under section 5(a) of the Federal Trade Commission Act" to sell or offer for sale any fine print which is published in a limited, numbered, or signed edition unless it has an accompanying receipt or certificate which accurately and clearly discloses the date of printing, name of artist, name of printer, size of edition and total size of any previous edition, if such information is known. It would also constitute a violation of section 5(a) if a reproduction of a fine print or painting is not clearly labeled "reproduction" when sold or offered for sale in commerce.

325. U.S. CONGRESS. HOUSE.

H.R. 15757. 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, June 28, 1972, and referred to the Committee on Interstate and Foreign Commerce. 2 p. (92d Cong., 2d Sess.)

In addition to providing that the FCC have exclusive regulatory jurisdiction over CATV systems, the bill would give the FCC authority, if it finds that the public interest so requires, to delegate to any State, territory or possession of the United States, or to a political subdivision of any of them, certain areas of regulation, such as the award, renewal, and revocation of franchises and rates and charges to subscribers.

326. U.S. CONGRESS. HOUSE.

H.R. 15778. A bill to exempt certain income of nonresident alien authors, artists, and composers from taxation. Introduced by Mr. Reid, June 29, 1972, and referred to the Committee on Ways and Means. 3 p. (92d Cong., 2d Sess.)

A bill which would exempt a creator of literary property who is a citizen of a "developing country", as defined by Presidential Proclamation, from taxation of gains and net earnings derived from transfers or licensing of the use of such property. The exemption would apply to taxable years beginning after December 31, 1972 and before December 31, 1977, "provided that if during said period any developing country shall grant an equivalent exemption from its taxes for corresponding gains and earnings of authors, artists and composers who are citizens of the United States, then the exemption provided in subsection (a) shall continue for citizens of such developing countries so long as those countries shall grant that equivalent to citizens of the United States."

327. U.S. CONGRESS. SENATE.

Copyright protection in certain cases. Report to accompany S.J. Res. 247, submitted by Mr. McClellan, June 29 (legislative day, June 28), 1972. 2 p. (92d Cong., 2d Sess., S. Rep. No. 92-934)

A favorable report on the most recent extension measure. See 19 BULL. CR. SOC. The Senate passed the resolution on June 30, 1972.

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

Patents, trademarks, and copyrights; report pursuant to S. Res. 32, Ninety-second Congress, First Session. June 29 (legislative day, June 28), 1972. 10 p. (92d Cong., 2d Sess., S. Rep. No. 92-935)

The annual report on the activities of the subcommittee, covering the first session of the 92d Congress.

329. U.S. LIBRARY OF CONGRESS.

Annual report of the Librarian of Congress for the fiscal year ending June 30, 1971. Washington, 1972. 160 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 dependent countries of the world as of June 30, 1971.

2. Foreign Nations

330. CANADA. *Laws, statutes, etc.*

An Act to amend the Copyright Act. (Assented to 23rd December, 1971.) 19-20 Elizabeth II, Chapter 60. *Copyright*, vol. 8, no. 6 (June 1972), p. 129.

This amendatory law, effective on and after January 1, 1971, removes the performing right in records, perforated rolls or other contrivances.

331. LUXEMBOURG. *Laws, statutes, etc.*

Copyright law. (Of March 29, 1972). *Copyright*, vol. 8, no. 6 (June 1972), pp. 129-134.

This law, published in the *Mémorial*, Official Journal of the Grand Duchy of Luxembourg, on April 12, 1972 (A-No. 23), provides that, with the exception of the provisions of article 48, the other provisions "shall enter into force three months after their publication in the *Mémorial*."

332. NETHERLANDS. *Laws, statutes, etc.*

Gesetz vom 1. März 1967 zur Regelung des Rundfunks (Rundfunkgesetz). *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, vol. 60 (1971), pp. 202-225.

A German translation of the Netherlands Broadcasting Act of March 1, 1967, effective May 29, 1969.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

333. THE CHARTER OF THE BOOK.

The Charter of the Book, drafted under the auspices of UNESCO on the occasion of the International Book Year, 1972, by the Book Year's Support Committee, is reprinted in full below, with an introduction by Theodore Waller, a member of the drafting committee of the Charter.

The Charter of the Book is something of a milestone in a number of regards. It breaks new ground in East-West cultural relations, particularly with regard to the copyright issue. It puts the whole matter of book development in the emerging societies on a new footing. The Charter has been adopted in scores of countries as the overarching theme of International Book Year (1972).

The concept of the Charter originated in the International Publishers Association meeting in Amsterdam in June, 1968. The text was refined at meetings of the International Support Committee for International Book Year in Paris in the spring of 1971 and in Brussels in the late fall of that year. The burden of draftsmanship fell principally on Mr. Ronald Barker, Secretary of the Publishers Association in London. Mr. Barker was supported by a drafting committee that included Edward Wegman of the UNESCO Secretariat, Jorge Cardenas Nannetti of Colombia and Theodore Waller of the United States. Every Article of the Charter was discussed in depth and in detail by the full Support Committee.

The Charter was signed by the full Support Committee and by several members of the UNESCO Secretariat in Brussels on October 22, 1971.¹ The signatories signed as individuals but the Charter was adopted, in the first instance by the seven international non-governmental organizations affiliated with UNESCO and most concerned with books and libraries:

International Community of Booksellers Associations

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1. Members of the Committee who signed the Charter are responsible executives of book-related and library organizations in Austria, Belgium, Colombia, DBR, England, France, Ghana, Hungary, India, Japan, Netherlands, UAR, United States, USSR, and the UNESCO Secretariat.

International Confederation of Societies of Authors
and Composers
International Federation of Documentation
International Federation of Library Associations
International Federation of Translators
International PEN
International Publishers Association

Subsequently the Charter has been adopted by a great variety of national and international organizations including, in the United States, the Association of American Publishers and the American Library Association.

Many organizations and publications have reprinted the Charter. It has already been circulated widely through all channels of communication throughout the world.

It is hoped and expected that International Book Year will be a point of departure from which a considerable variety of enduring world-wide reading development, library support and book programs will emerge. The impact of the Charter, particularly given its unique universality, should increase over the years.

THEODORE WALLER

CHARTER OF THE BOOK

Introduction

The declaration of the principles which should guide the treatment of books, both nationally and internationally, has been adopted by the international professional organizations of authors, publishers, librarians, booksellers and documentalists. These organizations, in association with UNESCO, desire with this declaration to affirm, on the occasion of International Book Year, that books, as well as related materials, should be accorded a position commensurate with the vital role they play in promoting individual fulfilment, social and economic progress, international understanding and peace. They invite other international as well as regional and national organizations to associate themselves with this Charter.

Text of the Charter

Preamble

Convinced that books remain essential tools for preserving and diffusing the world's storehouse of knowledge;

Believing that the role of books can be reinforced by the adoption of policies designed to encourage the widest possible use of the printed word;

Recalling that the Constitution of the United Nations Educational, Scientific and Cultural Organization calls for the promotion of "the free flow of ideas by word and image" as well as "international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them";

Recalling further that the General Conference of UNESCO has affirmed that books "perform a fundamental function in the realization of UNESCO's objectives, namely peace, development, the promotion of human rights and the campaign against racialism and colonialism";

Considering that the General Conference of UNESCO has proclaimed 1972 International Book Year, with the theme "Books for All";

The International Community of Booksellers Associations
The International Confederation of Societies of Authors and Composers
The International Federation for Documentation
The International Federation of Library Associations
The International Federation of Translators
The International PEN
The International Publishers Association

Adopt unanimously this Charter of the Book, and call upon all concerned to give effect to the principles here enunciated.

Article 1

Everyone has the right to read

Society has an obligation to ensure that everyone has an opportunity to enjoy the benefit of reading. Since vast portions of the world's population are deprived of access to books by inability to read, Governments have the responsibility of helping to obliterate the scourge of illiteracy. They should encourage provision of the printed materials needed to build and maintain the skill of reading. Bilateral and multilateral assistance should be made available, as required, to the book professions. The producers and distributors of books, for their part, have the obligation to ensure

that the ideas and information thus conveyed continue to meet the changing needs of the reader and of society as a whole.

Article 2

Books are essential to education

In an era of revolutionary changes in education and far-reaching programmes for expanded school enrollment, planning is required to ensure an adequate textbook component for the development of educational systems. The quality and content of educational books need constant improvement in all countries of the world. Regional production can assist national publishers in meeting requirements for textbooks as well as for general educational reading materials which are particularly needed in school libraries and literacy programmes.

Article 3

Society has a special obligation to establish the conditions in which the authors can exercise their creative role

The Universal Declaration of Human Rights states that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". This protection should be also extended to translators, whose work opens the horizon of a book beyond linguistic frontiers, thus providing an essential link between authors and a wider public. Since all countries have the right to express their cultural individuality, preserving the diversity essential to civilization, they should encourage authors in their creative role, and should provide, through translation, wider access to the riches contained in the literature of other languages, including those of limited diffusion.

Article 4

A sound publishing industry is essential
to national development

In a world in which there are sharp disparities in book production, with many countries lacking adequate reading materials, it is necessary to plan for the development of national publishing. This requires national initiative and, where necessary, international co-operation to help create the infrastructure needed. The devel-

opment of publishing countries also entails integration with education and economic and social planning; the participation of professional organizations, extending insofar as possible across the entire book community through institutions such as national book development councils; and long-term, low interest financing on a national, bilateral or multilateral basis.

Article 5

Book manufacturing facilities are necessary to the development of publishing

In their economic policies, Governments should ensure that necessary supplies and equipment are available for the development of an infrastructure for book manufacture, including paper, printing and binding machinery. The maximum use of national resources, together with eased importation of these supplies and equipment, will promote the production of inexpensive and attractive reading materials. Urgent attention should also be given to the development of transcriptions of oral languages. Those concerned with the manufacture of books should maintain the highest practicable standards of production and design. Particular efforts should be made for the manufacture of books for the handicapped.

Article 6

Booksellers provide a fundamental service as a link between publishers and the reading public

In the forefront of efforts to promote the reading habit, booksellers have both cultural and educational responsibilities. They play a vital role in ensuring that an adequate and well-chosen range of books reaches the reading public. Special book post and air freight rates, payment facilities and other financial incentives aid them in carrying out this function.

Article 7

Libraries are national resources for the transfer of information and knowledge, for the enjoyment of wisdom and beauty

Libraries occupy a central position in the distribution of books. They are often the most effective means of getting printed matter to the reader. As a public service, they promote reading

which, in turn, advances individual well-being, life-long education and economic and social progress. Library services should correspond to each nation's potentialities and needs. Not only in cities, but especially in the vast rural areas which frequently lack book supplies, each school and each community should possess at least one library with qualified staff and an adequate book budget. Libraries are also essential for higher education and scholarly requirements. The development of national library networks will enable readers everywhere to have access to book resources.

Article 8

Documentation serves books by preserving and making available essential background material

Scientific, technical and other specialized books require adequate documentation services. Accordingly, such services should be developed, with the assistance of Governments and all elements of the book community. In order that maximum information materials may be available at all times, measures should be taken to encourage the freest possible circulation across frontiers of these essential tools.

Article 9

The free flow of books between countries is an essential supplement to national supplies and promotes international understanding

To enable all to share in the world's creativity, the unhampered flow of books is vital. Obstacles such as tariffs and taxes, can be eliminated through widespread application of UNESCO Agreements and other international recommendations and treaties. Licenses and foreign currency for the purchase of books and the raw materials for book-making should be accorded generally, and internal taxes and other restraint on trade in books reduced to a minimum.

Article 10

Books serve international understanding
and peaceful cooperation

"Since wars begin in the minds of men", the UNESCO Constitution states, "it is in the minds of men that the defences of peace must be constructed". Books constitute one of the major defences of peace because of their enormous influence in creating

an intellectual climate of friendship and mutual understanding. All those concerned have an obligation to ensure that the content of books promotes individual fulfilment, social and economic progress, international understanding and peace.

Approved at Brussels,
22 October 1971,
by the Support Committee for
International Book Year.

334. UNIVERSAL COPYRIGHT CONVENTION. FIJI.

The Copyright Office has been informed that the Director-General of Unesco received a communication from the Government of Fiji on December 13, 1971 notifying him that it considered itself bound by the Universal Copyright Convention from its date of independence, October 10, 1970. The Universal Copyright Convention had been extended to the territory of Fiji by the United Kingdom between March 1, 1962 and the date of independence.

335. UNIVERSAL COPYRIGHT CONVENTION. MOROCCO.

The Copyright Office has also been informed that the instrument of accession by Morocco to the Universal Copyright Convention and annexed Protocols 1, 2 and 3 was deposited with the Director-General of Unesco on February 8, 1972.

In accordance with Article IX, paragraph 2, the Convention came into force, in respect of Morocco, on May 8, 1972, three months after the deposit of the instrument of accession. Protocols 1 and 2, in accordance with the provisions formulated in paragraph 2(b) thereof, came into force for Morocco on the same day as the Convention. Protocol 3, in application of paragraph 6(b) thereof, came into force for Morocco on the day on which the instrument of accession was deposited with the Director-General of Unesco.

336. UNIVERSAL COPYRIGHT CONVENTION. *Accessions and Ratifications as of July 1, 1972.*

<i>Country</i>	<i>Effective Date</i>
Andorra	September 16, 1955
Argentina	February 13, 1958
Australia	May 1, 1969
Austria	July 2, 1957
Belgium	August 31, 1960

<i>Country</i>	<i>Effective Date</i>
Brazil	January 13, 1960
Cambodia	September 16, 1955
Canada	August 10, 1962
Chile	September 16, 1955
Costa Rica	September 16, 1955
Cuba	June 18, 1957
Czechoslovakia	January 6, 1960
Denmark	February 9, 1962
Ecuador	June 5, 1957
Fiji	October 10, 1970
Finland	April 16, 1963
France	January 14, 1956
Germany, Federal Republic of	September 16, 1955
Ghana	August 22, 1962
Greece	August 24, 1963
Guatemala	October 28, 1964
Haiti	September 16, 1955
Holy See	October 5, 1955
Hungary	January 23, 1971
Iceland	December 18, 1956
India	January 21, 1958
Ireland	January 20, 1959
Israel	September 16, 1955
Italy	January 24, 1957
Japan	April 28, 1956
Kenya	September 7, 1966
Laos	September 16, 1955
Lebanon	October 17, 1959
Liberia	July 27, 1956
Liechtenstein	January 22, 1959
Luxembourg	October 15, 1955
Malawi	October 26, 1965
Malta	November 19, 1968
Mauritius	March 12, 1968
Mexico	May 12, 1957
Monaco	September 16, 1955
Morocco	May 8, 1972
Netherlands	June 22, 1967
New Zealand	September 11, 1964
Nicaragua	August 16, 1961
Nigeria	February 14, 1962

<i>Country</i>	<i>Effective Date</i>
Norway	January 23, 1963
Pakistan	September 16, 1955
Panama	October 17, 1962
Paraguay	March 11, 1962
Peru	October 16, 1963
*Philippines	November 19, 1955
Portugal	December 25, 1956
Spain	September 16, 1955
Sweden	July 1, 1961
Switzerland	March 30, 1956
Tunisia	June 19, 1969
United Kingdom	September 27, 1957
United States of America	September 16, 1955
Venezuela	September 30, 1966
Yugoslavia	May 11, 1966
Zambia	June 1, 1965

* UNESCO has advised the U.S. Government that a letter dated November 14, 1955, was received from the Philippine Minister in Paris stating that the Philippine President had directed the withdrawal of the instrument of accession before November 19, 1955, the date on which the Convention would become effective in respect of the Philippines. No determination has been made as to the legal effect of this communication.

PART IV.

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

337. *First American Artificial Flowers, Inc., et al. v. Joseph Markovits Inc.*, not yet reported (S.D.N.Y. March 28, 1972).

Plaintiffs' motion for preliminary injunction in action for infringement of copyright in an artificial flower. The court concluded that while plaintiffs "appeared" to sustain the validity of their copyright, unresolved factual questions on this issue and plaintiffs' failure to make a clear showing of infringement detracted from plaintiffs' probable success on the merits.

Held, motion dismissed.

I. Validity

A. *Post-Dated Notice*: Although plaintiffs' work comprised a "work of art" for copyright purposes and thus did not require a year-dated copyright notice, currently marketed copies did bear notice dated 1969. Actual first publication occurred in (and the deposit copies bore notice dated) 1967. Plaintiffs sought to explain the variance as due to an unauthorized change in mold made by its Hong Kong manufacturer under the mistaken impression that the year of manufacture was to appear on the copies. However, the court noted that "plaintiffs are generally responsible for the acts of their chosen agents, including their manufacturers, performed in the course of their agency [and this excuse] is not by itself sufficient to remove this situation from the ambit of the Copyright Act and the sanctions envisaged in the statute and the cases for failure for whatever reason to comply with statutory formalities."

The court then determined that, notwithstanding authority to the contrary, the error in an "elective" element of the notice should not work a forfeiture of a validly acquired copyright absent prejudice to innocent third parties:

The . . . question . . . is whether publication with a notice of copyright which contains an inaccurate elective addition is nevertheless adequate notice.

There is some authority for the proposition that it is not:

" . . . if the copyright owner elects to give the date of the copyright, the date given must certainly not be later than the actual date." *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41, 48 (S.D.N.Y. 1939).

However, the works therein involved, catalogs of reproductions of religious paintings, had been considered by the Court to be "books" and consequently to have required inclusion of the date of publication in the notice. . . . The above-quoted statement was therefore dictum; the Court was merely expressing the desire that whatever information is included in the notice should be accurate. It was not faced with the necessity to consider imposition of sanctions because of a misleading elective insertion . . .

. . . .

The general policy of the statute . . . stated in the broadest of terms, is to afford protection . . .

In the present action all formalities required by the statute for possession of a valid copyright were accomplished: the notice was prominently displayed, and included all necessary information. This was sufficient to obtain protection in the first instance; the question is really whether the addition of the erroneous date worked a forfeiture of that protection. Applying the basic policy to the facts, it would appear that no forfeiture should eventuate absent the possibility of some prejudice to innocent third parties by reason of the inclusion.

The only possible reliance by any members of the public, including defendant, upon the accuracy of the notice appearing on the copyrighted rose would be for the purposes of computation of the termination date of the monopoly enjoyed under the statute. There could be no significant prejudice from misreliance upon the "1969" date, since under either date, 1967 or 1969, 23 years of monopoly presently remain, assuming no renewal, . . . this is alleged without contradiction to be considerably in excess of the useful life of this type of object. Also, for whatever it is worth, anyone sufficiently interested could have obtained a copy of the registration certificate, which would have displayed the proper date of publication, . . . or could have observed the deposited copies, which contained the proper notice. . . . Plaintiff's copyright therefore appears valid against this challenge, notwithstanding the possible contrary inference from the dictum in *Basevi*, *supra*.

Alternatively, the court held that the post-dating appeared to be an innocent, insubstantial variation which should not defeat the copyright. The court said:

. . . [A]ssuming *arguendo* that the method for compliance with statutory strictures voluntarily assumed is no less rigid, and the sanctions for its violation no less inevitable by reason of the voluntariness of the inclusion, we remain of the opinion that plaintiffs' copyright must at this juncture be held to be valid and enforceable, of course assuming the eventual proof of what are presently mere unsupported allegations.

The leading case on this subject, *Baker v. Taylor*, 2 Fed. Cas. 478 (No. 782) (C.C., S.D.N.Y. 1848) . . . established the rule that any variance between the facts and the purported date of publication as stated in the notice of copyright constitutes a failure to comply with the statutory requirements, thereby rendering the notice ineffective. The work will then be deemed dedicated into the public domain, for lack of adequate notice of copyright. . . .

However, the harshness of this doctrine has been mitigated in more recent times: it is now held that substantial compliance with the copyright laws is all that is required in order to insure their protection. . . .

Similarly, inadvertent predating of the date of publication in a notice of copyright will not work a dedication, absent more, but will only shorten the period of statutory monopoly to that erroneously claimed.

. . . .

Likewise, it is now the law that minor discrepancies between the actual date of publication and that stated in the registration application form or notice of copyright will not preclude copyright protection, so long as the difference between the dates is less than one year. . . .

The conclusion must be that the *Baker* case, *supra*, if it be read as requiring rigid adherence to all formalities on pain of forfeiture of statutory protection, is no longer completely accurate as a statement of the law. . . . This is not to say that substantial compliance with the notice requirements of the statute is all that is now required, but only that, in specific situations, the allegation of excusable error plus lack of prejudice to others may suffice to avoid the more extreme statutory pitfalls.

It should also be noted that *Baker v. Taylor* may not be good law today on its facts. It involved post-dating of an indeterminable but relatively short period, intentionally but non-maliciously. The

case has never been openly disapproved, but has been consistently distinguished because of the international element present therein. It could, in fact, be distinguished from the present action on that ground. However, should the same situation arise today as arose in that case, and the error, although intentional, be done in good faith, the result might well be different.

The question then becomes whether there was substantial performance of statutory requirements by plaintiffs; or in other words, whether the two-year variation in dates was material. It is our opinion that it is not a significant deviation for present purposes.

A survey of the cases discloses that most "inadvertent" errors concerning dates have arisen from confusion between dates of printing or manufacture, etc. with dates of publication. Laymen sometimes fail to realize that "publication" is a word of art, and thereby create the problems, sometimes knotty, particularly in the case of three-dimensional works, which have given rise to the reported cases. These errors often involve short periods of time.

"Deliberate" variations, on the other hand, whether or not the intent to mislead exists, frequently involve longer time periods, such as those between successive editions or republications. In these situations, the copyright proprietor has generally made a judgment regarding whether or not a certain change in the work amounts to a new publication. The status of the first publication as such is not in question. In these cases, the courts have determined that such a proprietor proceeds at his peril. However, it is the forfeiture, not the validity *ab initio*, of the copyright which is in issue.

* * *

It therefore appears that, on the present state of the record, this case may be categorized as a "confusion case" rather than a "deliberate variation" or other case. Absent some evidence controverting the bona fides of plaintiffs' Hong Kong agent's "mistake," the error must be held insubstantial, and the copyright nonetheless valid. Plaintiffs have so far carried their burden of establishing validity, and defendants have failed to show any forfeiture.

B. *Authorship*: Defendant asserted that plaintiffs' rose was created by the corporate plaintiff's Hong Kong manufacturer, rather than by the "skill, labor and judgment" of the individual plaintiff (the purported "author".) Noting the individual plaintiff's affidavit that he "worked directly with the manufacturing plant . . . directed the making of the model rose, . . . specified the number of leaves, petals and thorns as well as the length of the stem and the arrangement of the compo-

nents . . . [and] formed the ripples in the leaves and the curls in the petals [with his own hands] in conformity with which the molds were shaped", the court held that "defendants have not as yet overcome the presumption of authorship from proper filing of the registration application."

C. Variance from Deposit Copies: Defendant urged that there were significant differences between the rose marketed by plaintiffs and the copies deposited for registration, but the court said:

. . . [T]here is no evidence in the record as to the amount of variation possible or inevitable under the manufacturing technology utilized in the production of either rose. The scope of permissible, "insubstantial" variations in form has not been addressed by the parties; some variation is evidently permissible, for the copyrighted rose appears to have been marketed without objection in both red-budded and yellow-budded versions. The deposited copy, or even a photograph of it, is not before the Court; all that is, is an unsworn statement in letter form by a correspondent of defendant's attorneys. We are therefore loath to find any error at this time in the deposit of the copy, reserving final determination of this issue . . . for trial.

D. Abandonment: Defendant argued that plaintiff abandoned its rights in the rose at issue by subsequently publishing elements thereof in an uncopyrighted artificial rose. The court held, however, that this would not defeat protection of plaintiffs' "entire" originally-copyrighted rose:

The amount of novelty required for a new work to be copyrightable is rather minimal. The plaintiffs' later rose is not uncopyrightable merely because it included elements of an earlier, copyrighted work . . . This being the case, the subsequent publication of the second rose resulted in a dedication of that rose to the public domain, including all its component parts, as plaintiffs concede. The leaves, which are concededly identical with the copyrighted leaves, are therefore abandoned. Defendant also alleges that the two stems are identical; plaintiffs deny this. Resolution of this non-determinative issue can also be left for trial.

However, the first rose remains original, even apart from the contribution made by its leaves. There does not appear to have been any intent to dedicate anything more than was necessarily dedicated to the public domain, and no more should be considered abandoned than the statute requires. But the statute, if anything,

supports plaintiffs' position: the second rose could arguably be considered an "adaptation . . . or other version" of the copyrighted rose; were this the case, the protection afforded the copyrighted rose cannot be diminished by any failure to obtain protection for the later version . . . Final determination of whether the later rose was actually a "version" of the former is another issue which may safely be left for trial.

II. *Infringement*: The court concluded that under the "ordinary observer" test, the parties' roses were not sufficiently *substantially* similar so as to warrant the inference of copying. The court said:

* * *

. . . Access is present . . . It is also clear that the two roses are similar in appearance. The substantiality of the similarity, however, is hotly contested . . .

Plaintiffs' difficulty in this regard is that any two devices purporting to represent a natural prototype or archetype are likely to be similar, quite apart from any copying. Thus, a copyright on a work which bears practically a photographic likeness to the natural article, as here, is likely to prove a relatively weak copyright. This is not to say that, as a matter of law, infringement of such a copyright cannot be inferred from mere similarity of appearance, but only that the plaintiff's burden will be that much more difficult to sustain because of the intrinsic similarities of the copyrighted and accused works. For example, plaintiffs must prove more than that the general "pattern" of the copyrighted rose was appropriated, since its "pattern" was presumably the natural article itself in one form or another. They must show an appropriation, not merely of the uncopyrightable "idea" of the polyethylene tea rose, but actually of its "expression."

* * *

Turning to the actual comparison of the copyrighted and accused works, the first, generalized impression is one of similarity. This is understandable, in light of the common natural source which presumably inspired the craftsmen of both roses. However, a closer inspection, more attentive to detail but still no more than could reasonably be expected of a lay observer, reveals a pattern of differences, not of near, or absolute, identity of parts.

Thus, with respect to leaves, both roses possess two topmost leaves composed of three leaflets each; the next lower leaf (defendant's) or leaves (plaintiffs') are composed of five leaflets. (Defendant states that the deposited copy contains "four branches of

leaves . . . consisting generally [?] of five leaves [leaflets] per [leaf]. One of the [leaves] has two [leaflets].") . . . From our experience we note that the rose as it commonly appears in nature contains three leaflets on each of the two leaves closest to each major bud, and five leaflets on all other leaves. With respect to the arrangement of the leaflets on the leaves, the copies of the roses handed up to the Court at argument are therefore similar, but both follow nature. Similarity in this regard is therefore not probative of copying. The arrangement of the leaves on the stems of the two roses is similar, but by no means identical; the placement varies vertically from about one-eighth to approximately three-fourths of an inch. The color and size of the leaflets themselves are noticeably different, as is the arrangement of the lenticals and the distinctiveness of the veins.

Even if the differences between the leaf and leaflet arrangements should be disregarded because of the dedication of plaintiffs' leaves to the public domain, the other parts of the two roses are considerably different. The calyces are entirely different, whether the accused rose is compared with the version of the copyrighted rose handed up at argument or with that on deposit in Washington, D.C., as described by defendant's correspondent. The individual petals comprising the flower buds of the two roses handed up are distinct shades of yellow. Finally, the positioning and shape of the thorns are different.

The total effect of these various differences, none of which is striking in and of itself, is sufficient to individualize the two roses. Their distinctiveness is such as to negate the inference, if any there be in this context, of copying from evidence of similarity alone. Since there is absolutely no evidence of actual copying, the only possible conclusion must be that plaintiffs have failed to carry their burden with respect to proof of infringement.

338. *Robinson v. Bantam Books, Inc., et al.*, 339 F.Supp. 150, 174 USPQ 26 (S.D.N.Y., January 14, 1972) (Levet, J.)

Inquest for damages in action for copyright infringement and libel. Plaintiff alleged that a certain book published by defendants Rand McNally & Company (hardcover) and Bantam Books, Inc. (paperback) and authored by defendant Angell infringed copyright in plaintiff's previously-published novel. Plaintiff also claimed libel in a certain statement appearing on the jacket and cover of the corporate defendants' publications.

The corporate defendants did not answer or appear and a default judgment of liability was entered against them. (The individual author-defendant did answer and was not affected by the judgment). The judgment directed the instant inquest for damages, costs and attorneys fees against the corporate defendants.

Held, judgment against corporate defendants on accounting.

A. Copyright

1. *Actual Damages*: Plaintiff produced no "direct evidence" regarding actual damages suffered from the infringement claim and, considering the lack of financial success of plaintiff's work, the court felt such damages to be "nominal."

2. *Profits*: The court found that defendants' profits were also "nominal" in that each corporate defendant incurred net losses in the publication and sale of the allegedly infringing work.

3. *"In Lieu Of" Damages*: The court concluded that, under the circumstances, an award of \$0.10 per copy of defendants' works "sold or distributed" was warranted under the "In Lieu Of" damage provisions of the Copyright Act. The court said:

Where damages do not exist and profits are nominal it is within the court's discretion to revert to the "in lieu" provision of the statute in awarding damages. . . .

. . . .

The "in lieu" provision of the statute provides:

"in lieu of actual damages and profits, such damages as to the court shall appear to be just * * *."

In reverting to the "in lieu" provision the court may allow as damages "the amounts as hereinafter stated." Accordingly, Section b provides:

"Second. In the case of any work enumerated in section 5 of this title * * * \$1 for every infringing copy made or sold or found in the possession of the infringer * * *."

The court, therefore, has within its discretion the power to award anywhere between no cents, or nominal damages, and one dollar for each infringing copy *made* or *sold*.

Since this court has decided, in the exercise of its discretion, to revert to the "in lieu" clause provided in Section 101, the question now arises, what is the reasonable monetary relief to be awarded for each infringing copy sold?

In the Fifth Circuit, the Court of Appeals, writing per curiam in *Mason v. Wainwright*, 417 F. 2d 769 (1969), directs the trial judge (at 769) to follow the Supreme Court's enunciation in *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106, as to the proper measure of damages:

"The court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling * * *."

. . . .

This court finds that no substantial harm was sustained by plaintiff. As already pointed out, plaintiff's book . . . has not been a financial success nor has the book received wide acclaim. In like manner, the infringing work . . . has also been a financial failure. It appears from the circumstances that plaintiff has sustained nominal damages from the infringing work.

4. *Costs & Attorney's Fees:* The court held that while 17 USC §116 required an award of "full costs" to the prevailing party in copyright infringement suits, it remained discretionary with the court whether to allow reasonable attorney's fees as a part of such costs. Observing that "the real test is not time spent but results accomplished" and noting that the default of the corporate defendants eliminated proof of facts other than damages and that plaintiff could not collect from the defaulting defendants for fees relating to the non-defaulting defendant, the court awarded \$750 attorney's fees against each corporate defendant.

B. *Libel*

Plaintiff complained of the statement on defendants' publications that "Much has been written about Arctic explorers and exploration, but there is no other book that tells of the relationship between these two amazing men." The court at inquest held:

In the case at bar, the default judgment on liability is determinative that the statement appearing on the cover of defendants' infringing books is libelous. However, the right, as a matter of law, to damages for libel, does not imply a right to substantial damages, and substantial damages must be founded upon a finding of substantial injury. However, where words are libelous upon their face,

general damages are inferred by law and need not be proved by evidence. . . .

I am bound by the default judgment; therefore, I hold that the inscription here concerned was libelous. Thus, as a matter of law, plaintiff has a right to general damages. However, I do not feel that plaintiff has sustained substantial damage as a result of the libel. Therefore, plaintiff is entitled to a damage award due to libel in the amount of \$100 from defendant Rand and in the amount of \$200 from defendant Bantam.

339. *McGraw-Hill, Inc., et al. v. Worth Publishers, Inc., et al.*, 335 F. Supp. 415, 172 USPQ 482 (S.D.N.Y., December 15, 1971) (Croake, J.)

Motion for preliminary injunction in action for copyright infringement. The parties both published economics textbooks.

Held, motion denied.

The court held that plaintiff had failed to make a sufficient showing of substantial similarity probative of copying. The court found *inter alia*, that such similarities as did exist in the works appeared to be the "inadvertent" result of independent creative effort in a field where possible variances in expression were limited by factors particular to the discipline involved. The court said, in part:

Defendants . . . [argue] that the nature of the subject matter dealt with in both texts inevitably restricts their creative discretion. They assert that the economics professors, who shape the market, desire texts to which their own class notes can be adapted. Their notes, in turn, are the products of long familiarity with what might be described as "Samuelson methodology" ["Samuelson" referring to the trend-setting economics textbook authored by Professor Samuelson]. These professors are presumptively unwilling to effect a reorganization of their own notes merely to satisfy the whim of a new textbook writer. This is not to say that "everyone is copying Samuelson," but rather that he has profoundly influenced, if not economics itself, then at least the teaching of economics.

In addition to the historical determinants, there are strong internal factors restricting defendants' literary options in creating an economics textbook. A particular style is essential to its success only in the negative sense that a cumbersome or otherwise unreadable style will inhibit market receptivity. Ideally, the style should be neutral; contemporary and inviting to students, and not "stuffy,"

but nevertheless adaptable to any possible teaching style. A noticeable style would be a drawback; these are not works of fiction.

A final set of restrictions relates to the subject itself. The long history of the development of the discipline has resulted in a large corpus of technical words and phrases whose meanings have been fixed, and of concepts whose importance is generally acknowledged. No professor dealing in the basics could hope to be successful with a radical departure from either the jargon or the substantive professional consensus, on issues where one exists. To be more specific, any introductory text must deal with macroeconomics and microeconomics. They can be presented in either order, or in a melange. But the range of choices is not large.

The basic question raised . . . is what was the nature of the activity which went into the preparation of the Spencer text. Was it conscientious scholarship, with careful checking of all sources in order to preserve currency and comprehensiveness, but nevertheless with independent organization and expression; or was it literary larceny by an unprincipled individual seeking to "cash in" on a lucrative market by the fastest and easiest method possible? The conclusion must be, based on all the evidence presented on this motion, but most particularly on my own comparison of the two books, that the evidence fails to demonstrate any actual copying, or other impropriety in the preparation of the Spencer text. We have found no verbatim copying; certain Spencer passages, read after their McConnell counterparts had been read, did give an impression of *deja vu*, but only in the most general way. We are convinced that any similarity between the Spencer and McConnell texts is inadvertent and occurred despite reasonable precautions on defendants' part, and in any event is insubstantial. "Where similarities or identities are relied upon, they must do more than engender a suspicion of piracy; they must establish piracy with reasonable certainty."

340. *Elan Associates, Ltd. v. Quackenbush Music, Ltd.*, 339 F.Supp. 461, 174 USPQ 258 (S.D.N.Y., March 30, 1972) (Cannella, J.)

Action for copyright infringement and declaratory judgment as to ownership of copyright. The parties claimed copyright in the same musical compositions. Plaintiff's claim rested on an exclusive publishing agreement with the author, which was the subject of a pending recession action in the state courts brought by defendant and the author. Defendant moved to dismiss the complaint for lack of subject matter jurisdiction.

Held, motion granted.

Finding that the controlling question at bar was that of title to the copyrights, which rested on the validity of the author-plaintiff agreement, the court concluded that "although the action is cast in terms of infringement, in reality [it] is merely one to establish valid title by seeking to enforce a contract [and] the case is not one which *arises under* the copyright laws . . ." (emphasis added).

341. *Shaab v. Kleindienst, et al.*, 174 USPQ 197 (D.D.C., June 8, 1972) (*Per Curiam*)

Action before a three-judge court to enjoin enforcement of P.L. 92-140, an amendment to the Copyright Act to provide a limited copyright in sound recordings.

Held, judgment for defendants.

Plaintiff argued that sound recordings could not qualify as the "writings" of "authors" under the Copyright Clause (Art. I, sec. 8) of the Constitution. However, the court held that the activities of record and tape producers in "provid[ing] the equipment" and "organiz[ing] the diverse talents of arrangers, performers and technicians" satisfied the Constitutional requirements.

Although defendant argued that Congress' failure to provide a compulsory licensing system for sound recordings invidiously discriminated against those subject to compulsory licensing of recorded musical compositions, the court found that there was a "rational and reasonable" distinction between the protection of the two types of works:

The provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition.

If Congress in 92-140 had extended the compulsory licensing provisions to call for licensing of companies that wish to make and sell identical versions of the recorded compositions, these public benefits would not result. Consumer choices would not be broadened since identical interpretations would be supplied first by the originator and later by the licensee. Equally important, competition and the creative aspects of the industry would be impaired since established recording firms would be discouraged from investing in new arrangements and performers, if they were compelled to license their successful interpretations to those desiring to take advantage of the originator's initiative and to add nothing themselves.

342. *Dave Grossman Designs, Inc. v. Bortin, et al.*, 174 USPQ 217 (N.D. Ill., May 26, 1972) (Will, J.)

Action for copyright infringement and unfair competition. Plaintiff alleged that defendant was engaged in the production and sale of certain statues of children which were copied from plaintiff's ten copyrighted statues. Plaintiff also alleged that defendant copied certain of its color features, packaging, display designs and sales brochures so as to create confusion as to source in violation of Section 43(a) of the (Federal) Lanham Act and of the Illinois Uniform Deceptive Trade Practices Act. Defendant moved for summary judgment dismissing the complaint.

Held, motion denied.

I. Copyright

A. *Originality*: Defendant argued that the sculptress of plaintiff's works had published sculptures having the same "dominant facial characteristics" as plaintiff's statues without notice. The court noted that plaintiff could not claim copyright in the sculptress' "dominant features" theme *per se*, but rather in "ten individual expressions of her motif which appear in the form of ten different statues" and held that the plaintiff's statues at bar were sufficiently different from the sculptress' prior works to comprise "original" protectible works, or at least that defendant was not entitled to summary judgment on this issue.

B. *Notice*: Defendant urged that three of plaintiff's statues were in the public domain because published with notice in plaintiff's name although plaintiff had received no "assignment of copyright rights" in these statues from the sculptress. The court, noting that "the assignment of a common law copyright need not be in writing and may even arise from implication by conduct", and that "the courts have written into the copyright law certain protections for copyright holders who have not dotted every 'i' and crossed every 't' in relation to their copyright notices" to avoid forfeiture and hold knowing infringers to liability, concluded that it was "too early" in the proceedings to resolve this issue, "particularly because the burden of proof . . . is upon the alleged infringers."

Defendant also alleged that the sculptress first produced the statues in question with copyright notice in her name, but that plaintiff removed her name from the notice in the reproduction molds, substituting its own name, without recording an assignment of copyright from the sculptress, therefore injecting the works into the public domain for improper change in notice prior to recordation under Section 32 of the

Copyright Act. The court held that this argument was baseless since Section 32 has no application to assignments of common law copyright:

The Copyright Act, by its own terms, does not abrogate the common law copyrights of an author. 17 U.S.C. §2. And the statutory copyright cannot possibly come into existence until *after* publication, i.e., at the time that the common law copyright ends . . . Therefore, when [the sculptress] transferred her rights to the plaintiff prior to publication, there could be no statutory copyright protection because there had been no publication. Section 32 of the Copyright Act, as concerns that point in time, can have no application. The only right that she then possessed that she could have assigned was her common law copyright. Once she had made such an assignment, the plaintiff was the proprietor of the common law right of first publication and could protect its rights after publication only by complying with the statute, i.e., by publishing the work with its name on the copyright notice. Defendants' motion for summary judgment based on Section 32 of the Copyright Act must be denied because⁹ no assignment of the statutory copyright which would bring this section into play has ever occurred.

C. Infringement: The court held that, under the "ordinary observer" test, "we conclude that the . . . statues are neither so conclusively similar nor dissimilar . . . that [we] can determine as a matter of law [on motion for summary judgment] that the accused statues are not substantially similar to . . . [plaintiff's]."

The court added:

A reading of the plaintiff's briefs in relation to the instant motion suggests that it believes that it possesses valid copyrights on the general style that [the sculptress] utilizes in sculpting children's faces. The defendants, on the other hand, appear to be under the impression that if they copy only a portion of the plaintiff's copyrighted works, but put that copy within a different scheme or setting, that no infringement may take place. If the parties do possess the above ideas, they are all mistaken.

The law of copyright is clear that only specific expressions of an idea may be copyrighted, that other parties may copy that idea, but that other parties may not copy that specific expression of the idea or portions thereof. For example, Picasso may be entitled to a copyright of his portrait of three women painted in his Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not

violate Picasso's copyright so long as the second artist does not *substantially copy* Picasso's specific expression of his idea. Similarly, the plaintiff allegedly possesses copyrights on ten statues and may prohibit the defendants from manufacturing their accused statuary if, *but only if*, the accused works are found to have crossed the vague line of demarcation that separates fragmented similarity from substantial similarity. It is the ad hoc definition of this vague line as it applies to the statuary involved in this litigation that cannot be made until a trial is had and witnesses and experts are proffered.

II. *Unfair Competition*

A. *Lanham Act*: Noting that several courts "have held that allegations [similar to those of plaintiff] do state a claim under Section 43a) . . .", the court concluded that this cause of action could not be dismissed on the face of the complaint.

B. *Illinois Uniform Deceptive Trade Practices Act*: Defendant appeared to argue that this state statute was unconstitutional under *Sears, Roebuck & Company v. Stiffel Company*, 376 U.S. 225 (1964), but the court stated:

In *Sears*, the Supreme Court ruled that, because of the Federal patent laws, a state may not prohibit the copying of an unpatented and uncopyrighted article or award damages for such copying. The Court specifically did say, however, that a state may require goods to be labelled or that other precautionary steps be taken to prevent the customers of the goods from being misled as to their source . . . This protection to consumers against having goods of one manufacturer being "palmed off" as goods made by another manufacturer is exactly what §§312 (1), (2) of the Uniform Deceptive Practices Act are designed to provide . . . Accordingly, we conclude that the plaintiff's third cause of action states a claim for which relief could be granted.

343. *Nucor Corporation v. Tennessee Forging Steel Service, Inc., et al.*, 339 F.Supp. 1305, 173 USPQ 374 (W.D. Ark., March 16, 1972) (Williams, J.)

Action for violation of common law copyright in plant construction plans.

Held, complaint dismissed.

1. *Publication*: The court found that plaintiff had generally published its plans, thereby divesting common law protection, by:

giving . . . approximately thirty sets of plans to bidders . . . [with] no limitation on their circulation [or provision for their return], by permitting any and all interested people to see, visit and inspect the building in all stages of construction and the entire plant when in operation after construction was completed, as well as by its conduct and advertising campaign [which included the distribution of many catalogs containing aerial photographs of its plants].

With respect to public visitation and inspection of the plants, the court had earlier in its opinion noted that while visitors did not inspect the plans themselves, "there is nothing in the plans . . . which would not be readily apparent to any competitor or knowledgeable person touring . . . plaintiff's plant."

2. *Infringement*: *Obiter*, the court added;

Even when the common law copyright has been held to be in effect it has not been extended to such an extent as to prevent the erection of buildings that are merely similar. [Defendants'] plans . . . were and are a separate, distinct, set of plans. There are similarities to the [plaintiff's] plans . . . but there are also material differences. In drafting plans it is and always will be necessary to use straight lines, angles, curves, etc., and the geometric shape of succeeding buildings will be or can be similar; but it is not reasonable to say that because the plaintiff has built a four-sided building no other builder can ever again build a four-sided building.

Not only are the [defendants'] plans different from the plans of [plaintiff]; but the similarities are not of such nature as to be exclusive or protected to [plaintiff].

344. *Walt Disney Productions v. The Air Pirates, et al., Not yet reported* (N.D. California, July 7, 1972) (Wollenberg, J.).

Action for copyright and trademark infringement and unfair competition. Plaintiff owned copyright in various cartoon strips, comic magazines and books containing graphic depictions of certain characters (e.g., "Mickey Mouse"). Defendants published cartoon magazines including picture characters "drawn as nearly like the plaintiff's drawing as defendant could make it." (Defendants also gave the so-copied characters the same names as used by plaintiff.) However, it was clear that the "theme and 'plot' of the defendants' publications differ markedly

from those of plaintiff." In sum, said the court: "In the graphic depiction of a number of the most prominent characters, and in the names given those characters, the respective works are the same. In nearly every other aspect, they are different."

Plaintiff moved for a preliminary injunction.

Held, motion granted.

The court held that plaintiff demonstrated a sufficient likelihood of success on the merits for copyright infringement to warrant preliminary relief.

1. *Protection of Plaintiff's Characters Per Se*: Defendants argued that plaintiff's characters were not protectible when taken in isolation from the works in which they appeared. However, the court concluded that plaintiff's graphic character representations were themselves protectible, either as component parts of plaintiff's publications or as the essence thereof. The court said (footnotes omitted):

. . . *King Features Syndicate v. Fleischer*, 299 Fed. 533 (2d Cir. 1924) dealt with the imitation of a comic strip character, an unlikely race-horse named Spark Plug, and its reproduction in the form of a toy or doll. The Court upheld a finding of infringement, upon the theory urged here, that the "pictorial illustration", or graphic depiction was a copyrightable component part of the entire work covered by an admittedly valid copyright. Accord, *Fleischer Studios v. Ralph A. Freundlich*, 73 F.2d 276 (2d Cir. 1934), and *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S.D.N.Y. 1914). In each of those cases, the Court found that the drawings, or graphic depictions, were sufficiently distinctive and defined to be protectible.

Defendants attempt to distinguish the cases cited above upon the ground that each involve an infringer which was trying to imitate the whole style and approach, as it were, of the holder of the copyright. That distinction, however, misses the issue, for protectibility as to a component part depends not at all upon the manner in which the alleged infringer acts, but strictly upon the status of the questioned part within the protected whole, and the characteristics and quality of that part, considered by itself.

Defendants, however, cite many cases in support of the proposition that "characters" as such are not generally copyrightable. They correctly assert that the leading case for that proposition is *Warner Brothers Pictures v. Columbia Broadcasting System*, 216 F.2d 945 (9th Cir. 1954) . . . [Here the] author of a detective story sold rights to the book, *The Maltese Falcon*, to a motion picture

studio. He then assigned rights in the characters, exclusive of their use in the *Falcon*, to other parties, which parties produced radio dramatizations . . . centering around the same Sam Spade and many of the other supporting characters, but using different plots. The decision of the Court of Appeals held that there was no infringement of the rights transferred in *The Maltese Falcon*. Primarily, that holding was premised upon construction of the contract, drawn by the assignee of the rights, with the result that the rights over the characters themselves were held not to have been conveyed. *As an alternative rationale*, the Court then analysed whether the characters in issue were subject to copyright protection at all, for if they were not covered by *The Maltese Falcon* copyright, there could in no event be any infringement. The decision stated:

"We conclude that even if the Owners assigned their complete rights in the copyright to the Falcon, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story." 216 F.2d at 950.

On the peculiar facts and alignment of the parties in the *Warner Bros. v. Columbia Broadcasting* case, the decision had the result of reserving to the author, the original holder of the copyright, the right to use his characters, or assign the right to use them to "B", even after assigning rights in the first work in which those characters appeared to "A". The difficulty lies in the holding that the characters were not copyrightable. The Court did not expressly state, and it was unnecessary to the decision there to do so, that the "character rights", after first publication, were in the public domain. The characters there had been used only with the permission of the author. Here, the defendants assert with considerable force, that a conclusion that such character rights are in the public domain is necessarily implied by the rationale of the decision of the Ninth Circuit. . . .

Whether the alternative holding on the scope of copyright protection is an example of the hard case making bad law, is simply not relevant here, for the Ninth Circuit decision binds this Court. Similarly, the criticism which the decision has drawn is a matter to be considered by that Court, not this, if at all. The Court's research indicates that the Court has not discussed its holding in any subsequent case.

Plaintiff here urges, however, that since *Warner Bros. v. Columbia Broadcasting*, was concerned with literary characters, rather than cartoon creatures, it has no application to the issues here presented. That proposition is by no means as self-evident as plaintiff would suggest. Plaintiff has cited no Ninth Circuit law on the issue of cartoon characters' protectibility by copyright, and the decisions from other Circuits, noted above, were not distinguished in the *Warner Bros.* decision. An analysis of the cases from all circuits would certainly lead one to the conclusion that courts have tended to deal with cartoon characters rather differently than they have literary characters, but the cases have not really explained the basis of the distinction. The issue of protectibility of characters found in literature had been commented upon, but never squarely decided, prior to the *Warner Bros.* case, but the cartoon characters had been ruled clearly protectible in decisions much earlier in time. The attempts by the commentators to introduce coherence into the collection of the dicta and holding of the various cases really avails the plaintiff little, for those attempts proceed upon the thesis that if cartoon characters are protectible, so should sufficiently delineated characters of literature, that is that a carefully drawn word picture should be protected as would a graphic representation in a cartoon. That suggestion amounts to a criticism of the *Warner Bros.* case, but does not suggest a way that that decision would admit of a different rule for cartoons.

The *Warner Bros.* holding did not purport to shut the door entirely on protection for characters.

"It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright." 216 F.2d at 950.

It would seem to be a narrow gap indeed which the Court left open. . . . Do the characters created by the plaintiff, or any of them, come within the ambit of that conceivable category? Plaintiff does not expressly argue that they do. Both plaintiff and defendants do agree that the depiction of each character as it has been developed by plaintiff has achieved a high degree of "recognition" or "identification". To an extent much greater than a mere name, the distinctive style in which each character is drawn conjures up in a world-wide audience, the parties agree, associations with rather extensive groupings of traits, characteristics and qualities. This recognition, plaintiff asserts, persists "[l]ong after the particular

circumstances in which they have been depicted have been forgotten . . .", and there is little reason to assume that the defendants would take issue with that assertion. Does that amount to saying that the character "really constitutes the story being told"? After all, the character is graphically represented many, many times, in the course of each series of panels. The facial expressions, position and movements represented may convey far more than the words set out as dialogue in the "balloon" hovering over the character's head, or the explanatory material appended. It is not simply one particular drawing, in one isolated cartoon "panel" for which plaintiff seeks protection, but rather it is the common features of all of the drawings of that character appearing in the copyrighted work.

On the other hand, an examination of the copyrighted works of plaintiff readily discloses that the plot of the piece not only centers around the character but is quite subordinated to the character's role. The principal appeal of each of the plaintiff's works to the primary audience of children for which they were intended lies with the character and nothing else.

In terms of both quantity and quality, if the Ninth Circuit determined that cartoon characters were to be judged by the *Warner Bros.* standard, then several, if not all, of plaintiff's characters would meet the requisite standard for protection. If, on the other hand, the Ninth Circuit determined that cartoon characters are to be distinguished from literary characters, in keeping with the decisions in other circuits, then, also, in view of the unique qualities embodied in plaintiff's drawings, they would surely be held protectible under the copyright of the work, as component parts.

2. *Substantiality of Appropriation, Parody and Fair Use:* The court said:

The determination of this Court that the characters and their graphic depiction are protectible under the Ninth Circuit standard as component parts of the copyrighted work, really disposes of the issue of whether a substantial part was taken. In the Court's view, the characters and their depiction is the *raison d'être* of the cartoons of plaintiff here in issue. Granting that the variations in plot and in dialogue might well not be much greater than they in fact are here from plaintiff's to defendants' works, still the borrowing of characters is the borrowing of a substantial portion of plaintiff's protected works, and a substantial contribution to the work of defendants. Abstraction of the characters and, of course, their

graphic depiction, would leave the work of both parties with very little.

* * * *

Defendants argue that they have taken no more than the minimum necessary to make possible a parody upon the plaintiff's works. The Court need not pause to attempt to make a literary judgment as to the true character of defendants' works. . . . Assume that all of defendants' works are to be credited, the answer still must be: "One cannot copy the substance of another's work without infringing his copyright." 239 F.2d at 537. It need not be determined whether parody would, in fact, be possible, by taking less, for example by caricaturing the plaintiff's characters, or whether some degree of such lesser taking would be permissible. The Court is in no position to dictate a mode of literary expression to the defendants, nor to decide cases not before it. To determine this case, it is only necessary to find that the defendants here have crossed the line . . . separating fair use and infringement.

3. *First Amendment Considerations*

The court concluded that "to extend the First Amendment . . . to cover this case [and privilege defendants' acts] would serve to obliterate copyright protection in any instance in which the alleged infringer could claim the intent to convey an idea."

345. *Russell-Cason Music, Inc., et al. v. Hartford Guarantee & Trust Company, et al.*, 174 USPQ 180 (C.D. Cal., May 2, 1972) (Williams, J.).

Action for infringement of mechanical reproduction rights in copyrighted musical compositions. Plaintiffs previously obtained summary judgment on liability and, in calculating damages the court said:

Liability for unauthorized sale is separate and apart from liability for unauthorized manufacture, and separate awards may be made for each violation. Where a party is chargeable with both violations, it would not be unreasonable or inconsistent with § 101(e) to make separate awards for each violation. The maximum cumulative royalty that could be imposed for such violations may not exceed 10¢ for each record manufactured and sold containing a copyrighted composition. This computation is based upon the statutory 2¢ royalty for unauthorized manufacture and an additional discretionary royalty of 6¢ under § 101(e) (or a total of 8¢) for unauthorized manufacture and use plus an additional 2¢ statutory royalty for unauthorized sale under § 101(e).

2. State Court Decisions

346. *Shaw v. Williamsville Manor, Inc.*, 330 N.Y.S. 2d 623, 174 USPQ 277 (N.Y. Sup. Ct., App. Div., 1st Dept., April 13, 1972) (Henry, J.).

Appeal from judgment for defendant in action for infringement of common law copyright in architectural building plans. The lower court dismissed the action on the grounds that plaintiff had published his plans, thereby divesting common law protection, by filing same with a local authority pursuant to ordinance.

Held, reversed.

The filing was a "limited publication made for a definite purpose of obtaining a building permit and did not result in the surrender of any rights inconsistent with such limited purpose."

347. *Current Audio, Inc. v. RCA Corp.*, N.Y.L.J. August 3, 1972 at 2, Col. 4 (N.Y. Sup. Ct., N.Y. County, 1972) (Frank, J.).

Action for declaratory relief and defendant's motion for temporary injunction.

Plaintiff Audio planned to distribute a mixed media "magazine" including a phonographic recording of excerpts from a press conference held by Elvis Presley, together with graphic use of the singer's name and photograph. Defendant RCA claimed the benefit of an exclusive recording agreement with Presley together with the exclusive right to use his name and likeness in connection with all Presley recordings.

Held, plaintiff entitled to publication; defendant's motion denied.

1. *Neighboring Rights*: RCA asserted that New York law recognized a common law performer's right in his oratorical or artistic performances which survives delivery of the performance. The court assumed the accuracy of this statement, but found it could not support RCA's claim to relief:

Elvis Presley is concededly a singer of note whose unique style is manifested in the course of his musical performances. Such, however, was not the nature of the appearance here in issue. On that occasion, Mr. Presley was in no way "performing" as that word has application to *his* "form of art expression, and his distinctive and valuable property" . . . The spontaneous "give and take" of an unrehearsed public press conference is of a wholly different character than the delivery of a formal speech or address, or the performance of a musical or artistic work. . . . Indeed in many

ways a press conference stands as the very symbol of a free and open press, using that term in its broadest sense to encompass all the media, in providing public access to, and direct communication with, the notable and newsworthy. To hold, as defendant urges, that one who has freely and willingly participated in a public press conference has some property right which supersedes the right of its free dissemination and permits such party to control or limit its distribution would constitute an impermissible restraint upon the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.

Defendant's strained contention that the answers given by Presley did not constitute "a general publication" is ludicrous on its face in light of the open invitation to and presence of representatives from every conceivable area of the mass media, and the subsequent, uncomplained of, unlimited transmittal of the conference, including Presley's voice, over both radio and television.

Finally, it must be noted that the assertion of defendant's alleged "property right" in Presley's participation in the conference is predicated upon its contractual arrangement with Presley. However, based upon a reading of that portion of the contract which is appended to its papers, it appears that defendant's exclusive recording rights do not cover every utterance by Presley, and indeed it is questionable whether any such broad covenant could in any event be sustained (see *Bizarre Productions v. Joseph Cates*, 70 Civ. 5480 U.S. Dist. Ct. So. Dist. of N.Y.), but rather relate to "any performance" rendered by Presley. In this instance, as already noted, Presley was not in fact engaged in the performance of his art but was engaged in a public non-artistic use of his speaking voice, to which defendant was given no property rights under the contract. Thus, aside from the basic infirmities in defendant's arguments with respect to the character of Presley's participation in the press conference and his lack of any property rights emanating therefrom, defendant would in any event lack standing to itself enforce any such alleged property right because it was given no rights under contract with respect to Presley's appearance in such context.

2. *Right of Publicity*: The court held that RCA could not claim the benefit of the "right of publicity" doctrine because the Presley press conference was a "newsworthy" event and Audio's publication was a "medium of communication subject to constitutional safeguards". The court said:

[The Nature of The Event]

[The] concept [of the "right of publicity"] which was a collateral outgrowth of the "law of privacy" is a positive recognition of the pecuniary value which attaches to the names and pictures of public figures particularly athletes and entertainers, and the right of such people to this financial benefit. Such right, however, is at best a limited one and has been accorded vitality only where there is an unauthorized use of the name or picture for advertising purposes in connection with the sale of a commodity. . . . It has always been made clear that such right is limited to commercial use and that it has no application to the use of a picture or name in connection with the dissemination of news or public interest presentations, notwithstanding that such activities are also carried on for a profit . . .

. . . .

The scope of the subject matter which falls within the protected area of the "newsworthy" or of "public interest" extends far beyond the dissemination of news in the sense of current events and includes all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general. . . . That a press conference of a popular and prominent singing star falls within this broad definition of "the newsworthy" is self-evident.

[The Medium of Communication]

While the medium for dissemination of the newsworthy to which privileged status was first awarded was that of the printed word, the courts have been equally liberal in progressively expanding the ambit of protection to cover whatever new media have emerged. Thus newsreels, motion pictures, radio and television have all been held to be constitutionally protected with respect to the free dissemination of thoughts, ideas, newsworthy events and matters of public interest . . . It is apparent, moreover, that should man's creative talent continue to develop new forms of communication, the law will further expand to cloak such with protective status. It is not the precise mechanics of the medium that is of prime significance; the crucial factor is that the particular medium be designed to disseminate the newsworthy or matters of public interest. Whether plaintiff's medium be continued simply as a magazine or some hybrid medium it is clear that it is deserving of constitutional protection as a vehicle designed to communicate material which

comes within the broad arena of what is considered newsworthy and of public interest.

It is apparently [RCA's] contention that [Audio's] "magazine" is no such thing but is simply a record and, as such, is deserving of no greater protection than a commodity such as chewing gum, and that the use of plaintiff's name, picture and voice in the merchandising of such "commodity is a violation of his right of publicity." Such argument is wholly untenable. While the plaintiff's product evidences many of the properties commonly associated with a magazine, and could properly be denominated as such, thereby concededly coming within the protected sphere of communication media, the precise labeling of the entity is not of major significance. What is critically determinative is the fact that, notwithstanding its creative and novel format, it is a medium both by way of the printed and the spoken word which disseminates and communicates information of newsworthy events of varied scope and matters of human interest. As such, it is entitled to broad protection and its right to freely communicate the newsworthy must supersede any private pecuniary considerations. . . . That records are sold for profit can no more affect the protected status to which this "talking magazine" is entitled than does such fact in connection with newspapers, books, movies, radio and television. The record which is part of plaintiff's publication is as much involved in the dissemination of information and matters of public interest as are these other recognized media and as such entitled to equivalent protection.

348. *Roberts v. Dahl, et al.*, Not yet reported (Ill. App. Ct., June 28, 1972) (Burman, J.). *For decision below, see* 168 USPQ 428 (Ill. Cir. Ct. 1971), 18 BULL. CR. SOC. 337, Item 257 (1971).

Appeal from summary judgment for defendants in 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 the scripts to a certain individual (Morris) who later became employed by a public relations firm (Ruder & Finn) which represented the Clairol cosmetics company. Plaintiff further alleged that his scripts were copied in the "Beauty Spot" TV series featuring defendant Arlene Dahl, a well-known entertainment personality, and sponsored by Clairol.

The lower court granted summary judgment for defendants.

Held, affirmed.

1. The lower court found that defendants' scripts were developed "independently of and without knowledge of plaintiff's idea and scripts . . ." and held that defendants were entitled to summary judgment on the basis of independent development. The appellate court, quoting (as had the trial court) the doctrine of independent development as stated in *O'Rourke v. R.K.O. Pictures, Inc.*, 44 F.Supp. 480, 53 USPQ 95 (D. Mass. 1942) (" . . . even an exact counterpart of another's work does not constitute plagiarism, [if] arrived at independently and without in fact resorting to the other's work.") and noting defendants' uncontradicted affidavits in support of such development, agreed. "Thus", said the court, "even if plaintiff . . . presented sufficient evidence of similarity and access to raise an inference of copying, that inference was necessarily dispelled by defendants' uncontradicted evidence of independent development [and] where a defendant interposes an absolute defense involving no triable issue of fact, the court may enter summary judgment in his favor."

2. The appellate court also agreed with the lower court's holding that plaintiff's evidence of similarity and access was insufficient to raise an inference of copying. The court said:

On the matter of access, it is uncontested that plaintiff informed Victor Morris of her idea and scripts for a television show on beauty counseling. Plaintiff contends that Victor Morris, as an employee of Ruder & Finn, initiated a chain which eventually led to the disclosure of her idea and the contents of her scripts to Arlene Dahl. As the trial court pointed out, however, there is no evidence that Morris disclosed or communicated his knowledge of plaintiff's idea and scripts to anyone. Plaintiff stated on deposition that Arlene Dahl came into possession of the detailed contents of her scripts, but when pressed to be more specific, she admitted that she did not know when, under what circumstances, or to whom Morris had disclosed this information . . . Conversely, those individuals responsible for writing and producing the Arlene Dahl scripts all stated on affidavit that they had no knowledge of Victor Morris or plaintiff, or of plaintiff's idea or scripts for a television beauty program.

It is well established that the courts will not engage in speculation or conjecture in order to make a finding of access . . . Moreover, the courts have refused to find access where, as here, the uncontroverted evidence of the persons directly involved in the preparation of defendant's work was that they had never seen or heard of plaintiff's scripts . . .

Plaintiff stresses that proof of substantial similarities can in some cases give rise to an inference of access . . . She has presented to this court a side-by-side comparison of both sets of scripts in an effort to show substantial similarities. We have also been presented by defendants with a side-by-side comparison of Arlene Dahl's scripts with her book entitled "Always Ask A Man—The Key to Femininity", which was published in May, 1965. We find virtually all of the similar language relied on by plaintiff can be found in Miss Dahl's book. In addition, Miss Dahl had been writing syndicated newspaper articles on the identical subjects covered in plaintiff's scripts long before plaintiff claims she authored her scripts. Moreover, certain descriptive words claimed by plaintiff to be original are but the routine phrases commonly used in the beauty consulting field. The inference of copying does not exist "where the similarity between the two works arises because of the nature of the subject matter and the fact that both authors used materials available to all." . . .

3. Presiding Judge Dieringer, fearing that "the majority opinion will foreclose the right to trial by jury in copyright cases", dissented in a lengthy opinion discussing the law pertaining to summary judgment and affidavits by interested parties and emphasizing "astonishing similarities" between the parties' scripts in language, format, continuity of thought and presentation.

349. *Columbia Broadcasting System, Inc. v. Custom Recording Company, Inc.*, 174 USPQ 309 (S. Car. Sup. Ct., May 29, 1972) (Littlejohn, J.). *For decision below, see* 171 USPQ 502 (S. Car. Ct. Comm. Pleas 1971), 19 BULL. CR. SOC. 412, Item 261 (1972).

Plaintiff's appeal from denial of preliminary injunction in action for record piracy.

Held, reversed.

1. The court, after reviewing various "disklegging" cases decided after *Sears and Compco* [376 U.S. 225 and 234 (1964)] concluded that defendant's "parasitic" acts amounted to actionable unfair competition under the misappropriation theory of *International News Service v. Associated Press*, 248 U.S. 215 (1918).

2. As South Carolina had enacted an "anti-common law copyright" statute in respect of phonograph records,* the court noted its agreement

* S.C. Code Ann. (1962), §66-101 provides, in part, that "When any phonograph record or electrical transcription, upon which musical performances

with a North Carolina holding that disklegging was not condoned by such statutes:

In *Liberty/UA, Inc. v. Easter Tape Corp.*, 180 S.E. 2d 414, 170 USPQ, 351 (1971) . . . plaintiff was faced with a statute identical to § 66-101 of our Code . . . both states having enacted it in 1939. In discussing the effect of the statute on that case, the court said, and we agree, 170 USPQ at 353-354:

“* * * It is unlikely that in 1939 the legislature had heard of this type of conduct [record piracy], 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. Judge Bussey dissented, stating that “The proposed majority opinion, in effect, decides, on the merits, a most important question of completely novel impression in this jurisdiction, without the benefit

are embodied, is sold in commerce for use within this State, all asserted common-law rights further to restrict or collect royalties on the commercial use made of any such recorded performances by any person are abrogated and expressly repealed. When such article or chattel has been sold in commerce any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself and the right to further restrict the use made of phonograph records or electrical transcriptions whose sole value is in their use, is forbidden and abrogated.”

of all the facts; without the benefit of any finding of fact by either a court or jury below; without the benefit of any oral argument; without even attempting to pass upon all the asserted defenses, and without the benefit of an in point decision from a court of last resort of any other jurisdiction”.

3. Also of Interest

350. *Simon & Schuster, Inc. v. Gunn Enterprises, Inc.*, N.Y.L.J. May 4, 1972 at 18, Col. 1 (Sup. Ct., N.Y. Co. 1972) (Saypol, J.).

“Involved here”, said the court, “is the practice of publishers who sell paper-back books to wholesalers on a fully returnable basis with full credit. The cost-saving distribution technique in respect of returns permits tearing off and returning the front cover alone provided the remains are destroyed or disposed of as waste paper and not as books. Extra costs are eliminated, enabling a lower price, while legitimate wholesalers and retailers are safeguarded against bootleggers, protecting authors and copyright owners also.”

Plaintiff publisher pled seven causes of action. The first and second causes charged “John Doe” wholesalers with breach of contract and fraud in stripping and returning covers for full credit while knowingly disposing of the coverless books to the “Richard Roe” waste paper dealer-defendants, and to the moving defendant-booksellers for resale as books. The third and fourth causes charged the “Richard Roe” waste dealers with breach of contract and inducement to breach in selling stripped books to the moving defendant-booksellers. The fifth cause of action charged the moving defendants with inducing breach of contract by the “John Doe” wholesalers and “Richard Roe” waste dealers; the sixth charged the movants with conversion; and the seventh sought injunctive relief.

In the instant proceeding, the defendant-booksellers moved for judgment dismissing the fifth, sixth and seventh causes of action.

Held, motions denied.

1. *The Inducement Charge* (Fifth Cause of Action):

The court found this claim legally sufficient on the pleadings. Although defendants urged that no act of inducement was alleged and that their mere dealing with plaintiff’s customers could not comprise an inducement to breach, the court said:

. . . this is not a case of the purchase by a defendant from a third party who had already agreed to sell to plaintiff, or the case of a

contracting party withdrawing from his own contract voluntarily. Here plaintiff had not withdrawn, its purchaser had not withdrawn, the moving defendants had not purchased what another had agreed to buy. On the contrary, defendant's acquired the stripped books not as originally sold, and they acquired these stripped books contrary to the trade practice restriction which constituted the breach by their vendors of the latter's concluded agreement with plaintiff.

2. *The Conversion Charge* (Sixth Cause of Action):

The court also sustained the sufficiency of the claim for conversion because plaintiff's customers' "title" to the books was "qualified" by the practice of full credit on cover-return, thus leaving plaintiff with a protectible possessory interest in the books left by custom with their customers. The court said:

Plaintiff on giving the full credit becomes entitled to possession and dominion but pursuant to the trade practice the property is left with the immediate vendees for a limited purpose, of which, as alleged, all defendants have knowledge. Those vendees did not transfer what they had and their vendees did not acquire what plaintiff entrusted to its vendees. There was conversion in that there was an impermissible delivery and taking for an impermissible use. In short, accepting the allegations of the complaint, it is a reasonable conclusion that the moving defendants are not innocents in handling stripped books and flouting the trade practice and plaintiff's rights.

3. *Injunctive Relief* (Seventh Cause of Action):

In sustaining the claim for equitable relief, the court observed that "[p]laintiff is entitled to the protection of its reputation and prevention of possible violation of copyright and reprint licenses and of jeopardizing the marketing structure."

351. *Waters v. Moore, et al.*, N.Y.L.J., June 8, 1971 at 20, Col. 3 (N.Y. Sup. Ct., Nassau Co., 1972) (Wachtler, J.).

Action for defamation and violation of N.Y. Civil Rights L. §§ 50, 51 (Right of Privacy). Plaintiff, a former agent of the Federal Bureau of Narcotics, was involved in various factual incidents dramatized in the book "The French Connection" and the motion picture derived therefrom. Plaintiff's actual name and photograph were used in the

book; however, neither his name nor actual likeness was used in the motion picture.

Plaintiff alleged that both the book and the motion picture contained defamatory matter. On the book, defendants' motion to dismiss the defamation claims for failure of the complaint to state the defamatory language, the court granted plaintiff's cross-motion to amend the complaint to cure the omission.

Plaintiff also alleged that the book violated his right of privacy by using his name and photograph without his consent; this cause of action was not here at issue.

Plaintiff further claimed that the motion picture violated his right of privacy by using his recognizable "character", albeit under a fictional name, for the purposes of advertising or trade without his consent. On the motion picture defendants' motion to dismiss, *held*, granted. The Court concluded that the New York right of privacy statute is not violated where an individual's "name, portrait or picture" is not used, notwithstanding possible recognition of a portrayal of such individual or inaccurate representations. The Court said:

The motion picture does not use the plaintiff's name or picture. What the plaintiff really means is set forth in his affidavit: "There is no doubt in my mind that the agent Mulderig in the motion picture is Frank Waters." . . . Without attaching any particular significance to labels, this allegation may fairly be read to mean that agent Waters in the book is "characterized" by agent Mulderig in the movie . . .

. . .

The movie, it is alleged, also contained numerous untruths regarding the plaintiff . . .

The question to be answered may thus be restated: Does the motion picture dramatization of an actual incident violate the statutory privacy right (Civil Rights Law, secs. 50, 51) of an individual involved if that person's "name, portrait, or picture" are not employed? And does the answer change by virtue of an allegation that the incident is inaccurately portrayed or that the individual is popularly known or may be readily ascertained by reference to external sources?

Spahn v. Julian Messner, Inc. (18 N.Y.S. 2d 324), tells us that the statute is violated by a substantially fictitious biography concerning a well known individual. . . . In *Spahn*, of course, the plaintiff's name was used repeatedly in a book which purported to be his biography. "The French Connection" identifies itself as

"fictitious," albeit based on an actual event, does not purport to be a biography, and does not use the plaintiff's name. It is thus significantly distinguishable.

. . . . [It] is [also] clear that "truth," in and of itself, even defamation, is not at the essence of the right to privacy. "Truth or falsity does not, of itself determine whether the publication comes within the ban of sections 50 and 51." (Koussevitzky [v. Allen, Towne & Heath, 188 Misc. 479 (Sup. Ct., N.Y. Co., 1947)].

Neither is the test whether an individual's identity can be ascertained from his involvement with the actual event or by reference to external sources (*Toscani v. Hershey*, 271 App. Div. 445; *University of Notre Dame v. 20th Century Fox*, 22 A.D. 452). In the *Toscani* case, plaintiff charged that the book and play "A Bell for Adano" were based upon a true incident, and that the plaintiff was portrayed in both as the central character under a fictitious name. In reliance on *Binna v. Vitagraph Co.* (210 N.Y. 51), plaintiff argued that the statutory language, "portrait or picture," includes "any representation of a living person which would include one in words or substance describing events that would be recognizable as acts and events of and concerning a living person." The court rejected this argument. The statute "was not intended to give a living person a cause of action for damages based on the mere portrayal of acts and events concerning a person designated fictitiously in a novel or play merely because the actual experience of the living person had been similar to the acts and events so narrated. To so construe the statute would broaden its scope far beyond anything warranted by the meaning that would ordinarily be ascribed to the words 'name, portrait or picture' especially when they are considered in the light of the history of the statute" (271 App. Div. at 448).

University of Notre Dame v. 20th Century Fox (22 A.D. 2d 452), is equally to the point. "John Goldfarb, Please Come Home" was a broad farce concerning the plaintiff university. The book twice mentioned the university's president, Father Hesberg, but his name is not used at all in the film. His claim for invasion of privacy was dismissed concerning the book because the references to him were of a "fleeting and incidental nature" and concerning the movie because "the film does not use his 'name, portrait or picture,' the statutory test of identification."

Finally, the court is unaware of any case in this state which sustained a cause of action under the statute where the plaintiff's "name, portrait or picture" was not employed (see e.g. *Binns v. Vitagraph Co.*, 210 N.Y. 51; *Sutton v. Hearst Corp.*, 277 App. Div.

155). The conclusion is thus inevitable that valid causes of action for invasion of privacy are not stated against [the motion picture defendants].

Plaintiff asserted that since the book and motion picture were jointly promoted by the book and motion picture defendants, the latter had "adopted" the former's use of plaintiff's name and photograph. The court, relying on the above cited *Notre Dame* ("John Goldfarb") case, concluded that "the statute is not designed to permit a bootstrap operation of this nature":

[In *University of Notre Dame v. 20th Century Fox*, *supra*, the court said:] "We do not think [the] test [of identification] is satisfied by the conjunction of the fact that the book names him and the fact that the cover pages, of the paperback edition which in no way refer to him or his co-plaintiff, laud the film" (22 A.D. at 455). In the present case the attempted conjunction between book and film is identical, and equally unsuccessful.

352. *Opinion of the Comptroller General of the United States*, BNA's Pat., Tm. & Copr. J. No. 85 at D-1 (No. B-173146, June 15, 1972) (Keller, Deputy).

The Union Carbide Corporation ("Union") protested a laser sub-contract awarded by LTV Electrosystems, Inc. to Martin Marietta Corporation under LTV's prime contract with the U.S. Air Force. Union complained, *inter alia*, that the sub-contract solicitation's specifications and drawings incorporated Union's proprietary design data.

During a prior phase in the program, Union allegedly provided an earlier LTV subcontractor ("Varo") with certain proprietary drawings with limitation of Varo's rights and under restrictive legends. Varo provided allegedly overlay copies, without legends, to LTV from which LTV allegedly derived the data complained of. Union therefore claimed that LTV's use of the drawings exceeded the limited rights it had granted Varo and requested that it be allowed the fair value of the "proprietary" drawings used by LTV.

The Comptroller General disallowed the claim, principally because the Government had no prior notice of Union's claimed proprietary rights. The Comptroller General's office advised Union:

We believe it is significant and controlling for purposes of this decision that the Air Force obtained the alleged proprietary drawing without a proprietary legend attached pursuant to a contract with LTV . . . and proceeded in good faith to allow the drawing to be

used as contemplated, that is, for solicitation of competitive offers for the item . . . Moreover, at the time LTV . . . received the Varo drawings and used them in the . . . solicitation, it had no notice of any proprietary rights, actual or alleged, in the drawings involved. We have held that the Government is entitled to disclose and use for any purpose technical data which it purchases for value from a contractor (prime) without restriction and without notice of another (third) party's proprietary rights in the data . . .

In addition, the Comptroller General will not adjudicate disputes regarding violations of proprietary rights arising under arrangements to which the Government is not a direct party (e.g., Varo's relation with [Union]) and until such rights have been established in courts, or otherwise, we are not justified in disturbing any program or granting any relief to the protesting party . . . You have noted that in our decision B-166022, May 22, 1969, we . . . pointed out the statutory authority to the Secretary involved for administrative settlement of the clear breach of confidence found in that case. However, that decision must be distinguished from the present situation in that the data there involved had been directly furnished to the Government, it had been marked with a proprietary legend when received by the Government, and the Government had assured the protestor by letter that its proprietary rights would be protected.

PART V.

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"Originally published in the *Encyclopedia of Library and Information Science*, volume 6." See 19 BULL. CR. SOC. 155, Item 98 (1971).

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A short history and description of the functions of the Society.

NEWS BRIEFS

386. LIBRARY OF CONGRESS SUES TO GAIN GERSHWIN SCRIPTS.

The U.S. Library of Congress, according to *Variety*, July 12, 1972, filed suit in N.Y. Surrogates Court during the week of July 5 to gain possession of fourteen original manuscripts of songs written by the late George Gershwin. The manuscripts were found among the papers of the late Leon Leonardi, a one-time copyist for Gershwin. Leonardi died in 1967 without leaving a will. The court-appointed public administrator handling his estate has blocked transfer of the manuscripts to the Gershwin estate. Ira Gershwin, brother of the composer, donated Gershwin's manuscripts to the Library of Congress in February, 1971; hence the Library's suit is directed toward getting the administrator of Leonardi's estate to deliver the manuscripts to the federal government.

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CORRECTION

In the report of the case of *Trebonik v. Grossman Music Corporation et al.*, 305 F.Supp. 339, 163 U.S.P.Q. 352 (D. Ohio August 28, 1969), which appears in 17 BULL. CR. SOC. 132, item 66 (December 1969), the language: "Defendants authored, published and distributed an allegedly infringing booklet entitled 'How to Play Rock and Roll Moveable Chords' ", should be clarified to indicate that Grossman Music Corporation was merely the distributor, and neither author nor publisher.