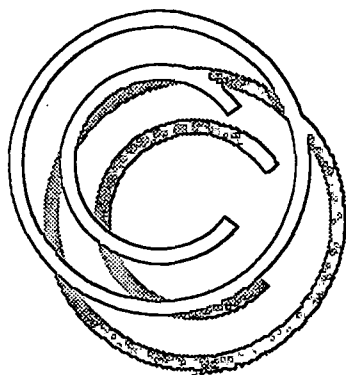

BULLETIN

OF THE

COPYRIGHT SOCIETY

OF THE U.S.A.



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Walter J. Derenberg
1903 - 1975

Walter J. Derenberg

It is my sad task as President of the COPYRIGHT SOCIETY OF THE U.S.A. to inform the Society's members that our dear and devoted colleague, Walter J. Derenberg, died on September 9, 1975.

Elsewhere in this issue of the BULLETIN you will read eloquent tributes from respected and respectful colleagues.

I, for myself and speaking for the Society, can only say that we will miss him in countless ways. No one reading these words needs to be reminded of Walter's role as a founder of the Society, the mainstay of its BULLETIN, and the guiding spirit behind every facet of its activities. Knowing Walter's wishes, I am certain he would want me to say that a most fitting tribute to his memory would be to carry on his work.

Accordingly, until official action is taken in the near future, Alan Latman has offered his services to the Copyright Society, and will supervise editorial content of the BULLETIN. All manuscripts and other material should be sent to the Society's office at the New York University Law Center, marked for his attention.

Through the force of will, Walter lived to witness the first steps toward the establishment of an expanded and enriched copyright program at N.Y.U. in his honor, initially to take the form of library resources. The Walter Derenberg Fund has been established as a fitting tribute to Walter's memory. Contributions can be made by check, payable to the NEW YORK UNIVERSITY—WALTER DERENBERG FUND, and mailed to the Office of Law Development, Vanderbilt Hall, New York University School of Law, 40 Washington Square South, New York, New York 10012. Those wishing to make pledges to be paid over a period of time can obtain pledge cards from the office of the President of the Society, Paul Gitlin, 7 West 51st Street, New York, New York 10019. Contributions are tax deductible.

Paul Gitlin,
President, Copyright Society
of the U.S.A.

WALTER J. DERENBERG—A TRIBUTE

*Spoken by Robert B. McKay,
former Dean of New York University School of Law
on September 11, 1975*

We come together today to remember our good friend Walter Derenberg. Although there are hundreds of us here, we are only a small percentage of all those who would wish to be on hand to pay this simple honor to Walter. His friends, former students, and professional comrades are scattered through every part of this country and almost literally every other country. But Walter, in his unassuming way, would not have wanted anyone to make some inconvenient arrangement to be here today. He would have said, "Don't bother."

But Walter would have wanted to be remembered by his good friends; and that is why we are here today, to speak together quietly about the joyous, ebullient, gentle man we all knew and all loved so dearly.

I have learned since Walter's death what kind of a service he wanted this to be. As I am sure you know, his health had long been precarious. He had a pacemaker for some years, and there were occasional collapses and hospitalizations. He carried with him the premonition of death, but that inexorable mandate was stayed until two days ago by his fierce determination to carry on, because he always had a new reason to live just a little longer. I recall, for example, that in the spring of this year he told me several times that he wanted to live until the day in April when the current volume of the *Annual Survey of American Law* was to be dedicated to him at a reception in his honor. I know now, as I only partly realized then, how deeply he meant that statement and how real was the demand that his will imposed on a body that no longer functioned except on special command.

On July first of this year, as I have now learned, Walter committed that premonition to writing, working with his close friend and former student, Jerry Lipper, who is now his executor. In that instrument he expressed his preference about how this funeral service might be conducted. He specified the Reform Jewish faith, music (you *would* know that) and a statement to be made by "Bob McKay, if available." (Note the unwillingness to impose an obligation, even on a close friend—as if it were not instead an honor to have the opportunity to speak about Walter to his friends.) We knew that he would have wanted a simple service, but there were no instructions about the tone. But I have now learned what he intended. His sister, Gabrielle Schiff, told me that he wanted me to repeat what I had said extemporaneously at the time of the *Annual Survey*

dedication in the spring. I cannot recapture the words, and I would in any event want to widen the frame beyond what I said then at a peculiarly in-house occasion. But what I did learn from his sister's remark is what he wanted the mood to be. That was a day of celebration, an opportunity to do honor to Walter, everyone's favorite. The occasion was joyous, even festive; and Walter's response was one of the best of his famous witty presentations, full of self-deprecation and reports of his lifelong encounters with a perverse world of mechanical devices and unaccountable occurrences.

So I know that Walter wanted us to think of him in happy recollection of the good times we have all had together. For he enjoyed life, everything he did, and everyone he knew.

Walter spoke often and affectionately of his family in Hamburg, Germany, where he grew up, and of his pleasures in study there and during his early years of government service and law practice in Hamburg and in Berlin. You can imagine, then, the horror with which this sensitive and intellectual young Jew saw the Nazis burning books on a Berlin street in 1933 and later saw the Reichstag fire. For a time he tried to persuade himself that life could go on; but by 1934 he gave up. As had so often been true in the past, Europe's folly was America's gain.

Soon after Walter came to New York, he took two jobs, one with the American Arbitration Association and one as lecturer at New York University School of Law, teaching the law of trademarks and unfair competition as regular subject matter for the first time in any American law school. Concurrently he was writing his major treatise, *Trade-Mark Protection and Unfair Trading*, published in 1936. Most remarkably of all, at the same time Walter was also a full-time law student at New York University because his German law degree would not allow him to practice in this country. Many of us recall Walter's hilarious account of his first encounter with the formidable Professor Larry Simpson at a faculty meeting, shortly after a particularly stressful encounter in class.

From that time forward, Walter's professional life was a constant triumph. His writing and teaching made him pre-eminent in the fields of copyright and trademark law. He has long been known as "Mr. Copyright", "Mr. Trademark", and even, in the fancy modern term, as "Mr. Literary Property". He has received medals, scrolls, certificates, and awards. Books have been dedicated to him, and speeches made about him. But I truly believe that the most treasured awards of all came from the Law School, which was second in his affection only to his love for Emily, his wife. In 1967, he was one of three recipients of the University-wide Great Teacher Awards; and in the Spring of 1975 the *Annual Survey* was dedicated to him. Both were quite appropriate. His former students

in the audience can testify to Walter's unique capacity as a teacher; and I once computed that nearly 10 per cent of the writing in the *Annual Survey* during a more than 25 year period was by Walter—some years he contributed three or four separate articles to a single volume.

There was one other recognition he would have liked. That recognition is already assured, but will come too late for him to be present. In November of this year, the Law School plans to dedicate the WALTER J. DERENBERG COPYRIGHT LIBRARY as the first step in developing the School's ever-deepening involvement in the field of intellectual property. Walter struggled to stay alive for that event.

The large numbers of Walter's friends who are here today make it impossible for all of us to know each other. But the same would be true even if there were only a few of us. Walter collected friends wherever he went, from each aspect of his many and diverse interests: family; law school colleagues; thousands of students; law firm associates; clients from other law firms, corporations, and governments around the world; and friends from the sometimes interlocking, sometimes separate worlds of chess, music, photography—and dog lovers. We could not possibly all know each other. No one of my acquaintances had so many interests in which his expertise was well recognized. I am almost tempted to ask, in classroom fashion, how many knew Walter first as students, how many as clients, how many through music, or chess, or photography. But I restrain myself. We are all here as friends of a man who was remarkably unitary as well as manifestly diverse.

Close as I was to Walter, I was not part of his professional group (but always invited to his famous Copyright Society parties). I scarcely know copyright from right of entry, or trademark from price markup. Chess has never interested me; in comparison to Walter, I am a musical illiterate; and cameras are as intractable to me as all other things mechanical were to Walter. But we shared a great deal, from affection for the Law School to—bedrooms, at Association of American Law Schools meetings, where Walter liked me as a roommate because I gave him my pillow and allowed him to control the windows. We talked at length, gossiped a bit, and we laughed quite a lot.

Each of us will remember Walter in his or her own way; for he was a vivid and powerful personality despite all his gentleness and modesty. Without wanting to disturb any of your separate recollections, I should like to tell you how I believe Walter would like to be remembered.

First, he would want you to recall his family love and pride. During the last week, when sometimes Walter did not recognize his visitors, Emily asked, "Do you know who I am?" He responded, "My beloved wife." What more can one say except that he also loved her son—his stepson Bob

Hess—Bob's wife, Stephanie, and their three sons, as though they were his own.

Second, Walter would want to be remembered for what he did in the Law School—and truly, *for* the Law School. Many have said, I believe accurately, that of all his professional associations, he valued his Law School affiliations most. I well remember the unhappy day when at last, as dean, I felt it necessary to talk to him about retirement. I used the word “emeritus”, and saw that he was destroyed. Only later did I learn that all I had to do to ease his mind was to assure him, as always intended, that we wanted him to teach almost as before, but free of other responsibilities. Indeed, he had planned until this summer to teach as usual this fall. I find it not without at least symbolic significance that he hung on until the very day the new school year began.

Third, I believe Walter would want to be remembered for his professional accomplishments. They were important to the world, and real to him despite his own incredulous wonderment that so much had been possible for a man who began a new career in a new country in the fourth decade of his life. His treatise, his many articles, and his annual reports to the American Bar Association are vivid reminders of his intellectual contribution. But most of all—once more I must say it—I believe he would want to be judged by the performance of his students, here and around the world. Walter was, you know, a world traveler and a tourist in the best sense. Finally, this spring I reached a far outpost where I thought he had not been, South Africa. But as I met judges and lawyers and university professors, Walter was the first of my colleagues about whom inquiry was made. Some knew him from one international meeting or another, some did not; but they all knew his work and his established worldwide reputation.

Fourth, I believe Walter would want to be remembered for his avocational interests: chess, music, and photography. He was a familiar figure in Washington Park, often walking his dog, Ernest, quietly taking on noisy, self-proclaimed chess masters for 25 cents a game—and more often than not, defeating them.

Finally, and in a way most importantly, I believe Walter would want you to remember him for his joyous spirit, as an eternal optimist, and as the ebullient good friend that he always was to me and, I am sure, to each of you.

That is the way I shall remember him, not in sadness, but in joy for the years we had together, now in friendship everlasting.

WALTER J. DERENBERG,

*As Remembered by the Hon. Barbara Ringer,
United States Register of Copyrights*

It is always shocking and somehow unfair when a truly great man dies, immeasurably more so when he is a warm and vital friend. Walter Derenberg's intelligence and abilities could have commanded a distant awe, yet in all whose lives he touched there was generated, first and foremost, real affection. One sensed, and then knew, that he was a rare individual, a realist who loved life and his fellow man.

He is impossible to eulogize in the usual way: to recall his contribution to the literature of the law is to give him the appearance of a narrow academic, which he certainly was not. To say he was an excellent lawyer, in a field with an unusual amount of legal talent, is to conceal his uniqueness as a lawyer. And while it is accurate to remember, above all, that he was a great teacher, even that accolade does not begin to disclose that all of us, at one time or another and in many different ways, were his students. Walter Derenberg, up to the very moment of his death, was one of the central shapers of American jurisprudence. Yet even this misses the loss we feel most poignantly: the man himself, endlessly interesting, inexhaustably curious, an irrepressible blend of wisdom and laughter.

Largely because of the antiquity of our copyright law, much that is important doctrine has been court-made law. In this process, the role of the private attorney is immeasurable; the degree to which society has benefited from copyright has hinged on the ability, sensitivity and statesmanship of the copyright bar. Even though we deal with statutes, the copyright bar may be one of the last bastions of the classic "common law" process in modern day America.

Walter was the best of that breed of legal statesmen who for almost 50 years, by force of reason and foresight, sacrifice and extraordinary labor, prepared the American copyright bar for the crucial role they played in shaping the law to meet today's society.

As a teacher in one of the pre-eminent law schools of the country, he expanded the intellectual horizons of at least a generation of students, many of whom are now carrying the tradition of legal statesmanship he inspired. He did more than teach them the rules of the game. He imparted a vital and often overlooked awareness that copyright and intellectual property are instruments that transcend day-to-day business law and touch squarely upon overriding issues of intellectual and artistic freedom in our country and the world community.

His quality as a teacher, in the broadest sense of the term, included more than a command of his field. Even if the subject was uninteresting, Walter never was. He taught as much by the example of his personality as from hornbooks. His teaching was the kind Emerson had in mind when he wrote:

There is no teaching until the pupil is brought into the same state or principle in which you are; a transfusion takes place; he is you, and you are he; there is a teaching; and by no unfriendly chance or bad company can he ever quite lose the benefit.

The Copyright Society of the U.S.A.—the credit for whose formation must go to Walter first of all—has become much more than a professional association. It is the focal point of much of the intellectual life of the copyright bar. In organizing the lawyers, however gently, it focused the efforts to maintain unity and relevance in our field. The pages of the *BULLETIN* have done more than keep us up to date on administrative, judicial, legislative and international developments in copyright; they have reflected, and often initiated, significant debate on every major policy issue in copyright.

Whether we realize it or not, Walter made possible the development of a sense of intellectual community, not predicated upon complete agreement, but rather upon a concern for the nation's culture. Through the Society and its diverse activities, he engendered a belief that reason is, in fact, the life of the law and a genuine delight in creative dialogue. This community is Walter's legacy to all of us—the work of a powerful and humane scholar whose infectious joy in life and the law was a source of constant pleasure and support. We were all his friends, colleagues, and students and, though he leaves many monuments to recall his achievements, we already miss his unquenchable spirit.

**DEDICATION OF THE ANNUAL SURVEY OF
AMERICAN LAW, 1973 / 74***

Each year we, the Editors of the *Annual Survey of American Law*, are privileged to select an outstanding member of the legal community as the dedicatee of our current volume. This year's dedication takes on a special significance in allowing us to express our appreciation to a distinguished and long-standing contributor to *Annual Survey*, Walter J. Derenberg.

Born in Hamburg, Germany in 1903, Walter Derenberg came to the New York University School of Law in 1934. With a degree of Juris Doctor from the University of Hamburg, he was simultaneously a first year law student and lecturer for the first graduate course in the United States on the protection of trademarks. Appointed Professor of Law at New York University in 1949, Professor Derenberg has succeeded in imparting his vast knowledge of the law of copyright, trademark and unfair competition to thousands of aspiring attorneys. His experience, coupled with his unique style and unbridled enthusiasm, has produced some of the most interesting and rewarding intellectual adventures in any area of the law.

In addition to his outstanding academic accomplishments, Professor Derenberg has contributed greatly to both national and international legal literature. It would indeed be difficult to find any thorough discourse on the law of copyright, trademark or unfair competition which did not contain some reference to one of his many works. In addition to preparing his Report to the Patent, Trademark and Copyright Section of the American Bar Association, published annually for the past twenty-seven years, he is the Editor-in-Chief, founder and past president of THE BULLETIN OF THE COPYRIGHT SOCIETY OF THE U.S.A.

Many have preceded us in our tribute to Professor Derenberg. His honors include the Great Teacher Award of the New York University Alumni Association, the Charles F. Kettering Award of George Washington University (1971), the Richard Strauss Medal presented by the German Performing Rights Society (GEMA, 1970) and the Jefferson Medal of the New Jersey Patent Law Association (1963).

*©Copyright 1974 by New York University.

The last of many public honors accorded to Professor Walter Derenberg was the dedication to him, in April 1975, of the 1973 / 74 volume of the *ANNUAL SURVEY OF AMERICAN LAW*, a publication produced by honor students at the New York University School of Law. The tributes in that volume, written by students of Walter Derenberg and by two distinguished colleagues, are reprinted here.

We wish to thank Professor Derenberg for the high scholarly standards he has brought to our publication—standards to which he has so faithfully adhered for thirty-two years.

THE BOARD OF STUDENT EDITORS

It would be difficult to call to mind any relevant honor that has not been bestowed upon Walter Derenberg in his chosen fields—the law of, trademark, copyright and unfair competition. Educator, practitioner, author and perceptive architect of the law in these subtle and complex areas, Walter Derenberg richly deserves the extraordinary recognition that he has received.

He has endeared himself to the hundreds of students, fellow-educators and lawyers who have had the good fortune to encounter him. He has set for them standards of excellence, dedication and urbanity that have delighted them and enriched the quality of their lives and professional careers.

The scope of Professor Derenberg's work and activities is truly amazing. He is an unusual example of a specialist who has contributed his unique knowledge, skill and understanding without reservation. His expertise has not been an asset for personal exploitation, but a quality to be made available through generous service to society.

ABE FORTAS

PARTNER AT THE FIRM OF FORTAS AND KOVEN

The law of trademarks, copyrights and unfair competition has developed over the years to such a high degree of complexity that most judges and practicing lawyers hesitate to give an opinion or to handle a case in that field without the guidance of one "skilled in the art." For many years Professor Derenberg has been recognized as the foremost authority in the philosophy and drafting of the law in this area. His publications, including his Annual Reports to the American Bar Association, are sources to which bench and bar alike turn when confronted with problems in this field. Whenever I have been faced with problems in the field I have almost automatically thought of Professor Derenberg. In view of his dedication to advancement of learning in this branch of the law one can be confident that he and his published works will bring the wisdom and judgment gained from years of experience to the solution of any perplexing patent and copyright question. His learning and skill are evidenced by

his many articles with respect to developments in the administration of the Lanham Trademark Act of 1946, his membership on the Editorial Board of the United States Trademark Association, his authorship of "Trademark Protection and Unfair Trading," which is considered the modern "bible" on the subject, and his participation as a member of the Panel of Experts appointed by the Library of Congress to revise the Copyright Law.

My mention of some of Professor Derenberg's accomplishments tells only part of the story. There is a much more important side that can only be derived from personal experience. That is his ability to simplify the complicated and to translate learning of a sometimes esoteric nature into terms that are understandable to the average professional person. My appreciation for his skill in this regard did not arise out of attendance at his outstanding lectures at New York University (I graduated from law school before they began) but from my having had the good fortune to preside in several cases which he briefed and argued as counsel. Throughout tortuous litigation Professor Derenberg was of great help to the court. More important has been his willingness throughout his professional career to make his rare gifts available not only to the legal profession but to the general public.

It is a pleasure to join in a tribute to Professor Walter J. Derenberg.

WALTER R. MANSFIELD
JUDGE OF THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

PART I.

ARTICLES

1. PRE-CONSTITUTIONAL COPYRIGHT STATUTES*

By FRANCINE CRAWFORD

In the period between January, 1783, and April, 1786, twelve of the thirteen newly-independent colonies passed copyright statutes. A comparison of the pre-constitutional copyright acts follows, but first the events which led up to their passage might be considered. The most appropriate point to begin is with the career of a man named John Usher.

John Usher was a prominent and financially successful publisher in Boston during the latter half of the seventeenth century. He not only published works in his own right, but he marketed the best English imports and local publications as well. While his career was at its height, Usher was chosen by the General Court of the Massachusetts Bay Colony to publish a revised edition of the public laws. Usher habitually contracted out his printing, and he began to worry that his printers, Samuel Green and Marmaduke Johnson, would run off more editions than he himself ordered, and sell these extra copies for their own profit.¹ In order to prevent this, Usher petitioned the court for the exclusive right of publication of the laws. Therefore, in May of 1672, the General Court for Elections of the Massachusetts Bay Colony issued the following order, our oldest indigenous copyright law:²

"In ansr to the petition of John Vsher, the Court judgeth it meete to order, & be it by this Court ordered & enacted, that no printer shall print any more coppies then are agreed & pajd for by the owner of the sajd coppie or coppies, nor shall he nor any other reprint or make sale of any of the same, without the sajd owners consent, vpon the forfeiture and poenalty of treble the whole

* This paper won First Prize in ASCAP's 1975 Nathan Burkan Memorial Competition in Copyright Law at the New England School of Law.

¹ J. TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES, VOLUME I, THE CREATION OF AN INDUSTRY 1630-1865, 25 [1972] [hereinafter cited as TEBBEL]

² The court order was later expanded, giving Usher a definite right to publish this work for a seven-year period.

charges of printing, & paper &c., of the whole quantity payd for by the ouner of the coppie, to the sajd ouner of the coppie, to the sajd owner or his assignes.”³

Though an act of this type was not passed in any other colony, it did incorporate all the basic elements of future pre-constitutional copyright statutes—e.g., the persons protected (owners and their assigns), the consent provisions and the formula for computation of damages.

Of course, since the laws of Great Britain applied throughout its empire, printers and publishers in Usher's time were protected by English common law copyright and later by the British Copyright Act of 1710, which policed violations of intellectual property rights.⁴ Only once more in the years between John Usher's petition and the Revolutionary War was a copyright bill produced in the colonies. In 1770, author William Billings tried to gain protection for his compendium of songs, *New-England Psalm-Singer*. Although the House of Representatives of Massachusetts passed the bill on June 14, 1772, giving Billings exclusive rights in the work for seven years, Governor Hutchinson would not sign it on the ground that English copyright laws were sufficient to protect the colonists.⁵

By the time the Revolutionary War broke out, Jeremy Belknap, founder of the Massachusetts Historical Society, Tom Paine, Joel Barlow, and Noah Webster were agitating for comprehensive copyright laws. By 1783, Webster was travelling north and south promoting the passage of such statutes. John Ledyard, author of *A Journal of Captain Cook's Last Voyage to the Pacific Ocean*, had petitioned the Connecticut Assembly for protection of his book. Webster, upon returning to his home state, was instrumental in persuading the Assembly there to grant Ledyard's request, and so the first independent American copyright act was passed, and the first copyrighted book in the new country was published.⁶

The Articles of Confederation, which went into effect on March 1, 1781, authorized Congress to set forth certain rules and regulations in order to preserve the independence and sovereignty of the states.⁷ Later,

³ 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, part 2 at 506, 527. Printed by order of the Legislature, edited by Nathaniel B. Shurtleff. [1864]

⁴ Shulman, *The Battle of the Books Revived – Copyright Law Revision in the Year 1971*, 17 BULL. CR. SOC. 404 [1971].

⁵ TEBBEL, *supra* n. 1, at 138.

⁶ *Ibid.* at 138.

⁷ S. E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE*, 279 [1965].

James Madison and Ralph Izard, in an effort to extend statutory protection of intellectual properties to authors, publishers, printers and their assigns, whose rights previously had been governed by English law, made the following resolution at the Congress of the Confederation:

“Resolved, that it be recommended to the several States to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators, and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication . . . such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators, and assigns, by such laws and under such restrictions as to the several States may seem proper.”⁸

The resolution was adopted on May 2, 1783, and, as a result, colonies which had not passed copyright legislation enacted laws in conformity with Madison's and Izard's guidelines. Massachusetts and Maryland, in addition to Connecticut, had already enacted statutes in this area. Delaware was the only state which never passed a copyright law.

The states took different approaches on the questions of which persons were protected, what works were included, what penalties were levied, and how suits were to be brought. What they all had in common, however, was a united wish to encourage scholarship and protect property rights in books and pamphlets. The legislators were concerned with balancing the rights of a creator with the rights of the public to have easy access to the work created.

The chronology of the statutes is as follows:

1. Connecticut - January, 1783
2. Massachusetts - March 17, 1783
3. Maryland - April, 1783
4. New Jersey - May 27, 1783
5. New Hampshire - November 7, 1783
6. Rhode Island - December, 1783
7. Pennsylvania - March 15, 1784
8. South Carolina - March 26, 1784
9. Virginia - October 17, 1785
10. North Carolina - November 19, 1785
11. Georgia - February 3, 1786
12. New York - April 29, 1786

⁸ JOURNAL OF THE UNITED STATES IN CONGRESS ASSEMBLED, CONTAINING THE PROCEEDINGS FROM NOV. 1782, TO NOV. 1783, 256–257. Printed by order of Congress [1783].

1. Expressed Purposes of the Early Acts

Each new state, in the preamble of its copyright statute, expressed its reason for the legislation.⁹ In general, the immediate catalyst for the passing of these laws was Madison's and Izard's directive to the Continental Congress, and the foundation upon which these statutes were built was the policy of protecting art and literature together with a strong sense of property rights. An example of this expressed rationale can be found in the Massachusetts statute:

"Whereas the Improvement of Knowledge, the progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such persons can have to make great and beneficial Exertions of this Nature, must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no property more peculiarly a Man's own than that which is produced by the Labour of his Mind: Therefore, to encourage learned and ingenious Persons to write useful Books for the Benefit of Mankind, . . ."¹⁰

The Rhode Island preface was identical to this. The South Carolina statute was entitled "An Act for the encouragement of Arts and Sciences," and New Hampshire's act " . . . for the Encouragement of Literature and Genius . . .," echoed the Massachusetts preamble recited above. Georgia's copyright law had the same title as did New Hampshire's, and the New Jersey statute is but a slight variation on the theme: "An Act for the promotion and encouragement of literature."

Massachusetts considered copyright protection to be a natural right, in much the same way that copyright protection is considered today to be a Constitutional privilege.¹¹ New York felt that:

" . . . it is agreeable to the principles of natural equity and justice, that every author should be secured in receiving the price that may arise from the sale of his or her works, and such security may encourage persons of learning and genius to publish their writings, which may do honor to their country and service to mankind . . ."¹²

⁹ Except Virginia. Virginia gives no reason for her copyright law, launching immediately into the terms of the protection granted.

¹⁰ ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 143. Printed by Benjamin Edes and Sons [1782]. [hereinafter cited as MASS.]

¹¹ Wheaton v. Peters, 33 U.S. 591 [1834].

¹² 1 LAWS OF THE STATE OF NEW YORK 274, 2nd Ed. Printed by Thomas Greenleaf [1798]. [hereinafter cited as NEW YORK]

The Georgia, North Carolina, and Connecticut preambles were worded similarly to the New York statute quoted above. Thus, even though encouragement of learning was included as a reason for these four statutes, the primary purpose seemed to have been the enforcement of a pre-existing right—a property right in intellectual works.

Pennsylvania's preamble was the most straightforward. It began with Madison's original recommendation to the states, although James Madison was not specifically referred to:

“... to secure to the authors or publishers of any new books not hitherto printed, ... the copy right of such books for a certain time: ...”¹³

The statute then mentioned that printers, booksellers and others

“... have heretofore frequently taken the liberty of printing, reprinting and publishing or causing to be reprinted and published books and other writings without the consent of the author or proprietors of such books and writings to their very great detriment, and the damage of their families, for preventing therefore such practices in the future, and for the encouragement of learned men to compose and write useful books, and in order to give all due force to the recommendations of congress. Be it enacted ...”¹⁴

Though the phrase concerning the encouragement of the arts was included here, it definitely played a secondary role to the more practical considerations of financial damage to authors and publishers. One may draw an inference that what was prevalent in Pennsylvania was also prevalent in the other states.¹⁵

Pennsylvania was not alone in admitting that its citizens were capable of such a sophisticated form of theft, and that action was necessary to discourage unauthorized printings. Maryland said:

“Whereas printers, booksellers, and other persons may take the liberty of printing, reprinting, and publishing, or causing to be printed ... books and other writings, without the consent of the authors or proprietors of such books and writings, to their great injury: For preventing therefore such practices, and for the encouragement of learned men, Be it enacted ...”^{15a}

¹³ 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 171. Compiled by James T. Mitchell and Henry Flanders, 1782 [1906]. [hereinafter cited as PENNSYLVANIA]

¹⁴ *Id.*, at 271–272.

¹⁵ There was little piracy in pre-Revolutionary America. Authors' rights however, were not a determining factor in this circumstance. Every printer's welfare would have been threatened by mass mutual piracy. An unspoken “gentlemen's agreement” not to steal each other's works seems to have existed among these men throughout the early years. TEBBEL, *supra* n. 1.

Maryland did not actually admit that its printers and booksellers had been stealing other peoples' works—the state simply wished to remove temptation by imposing penalties upon anyone who might in the future consider such a course of action.

The various statutes, in their preambles, viewed the underlying rationale for copyright in three major ways. The "positive approach" was seen in the laws drawn up, ostensibly, to promote learning and encourage writing. The positive approach was also the majority approach. The "negative", but practical approach, illustrated by Pennsylvania's statute, was to discourage the theft of intellectual property. A third approach, the middle ground, treated the protection of intellectual property as a natural right, and the copyright statutes under this view become simply a codification of that right.

2. *Persons Protected Under the Early Acts*

"The author of any book or pamphlet not yet printed, being a citizen of the United States of America, and his heirs and assigns, shall have the exclusive right . . ." ¹⁵

The Pennsylvania statute partially quoted above was typical in its protection of authors, their heirs and assigns. Connecticut, Rhode Island, North Carolina, New Jersey and Maryland protected authors, heirs and assigns, also.

Though the expressed purpose of the early copyright statutes was the encouragement of scholarship, the publishers as well as authors needed protection, since assignees of authors' rights were, most often, publishers. An author would be encouraged to write only if his work was marketable, and if copyright protection was lost when he transferred the work to a publisher, his market would be lost, also. Therefore, an author would be in favor of protecting publishers. ¹⁷

¹⁵ LAWS OF MARYLAND, MADE AND PASSED, AT A SESSION OF ASSEMBLY, BEGUN AND HELD AT THE CITY OF ANNAPOLIS ON MONDAY, THE 21ST OF APRIL, 1783. (no page numbers) F. Green, printer to the State, Annapolis [1783]. [hereinafter cited as MARYLAND]

¹⁶ PENNSYLVANIA, *supra* n. 13, at 272.

¹⁷ An argument might be made that publishers needed no extra encouragement to market books: the profit motive was sufficiently strong, even with literary piracy. Therefore, the professed reasons for copyright laws may be contradicted by including assignees among those protected.

New York and Georgia protected an "... author, assignee or proprietor..." . Pennsylvania and South Carolina also mentioned proprietors. Black's Law Dictionary, on page 1384, defines "proprietor" as:

"One who has the legal right or exclusive title to anything. In many instances it is synonymous with owner."

Virginia and South Carolina described in more detail those persons who were sheltered by statute. Virginia, in addition to protecting an author of a book already printed, his heirs and assigns, also went on to cover:

"... the person or persons who have purchased or acquired such copy or copies, share or shares, in order to print or re-print the same, his heirs and assigns..."¹⁸

In other words, author A could assign his rights in a book to publisher B, for a consideration, and B could in turn sell it to printer C, who could further assign it to yet another party without losing copyright protection. The sphere of protection was thus potentially much broader than that of the majority of statutes. However, for a book already composed and not printed or published, or for future literary works, the persons protected narrowed to the author, his heirs and assigns. South Carolina's terms were identical to Virginia's terms.

The requirement that the authors be "... Subjects of the United States of America..."¹⁹ was a sign of the political times. British works were readily accessible and fair game for American printers and publishers. Few legislators of the period would have considered offering a British author (or worse, publisher) access to state courts to file a claim against a United States citizen. Madison himself, in his resolution to the Continental Congress, suggested limiting protection to United States citizens.²⁰ All but five states, New York, Connecticut, New Jersey, Maryland, and Georgia, expressly limited the application of their copyright laws to United States citizens.

Georgia required only that the author be "... an inhabitant or

¹⁸ *A Collection of all such Acts of the General Assembly of Virginia of a Public and Permanent Nature, as are now in Force, Comprising the First Volume of the Revised Code.* Printed by Samuel Pleasants, Richmond [1814]. [hereinafter cited as VIRGINIA]

¹⁹ 4 LAWS OF NEW HAMPSHIRE, REVOLUTIONARY PERIOD 1776–1784, 521 [1916]. [hereinafter cited as NEW HAMPSHIRE]

²⁰ State citizenship requirements are discussed in the section on reciprocity.

resident in these United States . . ."²¹ Georgia's statute, passed in February of 1786, came at a later date than most of the other statutes, which may help explain this greater liberality. Connecticut's and New York's laws also protected inhabitants or residents, but though New York's act was passed in April, 1786, two months after Georgia's act was passed, Connecticut's was the earliest copyright statute. The argument that later statutes were more liberal in their citizenship requirements is therefore seriously weakened. No United States citizenship or residency requirement was mentioned by the Maryland legislature.

3. *Works Protected Under the Early Laws*

Books and pamphlets were the main pieces of work protected under these copyright acts. Books were expressly included in all of the statutes, and pamphlets were included in most.²² Some statutes were broadly worded, to encompass many different forms of literary enterprise, while others were specific and limiting.²³

Virginia spoke only of printed books and pamphlets, Maryland covered writings as well as books, New York added papers, and South Carolina's act, the most narrow of all, protected only books. The vast amount of intellectual endeavor which was left uncovered by South Carolina's law undoubtedly would have been the source of much litigation had the federal government not taken jurisdiction over copyright matters.

New Hampshire's description of writings protected was fairly broad: "... all Books, Treatises, and other literary Works . . ."²⁴ The catch-all phrase "... other literary Works . . ." was intended to cover unforeseen problems to arise in the future.²⁵ Massachusetts and Rhode Island had similar provisions.

Under these three statutes, and under New York's act, literary properties were protected whether previously published or not. Georgia's act covered only works not yet printed at time of passage. Connecticut, North Carolina and Pennsylvania spoke of "... books and other writings . . .

²¹ H. MARBURY AND W. H. CRAWFORD, *DIGEST OF THE LAWS OF THE STATE OF GEORGIA*, 342 [1802]. [hereinafter cited as *GEORGIA*]

²² Pamphlets, or broadsides, were a popular method of exchanging political ideas in colonial and revolutionary America, and had the advantages of cheapness and speed of production.

²³ How broadly or strictly these statutes were interpreted would depend upon the state courts' temperaments, the extent of violations, and the amount of damage done.

²⁴ *NEW HAMPSHIRE*, *supra* n. 19, at 521.

²⁵ Manuscripts might have been included in this designation, also.

[and] . . . pamphlets not yet printed . . . ,”²⁶ excluding previously published books and pamphlets. Virginia and South Carolina had provisions for works currently in print and for works which would be printed subsequent to the effective date of the acts.

Connecticut’s act, along with Georgia’s and North Carolina’s, contained an interesting variation on the prevailing theme of books and pamphlets, adding maps and charts to the list of protected works. Maps and charts were definitely products of much research and study, but they did cross over from the literary into the artistic and scientific spheres. Here, then, was the first inkling that copyright laws in the United States might protect artists and draftsmen as well as authors and scholars. If a map or chart were considered strictly a writing, then it would easily fit within the “. . . other literary Works . . .” category listed in statutes patterned after the Massachusetts law. However, reasonable men might differ as to how a map or chart should be classified, and ultimately, a conclusion might be reached that they were a separate entity entitled to separate treatment within the statutes. In a new country, the need for maps, coupled with the risks of exploration and surveying, made such an undertaking at once both profitable and dangerous, and therefore worthy of statutory protection. Connecticut’s statute was the first to be passed, yet only two other states followed its example in regard to maps and charts.²⁷

Connecticut’s ingenuity did not cease with the copyrighting of maps and charts. This state, Georgia and New York were unique with their explicit statutory coverage of manuscripts:

“ . . . any person who shall procure and print any unpublished manuscript . . . shall be liable . . . to the said author or proprietor . . . ”²⁸

Manuscripts traditionally have come under a common law copyright vesting in the author or owner.²⁹ Connecticut’s, Georgia’s and New York’s attempts at a comprehensive statute which could be used in all foreseeable circumstances was commendable, even though the laws would have fallen short of that goal.

None of the statutes mentioned paintings or prints, which today are

²⁶ PENNSYLVANIA, *supra* n. 13, at 272.

²⁷ It is interesting to note that, although New York’s law was patterned after Georgia’s, New York did not include maps and charts in its catalogue of protected works.

²⁸ NEW YORK, *supra* n. 12, at 275.

²⁹ NIMMER ON COPYRIGHT, 11.

covered by court interpretations of copyright statutes or are protected by common law copyright. Since the colonies inherited a legacy of English common law, legislators may have felt that a complete list of all intellectual property encompassed by copyright acts was unnecessary and limiting. Another view is that non-literary works such as paintings were meant to be outside the reach of the copyright legislation.³⁰ An author and a painter both would be interested in the preservation of their property rights in their original work. However, if publishers were meant to be the principal beneficiaries of these acts, as opposed to the creators, then the omission of individual works of art is understandable.³¹ Generally, publishers printed words, not pictures, during this period. Their main concern was the prevention of unauthorized printings of literary works which they had published. A copyright act which protected them from economic loss due to pirated books and pamphlets would be sufficient for their needs, and that, in effect, was what the majority of states granted them.

While intellectual properties such as paintings were passively excluded from protection by their omission from the statutes, other works were expressly and actively excluded in unequivocal language. Connecticut, Georgia and New York mirrored then-current popular prejudices and sympathies in the terms of their acts. The three states worded their exclusion clauses similarly, emphasizing that the copyright act was not meant to authorize³² or screen from punishment:³³

“... any person or persons who may be guilty of printing or publishing of any book, pamphlet, or paper that may be prophane, treasonable, defamatory, or injurious to government, morals, or religion.”³⁴

Which works would have been categorized as profane, treasonable, defamatory, or injurious was a court determination, as it would be today.³⁵

³⁰ Portraits in colonial America were executed chiefly by itinerant painters, and were rather primitive. As the years progressed, the European influence strengthened, more money became available, and the general quality of paintings were upgraded. Painters became artists.

³¹ Connecticut legislators could not have anticipated movies, television, records, computers, and the myriad other forms of communication, the copyrights of which have been litigated in the courts in this century.

³² NEW YORK, *supra* n. 12, at 275.

³³ GEORGIA, *supra* n. 21, at 343.

³⁴ ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, 134 [1784]. [hereinafter cited as CONNECTICUT]

³⁵ No copyright act of the Revolutionary era defined its terms in order to aid the fact-finder.

These three statutes also contained provisos that:

“ . . . nothing in this act shall extend to affect, prejudice or confirm the rights which any person may have to the printing or publishing of any book or pamphlet, at common law, in cases not mentioned in this act; . . . ”³⁶

The New York clause quoted above affirmed a legislative intent not to interfere with private contracts, transfers of printing or publishing rights, or other related transactions.

South Carolina disclaimed any intention of interfering with the importation of foreign literature. Its proviso read:

“ . . . nothing in this Act . . . shall be construed to extend, to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language, printed beyond the seas; anything in this Act contained, to the contrary notwithstanding.”³⁷

North Carolina, also, did not wish to prevent the importing, reprinting, or publishing of any book, map, or chart originally published abroad. A new country needed a cheap, readily available source of foreign language books, especially the classics, in order to educate its youth and to provide a variety of resources for its citizens. In addition, South Carolina may have been motivated by a wish to promote foreign trade—later on in American history, states would not be able to dictate laws concerning foreign trade even if they so desired.

Virginia, Pennsylvania, Rhode Island, New Jersey, Maryland, Massachusetts, and New Hampshire did not specifically exclude any literature or any related transactions from the shields or penalties of their copyright laws. Although the legal justification would not be found in the express words of the statute, however, courts in those states still may have refused to grant relief to a plaintiff who, for instance, complained that his treasonous work had been copied without his permission.

4. *Term of Protection Under Early Laws*

Pennsylvania extended to persons protected within the copyright act:

“ . . . the exclusive right of printing, publishing and vending the same, within this state, for the term of fourteen years, to commence

³⁶ NEW YORK, *supra* n. 12, at 275.

³⁷ 4 THE STATUTES AT LARGE OF SOUTH CAROLINA, 619. [hereinafter cited as SOUTH CAROLINA]

³⁸ The estoppel theory was a possible defense here.

from the day of its first printing or publication in this state.”³⁹

Also, at the end of this initial fourteen-year period, the exclusive right:

“ . . . of printing and disposing of any such book or pamphlet in this state shall return to the author thereof, if then living, his heirs and assigns for the term of fourteen years more . . . ”⁴⁰

The fourteen-plus-fourteen provision was the basic formula found in copyright statutes of the 1780's. Pennsylvania decreed that the initial fourteen-year term started on the date of the first printing or publication of the work anywhere. At the end of fourteen years, the rights again vested in the author,⁴¹ and he had the option of renewing the copyright for himself or of renewing a prior assignment of printing or publication rights, for another fourteen years.

New York, Connecticut, New Jersey, and Georgia provided for the same initial and renewal rights as did Pennsylvania. These states, also, started the first fourteen years tolling on the first printing or publication within their own boundaries, and the second fourteen-year term at the expiration of the first fourteen-year term. Maryland's law gave authors fourteen years of security, followed by another fourteen-year period of renewal, but the term began on the date of first publication anywhere.

South Carolina distinguished between terms applicable to authors or proprietors whose books were already published, and terms applicable to the authors or assigns of books intended to be published in the future. The act, passed in March of 1784, was effective retroactively from January 1, 1784. Books in print were protected for a term of fourteen years “ . . . to commence from the said first day of January, and no longer . . . ”⁴² The state of publication was irrelevant here, and South Carolina did not legislate any renewal rights for anyone under any circumstances.

Another state which afforded no renewal rights was North Carolina. The North Carolina term of protection began on the date of first publication anywhere, but, unlike the South Carolina law, did not differentiate between works already published and works not yet published. The statutes of the Carolinas gave the shortest terms of protection of any of the statutes discussed.

New Hampshire was not concerned with the site of initial publication,

³⁹ PENNSYLVANIA, *supra* n. 13 at 272.

⁴⁰ *Id* at 272.

⁴¹ On the assumption that he previously had assigned his interest elsewhere: otherwise, the vested rights would never have left him at all.

⁴² SOUTH CAROLINA, *supra* n. 37, at 618.

but started its period of protection from the date of first publication, wherever that occurred. New Hampshire's term, however, was unique: twenty years, with no renewal rights.

Massachusetts, Rhode Island and Virginia decided that twenty-one years was appropriate as a limited period of protection. The Massachusetts law began the period from the date of first publication anywhere, as did the Virginia and Rhode Island laws. An author could not renew his copyright in those states.

The four states which changed the term of protection from the traditional fourteen years to an extended term of twenty or twenty-one years were attempting to streamline the copyright process, and to simplify their laws. Perhaps they felt that copyright protection was increased even though potentially shortened by seven or eight years, since many authors or proprietors may not have re-registered properly, causing the copyrights to lapse. Today, many legislators are trying to change the copyright term of protection to life plus fifty years, and it is interesting to note that two hundred years ago legislators were motivated to make similar changes for similar reasons.

5. Registration Under the Early Statutes

In all the states which passed copyright laws, except Rhode Island and New Hampshire, authors, assignees, or proprietors had to register their works in some specified manner before they could avail themselves of the protection granted by the laws. The requirements for registration differed from jurisdiction to jurisdiction, but the purpose of recording was the same everywhere—to help insure that any person claiming rights in a book or pamphlet was actually the author or proprietor of the same. Once a person became the owner of record of any given work, all he needed to do when suing another for a copyright violation was produce the official registration document, and show that the other party reprinted that particular work without authorization. The threshold evidentiary question of who owned the work was answered by the recording.

Although New Hampshire's act had no explicit instructions for registering a publication with any agency of the state, it did provide that only books, treatises and other literary works:

“ . . . having the name or names of the Author or Authors thereof printed and published with the same . . . ”⁴³

⁴³ NEW HAMPSHIRE, *supra* n. 19, at 521. In England, the Parliamentary press restriction act completely forbade the publishing of anything to which the printer's name and place of publication had not been affixed. TEBBEL, *supra* n. 1, at 45.

would be protected. Authors of anonymous works seemingly are left to employ self-help. The Rhode Island statute contained this same provision.

South Carolina's law was typical of the registry requirements of the statutes:

"... whereas, many persons may, through ignorance, offend against this Act, unless some provision be made . . . Be it therefore further enacted . . . [that] the title to the copy of such book or books hereafter published, shall, before such publication, be entered in the register book, to be provided for that purpose by the secretary of the State; which register book may at all office hours be resorted to and inspected by any bookseller, printer, or other person . . . without any fee . . . and the secretary shall . . . give a certificate under his hand, of such entry . . . and . . . may take a fee not exceeding two shillings and four pence; . . ."⁴⁴

Note that once a book was published, under this act, the owner could no longer register it. In Maryland, the titles were registered with the clerk of the general court before publication, and certificates cost three shillings nine pence.

Virginia's registration clause was less detailed than South Carolina's clause. The author there could register the title with the clerk of the council whenever he wished, and receive a certificate upon the payment of three shillings. In New York, New Jersey, Connecticut, and Georgia, authors, assignees or proprietors could register the title of their works in the office of the secretary of state, who recorded the same. No filing fee was stipulated, and no certificate was given to the filing party. Pennsylvania provided for filing of the authors' or proprietors' names along with the titles of their books or pamphlets in the prothonotary's⁴⁵ office in Philadelphia, for a five shilling charge.

The Massachusetts legislature took a novel recording approach which closely resembled today's system of registration with the Library of Congress:

"... every Author of such Book, Treatise, or other Literary Work, shall, in Order to his holding such sole Property in them, present two printed Copies of each and every of them to the Library of the University at Cambridge, for the Use of the said University, and prior to his Recovery of the said Forfeiture . . . shall produce . . . a

⁴⁴ SOUTH CAROLINA, *supra* n. 37, at 619.

⁴⁵ Prothonotary is defined as, "The title given to an officer who officiates as principal clerk of some courts." BLACK'S LAW DICTIONARY, 1388.

Receipt of such Book, Treatise, or other Literary Work, from the Librarian . . . ”⁴⁶

This method safeguarded an author or proprietor and benefited scholarship at the same time. Also, when only the title of a work was recorded, confusion might have resulted when more than one work had the same or similar title. Filing the entire work circumvented this type of controversy.

North Carolina’s act, also, provided for the filing of an actual copy of the book, map or chart to be registered:

“ . . . author or proprietor . . . shall . . . duly enter his name as author or proprietor, together with the title of the book, map or chart to be published, in the office of the secretary of the State, who is hereby directed to enter the same on record; . . . [and] shall . . . [deliver] . . . one copy of such book, map or chart, for the use of the executive of the State . . . ”⁴⁷

The registration and delivery of the book, map, or chart were to take place before publication.

None of the statutes which allowed an author or proprietor to renew his copyright at the end of fourteen years discussed re-registration of name and title. Since the registration process served to identify the owner of the property right in a literary work, perhaps a second filing would have been advisable in those instances when, for example, the holder of a copyright changed from publisher to author. These acts did not continue in existence for fourteen years, however, so the problem is moot.

Had these statutes remained in effect after the ratification of the Constitution, more detailed schemes for registration and regulation of copyrights would have had to be adopted. However, the recording clauses in general were effective as far as they went, since early legislators could not foresee the proliferation of the written word in our society.

6. *Early Consent Provisions*

An author or proprietor did not have to sell all rights in his work if he contracted with other parties to print or distribute his book or pamphlet. From the late seventeenth century on, printers from different colonies often arranged to handle each other’s works through consensual agreements.⁴⁸ Legally, one person could hold the copyright to a writing

⁴⁶ MASS., *supra* n. 10 at 144.

⁴⁷ J. IREDELL, LAWS OF THE STATE OF NORTH CAROLINA, 563. [1791]. [hereinafter cited as NORTH CAROLINA]

⁴⁸ TEBBEL, *supra* n. 1, at 46.

while another person could market it. What that second person needed, of course, was the author's or proprietor's consent. The early copyright statutes incorporated the consent concept into their texts, some setting out in detail the necessary elements of the consent, others simply stating, like the Rhode Island statute:

"... [no] person or persons shall print, reprint, publish, sell, or expose to sale, or shall cause to be printed, re-printed, published, sold, or exposed to sale, any book, treatise, or other literary work... without consent of the author or authors, or their assigns..."⁴⁹

Consent under the Massachusetts, Rhode Island and New Hampshire statutes could have been oral, witnessed, unwitnessed, or implied; in short, no formal requirements were legislated. New York, in contrast, required that anyone who should:

"...knowingly publish, vend, utter, or distribute... [the books or pamphlets]... thereof, in writing, signed in the presence of two credible witnesses..."⁵⁰

would be liable for damages to the lawful owner. Here, an oral consent agreement could not be advanced as a defense by a printer when sued by the lawful owner of a book or pamphlet.

New Jersey required that the consent of the author or proprietor be in writing, and duly attested, though no specific number of witnesses was legislated. Maryland's and Virginia's acts said that one might print or import printed copies of books or pamphlets if, before doing so, permission was granted in writing by the author or proprietor, and that writing must have been signed in the presence of two or more credible witnesses. These statutes, unlike New York's and Georgia's, precluded any attempt by an offending party to get permission from an author or proprietor after the printing or importing had been done.⁵¹ South Carolina also required that the proprietor's consent be in writing, and, with Virginia and Maryland, allowed for more than two witnesses to that writing, as an additional safeguard against fraud. Two witnesses were the minimum number needed in these three states. North Carolina, Connecticut, and

⁴⁹ *Library of Congress Copyright Bulletin No. 3. Copyright Enactments 1783-1900*, 17. Compiled by Thorvald Solberg [1900].

⁵⁰ NEW YORK, *supra* n. 12, at 274.

⁵¹ If an author in Virginia or Maryland were to have given his permission after the fact, however, he may have been estopped from bringing suit. Other legal theories always were effective in conjunction with these copyright laws.

Georgia also called for a signed writing witnessed by two credible witnesses, but no more than two.

“... the consent of the author or proprietor thereof first lawfully obtained...”⁵²

was part of the Pennsylvania statute. Contract laws applicable there⁵³ during this period would have determined whether or not a signed, witnessed writing was a pre-condition to reprinting a given work. If the Statute of Frauds⁵⁴ were not incorporated into Pennsylvania’s laws at that time, perhaps an oral agreement would have been sufficient to allow a printer or bookseller to deal in another’s book or pamphlet.⁵⁵

The desire to keep intellectual property freely alienable in part as well as in whole was demonstrated by the consent clauses in these statutes, Especially in those states where a writing was required, both parties to a contract for reprinting rights were protected from later changes of heart or fraudulent allegations by the other side. A written, signed and witnessed statement of consent was a valid defense to any action in copyright brought under these acts, provided that such statement was not obtained through duress or undue influence. The states wished to provide for great flexibility within their copyright laws, encouraging the wide dissemination of literature, while at the same time sheltering rightful owners of intellectual property from the ill-effects of unauthorized printings of their works.

7. *Bringing Suit Under the Statutes*

The persons who could bring suit under these acts were those persons who were protected under them, with one notable exception which will be discussed later. Virginia, North Carolina and Connecticut stated that an injured party could recover damages “... at the suit of such party, in any court of record within this commonwealth...”⁵⁶ New Jersey’s act set out damages:

⁵² PENNSYLVANIA, *supra* n. 13, at 272.

⁵³ New Hampshire, Rhode Island, and Massachusetts laws also came within this proviso.

⁵⁴ The Statute of Frauds provides that certain classes of contracts, to be enforceable or to be used as a defense to an action, must be in writing and signed by the party to be charged. *Smith v. Morton*, 70 Okla. 157, 173 p. 520.

⁵⁵ Or, if the Statute of Frauds were on the Pennsylvania books, the agreement between the proprietor and the other party might have been narrow enough in scope to fit within accepted exceptions to it.

⁵⁶ VIRGINIA, *supra* n. 18, at 21.

“ . . . to be recovered by such author or proprietor in any court of this State where the same may be cognizable.”⁵⁷

New Hampshire’s law, while as terse as Virginia’s, did prescribe the cause of action to be used by the authors or assigns:

“ . . . [damages] to be recovered by Action of Debt⁵⁸, in any Court of Record proper to try the same . . . ”⁵⁹

Jurisdictional considerations such as the residence of the parties and the amount of damages claimed would determine whether or not a particular court was the proper one. Rhode Island’s statute contained the same provision as did the New Hampshire statute.

Massachusetts echoed the New Hampshire phrase quoted above, but went on to provide that prior to recovery, an injured party must produce in open court where the action was tried a receipt from the current Librarian of the “University Library” where the copies of his work were on file. The registration requirement here became more important than mere evidence in an action, but became an absolute prerequisite to recovery.⁶⁰

North Carolina’s act, except for providing a forum of “ . . . any court of record . . . ”⁶¹ did not discuss the mechanics of bringing suit for copyright infringement. However, since a registration receipt was required to be given to the registering party by the Secretary of State, anyone involved in litigation under this statute who possessed such a receipt would have been well advised to produce it in court.

Pennsylvania, like Massachusetts, insisted upon one provision. Here an author was required to:

“ . . . insert on the back of the title page, a copy of the certificate of entry obtained of the prothonotary . . . ”

and if he had not done so at the time of publication, his recovery was

⁵⁷ ACTS OF THE SEVENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY, AT A SESSION BEGUN AT TRENTON, ON THE 22ND DAY OF OCTOBER, 1782, AND CONTINUED BY ADJOURNMENTS, BEING THE SECOND SITTING, 47 [1783]. [hereinafter cited as NEW JERSEY]

⁵⁸ An action of debt is a common law action which lies to recover a specific sum of money, or a sum that can be easily reduced to a certainty. *U.S. v. Claflin*, 97 U.S. 546.

⁵⁹ NEW HAMPSHIRE, *supra* n. 19, at 521.

⁶⁰ It was the same in most of the statutes. Consent contracts, on the other hand, were rebuttable pieces of evidence.

⁶¹ NORTH CAROLINA, *supra* n. 47, at 24.

⁶² PENNSYLVANIA, *supra* n. 13, at 273.

barred. This piece of legislation also set out two options for recovery of damages, the choice being determined by the amount of money sought by the plaintiff:

“ . . . [large damages] to be recovered by such author or proprietor in any court of this state where the same may be cognizable, or if under the value of five pounds, before any two justices of the county where such offense is committed . . . ”⁶³

The courts of record were thus saved from hearing a multitude of small actions which could glut their calendars. Also, a plaintiff seeking a small recovery was able to gain satisfaction from the defendant more quickly.

A detailed treatment of the mechanics of bringing suit was contained in the South Carolina act:

“ . . . to be recovered in any court of record of the said State, by action of debt, bill⁶⁴, plaint⁶⁵, or information⁶⁶, in which no wager of law⁶⁷, essoign⁶⁸, privilege⁶⁹, or protection⁷⁰, or more than one imparlance⁷¹, shall be allowed.”⁷²

Although the wording may be antiquated, the spirit was modern, for South Carolina helped an aggrieved party to be recompensed quickly and easily. The choice of actions made it less likely that a defendant could escape liability on the technicality of plaintiff's pleading the wrong cause of action. South Carolina's act continued:

“ . . . the defendant in such case may plead the general issue, and give the special matter in evidence . . . ”⁷³

Again, the statute attempted to simplify the proceedings by allowing the defendant to deny liability in his answer to the court and produce any special defenses at the trial itself.

⁶³ *Id.*, at 272.

⁶⁴ A bill is a formal written complaint in equity averring that acts disclosed are contrary to equity and praying for specific relief. *Sharon v. Sharon*, 67 Cal. 185, 7 P. 456.

⁶⁵ A plaint is a civil law complaint. BLACK'S LAW DICTIONARY, 1308.

⁶⁶ Informations differ from bills in little more than form. 3 Bl. Comm. 261.

⁶⁷ A wager of law is the giving of sureties. BLACK'S LAW DICTIONARY, 1750.

⁶⁸ An essoign is an excuse for not appearing. BLACK'S LAW DICTIONARY, 642.

⁶⁹ A privilege is an immunity. *Colby v. Flanery*, 234 P. 845, 70 Cal. App. 738.

⁷⁰ Protection was a writ by which a king might privilege a defendant from all personal and many real suits for one year at a time. This was obviously inappropriate in revolutionary America.

⁷¹ An imparlance is a continuance. *Colby v. Knapp*, 13 N.H. 175.

⁷² SOUTH CAROLINA, *supra* n. 37, at 619.

⁷³ *Id.*, at 620.

A proviso in this statute set up a time limitation within which an action in copyright must be begun:

“... all actions ... for any offense that shall be committed against this Act, shall be brought, sued, and commenced within three months next after such offense committed, or else the same shall be void and of none effect...”⁷⁴

South Carolina and Maryland were the only states which mentioned such a limitation within the act itself. Maryland's law said:

“... all actions or informations for any offence that shall be committed against this act, shall be brought and commenced within twelve months after such offence committed, or the same shall be void and of none effect.”⁷⁵

In other states, a general statute of limitations pertaining to all causes of action applied.

New York's act provided that damages were to be recovered by the proprietor of a work in any court of law in the state proper to try the same. Georgia's statute provided that damages were recoverable in due course of law. These two statutes, along with the acts of Connecticut and the Carolinas, were memorable for their clauses which required that copyrighted books be published at a cheap price and, except for the North Carolina act, in sufficient numbers. Four of the five provisions were essentially the same, the primary aspects being that any judge of the state supreme court, acting on a written complaint, could summon the author or proprietor to appear before the court. The court might then inquire as to whether or not enough copies of the work were furnished to the public and/or whether or not the profits realized from the sale were:

“... beyond what may be adjudged a sufficient compensation for his or her labor, time, expences [sic] and risque of sale...”⁷⁶

If the judge were to find the complaint justified, he would ask the author or proprietor to pay a security, on the condition that he should, within a time period set out by the court, correct the offense. If security were not furnished, or if the offense remained uncorrected, the court was empowered to award the complainant a license to reprint, on the payment of a bond by the complainant.

The fifth state, North Carolina, did not mention insufficient

⁷⁴ *Id.*, at 620.

⁷⁵ MARYLAND, *supra* n. 15, no page number.

⁷⁶ NEW YORK, *supra* n. 12, at 275.

numbers of books in its clause, but instead dealt only with unreasonably priced books. While the mechanics of bringing suit under this clause closely resembled the procedure of the other four states, no license to print was given to the complainant if the original author or publisher did not adjust the price according to the court's direction. Instead, a financial penalty of twenty Spanish milled dollars⁷⁷ for every offense was levied, half to be awarded to the state, and half to go to the complainant. Georgia's law gave a reason for this truly revolutionary provision:

"... it is equally necessary for the encouragement of learning, that the inhabitants of this state be furnished with useful books, &c., at reasonable prices..."⁷⁸

Today, publishers put out editions in large enough quantity to satisfy the paying public.⁷⁹ On the issue of cost, however, socialists would agree that government regulation of profits would be desirable. The conditions and practices in eighteenth-century America brought about such legislation, and with inflation rampant today, perhaps Congress will look back for guidance.

8. *Penalties Under the Early Acts*

Once a copyright claim had been adjudicated and the plaintiff had obtained a judgment in his favor, damages were assessed against the defendant. The statutes in general provided for one of two measures of damages.

Pennsylvania, New Jersey, Georgia, Connecticut, New York and Virginia laws allowed the injured party to recover double the value of all copies which were printed, imported, published, sold or exposed to sale without the proprietor's authorization. Proving the actual number of books or pamphlets which were illegally marketed might have been difficult, since in a civil action, the items might not be confiscated by officers of the law.⁸⁰ Also, the word "value" was nowhere defined—did it mean the intrinsic worth of the paper, the binding, and the man-hours worked, or did it mean the selling price, or the profits to be gained? Double the value, no matter how value was determined, should have been adequate com-

⁷⁷ According to North Carolina almanacs of the period, a Spanish milled dollar in 1767, eighteen years before the passage of this act, was worth approximately six shillings six pence in British currency. Colonial currency, in turn, was valued at 8% to 10% less than its British counterpart.

⁷⁸ GEORGIA, *supra* n. 21, at 343.

⁷⁹ This is not necessarily true with other copyrightable material, such as films or art work.

⁸⁰ This is not universally true. See, e.g., the South Carolina law, text at n. 87, *infra*.

pensation to the proprietor.⁸¹ Such punitive damages served as a deterrent to potential wrongdoers. Therefore, for all its possible drawbacks, this type of clause adequately served its purpose.

Connecticut, Georgia and New York, in addition to the penalties discussed above, gave damages to an author or proprietor whose unpublished manuscript was printed without his consent. No formula for computing these damages was set out, which meant the courts, in awarding damages, could take all factors into consideration.⁸² Only New York awarded court costs to the injured plaintiff.

Rhode Island, New Hampshire and Massachusetts had statutes with clauses illustrative of the second type of damages provision. New Hampshire's law stated that any person printing, reprinting, or selling any work without the consent of the author or assigns:

"... shall forfeit and pay a sum not exceeding one Thousand pounds nor less than Five pounds — to the Use of such Author or Authors, or their Assigns; . . ."⁸³

The means for ascertaining the exact amount due to plaintiff was not included in the acts. Presumably, judges had broad discretionary powers in this matter, with only upper and lower limits to guide them. The Massachusetts and Rhode Island laws contained the same provision as above, but set the upper limit of damages at three thousand pounds.⁸⁴

The most original penalty provisions were found in the South Carolina statute:

"... such offender or offenders shall forfeit such book or books, and all and every sheet or sheets being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask⁸⁵ and make waste paper of them; and further, that every such offender or offenders shall forfeit one shilling for every sheet which shall be found in his, her, or their custody . . . the

⁸¹ Pennsylvania, in the provision in its law which said that a suit for damages which are less than five pounds should be heard by two county justices, recognized that the amount of damages might be low.

⁸² *E.g.*, loss of profit, loss of privacy, possible damage to reputation, etc. Connecticut's law called for the payment of "just" damages.

⁸³ NEW HAMPSHIRE, *supra* n. 19, at 521.

⁸⁴ Three thousand pounds was (and is) a great sum of money, and such a stiff fine should have discouraged any organized attempt at literary piracy.

⁸⁵ Damask means "... to deface (as a book) by marking with lines or figures." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 571.

one moiety⁸⁶ thereof to any person or persons who shall sue for the same . . . ”⁸⁷

The clause itself was labelled “penalty,” putting the emphasis on punishment of the wrongdoer instead of on compensation for the injured. Since one-half of all moneys received by this calculation, which could have been a formidable amount,⁸⁸ went into the State’s coffers, the act became less civil in aspect, and more criminal. The unusual directive to re-cycle the offending works into waste paper was a practical solution to the problem of what to do with the unauthorized books. Destruction also prevented the author or proprietor from obtaining statutory damages and later selling the illegally printed books for further profit. South Carolina’s founders preserved authors’ and proprietors’ rights in their property, while punishing offenders and providing an additional source of revenue for the state.

Maryland, like South Carolina, fined a guilty person by the sheet, but in Maryland the penalty was higher, and the state kept no part of it. Two pence for each sheet found in the offending party’s possession was the amount of forfeiture fixed by this legislature. The illegally printed books or writings were given over to the proprietor of the work, who presumably could re-sell them himself for further profit.

North Carolina’s act stated that offenders:

“ . . . shall forfeit to the proprietor all the books, maps, or charts thus printed, reprinted, imported, published, or offered for sale, together with double the value of the articles so imported; one moiety of which money shall go to the State, the other moiety to him who shall sue . . . ”⁸⁹

While certain elements of the South Carolina law were in evidence in the North Carolina law, such as the provision giving one-half of the damages to the state, on the whole the North Carolina statute was more generalized than the statute of its sister state.

9. *Reciprocity Under Early Laws*

The statutes, when they dealt with it at all,⁹⁰ approached the subject

⁸⁶ Moiety is the half of anything. BLACK’S LAW DICTIONARY, 1156.

⁸⁷ SOUTH CAROLINA, *supra* n. 37, at 618.

⁸⁸ The South Carolina act protects only books, and at the old rate of twelve shillings to a pound, a 240 page book would have 120 sheets, making the vendor liable for a ten pound penalty per volume.

⁸⁹ NORTH CAROLINA, *supra* n. 47, at 563.

⁹⁰ Neither South Carolina’s, New Jersey’s, nor Virginia’s acts contained a section dealing with reciprocity. These three statutes protected anyone who had properly registered his work in the appropriate place with the appropriate fee.

of reciprocity in two different ways. One group of laws protected out-of-state authors or proprietors only if the laws of the states from which they came shielded local authors or proprietors in return. Another group of statutes never became effective at all, since the date upon which they were to become active was the date when similar laws had been passed in each and every other state. This contingency never occurred.

The Massachusetts legislature passed the first type of reciprocity provision:

“ . . . this Act shall not be construed to extend in Favor or for the benefit of any Author or Authors, Subject or Subjects of any other of the United States, until the State or States of which such Authors are Subjects, shall have passed similar Laws for securing to Authors the exclusive Right and Benefit of publishing their Literary Productions.”⁹¹

This was an early statute (March 17, 1783), and for a year or two few out-of-state authors or assigns could have brought a successful suit in copyright in the Massachusetts courts, because their states did not yet protect Massachusetts authors. Gradually, the other states began to pass copyright statutes of their own, and the scope of national protection grew. Rhode Island's and New Hampshire's reciprocity clauses were identical to that of Massachusetts. The New York, North Carolina, Connecticut, and Georgia laws contained provisos which in substance provided for reciprocal protection in the same circumstances described above.

Maryland and Pennsylvania copyright statutes contained clauses which were illustrative of the second group of reciprocity provisions. Neither law ever went into effect because the requisite acts never were passed in all other states.⁹² Pennsylvania's clause read:

“ . . . this act shall not take place until such time as all and every of the states in the union shall have passed laws, similar to the same, in conformity to the recommendations of congress aforesaid.”⁹³

Had the Constitution not superseded the states' copyright statutes, one wonders if those laws with Pennsylvania-style reciprocity provisions would have become void as each new state was admitted into the union, and effective again when the new state passed copyright legislation. A state's rationale for allowing its own authors to remain unprotected until all other states passed similar laws is unclear. Pennsylvania and Maryland

⁹¹ MASS. *supra* n. 10, at 144.

⁹² Delaware never legislated on the subject of copyrights.

⁹³ PENNSYLVANIA, *supra* n. 13, at 273.

must have felt strongly that copyright was a subject requiring uniform national legislation. The Constitutional copyright provision might have been partially an outgrowth of this sentiment.

10. *Other Provisions of the Early Copyright Laws*

The statutes of South Carolina and New York contained certain provisions which were found in no other copyright acts of this time. These clauses were tacked on to the main bodies of the statutes, and did not deal directly with the mechanics of copyright protection. The provisions could be classified roughly as coming within the larger framework of encouragement of the arts and sciences.

Section IV of the South Carolina act granted for a period of fourteen years to "... inventors of useful machines ..." ⁹⁴ the exclusive privilege of making or vending their machines, subject to the restrictions of the act. Since Section II of this law required registration with the Secretary of State, each machine must have been listed in that office before a patent right could have vested in the inventor. No method for computing damages in a patent situation was provided—one shilling a sheet was obviously inapplicable. The three month statute of limitations would have applied, as would the other procedural directives. South Carolina was one of the states which legislated against authors or proprietors who sold their books at unreasonable prices. Would this proviso have been interpreted strictly, i.e., applicable only to the written word, or would inventions have been included within it? The courts would have had administrative difficulties in using one statute to control both copyrights and patents. Although these two subjects protected the fruits of man's intellectual labor, each had unique characteristics which called for separate treatment in the statutes.

New York's copyright law included a section which at first glance seemed misplaced. In Section V, the trustees of the Reformed Protestant Dutch Church in Flatbush, Kings County, were authorized ⁹⁵ to convey part of their real estate (no more than six acres) and use the proceeds to erect an academy. Church and state were obviously not then as separate as they are today. Since New York's act is entitled "An Act to promote Literature", presumably the proposed academy was meant to foster such studies. The purpose was not spelled out in the legislation, and one can only hypothesize concerning the events which led up to the inclusion of this clause in an otherwise straightforward copyright act. ⁹⁶

⁹⁴ SOUTH CAROLINA, *supra* n. 37, at 620.

⁹⁵ Did the church ask to do this, or was it an order?

⁹⁶ Today there is no Reformed Protestant Dutch Church in New York.

CONCLUSION

Article I, § 8 cl. 8 of the United States Constitution:

“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.”

This clause reputedly originated with Charles C. Pinckney, member of the Constitutional Convention from South Carolina.⁹⁷ Madison is entitled to as much credit as is Pinckney, however, because of his complaint in a speech to the Constitutional Convention that there was “ . . . a want of uniformity in the laws concerning literary property.”⁹⁸ His position here was indisputable in light of the preceding examination. Also, he said that “States cannot separately make effectual provision for either [copyright or patents] . . .”⁹⁹ This statement was opinion, but an educated opinion, based on his view of the level of performance of the statutes discussed. The Articles of Confederation had no provision for national protection of authors. There was no debate in the Constitutional Convention with reference to Article I, § 8 cl. 8, and when the states were ratifying the Constitution, no controversy arose concerning this provision. The states, for once, quickly agreed that the federal branch should control this aspect of the law.

While the lack of uniformity, coupled with the narrowness and unenforceability of certain provisions in some of the individual statutes may have caused the states to give over copyright control to the federal government, the impact upon later laws of these early attempts at copyright regulation is undeniable. The May 31, 1790 Act of the First Congress, “An Act for the encouragement of Learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned”, was a direct descendent of the 1783 Connecticut statute, and elements in the national statute can be traced back as far as the 1672 Massachusetts Bay Colony order. No contemporary examination of American copyright history is complete without an examination of the roots of our copyright laws. Our founding fathers found it necessary to acquaint themselves with the details of the revolutionary

⁹⁷ The proceedings were secret, and no contemporary publications credited anyone for originating this provision. 2 CURTIS, CONSTITUTIONAL HISTORY 340.

⁹⁸ Fenning, *The Origin of Patent and Copyright Clause of the Constitution* 17 GEO. L.J. 109, at 113 [1929].

⁹⁹ THE FEDERALIST, No. XLIII 267 (Lodge's Ed. 1888).

states' copyright acts before committing themselves to new Federal legislation.

The concern with the protection of intellectual properties exhibited by such men as Madison and Webster was evidently a moving force behind the adoption of the Constitutional provision and of the subsequent Congressional enactments. These men, along with others involved in copyright legislation, gained valuable insights from their experiences with the earlier copyright laws of the twelve states. The original copyright acts discussed herein, while not models of legislative excellence, at least served as an historical precedent, and even now may provide a useful idea or two for the future.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

2. U.S. CONGRESS. HOUSE.

H.R. 7059. A bill to amend the Copyright Act of 1909, and for other purposes. Introduced by Mr. Danielson (for himself and Mr. Ford of Tennessee), May 19, 1975, and referred to the Committee on the Judiciary. 7 p. (94th Cong., 1st Sess.)

Except for the addition of Mr. Ford of Tennessee as a co-sponsor, identical with H.R. 5345, the "Performance Rights Amendment of 1975," introduced by Mr. Danielson on March 21. *See* 22 BULL. CR. SOC. 455, Item 325.

3. U.S. CONGRESS. HOUSE.

H.R. 7091. 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. Koch (for himself and Mr. Waxman), May 19, 1975, and referred to the Committee on Ways and Means. 2 p. (94th Cong., 1st Sess.)

Identical to H.R. 6829, also introduced by Mr. Koch during the current Congress, except for the addition of Mr. Waxman as a co-sponsor. *See* 22 BULL. CR. SOC. 455, Item 327.

4. U.S. CONGRESS. HOUSE.

H.R. 7149. A bill to amend title 17 of the United States Code with respect to registration for unpublished works and with respect to the fees of the Copyright Office, and for other purposes. Introduced by Mr. Kastenmeier, May 20, 1975, and referred to the Committee on the Judiciary. 7 p. (94th Cong., 1st Sess.)

A bill which would permit registration of unpublished works not subject to registration under the existing law, and which would generally increase the fees for registration and other services performed by the Copyright Office. The bill includes a provision which would permit a copyright owner to voluntarily grant to the Library of Congress a license to reproduce books and similar materials by means of Braille or similar tactile symbols, or by fixation of a reading

of the work in a sound recording, or both, for limited distribution for the use of the blind and physically handicapped.

5. U.S. CONGRESS. HOUSE.

H.R. 7750. A bill to amend the Copyright Act of 1909, and for other purposes. Introduced by Mr. Danielson (for himself, Ms. Abzug, Mr. Bell, Mr. Edgar, Mr. Giaimo, Mr. Hannaford, Mr. Hicks, Mr. Hinshaw, Mr. O'Hara, Mr. Richmond, Mr. Solarz, Mr. Stark, and Mr. Thompson), June 10, 1975, and referred to the Committee on the Judiciary. 7 p. (94th Cong., 1st Sess.)

Except for additional co-sponsors, identical with H.R. 5345 and H.R. 7059, providing for performance royalties for sound recordings, also introduced by Mr. Danielson during the current session of Congress. *See* Item 2, *supra*.

6. U.S. CONGRESS. HOUSE.

H.R. 8015. A bill to amend the Copyright Act of 1909, and for other purposes. Introduced by Mr. Mitchell of New York, June 18, 1975, and referred to the Committee on the Judiciary. 7 p. (94th Cong., 1st Sess.)

Identical with H.R. 5345, H.R. 7059, and H.R. 7750, providing for performance royalties for sound recordings, and also introduced during the current session of Congress. *See* Items 2 and 5, *supra*.

7. U.S. CONGRESS. HOUSE. *Brinkley, Jack*.

Omnibus copyright revision bill. *Congressional Record*, vol. 121, no. 83, pt. 2 (daily ed. May 22, 1975), p. E 2656.

In an extension of remarks, Representative Brinkley causes to be inserted into the *Record*, a portion of the testimony of Irwin Goldbloom, Deputy Assistant Attorney General, Civil Division, Department of Justice, during hearings on the copyright revision bill, H.R. 2223, before the House Subcommittee on Courts, Liberties and the Administration of Justice on May 15, 1975. The reproduced testimony deals with the CATV provisions of the bill and, while supporting the imposition of a degree of liability upon CATV, urges that an area of free use be provided for those CATV systems which are, in whole or in part, within the local service area of the primary transmitter.

8. U.S. CONGRESS. SENATE.

S. 1782. A bill to make unlawful the transportation, sale, or receipt of counterfeit recordings. Introduced by Mr. Brock, May 20,

1975, and referred to the Committee on the Judiciary. 4 p. (94th Cong., 1st Sess.)

Identical with S. 3107, 93d Cong., 2d Sess. (1974), also introduced by Senator Brock. *See* 21 BULL. CR. SOC. 250, Item 217 (1974).

The bill would make record piracy a criminal offense, punishable by a fine, imprisonment, or both. *See* statement of Senator Brock on his introduction of the bill in 121 CONG. REC. S8671 (daily ed. May 20, 1975), in which he states that existing legislation against tape piracy is ineffective for the protection of older recordings.

9. U.S. CUSTOMS SERVICE.

19 CFR—Customs Duties. Chapter I—United States Customs Service: Part 133—Trademarks, Trade Names, and Copyrights: increase in customs fees. *Federal Register*, vol. 40, no. 132 (July 9, 1975), pp. 28790-28791.

Increases made in Customs fees to be submitted for trademark, trade name and copyright recordations, ownership changes, name changes, and renewals of a recorded trademark or copyright recordation, effective August 8, 1975, *See* 22 BULL. CR. SOC. 149, Item 98 (1974).

10. U.S. DEPT. OF JUSTICE.

U.S. Justice Dept. sends "Draft Final Decree" to defendants. *The Bookseller*, no. 3619 (May 3, 1975), pp. 2350, 52-53.

The text of a "Draft Final Decree" which has been sent by the U.S. Dept. of Justice to all defendants in the antitrust suit, in which the British Publishers Association is named as co-conspirator. "In a covering letter, the Department says that several defendants have entered into discussions with it, seeking a settlement. The Draft Final Decree is 'put forth as a basis for continuing these discussions'; and in the interests of consistency a copy has been forwarded to each defendant, whether or not they have so far indicated an interest in settlement."

11. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Cable television importation of distant signal sports events; Commission directs staff to draft rule. June 25, 1975. *Federal Register*, vol. 40, no. 128 (July 2, 1975), p. 27965. "Docket No. 19417; FCC 75-742."

The rule, which is directed primarily at professional and collegiate team sports, "will provide a 35-mile zone of protection corresponding to the cable signal carriage rules into which distant

telecasts of the same game may not be imported by a cable television system when the home team is playing at home." The rule will not apply to signals being lawfully carried by cable systems on or before March 31, 1972, and will not go into effect until August 1, 1975.

12. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Cable television carriage: selection of television signals. *Federal Register*, vol. 40, no. 104 (May 29, 1975), pp. 23316-23318. "Docket No. 20487; FCC 75-565."

Notice of proposed rule-making, amending the Commission's "leapfrogging" rules, which placed restrictions on the distance the signal of a television broadcast station may be extended beyond the station's contour.

13. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 76. Cable television systems: exempt from obligation of providing syndicated program exclusivity protection. *Federal Register*, vol. 40, no. 104 (May 29, 1975), pp. 23318-23319. "Docket No. 20482; FCC 75-541."

Notice of proposed rule-making which would exempt from the obligations of FCC syndicated program exclusivity rules, cable television systems and systems conglomerates serving fewer than 1,000 subscribers.

2. Foreign Nations

14. ALGERIA. *Laws, statutes, etc.*

Ordinance establishing the National Copyright Office. (No. 73-46, of July 25, 1973). *Copyright*, vol. 11, no. 4 (Apr. 1975), pp. 87-89.

"The French text of this Ordinance was published in the *Journal officiel* of the Democratic and Popular Republic of Algeria of September 11, 1973, WIPO translation."

15. ARGENTINE REPUBLIC. *Laws, statutes, etc.*

Decree No. 461. (Of January 31, 1973). *Copyright*, vol. 11, no. 5 (May 1975), pp. 108-110.

The regulatory decree with respect to the General Society of Authors of Argentina (ARGENTORES) for Reciprocal Protection. See Item 16, *infra*. The Spanish text was published in the *Boletín Oficial* of the Argentine Republic of January 31, 1973, and the English translation is by WIPO.

16. ARGENTINE REPUBLIC. *Laws, statutes, etc.*

Law No. 201.115. (Of January 23, 1973). *Copyright*, vol. 11, no. 5 (May 1975), pp. 107–108.

A law which, in effect, nationalizes the General Society of Authors of Argentina (ARGENTORES) for Reciprocal Protection. The Spanish text was published in the *Boletín Oficial* of the Argentine Republic of January 31, 1973, and the English translation is by WIPO.

17. AUSTRALIA. *Laws, statutes, etc.*

Copyright Tribunal (Procedure) Regulations. (No. 59, of April 24, 1969). *Copyright*, vol. 11, no. 6 (June 1975), pp. 124–133.

Regulations, under the Copyright Act 1968, covering procedures before the Copyright Tribunal, which was created for the principal purpose of deciding certain disputes between performing rights organizations and the like and would-be users of the works controlled by the organizations.

18. GERMANY (FEDERAL REPUBLIC, 1949–) *Bundesministerium für das Post- und Fernmeldewesen.*

Kabelfernsehen; die Bundesregierung antwortet auf parlamentarische Anfrage. *Film und Recht*, vol. 19, no. 5 (May 15, 1975), pp. 350–355.

Answers to parliamentary inquiries concerning cable television given on April 2, 1975, by the Federal Minister for Posts and Telecommunications in behalf of the Federal Government of the German Federal Republic.

19. GREAT BRITAIN. *Dept. of Education and Science.*

Public Lending Right: an account of an investigation of technical and cost aspects. London, H.M. Stationery Off., 1975. 53p.

The Report, which is the outcome of a year's effort by members of a Technical Investigation Group, "demonstrates that the implementation of any form of public lending right is no simple and easy task. Furthermore the Report presents much hitherto unknown material, for example, about authors and the library use of books."

20. GREAT BRITAIN. *Laws, statutes, etc.*

The Copyright Royalty (Records of Musical Works) (Inquiries Procedure) Regulations 1974. (No. 2190, of December 20, 1974,

coming into force on February 1, 1975). *Copyright*, vol. II, no. 5 (May 1975), pp. 110–112.

“These Regulations prescribe the procedure to be followed at and in connection with an inquiry under section 8(3) of the Copyright Act 1956 to inquire into the question whether the ordinary rate of royalty, or the minimum amount thereof, provided for in that section in relation to records of musical works, has ceased to be equitable.”

21. ICELAND. *Church Musical Education Fund*.

Charter. *Copyright*, vol. 11, no. 6 (June 1975), p. 135.

“The Charter was approved by the President of Iceland on July 17, 1974. Authorized English translation communicated to WIPO by courtesy of the Ministry of Culture and Education of the Republic of Iceland.” The purpose of the Fund “is to strengthen the composition of church music and texts to be sung to such music.”

22. ICELAND. *Laws, statutes, etc.*

Regulations concerning the payment of royalties to authors for public performances of literary works and musical compositions in religious services and other church ceremonies. (Of July 11, 1974). *Copyright*, vol. 11, no. 6 (June 1975), p. 134.

Authorized English translation communicated to WIPO by the Ministry of Culture and Education of the Republic of Iceland. “These Regulations, which are issued in accordance with the provisions of sub-paragraph (4) of Article 21 of the Copyright Act No. 73/1972, enter into effect forthwith.”

23. IRAN. *Laws, statutes, etc.*

Law on Translation, Duplication of Books, Publication and Phonograms. *Copyright*, vol. 11, no. 2 (Feb. 1975), p. 46.

Apparently an amendment to the Iranian copyright statute, but not designated as such. It was officially translated by the Ministry of Justice of Iran, and came into force on January 6, 1974.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

24. POLAND. *Treaties, etc. Russia, 1923-U.S.S.R., Oct. 4, 1974.*

Agreement on the reciprocal protection of copyrights concluded between the Government of the Polish People's Republic and the Government of the Union of Soviet Socialist Republics. *Copyright*, vol. 11, no. 4 (Apr. 1975), pp. 85-86.

The Agreement provides that it shall not affect the rights and obligations of the contracting parties under other international agreements, that it is concluded for a period of three years, automatically extended every three years unless denounced by one of the parties, and that it is subject to acceptance according to the legislation of each contracting party.

PART IV.

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

25. *Bell v. Pro Arts, Inc.*, 185 U.S.P.Q. 6 (6th Cir. Feb. 14, 1975) (Per Curiam).

Appeal from District Court judgment in favor of plaintiff in its action for infringement of its copyrighted poem "Desiderata", arising out of defendant's unauthorized reprinting thereof in its catalogue. Appellant contends, as the basis of the appeal, that the lower court erred in permitting the introduction of unauthenticated evidence; in allowing the introduction of hearsay statements, in imposing damages, and in exhibiting prejudice towards appellant during the trial.

Held, affirmed.

Each of the contentions made by the appellants was rejected by the court. With respect to the imposition of statutory damages within the limits of 17 U.S.C. Sec. 101, these were properly allowable despite the fact that actual damages were not ascertainable. The court noted, in addition, that appellant's lack of cooperation during pretrial discovery made it impossible to ascertain actual damages.

26. *Fuld v. National Broadcasting Company, Inc.*, 185 U.S.P.Q. 460 (S.D.N.Y. March 6, 1975) (Knapp, D.J.).

Action for alleged infringement of plaintiff's copyright in its script "Bugsy" arising out of defendant's television broadcast of the movie "The Virginia Hill Story". Prior to defendant's broadcast, plaintiff's script had been submitted unsolicited to defendant, who had rejected it. Plaintiff's earlier motion for a preliminary injunction prohibiting defendant from broadcasting the movie was denied. On defendant's motion for summary judgment (for the purposes of which defendant conceded access and the plaintiff's work was assumed to be the sole source of the ideas in defendant's movie), *held*, motion granted.

After a lengthy narration of the story lines of both plaintiff's and defendant's works, the court concluded that the only similarities between the works constituted historical facts or previously published fictional material which did not originate with the plaintiff and which was not protected by copyright, which permits use by others of ideas or themes in the copyrighted work or historical facts contained therein. Moreover, the

information common to both works was given entirely dissimilar treatment by the defendant in its movie. This was graphically illustrated by the court in its comparison of the radically different portrayal of the love affair between Virginia and "Bugsy" in each of the two works. Finally, the court rejected as without merit plaintiff's claim that infringement could be established by the defendant's use of certain dramatic techniques in the script, such as the use of flashbacks and the portrayal of Virginia and "Bugsy" as "starcrossed lovers." These techniques were employed with entirely different effects by the defendant and, in addition, did not originate with the plaintiff.

27. *Walt Disney Productions v. Mature Pictures Corp.*, 186 U.S.P.Q. 48 (S.D.N.Y. Feb. 14, 1975) (Duffy, D.J.).

Action for infringement of plaintiff's copyright in its musical composition entitled "Mickey Mouse March", which was originated by plaintiff and used extensively in connection with its Mickey Mouse Club television series for youngsters. The defendant's use of the music and portions of the words of the plaintiff's song in its movie "The Life and Times of the Happy Hooker" is not disputed. In fact, the scene in question consists of three male actors (nude except for "Mouseketeer" hats) who are being sexually fulfilled by the female protagonist, all to the tune of the "Mickey Mouse March". Defendant's defense to plaintiff's claim of infringement is that it made a "fair use" of plaintiff's work as a parody. On plaintiff's motion for a preliminary injunction, *held*, motion granted.

Although the court agreed with the defendant that parody is one of the possible situations where the doctrine of fair use may come into play, it held that because defendant had made a complete copy of the work—i.e., much more than necessary to "Recall or conjure up the object of (the) satire", and had used it "over and over again"—its copying was infringement and not fair use. The court also rejected as "totally wrong" defendant's argument that a preliminary injunction was inappropriate because no irreparable harm was present, stating that:

"Their use of the copyrighted material in the setting provided is such as to immediately compromise the work. Accordingly, a preliminary injunction will issue."

In order to avoid use of its decision to publicize either the plaintiff's or the defendant's works, the court, along with its decision, entered an order prohibiting any commercialization of the decision under penalty of contempt.

28. *Neal v. Glickman*, 185 U.S.P.Q. 549 (N.D. Texas, March 31, 1975) (Porter, D.J.).

Action to enjoin infringement by the defendant of plaintiff's allegedly copyrighted medical outline arising out of defendant's virtual reprinting thereof under a different title, without credit to the plaintiff. Plaintiff's work was first published in 1966 without a copyright notice, but was revised and republished by him in 1967 with a copyright notice. The parties did have an oral understanding, at a time when the defendant was still a student, that he would be permitted to reproduce plaintiff's work for resale to other students. However, the terms of such an oral agreement were in dispute. On plaintiff's motion for a preliminary injunction, *held*, motion granted.

Defendant's principal defense was that plaintiff was guilty of unclean hands in that he failed to mention on his subsequent copyright applications that his work was first published without a copyright notice. The court rejected defendant's theory for the reason that, since the new matter in the revised edition was copyrighted, defendant's reprinting was an infringement of at least that part of plaintiff's work.

29. *G.R.I. Corporation v. Golden Fifty Pharmaceutical Co., Inc.*, 185 U.S.P.Q. 674 (N.D. Ill. April 18, 1975).

Action for copyright and trademark infringement, and unfair competition, arising out of the similarities of defendant's advertising campaign which was developed subsequent to the marketing by plaintiff of its beauty kits with which defendant's products were in competition. On defendant's motion to preliminarily enjoin plaintiff from alleged anti-trust violations, *held*, motion denied.

Rejecting plaintiff's claim of copyright infringement, the court discussed the following points:

1) The requirement that plaintiff possess copyright registration certificates in order to maintain its copyright infringement claim was satisfied on the authority of *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) (permitting complaint to be amended to indicate registration occurring after filing of action) even though five of the applications for registration were filed just prior to suit and one was filed subsequently. All registrations had been issued prior to the decision on the motion.

2) The court rejected defendant's argument that plaintiff's allegedly copyrighted ads were in the public domain because of prior publication by plaintiff of similar ads without a copyright notice. The rejection was based on a comparison of the older ads with the registered ads, which revealed that the copyrighted ads were sufficiently distinctive from the old ads as to be protectable and not in the public domain. However, the plaintiff's

"welcome letter" was held in the public domain because it had been published almost verbatim without a copyright notice.

3) Since defendant admitted use of plaintiff's ads in designing the allegedly infringing ads, the only remaining question was whether defendant's ads were substantially similar to plaintiff's. While each of the ads contained the same basic elements (a woman before a mirror surrounded by cosmetic jars, applying cosmetics, etc.), the layouts, models, and the written material of each were different. Therefore, the court held that defendant had only used plaintiff's uncopyrightable ideas or methods:

"Similarities attributable to the fact that the parties to the instant lawsuit are competing in the same business thus are not substantial in the copyright sense. Presumably all cosmetics ads include pictures of women using the products and the products themselves. The similarities listed above between the ads are of this type; they do not relate to the manner of expressing the admittedly similar marketing item. Thus the court finds that there is no comprehensive substantial similarity between the ads which would trigger plaintiff's copyright protection.

Defendants were found to have violated the Lanham Act and the Illinois Deceptive Trade Practices Act by publishing their mailing coupon and welcome letter.

30. *Imperial Toy Corporation v. Ben Cooper, Incorporated*, 185 U.S.P.Q. 453 (C.D. Cal. Feb. 12, 1975) (Hill, D.J.).

Action for copyright infringement, trademark infringement and unfair competition. Defendant moved to dismiss all three causes.

Held, granted in part and denied in part.

The plaintiff's claim of copyright infringement was dismissed because the allegedly infringed work was refused a copyright registration certificate which the court considered an indispensable prerequisite to maintenance of such a suit. The court was not satisfied, however, that defendant's evidence was sufficient to warrant early dismissal of plaintiff's claim of trademark infringement, or its claim of unfair competition, which was held properly pendent thereto. 28 U.S.C. §1338 (b)

2. State Court Decisions

31. *Demaria v. Bobbs-Merrill Company, Inc.*, 185 U.S.P.Q. 575 (N.Y. Sup. Ct., N.Y. City, February 21, 1975) (Fein, J.).

Action by an American author for breach by defendant publisher, of publishing agreement. Following the execution of the agreement, the work was first published in Great Britain. However, during the six-month period subsequent thereto, no ad interim copyright application was filed

in the United States, and such a failure resulted in permanent loss of United States copyright, pursuant to 17 U.S.C. Sections 22-23. Each party asserted that it was the other's obligation to file under their agreement, which read as follows:

"The Publisher shall apply for copyright of the work in the name of the author in the United States, and may apply for copyright in such other countries as may be covered by this agreement, but is under no obligation to do so. The author will, upon the Publisher's request, do all acts necessary to effect and protect the copyright and renewals thereof."

On cross motions for summary judgment, *held*, defendant's motion denied, plaintiff's motion held in abeyance.

Despite defendant's argument that custom in the trade required the author or his agent to file for ad interim copyright, the court interpreted the language of the agreement to impose that duty on the publisher, absent a request by it to the author. However, since the defendant claimed, contrary to the plaintiff's assertion that he had not received notice of the British publication, the court declined to grant plaintiff's motion. Instead, that one factual issue was referred to a special referee, and plaintiff's motion was held in abeyance.

32. *Trophy Productions, Inc. v. Telebrity, Inc.*, 185 U.S.P.Q. 830 (N.Y. S. Ct., N.Y. County, Feb. 21, 1975) (Stecher, J.).

Action to enjoin alleged copyright infringement by defendant, arising out of its sale and/or manufacture of audio portions of plaintiff's copyrighted video-taped television show. Defendant moved to dismiss for lack of subject matter jurisdiction.

Held, motion granted.

The defendant's position, accepted by the court, was that the action pertained to copyrights encompassed within the Federal Copyright Act and that, therefore, the federal courts had exclusive jurisdiction. The plaintiff argued unsuccessfully that its work, which consisted of sounds accompanying a television show, were "sound recordings" and, therefore, only covered by state common law protection because fixed prior to Feb. 15, 1972. However, the court held that the work was encompassed by the Copyright Act. This was because they were held not "sound recordings" which are only protected if fixed after Feb. 15, 1972. Rather, such works were considered to be akin to "the sounds accompanying a motion picture" which are protected under the Act even if such were fixed prior to Feb. 15, 1972. On the ground of federal preemption, the court rejected plaintiff's attempt to circumvent the jurisdictional dilemma by alleging, in addition to infringement, common law unfair competition. The action was dismissed.

PART V.

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A. BOOKS AND TREATISES

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Public broadcasting and education; a report to the Corporation for Public Broadcasting. Washington, D.C. [1975] 114 p.

The results of a year-long study on the role of the Corporation for Public Broadcasting (CPB) in the relationship of public broadcasting and education. Eleven major goals are identified and a number of specific actions proposed which illustrate these goals. Among the proposals are the facilitation by the CPB of the development of new, more flexible patterns of rights clearance, and the alleviation of the many legal problems associated with copyright, royalties, and clearances.

34. AMERICAN BAR ASSOCIATION. *Section of Patent, Trademark and Copyright Law.*

Committee reports to be presented at the annual meeting held August 8-13, 1975, Montreal, Canada. Editor: Beverly A. Vandenberg. Chicago, American Bar Center [1975] 280 p.

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

35. ASSOCIATION OF AMERICAN PUBLISHERS.

Copyright permissions: a guide for noncommercial use. Washington, D.C. [1975] 6 p.

"The purpose of this brochure is to simplify and expedite, to the greatest extent possible, the seeking and granting of requests from educators, librarians, and other noncommercial users to duplicate portions of copyrighted materials."

36. FELDMAN, FRANKLIN, and STEPHEN E. WEIL.

Art works: law, policy, practice. New York, Practising Law Institute [1974]. 1241 p.

A comprehensive reference work, consisting of cases and other materials, for lawyers, art dealers, collectors, museum and foundation trustees and administrators, and others interested in the visual arts, organized into the following eight major sections: (1) The rights of the artist in his work; (2) Purchase and sale of works of art; (3) Transport of works of art across national boundaries; (4) Insuring works of art; (5) Lending works of art; (6) Tax aspects of works of art; (7) Civil and criminal liabilities involving works of art; (8) Private ownership and public trust.

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A greatly expanded and revised edition of the author's *The International Protection of Industrial Property* (Cambridge: Harvard University Press, 1960). "This new book has gone further than did . . . [the] earlier one in presenting the national treatment of the various rights of industrial property, in dealing with agreements between enterprises involving such rights, and in the problems stemming from the impact of antitrust laws on such agreements."

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Current developments in copyright, 1975. Walter J. Derenberg [and] Morton David Goldberg, co-chairmen. New York, [1975]. 2 v. (Patent, copyright, trademark and literary property; course handbook series, no. 64)

An attempt "to bring together the most significant written materials presently available on the subject [of copyright]."

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A "comprehensive management strategy for obtaining the maximum benefit from invention, know-how, and all other forms of intellectual property", this book is the third volume in the publisher's Intellectual Property Series. The legal and business as-

pects of copyright are treated in eight chapters, and numerous graphs, diagrams and forms involving all aspects of intellectual property are included.

2. Foreign Publications

1. In English

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The law of literary & dramatic copyright in a nut-shell. [Bombay, 1975] [2d ed] 259 p.

A summary of the law of copyright, with particular emphasis on the laws of India, Great Britain, and the United States.

41. LJUNGMAN, SEVE.

The function of copyright in present day society; a discussion concerning a suggested reappraisal of the fundamental principles of copyright legislation in the Nordic countries. Introductory address, *The First Nordic Copyright Symposium*, Hanaholmen (Helsinki), June 9-11, 1975 [Helsinki? 1975] 19 p.

Explores briefly several aspects of copyright protection which have been proposed in recent Nordic legislation, such as *droit moral*, *droit de suite*, "collective" legislation, and socioeconomic rights and problems which might arise from the international applications of these principles should they be enacted into domestic law.

42. SOMMERLAD, ERNEST LLOYD.

National communications systems: some policy issues and options. Paris, Unesco [1975] 35 p. (Reports and papers on mass communication, no. 74)

A paper which purposes "to sketch a profile of an organized communication system, to describe its various components, and to identify some of the important issues and options which arise in defining the objectives of the system, in organizing its structure and in formulating measures to control or support it." One of the issues covered is protection of private rights encompassing intellectual property, personal reputation and privacy.

2. In German

43. BOYTHA, GYÖRGY.

Das Urheberrecht der Ungarischen Volksrepublik. Berlin, Schweitzer, 1974. 128 p. (Schriftenreihe der UFITA, Heft 49)

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B. LAW REVIEW ARTICLES

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The question whether public performance rights should be extended to record producers is evaluated in terms of economic theory and equitable and legal consequences, with a conclusion that no convincing argument can be found for granting record producers such rights.

45. BESEN, STANLEY M. The economics of the cable television "consensus." *The Journal of Law & Economics*, vol. 17, no. 1 (April 1974), pp. 39-51.

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Highlights of income and estate tax provisions affecting creators of literary property.

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Observations concerning the protectability of resolutions under the copyright law of the German Federal Republic, sparked by a resolution made at a Congress of the League of German Writers, which took place in Frankfurt from November 15 to 17, 1974.

73. HUBMAN, HEINRICH. Die sklavische Nachahmung. *Gewerblicher Rechtsschutz und Urheberrecht*, vol. 77, no. 5 (May 1975), pp. 230–244.

A discussion of the problem of “slavish imitation” under the unfair competition law of the German Federal Republic.

74. KREILE, REINHOLD. Die Stellung des Fernsehproduzenten im Urheberrecht; Perspektiven zu aktuellen Fragen der Praxis. *Film und Recht*, vol. 19, no. 5 (May 15, 1975), pp. 293–299.

A discussion of the copyright situation of television producers in the German Federal Republic, with a brief section on the situation in other countries.

75. REICHARDT, ERNST. Zum GEMA—Berechtigungsvertrag; eine Erwiderung auf die Ausführungen von Dünnwald in FILM UND RECHT Nr. 9/1974, S. 554 ff. *Film und Recht*, vol. 19, no. 3 (Mar. 15, 1975), pp. 147–151.

A discussion of the scope of an assignment to the West German performing rights society, GEMA, of the right to license motion picture rights.

76. ROEBER, GEORG. Zum Thema: Urheberbvertragsrecht; dritte Diskussionssitzung beim Institut für Film-und Fernsehrecht, Bericht. *Film und Recht*, vol. 19, no. 5 (May 15, 1975), pp. 319–332.

A report on the discussions at the third meeting on the subject of copyright contracts in the German Federal Republic, held by the Institute for Film and Television Law on April 18, 1975.

77. SAMSON, BENVENUTO. Urhebervertragsgesetz oder Verzicht auf eine gesetzliche Regelung? Ein Plädoyer für die gesetzliche Regelung. *Film und Recht*, vol. 19, no. 5 (May 15, 1975), pp. 299–302.

The author's presentation, at the third session on the subject of copyright contracts in the German Federal Republic, held on April 18, 1975 by the Institute of Film and Television Law, at which he makes a strong defense of a statutory regulation of copyright contracts.

78. STEUP, ELISABETH, and ERHARD BUNGEROTH. Die Brüsseler Konferenz zum Schutz der durch Satelliten übertragenen Sendungen. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 4 (Apr. 1975), pp. 124–134.

A report on the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, May 6–21, 1974, by the alternate head and another member of the delegation to the conference of the German Federal Republic.

5. In Italian

79. CHAVES, ANTONIO. Nozioni introduttive in tema di contratti di diritto d'autore. *Il Diritto di Autore*, vol. 45, no. 4 (Oct.–Dec., 1974), pp. 513–528.

A lecture on the subject of copyright contracts under Brazilian, Italian and French laws given at the University of San Paolo, Brazil, as part of a course on copyright law.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

80. COX, HENRY BARTHOLOMEW. The law and the manuscripts curator. *Drexel Library Quarterly*, vol. 11, no. 1 (Jan. 1975), pp. 72–86.

A survey of the law as it pertains to the administration and use of manuscript documents, covering literary property rights, deeds of gift, restrictions, photocopying, monetary appraisals, theft, and problems of slander and libel.

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81. DIAMOND, SIDNEY A. Split Supreme Court leaves photocopying issue clouded. (What's doing on the legal front?) *Advertising Age*, vol. 46, no. 19 (May 12, 1975), p. 50.

An article on the impact of the split decision in the *Williams & Wilkins* case, 95 S. Ct. 1344 (1975).

82. Dispute is fierce over copyright and cable TV; House subcommittee hears almost as many arguments as witnesses. *Broadcasting*, vol. 88, no. 24 (June 16, 1975), pp. 30-32.

An article on the testimony of copyright owners, broadcasters and representatives of the cable industry on the question of copyright liability for cable at the hearings in June on the copyright revision bill, H.R. 2223.

83. HARRIS, PAUL. Make CATV pay H'wood pipers; should be bound by c'right Law, Valenti tells House in florid, but pointed, oratory. *Daily Variety*, vol. 168, no. 6 (June 13, 1975), pp. 1, 9.

An article on the testimony of Jack Valenti, president of the Motion Picture Association of America, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, June 12, on the provisions of the copyright revision bill, H.R. 2223, dealing with cable television.

84. LANIER, ROBIN. A home TV revolution. *The New York Times Magazine*, May 25, 1975, pp. 9, 43, 50-52.

An article on the "video disk," a new development in home-video programming.

85. LONG, JANICE R. Copyright bill gets workover from all sides; educators, librarians, others air views on library photocopying provisions of copyright bill in House subcommittee hearings. *Chemical Engineering News*, vol. 53, no. 21 (May 26, 1975), pp. 14-15.

An article on the hearings in regard to sections 107 and 108 of the revision bill, H.R. 2223, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice in May.

86. MICHENER, JAMES A. Michener, off the cuff. *The Swarthmore College Bulletin*, vol. 72, no. 5 (Apr. 1975), pp. 1-7.

An article, devoted largely to economic and other aspects of authorship, which was adapted from a speech given by Mr. Michener at the Swarthmore Club of Philadelphia annual banquet January 25, 1975, on the campus.

87. NCTA decision on copyright doesn't draw support; dissenters say they'll keep pushing for alternatives. *Broadcasting*, vol. 88, no. 22 (June 2, 1975), pp. 52-53.

An article on the negative reactions of a number of cable organizations toward the recently finalized position on copyright of the National Cable Television Association.

88. President Ford favors Act royalty, musicians told at convention. *Billboard*, vol. 87, no. 27 (July 5, 1975), p. 3.

An article on the 74th annual convention of the American Federation of Musicians (AFM) in Shreveport, La., during which Nancy Hanks, head of the National Endowment of the Arts, told the delegates that the Ford administration was supporting Sen. Hugh Scott's performance royalty bill (S. 1111), a statement which was confirmed by AFM president Hal Davis.

89. WAGNER, SUSAN. Copyright vs. "fair use": no agreement in sight. *Publishers Weekly*, vol. 207, no. 21 (May 26, 1975), pp. 25-26.

An article on the second round of House subcommittee hearings on H.R. 2223, May 14 and 15. Testimony was given "on the two issues of greatest concern to authors and publishers—library photocopying and so-called educational exemptions."

90. WAGNER, SUSAN. Copyright vs. technology: Congress begins its hearings. *Publishers Weekly*, vol. 207, no. 20 (May 19, 1975), p. 98.

An article on the first two days of hearings (May 7 and 8) before the House subcommittee on the copyright revision bill, H.R. 2223.

2. Foreign

1. England

91. E.P.C. and B.D.C. report on 1974-75. *The Bookseller*, no. 3618 (Apr. 26, 1975), pp. 2248-2252.

Extracts from the annual reports of the Educational Publishers Council and the Book Development Council, two divisions of the Publishers Association. Of copyright interest are extracts devoted to the question of copyright and copying in the schools and the revised copyright conventions.

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92. FRASE, ROBERT W. Addition of library and other protocols to the Florence Agreement. *IFLA Journal*, vol. 1, no. 2 (1975), pp. 100-112.

A paper prepared as the result of work, authorized by the General Conference of Unesco at its 18th meeting in Paris, October/November 1974, to begin on drafting a protocol to expand and extend the "Florence Agreement" for consideration by the 1976 General Conference. Appendices contain the text of the Agreement, some suggestions for a library protocol, and joint recommendations of the Section of National and University Libraries and the Subsection of University Libraries. With summaries in French and German.

93. Publishers under fire in 1974-75; P.A. reports on another eventful year. *The Bookseller*, no. 3616 (Apr. 12, 1975), pp. 2084-2092.

A summary of the annual report of the Publishers Association, covering such topics as market rights, copyright and education, domaine public payant, photocopying, public lending right, paperback royalties, and international copyright.

NEWS BRIEFS

94. ILLINOIS ENACTS ANTIPIRACY LAW.

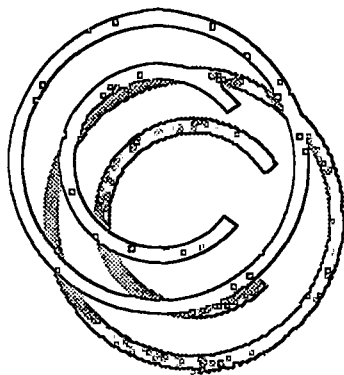
On August 14, 1975, Illinois' House Bill 1357 was signed by Governor Dan Walker, making the "unlawful use of sound recordings and unidentified sound recordings" a crime. Illinois thus became the 32nd state to enact antipiracy legislation.

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PART I.

ARTICLES

95. RECENT TRENDS OF THE GERMAN COPYRIGHT LAW*

By ERNEST K. PAKUSCHER**

I. INTRODUCTION

The new German Copyright Act of September 9, 1965 (BGBl. I p. 1273), as amended by the Act of Nov. 10, 1972 (BGBl. I p. 2081), is for the time being the culmination of a development comprehending nearly forty years. The first draft of an amendment to the then German Copyright Act of 1901 goes back to 1932; it was followed by several private and official drafts. After World War II, the reform work was continued: in 1954 the experts of the Federal Department of Justice published a draft, which was followed by an official paper of the Department of Justice in 1959 and by the draft of the Federal Government in Bonn in 1962.

This long history of preparation of the statute benefited from the fact that the drafts have been discussed carefully with both interested parties and experts. Moreover, the courts, and above all the Federal Supreme Court for Civil and Criminal Matters at Karlsruhe (Bundesgerichtshof abbr. BGH), rendered decisions during those years which dealt with new technical devices in the field of copyright law. Here the German law resembles the Anglo-American case law, since German "Urheberrecht" is to a large extent judge-made law. The legislator had practically nothing to do but to incorporate into the new statute the result of the leading cases decided by our Supreme Court, thereby molding the old law and new technical devices into a modern statute.

Do we really have a new copyright law or merely a new copyright statute? This question comes to mind because of the latest developments in the fine arts, especially in the area of modern music, such as electronic or serial music, where the composer frequently works together with technicians. For example, in Boris Blacher's opera, "The Emergency Landing", important parts have been produced in cooperation with Professor Dr. Winckel of the Technical University Berlin and two of his

* Abridged version of a lecture given at a luncheon sponsored by the Copyright Luncheon Circle on Oct 8, 1975 in New York City.

** Mr. Pakuscher is President of the Federal Patent Court of the Federal Republic of Germany. He has a Dr. jur. (Munich 1952); LL.M. (Berkeley 1956).

assistants. The program distributed on opening night at the Hamburg Opera House mentioned these names explicitly as co-composers. Another example would be music pieces for symphony orchestras in which the composer refrains from composing for some minutes and, in his score, merely instructs the users of his music to play on their instruments as they please. Wolfgang Sawallisch, chief conductor of the National Opera at Munich, asked in a recent television broadcast how the conductor could still feel responsible for the correct interpretation of the composer's score, if the author gives away his first and primary duty to let the public know how his work shall be interpreted. Of course, Mozart, and before him, Bach, hardly ever gave any detailed instructions as to the execution of their music. However, there exists a great difference: Bach and Mozart took great care to spell out their music in writing so that the tunes were there on paper, and posterity had only to wonder as to their correct presentation by adequate instruments, and at the correct tempo. To all these questions the new copyright act does not say one word, so that it must be said: we have a new copyright act, but not a new copyright law.

Five years have passed since the effective date of the new Copyright Act. Although this is a rather short period, an evaluation of the new law and the present trend of rights vested in authors of protected works seems of general interest. Inventions in the field of microcopies and xerocopies, an electrostatical reproduction procedure, will present us with new problems, since these forms of reproduction are to a large extent used without any participation by the authors and publishers of the copied works. At the same time, we stand at the frontier of new electronic developments. The products of electronic computers are no "personal products of the human spirit" in the sense of the new Copyright Act, but they can be directed in such way that a work of art might come into existence by a combination of both human and mechanical powers. Whether TV broadcasts from continent to continent and the development of new audiovisual devices will demand future changes of the German law remains to be seen (cf. Reh binder, *Film und Recht*, 1972, p. 359; Jacoby, *FuR* 1971, p. 387; Dietrich Reimer, *Copyright Problems of the New Audiovisual Media*, IIC, 1974, p. 180).

The new law has already been the subject of litigation submitted to the Federal Constitutional Court (*Bundesverfassungsgericht*) some years ago. The decisions rendered by this court (*UFITA* Vol. 63, p. 279 et seq. 1972) have led to the Amendment law of 1972 cited above which deals, *inter alia*, with the *droit de suite*, the lending of printed works, and the exemption from the obligation to pay royalties to the author for uses of protected works for church, school and other instructional purposes.

II. RECENT CASES ON THE GERMAN COPYRIGHT LAW

1. *Duration of Copyright*

While the U.S. Copyright Act provides for two successive terms of copyright of 28 years each, the German copyright extends to the full life of the author plus 70 years thereafter. This long period is the result of two German legislative acts: The law of 1901 granted a copyright for the lifetime of the author plus 30 years thereafter. By amendment law of December 13, 1934 (RGB1. II p. 1395), this period was extended to 50 years *post mortem auctoris* and, finally, the new Copyright Act of 1965—I might say to the surprise of all other countries and the German public—extended it to the present lifetime plus 70 years (Sec. 64 para 1).

These extensions were the subject of a Supreme Court decision last year (BGH November 12, 1974—I ZR 78/73—(KG: MDR 1975, 557), involving the right to publicly perform the operetta "The Merry Widow". The heirs of the composer Franz Léhar, who had died in 1948, and of the authors of the text used by Léhar, had thought that they would be free to negotiate for new terms with the defendant for the period for which the copyright term had been extended. The Supreme Court did not share this opinion and argued as follows: All the extensions of the copyright term have pursued the same aim, viz., to give the financial advantages deriving therefrom to the heirs of the authors. On the other hand, the holders of copyright assignments not limited in time should not be prevented from using their licenses also during the extended copyright term in the same way and under the same conditions as before. Therefore—contrary to the decision of the lower courts—the case was dismissed. This decision seems to indicate that the U.S. solution of two successive terms of 28 years copyright protection gives the author and his heirs more chance for re-negotiation than does the German law.

2. *Moral Rights and Works for Hire*

In this field of law the German courts and scientists have developed the concept of "Urheberpersönlichkeitsrecht", which is part of the general right to personality protected by our Constitution. It serves as the basis for such statutory rights as the right to publish (Sec. 12), the recognition of authorship (Sec. 13) and the protection against misrepresentation of protected works (Sec. 14). In this connection, the question arises whether it is permissible to accept the concept of works for hire, that is to say, the creation of new works (in the sense of the copyright act) in the course of an employment contract. Here, Sec. 43 of the German Copyright Act is of crucial importance: it provides that the provisions on the disposition of rights vested in the author shall also apply, if the author

has created his work by meeting his obligation under an employment contract. So far so good! But this provision, which is one of the shortest of the whole act, continues with the words: "as far as nothing to the contrary can be derived from the contents or the essence of the employment contract." Thereby, it is possible that interested parties will use employment contracts to make the first part of the provision obsolete and without any practical effect. This is still more regrettable, since the number of authors who work under an employment contract is much larger than the number of so-called "free" (i.e., free-lance) artists. The same is true for performing artists, because, pursuant to Sec. 79 of the German law, the extent to which an employer is entitled to use performances executed with the help of hired musicians and other artists will be governed by the employment contract, unless special conditions have been fixed explicitly. Here, also, the exception becomes the rule.

The regulation in the German law that individual rights might be changed or affected by employment contracts leads in many instances to the result that provisions established in the interest of authors and performing artists have been set aside. Insofar as the proponents of the German copyright act defend this result by claiming that employed artists and authors do not need any special protection, since they would not carry any risk vis-à-vis their works, the contrary is true! Due to their social and financial dependence on the employer, they need special protection. Thus, a provision in an employment contract entitling a radio corporation to assign broadcasting rights also to foreign radio stations will be legal, but a contractual provision obliging the author to assign certain rights for the use of his works which are not yet known, or for works which are not within the field of his employment contract, must be considered null and void, since by such provisions the employee will be moved into complete dependence on the employer. Certain discrepancies have arisen as to the interpretation of contracts in view of the question whether an employment relationship prevails or whether the author in question has remained a free artist solely under contract with radio or television corporations for the use of his works. Of course, radio and television companies will be of the opinion that an employment relationship has been established; however, the decision of this issue will depend on the duration of the contractual relationship, the amount of time the author has to put at the disposal of the radio company and the extent of his being subordinated to its order.

Another most interesting issue in the field of works for hire has been preliminarily decided by the 6th Civil Chamber of the District Court (Landgericht), Frankfurt on Main, on August 14, 1975. The court, by means of an injunction, ordered the Frankfurt City Opera House to refrain from performing "Götterdämmerung" by Richard Wagner

staged by the 26-year old Peter Mussbach, "if parts of the production—especially in the 3rd act—should not have generated from him or should not have been approved by him." The court divided the stage setting into three parts:

- 1) those approved by Mussbach
- 2) those disapproved by him and therefore unchangeable, and
- 3) those which might be changed under the principles of *bona fide* and *bonos mores*.

The stage setting by Mussbach had led to a scandal at the opening night. Therefore, the chief conductor of the opera house, the well-known Christian von Dohnanyi, tried to ameliorate or modify some parts of the performance's stage-setting. Mussbach opposed these changes and finally went to court successfully.

This case can become of extreme importance by setting limits between the rights of authors and composers on the one side and performing artists such as conductors and stage directors on the other side. Obviously, the court at Frankfort on Main will give the stage directors, (who so far have been considered as belonging to the group of performing artists and not to the group of composers or authors) a new status in the field of copyright relations. This is a basic question of tremendous importance which leads to a multitude of other questions. For instance: How shall the rights of opera conductors be limited with regard to those of the stage directors? What about rights of an expert in theater management as against those of a newcomer? In the future, shall all the ideas (even if of an ingenious nature) of a young stage director, who as yet has little if any experience with the technical and musical possibilities of opera houses, be protected without regard to the question whether his ideas can be realized or not and without considering whether their realization causes a theater scandal or not? Shall the courts become judges of good taste and even decide on the value of artistic achievements? I suggest that the courts should be very cautious with decisions like the one from Frankfort. Otherwise, it might happen that second-hand producers will receive greater and better protection than even the authors or composers of the performed work ever received during their lifetimes.

3. *The Law of Contracts in Copyright Matters*

A number of recent decisions have underlined the necessity for regulation of contracts in copyright as far as the assignment of rights to perform, broadcast or televise are concerned. This may be illustrated by the following case:

The plaintiff produces television films on behalf of a radio broadcasting corporation which, of course, is not a private, but a state organization in Germany. On September 9, 1966, this corporation came to a written agreement with the defendant, in which the latter undertook to submit a manuscript ready to be televised under the title of the well-known singer "Anneliese Rothenberger". The honorarium of 6,000.—DM was paid, and the film was televised. A dispute arose among the parties whether the plaintiff was entitled to sell and distribute tape-boxes (cassettes) in Super-8 dimension for non-public use.

According to the "General Conditions for Copyright Owners of Works of Literature and Music" which were part of the contract in question, the plaintiff acquired the exclusive right (copyright, neighboring and other rights) to use the work, including its title, for all purposes, including radio broadcasting, television, joint antenna broadcastings, wire broadcasting and film uses, as well as for possible uses in these fields not yet known or not yet discovered. With reference to this provision, the plaintiff was of the opinion that she was entitled to start the production and sale of the film "Anneliese Rothenberger" for so-called audio-visual exploitation. To that effect, a narrow film in Super-8 dimension shall be produced, packed into a standardized film-pack container and sold to customers of chain stores for private presentation. It is not contested among the parties that the film to be sold to the general public is fit to be shown on a TV screen, provided that certain adapters, which will be on the market soon, are used. The plaintiff filed an action for a declaratory judgment that the defendant was not entitled to prohibit the plaintiff from producing and distributing the mentioned narrow films for non-public use. The trial court dismissed the case, the appellate court reversed this judgment, and the final appeal to the Federal Supreme Court led to a final dismissal of the complaint.

The judgment of the Federal Supreme Court took a strict view in interpreting the subject copyright contract. With reference to the rule of interpretation as contained in Sec. 31 para 5 of the German Copyright Act, it stressed the leading principle of German copyright law that authors shall participate to the largest possible extent in profits derived from their works. Thus, in doubtful cases, the author will be held not to assign more rights than required by the exploitation envisaged and practiced under the contract. Accordingly, even in cases of "unlimited" assignments of a right established by the statute, such as the right to have tape recordings or films of a performance produced, nothing definite can be said on the scope of the assignment. The global assignment, to the contrary, must be limited in its objective, pursuant to the appropriate aim and purpose of the contract. In the case before the court, the contract among the parties was aimed at the production of a television program. Under these circum-

stances, the plaintiff would not be entitled to show this film in movie theatres. The exploitation assigned to the plaintiff covered only those presentations which are usually connected with the showing of the film by means of television. The lower court did not ascertain that at the time of the conclusion of the copyright contract, the private home presentation by means of projectors was included in the term "television presentation or production".

The reported decision of the Federal Supreme Court will promote the tendency of radio and film corporations to double their contract forms in size because of a desire to cover all conceivable means of exploitation and to have them spelled out in writing or printing. Finally, by its strict interpretation aimed at the protection of authors against abusive assignments of their rights, the Federal Supreme Court did not mention the regulations stipulated by the contract with respect to the remuneration of the author in case of continued exploitation of a film for which he had delivered the manuscript. Under these circumstances, the judgment of the Federal Supreme Court might induce authors and collecting societies to demand royalties to an extent which could impair the second or third exploitation of broadcast or televised works. To sum up, it can be said that the decision of the Federal Supreme Court will not necessarily promote the development of audiovisual recording and presentation means.

4. *Protection of Foreigners*

A rather recent decision of the Federal Supreme Court (April 16, 1975—I ZR 40/73: not yet published) deals with a Russian author, the famous refugee Alexander Solzhenitsyn. It concerns the competitive publication of his novel "August 1914" by two publishers in the Federal Republic of Germany. In October 1971, the aforementioned novel had been published in German translation by the defendant. The plaintiff claimed to possess the publishing rights for the novel in question, relying on a contract concluded on July 23, 1971, with an attorney at Zurich, who, allegedly, acted on behalf of the author. The District Court ordered the defendant to refrain from exploiting the novel in question and to render accounts on the number of produced and sold books, etc. The appeal and further appeal of the defendant were dismissed.

The Federal Supreme Court ruled that Solzhenitsyn enjoys protection under German copyright law under the proviso that his work in question was first published in a member state of the Berne Convention. Berne's provisions, of course, apply also to nationals of states which are not members of that convention. The appellate court ascertained that

some 5,000 copies of the novel had been published, in the Russian language, in France in the summer of 1971. This had been the first publication outside the Soviet Union. The Federal Supreme Court deemed the 5,000 copies sufficient to enable the public to get to know the novel. The fact that this publication was in the Russian language was not deemed material, since a sufficient number of people in France and Germany were able to read and understand the original text in that language. This publication took place with the consent of the author, and it is interesting to note that the Supreme Court did not accept the contention of the defendant that there had been a prior publication in Russia by means of *samizdat*, a form of secret distribution. The Court held that *samizdat* was merely a distribution among friends and other interested persons, and therefore, the novel had not been distributed publicly.

In addition, the Federal Supreme Court ruled that the plaintiff had validly acquired the author's right to publication. The argument of the defendant that such a decision would disregard the foreign trade restrictions of the Soviet Union was not accepted. According to the Supreme Court judgment, such restrictions are part of the general public law of a state and, as such, are limited to its territory. Also, the Court stated the Agreement between the Federal Republic of Germany and the Soviet Union of April 25, 1958 (BGBl. 1959 II p. 222) does not oblige the courts of the Federal Republic of Germany to enforce the foreign trade monopolies of the U.S.S.R. Courts of the Federal Republic of Germany have to take into consideration and to execute the state trade monopoly only if and insofar as the authorities of the Soviet Union are in a position to enforce it. According to the findings of the appellate court, this is not the case here, for the contract of July 23, 1971 did not cover Solzhenitsyn's publishing rights in the U.S.S.R., but only covered the right to translate and to otherwise use his works in states of the Berne Convention to which the Soviet Union was not a member at the time the contract was concluded. The individual rights of the author are limited in territorial scope to the countries involved; furthermore, the Berne Convention did not create a supra-national community law. With this decision, the Federal Supreme Court has clarified in a convincing manner general issues of interpretation connected with the protection of authors in non-convention countries.

5. *Reproduction of Copies of Protected Works*

"In the age of Xerox, every man is a publisher." This slogan by a British communications expert accurately describes the situation which has developed for authors and publishers as result of modern reproduction techniques (Kolle, GRUR Int. 1975, 201 et seq.). Sec. 54 of the

German law allows reproduction within commercial enterprises, but it requires such establishments to pay a corresponding remuneration to the author. This rule is effectuated by a collecting society which protects the interests of authors by concluding collective agreements with the various branches of the industry. The income (most recently, 500,000.—DM p.a.) is distributed among those authors who are members of the collecting society, pursuant to a specific scheme. New legislative enactments are now pending. Under special consideration by the Legislature is the question of whether, pursuant to Sec. 53 of the German law, the producers of copying machines should be subject to paying a general fee to a collecting society. The legislature is also considering how a just participation of publishers can be guaranteed. The Report by WIPO of May, 1973, should lead to an international resolution by the member states of the copyright convention, which may achieve a rather uniform national solution of this important problem.

6. *Neighboring Rights*

The question of which activities lead to the status of an author protected by the Copyright Act, and which are mere executory functions performed pursuant to directives given by a third person has been the subject of an interesting decision by the Federal Supreme Court. (Judgment of November 9, 1973, GRUR 1974, 672). In that case, the plaintiff was employed under a contract with the municipal theatres of the City of Cologne as "First Mask Designer and Deputy Chief Mask Designer at the Dramatic Theatre (Schauspielhaus)". In the contract, his activity is described as being primarily of an artistic nature. In the course of a TV film taken in the aforementioned theatre, the plaintiff was employed as mask designer. However, he claimed that under the contract he was not obliged to give his services on this occasion, since the functions he would be performing for television broadcasting were different from the theatre functions which he had been hired to perform.

The plaintiff applied for a declaratory judgment to the effect that he was entitled to the so-called neighboring rights, in the sense of Sec. 73 of the German Copyright Act, at any time when he operates as mask designer in stage productions of the municipal theatre which are recorded on tape or by other audio-visual means of reproduction. The case was dismissed by all three courts. The judgment of the Federal Supreme Court is another example of a court ruling more Anglo-American than German, since the pertinent provision of the German Copyright Act does not state the extent and nature of artistic contribution given by performing artists. Therefore, the court argued from the background of the provision and

from international agreements pertinent in this field that, for the provision to apply to plaintiff, it must be shown that his contribution had a decisive impact on the performance. This fact, however, was not shown to the satisfaction of the court. The court ruled that the description of the plaintiff's activities in his employment contract as being "preponderantly of an artistic nature" did not allow the conclusion that the plaintiff indeed performed services of an artistic nature in the sense of the pertinent provision. Pursuant to the uncontested findings of the appellate court, the plaintiff generally did nothing more than to execute drafts with a certain craftsmanship, since a mask designer is not entitled to change the drafts on his own initiative and artistic intuition. Therefore, the court felt that the re-shaping of the given model did not show any independence or decisive impact. The judgment finally stressed that, nevertheless, in exceptional cases, legal protection under the Copyright Act might be available.

As a result of this decision, the following can be said: The legal evaluation of the services of a mask designer might—a) because of their mere handicraft nature not give rise to any copyright protection at all, b) come under the neighboring rights clause, provided that the services of the mask designer can be considered similar to those of performing artists, and, c) in exceptional cases, even lead to a full copyright protection, provided that the standards of copyrightable works are met (Reimer, GRUR 1974, 674).

7. Compensation of Damages in Copyright Cases

At the close of this report reference should be made to the German law on damages in copyright matters: Pursuant to Sec. 97 of the German Copyright Act, the copyright owner has, in case of infringement of his rights, five claims:

- 1) correction of the violation
- 2) injunction, if danger of repetition exists
- 3) collection of damages, in cases of intentional or negligent infringement
- 4) compensation in money for those damages which have no property value, and
- 5) claims under other applicable statutes.

The claims 1) and 2) are available without fault of the tortfeasor. For example, the author may demand the insertion or announcement of his name in public performances of his work, regardless of whether failure to mention his name was intentional or negligent. The possibilities under 3)

to 5) require proof of intent or negligence, with slight negligence included. As to the subjective conditions of these claims, the Federal Supreme Court has accepted legal error as an excuse reducing fault in exceptional cases. An example of such an exceptional case might be a reliance on precedents in case of a change of the judicature of the Federal Supreme Court on a specific issue (BGHZ 38, 356, 368). Furthermore, a defendant has not been considered to be at fault if he waited for a final court decision in doubtful legal circumstances, provided that he had obtained legal advice in his favor from legal experts (BGHZ, 17, 266, 295). However, the risk of a legal error rests on the infringer; he cannot put this burden on the author (BGH, NJW 1974, 1903, 1904). Accordingly, in the Solzhenitsyn case, the Federal Supreme Court approved the decision of the appellate court that the legal situation had not been so uncertain that the defendant could have benefited from an expert opinion he had obtained in his favor.

As a matter of practice, it can be said that infringement cases hardly ever are continued in court, as soon as the basic issue of the infringement as such has been ascertained in favor of the plaintiff. The final financial settlement is normally reached outside the courtroom. This practice is partly due to the long duration of court proceedings: e.g., the aforementioned case concerning the novel "August 14" by Solzhenitsyn was pending for over two years in the Federal Supreme Court.

III. CONCLUSION

It is hoped that this report has proven that the German Copyright Law is aimed at the best possible protection of the authors regardless of the fact that not they, but their collecting societies, are called to the scene as soon as new developments occur which offer a possibility of new profits in which the author has not yet participated.

96. ALL RIGHTS NOT RESERVED AFTER THE FIRST SALE

By PETER F. NOLAN*

Use of the phrase "All Rights Reserved"¹ on a wide variety of copyrighted materials is common in this country. Nevertheless, by virtue of the operation of the so-called "first sale" doctrine, as it exists at common law and under the federal copyright statute, not all the intangible rights provided the copyright owner by law can, in fact, be reserved by the author when he passes title to copies of his protected work.

This article will examine the first sale doctrine in detail. It will attempt to determine which rights are actually reserved to the proprietor after he sells copies of his work, to identify those sale situations where the owner by his action might fortify his legal position under the doctrine, and to predict how the first sale doctrine would be changed by pertinent sections of the currently pending bill to revise our copyright law.

The first sale doctrine appears to have evolved from the common law limitations on restraints on alienation, which make suspect any subsequent control by a seller on property he has sold.² The application of this common law principle in the form of the first sale doctrine has, however, been inconsistent, depending upon whether the work involved is protected only by the common law or by the federal copyright statute. As will be seen below, the owners of the federally protected works fare better in some respects than their common law counterparts.

Works Protected at Common Law

Our courts at a very early stage recognized an important element of the first sale doctrine, namely, that there is a distinction between the legal protection for the author's intangible rights of authorship and the tangible, material object being sold.³ Nonetheless, it may be argued that the philosophy behind this doctrine at common law is in operation upon the sale of a manuscript or work of art not protected by the federal statute. In

* Copyright © 1975 Peter F. Nolan

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¹ Use of the phrase "All Rights Reserved" or an equivalent on copies of a work complies with the requirements of Art. 3 of the Pan American Copyright Convention, signed at Buenos Aires in 1910, a multilateral treaty to which the United States is an adherent. 38 Stat. 1785 (1910).

² See, e.g., *Murray v. Green*, 64 Cal. 363, 28 P. 118 (1883); *RCA Manufacturing Co., Inc. v. Whiteman*, 114 F.2d 86, 89 (2d Cir.), cert. denied, 311 U.S. 712 (1940). The doctrine may also be an offshoot of the "exhaustion theory" in the law of patents. See, e.g., *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873).

³ *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852).

the absence of a specific reservation of rights by the seller,⁴ this philosophy can help create a rebuttable presumption that it was the seller's intent to also convey to the purchaser the rights to reproduce and publish his work. This common law rule is applicable not only to voluntary sales,⁵ but also to *inter vivos* gifts⁶ and testamentary dispositions⁷ of the material object protected. Where the courts have found an intent by a voluntary seller to reserve rights to his work, they have, of course, enforced the rights that the seller had reserved.⁸ Presumably because the seller's intent at an involuntary sale would be to reserve rights to his work, the courts in such instances have held that the intangible rights are not conveyed to the purchaser merely because he bought the only tangible expression of the protected work.⁹

Works Protected Under the Federal Statute

Fortunately for the copyright owner, the present copyright statute¹⁰ not only clearly distinguishes between the intangible rights under the

⁴ The courts will recognize an express or implied reservation of rights by the seller for a variety of works. *See, e.g.*, *Dam v. Kirke La Shelle Co.*, 175 F. 902 (2d Cir. 1910); *Kinelow Publishing Co., Inc. v. Photography In Business, Inc.*, 270 F. Supp. 851 (S.D.N.Y. 1967); *Leigh v. Barnhart*, 96 F. Supp. 194 (D. N.J. 1951); *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949).

⁵ *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942); *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939); *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159 (2d Cir. 1927); *Parton v. Prang*, 18 F. Cas. 1273 (No. 10784) (C.C. Mass. 1872); *Best Medium Publishing Co., Inc. v. National Insider, Inc.*, 259 F. Supp. 433 (N. D. Ill. 1966), *aff'd*, 385 F.2d 384 (7th Cir. 1967); *Alexander v. Irving Trust Co.*, 132 F. Supp. 364 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956). New York has specifically overruled the *Pushman* case by statute [N.Y. GEN. BUS. LAW, ART. 12-E, §224 (McKinney 1966)] at least as it applied to works of fine art. *Samet & Wells, Inc. v. Shalom Toy Co., Inc.*, 185 U.S.P.Q. 36 (E.D.N.Y. 1975). *Accord*, CAL. CIV. CODE ANN. §982(c) [Deering 1975].

⁶ *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949).

⁷ *In re White's Estate*, 84 Cal. App. 2d 409, 190 P.2d 968 (1948).

⁸ *E.g.*, *Capitol Records, Inc. v. Mercury Record Corp.*, 109 F. Supp. 330 (S.D.N.Y. 1952), *aff'd*, 221 F.2d 567 (2d Cir. 1955); *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949); *In re Grace's Will*, 61 Misc. 2d 1064, 308 N.Y.S.2d 136 (Nassau County Sur. Ct. 1970); *cf.* *Universal Film Mfg. Co. v. Copperman*, 218 F. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914) (Court refused to enforce public performance right, since seller had already conveyed it to the defendant's predecessor in title. Case discussed *infra*).

⁹ *Dart v. Woodhouse*, 40 Mich. 399 (1879). *See* *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852); *Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1854); *Patterson v. J.S. Ogilvie Pub. Co.* 119 F. 451 (S.D.N.Y. 1902). [Those cases involved works protected under the federal copyright act of 1831.]

¹⁰ Title 17, United States Code.

statute and the material object protected,¹¹ but it also requires that each transfer of a statutory copyright be in writing, signed by the copyright proprietor.¹² In the absence of such a signed written instrument, any attempted assignment of a copyright secured under the statute will be held invalid.¹³ The statute, then, overrules (at least with regard to the whole statutory copyright) any common law presumption of a transfer of rights upon the sale of a copy of the protected work.

There is the question, of course, whether this statutory presumption against an intent to transfer the whole statutory copyright would also apply to particular rights afforded the copyright owner under the statute. Section 27 of the Copyright Act provides at least part of the answer, by restricting the copyright owner's exclusive right to vend¹⁴ when a copy of a copyrighted work is conveyed. That section reads, in pertinent part, as follows:

... but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.¹⁵

The right to vend is not, however, limited at all under this codification of the first sale doctrine unless there is a sale or other transfer of title to a copy of the copyrighted work. Hence, a mere lease or bailment is not enough to trigger the section.¹⁶ In addition, once it is operable the section will apply only to those copies sold but not to those unsold.¹⁷

Three cases seem to illustrate how the courts have restricted the right

¹¹ 17 U.S.C. §27 (1947).

¹² 17 U.S.C. §28 (1947).

¹³ *E.g.*, *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573, 576 (S.D.N.Y. 1949); *Davenport Quigley Expedition, Inc. v. Century Productions, Inc.*, 18 F. Supp. 974 (S.D.N.Y. 1937).

¹⁴ 17 U.S.C. §1(a) (1947).

¹⁵ 17 U.S.C. §27 (1947).

¹⁶ Although Section 27, if literally read, would be applicable to mere transfers of *possession* of a copy of a protected work, the intent of Congress was to have the section apply only where transfer of title to a copy of a copyrighted work had occurred. *Platt & Munk Co., Inc. v. Republic Graphics, Inc.* 315 F.2d 847 (2d Cir. 1963); *Platt & Munk Co., Inc. v. Playmore, Inc.*, 218 F. Supp. 267 (S.D.N.Y. 1962). See *United States v. Wells*, 176 F. Supp. 630 (S.D. Tex 1959); *Henry Hill Publishing Co. v. Smythe*, 27 F. 914 (S.D. Ohio 1886); *Yachting Publishing Corp. v. Friedman*, 15 Misc. 2d 810, 182 N.Y.S.2d 664 (1958).

¹⁷ *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881 (E.D. Pa. 1964); *Fawcett Publications, Inc. v. Elliot Pub. Co., Inc.*, 46 F. Supp. 717 (S.D.N.Y. 1942). See *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894). Use of the limiting words "any" and "of which" in Section 27 would strongly suggest a Congressional intent that the copyright owner's exclusive right to vend was to be exhausted only as to those copies actually sold.

to vend under the first sale doctrine. In the first case, *Independent News Co., Inc. v. Williams*,¹⁸ the copyright owner of certain comic books sought to enjoin resale of the periodicals without their covers by the defendant, who had purchased the comic books from a scrap dealer. The scrap dealer, in turn, had purchased the comic books without their covers from the plaintiff's distributor. The distributor, under his contract with the publisher, had agreed to sell unsold copies of the plaintiff's comic books without their covers for waste only (the covers to the comic books were returned to the plaintiff for credit), and to secure commitments from the purchasers of the coverless comic books that they would not resell the publications as anything other than waste. In fact, no such commitments were obtained by the distributor.

The Court of Appeals for the Third Circuit refused to grant the copyright owner an injunction since "once there is lawful ownership transferred to a first purchaser, the copyright holder's power of control in the sale of the copy ceases."¹⁹ The plaintiff's only remedy in the case appeared to be whatever relief he could secure under a breach of contract cause of action against the distributor.

A different result in the *Independent News* case might have been obtained had the publisher placed in its contract with the distributor a provision specifying that legal title to the coverless comic books remained in the publisher until the comic books were actually destroyed or mutilated. Under this approach, title to copies of the copyrighted work would have passed only after they had been rendered useless for resale as the publisher's work.²⁰

In a second case, *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*,²¹ the copyright owner of musical compositions had licensed a shampoo man-

¹⁸ 293 F.2d 510 (3d Cir. 1961); *accord*, *Bureau of National Literature v. Sells*, 211 F. 379 (W.D. Wash. 1914); *Ginn & Co. v. Apollo Pub. Co.*, 215 F. 772 (E.D. Pa. 1914). *See also* *U.S. v. Wells*, 176 F. Supp. 630 (S.D. Tex. 1959). There are also a number of cases decided before the enactment of the 1909 Act that involve similar facts and results. *E.g.*, *Kipling v. G. P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903); *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901); *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894); *Clemens v. Estes*, 22 F. 899 (C.C. Mass. 1885).

¹⁹ 293 F.2d at 517.

²⁰ In a case involving almost identical facts as those found in *Independent News*, the plaintiff did obtain an injunction against the sale of coverless comic books, the *possession* of which had been given to a scrap dealer. The plaintiff, however, had included in its wholesalers' contract the provision recommended in the text, and the court found this determinative of the case's outcome. *Yachting Publishing Corp. v. Friedman*, 15 Misc. 2d 810, 182 N.Y.S.2d 664 (Sup. Ct. 1958).

²¹ 223 F. Supp. 881 (E.D. Pa. 1964).

ufacturer to produce phonograph records that were to be sold to retailers, who were to give away the records as a free point of sale premium with the shampoo. Arrow Drug, the defendant store, purchased the phonograph records from the shampoo manufacturer but decided to sell the records as separate items, rather than to give them away as premiums. The plaintiff claimed that, because Arrow Drug had violated the restrictions in the contract between the plaintiff and the shampoo manufacturer, the record sales in question were unauthorized and the drug store had infringed its right to vend under the copyright statute. The court disagreed and held that under Section 27 of the Copyright Act a copyright owner could not control how copies of his copyrighted work were disposed of once they had been legitimately sold.

Under the first sale doctrine, the statutory right to vend may not be used to justify resale price maintenance. In *Bobbs-Merrill Co. v. Straus*,²² a publisher sought to enjoin Macy's department store from selling copies of a copyrighted book, "The Castaway", for less than the publisher's fixed retail price. The publisher sold copies of the protected book to wholesalers, from whom Macy's purchased most of the books in question. Although each copy of the publisher's copyrighted book contained a notice advising dealers that the book was to be sold at retail for \$1.00 and not less, Macy's resold copies of the book for only \$.89 each. The publisher based its lawsuit *solely* on the contention that its right to vend under the federal copyright statute had been infringed when Macy's resold copies of its copyrighted work under circumstances that were not authorized. No contract breach was alleged.

The Supreme Court held that the defendant had the right to resell without restriction any copies of the plaintiff's copyrighted work that it had legitimately purchased.

The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. *It has exercised the right to vend.*²³

The plaintiff, then, could not use the copyright statute to control further sales of purchased copies of his protected work. Indeed, it was later held that attempts to fix the *resale* price of such protected items, whether

²² 210 U.S. 339 (1908). Although this decision involved the interpretation of a prior copyright statute, its reasoning and holding are still applicable to the Copyright Act of 1909. *Straus v. American Publishers' Association*, 231 U.S. 222 (1913).

²³ 210 U.S. at 351 (emphasis added).

unilaterally²⁴ or in combination with others,²⁵ violate Section 1 of the Sherman Anti-Trust Act.

The owner's right to vend is thus restricted by the first sale doctrine. The question now is, what, if any, other rights afforded by the federal statute are also limited by Section 27? Since the right to vend is the only statutory right referred to in the proviso clause of Section 27, one would expect that, as a result, there would be created a presumption in favor of the copyright owner, reserving to him all of his other statutory rights upon his sale of copies of the protected work. This interpretation of Section 27 was confirmed relatively recently, when the U.S. District Court for the Southern District of New York stated:

Accordingly, once the item has been lawfully obtained, as in the case at bar, the "first sale" doctrine . . . would apply and the proprietor thereafter loses his right to control its subsequent vending and/or publication.

*As is obvious, however, the rule should not apply with respect to other rights protected by the statute.*²⁶

Right to Copy

The courts have consistently held that the right to copy is not forfeited by the sale of copies of a protected work. For example, in *Ginn & Co. v. Apollo Publishing Co.*,²⁸ the defendant had purchased second-hand copies of plaintiff's copyrighted school textbooks and had restored them for resale. In the process of "restoring" the second-hand copies, the defendant had replaced pages that were missing from some of the old copies with pages it had duplicated from more complete copies. The court held that to the extent that defendant had reprinted pages of plaintiff's work it had infringed plaintiff's copyright.

²⁴ *Ethyl Gasoline Corp. v. U.S.*, 309 U.S. 436 (1940).

²⁵ *Straus v. American Publishers' Association*, 231 U.S. 222 (1913). If there is no sale but a true consignment of a copyrighted or patented item, the consignor may establish the price for the first sale of the item. *U.S. v. General Electric Co.*, 272 U.S. 476 (1926); *cf. U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, at 379 n.6 (1967); *U.S. v. Line Material Co.*, 333 U.S. 287, 304 (1948). The consignment arrangement cannot, however, be a sham or be "coercive". *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13, *rehearing denied*, 377 U.S. 949 (1964). *See also Bement v. National Harrow Co.*, 186 U.S. 70 (1902) (patent owner may set the prices at which its manufacturer-licensee first sells the patented devices); *accord, U.S. v. Univis Lens Co., Inc.*, 316 U.S. 241 (1942).

²⁶ *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416, at 434 (S.D.N.Y. 1965) (emphasis added). *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, at 350-51 (1908).

²⁷ 17 U.S.C. §1(a) (1947).

²⁸ 215 F. 772 (E.D. Pa. 1914).

There are a number of other published decisions in which the statutory right to copy was held to be unaffected by the first sale doctrine.²⁹

*Right to Adapt*³⁰

Unfortunately, there are not many court decisions dealing with the effect of the first sale doctrine on the right to adapt.³¹ In the most famous case on point the defendant purchased old copies of the *National Geographic* Magazine, ripped out selected articles which he compiled and had rebound with his own index.³² There was no duplication of the articles themselves. The plaintiff sought to enjoin the sale of these compilations of *National Geographic* articles, and defendant resisted on the ground that the first sale doctrine was applicable. After all, the defendant contended, he was merely rebinding copies of plaintiff's work that he had legitimately purchased.

The court agreed with the defendant that he could legitimately rebind any complete issues or single articles of plaintiff's magazine that he had purchased,³³ but that he had engaged in activity which went well beyond mere rebinding. Defendant had made selections of plaintiff's articles, had written an index of these selections, and had compiled them all in a new work. Such acts, the court found, violated plaintiff's exclusive right to adapt, compile, arrange, and make other versions of its copyrighted works.

²⁹ *Golden Rule, Inc. v. B.V.D. Co.*, 242 F. 929 (8th Cir. 1917); *Foreign Car Parts, Inc. of New England v. Auto World, Inc.*, 366 F. Supp. 977 (M.D. Pa. 1973). See *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901) (case decided under prior statute). Of course, there may be instances where, because of the relationship between the buyer and seller, the court will recognize an implied license of the right to copy or of any of the other statutory rights. *E.g.*, *McKay v. Columbia Broadcasting System, Inc.*, 324 F.2d 762 (2d Cir. 1963).

³⁰ The exclusive right to adapt, as it is commonly called, is found in Section 1(b) [to "make any other version" of literary works and "to arrange or adapt" musical works] and Section 7 of the Copyright Act. 17 U.S.C. §§1(b) and 7 (1947).

³¹ There are a few cases where the right to adapt may have been infringed, but apparently for their own reasons the copyright owners in those cases chose not to raise the issue. *E.g.*, *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965); *Kipling v. G. P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903) (case decided under prior statute).

³² *National Geographic Society v. Classified Geographic, Inc.*, 27 F. Supp. 655 (D. Mass. 1939).

³³ See cases cited in note 18, *supra*. In *Fawcett Publications, Inc. v. Elliot Publishing Co., Inc.*, 46 F. Supp. 717 (S.D.N.Y. 1942), the defendant had bound together two copies of plaintiff's comic books and resold them as one work. It is doubtful whether such a combination of only two works could rise to the level of a "compilation" under Sec. 7.

In another, more recent first sale doctrine case involving the right to adapt, *C. M. Paula Co. v. Logan*,³⁴ the defendant had purchased at retail greeting cards and stationery items on which plaintiff's copyrighted designs had appeared. Defendant cut out and transferred the designs onto its own ceramic plaques. The plaintiff alleged that two of its exclusive statutory rights under the Copyright Act had been infringed: the right to copy and the right to adapt. The court found no "copying", on the ground that there had been no duplication or reproduction of plaintiff's work, and it correctly cited the *Blazon* case as authority.³⁵ The court then held that, although the right to adapt was reserved to the copyright owner under the first sale doctrine, the plaintiff's right to adapt had not been infringed. Unfortunately, the court provided no reasoning for its conclusion that the unauthorized application of plaintiff's copyrighted design onto defendant's plaques was not a compilation, an adaptation, or an arrangement of plaintiff's works.

It is submitted that while the court's decision concerning the first sale doctrine was absolutely correct, its conclusion that the right to adapt was not infringed is erroneous. The only apparent reason for its decision is its clear dislike for the *National Geographic* case discussed above, which (it stated) had been questioned in a prior case.³⁶ While it is conceded that the first sale doctrine restricts the copyright owner from controlling the resale of copies of his work *in its original form*, the right to adapt should provide the copyright owner with the ability to prevent the incorporation of his original work into someone else's.³⁷

³⁴ 355 F. Supp. 189 (N.D. Tex. 1973).

³⁵ *Id.* at 191. The court in that case, *Blazon, Inc. v. DeLuxè Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965), held there was no "copying" where the defendant had purchased plaintiff's copyrighted hobby horse, had repainted it a different color, and was offering it for sale as its own.

³⁶ 355 F. Supp. 192 n.6. The court was incorrect in stating that the *National Geographic* case had been questioned by another court. The court cited as having questioned the decision had merely referred to the *National Geographic* case as a possible alternative approach to the holding in *Kipling v. G.P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903), wherein the right to adapt issue was apparently not even raised by the plaintiff. See note 31 *supra*. *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, at 884 and n.6 (E.D. Pa. 1964).

³⁷ Although the first sale doctrine might preclude an action based on copyright, the copyright owner should not discount the value of the remedies afforded by the laws of unfair competition. For example, the *C. M. Paula* court did provide some relief to the plaintiff by requiring the defendant to disclaim any connection with the plaintiff copyright owner on labels and packaging for the articles in question. 355 F. Supp. at 193. Such relief may be afforded under state unfair competition law [*Fawcett Publications Co., Inc. v. Elliot Publishing Co., Inc.*, 46

*Right of Public Performance*³⁸

There are numerous court decisions acknowledging that the right to publicly perform musical works is unaffected by the first sale doctrine. For example, in *Chappell & Co., Inc. v. Middletown Farmers Market & Auction Co.*,³⁹ the defendant argued that his public performance for profit of an authorized phonograph record containing plaintiff's copyrighted musical composition was not an infringement of plaintiff's rights, since as a purchaser of one of the phonograph records he had automatically acquired the right to publicly perform it over his loudspeaker. The court, in holding the defendant liable, refused to extend the first sale doctrine beyond merely restricting the right to vend.

But while the record itself is thus free from further contributions to the copyright [sic], the use of the recordings for a public performance for profit is still reserved to the copyright owners. 17 U.S.C. §1(e) (1958). The surrender of one monopoly (the right to make mechanical reproductions) does not carry with it the right to publicly perform the copyrighted musical composition through a phonograph record thereof. [Citations omitted].

It follows that while the statute provides that once possession of a copy of the copyrighted musical composition is lawfully obtained, (whether in the form of phonograph record or sheet

F. Supp. 717 (S.D.N.Y. 1942); *Ginn & Co. v. Apollo Pub. Co.*, 215 F. 772 (E.D. Pa. 1914); *Bureau of National Literature v. Sells*, 211 F. 379 (W.D. Wash. 1914)] or the federal trademark statute [Lanham Act §43(a), 15 U.S.C. §1125(a) (1970); *Beech-Nut, Inc. v. Warner-Lambert Company*, 480 F.2d 801 (2d Cir. 1973); *Jaeger v. American International Pictures, Inc.*, 330 F. Supp. 274 (S.D.N.Y. 1971)]. See Uniform Deceptive Trade Practices Act §2(a). Some courts have granted only the limited type of relief found in the *C.M. Paula* case [*Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947); *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924); *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901); *Scarves by Vera, Inc. v. American Handbags, Inc.*, 188 F. Supp. 255 (S.D.N.Y. 1960)]. Recently, courts have begun to recognize the public deception that can easily result from requiring disclaimers and have accordingly granted the full injunctions requested. *Boston Professional Hockey Assn., Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975), *cert denied*, 96 Sup Ct. 132 (1975); *National Football League Properties, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 185 U.S.P.Q. 554 (Ill. App. Ct. 1975); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 185 U.S.P.Q. 550 (Ill. App. Ct. 1975).

³⁸ The Copyright Act affords the copyright owner the exclusive right to publicly perform for profit its protected nondramatic literary works and musical compositions. 17 U.S.C. §§1(c) and 1(e) (1947), respectively. It also grants the copyright owner the exclusive right to publicly perform his dramatic works, but without the "for profit" limitation. 17 U.S.C. §1(d) (1947).

³⁹ 334 F.2d 303 (3d Cir. 1964).

music), there shall be no restriction on its transfer—*this cannot be read to permit “public performance for profit” to bring about its transfer or sale.*⁴⁰

Perhaps the most interesting of the first sale doctrine cases involves the right of public performance as applied to motion pictures.⁴¹ Only the Courts of Appeals for the Second and Ninth Circuits have had the opportunity of applying the doctrine to motion pictures, and although at first glance their holdings on the issue may appear contradictory, it will be seen below that these two courts have, in fact, acted consistently on the matter.

The Ninth Circuit case, *Hampton v. Paramount Pictures Corp.*,⁴² involved a contention by a defendant that under Section 27 of the

⁴⁰ *Id.* at 305 (emphasis added); *accord*, *Herbert v. Shanley Co.*, 229 F. 340 (2d Cir. 1916), *rev'd on other grounds*, 242 U.S. 591 (1917) [performance right reserved despite sale of sheet music]; *Interstate Hotel Co. of Nebraska v. Remick Music Corp.*, 157 F.2d 744 (8th Cir.), *cert. denied*, 329 U.S. 809 (1946) [while right to vend may be affected by Section 27, performance right is not]; *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929) [synchronization right separate from performance right]. These cases are to be distinguished from those holding that an authorized exercise of the performance right may somehow be freely exploited by others who are not licensed by the copyright owner. *Twentieth Century Music Corp. v. Aiken*, 43 U.S.L.W. 4799 (U.S. June 17, 1975); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 94 Sup. Ct. 1129 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). *But see* *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969).

⁴¹ Motion pictures in the current Copyright Act are broken down into two categories: “motion picture photoplays” and “motion pictures other than photoplays”. 17 U.S.C. §§5(l) and (m) (1947). The former are considered dramatic works [*Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974)] and may thereby be infringed by unauthorized public screenings. 17 U.S.C. §1(d); *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 874 (2d Cir. 1967), *rev'd on other grounds*, 392 U.S. 390 (1968); *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 59 F.2d 70 (1st Cir. 1932); *Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526 (D. Mass. 1939); *Tiffany Productions, Inc. v. Dewing*, 50 F.2d 911 (D. Md. 1931). Motion pictures other than photoplays are not dramatic works but may be infringed by being exhibited, since such exhibitions can be considered either the making of “copies” of the works [*Patterson v. Century Productions, Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938). *Contra*, *Tiffany Productions, Inc. v. Dewing*, 50 F.2d 911, 913 (D. Md. 1931) (dictum)] or dramatizations of nondramatic works [17 U.S.C. §1(b); *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co. of Holyoke*, 3 F. Supp. 66, 73 (D. Mass. 1933) (dictum)]. *See* *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 874 n.1 (2d Cir. 1967), *rev'd on other grounds*, 392 U.S. 390 (1968). No cases applying the first sale doctrine to motion pictures other than photoplays could be found.

⁴² 279 F.2d 100 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960).

Copyright Act the performance right was conveyed to him when a print of the copyrighted motion picture sued on had been legitimately sold to him. The plaintiff in this case had authorized a licensee to sell 8 mm and 16 mm prints of a copyrighted motion picture, "The Covered Wagon", for non-theatrical use only. When the licensee did, however, sell prints of the plaintiff's film, it was without any notice of restriction. The defendant had exhibited one of these purchased 16 mm prints in a commercial theatre and plaintiff brought suit to enjoin the public performance of its motion picture photoplay.

The court, in granting the injunction against the defendant's public exhibitions of the purchased print, stated that the sale of a print of a copyrighted motion picture did not also automatically convey the right of public performance afforded by the federal copyright statute.⁴³ It also answered the defendant's argument that the plaintiff was estopped from enforcing its public performance right by its failure to place a warning notice concerning use restrictions on the sold prints⁴⁴:

But Paramount's assertion of copyright was clearly printed on the film in question in strict accordance with statutory requirements. Paramount had the right to assume that this printed assertion of right, which was flashed on the screen every time the film was shown, provided ample notice to Hampton of Paramount's interest in the film. Being charged with this notice, Hampton could easily have ascertained the facts by making inquiry of Paramount.⁴⁵

In the process of arriving at its decision, the court in the *Hampton* case carefully distinguished a Second Circuit case cited by the defendant as being in support of its position. In that case, *Universal Film Mfg. Co. v.*

⁴³ *Accord*, *Weiss v. Hollywood Film Enterprises, Inc.*, 81 U.S.P.Q. 570 (Cal. Super. Ct. 1949) (licensed manufacturer of prints of copyrighted motion pictures enjoined from sublicensing public performance of the films on television, where licensee was only authorized to manufacture and sell prints of work for private, home use).

⁴⁴ No such warning notices appeared on any of the sold prints themselves or on the containers for the sold prints. Some motion picture companies, out of an abundance of caution and to avoid misunderstandings, have a practice of placing notices on the prints they sell (as well as on containers for the prints), warning purchasers not to exhibit the purchased prints publicly. Use of such warning notices is definitely recommended whenever possible.

⁴⁵ 279 F.2d at 104. Paramount had licensed Kodascope Libraries, Inc., a subsidiary of Eastman Kodak Co., to reproduce prints of certain copyrighted motion pictures for only "non-theatrical exhibition." While it may seem unduly burdensome to insist that a purchaser of a print of a protected film find out whether the print may be exhibited publicly, this requirement is entirely consistent with the first clause of Section 27.

*Copperman*⁴⁶, the plaintiff as the assignee of all rights to the motion picture photoplay, "The Great Circus Catastrophe", sought to have the defendant enjoined from exhibiting a print of the film in public theatres. After producing the film, a firm named the Nordisk Company sold prints of the motion picture in Europe and licensed the purchasers to exhibit the prints commercially in the country of purchase. The purchasers of the prints were contractually prohibited by the Nordisk Company from reselling, as well as exporting, the prints. The defendant, after learning that the motion picture was not protected by statutory copyright in the United States, purchased in contravention of the contractual covenant one of the prints in England and brought it into the United States for public exhibition. The Nordisk Company, *subsequent to* the defendant's purchase, registered a copyright claim to the work under Section 12 of the Copyright Act.⁴⁷

While noting that the "Catastrophe" motion picture was protected in the United States under common law during the period of time when the Nordisk Company sold and licensed its prints and when the defendant purchased the print of the film in England, the court held that the plaintiff could not now repudiate the sale of the print and the license which plaintiff's predecessor had authorized.

When [Nordisk] sold a positive film, which was the only means of performing the play, it conferred the performing right on the purchaser and his assigns. No one, by virtue of that sale, would acquire the right to re-enact the play and take a negative of it, or make, if that could be done, a new negative from the positive film. This would be inconsistent with the Nordisk Company's common-law property in the photoplay and with the mere performing right *which it had conferred on the owner of the film*. But exercise of the performing right by one or by many purchasers of positive films would be entirely consistent with the Nordisk Company's common-law property in the play itself. The attempt, however, to annex a condition as to the use of the film after it was *absolutely* sold, was vain. Such conditions can not be made to accompany an article throughout its changes of ownership.⁴⁸

The court in the *Hampton* case properly distinguished the *Universal* decision on the ground that the older case clearly involved common law protection, while the case then before it involved a statutory copyright and it held that, as a result, a different outcome was required. Indeed, the

⁴⁶ 218 F. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914).

⁴⁷ 17 U.S.C. §12 (1947), *formerly* 37 Stat. 488 (1912).

⁴⁸ 218 F. at 579 (emphasis added).

court in the *Universal* opinion seemed to imply that the result in its case might have been different had plaintiff's motion picture been protected by statutory copyright when the Nordisk Company sold prints of the film in Europe.

Sale of positive films *after copyright* was as consistent with its statutory ownership as was the sale of films before copyright with its common-law ownership. But neither it nor its assigns as owner of the statutory copyright in this country, could repudiate the license it had given before copyright to the purchaser of the film in England and his assigns.⁴⁹

Furthermore, the Nordisk Company clearly did license the purchasers of its prints to publicly exhibit those prints. Such a license was certainly not present in the *Hampton* case; and although the *Universal* court was a bit ambiguous on the point, it is quite reasonable to assume that the court might well have enjoined the defendant from publicly exhibiting the purchased print if the Nordisk Company had not also granted exhibition licenses to the print purchasers. The court seemed correctly concerned that persons who had in good faith purchased prints that had been publicly exhibited for a long period of time should not be suddenly precluded from also exhibiting those prints after purchasing them.⁵⁰

In a subsequent decision, *Independent Film Distributors, Ltd. v. Chesapeake Industries, Inc.*,⁵¹ a case again involving a motion picture protected at common law, the Court of Appeals for the Second Circuit appears to have supported this reading of the *Universal* case. In that case, the copyright owner of two motion picture photoplays sought to enjoin publication of an advertisement that offered for sale, not only the physical negatives of the two films, but also "100% of all rights" to them. Included in such rights would, of course, have been the right to duplicate the motion picture negatives and to publicly exhibit the positive prints of the film.

⁴⁹ 218 F. at 580 (emphasis added).

⁵⁰ The motion picture industry practice is currently, and has been for many years, for the producer or distributor to lease prints of its feature films and to license the public performance right under the statutory copyright in the films, usually taking a percentage of the box office receipts. Hence, the purchaser of a print of a feature film today could not legitimately have the expectation that he could exhibit his print publicly. Indeed, the purchaser should suspect that a print for sale might not have been authorized by the copyright owner or that he was receiving stolen property.

⁵¹ 250 F.2d 951 (2d Cir. 1958).

Prior to publication of the advertisement in question, the plaintiff had granted to a distributor the exclusive rights to duplicate, to distribute, and to exhibit the two films publicly within the Western Hemisphere. Thereafter, the distributor ordered from a film laboratory a number of positive prints of the films, but never paid the lab for its services. The laboratory subsequently obtained a lien on the negatives from which it struck the positive prints for the distributor, and the negatives were sold at public auction to a third party. That third party later retained the defendant to sell the purchased negatives for a fee. The advertisement to which the plaintiff objected was published by the defendant pursuant to this agreement.

The court's decision primarily involved the proper interpretation of a particular section of the New York Lien Law, which allowed liens by New York film laboratories on the intangible duplication and public performance rights to the motion pictures they processed. The court, in remanding the case to the lower court for further findings of fact, stated in dictum that if the lien law had not specifically included within its scope the duplication and exhibition rights, the sale of the negatives by the laboratory would not have also conveyed those rights.

If [the laboratory] had no lien on the dupe negatives which included the right to print positives therefrom and exhibit the same, then . . . the purchaser at the foreclosure in the State Court action, acquired no right of that kind which [the defendant] could sell.⁵²

⁵² *Id.* at 954. The Court of Appeals for the Second Circuit relatively recently referred in dictum to the *Universal* case as holding that the public performance right is automatically conveyed to the purchaser when a print of a motion picture protected under the federal statute is sold. *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 882 (2d Cir. 1967), *rev'd on other grounds*, 392 U.S. 390 (1968). For the reasons indicated in the text, it is submitted that this dictum is not well founded.

A lower court within the Second Circuit has also in dictum stated "if a copyright owner of a film sells [a print of] the film without a stipulated condition as to its use [it could hardly be contended that] that purchaser is forbidden to exhibit the film merely because it is copyrighted." *Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587 (S.D.N.Y. 1965). (Emphasis in original.) It may have been that the *Mura* court was referring in its dictum only to private exhibitions of motion pictures and not to public screenings. This court gave as its authority for this dictum a case [*Westway Theatre, Inc. v. Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), *aff'd*, 113 F.2d 932 (4th Cir. 1940)] that does not stand for the proposition for which it was cited. The *Westway* case involved *leased* motion picture prints and concerned only the antitrust implications of clearances.

First Sale Doctrine in the Copyright Revision Bill

The Copyright Revision Bill⁵³ currently pending before Congress would eliminate virtually all of the problems and ambiguities of the first sale doctrine⁵⁴ as it exists under present law. First, Section 202 of the bill⁵⁵ would enact an improved version of §27 of the present Act. Because this section would apply to all copyrightable works, whether published or unpublished,⁵⁶ it would specifically overrule cases, such as *Pushman*,⁵⁷ under which a presumption of transfer was in favor of the purchaser and not the proprietor of works protected at common law.⁵⁸

In order to rebut the Section 202 presumption created in favor of the copyright owner, purchasers of copies of protected works who claim to have also acquired the copyright or any of the exclusive rights under the copyright from the seller will, under Section 204(a) of the bill,⁵⁹ have to

⁵³ S. 22, 94th Cong., 1st Sess. (January 15, 1975) and H.R. 2223, 94th Cong., 1st Sess. (January 28, 1975). [Hereinafter referred to as the "1975 Bill".] All references to the "bill" in the text will be to the 1975 Bill.

⁵⁴ The first sale doctrine in the 1975 Bill is embodied in Sections 109, 202, and 204. When read together, these sections set forth all the elements of the doctrine as it would exist under the 1975 Bill. None of these sections has been substantially changed since each was first introduced in 1964. See S. 3008, H.R. 11947, and H.R. 12354, 88th Cong., 2d Sess. §§7, 15, and 17 (1964); S. 1006 and H.R. 4347, 89th Cong., 1st Sess. §§108, 202, and 204 (1965); S. 597 and H.R. 2512, 90th Cong., 1st Sess. §§109, 202, and 204 (1967); S. 543, 91st Cong., 1st Sess. §§109, 202, and 204 (1969); S. 544, 92d Cong., 1st Sess. §§109, 202, and 204 (1971); and S. 1361, 93d Cong., 1st Sess. §§109, 202, and 204 (1973). There seems to have been very little discussion of the first sale doctrine at the hearings on the various revision bills that have been introduced since 1964. See *Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 55, 134, 1082, 1816, 1903-04 (1965).

⁵⁵ Section 202 of the 1975 Bill reads as follows:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

⁵⁶ 1975 Bill §301.

⁵⁷ *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

⁵⁸ S. Rep. No. 93-983, 93d Cong., 2d Sess. 159 (1974).

⁵⁹ Section 204(a) of the 1975 Bill reads as follows:

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

produce a writing signed by the copyright owner or his agent acknowledging in some way the transfer of rights. It is unclear what would be required to rebut the presumption regarding transfers of non-exclusive rights under the copyright,⁶⁰ but probably evidence of the seller's oral statements or conduct manifesting his intent to convey the non-exclusive rights would be sufficient. Section 204(a) of the bill would then change the present law only with regard to transfers of exclusive rights under the copyright by requiring such assignments to be in writing.

The bill would resolve some areas of doubt that now exist about the doctrine. For example, Section 109 in the bill⁶¹ makes clear that the first sale doctrine is not operative unless and until ownership of a copy of the protected work is transferred. Mere possession, loan, or rental of a copy of the work is not enough to result in the loss of any rights.⁶² In addition, Section 109 would affect only those particular copies in which ownership has been conveyed.⁶³ The doctrine, when operative under the bill, would

⁶⁰ The words "any rights" in the first part of the second sentence of Section 202 of the 1975 Bill presumably refer to both exclusive and non-exclusive rights under the copyright, and the rebuttable presumption created by this section would therefore seem to be applicable to purported grants of non-exclusive rights. On the other hand, Section 204(a) does not cover transfers of non-exclusive rights. See 1975 Bill §§101 [definition of "transfer of copyright ownership"], 201(d)(2) [divisibility of copyright ownership], and 205(f); S. Rep. No. 93-983, 93d Cong., 2d Sess. 158, 162-63 (1974).

⁶¹ Section 109 of the 1975 Bill reads as follows:

Limitation on exclusive rights: Effect of transfer of particular copy or phonorecord.

- (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.
- (b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.
- (c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

⁶² S. Rep. No. 93-983, 93d Cong., 2d Sess. 124 (1974).

⁶³ Sections 109(a) and 109(b) make reference to "particular" copies. In order for Section 109 to be operative, the copy sold must also have been "lawfully made". Hence the purchaser of a motion picture print that was not made under the authority of the copyright owner could not benefit from Section 109. S. Rep. No. 93-983, 93d Cong., 2d Sess. 123 (1974).

also restrict only two of the exclusive rights of the copyright owner: (1) the right of distribution and (2) the right to display protected works publicly.⁶⁴

Once a copy of a protected work is sold, the purchaser would have the right under the bill to dispose of the copy in any way he wished, including renting it, transferring ownership of it, or destroying it.⁶⁵ He would also be able to display the conveyed copy.⁶⁶ On the other hand, because the copyright owner would have been presumed under Section 202 to have reserved all rights other than the rights of distribution and display, the purchaser of a copy of the protected work would (in the absence of a separate transfer of the rights) not be able to reproduce the work, to adapt or prepare derivative works based on it, to perform it publicly⁶⁷ or to import it⁶⁸. For example, the purchaser of a motion picture print would

⁶⁴ These rights are described in Section 106 of the 1975 Bill, which reads, in part, as follows:

§106. *Exclusive rights in copyrighted works*

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * *

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

* * *

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

⁶⁵ 1975 Bill §109(a). Although such a disposition may be free from liability under copyright law, an unauthorized disposition of a purchased copy of a protected work might violate an enforceable contract covenant. S. Rep. No. 93-983, 93d Cong., 2d Sess. 123 (1974).

⁶⁶ To "display" a work means "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 1975 Bill §101. Under Section 109(b), the purchaser of a copy of a protected work would not, however, have the right to display the work at places other than where the purchased copy is physically located. Hence, in most cases display of a purchased copy by means of television transmission under this section would constitute an infringement. S. Rep. No. 93-983, 93d Cong., 2d Sess. 124 (1974).

⁶⁷ 1975 Bill §§106(1), (2), and (4).

⁶⁸ 1975 Bill §602. Under Section 27 of the current statute, it would appear that a person who purchases copies of a copyrighted work made and distributed in a foreign country with the copyright owner's permission could import those copies into the United States without there being a copyright infringement. Importation of such non-piratical copies is also not prohibited. 17 U.S.C. §107 (1947); 19 C.F.R. §133.42 (1972). Under Section 602(a) of the 1975 Bill, the

have the right to resell his print without violating the copyright owner's rights, but he would not be able to publicly exhibit it,⁶⁹ whether the exhibition took place in a public theatre or in a pizza parlor.⁷⁰

CONCLUSION

The first sale doctrine as it now exists maltreats incautious owners of works protected only at common law by depriving them of certain intangible rights to their works. Unless the proprietor expressly reserves his intangible rights when he sells his unpublished work, he may be deemed to have also conveyed all rights to his work to the purchaser. To a large degree, the current copyright statute recognizes this problem and has modified the first sale doctrine so that virtually all of the rights afforded by the law, with the exception of the right to vend, are presumed reserved to the copyright owner when he sells copies of his works. Nevertheless, the application of Section 27 in the 1909 Copyright Act has not always been consistent and a restatement of the doctrine in clearer language is needed from Congress to eliminate the uncertainties that have developed.

The 1975 Copyright Revision Bill, if passed, would eliminate the unwarranted discrimination the first sale doctrine now prescribes against owners of works currently protected only at common law, and would clarify the ambiguities that have resulted from applying the doctrine as embodied in the current federal statute. Hopefully, we will not have to wait too much longer for Congress to enact such a revision of our law.

importation of such non-piratical copies will constitute a copyright infringement. The United States Customs Service will still have authority to prohibit importation of piratical copies, but not copies lawfully made in a foreign country. 1975 Bill §602(b); S. Rep. No. 93-983, 93d Cong., 2d Sess. 200-01 (1974).

⁶⁹ S. Rep. No. 93-983, 93d Cong., 2d Sess. 123 (1974).

⁷⁰ A performance is "public" when it is at a place open to the public or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered". 1975 Bill §101. Accordingly, an establishment, such as a commercial pizza parlor, that exhibited legitimately purchased super 8 mm prints of a protected motion picture would, in the absence of an appropriate license, infringe the right of public performance. S. Rep. No. 93-983, 93d Cong. 114 (1974).

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

97. CALIFORNIA. *State Dept. of Education.*

Copyright guidelines. Prepared by the Bureau of Publications. [Sacramento, 1974] 32 p.

"These guidelines are applicable only to materials developed under state-administered grants or contracts."

98. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47 CFR—Telecommunications; Chapter 1—Federal Communications Commission. Part 76—Cable Television Service: Network Program Exclusivity. *Federal Register*, vol. 40, no. 141 (July 22, 1975), pp. 30650-30661. "Docket No. 19995, FCC 75-820."

"[A]mendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems, Docket No. 19995, RM-2275," effective August 22, 1975.

99. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47 CFR—Telecommunications. Part 76—Cable Television Services: Memorandum Opinion and Order. *Federal Register*, vol. 40, no. 168 (Aug. 28, 1975), pp. 39509-39511. "Docket No. 20028; FCC 75-937."

Amendment of rules regarding late-night programming, effective October 2, 1975.

100. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47 CFR—Telecommunications; Chapter 1—Federal Communications Commission. Part 76—Cable Television Service: Sports Programs. *Federal Register*, vol. 40, no. 141 (July 22, 1975), pp. 30641-30649. "Docket No. 19417; RM-1836; FCC 75-819."

Amendments by the FCC of regulations restricting cable television carriage of sports events which are telecast by distant television broadcast stations, effective August 22, 1975.

101. U.S. NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE.

Toward a national program for library and information services: goals for action. Washington, D.C., 1975. 106 p.

"[T]he basic justification required to substantiate the need for a national program and for new Federal legislation." One of the five major assumptions upon which the national program formulated by the Commission is based is "that the rights and interests of authors, publishers and other providers of information be recognized . . . in ways which maintain their economic and competitive viability."

2. Foreign Nations

102. CYPRUS. *Dept. of the Official Receiver and Registrar.*

Annual report for the year 1973, by T. L. Christodoulides. Nicosia, Printed at the Print. Off. of the Republic of Cyprus, 1975. 34 p.

Includes a brief statement on copyright-developments in Cyprus in 1973, with a concluding statement that "it is hoped that Cyprus may be able to ratify the Universal Copyright Convention in the near future."

103. JAPAN. *Agency for Cultural Affairs.*

Copyright system in Japan. [Tokyo] 1975. 125 p.

An outline of the copyright system in Japan divided into the following main chapter headings: 1. The history of the copyright system in Japan. 2. The outline of the Japanese Copyright Law (1970). 3. The protection of foreigners' works. 4. The administration of the copyright law. 5. Activities of societies and associations concerning copyright and exploitation of copyright works in Japan. Annexes contain texts, in English, of the Copyright Law of Japan, Law concerning Exceptional Provisions to the Copyright Law required in consequence of the Enforcement of the Universal Copyright Convention, and Law on Intermediary Business concerning Copyrights.

104. POLAND. *Laws, statutes, etc.*

Order of the Council of Ministers concerning the principles and rates of remuneration of authors and the conclusion and execution of contracts for the publishing of works in book form.

(No. 259, of September 9, 1972). *Copyright*, vol. 11, no. 7 (July 1975), pp. 142-146.

The Order, which is applicable to contracts concluded by national publishers with authors domiciled in the Polish People's Republic, was published in *Dziennik Ustaw PRL*, No. 40, of September 29, 1972, and was translated by WIPO.

105. POLAND. *Laws, statutes, etc.*

Order of the Minister for Finance concerning authorization to carry out certain operations with foreign exchange, and foreign exchange control measures at the frontier. (No. 184, of June 23, 1973). Excerpts. *Copyright*, vol. 11, no. 7 (July 1975), pp. 147-150.

Covers publishing contracts, fees for lectures, artistic performances, authors' royalties, and other commercial transactions involving copyrights.

106. RUSSIA (1917 — R.S.F.S.R.). *Laws, statutes, etc.*

Decree of the Presidium of the Supreme Soviet of the RSFSR on the introduction of amendments and additions to the Civil Code of the RSFSR. (Of March 1, 1974). *Copyright*, vol. 11, no. 7 (July 1975), pp. 151-153.

Amendments and additions to conform to the legislation of the U.S.S.R. implementing Soviet adherence to the Universal Copyright Convention. See 21 BULL. CR. SCC. 110, Item 99 (1973).

107. RUSSIA (1917 — R.S.F.S.R.). *Laws, statutes, etc.*

Decree of the RSFSR Council of Ministers on royalty rates for public performances of literary and artistic work. *Translations on USSR Political and Sociological Affairs*, no. 658 (July 29, 1975), pp. 1-22.

Translated from *Sobraniye Postanovleniy Pravitel'stva RSFSR*, no. 8, 1975.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

108. *Feiner v. Crown Publishers, Inc.*, 75 Civ. 3484 (S. D. N. Y. August 29, 1975). (Not yet reported)

Action for alleged infringement of the renewal copyrights in the original Laurel and Hardy films arising out of the proposed publication by defendant Darien House, Inc. ("Darien") entitled "*A Fine Mess: Verbal and Visual Gems From The Crazy World of Laurel and Hardy*". Defendant Darien's book was based on defendant Jay Ward Productions, Inc.'s ("Ward") previous film on the same subject which defendant Ward had produced pursuant to a limited license from plaintiff Hal Roach Studio, Inc. ("Roach") to use material from plaintiff Roach's copyrighted films.

On plaintiff's motion for a preliminary injunction, *held*, motion granted.

For the reasons set forth below, the court held that plaintiff Roach established its right to the preliminary injunction by meeting the requirements of showing its predecessor-in-interest's *prima facie* right to renew the copyright, together with a showing of infringement. Since the case involved copyright infringement, the court followed the lead of *American Metropolitan Enterprises of New York, Inc. v. Warner Bros. Records, Inc.*, 389 F.2d 903 (2d Cir. 1968), in dispensing with a detailed showing of irreparable harm.

1. *Plaintiff's renewal rights prima facie valid*

The court found that "some" presumption of validity flowed from the possession of a renewal copyright which has gone unchallenged for some time. The renewals in question were acquired during the period from 1959 to 1966. Since that time no challenge was made to the renewals by defendant Ward or others. Rather, defendant Ward had taken a limited license from plaintiff Roach, based on such renewal rights, to produce a film. The court thus found that the renewal certificates gave rise to a presumption that the renewals were validly obtained.

Beyond the presumption of validity of the certificates, the court found that the California Hal Roach Studios, Inc. (the "renewer"), plaintiff Roach's predecessor-in-interest, had a *prima facie* right to renew.

Either the work was "made for hire", in which event the renewer obtained the rights by a series of valid assignments from the original author-proprietor, or the work was *not* "made for hire", in which case the renewer, as the "author", if it had *not* assigned its renewal rights, would be entitled to the renewal. On the other hand, if the renewer *had* assigned its renewal rights, various reassignments back to it of such rights entitled it to renew.

The court also held that its finding of the *prima facie* validity of the renewal was supported by equitable principles of estoppel in that defendant Ward had benefited for eleven years from rights granted by the plaintiff.

The court found that it was likely that the plaintiff Roach could establish at trial that it was the valid successor to the title of such renewal copyrights.

2. *Infringement*

Defendant Ward's defense to the charge of infringement was essentially that its copyright in its film entitled it to convert the film into a non-dramatic form such as a book. Defendant Ward's copyright, however, was held to cover only its "original" arrangement and selection of portions of plaintiff Roach's films, and did not "give them the right to use and exploit the portions of the original Laurel and Hardy films out of which their own creation was made". Therefore, absent a license from plaintiff Roach to publish a book, defendant Ward's argument was rejected. Since the court found that plaintiff Roach had established that the agreement between the parties raised a "serious question" as to whether defendant Ward was granted such a right, the court further found it "highly questionable" whether the agreement authorized defendant to publish its book, and, therefore, concluded that it was probable plaintiff would succeed on the merits of that issue.

109. *Noone p/lka Herman of Herman's Hermits v. Banner Talent Associates*, Civil Action No. 75, Civ. 1546 (S. D. N. Y. August 4, 1975) (Metzner, D. J.). (Not yet reported)

Action by "Herman" of the "Herman's Hermits" under §43(a) of the Lanham Act, and for related claims of unfair competition, arising out of the use in the United States of the name "Herman's Hermits" by the other performers from the original musical group. All four of the performers were British citizens.

On defendants' motion to dismiss on several grounds, including lack of subject matter jurisdiction, *held*, motion denied.

Considering the question as one of first impression, the court held that §43(a) of the Lanham Act could be a basis for a claim of false

designation of origin by a foreign plaintiff against a foreign defendant. This was so because the name in question had acquired a secondary meaning within the jurisdiction of the court, and the section, by its own language, applies to "any person", and prior case law establishes that the section furnishes the basis for claims by nationals against foreign defendants and by foreign plaintiffs against nationals.

The court also denied defendants' motion for failure to state a claim upon which relief may be granted. Plaintiff's assertion that defendants' use of "Herman's" with "Hermits" falsely describes defendants' group in that "Herman" is no longer with the group was accepted by the court (to be proven later at trial) as encompassed within §43(a). The fact that a similar action was proceeding in England with respect to rights to use the name in that country had no effect on rights in the United States.

Finally, §43(a) was also held applicable to defendant's booking agent because the statute applies to "any person who knowingly causes a false representation to be used in commerce".

110. *L. Batlin & Son, Inc. v. Snyder d/b/a JSNY*, 394 F. Supp. 1389 (S. D. N. Y. May 12, 1975) (Metzner, D. J.).

Motion for a preliminary injunction to compel defendants to cancel the recordation of their copyright with the United States Customs Service so as to allow the entry of plaintiff's product into the United States. Defendant's work is a plastic version of a cast iron "Uncle Sam Mechanical Bank" admittedly in the public domain, reduced in size with trivial variations. Plaintiff's work, manufactured abroad, is virtually identical.

Held, motion granted.

The court reaffirmed its former opinion, *Etna Products Co., Inc. v. E. Mishan & Sons*, 75 Civ. 428 (S.D.N.Y. February 13, 1975), that defendant had little probability of sustaining its copyright at a trial on the merits. Though the reduction of size required some artistic skill, the contribution resulting therefrom was held merely a trivial variation from the original. The court distinguished *Alva Studios Inc. v. Winninger*, 177 F. Supp. 265 (S. D. N. Y. 1959) (holding that a half-size reproduction of a Rodin sculpture was copyrightable) on the ground that in order to produce the complex reproduction involved there with exactitude, far more skill was required than in the reproduction by the defendant in the case at bar. The opinion concluded by noting that, "Interestingly enough, defendants went to great pains on the hearing to prove that there were substantial differences between the [defendant's reproduction and the original]."

111. *Printempo Fabrics, Inc. v. G. & G. Shops Inc.* 186 U.S.P.Q. 327 (S. D. N. Y. May 12, 1975) (Greisa, D. J.).

Action for infringement arising out of defendant's retail sale of shirts

made from a fabric whose pattern infringed the copyright in plaintiff's fabric design. Defendant conceded the infringement and consented to the entry of a permanent injunction. However, it opposed an award of either damages or attorney's fees on the grounds that it lacked knowledge that the shirts bore an infringing design and that, upon notice by the plaintiff, it immediately ceased further sale of the shirts and referred the claim letter to its attorneys, who had regrettably overlooked the matter and failed to respond to the letter. The plaintiff's position was that lack of knowledge is no defense to a suit for infringement and that had defendant's attorneys responded, the matter would have been settled at an early stage and hence plaintiff would not have incurred substantial legal fees. Pursuant to 17 U.S.C. §101(b), and the broad discretion permitted the court under that section, the plaintiff was awarded as damages the amount of defendant's net profit from the infringing sales. In addition, the court awarded \$500 as attorney's fees, rather than the \$2,000 requested by plaintiffs, in the belief that plaintiffs attorneys could have "assisted in curing the oversight of defendant's law firm by the simple expedient of calling to check on the matter before filing a lawsuit."

112. *PPS, Inc. v. Jewelry Sales Representatives, Inc.*, 185 U. S. P. Q. 374 (S. D. N. Y. March 11, 1975) (Weinfeld, D.J.).

Action for alleged infringement of plaintiff's copyright, trademark, and trade dress rights in its "I Like You" costume jewelry, and other products, all bearing the same apple-like design. The claim arises out of defendants' sale of a line of costume jewelry copied from plaintiff's line. The defendant Nu-Style, located in Massachusetts, manufactures said jewelry; the defendant Jewelry Sales, incorporated and doing business in New York, of which defendant Aberbach is president, is the exclusive distributor and/or sales representative for Nu-Style's costume jewelry. However, Jewelry Sales, in its role as distributor, does not purchase jewelry from Nu-Style for resale, but rather receives a fixed commission for orders accepted by Nu-Style. In addition, Jewelry Sales also has a limited ability to determine prices or to make binding commitments.

On plaintiff's motion for a preliminary injunction, and on defendant Nu-Style's motion to dismiss or to transfer, *held*, plaintiff's motion granted in part and denied in part; defendant Nu-Style's motion denied.

1. *Nu-Style's motion*

With respect to defendant Nu-Style's motion, the issue was (1) whether Nu-Style was subject to the jurisdiction of the court, and, if so, (2) whether service of process upon defendant Jewelry Sales and Aberbach as Nu-Style's "managing or general agents" and personally upon Nu-Style's

president in Massachusetts was sufficient under F.R.C.P. 4(d) (3) and 28 U. S. C. §1404(a).

(1) Nu-Style's activities within the state, through the other defendants, was held to be sufficient to render it amenable to jurisdiction. The court indicated that the jurisdictional test with respect to a copyright claim was more appropriately governed by federal as opposed to state principles. However, in reaching its decision to retain jurisdiction, it held that both tests were met: Nu-Style's contacts were sufficient to satisfy both the due process standards of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and §302 of the C.P.L.R. as well. The court found that the activities of defendants Jewelry Sales and Aberbach on behalf of Nu-Style were sufficient to conclude that they were Nu-Style's "managing or general agents" within F.R.C.P. 4(d)(3), and that notice to them was, therefore, effective notice to Nu-Style. §302(a)(1) was satisfied because Jewelry Sales and Aberbach were Nu-Style's "agents" under that section, despite the absence of a formal agency relationship, in view of Nu-Style's control over sales activities involving Jewelry Sale and Aberbach. In addition, §302(a)(2) was satisfied by reason of Nu-Style's commission of tortious acts within the state, and §302(a)(3)(i) was satisfied by reason of its manufacture of the allegedly infringing articles and shipment thereof into the state coupled with its persistent solicitation of business through other defendants. Venue was proper since Nu-Style's agent maintained its office in Manhattan and was therefore "found" within the district.

(2) Since it was unclear whether the other defendants were subject to jurisdiction in Massachusetts, and since there was no sufficient showing that a transfer was warranted for the convenience of parties and/or witnesses, Nu-Style's motion to transfer the case to the District of Massachusetts pursuant to 28 U.S.C. §1404(a), was denied.

2. Plaintiff's motion for a preliminary injunction

For the purposes of its motion, plaintiff's ownership of valid copyrights was upheld despite defendant's assertions that plaintiff's design lacked creativity or originality. The court concluded that plaintiff's design "clearly" met these requirements, which were "minimal" in any event. Thus, since a detailed showing of irreparable harm was not required, and since defendant's testimony established "access to plaintiff's work," the only question remaining was whether defendant's product, which utilized an apple or other fruit together with the words "I Like You," infringed plaintiff's copyright or merely took the uncopyrightable portions of plaintiff's work. Employing the standard test, namely, "whether an average lay observer would recognize the alleged copy as

having been appropriated from the copyrighted work", the court found some of defendant's products infringed plaintiff's copyrights. Others, however, did not, particularly in view of sufficient distinctions in shape and color.

3. *Plaintiff's trademark claims*

The court rejected plaintiff's contention that the distinctive design on its jewelry functioned to indicate origin. Therefore, defendant's use of a similar design was held not to constitute an infringement of any trademark rights of the plaintiff.

113. *Gardner v. Nizer*, 185 U. S. P. Q. 485 (S.D.N.Y. Feb. 24, 1975) (Bonsal, D.J.).

Action for alleged copyright infringement of plaintiff's book, "The Rosenberg Story" (126 pages published by Masses & Mainstream in 1954) arising out of defendant's publication of "The Implosion Conspiracy" (495 pages published by Doubleday in 1973). Both works were in the nature of biographical studies of Julius and Ethel Rosenberg. Parts of plaintiff's book had previously been published by "New Press" as a series of articles, the rights to which were allegedly orally assigned to plaintiff's publisher Masses. Plaintiff claimed, therefore, that the copyright registration certificate on "The Rosenberg Story" assigned to her by her publisher covered rights not only to material added by her, but to the material which was previously published as well.

On defendant's motion for summary judgment, *held*, motion granted.

By virtue of the assignment to plaintiff by plaintiff's publisher of the copyright to "The Rosenberg Story", the plaintiff had a valid copyright on that part of her book which originated with her. Previously published material was not, however, covered by plaintiff's copyright. The oral assignment of rights in such material to plaintiff's publisher was ineffective because it failed to comply with the requirement of Section 28 of the copyright law that assignments of copyright be in writing and signed by the proprietor.

Taking into consideration that much of the material which originated with plaintiff centered around historical facts and events which are in the public domain, and that most of the similarities between the two works resulted from the fact that defendant's biographical work also contained such facts and events, the court held defendant had not infringed plaintiff's work. While in a few instances defendant's work was "copied" from plaintiff's, the court stated that these

"comprise an infinitesimal portion of each publication and do not constitute a 'substantial taking' . . ."

Somewhat parenthetically, the court concluded its opinion by noting that even if defendant had copied more of plaintiff's book, the similarities would still be sufficiently small so as to make defendant's taking a "fair use". This decision resulted from the Second Circuit opinion in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 150 U. S. P. Q. 715 (2d Cir. 1966), cert. denied, 385 U. S. 1009, 152 U. S. P. Q. 844 (1967), which found a public benefit in encouraging the development of historical and biographical works.

114. *Italian Book Corporation v. Palms Sheepshead Country*, 186 U.S.P.Q. 326 (E.D.N.Y. April 4, 1975) (Mishler, D. J.).

Action for infringement of plaintiff's copyrighted musical works arising out of the unauthorized performance thereof by an orchestra at defendant's catering hall. Pursuant to a contract, the hall had been rented out to a co-defendant (who was not served) for a dinner dance show. Defendant's only participation in the event was supplying and serving the food and drinks. The co-defendant hired the orchestra and planned the remainder of the event.

On plaintiff's motion for summary judgment against defendant on the issue of liability, *held*, motion granted.

The court rejected defendant's attempt to escape liability on the basis of its lack of participation in the infringement. The court distinguished defendant's role from that of a landlord, "which surrenders all control over leased premises". On the contrary, defendant "hire[d] out a portion of its premises and benefit[ed] from the infringing activity". The defendant was likened to a dance hall proprietor, who is liable for infringement of copyright arising out of the performance of musical compositions by a band, because such "activities provide the proprietor with a source of customers and enhanced income."

PART V.

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A. BOOKS AND TREATISES

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A critical note on the appellate decision in *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127, 22 BULL. CR. SOC. 461, Item 339 (3d Cir. 1974), *aff'd*, 95 S.Ct. 2040 (1975).

117. BRATTON, WILLIAM W., JR. The preemption doctrine: shifting perspectives on federalism and the Burger Court. *Columbia Law Review*, vol. 75, no. 3 (April 1975), pp. 623-654.

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the Burger Court's favorable disposition to concurrent state-federal regulation on the preemption doctrine."

118. CAMPBELL, FRANK. *Teleprompter v. Columbia Broadcasting System, Inc.*—an exemption for CATV from the copyright laws? *University of West Los Angeles Law Review*, vol. 6 (Winter 1974), pp. 152-160.

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120. COOK, VIRGINIA I. *Twentieth Century Music Corp. v. Aiken*: are broadcasting signals dedicated to the public? *University of Pittsburgh Law Review*, vol. 36, no. 4 (Summer 1975), pp. 994-1009.

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A discussion of the bases, criteria and fairness of claims, by authors and performing artists entitled to protection of their performances, for proportionate shares of the proceeds from sale or transfers of rights in the German Federal Republic.

143. KNAP, KAREL. Bilaterales Urheberrechtsabkommen zwischen der CSSR und der UdSSR; Verbesserung des Urheberrechtsschutzes im gegenseitigen Verkehr beider Länder. *Film und Recht*, vol. 19, no. 6 (June 15, 1975), pp. 366-368.

An article on an agreement for the reciprocal protection of copyrights between Czechoslovakia and the Soviet Union, which was signed on March 18, 1975, and although not yet ratified, became effective on the date it was signed.

144. KOLLE, GERT. Reprographie und Urheberrecht; ein rechtsvergleichender Beitrag zur Rolle des Urheberrechts in der Informationsgesellschaft. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 6 (June 1975), pp. 201-214.

A substantially expanded version of an address, delivered by the author on April 16, 1975, in Hannover, West Germany, before the International Congress for Reprography and Information. The address deals with the subject of reprography and copyright and was offered as a comparative contribution to the role of copyright in the information society.

145. SAMSON, BENVENUTO. Die Computerkunst und das Urheberrecht; Ergänzungen zum Aufsatz in *UFITA* 8d. 56 (1970) S. 117 ff. *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, vol. 72 (1975), pp. 89-106.

"In a continuation of his article in 56 *UFITA* 117 et seq. (1970) [see 18 *BULL. CR. SOC.* 459, Item 433 (1971)] the author provides a critical review of works relating to computer art which were published in recent years." At the end of the article the author deals with the question of copyright protection of computer programs. With summaries in French and English.

146. WALTER, MICHEL M. Grundfragen der Erschöpfung des Verbreitungsrechts im österreichischen Urheberrecht, mit Ausblicken auf das deutsche Recht und die Entwicklung im Recht der europäischen Gemeinschaften. *Österreichische Juristen-Zeitung*, vol. 30, no. 6 (Mar. 28, 1975), pp. 143-154.

A study of basic questions concerning the "exhaustion" of the right of distribution under the Austrian copyright law, with references to the pertinent laws of the German Federal Republic and the development of the right in the law of the European Common Market.

C. ARTICLES RELATING TO COPYRIGHT IN TRADE MAGAZINES

1. United States

147. ALTBACH, PHILIP G. Literary colonialism: books in the third world. *Harvard Educational Review*, vol. 45, no. 2 (May 1975), pp. 226-235.

One reason that most third world people have limited access to the world body of knowledge is that the majority of publishing houses are either located in the West or controlled by Westerners. Among the author's suggestions for increasing third world access to knowledge are better distribution of books within the countries, as well as greater exchange of information between the developing countries themselves, with a lesser dependence on the industrial nations.

148. BENJAMIN, CURTIS G. Photocopying: world bodies decide against international guidelines. *Publishers Weekly*, vol. 208, no. 7 (Aug. 18, 1975), p. 28.

An article on a joint session of respective subcommittees of UNESCO and WIPO in Washington in June, during which, among other discussions, they "declined to recommend the adoption of guidelines for their member states to follow in enacting legislation for the regulation of photocopying of copyrighted works protected under the UCC and Berne Convention."

149. Copyright 'show' as 2-day revival on Capitol Hill. *Variety*, vol. 279, no. 12 (July 30, 1975), pp. 40, 49.

An article on the hearings with respect to record performance royalties, held on July 23 before the House Judiciary subcommittee chaired by Rep. Kastenmeier, and on July 24 before Senator Scott, sponsor of S. 1111.

150. DAVIS, DOUGLAS. New model contract between public TV and video artists. *The Arts Advocate*, June 1975, pp. 1-3.

"A leading critic & artist explains why . . . [the proposed model contract] could lead to general reform of artists' rights." The contract, which was prepared by attorney Harvey Horowitz (see Item 154, *infra*) "is a model not only for the specific and complex arrangements that must be made between the artist and the television station (or experimental video center) but for all such arrangements in the field of video whether they involve art galleries, video distribution systems, foundations, governmental agencies, museums or universities."

151. FELSENTHAL, NORMAN A. Cherry-picking, cable, and the FCC. *Journal of Broadcasting*, vol. 19, no. 1 (winter 1975), pp. 43-53.

An exploration of "one aspect of FCC regulation: the need for Commission approval when a cable system chooses to alter the television signals it provides subscribers. This case illustrates how a seemingly extraneous variable (the transfer of baseball telecasts from one station to another) affected cable companies, television stations, and the viewing public, and eventually required the FCC to grant a waiver of procedural rules [i.e., the requirement that cable systems re-transmit the signals of broadcast stations *in toto*—a waiver which may prove precedential for similar cases in the future."

152. GOLODNER, JACK. New bills encompass broad reform. *The Arts Advocate*, June 1975, pp. 4, 9.

An examination of the copyright revision bill (S. 22; H.R. 2223).

153. HALL, MILDRED. Broadcaster power evident at hearing; Senate subcommittee listens. *Billboard*, vol. 87, no. 31 (Aug. 2, 1975), p. 10.

An article about the hearing on the Scott record royalty bill, S. 1111, held on July 24.

154. HOROWITZ, HARVEY. The commissioning contract for video artists. *The Arts Advocate*, June 1975, pp. 3, 12.

A brief introduction followed by a draft contract interspersed with textual comments. Video artists are described as "those who conceive and produce their work and view the finished product as their own. They usually function simultaneously as producer, director, cameraman, technician, sound synchronizer, and editor."

155. HOROWITZ, IS. Photocopying spurs pubs' new 'fair use' standards. *Billboard*, vol. 87, no. 35 (Aug. 30, 1975), pp. 1, 14, 50.

An article on an August meeting of a reactivated print committee of the National Music Publishers Association convened "to grapple with the problems of reproduction rights, in preparation for meetings in October with school and library user groups."

156. LOTTMAN, HERBERT R. Inside VAAP. *Publishers Weekly*, vol. 208, no. 10 (Sept. 8, 1975), pp. 28-33.

"A visit to the giant Soviet copyright agency shows an operation rapidly outgrowing its old quarters, a fully professional staff doing its best to cope with the vagaries of international publishing relations, and a philosophy clearly designed to help authors collect their royalties."

157. NAVASKY, VICTOR S. In cold print: copy rights. *The New York Times*, July 20, 1975, section 7, pp. 3, 22.

An article on a recent visit to Washington by a group of prominent authors called "Coalition for Fair Copyright Protection," the purpose of which was to protect writers' rights in the copyright bill currently under congressional consideration. The group met in the Gold Room of the Rayburn House Office Building, essentially to support the bill in its present form.

158. SCOTT, HUGH. Giving performers their just royalty. *The Arts Advocate*, June 1975, pp. 1, 10.

Senator Scott makes a strong argument in favor of a performance royalty which he indicates he has advocated and urged for more than 30 years as "one of simple justice."

159. SPERRY, ROBERT. A selected bibliography of works on the FCC and OTP: 1970-1973. *Journal of Broadcasting*, vol. 19, no. 1 (Winter 1975), pp. 55-113.

The third in a continuing series of selected bibliographies on the FCC and, with this installment, the Office of Telecommunications Policy (OTP).

160. TOY, STEVE. Intl. broadcast piracy cues ire of FIA: 'millions' washed out. *Variety*, vol. 279, no. 12 (July 30, 1975), p. 42.

An article on a recent meeting in Berlin of the executive committee of the International Federation of Actors (FIA), during

which the FIA took a strong stand against the pirating by some countries of the broadcast signals of other countries. It was suggested at the meeting that one of the ways to stop the practice is to get copyright owners to enforce their rights.

161. WAGNER, SUSAN. Soviet copyright policy discussed at GAC meeting. *Publishers Weekly*, vol. 208, no. 7 (Aug. 18, 1975), p. 21.

An article on highlights of the July 17, 1975, meeting of the Government Advisory Committee on International Book and Library Programs (GAC), which included a report by Leo Albert, chairman of the board of Prentice-Hall International, that the Department of State has been asked to look into reports that Soviet publishers are claiming copyright protection for some books published before Soviet adherence to the U.C.C.

162. WEINTRAUB, BORIS. Policing the tape pirates. *The Washington Star*, July 13, 1975, p. H-20.

An article about a Maryland State Trooper who is described as "the only policeman in the nation whose specialty is fighting tape pirates and record bootleggers," and who "has been so successful that there are few tape pirates [in Maryland] left to chase."

2. Foreign

1. England

163. CRABB, GEOFFREY. Copyright and the resource centre. *Programmed Learning and Educational Technology*, vol. 12, no. 3 (May 1975), pp. 191-198.

"This article is divided into three parts. First, a summary of the relevant provisions of the [U.K.] copyright law which will help towards an understanding of what follows; second, a review of the main difficulties faced by education in general and resource centres, in particular, in the use of copyright material; and third, an account of the work of the Council for Educational Technology in seeking solutions to the problems."

164. LASCELLES, DAVID. Copyright in the Soviet Union: brought to book at last. *Financial Times* (London), no. 26,703 (June 27, 1975), p. 7.

The East Europe correspondent of the *Financial Times* writes about copyright relations of the Soviet Union two years after Soviet

accession to the Universal Copyright Convention and finds that "Moscow's decision [to accede to the U.C.C.] seems on balance to have been a good thing."

165. Lord Willis introduces private PLR bill in House of Lords. *The Bookseller*, no. 3629 (July 12, 1975), pp. 104-106, 108.

A summary of the debates which followed when Lord Willis moved the second reading of his private Public Lending Right Bill in the House of Lords on July 4, 1975, with most of the members in favor. A postscript states that Lord Willis would withdraw his Bill after he had been given an assurance by Lord Strabolgi "that the Government would bring forward detailed legislation proposals as soon as possible."

166. NICHOLLS, S. PLR has spin-off benefits for booksellers. *The Bookseller*, no. 362 (Aug. 2, 1975), pp. 392, 394-395.

A demonstration of "how there should be considerable 'spin-off' benefit for the whole British retail book trade" if as a result of experiments, co-ordinated with H. M. Stationery Office, to determine the feasibility of printing machine readable codes in books for Public Lending Right purposes, "ISBNs are printed in these codes."

167. VOINOVICH, VLADIMIR. Letter to Comrade Pankin. *Index on Censorship*, vol. 4, no. 2 (Summer 1975), pp. 52-53.

A letter by a young Russian prose writer to Boris Pankin, the head of the Soviet Copyright Agency, VAAP, in October 1973, in response to an interview by Mr. Pankin concerning VAAP, which was published in the September 26, 1973, issue of *Literaturnaya gazeta*. The writer, who had been expelled from the Soviet Writers' Union and deprived of all literary work because of increasing difficulties with the authorities, is highly critical of VAAP, which he suggests should be renamed "VAPAP — the All-Union Agency for the Appropriation of Copyright."

168. WALTERS, GWYN. The booksellers in 1759 and 1774: the battle for literary property. *The Library*, vol. 29, no. 3 (Sept. 1974), pp. 287-311.

"The method of approach chosen . . . is to record the events of the two crucial years 1759 and 1774, and from this base to assess, retrospectively and circumstantially, the guiding motives of the rival groups of booksellers."

NEWS BRIEFS

169. NATIONAL COPYRIGHT COMMISSION APPOINTED

On July 25, 1975, President Ford appointed 12 persons as members of the National Commission on New Technological Uses of Copyrighted Works.

Stanley H. Fuld, formerly Chief Justice of the Court of Appeals of the State of New York and now counsel to the New York firm of Kaye, Scholer, Fierman, Hays and Handler, was appointed Chairman.

Professor Melville B. Nimmer of the U.C.L.A. School of Law in Los Angeles, one of the leading authorities in the field of copyright law and the author of *NIMMER ON COPYRIGHT*, was appointed Vice Chairman. Both Judge Fuld and Professor Nimmer were selected from the public generally.

The other two members of the Commission appointed from the public were:

Rhoda Karpatkin, the Executive Director of Consumers Union in New York and formerly a member of the New York law firm of Karpatkin, Pollet & Le Mout.

George D. Cary, the retired Register of Copyrights, who is also a lecturer in law at Georgetown University in Washington.

Four members of the Commission selected from authors and other copyright owners:

Dan Lacey of Irvington, New York, Senior Vice President of McGraw-Hill, Inc., long active in book publishing matters and formerly Executive Director of the American Book Publishers Council, one of the predecessors of the Association of American Publishers, Inc.

John Hersey, the noted author, and President of the Authors League of America.

Hershel B. Sarbin of New York, President of Ziff-Davis Publishing Company, and formerly a practicing lawyer in New York.

E. Gabriel Perle of New York, Vice President-Law of Time Incorporated, active in copyright matters and former chairman of the Copyright Division of the American Bar Association.

The President also selected four members from users of copyrighted works:

William S. Dix of Princeton, New Jersey, Librarian Emeritus of Princeton University.

Professor Arthur R. Miller of Belmont, Massachusetts, Professor of Law at Harvard Law School, who has taught and written extensively in the field of copyright, privacy and the interrelations of the computer and copyright law.

Robert Wedgeworth of Chicago, Illinois, Executive Director of the American Library Association.

Alice E. Wilcox of Wayzata, Minnesota, Director of MINITEX.

The Librarian of Congress, currently Daniel J. Boorstin, is also a member of the Commission.

Finally, the Register of Copyrights, Barbara Ringer, serves as an ex officio member.

The Commission met in Washington on October 8, 1975, for an organizational discussion at which, among other things, Arthur J. Levine was appointed Executive Director. Mr. Levine is an attorney specializing in copyright law in Washington, has served as Special Consultant to the Librarian of Congress on Planning for the Commission, and was formerly with the Copyright Office.

170. CORRECTION

It has recently come to the attention of the Editorial Board that two corrections should be made in the June 1971 issue of the BULLETIN. Please note the following corrected excerpts in E. Fulton Brylawski's "Copyrightability of Motion Picture Sound Tracks":

P. 361, last sentence of first paragraph should read:

"... This case has been extended to phonograph records and should be logically extended to sound tracks of motion pictures ..."

P. 365, fn.22 should end with the descriptive phrase,

"..., wherein the foreign distribution of a motion picture was held not to be a publication."

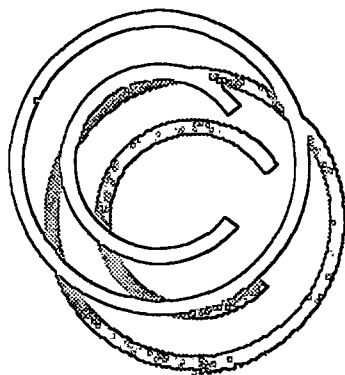
which was incorrectly placed at the end of fn.21.

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PART I.

ARTICLES

171. *UNITED STATES v. ASCAP: THE LICENSING PROVISIONS OF THE AMENDED FINAL JUDGMENT OF 1950**

By W. MICHAEL GARNER

INTRODUCTION

For 25 years, the licensing of musical performing rights in the repertory of the American Society of Composers, Authors and Publishers ("ASCAP"), possibly the world's largest performing rights society,¹ has been supervised by the District Court for the Southern District of New York under the terms of a consent decree entered as the final judgment in a government antitrust action against ASCAP.² Reconciling the conflicting policies between the antitrust and copyright laws, the consent decree maintains the free flow of music from composers, through ASCAP and the media, to the listening public; accordingly, the decree sets forth the terms and conditions under which ASCAP licenses the rights in its reper-

* An earlier version of this article was awarded First Prize in the 1975 annual ASCAP Nathan Burkan Competition at New York University School of Law. The topic was suggested by Professor Alan Latman in connection with the School's Seminar on Literary and Artistic Property, which he co-directed. Professor Latman represents the petitioners in *U.S. v. ASCAP—In the Matter of the Application of Radio Seaway, Inc., et al.* (Civ. Action No. 13-95, S.D.N.Y. March 14, 1950), one of the matters dealt with in the paper. The views expressed in the paper are the author's alone.

¹ ASCAP holds the rights to perform publicly and for profit well over half the copyrighted music in the United States; it also licenses on a non-exclusive basis the domestic performance rights in music published in the United Kingdom, Soviet Union, and most of Europe and South America. According to Bernard Korman, General Counsel for ASCAP, the current value of its repertory is over \$80. million per year.

A pamphlet published by ASCAP for prospective members notes that the Society has 16,300 composer or lyricist members and 6,000 publisher members; membership increased fivefold between 1954 and 1974. In addition, there are about 37,000 licensed users of ASCAP music. ASCAP, *ASCAP: THE FACTS*, pamphlet, no date.

² *United States v. ASCAP, et al.*, Civ. Action No. 13-95, 1940-43 Trade Cas. ¶56,104 (S.D.N.Y. 1941) (hereinafter cited as "1941 Decree"); as amended, 1950-51 Trade Cas. ¶62,595 (S.D.N.Y. 1950) (hereinafter cited as the "1950 Judgment").

tory to music users—radio, television, hotels, night clubs, and others in the entertainment industry. The court's administration of these provisions has resulted in a unique body of law that seeks both to maximize the composer's right to "perform publicly for profit"³ and yet to protect the public's access to the cultural resource that is the ASCAP repertory. The growth of radio and television during the past quarter century, as well as recent proposals to expand the scope of copyright protection in the area of performance rights,⁴ underscores the current significance of the policies that have developed under the court's supervision of the ASCAP decree.

This paper will consider the administration of the consent decree's provisions relating to licensing of radio broadcasters and telecasters. An initial consideration of the major policies inherent in the licensing of performing rights frames an historical inquiry into the need for, and purposes of, the original decree. ASCAP's licensing structure and the court's interpretation of the decree's licensing provisions are then examined. The paper concludes with an appraisal of the effectiveness of the decree in carrying out its purposes and satisfying the needs of the parties concerned.

The 1941 Decree

The consent decree grew out of a conflict between two fundamental policies of American law: the promotion of artistic efforts, and the prohibition of unfair trade practices. On the one hand, the Constitution gives Congress the power to enact laws "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."⁵ The "limited monopoly" of the exclusive right was first extended to the public performance of musical compositions in 1897.⁶ As included in the Copyright Act of 1909,⁷ this right was limited to public performances for profit. Thus, the proprietor of a copyright in a musical composition has the right to license any performance of his work from which a direct or

³ 17 U.S.C. §1(e) (1970).

⁴ See, e.g., the Copyright Revision Bill, H.R. 2223, 94th Cong., 1st Sess. (1975), providing for performance rights in sound recordings and telecasts, and the Performing Rights Amendment of 1975, S. 1111, 94th Cong., 1st Sess. (1975), a proposed amendment to the Copyright Act of 1909 that provides for performance rights in sound recordings.

⁵ U.S. CONST., ART. I, §8.

⁶ 29 Stat. 481 (1897).

⁷ 17 U.S.C. §1(e) (1970).

indirect commercial benefit may be expected.⁸ On the other hand, the Sherman Act prohibits monopolies through its broad proscription of “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce. . . .”⁹ The contradiction between the grant of exclusive rights in copyrighted music and the prohibition of trade restraints has been described as “a situation where the government has granted a monopoly with its left hand while vigorously attacking it with its right hand.”¹⁰

That the incompatibility of these policies would emerge most discordantly in the field of performing rights was almost inevitable. The individual composer is virtually incapable of policing and licensing numerous and widespread performances of his work. Likewise, the user of music cannot be expected to obtain a license from each composer for each performance. The solution to these problems in the United States was originally found in ASCAP—an unincorporated association of proprietors of musical copyrights who licensed the performing rights in their works to the Society. ASCAP, in turn, licensed the rights in its entire repertory to the users.¹¹ Thus, ASCAP had the resources to monitor performances on a widespread basis, collect royalties from users for distribution to members, and, if necessary, to sue for infringement. Likewise, music users enjoyed the convenience of a “blanket” license, which gave them immediate access to the entire ASCAP repertory, as well as rights in new works as they became part of that repertory. But the very characteristic that enabled ASCAP to effectively enforce the rights of its members—possession of a large and popular repertory—also discouraged users from seeking performing rights from individual composers.

The tension between ASCAP’s control of performing rights, and the desire of music users for lower license fees emerged in the 1930’s with the rise of radio broadcasting as a profitable industry.¹² Through a

⁸ M. NIMMER, *NIMMER ON COPYRIGHT* §107.32 (1974). Largely through ASCAP’s efforts in litigation, the courts have given a broad construction to the right of public performance for profit. *See, e.g.,* *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *Buck v. Jewell-LaSalle*, 51 F.2d 726 (8th Cir. 1931); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

⁹ 15 U.S.C. §1(1970).

¹⁰ White, *Musical Copyrights v. The Antitrust Laws*, 30 NEB. L. REV. 50 (1950).

¹¹ A detailed account of ASCAP’s operations is contained in Finkelstein, *Public Performance Rights in Music and Performance Right Societies*, 7 COPYRIGHT PROBLEMS ANALYZED 69 (1961).

¹² Almost from its inception, ASCAP’s activities were challenged as being in restraint of trade. These efforts were uniformly unsuccessful. *See, e.g.,* 174th St. & St. Nicholas Avenue Amusement Co. v. Maxwell, 169 N.Y.S. 895 (Sup. Ct. 1918). In 1926, the Department of Justice investigated ASCAP and reported that allegations of antitrust violations were unfounded. Cohn, *Music, Radio*

series of favorable court decisions, ASCAP had established the applicability of the performance right to radio broadcasts,¹³ and had proceeded to license on an industry-wide basis.¹⁴ At that time, ASCAP was the only performing rights society in the United States, controlling virtually the entire repertory of popular copyrighted music.¹⁵ Radio, on the other hand, was a rapidly growing, profitable industry that promised to become ASCAP's biggest customer.

A simmering dispute between ASCAP and the radio industry culminated in 1940 when the broadcasters and ASCAP were unable to agree on the terms of renewal license agreements.¹⁶ Rejecting ASCAP's initial

Broadcasters and the Sherman Act, 29 GEO. L. J. 424, n. 91 (1941). A later government investigation culminated in the filing of an antitrust complaint against ASCAP, but the government postponed presentation of its case indefinitely after less than a week at trial. *See* Complaint for Plaintiff, United States v. ASCAP, No. E 78-388 (S.D.N.Y. 1934).

Likewise, efforts to raise antitrust violations as a defense to infringement suits were unsuccessful. *See, e.g.,* M. Witmark & Sons v. Pastime Amusement Co., 2 F.2d 1020 (4th Cir. 1924); Buck v. Newsreel, Inc., 25 F. Supp. 787 (D. Mass. 1938); Harms v. Cohen 279 F. 276 (E.D. Pa. 1922).

¹³ *See, e.g.,* Witmark v. Bamberger, 291 F. 776 (D.C.N.J. 1923) (performance of music on a radio station is "for profit" even though listeners are not charged); Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F.2d 411 (6th Cir.) *cert. denied*, 269 U.S. 556 (1925) (radio performance is "public" even though listeners may receive broadcast in a private setting). *See generally* FINKELSTEIN, *supra* n. 11 at 72-75, and Charles, *ASCAP—A Half Century of Progress*, 11 BULL. CR. SOC. 133 (1965).

¹⁴ At first, ASCAP licensed radio stations free of charge in order to encourage growth of the industry. *Comment, ASCAP and the Antitrust Laws*, 1959 DUKE L. J. 258, 262.

¹⁵ Estimates of the percentage of copyrighted music controlled by ASCAP during the period governed by the 1941 Decree (1941-1950) vary between 75 and 90 percent. *See, e.g.,* Witmark & Sons v. Jensen, 80 F. Supp. 843, 846 (D. Minn. 1948) (80 percent of music in motion pictures); Gibbs v. Buck, 307 U.S. 66, 81 (1939) (Black, J., dissenting) (85 percent of copyrighted domestic music); Buck v. Swanson, 33 F. Supp. 377, 386 (D. Neb. 1939) (85 to 90 percent of popular music and 50 to 75 percent of standard or older music).

ASCAP does not release figures showing the percentage of its music currently performed, but the figure is inevitably lower than it was 25 years ago due to the increased importance of BMI. According to an affidavit filed by a broadcaster in a recent rate proceeding, ASCAP licenses the rights in approximately 36 percent of music currently listed on industry charts of best selling phonograph records. To the extent such charts reflect the popularity, and, hence, air play of compositions, the 36 percent figure would reflect the proportion of ASCAP music played on the radio. Matter of Capital Cities Broadcasting Corp., et al., Affidavit of Abiah Church at 3, filed March 13, 1972.

¹⁶ The primary issue was whether broadcasters would accept a single ASCAP license for network broadcasts, rather than separate licenses for each local station that carried the network program. Several good accounts of this

license fee schedule, the broadcasters, through their trade organization, the National Association of Broadcasters, funded a corporation, Broadcast Music, Inc. ("BMI") to acquire and license performance rights in music. Although BMI performed the same functions as ASCAP, it was owned and controlled entirely by broadcasters, as it is today.¹⁷ Thus armed with a limited, but growing, BMI repertory, as well as music in the public domain, the broadcasters withdrew ASCAP music from the airwaves on October 31, 1940.¹⁸

ASCAP anticipated that public demand for its repertory would lead the broadcasters to end the boycott; however, the anticipated public outcry for ASCAP's repertory of "old favorites" was not forthcoming,¹⁹ and ASCAP's revenues dropped severely; the broadcasters' boycott of its music had "brought ASCAP to its knees".²⁰

Meanwhile, in March 1941, the Department of Justice intervened with antitrust charges against ASCAP, BMI, and two major networks. The government alleged that ASCAP's power to dictate the terms for the use of its repertory threatened not only the public interest in the enjoyment of music but also the continued existence of commercial radio.²¹ A central provision of the government's complaint was directed at ASCAP's practice of issuing only blanket licenses for the ASCAP repertory. The government contended:

... that defendant Society refuses to grant licenses to perform single musical compositions or groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society.²²

controversy are available. Cohn, *supra* n. 12 at 407, provides an excellent review of events just prior to entry of the 1941 Decree. Other sources include Allen, *The Battle of Tin Pan Alley*, 181 HARPERS 514 (October, 1940); *Comment, The ASCAP-NAB Controversy: The Issues*, 11 AIR L. REV. 394 (1940) (views of ASCAP and broadcasting industry representatives); Shull, *Collecting Collectivity: ASCAP's Perennial Dilemma*, 7 COPYRIGHT LAW SYMPOSIUM 35 (1956); and White *supra* n. 10.

¹⁷ BMI's activities, like ASCAP's, are subject to a consent decree; however, the BMI decree contains no provisions for judicial intervention in the BMI-licensee relationship. See *United States v. Broadcast Music, Inc., et al.*, Civil No. 64 Civ. 3787 (S.D.N.Y. 1966), 1966 Trade Cas. 71, 941.

¹⁸ The broadcasters' ASCAP licenses did not expire until December 31, 1940, but the boycott commenced two months earlier.

¹⁹ White, *supra* n. 10 at 54-55.

²⁰ Bernard Korman, General Counsel to ASCAP, personal interview, October 30, 1975.

²¹ Complaint for Plaintiff at 4, *United States v. ASCAP* (1941 Decree), *supra* n. 2.

²² *Id.*

Within a week of the filing of the complaint, ASCAP and the government entered into a consent decree (the "1941 Decree").

The 1941 Decree's licensing provisions were apparently aimed primarily at two purposes: (1) curbing ASCAP's power to compel higher fees by withholding its repertory; and (2) limiting the allegedly unfair trade practices ASCAP had engaged in during prior years. Thus, ASCAP was expressly enjoined from exercising "any right or power to restrict from public performance for profit . . . any copyrighted musical composition in order to exact additional consideration."²³

The 1941 Decree further required ASCAP to offer three types of licenses: a blanket license, covering all ASCAP music for all uses; a per program license, likewise covering the entire repertory, but limited to use on a particular program; and a per-piece license for particular use of an individual work for non-broadcast users.²⁴

Additionally, no fees could be charged on the basis of income received from programs not using ASCAP music, and the rate differential between blanket and per-program licenses was to "afford radio broadcasters [an] alternative basis of license compensation."²⁵ Furthermore, ASCAP could not discriminate between licensees who were similarly situated, although "discrimination" did not encompass "differentials based on applicable business factors which justify different prices."²⁶ Finally, ASCAP was enjoined from seeking exclusive licenses from its members, although it could control revenues obtained from individual licenses.²⁷

Aside from the circumstances surrounding the decree and the government's complaint, there is little information regarding the purposes of the decree to aid in its interpretation. Moreover, the scope and applicability of its provisions were unclear. For six years, no questions arose in the courts concerning the construction of the 1941 Decree. Then, in 1948, two decisions in the federal courts found ASCAP's motion picture licensing practices in flagrant violation of the Sherman Act²⁸ and condemned ASCAP's other licensing activities in sweeping terms.²⁹ In the meantime, the number of complaints to the Department of Justice re-

²³ 1941 Decree, *supra* n. 2 at 52,573.

²⁴ *Id.* at 52,572-573.

²⁵ *Id.*

²⁶ *Id.* at 52,572.

²⁷ *Id.*

²⁸ Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948); M. Witmark v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).

²⁹ The Alden-Rochelle decision, for example, found that "almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theaters, involve a violation of the anti-trust laws." Alden-Rochelle, Inc. v. ASCAP, *supra* n. 28 at 893.

garding the operation of the 1941 Decree had been mounting, and the government had commenced proceedings to amend it.³⁰ A complete revision of the earlier decree was filed on March 14, 1950³¹ (the "1950 Judgment"), on consent of the parties and "without trial or adjudication of any issue of fact or law," thus leaving open the question of ASCAP's status under the antitrust laws in the absence of the Judgment.³²

The 1950 Judgment

The licensing provisions of the 1950 Judgment fall into three broad categories: general injunctions applicable to all of ASCAP's licensing practices; provisions authorizing the license and fee structure; and the authorization of judicial fee-setting for disputes between ASCAP and its licensees. These provisions will be reviewed briefly before considering the issues that have arisen in their interpretation and the court's resolution of those conflicts.

General Injunctions. The 1950 Judgment contains five general limitations on ASCAP's broadcast licensing powers which restrict its activities in a manner consistent with general principles of monopoly regulation. ASCAP is thus enjoined from holding or acquiring rights other than non-exclusive rights of public performance, and is prohibited from interfering with its members' rights to negotiate individually with users. Licensees are assured of even-handed treatment through a prohibition on discrimination in license terms and fees between "similarly situated" licensees, and the opportunity for periodic review of license fees is provided by a five-year maximum license term. Finally, ASCAP cannot restrain the performance of any composition in its repertory unless so requested by the member in interest in order to protect the value of dramatic rights in the work.

The Licensing Structure. As one attorney who participated in the amendment process has noted, "the schedule of payments negotiated between ASCAP and the radio industry on the basis of their 1941 concordat, were still accepted by both sides in 1950."³³ Accordingly, the 1950

³⁰ Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROB. 294, 307 (1954).

³¹ United States v. ASCAP (1950 Judgment), *supra* n. 2.

³² Since entry of the 1950 Judgment, ASCAP has been found not to be in violation of the antitrust laws. See *Columbia Broadcasting System, Inc. v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975); *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

³³ Timberg, *supra* n. 30 at 307. Bernard Korman, ASCAP's general counsel, has stated that the license fees were not entirely acceptable to ASCAP. ASCAP, however, accepted continuation of the fees because it feared the networks would again boycott ASCAP music if it contested the rates. Bernard Korman, personal interview, October 30, 1975.

Judgment “ordered and directed” ASCAP to offer either type of license to any radio or television user who so requested.³⁴ Moreover, users were assured the availability of either type of license by two provisions requiring ASCAP to avoid discrimination in license terms and fees so that licensees would enjoy a “genuine choice” between the blanket and per program forms of license. The third type of license—the per piece license—was also authorized, although the circumstances under which ASCAP was bound to grant it were unclear.³⁵

Provisions contained in Section V provided for “licensing at the source” of independently produced or network radio and television programs as well as for wired music services.³⁶ Under this section, for example, a network could obtain a license that would authorize performance on a simultaneous or “delayed” basis on all the network’s affiliated local stations; concomitantly, local stations were not charged for network broadcasts that were so licensed.

Although the 1950 Judgment’s licensing provisions essentially preserved the blanket license as the centerpiece of the ASCAP licensing structure, the Judgment does refer to “various types of licenses,”³⁷ suggesting that the drafters contemplated that new forms of licenses would develop to meet new needs. This inference is further supported by the provisions for judicial fee setting.

Judicial Fee-Setting. The 1950 Judgment’s most significant paragraphs provide for determination of a reasonable fee by the court in the event prospective licensees and ASCAP are unable to reach agreement. Included in the Judgment at the request of ASCAP, this section removes the possibility of a broadcaster boycott of ASCAP music by “removing” the excuse that ASCAP is charging too much.³⁸ Under Section IX, a potential licensee may make a written request to ASCAP for use of “any, some, or all of the compositions in the ASCAP repertory.”³⁹ Upon receipt of the request, ASCAP must advise the applicant of the fee it deems reasonable for such use, and, if the parties are unable to agree, the applicant may petition the court for determination of a reasonable fee. The burden of proving the reasonableness of a fee is placed upon ASCAP, and, if the court fixes a fee, ASCAP is required to offer licenses at comparable rates to all parties “similarly situated.”

The license applicant is assured of use of the ASCAP repertory

³⁴ 1950 Trade Cas. at 63,752-753.

³⁵ *Id.* at 63,753. See text accompanying notes 71 through 91, *infra*.

³⁶ *Id.* at 63,754.

³⁷ *Id.*

³⁸ Bernard Korman, personal interview, October 30, 1975.

³⁹ 1950 Trade Cas. at 63,754.

pending negotiations or court proceedings through two compulsory license provisions. Upon application to the court for determination of a fee, the prospective licensee is entitled to use the ASCAP repertory without compensation.⁴⁰ Either party may, however, petition the court for determination of an interim license fee, effective until final resolution of the fee dispute. If the court finally determines a reasonable fee, it becomes retroactive to the time the license applicant requested use of the ASCAP repertory.

On its face, the 1950 Judgment seems to contemplate the evolution of a system of different types of licenses for different users through continuing judicial supervision of the decree. No limitation is placed on the type of license a user can request, and the provision making the court's fee binding on similarly situated licensees seems to presuppose variation in licensing needs among classes of users. Additionally, periodic review of license terms is insured by the Judgment's proviso prohibiting ASCAP from issuing any license for more than five years.⁴¹ To the contrary, however, the scope of judicial power is unclear; as an omnibus provision, applicable to all of the other licensing provisions, Section IX does not specify whether the court may fix fees for any type of license requested or whether it is limited by the licensing structure established in other portions of the Judgment. Similarly, it is not clear whether the court has discretion to pass on the merit of a particular license application or whether it can only fix the fee.

At stake in the resolution of the Judgment's interpretation is the extent to which it was intended to be a document of continuing viability, adaptable to changing technological developments in the entertainment industry. As early as 1954, doubts were expressed concerning the Judgment's flexibility;⁴² the stream of litigation and negotiation that has marked the past decade suggests the need for reexamination of the Judgment's provisions.

Administration of the 1950 Judgment

Perhaps the most striking feature of the twenty-five year history of the 1950 Judgment is that the court has not once reached the merits of a request for a reasonable fee.⁴³ Instead, the parties have always reached

⁴⁰ *Id.*

⁴¹ *Id.* at 63,752.

⁴² Timberg, *supra* n. 30 at 311.

⁴³ United States v. ASCAP, Plaintiff's Historical Summary at 6, dated January 25, 1974.

agreement in private negotiations, which have subsequently been approved by the court. The court's primary function, then, has been in directing negotiations between ASCAP and its users.

Disputes between ASCAP and its licensees have generally concerned two disparate views of the value of the ASCAP repertory. On the one hand, broadcasters regard music as a necessary but fungible commodity, to be obtained at competitive prices like other elements of their programming budgets. Since under the blanket license, users acquire and pay for many works that they do not use, broadcasters argue that it is inherently unfair:

Some radio stations desire and need only special styles or catalogues of music programming such as western, religious, "good music", classical and "top 40." ASCAP does not offer licenses for special catalogues in order to satisfy these needs. Instead, by the bulk form of license ASCAP chooses to issue, broadcasters are required to subscribe to and pay for a catalogue of over one million compositions containing much music which is worthless to them. The vast portion of it is outdated, most of it is of a style most stations cannot use, most of it of inferior quality, and never had any value whatsoever for radio use.⁴⁴

Telecasters have similarly argued for a "per piece" license based on the nature of the use (*e.g.*, feature, theme or background music).⁴⁵ In addition to permitting producers to evaluate the economic benefit of music used on a program, such a license, the telecasters contend, would promote competition between composers, allow unknown composers to encourage use of their music through lower rates, and enable popular composers to command a highly remunerative fee for the use of their music.⁴⁶

In response, ASCAP has argued that music cannot be valued in a cost benefit sense; its value to the user depends, instead, on the unpredictability of public taste. Consequently, ASCAP maintains that large-scale users need immediate access to any work in its repertory in order to meet public demand and carry spontaneous renditions of music on their programs.⁴⁷ The blanket license is therefore the only practical means of licensing its repertory, and the disadvantage of using only part of the ASCAP reper-

⁴⁴ Brief for Appellant at 76, *K-91, Inc. v. Gershwyn Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

⁴⁵ See Plaintiff's Trial Memorandum, *CBS v. ASCAP*, *supra* n. 32.

⁴⁶ *Id.* at 36-37.

⁴⁷ Finkelstein, *supra* n. 11 at 76; Finkelstein, *The Composer and the Public Interest*, 19 LAW & CONTEMP. PROB. 275, 288 (1954).

tory is more than compensated by the flexibility the blanket license affords. Moreover, ASCAP points out that the blanket license provides broadcasters with the advantages of access at moderate prices to highly popular works, such as those of Irving Berlin, which might be very expensive if licensed separately. Additionally, the blanket license is purportedly the only type of license that permits musical compositions to compete for public favor on their own merit, rather than on the basis of price. In response to the broadcasters' demands for licenses based on certain "catalogs" of ASCAP music, ASCAP notes the difficulty of, first, defining the relevant catalog (Is a country and western version of "Easter Bonnet" a country and western song, a holiday song, or a "standard"?), and, secondly, of placing a value on that repertory. Finally, ASCAP contends that a per-piece licensing system would be administratively impossible since it would require that each proprietor set a separate fee for the use of its music under myriad conditions and for various purposes.

The interplay of these conflicting points of view with ASCAP's licensing structure has increased with the growth and diversification of the broadcasting and telecasting industries, recent changes in the law of copyright, and changes in public taste. Correspondingly, demands upon the court to mold the Judgment's provisions to meet new licensing needs have also increased. The decisions that have evolved from the bargaining stresses between ASCAP and its licensees will now be examined.

Jurisdiction. The 1950 Judgment created a new substantive right in favor of ASCAP's licensees—the right to a reasonable fee as determined by the court. The significance of this right is reflected in the fact that a proceeding to determine a reasonable fee is the *exclusive* remedy available to music users short of a frontal antitrust attack. Because licensees are not parties to the decree, they can neither intervene in proceedings to amend it,⁴⁸ nor institute an action for violation of its terms,⁴⁹ nor obtain relief under it that is not specifically authorized.⁵⁰

The court's power to hear a petition for a reasonable fee is defined by the Judgment. Section IX provides two jurisdictional predicates to the initiation of a reasonable fee proceeding: first, the applicant must have made a written application to ASCAP for a license; second, the parties must be "unable to agree" on a reasonable license fee for 60 days after ASCAP's receipt of the request.⁵¹ The proceeding is initiated by the license applicant upon the filing of a petition that sets forth compliance

⁴⁸ Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1960).

⁴⁹ United States v. ASCAP (Metromedia), 341 F.2d 1003 (2d Cir. 1965).

⁵⁰ United States v. ASCAP (Shenandoah), 331 F.2d 117 (2d Cir. 1964).

⁵¹ 1950 Trade Cas. at 63,754.

with the jurisdictional requirements and requests a judicially-determined fee. Once the petition is served and filed, the court assumes its full jurisdiction under the Judgment—it can hear the parties, oversee negotiations, entertain applications to set interim fees from either party, and enter a final order setting the fee or terminating the proceeding.

In contrast, the court has no jurisdiction over agreements negotiated without any judicial intervention, and such agreements are not affected by subsequent judicial rate-making for other similarly-situated users.⁵² Once the court has taken jurisdiction, however, its power to approve a private settlement of the dispute would appear to be limited. Customarily, the court has terminated its power over such negotiations by an order providing that the parties have agreed to a reasonable fee in compliance with the Judgment.⁵³ But as one user recently contended, the settlement technically moots the proceeding, and the court's power to terminate it is limited to a dismissal;⁵⁴ a conclusive finding of reasonableness would require a full evidentiary hearing.⁵⁵

Authorized Licenses. The most significant question to confront the court in interpreting the 1950 Judgment has concerned the scope of the court's power to compel ASCAP to grant licenses not expressly authorized by the Judgment. In *Application of Shenandoah Valley Broadcasting, Inc., et*

⁵² *Id.*

⁵³ See, e.g., *Matter of Capital Cities Broadcasting Corp.*, Final Order, December 20, 1972, providing:

"The License fees set forth in the form of Local Station Blanket Radio License Agreement . . . are reasonable and non-discriminatory fees for the license granted by such agreement for a five (5) year period . . . and comply with the terms of the Amended Final Judgment entered herein."

ASCAP claims that until 1970, every proceeding under Section IX terminated with an order containing a like provision.

⁵⁴ *Matter of Columbia Broadcasting System, Inc. (Network Television)*, Memorandum in Support of Motion to Alter, Amend or Vacate, January 22, 1970. In this proceeding CBS moved to amend an order containing the language quoted in note 53, *supra*, on the grounds that the court had lacked jurisdiction to enter an order passing on the reasonableness of the fee. CBS apparently feared that the order would collaterally estop it from contesting the reasonableness of ASCAP's fees in the private antitrust action CBS had just brought against ASCAP (see n. 32, *supra*). The motion was settled when ASCAP agreed to waive any collateral estoppel effect argument in other proceedings, and an order, omitting the finding of reasonableness, was entered. See *Matter of Columbia Broadcasting System, Inc., et al.*, Order, dated January 12, 1970.

⁵⁵ It should be noted that Section IX(A) of the Judgment specifically requires that ASCAP bear the burden of proving the reasonableness of its fees. However, both the court and the Department of Justice have indicated that the parties' agreements would be some evidence of reasonableness. See Hearing, January 12, 1970, Tr. at 24; John L. Wilson, Department of Justice, telephone interview August 7, 1975.

al.,⁵⁶ over three hundred local television stations challenged the traditional structure of the blanket license agreement. Under their existing licenses, the stations paid for music on all programs they broadcast, other than those originating with the networks. However, most of their non-network broadcasts were independently produced, pre-recorded programs.⁵⁷ The *Shenandoah* petitioners sought licenses that would have excluded such programs so that their billable time for ASCAP licenses would consist only of locally produced programs. The practical effect of the proposed license would have compelled independent producers to obtain licenses on their productions before marketing them to local television stations.⁵⁸

The court framed the issue in terms of its power, under Section IX, to compel ASCAP to grant a license that was neither blanket nor per program, but "a composite sort of license, containing a little bit of both."⁵⁹ The local stations read Section IX to encompass "the power to fix a type of license which the court finds to be reasonable."⁶⁰ A narrower construction, they argued, would frustrate the purposes of the Judgment. The government concurred.

ASCAP, on the other hand, argued that the Judgment enumerated only two types of licenses, blanket and per program; while the court could set fees for these licenses, it could not pass on the reasonableness of other license proposals. Under ASCAP's reading of the Judgment, the power to set the terms of, as well as grant or withhold any license not expressly enumerated by the Judgment was reserved to ASCAP. Granting the requested *Shenandoah* license would infringe upon the right of the parties to reach private settlements.⁶¹

⁵⁶ 208 F. Supp. 896 (S.D.N.Y. 1962), *appeal dismissed per curiam*, 371 U.S. 540 (1963), *appeal dismissed*, 317 F.2d 90 (2d Cir. 1963), *rev'd and remanded per curiam*, 375 U.S. 39 (1963), *opinion modified*, 375 U.S. 994 (1964), *aff'd*, 331 F.2d 117 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1964).

⁵⁷ Matter of Shenandoah Valley Broadcasting, Affidavit of Hamilton Shea at 15, dated December 18, 1961.

⁵⁸ In support of their proposal, petitioners argued that independent producers were in a position to negotiate directly for music rights. The local television stations, however, "have no real choice or bargaining power with respect to music rights in pre-recorded programs, because they buy such material 'in the can' after it has been recorded and produced. . . . If producers cleared the television performance rights in such material, just as they now clear recording and theatrical motion picture performance rights, experience shows that they could buy each composition at its actual competitive market value, and that in the aggregate less would be paid for such rights than is now paid collectively by broadcasters to ASCAP under blanket licenses." Shea Affidavit, *supra* n. 57 at 3.

⁵⁹ 208 F. Supp. at 897.

⁶⁰ *Id.*

⁶¹ *Id.*

In a sweeping opinion, the court held that its power with respect to broadcasters extended solely to the determination of fees for those licenses expressly enumerated in the Judgment—the blanket and per program licenses:

The entire Section IX, which speaks of a fee for the “license requested” following application for a license on “any, some or all” of the compositions, deals with the procedure for determining reasonable license fees, not types of licenses. The words “license requested” do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have this court fix the fee. . . . The words “license requested” do not remove the limitations as to the extent, type and nature of licenses found in other provisions of the judgment.⁶²

In dicta, the court construed the Judgment’s other broadcast licensing provisions consistently with this holding. Section VI, which required ASCAP to grant licenses for “all” of its repertory, was implicitly limited by the provisions for blanket and per program licenses. Thus, ASCAP was not directed under the Judgment to offer licenses for “any” or “some” of its repertory;⁶³ likewise, the court interpreted Section VIII’s reference to “the various types of licenses” to include, for television users, *only* blanket and per program licenses.⁶⁴ In the court’s view, then, the licensing structure was fixed by the Judgment:

. . . ASCAP must issue per-program licenses, on written request, and . . . stations must be given an economic choice between per-program and blanket licenses—there its obligation ends. There is no mention made of any type of license other than per-program or blanket.⁶⁵

On appeal, the Court of Appeals for the Second Circuit affirmed, but on much narrower grounds.⁶⁶ Examining the fee-setting power under Section IX, the court concluded that its purpose was “to describe *how* fees were to be set for licenses that ASCAP was bound to grant, not to delineate ASCAP’s obligations to grant them.”⁶⁷ And although Section V au-

⁶² *Id.* at 898.

⁶³ *Id.* In an elaboration of this point, the court stated that “‘all’ refers to a license to include the entire repertory as distinguished from the other type of license which is limited to one or more specified compositions.”

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 331 F.2d 117 (2d Cir. 1964).

⁶⁷ *Id.* at 123.

thorized ASCAP to license independent or network productions at the source, the court could not compel the issuance of such a license without the consent of the prospective licensee.⁶⁸ Thus, the Second Circuit upheld the denial of the *Shenandoah* license. Like the District Court, the Second Circuit found that the specific provisions for per program and blanket licenses limited the applicability of the Judgment's broader provisions; but it did not go so far as to say these were the only types of licenses the District Court could compel ASCAP to issue to broadcasters.⁶⁹

The *Shenandoah* decision, however, did not clearly dispose of the questions concerning the court's power to compel ASCAP to grant licenses other than in the per program and blanket forms. The *Shenandoah* license was nowhere authorized by the Judgment, and the interests of independent producers would have been seriously affected. Nearly ten years after the District Court decision in *Shenandoah*, the questions it had failed to clearly resolve were put squarely in issue by another application for determination of a reasonable fee.

In *Application of National Broadcasting Co., Inc.*, a television network ("NBC") sought a license for performance of 2,217 specific ASCAP compositions.⁷¹ NBC argued that its request was authorized under Section VI of the Judgment, which provided in part:

Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.⁷²

⁶⁸ *Id.*

⁶⁹ *Id.* at 122-23

⁷⁰ 1971 Trade Cas. ¶173,491 (S.D.N.Y. 1970).

⁷¹ NBC's proposed license reflected the same concerns that had motivated the *Shenandoah* license. That is, most of the musical performances on the network were of the "background" or "incidental" variety, and were controlled by either NBC or independent "packagers" of programs. NBC thus stood in a position to acquire the rights to these compositions independently. The 2,217 compositions requested of ASCAP represented a "nucleus" of standard songs that were most frequently presented as "feature" performances on NBC variety programs. The network proposed to use these songs, and negotiate for any others as the need for rights to them arose. Affidavit of Aaron Rubin, Financial Executive Vice President of NBC, dated June 26, 1970.

⁷² 1950 Trade Cas. at 63,753.

NBC contended that this provision required ASCAP to request individual licenses from those members whose compositions NBC desired to use.⁷³ Under this scheme, ASCAP would act as a “broker” between its members, who would set the price for the use of their works, and the network. A refusal to individually license, NBC argued, would constitute a violation of the antitrust laws.⁷⁴ In a parallel argument, the government took the position that Section VI’s authorization of individual licenses obligated the court to direct ASCAP, at least, to notify the members in interest of NBC’s request.⁷⁵

In reply, ASCAP contended that it was obligated to grant individual licenses only when *both* the member and prospective user so requested, unless a user required “a specific composition in an emergency situation,” and the ASCAP member was unavailable to the user.⁷⁶ Nowhere in the Judgment, ASCAP argued, was it required to grant licenses for individual works; rather, *Shenandoah*’s interpretation of the Judgment barred such a license.⁷⁷ Finally, ASCAP argued that granting the requested license would itself violate the antitrust laws, since it would “pitch the might of the NBC television network . . . against the individual composer of a new song seeking to have his work performed.”⁷⁸

Following its *Shenandoah* decision, the court held that the Judgment did not compel ASCAP to grant the requested license. At the heart of the court’s reasoning was its interpretation of Section V(A) of the 1950 Judgment:

⁷³ Reply Memorandum on Behalf of National Broadcasting Company, Inc. at 8-9, filed May 1, 1970.

⁷⁴ *Id.* at 2.

⁷⁵ Memorandum for the United States at 4, filed April 15, 1970.

⁷⁶ ASCAP’s Memorandum in Opposition to NBC’s Application at 12, filed April 15, 1970.

⁷⁷ *Id.* at 5-9. ASCAP also relied on *United States v. ASCAP (Metromedia)*, 341 F.2d 1003 (2d Cir. 1965), in which the Court of Appeals held that a user lacked standing to hold ASCAP in contempt for failing to comply with the Judgment. In dicta, the court noted that a user “has not the right conclusively to determine certain elements of the ‘fee’ and then to require ASCAP, under pain of contempt, to quote a matching percentage figure.” 241 F.2d at 1009. ASCAP cited this passage as authority for the proposition that the license requested by NBC was not authorized by the Judgment. ASCAP’s Memorandum, *supra* n. 76 at 9.

NBC countered in its Reply Memorandum, *supra* n. 73 at 13, by quoting the following language from the same *Metromedia* case: “The 1950 Judgment provided that the type of license granted either accord the user the right to perform all ASCAP compositions or one or more specified works. . . .” 341 F.2d at 1005. The court did not cite the *Metromedia* case in the NBC opinion.

⁷⁸ *Id.* at 90,009-010.

The scope of a license to a television network is stated in Section V(A) of the judgment to be “the ASCAP repertory”. This is the judgment directive applicable to NBC; the provisions for a limited (per piece) license in Section VI are permissive, not mandatory. A bulk user of music such as NBC can hardly avail itself of the limited procedures in Sections VI and IX, which are clearly designed for situations not here involved. In fact, the whole thrust of Section IX is to provide the mechanics for setting appropriate license fees, not for establishing the scope of a license.⁷⁹

In support of this interpretation, the court made three points. First, it approved ASCAP’s observation that a limited license to a bulk user such as NBC would be “completely illusory” because the network would not be able to control the many spontaneous uses of music on its programs.⁸⁰ Secondly, the court regarded NBC’s application as similar to that in the *Shenandoah* case, which it quoted at length to establish the inapplicability of Sections VI and IX to NBC’s request. Finally, the court stated that NBC’s consistent use of the standard blanket license was “indicative of the intent of the judgment” and persuasive that the court was correctly interpreting the decree.⁸¹ “Two decades of acquiescence in this interpretation,” the court declared, “is most relevant to a decision on this application.”⁸² In denying the license request, the court concluded that the opposite result would be “tantamount to a modification of the judgment on the application of one who was not a party to the lawsuit.”⁸³

The court’s decision is difficult to reconcile with the Judgment’s express language and structure. Section V(A) authorizes licensing at the source at the request of a network.⁸⁴ Because it is an expressly permissive provision, the court had little reason to interpret it as controlling the scope of the television network licenses. Indeed, the reference to “the ASCAP repertory”, which the court construed as defining the scope of *any* network license, is wholly incidental to the thrust of Section V(A). Likewise, the court’s assertion that NBC could not avail itself of Sections VI and IX, because they were “clearly designed for situations not here involved”, was unwarranted. Section IX requires ASCAP to quote a

⁷⁹ *Id.* at 90,010.

⁸⁰ *Id.* at 90,010.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Timberg has observed that Section V(A) was intended solely to make the principle of licensing at the source—which had been incorporated in the 1941 Decree for radio broadcasters—applicable to television and wired music services. Timberg, *supra* n. 30 at 310.

license fee for “any, some or all” of its repertory upon application by any user. Nothing in Section IX suggests that networks can apply only for blanket licenses. Similarly, Section VI contains no restrictions on applicants for per-piece licenses; as the Department of Justice suggested, Section VI seems to require ASCAP to at least notify interested members of any application for per-piece licenses—a step ASCAP refused to take on the ground that it would have been “contrary to the spirit of the Judgment.”⁸⁵

The court’s supportive reasoning in *NBC* was similarly questionable. While it is perhaps true that bulk users require immediate access to a great number of compositions, it does not follow that this would be grounds for denying the application for a limited license. In fact, the government optimistically predicted that, far from being “illusory”, the NBC license would substitute the “working of the marketplace” for judicial fee-setting.⁸⁶ Moreover, the court’s reliance on the *Shenandoah* case to find the NBC license unauthorized was inapposite. The court stated that the *Shenandoah* license was “substantially similar” to the NBC license;⁸⁷ but, in fact, NBC’s application rested on Section VI’s express authorization of per-piece licenses, whereas the *Shenandoah* license had been denied on the grounds that the Judgment contained no specific provision authorizing it. Neither the District Court nor the Court of Appeals in *Shenandoah* reached the question whether per-piece licenses could be denied to networks. Finally, the court’s assertion that NBC had “acquiesced” in the court’s interpretation of the Judgment for twenty years was inconsistent with NBC’s rights under the Judgment. The court failed to note that NBC had joined the petitioning local television stations in *Shenandoah* nearly a decade earlier in support of the license requested there;⁸⁸ moreover, nothing in the Judgment prevented NBC from seeking to alter its license. To the contrary, Section IV(D)’s limitation on the duration of ASCAP’s licenses was intended to promote “economic initiative by licensees and facilitate the government’s job should circumstances compel it to reopen the Judgment.”⁸⁹ If licensees were bound by the terms of prior practices, as the court intimated, Section IV(D) would be virtually nugatory.

It has been argued that *Shenandoah* and *NBC*, however unsatisfactory

⁸⁵ Affidavit of Herman Finkelstein, General Attorney for ASCAP, filed April 15, 1970 at 2-3.

⁸⁶ Memorandum for the United States, *supra* n. 75 at 5.

⁸⁷ 1971 Trade Cas. at 90,010.

⁸⁸ Bernard Korman, ASCAP’s General Counsel, takes the position that the networks, in fact, motivated the local stations to petition the court in *Shenandoah*. Bernard Korman, personal interview, October 30, 1975.

⁸⁹ Timber, *supra* n. 30 at 310.

from an analytical standpoint, nevertheless reached the correct result in economic terms and in view of the circumstances in which the cases were brought. Thus, ASCAP takes the position that the court saw the real danger in the NBC license as the prohibitive enforcement and accounting costs of per-piece licensing on a large-scale basis. Likewise, the fact that NBC rapidly withdrew its appeal after reaching agreement with ASCAP on new license rates gives substance to ASCAP's contention that the case was a ploy to induce lower license fees.⁹⁰ Thus, the fear of continued vexatious litigation as well as the desire to protect composers from the bargaining power of NBC could well have motivated the court's broad language in *Shenandoah* and *NBC*.⁹¹ Nevertheless, those decisions locked the Judgment's licensing scheme into the mold that had been cast in 1950. Under the court's reading of the Judgment, a radio or television station was entitled only to a blanket or per program license; the court could not pass on the reasonableness of any other kind of license; and the per-piece license was unavailable to television networks. The Judgment's provision concerning the rights of licensees to "any, some or all" of the ASCAP repertory, as well as the prohibition against discrimination among the "various types of licensees" were held to be inapplicable to ASCAP's largest users. Finally, the court's reluctance to experiment, on an interim basis, with new forms of licenses, left untested the users' theories about the practicability of non-blanket licenses.

⁹⁰ Order and Stipulation dismissing Appeal, filed December 21, 1971.

⁹¹ The following passage from the hearing held on the NBC application may shed light on the rationale of the court's decision:

THE COURT: Well, all right. I haven't made up my mind definitely on this yet, but my impression is that it may well create a situation which is going to be far more harmful to competition and far more harmful to the small man, far more harmful to the man who is beginning, who wants to begin to compose, who wants to take up music not only as a vocation but because he loves it. We are going to destroy that. We may as well destroy it if we grant licenses such as are sought here. But if we have to do it under the consent decree, we have to do it.

But I wonder whether you have weighed all these things. I wonder whether the Department has weighed them. Because I've lived with this business now, administering this decree, for, it must be, over 12 years, or pretty nearly 12 years. This is the way we've always interpreted this decree in the past, and this is the way it has been interpreted not only by ASCAP but by all the radio stations, all the networks, all the television people, networks and independents.

Now, this new idea of licensing specifically named, designated numbers of compositions. I don't know who is the father of this child, but he might have to pay an awful bill for the support of it if an order is entered of filiation. Hearing, September 28, 1970.

Per Program Licenses. The Judgment's provisions for per program licenses, contained in Section VII and applicable only to radio and television, embody the principle of license fees based on use. Unlike the blanket license, the per program license authorizes use of ASCAP music only for specific programs; the fee is based on the receipts from sponsors of those programs alone. Thus, the per program license provisions satisfy one of the primary demands of broadcasters prior to entry of the original 1941 decree: that ASCAP be required to issue licenses "which do not require the payment of a percentage of the . . . receipts . . . from radio programs on which no copyrighted musical compositions owned . . . by the . . . Society, are performed."⁹²

The Judgment contains three provisions that are intended to insure the viability of the per program license. Section VIII, requiring ASCAP to use its best efforts to avoid discrimination in license fees "which would deprive the licensees . . . of a genuine choice from among such various types of licenses" was held specifically applicable to the choice between blanket and per program licenses on *Shenandoah*.⁹³ A narrower provision, Section VII(B) (3), mandates that ASCAP take into account the "economic requirements and situation" of stations with relatively greater proportions of sustaining (unsponsored) programs and fewer commercials in order to give such stations a "genuine economic choice" between the blanket and per program license.⁹⁴ According to one knowledgeable commentator, this subsection was intended to protect "good music" stations that played primarily classical music in the common domain, and hence used a lesser proportion of ASCAP music than most stations.⁹⁵ Finally, the requirement of an economic choice between blanket and per program licenses is bolstered by Section VII(C), which enjoins ASCAP from influencing users to negotiate for a blanket license before negotiating for a per program license.⁹⁶

The per program license, however, has fallen into disuse. Although the number of radio stations licensed on a per program basis has never been great, today only a handful are so licensed;⁹⁷ moreover, while the blanket radio license has undergone several modifications since 1941, the per program agreement has remained unchanged. Most significantly, the commercial blanket license rate has been reduced in that time from 5

⁹² Complaint of Plaintiff at 23, *United States v. ASCAP*, *supra* n. 2.

⁹³ 208 F. Supp. at 898.

⁹⁴ 1950 Trade Cas. at 63,754.

⁹⁵ *Timberg*, *supra* n. 30 at 310.

⁹⁶ 1950 Trade Cas. at 63,754.

⁹⁷ Bernard Korman, personal interview, August 8, 1975.

percent to 1.725 percent of the station's net receipts from sponsors, while the per program rate has remained at 8 percent.⁹⁸ In large measure, this reduction in blanket license fees was conditioned on the understanding between ASCAP and the radio industry that the per program license fee would not be reduced.⁹⁹ A provision in a letter agreement that is part of the standard radio blanket license states:

As you know, no steps have been taken to conform per program agreement to present day practices, in view of the small number of stations now holding that form of agreement. It is understood that the failure to change the per program agreement is not to serve as a precedent or to apply in television or as a precedent or binding on the Society at the end of the term or any renewal of the new radio agreement.¹⁰⁰

The current disparity between the per program and blanket license has led some observers to conclude that licensees have been deprived of the "economic choice" contemplated by the 1950 Judgment.¹⁰¹

A pending proceeding, *Matter of Radio Seaway*, "seeks to transform the per program license from a phantom to a reality so that radio stations will enjoy 'the genuine choice' intended by the ASCAP final judgment."¹⁰² The *Radio Seaway* petitioners are, for the most part, local FM radio stations, distinguished from other stations by low advertising revenues, small audiences, and programming of classical or concert music.¹⁰³ Because most of this music is in the common domain, *Radio Seaway* petitioners play only about 10 percent of the ASCAP repertory, compared to an estimated industry-wide average of at least 36 percent.¹⁰⁴ Petitioners therefore contend that both Section VII(B) (3)'s

⁹⁸ United States v. ASCAP (Matter of Radio Seaway, Inc., et al.) (S.D.N.Y., filed, December 3, 1973) (hereinafter cited as *Radio Seaway*), Memorandum Opinion #40769 at 2, filed June 3, 1974. During the same time, the sustaining fee was reduced by 35 percent in 1959 and by 10 percent in 1965 for the blanket license, while the sustaining fee for the per-program license remained unchanged. Affidavit of Alan Latman, Counsel to Radio Seaway, filed December 4, 1973.

⁹⁹ Bernard Korman, personal interview, October 30, 1975.

¹⁰⁰ Letter from Herman Finkelstein, General Attorney for ASCAP, to Emanuel Dannett, Counsel to the Marion Broadcasting Co., et al., dated December 30, 1959.

¹⁰¹ Richard G. Green, Counsel to CBS, Inc., personal interview, August 6, 1975. See also Affidavit of Alan Latman, *supra* n. 98.

¹⁰² Affidavit of Alan Latman, *supra* n. 98 at 4.

¹⁰³ Memorandum Opinion #40769, *supra* n. 98 at 1-2.

¹⁰⁴ *Id.* at 4. See n. 15, *supra*.

provision for “good music” stations and Section VII’s prohibition on discrimination in license rates entitle them to a form of per program agreement that is economically competitive with the cost of the current blanket license agreement.

Petitioner’s reliance on Section VII(B) (3) raises the question of the scope of applicability of that provision. *Radio Seaway* contends that it falls within the intent of the section to protect “good music” stations because of its economic status and program format. But Section VII(B) (3) is expressly limited to stations “having relatively few commercial announcements and a relatively greater percentage of sustaining programs.” This language suggests that the section was intended to protect only stations that had a great number of unsponsored, or sustaining programs; accordingly, if ASCAP charged “good music” stations a reduced fee for sustaining programs only, then those stations would have an “economic choice” in license fees.¹⁰⁵ Hence, unless the *Radio Seaway* petitioners actually have a greater proportion of sustaining programs than most stations, as opposed to simply lower revenues, it is unlikely that they would fall clearly within the terms of Section VII(B) (3).

On the other hand, however, *Radio Seaway* contends that the per program license fee, plus the expense of certain record-keeping procedures required under the present form of license,¹⁰⁶ deprives it of the “genuine choice” contemplated by Section VIII. Petitioners argue that Section VIII was intended to insure competitive pricing between the blanket and per program licenses, such that radio stations with industry-wide median revenues would enjoy a parity in the actual dollar expense of either type of license.¹⁰⁷ The terms of Section VIII support this contention by employing a rigid standard of non-discrimination in license fees. The direction that ASCAP use its “best efforts” to avoid “any” discrimination suggests both that a substantial number of stations must have a reasonable choice between licenses and the lack of a choice must be

¹⁰⁵ ASCAP’s per-program radio agreement does, in fact, provide for a lower sustaining fee than the blanket agreement; moreover, the per-program agreement provides that in no event are the sustaining fees payable under it to be greater than those that would have been payable if the parties had executed the blanket agreement.

¹⁰⁶ The per program agreement requires a broadcaster to maintain a log of each composition played on the station as well as a list of sponsors and the amounts paid by each for advertising. The expense of this record-keeping is too great even for the larger stations. Emanuel Dannett, personal interview, July 30, 1975.

¹⁰⁷ Alan Latman and Stanley J. Lacher, Counsel for Radio Seaway, personal interview, August 11, 1975.

rationally related to relevant business factors of the user.¹⁰⁸ Given the obsolescence of the current program license, it is difficult to conceive of any result under Section VIII that would not mandate a drastic alteration of the terms of the current per program license.

The Non-Discrimination Provisions

Two provisions of the 1950 Judgment require ASCAP to treat competitive licensees even-handedly. Section IV(C)¹⁰⁹ restrains ASCAP from entering or enforcing license agreements that discriminate in terms or fees between similarly situated users. Section IX(C)¹¹⁰ extends this principle to an affirmative duty by requiring ASCAP to offer similarly situated users license fees comparable to any that are “finally determined” by the court. These non-discrimination clauses encourage equality in bargaining power between ASCAP and its licensees by separating users into large groups which can negotiate with ASCAP on an industry-wide basis. Moreover, the burden of avoiding discrimination is exclusively on ASCAP; a user is not barred from litigating its right to a reasonable fee by the fact that ASCAP has made a license agreement with other users who may be similarly situated.¹¹¹

The central issue concerning ASCAP's obligations under the non-discrimination provisions is the scope and meaning of “similar situation”. Although the court has not clearly defined the term, it has indicated that the established practices of the parties will be given great weight.¹¹² ASCAP's interpretation of “similar situation” is reflected in the terms of its license agreements. These contracts suggest three criteria for distinguishing between licensees: the size of the audience, the nature of the music use, and certain economic factors. The first of these, audience size, is a central factor in virtually all of ASCAP's licenses. In radio and television, for example, blanket license fees are fixed at a percentage of

¹⁰⁸ This interpretation is supported by the predecessor to Section VIII in the 1941 Decree, which provided:

“... defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this subparagraph to afford radio broadcasters alternative bases of license compensation.”

1941 Decree, Section I(3), *supra* n. 2 at 52,573.

¹⁰⁹ 1950 Trade Cas. at 63,752.

¹¹⁰ *Id.* at 63,754.

¹¹¹ Memorandum Opinion, *supra* n. 98 at 5-6.

¹¹² Matter of Musak, Inc., et al., Endorsement Fixing Interim License Rate, Filed November 4, 1971.

the station's net receipts from sponsors, which reflect, in part, audience size. Likewise, wired music services and public establishments that license directly through ASCAP pay according to seating capacity or other factors linked to the number of listeners. To a lesser extent, the nature of music use determines whether licensees are similarly situated. Thus, ASCAP considers all local radio stations to be similarly situated except for "all talk" or "all news" stations which use music exclusively for incidental purposes. Similarly, wired music licenses provide different rates for "entertainment" and "non-entertainment" users.¹¹³ Finally, ASCAP has argued on occasion that business factors, such as the economic power of a user, are relevant to the question of similar situation.¹¹⁴ This factor is most consistently applied to large-scale users, such as television networks, which bargain individually with ASCAP.

ASCAP's interpretation of the non-discrimination clauses is currently being challenged in two proceedings that seek judicial construction of "similar situation". In *Matter of Musak, Inc.*, the question has arisen whether licensees which are business competitors are similarly situated within the meaning of the Judgment. Musak, which provides wired background music, contends it is in competition with FM radio stations which cater to public establishments through a program format similar to petitioners' background music; accordingly, it argues that its license rates should be comparable to the lower rates charged radio stations. Early in the proceeding, Musak moved for partial summary judgment finding that it was both in competition with and similarly situated to FM radio stations.¹¹⁵ Although the court assumed, for purposes of the motion, that Musak was in competition with FM radio, it denied the motion on the grounds that there were factual issues to be determined on the question whether Musak was similarly situated "within the meaning and concept of Article [sic] IV(C) of the Amended Final Judgment."¹¹⁶

This decision rested in part on the legal conclusion that ASCAP was entitled to separately license establishments that played radios for back-

¹¹³ An "entertainment" use is one provided for the general public, as in a restaurant, whereas a "nonentertainment" use is one provided for the licensee's employees or other private groups.

¹¹⁴ See, e.g., Letter from Herman Finkelstein to Franklin Feinstein, Assistant Secretary of American Broadcasting Co., Inc., dated March 17, 1972, in which the argument is made that because ABC operated a radio network, the rate basis for its owned and operated radio stations should be different from that of stations without network affiliation.

¹¹⁵ *Matter of Musak, Inc.*, 1973 Trade Cas. ¶74,752 (1973).

¹¹⁶ *Id.* at 95,273.

ground music.¹¹⁷ The recent Supreme Court decision in *Twentieth Century Music v. Aiken*¹¹⁸ overrules this result by holding that playing a radio publicly for profit is not a "performance" within the meaning of the Copyright Act. Thus, because FM stations now lawfully compete with Musak in public places, the way is clear for the court's consideration of the merits of Musak's similar situation claim.

Musak argues that competition between users is the relevant criterion in determining similar situation since the anti-discrimination provisions of the Judgment were intended to implement the Sherman Act's policy against a monopoly's discrimination between competitors for its products.¹¹⁹ Although highly persuasive, this argument's presupposition that ASCAP is a monopoly may not withstand judicial scrutiny in light of the Judgment's express disclaimer of the merits of ASCAP's status under the antitrust laws. In addition, it is questionable whether Musak could show discrimination in rates, since radio and wired music services are vastly different industries.

Unlike *Musak*, the *Radio Seaway* proceeding raises program formats as a possible basis for determining similarly situated licensees. There, petitioners contend that the very limited availability of ASCAP music suitable for their classical music format, as well as the difficulty of changing formats under existing law,¹²⁰ makes them as distinct for licensing purposes as the "all talk" stations that ASCAP has licensed.¹²¹ Although ASCAP has not fully answered this contention, it has indicated that it views the proper standard to determine similar situation as the *type* of use authorized by the license, not the amount or kind of music used; the "all talk" license authorizes only incidental performances whereas the per program license authorizes all types of uses. This distinction is really directed at the question of enforcement, and, although enforcement

¹¹⁷ The court relied on *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973), which was reversed on appeal to the Supreme Court, 415 U.S. 394 (1974).

¹¹⁸ 415 U.S. 394 (1974).

¹¹⁹ Musak's Memorandum of Points and Authorities at 16-17, dated January 10, 1973.

¹²⁰ Under *Citizens Committee v. FCC*, 436 F.2d 263 (D.C. Cir. 1970), a radio station may have to justify any substantial change of program format in light of "the needs and tastes of the community and types of programming available from other stations." FCC, *Primer on Ascertainment of Community Problems by Broadcast Applicants*. The burden of justifying such a change is particularly difficult for a "good music" station, since there are only about thirty-five of them across the nation and, consequently, there is a low availability of alternative "good music" stations.

¹²¹ See generally Affidavit of Alan Latman, *supra* n. 98.

problems exist for the per program agreement, to discard the amount of ASCAP music available to a user as a criterion for similar situation ignores very fundamental differences in the value of the ASCAP repertory to various users. In this instance, problems of enforcement and dangers of abuse are counterbalanced by the narrowness of Radio Seaway's classical music format and the difficulty of changing it. Such a broadening of the criteria for determining "similar situation" would further the competitive marketing of performing rights in a manner consistent with the Judgment's fundamental rationale.¹²²

Interim Licenses

The Judgment's provisions concerning interim licenses and fees insure availability of the ASCAP repertory to users and provide for stability during negotiation of a final license agreement. Under Section IX(A), a user's petition to set a reasonable fee automatically gives it the right to use the ASCAP repertory pending negotiation of a final agreement.¹²³ At any time after the filing of the petition, either the user or ASCAP may apply to the court to set an interim fee; failure to pay the fee is grounds for dismissal of the application and terminates the licensee's right to use the ASCAP repertory. Once a final fee is set, it becomes retroactive to the time the petition was filed, and an adjustment is made for payments under the interim license.¹²⁴ In contrast to its duties with regard to a final fee, ASCAP is not bound to offer the interim fee to similarly situated users;¹²⁵ however, the court has held that it may not set

¹²² *Id.* at 13-14.

¹²³ 1950 Trade Cas. at 63,754.

¹²⁴ Although the Judgment specifies that the obligation to make interim payments does not arise until either party applies to the court for an interim fee, it appears that the court has inherent power to make the interim fee payable from the time of the user's original application, since the final fee is retroactive to that date. *See, e.g.,* Matter of Columbia Broadcasting System, Inc. (Local Radio), Order Fixing Interim Fee, filed June 21, 1972, in which the interim fee was made payable from the date of CBS's license application rather than the date of ASCAP's interim fee application, filed twenty days later. Whether the court will exercise this power apparently depends on the promptness of the interim fee application and the user's apparent ability to ultimately pay the full fee. Since, however, the parties have always settled on the final fee, the period for which the interim fees are payable may become an element of the final bargain.

¹²⁵ Matter of Trimount Automatic Sales Corporation, et al., Order Fixing Interim Fee, filed July 15, 1958. Petitioners in this action, background music suppliers, alleged that the interim fee set in the Musak proceeding, *infra* n. 127, was discriminatory because it provided for a 15 percent reduction from the prior rate in effect between the parties. *See* Petition of Trimount Automatic Sales Corporation, filed May 8, 1958.

an interim fee that discriminates against similarly situated users, despite the provisions for retroactive adjustment.¹²⁶ Thus, in concept, the interim fee is essentially a provisional remedy that protects both the user and ASCAP during negotiation; in practice, however, the interim fee is often a critical element of the bargaining process as well as a touchstone for determining a final fee.

In setting interim fees, the court has virtually always continued the prior license rate between the parties, in the absence of a contrary agreement.¹²⁷ This practice reflects the court's view that "[f]ixing an interim fee is distinctly a business proposition or transaction, and the idea is to preserve the status quo and do not manifest injustice that is going to shock anybody."¹²⁸ The court's maintenance of the status quo suggests, moreover, that prior license fees provide at least some evidence of reasonableness, even though interim fee orders typically disclaim any effect on the merits of the controversy. Indeed, the court has suggested that an interim fee is a "yardstick which might well be a guide, or establish guidelines for the fixation of a reasonable rate on a permanent basis."¹²⁹ Thus, negotiations for final fees during the interim period often focus on factors that would justify an alteration in existing rates, such as decreases or increases in the use of ASCAP music by the licensees.

The court's practice of setting interim fees at existing rates has had three principal effects on ASCAP's users. First, licensees seeking decreases in rates have had to bear the added cost of the old rates during the proceeding. Likewise, ASCAP incurs a similar loss if it is seeking an increase in license rates. Protracted negotiations are therefore more costly, and the rewards of ultimate success diminish proportionately with the length of the proceeding. The parties may well reduce their demands and accept rapid settlement rather than risk the expense of lengthy

¹²⁶ Matter of Musak, Inc., Endorsement filed January 24, 1973.

¹²⁷ No interim license fee order reviewed in the course of this study varied from the prior permanent fee unless there were unusual circumstances that motivated the parties to vary the fee. For example, in an early Musak proceeding, the parties agreed to an interim fee of 85 percent of the prior rate from the time of Musak's application, rather than the full rate from the time of ASCAP's petition for an interim fee, filed nearly a year later. In addition, Musak agreed to join nearly 100 of its franchisees in the proceeding. Matter of Background Music, Inc., Affidavit of Ferdinand Pecora, filed January 24, 1958 at 2-3. ASCAP's counsel noted, however, that the court will sometimes urge the parties to agree to an interim rate that differs from the prior rate. Bernard Korman, personal interview, August 8, 1975.

¹²⁸ Matter of Musak, Inc., Hearing, October 8, 1971, Tr. at 61.

¹²⁹ Matter of Columbia Broadcasting System, Inc., et al., Hearing, April 9, 1969, Tr. at 2-3.

negotiations. Secondly, however, preservation of the status quo has proven useful in negotiating fees when the parties have been unable to agree on proper criteria for future fees. For example, disputes over accounting procedures for television networks have been resolved by adjusting interim fees retroactively in light of actual financial data; this system has been more satisfactory than attempting to formulate accounting rules for future payment.¹³⁰ Finally, setting interim fees at prior rates and terms has discouraged development of new types of licenses. For example, in the NBC litigation, the government urged the court to grant an interim license fee for the 2200 compositions NBC desired to use. In support of its position, the government stressed the value of the interim license as an experimental device:

The interim license might afford a useful opportunity to gain experience with licensing of individual compositions. The court and the parties might well learn a good deal about the operation of such a licensing system by operating under it for some months. NBC might learn that it is not a panacea for its music licensing problems, ASCAP might learn that it is not so unworkable as it now believes, and the Court and the Government might gain useful knowledge as to the operation of such a system.¹³¹

The court, however, set the interim license at its prior rate and terms;¹³² although its reasons were not expressed, it is likely that the court did not want to approve a form of license not clearly authorized by the Judgment.

Despite the shortcomings of current interim license practices, attorneys for the parties generally agreed that the system is satisfactory and that it encourages continuing negotiations.¹³³ The court's practice of maintaining the status quo, however, has probably worked to ASCAP's advantage in the long run. Given the financial security of ASCAP's licensees and the provisions for making final fees retroactive, a bolder, more

¹³⁰ The CBS television network, for example, has operated on an interim license since 1970; the other two networks, however, have reached final agreements with ASCAP. Bernard Korman, General Attorney for ASCAP, personal interview, August 8, 1975.

¹³¹ Matter of National Broadcasting Company, Inc., Memorandum for the United States, filed May 5, 1970 at 4.

¹³² Matter of National Broadcasting Company, Inc., Order Fixing Interim Fee, filed December 21, 1970. *See also* Matter of Shenandoah Valley Broadcasting, Inc., Interim Order for Period Commencing January 1, 1962, filed March 15, 1962.

¹³³ Bernard Korman, General Attorney for ASCAP, personal interview, August 8, 1973; John L. Wilson, Department of Justice, telephone interview, August 7, 1975.

innovative approach in the field of interim fees, as suggested by the government in *NBC*, would provide a testing ground for more equitable solutions to ASCAP's licensing structure without ultimately injuring the parties.

Finding a Reasonable Fee

The experience of 25 years under the 1950 Judgment has produced surprisingly few independent criteria for determining the value of the ASCAP repertory. Virtually every license fee negotiated under the Judgment had its genesis in fees negotiated prior to the 1941 Decree.¹³⁴ Moreover, efforts to compel ASCAP to place a dollar value on a portion of its repertory, such as the *NBC* case, have met with no success. The license fees that have evolved, however, would provide the court with a basis for setting a reasonable fee if it were faced with the task; once the basis was ascertained, the court could adjust it according to factors recognized by the parties as relevant to the changes in value of the ASCAP repertory. One such factor currently is the amount or kind of use of ASCAP music.

The most widely recognized basis for computing license fees is the "percentage of receipts" method, under which the license fees vary with the user's income from sponsors. Local radio stations, which have a substantial number of feature performances of music, pay a commercial fee based on a fixed percentage of their receipts from sponsors plus a sustaining fee that varies according to the station's advertising rates and net income.¹³⁵ Local television, which has a more varied pattern of music usage than radio, pays on a complex "incremental" fee basis which "steps down" the percentage charged for income over a threshold level.¹³⁶ Television networks, which originally paid on a percentage basis, now pay flat dollar amounts for the use of ASCAP music, largely because of the parties' inability to agree on accounting procedures for computing the networks' income.

The well-established practices in local radio and television would provide the court with ample precedent upon which to base a fee. Network television, however, presents a thorny problem of determining the appropriate fee basis. The lack of well-settled precedent, the differences between networks, and the competing variables of music usage, income and audience size confound the search for a judicially manageable stan-

¹³⁴ Even television fees were based on existing radio rates, due to the parties' inexperience with television.

¹³⁵ Local Station Blanket Radio License, paragraph 5.

¹³⁶ Local Station Blanket Television License, paragraph 5.

dard of reasonableness. Until a more reliable pattern of negotiation develops between ASCAP and the networks, the court, if presented with the task, might have to choose between a long term fee basis that might ultimately prove unsatisfactory, or a series of short-term fees that would burden both the parties and the court with continuous negotiations.

If the court ascertained the proper fee basis, the nature or amount of use of ASCAP music would provide an appropriate measure for adjustment of the fee from prior rates. In local radio, the amount of ASCAP music played on an industry-wide basis has consistently proven to be a major factor in adjusting license rates. Likewise, ASCAP's recognition of distinctions in types of use through the "all talk" license provides an easily ascertainable standard for adjusting rates. Television presents greater problems in measuring use because of the greater mix of "incidental" and "feature" performances and the relative values accorded to them. Local television stations probably could not bear the expense of monitoring their music use so as to provide a reliable basis for adjustment of fees. Networks, however, can and do monitor their music so that the court could adjust the fee according to variations in numbers and kinds of performances.¹³⁷

The wisdom of canonizing one or another element of the bargaining process, however, is questionable. Although judicially set criteria might decrease the workload of the court and provide greater predictability in negotiations, they would also reduce the flexibility of the Judgment to adapt to changing conditions. This is particularly true because of the unavailability of forms of licenses other than the blanket or per program agreements. Moreover, to the extent that reliable standards have evolved, the parties seem, with few exceptions, to be conforming to them.

CONCLUSION

The government's decision to enter into a consent decree with ASCAP rather than to proceed to trial in an effort to disband it implied a recognition of the necessity of performing rights societies to the promotion of artistic efforts. But it also implied a belief that performing rights could be licensed in a manner consistent with principles of free enterprise through the aid and supervision of the court. The 1950 Judgment lay the groundwork for the delicate balance between the copyright and antitrust laws by providing for judicial supervision of ASCAP's relations with its licensees.

¹³⁷ Richard G. Green, Counsel for Columbia Broadcasting System, Inc., personal interview, August 6, 1975.

Since 1950, ASCAP's relationships with its users, under the Judgment, have been generally amicable. Some classes of users, such as hotels, have never found it necessary to seek the court's aid. When disputes have arisen, the court has generally guided the parties to settlement; a ruling on the merits of a reasonable fee request is yet to come. Broadcasters and telecasters, far more than other users, have tested ASCAP's fee structure and litigated the construction of the Judgment. Each contest with the broadcasters has ended in settlement. The compromises ASCAP and the broadcasters have made over the years are reflected in the fact that since 1950, ASCAP has accepted a steady erosion of its license rates; conversely, however, the income of broadcast users has risen so dramatically that ASCAP's income has steadily increased.

In comparison to other licensing systems, the Judgment ensures a reasonable balance in bargaining power between ASCAP and its users, with the result that the court's intervention has been minimal. The court's power to dictate license terms, albeit unexercised, encourages both users and ASCAP to act reasonably in negotiating license fees. In contrast, there is no such mechanism governing BMI's licensing practices. Moreover, unlike performing rights tribunals in other countries, the court provides a forum for adjudication of licensing disputes that is relatively inexpensive and free from political interference. Significantly, the license agreements and fees negotiated by ASCAP and its users are models for licensing organizations of other nations.

Nevertheless, disputes since 1950 have shown growing dissatisfaction with the Judgment's licensing provisions—especially with regard to the blanket license. It is true that no performing rights are licensed on other than a blanket basis in any nation in the world; indeed, as recently as 1967, the government took the position that blanket licensing was necessary.¹³⁸ But the history of the 1950 Judgment demonstrates that the blanket license no longer provides for the needs of broadcast and telecast users. The demands for per-piece licensing in television, as well as for more diversified licenses for radio, are consistent with the spirit and language of the Judgment. Neither the need for more diversified licenses nor the enforcement machinery to insure compliance with their terms was available in 1950. Today the need exists and the machinery is available.

The language of the Judgment is broad enough to encompass per-piece licensing for television networks, a per-program license for "good music" radio stations, and licenses for "catalogs" of particular types of music for radio stations. The question of enforcement, however, is more

¹³⁸ Memorandum for the United States as amicus curiae, *K-91, Inc. v. Gershwins*, *supra* n. 32.

difficult. In the case of per piece licenses, only large economic entities, such as the networks, can afford the cost of monitoring all their performances of music. Although network monitors might be subject to charges of abuse, the expense of independent monitoring could be avoided through judicially-imposed safeguards. Verified music logs, as well as independent, sporadic checks, would mitigate the possibility of abuse.

Per piece licensing, of course, raises the question of assessing the value of a given piece of music. In this regard, copyright proprietors could set the fee for the types of use and users, much in the same way that motion picture synchronization rights are now licensed. ASCAP, in turn, could act as agent for the proprietors in licensing the works. The fear that large networks might overwhelm composers or authors with their bargaining strength seems largely unfounded, since virtually every other labor group in the entertainment industry—most of whom share the same economic problems with music composers and authors—have successfully bargained collectively for standard contracts providing them with sufficient income and benefits.

In radio, the Judgment's provisions for per program licensing make a strong case for a substantial reduction in the current per program fee for "good music" stations. Particularly when such stations publish program guides or keep records of music aired, enforcement problems would be minimal. Such a license would further the objectives of the Judgment to provide a "genuine economic choice" between types of licenses, particularly for "good music" stations.

Licensing of particular catalogs of music, such as Country and Western, would be desirable for radio stations that play primarily one genre of music. Although ASCAP would point to the difficulty of defining a particular repertory for enforcement purposes, this problem can be overcome by periodically defining the repertory on an industry-wide basis. Thus, ASCAP would grant the radio stations in question a license for the use of a given repertory; at periodic intervals, a court-supervised survey of music played on all such stations would establish the repertory for that interval. Stations would then pay on the basis of the industry survey for that genre of music. Costs of enforcement and of conducting the surveys would be shared by all stations licensed for that genre. Moreover, the cost of the license could be derived from per-piece charges, or, alternatively, could be negotiated on the basis of the number or type of music used, as well as by comparison with use of other types of music. Licensing on a catalog basis would extend the concept of similarly situated users to the type of music used, and would further the competitive aspects of music licensing.

The prospect of a statutory performance right, and the consequent probable doubling of the cost of performing music to some of ASCAP's

licensees, intensifies the need for viable alternatives to the present licensing structure.¹³⁹ While the ultimate feasibility of these suggestions is not clear, the device of the interim license would provide a testing ground for them, without ultimately damaging the parties. Moreover, although implementation of new license forms might radically alter the court's role in licensing the ASCAP repertory, and the structure of ASCAP would change accordingly, they would bring ASCAP closer to what it claims to be—a clearinghouse for performing rights.

¹³⁹ Emanuel Dannett, who has represented the local radio industry in most of its negotiations with ASCAP, indicated that local radio presently pays approximately \$70. million in licensing fees and that enactment of a performance right would probably double this expense. Emanuel Dannett, personal interview, July 30, 1975.

172. THE LEGAL PROBLEMS OF VIDEO-CASSETTES AND AUDIO-VISUAL DISCS*

By FRANCA KLAVER**

INTRODUCTION

1. The appearance on the market of new devices for the recording and reproduction of sounds and images ("video-cassette-recorders") and of new products recorded on or manufactured for these devices ("video-cassettes" and "audio-visual discs") has caused some speculation recently in the various circles concerned with audio-visual systems. Film or record producers, publishers and "hardware" manufacturers, distributors and dealers, to mention some among those who expect a profit from these new products, along with educational establishments, libraries, broadcasting organizations, companies and private users, in fact all possible users, have sallied forth into this field with high hopes, but at the same time with many questions in their minds, relating mainly to legal considerations and more specifically to copyright and neighboring rights. For all those who are even vaguely familiar with the subject, there is no doubt that this new invention in the audio-visual field is going to present a great number of problems.

2. For the law-maker too, whether national or international, the question arises whether video-cassettes and audio-visual discs require the elaboration of new provisions in order to afford suitable protection to the interests of authors and performers on one hand, and those of industrial producers and broadcasting organizations on the other, when their works or products are used. What has to be determined is whether current legislation (including international conventions) in the copyright and neighboring rights fields is sufficient to ensure effective protection for these new productions, or whether it should be supplemented or even revised. The purpose of this study is precisely to review the problems existing at present or foreseeable in the near future, and to establish in what directions steps should be taken to solve them.

3. For this reason the starting point we have chosen is a review of the main multilateral conventions in the copyright field, namely the Berne Convention and the Universal Copyright Convention. Neighboring rights problems will be mentioned in connection with the Rome Convention for

*This study was written at the request of the Secretariat of Unesco and the International Bureaux of the World Intellectual Property Organization [WIPO] for consideration by the Inter-Governmental Copyright Committee and the Executive Committee of the Berne Union.

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the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, but they will not be dealt with in detail here as they deserve to be examined in a separate study which would have to be submitted for consideration to the Intergovernmental Committee set up by that Convention.

4. In close relation with the copyright conventions, the copyright legislation of a number of States will be closely examined with respect to certain points which seem essential. The picture is far from complete: it is impossible, within the limits of this study, to mention all the existing provisions in detail. Moreover, an inspection of national legislation reveals certain distinct types of provision, and therefore a selection has been made in order to highlight the wide range of possible solutions. The legislation examined is mainly that of industrialized countries, namely Australia, Canada, Japan, the United States of America and the countries of Europe. The situation in developing countries is very different and should be studied separately.

5. The order in which the various problems will be dealt with in this report is as follows:

- A. The legal nature of video programs;
- B. The rights related to the making of video programs;
- C. The private use of video-programs;
- D. The public or semi-public use of video-programs;
- E. The distribution of video-programs;
- F. Moral rights.

6. These problems will be examined in relation to the international conventions and the national legislation of the countries referred to. The concept of "video-programs" has been introduced here: we should explain the choice of this term and thereby demarcate the subject-matter of this study.

Terminology

7. As in all intellectual productions that raise questions of copyright and/or neighboring rights, a clear distinction should be made between the work or the performance, both of which are immaterial in nature, and the material object in which they are incorporated¹.

¹ This does not mean that an intellectual work always has to be fixed in order to be protected. Since the Stockholm revision of the Berne Convention (1967), it has been expressly recognized that an intellectual work not fixed on a material object could be protected; the requirement that it be fixed—or not—is a matter for domestic legislation (see Article 2(2) of the Berne Convention as revised at Stockholm, and also the Paris Act).

8. The material object may be a video-cassette, a video-disc (or audio-visual disc), a cartridge or any other film or tape on which sounds and images are recorded. The technical process used for recording is not decisive in relation to the legal problems to be solved; this is why this report does not explain the various processes that may be used². The important thing from the legal standpoint is that these are audio-visual programs (containing either copyright or non-copyright works), fixed on a material that allows them to be reproduced, if necessary in quantity, and used, if necessary repeatedly, by means of a television set.

9. In French legal doctrine the material object is called a "vidéogramme," by analogy with "phonogramme." It is clearly distinguished from the recorded intellectual production which in the same doctrine is called an "oeuvre vidéographique"³. Although this terminology gives an accurate indication of the difference between the immaterial work (or performance) and the material object in which it is incorporated, it seems to have found little favor outside French-speaking countries⁴.

10. German legal doctrine makes extensive use of the expressions "Kassettentelevision" or "Kassettenfilm," yet these seem less suitable in that they do not bring out the difference between the material object and the intellectual production, or between the video-program, which is always recorded, and television programs that are distributed to the public, the recording of which, although increasingly frequent, is by no means necessary⁵.

² A very comprehensive review of new technical inventions, such as video-cassettes, audio-visual discs, cable television and communications satellites, and their interaction, with a selective bibliography, may be found in the book by R. Wangormée and H. Lhoest; *L'APRÈS-TÉLÉVISION-UNE ANTI-MYTHOLOGIE DE L'AUDIO-VISUEL*, published in 1973 (Hachette). The bibliography refers to the situation both in Europe and in the United States and Canada. The reader will also find an abundance of informative literature in the press and in specialized reviews.

³ See Tournier, *Authors' Rights and Claims in Respect of Videograms*, RIDA, No. LXXI (1972). See also Gaudel, *Videograms in Search of their Identity*, RIDA, No. LXXVI (1973) and by the same author, *Concerning Teledistribution*, RIDA, No. LXXXI (1974).

⁴ In the Netherlands, for instance, the term has been used by S. Gerbrandy [see Pfeffer-Gerbrandy, *Kort commentaar op de Auteurswet 1912* (1973), *passim*,] but a few followed his example; generally the terms used are "video-cassette" and "beeldplaat," without any clear distinction between the material object and the program incorporated in it. In Belgium, on the other hand (see the book by R. Wangormée and H. Lhoest, note 2), as well as in Italy (see de Sanctis: in *COPYRIGHT*, 1973, pp. 224-225, and M. Fabiani in a report prepared for ALAI, (1972)), the term "videogram" is widely used.

⁵ See Brugger: *Die neuen audiovisuellen Systeme* (Schriftenreihe der UFITA, vol. 40, 1970), and other authors quoted by Reimer in *COPYRIGHT PROBLEMS OF THE*

11. Anglo-American terminology uses the word "systems" to designate the "hardware" but no special term seems to have been introduced for the intellectual production⁶.

12. In Japanese legal doctrine, the term "video-program" has been adopted to designate "video-software" (the program, or intellectual production), as advocated above⁷.

13. The copyright doctrine of other countries borrows one of the above terminologies (for instance "videogrammi" in Italy); alternatively a general expression is used (like "audio-visual works" or "works expressed by a process analogous to cinematography"), or again the new phenomenon of video-cassettes and audio-visual discs is simply ignored, no doubt on account of its newness.

14. In interested circles, that is, industry and commerce, "new media" or "nouveaux moyens audio-visuels" are often mentioned. Although in fact everyone knows that the reference in such cases is to video-cassettes, video discs or similar products (and sometimes even to cable television!), the term cannot be recommended for specific references to video-cassettes and similar products as it is too broad and too vague. The expression "audio-visual media" covers any type of fixation of sounds and images, including the cinematograph film. The difference between the latter and the video-cassette or the audio-visual disc lies in the fixation process: in "video," the sounds and images are recorded on an audio-visual tape or disc by means of a magnetic, mechanical or electronic process whereas in cinematography the recording is made on a film. The means of projection also is different: cinematograph films use a projector; "video" uses a television set. According to current forecasts the use of "video" will likewise be different from the use traditionally made of the film; this is an important point which will be brought up later on. For the same reason, namely, that it is too broad and too vague, the word "audio-visual fixation" is not suitable to denote the intellectual content of video-cassettes,

NEW AUDIOVISUAL MEDIA (IIC reprint of an article published in GRUR Int. 315, 1973), which mentions the adverse criticism of this terminology. Moreover, it should be noted that radio and television programs go through a body that has obtained official authorization to make its broadcasts; video-programs are independent: they are made by firms and can be used by anyone.

⁶ See de Freitas, *Audio-Visual Systems*, 18 BULL. CR. SOC. 304 (1971). Reimer, *supra* note 5, points out that the expression generally used in Anglo-American literature is "audiovisual recording and presentation systems" (AVRP).

⁷ See Nomura's recent *Letter from Japan* in COPYRIGHT, 131-132, May 1974. An earlier article by Kawamura, *Videopackages and Copyright Problems in Japan*, published in the EBU REVIEW, No. 127 B, May 1971, refers to "videopackages" (translated into "video-cassettes" in French).

video discs or similar products⁸. For all these reasons the term "video-program" has been chosen.

A. *The legal nature of video-programs*

15. Now just what is the legal nature of this new video-program phenomenon? It is apparent from the documentation at our disposal that the problem has been analyzed with particular thoroughness in Japan. A Sub-Committee of the Copyright Council investigated the problems associated with video, and its report was adopted by the Council. There is a provision in the Copyright Law which reads as follows: "As used in this Law, "cinematographic work" includes a work expressed by a process producing visual or audio-visual effects analogous to those of cinematography and fixed in some material form" and the Sub-Committee considered that practically all video-programs were covered by this definition. As to the possible future nature of video-programs, three different opinions were advanced in the Sub-Committee:

(1) video-programs constitute cinematographic works in the traditional copyright sense;

(2) there exist two kinds of video-programs, one constituting cinematographic works and the other constituting audio-visual works other than cinematographic works;

(3) video-programs constitute special works *sui generis*, different from cinematographic works or phonograms. The majority of the Sub-Committee shared the second opinion⁹.

16. The record of the discussions in the Sub-Committee is too short to convey accurately all the arguments in favor of the second opinion. There is reason to suppose that it was adopted by the majority on account of the possible uses of video-cassettes and video-discs which do not always—indeed often do not at all—correspond to the currently-known uses of cinematograph films. To illustrate this idea, one might mention the fact that cinematograph films are most frequently projected before an *audience* gathered together in a room (cinema, club, university hall, etc.) or communicated by television; they are rarely projected within a family, in a circle of friends or in the home of a single person. If present forecasts become reality, video-cassettes and audio-visual discs will be sold or hired

⁸ This term was incorporated, at their Paris revisions (July 1971), in the Berne Convention (Appendix, Article III(7) (b)) and the Universal Copyright Convention (Article V(3) (b)). It covers all processes for the fixation of sounds and images.

⁹ See Nomura, *Letter from Japan*, COPYRIGHT 132, May 1974 (under 2).

and, above all, used *privately*, via individual television receivers. Consequently they come closer, as far as their social function is concerned, to sound recordings, that is, phonograms and "musicassettes"¹⁰. It is possible, therefore, that the Sub-Committee of the Japanese Government Copyright Council was influenced by this consideration when it expressed its views on the legal nature of video-programs, particularly with regard to the future. This, however—we hasten to say—is mere conjecture.

17. The American Copyright Revision Bill¹¹ and its explanatory report do not seem to accord video-programs a legal nature different from that of cinematographic works in the traditional sense. The Bill defines audiovisual works as follows (paragraph 101): "Audiovisual works are 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." Cinematographic works, on the other hand, are defined as follows: "Motion pictures are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any" (paragraph 101). The conclusion may be drawn from this definition that "audio-visual works" are a broad category encompassing cinematographic works as well as video-programs and photographic slides, the latter differing from the other two only in that motion is lacking; between those two, however, no difference seems to exist in the eyes of either the American legislator or American doctrine¹².

18. Assimilation of video-programs to cinematographic works also seems to be the approach adopted by the Scandinavian countries, Sweden in particular. In the recent revision of the Swedish Copyright Law¹³, no

¹⁰ See Nomura (*id.*); Reimer, *supra* note 5; Schmidt di Simoni, quoted by Reimer, note 5 *supra*, and Tournier, *supra*, note 3.

¹¹ The text we consulted is the one submitted to the Committee of the Judiciary of the House of Representatives on September 12, 1974 (S. 1361), and the Committee Report is that of July 3, 1974 (to accompany S. 1361). In this connection see also Derenberg, *Letter from the United States*, COPYRIGHT, February 1971.

¹² The Committee Report makes no mention of video-cassettes or video discs. For the doctrinal viewpoint, see Meyer, *TV Cassettes—A New Frontier for Pioneers and Pirates*, 19 BULL. CR. SOC. 16 (1971). The author declares himself in favor of the assimilation of video-programs to cinematographic works in the revised American Copyright Act.

¹³ See the Law of May 25, 1973, amending the Law of 1960 (No. 729) on Copyright in Literary and Artistic Works. COPYRIGHT, February 1974, pp. 42 *et. seq.*

amendment was made to Article 1, which contains a list of the works protected, mentioning only cinematographic works among literary or artistic works, without any indication of other audio-visual productions. Moreover, Swedish doctrine seems to interpret the expression as being capable of including video-programs¹⁴.

19. A similar view, based on the interpretation of the British Copyright Act (Section 13), is expressed in the doctrine of the United Kingdom^{14a}.

20. French doctrine, on the other hand, is divided on this point. There is one current of opinion that regards the legal nature of the videographic work as being in no way distinct from that of the cinematographic work, while another considers that the assimilation of videographic works, even if "made by processes analogous to cinematography" (Article 3 of the Copyright Law), does not necessarily follow from the law. The law recognizes, apart from cinematographic works, "radio or television works" (Article 18), "works of collaboration" (Article 9(1)), "composite works", (Article 9(2)), and "collective works" (Article 9(3)). Nevertheless, from a practical standpoint the assimilation of videographic works to cinematographic works would seem to be desirable¹⁵.

21. A comparable opinion trend may be discerned in Italian doctrine^{15a}.

22. If we turn now to international copyright legislation, the two multilateral conventions, namely the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention, both of which have recently been revised (Stockholm 1967, Paris 1971), make no express mention of video-programs. However, the Berne Convention allows for future technological developments in its new text by mentioning, in the list of protected works (Article 2): "cinematographic works to which are assimilated works expressed by a process analgous to cinematography." Contracting States are free to interpret this expression as they see fit.

23. The Universal Copyright Convention places signatory countries under the obligation to provide for the "adequate and effective.

¹⁴ See Seve Ljungman, *Copyright to the extent of audio-visual cassettes*, speech delivered at the Stockholm Audio-Visual Conference, October 1970.

^{14a} See D. de Freitas, *supra* note 6.

¹⁵ See J. L. Tournier, *supra* note 3, advocating full assimilation to cinematographic works; Gaudel, on the other hand, stands for the opposite viewpoint (see *Videograms in Search of their Identity*, *supra* note 3).

^{15a} See M. Fabiani, *supra* note 4.

protection”¹⁶ of the rights of authors—and other copyright proprietors—in literary and artistic works (Article I). Cinematographic works appear among the works mentioned as examples but the Convention does not contain a definition of the term; neither does it contain the phrase that appears in the Berne Convention, namely “works expressed by a process analogous to cinematography.” Here too, however, reasonable interpretation leads to the conclusion that a video-program may be assimilated to a cinematographic work in view of the similarities existing between two types of work. Like States party to the Berne Convention, States party to the Universal Convention are entirely free to interpret at their discretion the terms “literary and artistic work” or “cinematographic work.” This means that States which, for one reason or another, do not wish to assimilate video-programs to cinematographic works are perfectly free to refrain from doing so.

24. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“neighboring rights”) is not intended for the grant of protection to literary and artistic works and therefore does not contain any definition of those works.

25. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the terminology to be adopted to denote the intellectual content of video-cassettes and audio-visual discs in so far as such content is susceptible of protection by copyright.*

26. *In addition, the two Committees are invited to express their views on the desirability of studying whether the Berne Convention and the Universal Copyright Convention, in their present form, are so drafted as to allow Contracting States sufficient freedom to protect the intellectual content of video-cassettes and audio-visual discs as literary or artistic works or, more specifically, as cinematographic works, or in any other manner.*

B. *The rights related to the making of video-programs*

1. *The position of the author*

(a) *Under the Berne Convention (as revised at Stockholm, 1967)*

27. The articles that may be applicable to video-programs are Articles, 2, 9, 11, 11 *bis*, 14, 14 *bis* and 15. If one considers those provisions as a whole,

¹⁶ The Convention does not indicate what is meant by this expression. According to the report of the 1952 Conference which adopted the Convention, these rights should comprise “those recognized in civilized countries,” and include at least the rights of reproduction, adaptation and public performance (see A. BOGSCH: *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION*, p. 6). These rights and the right of broadcasting were included in the Convention as revised at Paris (July 1971), in Article IV *bis*.

one can deduce certain principles that are internationally recognized in the member countries of the Berne Union. The creation of a video-program is permissible only with the consent of the authors concerned or their successors in title. Indeed, there can be no doubt that the program comprises a number of "works" created by different persons (author of the texts, director, composer of the music, decorator, designer, etc.). It also involves fixation, and the making of a number of copies of the fixation, in other words reproduction (Article 9).

28. These principles are also applicable where the video-program is not made directly but is taken from a film (or some other material, for instance, a slide, disc, book or periodical) already existing and transferred to the video-cassette or audio-visual disc. Here the contract entered into between the author of the work used and the producer of the film (or other material) is the deciding factor: it has to be determined whether the author has assigned his right in respect of any technical process already in existence or yet to be invented, or whether he has retained it. Where nothing is specified in the contract, or where there is doubt as to its interpretation; the matter has to be decided by the courts. Generally speaking, the courts tend to interpret contracts restrictively: all rights that the author has not specifically assigned or are not included in the intention of the two parties to the contract belong to the author. There is an abundance of court decisions and literature on this subject in a number of countries¹⁷. There is no need to go any further into this question in this study, as it is a well-known problem in the field of copyright contracts and one that does not depend for its solution on international legislation.

29. Another well-known copyright problem which, in the recent past (Stockholm 1967), has given rise to action on the part of the international legislator (the member States of the Berne Union) is that of the ownership of copyright in the end product resulting from the collaboration of the various authors. As we mentioned above, there is a very widely-held view according to which the video-program is regarded as a cinematographic work. The same questions arise here, therefore, as in connection with the authorship of a cinematographic work. The Stockholm revision of the Berne Convention clarified the protection of cinematographic works in many respects which it is unnecessary to go into again. For the purposes of

¹⁷ The "Zwecksübertragungstheorie" is the most widely known in German case law and doctrine. In this connection see, e.g., D. Reimer, *supra* note 5, pp. 193-197, and the literature he quotes, and the articles that appeared in *FILM UND RECHT* on the subject between 1972 and 1974 (Movsessian and others). See also Dunwald: *Spielfilmauswertung und Zwecksübertragungstheorie*, GRUR 1973, pp. 245 *et seq.*

this study, we shall merely mention the new Article 14*bis* which sets forth the principle that ownership of copyright in a cinematographic work is a matter of legislation in the country where protection is claimed (Article 14*bis*(2) (a)). Thus authorship of a video-program has to be defined, in principle, according to domestic legislation. These definitions vary from one country to another. For instance, there are copyright laws under which the authorship of a cinematographic work is determined on the basis of case law; a special mention should be made here of the legislation or case law that deems the producer to be the "author" of the cinematographic work (see Australia, Canada, United Kingdom, United States of America, etc.).

30. Article 14*bis* tries to simplify matters by providing an interpretative rule on contracts for countries that attribute authorship to the intellectual creator or creators of the cinematographic work (and do not, moreover, recognize *cassio legis*, as in the case of Austria and Italy). The purpose of this rule is to ensure peaceable exploitation of the cinematographic work by assuming, in the absence of any contrary or special stipulation, that authors who have brought creative contributions to the making of the work have given their consent. It does not apply, however, to the principal authors of the work (author of the scenario, the dialogue or the music) or to the principal director, unless the national legislation provides to the contrary, so that most of the practical value of Article 14*bis* is lost. The Article is in fact the result of a compromise that was arrived at with considerable difficulty at the Stockholm Diplomatic Conference.

31. As the assimilation of a video-program to a cinematographic work is not universally accepted—as we have just seen—the definition of authorship of such a work *sui generis* is entirely dependent on national legislation or case law.

32. The content of the protection of video-programs, which are assimilated to cinematographic works, is defined at the international level by the articles mentioned above, Article 14*bis* in particular. From that provision it may be deduced that they are protected against reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, and against the subtitling or dubbing of the texts. Such video-programs as are not assimilated to cinematographic works are nevertheless protected under the Berne Convention against the majority of these uses. However, due account has to be taken in both cases of the exceptions and limitations that will be dealt with later on (Chapters C, D and E).

(b) *Under the Universal Copyright Convention*

33. If the video-program is regarded as a cinematographic work, the

question arises, for States party to the Universal Copyright Convention, as to who is the author of the work. The Convention contains no definition of the author of a work or of any other copyright owner, which leaves national legislation entirely free with respect to interpretation. This conclusion is equally valid for national legislations that do not assimilate video-programs to cinematographic works.

34. As far as the content of the protection of a video-program under the Universal Convention is concerned, this is much less specific than under the Berne Convention. Article IV^{bis} of the Universal Convention (as revised at Paris in 1971) mentions *inter alia* the rights of reproduction, of public performance and of broadcasting; these are of importance throughout the audio-visual domain. Nevertheless, the definition of the precise scope and content of these rights is considered to be a matter for domestic legislation.

35. In addition, paragraph of Article IV^{bis} allows any Contracting State to make such exceptions to those rights as "do not conflict with the spirit and provisions of this Convention." In any case, "a reasonable degree of effective protection," must be ensured¹⁸.

36. Considering these provisions as a whole, we may conclude that, in the States party to the Universal Copyright Convention, the protection afforded to the authors of a video-program and to the program itself largely depends on the domestic legislation of the State in which protection is claimed.

37. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of studying whether the content and the scope of the protection afforded under the Berne Convention and the Universal Copyright Convention to the authors of literary and artistic works, and especially to the authors of cinematographic works, are sufficient to ensure the adequate and effective protection of the authors of video-programs.*

2. *The position of the performer*

38. It is well known that the protection afforded to performers is not comparable to that enjoyed by authors. According to a more or less universally-held opinion, the performer does not own copyright, but a "neighboring" right. The Rome Convention for the Protection of Per-

¹⁸ The report of the Conference of Revision of the Universal Copyright Convention (Paris, 1971) states on this subject "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." It further indicates that the introduction of a general compulsory license system will not be allowed.

formers, Producers of Phonograms and Broadcasting Organizations, of October 26, 1961, grants him certain rights which, taken together, are not sufficient to protect him fully against audio-visual use of his performance (whether "live" or recorded). However, as this study is concerned with the problems raised by video-programs above all in the context of the two international copyright conventions, and not in that of the Rome Convention, the various questions arising in the "neighboring rights" field will not be dealt with in detail here; they should be made the subject of a separate study.

39. Moreover, we could mention a number of countries that protect performers in different ways: by virtue of "neighboring rights" in their copyright legislation (for instance, the Scandinavian countries, Austria, Czechoslovakia, Germany (Federal Republic of), Hungary, Italy and Japan; also some Latin American countries such as Argentina, Colombia and Uruguay), or under criminal law (the United Kingdom and certain other countries of the Commonwealth), or according to the case law (France, the Netherlands, Switzerland and the United States). In the United States the protection of performers is the subject of considerable debate in connection with the revision of the Copyright Act. A fairly close link exists, therefore, in the opinion of several national legislators, between the protection of performers and that of authors.

40. There is reason to wonder, in view of the new problems arising in the audio-visual field, whether the time has not come to review the matter of the protection of performers, either within the Rome Convention or another framework¹⁹.

41. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the attention of the Intergovernmental Committee of the Rome Convention to the problems relating to the protection of performers in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to performers.*

¹⁹ In this connection see also the deliberations within the Japanese Sub-Committee (see note 9) on the protection of the interests of performers. Among the various possibilities (contract, exclusive right, remuneration for secondary use), the prevailing opinion within the Sub-Committee was that one should preserve at least the performer's right to claim remuneration for the use of video-programs incorporating their performances in broadcasts transmitted by radio or by wire. However, in view of the uncertainty as to the nature and the use of video-programs, and as to their assimilation to either cinematographic works or phonograms, contractual procedures have been recommended for the time being (see COPYRIGHT, May 1974, p. 132).

3. *The position of the producer of phonograms*

42. The producer of phonograms (sound recordings) has no entitlement to copyright either under the Berne Convention or under the Universal Copyright Convention. Nevertheless, in certain countries that are party to one or other, or both, of those Conventions, for instance Australia, Canada, the United Kingdom and the United States, and in countries whose legislation is based on that of the United Kingdom (for instance Ghana, India, Israel and Sri Lanka), the producer of phonograms holds a (restricted) copyright; in those countries, therefore, he can object to certain unauthorized uses of this product, such as reproduction.

43. In the countries that have ratified the Rome Convention or have legislation inspired by the principles of that Convention (for instance the Scandinavian countries, Austria, Germany (Federal Republic of) and Italy), or have ratified the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Geneva, October 29, 1971)²⁰, the producer of phonograms also enjoys a certain degree of protection, particularly against unauthorized duplication of his product. Also, case law based on common law will sometimes afford him some protection. In certain countries (for instance Switzerland), unfair competition legislation will also do so. However, in view of the fact that the principles of such protection fall within the purview of industrial property, it would not be appropriate to examine them in the context of this article²¹.

44. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the attention of the Intergovernmental Committee of the Rome Convention to the problems relating to the protection of producers of phonograms in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to producers of phonograms.*

²⁰ On the subject of the Geneva Convention (1971) see Ulmer: *Das Uebereinkommen zum Schutz der Hersteller von Tonträgern gegen die unerlaubte Vervielfältigung ihrer Tonträger*, GRUR INT., March 1972, and de Sanctis: *Some general considerations on the recent Geneva Convention for the protection of phonograms*, COPYRIGHT, May 1972, pp. 111 *et seq.* On January 1, 1975, 15 States had ratified the Geneva Convention (see COPYRIGHT, January 1975, p. 31).

²¹ See Article 10bis of the Paris Convention for the Protection of Industrial Property. The 1971 Geneva Convention (see the previous note) provides for the protection of producers of phonograms by different means, including unfair competition legislation (Article 3).

4. *The position of the broadcasting organization*

45. The legal position of the broadcasting organization is comparable, to some extent, to that of the producer of phonograms: it has no author's right either under the Rome Convention or the Universal Copyright Convention. Nevertheless in certain countries that are party to one or other, or both, of those instruments, the broadcasting organization is the owner of a (restricted) copyright. Such is the case, for example, in Australia and the United Kingdom. In those countries it is entitled to object to any unauthorized fixation of its broadcast.

46. In the countries that have ratified the Rome Convention or have legislation inspired by the principles of that Convention, the broadcasting organization owns a neighboring right which protects it against certain uses of its broadcast, in particular fixation on a material object and reproduction of a fixation made without its consent or under certain conditions (Article 13). However, it is well known that only a fairly small number of States have ratified the Rome Convention to date²². Under these circumstances, the possibility for a broadcasting organization of claiming protection against unauthorized recording or reproduction of its broadcasts depends primarily on the domestic legislation or case law (based on common law) of the country concerned. In the event of any disagreement, broadcasting organizations could in many cases oppose the unauthorized use of their product on the basis of the copyright of their employee-authors.

47. In connection with the rights of broadcasting organizations, it is relevant to mention—as far as Europe is concerned—the European Agreement on the Protection of Television Broadcasts (Strasbourg, June 22, 1960). This Agreement provides for the protection of broadcasting organizations against any unauthorized fixation of broadcasts or reproduction of such fixation (Article 1(1) (d) but the protection is only valid in respect of the limited number of countries that have ratified the Agreement^{22a}. Under these circumstances, domestic legislation or contractual relations will be of decisive significance as regards the protection available for broadcasting organizations.

48. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the*

²² On January 1, 1975, 15 States had ratified the Rome Convention (see COPYRIGHT, January 1975, p. 32. Since then Italy has ratified it (see COPYRIGHT, February 1975, p. 44).

^{22a} On January 1, 1975, nine States had ratified the European Agreement (see COPYRIGHT, January 1975, p. 34).

attention of the Intergovernmental Committee of the Berne Convention to the problems relating to the protection of broadcasting organizations in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to broadcasting organizations.

5. *The position of the film-maker*

49. The film-maker and the producer of a video-program will often be one and the same person²³. If such is not the case, the question arises whether the film-maker can object to a film being used in the making of a video-program. Under the Berne Convention, provision is made for protection against such unauthorized use: according to Article 14*bis*, a cinematographic work is presented as an original work, and the owner of copyright enjoys the same rights as the author of an original work²⁴. If the film-maker enjoys an author's right, or if he has obtained the right to use the work, or if he holds a copyright derived from the right of intellectual creators²⁵, he will be entitled to object to any unauthorized fixation of his film by a producer of video-programs.

50. Under the Universal Copyright Convention, cinematographic works are expressly protected (Article I). As regards the content and scope of this protection, the reader may refer to what has already been stated above in connection with protection of the author. Everything depends on the domestic legislation of the country in which protection is claimed,

²³ Several American film producers have already decided to put past successes on video-cassette.

²⁴ Protection naturally applies only to a *work* in the sense attributed to the word in copyright doctrine, namely, a personal intellectual creation. Some copyright laws, the one of the Federal Republic of Germany for instance, make a distinction between cinematographic works and sequences of pictures that do not constitute "works" (Article 95 of the Law: "Laufbilder"; see von Gamm: "Urheberrechtsgesetz," 1968, p. 705). The Italian Copyright Law makes the same distinction (Article 2(6)).

²⁵ The original copyright of the producer is recognized, for instance, in Poland, the United States of America, the United Kingdom and several other countries whose legislation is inspired by that of the United Kingdom (such as Australia, Canada and India), etc. In other countries, such as Austria, Germany (Federal Republic of) and Italy and in some Latin-American countries like Argentina, Colombia and Uruguay, the producer is accorded exploitation rights but he has to respect the rights of the intellectual creators. In the case of acquisition of rights derived from the rights of intellectual creators, the "presumption of assignment (or authorization)" may operate, as in France, for instance (see also note 17). In many countries the producer-employer of intellectual creators is considered the copyright owner, for instance in the Netherlands (Article 7).

due account being taken of the rights expressly mentioned in Article IVbis of the Convention as revised at Paris in 1971.

C. The private use of video-programs

1. The concept of "private" use

51. As we have already seen above, a video-program resembles a cinematograph film in several respects. In one particular respect, however, we may expect a very different development from that which has occurred in the field of cinematography, namely in the case of private use. A film is generally distributed with a view to its projection in cinemas or broadcasting by television. This operation is carried out by distributors, relatively few in each country, who make copies of the film available to cinemas or broadcasting organizations against payment of an amount that is well below the cost of making a copy. The situation is different for video-programs: it is expected that copies (in the form of video-cassettes, discs or "videograms") will be made available to the public through a market (bookstore, record shop, "video-library") where they can be bought or hired for use according to individual requirements²⁶. It follows that the making and distribution of copies plays a vital part in the exploitation of video-cassettes and video-discs whether for private use or for institutions such as educational, further training, adult education or other similar establishments. The latter will be dealt with later on (see Chapter D, on the public or semi-public use of video-programs).

52. In addition, as it is simple and cheap to make recordings and copies with the "video-cassette-recorder" of televised programs or programs already on video-cassette or audio-visual disc, intensive use of this apparatus may be expected on the part of both the public at large and educational and training establishments. The question that arises is whether or not copying strictly for private use is permissible.

53. The distinction between "private" or "personal" use and "public" or "semi-public" use is important. The domestic legislation of most countries contains exceptions in respect of "private" or "personal" use but in most cases fails to specify when one or the other occurs. On the evidence of this legislation and case law considered as a whole, it may be said that, as a general rule, a strict interpretation of the term is necessary. Whatever does not serve the personal use of a private person, including the family circle, must be deemed to be "public". The domestic legislation of some countries, however, provides exceptions for a special category that one

²⁶ See Reimer, *supra* note 5, at 184 and de Sanctis, *supra* note 20, at 225.

could term "semi-public" (for an explanation of this term, see Chapter D, on the public or semi-public use of video-programs).

2. *Under the Berne Convention*

54. The Berne Convention, from the Stockholm text onwards, allows certain exceptions to the general rule that any reproduction of a protected work is permissible only with the author's consent (Article 9). The Convention is somewhat vague as regards the exceptions: it speaks of "certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the authors" (Article 9(2)). This wording allows national legislation considerable freedom of action.

55. The Report on the Work of Main Committee I of the Stockholm Conference (paragraphs 78 to 86) contains an explanation on this subject, with a specific reference to private use. As the domestic legislation of most countries already provided an exception of this kind, the "post-Stockholm" situation did not change. What is new, on the other hand, is the possibility for national legislators to decide that the exception will not apply automatically but that it merits closer study in view of the ever-increasing use by private persons of copyright works by the tape recorder, and of the importance that similar apparatus for the recording of images (and sounds) could have in the near future.

56. Mention should be made here of the special provisions contained in the Copyright Act of the Federal Republic of Germany (Article 53(5)) concerning the remuneration payable to authors by the manufacturers of appliances for recording sounds or *images*. As protected works can be recorded and reproduced by means of those appliances, a fee—not to exceed five per cent of the selling price—is payable to the authors through the intermediary of the authors' society (GEMA). To date, no solution of this kind has been introduced into the legislation of any other country. Nevertheless, it deserves full attention because at any moment "video-cassette-recorders" (or similar appliances), with which recordings can be made for private use, are likely to appear on the market; indeed, it has been recommended in several quarters²⁷.

²⁷ For similarity see Reimer, *supra* note 5, at 191, and the authors quoted by him (de Freitas, Tournier, Meyer, *see* notes 3, 6 and 12, *supra*. Authors' representatives in Japan also proposed such a solution (*see* COPYRIGHT, May 1974, at 132). de Sanctis wishes that a system of equitable remuneration for authors were organized, if possible, even in a unitary, collective form (*see* the previous note).

3. *Under the Universal Copyright Convention*

57. The Universal Copyright Convention, like the Berne Convention, does not contain an express provision regarding private use of a protected work. Article IVbis, paragraph 2, contains a general clause: any Contracting State may, by its domestic legislation, make exceptions "that do not conflict with the spirit and provisions of this Convention," provided that it accords "a reasonable degree of effective protection." No doubt this clause allows an exception for private use to be made in domestic legislation²⁸.

58. As regards the effect of the provisions of domestic legislation regarding video-programs, the reader may refer to what has already been said above in connection with the Berne Convention (see Chapter 2).

59. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of studying the content and scope of the exceptions allowed by the two Conventions to the right of reproduction, in the light of the private use made of appliances for the recording of images (and sounds).*

4. *Under the Berne Convention and the European Agreement on the Protection of Television Broadcasts*

60. These two instruments provide a specific exception in respect of private use²⁹. Consequently, the protection that they afford to performers, producers of phonograms or broadcasting organizations may be limited by domestic legislation in the case of private use.

61. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views of the desirability of drawing the attention of the Intergovernmental Committee of the Rome Convention to the problems relating to the protection of performers, producers of phonograms and broadcasting organizations arising from the exception to this protection allowed for private use, in view of the use made by private persons of apparatus for the recording of images and sounds.*

D. *The public or semi-public use of video-programs*

1. *The concepts of "public" and "semi-public" use*

62. The problems mentioned in this chapter are the most important ones,

²⁸ See note 18 *supra*. See also de Sanctis, *supra* note 20, at 225, who lays stress on the fact that domestic legislation does not codify the principle, as such, of freedom of reproduction for private use, but that it draws up a list of "special cases" (Article 9(2) of the Berne Convention).

²⁹ Article 15 of the Rome Convention; Article 3(1) (c) of the Agreement.

especially from a practical standpoint. The concept of "public use" can be subdivided into three categories: (1) communication of a video-program to the public (a television set, installed in some public place—hotel, waiting-room, supermarket, etc.—is fed with programs contained in a video-cassette); (2) the television broadcasting of a video-program (a broadcasting organization uses a video-program for its broadcasts); (3) transmission of a video-program by cable (a cable network uses video-cassettes or audio visual discs for its programs).

63. By "semi-public use" I mean use for teaching purposes (school, university, post-university, adult education, etc.). I have chosen this term because use for teaching purposes constitutes a special category which in the domestic legislation of some countries is dealt with separately from other forms of public use³⁰. In the international conventions also, special provisions have occasionally been included to cover use for teaching purposes³¹.

64. It should further be pointed out with regard to the concept of "public" use that, according to the text of the international conventions, its interpretation is a matter for the domestic legislation of the Contracting States. This is of some practical importance because, in the United States, for example, and also in some European countries such as France, increasing use is being made of video-cassettes in hotels. Case law in Europe does not consider communication to the public to have taken place when a program of discs is communicated to hotel rooms but this opinion is a subject of controversy in doctrine³². Sometimes an exception to the author's exclusive right to authorize such a transmission, regarded in principle as "public," is written into the copyright law (see United Kingdom, Section 12(7), and other countries whose legislation is inspired by that of the United Kingdom; United States, Article 111(a) (1)), provided

³⁰ This tendency is strongest in the Scandinavian countries, the Anglo-Saxon countries, the Federal Republic of Germany and the United States of America.

³¹ See, e.g., the Universal Copyright Convention as revised at Paris (July 1971), Articles *Vter et seq.*, and the Appendix to the Berne Convention as revised at Paris (July 1971), Articles II *et seq.* On the subject of the exceptions written into the International conventions, see H. WISTRAND, *LES EXCEPTIONS APPORTÉES AUX DROITS DE L'AUTEUR SUR SES OEUVRES*, pages 242 *et seq.* (Paris, 1968).

³² On this subject see, e.g., French case law and that of the Federal Republic of Germany (R. PLAISANT; *LE DROIT DES AUTEURS ET DES ARTISTES EXÉCUTANTS*, 149 [1970] and VON GAMM, *Urheberrechtsgesetz*, 1968, on Article 22 of the German Law, No. 4). For the criticisms of this viewpoint, in France, see Keréver: *The Rights of Authors in Relation to the Public Communication of Broadcast Emissions*, RIDA, LXXIII, page 3 *et seq.* (1972), and Gaudel, *Concerning Teledistribution*, RIDA, LXXXI (1974).

that no special charge is made to clients who receive such a transmission with the aid of an ordinary apparatus.

65. With regard to television and cable transmission, it is obvious that this is public use as both types of transmission are directed to the public at large; only private reception, reception considered private (hotel rooms) or reception in a restricted, for instance, family, circle are exempt from copyright and therefore cannot give rise to the payment of royalties. Here too—as in the case of the actual concept of “public” use—the interpretation of the terms “restricted circle” or “family circle” is a matter for national law, and therefore can vary from one country to another. Generally speaking, a restrictive interpretation is called for (see, for instance, Article 29 of the Swiss Bill, and Article 12(2) of the recently-amended Netherlands Copyright Law). There are some national laws whose wording allows for freer interpretation: the American Bill, for instance, in its definition of “publicly,” requires that a “substantial” number of persons (outside the circle of family and friends) should be gathered together (Article 101). Furthermore, the fact that the *same* video-program is not used at the same time by the *same* public, as is generally the case with a radio or television broadcast, could result in an interpretation of the law to the effect that such a transmission is not “public”^{32a}. In this connection it should be borne in mind, as I mentioned earlier (Chapter A), that video-cassettes and audio-visual discs will in all likelihood be used mainly privately and that, consequently, *they are more like sound recordings with respect to their social function than cinematograph films or television*: the choice of a given program at a given time is determined by the individual, unlike the manager of the cinema or broadcasting organization, who communicates a certain program to his viewers.

66. The question is much more complicated with regard to “semi-public” use; I shall return later to the problems that arise in the field of education.

2. *The position of the author*

(a) *Under the Berne Convention*

67. Under this Convention, the communication to the public of a video-program, which, as we have seen above, is itself a protected work, is subject to the author’s consent. If the video-program is to be treated as a cinematographic work or a work “expressed by a process analogous to cinematography” (Article 2), any public performance thereof is subject to

^{32a} See Nimmer, *The Legal Aspect as Seen From the U.S. and Canadian Viewpoint*, in CARTRIDGE TV, published as a “Billboard Video Conference Report” (1971).

the authorization of the author(s) or his (of their) successors in title under the provisions of Articles 14 and 14*bis* of the Convention. If the video-program is regarded not as a cinematographic work but as a work of collaboration, for instance, other provisions of the Convention will apply according to the nature of the work, for instance, Articles 11 and 11*ter*.

68. The televising of such a program is, in principle, also subject to the author's consent; nevertheless, provision may be made for compulsory licensing under domestic legislation (Article 11*bis*). The same rule applies to communication of a broadcast work by wire (cable) (Article 11*bis*). If the video-program is used directly by a cable network (without having first been broadcast by television), it would appear that Article 14 and Article 11 or 11*ter* are applicable, and that the compulsory licensing clause does not operate. This theory is contingent on the fact that the interpretation concerned depends on the meaning given to the concept of "broadcasting" (Article 11*bis*) and to the concept of "communication to the public" (by any means). This interpretation is important under present circumstances in countries where wire television also allows operators to transmit locally-produced programs, in other words, programs not transmitted by electro-magnetic waves to the whole or part of the territory but intended only for a public connected by cable to a central point which serves as a production center for programs of purely local character (as in Canada, the Netherlands, the United Kingdom and the United States)³³.

The problems of "semi-public" use: reproduction

69. The problems of semi-public use that we have examined in connection with the Berne Convention are complex, as the norm written into that Convention is vague (Article 9; see under Chapter C.2 above). First of all, does private use, which we have just examined, also include reproduction by an educational establishment? Modern technical inventions will make it easy for such an establishment to record television broadcasts received in the classroom and to copy them, or alternatively to hire "videograms" (video-cassettes or audio-visual discs) and make the desired number of copies, all at relatively little cost. This situation will be similar to the one we have today in connection with tape recorders and photocopying. If the same situation were to arise for video-cassettes, the program producer might find himself obliged to discontinue production of these programs

³³ In these countries, program production experiments take place in different areas equipped with a CATV network (see Videographe in Montreal, Teleprompter Manhattan in the United States, Bristol Channel in the United Kingdom, Stichting "Do Lob," Bijlmermeer in the Netherlands).

in view of their being insufficiently remunerative. A new field, profitable to the author, would thus be lost.

70. It should also be mentioned that a number of countries are at present investigating means of putting an end to the unlawful use of photocopies, at the same time taking due account of the interests of society, scientific progress and new communications techniques. It would be no exaggeration to say that the control of the use of photocopies, at the international level also, is a matter of extreme urgency, as witness its inclusion in the Unesco and WIPO programs, and more specifically in the agendas of the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union³⁴. As tape recording and photocopying come under the heading of reproduction (Article 9 of the Berne Convention), we should first examine how the question is dealt with, at the present time, in certain countries party to the Berne Convention.

71. The legislation of several countries contains fairly restrictive provisions regarding reproduction, sometimes even in the case of reproduction for private use. Under the laws of the Scandinavian countries, for instance, it is permissible to make a copy for private use, but not to use the copy for other purposes (Swedish Copyright Law, Article 11). The French Law contains a similar provision (Article 42(2)). The Law of the Federal Republic of Germany, according to the same principle, does not allow a copy to be made by another person against payment in the case of a recording on a sound or (audio-) visual tape and the copying of such a recording (Article 53(2)). These copies may not be distributed or used for public performances (Article 53(3)). Reference has already been made to the special rules concerning the remuneration payable to the authors by the manufacturers of sound and image recording equipment (Article 53(5)). The new (1970) version of the Japanese Law also contains a very restrictive provision on private use (Article 30). However, family video reproduction has already become very popular in that country, and the use of such recordings for other purposes, although prohibited outside a restricted circle, is far from uncommon. No steps have been taken for the

³⁴ See No. 6053 in the Work Plan adopted at the 18th Unesco General Conference in 1974, and the 1975 program of the Berne Union. Some highly important decisions have been rendered recently on the subject of photocopying (in the library context). In the United States: *William & Wilkins v. United States*, 172 U.S.P.Q. 670 (1972); see also on this subject Derenberg, *supra* note 11, at 57. In Europe: *Société Masson et Cie and the Syndicat national de l'édition CNRS*; on this subject see also Desjeux, *Photocopying and Copyright*, COPYRIGHT, 1973, at 51 *et seq.*, and Gerbrandy, *The Netherlands Solution to the Problem of Reprography*, COPYRIGHT, 1975, at 47 *et seq.*

moment towards a modification of the present limits of private reproduction but a solution in the same direction as that adopted in the Federal Republic of Germany (Article 53(5)) has been advocated by authors³⁵. The British Copyright Act contains some fairly restrictive and detailed provisions regarding (photo)copies supplied by a library to persons using such copies for study or research purposes (Section 7). In the case of sound or (audio-)visual recordings, copies may not be made, even for private purposes (Sections 12 and 13). The only exception allowed to this rule is in the case of the reproduction for private purposes of a program broadcast by radio or television. The Netherlands Copyright Law, as revised in 1972, does not allow sound or (audio-)visual copies to be made for private use by any third party (Article 16(b)). All this legislation is based on the principle that a copy of this kind may not be made available to any third party or used in any other way. These rules appear to be fully consistent with the letter and spirit of the Berne Convention, as revised at Stockholm.

72. The legislation of some of these countries, for example, that of the Scandinavian countries, nevertheless provides more favorable exceptions for educational establishments. The Swedish Copyright Law (Article 17) recognizes some possibility of recording or copying, by fixation of *sounds*, published works in educational activities. The possibility is subject to certain restrictions: the copies may be made only for use during a limited period (three years), and commercial phonograms may not be copied except where they are broadcast by radio or television. The copies thus made may not be used in any other manner³⁶.

73. Under the Copyright Act of the Federal Republic of Germany (Article 47), recordings and copies (a limited number only) may be made of works broadcast in the context of a school broadcast. The tapes must be erased at the end of the school year, failing which the author is entitled to receive equitable remuneration. According to the text of the Article, this arrangement is applicable to sound recordings as well as audio-visual recordings.

74. The British Copyright Act (Section 41) also allows a recording or a copy to be made subject to certain conditions, the main one being that the recording is not made by a duplicating process but by the teacher or the

³⁵ See Nomura, *supra* note 7, at 132.

³⁶ A Swedish Committee of Experts proposed the repeal of this Article in 1970, but it came up against the opposition on the Royal Directorate of Schools, which in fact advocated an enlargement of its scope. Article 17 is still unamended at the present time, but an overall copyright revision is expected in the Nordic countries. See Strömholm, *Letter from Sweden*, COPYRIGHT, 116 *et seq.*, May 1972.

pupil himself. This wording seems to rule out any recording on sound or (audio-)visual tape, and permission is given only to primary and secondary schools. The new Australian Copyright Act (1968) contains a provision similar to that of the United Kingdom (Section 200).

75. When one wonders whether or not such exceptions in favor of educational establishments are compatible with the Berne Convention, one should bear in mind that the Stockholm revision, confirmed by the Paris Act, gave a much broader scope to the use that could previously be made (under the Brussels text³⁷) of literary or artistic works in the course of educational activities: according to Article 10(2), "it shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." In spite of all the restrictions written into this paragraph and the report³⁸, the freedom of Contracting States to adopt or maintain legislation allowing the use of protected works, both in the form of publications and in the form of broadcasts or sound or visual recordings, has been considerably increased.

76. It should be mentioned in this context and in that of Article 9(2) of the Berne Convention mentioned above (see Chapter C.2) that "fair practice" (Article 10(2)) and "the legitimate interests of the author" (Article 9(2)) could include equitable remuneration. In its present form, the Berne Convention does not make such a condition mandatory but the domestic legislation of certain countries is looking in this direction for a solution to the problems of photocopying. As examples of this we could mention Article 47 of the Copyright Act of the Federal Republic of Germany and Article 32 of the Swiss Copyright Bill, both of which allow the recording on sound or visual materials, by educational establishments of radio or television broadcasts for educational uses on condition that the author receives equitable remuneration (Article 32(2)).

The problems of "semi-public" use: performance

77. One question closely linked with the above is the following: is it permissible to use a video-program in an educational establishment with-

³⁷ The Brussels text (Article 10(2)) refers to the inclusion of "excerpts" in educational or scientific publications or in chrestomathies.

³⁸ The Report of Main Committee I makes it clear (paragraph 97) that the word "teaching" includes teaching at all levels, in both public and private schools; it must be dispensed in an institution, however.

out obtaining authorization from the author or his successors in title? In other words, should the use of a video-program in a teaching context be considered a "public performance," or is a special arrangement applicable?

78. The Berne Convention offers no clear reply to this question. In principle, authorization by the author is required for any public performance of a protected work (Articles 11 and 14, 14bis). Provision is nevertheless made in the legislation of some countries for "minor reservations"; this term was used by the Brussels Conference (1948)³⁹, and it includes, *inter alia*, "the requirements of education and popularization." At the Stockholm Conference it was decided not to touch these "minor reservations" in so far as they concerned exceptions to copyright traditionally agreed upon⁴⁰.

79. Having regard to the use of video-programs in education, one may wonder whether it is appropriate today to speak of "minor reservations" in connection with a phenomenon as far-reaching as education. One may also wonder whether the official statements made at the time of the Brussels revision to the effect that the States intended to maintain these reservations in their national laws—in spite of the fact that they are not mentioned in the text of the Convention—constitute a sound basis. The arguments against such action that were already put forward at the time of the Brussels revision⁴¹ have lost nothing of their validity; their importance will be conditioned by the use that is made of video-programs in connection with education^{41a}.

80. Another question that arises, of course, is whether or not the performance is *public*. As we saw earlier (see paragraph D.1), the interpretation of this concept is a matter for domestic legislation in the Contracting States. Domestic legislation is not always explicit on this point which is, moreover, a matter of controversy in doctrine⁴².

³⁹ See the Documents of the Brussels Conference, at 100.

⁴⁰ See the Report of Main Committee I of the Stockholm Conference (paragraphs 209 and 210). See also H. WISTRAND, *supra* note 31, at 57 *et seq.*

⁴¹ See BAPPERT-WAGNER, INTERNATIONALES URHEBERRECHT 113-114, (1956) and the authors quoted by him.

^{41a} In this context, moreover, attention should be drawn to Article 10(2) of the Berne Convention (mentioned in Chapter D.2). The word "utilization" could be taken to mean not only reproduction but also performance. The Stockholm report (paragraphs 92-107) is not clear on this point. It is probable that only reproduction was intended, yet the text does admit of misinterpretation.

⁴² Brugger, (*supra* note 5, at 36-42) voices the opinion that the use of a video-program by an educational establishment is neither a reproduction nor a "public" performance. He refers for this opinion to von Gamm, *supra* note 32,

81. Generally speaking, the domestic legislations quoted above which provide certain possibilities for the recording or reproduction of published works by fixation of sounds or images, also allow—within certain limits—the “performance” of such recordings for teaching purposes. They do not entirely coincide, however, as regards any performance of a *film* in the context of education. Under the British Copyright Act (Section 41(3)), a protected work may be performed in a primary or secondary school subject to certain restrictive conditions, and this possibility also applies to the “performance” (projection) of a film (Section 41(5)). The Swedish Copyright Law, on the other hand, expressly stipulates that the possibility of using a work in the context of education does not extend to the performance of a cinematographic work (Article 20(3)). The Copyright Act of the Federal Republic of Germany also contains a provision (Article 52(2)), stipulating that any public performance of a cinematographic work is subject to the author’s consent. In the context of education, this means that in general the “performance” of a film in a classroom will be allowed (not being “public,” see Article 15 and note 42), but that it will be subject to the consent of the author (or his successor in title) in all other cases (for example university courses or school festivities). The exception provided in Article 47(2), already mentioned above, will be applicable to the performance of a video-program broadcast in the context of a program for schools. In Japan there is an exception concerning performance for non-profit-making purposes (see Articles 35 and 38)⁴³.

(b) *Under the Universal Copyright Convention*

82. Under this Convention, the right to authorize reproduction and public performance of a protected work is among the basic rights of the author (article IV*bis*). However, any contracting State may, by its domestic legislation, make exceptions “that do not conflict with the spirit and provisions of this Convention” (Article IV*bis*(2)). “A reasonable degree of effective protection” must be accorded to each to the rights to which exception has been made (Article IV*bis*(2)). Consequently, it is principally

on the subject of Article 15(3) of the Copyright Act of the Federal Republic of Germany. On the other hand, Gaudel, *supra* note 3, at 33 considers that, under the French Law (Article 41(1)), the showing of a video-program in an educational establishment is not exempt from copyright.

⁴³ It should be noted that Nomura’s report, *supra* note 7, omits to mention the use of video-programs for educational purposes in Japan. In an earlier publication, Kawamura (see note 7) mentions the use made of video techniques in teaching; the most widespread is the copying of school or other educational broadcasts by means of “video-cassette-recorders.”

a matter for the domestic legislation of each State party to the Universal Convention to establish the level of protection to be accorded to video-programs.

83. On the occasion of the recent revision of the Universal Convention in Paris (July 1971), a special provision concerning "audio-visual fixations" was adopted for the benefit of developing countries. This provision (Article *Vquater* 3(b)) allows, under certain conditions, the audio-visual reproduction of "lawfully made audio-visual fixations," including any protected works incorporated therein provided that the audio-visual fixations were prepared and published "for the sole purpose of being used in connection with systematic instructional activities." For those countries—and these countries only—the Convention expressly allows reproduction, for example, of a video-program made for the sole purpose of being used in connection with instructional activities. The conditions attaching to such reproduction are enumerated in Articles *Vbis* and *Vquater*. Similar provisions were adopted by the Diplomatic Conference for the Revision of the Berne Convention (July 1971, Articles I, II and IV of the Appendix to the Convention). It should be made clear, however, that this is an exceptional arrangement in favor of developing countries.

84. The United States could be mentioned here as an example of the domestic legislation of an industrialized country having ratified the Universal Copyright Convention. The Copyright Revision Bill (as presented to the Committee on the Judiciary of the House of Representatives on September 12, 1974) lays down the principle of the copyright owner's right to authorize the *reproduction* of his work (Article 106). However, the "fair use" concept, well known to Anglo-Saxon countries, allows some quite important exceptions to this right. "Fair use" does not specifically mention private use but resorts to a general formulation. There are certain special cases relating to education and research among other things in which there is no infringement of copyright. To decide whether in a particular case, fair use can be claimed, the following factors are to be taken into account:

- (1) the purpose and character of the use;
- (2) the nature of the protected work;
- (3) the size and "substantiality" (importance) of the part used in relation to the whole work;
- (4) the effect of the use of the potential market for the work, or on the value of the protected work.

85. The only express mention of the exception for private use is in connection with the liberties accorded to libraries and archives (Article 108, under d, item 1). In the same context, however, it is specified that the right to (free) reproduction provided for in this Article does not apply to films or other audio-visual works (Article 108(h)).

86. As far as *public or semi-public performance* is concerned, the principle of the copyright owner's right to authorized public performance is also laid down (as for the right of reproduction) (Article 106). Definite limits to this right are provided for (Article 110), for the most part in favor of non-profit-making educational establishments. The performance of a protected work in the classroom, by the teachers or pupils and in their presence, is not an infringement of copyright unless a film or other audio-visual work is performed using a copy not lawfully made and the person responsible for the performance was or could have been aware of this fact (Article 110(1)).

87. Protected works incorporated in radio or television broadcasts for schools may also be performed in the classroom in so far as the broadcasts are part of the normal activities of a non-profit-making educational establishment, the performance is in direct relation to the broadcast and the broadcast is made primarily for reception in classrooms (Article 110(2)). However, this concession does not apply to the performance (projection) of films or other audio-visual works, as this would not be a "display"⁴⁴, or a literary or musical work⁴⁵.

88. With regard to the reception of a broadcast containing protected works and transmitted to the rooms of a hotel, the Act contains a provision whereby such transmission is allowed under certain conditions, the main ones being that the transmission must be made by the management of the hotel (and not by a CATV system) and that there must be no special charge payable by the clients (Article 111(1)). The same freedom exists for the retransmission of broadcasts containing protected works which are intended for reception by non-profit-making educational establishments (Article 111(a)(2)).

89. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of studying the content and scope of the protection afforded under the Berne Convention and the Universal Copyright Convention to the authors of literary and artistic works and more specifically to the authors of cinematographic works, and the permissible exceptions to that protection, against public and semi-public reproduction and performance, in the light of the (present or future) use made of video-cassettes and audio-visual discs in public places, by radio and television broadcasting and cable transmission, and in connection with teaching and education (of adults, etc.).*

⁴⁴ "Display" in the United States Copyright Act means the showing of a *single* image (not a succession) from a film or other audio-visual work, or of a photographic slide, etc. (see Section 101, on definitions).

⁴⁵ "Literary works" are defined as "works other than audio-visual works . . ." (see Section 101, on definitions).

3. *The position of the performer
under the Rome Convention*

90. As we have seen above (see Chapter A), in a few countries the performer enjoys certain neighboring rights and these can extend farther than the minimum rights provided under the Rome Convention, which has been ratified by 16 States to date. The protection that could be accorded to performers under the Rome Convention or national legislation providing for the protection of performers—either by virtue of neighboring rights or otherwise—should be dealt with in a separate study, as there are new problems arising for performers in the audio-visual field.

91. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the attention of the Intergovernmental Committee of the Rome Convention to the problems relating to the protection of performers in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to performers.*

4. *The position of the producer of phonograms*

92. As we have already seen (Chapter A), neither the Berne Convention nor the Universal Convention grants copyright to the producer of phonograms. The Rome Convention gives producers of phonograms the possibility of receiving equitable remuneration in the case of communication to the public (Article 12). The Geneva Convention (October 29, 1971) for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms gives them protection only against the reproduction and distribution of phonograms made without their consent; it does not, in other words, protect them against the public or semi-public use of the phonogram incorporated in a video-cassette.

93. On the other hand, in those countries which grant copyright protection to the producer of phonograms (see Chapter A above), the latter would, in principle, be entitled to object to any public or semi-public use of his phonogram incorporated in a video-program. Nevertheless, certain limits are set (see Sections 12, 40 and 41 of the British Copyright Act and Sections 97, 108 and 200 of the Australian Copyright Act).

94. Here too the question arises whether the protection of producers of phonograms should not be examined more closely in the light of the probable use of phonograms incorporated in video-cassettes or audio-visual discs.

95. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the*

attention of the Intergovernmental Committee of the Rome Convention to the problem relating to the protection of producers of phonograms in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to performers.

5. *The position of the broadcasting organization*

96. Neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to broadcasting organizations. The Rome Convention gives them a certain degree of protection but the question arises whether this protection is sufficient in relation to the use that will probably be made of radio and television programs incorporated in video-programs or audio-visual discs. The matter deserves to be studied more thoroughly.

97. In those countries which grant copyright protection to broadcasting organizations (see Chapter A above), a broadcasting organization can object to the public or semi-public use of any of its television broadcasts that have been incorporated in a video-program, subject to the conditions prescribed by law (see Section 14, 40 and 41 of the British Copyright Act and Section 91 of the Australian Copyright Act).

98. The European Agreement on the Protection of Television Broadcasts affords some protection to the broadcasting organization against certain uses of its broadcasts but, as we have seen above (Chapter A), this protection is valid only for a limited number of countries.

99. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of drawing the attention of the Intergovernmental Committee of the Rome Convention to the problems relating to the protection of broadcasting organizations in the light of the (present or future) use of video-cassettes or audio-visual discs, in view of the fact that neither the Berne Convention nor the Universal Copyright Convention affords copyright protection to broadcasting organizations.*

6. *The position of the film-maker*

100. In view of the fact that the film-maker has, in general, an original copyright, a right to exploit the film or a copyright derived from the right of creators (see Chapter A above), he is in fact protected—in the countries members of the Berne Union—against the public or semi-public use of his film incorporated in a video-program. In countries that have not joined the Berne Union but are party to the Universal Copyright Convention, the content and scope of the protection afforded to the film-maker mainly depend on the domestic legislation of the country in which protection is

claimed (see Chapter A above). Since the producer of video-programs is in a position similar to that of the film-maker, these conclusions apply also to producers of video-programs.

E. *The distribution of video-programs*

101. An interesting question that is closely associated with the private, public or semi-public use of a video-program is whether or not the producer of such a program can exercise control over the market for his product. In general, the Berne Convention does not recognize any "right to distribute" a work; however, Articles 14 and 14bis of the Convention, concerning rights in cinematographic works, specifically gives such a right to the authors of those works. The Universal Copyright Convention mentions nothing of the sort.

102. It follows that in the relatively few countries that recognize a right of distribution the owner of the copyright in a video-program can exercise control over the market by authorizing only the hiring and lending of copies and by reserving for himself the right to sell copies. If, on the other hand, he has put copies of video-cassettes or audio-visual discs on the market, his right of distribution lapses—under the law, under case law and according to doctrine—even in countries that recognize the right of distribution, or else it is severely limited in favor of the free circulation of works in the trade and among the public at large⁴⁶.

103. In other countries, that is, countries that do not recognize a right of distribution, such a right is nevertheless often an integral part of the right of reproduction or publication. Indeed case law and doctrine have sometimes arrived by deduction at more extensive protection than that provided for in countries that have written it into their laws; moreover they have given it very clearly-defined limits. It is impossible to reach a valid conclusion for all countries on this point.⁴⁷

104. There seem to have been fewer legal and practical difficulties for cinematographic works (for which the right of distribution is recognized by the Berne Convention), owing to the fact that these works are generally hired and not sold on the open market. Given these circumstances, the owners of copyright in cinematographic works have been able to exercise control easily over the use of their products.

⁴⁶ See Reimer, *The Right of Distribution With Special Reference to the Hiring and Lending of Books and Records*, COPYRIGHT, March 1973, at 56 *et seq.*, which gives a very comprehensive review of the legislation and case law of a number of countries.

⁴⁷ *Id.*

105. Briefly, we could mention the possibility of a double situation arising in the case of video-cassettes or audio-visual discs. If they are only hired or lent (for instance to teaching or other educational establishments) for one or two "performances," the owner of the copyright in the video-program may, in certain countries and under certain conditions, exercise control over the market. If, on the other hand, the video-cassettes are placed on the market and bought by the public, the right of distribution could be exercised in a few cases only, or else it would be very limited.⁴⁸

106. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of studying the content and scope of the right of distribution, as recognized to a certain extent by the Berne Convention, in the light of the (present or future) use made of video-programs by the public and teaching and other educational establishments, by means of the hiring and purchase of such programs.*

F. Moral rights

107. The Berne Convention specifically gives moral rights to the author (Article 6*bis*). This right includes the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his honor or reputation. The authors of works incorporated in a video-program, and likewise the owner of copyright in the program, can invoke these moral rights in the countries that are members of the Berne Union: the authors *vis-à-vis* a video-program producer who wants to include a work with unauthorized modifications, or the owner of copyright in the video-program himself *vis-à-vis* a third party (for example a broadcaster) who uses his product in a manner prejudicial to his reputation. The means of redress for safeguarding moral rights are governed by the legislation of the country where protection is claimed (Article 6*bis*(3)).

108. The Universal Copyright Convention confers limited moral rights on the author in the context of translation (Article V(2)(d) and (e)).

⁴⁸ See the discussion within the Subcommittee of the Japanese Copyright Council, mentioned at notes 7 and 10, *supra*. The Subcommittee came to the conclusion that the status quo should be maintained, there being no difficulty, for the moment, in granting the right of distribution in respect of video-programs in so far as they constitute cinematographic works (for which the right of distribution exists under Article 26 of the Copyright Law). In the opinion of the Subcommittee, a premature decision of this matter should be avoided, as the state of the market for video-programs within the country has to be taken into consideration.

Neither the Rome Convention nor the European Agreement on the Protection of Television Broadcasts recognizes these moral rights.

109. Nevertheless, having regard to the fact that the instruments mentioned above provide only a minimum of protection, provision can be made in domestic legislation for more extensive rights in the field of moral rights also.

110. *The Intergovernmental Copyright Committee and the Executive Committee of the Berne Union are invited to express their views on the desirability of studying the content and scope of moral rights, as recognized to a certain extent by the Berne Convention and the Universal Copyright Convention, in the light of the making of video-programs and the (present or future) use made of those programs.*

Conclusions

111. By way of summary, it can be stated that the two multilateral copyright conventions, namely the Berne Convention and the Universal Copyright Convention, contain provisions that form a sound basis for the adequate and effective protection of video-programs and their authors or other copyright owners (such as producers). However, precisely on account of the international character and universal calling of the Conventions, these provisions are more often than not somewhat vague, and they therefore allow domestic legislation considerable leeway with respect to the definition of the content and scope of that protection. Even under the Berne Convention—the more comprehensive of the two—national legislators are allowed considerable freedom in the interpretation of the “limits,” “exceptions,” “conditions” or “reservations” to which they have made subject (or may yet wish to make subject) to the rights recognized by the Convention.

112. This is why consideration should be given, in our opinion, to the question whether the provisions of the two conventions to which we have referred in this study should not be changed in the course of future revisions. The problems alluded to in this report seem real enough to warrant examination in depth.

113. Furthermore, the situation may develop in a manner that cannot be anticipated at the present time. The fact that the domestic legislation of many countries has not yet made any ruling on this new phenomenon of video-programs is in itself an indication that a cloud of uncertainty hangs over the legal nature of these programs and the use that will be made of them. It would not be surprising if international legislation did not intervene in this development for many years. Therefore, one cannot but recommend to States party to one or two of these Conventions that they keep a close watch on events in this area, both at the national and at the

international level. As far as the latter is concerned, working groups or committees of experts could usefully start to consider the questions raised in this report with a view to the future adoption of provisions on video-programs should the need for such provisions make itself felt.

114. In my opinion there are two questions that deserve special attention, namely, the private use of video-programs and their use for educational and instructional purposes. As far as private use is concerned, the problem will present itself in particular when "video-cassette-recorders," by means of which works can be recorded on blank tapes or copies can be made of existing tapes, become a familiar sight in every household and when ready-made video-programs can be easily and cheaply bought or hired. The recording of protected works for private use will then become commonplace and likewise the copying of works already recorded.

115. With regard to the second question, the problem arises as to the manner in which the interests of copyright owners can be reconciled with the present-day needs of education and instructional activities in general (adult education, further education, training of executive staff, etc.). Even now it can be seen that establishments operating in this field are resorting more and more to the use of audio-visual techniques. Obviously the exercise of copyright should not be allowed to hamper this development. Moreover, it is equally true that the production of audio-visual equipment calls for an abundance of both capital and talent. The latter also deserves proper protection with respect to both its material and its moral aspects.

116. If, with the minimum of drawbacks, the maximum use is to be allowed of intellectual works in their present forms (films, video-cassettes, discs, tape recordings, television, etc.)—and the domestic legislation of several industrialized countries has taken steps in this direction—the absolute right of the copyright owner is bound to suffer restrictions. The dilemma for international legislation lies mainly in the question whether the exceptions provided for in the two Conventions should be restricted or broadened; in the latter case, care should be taken not to lose sight of the moral and economic interests of the author or his successors in title.

117. Finally, on the subject of neighboring rights, a thorough study of the problems associated with them should be made. The Intergovernmental Committee of the Rome Convention should consider the protection of those who, while they cannot actually be described as "authors," often make important contributions to video-programs, for instance, performers and broadcasting organizations. As the Rome Convention has been ratified by only 16 countries, the question remains within the province of domestic legislation, which, in most cases, has not made provision for it.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

173. U.S. CONGRESS. HOUSE.

H.R. 8736. A bill to amend section 174 of the Internal Revenue Code of 1954 to make clear that product development and improvement costs of publishers are research or experimental expenditures, and to prohibit the retroactive application of Revenue Ruling Numbered 73-395. Introduced by Mr. Burke of Massachusetts, July 18, 1975, and referred to the Committee on Ways and Means. 3 p. (94th Cong., 1st Sess.)

A proposed amendment to an Internal Revenue Ruling that would permit publishers to deduct development and other expenses as against ordinary income.

174. U.S. CONGRESS. HOUSE.

H.R. 9301. A bill for the amendment of the Copyright law, title 17 of the United States Code. Introduced by Mr. Won Pat (for himself and Mr. Matsunaga), August 1, 1975, and referred to the Committee on the Judiciary. 4 p. (94th Cong., 1st Sess.)

Identical with H.R. 4965, except for the additional sponsor, introduced by Mr. Won Pat on March 14, 1975. The bill would insure that cable systems in most non-contiguous areas (a State, territory or other possession of the United States) are not treated differently under the U.S. Copyright Law from those located within the boundaries of the 48 contiguous States. *See* 22 BULL. CR. SOC. 455, Item 324 (1975).

175. U.S. CONGRESS. HOUSE.

H.R. 9566. A bill to amend the Communications Act of 1934 with regard to the broadcasting of certain professional sports clubs' games. Introduced by Mr. Macdonald of Massachusetts, September 11, 1975, and referred to the Committee on Interstate and Foreign Commerce. 4 p. (94th Cong., 1st Sess.)

A bill to make permanent the anti-blackout law which prohibits home games of professional football, baseball, basketball and

hockey from being blacked out on local commercial television if they are sold out 72 hours in advance. The bill would also change the 72-hour cutoff for postseason games of baseball, basketball and hockey to 24 hours.

176. U.S. CONGRESS. SENATE.

S. 2355. A bill to provide that four publications detailing the history of the Indian tribes of Nevada shall be subject to copyright by the Inter-Tribal Council of Nevada. Introduced by Mr. Cannon (for himself and Mr. Laxalt), Sept. 17, (legislative day, Sept. 11), 1975 and referred to the Committee on the Judiciary. 1 p. (94th Cong., 1st Sess.)

In his remarks on his introduction of the bill [*see* 121 CONG. REC. S16028 (daily ed. Sept. 17, 1975)] Mr. Cannon observes that since the publications will be published with the use of federal funds and printed by the Government Printing Office, they would normally be in the public domain. However, because a great deal of communal effort has gone into research and recording of these four tribal histories, copyright for the benefit of the Indian people would not only be fair and equitable, but would also encourage other Indian tribes to record their histories before it is too late.

177. U.S. CONGRESS. SENATE.

S. 2554. A bill to amend Public Law 93-107 with regard to the broadcasting of certain professional sports clubs' games. Introduced by Mr. Pastore (for himself and Mr. Beall), October 22, 1975, and referred to the Committee on Commerce. 2 p. (94th Cong., 1st Sess.)

Similar to H.R. 9566, introduced by Mr. Macdonald on September 11 (*see* Item 175, *supra*), except that the Macdonald bill proposes to make the anti-blackout law permanent, while the present bill extends the law for three years, *i.e.*, to December 31, 1978. *See* statements of Senators Pastore and Beall on their introduction of the bill in 121 CONG. REC. S18555 (daily ed. Oct. 22, 1975).

178. U.S. CONGRESS. SENATE. *Mathias, Charles McC.*

Public broadcasting and the copyright bill. *Congressional Record*, vol. 121, no. 155 (daily ed. Oct. 22, 1975), pp. S18555-S18556.

Senator Mathias, in order "to promote fuller understanding of the intent and need" for his amendment to the copyright revision bill, S. 22, which established a compulsory licensing system for public broadcasting and which was adopted by the Senate Judiciary

Committee during its markup of the bill on October 7, receives unanimous consent to have his complete statement before the committee printed in the Congressional Record.

179. U.S. COPYRIGHT OFFICE.

International copyright protection. (Washington, 1975) Folder (4 p.) (Circular 38).

Gives general information about international copyright protection, United States copyright protection for foreign works, copyright protection in other countries for United States works, application forms, mail and remittances, and information furnished by the Copyright Office.

180. U.S. COPYRIGHT OFFICE.

International copyright relations of the United States; general information: relations as of June 30, 1975. (Washington, 1975) Folder (3 p.) (Circular 38a).

"This sets forth U.S. copyright relations of current interest with the other independent nations of the world. Each entry gives country name (and alternate name) and statement of copyright relations."

181. U.S. COPYRIGHT OFFICE.

77th annual report of the Register of Copyrights for the fiscal year ending June 30, 1974. Washington, Library of Congress, 1975. 24 p.

A report, reprinted from the *Annual Report of the Librarian of Congress* for the fiscal year ending June 30, 1974, which is a survey of administrative, legislative, judicial, and international copyright developments during the fiscal year. Contains a number of tables in regard to financial and other business matters of the Copyright Office and one giving the international copyright relations of the United States as of July 10, 1974.

182. U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION.

41 CFR Part 9-9: Patents, Data, and Copyrights: proposed policies and procedures. *Federal Register*, vol. 40, no. 200 (Oct. 15, 1975), pp. 48363-48380.

Proposed regulations setting forth policies, instructions and contract clauses pertaining to patents, data, and copyrights in connection with Government contracts. Comments on the proposed revisions are invited to be submitted by December 1, 1975.

183. U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION.

Title 41 CFR—Public Contracts and Property Management. Chapter 9—Energy Research and Development Administration. Revision of Chapter 9 to reflect the Energy Reorganization Act of 1974: Subpart 9-9.51—Copyrights. *Federal Register*, vol. 40, no. 195 (Oct. 7, 1975), pp. 46929-46930.

"This subpart sets forth the policy and practices of the ERDA as to use and publication of copyrightable materials, and contract provisions in connection with the procurement of material subject to copyright. The copyright provision to be incorporated in sub-contracts shall be determined by the principles applicable to contracts."

184. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 76. Cable Television: Definition of Cable Television System; Creation of Classes of Systems. *Federal Register*, vol. 40, no. 158 (Aug. 14, 1975), pp. 34155-34161. "FCC 75-896; Docket No. 20561."

Notice of proposals to amend the Commission's rules on the definition of a "Cable Television System."

185. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 76. Cable Television: Report and Order Terminating Proceeding. *Federal Register*, vol. 40, no. 160 (Aug. 18, 1975), pp. 34608-34613. "FCC 75-897; Docket No. 20272."

A report and order terminating the proceeding in the matter of the amendment of Part 76 of the Commission's rules and regulations relative to an inquiry on the need for additional rules in the area of duplicative and excessive over-regulation of cable television, with a conclusion "that the most appropriate course would be to secure legislation from Congress."

186. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 76—Cable Television Services: Per-Program or Per-Channel Charge. *Federal Register*, vol. 40, no. 159 (Aug. 15, 1975), pp. 34341-34346. "FCC 75-925; Docket Nos. 19554, 18893."

"Part 76 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows: In § 76.225 the headnote and par (a) (3) are amended to read as follows:

§ 76.225 Subscription cablecasting.

(a) * * *

(3) Every cable television system operator or channel lessee engaging in origination or access cablecasting pursuant to this paragraph shall maintain, or cause to be maintained, for public inspection a file listing the title of the film, the date on which it was cablecast and the provision of this paragraph pursuant to which it was cablecast. When a feature film is cablecast pursuant to paragraph (a) (1) (ii) of this section, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years."

187. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 76. Cable Television Systems: Network program exclusivity. *Federal Register*, vol. 40, no. 159 (Aug. 15, 1975), pp. 34395-34396. "FCC 75-922; Docket No. 19995; RM-2275."

Further notice of proposed rule making on the subject of network program exclusivity, the purpose of which "is to set a standard which will prevent those television signals, commonly viewed in non-cable households of a cable community, from being blacked out because of the mileage priorities."

188. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47 CFR—Telecommunication. Chapter 1—Federal Communications Commission Part 73—Radio Broadcast Services. Part 76—Cable Television Service. Cablecasting charges. *Federal Register*, vol. 40, no. 219 (Nov. 12, 1975), pp. 52731-52733.

Amendments of the Commission's rules and regulations pertaining to the cablecasting of programs for which a per-program or per-channel charge is made, and to over-the-air subscription television.

189. NEW YORK (STATE). *Attorney General*.

Piracy hearing: public hearing, tape piracy, before Louis J. Lefkowitz, Attorney General of the State of New York. *Performing Arts Review*, vol. 5, nos. 1-2 (1974), pp. 5-62.

Testimony at a public hearing, convened on August 15, 1974, in New York City, by representatives of the recording industry, performers, radio personalities and union officials who "graphically described the harm to the consumer and to various echelons of the legitimate industry being wreaked by those who are still engaged in sound recording piracy."

2. Foreign Nations

190. CHILE. *Laws, statutes, etc.*

Regulations under Law No. 17,336 on Intellectual Property. (No. 1,122 of May 17, 1971). *Copyright*, vol. 11, no. 9 (Sept. 1975), pp. 187-189.

A WIPO translation of regulations which "complete and supplement the principles laid down in" the Chilean copyright statute. The original Spanish text of the Regulations was published in the *Diario Oficial de la República de Chile*, No. 27, 1974, of June 17, 1971.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

191. Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms.
State of ratifications, acceptances and accessions up to 30 April 1975. *Copyright Bulletin* (Unesco), vol. 9, no. 1 (1975), pp. 23-24.
192. CONVENTION RELATING TO THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE.
Signatory states up to 31 March 1975. *Copyright Bulletin* (Unesco), vol. 9, no. 1 (1975), p. 25.
193. INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS.
State of ratifications, acceptances and accessions up to 30 April 1975. *Copyright Bulletin* (Unesco), vol. 9, no. 1 (1975), pp. 17-21.
194. UNIVERSAL COPYRIGHT CONVENTION ADOPTED AT GENEVA IN 1952 AND ANNEXED PROTOCOLS 1, 2 AND 3.
State of ratifications, acceptances and accessions up to 30 April 1975. *Copyright Bulletin* (Unesco), vol. 9, no. 1 (1975), pp. 6-12.
195. UNIVERSAL COPYRIGHT CONVENTION AS REVISED AT PARIS ON 24 JULY 1971 AND ANNEXED PROTOCOLS 1 and 2.
State of ratifications, acceptances and accessions up to 30 April 1975. *Copyright Bulletin* (Unesco), vol. 9, no. 1 (1975), pp. 13-15.
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PART IV.

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

196. *Epoch Producing Corporation v. Killiam Shows, Inc.*, 187 U.S.P.Q. 270 (2d Cir. August 13, 1975) (Mansfield, J.).

Action for infringement of plaintiff's alleged renewal copyright in the classic film "Birth of a Nation". The District Court upheld the validity of plaintiff's renewal, and assessed damages against the defendant. In Epoch's application for a renewal, which was granted, Epoch alleged Griffith (the individual author of "The Birth") to be Epoch's employee for hire, and Epoch thereby claimed itself to be the original author. At trial, since the issue was the validity of the renewal certificate, Epoch attempted to establish its employer-employee relationship with Griffith by admitting into evidence certain agreements to which Epoch was the successor, by which Dixon gave the rights to make a film from his book. In addition, Epoch introduced the copyright assignments from Griffith which purportedly were motivated by Griffith's recognition, as Epoch's employee, that Epoch had the "primary right to the copyright in the film". Finally, plaintiff introduced the renewal certificates themselves. However, Epoch was not incorporated until after the creation of "The Birth".

On defendant's appeal from the District Court's holding, *held*, reversed on the above issues.

In holding that the District Court erred in failing to direct a verdict for the defendant since that was the only reasonable conclusion based on the evidence without regard to credibility, the court made the following points worth noting:

(1) The assignments of copyright to Epoch did not convey the renewal rights as well. One assignment clearly referred to the interest conveyed as the first 28-year term only. The other referred to "The copyright acquired by it by public presentation of the motion picture photoplay with notice of copyright" which the court said excluded the renewal which is not acquired by publication with notice. Therefore, the court reasoned, since the renewal is "not merely an extension of the initial term copyright . . . (but) has been described as a 'new grant' . . .", such conveyances did not transfer the renewal rights. This finding was consis-

tent, the court noted, with the general rule that the absence of a reference to the renewal in an assignment of copyright precludes a holding that a transfer of the renewal was intended.

(2) Epoch could not establish that the film had been created by Epoch by virtue of Griffith's status as employee for hire. The crucial gap in plaintiff's case was that "the evidence sheds absolutely no light on the critical issue, which is what relationship, if any, existed between Griffith, on the one hand, and . . . Epoch, on the other."

(3) Nor could Epoch establish an employer-employee relationship between DWG Corp. (Griffith's shell corporation which applied for the initial copyright registration) and Griffith. Epoch argued that this would have entitled it to the renewal as the assignee of a work copyrighted by a corporate body. On the contrary, the evidence indicated that DWG Corp. was a corporate shell, that Griffith individually created the work, and that DWG Corp. "could only have copyrighted the work as the licensee or assignee of his common law copyright." Moreover, even if Griffith was DWG Corp.'s employee for hire, the court stated that §24 of the Act was not intended to vest in corporations ownership of renewals of this type where one identifiable individual was the author and producer.

(4) Furthermore, the court rejected plaintiff's argument that its renewal certificate created a presumption of validity. Section 209 of the Copyright Act creates such a presumption, but is applicable only in the case of the original certificates and not of renewals. This is further supported by the policy of the Copyright Office to register even conflicting renewals. Moreover, even if a presumption of validity did stem from the certificates and the fact that the renewal went unchallenged for 27 years, such a presumption may be overcome by proof that material statements in the certificate were false.

197. *Deering Milliken, Inc. v. Quaker Fabric Corp.*, 187 U.S.P.Q. 288 (S.D.N.Y. July 10, 1975) (Werker, D.J.).

Action for a declaratory judgment that plaintiff's "Tree of Life" fabric design ("Pembroke"), does not infringe defendant's copyright in its "Tree of Life" design ("Nouvelle").

On defendant's motion for a preliminary injunction, *held*, motion denied.

The court's decision was based on the defendant's failure to shoulder its burden in establishing infringement. While generally similarity alone may itself indicate copying, such an assumption was refuted in this case by evidence that the plaintiff's artist, in creating "Pembroke", considered not

only "Nouvelle", but other "Tree of Life" designs as well. Such artist's "use of Nouvelle", the court stated,

"did not go so far as to constitute appropriation of Quaker's originality of expression".

Quaker's "originality", referred to by the court above, was limited by the public domain nature of the "Tree of Life" motif, and by defendant's corresponding minor variations thereon.

198. *Kingsrow Enterprises, Inc. v. Metromedia, Inc.*, 397 F. Supp. 879 (S.D.N.Y. July 8, 1975) (Frankel, D.J.).

Action for infringement of plaintiff's copyright in 26 hour-long episodes of "The Judy Garland Show". Defendant claims it acquired a valid license from the copyright owner, Trophy Productions, Ltd. ("Trophy"). Trophy had allegedly acquired such rights at a sheriff's sale at which it bought the contents of a warehouse wherein certain physical properties relating to the show, as well as the copyright certificates, were housed.

On defendant's motion for summary judgment, *held*, motion denied.

Despite Trophy's possession and "purchase" of the copyright certificates, Trophy was not necessarily the copyright owner. As the court stated, "The certificate is not the copyright The valuable federal right is not transferred by mere physical delivery, or other acquisition, of the certificate. The owner may, of course, assign the copyright. But this is to be done 'by an instrument in writing signed by the proprietor of the copyright'"

While under New York law Kingsrow's judgment creditors could have forced an assignment of copyright, it appeared from the facts before the court that Trophy was not such an assignee.

199. *Bell v. Combined Registry Company*, 397 F. Supp. 1241 (S.D. Ill., July 14, 1975).

Action for infringement of plaintiff's alleged copyright in a poem entitled "Desiderata" arising out of defendant's publication thereof in its magazine. Defendant conceded publication.

Held, judgment for defendant.

Despite a prior case upholding plaintiff's ownership and the validity of the copyrights in issue (*Bell v. Pro Arts Inc.*, 366 F. Supp. 474, N.D. Ohio, 1973), which was entitled to "weight as precedent", the court held that the original author had forfeited his copyright. Therefore, regardless of plaintiff's success in establishing its chain of title to the registration in issue, the poem was held in the public domain.

Several issues are of interest:

(1) Max Ehrman's (the poet) registration of the copyright in the fictitious name "Indiana Publishing Company", which was not registered under the Indiana fictitious name statute, did not operate to invalidate the registration. This was for the reason that federal rights cannot be defeated by state law and that, even if they could, the Indiana law in question only rendered void those acts of unregistered fictitious names which misled third persons, which was not the case here.

(2) Max Ehrman forfeited his copyright by publication of "Desiderata" without copyright notice. The evidence was overwhelming that he permitted distribution of hundreds of copies of the poem to U.S. troops, and the court held there was a fair inference that such distribution was accomplished without a copyright notice. This inference came from the fact that correspondence from Ehrman indicated repeated gratuitous permissions to duplicate the work without ever mentioning a copyright notice. In addition, the only copy of the poem in the hands of the one requesting such permission did not bear a copyright notice. The court concluded that, "The actions of Max Ehrman are not consonant with those of a copyright proprietor intent on protecting a commercial asset. Defendants have met the burden of showing that a forfeiture was more likely than not." Since the plaintiff failed to offer into evidence a copy of the work which was distributed to the troops, and since "most courts have imposed the burden of proof on the copyright proprietor in the first instance to demonstrate that he has placed the notice on all published copies", the court concluded that a forfeiture was established by a preponderance of the evidence. In addition, on the basis of the facts outlined above, the court found Max Ehrman to have abandoned his copyright.

(3) The court rejected defendant's quasi-contractual claim for reimbursement for the costs of printing a retraction at the behest of the plaintiff. No evidence was introduced indicating defendant ever expected to be repaid.

200. *Ed Brawley, Inc. v. Gaffney*, 399 F. Supp. 115 (N.D. Cal. Sept. 9, 1975) (Wollenberg, D.J.).

Action for infringement of plaintiff's alleged copyright in a diving manual which plaintiff claims by assignment. Defendant asserts that plaintiff is not an assignee, but merely a licensee and that, therefore, plaintiff's "licensor", the copyright proprietor, must be joined as a party plaintiff.

Defendant cites two provisions of the purported assignment from the original copyright proprietor to plaintiff to support its theory that plaintiff is only a licensee:

(1) The licensor reserves all causes of action for copyright infringe-

ment accruing up to the date of the assignment; and (2) the licensor reserves the right to republish the work with copyright in the name of Brawley, provided Brawley gives permission, which shall not be unreasonably withheld.

On defendant's motion for a judgment on the pleadings on the ground that plaintiff lacks standing and/or for failure to join an indispensable party, *held*, motion denied.

The court's decision turned on the question of whether plaintiff was merely a licensee or was the owner by assignment of the copyright in question. Referring to the two pertinent provisions above, the court held that neither one led to the conclusion that plaintiff was a mere licensee. As to causes of action for copyright infringement which accrued prior to the transfer, those generally belong to the transferor unless a contrary intention is expressed. As to the second provision whereby plaintiff would not unreasonably withhold permission from its assignor to reprint the work, this reservation was not fatal to plaintiff's ownership as it was in *First Financial Marketing Services Group, Inc. v. Field Promotion, Inc.*, 286 F. Supp 295 (S.D.N.Y. 1968) where the "assignor" retained an *absolute* right to reprint. The court distinguished the *Brawley* provision from *First Financial* in the following way:

"While the agreement appears to reserve in Gaff [assignor] the right to use the copyright, . . . the reservation is conditioned on the business judgment Brawley would exercise in the event of any request for a license, and, thus, is not a retention of such rights that would defeat the attempted assignment of the copyright."

2. State Court Decisions

201. *Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.*, 187 U.S.P.Q. 113 (N.J. Sup. Ct., App. Div. May 13, 1975) (Handler, J.).

Action for infringement of plaintiff's common law copyright in its musical recordings fixed prior to February 15, 1972 and for unfair competition arising out of defendant's "tape piracy".

On defendant's appeal from summary judgment for plaintiff, *held*, affirmed and remanded.

The court rejected defendants' argument that only state action in the form of statutory enactments could permissibly regulate the duplication of pre-February 15, 1972 recordings:

"While *Goldstein* did involve the criminal enforcement of a provision of the California Penal Code, and the Supreme Court ruled specifically that the California statute was not federally pre-empted, the court did not hold, or otherwise suggest that state action in this area, in a form other than legislative enactment,

would be barred. Goldstein may be viewed as permitting local protection of musical performances under the judicial aegis of the common law, as well as by statute."

While the New Jersey unfair competition statute did not explicitly prohibit the defendant's activities, the court held it did not "by negative implication, immunize from judicial concern business or commercial conduct, which is injurious and otherwise unfair, improper and wrongful."

In an expansive and probing discussion of the law of unfair competition and how it should be implemented, for example, in the context of "contemporary business practices, [where there] is a critical, albeit fine, line separating commercial parroting from pirating", the court concluded as follows:

Defendants' final contention is that the court should await direction from the Legislature before undertaking to create new rights in the area of unfair competition. The protection of business against unlawful injury, however, is a matter to which the courts must be responsive; it is not a concern solely of the Legislature. E.g., *J. B. Liebman & Co., Inc. v. Leibman*, 135 N.J. Eq. 288, 62 U.S.P.Q. 391 (Ch. 1944); *Sachs etc., Radio Co. v. Sachs Quality Stores Corp.*, supra. We are, of course, mindful that the areas embracing unfair competition are appropriate for legislative treatment. We note also the pendency in the Legislature of proposals which would provide criminal sanctions for the practices which are the subject of this litigation. A 1916 (July 8, 1974); A 3256 (April 10, 1975). Prospective legislative action, however, while instructive, cannot impart substance to the current law. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 N.J. 236, 240 (1974); cf. *City of East Orange v. Tp. of Livingston et al.*, 102 N.J. Super. 512, 535 n. 2 (Law Div. 1968), aff'd o.b. 54 N.J. 96 (1969).

The common law doctrine of unfair competition is well-grounded and has long and frequently been interpreted and applied by the courts. This is entirely consonant with the obligation of the judiciary to expound and develop the common law to serve justice and the interests of society. *La Stella v. Garcia Estates*, 66 N.J. 297, 305 (1975). Accordingly, we hold that the court below properly entertained the action and on the merits for the reasons already advanced, entered summary judgment in favor of plaintiff.

PART V.

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Practical guidance for a lawyer or entrepreneur in “effectively and successfully dealing with innovation.”

2. Foreign Publications

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203. PEACOCK, ALAN T., and RONALD WEIR.

The composer in the market place. With a pref. by Asa Briggs. [London] Faber Music [1975] 171 p.

“The main purpose of this study is to identify the influences on the supply of musical composition of all kinds in Britain in the course of the last seventy years. This has entailed a close examination not only of the ways in which composers, in association with publishers and others, have brought their creations before the public, but also of the legal and political environment which has become an increasingly important influence on the economic position of suppliers of music.”

204. UNITED NATIONS. *Conference on Trade and Development. Trade and Development Board.*

Restrictive business practices; review of major developments in the area of restrictive business practices, report by the UNCTAD secretariat. [Geneva] 1975. 30 p. (United Nations. [Document] TD/B/C.2/159, 29 April 1975). At head of title: Committee on Manufactures, Seventh session, Geneva, 23 June 1975, Item 7 of provisional agenda.

Includes examples of restrictive business practices in the book industry (pp. 13-17) involving: (a) an international market allocation cartel arrangement between United Kingdom and United States publishers dividing up the world market in respect to books which both countries publish; (b) the U.S. manufacturing clause; and (c) price-fixing arrangements.

2. In Polish

205. Prace z wynalazczości i prawa autorskiego.

[Kraków] Nakł. Uniwersytetu Jagiellońskiego, 1975. 249 p. (Zeszyty naukowe Uniwersytetu Jagiellońskiego, 382) (Prace z wynalazczości i ochrony własności intelektualnej, zesz. 5) Added title page, in Latin. Partial contents.—Programy dla maszyn cyfrowych jako przedmiot prawa, przez Jan Waluszewski—Ochrona prawna kroju pisma drukarskiego, przez Janusz Barta.

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construction of copyright law. *Hastings Constitutional Law Quarterly*, vol. 2, no. 1 (Winter 1975), pp. 221-249.

A note, originally written as a paper for the 1974 Nathan Burkan Memorial Competition, which suggests "that rules are needed to guide the courts in applying the body of copyright law to disputes arising out of the continuing flow of unanticipated developments", using for illustrative purposes three recent developments involving record piracy, cable television, and library photocopying. "Further, this note . . . draw[s] attention to the value of the copyright clause in construction of copyright law", and proposes a set of rules of construction for application to the three illustrative situations reviewed in the note.

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The author demonstrates that "significant legal protection is afforded unpublished works by courts at common law, and such *common law copyright* may be invoked to protect more types of choreographic works, to a greater extent, and with fewer formalities than statutory copyright."

210. STEVENSON, IRIS CAROLINE. The doctrine of fair use as it affects libraries. *Law Library Journal*, vol. 68, no. 3 (August 1975), pp. 254-273.

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2. Foreign

1. In English

211. Advisory Group of Non-Governmental Experts on the Protection of Computer Programs, 2d Session, Geneva, June 23-27, 1975. Note. *Copyright*, vol. 11, no. 9 (Sept. 1975), pp. 183-185.

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231. ASCAP, BMI win CBS suit on license fee. *Variety*, vol. 280, no. 7 (Sept. 24, 1975), pp. 1, col. 1; 86, cols. 4-5.

An article on the dismissal by Judge Lasker of the New York Federal Court, in a 107-page decision, of a long-standing antitrust suit by CBS which would have compelled ASCAP and BMI to submit a per use license to music users as an alternative to the present blanket licenses.

232. ALTBACH, PHILIP G. Publishing and the intellectual system. *Annals of the American Academy of Political and Social Science*, no. 421 (Sept. 1975), pp. 1-13.

An outline of some of the key elements of the intellectual system as it affects publishing, including copyright.

233. CONTU organizes. *Information Action*, vol. 7, no. 4 (Oct. 1975), pp. 6-7.

An article on the first and organizational meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU).

234. FRASE, ROBERT W. Will international duties be removed on A-V materials and microforms? New protocol considered for the Florence Agreement. *Publishers Weekly*, vol. 208, no. 16 (Oct. 20, 1975), pp. 41-42.

An article on a draft protocol dated August 22, 1975, circulated by the Director General of UNESCO, on which comments by member nations of UNESCO have been requested, following which a revised draft will be prepared for consideration in 1976.

235. HALL, MILDRED. Copyright Office mute on mechanical, jukebox fees; says Congress should decide. *Billboard*, vol. 87, no. 46 (Nov. 15, 1975), pp. 3, 18.

An article on the testimony of Ms. Barbara Ringer, Register of Copyrights, given before the Kastenmeier subcommittee to the effect "that the copyright office will have to 'duck' specific rate questions, and some other issues it feels Congress should decide." Also, the Register called the wording of the Mathias amendment providing compulsory licensing for public broadcasters "vague and ambiguous."

236. HALL, MILDRED. Ringer testimony hits on liability of 4-speaker 'Q'. *Billboard*, vol. 87, no. 45 (Nov. 8, 1975), pp. 3, 55.

An article on a portion of the testimony of the Register of Copyrights before the Kastenmeier subcommittee on October 30 in regard to the possible liability involved in the use of four-speaker quadrophonic reception in bars, during which she indicated she was not fully satisfied with the wording on this subject of the recently marked-up Senate bill (S. 22).

237. HALL, MILDRED. Subgroup convenes Sept. 11. C'right hearing: the final round? *Billboard*, vol. 87, no. 37 (Sept. 13, 1975), pp. 4, 16.

A summary of some of the more controversial issues that have been covered during the hearings on H.R. 2223, S. 22, and the performance royalties bills, presently being considered by subcommittees of both House and Senate, together with a prognosis of possible developments during the remainder of this Congress.

238. HOROWITZ, IS. Ask legal duping in Vt. for pre-72 disks. *Billboard*, vol. 87, no. 44 (Nov. 1, 1975), pp. 5, 18.

An article on a recently introduced bill in Vermont, S-161, whose stated purpose is "to provide guidelines for the lawful duplication of pre-1972 sound recordings."

239. KRIEGSMAN, ALAN M. Beyond the third dimension: a new medium materializes. *The Washington Post*, Sept. 28, 1975, pp. G1, cols. 1-6; G8, cols. 1-6.

An article on "holograms," which are briefly defined as images that contain the whole message about the objects they reproduce visually, including depth, and all other special properties as well as frontal appearances. "A hologram image isn't just a picture, it's an optical simulacrum."

240. LOTTMAN, HERBERT R. Frankfurt 1975: a calm, serene fair, and plenty of Muhammad Ali. *Publishers Weekly*, vol. 208, no. 18 (Nov. 3, 1975). pp. 31-38.

An article on the 1975 Frankfurt book fair, held from October 9-14, with the heavyweight champion present to promote his autobiography, "The Greatest." In addition to international publishing, copyright and rights in general formed topics for discussion among the participants.

241. Macdonald blisters NFL for claims of harm from blackout law. *Broadcasting*, vol. 89, no. 13 (Sept. 29, 1975), pp. 37-38.

"Hearings open on legislation [H.R. 9566] to make measure permanent; Wiley says FCC study shows no adverse effect in '73, '74; CBS's Schneider voices support."

242. MAZZA, BOB. Budget Films trio sentenced; fines total \$49,000. *Hollywood Reporter*, vol. 238, no. 41 (Nov. 4, 1975), pp. 1, 13.

An article on the conviction and sentencing of three men and a company "in a precedent-setting trial of pirating many of Hollywood's top motion pictures and television programs."

243. Report from Capitol Hill: Debate over copyright change. *U.S. News & World Report*, vol. 79, no. 14 (Oct. 6, 1975), p. 40.

A brief summary of some of the major provisions of the copyright revision bill, including reactions of some interested parties, with special attention to photocopying by libraries.

244. Ringer says provision in copyright bill for TV-news archives is open to abuses. *Broadcasting*, vol. 89, no. 15 (Oct. 13, 1975), pp. 26, 28.

A summary of the "wrap-up" testimony on the copyright revision bill, H.R. 2223, given by the Register of Copyrights on October 9 before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Ms. Ringer indicated that the Copyright Office is opposed to the wording of the Baker amendment giving libraries and archives the right to record and copy television news programs, and is also opposed to giving the copyright royalty tribunal the right to change the base on which cable fees are computed.

245. Senate unit sticks cable with liability on copyright. But committee stretches time between rate reviews by tribunal that cables wanted scrapped; noncommercial broadcasters get break on nondramatic works. *Broadcasting*, vol. 89, no. 15 (Oct. 13, 1975), p. 47.

A summary of the markup of the copyright bill, S. 22, with emphasis on cable television provisions.

246. SHAIN, MICHAEL. Hopes for performers' fee fade as labor support fails to gel. *Record World*, vol. 31, no. 1481 (Nov. 8, 1975), pp. 3, 25.

A pessimistic assessment of the prospects for the incorporation of a provision for a performer's royalty into the copyright revision bill, with particular reference to the lobbyists for organized labor.

247. SHAIN, MICHAEL. Senate Judiciary Committee votes half-cent royalty hike. *Record World*, vol. 31, no. 1478 (Oct. 18, 1975), pp. 3, 151.

An article on the markup on October 7 by the Senate Judiciary Committee of the copyright revision bill, S. 22, with special attention to the vote by the committee to raise the mechanical royalty only half a penny to 2 ½ cents per tune.

248. Three persons, firm guilty of film piracy. *The Wall Street Journal*, vol. 186, no. 60 (Sept. 24, 1975), p. 38, cols. 1-3.

A brief note concerning a trial in Los Angeles in which three individual defendants and one corporate defendant were found guilty of pirating a number of motion picture and television films and transporting them in foreign commerce.

249. Urges authors to be equal with publishers on 'development' costs. *Variety*, vol. 280, no. 7 (Sept. 24, 1975), p. 6, col. 1.

An article on a letter dated September 8 from Irwin Karp, counsel for the Authors League of America, to Representative Al Ullman, chairman of the House Ways and Means Committee, to the effect that authors should be entitled to the same tax benefits as are awarded their publishers in a proposed amendment to an Internal Revenue Ruling, currently in H.R. 8736 (*see* Item 173, *supra*). "Karp wrote that the proposed amendment to the inequities imposed on both authors and publishers in Rev. Ruling 73-395 would only relieve publishers . . . and not the authors who are engaged in 'the trade or business of writing the book.' "

250. WAGNER, SUSAN. NCLIS study will explore photocopying. *Publishers Weekly*, vol. 208, no. 17 (Oct. 27, 1975), pp. 18-19.

"With less than a year to fulfill its assignment, the National Commission on Libraries and Information Science will soon ask for bids on a contract to make a nationwide study on library photocopying practices, including the feasibility of a transaction-based royalty payment mechanism."

251. WAGNER, SUSAN. Senate Committee marks up copyright bill, approves Mathias amendment. *Publishers Weekly*, vol. 208, no. 16 (Oct. 20, 1975), pp. 30-31.

An article on the markup on October 7 by the Senate Judiciary Committee of the copyright revision bill, S. 22, with special attention to the adoption of the Mathias amendment calling for compulsory licensing by non-profit public broadcasters for performance of non-dramatic literary and musical works. Mention is also made of the first meeting of the National Commission on New Technological Uses of Copyrighted Works (CONTU).

2. Foreign

1. England

252. HAMILTON, L. CLARK. Copyright, technology and compulsory licensing. *InterMedia*, vol. 2, no. 6 (May 1975), pp. 12-14.

An overview, by the Deputy Register of Copyrights, of copyright problems raised by technological developments in regard to computers, reprography, and "data communications/cable television," with special reference to the United States. The writer

opines that "[c]ompulsory licensing is the best compromise between (a) the broadest possible dissemination of information and (b) the reimbursement of the intellectual property owner for his efforts."

253. Inflation, libraries and books; SPEX forum discusses the effects of the recession. *The Bookseller*, no. 3643 (Oct. 18, 1975), pp. 2094-2097, 2099-2101.

An article on a seminar on "Selling Across the Atlantic," which took place on the day preceding the Specialist Publishers Exhibition (SPEX) and was attended by publishers from both Britain and the United States. One of the speakers offered some remarks on the future of transatlantic dealing with special attention to the pending antitrust suit.

254. NURNBERG, ANDREW. Dealing with the Russians. *The Author*, vol. 86, no. 3 (Autumn 1975), pp. 83-86.

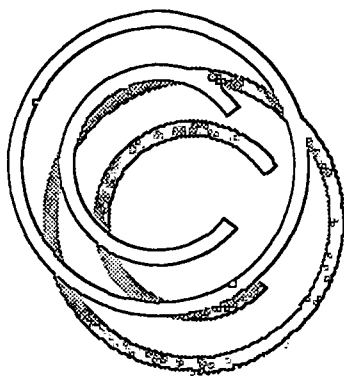
A rather favorable assessment of copyright relations between Great Britain and the Soviet Union since the latter's accession to the Universal Copyright Convention.

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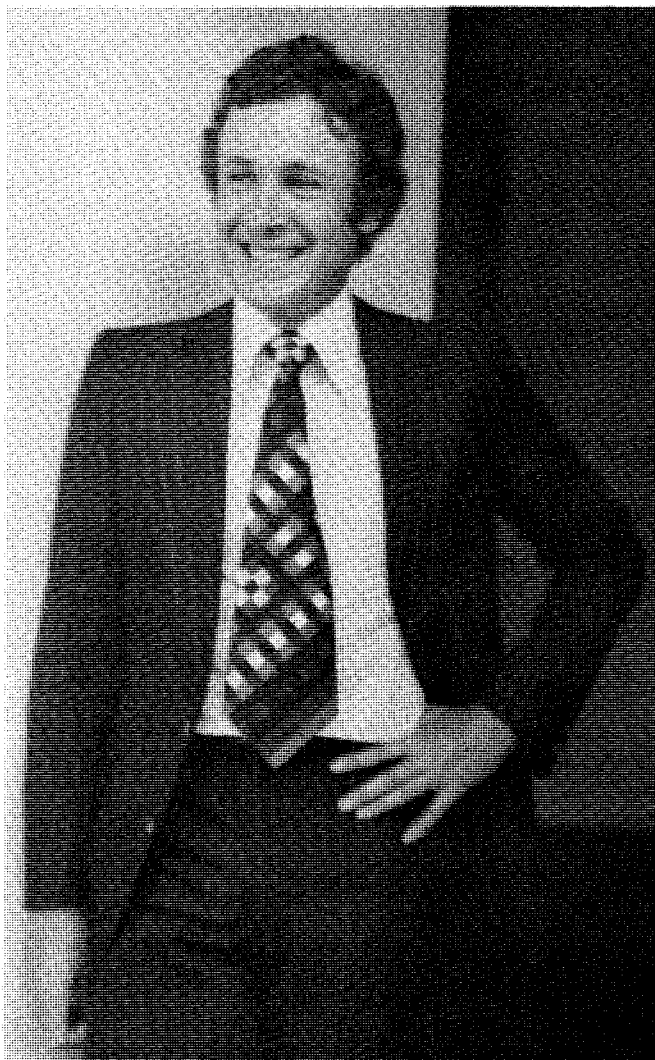
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DAVID CATTERNS

PART I.

ARTICLES

255. "THE AMERICANS, BABY" BY MOORHOUSE: AN AUSTRALIAN STORY OF COPYRIGHT AND THE NEW TECHNOLOGY—*The Thirteenth Annual Jean Geiringer Memorial Lecture on International Copyright Law**

By DAVID CATTERNS**

Introduction

I have called my lecture *The Americans, Baby* to demonstrate the starting point of one Australian approach to reprography and copyright: the individual author and his individual work. As Professor Ulmer said in the tenth *Jean Geiringer Memorial Lecture*, "The very nature and essence of copyright is to secure to the individual author the fruits of his labour".¹ It seems to me that there is a real risk that the technologies of reprography and of automatic storage and retrieval systems will obscure this focus on the individual, independent author and his work. What I hope to be able to show here is that we can design a legal and administrative approach which accords with these technological realities and, at the same time, maintains our focus on the author.

Frank Moorhouse's book, *The Americans, Baby*, was the subject of a copyright action in the Supreme Court of New South Wales and, on appeal, in the High Court of Australia. On 1 August this year, a Full Bench of the High Court gave a unanimous declaratory judgment

that the [University of New South Wales] authorized the doing on 28 September 1973 by Paul Brennan of the act of reproducing the literary work *The Americans, Baby* in a material form and *thereby infringed* the respondent's copyright in the said work.

*This lecture was delivered on December 18, 1975, in the Auditorium of the New York University School of Law in New York City.

**Mr. Catterns is the Legal Research Officer of the Australian Copyright Council.

¹ 19 BULL. CR. SOC. 263 at 276, Item 180 (1972).

The full title of the case is *University of New South Wales v. Moorhouse and Angus and Robertson (Publishers) Pty. Ltd.*²

Authorization

The key word in the judgment is "authorized". Neither the University, nor its servant, nor its agent reproduced the work. The act was done deliberately by a library user, a graduate of the University, at the request of the Australian Copyright Council.

We initiated this case to test the responsibility of the controller of a library who installs self-service photocopiers. We designed the case, as best we could, to isolate the one issue of "authorization".

"Authorization" appeared in the U.K. Copyright Act in 1911 and in the Australian Copyright Act in 1912. By virtue of those Acts, the exclusive rights of the owner of copyright in a work included the right to reproduce *or to authorize* the reproduction of the work in a material form. The U.K. Copyright Act 1956 and the Australian Copyright Act 1968-1973 contain provisions which are substantially the same. They provide, in addition, that copyright is infringed by a person who does or authorizes the doing of any of the acts which it is the owner's exclusive right to do.

The U.S. Copyright Act of 1909 does not have a similar general provision for the owner's right to authorize. Paragraph (c) of Section 1 of that Act does provide, however, that the owner has the exclusive right

To deliver, authorize the delivery of, read, or present the copyrighted work in public if it be a lecture, sermon, address or similar production, or other nondramatic literary work.

Section 106 of the U.S. Copyright Revision Bill introduces a provision similar to that in the Australian law. It says:

the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .

"Authorization" is an important concept in accommodating copyright to new technologies. It carries legal responsibility from the person who puts a coin in a juke box to the person who installs the

² (1975) 6 ALR 193.

machine,³ from a band in a club to the owner of the premises⁴ and, after *Moorhouse*, from a student at a photocopier to the library or the university.

Before the U.K. Act of 1911, it was an infringement "to cause" another person to infringe. It was held that this only related to infringements committed by servants or agents.⁵ It is now clear that authorization goes beyond master-and-servant and agency relationships.

The 1975 Report of the Senate Judiciary Committee has this to say about the introduction of "authorization":

The exclusive rights accorded to a copyright owner under section 106 are 'to do and to authorize' any of the activities specified in the five numbered clauses. Use of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers.

As I understand it, this idea of contributory infringement differs slightly from the Australian and English interpretation of authorization, where it has been held that authorization is a separate tort; the right to authorize is a separate right and infringement by authorization is a separate infringement, distinct from infringement by reproduction.

The Moorhouse Case

Frank Moorhouse calls his book "a discontinuous narrative". It consists of a number of short stories, more or less connected with each other.

The copier in this case took a copy of the book from the open shelves of the library of the University of New South Wales. He used the library's self-service photocopier to make two copies of one of the stories, which was ten pages long. He made two copies because we wanted the reproduction to be a clear infringement, with the only question that of authorization.

Moorhouse (with his publisher) sought a declaration in the Supreme Court of New South Wales that the University had infringed his

³ See, e.g., *Winstone v. Wurlitzer Automatic Phonograph Co of Australia Pty Ltd* [1946] VLR 338.

⁴ See, e.g., *Australasian Performing Right Association v. Canterbury-Bankstown Leagues Club* [1964-65] NSW R 138.

⁵ *Karno v. Pathe Freres, Ltd* (1909) 100 LT 260.

copyright, by authorizing Brennan's infringement. The Court (Hutley J.A.) held that the University had not authorized the particular infringement which had been proved but that it had "authorized such breaches as occurred by the photocopying of the whole or part of the library copy of the said book"⁶. The University appealed against this order and the author cross-appealed against the finding that Brennan's infringement had not been authorized by the University.

The High Court unanimously upheld both the appeal and the cross-appeal and, in the terms I have quoted before, held that the University had authorized an infringement and had "thereby" itself committed an infringement.

I don't propose to give an exhaustive summary of the judgments. I will here concentrate briefly on the Court's analysis of authorization and on its application of this analysis to the particular facts.

The Court followed the English and Australian authorities that authorization may be taken in its dictionary sense of "sanction, approve, countenance", and that authorization need not be express: "indifference, exhibited by acts of commission or omission may reach a degree from which an authorization may be inferred"⁷.

The judgments of the Court were given by Jacobs J. (with whom McTiernan A.C.J. agreed) and Gibbs J. The judgments agree that an authorization can be given in general terms in respect of a number of works. At page 201 of the Report of the judgment, Gibbs J. says:

Although in some of the authorities it is said that the person who authorizes an infringement must have knowledge or reason to suspect that the particular act is likely to be done, it is clearly sufficient if there is knowledge or reason to suspect that any one of a number of particular acts is likely to be done, as for example, where the proprietor of a shop installs a gramophone and supplies a number of records any one of which may be played on it.

Authorization is a question of fact, to be determined in the light of particular circumstances. The question in this case, therefore, was whether it could be inferred from the University's conduct that it had authorized an infringement of copyright.

Gibbs J. described the University's copying system:

⁶ *Moorhouse and Angus & Robertson (Publishers) Pty Ltd v. University of New South Wales* (1974) 3 ALR 1.

⁷ (1975) 6 ALR 193 at 200.

... the University made available to a section of the public the books in its library—at least those in the open shelves—and provided in the library the machines by which copies of those books could be made.

... in the nature of things it was likely that some of the books ... might be copied by use of the machines in a manner that would constitute infringement of copyright unless some means were adopted to prevent that from being done. (at 201)

Jacobs J. concluded that

the unqualified supply of the books and the machines amounted to an invitation to users of the library to make such use of the machines by photocopying of the books or substantial portions thereof as they saw fit. (at 209)

Gibbs J. found that

the University had reasonable grounds to suspect that some infringements would be made if adequate precautions were not taken. (at 202)

The approach of Jacobs J. is somewhat different: his Honour looked at the “unqualified supply” of books and machines and held that

in the circumstances it was of little importance whether or not the University knew in fact that users of the machines were doing acts comprised in the authors’ copyrights. This knowledge or lack of it would not change the terms of the invitation extended by the supply of books and machines. (at 209)

It thus appears that their Honours appear to have differing views on the necessity for the authorizer to have knowledge of the “likelihood” of infringement. Gibbs J.’s test of authorization includes “knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement” (at 201). On the other hand, Jacobs J. felt that it was of “little importance whether or not the University knew in fact”. This, however, was a case of “unqualified invitation”; Jacobs J. says that “knowledge could become important if the invitation were qualified”.

It is clear that their Honours agree that the provision of the machines gives rise to a duty on the part of the University. Gibbs J.

phrases this duty in several ways: "reasonable steps to limit [the machine's] use to legitimate purposes" (at 201); "effective measures to ensure that any other copying of copyright works was forbidden" (at 201); "adequate precautions" (at 202); "reasonable or effective precautions" (at 204); and "measures reasonably sufficient for the purpose of preventing infringements taking place" (at 204). Jacobs J. phrases the University's duty as having "to qualify the invitation" which the provision of the machines constitutes.

As, in this case, the University failed to take such steps or make such qualification, it was held to have authorized the infringement which occurred and, thereby, to have itself infringed.

It is worth noting that the Paris Civil Court came to a similar conclusion in the CNRS case:

The furnishing of the methods could, however, be criticized in the case where the client proceeds to a utilization involving infringement of the documents which have been furnished to him and where CNRS has not, in the first place, taken all preventative precautions at the moment of delivering the photocopies, in order to avoid, as far as possible, this infringing use; that in such an event, CNRS becomes, in a way, an accomplice in the infringement by furnishing the means.

Although their Honours say that they doubt the value of *Moorhouse* as a test case, it appears to me that the case is useful in several respects. The responsibility of the universities has been a matter of dispute for a number of years. *Moorhouse* makes it clear that the provision of photocopying machines in a university library in similar circumstances to those of the University of New South Wales gives rise, at least, to a *prima facie* responsibility for infringements which may occur on the machines. The area of uncertainty which now remains under the present law is: how can a university discharge this responsibility? The High Court gives a few hints but they are far from clear and, with respect, their force is far from certain.

The principal hint given by the Court relates to notices which might be displayed on or near the machines. Those displayed by the University of New South Wales in this case were clearly inadequate, the Court held, because they referred to the wrong section of the Act. At p. 203, Gibbs J. says

To place a clearly worded and accurate notice on each machine in a position where it could not be overlooked would be one measure which might be expected to have some value in

informing users of the library of the limits which the University imposed on the permission which it gave them to use the machines.

In my opinion, this statement does not meet his Honour's own test of "effectiveness"—"measures reasonably sufficient for the purpose of preventing infringements".

His Honour says elsewhere that merely "to provide a copy of a statute whose meaning would be obscure to the laymen would not be an effective way of conveying" advice to users (at 203) and that merely to say that copying for the purpose of research or private study was only permissible if it amounted to a fair dealing "would not have proved enlightening to most users" (at 202). Thus, presumably, his Honour suggests explanation and advice rather than bald quotation of statutory provisions. It is difficult to see, however, what enlightenment or advice is possible. As his Honour says,

The principles laid down by the Act are broadly stated, by reference to such abstract concepts as 'fair dealing' (s 40) and 'reasonable portion' (s 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case. (at 200)

Accordingly, it seems that the only remaining way in which a notice can be effective is admonition or prohibition—"informing users that the machines were not to be used in a manner that would constitute an infringement of copyright" (at 204).

The real effectiveness of such a notice in preventing infringements must be doubted. Neither students nor the library staff can know what copying amounts to an infringement and, as Gibbs J. says,

It could not be assumed that persons making copies of works in which copyright existed would do so only in circumstances which amount to a fair dealing for the purpose of research or private study, at least in the absence of any effective measures to ensure that any other copying of copyright works was forbidden. (at 201)

Gibbs J. also examined such facts as the lack of effective supervision, but he felt that the "fatal weakness" in the case for the University was the lack of an adequate notice.

Jacobs J. also felt that the lack of adequate notices and of supervision were negative factors. It appears to be his Honour's view that an

adequate notice might be a satisfactory "qualification of the invitation". It is clear, however, that such a notice is to be evaluated by its effectiveness:

... if nevertheless it were known that the qualification to the invitation was being ignored and yet the University allowed that state of things to continue. Then it might be found as a fact that the University authorized the continued state of things, the continued use of its machines to do acts comprised in authors' copyrights, and thus to infringe those copyrights. (at 209)

As I have said, the Court upheld the author's cross-appeal and declared that the University had itself committed an infringement by authorizing Brennan's particular infringement. The Court also upheld the University's appeal against the declaration of the Supreme Court. This declaration referred to "such breaches as occurred" and the High Court held that the Supreme Court ought not to have made such a hypothetical declaration. As this question relates to the law on declaratory judgments and not to copyright, I shall not discuss it here.

If I may say so, I think it is a pity that section 108 of the U.S. Revision Bill contains a provision which appears to exempt a library from responsibility "for the unsupervised use of reproducing equipment located on its premises". This is section 108, paragraph (f)(1). I say "appears to exempt" because, although the Judiciary Committee Report makes this intention clear, I am not quite sure of the effect of the relationship between section 106, which says the owner has the exclusive right to authorize, and section 108 (f)(1), which says "nothing in this section shall be construed to impose liability" on libraries in such cases. I think that this is a pity because it places both the user and the owner in an impossible position. The user is told in 108 (f)(2) that he may not exceed "fair use" but, of course, he cannot know what this means. The owner, as a result, will have no practical means of controlling self-service copying. What it must mean is that self-service copiers will have a completely free hand; there can probably be no hope for a licensing scheme for this situation because the library has no legal responsibility to negotiate one.

AN AUSTRALIAN APPROACH TO REPROGRAPHY

a. The Context of Moorhouse

The context of the *Moorhouse* case is that it is part of the overall approach of the Australian Copyright Council to the problems of

copyright. We have concentrated on testing and asserting the author's rights, developing a practical licensing scheme and proposing and arguing for legislative change. We chose to test the issue of authorization because it is at the heart of our proposals for a licensing scheme.

There is some international agreement that these schemes should be based on collective agreements. For example, the Washington meetings of the sub-committees on reprographic reproduction of the two Copyright Conventions, recommended that States

could consider, among other measures, encouraging the establishment of collective systems to exercise and administer the right to remuneration⁸.

The meetings of the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union endorsed this resolution in Geneva last week.

In the absence of compulsory licenses granted by states to users as a class, a licensing scheme must be based on contract. Even in cases of compulsory licences, if I may borrow Professor Ulmer's words, these "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 licence contracts"⁹.

Who are to be the parties to a licence contract? On the one hand, a collective of authors and publishers; on the other, the representatives of users. The logical negotiating body on behalf of individual users is the institution in which copying takes place, as it is obviously impractical for the authors' collective to negotiate with each individual researcher or student.

If the employees of a university, library, or school authority actually make the copies, the legal responsibility of the institution is clear. If individual users make their own copies, however, the institution may well argue that sole responsibility rests with the individual. This has been the position of the Australian universities for some years.

A considerable part of the reprographic reproduction of copyright works which now takes place is done by these employees, such as teachers and librarians and school ancillary staff. Much is also done by those who are neither servants nor agents of the institution which provides the equipment. In other cases, such as the *Williams &*

⁸ COPYRIGHT, 11th year,—No. 8, August 1975, 175.

⁹ Ulmer, *International Copyright After the Paris Revisions*, 19 BULL. CR. SOC. 263 at 275, Item 180 (1972).

Wilkins situation of library staff, copying on request, "the personal individual focus is still present". As Judge Davis said, "individual work needs are dominant in the reproduction programs of the two medical libraries"¹⁰.

The importance of the individual library user is even more apparent when we consider the prospects of library information storage and retrieval systems, especially those which will involve storage of whole works in microform and retrieval and reproduction by individual users. Whether the copyright owner's control in these systems is exercised at input or output, the library's legal responsibility for each act of copying by users remains of fundamental importance in designing schemes for remuneration.

Given all these considerations, "authorization" is a crucial concept: it establishes the responsibility of the institution which provides the copying facility for the acts of the individuals who use it. In other words, authorization is the means by which institutions can be compelled to enter licensing contracts as the representative of individual users.

b. The Uneasy Case for Fair Use

In developing an Australian approach to reprography, we continually come up against the issue of fair use (or "fair dealing" as it is called in the Australian Copyright Act)¹¹. For example, it is apparent from the judgment of Gibbs J. that he thought it a pity that *Moorhouse* did not test the meaning and scope of fair dealing.

In fact, we were most careful not to test fair dealing, and we designed the case (two copies of the same short story) so that it would not arise. The reason for this is that we think that the concept of fair dealing or fair use is an anachronism and that it should be abandoned with respect to reprographic reproduction.

In 1970, the Australian Copyright Council adopted a general policy on facsimile copying which included a statement that the "fair dealing for the purpose of research or private study" provisions of the Australian Copyright Act should be restricted to copying by hand. The statement suggested that the fair dealing provisions "for the purpose of criticism or review" and "for the purpose of reporting news" should remain. I should explain that the same policy recommended that those wishing to copy works should be able to do so, in return for

¹⁰ 180 U.S.P.Q. 49

¹¹ (AUS) Copyright Act 1968-1973, § 40.

payment, without a requirement of obtaining prior permission and without limit on the number of pages copied, although with limits on multiple copying.

The principle of "fair use" is a judicial invention. Its basis is that certain useful purposes can be served, without damage to the author, by allowing part of his work to be used. A reading of the first lecture of Professor Kaplan's *An Unhurried View of Copyright*¹² makes it clear that most cases of fair use have dealt with alleged piracies, where a later work has made use of an earlier, and not with the forms of reproduction which concern us here. As Professor Nimmer puts it,

It is believed that the actual decisions bearing upon fair use, if not always their stated rationale, can best be explained by looking to the central question of whether the defendant's work tends to diminish or prejudice the potential sale of the plaintiff's work. This determination must be made not by comparing the media in which the two works appear, but rather in terms of the function of each such work regardless of media.¹³

The fair use provision of the U.S. Copyright Revision Bill (§ 107) uses a similar approach—by including among the factors to be considered in determining fair use:

(4) the effect of the use upon the potential market for or value of the copyrighted work.

In other words, in the terms of the Stockholm and Paris Acts of the Berne Convention, use can only be "fair" if it "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author"¹⁴. And in the words of the U.C.C., such use must not derogate from a reasonable degree of effective protection.

It is also clear that fair dealing and fair use cannot be defined—"after all is said and done, it must be a matter of impression".¹⁵ The Report of the U.S. Senate committee on the Judiciary on the Revision Bill restates this fact:

¹² B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT*, (1967).

¹³ M. NIMMER, *NIMMER ON COPYRIGHT*, 646.

¹⁴ Article 9(2).

¹⁵ *Hubbard v. Vosper* [1972] 1 AER 1023, at 1027.

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.¹⁶

Finally, in *Moorhouse*, Gibbs J. says that fair dealing is an "abstract concept"¹⁷.

I think that, in the context of reprography, fair use reflects a mistaken view of public interest. The public interest demands that education and research should have full access to copyright work. It does not demand that this access should be free of charge. No other component of the "free flow of information" is expected to work without pay. No one suggests that the teacher or librarian who copies, the Minister whose Department employs them, or the companies who supply the paper and machines should be paid less, or not at all, because educational copying is in the public interest. All others who supply services to schools and libraries do so at full price.

In the international studies of this problem, the 1968 Committee of Experts¹⁸ and the 1973 Working Group on Reprography¹⁹ both recommended that individuals should be free to make single copies for personal use free of charge²⁰. This reflects the view that "if reproductions of this kind were to be made subject to the payment of royalties, the resulting increase of costs would make the task of those engaged in research more difficult and would prevent much work from being successfully completed"²¹. I do not find this argument convincing. As a matter of principle, if research is in the public interest and if, therefore, it is to be subsidized, then it is "the public" who should pay the subsidies, not authors.

In addition, a look at the figures we have suggests that it is wrong. For example, evidence in the *Moorhouse* case suggests that a maximum of two million copy pages of copyright material were copied on the University of New South Wales' self-service photo-

¹⁶ Report No. 93-983, s 117.

¹⁷ (1975) 6 ALR 193, at 200.

¹⁸ Committee of Experts on the Photographic Reproduction of Protected Works, Paris, 1-5 July 1968.

¹⁹ Working Group on Reprographic Reproduction of Works Protected by Copyright, Paris, 2-4 May 1973.

²⁰ See, e.g., Recommendation 2 of the 1973 Working Group.

²¹ *General Report*, 1968 Committee of Experts, para. 10.

copiers in 1973. At a rate of, say, one cent per page (which is of the order of most suggestions around the world) this would result in \$20,000 being paid to authors and publishers. This is a trivial amount in a university budget, far less than the cost of paper and service for the machines. On the evidence in the *Williams & Wilkins* case, one cent per page on journals copied by the National Institutes of Health would give \$9,300 royalties, compared to a photocopying budget of \$86,000, a journals purchasing vote of \$85,000 and a total library budget of \$1.1 million²².

Another problem with fair use is that it gives no certainty to users. One of the main attractions of reprography is the speed and ease of copying. To complement this, a user needs to know how much he may copy. The statements of the doctrine which I've quoted above show that it gives the antithesis of certainty.

Professor Kaplan criticized this aspect of the 1964 U.S. Revision Bill from the user's point of view:

The Revision Bill is reduced to uttering on the subject only the staccato bleat of just the words "fair use". It seems hardly a statesmanlike result to leave a sizable fraction of the population . . . thus uncertainly liable to civil and even criminal liability for acts now as habitual to them as a shave in the morning.²³

With respect, I don't think that the "factors to be considered" of the Bill as it now stands or even the Report of the Judiciary Committee give much more help to users.

To put it mildly, when we look at the possibilities of computer and microform integration systems, fair use seems manifestly out of date. A researcher will be able to have direct access via television and satellite to a data bank with full texts stored on microfiches. A computerized automatic retrieval device will enable search and retrieval of each microfiche. The microfiche will be able to be recorded by a video recorder and reproduced in whatever form is required²⁴. If the user asks how much he may copy, at present he would have to be told "a reasonable amount" or "whatever is fair in the circumstances".

In my opinion, a "fair use" exception for reprography conflicts

²² 180 U.S.P.Q. 49

²³ B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, 102 (1967). See also "an added note", 125-126.

²⁴ Ulmer, *Problems Arising from the Use of Electronic Computers and other Technological Equipment*. WIPO Document B/EC/IX/8; UNESCO Document IGC/XR.1 (1971)/12, 4-5.

with the author's normal exploitation of his work. I don't propose to argue here whether or how much photocopying affects sales of books or journals. I think that copyright owners in the past have been mistaken in allowing themselves to be trapped into having to defend these assertions of detriment. The *Williams & Wilkins* case illustrates how hard it is to argue for or against such assertions.

My argument is that "normal exploitation" does not mean traditional exploitation. The preparatory documents for the Stockholm Conference, which introduced the term, support my view that

all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the author²⁵.

I don't think I need to catalogue all the instances in which the copyright law has altered to allow the author to extend his normal exploitation to cover a new use of his work (or to mention to a U.S. audience the bitter arguments where it has not).

As I see it, the principle is simple: As a result of reprography, the author's work is useful in a new way; he ought to share in the benefits of this new usefulness.

Fair use conflicts with both the economic and practical exploitation of the author's right to reproduce his work by reprographic means. At first glance, the copying by one researcher may seem to be fair but the important thing about modern reprography is that it is often institutionalized and systematic. § 108 (g)(2) of the U.S. Revision Bill recognizes this.

Thus, copying by individual users may be fair, but the realities of reprography compel us to look at the aggregate of all users. The sum of thirty thousand school students' copying, or of their teachers on their behalf, must have a different effect. So must the intensive copying of six hundred first-year university students in one subject. This is economic conflict with the author's rights. Even more important, it seems to me, is that fair use conflicts with the practical exploitation of his rights or, in terms of the U.C.C., derogates from his "effective" protection. In Australia, we have learned that "fair dealing" makes the implementation of a practical scheme for licensing reprography almost impossible.

I have said that the vagueness of the term does a disservice to us-

²⁵ Records of the International Property Conference of Stockholm (1967). WIPO, Geneva 1971, 128. Preparatory Document: S/1 (Berne Convention).

ers. On the other hand, it is a marvellous tool for institutions when they are arguing with the owners of copyright. For years, the Australian Copyright Council has tried to press universities in Australia to begin to recognize the problem of photocopying. One response of the University of New South Wales, quoted in the *Moorhouse* judgment, illustrates how difficult this is: "there seems no reason to doubt that most photocopying in university libraries is within the spirit and meaning of the law".

I fear that American copyright owners will meet a similar response if §§ 107 and 108 of the Revision Bill are enacted in their present form. If they propose a collective license, they will hear "We don't need a licence because everything that takes place in our libraries (or our schools) is fair". The majority of the Court of Claims in *Williams & Wilkins* said the same thing:

... one cannot assume at the start the merit of the plaintiff's position, i.e., that the plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is 'unfair'.²⁶

Fair use conflicts with the practical exploitation of the owner's rights because it is virtually impossible, and certainly prohibitively costly for him to detect what might be infringements and to demonstrate to users through the courts that they are in fact infringing. One reading of *Williams & Wilkins* will make this clear.

We have found that the next argument after "we don't need a license because what we do is fair" is "we'd barely pay you anything because most of what we do is fair".

This is a legitimate response on the part of copying institutions, and it illustrates again one of the practical difficulties of fair use: in any contractual licensing scheme which operates under a "fair use" provision, users will demand the separation of copying which they can do freely from copying for which the owner must be paid. Since fair use "cannot be defined", how can such separation be achieved? If we restate "fair use", as in § 108 (g)(2), as being non-systematic copying, how are we going to separate this, for which no payment is due, from systematic copying, for which the owner has the right to grant licenses?

The only practical way which I can see to overcome this difficulty now is for a contractual license to apply a "fair use discount". For

²⁶ 180 U.S.P.Q. 49

example, a lower rate of payment could be agreed upon, bearing in mind that some of the copies paid for could have been made without payment. Alternatively, a quantitative rule of thumb can be agreed upon in a computerized recording system such as I will describe in a few moments. In this case, the computer program can provide that copying of less than the quantity agreed on will be ignored when assessing payment.

For all of these reasons, we have suggested to the Australian Copyright Law Committee on Reprographic Reproduction, the Franki Committee, that the Copyright Act should be changed to remove the exception of "fair dealing for the purpose of research or private study". As all copying would thus be paid for, we have suggested that the jurisdiction of the Copyright Tribunal (which was set up, largely, to deal with performing rights in music) should be widened to cover reprographic licensing schemes and, in particular, to include the hearing of disputes on the amount of payment.

I realize that we are talking about a sacred cow. But I cannot see any alternative. I think that those who are concerned with authors' rights are going to have to stop paying lip service to fair use and to start to point out that fair use does not work with the new technologies. I would respectfully suggest that one of the questions which the United States' new National Commission on New Technological Uses should consider is the validity and relevance of the fair use assumption and its practical effect, particularly with computer uses.

c. Comprehensiveness

The proponents of schemes for compulsory licensing of reprographic reproduction for certain purposes advocate such schemes because users need comprehensiveness. That is, as well as knowing how much of a work he may copy, a user needs to know exactly to which works any compulsory or voluntary license applies. In other words, users need a blanket scheme.

It seems to me that a voluntary blanket license scheme can now be achieved in Australia under present law. The basis of the scheme is the collective of authors and publishers. The Australian organization, Copyright Agency Limited, was incorporated in 1974. The Agency accepts an exclusive license from the owner of the relevant rights. This enables it to negotiate with, and grant sub-licenses to, any prospective copier. A problem with some works is that the author-publisher contract does not clearly dispose of all the rights involved in reprographic reproduction. In these cases, we are using a tripartite form of license.

The hopes of a blanket voluntary coverage, especially in Australia, which imports many works from other English-speaking countries, rest on an international network similar to the societies for the performing rights in music. We have proposed changes in the legislation for a statutory license to supplement voluntary licensing in order to achieve full blanket cover.

In the absence of a supplementary statutory licence, it now seems possible to achieve complete comprehensiveness by the device of the Agency's granting warranties and indemnities to its licensees. Briefly, this would work by the licensee paying, as agreed, for copying of works within the scheme. For copying of works which are outside the scheme, an amount of payment, assessed on the same terms, will be held in trust for the limitations period of six years. If an owner of copyright of a work outside the scheme makes a claim on the Agency or the institution, he would be offered this amount of payment. The Agency would undertake to indemnify the institution for successful claims beyond the amount held in trust. It now appears that a mixture of financial guarantees, insurance and interest on the trust funds will be used to support the indemnity.

Although the thrust of my argument is that reprographic reproduction should be freed from restriction in return for payment to authors and publishers, it seems to me that there may be some rare circumstances where the balance of interests may be in favor of restriction of reproduction: where the private detriment if large scale copying is allowed far outweighs the public benefit. In these cases, authors and publishers should be able to withhold their works from voluntary and statutory licensing. The most likely cases here are where an author's moral rights may be infringed and where copyright material is particularly vulnerable to reprography, such as classroom tests and worksheets.

In the interests of certainty for users, I think that those who wish to withhold their works in these cases should accept the onus of communicating this to users. The Australian Copyright Council's submission to the Franki Committee proposed that there should be a prescribed form of notice and manner of giving notice. Libraries, for example, could maintain accurate lists of works under notice, and users could know at a glance whether the work they wished to copy was in this category.

d. Methods of Assessment and Distribution

It may seem that I've come a long way from Frank Moorhouse and *The Americans, Baby*, but I would like to stress now that, for me, a

scheme which hopes to achieve a solution to the problem of copyright and reprography has no validity unless, by whatever mechanism, that author is paid whenever that book is copied. Having said that, it is incumbent on me to demonstrate that a simple method can be devised which will achieve the ideal of distribution on the basis of use, work by work—without requiring all the entitlement to be spent on administration.

The most likely solution seems to lie with computer technology. It seems that the best method is to record copying data in computer-readable form. There are proposals for computer-readable identification to be printed on the journal or book and for the copying machine itself to record amounts of copying automatically. These schemes do not seem to be practicable yet. I suggest that there is a simple method which is feasible now: using computer-readable cards (such as those for IBM's optical mark reader), international standard book and serial numbers and the labor of the user who wants the copy.

Most copying which takes place today, at least in Australia, is accompanied by some form of written request. Examples of this are, inter-library loans, copying by public, commercial and educational libraries at the request of readers, multiple copying by school and university ancillary staff on behalf of teachers, and copying in any establishment where controls are kept on the quantity (and thus the cost) of copying. In all of these cases, it could simply be made a condition of acceding to the request that an optical mark reader card, pre-printed to identify the institution, be completed with just this information: ISBN or ISSN, number of pages, number of multiples. A user will take a few seconds to complete each card. Of course, the cards could be printed to incorporate other information required by the copying institution or even to embody the whole request. These cards can be collected regularly by the licensing agency, machine read, and the resulting aggregate totals of copying per work can be compared by the computer with the agency's lists of works. The computer can bill the copying institution, calculate the amounts due in respect of each work, deduct from this amount a percentage for shared administrative expenses, and print and address cheques to authors and publishers in the proportions they instruct the agency.

It is a relatively simple matter to build into this system the accountability and checking mechanisms which are needed. For example, the last digit of the international standard numbers is a check digit which will detect errors in transcription. Gross copying totals on each machine can be compared with the aggregate from the cards.

The computer can be instructed to reject any cards outside a normal range of expected copy pages.

Not all journals and books will have ISSN's or ISBN's. U.K. statistics suggest that by 1980, 91% of books for lending in U.K. libraries will have ISBN's printed in them²⁷. I do not have any comparable data for journals. In many cases, the Library of Congress number will be able to be used. Where there is no unique number, the work may have to be identified in full, with greater processing costs as a result.

It may be necessary to institute varying levels of supervision, education and random checking of user's performance in filling in cards. I think it is fair to assume that users can be persuaded that it is in their interest to fill in the cards accurately—after all, they are being permitted to copy what they need. It is also fair to assume that users will obey the law if they can see that it is not unreasonably obstructing them and that it is ensuring a fair return to authors. I have no doubt that copyright owners will prefer to accept these assumptions rather than to have to assume, as they do now, that what users are doing is "fair".

How much will this approach cost? I exclude here the costs of establishing the agency's list of works. Very roughly, we think that the whole costs of the cards and their printing, optical mark reading, processing and printing of invoices and cheques will be *of the order of* one cent Australian per card. One card will be required for each copying instance, whether it be five copy pages or fifty copies each of twenty pages—a total of a thousand copy pages.

Of course, these figures are rough, but this is my understanding of the advice we have received from the computer experts.

It appears further that methods of statistical sampling may enable collecting agencies to achieve acceptable levels of accuracy at reduced cost. The sample may be selected from a number of institutions, or from one of a bank of machines, or over time. There will be different levels of variance or homogeneity or copying between different types of copying. For example, copying in a medical research institution may be more homogeneous than it is in a university library.

There is no empirical evidence of the application of sampling to this problem in Australia. Calculations based on assumptions of variance levels do support this hope.

²⁷ Public Lending Right: *An Account of an Investigation of Technical and Cost Aspects*. London, H.M.S.O. 1975, 39.

Conclusion

It seems clear that we cannot look for much international help in solving these problems and that an international approach must wait upon national solutions. It also seems to me that national solutions cannot come from legislators operating in a vacuum.

We can only arrive at a fair balance of interests, guaranteeing access to users and fairness to authors, if we build upon the experience and the trials and errors of those who are working on the problems at the practical level. It is as one of those that I have spoken tonight.

256. CAN COPYRIGHT LAW EFFECTIVELY PROMOTE PROGRESS IN THE VISUAL ARTS?*

By ROBERT M. KUNSTADT**

In the United States, the ultimate authority for the creation of a statutory federal copyright system is found in the Constitution, which grants the Congress "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."¹ This paper will attempt to assess the extent to which our system of copyright law is capable of fulfilling its constitutional mandate of promoting progress in the visual arts.²

Fundamental assumptions underlying our copyright system; basic limitations of copyright law; legal rights complementary to copyright; and the specific rights of artists under the current and proposed United States copyright statute, as well as international treaties, will be considered in formulating conclusions and suggestions for increasing copyright law's contribution to progress in the visual arts.

I. *Exploring Basic Assumptions Regarding Copyright and the Arts*

The Measurement of Progress

The first assumption tacitly underlying the view that Congress can effectively promote progress in the visual arts through the passage of suitable copyright legislation is the assumption that progress in the visual arts is sufficiently identifiable so as to enable the drafting of a statute capable of encouraging *progress*. But in the visual arts, who can say which works represent genuine progress, and which are either det-

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¹ U. S. CONST. art. I, §8.

² As used herein, the term "visual arts" refers to painting, sculpture, and graphics. However, traditional easel painting will be taken as a paradigm for purposes of analysis. Since sculpture and graphics are often produced in multiple copies by the artist, the principles of copyright law applicable to them may differ from the principles applicable to oil and acrylic paintings, of which only one, original copy is generally created.

rimental to the progress of art, or neutral?³ Indeed, the courts are avowedly reluctant to invade the province of the art critic by making judgments as to the creativity or originality of a work of art.⁴

Since we are either unable or reluctant to directly measure progress in the visual arts, how can we determine whether our copyright system is adequately promoting it? Perhaps progress in the arts can be *indirectly* measured by measuring the *economic security* which practitioners of the arts enjoy. Just as we measure the health of the automobile industry in terms of profits, so, perhaps, can we measure the health of the art industry. By adopting value-neutral dollars as the measure of progress in the visual arts, perhaps we can avoid making artistic judgments regarding the quality of the work being produced.

The Link Between Profits and Progress

But will maximizing economic security for artists maximize progress in the arts? Perhaps the availability of monetary profit opportunities in the arts will act as a spur or incentive to the creation of works of art, and progress in the arts will flow from this outpouring of new works.⁵ Such an assumption underlies our understanding of patent law; we assume that the availability of monopoly profits will encourage the commitment of time and money to technological research and developments effort, and that the increased magnitude of these efforts will ensure the speedy achievement of technological progress.⁶

³ Tom Wolfe, for example, has recently satirized the trends in contemporary painting as comic departures from the realm of art into the realm of literature. Wolfe, *The Painted Word—What you see is what they say*, HARPER'S 57, 92 (April, 1975), criticized in Wilson, *Wolfe Mau-Maus the Modernists*, Los Angeles Times, July 13, 1975, Book Review Section, at 1.

⁴ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (Holmes, J.).

⁵ Herman Finkelstein, former General Counsel for the American Society of Composers, Authors, and Publishers (ASCAP) has testified that "[b]ut for performance royalties, there would be little encouragement today for the great number of men and women who have the talent to write our nation's music. . . ." Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, at 339 (1967).

⁶ See, e.g., Oppenheim, *A New Approach to Evaluation of the American Patent System*, 33 J.P.O.S. 555, 567 (1951). C. Marshall Dann, Commissioner of the U.S. Patent and Trademark Office, maintains that "[t]he more important the technological goal, whether it be energy, the environment, medicine, or anything else, the more important become the incentives which patents provide." Los Angeles Times, March 4, 1975, § III, at 10.

Such an assumption, applied to the creation of works of art, may be questioned on two grounds. First, we may inquire whether wealth is in fact a *sine qua non* to the creation of works of art. If a struggling artist of moderate means is a better artist than a wealthy, complacent one, then excessive promotion of economic security for artists may *retard* progress in the arts.⁷ However, the excessively wealthy artist is probably a rarity in contemporary America.

A more serious danger is that the domination of production by market forces, though perhaps desirable with respect to the production of goods of the type encouraged by the patent system, may skew artistic production in ways detrimental to artistic progress.⁸ A system of direct grants to artists and arts institutions, to be spent as they see fit, may therefore be preferable to a copyright system as a means of promoting artistic progress.⁹

Assuming, however, that these speculative objections can be overcome, and that assuring economic security for artists through copyright will in fact promote the visual arts, to what extent can and does copyright promote that security?

II. *Fundamental Limitations on Copyright Protection*

Fundamental limitations on the extent of copyright protection are of two basic types: (1) limitations inhering in the nature of copyright, which effectively distinguish it from other types of protection for

⁷ Consider PLATO, *REPUBLIC*, Book IV, *421e: "From both causes, then, poverty and wealth, the products of the arts deteriorate, and so do the artisans? So it appears."

⁸ Compare, for example, the programming available on commercial television with that offered on public television. See N. JOHNSON, *HOW TO TALK BACK TO YOUR TELEVISION SET* 16-20, 162-63 (1970). Of course, not everyone laments commercialization of the arts. See Finkelstein, *The Composer and the Public Interest—Regulation of Performing Rights Societies*, 19 *LAW AND CONTEMP. PROB.* 275, 279 (1954), applauding the growth of music as a lucrative advertising tool.

⁹ In California, a debate has taken place between those favoring direct state grants to arts institutions, and those favoring grants to the public to be spent as the public sees fit. The former alternative is said to foster elitism; the latter, to invite catering to the "lowest common denominator" in the audience's taste. See *Los Angeles Times*, Feb. 16, 1975, §VI, at 5 (three articles expressing opposing viewpoints). One California artist has actually filed suit in San Francisco's Superior Court, alleging that State Arts Commission grants unconstitutionally establish a privileged class of artists and threaten artistic freedom. *Los Angeles Times*, May 25, 1975, Calendar Section, at 67.

thoughts and ideas; and (2) extrinsic limitations due to conflicts between copyright and other important social goals.

Intrinsic Limitations

The first intrinsic limitation on copyright is that it protects only expression, not ideas.¹⁰ In this respect copyright is distinguishable from patent law, which does not clearly distinguish between an idea and its expression.¹¹

Although tests have been formulated to differentiate unprotected ideas from protected expression in literary works,¹² such tests are difficult to apply to works of art. Abstract works, especially, defy separation into "idea" and "expression" components. Analyzing a work by Jackson Pollock, for example, one could decide that the protected expression consists only of the work's unique arrangement of colors and lines, and that the idea of using a dripped paint technique is not protected by copyright; or, alternatively, that the work's unprotected idea is the use of controlled randomness in painting, and that the dripped paint technique used to express this idea constitutes protected expression.

The extent of protection enjoyed will vary considerably depending upon the courts' views on the scope of the term "expression" as applied to an art work. Thus, to a considerable extent, even an artist possessing a valid copyright can not be certain of the scope of the right he enjoys.

The second intrinsic limitation of copyright is that, as its name implies, it prohibits only copying, not independent creation.¹³ Therefore, an artist holding a valid copyright will not be protected from the possibility of another artist's independent creation and sale of a substantially similar work.

As a practical matter, an artist alleging copyright infringement can make out a *prima facie* case of copying merely by proving the elements of *access* to the protected work by the infringer, and *substan-*

¹⁰ *Holmes v. Hurst*, 174 U.S. 82, 86 (1898); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.).

¹¹ Anyone who "makes, uses, or sells any patented invention" is an infringer. 35 U.S.C. §271(a) (1970). The scope of the patented invention is defined by the specification filed with the patent application, which must be "full, clear, concise, and exact." 35 U.S.C.A. §112 (Supp. 1975).

¹² *E.g.*, *Nichols v. Universal Pictures Corp.*, 45 F.2d at 121.

¹³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. at 249; *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951); *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914).

tial similarity of the infringing work to the protected work.¹⁴ However, judging the substantial similarity, or lack thereof, of two works of art is probably no easier than making judgments regarding creativity, which the courts themselves have confessed reluctance to make.¹⁵

Moreover, in many cases the element of access may either be lacking, or difficult to prove. If an artist never exhibits a work, access to that work by an infringer will be lacking (absent a showing of breaking and entering, or other "dirty tricks"). Therefore, a work which an artist keeps private, though protected by common law copyright, and thus protected from *copying*, enjoys a type of protection which is of little value, since no one can *copy* a work he has not seen.

On the other hand, if an artist conducts a nationwide publicity campaign to promote his image, and distributes millions of copyrighted photographs of his paintings as part of his campaign, then the element of access will easily be proven, and the protection against copying afforded by copyright law will possess substantial economic value.

Consider a further, intermediate situation: an artist has exhibited a painting only a few times, in small, local exhibitions. Here, sufficient public access has occurred to provide opportunities to copy, but the public access has not been so widespread as to easily support a finding of access by, for example, a greeting card publisher located in another city. In this situation, the value of the artist's copyright will depend upon the artist's ability to prove copying, making the value of the copyright speculative, and dependent upon a favorable finding at trial.¹⁶ In summary, the less well known is an artist and his work, the greater the artist's burden of proving the degree of access needed to support a finding of copying, and therefore the less is the value of the artist's copyright.

Extrinsic Limitations

Finally, extrinsic considerations of social policy may act as limitations upon copyright. The First Amendment may protect speech with

¹⁴ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (Frank, J.).

¹⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. at 251-52.

¹⁶ Consider, for example, the conflicting evidence on the issue of copying reviewed by the appeals court in *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315, 316-17 (1st Cir. 1967) (unfair competition cause of action for misappropriation of a character and idea). Although DeCosta claimed to have distributed 250,000 business cards depicting the ideas in issue, the CBS writers nevertheless claimed that they had independently originated the ideas. The jury, however, believed DeCosta.

significant news value against charges of copyright infringement.¹⁷ In a few cases, the latest work of a famous artist, even if displayed with a valid copyright notice, may be of such public importance as to immunize news photographers from copyright liability.¹⁸

A second extrinsic limitation on copyright is the doctrine of fair use, which permits copying of protected works in limited academic, scholarly, and public affairs reporting contexts.¹⁹ As applied to works of art, the fair use doctrine may permit art teachers, for example, to show their classes slides of protected art works without liability for copyright infringement.²⁰

III. *Rights of the Artist Complementary to Copyright*

If a work of art does not enjoy copyright protection (either because the copyright term has expired,²¹ or because copyright has been lost through failure to observe the requisite formalities of notice²²), what other forms of protection will nevertheless provide an economic return to the artist? Inquiry into the availability of alternative, non-copyright forms of protection is essential to an analysis of the marginal contribution of copyright to the artist's economic security; if these alternative forms of protection suffice to ensure a substantial economic return to the artist, then copyright law does not effectively add to the quantum of protection available. Such a finding might explain artists' noticeable inattention to the formalities necessary to secure a valid copyright under the current statute:²³ if copyright protec-

¹⁷ Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1196-1204 (1970).

¹⁸ Perhaps a work expressing a strong viewpoint on important social issues, such as Picasso's "Guernica," would fall within this unprotected category. See Nimmer, *supra* n. 17, at 1197.

¹⁹ *The Williams & Wilkins Co. v. The United States*, 95 S.Ct. 1344 (1975); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D. N.Y. 1968); see Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 UCLA L. REV. 1052 (1975).

²⁰ *But see* *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (reproduction of 48 copies of a song and their distribution to high school students and a church choir not a fair use).

²¹ 17 U.S.C. §24 (1970).

²² 17 U.S.C. §10 (1970); 17 U.S.C. §19 (Supp. III, 1973).

²³ Several writers have criticized artists for their common failure to place statutory copyright notices on their works. *E.g.*, Associated Councils of the Arts, *The Ass'n of the Bar of the City of New York, & Volunteer Lawyers for the Arts, THE VISUAL ARTIST AND THE LAW* 3 (1971); Carroll, *Statutory Copyright—A Valuable Right for the Visual Artist*, 20 BULL. CR. SOC. 316, 331 (Item 252, 1973); Note, *Protection of the Artist and Sculptor Under the Law of*

tion is of little marginal value, why should artists mar their works with the required copyright notices?²⁴

Protection Against Forgery and Misrepresentation

The most elementary protection afforded the artist consists of legal and customary professional sanctions against art forgery and fraud. A copier who attempts to pass off his own work as that of another artist will be subject to criminal sanctions for art forgery,²⁵ and civilly liable to the original artist for unfair competition.²⁶ Moreover, such a plagiarist will be subject to severe, reputation-injuring ostracism within the art community, wholly apart from the legal consequences of his acts.²⁷

Copyrights, 22 U. PITT. L. REV. 709 (1961). One writer has even conducted an empirical survey among artists; 71.8% of those questioned never placed a copyright notice on their works. Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 BULL. CR. SOC. 242, Item 241 at 245 (1975).

²⁴ Judge Friendly has noted the artist's "dilemma of either defacing the work of art with a plainly visible notice or losing copyright protection." Scherr v. Universal Match Corp., 417 F.2d 497, 503 (2d Cir. 1969) (dissenting opinion). Carroll, however, argues that "since artists generally put their name or initials on the face of their painting [sic] anyway, certainly the addition of the symbol © would not be a substantial disfigurement of the painting." Carroll, *supra* n. 23, at 334. Judge Friendly's position would seem to be the better view: the copyright notice is usually offensive and visually distracting in the context of a carefully arranged artistic composition; its use, moreover, implies an unseemly concern for monetary profit, and a lack of faith in the honesty of viewers as security against unauthorized copying. See Sheehan, *supra* n. 23, at 255-61.

²⁵ E.g., CAL. PENAL CODE §484(a) (West 1972); N.Y. GEN. BUS. L. §§225-26 (McKinney 1974); see C.J.S. False Pretenses §6. Whether the work copied is copyrighted or in the public domain is of course immaterial to a finding of criminal fraud under state law, although federal copyright law also provides criminal penalties for wilful copyright infringement for profit. 17 U.S.C. §104 (1970).

²⁶ See Geisel v. Poynter Products, Inc., 295 F. Supp. 331, 351-55 (S.D. N.Y. 1968) (toy manufacturer restrained from using the name "Dr. Seuss" so as to mislead the public regarding Seuss's participation in or authorization of the manufacture of dolls).

²⁷ In FitzGerald v. Hopkins, 144 U.S.P.Q. 771, 774-75 (Wash. Sup.Ct. 1965) (common law copyright action with a counterclaim for slander) the effects of a charge of plagiarism on an artist's reputation were emphatically described:

We find then that when the defendant Hopkins gets his master's degree in fine arts and sculpture at the University of Washington he is confronted with a future where he is condemned in the art community by

But if a copier copies the work of another, signing either his own name to the work, or copying the name of the original artist but appending his own name, will the copier be subject to liability? The Supreme Court has effectively drawn a distinction between misrepresentation and misappropriation: while state law can constitutionally prohibit acts of "palming-off" or *misrepresentation* related to unpatented and uncopyrighted ideas or works, federal law constitutionally pre-empts state law insofar as state law attempts to prevent mere *appropriation* of ideas and works within a category capable of protection under federal law.²⁸

Applying this rule of federal pre-emption, one can differentiate between art forgery, which as a form of misrepresentation can be prohibited by state law regardless of the public domain status of the work being forged, and copying without misrepresentation, which can be viewed as mere appropriation of another's artistic ideas and expression, permissible absent a valid copyright in the work being copied. Thus, if a copier copies Rembrandt's "The Night Watch", signs it "Rembrandt", and sells it as an original, he can be punished for art forgery; but if he signs it with his own name and sells it, Rembrandt, were he alive today, could not constitutionally recover for the *appropriation* of his public domain work.

However, the copier has engaged in *misrepresentation* even in the latter case, assuming that the buyer reasonably believed that he was purchasing an original oil by the copier, and not a copy of a work by another. In this respect oil paintings are unlike the lighting fixtures involved in the leading federal pre-emption cases. While a consumer may not care whether his lighting fixture was originally designed by Compco or by Day-Brite, so long as the design of the fixture is identical in either case, a purchaser of fine art is often interested in investing in the creative output of a particular artist,²⁹ and therefore will

the foremost sculptor in the Northwest as being a plagiarist. The architects know it, the art community knows it. . . .

The Court is of the opinion that in the light of the testimony the defendant has been damaged in the sum of \$15,000.

On appeal, the trial court judgment in favor of Hopkins' defamation counterclaim was affirmed, although the amount of damages was found excessive, and reduced to \$7,500. *FitzGerald v. Hopkins*, 70 Wash.2d 924 (1967).

²⁸ See *Goldstein v. California*, 412 U.S. 546 (1973); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); M. NIMMER, NIMMER ON COPYRIGHT §1 (1974) [hereinafter cited as NIMMER].

²⁹ C. GOODMAN, *MARKETING ART* 17-18 (1972); R. H. Rush, *ART AS AN INVESTMENT* 386-402 (1962).

want to know that the artist whose signature appears on a painting was *solely* responsible for its creation. Copiers of fine art, therefore, should disclose to purchasers, by means of labels and in their advertisements and bills of sale, that their work is "a hand-painted copy of a great master," or "a hand-painted copy of a famous work of modern art." In any case, a state law requiring such disclosure³⁰ would not be invalid under the federal pre-emption doctrine, since it would be punishing misrepresentation, not mere appropriation.

Protection Against Copying from Reproductions

A second alternative to copyright in a work of art is the availability of copyright in reproductions of that work.³¹ Strictly speaking, this is not a *non-copyright* alternative, since absent a copyright system there could be no copyright in reproductions of works of art. Nevertheless, when the underlying work itself has entered the public domain, the right to copy a reproduction of that work may still be protected. This is a necessary consequence of the unavoidable physical, and to an extent metaphysical, fact that an original art work inheres in its physical embodiment in a very different way than do works of literature or music.

Literary and musical works are composed in *symbolic* notation; the work of creative authorship inheres in formulating the ideas underlying the symbols, and reducing them to correct symbolic form. After the work has been reduced to verbal or musical notation, multiple copies of the symbols can be printed, each copy as good as its fellows in point of musical or literary genius.³² The type face, color of ink, paper, or pagination employed may reflect on the skills of the printer, but they neither add to nor detract from the skills of the author or composer.

However, at least insofar as traditional easel painting is considered, the artistic genius is fully manifest only in the original canvas; hand-painted or photographic copies can not, given current skills and technology, create reproductions artistically comparable to the origi-

³⁰ Cf. CAL. CIV. CODE §§1740-45 (West, 1975 Supp.); ILL. ANN. STAT's, S.H.A. ch. 121 1/2, §§361-69 (West, 1975 Supp.) (statutes requiring that pertinent data be disclosed to purchasers of fine prints).

³¹ 17 U.S.C. §5(h) (1970).

³² A non-unique copy of this nature is termed an *exemplaire* in the French text of the Universal Copyright Convention. A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION 70 (3d ed. 1968) [hereinafter cited as BOGSCH].

nal.³³ Since each reproduction of a work of art requires the exercise of creative judgment to produce, and is noticeably different from the original, the reproduction itself is entitled to copyright as a derivative work; even if the original is in the public domain, the reproduction, insofar as it differs from the original, is entitled to copyright.³⁴

Availability of copyright in a reproduction adds substantially to the bundle of rights available to the artist. Even if a work is in the public domain, provided that its owner can control the ability of others to view and photograph the work, the owner can monopolize the exploitation of the work by means of copyright in its reproductions. If an artist does not wish to mar his original work by affixing a copyright notice to it (a condition of securing copyright if the work itself is to be published),³⁵ he can nevertheless sell photographic or lithographic copies of the work, and they will be protected so long as the requisite notice is affixed to them.

But when the statutory copyright term of the reproductions expires, will the artist be able to claim a new copyright in the underlying original work, or in new copies made from a new photographic negative? Insofar as the new photographs and the original work contain distinguishable artistic elements not contained in the old photographs, and these elements are therefore being revealed for the first time, a copyright on these new elements alone would be available.³⁶

However, even if copyright for reproductions were not available, the practical difficulties in accurately reproducing a work of art might make photographic copying from reproductions commercially impractical. A copy of a copy, being twice removed from the original, will

³³ BOGSCH, at 71; Keppler, *How to Photograph Your Art*, AMERICAN ARTIST 52, 55 (July, 1975). A copy of this nature is termed a *copie* in the French text of the Universal Copyright Convention. BOGSCH, at 70.

³⁴ Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d at 104-05.

³⁵ 17 U.S.C. §10 (1970).

³⁶ See Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d at 104-05. For example, publication of black and white photographs of a painting surely could not effect publication of the painting's color scheme; when the black and white photographs entered the public domain, copying of the underlying painting's color scheme would still be prohibited by common law copyright. However, the entrance of a sculptural maquette into the public domain has been held to invalidate a subsequently claimed copyright in a monumental copy of the maquette, as being a "mere copy, albeit on a grand scale, of the maquette, a work already in the public domain." Letter Edged in Black Press v. Pub. Bld'g Com'n of Chicago, 320 F. Supp. 1303 (N.D. Ill. 1970). But see Alva Studios v. Winniger, 177 F. Supp. 265 (S.D. N.Y. 1959) (reduced scale copy of public domain sculpture shows sufficient originality to support claimed copyright as a reproduction of a work of art).

not compare favorably in quality to a reproduction made directly from an original. For this reason, such second generation reproductions may not be commercially competitive.³⁷ But if it were possible to develop a substantial market for such inexpensive, low-quality copies,³⁸ then the need for copyright protection for the first generation reproduction would become pressing.

Property and Contract Rights

Finally, property and contract rights in the physical work itself can serve as a substitute for copyright protection. Since in many cases only one original of an art work exists, the owner of the property rights in that work can restrict public access to it, or can condition public access upon promises to refrain from copying. The public can be admitted to an art exhibit, for example, only on condition that no photographs are taken.

If an individual has promised not to copy, then the artist could enforce that promise against him; his admission to view the work would serve as consideration flowing from the artist. But if the viewer does make a copy and sells it to a third person, will the rights of the third person to reproduce the copy be affected by the existence of a contract between the artist and the breaching viewer? Since the third party is not in privity of contract with the artist, contract liability is not present.³⁹ Nor does a cause of action in tort for interference with contractual relations exist, so long as the third party has "merely reaped the advantages of the broken contract after the contracting party has

³⁷ Fine Arts 260, a division of Book-of-the-Month Club, Inc., which markets limited edition graphics and sculptures, recently sent this writer an uncopyrighted advertising brochure containing color photographs of works offered for sale. Since the attorneys and executives of such a large organization are presumably aware that forfeiture of copyright will result from the distribution of multiple reproductions without notice of copyright, one can only assume that they do not consider unauthorized second generation reproductions likely to pose a threat of substantial competitive harm.

³⁸ In the recording industry, for example, sales by tape "pirates" pose a substantial threat of harm to legitimate companies; evidently, the inferior quality of the pirated tapes does not substantially impair their saleability in the popular music market. See, e.g., *Capitol Records, Inc. v. Erickson*, 2 Cal. App.3d 526, 82 Cal. Rptr. 798 (C.A. 2 1969).

³⁹ See *Van Veen v. Franklin Knitting Mills, Inc.*, 145 Misc. 451, 260 N.Y. Supp. 163 (Sup. Ct. 1932) (agreement between owner of a painting and art magazine that magazine has no power to license further reproductions not binding on members of the public unaware of the agreement).

withdrawn from it on his own motion."⁴⁰ If an artist is to control reproductions of his work by such innocent third parties, he must therefore rely upon copyright law.

Alternatively, the artist can exploit the property rights in his work by means of suitable terms in contracts with purchasers. One contract of this type, drafted by attorney Robert Projansky,⁴¹ is typical; it provides, among other terms, for payments to the artist upon subsequent resale of his work. However, such contracts between an artist and a purchaser of his work, like contracts between the artist and viewers of his work, may be difficult to enforce when sought to be applied to subsequent, third-party purchasers not in privity of contract with the artist.⁴²

In summary, we have seen that even absent copyright in his original work an artist will enjoy valuable protection against forgery, fraud, and copying from his copyrighted reproductions, and will be able to extract contractual promises based upon his control of the physical property interest in his work. However, in the absence of privity of contract, an artist cannot prevent the reproduction of copies made from his public domain works, assuming that all the relevant facts concerning authorship are disclosed by the copier to purchasers. To fill this gap, the artist must rely upon copyright law.

IV. Copyright Law's Contribution to the Artist's Economic Security: A Hypothetical Case

In order to facilitate inquiry into copyright law's contribution to the artist's economic security, we can consider a hypothetical fact situation replicating typical practices of American artists in exhibiting their work.⁴³

⁴⁰ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 934 (4th ed. 1971).

⁴¹ The Projansky contract is reproduced in F. FELDMAN AND S. WEIL, *LEGAL AND BUSINESS PROBLEMS OF ARTISTS, ART GALLERIES, AND MUSEUMS* 498-500 (1973). Attorneys using this contract should carefully consider the applicability of the Rule Against Perpetuities to the provisions regarding rights of the artist's surviving spouse, which succumb to the "Unborn Widow" trap. See Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 660 (1938); *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 992 (1965).

⁴² Carroll, *supra* n. 23, at 327-30.

⁴³ This hypothetical case is designed both to highlight areas of interest in copyright law, and to provide a reasonably realistic model of an actual art marketing situation, based upon this writer's experience. Compare the somewhat different sales techniques recommended in K. HARRIS, *HOW TO MAKE A LIVING AS A PAINTER* 74-83 (1973) (post prices near the works; distribute circulars containing photographic reproductions).

Assume that *A*, an artist, exhibits several of his recent paintings in the *G* Gallery. *G* Gallery holds the works on consignment. The public has been invited to the showing by means of newspaper advertisements, and invitations have been sent to a large number of persons on a mailing list of friends, prior customers, and wealthy individuals likely to purchase art. No copyright notices appear anywhere on the paintings, front or rear, although *A* has signed each painting with the initial "A" in the lower right hand corner. No signs are posted prohibiting photography. The gallery is attended by one sales clerk sitting in the foyer. The clerk generally does not accompany patrons into the gallery area; most patrons view the works in private. If a patron is interested in purchasing a work, he will approach the clerk, who will quote a price from a price list prepared by the *G* Gallery in consultation with *A*.

Given these facts, we may inquire (1) whether *A* possesses a United States common law or statutory copyright in the works exhibited; (2) whether *A* enjoys copyright in foreign countries under the Universal Copyright Convention; and (3) whether the proposed revisions of the federal copyright statute⁴⁴ will materially expand the scope of protection available to *A* in these circumstances.

A's Rights Under Current United States Law

Under current law, two types of copyright exist: common law copyright under state law, which protects a work from its creation until the time of its publication;⁴⁵ and federal statutory copyright, which protects the work for a maximum term of fifty-six years from its publication.⁴⁶ However, in order to secure statutory copyright, all published copies of the work must bear the requisite copyright notice.⁴⁷ Therefore, if copies of the work are published without notice, all copyright is forfeited; neither common law copyright nor statutory copyright can be claimed in any past or future copies of the work.⁴⁸

In order to determine whether copyright exists in our hypothetical exhibited works, we must determine whether the works have been

⁴⁴ S. 22, 94th Cong., 1st Sess. (1975); H.R. 2223, 94th Cong., 1st Sess. (1975) [Both bills are identical; they are hereinafter cited as "1975 Bill."].

⁴⁵ 17 U.S.C. §2 (1970); *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (1834).

⁴⁶ 17 U.S.C. §24 (1970).

⁴⁷ 17 U.S.C. §10 (1970). Statutory copyright can also be acquired in works "not reproduced for sale" by compliance with the formalities of registration and deposit of copies under 17 U.S.C. §12 (1970).

⁴⁸ *Letter Edged in Black Press v. Pub. Bldg. Com'n of Chicago*, 320 F. Supp. at 1308-09.

published without notice affixed. This task is difficult, due to an absence of unequivocal judicial authority on the question of whether the public exhibition of a work of art will effect its publication.⁴⁹ We must therefore consider several alternative definitions of publication.

*American Tobacco Co. v. Werckmeister*⁵⁰ stands as the only Supreme Court authority on the question of the publication of a work of art by exhibition. The Court first stated a general rule:

[O]ne of the occasions that does not amount to a general publication [is] the exhibition of a work of art at a public exhibition where there are by-laws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege.⁵¹

Then, the Court noted that at the exhibition in issue, officers were present to rigidly enforce rules against copying.⁵² Finally, the Court expressly reserved judgment on situations beyond the scope of the case in issue:

We do not mean to say that the public exhibition of a painting or statue, where all might see and clearly copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying.⁵³

Several lower courts, however, have viewed the *Werckmeister* court's reservation of judgment as an implication that absent enforced restrictions on copying, publication would result.⁵⁴ However, these lower court decisions are at best equivocal authority, since in some cases alternative theories can be offered to explain the results reached,⁵⁵ and in others the reasoning used is dubious.⁵⁶

⁴⁹ NIMMER, at 213; Cary, *The Quiet Revolution in Copyright: The End of the "Publication" Concept*, 35 GEO. WASH. L. REV. 652, 660 (1967).

⁵⁰ 207 U.S. 284 (1907).

⁵¹ *Id.*, at 300.

⁵² *Id.*

⁵³ *Id.* [emphasis added].

⁵⁴ The cases are discussed in Jonakait, *Do Art Exhibitions Destiny Common-law Copyright in Works of Art?*, 19 ASCAP COP. L. SYMP. 81 (1971) [hereinafter cited as "Jonakait"].

⁵⁵ E.g., *Scherr v. Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969) (copyright in work by a government employee belongs to the government);

To read *Werckmeister* as implying that an exhibition without enforced restrictions on copying will effect a divestive publication is to effectively analogize common law copyright to a right in a trade secret, which will enjoy legal protection only so long as the owner makes diligent efforts to keep it secret, either by hiding it from others, or by revealing to others on condition that they keep the secret.⁵⁷

Recall that even absent copyright protection, the owner of an art work can contractually condition the right of others to view it upon their promise not to copy. However, such a promise may not effectively bind third-party purchasers of the copy. Therefore, the effect of the *Werckmeister* rule, if interpreted as requiring actively enforced restrictions on copying in order to preserve common law copyright, is merely to allow the artist to prevent innocent purchasers of copies, made in violation of actively enforced restrictions against copying at an exhibition, from exploiting such pirated copies.⁵⁸

Applying this interpretation of *Werckmeister* to *A*'s hypothetical exhibition, we must find that *A* has forfeited all copyright in his works, since they have been freely exhibited to the public without either actively enforced restrictions on copying, or statutory notices of copyright. One sales clerk, who does not stay in the same room in which the works are displayed, probably could not be considered effective in enforcing restrictions on copying, even if such restrictions, though not here express, were found implied in the circumstances.

At least one commentator, however, has argued for a definition of publication more favorable to artists. Professor Nimmer maintains that as a general rule, "the unrestricted sale or other public disposition of a work of art, or of a tangible copy thereof, results in its publication."⁵⁹ However, he urges that "exhibition without actual or offered

Grandma Moses Properties v. This Week Magazine, 117 F. Supp. 348 (S.D. N.Y. 1953) (sale of a work of art transfers copyright to the purchaser); *Morton v. Raphael*, 334 Ill. App. 399, 79 N.E.2d 522 (1948) (individual commissioning a work, not the artist, owns the work's copyright). See generally Cohen, *An Artist Sells a Painting: The Courts Go Astray*, 5 UCLA L. REV. 235 (1958).

⁵⁶ E.g., *Carns v. Keefe Bros.*, 242 F. Rptr. 745 (D. Mont. 1917) (Bourquin, J.), criticized in Jonakait, at 102-03. Judge Bourquin's humorous style, while making interesting reading, tends to undercut the opinion's authority as precedent.

⁵⁷ *E.I. duPont deNemours & Co., Inc. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), cert. denied 400 U.S. 1024 (1971).

⁵⁸ Perhaps the rule would also benefit artists by undercutting public policy objections, based on contract of adhesion principles, to enforcement of contractual limitations on copying at public exhibitions.

⁵⁹ NIMMER §54.

public sale or other disposition of tangible copies" should not be taken to constitute publication.⁶⁰ By implication, a public offer of sale (even if actual sale does not result) would work a publication.⁶¹ If an actual sale has occurred, Professor Nimmer would conclude that "if such sale was not preceded by a general offer of sale made to all members of the public and if the right of reproduction is expressly or impliedly reserved by the seller . . . the sale should not constitute a surrender of common law rights."⁶² Therefore, whether or not an exhibition results in sale, the key operative fact in applying Professor Nimmer's analysis is the existence of a general offer to sell a work or copies of it. If *A*'s acts are viewed as an offer to sell his paintings to the public, the paintings will have been published, and copyright in them will be lost.

What criteria should be used to judge the existence of an offer to sell? According to general principles of contract law, an offer must indicate present contractual intent and must be reasonably definite and certain. Neither an advertisement nor the display of merchandise are ordinarily meant to be offers; rather, they are viewed as invitations to an offer to buy. Even the mention of a price in an advertisement or on a price tag need not be considered an offer, since the price is but one of the terms which must be specified before an offer can be found.⁶³

Thus, even if *A*'s advertisements and invitations had listed prices, they nevertheless could be viewed not as offers, but as mere invitations to an offer. Important terms, such as the ownership of any copyrights, the possibility of art proceeds rights, the availability of credit, type of framing, return privileges, etc., have not been specified.

In our hypothetical, *A* has not posted prices on his works. Quotations of prices by the *G* Gallery to a few individuals on request, even if considered offers, would not be offers made to the public. Even if prices had been posted on the works, the same questions of indefiniteness and present contractual intent would arise as are present in analyzing prices in advertisements.

But is the contract law definition of an offer relevant to copyright law? Perhaps *any* conduct manifesting an intention to sell or publicly exploit a work, or even to gratuitously offer it to the public, should

⁶⁰ *Id.*

⁶¹ Jonakait, at 111; see NIMMER §49.

⁶² NIMMER §54 n.143.

⁶³ See *Morris Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957). See generally L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS §§14-16 (2d ed. 1965).

suffice to end common law copyright in that work, whether or not the conduct meets the requisites of a valid contractual offer.⁶⁴

When an artist merely manifests an *intention* to sell a work or to dispose of it gratuitously, is he likely to consequently recover an economic reward sufficient to justify limiting his subsequent rights in the work? If not, then a rule of copyright law which deprives the artist of copyright at this point will fail to advance the economic security of artists. If the proper point for terminating an artist's perpetual common law rights in his work is the point at which the artist obtains substantial economic reward for his work,⁶⁵ then if artist *A*'s intentions to sell a work, and the public's desire to buy it, do not coincide so as to result in a sale, then a finding of publication would be unwarranted.

Indeed, in view of the substantial benefits which accrue to the public as a result of the many free exhibitions provided by artists, it seems anomalous to hold the view that artists who engage in such exhibitions should risk the loss of their common law rights in the works exhibited, even if sales do not result. But the irony is compounded in that the artist who observes the *Werckmeister* rule, thereby forbidding even limited copying of the type regarded as a fair use under the statutory copyright scheme (*e.g.*, single copies for academic use),⁶⁶ can exhibit without divesting his or her rights, whereas the artist who suffers the public's enjoyment of such minimal privileges risks divestment of his copyrights.

If *A* not only evidences an intent to place his work on sale, but also makes a contractually valid public offer of sale, or makes such an offer and consequently sells his work, will a finding of publication now be justified? Applying Professor Nimmer's rules, we must answer in the affirmative.

Nevertheless, several unique characteristics of the art market combine to suggest that neither the public exhibition, public offer of sale, nor even the actual sale of an original work of art is an appropriate point at which to impose the statutory copyright scheme through a finding of publication.

The tangible property in a work of art possesses a use value clearly distinct from the value of the work's reproduction rights. The use value, of course, is the value of the work as a decorative item and

⁶⁴ *Jewelers' Mercantile Agency v. Jewelers' Pub. Co.*, 155 N.Y. 241, 49 N.E. 872 (1898).

⁶⁵ NIMMER §52.

⁶⁶ Text accompanying notes 17-20, *supra*.

aesthetic experience. Generally, the initial sale of an original work of art occurs at a time when the primary value of the work is its use value, since most sales of artworks are by relatively unknown artists whose work is not in great demand in the market for art books and reproductions of works of art.⁶⁷ Whatever economic benefit the artist receives, therefore, is ascribable to the use value of the original work, not the copyright in it. This situation contrasts sharply with the market for other types of creative works. Literary works, for example, have little value as objects of exclusive ownership and contemplation by one individual; their market value is ascribable to their demand in the mass distribution market. Therefore, the time of the sale of a literary work to the public generally corresponds to the time when the reproduction rights in the work possess exploitable economic value. For this reason, it is not unfair to "start the clock running" to measure the author's statutory fifty-six year period of monopoly exploitation. But if an artist's monopoly over reproduction rights (or that of the collector, who will compensate the artist for the reproduction rights in accordance with their value as a speculative investment) is measured from the time of the public sale of the tangible property interest in the work, it is quite likely that the monopoly will be well on its way towards expiration before the artist (or collector) will receive any economic gain from its exploitation.

Moreover, the market for works of art is unlike the market for other creative works in that artists place much greater reliance on the public sale as a means of developing a market than do authors, composers, or other users of the copyright system. Limited publication through private disclosure of new works to publishing or music industry executives serves to create a market for manuscripts and musical scores, since those industries are dominated by large firms which are few in number.⁶⁸ The author or composer can realize on his work through sale to such a firm, without being compelled to elect between obtaining statutory copyright or throwing the work into the public domain.⁶⁹ One rarely, if ever, sees authors or composers attempting to

⁶⁷ See Goodman, *Getting Started: How to Develop Your Own Clientele*, AMERICAN ARTIST 20-22 (Jan., 1975).

⁶⁸ See Brown, *Publication and Pre-emption in Copyright Law: Elegiac Reflections on Goldstein v. California*, 22 UCLA L. REV. 1022, 1045 n. 114 (1975); Jonakait, at 110-11.

⁶⁹ *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952). Note that if the author's activity in selling a manuscript to his publisher is viewed as a turning over of the manuscript with no restrictions on its publication (which is the real substance of the transaction) then the transaction could not qualify as a li-

peddle their works directly to the public, as do artists, in the context of studio sales, street fairs, or displays in public buildings. Authors and composers who cannot manage to realize on their works through assignment of the reproduction rights to publishers or record companies can always realize on them through a public performance, which does not divest common law copyright.⁷⁰ Artists, of course, cannot perform their works.⁷¹ Since public exhibitions offer the artist an important means of making a market and gaining critical attention, artists must exhibit, regardless of the probability of making an immediate successful return, through the sale of either original works or of copies.⁷²

In summary, *A*'s hypothetical exhibition may have resulted in forfeiture of his rights under the United States copyright law; at best, his rights will be clouded, due to uncertainty surrounding the definition of publication. Even if *A* had preserved copyright in his works by affixing statutory notices, the copyright term may be well on its way towards expiration before *A*'s reproduction rights become valuable. Copyright law, therefore, does not afford substantial economic security to artists under these circumstances.

A's Rights Under the Copyright Revision Bill

The current copyright revision bill abandons the distinction between common law and statutory copyright, and establishes the life of the author plus fifty years as the duration of copyright in all works, published or unpublished.⁷³ However, difficult questions concerning the definition of publication remain in connection with the revision bill's requirement that whenever a work is "published in the United States or elsewhere . . . a notice of copyright shall be placed on all publicly distributed copies. . . ."⁷⁴ If the required notice is omitted, copyright will be forfeited unless (1) "the notice has been omitted

mitted publication under *White v. Kimmell*. Only if it is viewed as a two-step transaction—a turning over of the manuscript *preceded* by an assignment of the right to reproduce it—will the common law copyright be preserved.

⁷⁰ *Ferris v. Frohman*, 223 U.S. 424 (1912).

⁷¹ Except, perhaps, in the case of unusual contemporary works. See Jonakait, *supra* n. 54, at 110.

⁷² Compare B. CHAMBERLAIN, *THE ARTIST'S GUIDE TO HIS MARKET* 95-108 (1970) with C. GOODMAN, *MARKETING ART* 81, 113-15 (1972); K. HARRIS, *HOW TO MAKE A LIVING AS A PAINTER* 74-75, 97 (2d ed. 1964); and Jonakait, at 109-10.

⁷³ 1975 Bill §302.

⁷⁴ *Id.* §401(a).

from no more than a relatively small number of copies . . . distributed to the public," or (2) the work is registered with the Copyright Office within five years, and efforts are made to add the notice to all copies distributed in the United States after the discovery of the omission, or (3) the omission was made without authorization from the copyright owner.⁷⁵ Moreover, the liability of an "innocent infringer" is limited to the extent of his profits, if any, provided that he can prove that he was misled by the omission of notice.⁷⁶

Applying the revision bill's provisions to *A*'s hypothetical exhibit, we must determine whether *A* has published without placing notice on publicly distributed copies; if so, we must examine the §405(a) exceptions to determine whether *A*'s copyright can be saved from forfeiture.

Publication is defined as "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."⁷⁷ However, "[a] public . . . display of a work does not of itself constitute publication."⁷⁸ Clearly, since sale or other transfer of ownership is explicitly defined as a distribution, any copies sold must have been distributed, and therefore published. But will a mere offer to sell support a finding of distribution?

The bill specifically provides that "[t]he offering to distribute copies . . . to a *group* of persons *for purposes* of further distribution, public performance, or public display, constitutes publication."⁷⁹ By implication, an offer not fitting this description, such as an offer to sell a painting to a single individual for purposes of private enjoyment, would not constitute distribution or result in publication. An offer to the general public, even if viewed as an offer to a "group of persons", probably would not effect a publication, so long as the *purpose* of the transaction is private enjoyment, rather than "further distribution, public performance, or public display".

But assuming that *A* has engaged in distribution, has he distributed *copies*? *A* could argue that since one of the purposes of the revision bill is to promote uniformity in world copyright law,⁸⁰ the bill should be interpreted in accordance with that purpose. The Universal

⁷⁵ *Id.* §405(a).

⁷⁶ *Id.* §405(b).

⁷⁷ *Id.* §101.

⁷⁸ *Id.*

⁷⁹ *Id.* [emphasis added]. The probable purpose of this provision is to make the rental or leasing of motion pictures to theater owners effect a publication. *Cf.* Jonakait, at 114.

⁸⁰ See H. R. REP. No. 83, 90th Cong., 1st Sess. 101-02 (1967).

Copyright Convention, like the revision bill, defines publication as "... the general distribution to the public of copies of a work. . . ."⁸¹ Since the term "copy" in the Convention's English text is a translation of the term "*exemplaire*" in the French text, and a painting is reproducible only in a *copie*, not an *exemplaire*,⁸² a painting is not susceptible of publication under the Convention; only the distribution of two or more copies in the nature of an *exemplaire* will effect a publication.⁸³

The revision bill, however, provides that "[t]he term 'copies' includes the material object . . . in which the work was first fixed,"⁸⁴ thereby seeming to reject the *copie-exemplaire* distinction. Nevertheless, the distinction implicitly survives in the revision bill's definition of publication as the distribution of *copies*, rather than a copy. The Copyright Office⁸⁵ and one writer⁸⁶ see no significance in this use of the plural form.

Since under the revision bill a work of art can be publicly *displayed* without notice affixed, it makes little sense to require that a work publicly *distributed* bear a notice. Such a requirement mistakenly applies the rationale for publication under our current statute, that enjoyment of economic benefits should limit the *duration* of copyright, to the question of *notice* of copyright.

When a work of art, or a unique copy of the work, is distributed, the burden placed upon would-be copiers in ascertaining the existence of copyright and the identity of the copyright proprietor will be no greater than the burden imposed if the work is publicly exhibited; in fact, the purchaser of the work, if not himself the copyright proprietor, is as likely to know the identity of the copyright proprietor as is a gallery curator assembling an exhibition. The risk that an owner of a copy will not, absent a copyright notice, be able to identify the copyright proprietor becomes substantial only when multiple copies have been distributed through long marketing chains.

Therefore, in order to avoid the necessity of marring art works with copyright notices, distribution of a single original art work, or a unique copy of the work, should not be classified as a publication. A unique copy should be equated with an original because such a copy

⁸¹ Universal Copyright Convention, [1955] 3 U.S.T. 2731, T.I.A.S. No. 3324, art. VI.

⁸² *Supra* n. 33 and text at n. 32-33.

⁸³ BOGSCH, at 77.

⁸⁵ REGISTER OF COPYRIGHTS, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW: 1965 REVISION BILL 91 (1965).

⁸⁶ Jonakait, at 113-14.

may be intended by the artist to serve, like an original, as the primary means of acquainting the public with the work; e.g., a sculptural work may be first fixed in a model, and then distributed in the form of a copy of the model. So long as only one piece of work has been distributed, the need for notice is minimal. But since the distribution of multiple copies increases the risk that holders of copies will be unaware of the existence of copyright in them, a requirement of notice on multiple copies is meaningful. Drawing the line between one copy and two, rather than ten, twenty, or one hundred, can be defended both as a matter of convenience, and because distribution of two copies rather than one roughly doubles the chances that an innocent copier may be misled by the omission of notice.

If *A*'s distribution of his works were held to be a publication, however, *A* could rely upon §405 of the revision bill in order to cure the omission of notice, even if the omission were intentional.⁸⁷ §405(a)(3) does not apply to *A*, since *A* made no agreement with the *G* Gallery regarding their duty to place copyright notices on the works. §405(a)(2) applies, but it requires that *A* register his works, and place notice on them at all future exhibitions. §405(a)(1) may provide the most attractive alternative: by making *more* copies of his works (e.g., in advertising brochures) and distributing them to the public with notice affixed, *A* could claim that only a relatively small number of copies (*i.e.*, one) have been distributed without notice, so that copyright has not been forfeited.⁸⁸

Whichever exception *A* relies upon, *A* will not be able to recover damages against an innocent infringer.⁸⁹ Query, however, whether a commercial publisher of art reproductions, aware of the copyright statute's provisions for curing the omission of notice, will ever be able to establish that he was innocently misled by the omission of notice on a work of art, especially if the work's style makes apparent that the work is less than fifty years old.

V. Conclusion—Clarifying Copyright Law Through Administrative Rulemaking

Professor Nimmer prefaced his authoritative treatise, *Nimmer on Copyright*, with a quotation from a Second Circuit opinion lamenting

⁸⁷ H. R. REP. NO. 83, *supra* n. 79, at 114.

⁸⁸ *Id.*, at 114-15 (number of copies with notice omitted must be small both in an absolute sense, and in relation to the size of the edition).

⁸⁹ 1975 Bill §405(b).

the lack of guidance available to a court faced with interpreting the copyright statutes:

This action for copyright infringement presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act. . . .⁹⁰

We have seen that vexing problems can arise even in defining basic concepts such as publication, copying, or the distribution of copies. One way to resolve these problems is through litigation. However, the usefulness of the courts in clarifying the copyright statutes is distinctly limited. Litigation will arise after a dispute has occurred; the newly announced rule resulting from the litigation will arrive too late to benefit the parties involved. The parties may prefer to settle rather than pursue the case to judgment. And the courts, unlike administrative agencies, are bound by the method of "reasoned elaboration" from precedent; they can not overtly weigh competing societal interests, as can an agency soliciting public comment on a proposed rule. And finally, judicially created rules tend towards complexity and technicality, whereas an agency can consider the need for simplicity if a rule is to be comprehensible to the public.⁹¹ The need for simplicity is especially apparent if artists are to understand and use the copyright system.

Under current law, the Register of Copyrights derives rule-making authority from two sources: the Copyright Act⁹² and the Administrative Procedure Act.⁹³ The Copyright Act contains a broad grant of authority: "... [T]he Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title."⁹⁴ Although the courts may

⁹⁰ *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co.*, 316 F.2d 304, 305 (2d Cir. 1963), quoted in *NIMMER*, at ii(c).

⁹¹ See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§1.05-1.08, §6.03 (3rd ed. 1972); K. DAVIS, *ADMINISTRATIVE LAW TEXT* 132-33 (1965 ed.); H. HART AND A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 662-69 (tent. ed. 1958).

⁹² 17 U.S.C. §1 *et seq.* (1970).

⁹³ 5 U.S.C. §551 *et seq.* (1970).

⁹⁴ 17 U.S.C. §207 (1970).

examine the validity of the regulations promulgated by the Register, doubts must be resolved in favor of their validity.⁹⁵

Under the revision bill, the Register's authority is not limited to making rules for the registration of claims, but encompasses the general power to "establish regulations . . . for the administration of the functions and duties made his responsibility. . . ."⁹⁶ Under both the proposed and the current statutes, the Register's regulations are subject to approval by the Librarian of Congress.⁹⁷

The Administrative Procedure Act provides that any interested person may petition an agency for the issuance, amendment, or repeal of a rule.⁹⁸ Little doubt would seem to exist concerning the standing of an artist to institute such a proceeding, since an artist has a personal financial interest in the existence of valid copyright in his works.⁹⁹

But is the Copyright Office an agency subject to the provisions of the Administrative Procedure Act? The Act defines an agency as "any authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ."¹⁰⁰ An administrative unit with substantial independent authority in the exercise of specific functions possesses agency status.¹⁰¹ Although Congress itself is not an agency,¹⁰² an agency of the Congress independent of the executive is subject to the Administrative Procedure Act.¹⁰³ Therefore, the supervisory role of the Librarian of Congress should not deprive the Copyright Office of agency status.

⁹⁵ *Hoffenberg v. Kaminstein*, 396 F.2d 684, 685 (D.C. Cir. 1968), *cert. denied* 393 U.S. 913 (1968).

⁹⁶ 1975 Bill §702.

⁹⁷ *Id.*; 17 U.S.C. §207 (1970).

⁹⁸ 5 U.S.C. §553(e) (1970).

⁹⁹ *See, e.g., United States v. SCRAP*, 412 U.S. 669 (1973) (students have standing to contest high railroad freight rates for recycled materials, since the rates will affect the students' own immediate environment, even if only to a small degree).

¹⁰⁰ 5 U.S.C. §551(1) (1970).

¹⁰¹ *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 714 (D.C. Cir. 1973) (regional renegotiation board is an agency); *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (President's Office of Science and Technology is an agency); *Gates v. Schlesinger*, 366 F. Supp. 797, 799 (D.D.C. 1973) (Defense Advisory Committee on Women in the Services is not an agency, as its function is merely advisory).

¹⁰² 5 U.S.C. §551(1)(A) (1970).

¹⁰³ *Petkas v. Staats*, 364 F. Supp. 680, 682 (D. D.C. 1973) (Cost Accounting Standards Board, though established as an agent of the Congress, is an agency).

A government body's own actions indicating that it views itself as an agency can evidence agency status.¹⁰⁴ Significantly, the Copyright Office has published its *Compendium of Copyright Office Practices* "pursuant to the Freedom of Information Act".¹⁰⁵ That act provides that "each *agency* shall make available to the public information as follows. . . ." ¹⁰⁶ Recently, the Office held its first public hearing, for the purpose of receiving comments on the desirability of modifying the regulations regarding typeface designs.¹⁰⁷

Artists and arts organizations, therefore, need not speculate concerning the interpretation of puzzling statutory provisions, nor tolerate the effects of uncertainty in rendering their copyrights dubious and unmarketable. Administrative rule-making petitions addressed to the Register of Copyrights could help clarify and simplify the interpretation of the copyright statutes. Copyright law can more effectively promote artists' economic security, provided that they convincingly demonstrate the need for copyright doctrines suited to the unique characteristics of the visual arts. From this increased economic security, progress in the arts, we may hope, will result.

¹⁰⁴ *Id.*

¹⁰⁵ COPYRIGHT OFFICE, *COMPENDIUM OF COPYRIGHT OFFICE PRACTICES* iii (1970).

¹⁰⁶ 5 U.S.C. §552 (1970) [emphasis added].

¹⁰⁷ ABA SECTION OF PATENT, TRADEMARK, AND COPYRIGHT LAW—1975 PROCEEDINGS 101 (summary of report by Ms. Dorothy Schrader, General Counsel of the Copyright Office).

257. CONCEPTS IN COPYRIGHT PROTECTION

By J.E. ESEZOBOR*

INTRODUCTION

The idea of copyright protection developed as an aftermath of the invention of printing, which made copying easier, cheaper and faster.¹ As intellectual works became susceptible of exploitation in a manner that could jeopardize the interests of the original producer, some form of protection had to be designed. A study of the history of copyright protection would reveal that several different concepts have developed to justify the need for protection of intellectual works, and that reliance on these concepts varies depending on the prevailing—particularly the sociological—situation of the society concerned. Four main concepts can be identified.

1. Economic concept

The pecuniary interest of the author dominated in the early days of the development of copyright, as it was thought that authors have the right to earn a living by writing. Beaumarchais, in his work, *The Barber of Seville*, written in the 18th century, observed:

It is said in the foyers of the theatres that it is ignoble of authors to plead for payment—they who pride themselves on thoughts of fame. This is well said; fame is indeed attractive, but it is forgotten that to enjoy it only for one year nature has condemned us to eat 365 times.²

In the United Kingdom, for instance, copyright prerogatives were retained by the Crown, which granted the sole right to print through letters patent from the advent of printing until about the middle of the 16th century. After that time, ordinances were established, prohibiting printing without consent of the owner of the copy.

The Statute of Anne, passed in 1709, was designed to serve the

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¹ B.C. McDonald, *Copyright in Context: The Challenge of Change*, in ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY, 127-8 (1971).

² R.F. Whale, 12

economic concept.³ Under the Act, pirated works were liable to forfeiture to the owner of the right to copy and to a fine of one half-penny each copy, paid to the owner and the Queen for every sheet found in the pirate's possession. In his speech at the second reading in 1841 of the Serjeant Talfourd's Copyright Bill which led to the English Act of 1842, Macaulay observed:

It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated, and the least objectionable way of remunerating them is by means of copyright.⁴

In France, copyright developed as part of the doctrine of unfair competition and was designed primarily to protect the author against economic losses consequent upon the free trade policy. Copyright was regarded as a part of the industrial property rights designed to protect the commercial benefits of the author against usurpation by a competitor.⁵ The French courts accordingly gave early protection in all cases intended to disparage a competitor's products or divert his clientele. By the end of the 19th century, this protection had reached such a level that it covered all acts that could cause prejudice to the name or renown of a work. The end result is that the French law today recognizes a dual right of the author—moral and pecuniary.

The property concept of copyright is founded on the belief that a person who brings a commodity into existence should be able to control its exploitation. In producing an intellectual work, labor and skill are involved, and these must be compensated.⁶ In the words of Herbert Spencer,

³ L.P. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE*, 14 (1968).

⁴ LOS ANGELES COPYRIGHT SOCIETY, *COPYRIGHT AND RELATED TOPICS: A CHOICE OF ARTICLES*, 5 (1964); Plant, *The Economic Aspects of Copyright in Books*, *ECONOMICA*, NS 2: 170-171 (1934).

⁵ Several statutes were passed in France in the 19th century dealing specifically with the law of unfair competition: CAMELS, *DES NOMS ET MARQUES DE FABRIQUE ET DE COMMERCE ET DE LA CONCURRENCE DÉLOYALE* (Paris, 1858); GASTAMBIDE, *TRAITÉ THÉORIQUE ET PRATIQUE DES CONTREFAÇONS EN TOUS GENRES* (Paris, 1837); A. RENDU ET DELORME, *TRAITÉ PRATIQUE DE DROIT INDUSTRIAL* (Paris, 1855) and *TRAITÉ PRATIQUE DES MARQUES DE FABRIQUE ET DE COMMERCE ET DE LA CONCURRENCE DÉLOYALE* (Paris, 1858); MAYER, *DE LA CONCURRENCE DELOYALE ET DE LA CONTREFAÇON EN MATIÈRE DE NOMS ET DE MARQUES* (Paris, 1879); H. ALLART, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA CONCURRENCE DELOYALE* (Paris, 1892); POUILLET *TRAITÉ DES MARQUES DE FABRIQUE ET DE LA CONCURRENCE DÉLOYALE* (6th ed. Paris, 1912).

⁶ Abel, *Copyright from the International Viewpoint*, 1 *JOURNAL OF WORLD TRADE LAW*, 399 (1967).

A production of mental labour may be regarded as property in a fuller sense than may be a product of bodily labour; since that which constitutes its value is exclusively created by the worker.⁷

The amount of compensation may not be correlative to that of labor involved, depending on the author's skill and expertise. It may be added that most writers, particularly academicians, derive significant remuneration from a variety of other sources, apart from royalties paid on their publications. This group of writers nevertheless needs to be assured that their interests in the works they produce will be protected. They need to be assured that if they want to make writing a profession, they can live by it; that the works they have produced will not be attributed to someone else or *vice versa*; that they can control the reproduction, communication to the public and translation of their works. The assurance of these possibilities provides an incentive to the writer. Hence, Anthony Trollope warned in the mid-nineteenth century that to deprive English authors of their copyright was to rob England of all her authors.⁸

Giving a practical example of the consequence of non-legal protection of authors' right, the *Encyclopedia Britannica*,⁹ reports that as a result of insufficient protection afforded music publishers by England's 1902 Copyright Act, the publishers in 1905 announced their intention of not producing any further works until their economic interest was protected by the laws. Following this threat, the 1906 Musical Copyright Act was passed, making it a criminal offense punishable by fine and imprisonment to reproduce or sell or to possess plates for production of pirated copies of musical works.

2. *Personality concept*

The author's interest lies not only in terms of financial gain; he also wants his personality protected. The process of literary or artistic

⁷ Hurt and Schuchman, *The Economic Rationale of Copyright*, 56 AMERICAN ECONOMIC REVIEW 422 (1966). See also Renouard, *Theory of the Rights of Authors*, 23 AMERICAN JURIST AND LAW MAGAZINE, 41-2 (1839):

Naturally, equity and history agree in putting this proposition beyond dispute. It has always been considered that the author of a work has a right to be recompensed for his labors . . . To deny that they have a right to derive a profit from their labors would be to deny the existence of light.

⁸ P.F. CARTER-RUCK, & E.P. SKONE JAMES. COPYRIGHT: MODERN LAW AND PRACTICE, 19 (London, 1965).

⁹ 11th ed., vol. 7, at 122.

creation is regarded as a form of personality expression in the sense that it involves some form of personal creation by the author; the author's product is seen as an attempt to communicate with the public, and this could be inhibited by uncontrolled use by others. In order that the author can successfully maintain and improve on the system of communication with the public, he must be guaranteed adequate protection. Therefore, there is a natural obligation on the part of the consumers to refrain from counterfeiting his work.¹⁰

In *Millar v. Taylor*¹¹ Lord Mansfield stressed the necessity of securing to the author the opportunity to recover his expenses and earn a profit as well as of deciding how his name and work should be presented to the public.

It is just that an author should reap the pecuniary profits of his own ingenuity and labour. It is just that another should not use his name without his consent. It is fit that he should judge when to publish or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication, how many, what volume, what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression, in whose honesty he will confide not to foist in additions: with other reasonings of the same effect.

Arising out of the personality concept is the moral right, a right which is recognized in most countries in Continental Europe but not in the United Kingdom, the United States of America or most developing countries, including Nigeria.¹² The doctrine establishes that the author has the moral right of *paternity* and *integrity* in his work. The former entitles him to make his work known to the public as the author, to prevent others from crediting his work to another person, and to prevent others from attributing to him authorship of a work he did not originate. The integrity right entitles the author to prevent all deformations of his work.

In the non-moral right countries, the author's rights of paternity and integrity are protected in one form or another under the law of

¹⁰ Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARVARD LAW REVIEW, 290 (1970).

¹¹ 4 Burr. 2303, 2398, (1769).

¹² In the United Kingdom, moral right does not form part of the domestic law; the Copyright Act 1956 contains no provisions regarding it. In the U.S. there is no statutory protection as well. 17 U.S.C. (1973). The Nigerian Copyright Decree 1970, s.16, excludes it from copyright.

torts or under equity, so that without using the label 'moral right', or designations of components of the 'moral right', the courts in such countries often arrive at much the same results as do continental courts.¹³

3. *Privacy concept*

Another justification for the property concept of copyright is the right of privacy. This has been applied in limited areas, such as in the protection of private letters against unjustifiable publication. In common law countries, a court of equity will grant an injunction to prevent the publication of a letter because of a recognition of property in the writer. Although he has parted with the manuscript, the writer retains an interest in it since the purpose of his writing was to enable the recipient to know his sentiments and not to give them to the world.¹⁴ In *Gee v. Prichard*,¹⁵ Lord Eldon had earlier said,

The sender of the letters had still that kind of interest, if not property, in the letters that he has a right to restrain any use being made of the communication which he has made in the letters so sent by him.

In this case, letters written by plaintiff to defendant were returned by the latter, with a declaration that he did not consider himself entitled to retain them. The publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction. It was held that the jurisdiction to restrain the publication of letters is founded on a right of property in the writer.

The privacy concept results in limiting communication, so that aside from private correspondence and private diaries, there seems to be no justifiable reason to base copyright upon the doctrine of privacy. The largest portion of intellectual material is either published or intended to be published and not hidden away from the public. Thus, while private letters should be protected, the rationale for their protection does not constitute the basis for the entire field of copyright.

4. *Public policy concept*

The right of authors to exercise control over certain acts in re-

¹³ Strauss, *Moral Right of the Author* COPYRIGHT LAW REVISION STUDIES, 1-4, 141 (1960).

¹⁴ *Boosey v. Jefferys*, 6 Exch. Rep. 580, 583 (1851), per Lord Campbell.

¹⁵ 36 Eng. Rep. 670 (1818).

spect to their works must yield to the dictates of public interest. In most countries, only those rights expressly granted by statute avail to the author, and then within prescribed limits.¹⁶ The rationale for the 'public interest' notion was exemplified in the U.S. case of *Eichel v. Marcin*,¹⁷ as follows:

If an author, by originating a new arrangement and form of expression of certain ideas or conceptions could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation; science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted.

In this case, the defendants claimed authorship of a play registered under the title, 'Cheating Cheaters'. Plaintiffs claimed exclusive proprietorship of another play, 'Wedding Presents', a copy of which they deposited with defendants for a period of 2 months. The claim was that the title 'Cheating Cheaters' and the play were an infringement of copyright. An injunction and damages were sought. It was held that the defendants' play did not constitute an infringement of plaintiffs' play because the plot, scene, dialogue and characters were different.

As the impact of science and technology on the handling and dissemination of information increased, it became apparent that copyright could no longer be restricted to the protection of the property interest of the author. The interest of the public started gaining prominence, and copyright assumed a socio-cultural function rather than a merely personal protection. The rights granted to the author became regarded as a means to an end, the end being the overall welfare of society. Hence, copyright is thought of today as a necessary and desirable monopoly justified by the public interest.¹⁸

The U.S. House of Representatives Committee on Patents of the 60th Congress, in its report accompanying the bill which became the Copyright Act, 1909—a report which was adopted *verbatim* by the Senate Committee—states:

¹⁶ Particularly in the common law countries; see U.K. 1956 Act s.45 (5), Nigerian Copyright Decree, 1970, s.16.

¹⁷ 241 Fed. 404, 408 (S.D.N.Y. 1917).

¹⁸ Clapp, *The Copyright Dilemma; A Librarian's View*, 38 LIBRARY QUARTERLY, 352 (1968).

The enactment of copyright legislation by Congress under the term of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights,¹⁹ but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive right to their writings. . . . Not primarily for the benefits of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens; however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of the people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.

In enacting a copyright law, Congress must consider two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.²⁰

Hence in *Fox Film Corp. v. Doyal*,²¹ a suit to restrain the collection of a state tax upon gross receipts arising from the licensing of copyright moving pictures failed. Chief Justice Hughes noted that the primary object and the sole interest of the U.S. in conferring the copyright monopoly lie in the general benefits derived by the public from the labours of authors. In the antitrust case of *U.S. v. Paramount Pictures, Inc.*,²² Justice Douglas observed that the copyright law, like the patent statute, makes reward to the owner a secondary consideration. In this case, an injunction was sought by the U.S. Government under the Sherman Act to eliminate or qualify certain business practices in the motion picture industry, such as the fixing by distributors of minimum admission price which a licensee may charge, unreasonable provisions as to clearances, joint ownership of theatres by distributors

¹⁹ See the leading case of *Wheaton v. Peters*, 8 Peters 591 (1834).

²⁰ U.S. Congress. House of Representatives. Committee on Patents: House report no. 2222, 60th Congress, 2nd Session, Feb. 29, 1909, accompanying H.R. 28192, a bill to amend and consolidate the acts respecting copyright, 6-7.

²¹ 286 U.S. 123, 127 (1932).

²² 334 U.S. 131, 158 (1948).

and exhibitors, theatre pooling agreements, formula deals, master agreements and franchises, block booking, and discrimination between exhibitors in the terms of master agreements.

Conclusion

The theoretical controversy over the primacy of interest in copyright has been generated by the problem of whether or not copyright is an absolute property right or a privilege guaranteed to the author by the State. The proponents of the first view see the author's right to control the communication, reproduction or adaptation of his work in the absolute sense, so that the public interest is secondary. To those who advocate the privilege concept, the public interest is paramount.

If the primary purpose of copyright is to protect the author's interest, the ideas that it also promotes learning, that it is a statutory grant to maintain order in the trade and that it is to prevent monopoly will be subordinated to the primary purpose.

On the other hand, if copyright is thought of as a device for the prevention of a harmful monopoly, the idea of its being a statutory grant to maintain order in the trade and to promote learning by rewarding the author will be subordinated to this purpose.²³

These are two extreme views which must be reconciled if the essence of copyright is to be rightly appreciated. To uphold one as against the other constitutes a disservice to the course of copyright. In the words of Lord Mansfield,

We must take care against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.²⁴

The twentieth century is witnessing a new evolution in copyright: a recognition of the need for a compromise between the rights of authors and the needs of society. It has now become apparent that

²³ L.R. Patterson, 183.

²⁴ *Sayre v. Moore*, 102, Eng. Rep. 139 at 140 (1785).

copyright properly understood and wisely handled could constitute a powerful stimulus to creation as well as a means of opening the channels of dissemination of information and knowledge. However, if it is misunderstood and its true purpose lost sight of, it could become a limitation on creation and a barrier to free exchange of thought and expression.²⁵ This has been given statutory recognition by the Universal Declaration of Human Rights adopted by the Third General Assembly of United Nations in 1948. Article 27 provides:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

Copyright now assumes the role of balancing the needs of society against the interests of the author. No particular group of interests is given prominence over the other. In the words of Ronald E. Barker,

Copyright was invented by society for the benefit of society. Without it, the writer may be discouraged from writing or from making his work available to the public at large. Without it, too, publishers would lack the security necessary to enable them to invest their capital and energy in making new books available to the public.

Copyright laws represent a compromise between the extreme demands of the author on the one hand, and of the public, on the other. All countries' laws nevertheless recognize that copyright is essential to the stimulation of creative writing and to support the economics of publishing.²⁶

The rights of the author must be balanced against the legitimate demands of the consuming public to enjoy intellectual products. Nevertheless, in a democratic society it can hardly be questioned that literary and artistic products should be given enough legal protection so that the producer is encouraged by rewards, financial or otherwise, to create more. Society cannot afford the luxury of leaving artists and

²⁵ Roberts, *Copyright and Photocopying: An Experiment in Co-operation*, 30 COLLEGE AND RESEARCH LIBRARIES 222 (1969).

²⁶ India. Ministry of Education. International copyright: needs of developing countries—symposium. New Delhi, 1966, p. 9

composers to be financially dependent on state subsidies or private philanthropy. Some element of ownership is essential. On the other hand, an essential factor of the democratic society is the transmission, development, and use of intellectual products in the freest possible manner. Consequently, those who demand rights in intellectual products must be willing also to accept correlative duties and responsibilities. The law must not permit the protection given to turn into barriers walling off part or all of the society from the use and enjoyment of literary and artistic products.²⁷

No book, however useful, could be universally diffused amongst mankind should the proprietor take it into his head to restrain its circulation. No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world therefore, whatever valuable work has once been created by an author, and issued out by him should be understood as no longer in his power, but as belonging to the public; at the same time the author is entitled to an adequate reward.²⁸

Undue restraint on the use of copyright materials could lead to a vicious circle. What is required therefore is a set of rules that will enable the copyright system to operate to the best public advantage and at the same time protect the source of intellectual products. Whether the existing copyright laws satisfy this objective is a matter for investigation.

²⁷ R. Kramer, ed., *Literary and artistic products and copyright problems*, 19 LAW AND CONTEMPORARY PROBLEMS, 140 (1954).

²⁸ Boswell, *Life of Johnson, May 8, 1773*, in LOS ANGELES COPYRIGHT SOCIETY. COPYRIGHT AND RELATED TOPICS: A CHOICE OF ARTICLES, 35 (1964).

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

258. U.S. CONGRESS. SENATE.

S. 2756. A bill to amend the Communications Act of 1934 in order to remove certain limitations on cable television systems operating in any State which does not have a commercial television broadcasting station. Introduced by Mr. Roth, December 8, 1975, and referred to the Committee on Commerce. 1 p. (94th Cong., 1st Sess.)

Senator Roth explains in his statement on introducing this bill, 121 *Congressional Record* S21327 (daily ed., Dec. 8, 1975), that Delaware is unique because of its geographical location and size. The state relates in business, commerce and public affairs to Philadelphia, Washington and Baltimore. Under present FCC regulations, the cable system serving the southeastern portion of the state is prevented from carrying the signals from Philadelphia. The bill would amend the Communications Act of 1934 to remove the restriction.

259. U.S. CONGRESS. SENATE.

S. Res. 291. Resolution clarifying the intent of Congress regarding the regulation of pay cable television. Submitted by Mr. Beall, November 3, 1975, and referred to the Committee on Commerce. 3 p. (94th Cong., 1st Sess.)

The resolution directs the Federal Communications Commission and other appropriate executive and administrative agencies to insure that the quality and quantity of the over-the-air broadcasting service now available to the public not be jeopardized by pay TV systems which might be able to outbid free systems for the more attractive sports and entertainment programs. See statement by Senator Beall on his introduction of the resolution in 121 *Congressional Record* S19008-S19012 (daily ed., Nov. 3, 1975).

260. U.S. CONGRESS. SENATE. *Committee on Foreign Relations.*

Tax convention with U.S.S.R. Report, submitted by Mr. Sparkman, to accompany Ex. T, 93-1. Washington, U.S. Govt. Print. Off., Dec. 11, 1975. 38 p. (94th Cong., 1st Sess.)

With the expectation that there will be increasing economic contact between the U.S. and the U.S.S.R., an income tax convention has been negotiated which contains a provision that either country may terminate the agreement at any time after 3 years from its entry into force. Among the types of income specifically exempted from taxation in the source country are rents or royalties for the use of patents, copyrights, equipment and know-how. The report submits the convention to the Senate for favorable action.

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

Copyright law revision. Report, together with additional views, to accompany S. 22, submitted by Mr. McClellan, November 20 (legislative day, November 18), 1975. 169 p. (94th Cong., 1st Sess.)

The report analyzes the provisions of the copyright law revision bill, S. 22, as amended by the Senate Judiciary Committee, and explains the reasons for the committee amendments. Senator John V. Tunney, in his additional view, expresses concern that the move to freeze the cycle of rate adjustments by the Copyright Royalty Tribunal for ten years is inequitable since it does not take into consideration the marketplace or shifting economic and financial conditions.

262. U.S. CONGRESS. SENATE. *Committee on the Judiciary. Subcommittee on Patents, Trademarks and Copyright.*

Performance royalty. Hearings, Ninety-fourth Congress, 1st Session, pursuant to S. Res. 72 on S. 1111, July 24, 1975. Washington, U.S. Govt. Print. Off., 1975. 93 p.

The printed hearings include statements from the National Endowment for the Arts, the Register of Copyrights and representatives of labor, and the broadcasting and jukebox industries.

263. U.S. COPYRIGHT OFFICE.

Publications of the Copyright Office. [Washington, 1975]. 4 p. (Its Circular No. 2)

Lists current publications available through either the Copyright Office or the Superintendent of Documents.

2. Foreign Nations

264. AUSTRALIA. *Laws, statutes, etc.*

Copyright (International Protection) Regulations. (S.R. No. 60 of 1969, as amended by S.R. No. 137 of 1974). *Copyright*, vol. 11, no. 10 (Oct. 1975), pp. 203-208.

These Australian statutory regulations made under the Copyright Act of 1968-1973 have been amended several times and are here presented in a consolidated form.

265. DENMARK. *Laws, statutes, etc.*

Act No. 158 of May 31, 1961. Copyright Act, 1961. Official translation published by the Ministry of Education. *Performing Arts Review*, vol. 6, no. 1 (1975), pp. 145-168.

266. GREAT BRITAIN. *Laws, statutes, etc.*

The Copyright (International Conventions) (Amendment No. 2) of Nov. 12, 1975, no. 1837, coming into operation Dec. 12, 1975. London, Her Majesty's Stationery Off., 1975. 2 p.

The Order amends the schedule in the Copyright (International Conventions) Order of 1972 to show the accession of Bangladesh and Bulgaria to the Universal Copyright Convention and to extend the order to the dependent countries of the Commonwealth.

267. IRAN. *Laws, statutes, etc.*

Act Governing Translation and Reproduction of Books and Publications and Reproduction of Recorded Sound Materials. *Copyright*, vol. 11, no. 10 (Oct. 1975), p. 209.

A new official translation of an Iranian law which entered into force January 6, 1974. An earlier translation appeared at *Copyright*, vol. 11, no. 2 (Feb. 1975), p. 46.

268. ITALY. *Laws, statutes, etc.*

Decree of the President of the republic concerning the implementation of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

Organizations, signed at Rome on October 26, 1961. (No. 490 of May 14, 1974). *Copyright*, vol. 11, no. 11 (Nov. 1975), pp. 223-224.

The decree amends Arts. 73 and 79 of the Italian copyright law (No. 633 of 1941) and Art. 23 of the regulations, in order to implement the ratification of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed at Rome on Oct. 26, 1961.

269. ITALY. *Laws, statutes, etc.*

Law concerning the ratification and implementation of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed at Rome on October 26, 1961. (No. 866 of November 22, 1973). *Copyright*, vol. 11, no. 11 (Nov. 1975), p. 223.

The law states that a presidential decree will be issued and that it will provide that phonogram producers shall share remuneration received for secondary use of their recordings with performers; also that the rights of a broadcasting organization shall be extended to television.

270. KENYA. *Laws, statutes, etc.*

The Copyright (Amendment) Act, 1975. An act of Parliament to amend the Copyright Act (No. 5 of 1975). *Copyright*, vol. 11, no. 11 (Nov. 1975), pp. 224-226.

This act entered into force May 9, 1975 and amends the Copyright Law so as to regulate the use of satellite broadcasting for purposes of systematic instructional activities and to amend the provisions for penalties for infringement.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

271. INTERGOVERNMENTAL COPYRIGHT COMMITTEE, 1971. *1st Ordinary Session, Paris, June 1975.*

Report adopted by the committee. *Unesco Copyright Bulletin*, vol. 9, nos. 2-3 (1975), pp. 6-17.

The major portion of the report deals with the rules of procedure for the Intergovernmental Copyright Committee meetings under the 1971 revision of the Universal Copyright Convention.

272. INTERGOVERNMENTAL COPYRIGHT COMMITTEE. *Subcommittee on Reprographic Reproduction of Works Protected by Copyright. Washington, D. C., June 16-21, 1975.*

Report. *Unesco Copyright Bulletin*, vol. 9, nos. 2-3 (1975), pp. 18-48.

The report summarizes the general statements submitted by attending delegations, and discussions on (1) methods of remuneration and control; (2) users of reprography; (3) special problems of developing countries. The text of the resolution adopted at the close of the session is also included.

273. INTERNATIONAL CONFERENCE OF STATES ON THE PROTECTION OF PHONOGRAMS. *Geneva, Oct. 18-29, 1971.*

Records. Paris, United Nations Educational, Scientific and Cultural Organization, 1975. 224 p. (WIPO Publication No. 318(E); Unesco Publication ISBN 92-3-101280-0).

The volume contains reports, summaries of minutes and the documents of the conference.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

274. *L. Batlin & Son, Inc. v. Snyder*, 187 U.S.P.Q. 721 (2d Cir. Oct. 24, 1975) (Meskill, C.J.).

Appeal from District Court issuance of a preliminary injunction compelling the defendant to cancel a recordation of copyright with U.S. Customs and restraining him from enforcing said copyright. The copyright pertained to defendant's replica of the public domain Uncle Sam bank. The District Court's injunction was based on its serious doubts as to the copyrightability of the defendant's work.

Held, reversed and remanded.

Reviewing the history of copyright in a fascinating opinion, the court underscored that copyrightability requires only (1) *originality*—*i.e.*, a “process requiring independent skill, labor and judgment of an individual”; and (2) *creativity*—*i.e.*, “a modicum of novelty. . . only a minor quantum of difference from others before it. After all, cultural progress tends to occur incrementally.” The defendant's version of the Uncle Sam bank satisfied both standards. The trial court had found that defendant's version of the bank required independent judgment of the artist and that no slavish or mechanical copying was involved. The element of creativity was held to be supplied, in the case of “a reproduction of a work of art” by the underlying work of art:

“A reproduction of a work of art must satisfy the same standards for copyrightability as must any work of art. However, it would be self-contradictory to require that the reproduction display the same degree of creativity, when compared to the basic work of art, as if it were a conceptually independent production. The very idea of “reproduction” negates, within copyright law, the idea of an increment of difference inherent to the concept of “nontriviality,” necessary to the creativity element. *Peter Pan Fabrics, Inc. v. Dan River Mills Inc.*, 295 F.Supp. 1366, 161 USPQ 119 (S.D.N.Y., 1969), *aff'd*. 415 F.2d 1067, 163 USPQ 670; *H.M. Kolbe Co. v. Armigus Textile Co.*,

184 F.Supp. 423, 126 USPQ 11 (S.D.N.Y., 1960), *aff'd*. 279 F.2d 555, 126 USPQ 1 (2d Cir.). That element—creativity—is supplied by the basic underlying work.”

However, in view of the limited scope of protection to be afforded defendant's work—namely, only “to the increment of difference from the basic version”, the court noted in closing that plaintiff might well succeed at trial in “clearly distinguishing” his from the defendant's bank. This was so in that Snyder could not prevent Batlin from “using the same basic bank as an inspiration for its product and from acquiring a copyright” so long as it “avoids pirating those increments which Snyder added to the original production.”

275. *The Robert Stigwood Group Ltd. v. John T. O'Reilly and Track Music, Inc. v. Contemporary Mission, Inc.*, Docket Nos. 75-7076, 75-7077, and 75-7091 (2d Cir. Jan. 19, 1976) (Not yet reported.) (Curfein, C.J.).

Consolidated appeals from judgments granting summary judgment of infringement in favor of plaintiffs and assessing statutory damages. The issue on appeal was whether the District Court had properly determined statutory damages under 17 U.S.C. §101(b).

Held, reversed on assessment of damages.

The key questions addressed by the court were the following:

(1) How many performances were given by the defendants and was the number undisputed for purposes of summary judgment? (2) Should the twelve Canadian performances be treated as infringements of United States copyrights and performing rights thereunder? (3) Was each infringing performance in the circumstance a separate infringement for the purpose of applying §101(b)? (4) When a dramatico-musical work is covered by six separate copyrights, is an infringement by a single performance, which infringes each of the copyrights at the same time, a single infringement or six separate infringements?”

The court responded to the above questions in the following ways:

(1) Since the defendants had not rebutted plaintiffs' sworn affidavits which stated that defendants had performed the opera on at least 60 occasions, the court accepted that figure. The trial court had erred in accepting the baseline figure of 50 because the defendants had conceded performing the work at least that many times.

(2) The court affirmed District Judge Zampano's exclusion of the 12 performances which occurred in Canada, distinguishing the cases relied on by the plaintiffs, to wit, *Famous Music Corp. v. Seeco Records, Inc.*, 201 F. Supp. 560 (S.D.N.Y. 1961) (shipment of infringing tape recordings abroad) and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940) (shipment abroad of infringing negatives of motion pictures and subsequent exhibition thereof):

The steps taken by the defendants preliminary to the Canadian performances were certainly not the 'manufacture' of anything, nor were the performances 'records' from which the work could be 'reproduced.' *It is only when the type of infringement permits further reproduction abroad that its exploitation abroad becomes the subject of a constructive trust. . . . Copyright laws do not have extraterritorial operation. . . . The Canadian performances, while they may have been torts in Canada, were not torts here.*" (emphasis added).

(3) The defendants, "as was their privilege," elected to seek recovery of statutory damages under §101(b) which provides: "in lieu of actual damages and profits, such damages as to the court shall appear to be just . . . and such damages shall [not] exceed the sum of \$5,000 nor be less than the sum of \$250.00, and shall not be regarded as a penalty." Overturning the District Court's award, Judge Gurfein held that the statutory minimum of \$250.00 for each separate infringement was mandatory. Therefore, the question remaining was how many infringements occurred. Responding to that inquiry, the court examined the limited precedents, such as *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919). *Westermann* and other authorities suggested that if each repetition of an infringement is "a separate transaction, perhaps involving different joint tortfeasors . . . or diverse business features" or if the time interval is more than a few days between publications, then each will constitute a separate infringement. Rejecting the time interval test as inapplicable to performances, the court held that because the components of the performances in this case were "heterogenous"—*i.e.*, "they were a series of disconnected one-night or two-night stands in different cities"; each performance "was given pursuant to a separately negotiated [and varied] agreement made with a specific auditorium, and in conjunction with separately arranged advertising with local newspapers and radio stations".

(4) While the plaintiffs argued that 6 of their copyrights were in-

fringed at each of the 48 separately infringing performances, the court was partially in disagreement:

Having found that each United States performance was a separate infringement, we have not solved the whole problem, however. For the plaintiffs contend that each performance was a separate infringement of each of six copyrights, not one. The District Court so held, even though it failed to apply the statutory minimum in accordance with that legal conclusion.

The six copyrights on which separate infringement is claimed fall into two classes. Three are copyrights of individual songs registered in Class (e) as "musical compositions," and three are registered in Class (d) as "dramatico-musical compositions." The three Class (d) copyrights are obviously duplicative so far as the protection of performing rights is concerned. These are: 1) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Musical Excerpts Complete Libretto)," Dec. 21, 1970; 2) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Libretto)," Feb. 24, 1971 (Additional Words); 3) "JESUS CHRIST SUPERSTAR (Vocal Score)," Apr. 20, 1971.

While the point is not altogether clear, it appears to us that infringement of performing rights of *overlapping* copyrights on substantial parts of the entire work should be considered as a single infringement.

Since we are compelled to interpret an unexpressed statutory policy, it seems sensible to take a middle ground between possibly excessive damages and possibly insufficient damages. Duplicative copyrights in the same category of entire works, registered under Class (d), are like superfluous protective layers. There is only one entire work and, realistically, only one infringement of libretto, score and dramatic continuity. To award statutory damages for each overlapping Class (d) copyright would simply multiply the statutory minimum without any compelling reason of policy, permitting owners of a dramatico-musical composition to multiply statutory damages almost at their whim. For example, since every scene in a drama is protected under a single copyright of the entire work, *Brady v. Daly*, 83 F. 1007, 1010 (2 Cir. 1897), *aff'd*, 175 U.S. 148 (1899); *Herbert v. Shanley Co.*, 222 F. 344, 345 (S.D.N.Y. 1915), *aff'd*, 229 F. 340 (2 Cir. 1916), *rev'd on other grounds*, 242 U.S. 591 (1917), it would not be desirable to permit the individual copyrighting of each scene to mandate the collection of minimum statutory damages on a cumulative basis. And cf.

Schellberg v. Empringham, 36 F.2d 991, 996-97 (S.D.N.Y. 1929).

The separate copyrights on the songs stand in somewhat different case. A purpose of the separate registrations of the musical numbers was apparently to protect the plaintiffs' publication rights, as well as their nondramatic performance rights. The *dramatic* performance of these copyrighted songs was excluded from the general ASCAP license. See *Rice v. American Program Bureau*, 446 F.2d 685, 686 (2 Cir. 1971). The performing rights were granted exclusively to Stigwood. When the defendants gave infringing *dramatic* performances, they infringed upon the *separate* dramatic rights in *each* song *exclusively* given to Stigwood.

While the analogy to the holding in *Westermann*, *supra*, is less than perfect, the general tenor of the opinion supports our result. Distinction can indeed be made. The separate copyrighted illustrations in *Westermann* were not covered by a composite copyright of all. They were tied together, moreover, not by the copyright owner but by the publisher of the infringements.

The Supreme Court in *Westermann* could not have considered whether the Congress, in drafting § 101(b), had in mind the infringement of a dramatico-musical work containing separate musical compositions which form an integral part of the whole and which are the subject of separate copyrights. Nor would we find enlightenment on our particular set of facts by parsing the statute with a grammarian's eye. A grammatic analysis of a statute as obscurely written as this one often proves either that the grammarian has oversimplified or that the draftsman has been inept.

Yet, regardless of any doubts we might have if the matter were entirely *res nova*, the Supreme Court in *Westermann* did emphasize that liability attaches in respect of each copyright that is infringed, 249 U.S. at 105, as did this court in *Burndy Engineering Co. v. Sheldon Service Corp.*, *supra*. We do not believe that the *Westermann* language must be taken literally in every case, however, for the problem now before us was surely not in the contemplation of the Court when Justice Van Devanter wrote. When the copyrights on the songs can live their own copyright life, we take the teaching of *Westermann* to apply. When the particular copyrights on the dramatico-musical composition itself are essentially duplicative, however, we perceive no mandate to thwart what we think is otherwise a sensible construction.

In sum, the District Court is *required* to recognize the in-

fringements of one basic Class (d) copyright and three Class (e) copyrights at each of forty-eight performances, and to apply the statutory minimum of \$250 to each infringement. The District Court is directed, therefore, to enter judgment for \$48,000 as a minimum award of damages (4 copyrights $\times$ \$250 $\times$ 48 performances), or such greater sum within the limitations of 17 U.S.C. § 101(b) "as to the court shall appear to be just."

276. *American Greetings Corporation v. Kleinfab Corporation*, 400 F. Supp. 228 (S.D.N.Y. Sept. 15, 1975) (Owen, D.J.)

Action for infringement of plaintiff's copyright in its design featured on a gift wrap, greeting card, and illustrated book. The infringement arose out of a defendant's manufacture and sale of fabric designs which plaintiff claimed were copied from its designs. Defendant opposed plaintiff's motion for a preliminary injunction by asserting lack of substantial similarity, forfeit of plaintiff's copyright by publication without the requisite notice, laches and lack of irreparable harm.

On plaintiff's motion, *held*, granted.

(1) *Substantial Similarity*

Using the detached similarities between one panel in each twelve paneled work as an illustration, the court found the defendant's fabric design #846 was a deliberate copy of the plaintiff's gift wrap. The designs were held substantially similar as to individual panel designs and overall arrangement. In addition, as the defendant "declined" to make clear its source materials after repeated questions with respect thereto from the court, Judge Owen concluded that copying could be inferred. As to defendant's design #905, two panels of which were alleged to infringe plaintiff's designs contained in its greeting card and illustrated book, these too, the court observed, were "startlingly similar" to plaintiff's.

(2) *Defective Notice Issue Under 17 U.S.C. §21*

With respect to fabric #905, defendant argued that plaintiff forfeited its copyright in one of the two panel designs it allegedly copied, in that 500,000 copies thereof were printed without notice. The plaintiff admitted that 500,000 copies had been so distributed. However, in view of the total of 22,000,000 copies distributed, plaintiff invoked 17 U.S.C. §21 to retain protection on the basis that the omitted notice was a mistake or accident and that defendant was not misled thereby. While the court indicated that the facts presented a close question as to the applicability of 17 U.S.C. §21, it was one which he "might have been inclined to resolve in plaintiff's favor."

Had this design been the only one infringed by defendant's fabric #905, defendant would have been granted a hearing to explore the following issues:

"1) the extent to which omissions of the copyright notice of the Blue Girl did occur, 2) how they came into existence, 3) why they occurred on several different types of products and 4) why copies with omissions have been contained on products sold right up to the date of the hearing of this injunction."

However, since defendant's Fabric #905 copied *two* panels of plaintiff's, one of which had never been published without notice, this served as an independent justification for the granting of relief, and therefore an evidentiary hearing was unnecessary. Defendant attempted to challenge the notice with respect to this second panel design which had been published on porcelain boxes with two copyright notices, one in the full name of the plaintiff's subsidiary and one with the initials of such subsidiary. Defendant's effort was defeated in that 17 U.S.C. §19 authorizes the use of a notice with initials on works of art as long as a fuller notice appears permanently affixed somewhere else on the work. In addition, while plaintiff owned the copyright, a notice in the name of its subsidiary was proper because of the identity of officers, directors, and shareholders. Finally, while the work was first published in 1967, the year 1973 in the notice was not an "impermissible attempt to extend the period of statutory protection" but reflected the fact that plaintiff's work was "derivative" in that it had new matter not contained in the original design and was thus independently copyrightable with no reference to the original year date needed.

The court then commented on defendant's attack on the copyright notice on the work its fabric #846 was alleged to infringe:

"With respect to fabric #846, defendant's arguments claiming forfeiture by reasons of defective notice are even weaker. At best, defendant's attack could invalidate the copyrights to the illustrations of perhaps four of the eleven panels of the gift wrap copied on the fabric, even if all the objections were sustained. Thus, even if defendants were correct, fabric #846 still copied several panels to which there is no claim of copyright invalidity. And most importantly, defendant's fabric #846 copies the overall arrangement of the panels on plaintiff's gift wrap. Thus even if somehow plaintiff lost the copyright to all of the indi-

vidual panels, defendant is not thereby permitted to infringe on plaintiff's copyrighted design arranging the panels in a distinct artistic pattern."

(3) *Laches*

Plaintiff's delay of approximately two months after bringing suit and of approximately four and a half months after it learned of defendant's activities was held "reasonable" given

"the plaintiff's desire to perform an adequate and responsible investigation, the need to correspond with and obtain documents from the office of the Register of Copyrights in Washington, D.C. and the need to communicate between plaintiff's home city of Cleveland and its New York attorneys in preparing the papers in this action."

The court dispensed with the requirement of irreparable harm by reason of plaintiff's prima facie case of infringement. However, in balancing the equities, the court concluded with the following remarks:

"Finally, while I am aware of the fact that defendants are not barred from asserting the defense of the insufficiency of plaintiff's copyright notice simply because they were previously aware of the existence of plaintiff's copyright, *Puddu v. Buonamici Statutory, Inc.*, 450 F.2d 401 (2d Cir. 1971), nevertheless in balancing the equities involved on this motion and in resolving in a preliminary fashion the sufficiency of plaintiff's copyright notices, I cannot ignore the obvious fact that defendant appears to be a brazen infringer, attempting to retain the benefits of its piracy of plaintiff's design principally by raising technical defenses to defects in copyright notice upon which it makes no pretence of having relied."

277. *United States v. Brown*, 400 F. Supp. 656 (S.D. Miss. Sept. 17, 1975) (Nixon, D.J.).

The action was brought by the United States Government to confiscate and destroy tape duplicating equipment, master tapes of sound recordings protected under the copyright laws of the United States, infringing copies of sound recordings, and miscellaneous supplies and materials used in making and packaging magnetic tape recordings. The plaintiff had no proprietary interest in the copyrights infringed.

The fact that the defendant's property infringed valid rights of various third parties was stipulated.

Held, judgment for the government.

The primary issue addressed by the court was the plaintiff's standing. As this case is one of the first impression, the relevant portion of the court's opinion is set out below in full:

The standing of the United States to bring this action presents the most difficult issue for determination by the Court. It is the position of the plaintiff that it is entitled to all of the relief provided by 17 U.S.C. § 101 except for damages, profits and royalties, which, pursuant to this statute, can only be recovered by a person having a proprietary interest in the infringed copyright. It is indeed significant that Sections 101(b) and 101(e), which provide for damages, profits and royalties, make these actions available only to persons having this proprietary right, whereas the other provisions of the statute relating to injunctions and destruction of infringing property do not contain such a provision. Furthermore, Section 116, Title 17, provides that "in all actions, suits, or proceedings under this title, except *when brought by or against the United States or any officer thereof, full cost shall be allowed . . .*", thus indicating that the United States may be a party plaintiff in civil actions under this chapter. (Emphasis Supplied)

On the other hand, 17 U.S.C. § 108 provides that foreign articles which infringe on a copyright can be seized and forfeited by the United States in like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the custom revenue laws, and upon forfeiture, it shall be destroyed or in certain cases sent back to the country of export. The defendant argues that had Congress intended to grant the United States the right to subject articles and equipment used in a copyrighting infringement in a domestic case to forfeiture, it would have been a simple matter to have enacted such a provision for domestic articles.

Neither party has submitted, nor has independent research by the Court revealed any case in which the United States' standing to bring an action of this type has been determined. The few federal cases where the infringing articles have been "delivered up" for destruction involved civil suits between the owner of the copyright and the offending infringer. Chapter 2 of Title 17, U.S.C., entitled "Infringement Proceedings" neither grants nor denies the United States the right to bring an action under Section 101(a) for injunctive relief or under Section 101(d) for destruction of the infringing paraphernalia. The plaintiff points out that the United States Supreme Court has on several occasions determined that the government was entitled to in-

junctive relief and damages for violations of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. § 401 et seq., even though not expressly provided for in the Act, which, in addition, provides criminal sanctions for violations. See *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960) and *Wyandotte Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967).

The United States contends it is entitled to the requested relief in order to permit it to fulfill its obligations under international law, to enforce its domestic law, and protect its revenues, and to protect, in its capacity as *parens patriae*, its citizens whose economic interests are jeopardized by copyright infringement. Based upon the above statutory language and an examination of the case law submitted by the plaintiff in support of these contentions, this Court is of the opinion that the United States may bring this action under Section 101(d) for the destruction of infringing paraphernalia, and, under the facts of this case, is entitled to the relief sought herein.

[3] Examining the latter contention first, this Court finds that the government is entitled to seek relief under the provisions of Sections 101(a) and 101(d) in its capacity as *parens patriae* in order to protect the rights of all persons whose economic interest may be adversely affected by copyright infringers. In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the United States Supreme Court recognized that a State in its capacity as *parens patriae* could maintain an action for an injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, but could not recover damages in that capacity under Section 4 of the Act, 15 U.S.C. § 15.

[4] Secondly, this Court concurs with the plaintiff's contention that the government's right to a judgment in this case is the interest which the United States has in enforcing its copyright laws. In the case of *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), an injunction was sought by the United States to prohibit the development of coral reefs within an area designated as the Continental Shelf by both the Outer Continental Lands Acts and the Geneva Convention on the Continental Shelf. In holding that the United States was entitled to an injunction, the Court noted that neither ownership nor possession of the property involved was a necessary prerequisite for the granting of injunctive relief, but that the United States had an interest to protect or defend. The decision was not based on the Outer Continental Shelf Lands Act, but on the sovereign rights granted the government under Article 2 of the Geneva Convention respecting exploration for an exploitation of natural resources.

[5] Furthermore, the Court finds meritorious the government's

contention that the United States is signatory to numerous treaties and other international agreements requiring it to protect copyrights, the most significant of these treaties being the Universal Copyright Convention, 6 U.S.T. § 2733, which became effective as to the United States on December 6, 1954. Article I of the Convention recognizes the obligation of the Contracting States to provide adequate and effective protection of copyrights. Under the provisions of Article X, the United States obligates itself to adopt measures necessary to insure application of the Convention and acknowledges that it is in a position under its domestic law to give effect to the terms of the Convention. Inasmuch as the United States, under the rationale of *Ray*, supra, is entitled to injunctive relief to enforce rights granted to it under the terms of a treaty, it should be entitled to an injunction or other relief reasonably necessary to fulfill its international obligations.

Accordingly, based on the above findings and conclusions, it is the opinion of this Court that the defendant Henry Newton Brown, Jr., should be required to deliver up on oath for destruction all copies of tape recordings infringing the copyrights and the work protected under the copyright laws of the United States, together with all means for making such infringing copies which are owned by him, or in his possession or subject to his control. The Court further finds that the property described in Exhibit "A" to the Complaint, consisting of infringing copies protected under the copyright laws of the United States, should be destroyed in accordance with the provisions of the law.

PART V.

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A. BOOKS AND TREATISES

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The conference has been co-sponsored by the Copyright Office of the Library of Congress and the National Commission on Libraries and Information Science. The meetings have been dealing with the issue of library photocopying.

279. PINCUS, LEE.

The songwriters' success manual. New York, Music Press [1974]. 160 p.

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280. TAPE PIRACY SYMPOSIUM. *Vanderbilt University, 1974.*

Tape piracy symposium, September 13-14, 1974. Nashville, Vanderbilt University [1975]. 194 p.

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281. WINCOR, RICHARD.

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2. Foreign Publications

1. In German

282. KATSUMOTO, MASAAKIRA.

Das neue japanische Urheberrechtsgesetz. The new Japanese copyright law. Wien, Manzschel Verlags- und Universitätsbuchhandlung, [1975]. 218 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 52).

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289. STEVENS, GEORGE E. Performing artists as "public figures"; the implication of *Gertz v. Robert Welch*. *Performing Arts Review*, vol. 6, no. 1 (1975), pp. 3-19.

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The article examines pertinent language in both the Berne Copyright Convention and French domestic legislation, reviews recent French court decisions on the subject and discusses copyright liabilities of persons who undertake transmission of

radio and television programs on private networks in housing developments.

295. N'DIAYE, N'DÉNÉ. L'influence du droit d'auteur sur le développement de la culture dans les pays en voie de développement. *Revue Internationale du Droit d'Auteur*, no. 86 (Oct. 1975), pp. 58-87.

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303. Copyright hearings conclude with Register's testimony. *BNA's Patent, Trademark & Copyright Journal*, no. 257 (Dec. 11, 1975), pp. A4-A9.

A summary of the Register's testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice concerning the provisions in H.R. 2223. An analysis of the provisions concerning the Copyright Royalty Tribunal is included, with a prognosis of future action on the bill.

304. Copyright Register says it's late to be revising mechanical rate. *Variety*, vol. 281, no. 4 (Dec. 3, 1975), p. 51.

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305. G., R. What's wrong with this picture? *Science*, vol. 189, no. 4204 (Aug. 29, 1975), p. 703.

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The suggestion is made that U.S. record manufacturers register their copyrights with that government; that Chinese agents or licensees be appointed, and that legal actions be taken against the pirates in an effort to minimize the record piracy that flourishes on Formosa.

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This brief report was given at a recent meeting of the American Society of Information Science. After delineating instances in which scientific articles from American Institute of Physics publications have been reproduced without authorization, the conclusion is reached that both the financial and professional crises that are now arising will increase with future operations of computerized networks.

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315. OELSNER, LESLEY. Law giving Nixon's tapes to U.S. is upheld by court. *The New York Times*, vol. 125, no. 43,083 (City ed., Jan. 8, 1976), p. 1, cols. 1-2; p. 15, cols. 1-8.

A news report on a decision by a three-judge federal court relative to the constitutionality of the 1974 law which gave the Government control over Richard M. Nixon's papers and tape recordings. The law was unanimously upheld on grounds that custody was given to the Administrator of General Services with

the direction that he promulgate regulations for processing the papers to determine which were private and could be returned to the former President, and which were of public interest.

316. Paramount, Universal sued for \$7.5 million by W.C. Fields' kin. *The Wall Street Journal*, vol. 187, no. 2 (Eastern ed., Jan. 5, 1976), p. 24, cols. 1-3.

Suit by daughter-in-law and grandchildren of W.C. Fields to enjoin production of a "fraudulently fictionalized" biography of the late comedian as a motion picture.

317. Ringer supports a judicial review of copyright trib. *Variety*, vol. 281, no. 7 (Dec. 24, 1975), p. 35.

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The American Society for Information Science held a meeting in Boston in October at which a number of issues were presented, including library photocopying and its effect on publishing. The reporter opines that "the lack of consensus on such important items as the national library plan and copyright indicates that we're still a long way off from resolution of these issues."

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The Canadian parliament adjourned before taking action on a bill that would remove commercial advertising in American magazines and on radio and TV programs read, heard or viewed in Canada from their present tax-exempt status. U.S. Senators from states bordering on Canada have been considering the possibility of introducing legislation that would impose import duties on Canadian records and films in retaliation.

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325. WAGNER, SUSAN. AAP Washington seminar. Hoopes: direct involvement by publishers makes the difference in Washington issues. *Publishers Weekly*, vol. 208, no. 22 (Dec. 1, 1975), p. 18.

At the Third Annual Publishers Forum seminar which met in Washington on November 11, 1975, Townsend Hoopes, President of the Association of American Publishers, remarked that he felt the copyright revision bills currently in Congress would be passed next year, that the publishers' positions on sec. 107 (fair use) and 108 (library photocopying) seemed to have favorable support in Congress, but that the Mathias amendment permitting a compulsory license for public broadcasters was presenting difficulties.

326. WAGNER, SUSAN. Copyright office testifies against Mathias amendment. *Publishers Weekly*, vol. 208, no. 20 (Nov. 17, 1975), pp. 16-17.

During one day's testimony by the Register of Copyrights before the Kastenmeier Subcommittee's hearings on copyright law revision, two controversial subjects were discussed: the public broadcast amendment which would provide for a compulsory license for the use of "nondramatic literary, musical works, pictorial, graphic and sculptural works" with royalty payments set by the Copyright Royalty Tribunal, and the protection of typeface designs under Title II of the bill (H.R. 2223).

327. WAGNER, SUSAN. GAC-AAP: books are a vital element in foreign policy. *Publishers Weekly*, vol. 208, no. 21 (Nov. 24, 1975), pp. 14-15, 18.

A special joint session of the Government Advisory Committee on International Books and Library Programs and the International Trade Committee of the Association of American Publishers was called to reassess and revitalize the role of books in U.S. cultural and information programs within the context of that section of the Helsinki Agreement that dealt with books and library programs. Among some of the recommendations at the meeting were that efforts be made to facilitate international exchanges of books and cultural material, to secure effective application of the international conventions on copyright and to promote wide-scale translation and publication of cultural works.

328. WAGNER, SUSAN. Ringer urges end to manufacturing clause. *Publishers Weekly*, vol. 208, no. 23 (Dec. 8, 1975), p. 13.

A report on the Register of Copyright's testimony before

the House Subcommittee on Courts, Civil Liberties and the Administration of Justice relative to the manufacturing clause provisions contained in H.R. 2223.

329. WAGNER, SUSAN. Stronger U.S. policy urged on repression of writers abroad. *Publishers Weekly*, vol. 208, no. 22 (Dec. 1, 1975), pp. 17, 21.

Claiming that the U.S. is pursuing a morally bankrupt policy toward freedom to write and publish, a representative of the Authors League, in testimony before a Senate subcommittee on November 18, 1975, called for enactment of copyright revision legislation to prevent a foreign government from interfering with the U.S. copyrights of its authors' works. Opposition was also voiced to the so-called Mathias amendment presently incorporated in S. 22, the general copyright revision bill. The amendment would grant a compulsory license for use of non-dramatic literary and musical works, as well as pictorial works by public broadcasting systems.

2. Foreign

1. England

330. Copying in schools; P.A. offers draft license as basis for discussion. *The Bookseller*, no. 3644 (Oct. 25, 1975), pp. 2180-2187.

A memorandum and draft blanket license submitted by the British Publishers Association as a basis for discussion in resolving the question of how to secure compensation to authors and publishers for the photocopies of textbook material used in various school systems. The proposed license fee would be based on the number of students in each participating school.

2. Russia

331. KHROPOTINSKY, VASSILY. Moldavian books today. *VAAP; information bulletin of the copyright agency of the U.S.S.R.*, no. 2 (1975), p. 15.

A brief note on the type of publications and the amount of printing being produced in the Moldavian Soviet Socialist Republic today.

NEWS BRIEFS

332. BANGLADESH ACCEDES TO U.C.C.

An instrument of accession by Bangladesh to the Universal Copyright Convention as revised on July 24, 1971, and to annexed Protocols 1 and 2, was deposited with the Director-General of Unesco on May 5, 1975, and the 1952 Convention came into force for Bangladesh on August 5, 1975.

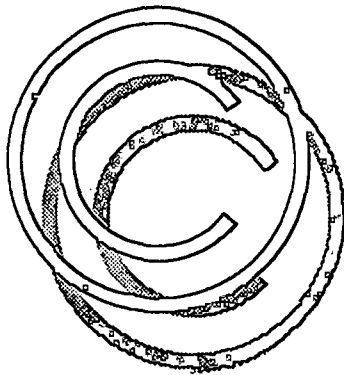
Accession by Bangladesh brings the total number of parties to the 1952 U.C.C. to sixty-nine.

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ANNOUNCEMENT

Dr. Louis Charles Smith, 1909-1976	<i>preceding</i>

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DR. LOUIS CHARLES SMITH
1909-1976

Dr. Louis Charles Smith, former Senior Attorney of the Copyright Office, died on April 20, 1976, after a protracted illness.

Dr. Smith retired on December 31, 1961, after 39 years of service in the Copyright Office, where he began as an Indexer, became a Cataloger, had charge of copyright searches and public information on copyrights, and served as Chairman of the former Revisory Board, which passed on rejections of claims to copyright, before becoming Senior Attorney.

Dr. Smith was the author of a number of monographs, including *Copyright of Literary Property in Library Collections*, and a paper entitled "Copyright in the Editing of Music" (1947). The latter was an important factor in the formulation by the Copyright Office of its policy with regard to the registration of copyright claims based on the editing of musical compositions. Also, he was an authority on the provisions of the copyright law that relate to importation. Dr. Smith was a member of the original Board of Trustees of the Copyright Society of the United States of America.

PART I

ARTICLES

333. COPYRIGHT IN THE 1980s—*The Sixth Donald C. Brace Memorial Lecture**

By HON. BARBARA RINGER**

When Paul Gitlin called to invite me to deliver the Sixth Donald C. Brace Memorial Lecture, he did me more honor than he knew. Donald Clifford Brace was a truly outstanding publisher, who brought to the American public the works of some of the greatest English authors of the twentieth century. Among these authors is the man whose works and voice and life have spoken to me more directly than those of any other: George Orwell.

In 1946 Orwell wrote to his agent, Leonard Moore:

You mentioned in your last letter something about giving Harcourt Brace an option on future books. It's a bit premature as I have no book in preparation yet, but I should think Harcourt Brace would be the people to tie up with, as they had the courage to publish *Animal Farm*. But of course they may well be put off the idea if the book flops in the USA, as it well may. I am not sure whether one can count on the American public grasping what it is about. You may remember that [a certain publisher] had been asking me for some years for a manuscript, but when I sent the ms. of *AF* in 1944 they returned it, saying shortly that "it was impossible to sell animal stories in the USA." So I suppose it might be worth indicating on the dust-jacket of the American edition what the book is about. However, Harcourt Brace would be the best judges of that.

Harcourt Brace did, in fact, go on to publish Orwell's next work, one whose literary and historical significance, and whose ultimate so-

*This lecture was delivered in the Auditorium of the New York University School of Law on March 25, 1976.

**Ms. Ringer is the United States Register of Copyrights. The views of the author are personal and are not intended to reflect any official positions of the Copyright Office or of the Library of Congress. No copyright is claimed in this lecture.

cial influence, cannot be exaggerated. The title of Orwell's work, "1984" has become a symbol and, I fear, a political slogan of exactly the kind he was attacking in the book. The popularity of the title as a catch phrase has obscured and distorted the meaning of the work itself. Orwell, who was dying when the novel was published in 1949, cast his story in terms of the utmost pessimism, but his intention was the opposite of despair. "1984" is a kind of hymn to what Erich Fromm has called the very roots of Occidental culture: the spirit of humanism and dignity. Most of all it is a warning that the values on which our culture is based—of individualism, idealism, and free expression—are in the most immediate possible danger, not from any particular ideology or political system, but simply from the juggernaut of technology. Orwell was powerfully and desperately trying to warn us of the new barbarism just around the corner, of "the new form of managerial industrialism in which", to quote Fromm's trenchant essay, "man builds machines which act like men and develops men who act like machines"—of "an era of dehumanization and complete alienation, in which men are transformed into things and become appendices to the process of production and consumption."

For publishing this book, and for publishing George Orwell at all, Donald Brace deserves to be thanked and honored. The message Orwell was seeking to convey affected the lives and actions of some members of my generation very profoundly. And yet today, less than eight years from the date Orwell chose as his particular doomsday—when everything he predicted is coming true, and not just in other countries—we accept these horrors as inevitable or even acceptable, and spend most of our time looking for personal anodynes.

When Paul Gitlin first called to ask me about making this lecture, he had just seen a piece I wrote for the Centennial Issue of the *Library Journal* titled "Copyright and the Future Condition of Authorship". He said he found the tone of my essay pessimistic, and he rather implied that I might do well to make this lecture a little more up-beat. As I told him, my own feeling is not one of despair, and I certainly have no wish to plunge anyone into a blue funk over what is happening to copyright and the condition of authorship. But in copyright, which is the particular field I am called upon to plow, I do believe that people should be made to recognize the dangers and to realize that there is still a chance to do something toward averting them.

I am making these remarks at a time that may prove to be a major turning point in the history of American copyright law. In February, the bill for general revision of the copyright law, which has been pending in Congress for nearly 12 years, passed the Senate unanimously by a vote of 97 to nothing. Progress in the House of Rep-

representatives has been slow, and I see enormous difficulties in the months ahead, but I still believe it is safe to predict enactment of the bill this year. If I am wrong, if the efforts to reform the present copyright statute of 1909 have to continue into the 1980s in the face of on-rushing technological change, I am afraid the picture I am painting will be much darker and bleaker than I anticipate.

I prefer to look on the brighter side. I base my analysis of copyright in the 1980s on the assumption that S. 22 of the 94th Congress will be in effect before the start of that decade, and that the impact of its changes will already have been felt. These changes will certainly lay the basis for the conditions of authorship and the dissemination of authors' works during the last quarter of the century.

When I began to frame the outline of this lecture I first thought I would take the specific provisions of S. 22 and project them into the 1980s, in an attempt to analyze how they should work out in practice. It did not take me long to realize that this approach would be both too difficult and too easy: too difficult because of the amount of complex detail and imponderabilia involved, and too easy because it is always simpler to analyze the trees and ignore the forest and the surrounding terrain. Instead, and with considerable misgivings, I will try to take the trends I see working upon and through the domestic revision bill—and in international copyright—and to project what may emerge from them in the next decade. I will try to deal with these trends under four general headings:

- 1) The nature of copyrightable works and the methods of their dissemination;
- 2) The nature of rights in copyrightable works;
- 3) The situation of individual authors; and
- 4) The role of the state in copyright and authorship.

The nature of copyrightable works and the methods of their dissemination

I believe, with Orwell, that mankind is changing the world through technology and that technology in its turn is changing mankind into technological beings. Where does this leave the creative individual and his ability to present his ideas and creations to others?

It seems most superfluous to observe that the technological revolution in communications is a pivotal event in the history of mankind, and that its full impact has not yet been felt. Among the plethora of electronic marvels now arrayed for our use, there are those that are merely transitory toys and gadgets, but there are others that seem to some people to have god-like qualities. It is certain that,

amid all the electronics and advertising, the quality of human life is changing, and that the real impact of the change has not yet been felt.

Anyone who sits down and thinks about what has happened to mass communications since 1909 can come up with quite a list: silent and, later, sound motion pictures; radio and, later, television and, still later, cable and pay-television; computers and their ability to assimilate, generate, and manipulate limitless amounts of information; satellites and their potential for reaching and linking everyone on earth; sound recordings and, later, audio and video tape recordings; photocopying and microreprography; and automation in the composition and reproduction of printed matter. This certainly does not exhaust the list, and many of these developments combine and interact, providing nationwide and worldwide networks for quick or instantaneous dissemination of what passes for information and entertainment. And there is evidently no end to this process: a satellite is already making direct transmissions into individual receiving sets in India; holography is beginning to lose its mystery; and lasers are being used for all sorts of things: for data storage, for communications channels into homes, and as a part of commercial video disk players soon to enter the consumer marketplace.

On the face of it, all this opens tremendous new channels for creative endeavor and new ways of reaching huge audiences of readers, and viewers, and listeners, and information seekers. Like the invention of movable type and of painting techniques and musical instruments during the Renaissance, technology is bringing a whole new breed of creators into the communications arts. It is also allowing traditional creators to fix their works permanently and, literally, to get them into the hands of anyone who wishes to see or hear them. The 80s should see some startling developments in one-way, two-way, and unlimited wireless communications.

Despite the cynicism and alienation that we see everywhere today, most people still welcome each technological "advance" as some sort of miracle and rush to buy and use it for purposes that, if pressed, they might have trouble articulating. Yet, unless I misjudge the signs, there is a growing realization that all this machinery has done less than nothing to improve human life; the more voracious our craving for technological advance, the more individual people suffer. Instead of fostering perfection in the arts and the creation of masterpieces, the communications revolution has already maimed a number of traditional forms of expression and is destroying our standards, our ability, and our desire to judge our own culture.

I remember someone predicting a few years ago that, if the present trends continue, by the end of the century we will have a great

many more birds than we have now, but that they will almost all be either pigeons and starlings. I have the same feeling about the effect of technology on copyright: a great many more works are going to be copyrighted in 1986 than in 1976, but their intrinsic value will continue to decline.

I believe that the courts and the Congress will continue to expand the subject matter protected by copyright and to cover the new uses of copyrighted works made possible by the expanding technology. But if the effect of this limitless expansion is to destroy incentives to truly creative work, to substitute remuneration for inspiration, and to make great creative works compete unequally with vastly increased quantities of trash and propaganda, we will have lost much more than we have gained.

The nature of rights in copyrightable works

Throughout the whole range of national and international copyright regimes since 1950, a single concept insistently recurs: it is usually called compulsory licensing, although in its various guises it may be referred to as "obligatory", "statutory", "legal" or "agreed" licensing. Characteristically, it is offered as a compromise to copyright controversies in two situations: where technology has created new uses for which the author's exclusive rights have not been clearly established, and where technology has made old licensing methods for established rights ponderous or inefficient.

Under a typical compulsory licensing scheme, the author loses the right to control the use of his work, and cannot grant anyone an exclusive license for a certain specified purpose. Instead, his work is lumped with thousands or millions of other works, and the author also becomes a unit in a large collective system under which blanket royalties are received and distributed. The government is involved in operating the system, and the individuality of both authors and works tends to be lost. Authors may be paid well for the use of their works, but their participation in the system is, by definition, compulsory rather than voluntary.

It may come as a shock to realize that S. 22, as it now stands, contains four full-fledged compulsory licenses involving rate-making by a government tribunal. A separate piece of legislation, which will be pushed very hard in the House, raises the possibility of a fifth, and others may emerge before the bill is finally enacted. As we go into the 1980s, copyright is becoming less the exclusive right of the author and more a system under which the author is insured some remuneration but is deprived of control over the use to which his words are put.

In 1908, Congress was confronted with a particular dilemma of either giving exclusive rights to musical copyright owners, and thereby allowing the creation of what they referred to as a giant music trust, or of withholding these rights and thereby causing a great injustice to creators. Congress devised what, to my knowledge—and I have never been challenged on this statement—is the first compulsory license in history, section 1(e) of the present law. There may well have been intellectual antecedents to this under specific court decisions or in private, blanket licensing arrangements; but, as far as statutory, across-the-board, arrangements are concerned, I believe that the copyright royalty for sound recordings was the first compulsory license in the world.

It was copied almost immediately in the copyright statutes of other countries, in the same context of mechanical royalties for recording music. The situation as it evolved in the statute meant that a two-cent limit was imposed on the amount of royalties a copyright owner could get for having a song recorded by another person. Once the owner of the copyright in a musical composition licensed his work for recording, everyone else had a right to make a recording by paying two cents per song per record. This is still the law, all these years later.

It would seem, on the basis of a great deal of experience, that this compulsory license is as firmly rooted in our copyright law as anything can be. I suspect that, by the time S. 22 is enacted into law, the two-cent rate will have been raised somewhat, but it is probably too late to raise any philosophical questions about compulsory licensing in this context. Indeed, the trend is exactly the reverse: to expand the concept of compulsory licensing into every new form of use of copyrighted works created by changes in communications technology. This seems certain to be true in the case of jukebox performances and cable television transmissions.

The cable issue, in particular, has been the reef on which copyright law revision foundered for seven years. In 1967, the House Subcommittee, confronted by this new and highly controversial issue, tried as forthrightly as possible to solve the problem through a rather simple form of compulsory license, and without imposing the heavy hand of government regulation. This effort was doomed to failure. The reason was that no one knew what the liability of cable systems was under the law, as construed in 1967. They do now: the Supreme Court has twice held in favor of cable and against exclusive rights under the copyright statute. Cable became a roaring issue in 1967 and, as a result, when the House passed the bill, the whole cable provision was simply wiped away and the problem was passed to the Senate.

The Senate, in turn, evolved a whole new concept of protection for cable uses of copyrighted works which rested upon a compulsory license and added a new and very significant institution, a copyright royalty tribunal. This new device, which was inevitable when the House approach of 1967 failed, would create a government-associated body empowered to make decisions with respect to the practical running of the compulsory licensing system. Rates would be subject to review by this tribunal and decisions would be made with respect to the distribution of fees.

All three of these compulsory licenses—the so-called mechanical royalty, the jukebox compulsory license, and the compulsory license for cable television—seem certain to be enacted in some form. All three are very deeply rooted in the bill, and they are all related, in one way or another, to a copyright royalty tribunal that would be involved in rate-making and in the distribution of fees.

In 1969, the Senate Subcommittee added a fourth compulsory license for the performance of sound recordings. This turned out to be one of the most controversial provisions in the bill. It was knocked out in the Senate in September of 1974 and has not yet been reintroduced. Interestingly, for a generation or more the organized musicians turned their backs on copyright protection and sought to protect their interests through collective bargaining and a controversial trust-fund device. Now, in a complete turnabout, the whole AFL-CIO has joined with the record industry in a concerted effort to enact a copyright law establishing a royalty for the performance of sound recordings in radio and other media. Of course, this is being fought vigorously by the broadcasting industry, and the fight will probably go right down to the House floor, promising a dramatic confrontation.

I am supporting this proposal in principle because I think it is unfair that individual performers have rarely received any of the benefits from the great technological developments that have, to a large extent, wiped out their profession. Fairness indicates that it is wrong that they not get paid for performances of their works, and I believe that sooner or later this right will be recognized under some form of compulsory licensing.

When this provision was in the bill the public broadcasters said, "Well, for heaven's sake, if all these commercial interests are going to get something like this compulsory license, why shouldn't we? We public broadcasters are not paying any copyright royalties now, but we recognize that we should. But, even if we have to pay something, we cannot put ourselves in the position of having to get individual clearances for all the music we play, all the graphic works that we show on the screen, and all of the literary works that we read over public radio and on the tube." They took their problems to Senator Mathias and

apparently made a persuasive case, because we now have a new Section 118 in the bill as it passed the Senate. The section would create a rather amorphous compulsory license for the public broadcasting of musical compositions, nondramatic literary works, and pictorial, graphic and sculptural works. It would leave to the proposed royalty tribunal the problem of setting the terms, rates, and the entire mechanism for running the compulsory license.

I am opposed to this provision, and particularly its impact on the whole range of nondramatic literary works. At the same time, I am aware of the vast political power of public broadcasters, and I think the chances of facing compulsory licensing in this area in the 1980s are better than ever.

What we have seen demonstrated in the evolution of these five compulsory licensing schemes, and others that seem to be right around the corner, is a kind of inexorable historical process:

- First you have a copyright law that was written at a particular point in the development of communications technology, and without much foresight.
- Then you have technological developments, which create whole new areas for the creation and use of copyrighted works.
- Business investments are made and industries begin to develop.
- The law is ambiguous in allocating rights and liabilities, so no one pays any royalties.
- A point is reached where the courts simply stop expanding the copyright law and say that only Congress can solve the problem by legislation.
- You go to Congress, but you find that you have hundreds of special interests lobbying for or against the expansion of rights, and the legislative task is horrendous.
- So Congress, looking for a compromise, turns to compulsory licensing. On its face, a compulsory licensing system looks fair to each side: the author and copyright owner get paid, but the user, who has made a strong argument that what he is doing represents the public interest, cannot be prevented from using the work.

We have reached the point where any new rights under the copyright law apparently cannot be exclusive rights. If a new technological development makes new forms of exploitation possible,

compulsory licensing seems to offer the only solution. This is happening in the United States and it is happening just as much internationally. Compulsory licensing systems represent key provisions in the 1971 revisions of both the Berne and Universal Copyright Conventions, and in recent copyright laws in other countries.

Before the present program for general revision of the copyright law began in 1955, the United States had endeavored successfully to develop an international convention which would provide multilateral copyright relations between Western Hemisphere countries and the European countries members of the Berne Convention. The result was the Universal Copyright Convention, which was signed in Geneva in 1952 and came into effect in 1955.

In its origins, the Universal Copyright Convention was considered a low-level transitional treaty which would dry up and blow away as more and more of its members accepted the principles of the Berne Convention. The confident assumption twenty-five years ago was not only that the level of protection reached at the Brussels revision of the Berne Convention in 1948 constituted the norm in international copyright, but that even its relatively high level of protection would continue to rise and expand.

These expectations have proved false, for at least three interrelated reasons:

- First, the technological revolution in communications.* This includes the compulsory licensing demands that technological development has spawned in practically all countries.
- Second, the needs of developing countries.* At crucial conferences in Stockholm in 1967 and Paris in 1971, the developing countries made a persuasive case for an international copyright system that gives them ready access to the materials they need to combat illiteracy and provide educational, scientific and technical information for their peoples, at prices they can afford to pay. Whether the 1971 revisions of the two conventions have achieved this goal as a practical matter remains to be seen.

The concessions made in the Paris revisions of both the U.C.C. and the Berne Convention, in a general sense, are an attempt to preserve the principles of copyright in the face of the needs of states with limited resources, confronted with difficult and pressing development choices in allocating their expenditures. In this light, the Paris revisions looked towards greater interdependence and cooperative trading relationships

within the world copyright community. Whether this approach is realistic in an increasingly inflationary world economy is far from certain.

—*Third, the impact of socialist legal thinking.* The adherence by the U.S.S.R. to the 1952 text of the U.C.C. effective on May 27, 1973, was a dramatic illustration of a trend already apparent in international copyright. Increasingly the status of an author as an individual controlling definite rights, and the concept of copyright as a form of private property, are being questioned and challenged.

Socialist attitudes toward property generally have made deep inroads into the fabric of international law. To an extent, it is even something of a misnomer to call these attitudes "socialist", since they are frequently shared and enunciated forcefully by non-socialist developing states. The 19th century capitalist tradition of unqualified individual property rights and full freedom of contract disappeared from the West long before the same principles came under attack internationally. The gradual disappearance of colonies has largely produced a reworking of those notions of property and contract which underlay mercantile capitalism. The constitutions and legislation of developing states are replete with provisions which stress that the notion of private property is qualified in all cases by social welfare and necessity. As unique a form of property as copyright is, it has not proved immune from these pressures.

The situation of individual authors

All of these forces seem to be combining throughout the world to substitute compulsory licensing and various forms of state control for exclusive copyright control, and to substitute remuneration for voluntary licensing arrangements. Individual authors, standing alone, are helpless to protect themselves in a situation like this. Ironically, in order to preserve their own independence as authors, they will inevitably be forced to unite in collective bargaining organizations, and to allow their representatives to speak for them.

Authorship, by which I include all kinds of creative endeavor, is in an extraordinary state of flux. For some two hundred years, from the end of the patronage system in the late 17th century to the emergence of the new technology in the beginning of the 20th century, authors enjoyed something like a direct one-to-one relationship with their readers, through their publishers. This relationship has

ceased to exist entirely in some creative fields, and is fast disappearing in others. Authors are losing their ability to speak directly to readers, listeners and viewers, and must now deal with increasing hordes of middlemen who control the communications media or the access to them. In this situation it is quite possible to envision the emergence of societies in which there is little individual or independent authorship; most creative work would be done as part of collective endeavors, merged together anonymously, and whatever individual writing remains would be done under the patronage and control of the state.

Copyright is obviously caught up in a social tidal wave. In trying to preserve independent, free, authorship as a natural resource, one must be aware of the changes that are taking place and cautious about the methods adopted to deal with them. Some ideas that are put forward as solutions to practical problems of copyright clearance and access to information may turn out to be more destructive to our society than the problems they are supposed to solve.

I confess that at this point I come to the first of two dilemmas in my present thinking about the next twenty years—questions that I consider of immense importance but to which I can see no clear-cut answers. The first is what individual authors can do to protect themselves from this onslaught of technology. We have already reached a turning point in several areas, and are fast approaching it in others, where the individual creator simply cannot assure himself of fair remuneration for the use of his works unless he joins a collective organization of some sort. ASCAP and BMI are examples of one sort of collective organization in which authors pool their copyrights but maintain some degree of individual ownership and control over their use. The other most common type of organization is a trade union, which represents its members as employees and bargains for them on a collective basis.

There is, quite obviously, a loss of independence in both cases, and for some authors and for some types of work this may prove an intolerable sacrifice. But what are the alternatives? A continuing alliance with publishers or equivalent middlemen in which the individual author's voice cannot be heard? Direct government control over licensing? Direct government patronage?

These are the questions that will inevitably have to be faced and answered in the 1980s, and I find it astonishing that so far there is very little awareness or discussion of them. The discussion should be undertaken by the authors and creators themselves, not by lawyers or government types like me, and not by publishers or film producers or information industry representatives. But a movement toward clearing-house arrangements and collective licensing has already started, and

unless the implications and alternatives are carefully examined, patterns may become established that authors will soon find themselves powerless to change.

The role of the state in copyright and authorship

The most critical question arising from all of these trends involves the role that government will play in the operation of the copyright systems of the 1980s. In the United States that role is clearly expanding. It seems inevitable that the government will shortly be involved in setting regulatory standards and royalty rates, in settling disputes over distribution of statutory royalties, and in establishing means by which individual authors organize for the payment of royalties. How far this process is allowed to go, and how irreversible it is allowed to become, will depend on decisions that must be taken in the immediate future.

My second dilemma thus involves the Copyright Office and what is to become of it. Recognizing what happens whenever bureaucratic nature is allowed to take its course, I feel that the Office must resist the lure of embracing new regulatory powers over copyright licensing which could easily grow into government control over the conditions of authorship. Yet, I feel just as strongly that the Copyright Office cannot simply walk away from the problem, leaving it to other would-be government regulators or communicators or patrons to fill the vacuum. The decisions on this question, whatever they are, must be taken in full realization of the dangers facing independent authorship in the next decade, and in full determination to surmount them.

334. CASE COMMENT: *Bartok v. Boosey & Hawkes, Inc.*

By MITCHELL G. BERNSTEIN*

It is firmly established that "the protection given to copyrights in this country is wholly statutory."¹ The Copyright Act of March 4, 1909,² which governs this area of law at present, provides the owner of a copyrighted work of art with an "exclusive right: (a) [t]o print, reprint, publish, copy and vend the copyrighted work. . . ."³ Section 24 of the Act⁴ limits the initial period during which the original copyright proprietor may utilize his exclusive right to 28 years.⁵ It establishes, in addition, a priority of persons who are granted a right to renew the copyright for another 28 years. The grantee, under most circumstances, will be the author or his family; but Congress has recognized certain instances where the publisher, as proprietor of the copyright, would be the one entitled to renew.

Since the adoption of the Act, there has been great difficulty in ascertaining ownership of the renewal right. Despite a vast amount of

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¹ *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 15 (1908).

² 17 U.S.C. § 1 *et seq.* [hereinafter cited as "the Act"].

³ *Id.* § 1.

⁴ Section 24 of the Act provides:

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body . . . or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years . . . *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, 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

⁵ A renewal application and fee may only be filed during the twenty-eighth year of the original term of copyright, and is effective if delivered to the Copyright Office within the last year, even though the application is not duly registered until after such period. See 2 M. NIMMER, *THE LAW OF COPYRIGHT* § 116.1, at 480 (1975 ed.) [hereinafter cited as NIMMER].

case law addressed to this problem, an issue never before litigated in the courts⁶ has recently been decided by the Second Circuit in *Bartok v. Boosey & Hawkes, Inc.*⁷ The question presented was whether a musical composition, the rights to which had been assigned by the composer and which had been performed during his lifetime, but which had not been published, or more precisely, printed, until after his death, was "posthumous" within the meaning of Section 24. A majority of the court answered negatively and held that a "posthumous work" within the meaning of the renewal provision could only be one as to which "a contract for copyright was never executed by the author during his life".⁸

In this case, Bela Bartok composed *Concerto for Orchestra* in the late summer of 1943. During the next 15 months, the *Concerto* was performed six times publicly and was broadcast over the radio.⁹ Pursuant to a 1939 publishing contract with Boosey & Hawkes, Inc., Bartok assigned his rights in the composition in exchange for royalties and a promise to issue a printed edition promptly.

The printed manuscript was not completed and therefore not copyrighted until March 20, 1946, six months after Bartok's death.¹⁰ Three years later the composer's widow, his son, Peter, and his estate signed an agreement with Boosey providing for all renewal royalties to be paid to the estate. Pursuant to the composer's will, the estate would pay the proceeds to Mrs. Bartok for her lifetime and then to Peter and the composer's other son after her death.

Before the original copyright period ended in March, 1974, both Boosey and the son, Peter Bartok, filed timely renewal applications. Boosey relied on the first proviso of Section 24, arguing that it was the proprietor of a "posthumous work", since the *Concerto* was not published until after Bela Bartok's death. Peter Bartok contended that the work was not posthumous, and that he was a member of the first

⁶ See *id.* § 114.1, at 464. See also B. RINGER, RENEWAL OF COPYRIGHT, COPYRIGHT OFFICE STUDY NO. 31 128 n. 155 (1960), found in 1 STUDIES ON COPYRIGHT (Arthur Fisher Memorial Ed. 1963) [hereinafter cited as RINGER].

⁷ 523 F. 2d 941 (2d Cir. 1975).

⁸ *Id.* at 944.

⁹ The *Concerto* was initially performed by the Boston Symphony Orchestra on four separate occasions in Symphony Hall, Boston. It was also performed twice at Carnegie Hall in New York. *Id.* at 946.

¹⁰ The delay was due to wartime conditions in England and the fact that Bela Bartok made some minor revisions in the *Concerto*. There was no question, therefore, as to a breach of Boosey's promise to issue a printed manuscript promptly. See *id.* at 943.

class designated in the second proviso of Section 24: "the widow, widower, or children of the author, if the author be not living"

The district court declared that the *Concerto*, "having been published after the death of its composer, is a 'posthumous work' within the meaning of [Section 24]", and consequently conferred the right of renewal on Boosey.¹¹ Although the court felt that the renewal period was intended to benefit the author, his widow and his children, it relied, *inter alia*, on Professor Nimmer's statement that "[t]he accepted dictionary definition of 'posthumous' . . . is 'Published after the death of its author . . .' "¹²

On appeal, the circuit court reversed and conferred the renewal right on Peter Bartok as a statutory beneficiary, holding that the *Concerto* was *not* a posthumous work. The court looked for guidance to the underlying purpose of the renewal provision and the specific reason for excepting posthumous works from the general grant of renewal rights to the author and his family. It concluded that the term "posthumous" did not have the usual dictionary definition, which focuses on the concept of publication, when interpreted within the context of Section 24. Moreover, even were it to be defined in terms of publication, the court implied that in this case, sufficient public dissemination had occurred before the demise of the composer so as to warrant a finding of publication before death.¹³

Justice Van Graafeiland, in his dissenting opinion, would have affirmed the district court decision. He felt that once a commonly accepted definition of "posthumous work" was established,¹⁴ the court should have applied "an equally accepted and established rule of

¹¹ *Bartok v. Boosey & Hawkes, Inc.*, 382 F. Supp. 880, 884 (S.D.N.Y. 1974).

¹² NIMMER, *supra* note 5, § 114.1, at 463. The district court, however, overlooked the commentator's disapproval of the use of the dictionary definition to define "posthumous" within the meaning of Section 24. Nimmer states that "a construction is justified which includes among posthumous works only those which have received no public dissemination in any form during the author's life." *Id.* at 464-64.1.

It is in accord with this construction that Nimmer in the 1975 edition of his treatise describes the holding of the lower court in *Bartok* as "[c]ontrary to the suggestion in the text" *Id.* at 464.1 n. 35a.

¹³ A finding of publication based upon public performance of a musical work, either in concert or by broadcasting, is not supported by most authorities. See 523 F.2d at 953 (dissenting opinion).

¹⁴ Indeed, the dissent cites 19 illustrations (18 when the fact that the Ringer and Fisher definitions are from the same book is considered), ranging from music dictionaries to law review articles, to support his finding of a well accepted definition of a "posthumous work" as one "published after the death of its author." *Id.* at 950-51.

statutory interpretation, viz., 'The popular or accepted import of words furnishes the general rule for the interpretation of statutes.'"¹⁵

The argument of the dissent fails to recognize that this is only a *general* rule, and that it has been held in deference to the rule that courts shall give effect to the purpose of the legislature.¹⁶ Courts may consider all known definitions of words, including dictionary definitions, but these are not necessarily controlling.¹⁷ Courts also may look to legislative history to determine whether the natural significance of words compels an unreasonable and unintended result.¹⁸

In refusing to adopt the accepted dictionary definition of "posthumous" and in considering also the purpose of the renewal provision, the circuit court unquestionably engaged in a valid exercise of statutory construction.¹⁹ It is this writer's contention that if the Second Circuit in *Bartok* had defined a "posthumous work" as one published after the death of the author, the intent of Congress in providing for renewal rights would certainly have been defeated.

Two questions must be answered in order to determine whether the plain meaning of "posthumous work" violates Congressional intent: what is the purpose of the renewal provision in its entirety; and why are posthumous works excepted from the general renewal format?

It is clear that the renewal provision was intended to benefit the author and his family by giving them an exclusive right to take the renewal term.²⁰ The House Committee which submitted the legislation called for the law "[to] be framed . . . so that [they] could not be deprived of that right."²¹

¹⁵ *Id.* at 951, quoting *Shaw v. Dreyfus*, 172 F.2d 140, 142 (2d Cir.), *cert. denied*, 337 U.S. 907 (1949).

¹⁶ See *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937).

¹⁷ The majority in *Bartok* cited Judge Learned Hand's warning against making a "fortress out of the dictionary" in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). 523 F.2d at 947.

¹⁸ See *United States ex rel. Tillary v. Cavell*, 294 F.2d 12, 15 (3d Cir. 1961), *cert. denied*, 370 U.S. 945 (1962).

¹⁹ The Supreme Court has held that the "plain meaning" of words are often sufficient in and of themselves to determine the purpose of the legislation. "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940).

²⁰ See *De Sylva v. Ballentine*, 351 U.S. 570 (1956); *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943); *Harris v. Coca-Cola Co.*, 73 F.2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935).

²¹ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909).

There have been many theories advanced as the rationale for rendering such a valuable right to the author and his family, and it is difficult to decide which is closest to the truth; because as one copyright expert comments, "the development of the 1909 duration-renewal provision appears to comprise an extraordinary *non-sequitur*."²²

One court has submitted that "[t]here are at least sentimental reasons for believing that Congress may have intended that the author, who, according to tradition, receives but little for his work and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom."²³ Many courts have followed the reasoning of Judge Learned Hand in *Shapiro, Bernstein & Co., v. Bryan*,²⁴ where he stated that Congress "clearly intended to protect widows and children from the supposed improvidence of authors in the colloquial sense"²⁵

It has been suggested that these rationales find no support in the report of the House Committee.²⁶ Rather, "[t]here is more evidence . . . that author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position."²⁷ It seems that the "conjectural value" rationale is the most accurate, in that it focuses on the peculiar nature of the copyright property. This rationale is the only one which justifies the departure in the renewal provisions from the traditional rules of property.

The first of these departures, which has been referred to as the rule of reversion,²⁸ is primarily designed to protect the author. At its very essence is the concept that the copyright and the renewal right are not one and the same right. The renewal right is not a continuing right in the initial copyright; it is a new grant of copyright for a sec-

²² RINGER, *supra* note 6, at 121.

²³ *White-Smith Publishing Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

²⁴ 123 F.2d 697 (2d Cir. 1941).

²⁵ *Id.* at 700.

²⁶ See RINGER, *supra* note 6, at 125.

²⁷ *Id.*

²⁸ See RINGER, *supra* note 6, at 125, wherein she states that if Congress wanted to give the author an opportunity to benefit from the success of his work and to renegotiate disadvantageous bargains, "[t]he statute had to break the continuity of title at the end of the first term and provide for a reversion of ownership to [him], if living."

ond term of 28 years.²⁹ Although it is well established that the author may assign his renewal right,³⁰ it is equally true that a mere assignment of the initial copyright will not affect the author's right to renew.³¹ Moreover, there must be strong evidence of the author's intention to assign the renewal right before the courts will uphold such an assignment.³² Courts will also invalidate an assignment on the grounds of inadequate consideration.³³

The second departure from the ordinary rules of property—statutory designation of beneficiaries³⁴—has an important bearing on a discussion of the *Bartok* case. An author must be alive at the end of the original term of copyright in order to obtain the benefits of a renewal term.³⁵ Any assignment prior to this time is merely an assignment of an expectancy of a renewal right.³⁶ The effect of the statutory designation of beneficiaries, therefore, is to allow those persons who succeed to the renewal rights to take the renewal grant free from any assignment made by the author, provided that the author is not alive

²⁹ See HOWELL'S COPYRIGHT LAW 114 (Latman rev. ed. 1962) [hereinafter cited as HOWELL]. In *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 911 (2d Cir. 1921), *cert. denied*, 262 U.S. 758 (1923), the Court stated that the purpose of the renewal provision was to give those persons enumerated "a new right or estate, not growing legally out of the original copyright property, but a new creation . . ." *Accord*, *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951).

³⁰ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). *But see* NIMMER, *supra* note 5, § 117.21 at 490.1-494.

³¹ See *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958).

³² RINGER, *supra* note 6, at 163-64. See *Rossiter v. Vogel*, 134 F.2d 908, 911 (2d Cir. 1943).

³³ See NIMMER, *supra* note 5, § 117.22, at 496 n. 191.

³⁴ See RINGER, *supra* note 6, wherein the author states:

If the renewal reverted to the author's estate, it was entirely possible that legatees and creditors might gain the benefits at the expense of the author's family and dependents. Apparently in a deliberate effort to avoid this result, Congress set up a schedule of successive classes of persons who are entitled to take the renewal as "a new personal grant of a right." *Id.* at 125 (citations omitted).

³⁵ See NIMMER, *supra* note 5, § 116.2, at 483. *Cf.* *Rose v. Bourne, Inc.*, 279 F.2d 79 (2d Cir. 1960).

³⁶ "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." *Miller Music Corp. v. Charles N. Daniels Inc.*, 158 F. Supp. 188, 192 (S.D.N.Y. 1957).

at the time the renewal right vests.³⁷ Congress further sought to make certain that the renewal benefits went to the natural dependents of the author, by commanding that the renewal rights inure directly to the statutory beneficiaries rather than reverting first to the estate, where they could be diminished by legatees and creditors.³⁸ As the author may assign his renewal rights or expectancies, the statutory beneficiaries may assign theirs. Such assignments will be valid against the assignors provided there is adequate consideration.³⁹

In the situation where an author assigns his renewal rights in a work and then dies before those rights vest in him, the only conclusion which squares with the intent of Congress and the decisions of the courts is that the statutory beneficiaries are to take the grant free of the assignment. The court in *Bartok* correctly recognized this rationale in deciding the case, for Bela Bartok contracted the rights of his *original* copyright term and died a few years later, prior to "publication" of the work. At the time that Bartok made that contract, his wife and children were not represented in any capacity as owners of renewal expectancies and therefore had "no means of protection other than the statutory renewal right".⁴⁰ This means of protection was properly held not to be circumvented by the mere fact that the work was not printed until after the composer's death. To allow such an avoidance would create "an illogical discrimination between families who are in equal need of protection."⁴¹

An investigation of the legislative history of the "posthumous works" exception from the statutory protection of authors' families supports the *Bartok* decision and reinforces the majority's conclusion that a definition of "posthumous" focusing on the printing of a work of art was not intended by Congress.

Prior to the passage of the Act, there was a campaign conducted by many legislators and various interest groups to modify the law existing at that time, which provided for an initial copyright and for a right to renew.⁴² Their desire was to grant copyrights to authors for

³⁷ *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

³⁸ See RINGER, *supra* note 6, at 125.

³⁹ See NIMMER, *supra* note 5, § 117.3, at 504.

⁴⁰ 523 F.2d at 944.

⁴¹ *Id.* at 945.

⁴² For an outstanding account and analysis of the popular movement in the country and the legislative history prior to the Copyright Act of 1909, see RINGER, *supra* note 6, at 112-22. See also Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 24 (1955).

the term of their lives plus a period of years.⁴³ Each of the many bills incorporating this system⁴⁴ excepted posthumous works for the obvious reason that a "life plus" term loses its base period when applied to the work of an author who has already died. A bill sponsored by Representative Currier maintained the existing system by providing for an initial term of 28 years, with a 28-year renewal granted to a class of beneficiaries. His only exception was for a composite work.⁴⁵ The result of the legislative battle which ensued has been described as follows:

The Smoot-Currier bill . . . which became the Act of 1909, represents a crude attempt to graft some of the provisions of the other bills onto the basic renewal provisions of the 1908 Currier bill. In particular, the four types of works for which special terms had been provided in the other bills—posthumous works . . . —were picked up intact and forced into the renewal scheme as works for which a proprietor could claim renewal in his own right. . . .⁴⁶

The *Bartok* court, however, did find some justification for the exception of posthumous works, when defined as those works for which the right to copyright has passed by will or intestacy. It analogized such works to those works expressly excepted from the renewal provision on the ground that it would be difficult to locate a multitude of *authors* at the time of renewal: composite works,⁴⁷ works copyrighted

⁴³ The "life plus" system that was advocated was and still is in force in most foreign countries. See generally, GUINAN, *DURATION OF COPYRIGHT, COPYRIGHT OFFICE STUDY NO. 30 59-62 (1957) found in 1 STUDIES OF COPYRIGHT* (Arthur Fisher Memorial Ed. 1963).

⁴⁴ Out of seven bills that were introduced in the House between May, 1908, and January, 1909, six provided for most works a term equal to the life of the author plus a period of years (30 years in one bill, 42 in two and 50 in the other three), subject to a renewal by the proprietor in the twenty-eighth year from publication. See RINGER, *supra* note 6, at 120.

⁴⁵ *Id.* at 120-21.

⁴⁶ *Id.* at 121.

⁴⁷ Composite works are "those composed of the copyrightable work of several persons . . ." *Harris v. Coca-Cola Co.*, 73 F.2d 370, 371 (5th Cir. 1934). The rationale for their exception was given as follows:

In some cases the contributors to such a work might number hundreds and be scattered over the world, and it would be impossible for the proprietor of the work to secure their cooperation in applying for renewal.

H.R. REP. NO. 2222, 60th Cong., 2d Sess. 15 (1909).

by a corporate body,⁴⁸ and works copyrighted by an employer for hire.⁴⁹ It rationalized that "it may be many years before the work is performed, distributed and copyrighted originally; therefore the renewal right may vest beyond the life of the author's children; there may be many heirs difficult to locate."⁵⁰ The argument of the court does not coincide with the fact that Congress has set up a class of beneficiaries of the renewal rights which extends beyond the children of the author, *viz.*, "the author's executors, or in the absence of a will, his next of kin . . ."⁵¹ Had Congress feared a multitude of *beneficiaries* as well as a multitude of authors, it would not have set up this class.

The exception for posthumous works appears to have been simply the result of legislative compromise and poor draftsmanship. Although it serves a distinct purpose in the "life plus" system, its value is questionable in a "duration-renewal" process like that of Section 24. One may go so far as to conclude that there is no substantial justification whatsoever for excepting posthumous works from the statutory protection afforded an author's family.⁵²

At the very least, therefore, any definition of "posthumous" must comport with the overall purpose of the renewal provision. An adoption of the dictionary or popular definition of a "posthumous work"

⁴⁸ These works have been described as those "of an 'impersonal character', such as digests and dictionaries, where the identity of the individual authors is merged in the work as a whole." HOWELL, *supra* note 29, at 118.

⁴⁹ These works do not encompass the situation where the author is an independent contractor. *But see* *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970). This case has been severely criticized in NIMMER, *supra* note 5, § 114.4, at 470. Ringer comments that the "committee reports on this final bill indicate a likelihood that the legislators regarded 'a work made for hire' as a species of 'composite or cyclopedic work', and did not realize the breadth of the exception they were creating." RINGER, *supra* note 6, at 138-39.

⁵⁰ 523 F.2d at 948.

⁵¹ 17 U.S.C. § 24 (1947).

⁵² Such was the conclusion of Mr. Howell. He writes:

It is difficult to justify including these in the first proviso, since it has the effect of depriving the author's spouse and children of the renewal privilege in case the original copyright was secured by the publisher. In principle, they should have the same right of renewal as they would have if the work were published during the author's life.

HOWELL, *supra* note 29, at 117. The author's argument is well taken. If the primary purpose of the renewal is to protect the author's family, it would seem that an illogical discrimination again would arise between those families in which the author contracts with a publisher before he dies and those in which a contract is made after the author's death.

would in many cases avoid the primary purpose of granting to authors and their families a supplementary copyright in a work which proves meritorious over the years—a work the value of which was most likely too conjectural at the time of contracting the original copyright to have provided them adequate compensation. It is this earlier time, not the time of “publication”, that the *Bartok* court emphasized in making its determination that the *Concerto* was not a posthumous work. It is concluded, therefore, that by rejecting the application of the dictionary definition of “posthumous”, the *Bartok* court refused to accept an interpretation which would have been violative of the intent of Congress and, thereby, correctly decided the case.

335. STATE ANTIPIRACY LEGISLATION

Ohio, West Virginia and Idaho have recently passed antipiracy laws, bringing the total number of states having such legislation to 40. In addition, an antipiracy bill has been passed by both houses in Wisconsin and is now awaiting signature by the Governor. Antipiracy bills have been introduced in several other state legislatures, and in the Legislature of the Virgin Islands, and are in various stages of enactment.

The following is a list of all the forty states which have antipiracy statutes, together with other relevant information, made available through the courtesy of the Recording Industry Association of America.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
Alabama	Nov. 5, 1975	Felony— Manufacture and/or distribution/ misdemeanor— Retail sales	Felony—1st offense—Fine of not more than \$25,000 and/or 1-3 years imprison- ment; 2nd and subsequent offenses—Fine of not more than \$100,000 and/or 3-10 years imprisonment. Misdemeanor—unclassified.	Felony—Unlawful to knowingly transfer or cause to be transferred, without the owner's consent, rec- orded sounds with the intent to sell same or use for profit through public performance. Also illegal to manufacture, distribute or wholesale any article with knowledge that sounds thereon are unlawfully transferred. Misdemeanor—Unlawful to retail or possess for purposes of retail any recording unlawfully manufactured or distributed.
Alaska	July 3, 1975	Misdemeanor	A fine of not more than \$1,000, imprisonment for a period of not more than one year and confiscation of the unlawful stock.	Unlawful to reproduce, sell, offer for sale or advertise for sale any sound record- ing, reproduced without the owner's consent. Also illegal to advertise, offer for sale or sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.

Arizona 13 A.R.S. 1024	August 15, 1972	Misdemeanor	Fine of not more than \$300 and/or imprisonment of not more than 6 months.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.
Arkansas 41 Ark. Stats. 2368-2372	Feb. 12, 1971	Misdemeanor	Fine of not less than \$50 nor more than \$250.	Same as the above.
California	Nov. 13, 1968 Amended Sept. 30, 1975	Felony/ Misdemeanor	1st offense—fine of up to \$25,000 and/or up to one year in county jail or up to one year and a day in state prison. 2nd offense—fine of up to \$50,000 and/or imprisonment for up to two years.	Same as the above.
Connecticut—Gen. Stat. Ann. 54-41s	Oct. 11, 1974	Misdemeanor Felony (Class D)	Fine of not more than \$1,000 and/or imprisonment for not more than one year. Subsequent offense—fine of up to \$2,000 and/or not more than one year imprisonment	Unlawful to knowingly manufacture, distribute, sell or advertise for sale recording whose sounds have been transferred without the owner's consent. Unlawful to rent or make available equipment for such transfer.

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
Florida F.S.A. 543.041	Oct. 1, 1971	Misdemeanor	Fine of not more than \$500 or imprisonment of not more than 60 days.	Same as the above
Georgia	Feb. 28, 1975	Felony	1st offense—fine of not more than \$25,000. 2nd offense—fine of not more than \$100,000 and/or imprisonment for not less than one or more than three years.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor of the sounds.
Hawaii Act 81 Laws of 1975	May 13, 1975	Misdemeanor		Unlawful to manufacture for profit a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell or advertise such recordings or to make equipment available for their manufacture.

Idaho HB 403 Approved 3/18/76	July 1, 1976	Felony (Manufacture) /Misdemeanor	Felony—Fine of not more than \$10,000 and/or imprisonment for up to 4 years; Misdemeanor—fine of not more than \$1,000 and/or imprisonment for up to six months. In addition all infringing articles and the equipment used to make them are subject to confiscation and destruction.	Unlawful to knowingly transfer or cause to be transferred, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly, or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
Illinois 38 Ill. Rev. Stat. 16-7 & 8 and 38 Ill. Rev. Stat. 43-1 & 2	August 14, 1975	Class A Felony/ Class B Misdemeanor	Felony—Fine of not more than \$10,000 and/or 1-3 years imprisonment. Confiscation and destruction of pirated recordings. Misdemeanor—Fine of not more than \$500 and/or imprisonment for not more than six months. Confiscation and destruction of pirated recordings.	Felony to knowingly manufacture, sell, offer for sale or advertise for sale recordings reproduced without the consent of the owner of the master recording or rent or make available equipment for such manufacture. Misdemeanor to manufacture, sell or otherwise deal in unidentified sound recordings (those recordings which do not provide the actual name and address of the manufacturer and the name of the performer on a prominent place on the label and outside cover or jacket).

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
Indiana	July 1, 1974	Misdemeanor/ Felony	1st offense up to \$2,000 and/or up to 1 year imprisonment. Subsequent offense—fine up to \$5,000 and/or 1-10 years imprisonment.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.
Iowa Senate file 309 Laws of 1975 (Will be part of Chapter 73 Iowa Code)	July 1, 1975	Misdemeanor	Fine of not more than \$500 and/or imprisonment for not more than one year.	Same as the above and unlawful to knowingly sell or distribute recordings not bearing name and address of the transfer sounds.
Kentucky KRS 434-445	June 20, 1974	Misdemeanor	Fine of up to \$1,000 or double the amount of gain from the commission of the offense, whichever is greater, or imprisonment for up to 60 days, and fine of up to \$1,000, and police may confiscate recordings produced in violation of this act.	Same as the above
Louisiana LRS 14:223	January 1, 1973	Misdemeanor	1st Offense—up to \$1,000 Subsequent offense—up to \$2,000.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.

Maine 10 MRSA 208	Misdemeanor	Manufacture—fine of not less than \$500 nor more than \$5,000; Advertising or sale—fine of not less than \$50 nor more than \$500. Unlawful to knowingly and willfully manufacture a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell, offer for sale or advertise such a sound recording.
Massachusetts A L M 266:143	Misdemeanor	Oct. 31, 1973 Fine of not more than \$5,000 or imprisonment for not more than 1 year Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent.
Maryland 27 MAC 467A	Misdemeanor	July 1, 1973 1st offense—up to 2,500 and/or up to 1 year's imprisonment. Subsequent offense—up to \$10,000 fine and/or up to 3 years imprisonment Same as above, and it is also unlawful to knowingly distribute, or retail any sound recording which does not bear the actual name and street address of the transferer of sound.
Michigan HB 4620	Misdemeanor	November 18, 1975 Manufacture: Imprisonment for not more than one year, or a fine of not more than \$5,000, or both. Sale: Fine of not more than \$100 for each offense. Unlawful to knowingly manufacture, advertise, sell, resell, offer for sale or resale, or possess for the purpose of sale or resale recordings without the consent of the owner.

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
Minnesota MSA 325.841-844	Aug. 1, 1973	Felony	1st offense—up to \$25,000 Subsequent offense—up to \$100,000 fine and/or impris- onment of not more than 3 years.	Unlawful to knowingly man- ufacture, distribute or sell recordings whose sounds are transferred without the own- er's consent.
Mississippi	July 1, 1974	Misdemeanor	1st offense—up to \$100 fine and/or up to 30 days impris- onment; subsequent offenses—up to \$500 fine and/or 6 months imprison- ment	Unlawful to knowingly man- ufacture, distribute, retail or advise a recording whose sounds are transferred with- out the owner's consent. It is also unlawful to knowingly manufacture, distribute or sell recordings not bearing the ac- tual name and street address of the transferer as well as the name of the actual performer.
Nebraska R.S. Supp. (1974) 28- 1601 thru 28- 1604	July 12, 1974	Misdemeanor	Fine of up to \$1,000 and/or 6 months imprisonment	Unlawful to knowingly man- ufacture, distribute or sell a recording whose sounds are transferred without the own- er's consent.
Nevada N.R.S. 205.217	July 1, 1973	Felony	1st offense—fine of not more than \$5,000 and/or impris- onment for not less than 1 year nor more than 6 years. Subsequent offense—fine of not more than \$5,000 and/or imprisonment for not less than 1 year nor more than 10	Same as the above.

New Hampshire N.H.R.S.A. 352-A: 1-4 (Supp)	Nov. 1, 1973	Prohibited Conduct	Onwer of recorded device has cause of action for treble compensatory damages and/or injunctive relief.	Prohibited to knowingly manufacture, distribute, or retail a recording whose sounds are transferred without the owner's consent and/or which does not bear the manufacturer's name and address.
New Jersey A.B. 1916 signed 1/8/76	Jan. 8, 1976	High misdemeanor/ manufacturer/ misdemeanor sales.	High misdemeanor—A fine of not more than \$2,000 and imprisonment for not more than seven years. Misdemeanor—A fine of not more than \$1,000 and up to three years imprisonment.	Unlawful to manufacture, cause to be manufactured, sell, offer for sale or advertise a recording whose sounds are transferred without the owner's consent.
New Mexico 40A N.M.S.A. 16-41 thru 16-45	May 15, 1974 And laws of 1975 Ch. 335	Misdemeanor/ Felony	Felony for manufacturers and distributors up to \$5,000 and/or 1 year imprisonment. Misdemeanor for retailers.	Unlawful to knowingly manufacture, distribute or sell a recording whose sounds are transferred without the owner's consent.
New York G.B.L. 560-561	Sept. 1, 1967	Misdemeanor	Fine of not more than \$100 and/or imprisonment of up to one year.	Same as above; also illegal to manufacture or sell sound recordings without the manufacturer's name and address.

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
North Carolina Chapter 14, Gen- eral Statutes Arti- cle 56A	Jan. 1, 1975	Misdemeanor	Fine of up to \$500 and/or im- prisonment of up to 6 months.	Unlawful to knowingly man- ufacture, distribute or sell un- authorized duplications of sound recordings or to record live concerts without permis- sion. Unlawful to manufac- ture, distribute or sell rec- ordings not bearing the true name of the manufacturer.
Ohio ORC 2913.32	Jan. 1, 1974	Felony	Imprisonment for not less than six months nor more than five years and a fine of not more than \$2,500.	Unlawful to know- ingly) . . . practice deception in . . . reproducing any . . . phonograph record, or recording tape. Also un- lawful to utter or possess with purpose to utter any record- ing deceptively simulated.
Ohio ORC 1333.52	May 10, 1976	Misdemeanor	Manufacture—Not more than six months imprison- ment and/or a maximum fine of \$1,000. Sale of unau- thorized duplication or viola- tion of labeling provisions not more than 90 days im- prisonment and/or a maximum fine of \$750.	Unlawful to duplicate for sale any sound recording without the consent of the owner of that recording; un- lawful to knowingly sell, ad- vertise or offer to sell such a recording. Also unlawful to manufacture or sell a sound recording not bearing the name of the artists and the name and address of the manufacturer.

Oklahoma 21 O.S. Supp (1975) 1865-1869	September 1, 1975	Misdemeanor/ Felony	1st offense—manufacture— up to \$500. 2nd offense manufacture—up to \$25,000 owner's consent, sound re- cording less than 20 years old. Unlawful to sell such recordings.	Unlawful to knowingly re- produce for sale without the owner's consent, sound re- cording less than 20 years old. Unlawful to sell such recordings.
Oregon Chapter 747 Laws of 1973	October 5, 1973	Misdemeanor	Fine not to exceed \$500 and/or imprisonment for not more than 6 months.	Unlawful to knowingly man- ufacture, distribute or retail or advertise for sale any sound recording which is duplicated without the consent of the owner of the original master recording.
Pennsylvania 18 P.S.A 4116	October 18, 1971	Misdemeanor—to knowingly pos- sess for purpose of retailing. Felony—to know- ingly manufac- ture, distribute or wholesale sound recordings duplicated with- out the consent of the owner.	Confiscation of pirated re- cordings and: 1st offense— fine of not more than \$25,000 and/or imprison- ment of not less than 1 year nor more than 3 years. Sub- sequent offense—fine of not more than \$100,000 and/or imprisonment of not more than 3 years nor more than 10 years.	Unlawful to knowingly man- ufacture, distribute or retail a recording whose sounds are transferred without the own- er's consent and/or who does not bear the true name of the manufacturer.

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
South Carolina	January 1, 1975	Misdemeanor	1st offense—manufacture—fine of up to \$5,000 and/or imprisonment for 6 months to 2 years; subsequent offense—fine of up to \$10,000 and/or imprisonment for 3-5 years. Advertisement or sale—fine of up to \$1,000 and/or imprisonment for up to 1 year.	Unlawful to knowingly manufacture, distribute, sell, cause to be sold, advertise or use for profit through public performance a recording whose sounds are transferred without the owner's consent; to rent or make available equipment for such transfer.
South Dakota 13 S.D. compiled Laws 43-43A	July 1, 1975	Misdemeanor	Retailer—fine of not more than \$500 and/or not more than 6 months imprisonment. All others—a fine of not more than \$1,000 and/or not more than 3 years imprisonment.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor of the sounds. Also, unlawful to use such recordings for profit through public performance.
Tennessee 7 Tenn. Ann. Code 39-4244 through 39-4250	July 1, 1971	Misdemeanor—to knowingly retail or possess for purpose of retailing. Felony—to manufacture, distribute or wholesale sound	Confiscation of pirated recordings and: 1st offense—fine of not more than \$25,000 and/or imprisonment of not less than 1 year nor more than 3 years. Subsequent offense—fine of not more than \$100,000 and/or	Unlawful to knowingly manufacture, distribute, retail or use for profit through public performance recordings whose sounds are transferred without the owner's consent.

recordings duplicated without the consent of the owner.	imprisonment of not more than 3 years nor more than 10 years.				
Texas Vernon's Ann. Civ. Stat. Art. 9012	August 30, 1971	Misdemeanor/ Felony	1st offense—fine of not more than \$2,000. 2nd offense—fine of not more than \$25,000 and/or imprisonment for not more than 5 years.	Unlawful to knowingly reproduce for sale, to sell or offer for sale a sound recording whose sounds are transferred without the owner's consent.	
Utah Unauthorized Recording Practices Act of 1973	May 8, 1973	Misdemeanor	Fine not to exceed \$299 and/or imprisonment up to 6 months.	Same as above, as well as to rent or make available equipment for such transfers.	
Virginia 59.1 Code of Va. 41.1-41.6	July 1, 1972	Misdemeanor	Fine not to exceed \$500 and/or imprisonment up to 1 year.	Unlawful to knowingly manufacture, distribute or retail without consent of the owner and/or does not bear the name of the manufacturer.	
Washington 19 R.C.W.A. 25.020-25.040	July 25, 1974	Misdemeanor	Fine not to exceed \$1,000 and/or up to 1 year imprisonment plus confiscation of tapes	Same as above	

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
West Virginia Senate Bill 220 approved 3/12/76	June 12, 1976	Misdemeanor	Fine of up to \$1,000 and confiscation and destruction of unauthorized recordings and the equipment used to make them.	Same as the above.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

336. U.S. CONGRESS. HOUSE.

H.R. 11877. A bill to extend the authorization of appropriations for the National Commission on New Technological Uses of Copyrighted Works to be coextensive with the life of such Commission. Introduced by Mr. Kastenmeier, Feb. 11, 1976, and referred to the Committee on the Judiciary. 2 p. (94th Cong., 2d Sess.)

The bill would amend P.L. 93-573 by striking out the words, "June 30, 1976" in sec. 205 which authorized the appropriation of money for the expenses of the Commission, and would substitute the phrase, "and including the day on which the Commission terminates". Hearings on the bill were held on Feb. 23, 1976.

337. U.S. CONGRESS. HOUSE.

H.R. 11948. A bill to extend the authorization of appropriations for the National Commission on New Technological Uses of Copyrighted Works to be coextensive with the life of such Commission. Introduced by Mr. Kastenmeier (for himself and Mr. Danielson) on Feb. 18, 1976 and referred to the Committee on the Judiciary. 2 p. (94th Cong., 2d Sess.)

The bill is identical with H.R. 11877, Item 336, *supra*.

338. U.S. CONGRESS. HOUSE.

H.R. 12426. 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. Koch (for himself, Ms. Abzug, Mr. Bingham, Mr. Dan Daniel, Mr. Flood, Mr. Frenzel, Mr. Helstoski, Mr. Krebs, Mr. Lehman, Mr. Pickle, Mr. Pritchard, Mr. Rodino, Mr. Seiberling, Mr. Symington, Mr. Thompson, Mr. Vander Veen, Mr. Wolff, and Mr. Yates) on

March 11, 1976 and referred to the Committee on Ways and Means. 2 p. (94th Cong., 2d Sess.)

Identical with H.R. 6829 (22 BULL. CR. SOC. 455, Item 327) introduced by Mr. Koch and others during the first session, on May 8, 1975. The bill would tax any literary, musical or artistic composition or similar property created by the personal efforts of the taxpayer and contributed to a public institution as having been sold at fair market value.

339. U.S. CONGRESS. HOUSE.

H. Res. 998. Resolution to insure that the quality and quantity of free broadcasting service not be impaired. Mr. Thone (for himself, Mr. Bowen, Mr. Jenrette, Mr. Hubbard, Mr. Sebelius, Mr. Stark, Mr. Beard of Rhode Island, Mr. Clay, Mr. Carney, Mr. Mazzolli, Mr. Kastenmeier, Mr. Madigan, Mr. Goodling, Mr. Jeffords, Mr. Emery, Mr. Cleveland, Mr. Rostenkowski, Mr. Traxler, and Mr. Blanchard) submitted the resolution which was referred to the Committee on Interstate and Foreign Commerce. 3 p. (94th Cong., 2d Sess.)

Similar to S. Res. 291, introduced by Senator Beall on November 3, 1975.

340. U.S. CONGRESS. HOUSE.

S. 22. An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Referred to the Committee on the Judiciary, Feb. 23, 1976. 83 p. (94th Cong., 2d Sess.)

S. 22 was debated in the Senate on Feb. 6, 16, 17, and 19, 1976. (122 *Congressional Record*, pp. S1526-S1547, S1607-S1616, S1755-S1758 and S2027-S2065). On Feb. 17, the Senate adopted a Pastore amendment which provided that public broadcasting and copyright entities negotiate in good faith and cooperate fully with the Copyright Royalty Tribunal in establishing reasonable royalty fees. On Feb. 19, the Senate adopted an amendment by Sen. Hathaway and perfecting amendments offered by Sen. Mathias dealing with compulsory licenses for the use of certain types of copyrighted material by public broadcasting. The amended bill then passed the Senate by a vote of 97 to 0 and was sent to the House.

341. U.S. CONGRESS. HOUSE. *Committee on Interstate and Foreign Commerce. Subcommittee on Communication.*

Cable television: promises versus regulatory performance.

Prepared by the staff for the use of the Subcommittee on Communications. Washington, Govt. Print. Off., 1976. 110 p. (94th Cong., 2d Sess.)

In completion of a six-month study by the staff of the House Subcommittee on Communications, the report includes recommendations that the language now contained in S. 22 and H.R. 2223, dealing with cable television be so modified as to direct the Copyright Royalty Tribunal to establish a system of royalty payments based on per channel carriage of distant signals rather than on a percentage of the subscribers' fees. Further, it suggests that cable systems not be required to pay royalties on local signals. Also the Tribunal should be required to report to Congress if at any time it believes the administration of copyright payments could be replaced by reliance on the market.

342. U.S. CONGRESS. SENATE.

Amdt. No. 1353. Amendment intended to be proposed by Mr. Tunney to S. 22, a bill for the general revision of the copyright law, title 17 of the United States Code, and for other purposes. Introduced Jan. 28, 1976 and ordered to lie on the table and to be printed. 1 p. (94th Cong., 2d Sess.)

In line with his additional view, printed in S. Rep. 94-473, Senator Tunney introduced this amendment in an attempt to reduce the rate adjustment cycle of the Copyright Royalty Tribunal from ten to seven years. (122 *Congressional Record*, no. 8 [daily ed.], p. S660). The amendment was debated on Feb. 16, 1976 and defeated by a vote of 28 to 23 (122 *Congressional Record*, no. 19 [daily ed.], pp. S1610-S1614).

343. U.S. CONGRESS. SENATE.

Amdt. No. 1383. Amendments intended to be proposed by Mr. Humphrey (for himself, Mr. Cranston and Mr. Buckley) to S. 22, a bill for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Introduced Feb. 5, 1976, ordered to lie on the table and to be printed. 2 p. (94th Congress, 2d Sess.)

These amendments would delete references to literary, pictorial, graphic and sculptural works in the compulsory license provisions contained in sec. 118. (122 *Congressional Record*, no. 14 [daily ed.], p. S1343). The amendments were debated, modified and then tabled by a vote of 61 to 22 on Feb. 17, 1976 (122 *Congressional Record*, no. 20, [daily ed.], pp. S1756-S1758).

344. U.S. CONGRESS. SENATE.

Amdt. No. 1402. Amendment intended to be proposed by Mr. Hathaway to S. 22, a bill for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Introduced Feb. 17, 1976. Ordered to lie on the table and to be printed. 1 p. (94th Cong., 2d Sess.)

The amendment provides in Sec. 111 (d)(2)(B)(v) that copyright liability for cable television systems having less than \$160,000 annual gross income would be determined on a computed basis rather than on actual gross revenue. The amendment was modified and then adopted by the Senate on Feb. 19, 1976 (122 *Congressional Record*, no. 22 [daily ed.], pp. S2038-S2039).

345. U.S. CONGRESS. SENATE.

S. 2847. A bill to amend section 318 of the Communications Act of 1934, as amended, to enable the Federal Communications Commission to authorize translator broadcast stations to originate limited amounts of local programing, and to authorize frequency modulation (FM) radio translator stations to operate unattended in the same manner as is now permitted for television broadcast translator stations. Introduced by Mr. Magnuson (for himself and Mr. Pearson) (by request) on Jan. 19, 1976 and referred to the Committee on Commerce. 1 p. (94th Cong., 2d Sess.)

Introduced at the request of the Federal Communications Commission, At present, sec. 318 of the Communications Act of 1934 as amended, limits translator stations to rebroadcasting the signals of their primary stations. UHF translators may broadcast 20 seconds of commercial advertising per hour and this is restricted to slide announcements. Hence translators are not self-supporting and persons entirely dependent on translator stations for their TV and FM receptions are deprived of news of local and political events. The Commission believes that origination by translators would serve the public interest. (122 *Congressional Record*, no. 1 [daily ed.], pp. S57-S58.)

346. U.S. DEPARTMENT OF COMMERCE. PATENT AND TRADEMARK OFFICE.

International protection of government emblems and seals; invitation for comments. *Federal Register*, vol. 40, no. 247 (Dec. 23, 1975), p. 59366.

A notice that the publication "Seals and other Devices in Use at the Government Printing Office" will be forwarded to the World Intellectual Property Organization (WIPO) in order to obtain protection under the Paris Convention for the Protection of Industrial Property. Federal agencies and state governments are requested to notify the Patent and Trademark Office at any time of emblems not contained in the publication which they feel should be registered for protection.

347. U.S. LIBRARY OF CONGRESS.

Title 36—Parks, Forests, and Memorials; Ch. VII Library of Congress, Part 703—Availability of Library of Congress Records. *Federal Register*, vol. 41, no. 10 (Jan. 15, 1976), pp. 2229-2231.

Section 703 of title 36 of the Code of Federal Regulations relative to the availability of Library of Congress records has been completely restated. Among the exemptions to public disclosure as listed in sec. 703.3 (4) are materials related to copyrights as provided by 17 U.S.C. 212, and 37 C.F.R. 201.2.

2. Foreign Nations

348. NETHERLANDS. *Laws, statutes, etc.*

Decree on the reproduction of copyright works (of June 20, 1974). *Copyright*, vol. 12, no. 1 (Jan. 1976), pp. 28-29.

This is an English translation of the official French version of the decree that was published in the Netherlands *Staatsblad* on June 25, 1974. The decree provides guidelines as to the number of copies that may be reproduced from copyrighted works for use by public authorities, libraries and educational establishments without constituting copyright infringement.

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

Copyright amendment act, 1975. Act to amend the Copyright Act, 1965, so as to further provide for the calculation of the period of copyright in any cinematograph film; to provide for a presumption of knowledge in connection with infringing copies; to increase the penalties for certain offenses; to extend the provisions relating to the prohibition of the importation of certain copies in certain circumstances, to copies of cinematograph films and sound recordings; and to provide for

incidental matters. (No. 64 of 1975). *Copyright*, vol. 11, no. 12 (Dec. 1975), pp. 237-238.

The amendments, published in the Government Gazette of July 23, 1975, are designed to discourage the manufacture, distribution and exhibition of infringing copies of motion pictures and sound recordings.

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

Copyright amendment act, 1972. Act to amend the provisions of the Copyright Act, 1965, relating to copyright in cinematograph films and the onus of proof in actions in respect of copyright in cinematograph films; and to provide for incidental matters. (No. 75 of 1972). *Copyright*, vol. 11, no. 12 (Dec. 1975), p. 236.

The law amends secs. 14 and 21 of the Copyright Act of 1965 and it entered into effect on July 28, 1972.

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

Copyright (Makes of cinematograph films) regulations, 1972. (No. R. 1289 of July 28, 1972). *Copyright*, vol. 11, no. 12 (Dec. 1975), p. 236.

These regulations deal with the form and placement of the copyright notice on motion pictures.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

352. BERNE COPYRIGHT CONVENTION.

Members of the international union for the protection of literary and artistic works (Berne Union) founded by the Berne Convention (1883), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971) as on January 1, 1976. *Copyright*, vol. 12, no. 1 (Jan. 1976), pp. 20-22.

The names of the 65 countries that have ratified or adhered to the Berne Copyright Convention and the dates of their ratifications or accessions.

353. CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORIZED DUPLICATION OF THEIR PHONOGRAMS.

State of ratifications or accessions as on January 1, 1976. *Copyright*, vol. 12, no. 1 (Jan. 1976), p. 23.

A list of the 18 states who are members of this convention.

354. INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS. *Rome, Oct. 26, 1961.*

State of ratifications or accessions as on January 1, 1976. *Copyright*, vol. 12, no. 1 (Jan. 1976), p. 24.

According to this table, 17 states are now members of the convention.

355. UNIVERSAL COPYRIGHT CONVENTION.

State of ratifications or accessions as on January 1, 1976. *Copyright*, vol. 12, no. 1 (Jan. 1976), p. 30.

Seventy countries are listed as members of the Universal Copyright Convention.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

356. *Zolar Publishing Company, Inc. v. Doubleday & Company, Inc.*, 188 U.S.P.Q. 609 (2d Cir. Dec. 17, 1975) (Moore, C. J.).

Action for copyright infringement arising out of the republication by defendant of two works, arguably subsequent to the termination of the publishing contracts involved.

With respect to plaintiff's work, "Horoscope", dealing with daily astrological auguries for 1964, plaintiff and defendant had, in 1963, entered into a publishing agreement whereby plaintiff purported to license defendant the exclusive publication rights throughout the world. The execution of this agreement was preceded by lengthy correspondence spelling out in great detail the specifics of the work, which was nowhere so defined in the agreement. Subsequent to minimal sales of the work, plaintiff inquired of defendant as to whether defendant were interested in similar works for successive years, to which defendant replied in the negative. Thereafter, plaintiff published a sequel for the succeeding year, of which defendant was well aware and, in fact, which defendant commented upon by letter to plaintiff stating, "it does seem even more logical for you to continue publication of the new editions yourself". Plaintiff thereafter published annual, revised editions of the work. In 1970, however, defendant published an updated version of the 1964 edition which, in addition, bore a cover resembling plaintiff's 1970 edition. When sued by plaintiff for copyright infringement, defendant based its defense on the 1963 publishing agreement and moved for summary judgment, which was granted.

With respect to plaintiff's work, "Encyclopedia", plaintiff and defendant had, in 1963, entered into an agreement for the work's publication. Two years after publication, plaintiff requested an arrangement for reversion of all rights if defendant did not intend to continue publication. Shortly thereafter, by letters between plaintiff and defendant, defendant released all hardcover rights. However, the

situation with respect to reprint rights was less clear in that the two letters on this subject from defendant to plaintiff in the record were in conflict. One stated that the reprint rights would be released to plaintiff within six months if defendant could not make a sale of such rights by that time. The other, which was signed by both plaintiff and defendant, stated that if no such sale had been made within six months the defendant would "consider" plaintiff's request for reacquisition of the rights. Before signing this latter letter as requested, however, plaintiff was informed by defendant that this letter meant the same thing as the earlier one. More than six months thereafter, plaintiff wrote to defendant and stated that since defendant had not sold the paperback rights, these rights reverted to him. No further correspondence took place. Several years passed and defendant then published the paperback edition which caused plaintiff to institute suit for infringement. Based on its argument that the original 1963 contract still governed and that it had only been modified with respect to the hardcover rights, the defendant moved for summary judgment. The motion was granted on the ground that the 1963 contract was still effective since the defendant Doubleday had not consented to a termination thereof in writing.

The defendant asserted counterclaims for unfair competition and unfair trade practices which were denied for lack of subject matter jurisdiction. This denial was based on the District Court's characterization of such claims as "non-Federal" which it felt bound to dismiss once it denied plaintiff's claims on the merits.

On plaintiff's appeal from the granting of defendant's motion for summary judgment and defendant's appeal from the dismissal of its counterclaims, *held*, judgment vacated and case remanded for trial.

Addressing the inappropriateness of granting defendant's motion for summary judgment, the court identified key factual issues which were unresolved by the record. With respect to "Horoscope", the court pointed to the incompleteness of the publishing agreement in its lack of adequate definition of the work covered or in its lack of provision for the duration of the contract. These facts seemed particularly significant here where the work published dealt with 1964 horoscopes and, therefore, it was unclear as to whether the parties intended the rights granted to cover only a work meant for that year or for revised sequels as well. "In such circumstances" the court stated, "extrinsic evidence is required to prove which construction best comports with the parties' actual intent". With respect to "Encyclopedia", the issue identified by the court as unresolved was whether Doubleday was estopped, by virtue of its correspondence, from denying the termination of the contract. Since the claims by plaintiff were inappropriately dis-

missed, the rationale for dismissing defendant's counterclaims was no longer applicable. Accordingly, the case was remanded for trial on all issues.

357. *Bliss & Laughlin Industries, Inc. v. Starvaggi db/a Electronic Tool Co.*, 188 U.S.P.Q. 89 (S.D.N.Y. Oct. 6, 1975).

Action for copyright infringement and unfair competition arising out of defendant's publication of two trade catalogues, one appropriating both the photographs and text from plaintiff's competing catalogue; the other appropriating only the text. Such catalogues were central to the strictly mail order nature of the business of both parties. Due to the lack of copyright notice on other printed matter containing material in the catalogue, plaintiff was forced to limit its charge of infringement to the material which had not been reprinted without a notice.

To support its claim of unfair competition, plaintiff cited defendant's use of plaintiff's so-called pirated catalogue to develop a customer list from which to solicit business.

Held, judgment for plaintiff.

In a rather unusual opinion, the court breezed rather lightly over the copyright infringement issues, but instead, stressed defendant's solicitation of customers through use of the offending catalogue. The defendant was enjoined not only from further infringement, but from accepting, for the next two years, orders for tools from customers obtained by use of the offending catalogues.

358. *Terry DeNicola, Inc. v. Genesco, Pakula & Company*, 188 U.S.P.Q. 304 (S.D.N.Y. April 5, 1974) (liability); 188 U.S.P.Q. 306 (S.D.N.Y. July 2, 1975) (damages) (Knapp, D.J.).

Action for infringement of plaintiff's 12 copyrighted Zodiac pins.

Held, judgment for plaintiff.

After the initial trial on the issue of liability, the court found deliberate infringement of plaintiff's copyright in that eight of defendant's pins bore a "clear" aesthetic similarity to eight of plaintiff's pins. Also on the issue of liability, the court discussed two issues raised by the defendants which had not been earlier considered by Judge Bonsal in his opinion concerning defendant's charge that plaintiff was not a proper plaintiff. The first of these concerned plaintiff's claim that Jerry Nicola, Inc. was the author of the work. Following the rule that authorship means control over the manner in which the work is created, the court held that the facts established plaintiff as the author as it had exercised such control. The second issue on liability was whether plaintiff's distribution of pictorial renderings of the pins,

prior to manufacture, without a copyright notice, caused plaintiff to abandon its copyright. The Court saved plaintiff's rights by terming plaintiff's distribution a "limited publication" in that the distribution had been to obtain feedback and suggestions for improvement prior to production of the pins. "The fact that plaintiff may have hoped that the persons whose criticism he sought might also become customers of the completed product would not take the case out of the exception noted", the court stated. In addition, the court found that defendant's grouping of the pins in a manner similar to plaintiff's grouping produced "upon consumers a 'cumulative' effect of overall similarity to plaintiff's detriment". The court forewarned that this factor would be relevant to a computation of plaintiff's actual damages but not of defendant's profits should the parties be unable to settle the issue of damages.

Apparently not having resolved the damage question on their own, the parties appeared at a second trial devoted to that issue. The relevant facts found are as follows:

1. The plaintiff's net profit from its first year of sales was \$60,000, the figure offered by plaintiff as its sales figure, and unquestioned by the defendant.

2. Plaintiff's pins were sold for \$15.00 each in better stores.

3. Defendant's pins were sold for \$2.00 each in different stores.

4. Three or four months after defendant's pins were put on the market, plaintiff's sales dropped abruptly and then ceased.

5. The entry of defendant's pins was a "significant contributing cause" of plaintiff's decrease because customers of plaintiff would no longer want pins that had been knocked off.

6. Defendant sold \$17,000 worth of pins after notice of infringement.

7. Defendant's profit on its pins was \$1,617.00.

8. Plaintiff expended approximately \$52,000 for attorneys' fees.

Starting with the proposition that actual damages were speculative, the court turned to Section 101(b) under which, following *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.* (2d Cir. 1964),

"The Court may award the defendant's profits as established plus a discretionary sum within the statutory limits 'in lieu' of plaintiff's actual damages."

Using the above standard, the court awarded the following recovery to plaintiff:

1. Defendant's actual profits: \$1,617.00 for infringements prior to notice.

2. The maximum statutory damages of \$5,000 per infringement, amounting to a total of \$40,000.
3. For infringements after notice, \$1.00 per copy, or \$17,000. The court rejected plaintiff's request that the proper yardstick considered be \$10.00, the statutory amount for infringement of a sculpture, in that plaintiff's work was costume jewelry which is "mass produced and widely distributed".
4. In light of defendant's deliberate infringement, plaintiff was entitled to a "reasonable" attorney's fee of \$25,000.

359. *Kenya Music, Inc. v. Warner Bros., Inc.*, 188 U.S.P.Q. 605 (S.D.N.Y. April 7, 1975) (Stewart, D.J.).

Action for copyright infringement by an allegedly prior assignee. On plaintiff's motion to strike three of defendant's affirmative defenses, *held*, granted as to the fourth defense but denied in all other respects.

The fourth affirmative defense asserted plaintiff's failure to comply with §30 of the Copyright Act which, defendant argued, constitutes a bar to plaintiff's action. Section 30 provides, in pertinent part, as follows:

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States * * * in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice. whose assignment has been duly recorded.] July 30, 1947, c. 391, §1, 61 Stat. 652.

The court held that, as a matter of law, defendant was unable to assert §30 for two reasons:

1. Defendant was a "licensee" rather than a "purchaser". The court tended to agree that an "expanded construction" which would include licensees in the term "purchasers", might be warranted. However, in that the second problem, noted below, was also present, the court did not fully explore this issue.
2. The defendant had not yet recorded its assignment. The court held, therefore that the defendant had not "duly" recorded its assignment within the meaning of §30. The defendant attempted to escape the clear language of §30 by arguing that "duly" did not impose an absolute requirement that they record, or, if it did, that they could record now. The

court rejected even the more moderate view that "duly" means within a reasonable time under the facts and circumstances of an individual case, imposing the same three month time requirement for recordation on subsequent purchasers as exists on prior purchasers.

360. *Vogue Ring Creations, Inc. v. William A. Hardman, Jr. d/b/a Royal of America*, Civil Action No. 74-191 (E.D.R.I. Feb. 25, 1976) (not yet reported).

Action for alleged infringement of plaintiff's federally registered claim to copyright in a ring with an antitrust counterclaim asserted by the defendant. Plaintiff had formerly manufactured and sold a similar uncopyrighted ring, and therefore, the dispositive issue before the court was whether plaintiff had added sufficient new matter to the public domain work so as to make its version copyrightable.

Held, judgment for defendant.

On the issue of copyrightability, the court found the differences between plaintiff's work and its public domain predecessor to be "trivial" and not affecting "the feeling, quality and sensory impact of the whole", and thus to fall short of even the minimal standards required by the copyright law.

The other issues discussed were as follows:

1. *Unfair competition*. No evidence was presented to show that the defendant attempted to pass off its goods as the plaintiff's, and, as the court stated, "It is well established that copying another's article is not, standing alone, unfair competition".

2. *Copyright misuse*. The plaintiff omitted to fill in Line 7 of the copyright application which requests information concerning prior publication of the work. Had this been properly completed, the copyright office would have had an opportunity to examine plaintiff's addition before issuing a certificate of registration. This, coupled with the copyright warning published by the plaintiff subsequent to the commencement of the suit, greatly exaggerating the penalties for infringement, and particularly in light of plaintiff's knowledge of the prior pin, was enough for the court to conclude that if the copyright were valid it would have been unenforceable.

3. *Antitrust*. The defendant contended that plaintiff's fraudulent procurement of the copyright violated the antitrust laws. While rejecting the claim as not founded even with "minimal proof", the court stated:

"There appear to be no prior authorities specifically concerning fraudulent procurement of a copyright registration.

However, it appears to this court, the same rationale affixing liability for violation of Section 4 of the Clayton Act (15 U.S.C. §15), for violation of Section 2 of the Sherman Act (15 U.S.C. §2) on the holder of a patent monopoly is applicable to copyright cases, if the necessary conditions are proven."

361. *Jackson v. Stone & Simon Advertising, Inc.*, 188 U.S.P.Q. 564 (E.D. Mich. April 11, 1974) (Kennedy, D.J.).

Action for copyright infringement and conversion of plaintiff's copyrighted musical composition entitled "Merry Christmas To You". The action arose from the use thereof by defendant's television stations, sponsors, and advertising agency which produced the ad and the recording studio which had access to plaintiff's music and where the ad was allegedly produced, as background music on a 10-second spot advertisement. Plaintiff was party to an agreement with Broadcast Music, Inc. (BMI), pursuant to which BMI had the right to license others to record the plaintiff's work for performance thereof on television. The defendant television stations had been licensed to make use of the work from BMI.

On defendant's motion for summary judgment, *held*, granted as to the defendant television stations only.

The court refused to dismiss as to the other defendants in that the record was barren to establish that such other defendants could escape liability by some benefit from the BMI contract. Such could have been established by any of the following:

1. permission or consent from the television stations.
2. contractual relation between them and the television stations.
3. custom or usage in the trade.

362. *Crumb v. A & A Sales, Inc.*, 188 U.S.P.Q. 445 (N.D. Cal. Sept. 3, 1975) 188 U.S.P.Q. 447 (Sept. 19, 1975) (Wollenberg, D.J.).

Action for alleged infringement of plaintiff's copyrighted cartoon character. The defense was based on the testimony of plaintiff's printer, which the plaintiff unsuccessfully attempted to controvert, that plaintiff had given him permission to use the cartoon character on business cards and that, accordingly, between 15,000 and 20,000 of such cards, without a copyright notice, were distributed.

On defendant's motion for summary judgment, *held*, motion granted.

The plaintiff tried to overcome defendant's defense by relying on *S. C. Johnson & Son, Inc. v. Drop Dead Co., Inc.*, 201 F. Supp. 442, 132 U.S.P.Q. 309 (S.D. Cal. 1961). In *S.C. Johnson*, the plaintiff was held

not to have abandoned rights in its copyrighted label for furniture polish by distribution of a poster to the trade, without a copyright notice, which included a reproduction of the label. There, the court held the distribution to be to the trade only and not the public and that no abandonment was present. Distinguishing the permitted use of plaintiff's cartoon business cards, the court stated:

The present case is wholly distinct from the situation before Judge Hall in *S.C. Johnson & Son, Inc.* In the present case the uncontradicted evidence is that the author gave Rita permission to publish the disputed cartoon figure; and that thousands of copies of the figure were circulated among the public. There is no claim that Rita's use of the figure was an effort to bring the author's product to the attention of a select buying group; the business cards were intended to promote Rita's business, not Plaintiff's. When a copyrighted item is published in this manner, it becomes dedicated to the public and loses its copyright protection. 17 U.S.C. §10; *Mifflin v. R. H. White Co.*, 190 U.S. 260 (1903); *White v. Kimmell*, 193 F.2d 744, 92 USPQ 400 (CA9 1952); 1 *Nimmer on Copyright* §59 (1974).

On plaintiff's motion for reconsideration of the court's order granting defendant's motion for summary judgment, *held*, motion denied.

Plaintiff's motion was based on plaintiff's argument that it be afforded an opportunity to fit within *S.C. Johnson* by demonstrating that the business cards embodying its cartoon were distributed only to printers for the purpose of informing the trade of the plaintiff's product. However, plaintiff had conceded that, indeed, the defendant A & A was one of the recipients of a card. The motion was denied as not contesting any finding essential to support the court's prior order.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

363. BISCHEL, JON E. Taxation of patents, trademarks, copyrights and know-how. Boston, Warren, Gorham & Lamont. [1974] 1 v. (looseleaf).

A comprehensive manual designed to assist U.S. tax practitioners, patent and corporate attorneys and others who deal with the structuring and tax planning for transfers or commercial and industrial exploitation of intellectual property. In the field of copyrights, subjects such as tax treatment of authors, sale of copyrights and royalties are discussed.

364. Bookselling in America and the world: some observations and recollections in celebration of the 75th anniversary of the American Bookseller Association. Edited by Charles B. Anderson. New York, The New York Times Book Co. [1975] 211 p.

A souvenir volume celebrating the "diamond jubilee" of the American Bookseller Association. The volume contains four main articles—John Tebbel's "A Brief History of American Bookselling"; Sigfred Taubert's "World Bookselling, Some Historical Comments"; Chandler B. Grannis' "More Than Merchants, Seventy-Five Years of the ABA", and Alice Payne Hackett's "Best Sellers in the Bookstore, 1900-1975". The remainder of the book is a compendium of short articles, poems, photographs and information related to bookselling and the ABA.

365. CAVALLO, ROBERT M. and STUART KAHAN. Photography: What's the Law? New York, Crown Publishers, Inc. [1976] 139 p.

A discussion of "how a photographer can best protect his work, what is involved in copyrighting, how to avoid invasion of privacy actions, and what rights are involved in taking and using photographs."

366. Dissent in the USSR: politics, ideology, and people. Edited by

Rudolf L. Tökés. Baltimore, Johns Hopkins University Press [1975] 453 p.

Of interest to copyright specialists is Part 3 entitled "Samizdat as political communication" which contains three chapters. Chapter 7, by Gayle Hollander is titled "Political communication and dissent in the Soviet Union" and contains an interesting history of "samizdat" publication. Chapter 8, "Magnitizdat: uncensored songs of dissent" is by Gene Sosin, while Chapter 9 refers to "Legal controls on American publication of heterodox Soviet writings" and is written by Peter B. Maggs.

367. GOLDBERG, MORTON DAVID. Copyright and new technology. Paper delivered at the 20th Annual Conference of the Graduate School (Intellectual Property Division) of the John Marshall Law School, Chicago [Feb. 19, 1976] 40 p.

Following a report on the current status of the copyright revision bills in Congress with particular emphasis on how they would protect computer programs, the author also analyzes the scope of rights contained in the present copyright law and delineated by various court decisions. Protection under the doctrines of unfair competition and common law copyright are also explored. The author predicts considerable litigation in the field before an unambiguous law can be developed because of the rapid development of the new technologies.

2. Foreign Publications

1. In English

368. British music yearbook: a survey and directory with statistics and reference articles for 1975. Edited by Arthur Jacobs. London, Bowker, 1975. 801 p.

A reference volume on the music industry in Great Britain. Sec. 3 of the volume contains three short contributions, by E. P. Skone James and the late Peter Kleiner on "Copyright in Music" and one by Michael J. Freegard entitled "Copyright: some practical obligations". The last article deals with performing rights, recording rights and photocopying.

2. In German

369. Die Pariser Revisionen der Ubereinkünfte zum internationalen Urheberrecht. Herausgegeben von Dr. jur. Georg Roeber. Berlin, J. Schweitzer Verlag, 1975. 463 p. (Schriftenreihe der UFITA, Heft 50).

The texts of the UCC and the Berne Copyright Convention, as revised at Paris in 1971, are here reproduced in German, French and English, together with the Reports of the Reporter-General for each of the conventions, as well as the personal views of Abraham L. Kaminstein, former Register of Copyrights, in each of the languages. Three evaluative commentaries on the agreements by Elizabeth Steup, Dr. Erhard Bungereth and Dr. Dimitrios S. Oekonomidis are printed in German, with French and English summaries. The final part of the volume contains a list of the countries that have ratified the two multilateral conventions as well as the text of the implementing legislation enacted by the German Federal Republic.

3. In Portuguese

370. CHAVES, ANTONIO. A nova lei brasileira de direito de autor. Estudo comparativo com o projeto que lhe deu origem. Sao Paulo, Edit. Revista dos Tribunais, 1975. 181 p.

A commentary on the provisions of the new Brazilian copyright law, No. 5,988 of Dec. 14, 1973. Both the text of the law as adopted and the original draft legislation are printed at the end of the commentary. Thus the reader may note the changes referred to in the comments. Also included is the text of Decree No. 76,275 of Sept. 15, 1975 concerning the formation of a National Copyright Council as provided for in sec. 117 of the Copyright Law.

B. LAW REVIEW ARTICLES

1. United States

371. BOTEIN, MICHAEL. Citizen participation in the regulation of cable television. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 777-794.

As a participant in a seminar on cable television, the author

finds that "whether cable remains merely a means of improving reception or becomes a responsive communications system will depend largely upon actions taken by citizens groups now, while the cable industry is still in its formative stages. . . . If citizens groups now take an active role in shaping cable television, they can institutionalize procedures for citizen input and thus obviate the need for a future breakthrough."

372. BRENNAN, THOMAS C. An overview of copyright and the copyright bill. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 5-13.

A member of a panel on copyright, the chief counsel of the Senate Committee on the Judiciary's Subcommittee on Patents, Trademarks and Copyright, reported on the status of the copyright revision, and expressed a disapproval of the trend toward compulsory licensing as evidenced in the current copyright revision bills.

373. CARY, GEORGE D. The troublesome concept of publication: a look at some of the "forgotten" provisions of the copyright revision bill. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 69-84.

Using the troublesome and sometimes frustrating concept of "publication" as an example of one of the areas that is in need of resolution, the former Register of Copyrights concludes that a number of non-controversial sections in the current revision bills will offer beneficial solutions to past problems. He hopes that the few controversial issues will not be permitted to torpedo the much needed revision of the copyright law.

374. COLLINS, TOM A. The future of cable communication and the fairness doctrine. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 833-853.

In the past, the fairness doctrine has been based upon the scarcity of broadcast frequencies and intense competition for broadcast time. Properly structured, however, cable will be able to transmit unlimited sources of information and thus the present concept of the fairness doctrine should undergo a reappraisal in the light of future cable developments.

375. FELDSTEIN, STUART F. Perspectives on copyright and cable television. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 59-67.

A review of recent court decisions and proposed legislation

relative to the copyright liability of cable television systems by an official of the National Cable Television Association.

376. FINKELSTEIN, HERMAN. The role of ASCAP in licensing the right to perform copyrighted musical works. *Idea*, vol. 17, no. 3 (Fall, 1975), pp. 15-24.

An explanation of the manner in which the American Society of Composers, Authors and Publishers licenses the performances of musical compositions, collects royalties and makes distribution is given by the director of the Nathan Burkan Memorial Competition and special counsel for ASCAP.

377. HAMILTON, L. CLARK. Technology and the law in copyright. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 25-34.

Among the new technologies reviewed by the Deputy Register of Copyrights for their effect on the United States copyright law and on international copyright as well are reprographic reproduction, computers and library photocopying. The possible problems that might occur in administering the proposed compulsory licenses are also touched upon.

378. HERMAN, ROBERT N. The manufacturing clause: a history and critique of a sophism in the copyright act. *Idea*, vol. 17, no. 2 (Summer 1975), pp. 5-40.

Upon tracing the evolution of the manufacturing clause and summarizing the U.S. court decisions which sought to apply or interpret the manufacturing provisions contained in the 1909 copyright act, the author recommends passage of H.R. 2223, one of the current copyright revision bills, because of the compromises in sec. 601. The author states that while the manufacturing provisions were originally enacted to aid an infant printing trade, the industry has outgrown the need for protection, and the provision impedes the freedom by which creators may share their output with the world.

379. KAHN, FRANK J. Cable, competition and the Commission. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 854-871.

In an analysis of the Federal Communications Commission's attempts to regulate cable television during the past ten years, the author concludes that the FCC "has failed to require

that broadcasters provide even a fraction of the opportunity for access it mandated for cable, and for the most part, it permits television stations to operate as they see fit and to determine for themselves what is in the public interest. It has neither assessed the relationship between competition and the public interest within broadcasting, nor attempted to reconcile its protective acts on broadcasting's behalf in the absence of profit limits and clear, enforced service standards for broadcasters."

380. KRASNOW, ERWIN G. and JOHN C. QUALE. Developing legal issues in cable communications. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 677-691.

Though the cable industry celebrates its 25th anniversary, the Federal Communications Commission, Congress and the courts have only begun to grapple with the difficult issues that will shape the industry. Such issues as copyright, pay cable and state regulation are touched upon in this article.

381. LAFF, CHARLES A. and LARRY L. SARET. Further unraveling of Sears-Compco: Of patches, Paladin and Laurel & Hardy. *Loyola University of Chicago Law Journal*, vol. 7, no. 1 (Winter 1976), pp. 33-56.

The traditional boundaries of intellectual property (patents, copyrights, trade-marks and trade secrets) are no longer sufficient to afford adequate protection for modern commercial practices. Case law has developed two solutions: drastic modification of the accepted definitions of intellectual property rights and expansion of the entire body of law through recognition of new, but clearly defined, property rights or equitable considerations. In a survey of recent cases decided on the basis of misappropriation and unfair competition, the authors prefer the latter solution, hoping that the courts will develop a clear and uniform body of law.

382. LEDUC, DON R. Control of cable television: the senseless assault on states' rights. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 795-812.

An examination of diverse local, state and federal regulations of the cable television industry to discover what benefits each might provide and where burdensome overlap might occur.

383. LENNY, DAVID C. Copyright infringement problems of a network/home cable record selection and playing system. *Rutgers Journal of Computers and the Law*, vol. 5, no. 1 (1975), pp. 51-96.

Envisioning storage of millions of records and tapes in central computer terminals, i.e., "giant jukeboxes" connected by cable to a network/home cable record selection and playing system, the author looks at the photocopying, cable TV, and jukebox provisions in the present copyright law and the copyright revision bills. He concludes that neither the law nor the proposed legislation deal adequately with the legal problems that might be encountered with the new technology so as to offer incentives to musicians to continue their creative efforts.

384. LORR, RICHARD. Copyright, computers and compulsory licensing. *Rutgers Journal of Computers and the Law*, vol. 5, no. 1 (1975), pp. 149-169.

The article presents an argument in favor of a federal copyright protection system for computer programs because it would assure a uniform application and limited duration, in contrast to the variety of state laws that might permit perpetual monopolies to develop. Compulsory licensing would help preserve property values and maximize First Amendment values in the evolving communication structure.

385. MAHONY, SHEILA. Cable television's jurisdictional dispute. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 872-898.

Though the argument has been made that jurisdictional boundaries among federal, state and local governments regarding the regulation of cable television need to be more clearly drawn, and that the state and local regulators are already burdening the industry, such disputes may still be presented to the courts for adjudication. It would be wrong to have Congress establish exclusive spheres of regulatory authority while the industry is still relatively new and growing.

386. NEVINS, FRANCIS M., JR. Copyright property and the film collector. *Rutgers Law Review*, vol. 29, no. 1 (Fall 1975), pp. 2-34.

An analysis of the U.S. court decisions, including *American International Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D.

Ala. 1975), which involve copyrights and property rights in motion pictures. The suggestion is made that collectors of motion pictures might achieve better protection and that it might be in the studios' economic interest if they would offer for sale or life-of-print leases either freshly made 16mm prints or used prints rather than continue to discard used prints through salvage or used-film dealers. If appropriate precautions were taken against unauthorized public exhibition, on television or otherwise, film collectors would know their activities did not constitute copyright infringement or subject them to civil or criminal liabilities.

387. OLER, HARRIET L. Royalties and educational exemptions in copyright. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 51-58.

Three of the more controversial areas of copyright revision have been cable television, educational uses of copyrighted works and performance rights for sound recordings. Some of the problems with the proposed resolutions contained in the copyright revision bills are briefly presented here.

388. OLER, HARRIET L. World Intellectual Property Organization: Geneva conference. *Idea*, vol. 17, no. 2 (Summer 1975), pp. 57-59.

A note on the activities of the Advisory Group of Non-Governmental Experts on the Protection of Computer Programs that convened in Geneva on June 23, 1975. The group recommended that a special type of legal protection be given computer software for a term of from 5 to 20 years, and that a system of international registration be developed. WIPO has also agreed to draft model provisions for national laws and an international treaty to provide minimal protection for computer software.

389. PATTERSON, LYMAN RAY. Private copyright and public communication: free speech endangered. *Vanderbilt Law Review*, vol. 28, no. 6 (Nov. 1975), pp. 1161-1211.

Finding that history provides a helpful perspective by revealing a not so obvious truth that copyright has more to do with conduct than with property, the author observes that one must choose whether copyright is an author's natural right or a device of trade regulation and unfair competition. Hence the

potential conflict between copyright and free speech is inevitable if the copyright bill providing copyright for television is enacted, since public communication of information is too important to the welfare of a free and democratic society to be subjected to the private monopoly provided by the current concept of copyright.

390. PEER, RALPH, II. Licensing: copyright royalties and exemptions in the music industry. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 43-50.

A review of the mechanical reproduction license provisions in the 1909 Copyright Law and the jukebox exemption, with comments on the limitations provided in current copyright revision bills by way of fair use and compulsory licenses for educational purposes.

391. POPHAM, JAMES J. The 1971 consensus agreement: the perils of unkept promises. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 813-832.

In November 1971, the television broadcast industry, the cable television industry and copyright owners of programs accepted a compromise agreement engineered by the White House Office of Telecommunications Policy, to be implemented by the Federal Communications Commission. Congressional action on the copyright revision bills is evaluated with the conclusion that the FCC must now act to make sure that much of its regulatory program for cable television is based upon the provisions contained in the consensus agreement.

392. POWE, L. A., JR. Cable and obscenity. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 719-754.

A review of recent court decisions relative to state and local laws concerning obscenity in motion pictures. The author then projects their application to the exhibition of such films on cable television, and suggests the type of regulation that will be needed to be employed.

393. ROSENFELD, HARRY M. Customary use as "fair use" in copyright law. *Buffalo Law Review*, vol. 25, no. 1 (Fall 1975), pp. 119-140.

This article has been adapted and modified from a portion of the amicus brief submitted by the author in *Williams & Wilkins* on behalf of the National Education Association. The con-

clusion is reached that unless appropriate changes are made in the present copyright revision bills, provisions concerning "fair use" would result in a reversal of the common law doctrine that customary non-profit use of copyrighted materials for non-commercial education, research and scholarship is *per se* "fair use."

394. SHAFTER, ROBERT L. The photocopy industry and copyright: section 108 of the bill. *Idea*, vol. 17, no. 3 (Fall 1975), pp. 35-42.

A discussion of the library photocopying controversy and the compromises incorporated in section 108 of the copyright revision bill, S. 22.

395. SHAPIRO, GEORGE H., GARY M. EPSTEIN and RONALD A. CASS. Cable-satellite networks: structures and problems. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 692-718.

Because cable systems are small as compared to the three national television networks, originations by cable are locally oriented and seldom sophisticated. The possibility of cable networking via satellites is discussed in the light of possible problems such as carrier status, monopolization, etc.

396. SMITH, DAVID W. Local taxation of cable television systems: the constitutional problems. *The Catholic University Law Review*, vol. 24, no. 4 (Summer 1975), pp. 755-776.

Recently municipalities and states have attempted to impose taxes on subscribers to cable television systems. The Federal Communications Commission has expressed an opinion that the taxes do not violate franchise compensation limitations, but that the taxes might possibly violate the equal protection clause, the commerce clause and the free speech provisions of the Constitution. The purpose of the article is to clarify the questions raised by the FCC.

397. WALTHER, DALE J. Antitrust aspects of international copyright law. *The Antitrust Bulletin*, vol. 20, no. 3 (Fall 1975), pp. 449-469.

This paper won first prize at California Western School of Law in the 1974 Nathan Burkan competition. In exploring the antitrust aspects of international copyright, the author concludes that "co-existence and cooperation are possible under

the national treatment provisions of existing international copyright conventions, but idealistic development of a world copyright is presently limited by divergent national concepts toward property ownership. . . . However, the trend toward free-trade advancement as seen in the decisions of the European Court of Justice suggest regional, if not global, acceptance of antitrust principles. The same forces that foster international free trade may well foster the practicality of an international copyright."

2. Foreign

1. In English

398. DITTRICH, ROBERT. Community aeriels. *EBU Review*, vol. 26, nò. 6 (Nov. 1975), pp. 46-50

A case note commenting on a recent Austrian Supreme Court of Appeals decision which concerned an interpretation of sec. 17 of the Austrian Copyright Law. The defendant cable television system claimed that it was not liable for performance royalties for the music carried by the system since relay installations were exempted from copyright liability under paragraph 2 of the section. The court held, however, that the exemption which dated from 1936 was applicable only to radio broadcasts and not to cable.

399. MASOUYÉ, CLAUDE. WIPO: A new United Nations specialized agency. *EBU Review*, vol. 27, no. 1 (Jan. 1976), pp. 40-50.

On December 17, 1974, the World Intellectual Organization formally became a part of the United Nations "family" and is the 14th specialized agency within that international group. This study recapitulates the evolutionary changes that have taken place in the legal framework, explains the reasons for the changes, outlines the present structures and discusses the activities and functions that are to be performed.

400. PEDRAZZINI, MARIO M. Letter from Switzerland: revision of the Swiss copyright law. *Copyright*, vol. 11, no. 12 (Dec. 1975), pp. 247-252.

With the appointment of a Second Committee of Experts in 1973, the work on the draft of a new Swiss copyright law

began a new phase of development. The letter summarizes the amendments that have been incorporated into the draft which is expected to be introduced into the Parliament some time after December 31, 1975.

401. ULMER, EUGEN. Automatic and, in particular, computerized information and documentation systems and the copyright law. *Copyright*, vol. 11, no. 12 (Dec. 1975), pp. 239-246.

In a continuation of his report submitted to Unesco and WIPO in 1971, Prof. Ulmer reviews the development of national and international information and documentation systems, the various bases for copyright protection of the information and documentation and its relationship to reprography. He concludes that "since development is still in a state of flux, it would seem that the time has not yet come for the formulation of recommendations for a legal settlement at the international level." In the meantime, the member states should keep the two international organizations informed of any measures from the copyright standpoint that they have adopted in order to facilitate international cooperation.

2. In French, English and Spanish

402. DESBOIS, HENRI. A propos d'un arrêt relatif aux créations d'auteurs salariés. *Revue Internationale du Droit d'Auteur*, no. 87 (Jan. 1976), pp. 89-103.

A case note in French, with English and Spanish translations, concerned with a decision of April 11, 1975 by the Criminal Division of the French Court of Cassation. A part-time employee had submitted designs for hand-bags to his employer for approval. The employer selected several designs and paid the employee for them. The question involved was whether the right to reproduce the designs could be transferred without a written instrument. The court based its decision on art. 3 of the Law of Mar. 12, 1952 concerning seasonal designs and art, and on art. 31 of the Mar. 11, 1957 law on copyright.

403. FAUCHÈRE, JACQUELINE. Les faux en matière de peinture et d'oeuvres d'art. *Revue Internationale du Droit d'Auteur*, no. 86 (Oct. 1975), pp. 89-123, no. 87 (Jan. 1976), pp. 3-43.

The article in French, accompanied by translations in English and Spanish, analyzes various French laws that provide remedies to artists, buyers and sellers of art objects in protecting

them from forgeries and unauthorized copying. The conclusion is reached that while France abounds in laws, artists, gallery owners and auctioneers prefer not to take advantage of the legal remedies for economic or moral reasons. The establishment of an official catalog of an artist's work at the time of his death, plus a corps of experts with scientific laboratories for the authentication of doubtful works is proposed as a possible solution to the problems created by an increasing number of forgeries on the market.

404. WALTER, MICHAEL M. La liberté contractuelle dans le domaine du droit d'auteur et les conflits de lois. *Revue Internationale du Droit d'Auteur*, no. 87 (Jan. 1976), pp. 45-87.

This article in French, with English and Spanish translations, contains an analysis of the manner in which the national treatment provisions of the Brussels revisions of the Berne Copyright Convention have actually been applied in resolving conflict of laws situations arising from contracts that deal with author's rights and their transferability. Principles such as country of origin, *lex loci delicti*, status of contract, and the weighing of interests have all been used in determining the national laws to be applied.

3. In German

405. BIRKLEIN, HERBERT and KLAUS HENKEL. Die neue Musterschutzordnung noch stärker nutzen. *Der Neuerer*, Ausg. B, (Sept. 1975), pp. 115-117.

A comment on the effectiveness of the Order on Industrial Designs, enacted Jan. 17, 1974, after one year's operation by two members of the German Democratic Republic's Patent Office staff.

406. GLÜCKSMANN, ANSELM. Die urheberrechtlichen Beziehungen der DDR zu den anderen RGW-Ländern und ihre praktischen Folgen für urheberrechtlich Berechtigte. *Neue Justiz*, vol. 29, no. 4 (Feb. 1975), pp. 102-106.

A brief commentary on developments in copyright relations between the German Democratic Republic and the other countries of the European Economic Community, as well as with other socialist countries in Europe, especially since the

USSR negotiated a copyright treaty with Hungary in 1967 and joined the Universal Copyright Convention in 1973.

407. HEFTI, ERNST. Die Parodiebehandlung in Frankreich. *Film und Recht*, vol. 19, no. 12 (Dec. 15, 1975), pp. 825-829.

A resume of the treatment of parodies under art. 41, paragraph 4 of the French copyright law as developed by leading French law text writers and by the French courts.

408. PROSEK, J. Der Rechtsschutz für industrielle Muster in der CSSR. *Der Neuerer*, Ausg. B (June 1975), pp. 92-94.

The Director of the Trademark and Industrial Design Division of the Czech Office of Inventions and Discoveries discusses the scope of protection afforded industrial designs under the new Czech law on discoveries, inventions, innovations and industrial designs that entered into force Jan. 1, 1973. Requirements for novelty, registration and description of the design; the effect of collaboration between the designer and the commercial user; licensing agreements and their rescission and various forms of remuneration are among the subjects mentioned.

4. In Italian

409. AMMENDOLA, MAURIZIO. Ancora sulla tutela degli artisti. *Rassegna di diritto cinematografico, teatrale e della radiotelevisione*, vol. 24, no. 3 (July-Sept. 1975), pp. 92-97.

An interpretation of the rights granted to performing artists under the provisions contained in articles 80, 83, and 84 of the Italian Copyright Law of April 22, 1941.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

410. Battle joined in new debate on national cable policy. House subcommittee staff's report signals renewed confrontation between conventional broadcasting and CATV; most federal controls on cable would be lifted, with marketplace to decide; FCC scored for siding with broadcasters in maintaining artificial

scarcity of competition; new equilibrium between services of competition; new equilibrium between services could emerge; arena for future policy planning may shift from FCC to Congress. *Broadcasting*, vol. 90, no. 6 (Feb. 2, 1976), pp. 19-22.

While some interests were pleased with the report of the House Subcommittee on Communication's staff, others took exception to positions taken. The Community Antenna Television Association asked that the markup sessions in the House on S. 22 be delayed for 30 days to give them time to digest the committee report.

411. Broadcasters swarm at FCC to protest looser rules for cable. Small-market operators cite loss of business and audience from cable importation now; bigs see much larger dangers; FCC keeps asking for facts. *Broadcasting*, vol. 90, no. 8 (Feb. 23, 1976), pp. 19-22.

At an *en banc* meeting of the FCC commissioners, representatives from the broadcasting industry defended the commission's policy of de-regulating the cable industry. CATV was accused of renegeing on its promised support of copyright legislation. Jack Valenti, of the Motion Picture Association of America, stated that if copyright revision came, the commission should not relax all restrictions on cable's importation of distant programs since the royalties provided in the revision bill would tend to limit syndication, a market on which television producers relied to recoup their investment in prime-time programming.

412. COPLAND, AARON. Copyright revision and the U.S. symphonic composer. *ASCAP Today*, vol. 7, no. 2 (Winter 1975), p. 9.

A condensation of the composer's statement before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice during a hearing on H.R. 2223, the copyright revision bill. Mr. Copland, among other subjects, urged an end to the jukebox exemption and recommended that the Copyright Royalty Tribunal be given authority to review jukebox license fees.

413. FISHMAN, JAMES J. Art law; what is art law? *New York Law Journal*, vol. 175, no. 14 (Jan. 21, 1976), p. 1, col. 1; p. 3, cols. 1-2.

The executive director of Volunteer Lawyers for the Arts, in commencing a regular series of articles in this publication

surveys the scope of the legal problems encountered by artists in seeking protection for their creations in the United States and mentions the areas which will receive fuller treatment in future columns.

414. GOTBETTER, HOWARD. If a picture becomes public domain, can anyone use it? *Variety* [wkly ed.], vol. 281, no. 9 (Jan. 7, 1976), pp. 26, 52.

The question of whether an author of a still copyrighted underlying literary property should be permitted to prevent the general public from using a motion picture on which the original term of copyright has expired and no application for renewal has been made is explored here. Though there have been no court decisions directly on point, the author expresses the belief that the answer should be in the negative.

415. HALL, MILDRED. C'right chief a shocker at Washington hearings; Ringer asks antipiracy end 'in 72 years'. *Billboard*, vol. 87, no. 50 (Dec. 13, 1975), pp. 3, 55.

A report on the testimony of the Register of Copyrights on Dec. 4, 1975 relating to copyright in sound recordings, compulsory licensing, performance royalties, and possible perpetual copyright for pre-1972 recordings under current state anti-piracy legislations.

416. HALL, MILDRED. Copyright revision: revolution on the way; a quantum leap for compulsory licensing. *Billboard*, vol. 88, no. 1 (Jan. 3, 1976), pp. 4, 46.

The Copyright Royalty Tribunal, proposed in H.R. 2223 and S. 22, the current copyright revision bills, has received surprisingly little attention from the music industry and other copyright-based industries. Yet, if it survives the legislative process in its present form, it will have an important impact on compulsory licensing rates and the media. So far only the jukebox and cable people have voiced opposition to having their rates reviewed by the tribunal. Drastic changes may be forthcoming as the result of lobbying from some of the interested groups.

417. HILLER, JOHN. Indie Filmmakers in fear of "educators" riding free. *Variety*, [wkly ed.], vol. 281, no. 9 (Jan. 7, 1976), p. 30.

The Association of Independent Video & Filmmakers, Inc. has expressed opposition to two proposed amendments to H.R. 2223 which would exempt educators, libraries and museums as well as public broadcasting systems from copyright liability in making copies of films and videotapes under certain circumstances.

418. Hong Kong piracy exports at \$200 mil. *Billboard*, vol. 88, no. 1 (Jan. 3, 1976), pp. 6, 46.

Recent findings in Australia of \$500,000 worth of pirated tapes imported from Hong Kong came as a shock to officials who, up until a short time previously, had thought that continent was free from pirated goods. Piracy of sound recordings and their exportation from Hong Kong are reaching epidemic proportions.

419. JONES, PETER. Retailers must pay royalty \$ in England. *Billboard* vol. 88, no. 1 (Jan. 3, 1976), pp. 1, 35.

In Great Britain, retailers who play records in their stores for background or demonstration purposes, and where the music is audible to customers, must now pay to the Performing Right Society a royalty of 26 cents per square meter of sales floor space, with a minimum of \$21 annually.

420. Justice joins cable attack on FCC's siphoning rules. Antitrust division says pay cable is unfairly restrained by controls that broadcasters call too liberal. *Broadcasting*, vol. 90, no. 9 (Feb. 9, 1976), pp. 25-26.

The Justice Department has filed a brief in the U.S. Court of Appeals in Washington, D.C. asking that the FCC rules limiting the right of pay cable to carry movies and sports events be vacated on grounds that the rules are not only anti-competitive, but also lack economic and legal support. The FCC has contended that its rules are needed to guard against the siphoning of programs currently available to viewers of conventional television at no charge.

421. LEONARD, JOHN. Public television versus private rights. *The New York Times*, vol. 125, no. 43149 (Mar. 14, 1976), p. D25, cols. 3-8.

An editorial by a writer of "non-dramatic" literary works

opposing the so-called "Mathias" amendment as it was finally incorporated into sec. 118 of the Copyright Revision Bill, S. 22, and passed by the Senate on February 19, 1976.

422. MILLER, JEROME K. A brief history of copyright. *Audiovisual Instruction*, vol. 20, no. 10 (Dec. 1975), p. 44.

Under a regular magazine department heading entitled "Copyright Today", the author-editor briefly highlights major English and American efforts to develop and revise copyright legislation since the days of Caxton's printing press.

423. MULLIGAN, BRIAN. Major source detected; bootlegged albums seized in U.K. *Billboard*, vol. 88, no. 1 (Jan. 3, 1976), pp. 8, 33.

A report on the fourth successful bootleg-piracy prosecution in Great Britain conducted by the British Phonograph Industry this year. What proved to be an invaluable find was information on the record pirate's source of supply in Germany, Holland and the United States.

424. Picking authors' pockets. *ASCAP Today*, vol. 7, no. 2 (Winter 1975), p. 8.

A reprint of an editorial from the *Boston Globe* which does not favor adoption of the Mathias and Bayh amendments to the current copyright revision bill.

425. Senate passes copyright revision bill. *Broadcasting*, vol. 90, no. 8 (Feb. 23, 1976), p. 24.

The bill as passed by the Senate would lessen the amount small cable systems would have to pay in copyright royalties. Another feature of the bill was the compulsory license for public broadcasters to be paid for the use of musical, non-dramatic literary or photographic works. An annual fee would be set by the royalty tribunal, and the amount would be paid into a pool to be distributed to copyright owners. This provision survived an attempt by Senators Cranston, Humphrey and Buckley to limit the license to musical works only. A surprise amendment by Senator Hathaway altered the royalty to be paid by small cable systems downward, and that was modified to insure that a minimum payment of \$30 annually would be paid by every cable system.

426. WAGNER, SUSAN. Copyright developments are speeding up on Washington. *Publishers Weekly*, vol. 209, no. 8 (Feb. 23, 1976), pp. 61-62.

With the Senate about to debate its copyright revision bill, S. 22, and the Kastenmeier subcommittee in the House beginning a mark-up of H.R. 2223, groups of copyright owners, librarians, etc. are meeting in attempts to work out compromises on fair use, photocopying, and the so-called Mathias amendment. Plans are being made to establish a clearing house for payment of royalties for photocopying.

427. WAGNER, SUSAN. Copyright owners agree with educators on fair use. *Publishers Weekly*, vol. 209, no. 12 (Mar. 22, 1976), p. 18.

On Mar. 5, 1976, an agreement was reached between educators and copyright owners as to the amount of copying of books and periodicals that would be permitted for educational uses. The guidelines do not cover anthologies, workbooks, tests and other consumables. Other groups are determining the guidelines for the copying of audio-visual materials and music. In turn, copyright owners have agreed to accept amendments to the fair use provisions in S. 22 as adopted by the Kastenmeier subcommittee during its mark-up.

428. WAGNER, SUSAN. 1975, the view from Washington: on copyright a continuing struggle—and a bill in '76?; on education funds, an uphill battle with the White House; no relief from soaring postal rates in sight. *Publishers Weekly*, vol. 209, no. 6 (Feb. 9, 1976), pp. 40-41.

A summation of developments in the field of U.S. copyright during 1975 that would be of particular interest to publishers, with a hopeful prognosis of success in revising the copyright law.

429. ZERKEL, FRED H., LING-YEE GIBNEY and JAMES R. LONG. 1976 election complicates congressional outlook. *Chemical and Engineering News*, vol. 54, no. 2 (Jan. 12, 1976), pp. 19-23.

An overview of prospective legislative developments for the coming session of Congress. The opinion is expressed that sec-

tions 107-108 of the copyright revision bills are aimed at settling once and for all the question of how much photocopying of copyrighted material is too much. Despite the controversies, it seems likely that a revision bill will be enacted prior to the elections in November.

2. Foreign

1. England

430. HEWISON, J. T. C. Australian Trade Practices Law; effects on publishing and distribution agreements. *The Bookseller*, no 3661 (Feb. 21, 1976), pp. 1312-1315.

Australia's recently enacted Trade Practices Act is based upon the U.S. Sherman and Clayton Acts. Paragraph 51 (3) (a) of the Act provides exemptions for licenses and assignments relating exclusively to the work or other subject matter in which copyright subsists. Exemptions are not extended to resale price maintenance and other methods of gaining monopolization.

431. P. L. R.: the position so far; a statement by Brigid Brophy, John Coleby, Maureen Duffy, Francis King, and Victor Menzies for the Writers Action Group; the Society of Authors; the Writers' Guild of Great Britain. *The Bookseller*, no. 3657 (Jan. 24, 1976), pp. 234-237.

After noting the present status of the Technical Investigation Group report and pending legislation there follows a series of brief questions and answers designed to explain just what the public lending right is, how it will work, what it will cost, and how authors of books, the public and library services will be affected.

432. RICHARDSON, PAUL. Copying and copyright in schools; a personal view. *The Bookseller*, no. 3659 (Feb. 7, 1976), pp. 422, 424-426, 428, 430-431.

The author suggests alternatives to the blanket-licensing of photocopying proposed by the Publishers Association in Great Britain, for consideration by the schools. He concludes, "What we must avoid is a system which creates some new, costly and non-productive organization, which offers more work for the

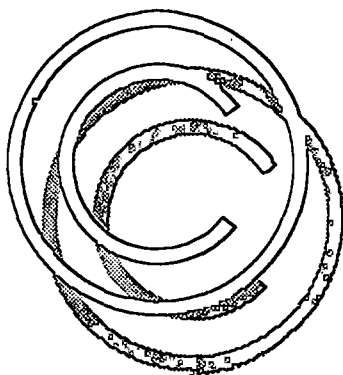
bureaucrats and computer programmers without really protecting the essential interests of the producers and purveyors of books—authors, publishers, booksellers—or meeting the reasonable needs of the consumers—the schools and the education authorities.”

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PART I

ARTICLES

433. MUSICAL COPYRIGHTS IN JAPAN

*By SUMIO IJIMA***I. INTRODUCTION*

Music does not know any borders. Music, irrespective of its origin, is heard all over the world. Just as American music can be heard and appreciated in Japan, Japanese music can be enjoyed in the United States.

Music is closely connected with every important phase of a person's life and is very nearly indispensable. At birth, music accompanies the celebration that invariably follows. At marriage, the ceremony is begun with the well-known "Wedding March". At death, it is the "funeral march" that will usher him from this world to heaven. Music plays an important role in everyday life. People sing when they feel good, and it seems completely natural that they should evidence their feeling in song. No one can exist without hearing music or singing a song.

A writer describes music as follows:

"Ageless is music. Time does not recognize a people without music. Music, unlike other artistic creations, requires no special tools. Music is entwined in the life of every race. Springing from the soul of the illiterate or the educated, but always from the soul, has come from earliest time a succession of melodies. Clumsiness of tools prevented the early development of great writers, and after the Egyptians had perfected papyrus and made easier task of writing, the appreciation of this artistic endeavor was confined to a select few. But those enlightened castes, fortunate to possess and understand writings, enjoyed their music no more than did the slaves who sang as they toiled. Each caste had its own music. It had always been thus. Music is as universal as it is ageless. There is inherent in every

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race an intuitive appreciation of its simple music that requires no tutelage, no development. Prior to the time when different peoples had advanced to the point of intercommunication, the joyous song of the one would instill joy into the heart of the other, and the plaintive lullaby of either was easily understood by the other. Unquestionably music is the oldest form of audible expression. No history of music traces the first song; it is as ancient as man."¹

It is said that the history of music is older than that of literature, yet literary copyright antedates musical copyright.² Although the recognition of the musical copyright is relatively new, many countries now protect music as copyrightable works by their own laws.³ Both the United States and Japan are signatories to the Universal Copyright Convention,⁴ and with respect to musical works, the United States and Japan are obliged to give each other the same protection as they accord to their own nationals.⁵ For this reason, the writer believes it would be useful for American readers of the BULLETIN OF THE COPYRIGHT SOCIETY OF THE USA to become acquainted with the scope of protection of music in Japan, by outlining how music is protected in Japan under that country's copyright laws.

A short history of the copyright law in Japan will be provided in the next section in order to help readers understand how Japanese copyright laws (including the musical copyright) have developed. Following that, the writer will discuss what kind of music is eligible for copyright protection ("the subject matter of the copyright"), the formal procedure that must be observed in order to obtain a musical copyright ("formalities"), the kind of right that is granted as a musical copyright ("contents of the musical copyright"), the limitations placed on the musical copyright ("limitations"), and the performing rights society in Japan.

¹ Henderson, *The Law of Copyright, Especially Musical*, 1 ASCAP COPYRIGHT LAW SYMPOSIUM 125 (1939).

² A. M. SHAFTER, *MUSICAL COPYRIGHT*, 1 (2d ed. 1939).

³ See *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (U.N.E.S.C.O. 1970).

⁴ It was adopted by an intergovernmental conference, fifty countries participating, on September 6, 1952, in Geneva, Switzerland and went into effect on September 16, 1955. (hereinafter referred to as the "Universal Copyright Convention"). The United States ratified the Convention on December 6, 1954 and Japan did on January 28, 1956. This convention was revised at Paris on July 24, 1971. Although the United States ratified the revised text, Japan has not yet ratified it.

⁵ Arts. I and II of the Universal Copyright Convention.

II. HISTORY OF JAPANESE COPYRIGHT LAW

(1) *Edo Era (1603-1867)*⁶

During this period, there was a system of protection for the printer, but not for the author. By virtue of a charter granted by the Shogunate (which was the paramount political authority in Japan during the Edo period), the printers organized a printers' guild ("*hon-yanakama*") in order to protect their business. The printers' guild was a monopolistic commercial organization ("*kabunakama*") to which the Shogunate granted chartered rights with respect to certain businesses, in return for payment of certain royalties. Thus, only members of the printers' guild were permitted to engage in the publishing business. Prior to publication of a new book, the printer of the book had to obtain special permission from the Shogunate to publish the book. Such permission gave the printer the exclusive right to publish and sell the book, but did not, however, give any right, privilege, or power to the author of the book. It can be said that during the Edo period there was no copyright system in a modern sense.⁷

(2) *Meiji Era (1868-1912)*

It is said that the modern copyright system was introduced into Japan from Western countries in this period.⁸ There was a remarkable development of the copyright, which can be divided into three phases, namely: (1) license period, in which a license from the government was required to obtain protection; (2) formality period, in which certain formalities had to be met to obtain protection; and (3) non-formality period, in which no formality had to be met to obtain protection.

(A) *License Period*

In 1868, the Shogunate was abolished and Japan started to become a modern state under the reign of the Meiji Emperor. During this period, control of the press and protection of publication were not separated, since the former was considered of more importance

⁶ See N. Ito, *Chosakuken seidoshi no sobyo* (Rough sketch of history of copyright system), 4 CHOSAKUKEN KENKYU (Studies on copyright) 101, 120-21 (1971).

⁷ For a more detailed history of the copyright system during the Edo era, see generally *id.* at 121-31; D. NAGANO, WAGAKUNI CHOSAKUKENHOSEI NO EN-KAKU (History of Japanese copyright system) 1-14 (1968).

⁸ Ito, *supra*, note 6, at 120.

than the latter.⁹ In 1869, the Publication Ordinance (*shuppan jōrei*) was enacted.¹⁰ This ordinance controlled the press and, at the same time, granted protection from plagiarism only to publishers who obtained a license from the government. Protection was given in the form of prohibiting the unauthorized reprinting of books. This ordinance was abolished in 1875, and a new Publication Ordinance was enacted.¹¹ By virtue of this new ordinance, the exclusive right to publish and sell books (including translations of foreign books) was clearly granted to the publisher, and such right continued in force for thirty years from the first publication of the protected work. However, a license from the government was still required to obtain such a publication right.¹²

(B) *Formality Period*

During this period, remarkable progress was made. In 1887, the Copyright Ordinance (*hanken jōrei*) was enacted to replace the Publication Ordinance.¹³ The Copyright Ordinance can be said to contain the substance of copyright law in a modern sense.¹⁴ The protection of the publication of writings or drawings was completely separated from control of the press, and it was also made clear that such protection was granted only to the author, and not to the publisher. Therefore, it can be said that a modern copyright system was established by this ordinance for the first time. Furthermore, the license system was completely abandoned and a "formality system" was adopted instead. In order to secure protection, registration of copyright had to be made, and at the same time, a certain notice had to be affixed to all copies of the published writing or drawing. The period of protection continued, in principle, for five years after the death of the author. This copyright was assignable either before or after his death.

Contemporaneously with the enactment of the Copyright Ordinance, the Dramatic and Musical Compositions Ordinance (*kyakuhon gakufu jōrei*)¹⁵ was enacted. Under this Ordinance, a publication right

⁹ K. YAMAMOTO, CHOSAKUKENHO (Copyright law) 21, in 54 II HÖRITSUGAKU ZENSHU (1969).

¹⁰ *Gyōseikantatsu* No. 444 of 1869.

¹¹ *Dajōkan fukoku* No. 135 of 1875.

¹² In 1876, the Photographic Ordinance (*shashin jōrei*) was enacted and the publication right of photographs was recognized for the first time. A license from the government was necessary to obtain such a right and the right was valid for five years. *Dajōkan fukoku* No. 90 of 1876.

¹³ Imperial Ordinance No. 77 of 1887.

¹⁴ YAMAMOTO, *supra*, note 9, at 21.

¹⁵ Imperial Ordinance No. 78 of 1887.

and a performance right, defined as a right to perform the work publicly for profit, were established to protect dramatic and musical compositions. Musical compositions were for the first time recognized as copyrightable works. In addition to observation of the formalities (registration and notice) to secure the publication right, a different and independent notice had to be placed on each copy of a dramatic or musical composition in order to secure such a performance right. The provisions of the Copyright Ordinance were applied *mutatis mutandis* to dramatic and musical compositions.

In 1893, the Copyright Ordinance was replaced by the Copyright Law (*hankenho*),¹⁶ but apart from the change in title, there was no change in substance.

(C) *Non-formality Period*

As part of its efforts to abolish the unequal treaties which the Shogunate had concluded with foreign powers which enjoyed extraterritorial rights and consular courts, the Japanese Government promised to accede to the International Copyright Convention, commonly known as the Berne Convention,¹⁷ on the condition that such extraterritorial rights and consular courts were to be abolished.¹⁸ In order to comply with the provisions of the Berne Convention, a new copyright law needed to be enacted. Therefore, in 1899 the Copyright Law (*chosakukenho*)¹⁹ was enacted and both the Copyright Law of 1893, and the Dramatic and Musical Compositions Ordinance of 1887 were abolished.

Under the new copyright law, a copyright was automatically vested in an author when he created a work, and no formalities, such as registration and notice, were required to be observed. A copyright was

¹⁶ Law No. 16 of 1893.

¹⁷ Convention Creating an International Union for the Protection of Literary and Artistic Works signed at Berne, September 9, 1886. (hereinafter referred to as the "Berne Convention").

The Berne Convention has undergone several revisions made at Paris on May 4, 1896, at Berlin on November 13, 1908, at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971.

Japan initially accepted the original text and the Paris revision of the Berne Convention on April 18, 1899. Thereafter, she ratified the Berlin text on May 20, 1910, the Rome text on June 5, 1931, the Brussels text on June 6, 1974, and the Paris text on January 20, 1975. The United States is not a signatory to the Berne Convention.

¹⁸ Ito, *supra*, note 6, at 141; YAMAMOTO, *supra*, note 9, at 22.

¹⁹ Law No. 39 of 1899.

valid, in principle, for a period of thirty years after the death of the author. The subjects for which a copyright could be obtained were extended to include "any work belonging to the scope of writings, speeches and statements, drawings and paintings, sculptures, models, photographs, and any other form of literature, science or art." Foreign authors were accorded national treatment with respect to copyright protection. Moral rights of the author were expressly mentioned.

The Copyright Law of 1899 continued essentially in its original form until its complete overhaul in 1970. During its lifetime of seventy-one years, the Copyright Law was amended on sixteen occasions.²⁰ In 1910, "architecture" was added to the list of subjects covered by copyright.²¹ In 1920, "performance" and "singing" were also added to the list of copyrightable works.²² In 1931, it was specified that "music", which had not been mentioned in the Copyright Law of 1899 (although previously covered under the 1887 Ordinance) was included in "art" in the list of copyright subject matter and, at the same time, a broadcasting right was recognized.²³

From the inception of the Copyright Law of 1899, there had been no doubt that a musical work would come under the scope of literature, science or art and would be protected as a copyrightable work, although the law itself did not explicitly so indicate.²⁴ In the course of the revision of 1931, the question had been raised in the Diet whether "music" would belong to the scope of "literature", "science" or "art", and it was resolved by assigning music to the general category of art.²⁵ In 1934, record manufacturers were allowed to obtain copyrights on their records in which another's work was lawfully (*i.e.*, with consent of the copyright owner of such work) recorded.²⁶ At the same time, the scope of the free use of copyrighted works was expanded and copyrighted records were allowed to be used freely for public performance or broadcasting.

(3) *Copyright Law of 1970*

Since new technology developed strikingly after World War Two, there was a strong desire to completely revamp the Copyright Law of

²⁰ See ITO, *supra*, note 6, at 143-46.

²¹ The Law Amending the Copyright Law; Law No. 63 of 1910.

²² The Law Amending the Copyright Law; Law No. 60 of 1920.

²³ The Law Amending the Copyright Law; Law No. 64 of 1931.

²⁴ J. KOBAYASHI, GENKO CHOSAKUKENHO NO RIPPORYU TO KAISHAKU (Legislative purpose and interpretation of the present copyright law) 41 (1953).

²⁵ *Id.* at 41-42.

²⁶ The Law Amending the Copyright Law; Law No. 48 of 1934.

1899 in order to cope with it. In the post-war period, there were three attempts to make a general revision of the Copyright Law of 1899: in 1950, in 1953 and in 1962. The first two attempts failed, but the last one finally brought a new copyright law into being in 1970.²⁷

A new copyright law was promulgated on May 8, 1970 and came into effect on January 1, 1971.²⁸ The Copyright Law of 1970 consists of 124 articles, while the old Copyright Law of 1899 comprised 45 articles. Additionally, there are supplementary provisions consisting of 31 articles, dealing mainly with transitional measures. Among the numerous changes made, the following points can be said to constitute the major revisions: (1) extension of the protection period, in principle, to fifty years after the death of the author; (2) abandonment of the free use of recorded works for public performance or broadcasting and (3) introduction of the neighboring rights system,²⁹ under which the rights of performers, record manufacturers and broadcasters became protectable as neighboring rights.³⁰

²⁷ Itō, *supra*, note 6, at 150-52.

²⁸ Law No. 48 of 1970. For general information concerning historical background of the revision, see Y. Nomura, *Letter from Japan*, (1) and (3), 2 COPYRIGHT 276 (1966) and 6 COPYRIGHT 49 (1970) and *General Revision of the Copyright Laws in Japan*, 57 REVUE INTERNATIONALE DU DROIT D'AUTEUR 26 (1968).

²⁹ The rights of performing artists, producers of phonograms and broadcasting organizations are referred to as "neighboring rights" in that they adjoin copyright though they are not copyright rights in a strict sense. There is an international treaty providing for protection for such neighboring rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, popularly known as the Rome Convention of 1961. Neither the United States nor Japan is a signatory to this treaty.

For detailed discussions of neighboring rights, see G. H. C. Bodenhausen, *Protection of "Neighboring Rights"*, 19 LAW AND CONTEMPORARY PROBLEMS 156 (1954) and E. Ulmer, *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 10 BULL. CR. SOC. 90, 165, 219 (1962-63).

³⁰ In addition to these revisions, the following laws were enacted:

In 1939, the "Law on Intermediary Business concerning Copyright", regulating intermediary businesses for the benefit of copyright owners and users of works was enacted.

After World War II, Japan concluded the Peace Treaty and in order to put it into force in the field of copyright, the "Law concerning Exceptional Provisions for Copyrights Owned by the Allied Powers and the Allied Nationals" was enacted in 1952.

In 1956, Japan ratified the Universal Copyright Convention (1952), and the "Law concerning the Exceptional Provisions to the Copyright Law required in consequence of the Enforcement of the Universal Copyright Convention" was enacted in that year.

Because the Copyright Law of 1970 is quite young, the Copyright Law of 1899 occasionally will be referred to in this paper in order to understand the Copyright Law of 1970 through comparison with analogous provisions in the 1899 Law. When such comparisons are made, the Copyright Law of 1970 will be referred to as the "Copyright Law" and the Copyright Law of 1899 will be referred to as the "old Copyright Law".³¹

III. SUBJECT MATTER OF COPYRIGHT

(1) General

The works to be protected under the Copyright Law are defined as "productions in which thoughts or sentiments are expressed in a creative way and fall within the literary, scientific, artistic or musical domain".³² Since, however, such a simple definition is too broad to be of any practical assistance, the Copyright Law clarifies the scope of works eligible for protection by enumerating examples of works to be protected as follows:

- (i) Novels, dramas, articles, lectures and other literary works;
- (ii) Musical works;
- (iii) Choreographic works and pantomimes;
- (iv) Paintings, engravings, sculptures and other artistic works;
- (v) Architectural works;
- (vi) Maps as well as figurative works of a scientific nature such as drawings, charts, and models;
- (vii) Cinematographic works;
- (viii) Photographic works.³³

³¹ Two English translations of the Copyright Law of 1970 are available. They are the Eibun Horei Sha (EHS) translation, 3 EHS No. 3380 A (1971) and the World Intellectual Property Organization (WIPO) translation, 7 COPYRIGHT 71-90 (1971). The latter translation seems more understandable than the former and hence the latter translation will be referred to in this paper unless indicated otherwise.

There are also two English translations of the Copyright Law of 1899. One of them is the EHS translation, 3 EHS No. 3380 (1966) and another is the UNESCO translation, COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1970). The latter translation seems more understandable than the former and hence the latter translation will be referred to in this paper unless indicated otherwise.

³² Art. 2(1) (i) of the Copyright Law (Law No. 48 of 1970).

³³ Art. 10(1) of the Copyright Law.

Under the old Copyright Law, the works to be protected were enumerated simply as those "in the domain of writing, speech, drawing and painting, architecture, sculpture, modelling, photography, performances, singing, and other forms of literary scientific or artistic works (which term includes "music")."³⁴ Since it could not be said that the criteria for eligibility of works for protection was clearly defined under the old Copyright Law, it was urged in the course of the general revision of the old Copyright Law that such criteria should be defined as clearly as possible.³⁵ Based upon the definition presented in *Takeuchi v. Ogawa*,³⁶ the definition of "copyrightable works" in the present Copyright Law has been adopted.³⁷ The Osaka Appellate Chamber, in *Takeuchi v. Ogawa*, defined copyrightable works as "intellectual creations with an objective existence and expressing thoughts or sentiments, and which fall within the literary, scientific or artistic domain."³⁸

Under the definition clause, any work is capable of copyright protection, subject only to the following requirements:

- (a) the work must express thoughts or sentiments and must fall within the literary, scientific, artistic or musical domain;
- (b) the work must be original with its author in the sense that thoughts or sentiments are expressed in a creative way;
- (c) the work must be expressed beyond the point of being merely an inchoate idea so that others can perceive the work.
- (d) the work must be the creation of a person who has a personality.³⁹

³⁴ Art. 1(1) of the old Copyright Law (Law No. 39 of 1899).

³⁵ See CHOSAKUKEN SEIDO SHINGIKAI TOSHIN (Report of copyright system council) 1 (Ministry of Education, 1966); CHOSAKUKEN SEIDO SHINGIKAI DAIICHI SHOIINKAI SHINGI KEEKKA HOKOKU (Report of results of deliberations of the first subcommittee of the copyright system council) 1-2 (Ministry of Education, 1965).

³⁶ 4006 Horitsu shinbun 12 (Osaka App. Ch., May 19, 1936).

³⁷ CHOSAKUKEN SEIDO SHINGIKAI TOSHIN SETUMEISHO (Explanation to report of copyright system council) (hereinafter cited as "EXPLANATION") 1 (Ministry of Education, 1966).

³⁸ 4006 Horitsu shinbun, *supra*, note 36, at 13.

³⁹ KAITEI SHINPAN CHOSAKUKENHO HANDOBUKKU (Revised handbook on copyright law) (hereinafter cited as "HANDBOOK") 6-7 (Agency for Cultural Affairs, 1974); B. SANO AND T. SUZUKI, SHIN CHOSAKUKENHO MONDO (Questions and answers on new copyright law) 102-103 (1970); M. HANDA, CHOSAKUKENHO GAISETSU (Outline of copyright law) 74-76 (1974).

If a work satisfies the above requirements, copyright protection is granted to the work irrespective of the mode or form of its expression.⁴⁰ With respect to the second requirement of originality, it is said that the originality necessary to support a copyright is merely that of independent creation, not novelty.⁴¹

(2) *Musical Works*

As mentioned above, intellectual creations which fall within the musical domain are eligible for protection under the Copyright Law, as indicated by the enumeration of examples of works which can be protected. The general interpretation is that "musical works" mean musical compositions with or without words (lyrics).⁴² Although such dramatico-musical compositions as operas, operettas and musical comedies are not enumerated as copyrightable works under Article 10 of the Copyright Law, those forms are considered composite works of "literary work" (dramatic component) and "musical work" (musical component).⁴³

Musical works need not be drafted in a tangible form in order to qualify for copyright protection.⁴⁴ As long as a musical work is performed by singing or otherwise (for example ad lib), it need not be set in a tangible form such as sheet music, a phonograph record, or a magnetic tape. It has been pointed out, however, that, as a practical matter, putting a musical work into a tangible form would be essential for litigation purposes, in order to prove the existence of the musical

With respect to the requirements of a copyrightable work under the old Copyright Law, it was well accepted by courts and scholars that the work had to express thoughts or sentiments in a creative way and, at the same time, that such a work had to exist objectively so that it could be perceived by another person. See YAMAMOTO, *supra*, note 9, at 33. Therefore, there is no difference in substance between the requirement of a copyrightable work under the old Copyright Law and that under the present Copyright Law.

⁴⁰ HANDBOOK, *supra*, note 39 at 7; HANDA, *supra*, note 39, at 76.

⁴¹ HANDBOOK, *supra*, note 39 at 7.

⁴² SANO & SUZUKI, *supra*, note 39, at 109; M. KATO, CHOSAKUKENHO CHIKUJOKOGI (Commentary on copyright law) 69 (1974).

⁴³ HANDBOOK, *supra*, note 39, at 11; Z. NAKAGAWA AND K. ABE, ED. CHOSAKUKEN (Copyright) 42, in 10 JITSUYO HORITSU JITEN (1973).

⁴⁴ M. Ito and others, *Shin chosakukenho semina* (Seminar on new copyright law) (a symposium) (hereinafter cited as "SEMINAR") 467 JURISUTO 74, 86 (speech of B. Sano); NAKAGAWA & ABE, *supra*, note 43, at 42; KATO, *supra*, note 42, at 69.

work in question.⁴⁵ Accordingly, from a practical point of view, it is necessary for a composer to fix his musical work in any tangible form such as sheet music, phonograph records, or magnetic tapes.

Under the old Copyright Law, "music" was included in the category of "art".⁴⁶ As mentioned above, "music" now constitutes an independent category. Although "singing" and "performance" were recognized under the old Copyright Law as copyrightable works,⁴⁷ they become protectable as neighboring rights under the present Copyright Law.⁴⁸

(3) *Relationship between Music and Words (Lyrics)*

A musical composition with or without words is protected as a "musical work".⁴⁹ A lyric itself is protected independently as a "literary work"⁵⁰ if it does not accompany music. In other words, the words alone of a song, when unaccompanied by music, do not constitute a "musical work", but, rather, a "literary work". If, however, the words are accompanied by music, they can be protected together with the music indivisibly as a "musical work".⁵¹ Nonetheless, the music of a song and the words are copyrightable independently of each other, and are generally separable.

Songs (musical compositions with words) are commonly created by the joint effort of a composer of music and an author of lyrics. In addition to the case where a composer writes music and a lyricist writes a lyric under a preconcerted common design to create a song, there are other situations in which a composer writes music for a prior existing lyric or a lyricist writes a lyric for prior existing music. It is questionable whether such a song created by a composer and a lyricist who work independently of each other is a joint work.

The old Copyright Law provided that a copyright in a work created by collaboration of two or more persons belonged to the several authors jointly.⁵² In the case of joint ownership of a copyright, a work could not be exploited by either joint author without consent of

⁴⁵ SANO & SUZUKI, *supra*, note 39, at 154-155; SEMINAR, *supra*, note 44, at 85 (speech of Y. Nomura).

⁴⁶ Art. 1(1) of the old Copyright Law.

⁴⁷ *Ibid.*

⁴⁸ Arts. 2(1) (iv), 89(1), 91, 92 and 95(1) of the Copyright Law.

⁴⁹ Art. 10(1) (ii) of the Copyright Law.

⁵⁰ Art. 10(1) (i) of the Copyright Law.

⁵¹ SANO & SUZUKI, *supra*, note 39, at 109.

⁵² Art. 13(1) of the old Copyright Law.

the other.⁵³ Although the old Copyright Law did not expressly stipulate any criterion by reference to which a work could be classified as a joint work (a work created by collaboration of two or more persons), it was a generally accepted opinion that, to establish joint ownership of a copyright in a work, two or more persons must collaborate in creating such a work and, in addition, their contributions must be merged into inseparable parts of such a work.⁵⁴ Since, with respect to a song, a contribution by a composer (music portion) is separable from a contribution by a lyricist (lyric portion), under the aforesaid accepted opinion, the song was not considered a joint work.⁵⁵ However, there was a contrary opinion that when a composer wrote music and a lyricist wrote the lyrics under a preconcerted common design to create a song, such a song should be regarded as a joint work on the ground that the old Copyright Law would not require inseparability of the contribution of joint authors.⁵⁶

The present Copyright Law defines a joint work as "a work created by two or more persons in which the contribution of each person cannot be separately exploited."⁵⁷ Since it is clear that the contribution of a composer in a song (*i.e.*, the music portion) is separable from the contribution of a lyricist (*i.e.*, the lyric portion), and since music and lyrics can be exploited independently of each other, such a song is not a joint work even if the composer and the lyricist worked closely together in creating the song.⁵⁸

Lastly, it should be noted that the old Copyright Law permitted the free use of another person's literary work in one's own musical composition.⁵⁹ For example, when a poem was already in existence, anyone could insert in his own musical composition extracts from the text of such a poem without obtaining consent of the poet. The present Copyright Law has abandoned this "free use" system.

⁵³ See KOBAYASHI, *supra*, note 24, at 131.

⁵⁴ KOBAYASHI, *supra*, note 24, at 128-31; CHOSAKUKEN SEIDO SHINGIKAI DAISAN SHOIINKAI SHINGI KKKKA HOKOKU (Report of results of deliberations of the third subcommittee of the copyright system council) (hereinafter cited as "THIRD SUBCOMMITTEE REPORT" 32 (Ministry of Education, 1965).

⁵⁵ KOBAYASHI, *supra*, note 24 at 134; THIRD SUBCOMMITTEE REPORT, *supra*, note 54, at 33.

⁵⁶ M. HANABUSA, JOKAI CHOSAKUKEN (Commentary on copyright law) 123 (1961).

⁵⁷ Art. 2(1) (xii) of the Copyright Law.

⁵⁸ See HANDA, *supra*, note 39, at 61-3; KATO, *supra*, note 42, at 31; NAKAGAWA & ABE, *supra*, note 43, at 94.

⁵⁹ Art 30(1) (iv) of the old Copyright Law.

(4) *Musical Arrangements*

There was no provision in the old Copyright Law which dealt directly with the copyrightability of musical arrangements. However, it had been generally held that a musical arrangement could be copyrighted if such arrangement were deemed a new work under Article 19 of the old Copyright Law.⁶⁰ If such were the case, a musical arrangement could be protected as a copyrightable work irrespective of whether the musical arrangement was made with or without the consent of the author of the original work, so long as the original work was altered so as to constitute a new work.⁶¹ Since the copyrightability and treatment of a derivative work such as an arrangement, translation, or adaptation were not explicitly provided for in the old Copyright Law, it was urged in the course of the general revision of the old Copyright Law that such matters should be specified as clearly as possible.⁶²

The present Copyright Law explicitly recognizes the copyrightability of a derivative work such as a translation, arrangement, transformation, dramatization, cinematization or adaptation.⁶³ The right of the author of the derivative work does not affect the right of the author of the original work.⁶⁴ Since a musical arrangement falls clearly within the category of derivative works, it is protected as a copyrightable work independently from the original work.⁶⁵ It should be noted, however, that a transposition from one key to a different key is deemed too trivial an alteration to be protected by copyright.⁶⁶ The consent of the author of the original work is not a prerequisite to copyrightability of the musical arrangement because the Copyright Law does not require such consent.⁶⁷ Since, however, the author of

⁶⁰ THIRD SUBCOMMITTEE REPORT, *supra*, note 54, at 2-3. Art. 19 of the old Copyright Law provided that "a new copyright shall not be created by the addition of annotation marks, side annotations with syllabary, punctuations, criticisms, interpretations, supplements, drawings and paintings, or by other alterations, additions, omissions or adaptations; provided, however, that this shall not apply to those works deemed as new works."

⁶¹ See Y. Kido, *Ongaku to chosakuken no shomondai* (Several problems on music and copyright) in CHOSAKUKEN SEMINA KOENSHU (Lectures in seminar on copyright) 1, 9-10 (1963).

⁶² EXPLANATION, *supra*, note 37, at 14.

⁶³ Art. 2(1) (xi) and 11 of the Copyright Law.

⁶⁴ Art. 11 of the Copyright Law.

⁶⁵ KATO, *supra*, note 42, at 29; NAKAGAWA & ABE, *supra*, note 43, at 54.

⁶⁶ KATO, *supra*, note 42, at 29.

⁶⁷ See art. 2(1) (xi) of the Copyright Law; EXPLANATION, *supra*, note 37, at 15; HANDBOOK, *supra*, note 39, at 12; SANO & SUZUKI, *supra*, note 39, at 120; KATO, *supra*, note 42, at 75; NAKAGAWA & ABE, *supra*, note 43, at 53.

the original work enjoys the exclusive right to arrange his work,⁶⁸ an unauthorized arrangement would constitute an infringement of his right. Because the right of the arranger and the right of the author of the original work coexist,⁶⁹ consent of both the arranger and the author of the original work must be obtained for use of the musical arrangement.⁷⁰

(5) *Compilation*

The Copyright Law provides that compilations which by reason of the selection and arrangement of their contents constitute intellectual creations shall be protected as independent works.⁷¹ It is said that a compilation is a work consisting of another author's works or excerpts thereof, or of a combination of materials gathered from different sources by the independent effort of the compiler, and organized and arranged in such a manner as to produce an intellectual creation.⁷² Musical compilations include anthologies of songs and albums.

Even if a compiler uses the works of other authors for his compilation, the consents of those authors need not be obtained in order to obtain copyright protection for his compilation.⁷³ It should be noted, however, that since the copyright covering a compilation extends only to the compilation as a whole, the compiler's copyright is without prejudice to the rights of the individual authors with respect to the works (or excerpts thereof) utilized in the compilation.⁷⁴ In other words, a person desiring to utilize a compilation as a whole must obtain the consents of both the compiler *and* each author whose works or excerpts thereof are selected for use in the compilation, whereas it is sufficient for him to obtain the consent of only an individual author if he intends to use a single piece of music found in the compilation.

⁶⁸ Art. 27 of the Copyright Law.

⁶⁹ Art. 28 of the Copyright Law.

⁷⁰ See EXPLANATION, *supra*, note 37, at 15; HANDBOOK, *supra*, note 39, at 12; SANO & SUZUKI, *supra*, note 39, at 120; KATO, *supra*, note 42, at 75; NAKAGAWA & ABE, *supra*, note 43, at 53.

⁷¹ Art. 12(1) of the Copyright Law.

⁷² KATO, *supra*, note 42, at 76-7.

⁷³ See art. 12(1) of the Copyright Law; HANDBOOK, *supra*, note 39, at 13; KATO, *supra*, note 42, at 77; NAKAGAWA & ABE, *supra*, note 43, at 55.

The old Copyright Law required consent of individual authors whose works or excerpts thereof were selected for a compilation. Art. 14.

⁷⁴ See art. 12(2) of the Copyright Law; HANDBOOK, *supra*, note 39 at 13; KATO, *supra*, note 42, at 77-8.

IV. FORMALITIES

Copyright protection granted under the Copyright Law extends only to: (i) works of Japanese nationals, (ii) works first published in Japan, and (iii) works for which Japan is obliged to extend protection in accordance with commitments made in an international treaty.⁷⁵

Since both the United States and Japan are signatories to the Universal Copyright Convention, they are obliged to give each other the same protection as they accord to their nationals with respect to musical works.⁷⁶ The United States requires that certain formalities be observed in order to obtain copyright protection, while Japan does not.

If each country of the Universal Copyright Convention were to be allowed to impose any and all types of formalities upon works of nationals of other countries under the principle of "national treatment", the process of obtaining copyright protection abroad would be impossible.⁷⁷ In order to overcome this difficulty, the Universal Copyright Convention has adopted the now well-known Convention notice system.⁷⁸ Article III (1) of the Universal Copyright Convention provides that any contracting state which, under its domestic law, requires as a condition of copyright, compliance with formalities, shall regard such formalities as satisfied as to foreign works if the symbol ©, the name of the copyright proprietor, and the year of first publication are placed on all copies of the work from the time of first publication. Accordingly, if a musical work of a Japanese national is published in Japan with the prescribed Convention form of notice, such work is protected in the United States without any further formalities. In other words, if he uses the prescribed Convention form of notice, he is excused from complying with the formality requirements of the Copyright Act of the United States.⁷⁹ However, it should be noted that "one complete copy of the best edition" of the musical composition must be deposited in the Copyright Office in order to enforce copyright in the United States.⁸⁰ Since this requirement is not a condition of copyright, but a condition to seeking judicial relief in bringing

⁷⁵ Art. 6 of the Copyright Law.

⁷⁶ Arts. I and II of the Universal Copyright Convention.

⁷⁷ See A. BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION*, 25 (3rd ed. 1968).

⁷⁸ Art. III(1) of the Universal Copyright Convention.

⁷⁹ 17 U.S.C. Sec. 9 (c) (1970).

⁸⁰ 17 U.S.C. Secs. 9 (c) and 13 (1970).

an infringement action, it does not violate the Universal Copyright Convention.⁸¹

Thus, unlike the United States, Japan has not adopted in her copyright system a formality principle under which compliance with notice, registration requirements or other formalities is necessary to obtain, maintain, and enforce copyright. The Copyright Law clearly provides that "the duration of copyright shall begin with the creation of the work"⁸² and that "the enjoyment of copyright shall not be subject to any formality".⁸³

A musical work of an American national is protected in Japan irrespective of the place of the first publication under the Universal Copyright Convention.⁸⁴ An important question that is presented is whether Japan is obliged to grant copyright protection to works for which the prescribed Convention notice has not been given and which have not complied with the formality requirements of the United States Copyright Act. As mentioned above, the purpose of the Universal Copyright Convention is to bridge the gap between the copyright laws of formality countries and of non-formality countries in order to avoid difficulties which an author of a non-formality country might face with respect to the domestic copyright formalities imposed by another country. Under the Universal Copyright Convention, Japan is required to give national treatment to American nationals irrespective of the place of the first publication of their works. Therefore, a musical work of an American national is protected in Japan even if the American national has failed to use the prescribed Convention notice or has not complied with the formality requirements of the United States Copyright Act.⁸⁵

A musical work, whether published or unpublished, is protected automatically at the time of its creation without any formality. Copyright in the musical work continues in force, in principle, until the end of a period of fifty years following the death of the author.⁸⁶ It should be noted, however, that Japan is not required to accord protection to a musical work of an American national beyond the protection period stipulated by the United States Copyright Act.⁸⁷

⁸¹ Art. III(3) of the Universal Copyright Convention.

⁸² Art. 51(1) of the Copyright Law.

⁸³ Art. 17(2) of the Copyright Law.

⁸⁴ See art. II of the Universal Copyright Convention.

⁸⁵ NAKAGAWA & ABE, *supra*, note 43, at 108.

⁸⁶ Art. 51(2) of the Copyright Law.

⁸⁷ Art. IV (4) of the Universal Copyright Convention.

Although the Copyright Law recognizes the registration system,⁸⁸ such registration is not requisite to the enjoyment of copyright.⁸⁹ The actual name of the author of an anonymous or pseudonymous work,⁹⁰ the date of first publication⁹¹ and the transfer of copyright, or the establishment, transfer, alteration or expiration of a pledge on copyright⁹² are registrable at the option of the author. With respect to the transfer of copyright, the Great Court of Cassation (*Daishin-in*)⁹³ held in *S. Haneda v. State*⁹⁴ that, since the registration is not requisite to the transfer of copyright but is requisite to a claim of ownership against any subsequent transferee, an assignee of copyright may legally file a criminal complaint against an infringer even without having registered. Furthermore, the Great Court of Cassation held that the assignee may legally seek damages from the infringer even if the assignee has failed to make the necessary registration of transfer of copyright.⁹⁵

V. CONTENTS OF MUSICAL COPYRIGHT

(1) General

Under the Copyright Law, various rights are specifically included under copyright.⁹⁶ The following rights are granted under a musical copyright:

- (1) The right to reproduce a musical work (reproduction right);⁹⁷
- (2) The right to perform the work publicly (performance right);⁹⁸
- (3) The right to broadcast or diffuse the work by wire and to communicate publicly, by means of a receiving apparatus, the work broadcast or diffused by wire (broadcasting right);⁹⁹
- (4) The right to arrange or to adapt the work (right of arrangement)¹⁰⁰

⁸⁸ See arts. 75 to 77 of the Copyright Law.

⁸⁹ See art. 17(2) of the Copyright Law.

⁹⁰ Art. 75 of the Copyright Law.

⁹¹ Art. 76 of the Copyright Law.

⁹² Art. 77 of the Copyright Law.

⁹³ Supreme Court of Japan in the prewar period.

⁹⁴ 10 Keiroku 766 (April 7, 1904).

⁹⁵ *Heibonsha et. al. v. Kodansha et. al.*, 11 Minshū 1069 (May 27, 1932).

⁹⁶ See arts. 21 to 28 of the Copyright Law.

⁹⁷ Art. 21 of the Copyright Law; see Section V (2), *infra*.

⁹⁸ Art. 22 of the Copyright Law; see Section V (3), *infra*.

⁹⁹ Art. 23 of the Copyright Law; see Section V (4), *infra*.

¹⁰⁰ Art. 27 of the Copyright Law. With regard to musical arrangements, see Section III (4), *supra*.

Under the old Copyright Law, the contents of a copyright were not specified.¹⁰¹ In the course of revision of the old Copyright Law, therefore, it had been urged that the contents of a copyright be specified so as to adapt the notion of copyright to the various situations under which works are exploited.¹⁰² The present Copyright Law specifies the contents of a copyright in its provisions from Articles 21 to 28.¹⁰³

Each of the rights comprised in a copyright is separate and distinct from the others, and a copyright may be assigned in whole or in part.¹⁰⁴ In this connection, it should be noted that a sale of the material embodying a copyright (*e.g.*, sheet music, phonograph record, or magnetic tape) does not constitute a transfer of the copyright itself. The author¹⁰⁵ may grant another person permission to exploit the work.¹⁰⁶ Unauthorized exploitation of the work constitutes an infringement of the copyright.¹⁰⁷

(2) *Reproduction Right*

The author has the exclusive right to reproduce his musical work.¹⁰⁸ The word "reproduction" is defined as "the reproduction in a tangible form by means of printing, photography, duplicating, sound or visual recording, or otherwise."¹⁰⁹ A reproduction right may be divided into three categories according to the means by which a musical work is exploited, including the right to publish sheet music (the publication right), the right to record the musical work on a phonograph record, an open reel tape, cassettes, or a music box (the recording right or mechanical right), and the right to synchronize the musical work on cinema film or television film (the synchronization right). These three rights are recognized separately in some countries but in Japan they are protected under the general rubric of the reproduction right.

¹⁰¹ See Nomura, *General Revision of the Copyright Laws in Japan*, 57 REVUE INTERNATIONALE DU DROIT D'AUTEUR 26, 59-61 (1968).

¹⁰² See EXPLANATION, *supra*, note 37, at 32.

¹⁰³ Arts. 21 to 28 of the Copyright Law.

¹⁰⁴ Art. 61(1) of the Copyright Law.

¹⁰⁵ The term "author" in this chapter includes a copyright owner who has acquired the copyright from the author by transfer or by inheritance.

¹⁰⁶ Art. 63(1) of the Copyright Law.

¹⁰⁷ See arts. 112 and 114 of the Copyright Law.

¹⁰⁸ Art. 21 of the Copyright Law.

¹⁰⁹ Art. 2(1) of the Copyright Law.

(A) *Publication Right*

The publication right affords protection to the author against unauthorized copying of his musical work. Unauthorized copying constitutes an infringement of copyright.¹¹⁰ The concept of copying is not confined to a literal and exact reproduction, but includes various modes in which the copyrighted musical work is adopted, imitated or transposed with colorable alteration. It is very difficult to define what constitutes an unauthorized copying of a musical composition. This question was discussed in the Japanese case *K.K. International Music Publishers v. M. Suzuki et. al.*¹¹¹ In that case, the plaintiff acquired a copyright on a musical composition entitled "The Boulevard of Broken Dreams". He sought damages from the defendant who had composed a piece of music called "One Rainy Night in Tokyo" allegedly on the basis of the musical composition previously published and copyrighted by the plaintiff. The Tokyo District Court held that since a musical composition normally consists of rhythm, melody, harmony, and form, all these elements must be considered to determine the similarity between two pieces of music.¹¹² The court held that similarity between only the melodies of two pieces of music could not constitute an unauthorized copying of another's musical composition.¹¹³ The Tokyo High Court dismissed the plaintiff's appeal on other grounds, ruling that, in order to determine whether infringement has taken place, not only must there exist similarity between two pieces of music, but it must also be shown that the alleged infringer had knowledge of the contents of the previously published piece of music.¹¹⁴ The High Court determined that the defendant composer did not have access to the music in question. In other words, unauthorized copying may be demonstrated by substantive similarity between the music compositions in question and access by the alleged infringer to the piece of music allegedly copied which would mitigate the difficulty in proving direct copying.

(B) *Recording Right*

The author has the exclusive right to record his musical work and to make mechanical reproductions thereof. Such mechanical repro-

¹¹⁰ See art. 112 of the Copyright Law.

¹¹¹ 19 Kaminshu 257 (Tokyo District Court, May 13, 1968).

¹¹² *Id.* at 270.

¹¹³ *Id.* at 276.

¹¹⁴ 319 Hanrei Taimuzu 178 (December 24, 1974).

duction normally is made in the form of piano rolls, music boxes, phonograph records, open reel tapes, cartridges, or cassettes.

No one can legally record a musical work or make a mechanical reproduction without permission from the author. However, such an exclusive right survives for only three years after a commercial record (a record made for commercial purposes) has been sold for the first time in Japan because, with the first sale, the compulsory (statutory) license provision¹¹⁵ becomes operative. In other words, once a musical work has been recorded for commercial purposes and a three year period has elapsed from the date of the first sale, the recording right becomes non-exclusive, subject to the terms and conditions of the compulsory license provision. The compulsory license will be discussed in the next section.

(C) *Synchronization Right*

This right permits use of a musical work in a motion picture sound track or in a filmed or taped television program. The motion picture is normally exhibited at a theatre, and the television film is normally broadcast. Such exhibition or broadcasting constitutes a public performance of the music synchronized in a motion picture or television film. It should be noted that a music synchronization license does not include a license to publicly perform the music. Accordingly, in order to secure authorization for the commercial showing of a motion picture containing a copyrighted musical composition, a motion picture producer must obtain a music synchronization license, and a motion picture theatre must obtain a separate license to publicly perform the music.

(3) *Performance Right*

The author has the exclusive right to perform his musical work publicly,¹¹⁶ and unauthorized public performance constitutes an infringement of the author's copyright.¹¹⁷ A performance right can also be granted to a dramatico-musical composition such as opera, operetta or musical comedy.

Unlike the United States,¹¹⁸ there is no requirement that the performance be "for profit" in order that a performance right may be

¹¹⁵ Art. 69 of the Copyright Law; see section VI(5), *infra*.

¹¹⁶ Art. 22 of the Copyright Law.

¹¹⁷ See art. 112 of the Copyright Law.

¹¹⁸ 17 U.S.C. Sec. 1 (e) (1970).

available. It should be noted, however, that the performance right does not extend to a public performance for non-profit-making purposes if no admission fee is charged and the performer is not paid for his performance.¹¹⁹ Only those performances which are public are protected under a performance right. The Copyright Law defines the word "publicly" as "for the purpose of making the work heard directly by the public".¹²⁰ The term "public" includes not only "unspecified people" but also "a large number of specified persons".¹²¹ This definition is broader than the normal concept of "public".¹²² A public place includes not only a theatre or auditorium, but also a park, stadium, cafe, dance hall, or the like.

There is a question as to whether a performance of a musical work at a private club is a public performance. It is accepted that performance of a musical work at a private home for members of the family and invited guests only is not a public performance.¹²³ With respect to performance in a private club, it is said that since a club which limits attendance primarily to its own members cannot be expected normally to place effective restrictions on attendance by uninvited members of the public, such a performance would be a public one.¹²⁴

The term "performance" includes performance of musical works by means of sound recordings, but does not include performance by means of broadcasting or diffusion by wire.¹²⁵ Therefore, a "live" performance as well as a performance by means of records is protected as long as such a performance is "public". Performance by means of broadcasting or diffusion by wire is protected not by a performance right, but by a broadcasting right.¹²⁶

Under the old Copyright Law, a performance right with respect to a musical work was recognized,¹²⁷ but protection did not extend to a public performance by means of records.¹²⁸ Article 30 (1) (viii) of the old Copyright Law exempted from infringement public performance of a work by means of records and the broadcasting of a work

¹¹⁹ Art. 38(1) of the Copyright Law; *see* section VI(4), *infra*.

¹²⁰ Art. 22 of the Copyright Law.

¹²¹ Art. 2(5) of the Copyright Law.

¹²² KATO, *supra*, note 42, at 43-4.

¹²³ EXPLANATION, *supra*, note 37, at 42.

¹²⁴ *Id.* at 42-3.

¹²⁵ Art. 2(7) of the Copyright Law.

¹²⁶ *See* art. 23 of the Copyright Law.

¹²⁷ Art. 1(2) of the old Copyright Law.

¹²⁸ Art. 30(1) (viii) of the old Copyright Law.

by means of records. This exemption was established in 1934.¹²⁹ The legislative rationale was that the exemption would increase the sale of records.¹³⁰ However, it has been suggested that the real reason underlying the exemption was to overcome the difficulty involved in obtaining permission to broadcast foreign musical works without paying high royalty rates.¹³¹ This exemption was severely criticized by domestic copyright owners of musical works as well as by foreign copyright owners.¹³² The present Copyright Law has abolished the exemption.

Because the aforesaid exemption was available for thirty-seven years, the public performance of musical works by means of records has been prevalent in Japan. In the course of debates on the revision of the old Copyright Law, the fact that the practice of allowing the free use of recorded music without paying royalties to the copyright owner had been so long entrenched in Japan led to a proposal that the free use be abolished in a manner not too abrupt for small enterprises which make such use of musical works.¹³³ The present Copyright Law provides that the free use system shall continue, for the time being, except for those enterprises which use musical works for profit-making purposes, as designated by Cabinet Order.¹³⁴ Those enterprises designated by Cabinet Order are coffee shops and other businesses offering food and drink to customers while advertising music for their enjoyment, cabarets, night-clubs, dance halls, and other businesses offering customer dancing, and enterprises providing their customers with public entertainment, such as theatrical performances, art performances or dance performances with accompanying music.¹³⁵ Therefore, performance by means of records at department stores, supermarkets, hotels or other enterprises not designated by Cabinet Order for advertising purposes is presently permissible.

A question arose whether a person who operates and controls a place of public entertainment such as a cabaret, night-club, bar, dance hall or restaurant is liable for permitting and authorizing the un-

¹²⁹ The Law Amending the (old) Copyright Law; Law No. 48 of 1934.

¹³⁰ KOBAYASHI, *supra*, note 24, at 220.

¹³¹ S. Matsui, *Ongaku chosakuken nikansuru sakkon no mondai to sono haikei* (Past and present problems, and background relating to copyrighted musical works) 282 JURISUTO 18 (1963).

¹³² *Id.* at 19.

¹³³ EXPLANATION, *supra*, note 37, at 59-62.

¹³⁴ Art. 14 of the Supplementary Provisions of the Copyright Law.

¹³⁵ Art. 3 of the Supplementary Provisions of the Copyright Law Enforcement Order (*chosakukenho shikōrei fusoku*) (Cabinet Order No. 335 of 1970). For its English translation, see the Eibun Horei Sha translation, 3 EHS No. 3381A (1971).

licensed use of copyrighted musical works by performers on his premises. It was held in *Chubu Kanko K.K. v. Japanese Society of Rights of Authors & Composers*¹³⁶ that the proprietor of a cabaret in which an orchestra gives unlicensed performances of copyrighted musical works is liable for infringement of the copyright, despite the fact that the orchestra was hired under a contract for continuing services and the proprietor did not specifically instruct the orchestra about selections of music. The Court reasoned that the orchestra did not rent the premises from the proprietor, but performed for the entertainment of patrons of the business in accordance with the business plan and general instructions of the proprietor. Hence, the Court found that the orchestra was not an independent contractor. In view of the *Chubu Kanko* ruling, it can be stated with confidence that a person operating a place of public entertainment is liable for unauthorized performance by performers as long as such performance is made in accordance with his business plan and general instructions (which instructions may apparently differ from the performers' independent plan).

(4) Broadcasting Right

The author has the exclusive right to broadcast or diffuse his musical work by wire.¹³⁷ Broadcasting includes both radio and television broadcasting. The broadcasting right and the right of diffusion by wire also include the right to authorize the rebroadcasting or retransmission by wire of a lawfully broadcast work in cases where such communication is made by a person other than the original broadcaster.¹³⁸ Therefore, if a broadcaster other than the original broadcaster desires to rebroadcast or retransmit a copyrighted work by wire, he must obtain a separate permission from the copyright owner.

The author also has the exclusive right to communicate publicly, by means of a receiving apparatus, his musical work already broadcast or diffused by wire.¹³⁹ Since this right does not extend to public communications made by means of a receiving apparatus of a kind commonly used in private homes,¹⁴⁰ the right is available only when the work broadcast or diffused by wire is communicated to the public by loudspeakers or any other sound amplifiers.

Under the old Copyright Law, a broadcasting right was first rec-

¹³⁶ 224 Hanrei Jihō 15 (Nagoya High Court, April 27, 1960).

¹³⁷ Art. 23(1) of the Copyright Law.

¹³⁸ EXPLANATION, *supra*, note 37, at 35.

¹³⁹ Art. 23(3) of the Copyright Law.

¹⁴⁰ Art. 38(2) of the Copyright Law.

ognized in 1931,¹⁴¹ and was limited to the case of broadcasting by radio.¹⁴² This right extended to the broadcasting of live performances as well as to broadcasting by means of records.¹⁴³ However, by an amendment of the old Copyright Law in 1934,¹⁴⁴ the system of free use of recorded music was established for broadcasting and public performance.¹⁴⁵ Since the old Copyright Law did not refer to the diffusion by wire, a question arose whether transmission of recorded music by wire to private customers as is done by restaurants, coffee shops, and taverns would be categorized as "broadcasting". The Supreme Court held in *Nihon Columbia Co., Ltd. v. Hokkaido Music Supply*¹⁴⁶ that although diffusion by wire did not fall under "broadcasting" in a legal sense, it was a "public performance", and thus free use of recorded music could be made of transmission of recorded music by wire.

The present Copyright Law recognizes the right of diffusion by wire and has abandoned the free use system for recorded music in the cases of broadcasting and diffusion by wire. Unlike a public performance by means of records, no exception is made to allow any kind of free use.¹⁴⁷

(5) *Moral Rights*

In addition to a copyright which is characterized as a property right, the Copyright Law recognizes the moral rights of an author¹⁴⁸ of a musical work in order to safeguard his artistic reputation.¹⁴⁹ These rights are personal to authors and are separate and distinct from any copyright.

Moral rights consist of the following rights:

- (1) The right of making the work public,¹⁵⁰
- (2) The right of authorship;¹⁵¹
- (3) The right of integrity.¹⁵²

¹⁴¹ The Law Amending the (old) Copyright Law; Law No. 64 of 1931.

¹⁴² Art. 22-5(1) of the old Copyright Law.

¹⁴³ Matsui, *supra*, note 131, at 18.

¹⁴⁴ The Law Amending the (old) Copyright Law; Law No. 48 of 1934.

¹⁴⁵ Art. 30(1) (viii) of the old Copyright Law.

¹⁴⁶ 17 Minshu 1802 (December 25, 1963).

¹⁴⁷ Art. 14 of the Supplementary Provisions of the Copyright Law.

¹⁴⁸ The term "author" in this sub-section does not include any copyright owner who acquired a copyright from the author.

¹⁴⁹ See arts. 18 to 20 of the Copyright Law.

¹⁵⁰ Art. 18(1) of the Copyright Law.

¹⁵¹ Art. 19(1) of the Copyright Law.

¹⁵² Art. 20(1) of the Copyright Law.

The first moral right is the right to make available to the public a work which has not previously been made public. However, in the case of assignment of copyright in an unpublished musical work, the author is deemed to have consented to having his work made available to the public.¹⁵³ The second moral right is the right to determine whether the author's true name or a pseudonym should be indicated as the name of the author, either on the original work or at the time when the work is made available to the public. The author has the same right with respect to a derivative work derived from his original work and made available to the public.¹⁵⁴ In the absence of any declaration of his intention to the contrary, the author's name may be indicated in the same manner as that already adopted by him.¹⁵⁵ Moreover, his name may be omitted when his right of authorship would not be damaged in view of the purpose and manner of the use of the work and when such omission is compatible with fair practice.¹⁵⁶ The last moral right is the right to preserve the integrity of the work and its title against any distortion, mutilation, or other alteration against the author's will. Moral rights are personal to the author and inalienable.¹⁵⁷ The author can enjoy moral rights independently of his copyright.

VI. LIMITATIONS

In seventeen separate Articles, the Copyright Law provides limitations on copyright.¹⁵⁸ Although under the old Copyright Law there was no compulsory license scheme with respect to mechanical reproduction of musical works, the present Copyright Law has adopted a compulsory license system.¹⁵⁹ Accordingly, limitations on musical copyright and the compulsory license scheme will be explained hereinafter.

(1) *Private Use*

The Copyright Law provides that "it shall be permissible for a user to reproduce by himself a copyrighted work for the purpose of his personal use, family use or other similar uses within a limited cir-

¹⁵³ Art. 18(2) (i) of the Copyright Law.

¹⁵⁴ Art. 19(1) of the Copyright Law.

¹⁵⁵ Art. 19(2) of the Copyright Law.

¹⁵⁶ Art. 19(3) of the Copyright Law.

¹⁵⁷ Art. 59 of the Copyright Law.

¹⁵⁸ Arts. 30 to 47 of the Copyright Law.

¹⁵⁹ Art. 69 of the Copyright Law.

cle.”¹⁶⁰ The old Copyright Law permitted the free reproduction of a published work if such reproduction was made by other than mechanical or chemical processes, without any intention of publishing it.¹⁶¹ It has become clear that the limitation of the manner of reproduction to only copying by hand has not kept pace with present-day technology, particularly with the development of copying or recording machines.

Under the present Copyright Law, the reproduction of musical works in any manner (for example, copying by any means of sheet music, recording of broadcast music on tape) is permitted if such reproduction is made only for private use.

Private use may be made at public or private libraries. Reproduction of a musical work in a library by the library staff as a part of its non-profit-making activities is permitted if a library patron requests for the purpose of his own investigation or research and is furnished with a single copy of a part of the work published.¹⁶² In other words, libraries may render copying services as non-profit-making activities to the public with respect to works in their custody without infringing any copyright.

Recently some problems have arisen with respect to private use of copyrighted works.¹⁶³ One question is whether private use may extend to an organization such as a corporation or labor union. The prevailing view of scholars and governmental officials is that such an organization would not be permitted to enjoy a private use right because the “limited circle” provided in the Copyright Law refers to a hobby circle with a limited number of members.¹⁶⁴ A second problem is the lucrative business enjoyed by copying services which have caused a decrease in book sales.¹⁶⁵ It is clear that copying services as described above are not permitted except by libraries. However, in practice there is no appropriate means to enforce a copyright against such unauthorized copying.¹⁶⁶ A third problem is the decrease in phonograph

¹⁶⁰ Art. 30 of the Copyright Law.

¹⁶¹ Art. 30(1) (i) of the old Copyright Law.

¹⁶² Art. 31(i) of the Copyright Law.

¹⁶³ See M. Handa, *Chosakubutsu no shitekishiyō notamemo fukusei* (Reproduction of copyrighted works for private use) 580 JURISUTO 87 (1975).

¹⁶⁴ SANO & SUZUKI, *supra*, note 39, at 331; KATO, *supra*, note 42, at 143; NAKAGAWA & ABE, *supra*, note 43, at 172.

¹⁶⁵ See *Asahi Shimbun*, June 21, 1975, “*Kopii kogai*” *hon urezu* (Books not sold due to “copying pollution”) and June 25, 1975, “*Kopii kogai*” *to chosakuken* (“Copying pollution” and copyright).

¹⁶⁶ SANO & SUZUKI, *supra*, note 39, at 331-32.

record sales due to the private recording of musical works on tapes or cassettes.¹⁶⁷

To deal with these problems, in March, 1974 the Agency for Cultural Affairs¹⁶⁸ established a study committee called the Fourth Subcommittee attached to the Copyright Council which has not yet completed its deliberations.¹⁶⁹

(2) *Quotations*

It is permissible to make quotations from musical works already made public if such quotations are compatible with fair practice and their extent does not exceed that justified for information, criticism, research and the like.¹⁷⁰ In this case, the source (*e.g.*, title of the work, the name of the author) must be clearly indicated in the manner and to the extent deemed reasonable by the character of the reproduction.¹⁷¹ To the extent justified by a reasonable purpose, a quotation from another person's work will be permitted even though such quotation comprises the whole of a short work.¹⁷² Under the old Copyright Law, a free use of another person's literary work in one's own musical composition was recognized,¹⁷³ but such free use was abolished by the present Copyright Law.

(3) *Education Use*

(A) *Reproduction in Textbooks*

It is permissible to reproduce in school textbooks authorized or compiled by the Ministry of Education musical works already made public, to the extent deemed necessary for the purpose of school education.¹⁷⁴ In this case, the payment of a reasonable compensation to be fixed by the Commissioner¹⁷⁵ of the Agency for Cultural Affairs

¹⁶⁷ See *Asahi Shimbun*, May 15, 1976, *Nobiru kasseto rekodo o kuu* (Decrease in sales of phonograph records due to cassettes).

¹⁶⁸ This is an agency attached to the Ministry of Education and can be said to be an equivalent of the United States Copyright Office.

¹⁶⁹ M. Handa, *supra*, note 163, at 87.

¹⁷⁰ Art. 32(1) of the Copyright Law.

¹⁷¹ Art. 48 of the Copyright Law.

¹⁷² SANO & SUZUKI, *supra*, note 39, at 333; NAKAGAWA & ABE, *supra*, note 43, at 174.

¹⁷³ Art. 30(1) (iv) of the old Copyright Law.

¹⁷⁴ Art. 33(1) of the Copyright Law.

¹⁷⁵ A counterpart of the United States Register of Copyrights.

must be made.¹⁷⁶ Furthermore, the source (*e.g.*, title of the work, the name of the author) must be clearly indicated.¹⁷⁷

(B) *School Broadcasting*

The use of musical works already made public in school broadcasting programs is permissible on the same conditions as for use in textbooks.¹⁷⁸

(C) *Reproduction in Schools, etc.*

A teacher of a public or private school or a non-profit educational institute is permitted to reproduce musical works already made public to the extent deemed necessary for teaching purposes.¹⁷⁹ However, such reproduction is not permitted in cases where the interests of the copyright owner might be prejudiced unreasonably in the light of the nature and the purpose of the work as well as the number of copies and the nature of reproduction.¹⁸⁰

(4) *Non-Profit Public Performances*

It is permissible to perform publicly as well as to diffuse by wire musical works already made public for non-profit-making purposes and without charging any admission fees, provided the performers are not paid for their performances.¹⁸¹ However, any public performance for promotional or advertising purposes cannot enjoy this exemption even if there is no admission fee. A public performance made for charitable purposes is not permitted if an admission charge is made, even though it is clear that such a performance has no profit-making purpose.

It is also permissible to communicate publicly a musical work while it is being broadcast or diffused by wire for non-profit-making purposes and without charging any admission fees, by means of a receiving apparatus.¹⁸² In these cases, the composer's performance right and right of broadcasting are not protected. It has been pointed out that since retransmission of broadcasts by wire has spread practically

¹⁷⁶ Art. 33(2) of the Copyright Law.

¹⁷⁷ Art. 48 of the Copyright Law.

¹⁷⁸ Arts. 34 and 48 of the Copyright Law.

¹⁷⁹ Art. 35 of the Copyright Law.

¹⁸⁰ *Ibid.*

¹⁸¹ Art. 38(1) of the Copyright Law.

¹⁸² Art. 38(2) of the Copyright Law.

all over Japan (especially in rural villages) on a non-profit basis, this exemption has been adopted in order to avoid disturbing such a practice.¹⁸³

(5) *Compulsory License for Mechanical Reproduction*

The Copyright Law provides that when a commercial record (record made for commercial purposes)¹⁸⁴ has been sold for the first time in Japan and a period of three years has elapsed from the date of that first sale, any person who wishes to make a commercial record by recording the musical work may do so by virtue of a compulsory license issued by the Commissioner of the Agency for Cultural Affairs, if negotiation between such person and the copyright owner with respect of the recording has been unsuccessful.¹⁸⁵ The person who wishes to make a commercial record must pay to the copyright owner compensation in an amount which is fixed by the Commissioner on the basis of prevailing royalty rates.¹⁸⁶

The old Copyright Law made no provision for issuing a compulsory license with respect to mechanical reproduction of musical works. In the course of the general revision of the old Copyright Law, it was pointed out that the musical industry tended to monopolize the musical works of authors and composers and this business custom impaired the free development of musical culture.¹⁸⁷ Taking into consideration the fact that such a business custom was prevalent, a three-year grace period in which the compulsory licensing scheme would not be operative was recommended so as not to cause an abrupt change in the existing situation.¹⁸⁸

It should be noted that this compulsory license provision does not apply to musical works recorded on commercial records first sold abroad. This provision also does not apply with respect to musical works already recorded on commercial records sold in Japan before enforcement of the Copyright Law (the enforcement date thereof is January 1, 1971).¹⁸⁹ Because the term "record" includes phonograph records, tapes and other material objects on which the sounds are fixed, but does not include material intended for use exclusively with

¹⁸³ EXPLANATION, *supra*, note 37, at 35.

¹⁸⁴ Art. 2(1) (vii) of the Copyright Law.

¹⁸⁵ Art. 69 of the Copyright Law.

¹⁸⁶ *Ibid.*

¹⁸⁷ EXPLANATION, *supra*, note 37, at 66.

¹⁸⁸ *Id.* at 67.

¹⁸⁹ Art. 11(1) of the Supplementary Provisions of the Copyright Law.

images,¹⁹⁰ this compulsory license provision does not apply to the recording of musical works already recorded on commercial records and incorporated into motion pictures or video tapes.

VII. PERFORMING RIGHTS SOCIETY

(1) *Introduction*

It has been stated that no discussion of the musical copyright would be complete without mentioning the performing rights society, without which rights granted by the copyright laws would be of little worth.¹⁹¹

After the performance right had been granted by the copyright laws, public performance of any copyrighted song at entertainment establishments such as hotels, taverns, restaurants, dance halls, ball-rooms or theatres could not be made without the consent of the copyright owner of the particular song. Nevertheless, composers and authors obtained little legal relief because of the fact that even if they were able to prove and detect a single unauthorized public performance of their songs, innumerable other unauthorized public performances could be made at the same time at thousands of different amusement establishments all over the country. Both composers and authors would normally be unaware of many unauthorized public performances, and were thus unable to enforce their performance rights. The bitter experience of composers and authors all over the world had proven that as individuals they were unable to protect their copyrights against infringement by unauthorized public performance of copyrighted songs. From such bitter experience, both composers and authors realized that collective action would be necessary to make effective their performance rights granted under the copyright laws. The basic idea was that an organization with branches throughout the country could administer the performance rights of authors and composers, and if any unauthorized public performance was discovered, the organization would seek to have the user of music obtain a license therefor. If a user of music did not obtain a license in order to use music, the organization would bring an infringement suit against him. In addition to fulfilling this enforcement function, the organization acts as a clearing house, that is, it provides a central vehi-

¹⁹⁰ Art. 2(1) (v) of the Copyright Law.

¹⁹¹ H. Finkelstein, *Music and The Copyright Law*, 10 N.Y.L.F. 155, 165-66 (1964).

cle through which users of music may obtain a license to publicly perform copyrighted songs.¹⁹² Since there are innumerable copyrighted songs and thousands of composers and authors, it is practically impossible for every user of a copyrighted song to obtain a separate license from the copyright owner of each individual song which the user wants to perform publicly, and hence it is quite convenient for prospective users of music to be able to turn to a performing rights society as a clearing house.

In Japan there is only one performing rights organization, the Japanese Society of Rights of Authors and Composers (*nihon ongaku chosakuken kyokai*), commonly known as JASRAC. Unlike performing right societies in the United States, JASRAC administers not only performing rights but also publication, recording and synchronization rights. JASRAC was founded in 1939 and is a non-profit association with a membership of composers, authors and publishers. The circumstances under which JASRAC was organized were quite different from those under which ASCAP, BMI and SESAC were organized. A brief history and discussion of the operation of JASRAC will follow.

(2) *The Japanese Society of Rights of Authors and Composers (JASRAC)*

(A) *History*

Although prior to 1939 there were several non-profit membership associations in Japan consisting of composers and authors, they did not function as enforcement bodies and clearing houses.¹⁹³ Instead, their activities were limited to educating the public on musical copyrights by issuing pamphlets and sponsoring lectures.

The broadcasting right was first recognized in 1931.¹⁹⁴ At that time, there was only one broadcasting network in Japan, *Nippon Hōsō Kyōkai* (NHK), Japan Broadcasting Corporation, which had been operating as a public, non-profit nation-wide network since 1925. Although NHK wished to obtain broadcasting rights to musical works after such rights were granted to their respective authors, the network was unable to ascertain who owned the copyrights and with whom it should communicate in order to obtain particular copyright licenses.

¹⁹² See S. M. Stewart, *The Clearing House System for Licenses*, 14 BULL. CR. SOC. 8 (1966).

¹⁹³ S. Ōie, *Purage shi no chosakuken katsudo* (Dr. Plage and his copyright enforcement), in *Chosakuken no hanashi* (5) (Copyright story), KOHO 48, 49 (March, 1972).

¹⁹⁴ The Law Amending the (old) Copyright Law; Law No. 64 of 1931.

Thus, NHK could not economically obtain individual licenses for the separate performance (*i.e.*, broadcasting) of the large number of musical works it required daily. With respect to Japanese musical works, NHK obtained blanket licenses from the aforementioned non-profit membership associations in 1932. However, with respect to European musical works, NHK often made unauthorized broadcasting because more than two months was required to communicate with European composers and authors, and it was almost impossible for NHK to obtain separate licenses in advance of the broadcasting thereof.¹⁹⁵

In 1932, Wilhelm Plage, a German who represented English, French, Italian, and Austrian as well as German composers and authors came to Japan and began to enforce those authors' musical copyrights.¹⁹⁶ His enforcement activities, bringing civil suits or filing criminal complaints against unauthorized performers of musical works, were carried out vigorously and often harshly, and were called, colloquially, the "Plage Tornado".¹⁹⁷ Plage's proposed royalties were much higher than those paid by NHK to Japanese composers and authors, and NHK could not accept them. Consequently, the network was forced to discontinue the use of European music for about one year after August, 1933.¹⁹⁸ It was under these circumstances that the system of free use of recorded music for broadcasting and public performance was adopted in 1934.

Plage expanded his activities in Japan, and in 1938 organized a society for administration of copyrights of Japanese authors, composers and publishers.¹⁹⁹ In opposition to his activities, a group of Japanese authors and composers consulted the competent government Minister about organizing their own society for administration of copyrights of Japanese composers and authors.²⁰⁰ In 1939, their consultation with the Minister successfully resulted in the enactment of the Law on Intermediary Business Concerning Copyrights (*chosakuken*

¹⁹⁵ Ōie, *supra*, note 193, at 50; Y. Kanagawa, *Shōwa shoki no chosakukenjijo to chosakukenjimu no tenkai ni tsuite* (Copyright situations in the early part of the Showa era and the development of the copyright licensing business), 23 KOPIRAITO 1 (February, 1963), 24 KOPIRAITO 1 (March, 1963) and 25 KOPIRAITO 1 (April, 1973).

¹⁹⁶ Ōie, *supra*, note 193, at 49-50; Kanagawa, *supra*, note 199, 24 KOPIRAITO 1.

¹⁹⁷ Ōie, *supra*, note 193, at 48.

¹⁹⁸ Ōie, *supra*, note 193, at 50; Kanagawa, *supra*, note 199, 25 KOPIRAITO 1.

¹⁹⁹ NIHON ONGAKU CHOSAKUKEN KYOKAI SANJUNENSHI (Thirty year history of the Japanese Society of Rights of Authors and Composers) (hereinafter cited as "JASRAC THIRTY YEAR HISTORY") 16 (1970).

²⁰⁰ *Id.* at 17.

ni kansuru chukaigyomu ni kansuru hōritsu).²⁰¹ Because the license system had been considered the best way of adequately limiting the number of intermediaries as well as encouraging and supervising them, a license system was adopted under which any person wishing to engage in an intermediary business concerning copyrights must obtain a license from the competent Minister.²⁰² The types of copyrighted works to be handled by an intermediary under the Law on Intermediary Business Concerning Copyrights were those in the literary and musical domain.

Immediately after the enactment of the Law on Intermediary Business Concerning Copyrights, in 1939, JASRAC was formally organized by composers and authors as a non-profit membership association to carry on business as an administrator of musical copyrights and a collector of royalties on behalf of the composers and authors.²⁰³ JASRAC obtained a license under the Law on Intermediary Business Concerning Copyrights. The competent Minister in exercising its discretionary power granted a license to only two intermediaries concerning copyrights: JASRAC in the musical field and the Japanese Alliance for the Protection of Literary Works in the literary field.²⁰⁴ No license was granted to the society which Plage organized, and his activities in Japan were terminated by the enactment of the Law on Intermediary Business Concerning Copyrights. Since that time, both JASRAC and the Japanese Alliance for the Protection of Literary Works have been the sole intermediaries licensed in their respective fields.

(B) Operation

JASRAC is now the only musical copyright clearance organization for intermediary business regarding copyrights of musical works in Japan officially licensed by the competent Minister under the Law on Intermediary Business Concerning Copyrights.²⁰⁵ JASRAC performs,

²⁰¹ Law No. 67 of 1939. For an English comment on this law, see Y. Nomurá, *Letter from Japan* (2), 4 COPYRIGHT 70 (1968). For English translations of this law, see Eibun Horei Sha translation in 3 EHS No. 3386 (1971) and the UNESCO translation in COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1970).

²⁰² The Minister of Home in the prewar period who was replaced by the Minister of Education in the postwar period. However, the Commissioner of the Agency for Cultural Affairs is now the competent Minister.

²⁰³ JASRAC THIRTY YEAR HISTORY, *supra*, note 203, at 17-18.

²⁰⁴ See Nomura, *supra*, note 201, at 72.

²⁰⁵ With respect to recording rights of musical compositions (especially Ameri-

as a business, acts of agency, mediation, or trust on behalf of composers, authors and publishers and effects collection and distribution of royalties on their behalf.

JASRAC makes copyright trust agreements with composers, authors, or publishers under which JASRAC is normally entrusted with their copyrights [not only performance rights (including broadcasting rights) but also publication rights, recording rights and synchronization rights]. Therefore, the administration of JASRAC covers rights not only for public performance (including broadcasting), but also for motion picture synchronization, mechanical reproduction, and publication of musical works.

Royalties are subject to the "Fee Scales for Musical Works" approved by the Commissioner of the Agency for Cultural Affairs under the Law on Intermediary Business Concerning Copyrights.²⁰⁶ After deduction of expenses of JASRAC, all monies which JASRAC collects from users of music are distributed to composers, authors and publishers whose musical copyrights are entrusted to JASRAC.

JASRAC is governed by full members elected from among composers, authors and publishers who have entrusted their copyrights to JASRAC. Composers, authors, and publishers who are not full members are classified as "associate members". Under arrangements with copyright licensing organizations in foreign countries such as ASCAP and BMI, JASRAC administers copyrights of musical works in the repertories of these organizations. As of March 31, 1975, JASRAC consisted of 1,246 full members (including 51 publishers) and 4,487 associate members (including 331 publishers) and for fiscal 1974 (ending March 31, 1975) its income was ¥9,648,417,934 (including

can ones), however, George T. Folster and Associates was also engaged in the intermediary business in Japan until 1974. George T. Folster and Associates shared control of the recording rights licensing business with JASRAC in the postwar period, but transferred its business to JASRAC on December 31, 1974.

The reason why George T. Folster and Associates was established was that during the period when the control of foreign copyrights was in the hands of the General Headquarters of the Allied Powers ("GHQ"), George T. Folster and Associates was specially authorized by GHQ to act as an intermediary for the administration of foreign copyrights in Japan. The competent Minister allowed it to continue its intermediary business without granting it a license under the Law on Intermediary Business Concerning Copyrights on an *ad interim* basis even after the Peace Treaty with the Allied Nations of 1951 entered into force and GHQ no longer existed. See CHOSAKUKEN SEIDO SHINGIKAI TOSHIN (Report of deliberation of copyright system council) 17-8 (Ministry of Education, 1967).

²⁰⁶ See art. 3 of the Law on Intermediary Business Concerning Copyrights.

¥37,867,559 as foreign revenues), equivalent to approximately \$32,161,393.²¹¹

It can be stated that JASRAC is a successful case for composers and authors even though it was supported by a law such as the Law on Intermediary Business Concerning Copyrights.

²⁰⁷ 220 NIHON ONGAKU CHOSAKUKEN KYŌKAI KAIHO (News of the Japanese Society of Rights of Authors and Composers) 4 and 6 (1975).

PART II

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

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

Authorization for CONTU appropriations. Report No. 94-1137 [including cost estimate and comparison of the Congressional Budget Office] submitted by Mr. Kastenmeier to accompany H.R. 11877, May 14, 1976. 5p. (94th Cong., 2d Sess.)

The House Judiciary Committee recommended favorable consideration of H.R. 11877 without amendment. The bill would provide operating funds for the National Commission on New Technological Uses of Copyrighted Works through March 1, 1978, sixty days after the final report by the commission is due (Dec. 31, 1977).

435. U.S. CONGRESS. SENATE.

S. 3187. A Bill to extend the authorization of appropriations for the National Commission on New Technological Uses of Copyrighted Works to be coextensive with the life of such Commission. Introduced by Mr. McClellan on Mar. 22, 1976 and referred to the Committee on the Judiciary. 2 p. (94th Cong., 2d Sess.)

Identical to H.R. 11877 and H.R. 11948 (23 BULL. CR. SOC. 335, Items 336 and 337). In his remarks upon introducing the bill, Senator McClellan explained that the sole purpose of the bill was to authorize appropriations for the commission until the date established for its termination. (122 *Congressional Record* p. S3865).

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

Extending the authorization of appropriations for the National Commission on New Technological Uses of Copyrighted Works. Submitted by Mr. McClellan May 6, 1976, to accompany S. 3187. 2 p. (94th Cong., 2d Sess. S. Rept. 94-798)

The Senate Committee on the Judiciary reported the bill,

S. 3187, favorably without amendment. On May 11, 1976, the Senate passed the bill (122 *Congressional Record* [daily ed.] p. S6785).

437. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47—Telecommunications. Part 76—Cable Television Service. Specialty stations and specialty format programming. *Federal Register*, Vol. 41, no. 51 (Mar. 15, 1975), pp. 10895-10902.

The Federal Communications Commission authorizes a change in the rules defining a specialty station and provides that since such stations are no longer considered independent stations, for purposes of distant-signal carriage they will not be included in the quota of independent signals that a cable system may carry. There also will not be a limit imposed on the amount of specialty programs a cable system may carry. Specialty programs include foreign-language, religious and automated programming.

2. Foreign Nations

438. GREAT BRITAIN. *Laws, statutes, etc.*

Copyright. The Copyright (International Conventions) (Amendment No. 3) Order 1975. London, Her Majesty's Stationery Office, 1976. 2 p. (1975, No. 2193).

The order amends schedule 1 of the Copyright (International Conventions) Order, 1972 (c) to include Upper Volta as having acceded to the Berne Copyright Convention, effective Jan. 24, 1976.

439. GREAT BRITAIN. *Laws, statutes, etc.*

Copyright. The Copyright (International Conventions) (Amendment) Order, 1976. London, Her Majesty's Stationery Office, 1976. 1 p. (1976, No. 227).

The order amends schedules 4 and 5 of the British Copyright International Conventions Order of 1972 to include Luxembourg under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations as having acceded to the convention effective Mar. 18, 1976.

440. LUXEMBOURG. *Laws, statutes, etc.*

Law on the protection of performers, producers of phonograms and broadcasting organizations, (of Sept. 23, 1975). *Copyright*, vol. 12, no. 3 (Mar. 1976), pp. 77-80.

An English translation of the law which was published in the official journal of the Grand Duchy of Luxembourg on Sept. 30, 1975.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

441. INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (BERNE UNION). *Executive Committee, 9th Session (3d Extraordinary), Geneva, Dec. 10-16, 1975.*

Report submitted by the Secretariat and adopted by the Committee. *Copyright*, vol. 12, no. 2 (Feb. 1976), pp. 40-54.

A summary of developments in the fields of reprographic reproduction of copyrighted works, model law on copyright for developing countries, problems arising from use of computers, audio-visual cassettes and discs, and CATV, and a possible instrument for the protection of folklore. The status of various international conventions administered by WIPO was reported, and views were expressed regarding the Mexican Delegation's memorandum concerning its experiences in implementing the preferential licensing systems introduced in the 1971 revisions of both the Berne and UCC revisions for developing countries.

PART V

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. Foreign Publications

1. In English

442. Canada. Department of Consumer and Corporate Affairs. Bureau of Intellectual Property. Report for the year ended March 31, 1975. Ottawa, Information Canada, 1976. 19 p.

According to the table of statistics, the peak year for copyright applications and registrations in Canada was 1971-72. In 1975 both applications and registration were down 13% and 11.8% from the previous year.

B. LAW REVIEW ARTICLES

1. United States

443. BRYLAWSKI, E. FULTON. The Copyright Office: a constitutional confrontation. *The George Washington Law Review*, vol. 44, no. 1 (Nov. 1975), pp. 1-47.

"For some time, the Copyright Office has been performing executive functions in its execution and administration of the copyright laws. The executive nature of the Copyright Office promises to become even more pronounced in the near future, since the agency may soon assume the full trappings of an executive department under the copyright revision bill now being considered by Congress. The purpose of this article is to consider whether the present operation of the Copyright Office, as well as its proposed role under the copyright revision bill, violates the separation of powers doctrine or any other constitutional limitation."

444. Copyright—exclusive right to perform copyrighted works publicly for profit not infringed by radio entertainment of restau-

rant patrons. *Dickinson Law Review*, vol. 80, no. 2 (Winter 1976), pp. 328-335.

A case note on *Twentieth Century Music Corp. v. Aiken* in which the conclusion is reached that Congress should clarify the liability of restaurateurs, by either an express exemption or inclusion in the pending copyright revision bills, since the dubious reasoning of the court "renders it ripe for future judicial scrutiny and makes blind reliance on its shield a risky course."

445. FABE, JACQUELINE M. The fine artist's right to the reproductions of his original work. *Journal of the Beverly Hills Bar Association*, vol. 9, no. 4 (July-Aug. 1975), pp. 59-67.

This paper was a prize winner in the 1973 Nathan Burkan Memorial Competition. It analyzes American case law dealing with copyright protection for art, discusses rights under contracts of sale, or commissioning of works and also looks at state and federal laws which offer protection to artists and the transfer of their works. The French concept of "droit de suite" is explained briefly and recommendations are made for changes in the federal copyright law in order to offer better protection for artists and their works.

446. FORD, WILLIAM D. and DANIEL H. POLLITT. Who owns the tapes? *North Carolina Central Law Journal*, vol. 6, no. 2 (Spring, 1975), pp. 197-203.

A Congressman and a law school professor analyze the handful of relevant cases and prior legislative action which supports the proposition that the Nixon tapes and papers belong to the public and not to the former President.

447. GRIFFIN, JAMES N. The Universal Copyright Convention and the problem of community antenna television systems. *Ohio Northern University Law Review*, vol. 3, no. 2 (1975), pp. 535-549.

Submitted as an entry in the 1975 Nathan Burkan Memorial Competition, the paper reviews recent court decisions in Canada and the United States relative to copyright liability for CATV systems. Since both countries have ratified the U.C.C., as revised in 1971, the writer discusses its application to the Canadian-American cable situation and suggests that rather than draft a bilateral agreement, the courts of both countries

already have the tools to protect copyright proprietors against the economic threat posed by expanding cable networking and copyright infringement.

448. LATMAN, ALAN. Copyright law. *1974/75 Annual Survey of American Law*. New York, Oceana Pub., 1976, pp. 593-606.

Interesting developments in copyright law in the United States include progress in copyright revision legislation and the establishment of a National Commission on New Technological Uses of Copyrighted Works. Also included in the summary are references to recent record and tape piracy decisions, the *Aiken* case, litigation involving renewals of copyright, and the antitrust allegations made by CBS against ASCAP and BMI.

449. PLASSE, JONATHAN M. Recent developments in the law of direct broadcast satellites. *Brooklyn Journal of International Law*, vol. 2, no. 1 (Fall 1975), pp. 139-171.

Recent developments in communications have made possible transmission of television signals by direct broadcast satellites. This study reviews the work of the International Telecommunications Union, Unesco and WIPO, and the report of the fifth session of the Working Group (II) on Peaceful Uses of Outer Space. Some of the aspects considered in the report dealt with non-governmental broadcasting, prior consent, spillover, program content, commercial advertising, copyright and neighboring rights.

2. Foreign

1. In English, French and Spanish

450. DILLENZ, WALTER. Cable television in Austria; end of legal proceedings—beginning of problems. *GEMA News*, no. 14 (Dec. 1975), pp. 73-82.

The article, printed in English, French and Spanish, summarizes two and a half years of litigation by the Austrian performing right society, AKM, against a cable television system in Feldkirch, Austria, which involved the question of the cable system's liability for payment of copyright royalties. The article also touches on future problems which might arise from the re-

transmission of broadcasts originating outside national boundaries, distribution of payments for musical "small" rights, literary "small" rights, "grand" rights and neighboring rights, as well as reaching contractual agreements with all the various parties whose rights may be affected by such new uses of copyrighted works.

451. HUET, MICHEL. Architecture and copyright. *Revue Internationale du Droit d'Auteur*, no. 88 (April 1976), pp. 2-49.

In reviewing the problem of whether architectural works receive adequate protection under the French copyright law of 1957, the conclusion is reached that the answer is not easy. Architecture itself is in a state of evolution, no longer merely an art, but rather quickly becoming industrialized. In view of the changing concepts, the French law no longer seems adequate.

452. LJUNGMAN, SEVE. The function of copyright in the present day society; some reflections with reference to the Nordic situation. *Revue Internationale du Droit d'Auteur*, No. 88 (April 1976), pp. 50-91.

Beginning with such Norwegian innovations in domestic legislation as a 3% tax on public sales of fine art and the library lending royalty or tax, the author analyzes the reports of the Swedish Cultural Council and the Paris Revision of the Berne Copyright Convention and concludes that in the Nordic countries at least, the stimulus to economic creativity engendered in copyright is being restored to the central position in cultural policy which it should have occupied all along.

453. MASOUYÉ, CLAUDE. Toward elimination of the double taxation of copyright royalties? *Revue Internationale du Droit d'Auteur*, no. 88 (April 1976), pp. 92-113.

In view of a recent meeting co-sponsored by Unesco and WIPO which established a committee for the purpose of studying the problems posed by the double taxation of copyright royalties in developed and developing countries and to determine whether a multilateral agreement might help resolve these problems, the author enumerates areas in international copyright which ought to be examined during the proposed studies.

454. MELICHAR, FERDINAND. Photocopying of works protected by copyright. *GEMA News*, no. 14 (Dec. 1975), pp. 51-60.

After reviewing the economics of photocopying, and recent developments in the law and courts of several European countries as well as the United States, the author suggests that a royalty be levied on each photocopying machine, with distribution made by national authors' societies. The article is reproduced in English, French and Spanish.

455. MILLS, JOHN V. Cable television—a Canadian view. *GEMA News*, no. 14 (Dec. 1975), pp. 61-72.

An analysis in English, French and Spanish of Canadian television and cable television, that concludes with the warning that "if Canada is particularly vulnerable because of its close relationship to the United States we must all bear in mind that the continuing advances with respect to satellite broadcasting could bring all countries into the same position that Canada, today, finds itself. Thus it is quite possible in the future that any National television system could find itself in competition with a cable television system that is drawing in signals from all over the world and delivering it to the subscribers within the National Border and it can be seen that such competition could destroy the national system."

456. N'DIAYE, N'DÉNÉ. The influence of copyright on cultural development in the developing countries. *GEMA News*, no. 14 (Dec. 1975), pp. 83-96.

Under colonial or protectorate regimes, headquarters for authors' societies were located abroad. Though national copyright legislation and authors' organizations have developed slowly in the newly independent countries, these developing nations do recognize the fact that copyright, more than in the developed countries, is an important element in the promotion of culture. The higher the level of protection granted to authors and copyright owners, rather than copyright users, the greater the production of literary and artistic works, and this personal right is to be safeguarded. The article is reproduced in French and Spanish as well as in English.

457. SCHULZE, ERICH. The new audio-visual media. *GEMA News*, no. 14 (Dec. 1975), pp. 47-50.

The article in English, French and Spanish explores the problem of interpreting contracts involving motion picture and television production written several years ago, before small format films, video-disc records and cassettes became prevalent, and questions of copyright in the preexisting works currently being used in the new media and to whom the rights belong.

2. In French

458. KEREVER, ANDRÉ. La reprographie et les normes internationales en matière de droit d'auteur. *Il Diritto di Autore*, vol. 46, no. 3 (July-Sept. 1975), pp. 330-340.

A comment on copyright problems arising from the recent phenomenon of reprographic reproduction. The application of art. 9 of the Berne Copyright Convention, revised in 1971; the 1971 Revision of the Universal Copyright Convention; recommendations made at the Washington meeting on reprography, jointly sponsored by Unesco and WIPO, a recent French court decision and the *Williams and Wilkins* decision in the United States are among the developments reviewed.

3. In German

459. BOLLACK, GERT. Die Rechtsstellung des Urhebers im Dienst- oder Arbeitsverhältnis. *Gewerblicher Rechtsschutz und Urheberrecht*, vol. 78, no. 2 (Feb. 1976), pp. 74-78.

A discussion of the rights granted an author, working under a contract, or as an employee, under art. 43 of the Copyright Law of the German Federal Republic. His ability to transfer those rights by license or assignment as provided under arts. 34-36 are also explored.

460. FLECHSIG, NORBERT P. Die Dauer des Anspruchs des Ausübenden Künstlers auf Integrität seiner Künstlerischen Leistung; zur Rechtslage bei verstorbenen Künstlern. *Film und Recht*, vol. 20, no. 4 (April 1976), pp. 208-215.

The protection granted a performing artist in the integrity of his recorded performance by arts. 82-83 of the German Federal Republic's Copyright Law is analyzed here. Special refer-

ence is made to the determination of the term of protection occurring in the case of the death of the artist and the transfer of his rights to his widow and heirs or by will.

461. FLECHSIG, NORBERT P. Die Vererbung des Immateriellen Schadenersatzanspruch des Ausübenden Künstlers; schliessung einer Gesetzeslücke in Analogie zum Urheberrecht. *Film und Recht*, vol. 20, no. 2 (Feb. 1976), pp. 74-82.

The problem of interpreting the provisions in art. 97 of the German Copyright Law with respect to the recovery of damages by heirs or successors of a deceased artist is explored here. Damages resulting from an infringing performance or from one which damages the integrity of the original performance are discussed.

462. HAMMES, BRUNO JORGE. Das neue brasilianische Urheberrechtsgesetz. *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*, no. 12 (Dec. 1975), pp. 428-436.

An analysis of the Brazilian Copyright Law which entered into force on Dec. 14, 1973.

463. HEFTI, ERNST. Die Parodiebehandlung in Italien. *Film und Recht*, vol. 20, no. 3 (Mar. 1976), pp. 167-172.

A survey of the treatment given parodies in Italy under the copyright law, by text-writers and by the courts.

464. KOLLE, GERT and EUGEN ULMER. Einspeicherung geschützter Werke in automatische Informations- und Dokumentationssysteme. *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*, no. 3 (Mar. 1976), pp. 108-116.

The German original of a report prepared for Unesco and WIPO on the development of national and international information and documentation systems. The English translation of this report was previously published in *Copyright*, vol. 11, no. 12 (Dec. 1975). See 23 BULL. CR. SOC., 360, Item 401.

465. SCHMIEDER, HANS-HEINRICH. Zehn Jahre Urheberrechtsgesetz. *Neue Juristische Wochenschrift*, vol. 29, no. 3 (Jan. 21, 1976), pp. 81-87.

A review of the amendments, related legislation, litigation,

problems, etc. that have developed during the ten years that the Copyright Law for the German Federal Republic has been in force. The writer is a judge in the Federal Patent Court system, located at Munich.

4. In Italian

466. ARIENZO, ALFREDO. Diritto di autore e problemi dell'informazione e della cultura de fronte alle nuove tecniche di riproduzione e diffusione delle creazioni intellettuali. *Il Diritto di Autore*, vol. 46, no. 4 (Oct.-Dec. 1975), pp. 470-495.

Since enactment of the Italian copyright law in 1941, many developments in international agreements, and the evolution of new technologies such as reprography, audio-visual media, microfilm, television, cable systems, and satellities have created new rights, interests, and a multiplicity of ways in which works may be used or adapted. Thus new legislation to provide for the new technologies is essential.

467. FABIANI, MARIO. Protezione giuridica dell'opera d'arte e di scienze e sua funzione sociale come strumento di sviluppo della cultura. *Il Diritto di Autore*, vol. 46, no. 4 (Oct.-Dec. 1975), pp. 506-508.

A brief analysis of the limitations placed upon an author's control of his work whenever it is disseminated for purposes of information or public interest in accordance with provisions contained in arts. 52, 55, 58, 65-66, and 70 of the Italian Copyright Law.

468. FRAGOLA, AUGUSTO. Autori e TV-via cavo. *Il Diritto di Autore*, vol. 46, no. 3 (July-Sept. 1975), pp. 295-306.

At a recent meeting in Italy on copyright and the public interest as affected by new technologies, this study was presented for consideration. Pertinent articles in the Italian copyright law and the Berne Copyright Convention were analyzed, as well as a recent Belgian court decision, concerning retransmission of programs by cable beyond the scope of the original license to broadcast.

469. GALTERI, GINO. Note in tema di informatica a diritto d'autore. *Il Diritto di Autore*, vol. 46, no. 4 (Oct.-Dec. 1975), pp. 509-515.

A presentation of some of the problems involving moral rights, neighboring rights, and the protectibility of the program which may result from a reproduction of copyrighted works by computers that simply reproduce and publish the work; that adapts or elaborates on the original work, or that produces a completely new work.

470. SANTORO, EMANUELE. Note introduttive sul fondamento costituzionale della protezione del diritto d'autore. *Il Diritto di Autore*, vol. 46, no. 3 (July-Sept. 1975), pp. 307-329.

A note on the constitutional guarantees given authors in the protection of their intellectual creations.

471. SORDELLI, LUIGI. Diritto di autore, riproduzione di opere mediante la C.D. reprografia ed interessi personali e collettivi alla cultura. *Il Diritto di Autore*, vol. 46, no. 4 (Oct.-Dec. 1975), pp. 496-505.

A discussion of photocopying for personal use and public interest as permitted under the provisions of arts. 65-70 of the Italian copyright law of 1941, and in the light of the developments growing out of the meetings sponsored by Unesco and WIPO since 1973.

5. In Swedish

472. LIEDES, JUKKA. Synpunkter på den sovjetiska upphovsrätten. *NIR*, Häfte 4, (1975), pp. 500-509.

A review of recent domestic and international developments in Soviet copyright law since that country first negotiated a bilateral copyright treaty with Hungary in 1967, with Bulgaria in 1971, and adhered to the Universal Copyright Convention of 1952.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

473. AKOJIMA, TAKESHI. Blanket broadcast, one-side royalty turn up publishing fortissimo. *Billboard*, vol. 88, no. 16, (Apr. 17, 1976), pp. 44.

With a royalty percentage increase, due each year until 1980, on records in Japan, its effect on blanket licenses and royalty payments is discussed. Differences between the Japan Broadcasting Corp., the Japanese Society of Rights of Authors and Composers (JASRAC) and the National Association of Commercial Broadcasters in Japan are also mentioned.

474. Automation: one station in 7 falls in. *Billboard*, vol. 88, no. 15 (Apr. 10, 1976), pp. 3, 13, 15.

An article concerning the growth of automated programming on radio stations throughout the United States, and particularly in California.

475. BARRETT, CHARLES A. AFM-NBC settle unpaid residual suit for \$150,000. *Hollywood Reporter*, vol. 241, no. 8 (Apr. 21, 1976), pp. 1, 4.

After having filed suit against NBC-TV in the U.S. District court in New York more than three years ago, the American Federation of Musicians made an out-of-court settlement for \$150,000 in unpaid residuals to union musicians who appeared in more than two showings of the Dean Martin and Jerry Lewis shows in Puerto Rico.

476. BARRETT, CHARLES A. Lawmen unite against piracy. *Hollywood Reporter*, vol. 241, no. 21 (May 10, 1976), pp. 1, 10.

With an estimated 20% of all national record piracy occurring in Los Angeles county, a new cooperative effort to pool information to facilitate more arrests and convictions is being mounted by the law enforcement agencies. Under the new California law, record piracy is no longer a misdemeanor, but rather a felony. A very high incidence of piracy is occurring in Spanish language music.

477. CATV industry, copyright owners reach agreement, *BNA's Patent, Trademark and Copyright Journal*, no. 275 (Apr. 22, 1976), pp. A1-A2.

The National Cable Television Association and the Motion Picture Association of America have worked out a compromise agreement wherein cable will incur copyright liability only for retransmission of non-network programming from distant TV stations. The royalty rate will be based on the number of im-

ported equivalent signals and a percentage of the basic subscriber revenues. Reviews of the royalty formula by the Copyright Royalty Tribunal will be limited to certain conditions.

478. FCC is all alone in defending pay cable rules in appeals court; oral argument is held; lined up against commission are CATV, movie producers, Department of Justice, a citizen group and, for their own reasons, broadcasters. *Broadcasting*, vol. 90, no. 17 (Apr. 26, 1976), pp. 42-44.

A summary of the arguments presented in the U.S. Court of Appeals against the FCC's revised 1970 pay cable rulings, by different interest groups. Of concern to the FCC counsel was the Justice Department's premise that the newer rulings would have an adverse effect on competition.

479. FCC nixes background service; education FM's must not air music for profit. *Billboard*, vol. 88, no. 13 (Mar. 27, 1976), p. 8.

A ruling by the Federal Communications Commission not to allow noncommercial, educational FM stations to provide background music for profit is explained.

480. FRASER, C. GERALD. Frank Gilroy wins million over misuse of his TV detective. *The New York Times*, vol. 125, no. 43,169 (city ed., Apr. 3, 1976), p. 1, col. 3; p. 42, col. 6.

The article contains a history of the litigation in the 11 year battle between Pulitzer prize-winner Frank Gilroy and the American Broadcasting Co. The author feels the case "highlights" authors' struggles to maintain literary rights.

481. German royalties pact set. *Billboard*, vol. 88, no. 20 (May 15, 1976), p. 58.

A report on completion of protracted negotiations between GEMA, the German Performing Rights Society, and the West German record industry with a resumé of some of the more important provisions relative to royalty rates for records, tapes and albums.

482. HALL, CLAUDE. NAB to radio; fight royalty fee. *Billboard*, vol. 88, no. 14 (Apr. 3, 1976), pp. 1, 16.

At the 54th annual National Association of Broadcasters' convention in Chicago, radio broadcasters were urged to con-

tact their congressmen to oppose copyright legislation that would require them to pay royalties to record producers and performers based on airplay of their records.

483. HALL, MILDRED. Hearings on copyright revision markup resume in D.C. April 7. *Billboard*, vol. 88, no. 15 (Apr. 10, 1976), p. 4.

The article raises the question as to whether the copyright revision bill will be ready for passage by the House before the target date of Oct. 2, when Congress hopes to adjourn. Some of the issues yet to be settled are summarized briefly.

484. HALL, MILDRED. Loudspeaker placement in revision bill markup meet. *Billboard*, vol. 88, no. 16 (Apr. 17, 1976), pp. 3, 79.

The U.S. Supreme Court's decision in the *Aiken* case in 1975 had reversed a long-standing rule which made restaurants and bars liable for copyright royalties. This article reports on the discussions in the House Judiciary Subcommittee mark-up session relative to the multi-speaker broadcast of music in public places.

485. HERTZBERG, HENDRIK. Onward and upward with the arts; naughty bits. *The New Yorker*, (Mar. 29, 1976), pp. 69-70, 72.

A summary of the facts involved in *Monty Python v. American Broadcasting Co.*, and Judge Lasker's oral decision. The controversy concerned the amount of control performing artists should be allowed to exercise over the editing of their television series by a network.

486. HOLROYD, MICHAEL. The 'system' in manuscript libraries, based on prestige and the exclusivity of materials, aggravates . . . the wrongs of copyright. *Library Journal*, vol. 101, no. 9 (May 1, 1976), pp. 1081-1083.

A biographer suggests that all English language manuscripts be listed in a comprehensive computer-index so that they could be more easily located. He also suggests that information relative to copyright owners or executors of deceased writers' estates be included in the index so that permission to use or copy material could be secured; that whenever manuscripts are exported, microfilm copies be deposited in official libraries in order to facilitate their authentication and cataloging. Whenever the material is photocopied, the name and title

should be recorded and an annual tax levied on each machine. Thus, the royalty tax could be distributed to living authors listed.

487. HOROWITZ, Is. Artist tax exemption seen for U.S., U.K. *Billboard*, vol. 88, no. 13 (Mar. 27, 1976), pp. 1, 20.

New reciprocal income tax treaties with Canada and the United Kingdom are being negotiated. Foreign performers have long complained about the arbitrary withholding of 30% of their gross receipts by the Internal Revenue Service. Under the proposed treaties, an artist would be exempt from paying taxes on the first \$15,000 of gross earnings in any one year.

488. The ins and outs of copyright law. *American Artist Business Letter for Practicing Artists*, vol. 3, no. 1 (Apr. 1976), pp. 1-5.

In addition to reporting the present status of copyright revision, the article contains a simple explanation of publication, both general and limited, placement of notice and the registration of unpublished and published works of art. The ramifications of copyright protection on reproductions in periodicals, and the provisions of a recently enacted California law that deals with the right of reproduction after sale or transfer of the work of art are also touched upon.

489. JONG, ERICA. *The New York Times*, vol. 125, no. 43,195 (city ed., Apr. 29, 1976), p. 39.

A strong plea by a successful author for legislative protection of the integrity or quality of authors' works and a share in the profits whenever the original creation is adapted or used in another medium.

490. KONGALIDES, "LEFTY". Piracy new expose; copyright agency accused. *Billboard*, vol. 88, no. 14 (Apr. 3, 1976), p. 61.

Recently a newspaper in Athens contained an article that alleged that the Greek copyright agency AEPI was involved in a "fraud" associated with the illegal recording and sale of tapes. The Greek Union of Composers and Lyricists is planning to bring suit against the agency.

491. MPAA's Valenti: the Kissinger of copyright; he brings together NAB and NCTA at meeting this week to explore possibility of

compromise, although time is growing short. *Broadcasting*, vol. 90, no. 19 (May 10, 1976), p. 23.

Mr. Kastenmeier, chairman of the House Judiciary subcommittee presently marking up the copyright revision bill, is anxious to resolve the cable controversy by having the broadcasters, motion picture owners and cable operators reach an agreement among themselves. Mr. Valenti of the motion picture industry has called a meeting to explore the possibility of a satisfactory compromise.

492. MCBRIDE, JOSEPH. Pic biz ignoring copyright; 'sustained and deliberate' failure to register pix, Tv shows invitation to pirates. *Daily Variety*, vol. 171, no. 42 (May 4, 1976), pp. 1, 7.

The Justice Department has accumulated evidence that some film and TV producers "deliberately fail" to copyright their productions. The Justice Department warns that should a non-registered production be pirated and found to have been deliberately left uncopyrighted, no action may be taken against the infringer.

493. New wrinkle on cable copyright; revised section 111 produced for mark-up by Judiciary subcommittee; cable and movie interests general favorable, broadcasters disposed to oppose. *Broadcasting*, vol. 90, no. 20 (May 17, 1976), pp. 24-25.

A new sec. 111 of the Copyright Revision bill, drafted by the Register of Copyrights and the House Judiciary subcommittee staff would base cable royalty payments on the number of distant signals carried, rather than on the number of subscribers. Another provision would extend compulsory license to cable signals imported from Canada and Mexico. Each cable system would be directed to report to the Register of Copyrights all programs substituted voluntarily. The provision was incorporated at the request of sports interests who wanted their copyright claims recorded when their programs were "cherry-picked". Reviews of the rates by the royalty tribunal would be called whenever FCC changed its exclusivity rules or increased the number of permissible distant signals.

494. SHAIN, MICHAEL. Songwriters lobbying for royalty increase. *Record World*, vol. 31, no. 1506 (May 1, 1976), pp. 3, 58.

Though songwriters and composers have been lobbying for

a royalty increase of more than ½ cent per record, the record manufacturers report that though they could afford to pay a higher rate on successful records, they could not afford to take a greater loss on those records that do not break even.

495. STEWART, KEN. Irish antipirate drive underway. *Billboard*, vol. 88, no. 14 (Apr. 3, 1976), pp. 6, 63.

The Irish Mechanical Copyright Protection Society has instituted a major advertising campaign to alert the general public and retailers not to buy American recordings that have been imported illegally. An increasing number of pirated records, cassettes and cartridges are being imported in direct contravention of the Copyright Act.

496. WAGNER, SUSAN. "Fair use" section passes in House mark-up session. *Publishers Weekly*, vol. 209, no. 11 (Mar. 15, 1976), p. 18.

The House Judiciary subcommittee has been using the Senate-passed S. 22 in its current mark-up sessions. On Mar. 3, sec. 105 was amended to provide a limited copyright of five years for materials in the Commerce Department's National Technological Information Service in order to help NTIS support itself. The subcommittee also amended sec. 504(c) (2) to give relief to educators and librarians in "innocent infringer" situations.

2. Foreign

1. Australia

497. BANKI, PETER. Reprographic reproduction of works protected by copyright: Washington—June 1975. *Australian Copyright Council Bulletin*, no. 15 (Sept. 24, 1975), pp. 1-15.

A report by the representative of the Australian Copyright Council on the meeting on reprographic reproduction held in Washington, D.C. under the joint sponsorship of Unesco and WIPO.

498. BANKI, PETER. Some common questions in copyright. *Australian Copyright Council Bulletin*, no. 18 (Mar. 1, 1976), pp. 1-7.

An elementary summary of what is subject to copyright protection in Australia, how copyright is secured both in Aus-

tralia and internationally and what constitutes copyright infringement.

499. CATTERNS, DAVID. International convention meetings, Geneva, December 1975. *Australian Copyright Council Bulletin*, no. 19 (Mar. 3, 1976), pp. 1-8.

Brief reports on the meetings on the Rome convention, Berne Copyright Convention and the Universal Copyright Convention held in Geneva by WIPO and Unesco in December 1975. Among the subjects discussed were reprographic reproduction, computers and other technological equipment, audio-visual cassettes and disks, CATV problems and folklore protection. The model copyright law for developing countries, and the need for coordination of information from national copyright information centers were also reported on.

500. CATTERNS, DAVID. Ownership of copyright. *Australian Copyright Council Bulletin*, no. 17 (Dec. 2, 1975), pp. 1-9.

A brief analysis of Australian copyright law with regard to ownership in works produced by an employee, commissioned works, and transfer of ownership by assignment or license, joint authorship, gifts of unpublished manuscripts, and crown copyright.

501. CATTERNS, DAVID. University of New South Wales v. Moorhouse and Angus and Robertson (Publishers) Pty. Ltd. *Australian Copyright Council Bulletin*, no. 16, (Sept. 24, 1975), pp. 1-8.

Reproduction of a case note which originally appeared in the *Australian Current Law* issue of October 1975. Judgment by the High Court of Australia was handed down on Aug. 1, 1975 on the question of responsibility for photocopying copyrighted material in a university library.

2. England

502. FERGUSON, GEORGE. U.S. books in Australia after the market agreement ends. *The Bookseller*, no. 3665 (Mar. 20, 1976), pp. 1686-1688, 1690-1691.

The author is the retired director of the Australian Book Publisher Association. He gives the background as well as the history of the British market agreement. With the abrogation of

the market agreement as the result of the American antitrust suit against 21 British publishers, an attempt is made to answer the question as to the effect on Australian publishing. He believes it will "be again possible for an American copyright owner to deal with an individual British publisher on a territory-by-territory basis rather than on an all-or-nothing basis."

503. P.L.R. situation: authors seek urgent meeting with Minister; a correspondent reports. *The Bookseller*, no. 3665 (Mar. 20, 1976), pp. 1684-1685.

Commenting on a deterioration in the hope to have the Public Lending Right Bill in the British Parliament before the Easter recess, the article summarizes the speculation among book authors as to the costs of administering the royalty and the size of individual payments.

504. A Public Lending Right Bill is introduced by the government. *The Bookseller*, no. 3666 (Mar. 27, 1976), pp. 1768-1799.

The Public Lending Right Bill was introduced in the House of Lords by Lord Strabolgi on Mar. 22, 1976. The provisions of the bill are here outlined.

505. A year of troubles for exporters; British Post Office and U.S. Department of Justice are the main problems—P. A. report. *The Bookseller*, no. 3669 (Apr. 17, 1976), pp. 2006-2012.

In addition to increased postal rates and the continuing discussions between the U.S. Department of Justice and American defendant publishers over the antitrust claims regarding the British marketing agreement, the Publishers Association also presented summaries of the papers on the European Economic Community, reprographic reproduction, and international copyright which they hope to submit to the Congress of the International Publishers' Association in Kyoto, Japan.

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