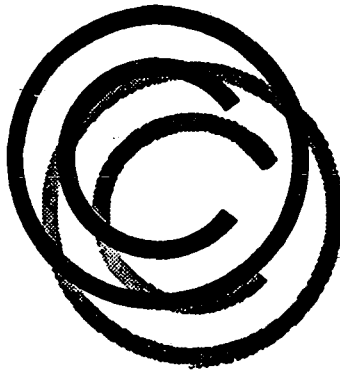

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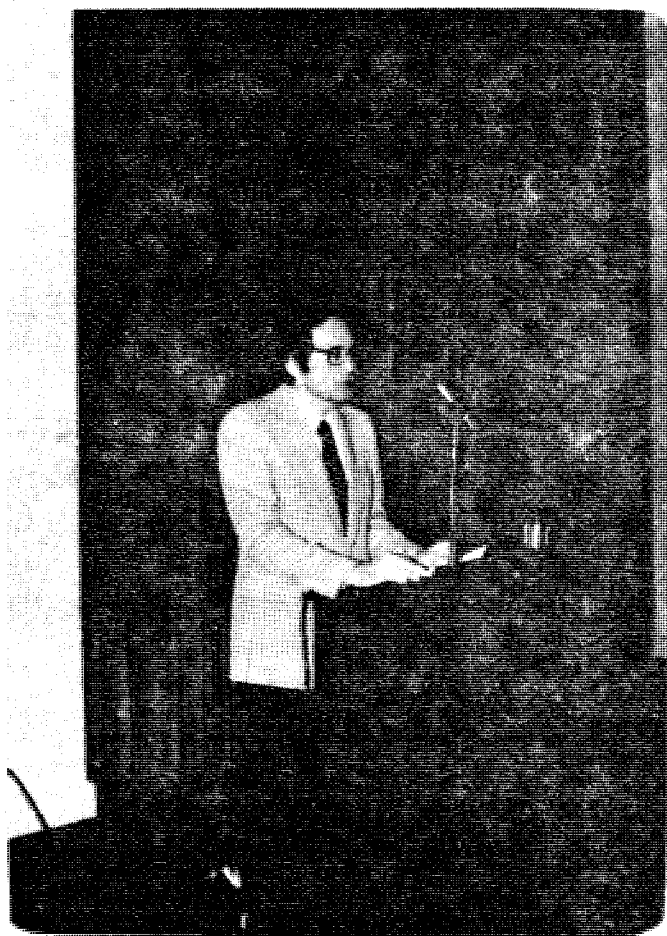
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IRWIN KARP

PART I

ARTICLES

1. FROM ROTH TO ROHAUER: TWENTY YEARS OF
AMICUS BRIEFS—*The Seventh Donald C. Brace Memorial Lecture
on Copyright Law**

By IRWIN KARP**

I am honored by the Copyright Society's invitation to deliver the Brace Memorial Lecture. My subject is the *amicus curiae* briefs filed by the Authors League during the last 20 years. They cover the period from *Roth v. United States*,¹ the 1957 landmark obscenity decision, to *Rohauer v. Killiam Shows, Inc.*,² the 1977 decision interpreting the renewal section of the Copyright Act.

The topic was proposed by Stanley Rothenberg and I am grateful to him. His suggestion gave me the opportunity to refresh my perspective on the past two decades. Although it sometimes felt that way, those years were not devoted exclusively to the Copyright Revision Bill. During this period when the Bill exploded intermittently in bursts of frantic activity, authors and publishers were confronted by a variety of other problems. Some were presented in cases involving obscenity, privacy, libel and other First Amendment questions. Others arose in suits involving contract provisions, taxation of authors and provisions of the 1909 Copyright Act.

The Authors League certainly did not participate in all of these cases. But it filed a great number of briefs in appeals, administrative proceedings and legislative hearings. Some were presented as *amicus curiae*; as a friend of the Court. Others were submitted directly for a party, or for the League itself. I will only touch on some of them, and briefly. But these do reflect the spectrum of problems that occupied the literary and copyright communities between those rounds of revision hearings.

*This lecture was delivered at the first annual convention of the copyright Society of the U.S.A. on May 25, 1977, at the Concord Hotel in Kiamesha Lake, New York.

**Mr. Karp is Counsel of the Authors League of America.

¹ 354 U.S. 476 (1957).

² 551 F.2d 484 (2d Cir. 1977), *cert. denied* 97 S.Ct. 2666 (1977).

Those copyright hearings did seem to be interminable. One attorney wrote "we have argued for copyright to come into existence on creation . . . and for 'divisible' copyright . . . but the solons in Washington hold many hearings and then leave our antiquated copyright laws unchanged." This complaint was made in 1942 by Arthur Garfield Hays in his autobiography CITY LAWYER. He went on to say "A group has for years worked on a new copyright bill under the chairmanship of Professor William Shotwell . . . My partner John Schulman is a member . . . representing the Song Writers Protective Association."

Arthur Hays was a great defender of civil liberties. He was counsel to the American Civil Liberties Union. And he fought for human rights from the Scopes Trial in Tennessee to the Reichstag Fire Trials in Nazi Germany. Fittingly, the foundation named in his honor is, like the Copyright Society, housed at the New York University Law School. For Arthur Hays also was much involved in copyright affairs. He represented a number of authors and publishers. He and John Schulman helped to form the Dramatists Guild and then the Songwriters Protective Association. He was attorney for the Authors League of America. And by coincidence, several Copyright Society members were associated with his law firm. There was John Schulman, of course; and Bill Klein, Dick Wincor, Bill Krasilovsky and me. Among the earlier transients were Sidney Kaye, Ed Sargoy, Bob Burton, Dick Green and Nancy Wechsler.

Arthur Hays was a contemporary of Donald C. Brace, whom we honor in these annual lectures. Each of them graduated from Columbia College; Hays in 1902 and Brace in 1904. Each of them was the same age when he died; Hays in 1954 and Donald Brace in 1955. And both of them were active in publishing during that period when it began to flourish as an industry composed of numerous independently owned firms; Hays as an attorney; Brace and his partner Alfred Harcourt as leading practitioners of the art of publishing.

Harcourt and Brace began their firm in an era of expansion, in his HOUSE OF HARPER. Eugene Exman describes an exodus of its authors during an economy wave at Harper. Sinclair Lewis "went for solace to his friend Alfred Harcourt, editor of trade books for Henry Holt & Company. Harcourt encouraged Lewis to come with Holt . . . and when Harcourt and Brace left Holt in 1919 to start their own firm, they issued Lewis's FREE AIR as one of their first titles"; and published MAIN STREET the following year. Other Harper emigres at that time included Joseph Conrad who had been discovered by "young Alfred Knopf," then at Doubleday; and Theodore

Dreiser who went to Boni & Liverwright, a sometime client of Arthur Hays.

Subsequently, Hays unsuccessfully defended Dreiser's *AN AMERICAN TRAGEDY* against obscenity charges in Boston. The District Attorney had alleged that "A story like this is indecent . . . It is an invitation to young people to learn birth control." Banned in Boston, the book flourished. About thirty years later, a few months after Hays' death, I filed my first *amicus curiae* brief for the Authors League in *Phillips v. McCaffrey*.³ It was an obscenity case, although it hardly merits that classification by today's standards.

I. THE REASON FOR AMICUS BRIEFS

Phillips had been denied a theatre license because his application used the word "burlesque" to describe the proposed performances. Commissioner McCaffrey also saw it his duty to protect citizens who would be offended by real burlesque performances; and if they were not burlesque, to protect those "panting womanless hordes . . . who would feel cheated thereby." Proclaiming that prior restraint is "especially to be condemned", Justice Steuer ordered the Commissioner to issue a license containing the word "burlesque." On appeal, this bland First Amendment issue was fudged, wasting our second brief. Our champion agreed to delete the word "burlesque" from his application and substitute "theatrical shows." After this semantic retreat, his right to a license was affirmed.

That year, the Authors League also filed a brief in *Butler v. Michigan*,⁴ where the Supreme Court held that works objectionable for children could not be banned to adults. The following year brought the appeal in *Roth v. United States*,⁵ which promised a constitutional test for obscenity statutes. The Authors League and other *amici* filed briefs. I had not yet been admitted to the Supreme Court bar when I wrote these two briefs, so Osmond Frankel agreed to add his name to them. Joining the Hays firm gave me the high privilege of getting to know Osmond, who is one of the outstanding constitutional lawyers of our time.

I should mention that obscenity briefs open this discussion only by reason of chronology. Other First Amendment cases posed issues

³ 208 Misc. 267, 143 N.Y.S.2d 138 (Sup. Ct. 1955), *mod. & aff'd*, 1 A.D.2d 662, 147 N.Y.S.2d 687 (1st Dept. 1955).

⁴ 352 U.S. 380 (1957).

⁵ 354 U.S. 476 (1957).

of greater importance to authors. The obscenity decisions did, however, have serious First Amendment consequences—as League briefs argued in a dozen Supreme Court appeals, in other cases, in administrative proceedings and legislative hearings. Some of the obscenity legislation hearings, incidentally, were conducted by the same subcommittees which wrote the Copyright Revision Bill, or by their Chairmen—serving on other subcommittees.

The obscenity cases illustrate why the Authors League and other organizations file *amicus curiae* briefs. Chief Justice Warren said of one obscenity appeal “This Court hears such cases . . . not merely to rule upon the alleged obscenity of a specific book or film but to establish principles for the guidance of lower courts and legislatures.” Whether in obscenity, copyright or contract cases, principles established by a decision often apply generally, and are not limited to the parties. The courts’ opinions in *Goodis*,⁶ *Bartok*,⁷ and *Rohauer*⁸—for example—will affect the rights of many authors or their surviving families.

Thus, in *Goodis* the Court of Appeals reversed a summary judgment which had accepted the defendant-motion picture company’s interpretation of its contract with the author. Among other reasons for requiring a full trial, the Court of Appeals said: “our disposition of this appeal may affect the interpretation of other contracts . . . Many authors have used characters they created in one novel in a whole series of subsequent works; surely it would be rash of us to hold on summary judgment that the sale of rights in one of an author’s works ends, without specific mention that it ends, the author’s exclusive ownership of the valuable characters he created in that one work, when he may well desire to create sequels of his own using these same characters.” This point, needless to say, had been urged on the Court in the Authors League brief.

The *amicus curiae* brief is the only opportunity for organizations representing authors, publishers or film companies to present their members’ views to a court before it judicially “legislates” broad principles that will affect their copyrights, contracts or freedom of expression.

II. THE AUTHORS LEAGUE POSITION ON OBSCENITY

In *Roth*,⁹ Justice Brennan’s majority opinion established a new First Amendment test for obscenity. A work could only be ruled

⁶ *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

⁷ *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1976).

⁸ *Supra* n. 2.

⁹ *Supra* n. 1.

obscene if, taken as a whole, its dominant theme appealed to prurient interest in sex. A revised 3-part version of the *Roth* standard emerged in Justice Brennan's plurality opinion in *Memoirs v. Massachusetts*,¹⁰ the *Fanny Hill* appeal successfully argued by Charles Rembar. No restraint could be imposed on a work unless it failed the prurient interest test *and* the patent offensiveness test; *and* also was utterly without redeeming social value.

Several Authors League briefs, commencing with *Roth*, opposed these tests and urged the Court to adopt principles which would give effective protection to freedom of expression. Thus, in its 1956 *Roth* brief, the League argued that the state only has two interests in restraining "obscene materials" that can be tolerated under the First Amendment. One is to protect minors. The other is to prevent the thrusting of obscene materials on adults who do not choose to receive them, under circumstances in which there is no opportunity to reject them. Public displays of offensive materials on theatre billboards, newsstands or book stores were among examples we cited. But, the League argued, there should be no suppression of the books, films or magazines involved on the ground that their contents are obscene. As we stated in our 1965 *Ralph Ginzburg*¹¹ brief the First Amendment does not permit any obscenity statute to be applied

"where a book or other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the privacy of individual(s) . . ."

Our brief then said:

"Where a publisher distributes a book or magazine to adults who are free to decide whether they will accept it or reject it, read it or not read it, then, we submit, neither the Federal nor the State governments should interfere with the right of the author to write, the publisher to publish, or the reader to read. In these circumstances, the absolute guaranty of the First Amendment can and should be retained."

We also argued in briefs commencing with *Roth* that this principle also should apply to plays and films.

In 1973 the Supreme Court decided *Miller v. California*¹² and

¹⁰ 383 U.S. 43 (1966).

¹¹ *Ginzburg v. United States*, 383 U.S. 463 (1966).

¹² 413 U.S. 15 (1973).

Paris Adult Theatre I v. Slaton.¹³ Justices Brennan, Marshall and Stewart concluded that the original and revised Roth tests were unworkable and abandoned them. They said it is impossible to *define* obscenity specifically enough to provide the fair notice required by the First Amendment or to prevent the erosion of protected speech which follows from the enforcement of obscenity statutes.

Justices Brennan, Stewart and Marshall then adopted the same position which the Authors League had argued in its 1956 *Roth* brief. In his dissenting opinion, Justice Brennan said

"I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."

There is some measure of satisfaction in having anticipated the free-speech wing of the Court by 17 years, and in seeing the League's 1956 position advocated now by groups which had asked much less of the Court in the name of the First Amendment.

Starting in the 1960's, the Authors League briefs also urged the Court to rule that under the First Amendment a book seller or theatre owner could not be prosecuted under a criminal statute unless the work involved had been previously judged obscene in a civil proceeding. That principle too became respectable in 1973 when it was endorsed by Chief Justice Burger and Justice Douglas.

Although the Court's definitional approach was a failure, the cumulative effect of several decisions protecting books such as *FANNY HILL* and *TROPIC OF CANCER*, and films such as *CARNAL KNOWLEDGE*, has been to change the attitudes of prosecutors and lower courts. Even after the revised *Miller* standard—whose differences from the *Roth* tests were mostly academic, according to Justice Brennan—convictions affirmed on appeal largely have been limited to material which fits Justice Stewart's definition of hard core pornography." Moreover, decisions such as *Bantam Books v. Sullivan*¹⁴—successfully argued by Horace Manges—have restricted censorship by administrative classification and coercion. The League filed there. And Horace, Sidney Schreiber and I submitted briefs in other obscenity appeals for our respective organizations.

¹³ 413 U.S. 49 (1973).

¹⁴ 372 U.S. 58 (1963).

III. FREEDOM OF EXPRESSION CASES

During the 20 years of copyright revision, the Authors League also presented its views in cases involving restraints on freedom of political, cultural and social expression.

The books of many distinguished authors—including Langston Hughes, Ralph Ellison and Richard Wright—are censored by school boards which remove them from libraries and reading lists. We submitted briefs to the District Court and Court of Appeals in *DOWN THESE MEAN STREETS*,¹⁵ contending that these removals violate the First Amendment rights of students, teachers and authors. Our *amicus* brief to the Supreme Court unsuccessfully urged it to review the adverse 2d Circuit opinion. Fortunately, a subsequent Sixth Circuit decision upheld freedom of expression in almost identical circumstances.¹⁶

In *U.S. v. Earl Caldwell*,¹⁷ League briefs in the Court of Appeals and Supreme Court argued that the First Amendment absolutely protected the right of authors not to divulge their sources or confidential information. When the majority opinion denied that protection, we testified and submitted briefs in support of Chairman Kastenmeier's Newsman's Shield Bill which would have provided greater support for freedom of expression than the liberal dissent in *Caldwell*.

The Authors League supported Victor Marchetti and Knopf with a Circuit Court and two Supreme Court briefs.¹⁸ In the first one, we argued that secrecy clauses were not only unconstitutional but potentially futile. A government employee could go abroad and publish his book. On the second Petition we reminded the Supreme Court that another CIA employee had subsequently done that. To no avail.

While the Revision Bill was working its way through the Senate copyright Subcommittee, the Authors League filed a Circuit Court *amicus* brief supporting the First Amendment right of an editor to protect the identity of an author.¹⁹ Under a pseudonym, the author had written articles detailing "how to accomplish sabotage and terrorism," with suggestions for targets and instructions for manufacturing explosives. We were a bit uneasy about this one. Not on the

¹⁵ *Presidents Council, District 25 v. Community School Board No. 25*, 457 F.2d 289 (2d Cir. 1972); *cert. denied* 409 U.S. 998 (1972).

¹⁶ *Minarcini v. Strongsville*, 541 F.2d 577 (6th Cir. 1976).

¹⁷ 434 F.2d 1081 (9th Cir. 1970); *rev'd* 408 U.S. 665 (1972).

¹⁸ *Marchetti v. United States*, 466 F.2d 1309 (4th Cir. 1972); *cert. denied* 409 U.S. 1063 (1972).

¹⁹ *Knopf v. Colby*, 509 F.2d 1362 (4th Cir. 1971); *cert. denied* 421 U.S. 992 (1975).

merits—the First Amendment does protect. Rather, because the defendant was Senator McClellan, as Chairman of the Government Operations Subcommittee. But the Chairman kept his copyright hat separate. And everybody won. The case was dismissed as premature. The editor was rescued by an event familiar to revision buffs—that Congress expired. The League also testified before the Senate Judiciary Committee on another non-copyright issue during this period, opposing various provisions of Senator McClellan's Bill to revise the Criminal Code (S.1).

IV. LIBEL AND PRIVACY

For authors and book publishers, the most serious threat to freedom of expression has occurred in libel and invasion-of-privacy suits. Ironically, the threat probably has increased since Justice Brennan began the effort, in *Times v. Sullivan*²⁰ and *Time, Inc. v. Hill*,²¹ to protect freedom of expression against the restraints of such litigation. But the Court has repeated the errors of its obscenity decisions. It has substituted its own balancing of values for the fundamental balance struck by the First Amendment—to give complete protection to free speech despite abuses that also would be protected. And the Court has again tried, unsuccessfully, to protect freedom of expression by a series of definitions of unprotected speech—varying from one group of Justices to another.

The right of privacy began as a very limited statutory right to prevent the use of one's name or photograph in advertising or promoting the sale of goods. But in *Time, Inc. v. Hill* and *Spahn v. Messner*,²² New York courts ruled that a plaintiff could recover damages if a book, play, motion picture, etc. made material and substantially false statements about him—even though they were not defamatory. This threatens far greater exposure to liability than does libel.

Until this doctrine developed, non-defamatory falsehood was not actionable. In *Times v. Sullivan* and other cases the Supreme Court had said "constitutional protection does not turn upon the truth of the ideas or beliefs which are offered . . ." Otherwise authors and publishers would be inhibited by the fear of adverse judgments if unfriendly juries or judges disagreed on what was truth, or if legally admissible evidence was not available at trial, or if the cost of verifying every statement to a certainty was too high.

²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²¹ 385 U.S. 374 (1967).

²² See notes 23 and 24, *infra*.

Nonetheless, in *Time, Inc. v. Hill*, the Supreme Court upheld the new right of action, as it had been formulated in the *Spahn* opinion. Justice Brennan's majority opinion only limited the liability of authors and publishers for reports on matters of public interest—if these were published without knowledge they were false and without reckless disregard of the truth. And even that limited protection has since been diluted.

In *Spahn I*,²³ the Authors League brief to the Supreme Court supported the publisher and its attorney, Selig Levitan. Among other things, we argued that the New York court's proscription of imaginary incident and dialogue—as “falsification”—literally would ban many political cartoons and satirical pieces which contain both. This will be a difficult dilemma for the Court to define its way out of.

In *Spahn II*,²⁴ our brief emphasized that the new privacy rule magnified perhaps the most important deterrent to freedom of expression. This, as Justice Brennan had stressed, is “the fear of the expense involved in ‘th(e) defense’” of statements challenged by libel or privacy suits. Any allegedly false statement could bring a suit, even though it was innocent of harm or defamation. Any affluent plaintiff, or lawyer on a contingent-fee basis, can put authors and publishers to the costly burden of pretrial depositions, motions, other proceedings, and of the trial itself. It is the fear of such expenses and drain of time that leads publishers to shy away from controversial subjects and persons. As the Supreme Court has repeatedly held, the First Amendment was designed to prevent such self-censorship. But it can only do so, we argued in *Spahn II*, if the Court holds that such non-defamatory privacy suits are barred by the First Amendment.

Another important privacy question is raised in an appeal argued recently by Eugene Girden in the New York Appellate Division. The case involves the film *DOG DAY AFTERNOON* and a paperback book that followed it. The question is whether a person may sue under the New York Civil Rights Law even if the book or film does not use his or her name or photograph. In its brief, the Authors League argued that the New York statute requires that the plaintiff be identified by name, and that this test should not be abandoned. We pointed out that Western civilization had survived the roman a clef for four centuries. We noted that authors have portrayed real people under fictitious names, and have borrowed their traits and foibles for

²³ *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324 (1966); *vacated*, 387 U.S. 239 (1967).

²⁴ *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967); *probable jurisdiction noted*, 393 U.S. 818 (1969); *appeal dismissed*, 393 U.S. 1046 (1969).

characters in books and plays. Without the test of identification by name, anyone claiming to be the character in a work could put author and publisher to the heavy financial burden of litigation. Moreover, the door would be open to strike suits against books, plays and films that never were intended to portray any living person.*

Among other cases, the League filed a brief supporting Al Wasserstrom's successful argument that a publisher could print on a book-cover a reviewer's statements comparing the author's style with that of another writer. This was held not to invade the latter's right of privacy.²⁵

V. CONTRACT CASES

Whatever rights the Copyright act gives an author, a contract or court interpretation of a contract may take away from him. And more than one contract appeal has resulted in a decision establishing or changing principles that affect many authors. Consequently, the League files *amicus* briefs in some of these cases.

My first involvement was at the behest of Luise Sillcox, for many years the indomitable Executive Secretary of the Authors League. I represented a plaintiff seeking to recover money paid to a publisher. The complaint alleged that she had been induced to enter the contract by false and fraudulent representations "made 'in the regular course of (defendant's) business . . .'" And it asked for punitive damages as well as compensatory damages. In a 4 to 3 decision, the Court of Appeals sustained the complaint against defendants' motion to strike the claim for punitive damages. The theory of the claim is reflected in Judge Fuld's comment that punitive damages would serve their desired deterrent effect if applied when a fraudulent scheme was pursued "systematically." Little did I realize in 1961 what further ramifications that magic word could have.

In *Goodis v. United Artists Television*,²⁶ I presented the argument for the author on appeal. As I mentioned earlier, the appeal raised

*After the Lecture was delivered, the Appellate Division unanimously dismissed the claims for invasion of privacy. The Court ruled that "... Plaintiffs' names, portraits or pictures not having been used in either the movie or the books, no cause of action based on Civil Rights Law Sections 50 and 51 is stated—and it matters not that it may be clear that the plaintiffs were actually being depicted therein or that the movie and books described the story as true."

²⁵ *Walker v. Sheldon*, 10 N.Y.2d 401 (1961).

²⁶ *Supra* n. 6.

contract as well as copyright questions. Did the provisions of a contract which conveyed motion picture rights in a novel also transfer the right to make television "sequels" based on its characters? The District Court had said "yes," on a motion for summary judgment. The Court of Appeals did not find the contract's language all that unambiguous, and reversed. It said a determination of the parties' intent required evidence, at a trial, of the "custom and general expectations of authors and members of the publishing, broadcasting and film vocations." The case was subsequently settled. But there is enough in the majority opinion to increase authors' protection against claims they have conveyed sequel rights in a book or play, or its characters, without explicit provisions to that effect. The Court of Appeals' opinion also contains significant comment on the copyright status of characters.

A suit brought by Frank Gilroy produced two appeals, two *amicus* briefs by the League supporting him, and something we rarely encounter. The other side objected to our submitting briefs. However, the Appellate Division granted our motion for leave to file.

In *Gilroy I*,²⁷ the Appellate Court ruled that when an author's literary property is misappropriated, he is entitled to recover its reasonable value. And, that he may establish its reasonable value through the opinion evidence of expert witnesses. On the second trial, following this decision, the jury awarded Mr. Gilroy \$745,000 in damages. *Gilroy II*²⁸ is an appeal, not unexpectedly, by the defendants. The League's *amicus* brief supports Gilroy's argument that the opinion evidence supports the judgment. A decision is expected soon.

In *Van Valkenburgh v. Haydon*,²⁹ the Authors League supported Ephraim London's successful argument in the Court of Appeals that the defendant-publisher breached the *best efforts* clause in its contract with his author-client. The publisher had prepared a series of books which it offered to customers who had been buying the author's books on the same subject. The Court of Appeals, holding the best efforts clause had been breached, quoted the League's "interesting comment"—to wit, "The astounding pattern of publisher's conduct, as disclosed and documented by the record, is probably without parallel in publishing history. Clearly it violates the best efforts clause of the contract executed by the parties."

²⁷ *Gilroy v. American Broadcasting Company, Inc.*, 47 A.D.2d 728, 365 N.Y.S. 2d 193 (1975).

²⁸ *Gilroy v. American Broadcasting Company, Inc.*, not yet reported.

²⁹ *Van Valkenburgh v. Haydon Pub. Co.*, 30 N.Y.2d 34 (1972).

VI. TAX ISSUES

Not every shuttle flight to Washington was prompted by the Revision Bill. A series of tax problems provided occasional diversion. First, the Social Security Administration insisted that royalties from early copyrights must be charged against an author's benefits. The League succeeded in obtaining an amendment to the Social Security Act that excludes royalties under pre-65 copyrights and patents from the calculation of income that can reduce Social Security benefits. Next, the Internal Revenue Service contended that authors could not deduct contributions to HR 10—Keogh retirement plans because royalties were not "earned income." The League obtained an amendment which defined "earned income" to include income derived by a taxpayer from disposition of property he or she created, so that authors, composers and inventors could qualify under HR 10. And at its request, the definition later was added to the 50% maximum tax provision—it had not appeared in the version passed by one house. Also interspersed with copyright revision were briefs to the New York State Tax Commission which secured an exemption for authors from the Unincorporated Business Tax, and to the New Jersey State Tax Commission to gain an exemption from its recent Unearned Income Tax.

VII. COPYRIGHT CASES

As would be expected, the Authors League filed more briefs during the last 20 years in copyright cases than in any other area. I cannot recall how I ever got involved in the first one—*Biltmore Music Corp. v. Kittinger*.³⁰ The Court of Appeals had ruled that the notice-of-use requirement applied when the first recording of a composition was made abroad. We supported the copyright owner, but certiorari was denied. However, the notice of use drops out of the Copyright Law on January 1, 1978.

Next came *DeSylva v. Ballentine*.³¹ The Supreme Court was petitioned to reconsider its decision that "widow or children" in Section 24 meant they constituted one class for renewal purposes. Various organizations were invited to file amicus briefs in support. We declined. It was not because these petitions are almost always futile. Despite the odds against them, the League submitted briefs urging the

³⁰ 238 F.2d 373 (9th Cir. 1956); *cert. denied*, 352 U.S. 954 (1956).

³¹ 351 U.S. 570 (1956); *rehearing denied*, 352 U.S. 859 (1956).

Supreme Court to reconsider its decisions in *Fortnightly*³² and *Miller v. California*.³³ And on *Ralph Ginzburg's* petition for rehearing,³⁴ I prepared two briefs in support. One was filed by the Authors League. The other was filed by a group of distinguished *amici* Horace Manges had assembled: Ernest Angell, Jefferson Fordham, Harriet Pilpel, Louis Pollak, Whitney North Seymour, Harrison Tweed, Bethuel M. Webster and Horace himself. We all agreed that the *Roth* standard did not give Ginzburg "fair notice" under the First and Fourteenth Amendments that methods of advertising or promoting a book were factors the Supreme Court would later use in ruling it obscene. There was no such reason in *DeSylva*. Besides, the League thought the Supreme Court's decision was correct, as a matter of law and of good policy.

*Hoffenberg v. Kaminstein*³⁵ was a "must" *amicus curiae* situation. The Copyright Office had refused to accept copyright registration for the novel CANDY, after an American edition was manufactured and published here. It previously had been first published abroad with a notice of copyright. But the Office ruled that under the manufacturing clause it never secured copyright, even though no copies of the foreign-manufactured edition were distributed here. We filed briefs in the Circuit Court and Supreme Court supporting Cy Rembar's argument that the Copyright Office was wrong. The League contended that the manufacturing clause does not impose domestic production as a requirement for securing a copyright, but only as a condition for bringing infringement suits. A literal and logical reading of Sec. 16 supports that view.

In addition, the League contended that the drastic penalty of Section 16, as interpreted by the Copyright Office, applied only to American authors of literary works—in violation of the Fifth Amendment's due process clause. Our brief also argued that the Copyright Office version of Section 16 imposed restraints on freedom of communication which violated the First Amendment. We got nowhere in the Circuit Court. But justice—sometimes—prevails. The House copyright Subcommittee was more receptive to the League's First Amendment plea during the 1975 hearings, when it was the sole witness testifying in support of the phaseout of Section 16. At the hear-

³² *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *rehearing denied*, 393 U.S. 902 (1968).

³³ *Kaplan v. California*, *rehearing denied*, 414 U.S. 883 (1973).

³⁴ *Ginzburg v. United States*, 383 U.S. 463 (1966), *rehearing denied*, 384 U.S. 934 (1966).

³⁵ 396 F.2d 684 (D.C. Cir. 1968); *cert. denied*, 393 U.S. 913 (1968).

ing we also urged an Amendment exempting authors in Hoffenberg's position from the manufacturing clause during the interim before it is eliminated. The exemption was written into the 1976 Act.

The Authors League added its *amicus* briefs to those filed by several of you in *Fortnightly v. United Artists Television*,³⁶ *Teleprompter v. CBS*,³⁷ *Twentieth Century Music v. Aiken*,³⁸ and *Williams & Wilkins Co. v. U.S.*³⁹ To dwell on these at length would not enlighten you and might only serve to rekindle irritation. *Fortnightly*, *Teleprompter* and *Williams & Wilkins* were political-policy decisions rather than logical interpretations of the 1909 Act. I think the Holmes of *Herbert v. Shanley Co.*⁴⁰ and the Brandeis of *Buck v. Jewell-LaSalle*⁴¹ would have held there was copyright infringement in each case.

If Alan Latman and Arthur Greenbaum need a title for their leather bound edition of *Williams & Wilkins* briefs, I suggest the old army saying I learned in the 310th Infantry. "You go first, we'll cover you." A test case should have been brought. No one other than Bill Passano of Williams & Wilkins was willing to do it. No one could have done it better than Alan and Arthur. And they did it with an abundance of "covering" fire which, in the law as in combat, can be a mixed blessing.

In any event, the suit gave us a gloss on Sec. 108 which I believe is very important. It appears in one of the primary authorities for interpreting the new Act, the final Senate Report, which states: "It is still uncertain how far a library may go under the Copyright Act of 1909 in supplying a photocopy of copyrighted material in its collection. The recent (*Williams & Wilkins*) case failed to significantly illuminate the application of the fair-use doctrine to library photocopying practices. While the several opinions in the *Wilkins* case have given the Congress little guidance as to the current state of the law of fair use, these opinions provide additional support for the balanced resolution of the photocopying issue adopted by the Senate last year . . . and preserved in Section 108 of this legislation."

*Goodis v. United Artists Television*⁴² was one of the Authors League's most satisfying cases. I argued the appeal for the appellant-author,

³⁶ Supra n. 32.

³⁷ *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

³⁸ 422 U.S. 151 (1975).

³⁹ 172 U.S.P.Q. 670 (1972); *rev'd*, 487 F.2d 1345 (1973); *aff'd*, 420 U.S. 376 (1975).

⁴⁰ 242 U.S. 591 (1917).

⁴¹ *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

⁴² Supra n. 6.

and *amicus* briefs were filed by Horace Manges and Marshall Berger for the Book Publishers Council, and by the Authors League. The decision disposed of the nonsensical theory that a magazine's copyright notice did not copyright individual contributions unless their authors had assigned all their rights to the publisher. The decision also disposed of the theory of indivisibility of copyright. Read together with the earlier Circuit Court and Tax Court decisions that each exclusive right in a work was a separate property right for tax and business purposes, *Goodis* effectively established divisibility. And the *Goodis* decision preserved countless copyrights for authors of works first published in magazines which carried only the publisher's copyright notice.

Jerome Frank wrote the much better opinion, but Felix Frankfurter had the rank. If only Judge Frank had prevailed in *Fisher v. Witmark*⁴³ the Authors League would have been spared considerable effort over the last few years. As it was, we filed amicus briefs in various renewal cases. In *Siegel & Schuster v. National Periodical Publications, Inc.*⁴⁴ we supported the position taken by Gordon King and Carl Eldridge. Thankfully, the Court of Appeals reversed a District Court ruling that the authors of SUPERMAN had created the character as employees-for-hire. Left standing, that ruling could have further eroded protection under the renewal section.

The *Landon v. Twentieth Century Fox*⁴⁵ appeal almost gave the League an opportunity to argue the theory that a renewal copyright assignment is unenforceable under the Sherman Act when it was "tied-in" to an assignment of the original copyright. The point was argued in the League's *amicus* brief and reply brief, and incorporated by reference in the appellant's brief. And the League was granted permission to present the point on oral argument. However, the show closed out of town. The case was settled before the appeal was heard. While the Authors League did not get a test of its theory, Mrs. Landon did get back various renewal rights in ANNA AND THE KING OF SIAM as part of the settlement.

In *Bartok v. Boosey & Hawkes*,⁴⁶ the Authors League filed District and Circuit court briefs supporting Peter Herbert's successful argument on the definition of a "posthumous work," under the renewal section. The lower Court accepted the Copyright Office definition: that is, a work first published and copyrighted after the author's death. This would give the renewal copyright to the publisher. The

⁴³ *Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

⁴⁴ 508 F.2d 909 (2d Cir. 1974).

⁴⁵ 384 F. Supp. 450 (S.D.N.Y. 1974).

⁴⁶ *Bartok*, *supra* n. 7.

Court of Appeals adopted the definition urged by Peter and the Authors League: that is, a work is only posthumous for renewal purposes if the author never executed a contract concerning its copyright. This gave the renewal copyright to the widow and children as the renewal section intended. The Copyright Office definition was wrong for several reasons. Not the least was that it contradicted the context and purpose of Section 24.

Which brings me to *Rohauer v. Killiam*,⁴⁷ decided this year, and marking the close of the first 20 years of *amicus curiae* briefs. Because it is so recent and so important, there is the temptation—as with some of the other controversial cases—to reargue it here. But that would take another lecture, and it ought to be delivered by Herbert Jacoby whose position the Authors League supported.

Briefly then: the crux of the case is consent and the renewal clause, not Section 7 (which governs copyright in derivative works). The Court and the defendants agreed they required consent to exhibit their motion picture during the renewal copyright term of the novel on which it was based. The issue was whose consent. The Circuit Court conceded that any other use required the renewal copyright owner's permission. But it held the original motion picture contract demonstrated the author's intent to grant motion picture rights for the novel's renewal term. However, the purpose of creating the renewal copyright is to nullify any such grant if the author dies before renewal, so that his or her spouse and children can make new contracts and obtain compensation for uses made during *their* renewal copyright. For this reason, the Supreme Court has ruled that their renewal is unencumbered by *any* grant of rights made by the author. As many of us know, the motion picture industry for decades has interpreted the renewal clause as requiring a motion picture company to obtain a new license to exhibit a film based on a book or play, when the copyright is renewed by the author's surviving family. And countless such licenses have been granted.

If the *Rohauer* decision stands, it would be very costly to many of these families over the next 28 years. However, the book is not yet closed. The Supreme Court may grant certiorari.* And if it does not, another Circuit might read Sec. 24 as Herbert, I and the motion picture industry believe it should be interpreted.

⁴⁷ *Rohauer*, *supra* n. 2.

*After the Lecture was delivered, the Supreme Court denied certiorari.

CONCLUSION

I had thought at this moment of peroration, to synthesize the experience of this twenty years of *amicus curiae* briefs: to provide a diagram of the theoretical structure of these cases. But such a diagram could only be drawn by Rube Goldberg. There is no underlying set of principles to explain the decisions that affected authors and publishers during this period. We might have had one in the First Amendment area if the Brennan minority in *Slaton* had become a majority; and if they had recognized that the principles they finally adopted in *Slaton* also apply to libel, privacy and restraints on political expression.

In copyright law, there is an underlying principle. The Act was intended to secure valuable rights to the author who brought a book, play or musical composition into existence. And these well deserved rights should not be frustrated by hair-splitting technicalities, myopic semantics or BLEAK HOUSE analyses of provisions like the manufacturing clause of the renewal section. Sometimes the principle has worked. Sometimes it has not.

One reason for the lack of coherent theory is that so much depends on who wears the black robe when the landmark case is being argued. Is it a Holmes or a Stewart? A Brandeis or a Frankfurter? What would the renewal clause have looked like today if Jerome Frank, a great copyright judge, had sat in the seat occupied by Justice Frankfurter? What constitutional test of obscenity might apply today if Arthur Goldberg had not taken up a diplomatic career? Or consider our recent mutual experience. Sixteen judges voted on *Williams & Wilkins*. They divided 8 to 8. After years of arduous labor by Alan, Arthur, their adversaries and their *amici*—the whole thing turned on one judge's vote—and he did not vote.

There are consoling lessons from the past twenty years. Not all defeats are permanent. Arthur Hays finally got his automatic and divisible copyright, although posthumously. John Schulman's labors in a group chaired by Abraham Kaminstein, rather than Professor Shotwell, ultimately were crowned by success. Future Hoffenbergs and Southernns finally were freed from the manufacturing clause, etc., etc., etc.

Finally, the past twenty years remind us, as did the twenty years before them, that the Copyright Act and the First Amendment will continue to undergo change through the judicial process.

Marcus Aurelius warned us:

Observe constantly that all things take place by change, and ac-

custom thyself to consider that the nature of the universe loves nothing so much as to change the things which are, and to make new things like them.

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2. CAVEAT EMPTOR IN COPYRIGHT: A PRACTICAL GUIDE TO THE TERMINATION-OF-TRANSFERS PROVISIONS OF THE NEW COPYRIGHT CODE*

By FRANK R. CURTIS**

INTRODUCTION

Twenty years after work began on the most recent and perhaps the most ambitious revision of United States copyright law,¹ the nation finally has a new Copyright Code, which takes effect on January 1, 1978.² Given the number of fundamental changes in the new Code and the need for judicial interpretation of many of its provisions, it may be another twenty years or more before its effects are fully understood.

Among the creations of the new Code is a statutory right in the author and his heirs to terminate copyright grants after a number of years. These "termination-of-transfers" provisions,³ contained in sections 203 and 304(c) of the new Code, are intended to give an author and his family a second chance to profit from the success of his work.

"A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."⁴

*© Copyright 1977 by Frank R. Curtis. The writer wishes to express his appreciation to his partner, Charles Rembar, for his comments on this article.

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¹ For a brief history of the current revision effort, see H. R. REP. NO. 94-1476, 94th Cong., 2d Sess. 47-50 (1976) (hereinafter referred to as "House Report"); S. REP. NO. 94-473, 94th Cong., 1st Sess. 47-50 (1975).

² Act of October 19, 1976, 90 Stat. 2541, reprinted in 17 U.S.C.A. (1977 Supp. at 226ff). Section 101 of the Act of October 19, 1976 amends Title 17 of the United States Code in its entirety, and section 102 of the Act provides that, except as otherwise expressly provided, those amendments take effect on January 1, 1978. Although at the time of this writing the amendments have not yet taken effect, references in this article (except as otherwise noted) will be to the amended sections of Title 17.

³ Section 203 is entitled "termination of transfers and licenses granted by the author"; section 304(c) is entitled "termination of transfers and licenses covering extended renewal term".

⁴ House Report at 124. The 1975 Senate Report, *supra* at n. 1, contains virtually the same commentary on the termination provisions (those provisions have been carried forward, without change, in the copyright revision bills

The idea that authors should be given a second chance to profit from their works is not new to United States copyright law.⁵ The old Copyright Code, which derives from the Copyright Act of 1909,⁶ provides copyright protection for an initial term of 28 years, which may then be renewed for an additional 28-year term.⁷ The draftsmen of that provision intended that "... it should be the exclusive right of the author to take the renewal term. . . ."⁸ However, perhaps because the final version of the 1909 Act was enacted in some haste,⁹ it was left unclear whether rights in the renewal term could be assigned in advance. In 1943 the Supreme Court upheld such advance assignments.¹⁰ Thus, under the old Code, the copyright reverts to an author (or his family) upon expiration of the first term only if the grant does not mention the renewal term or if the author dies before renewing the copyright and a separate advance assignment has not been obtained from those members of the author's family who are entitled to renew after his death.

under consideration by Congress for the last ten years). For simplicity, reference will be made only to the House Report and not to the page at which the identical commentary appears in the 1975 Senate Report.

Congressman Hutchison, the ranking minority member of the House Copyright Subcommittee, pointed out during the floor debate that this "second chance" may include a second opportunity to secure more effective exploitation of an unsuccessful work as well as a second opportunity to profit from a successful one:

"The right of reverter will also afford an author an opportunity to find some other method to exploit his work if during the original 35 years his original publisher has not vigorously promoted the work." 122 CONG. REC. 10877 (94th Cong. 2d Sess. 1976).

⁵ Prior to the enactment of the new Code, this writer evaluated the termination provisions and some alternatives in *Protecting Authors in Copyright Transfers: Revision Bill §203 and the Alternatives*, 72 COLUM. L. REV. 799 (1972). See Part I of that article at pages 801-809, subtitled "Reversion as an Historical Accident," for a fuller history of the idea that authors should be assured a "second chance" to profit from their works.

⁶ Old Title 17 of the United States Code was enacted by the Act of July 30, 1947, ch. 391, 61 Stat. 652 and is based upon the Act of March 4, 1909, ch. 320, 35 Stat. 1075.

⁷ Section 24 of old Title 17. The term is measured from the date of publication or, in the case of works registered prior to publication, from the date of deposit. See n. 79, *infra*.

⁸ H. R. REP. NO. 2222, 60th Cong., 2d Sess. 14 (1909).

⁹ See Ringer, *Renewal of Copyright* (Study No. 31) IN UNITED STATES COPYRIGHT OFFICE, COPYRIGHT LAW REVISION STUDIES 29-31, 105, 121 and 161 (printed for the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1961)).

¹⁰ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

In part because of the difficulties created by the renewal system and in part for other reason,¹¹ the new Code was substituted a single term of copyright based upon the life of the author. Copyright in works created on or after January 1, 1978 by individual authors will endure for the life of the author plus 50 years. If the work is "made for hire"¹² or by an unidentified author, the term will be 75 years from publication or 100 years from creation, whichever expires first.¹³ Copyrights secured prior to January 1, 1978 are extended to endure a total of 75 years (the extension from a total of 56 years under the old Code to 75 years under the new Code is automatic but, if the copyright is presently in its first term, it must still be renewed after 28 years or protection will lapse).¹⁴ Special rules apply to works created but not copyrighted before the effective date of the new Code.¹⁵ Finally, all terms of copyright are extended to the end of the calendar year in which they would otherwise expire.¹⁶

The termination-of-transfers provisions are intended to perpetuate the reversion principle in this new single-term system, and to cure the old system's deficiencies. Section 203 of the new Code provides that transfers made on or after January 1, 1978 may be terminated after 35 to 40 years (depending on the nature of the rights conveyed). Section 304(c) provides for the termination of transfers executed prior to January 1, 1978 at the end of 56 years from the date copyright protection was first secured (that is, such grants are termin-

¹¹ See House Report at 134-136. The primary additional reason for the switch to a single-term system was to bring the United States law in line with the copyright laws of most other countries, under which duration is determined by the life of the author, and thus qualify the United States for possible membership in the Berne Copyright Union.

¹² See Part A(4) *infra* for a discussion of works "made for hire."

¹³ §302(c).

¹⁴ §304(a) and (b).

¹⁵ The new Code provides federal statutory copyright protection from the moment of creation. Section 301 preempts the "common law copyright" protection previously enjoyed by unpublished works under state law (protection that continued in perpetuity if the works were never published). Under section 303, works created before January 1, 1978, but not copyrighted or in the public domain, are generally treated as if they were newly created works (i.e., copyright protection endures for the life of the author plus fifty years, except for works made for hire and works of an unidentified author). However, to prevent the sudden loss of protection for the uncopyrighted works of an author long dead, section 303 provides that in no event shall the copyright in such previously uncopyrighted works expire before December 31, 2002, and, if the work is published by that date, copyright protection will continue through December 31, 2027.

¹⁶ §305.

able at the time when the renewal term under the old Code would have expired). Under both provisions, the statutory termination right may not be waived or bargained away.

The present article is a guide to those new provisions and the opportunities and problems which sellers and purchasers of rights in copyrighted material can expect—and should try to anticipate. The sections that follow will identify more precisely which grants are subject to termination, set forth the procedures for effecting termination, clarify the effect of termination on derivative works prepared by the grantee and on the grantor's rights under the terminated agreements, and explain the requirements for new grants of reverted rights. Where the termination provisions are clear, their implications will be spelled out for seller and purchaser. Where the new provisions are ambiguous—and the ambiguities in the new provisions are many—all that can be done is to pose the alternatives and suggest the more likely solutions. The final answers, in many cases, will not be known for years to come.

A: WHICH GRANTS CAN BE TERMINATED

Though the new termination provisions are broad, they are far from all-inclusive, and some of the controlling factors have no logical relation to the provisions' fundamental purposes. In deciding whether a particular transfer is terminable, there are six basic questions that must be considered.

1. When Was the Grant Made?

Section 203 of the new Code applies to grants executed by the author on or after January 1, 1978, no matter when the work was created or the copyright secured.¹⁷ Nor does it matter that the same rights may have been sold many times before. Section 203 will still apply to all new grants of such rights.

Section 304(c) of the new Code applies to grants executed prior to January 1, 1978, but only if the transfer involves a copyright "...subsisting in either its first or renewal term..." on that date. Thus, grants made before the end of 1977 in works not yet created,

¹⁷ Under the old Code, statutory copyright could be secured by publication with the required notice (§10) or, as to some categories of works, by registration prior to publication (§12). Under the new Code, statutory protection exists from the moment of creation (§302). A work is considered "created" when it is fixed in a copy or phonorecord for the first time (§101).

or in works created but not yet copyrighted, are not covered by either of the termination provisions.¹⁸

Since the effective date of the new Code is still a few months away, the prospective seller and purchaser can determine which, if either, of the two provisions will apply, simply by expediting or delay-

¹⁸ The decision not to provide for termination of existing grants in uncopyrighted works probably reflected a concern that such a provision would abrogate vested contractual rights. Section 203 does not interfere with such vested rights, since it is purely prospective (anyone purchasing rights after January 1, 1978 necessarily takes subject to the provisions of §203). Similarly, section 304(c) does not abrogate vested interests, since it permits termination of transfers at the point at which, under the prior Code, the copyright would expire in any event. (Section 304(c) does, however, cut off a purchaser's non-exclusive right to continue using the rights he has purchased after the copyright would have expired, and at least partially restricts his right to exploit his own derivative works. *See* Part C(1) *infra*.)

It has been suggested to this writer that the draftsmen were probably concerned about the constitutionality of a provision permitting the termination of prior agreements involving works for which federal copyright had not yet been secured. The argument would be that such an abrogation of vested contractual rights would violate the due process requirement of the Fifth Amendment. (The constitutional prohibition on laws impairing the obligation of contracts in Article I, §10 of the Constitution, applies only to State action. Therefore, one must look to the due process clause of the Fifth Amendment for protection against impairment of contractual rights by the federal government. *John McShain, Inc. v. District of Columbia*, 205 F.2d 882 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 900 (1953).)

It should be noted, however, that Congress concluded that due process is not denied by the provision of the new Code that preempts the prior scheme of perpetual copyright in "unpublished" works under state law and substitutes a single federal system of protection for a limited number of years. House Report at 139. In reaching this conclusion, the Congress was undoubtedly influenced by the view that the single federal system being substituted offers more certain protection, though for a more limited period, than the "... present anachronistic, uncertain, impractical, and highly complicated dual system. ..." House Report at 129. If the Congress was correct in its conclusion that substitution of more certain protection, though for a limited period, does not violate the due process clause, it would seem that a further limitation, permitting termination of transfers after a reasonable period of time but before the expiration of the copyright, would also not violate the due process clause. For example, the new Code might have provided that grants in works not yet created or in works created but not yet copyrighted should be deemed to have been made on the effective date of the new Code and the termination provisions of §203 (permitting termination after 35 to 40 years) then applied.

ing the transaction.¹⁹ For simplicity, the following discussion will consider the various alternatives primarily from the viewpoint of the author and his family. Naturally, what is advantageous from the author's point of view will be disadvantageous from the purchaser's point of view, and vice versa.

Whether it is advantageous to conclude a transfer before or after the end of 1977 depends upon whether the work has been copyrighted and, if so, how long ago. If the work has been copyrighted, but only comparatively recently (within approximately the last twenty years), it will be to the author's advantage to wait until 1978 before making any new grants of rights in his works. If he waits until then, he will be able to terminate the grant in approximately 35 years. If he acts now, he will not be able to terminate until 56 years from the date upon which copyright was originally secured. On the other hand, if the author has already died, any grant involving a previously copyrighted work should be made now. As explained below,²⁰ §203 covers only grants made by the author himself, whereas section 304(c) also covers grants by certain members of the author's family.²¹

But if the work was copyrighted more than 21 years ago,²² it will be to the author's advantage to conclude the grant now, since his right under §304(c) to terminate 56 years after the copyright was secured will accrue sooner than the right under §203 to terminate 35 years after the date of the grant. The fact that termination under §304(c) is measured from the date copyright was secured, without regard to the date of the grant, will entail some unpleasant surprises for unsuspecting purchasers of rights in older works. To take an extreme example, if a grant is made on December 31, 1977 of rights in a work in which

¹⁹ The question of whether one of the termination provisions will apply—and, if so, which one—is not, of course, the only consideration in deciding when a transfer should be concluded, and normally it will not be the controlling consideration. However, if the transfer can be concluded just as easily before as after the end of 1977, this question should certainly be considered.

²⁰ See notes 29 and 34, *infra*, and accompanying text.

²¹ Of course, in considering the application of the new termination provisions to works in which copyright has been secured under the old Code prior to January 1, 1978, and in which the copyright, still in its initial 28-year term, has not been renewed, one must not overlook the fact that rights may also revert to the author and his family under the renewal scheme, which has been carried forward, as to such subsisting copyrights, into the new Code. See §304(a).

²² The cut-off date will be somewhat shorter if publication rights are involved, for in that event the grant may not be terminable until as long as 40 years after the grant. See text accompanying note 85, *infra*.

copyright was secured 56 years ago, then the next day, January 1, 1978, the author may immediately serve a notice of termination, to take effect in two years.²³

If the work in question has not been created or has been created but remains uncopyrighted, it is clearly to the author's advantage to delay until 1978 to conclude the transaction. If the agreement is made before the end of 1977, but copyright has not been secured, there will be no right of termination whatsoever, whereas if the author waits until after January 1, 1978, the provisions of section 203 will apply.

If such an agreement for an uncopyrighted work has already been concluded, it will be to the author's advantage to secure copyright for the work in whole or at least in part, before the end of 1977 (either by publication or, where appropriate under the old Code,²⁴ by registration without publication). For if the grant already has been made, section 203 cannot apply, but section 304(c) will apply to the copyrighted portion.²⁵

As the end of 1977 approaches, it will be important for all parties to keep accurate records whether agreements were actually executed before or after December 31, 1977. The date appearing on an agreement is, of course, frequently quite different from the date when it is finally executed with all the agreed revisions.²⁶ Such records will also

²³ As should be obvious from this example, the termination provisions were drafted with a view to protecting the naive seller. The very real possibility of injustice to a naive purchaser was evidently considered unimportant or simply overlooked.

²⁴ See §12 of old Title 17.

²⁵ By securing copyright before the end of 1977, the author and his family also gain an opportunity for reversion under the renewal provisions carried forward from the old Code (see n. 21, *supra*), but the effect on the duration of copyright must also be considered. Subsisting copyrights as of December 31, 1977 will endure for a total of 75 years from the time copyright was secured (§304(a) and (b)), whereas uncopyrighted works will be protected for the life of the author plus 50 years (§303). Depending upon the author's life expectancy, this may be a further reason for securing copyright before the end of 1977 or a countervailing consideration against doing so.

²⁶ Sections 203 and 304(c) both refer to the date on which the grant is "executed by the author" (or, in the case of §304(c), by certain of his heirs) as determinative. "Executed" in this sense would appear to refer to the physical act of signing by the author (*compare with* n. 87, *infra*). Presumably, however, if the grant has been signed by the author prior to January 1, 1978 but is not signed by the purchaser until later (or for some other reason does not become a binding agreement until thereafter), then §203, rather than §304(c), would apply.

be important for all grants made on or after January 1, 1978, in computing the period for effecting termination.²⁷

2. Who Made the Grant?

Section 203, applicable to grants made on or after January 1, 1978, provides a right of termination only for those grants "executed"²⁸ by the author.²⁹ Grants made by anyone other than the original author—even those made by a deceased author's widow or other

²⁷ See Part B(1), *infra*.

²⁸ See n. 87 and text accompanying notes 50-52, *infra*, for a discussion of the term "executed."

²⁹ The reason given in the Congressional Committee reports for not extending this provision to transfers made by members of the author's family suggests that the draftsmen failed to consider all the situations that might arise. The reports note that "...an author's widow or widower and children are given rights of termination if the author is dead, . . . and any effort by a widow, widower, or child to transfer contingent future interests under a termination would be ineffective." House Report at 140. Plainly, the draftsmen had in mind the situation in which an author has sold all the rights in all of his works prior to his death. In such circumstances, the author's family cannot make a new grant to anyone other than the original grantee until the termination has become effective or even to the original grantee until a termination notice has been served (see Part D(2), *infra*). But the draftsmen do not appear to have considered the need for a "second chance" through termination where an author dies leaving unsold works or works in which only some of the rights have been sold, and the unsophisticated widow, widower or children sell the rights they have inherited for a pittance.

Two other arguments might be advanced for this limitation. First, it avoids the further complications that would arise from including grants made by the author's heirs. Second, a right to terminate grants made by members of the author's family would be of comparatively little benefit since, even if made immediately after his death, the grant would be terminable 35 years after his death and thus only 15 years before expiration of the copyright (assuming that the work in question is created after the effective date of the new Code). Neither argument is particularly compelling. The provisions as they stand are already terribly complex, and a little more complexity surely would not make them too much worse. Even fifteen years worth of royalties in a truly successful work may be quite valuable (and certainly it is better than nothing at all). Moreover, the drafters of §304(c), covering prior grants, did attempt to work out the complexities caused by including grants by persons other than the author, although the reverted rights under that section will be for a minimum of 19 years (i.e., from the end of the 56th to the end of the 75th year after copyright was secured).

devises or heirs—are not subject to termination.³⁰ The Code and the legislative history do not explain whether or how this section is to be applied, in the case of joint works,³¹ if the grant was made by one of the authors and by the family of his deceased co-author³² or by one author and an assignee of his co-author's interest.³³

³⁰ An author in his later years might consider transferring rights to his widow and children before his death. Though any grants they made would not be terminable *per se*, they apparently could, as statutory owners of the author's termination interest, later use §203 to terminate the author's gift to themselves, and thereby also effectively terminate the sublicenses which, as donees of the inter vivos gift, they made to third parties.

³¹ If the various authors' contributions do not constitute a "joint work" under the definition in §101 ("... a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"), then the grant involves several distinct copyrights and should be treated, for purposes of the termination provisions, as if there had been separate grants of each copyright.

³² It would certainly seem unfair and illogical that an author's right of termination should be lost because the grant was made after the death of his co-author(s). On the other hand, termination under §203 may be effected only by a majority of the authors who executed the grant. Thus, if a joint work has been created by two authors and a grant is later made by one author and the heirs of his deceased co-author, permitting the sole surviving author to terminate the grant on his own (either to terminate it entirely or to the extent of his own share) would give him a right to act unilaterally that he would not have enjoyed if the grant had been made while his co-author were still alive (in that event, both authors, or their statutorily designated heirs, would be required to join in the termination). Of course, if there are more than two authors and a majority join both in the original grant and in the later termination, there is no logical reason why the grant should not be terminable. But the limitation of §203 to grants executed "by the author" leaves the author's rights in all of these situations quite unclear.

A co-author of a joint work who wants to be sure to preserve his right of termination in a grant made after his co-author's death should insist upon a separate agreement for the transfer of his own interest in the rights conveyed. Of course, an author who is legally sophisticated enough to ask for a separate agreement in such circumstances and who enjoys a strong enough bargaining position to obtain a separate agreement upon request will probably also obtain reasonably fair terms in the original grant and thus not really need the "second chance" afforded by the termination provisions.

³³ If the second author, who had earlier assigned his rights, can terminate that earlier assignment, then, once that termination becomes effective, it would seem that the two authors should also be able to terminate the transfer made by the first author and the assignee of the second author. But even this point is not clear from the Code's provisions.

Under section 304(c), applicable to prior grants of rights in subsisting copyrights, the right of termination does extend to grants made by certain members of the author's family,³⁴ but not grants made by other assignees. Again, the Code leaves unclear whether and how this provision is to be applied when one grantor is a co-author or surviving member of his family and the other grantor is an unrelated devisee or assignee of his co-author's rights.³⁵

³⁴ More precisely, the right applies to grants executed "by any of the persons designated by the second proviso of subsection (a). . . ." Subsection (a) of section 304 sets forth the duration of copyright in works presently in their first term. It provides for a renewal term of 47 years rather than 28 years, as under the present system, but otherwise adopts all of the definitions of the prior law as to when and how renewal is to be effected (and, of course, all the ambiguities of the prior law—see 2 NIMMER ON COPYRIGHT (1976 ed.) §§114-115). The first proviso of the subsection sets forth the circumstances in which "the proprietor" of the copyright may renew (any posthumous work, periodical, encyclopedic or other composite work, a work made for hire, etc.), and the second proviso sets forth who may renew in all other events (the author, if alive; or if deceased, the widow, widower or children; or, if they are also deceased, the author's executor; or, if there is no will, the author's next of kin).

The vague reference in §304(c) to the persons "designated" by the second proviso creates numerous uncertainties. If the individual making the grant is within one of the classes mentioned in the second proviso, does it make any difference that the grantor owns the rights, not under that proviso, but for other reasons? Suppose, for example, the author lives long enough to renew the copyright but dies soon thereafter and his wife makes a grant as devisee under the author's will, rather than as statutory owner of the renewal term. Or, taking the question one step further, suppose the person making the grant falls within one of the later, alternative classes of those who may renew under the second proviso but there are surviving members of one of the predecessor classes (e.g. the author's widow transfers her contingent interest in the renewal period while the author is still alive, or the author's executor makes a grant while the author's widow and children are living). Are members of such successor classes to be considered persons "designated" by the second proviso? Though the answer is far from clear, it seems more consistent with the remedial purposes of the termination provisions to consider transfers by such persons to be within the scope of §304(c).

³⁵ Logically, if an author is one of the grantors, he should be able to terminate as to his own share, since termination under §304(c) of grants made by joint authors proceeds author-by-author and does not require majority action (see section 3 of this Part A, *infra*). On the other hand, if one of the grantors is a member of the author's family, logic suggests that the grant should not be terminable as to his share, since unanimous action is normally required to terminate transfers by surviving members of the author's family (see text accompanying n. 49, *supra*). But as pointed out above, all such problems seem to have been overlooked and the statutory language gives no indication how they are to be resolved.

The cautious purchaser of rights must be concerned not only with determining whether the seller himself can terminate the grant, but also with determining whether the seller is the sole author of the entire work. If the seller has acquired rights in the work from another or if the seller is the primary author but has incorporated portions of one or more underlying works, then the purchaser must inquire further as to whether rights in those underlying works are subject to termination. If any question remains, the purchaser should seek warranties that the rights in any underlying works are not subject to termination during the term of the agreement.³⁶ The author or other grantor who is asked to make such a warranty should consider whether he can do so with safety³⁷ (even if he cannot give a blanket warranty to that effect, he may be able to warrant that no right of termination will accrue for a number of years). As to *existing* agreements, there will be difficult questions as to how warranties of ownership or authorship are to be applied when rights in underlying works are terminated under 304(c).³⁸

The possibility of termination by the author of an underlying work may also prompt the cautious purchaser to require all authors of underlying works to join in the grant,³⁹ thus assuring that the 35 to

³⁶ An author or another having a right of termination cannot waive the right or otherwise agree that it will not be exercised (§203(a) (5), §304(c) (5)). Therefore, any warranty by the author that he has no right of termination or that the right will not be exercised would clearly be unenforceable. (On the other hand, a factual warranty reasonably relied upon by the purchaser might well be enforceable.) But there does not seem to be any reason why the purchaser may not insist upon warranties that rights in underlying works by another author are not subject to termination (or, if the seller is not the author, even insist upon warranties that rights in the entire work are not subject to termination).

³⁷ The "derivative works" exception will have an important effect on whether such a warranty can be given and the extent of damages flowing from its breach. *See* Part C(1), *infra*.

³⁸ It is doubtful that a simple warranty of ownership is breached when the seller does, in fact, own all of the necessary rights at the time of the grant, but some or all of them may be subject to a statutory right of termination at a future date by an author over whom the seller has no control. However, a warranty of sole authorship may well be breached in such a situation (if "sole" author is really intended to mean sole author of each and every part of the work). Naturally, a great deal will depend upon the exact language of the warranty and the surrounding circumstances. Generally, where the existing contractual language is unclear, it should be presumed that the parties did not intend to include a warranty against such statutory innovations as the termination provisions.

³⁹ That joinder may have to be effected by reconfirming the grant to the original grantee. *See* Part D(2), *infra*.

40 year period will begin running anew. Or, by insisting upon broad warranties, the purchaser may force the seller to renegotiate his agreement with those authors. If so, the authors of the underlying works may profit from the termination provisions long before their original grants could normally be terminated.

3. *Is There Anyone Who Can Terminate?*

In addition to determining who made the original grant, one must consider whether there are any survivors within the class of persons who can terminate.

Under section 203 the author owns the termination interest if he survives and, if not, it is owned in specified proportions by the author's surviving spouse, children and grandchildren.⁴⁰ If, at the time of termination, the author has died and is survived only by parents, siblings, or great-grandchildren, or by more remote relatives, then the grant cannot be terminated.

The same rules apply under section 304(c) to grants made by the author—that is, the author may terminate the grant if he survives and, if not, it may be terminated only by his widow, children and grandchildren.⁴¹ However, as noted above, section 304(c) also covers situations in which the grant was made by certain of the author's heirs. In that event, termination may be effected only by the surviving person or persons who executed it. It makes no difference that a majority of the grantors have died;⁴² the grant can still be terminated if one of the grantors survives. On the other hand, if all the particular persons who made the grant have died, the grant cannot be terminated, even though their closest relatives may survive (e.g., if the grant was made by the author's sole surviving child, who has since died, the grant cannot be terminated by the author's grandchildren).

Moreover, even if there are persons who theoretically could terminate the grant and some of them do want to terminate the grant, the rules requiring majority or unanimous action may, as a practical matter, prevent termination. In the case of a grant by an author who has since died, his termination interest under either §203 or §304(c) may be exercised only by those owning more than one half of that interest.⁴³

⁴⁰ §203(a) (1) and (2).

⁴¹ §304(c) (1) and (2).

⁴² But their death will affect the ownership of rights after termination, since the rights then belong to those entitled to terminate the grant. *See* page 65, *infra*.

⁴³ §203(a) (1); §304(c) (1). The rule requiring majority action by members of an author's family and among joint authors (*see* n. 44, *infra*) is a com-

Under section 203, there is a further complication in the case of a grant in a joint work executed by two or more authors. In that event, termination may be effected only by a majority of the authors who executed the grant (and if any of the authors is dead, his interest can be exercised only as a unit by those who own more than one half of his interest).⁴⁴ If, for example, two authors made a grant and both died, each leaving a widow and one child, there could be no termination unless all four survivors joined in doing so.⁴⁵

Worse yet, if one of the authors left no surviving spouse or issue, there would be no one able to exercise his termination interest and, consequently, no way to obtain the majority necessary to terminate the grant.⁴⁶ This majority rule also raises the possibility that purchasers of rights for resale may try to structure the contractual arrangements so as to make the work appear to be a joint work and the middlemen

promise arising from "... a recognition of the dangers of one or more beneficiaries being induced to 'hold out' and of unknown children or grandchildren being discovered later." House Report at 125. Under both sections, the widow or widower owns the entire interest if there are no surviving children or grandchildren and one-half if there are surviving children or grandchildren. Similarly, the surviving children of the author and the surviving children of any dead child of the author own the entire termination interest if there is no surviving widow or widower, and if there is, they own one half of the termination interest. The interests of the author's children and grandchildren are divided and exercised on a *per stirpes* basis according to the number of author's children represented and the share of the children of a dead child can be exercised only by the action of a majority of these children. §203(a) (2); §304(c) (2).

⁴⁴ §203(a) (1). It will be noted that the Code at some points uses the phrase "more than one-half" and, at other points in the same section, uses the term "majority". No difference in meaning appears to have been intended. The Congressional reports make perfectly plain (if there could be any doubt) that "majority" means *more* than one half. See House Report at 126.

⁴⁵ Each deceased author's interest can be exercised only by those owning *more* than half of his interest, and his widow and child each own exactly one half of his interest. A majority of the authors must join and, in the case of only two authors, neither author alone would constitute a majority.

⁴⁶ Consider also the situation where a grant is made by two joint authors shortly after January 1, 1978, with respect to a work copyrighted before that date and still in its initial copyright term. If one of the authors dies before renewal, his interest in the rights granted will revert to the members of his family upon the expiration of the initial term, twenty-eight years after copyright was first secured, yet their consent will be required under §203 to terminate the grant 35 to 40 years after it was made, at a time when its termination is likely to be a matter of complete indifference to them, though it may be vitally important to the author who survives (or who at least survived until the time for renewal). The draftsmen recognized this problem in the case of §304(c), but not §203 (see n. 49, *infra*).

appear to be co-authors and co-grantors, and thus entitled to veto any attempted termination.⁴⁷ Authors should beware of any such arrangements.

Under section 304(c)(1), by contrast, if a grant has been executed by more than one author, then each author (or a majority of those owning his termination interest) may terminate the grant "to the extent of [the] particular author's share."⁴⁸ On the other hand, in the case of a grant made by persons other than the author, *all* of the sur-

⁴⁷ Whatever the contracts may say, the author should be free to try to establish that the work was not a "joint work" because he did not intend that his contribution be "merged into inseparable or interdependent parts of a unitary whole" (§101). (As pointed out in n. 31 *supra*, if the work is not a joint work, then the grant should be treated as separate grants of each author's contribution.) Of course, it will frequently be difficult for the author to establish years after the event that the contracts did not properly reflect his intent and even more difficult for his heirs to do so after his death. For that reason among others, the application of the joint work doctrine has been among the most troublesome under the old Code and will continue to be troublesome under the new Code.

⁴⁸ The Code does not clarify the relationships among the parties where one author terminates under §304(c) and the other does not. The most logical conclusion is that the grantee and the terminating author are tenants-in-common, under an obligation to account to each other for any profits. But that conclusion is not without its difficulties. What if, as is likely, the original grant provided a single continuing royalty for all of the rights conveyed? Must the grantee share his profits with the terminating author as well as continue to pay a full royalty to the non-terminating author? (If so, that certainly seems unfair.) Or is he, perhaps, entitled to make his own judgment as to their respective contributions and scale down the royalty accordingly? (One suspects he should not be permitted to do so.) Or, finally, do these difficulties suggest that, unless the license itself sets forth separate grants of each author's individual interest (or at least separate compensation to each), the grantee and the terminating owner should not be treated as tenants-in-common? Perhaps, it would be better if the grantee's only obligation were to continue the royalty payments under the original agreement and either (a) the non-terminating author would then account to the terminating author for a share of those royalties and the latter account to the former for a share of the terminating author's profits from new grants or (b) the non-terminating author would retain all of the royalties and the terminating author retain all of his profits. But if one were to conclude that, when there is a royalty, the grantee's only obligation is to continue paying that royalty, is there any reason why he should be treated differently if he paid a lump sum, instead of a continuing royalty, for the rights conveyed? Again, one can only hope that such questions will be answered by judicial interpretation at an early date.

viving grantors must join in the termination under section 304(c)(4).⁴⁹ The Code does not explain what rule is to apply when the grant was made by one or more authors and the surviving families of their deceased co-author or co-authors. Probably, in such circumstances, the shares belonging to the authors who joined in the original grant could be terminated author-by-author, and the shares belonging to non-authors could be terminated only if all of the survivors joined in the termination.

In considering all the references in sections 203 and 304(c) to the termination rights of those who "executed" the grant, there is a question whether one should count merely those who actually signed the instrument or the entire class of persons who owned the rights conveyed. In certain contexts, an insistence on literal application of the term "executed" would lead to absurd results. "Executed" as used in

⁴⁹ The reason given for deviating from majority rule in the case of joint authors was as follows:

"Under section 304, a grant of renewal rights executed by joint authors during the first term of copyright would be effective only as to those who were living at the time of renewal; where any of them are dead, their statutory beneficiaries are entitled to claim the renewal independently as a new estate. It would therefore be inappropriate to impose a requirement of majority action with respect to transfers executed by two or more joint authors." House Report at 141.

The rule is both too broad and too narrow for the rationale: too broad in that the rule applies even if the authors are still alive and too narrow in that the rule does not apply to grants made after January 1, 1978 with respect to works copyrighted before that date and still in their initial term (such grants are terminable under §203, which requires majority action—see n. 44, *supra*).

The reason for deviating from majority rule in the case of grants by non-authors is as follows:

"There is much less reason, as a matter of policy, to apply this principle [of majority rule] in the case of transfers and licenses of renewal rights executed under the present law by the author's widow, widower, children, executors, or next of kin, and the practical arguments against doing so are conclusive. It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law, and greater difficulties would be presented if any attempt were made to apply the majority principle to further beneficiaries in cases where one or more of the renewal beneficiaries are dead. Therefore, where the grant was executed by a person or persons other than the author, termination can be effected only by the unanimous action of the survivors of those who executed it." House Report at 141.

But this focus on the rights of surviving grantors may unfairly cut off the rights of the families of non-surviving grants. See p. 30, *supra*.

this context at least strongly suggests the signing of a written document,⁵⁰ yet plainly it cannot have been intended that oral licenses⁵¹ should be outside the scope of the termination provisions merely because they are not "executed." Similarly, if the document is written, but signed by one author as the designated agent of the others (or by a third party as agent for them all), one would certainly look to the identity of the principals, rather than those who signed the document, in determining who should be considered to have "executed" the grant for purposes of the termination provisions.

On the other hand, the situation of one author acting as agent for all the co-authors of a joint work must be distinguished from a transfer by one author of all or part of his own interest in the copyright. In that case, the rights being conveyed belong entirely to the individual author and there would be no possible reason to consider his co-authors as parties to the grant.

Unfortunately, this theoretical distinction may not always be clear in practice, particularly in the case of non-exclusive licenses. A co-author may grant non-exclusive rights as agent for all the authors and under a duty to account to them as agent, or he may grant such non-exclusive rights as one of the tenants-in-common and under a duty to account to them for his profits as co-owner.⁵² The practical result may be the same during the term of the license, but the termination provisions should be applied differently in the two situations. Where the author acts as agent, the grant is being made by all the authors and all should be considered to have "executed" it, even if only one of them

⁵⁰ *Cf.* *NLRB v. Waterfront Employers of Washington*, 211 F.2d 946, 956 (9th Cir. 1956) (oral agreement reached November 25, 1948 and became effective December 6, 1948, but it was "initialed and thereby 'executed'" on December 17, 1948).

⁵¹ An oral license is only valid for the transfer of non-exclusive rights. See n. 55, *infra*.

⁵² The new Code states that "The authors of a joint work are coowners of copyright in the work." §201(a). But it does not attempt to define either the respective rights and duties of joint authors or of any other parties who, by reason of the author's death or otherwise, are co-owners of the copyright. The Congressional reports make clear that this omission was intentional and that prior court-made law, treating co-owners as tenants-in-common, is to be applied.

There is, and need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, co-owners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use of [r] license the use of a work, subject to a duty of accounting to the other coowners for any profits" (House Report at 121).

(or a third party acting for them) signed the written grant (or made the oral grant). Where the author acts as a single co-tenant, the grant is being made by him alone and only he should be considered to have "executed" it (even though he is under an obligation to account to his co-authors for their proper shares of the proceeds).

In deciding whether to join in terminating a grant, each individual will need to consider both whether the total amount to be received under a new grant will exceed the amount presently being received *and* how his proportionate share in the amount received will be affected. For example, if the author has left his copyrights and his rights under existing agreements entirely to his children (either because he wishes to minimize his widow's share of his estate or because other property has been left to her), then those children may pause to consider whether their 50% interest under a new agreement will be worth more than their 100% interest under the old agreement. As another example, suppose the author's three children joined in a grant made before January 1, 1978 (there being no surviving widow), but only one remains alive at the time of termination (the share of royalties originally paid to the other two children now being paid to those children's heirs). The surviving child, if he considers only his own interest, will almost certainly want to terminate the grant pursuant to §304(c), even if he then must accept a less advantageous agreement. As the sole surviving grantor, he will own the entire termination interest, to the exclusion of his deceased siblings' families. (Under §304(c)(1), as noted above, a grant executed by a person or persons other than the author may be terminated by the surviving persons who executed it and, under §304(c)(6), the terminated rights belong to those entitled to terminate the grant.)

Thus, the survivors will frequently need to make complex computations and will face an almost endless number of possibilities for bargaining among themselves in determining whether or not to exercise the right of termination.⁵³

4. *Was the Work "Made for Hire?"*

The only class of works excluded from sections 203 and 304(c) are "works made for hire". The definition of that term in section 101

⁵³ As discussed in Part C(2), in some circumstances the persons owning the termination interest will be entirely different from the persons to whom the author has left his copyright and contractual rights under existing agreements. In such circumstances, exercise of the termination right will effect an even more dramatic redistribution of the profits from the author's works.

of the new Code encompasses two quite different situations.

First, it includes all works "prepared by an employee within the scope of his or her employment." Presumably, the determination of whether an author is an employee would be made, as under current law, by looking for the various indicia of an employment relationship.⁵⁴ The new Code does not require that the employment relationship be set forth in writing, even though the existence of that relationship causes ownership of the entire copyright to vest in the employer. (By contrast, if a non-employee author creates a work, any license of exclusive rights must be in writing and signed by the author.)⁵⁵ It should be equally true that the existence of a written employment agreement will not bind the author if he can show that an employment relationship did not in fact exist. However, when the question of termination finally arises years after the contract, it may be difficult (or nearly impossible, if the author has died) to establish the facts necessary to overcome the presumptive accuracy of the written agreement.

Second, the new Code adopts, but subject to severe limitations, the doctrine developed under prior law that "commissioned" works are to be treated in the same manner as those prepared by full-time employees.⁵⁶ Under the new Code, commissioned works are to be treated as works made for hire only if (a) they are specially ordered or commissioned for certain quite limited uses set forth in the Code and (b) the parties expressly agree in writing that the work shall be considered a work made for hire.⁵⁷

⁵⁴ See 1 NIMMER ON COPYRIGHT (1976 ed.) §62.2

⁵⁵ Under §204(a) of the new Code, a "transfer of copyright ownership" must be in writing and signed by the owner, and that term is defined in §101 to include all grants of exclusive licenses.

⁵⁶ 1 NIMMER ON COPYRIGHT (1976 ed.) §63.

⁵⁷ A "work made for hire" is defined in section 101 to include "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a 'supplementary work' is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an 'instructional text' is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities."

This exemption of works made for hire from the termination provision is consistent with the Code's overall scheme of copyright ownership, under which the employer or commissioning party is considered its author and therefore the initial owner of the copyright.⁵⁸ If, however, the termination provisions significantly increase the complications and burdens involved in acquiring rights, this exemption may have the unfortunate, and certainly unintended, result of causing producers of such works as motion pictures to turn to even greater use of material produced by employees or by specially commissioned authors, instead of using previous works of independent authors. There is also a risk that a purchaser intent on evading the termination provisions will attempt to convert a previously independent author into an "employee for hire", either by hiring the author directly or by persuading the author to set up his own production company, which would then hire the author⁵⁹ and license rights in the resulting work to the purchaser.

5. *Was the Transfer Either "By Will" or Involuntary?*

The only form of transfer specifically exempted from sections 203 and 304 are transfers made "by will".⁶⁰ An agreement to make a will is not binding, however.⁶¹

It is somewhat unclear how the Code provisions should be applied to involuntary transfers, either at death (i.e., in the event of intestacy) or during life (i.e., attachment by creditors, sale by a trustee in bankruptcy, etc.). At first glance, the answer seems simple enough: all involuntary transfers are exempt because they are not "executed" by the author (or, in the case of §304(c), by his family members).

On the other hand, as noted above,⁶² it is a mistake to place too much weight on the literal meaning of the term "executed", without considering the policies behind the termination provisions. When considered in light of those policies, the result should depend upon whether the involuntary transfer is by intestacy or through an *inter vivos* seizure by creditors. There is no reason whatever to allow termination of the transfer effected by intestacy (and certainly no greater

⁵⁸ §201(c). Although the employer is in this sense the work's author, the employer could not terminate his later transfer of rights to others, since the entire class of "works made for hire," not just the employment agreement itself, is excluded from the scope of the termination provisions.

⁵⁹ *But cf.* Donaldson Publishing Co. v. Bregman, Vocco & Conn. Inc., 375 F.2d 639 (2d Cir. 1967).

⁶⁰ §203(a); §304(c).

⁶¹ §203(a) (5); §304(c) (5).

⁶² See text accompanying notes 50-52, *supra*.

reason than in the case of transfers "by will", which are specifically exempted). On the other hand, if an impoverished author, instead of selling his copyright for a pittance, goes into debt and his copyrights are eventually attached by his creditors⁶³ and sold by them for a pittance, the author is as much in need of a "second chance" to profit from his work as if he had sold the rights himself.⁶⁴

But one must also recognize that the termination provisions simply do not cover all situations which the policies behind the provisions suggest they should. Although it might be better if the termination provisions did cover involuntary transfers during the author's life, it does not appear to lead to any absurd results or undermine the normal functioning of the provisions to exempt all involuntary transfers.⁶⁵ Therefore, although the correct answer is by no means clear, it may be best to follow the literal meaning of the term "executed" in this context and exempt all involuntary transfers, in the absence of a really compelling reason to do otherwise.⁶⁶

6. *What Rights Were Conveyed?*

The termination provisions cover all transfers or licenses of copyright or of any right under a copyright. Every license, from a grant of exclusive rights in the complete works of a major author to a \$50 non-exclusive permission for a 100-word quotation, are covered

⁶³ Section 201(e) prohibits certain forms of government expropriation of copyrights, but it has no application to "[t]raditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures. . . ." House Report at 124.

⁶⁴ One of the reasons given for specifying the owners of the termination interest in the statute, rather than letting the author convey that interest by will, was the avoidance of creditor's claims against the author's estate. (The other reason was certainty of devolution.) United States Copyright Office, Copyright Law Revision Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law—1965 Revision Bill 73 (House Comm. Print, printed for the use of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 1965).

⁶⁵ It is also arguable that the fact that the draftsmen exempted transfers by will, but did not bother to exempt transfers effected by intestacy, indicates that the draftsmen believed that they had already exempted all involuntary transfers, by their use of the term "executed."

⁶⁶ But it will be necessary to beware of any scheme by which a potential purchaser is able to put himself in a position where he can later bring about an involuntary transfer of the author's copyrights to the purchaser (e.g., by giving the author an advance that is labelled a loan and for which the copyright is pledged as security). In such circumstances, the potential future transfer should be treated as if it were part of the original agreement "executed" by the author and therefore terminable under §203 or §304(c).

by these provisions. (In the latter case, however, the effect of termination will be quite different than in the former, since "derivative works" incorporating elements of prior works may continue to be "utilized" after termination of the grant.)⁶⁷

However, the termination provisions affect only rights arising under United States copyright. Any rights transferred by the author which arise under other federal or state law, and any rights under foreign copyright law are not terminable.⁶⁸ The specific exemption of transfers of foreign copyright eliminates the choice-of-law problems which would otherwise arise with respect to the application of the termination provisions to contracts made in the United States involving foreign copyright.⁶⁹

Though the termination provisions affect only rights arising under the United States copyright law and not those rights arising under other Federal or State laws,⁷⁰ obviously those provisions are not to be avoided by using different words to accomplish the same purpose. A covenant not to sue is simply a non-exclusive grant under another name. An agreement not to compete may be the functional equivalent of an exclusive grant.

It is unclear, however, whether these provisions are to be applied to the vast variety of agreements that relate to copyrighted works but are not normally considered to be licensing agreements.

Probably the most important single question is whether an author's agreement to pay a share of the proceeds from one or more forms of exploitation of his work is subject to termination under sections 203 and 304(c). Frequently such provisions are included as part of an agreement that clearly includes a transfer of part of the copyright. (An author, for example, normally agrees to share with his book publisher the revenues from certain non-book rights and even non-publishing rights. Sometimes title to such "subsidiary" rights is

⁶⁷ See Part C(1), *infra*.

⁶⁸ §203(b) (5); §304(c) (6) (E).

⁶⁹ Such problems have frequently arisen under similar provisions of foreign copyright laws. 2 NIMMER ON COPYRIGHT (1976 ed.) §120.42. This limitation does not, of course, eliminate a possible choice-of-law question where a grant includes rights under a United States copyright, but all of the other contacts are in a foreign country. However, in view of the important public policy reflected in the termination provisions and the fact that they provide the author an absolute statutory right which he cannot waive, it seems inconceivable that any court (certainly any United States court, where the question is most likely to arise) would give effect to a grant of United States copyright after the effective date of a termination notice, even when all the other contacts are in a foreign country.

⁷⁰ §203(b) (5); §304(c)(6) (E).

formally transferred to the publisher, but in other cases the author retains title to the rights and simply agrees to account to the publisher for a share of the revenues.) In other cases, the author may agree to pay a share of revenues to a party to whom there has been no transfer of title in any portion of the copyright. (For example, an author normally compensates his agent or manager by paying a share of his revenues, rather than a flat sum.)

The critical language of §203 is that "... the exclusive or non-exclusive grant of a transfer or license of copyright or of any right under a copyright... is subject to termination..." The language of §304(c) is essentially the same.⁷¹ Since an agreement to share in revenues does not seem to involve the "transfer" or "license" of any part of the "copyright" itself, the question is whether that right to share revenues falls within the broader phrase of "any right under a copyright."

It may be argued that the latter phrase is simply intended to make clear that the termination provisions cover transfers of less than the entire copyright. Under this narrow construction, the termination provisions would cover only transfers of the right to *use* the work in one or more of the ways protected by copyright (section 106 of the new Code defines five such exclusive rights belonging to the copyright owner).⁷² On the other hand, it may be argued that there is a purposeful distinction between the phrase "rights *comprised* in a copyright", used in some of the Code's provisions,⁷³ and the phrase "rights *under* a copyright" used in the termination provisions⁷⁴ (the argument would be that the former is used when the Code refers to actual title to a part of the copyright and the latter is used when the

⁷¹ Section 304(c) provides that "... the exclusive or non-exclusive grant of a transfer or license of the renewal copyright or any right under it... is subject to termination..."

⁷² Arguably, the statement in each termination provision that termination affects only rights arising "under this title" (§203(b) (5), 304(c) (6) (E)) suggests this conclusion even more strongly than the phrase "under a copyright." But at least the primary purpose of the phrase "under this title" is, as the words that follow make clear, to establish that termination "... in no way affects rights under any other Federal, State, or foreign laws."

⁷³ See, e.g., the definitions of "copyright owner" and "transfer of copyright ownership" in §101 and the provisions on works made for hire in §201(b).

⁷⁴ The same phrase appears in §201(c), on the presumed scope of the rights acquired by the owner of copyright in a collective work.

Code intends to encompass a broader category of rights flowing from copyright ownership).⁷⁵

Such careful parsing of the Code's language probably does not advance one significantly toward a proper interpretation of the termination provisions. They simply were not drafted with the greatest precision, and there is no evidence that any thought was given to whether or how they should be applied to agreements to share revenues (or any other agreements not directly affecting title to the copyright).

But a construction that exempted agreements to share in revenues from exploitation of the work would vitiate the protection of the termination provisions. Every transferee of rights would then insist upon the grant of a share (a very large share) of the proceeds derived from exploitation of the work⁷⁶ and, although the author and his family might regain formal title to the copyright in his works, they would not regain the right to enjoy the full monetary reward from the exploitation of those works. If the termination provisions are to protect authors and their families properly, the right to receive a share of the proceeds from exploitation of a copyright (or to receive compensation that is calculated upon the amount of those proceeds) must be considered a "right under copyright" for purposes of the termination provisions.

This question is only the most important of a host of questions that will arise when the time comes to determine whether⁷⁷ and how⁷⁸

⁷⁵ On the other hand, the phrase "*exclusive* rights under a copyright" is used in sections 201(c), 202 and 205(d) in a manner that, from the context, suggests that the phrase is being used to mean title to one or more of the rights protected by copyright.

⁷⁶ The grant of a share of revenues could be set forth in a document separate from the transfer of title to all or part of the copyright, if that were thought to make any difference (though there is no logical reason why it should).

⁷⁷ For example, do these provisions apply to agreements between or among authors as to division of royalties, control over licensing, etc.? If such an agreement involves distinct and separately copyrightable works of two authors (e.g. an agreement between a novelist and a dramatist concerning the latter's play based upon the former's novel), the agreement plainly should be terminable like any other license (subject to the licensee's rights under the derivative works exception, discussed in Part C(1), *infra*). But the situation is less clear in the case of a "joint work". The fact that the contracting parties are creators of a joint work is, of course, no assurance of fair dealing. The junior member of such a joint effort may be treated just as unfairly by his senior collaborator(s) in allocating the profits from their work

as he would be by a publisher or other licensee. On the other hand, joint authors' contributions are by no means always equal and, if agreements between or among them were terminable, either could then grant non-exclusive licenses or exploit the work himself, and it would ultimately fall to the courts, on subsequent accountings, to decide extremely difficult questions as to the comparative value of their contributions. Moreover, the rule requiring majority action under §203 to terminate a grant "executed by two or more authors of a joint work" would obviously render the termination right entirely useless in the case of agreements made after January 1, 1978 between two authors of a joint work. (If one author obtained an unfair advantage, he would simply refuse to join in the termination.) Finally, it is perhaps stretching the phrase "transfer of . . . any right under a copyright" just a little too far to apply it to an agreement between two authors who are by statute (§201(a)) the co-owners of the single copyright protecting their joint work. For all these reasons, it seems best to conclude that agreements between or among authors of a joint work are not subject to termination.

- ⁷⁸ If, for example, the termination provisions do apply to author-agent agreements under which the agent's compensation is based upon the earnings derived from licensing the author's works, is the time for termination to be measured from the date of the agency agreement or from the date of each individual sale arranged by the agent? Obviously, the agent's share of the proceeds from a particular sale of the author's work would cease if the sale itself is later terminated. But what if the agency agreement were executed many years before the individual sales?

If, as argued above, the agreement giving the agent a share of the proceeds is itself the "transfer of . . . [a] right under a copyright," then the agent's agreement and his share of all sales made pursuant to that agreement could be terminated on a date computed from the date of the agency agreement. This would mean, for example, that an agent's commission under an agency agreement made before the end of 1977 would be terminable as follows: (a) with respect to works copyrighted before the end of 1977, the agency agreement could be terminated 56 years after the copyright was first secured (as to any sales negotiated before the end of 1977, this would mean that the agency agreement and the individual sales could be terminated under §304(c) at exactly the same time; as to any sales negotiated by the agent after the end of 1977, the date upon which the agency agreement could be terminated under §304(c) might be before or after the date upon which the individual sales could be terminated under §203) and (b) with respect to works not copyrighted by the end of 1977, an agency agreement made before December 31, 1977 could not be terminated at all.

Of course, the individual sales agreements negotiated by the agent and signed by the author frequently contain a clause confirming the agent's commission and it might be argued that, where such clauses are included, the agent's interest must be computed from the date of each particular sales agreement. However, such clauses would appear to be agreements to make a further grant of the agent's rights under the existing agency agreement and therefore void unless the author and agent first terminated their existing agreement. *See* Part D(2) *infra*.

the termination provisions are to be applied to the multifarious agreements that relate to copyrighted works and their exploitation. Unless and until those questions are clarified, there will be considerable confusion in store for author and grantee alike.

B: THE PROCEDURAL REQUIREMENTS FOR EFFECTING TERMINATION

Having ascertained that a grant is terminable, the next step is to decide what action must be taken to effect that termination. Under both sections 203 and 304(c), termination is effected by serving a written notice upon the grantee and then filing a copy with the Copyright Office.

1. When Can the Notice Be Served?

Careful attention must be paid to the timing requirements. The termination provisions of the new Code do allow the author and his family a much longer period within which to act than the one-year period for renewal under the old Code.⁷⁹ But the author must still keep track of the passage of time—action taken too early or too late will be ineffective—and the computation under §203 will be considerably more difficult than under the current renewal provisions.

Under both termination provisions of the new Code, the notice is to be served not less than two and not more than ten years prior to the effective termination date set forth in the notice.⁸⁰ Thus, in order to determine when to serve the notice, one must first determine the period within which termination may be effected.

⁷⁹ Under §24 of the old Code and under §304(a) of the new Code (pertaining to copyrights subsisting in their first term on January 1, 1978), copyright must be renewed within one year prior to expiration of the original term.

The old Code provides that the first term of copyright endures for 28 years from the date of publication (§24), thus suggesting that perpetual statutory protection might be obtained for those classes of works that can be registered without publication (§12) and which are in fact never published. The possible Constitutional problems raised by such an interpretation led the court in *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938), to construe the duration provision to mean that the first term would endure until twenty-eight years after deposit in the case of works deposited prior to publication. This interpretation was evidently adopted by the draftsmen of the new Code, which provides in §304(a) that the first term of subsisting copyrights shall endure for 28 years from the time copyright was "secured".

⁸⁰ §203 (a) (4) (A); §304(c) (4) (A).

Computing the effective date under section 304(c), governing the termination of prior grants in subsisting copyrights, is relatively straightforward:⁸¹

“Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.”⁸²

Because Congress, during its work on the new Code, repeatedly extended the terms of copyrights that would otherwise have expired on or after September 19, 1962,⁸³ the period from now until the end of 1980⁸⁴ will be an especially busy period for the service of termination notices under section 304(c).

The duration provision under section 203, covering grants made on or after January 1, 1978, is almost as brief, but the computation is more difficult:

“Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.”⁸⁵

The first step under section 203 obviously is to determine the precise date of execution, which may be difficult thirty-five years after the event. Determining the execution date even approximately may be difficult in the case of an undated written agreement or an oral agreement (the latter, under the new Code, would be valid only as to

⁸¹ But see n. 96, *infra*, on the confusion over the precise day upon which a term of years “expires.”

⁸² §304(c) (3). The provision that copyrights are extended until the end of the calendar year in which they would otherwise expire (§305) does not in any way affect termination dates. House Report at 142.

⁸³ P.L. 87-668, P.L. 89-142, P.L. 90-141, P.L. 90-416, P.L. 91-147, P.L. 91-555, P.L. 92-170, P.L. 92-566, P.L. 93-573.

⁸⁴ The effective date for termination of grants of such copyrights will run until January 1, 1983, but the notice must be served two years in advance, or by January 1, 1981.

⁸⁵ §203(a) (3).

non-exclusive licenses).⁸⁶ But, as noted above, even where there is a dated written agreement, the date upon which the agreement is revised by the parties is finally signed and delivered⁸⁷ may be weeks or months after the date mentioned in the agreement.

Next, one must determine if the grant "covers the right of publication of the work." Several very difficult questions inhere in this seemingly simple phrase. "Publication" is defined so broadly in the Code that it would appear to cover *all* forms of exploitation that involve the distribution of copies.⁸⁸ Professor Nimmer has suggested that "publication" as used in §203 was intended to be limited to book, periodical and other forms of conventional printed matter.⁸⁹ But if the vague indications of legislative intent suggest this conclusion at all,⁹⁰ they seem by no means persuasive enough to overcome an

⁸⁶ A "transfer of copyright ownership", which is defined to include any transfer of exclusive rights (§101), is valid only if effected by operation of law or by a signed writing (§204(a)).

⁸⁷ Presumably, the phrase "date of execution" is used in this section in its usual legal sense to refer to the date upon which a written agreement becomes fully binding (which may require delivery, as well as signing), rather than the date upon which one party or another signed the agreement. In the case of a purely oral agreement, no "execution" is involved and the time period presumably would be computed from the date upon which agreement was reached orally.

⁸⁸ "'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication." §101.

⁸⁹ Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 975 n. 154 (1977).

⁹⁰ Nimmer mentions in support of this argument "the rationale" for the extended period and "the fact that book publishers were among those responsible for it."

But the Committee reports simply state that "This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work." House Report at 126. Though the phrase "publication contract" may, to some people, suggest conventional print publication, it also may merely mean a contract for "publication" as defined in the statute. Certainly, the reason for this extension—allowing a few extra years where the work has not been completed at the time of the contract or for some other reason is not published until several years after the contract—is not limited to situations involving conventional print publication. (Of course, for that matter, the rationale is not limited to situations involving "publication" even in the broader sense defined in the Code. A theatrical producer who contracts in advance for performance rights in a musical comedy that takes several

explicit definition of the term "publication" in the Code itself.

On the other hand, this extended period does not extend to all grants of publication rights, only to publication "of the work." This would appear to mean that if the grantee prepares and publishes a derivative work, the extended period does not apply (since what he is then publishing is no longer "the work").⁹¹

But even after one has decided what type of uses involve "publication of the work," a serious problem remains. Almost every significant grant will to some degree cover the right to publish the work (particularly in view of the broad definition in the new Code, but even if the term were limited for purposes of §203 to conventional print publication). On the other hand, almost every publishing agreement carries with it certain non-publication rights.

The Code does not make clear whether, when a grant includes both publication and non-publication rights, the entire grant is governed by the rule applicable to publication agreements or whether the agreement is to be treated, in effect, as two separate grants. It

years to write is in principle just as much entitled to a postponement of termination as the publisher who waits several years for a book to be written.)

The fact, also mentioned by Nimmer, that book publishers were "among" those responsible for this extended term is an even less compelling reason to deviate from the statutory definition. Many aspects of the termination provisions were influenced by the concerns of one interest group or another. But the resulting statute is cast in general terms and one certainly would not expect the benefits of its various provisions to be limited to the particular parties whose concerns about their own interests led them to object to certain aspects of the early drafts of the termination provisions. (For example, the derivative works exception, discussed in Part C(2) below, resulted from the concerns expressed by motion picture producers and, to a lesser extent, by publishers of such composite works as dictionaries and encyclopedias. But surely no one would argue that the benefits of the provisions as finally drafted are to be limited to those two groups.)

⁹¹ The grantee who prepares a derivative work is protected by another part of the termination provisions, permitting the continued "utilization" of derivative works even after termination of the grant. See Part C(1), *infra*.

On the other hand, the right to publish the author's work in a "compilation" that is not also a "derivative work" (for a discussion of the distinction, see n. 115, *infra*) would be subject to the 40-year provision. In that situation "the work" being published has not been "recast, transformed or adapted" (see the definition of "derivative work" in the text accompanying n. 112, *infra*) and therefore remains "the work," even though placed in a compilation with other works.

might be argued that the former interpretation, treating the agreement as an indivisible whole, is more consistent with the statutory language, which provides for an extended term "if the grant covers the right of publication."⁹² But that interpretation would have the undesirable effect of delaying the accrual of the author's right to terminate even non-publication rights if conveyed in an agreement that includes some publication rights, however trivial.⁹³ Moreover, extending the term of the entire grant in such circumstances would create a real risk that the author, overlooking the trivial grant of publication rights, would serve a premature notice that would be entirely void, even as to the important non-publication rights conveyed.⁹⁴ Since there does not appear to be any important policy that favors treating an agreement as a indivisible whole in such circumstances and since the statutory language does not absolutely compel that result, the better interpreta-

⁹² At least in some contexts in the termination provisions, the term "grant" appears to mean the overall document conveying various rights. For example, it is hard to imagine what else that term could mean in the rather awkward statutory phrase "...the...grant of a transfer or license of copyright..." and the provisions elsewhere refer to the "grant" (not the transfer or the license) being "executed" by the author or his heirs. On the other hand, one suspects that the term "grant", like the term "executed" (*see* text accompanying notes 50-52, *supra*), has not been chosen or used with great precision or with full consideration of its implications in all the contexts in which it has been used.

⁹³ Where publication is a minor aim of the agreement, presumably it will tend to occur later. The odd result would be that agreements which involve primarily publication rights would be terminable earlier (because publication occurs earlier) than agreements which involve primarily non-publication rights.

⁹⁴ Suppose, for example, that an author sold motion picture rights in his novel. Twenty-five years later (i.e. 10 years before the expiration of the 35-year period) he serves a notice of termination to take effect 10 years thereafter. After the period for termination has passed, the motion picture company may point out that the notice was premature and therefore invalid since the agreement included the right to reprint small portions of the original work for publicity purposes.

Of course, the grantee who receives a notice that he believes to be premature might, in certain circumstances, be estopped to deny the notice's effectiveness if he remained silent while the period passed for proper service of the notice. The party serving the notice might seek to strengthen such an argument by including in the notice a warning that all questions as to its accuracy and/or effectiveness should be brought to the sender's attention in written form as soon as possible.

tion is that only the rights of publication included in the grant will be extended.⁹⁵

Computing the date of publication (presumably meaning the date of first publication) under the grant may be even more difficult than determining the date of execution when the question arises years after the event, particularly in view of the broad statutory definition of publication and particularly if publication under the grant at issue was not the first publication of the work. Moreover, the Committee reports are inconsistent as to whether the 35 and 40 year periods expire on the same calendar day (but within the later year) as the day of execution or publication or the day immediately preceding (i.e. whether a grant of non-publication rights made on January 1, 1978 expires on January 1, 2013 or December 31, 2012).⁹⁶

Once the period has been computed within which termination can be effected, the party intending to serve a notice must pick a specific termination date to be set forth in the notice and then serve the notice two to ten years before that chosen date. The careful author (or member of his family) should serve a notice that will be effective under any reasonable interpretation of the Code, even if the execution or publication dates prove to be somewhat different from what he believes them to be. Frequently, such caution may require the ser-

⁹⁵ Strictly speaking, "publication" as defined in the new Code is merely the act of distributing copies and does not include the preparation of such copies. (See, in addition to the definition of publication in §101, the delineation in §106 of the exclusive rights belonging to the copyright owner. The right "to reproduce the copyrighted work in copies or phonorecords" in §106(1) is separate from the right "to distribute copies or phonorecords of the copyrighted work to the public..." in § 106(3).) However, it is highly unlikely that the draftsmen of §203 intended that a publisher's rights during the thirty-sixth through fortieth year should be limited to the distribution of copies on hand. Therefore, although any granted rights to perform or display the work or to prepare derivative works (see subsections 2, 4 and 5 of section (106)) would be terminable after thirty-five years, the right to prepare copies and any other rights reasonably necessary for continued publication would endure until the expiration of the fortieth year.

⁹⁶ The House Report explains at 126:

"Case 1: Contract for theatrical production signed on September 2, 1987. *Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year termination period).* Assuming that *the author decides to terminate on September 1, 2022 (the earliest possible date)* the advance notice must be filed between September 1, 2012 and September 1, 2020." (emphasis added)

Similar problems of whether or not to count the last day arise in computing the 56-year period under §304(c) and in computing the two-to-ten year period before termination within which the notice must be served.

vice of more than one notice. Any author who served a notice as soon as the new Code was enacted⁹⁷ should also serve a second notice (which may have to specify a new termination date) after January 1, 1978, when the new Code becomes fully effective and when the final Copyright Office regulations on the form, content and manner of service, discussed in section 3 below, are taken in effect.⁹⁸

2. *Who Should Be Served?*

Sections 203 and 304(c) both provide simply that service should be made "upon the grantee or the grantee's successor in title."

An initial question is whether the statutory use of the word "or" means that service upon the original grantee is always sufficient or whether, if there is a "successor in interest", that successor *must* be served. The former interpretation, permitting service upon either the original grantee or any successor in interest, seems more consistent with the statutory language. But, if it is the proper interpretation, the only party receiving notice of the termination may no longer have any interest in the rights conveyed (or, indeed, no longer exist) and he is evidently under no obligation, or at least no explicit statutory obligation, to inform those who have succeeded to his rights (though his failure to inform them might be a violation of the express or implied terms of his agreements with them). The notice of termination must eventually be filed with the Copyright Office, but it is obviously an onerous task for each successor to check regularly with the Copyright Office for every work in which he has any rights.

A further complication is that the phrase "successor in title" is not defined, leaving it unclear whether every sublicensee of rights (or at least every sublicensee of exclusive rights) is a "successor" or whether

⁹⁷ This problem may not be too common. As of July 1977, nine months after the new Code was enacted, only five termination notices had been recorded. United States Copyright Office, *Six-Month Status Report of the Revision Coordinating Committee on Implementation of the New Copyright Act of 1976* 9 (July 1977).

⁹⁸ The termination notice must comply in form, content and manner of service with regulations to be prescribed by the Register of Copyrights (§203 (a) (4) (B); §304(c) (4) (B)). As noted in n. 99, *infra*, the final regulations were not published until September 13, 1977 and became effective October 13, 1977. Even if an earlier notice happened to coincide with the form, content and manner of service later prescribed in the regulations, there would be at least some question whether a notice can be said to "comply" with regulations that did not even exist when the notice was served.

There is also a question whether any notice can be effective if it is served before January 1, 1978, when the new Code as a whole takes effect. See NIMMER, n. 89, *supra*, at 979-980.

that term covers only an assignee of all the rights under the original grant. The Code's use of the singular "successor in title" rather than the plural "successors in title" suggests that the latter was intended. (This means that the terminating party need not inform any sublicensees of the termination, even if the phrase "the grantee or the grantee's successor in title" were interpreted to require service upon the grantee's "successor." On the other hand, requiring service on all sublicensees would frequently involve a tremendous burden, both because of their number and the difficulty of tracking them down.) However, a sublicensee who receives an otherwise valid termination notice should certainly not be permitted to object to the termination of *his* particular rights merely because the notice was not also served on the original grantee.

The final Copyright Office regulations on section 304(c), published as this article was being completed in September of 1977,⁹⁹ offer little help in resolving these questions. These regulations, which are to be section 201.10 of title 37 of the Code of Federal Regulations, do suggest that the "successor in title," if there is one, should be served,¹⁰⁰ but subsection (d)(4) of the regulations carefully notes that "... as long as the statutory requirements have been met, the failure

⁹⁹ The final regulations were published September 13, 1977 and became effective October 13, 1977. The regulations and a very useful discussion of the considerations affecting their final form appear at 42 F.R. 45916-21 (1977). Although the regulations had not become effective at the time this article was being written, references here and in the following discussion will be to the relevant subsections of what will be 37 C.F.R. §201.10, rather than the Federal Register pages.

¹⁰⁰ Subsections (d) (2) and (3) explain the parties to be served:

(2) The service provision of section 304(c) (4) of title 17, U.S.C., will be satisfied if, before the notice of termination is served, a reasonable investigation is made by the person or persons executing the notice as to the current ownership of the rights being terminated, and based on such investigation: (i) If there is no reason to believe that such rights have been transferred by the grantee to a successor in title, the notice is served on the grantee; or (ii) if there is reason to believe that such rights have been transferred by the grantee to a particular successor in title, the notice is served on such successor in title.

(3) For purposes of subparagraph (2) of this paragraph (d), a "reasonable investigation" includes, but is not limited to, a search of the records in the Copyright Office; in the case of a musical composition with respect to which performing rights are licensed by a performing rights society, as defined by section 116(e) (3) of title 17, U.S.C., a "reasonable investigation" also includes a report from that performing rights society identifying the person or persons claiming current ownership of the rights being terminated.

to comply with the regulatory provisions of [the service provisions of the regulations] will not affect the validity of the service." More importantly, the regulations do not even attempt to resolve the more difficult question of whether every sublicensee or only an assignee of all rights is a "successor in title."¹⁰¹ And, it should be noted, the regulations are in some respects more liberal than the Code, so that compliance with the regulations may not be sufficient to satisfy the Code's requirements.¹⁰²

As suggested above, service upon the original grantee may well be sufficient in any event (and, unless that grantee has assigned all his rights, so there clearly is a "successor in title," service should *always* be made upon the original grantee, among others). But until these questions are further clarified by court decisions, the cautious author should make multiple services upon the original grantee, any assignee of his rights, and all the sublicensees he can discover.

The notice provisions leave sublicensees in an extremely perilous position. Unless they are prepared to make regular checks of Copyright Office filings, sublicensees proceed at the risk of finding one day that rights they purchased have been terminated without their knowledge and that they are unexpectedly, and quite innocently, liable for infringement of the author's copyright.¹⁰³ In making future agreements, sublicensees should seek an explicit contractual commitment that they will be informed immediately of any termination notices served.

¹⁰¹ See section 201.10 (d) and the discussion in 42 F.R. 45916-21 (1977).

¹⁰² For example, subsection (d) (2) (ii) states that "... if there is reason to believe that such rights have been transferred by the grantee to a particular successor in title, the notice is served on such successor in title." If the notice is served upon someone whom the party serving the notice reasonably, but incorrectly, believes to be a successor in title, then he has satisfied the regulation, but he certainly does not appear to have satisfied the statutory requirement that he serve "the grantee or the grantee's successor in title." Indeed, it may be questioned whether the Copyright Office's authority to regulate the "manner" of service properly includes any authority to specify which persons can or should be served.

¹⁰³ Ignorance of the termination would not appear to be a defense to an infringement suit for actual damages or profits, though under the new Code the Court may in its discretion reduce an award for "statutory damages" to a sum not less than \$100.00 if an infringer proves that he "... was not aware and had no reason to believe that his or her acts constituted an infringement. ..." §504(c) (2).

3. *What Should be Served and Filed?*

The only requirements in the new Code concerning the form and content of termination notices are that they must be signed by the required number of persons entitled to terminate and that they must state the effective date of termination, but the Code also provides that such notices shall comply in form, content and manner of service with requirements that the Register of Copyrights shall prescribe by regulation.¹⁰⁴ The final Copyright Office regulations prescribe that the notice must be served by first-class mail or by personal service¹⁰⁵ (the regulations do not make clear whether anything less than in-hand delivery to an individual being served can constitute "personal service" and do not prescribe upon what persons "personal" service can be made in the case of a corporation or other entity). The regulations also prescribe in some detail the contents¹⁰⁶ of the notice, including (a) the title and the name of at least one author of the work, (b) a brief statement "reasonably identifying the grant," (c) the effective date of termination, (d) the name of each grantee or his successor in title and each address at which service is being made, and (e) the signature, name and address of the persons terminating the grant and certain additional information where the party(ies) making or terminating the grant is not the author himself. However, the regulations

¹⁰⁴ §203(a) (4); §304 (c) (4).

¹⁰⁵ Subsection (d) (1) of the regulations provides:

(d) *Service.* (1) The notice of termination shall be served upon each grantee whose rights are being terminated, or the grantee's successor in title, by personal service, or by first-class mail sent to an address which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title.

¹⁰⁶ Subsections (b) and (c) provide:

(b) *Contents.* (1) A notice of termination must include a clear identification of each of the following:

(i) The name of each grantee whose rights are being terminated, or the grantee's successor in title, and each address at which service of the notice is being made;

(ii) The title and the name of at least one author of, and the date copyright was originally secured in, each work to which the notice of termination applies; and, if possible and practicable, the original copyright registration number;

(iii) A brief statement reasonably identifying the grant to which the notice of termination applies;

(iv) The effective date of termination; and

(v) In the case of a termination of a grant executed by a person or persons other than the author, a listing of the surviving person or persons who executed the grant. In the case of a termination of a grant executed by one or more of the authors of the work where the termination is exer-

state that "harmless errors" in the notice will not render it invalid.¹⁰⁷ Unfortunately, despite the regulations' complexity (indeed, perhaps

cised by the successors of a deceased author, a listing of the names and relationships to that deceased author of all of the following, together with specific indication of the person or persons executing the notice who constitute more than one-half of that author's termination interest: That author's surviving widow or widower; and all of that author's surviving children; and, where any of that author's children are dead, all of the surviving children of any such deceased child of that author; however, instead of the information required by this subdivision (v), the notice may contain both of the following: (A) A statement of as much of such information as is currently available to the person or persons signing the notice, with a brief explanation of the reasons why full information is or may be lacking; together with (B) a statement that, to the best knowledge and belief of the person or persons signing the notice, the notice has been signed by all persons whose signature is necessary to terminate the grant under section 304(c) of title 17, U.S.C., or by their duly authorized agents.

(2) Clear identification of the information specified by paragraph (b) (1) of this section requires a complete and unambiguous statement of facts in the notice itself, without incorporation by reference of information in other documents or records.

(c) *Signature.* (1) In the case of a termination of a grant executed by a person or persons other than the author, the notice shall be signed by all of the surviving person or persons who executed the grant, or by their duly authorized agents.

(2) In the case of a termination of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or by his or her duly authorized agent. If that author is dead, the notice shall be signed by the number and proportion of the owners of that author's termination interest required under clauses (1) and (2) of section 304(c) of title 17, U.S.C., or by their duly authorized agents, and shall contain a brief statement of their relationship or relationships to that author.

(3) Where a signature is by a duly authorized agent, it shall clearly identify the person or persons on whose behalf the agent is acting.

(4) The handwritten signature of each person effecting the termination shall either be accompanied by a statement of the full name and address of that person, typewritten or printed legibly by hand, or shall clearly correspond to such a statement elsewhere in the notice.

¹⁰⁷ Subsection (e) provides:

(e) *Harmless errors.* (1) Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of section 304(c) of title 17, U.S.C., shall not render the notice invalid.

(2) Without prejudice to the general rule provided by subparagraph (1) of this paragraph (e), errors made in giving the date or registration number referred to in paragraph (b) (1) (ii) of this section, or in complying with the provisions of paragraph (b) (1) (v) of this section, or in describing the precise relationships under clause (2) of paragraph (c) of this section shall not affect the validity of the notice if the errors were made in good faith and without any intention to deceive, mislead, or conceal relevant information.

because of their very complexity), the Copyright Office will not provide a printed form of termination notice.¹⁰⁸

The notice must also be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.¹⁰⁹ (Presumably, if the notice is not recorded by that effective date, it remains open to those owning the termination interest, if sufficient time remains, to serve and file a second notice specifying a new effective termination date within the period permitted by the Code.¹¹⁰) The Copyright Office regulations (subsection (f)(1)(ii)) provide that the copy of the notice submitted for recordation must be accompanied by a statement of the date and manner of service, unless that information is contained in the notice, and make explicit (subsection (f)(1)(i)) that the copy submitted must be a complete and accurate copy, containing actual signatures or copies thereof. Only when a proper copy of the notice (with statement of service) and the required fee are all received at the Copyright Office will the notice be recorded (see subsection (f)(3) of the regulations).

C: THE EFFECT OF TERMINATION

1. *The Derivative Works Exception*

Upon the effective date of termination, as specified in the termination notice, all of the grantee's rights terminate, with one very important exception. "Derivative works" may continue to be "utilized" under the terms of the grant.¹¹¹

¹⁰⁸ See subsection (a) of the regulations.

¹⁰⁹ §203(a) (4) (A); §304(c) (4) (A).

¹¹⁰ However, service of a new notice should not affect the rights of those who have acted in reliance upon the original service. For example, as discussed *infra* at p. 67, the original purchaser may enter into an agreement for a further grant of rights as soon as the notice has been served and without waiting for the effective termination date. That purchaser's new rights should not be affected by the sender's failure to record the notice. (A careful purchaser will, in such circumstances, check with the Copyright Office to make sure that the notice has been recorded and, if not, will record it himself. The Code does not appear to require that it be the sender of the notice who records it.)

¹¹¹ §203(b) (1), §304(c) (6) (A). The Second Circuit has recently applied a similar "derivative works" exception to the reversion that occurs at the time of renewal under the old Code if the author has granted rights in the renewal term to a derivative user but then dies before the time for renewal. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), *cert. denied* 97 S. Ct. 2666 (1977). The court relied in part upon the policy considerations behind the derivative works exception to the termination provisions of the new Code. 551 F.2d at 494.

The Code thus recognizes that a "derivative work" frequently involves significant authorship by the derivative user and that it may be unfair to prohibit all further use of such work after termination or to subject its creator to the possibly exorbitant demands of the owner of an underlying work. Indeed, the derivative work thus lost to the public might be far more important than the underlying work (for example, an opera using the storyline of a long-forgotten novel).

However, the new Code does not try to effect any fine balance according to the importance of the derivative work or the degree to which it is based upon the earlier work (probably an impossible task, in any event). All derivative works may continue to be utilized and the definition of "derivative works" is broad indeed.

"A 'derivative work' is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'."¹¹²

Thus, an arrangement or sound recording of a composer's song, an engraved reproduction of an artist's painting,¹¹³ a translation or annotated version¹¹⁴ of an author's novel, or any other "form in which

¹¹² §101.

¹¹³ The term "art reproduction" is not further defined in the Code. However, it has long been held that engravings and similar versions of art works may be copyrighted as "reproductions of works of art" under the old Code, at least if the reproduction is more than a "merely trivial variation" of the original work. *Alfred Bell & Co. v. Catalda*, 191 F.2d 99, 103 (2d Cir. 1951). Thus, even a quite modest variation may constitute an "art reproduction" under the statutory definition. This is a prime example of the unfortunate results that occur when a single statutory definition is employed for a term used in several very different statutory contexts. A broad definition of "derivative work" may be perfectly acceptable when defining those works which are copyrightable (§§102 and 103), or the exclusive rights of a copyright owner (§106), but a narrower definition, requiring more substantial authorship, would seem more consistent with the purposes of the derivative works exception to the termination provisions.

¹¹⁴ Apparently the change must be substantial enough to constitute "an original work of authorship." The second sentence of the definition concerning "editorial revisions, annotations, elaborations, or other modifications" makes this explicit, but the requirement of originality should probably be read into the rest of the definition as well. (Section 103 states that "The

[the original] work may be recast, transformed or adapted" may continue to be utilized after termination, even though it is in direct competition with the author's exploitation of his original work. (Mere compilations, however, would not normally qualify for the derivative works exception.)¹¹⁵ The extent to which an author benefits from termination will therefore depend upon whether the primary economic value of his work lies in its exploitation in its original form or in the form of derivative works.

It should also be noted that the derivative work may be prepared at any time prior to termination (even, apparently, after the notice of termination has been served) and that it is only necessary to *prepare* the work prior to termination (even though it remains unpublished and unperformed). Thus, the grantee served with a notice of termination will scurry to prepare all the derivative works which he might be able to use in later years. If the grantee himself is not in a position to

subject matter of copyright as specified by section 102 includes compilations and derivative works..." Under section 102, copyright protection subsists in "original works of authorship" fixed in any tangible medium of expression.)

It may be argued that the language of the second sentence of the definition suggests that it is only the revisions or annotations themselves and not the underlying work *with* revisions or annotations which constitute the "derivative work" and which may continue to be utilized after termination. Such an interpretation would, of course, render the derivative work exception useless as to those categories of derivative works and perhaps should be rejected for that reason alone. Moreover, the more general language of the definition's first sentence makes clear that it is the entire work as "recast, transformed or adapted" that constitutes the derivative work and not merely the changes in the original work.

Assuming that the entire work with "editorial revisions" constitutes the derivative work, a publisher who has made substantial editorial revisions in an author's work should take great care to preserve a record of those revisions. On the other hand, an author whose work is published without significant changes should try to preserve a record of that fact.

¹¹⁵ The new Code recognizes that the process of selection, coordination and arrangement of materials may be so substantial as to constitute an original work of authorship. To such works the Code applies the term "compilation" (§101) and provides copyright protection (§103). However, the House Report (at p. 57) makes clear that "compilations" are not normally "derivative works."

"There is necessarily some overlapping between the two, but they basically represent different concepts. A 'compilation' results from a process of selecting, bringing together, organizing, and arranging previously existing materials of all kinds.... A 'derivative work,' on the other hand, requires a process of recasting, transforming, or adapting 'one or more preexisting works'...."

exploit certain rights of derivative use, he will try to sell those rights¹¹⁶ and, as the termination date approaches, it will be to his advantage to dispose of those rights at any price he is offered.¹¹⁷ Carried to an extreme, this preparation of derivative works and sale of derivative use licenses during the final years of the grant may substantially reduce or even destroy the value of the terminated rights to the author and his family. The grantee's power to do so will give him considerable leverage in bargaining for renewal of the grant on favorable terms.

However, the exception only permits the derivative work to be "utilized" after termination. The Code explicitly states that "... this privilege does not extend to the preparation after the termination of other derivative works . . .", even though such new works may use nothing more of the author's work than the grantee's original derivative work.¹¹⁸ The limitation is primarily aimed at assuring that motion picture remake rights, and other rights of comparable importance, will revert to the author and his family.¹¹⁹ But, by its terms, it also prohibits any modification of the original derivative work significant enough to constitute a distinct "derivative work" under the Code's definition.¹²⁰

The derivative user who wishes to avail himself of this section may face some difficult choices after termination. Consider, for

¹¹⁶ The exception for derivative works "prepared under authority of the grant" would appear to encompass works prepared under sublicenses from the author's original grantee.

¹¹⁷ The grantee is likely to wait until the notice is actually served before he rushes to prepare derivative works and sell off licenses. The author and his family may therefore wish to give the minimum two-year notice permitted under the termination provisions, but even that minimum period will usually allow the grantee plenty of time in which to prepare all the derivative works he expects to be able to use (except, perhaps, for derivative works, such as motion pictures, involving very long production periods).

¹¹⁸ §203(b) (1); §304(c) (6) (A). The five exclusive rights secured to a copyright owner under the Code are reproduction in copies or phonorecords, preparation of derivative works, public distribution of copies or phonorecords, public performance and public display. §106. "Utilization" presumably includes all rights to exploit the derivative work other than the preparation of new derivative works and would, of course, also include those uses that fall short of copyright protection—for example, a manuscript sale or private perusal of the derivative work.

¹¹⁹ See House Report at 127; Supplementary Report of the Register, *supra* n. 64, at 76.

¹²⁰ On the other hand, reproducing the entire and unaltered derivative work in another work (e.g., including a musical arrangement in a new collection or an art reproduction in a new art history text) would appear to be permissible.

example, the scholar who has obtained permission to quote from copyrighted sources in his history text, but the permission has been terminated and the text now requires updating or other revision. He can eliminate the quotation from his revised edition or pay a second fee for using the quotation in the revised edition or, worst of all, eschew the necessary revision of his text. Particularly where further revisions or new editions may later be appropriate, the authors and licensees of works based in part on prior works will need to pay careful attention to the possible application of the termination rules. (For example, an author presently considering such a work may wish to defer until after January 1, 1978 in obtaining permissions for works copyrighted many years ago.)¹²¹

Obviously, some very fine distinctions will have to be drawn in the practical application of the derivative works exception, both in deciding what changes in the original work prior to termination are substantial enough to constitute a derivative work (which may continue to be "utilized" for an indefinite period after termination) and in deciding what changes in the derivative work after termination are substantial enough to make it a new derivative work (which cannot be "utilized" at all).

Once it has been established that the work is a "derivative" one and that the exploitation being made of it is a permissible "utilization", several questions arise as to the proper disposition of the royalties due from the derivative user. The only guidance in the Code itself is the statement that the derivative work may continue to be utilized "under the terms of the grant." That phrase offers some guidance, but, as will be seen, it does not answer all questions.

The initial question is whether the derivative user must continue to pay the same royalty after termination, even though he will then be faced with competing derivative works prepared by the author or his new grantee. Though there may be some unfairness in requiring the grantee to pay a royalty that was intended to give him exclusive rights in a particular medium, the Code's reference to continued utilization "under the terms of the grant" would seem to require that the grantee either pay the agreed-upon royalty or discontinue the use.

In the future, however, we may anticipate that the agreements themselves will provide for a reduced royalty (or even no royalty) in the event of termination pursuant to sections 203 and 304(c). Nothing in the Code appears to prohibit such provisions,¹²² though any

¹²¹ See text accompanying notes 22-23, *supra*.

¹²² A provision for a reduction to take effect as soon as notice of termination is served would also appear valid, though perhaps presenting a closer question.

agreement requiring the author to *return* royalties already received would probably be unenforceable.¹²³ If such provisions for the reduction or elimination of the royalty in the event of termination become common, the benefits to be derived by termination will be substantially reduced. Indeed, the hapless author (or member of his family) who underestimates the importance of the royalties received under the existing agreements or overestimates the amount to be realized by resale of those rights might find that he actually received less after termination than before.

Though it seems clear that the derivative user must continue to pay whatever compensation was prescribed in the original grant, it is less clear to whom that compensation should be paid. Naturally, if the author (or, under §304(c), a member of his family) has contracted directly with the derivative user, the latter will simply continue to make payments "under the terms of the grant" to the author or his family. But what if the author has licensed all his rights to one who simply published the work in its original form and then sub-licensed to others the right to prepare derivative works (e.g. a sound recording based upon the composer's song or a motion picture based upon the author's novel)? Does the right to compensation under that sublicense now revert to the author and his family?

A literal application of the provision that derivative works may continue to be utilized "under the terms of the grant" might seem to require that the author's share of such sublicensing agreements be limited to the amount provided in the terminated grant to the publisher. But, in that situation, the publisher's only continuing interest in the work would be the right to receive a share of the income from such sublicenses. He would stand in essentially the same position as if the author had made the grant directly to the derivative user and separately had agreed to pay his publisher a share of the revenues, or if the publisher had made the grant as agent for the author in return for a share of the proceeds. Yet in both of the latter situations, it has been argued above that the publisher's share of the proceeds would be subject to termination. In terms of the purposes of termination provisions, the result should be the same if the author transfers title

¹²³ The Code provides that "Termination of the grant may be effected notwithstanding any agreement to the contrary . . ." §203(a) (5); §304(c) (5). An agreement requiring the author to repay prior royalties in the event of termination would probably be considered such an "agreement to the contrary." Precisely where to draw the line is quite unclear. What if, for example, the agreement provided that a portion of the royalty was to be paid, not year by year, but instead held by the grantee and paid only after the right of termination had expired unexercised.

to the publisher, who then makes the sublicense to the derivative user in the publisher's own name. Permitting the publisher to retain all or a substantial portion of the revenues payable by the derivative user would greatly decrease the amount realized by the author and his family upon termination, without in any way serving the purposes of the derivative works exception (which is merely intended to protect the derivative user from the author's veto over continued use of the derivative work, not a middleman's passive interest in a share of the proceeds). Though the question is certainly far from clear, the interpretation most consistent with the statutory purposes is that the right to continue using the derivative work "under the terms of the grant" is only for the protection of the derivative user and that the publisher's interest in the proceeds of that grant is terminable under §203 and §304(c).¹²⁴

The further question then arises of whether the sublicensee can continue to make payment to the publisher (who would then be required to turn over those payments to the author and his family) or whether the sublicensee must make direct payment to the author and his family. Requiring direct payment to the author and his family may place a considerable burden upon the sublicensee. That burden will be especially great in circumstances where, as discussed in Part C(2) below, the owners of the statutory termination interest are not identical to the owners of the author's (or other grantor's) contractual rights under the original agreement. In that event, the sublicensee would have to pay part of the royalty to the owner of the author's contractual rights and the remainder to the owner of the statutory termination interest. That division would depend upon the terms of the original agreement between the author (or other grantor) and the publisher (an agreement to which the sublicensee was not a party and of which he may not even have a copy). Arguably, therefore, "the terms of the grant" should be given effect at least to the extent of permitting the sublicensee to continue making payment to the party specified in the sublicensing agreement.

On the other hand, the problems faced by the sublicensed derivative user in this context are really just another illustration of the general problem of the uninformed sublicensee under the termination provisions. As noted in Part B(2) above, there is no assurance that the

¹²⁴ Similarly, the author should be able to terminate any transfer of a share in the proceeds from a compulsory license of the copyright in his work (*see*, for example, §§111(c) and (d), 115, 116, 118) even though the compulsory license itself, being involuntary, would not be terminable (*see* Part A(5), *supra*).

sub-licensee, whether his rights include the preparation of derivative works or not, will even receive notice of the termination. Also, if there is some risk that the sublicensee will be uninformed as to the terms of the agreement between the author and the original grantee, there is equally some risk that the author will be uninformed as to the terms of the sublicense, or perhaps even totally ignorant that such a sublicense was made. If the sublicensee can continue remitting payment to the original grantee, there is a real possibility that such payments will never be passed along to the author and that he will remain ignorant that the sublicense was ever made.

In the final analysis, there is no perfect solution. The question is simply whether the author or the sublicensee should bear the burden and risk of ascertaining the facts. Since the derivative works provision is a limited exception to a broad remedial provision for the author's benefit, it is probably appropriate that the burden should lie with the sublicensee. Moreover, if the original grantee's interest in the proceeds from the grant of derivative rights is indeed terminable, as argued above, it is certainly more logical to make payment to the author than to a publisher or other grantee who no longer has any rightful interest in any part of such proceeds.

2. *The Copyright Owner's Rights After Termination*

When the party who made the original grant (the author or, under §304(c), a member of his family) is still alive at the time of termination, there will normally be no need to distinguish the rights he holds by reason of the termination effected under the new Code's provisions from the rights he holds as copyright owner (unless, of course, he has assigned all his residual interest in the copyright during the interim). But, where the author or other party who made the original grant has died, the copyright and the termination right will frequently be owned by different persons (or the two rights may be owned by the same persons, but in different proportions).¹²⁵ In such circumstances, the distinction between rights held under the termination provisions and rights held as devisee of the author's copyright and contractual rights becomes crucial. For simplicity, we will consider here the situation in which the owner of the copyright and contractual rights (who will be referred to as the "copyright owner") is an entirely different person from the owner of the statutory termination interest (who will be referred to as the "termination owner"). The same problems will arise, but in a lesser degree, when the copyright owners and the termination owners are the same persons but their ownership of

¹²⁵ See Part A(3), *supra*, and Part D(1), *infra*.

the copyright and of the termination interest are in different proportions.

Termination under sections 203 and 304(c), unlike termination under the renewal provisions of the old Code, does not result from a lapsing of the copyright term. There is a single term of copyright protection (or, under §304(c), a single 47-year long renewal term). The rights after termination derive from the same continuous copyright as before, not a "new estate" such as the renewal term.¹²⁶ Upon termination, although the grantee's interest in the rights end, the rights themselves do not expire. Rather, those rights which were the subject of the grant "vest"¹²⁷ in the statutory termination owner—in effect, the grantee's rights are transferred to the termination owner. If the termination owner is not also the copyright owner, the termination owner logically cannot succeed to rights any more extensive than the grantee purchased.

It seems plain, therefore, that the basic limits on the scope of the original grant (its duration, geographic extent and definition of the media covered) will equally limit the termination owner's rights.¹²⁸ For example, where the grantee only purchased the right to publish the work in book form in New England for fifty years, the termination owner can own no more. Motion picture rights, publishing rights in the rest of the country, and all rights after fifty years still inhere in the copyright owner (or, perhaps, another grantee).¹²⁹

But what of the myriad other terms and conditions that may be included in an agreement transferring rights? At least insofar as the terms of the original grant purport to define the permissible uses of the copyrighted work, it seems that those terms should continue to apply to the termination owner and his licensees, although it may not be possible to apply all of the terms literally, and some terms it may be impossible to apply at all. (For example, a provision prohibiting the

¹²⁶ See *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951), *cert. denied*, 342 U.S. 849 (1951).

¹²⁷ §203(b) (2); §304(c) (6) (B) and (C).

¹²⁸ Such terms may well, of course, affect the rights of other grantees, as well as the copyright owner and the termination owner. A purchaser of television rights may have relied upon the limitations imposed upon an earlier purchaser of motion pictures rights.

¹²⁹ Similarly, if the author does not survive until the time for renewal of a copyright secured under the old Code (or §304(a) of the new Code) and the grantee thus loses all rights to the owners of the renewal term, there will be no rights to "terminate" under the new Code's termination provisions. Compare Dreben, *Section 203 and a Call for a Hurried Review*, in *THE COPYRIGHT ACT OF 1976: DEALING WITH THE NEW REALITIES* (A. Latman ed. 1977) at 229, 232-233.

grantee from re-selling his rights should not be enforceable against the termination owner. The termination owner must be free to sell the terminated rights or they will probably be of little value.)

But what of the licensee's continuing obligation to pay royalties under the grant? Must the termination owner, following termination, make such payments to the copyright owner? For example, if the author is survived by only a brother and a son and has left his copyright and his contractual rights to his brother, must the son, as owner of the terminated rights, pay royalties to his uncle, the author's brother?

Such a result would not be irrational. The copyright owner would then continue to receive the level of compensation provided under the original grant and the termination owner would retain only the amount by which the current level of compensation exceeds the level in the original agreement. Such a result would substantially decrease the potential competition between the copyright owner and the termination owner in the further sale of rights,¹³⁰ since they would only be competing over the marginal increase in value.

On the other hand, the termination provisions only vest in the termination owner the "rights" of the transferee under the grant, not all his "obligations", and there is nothing in the termination provisions or in the statutory history to suggest that the draftsmen foresaw the possibility of continuing royalty payments under the terminated grant. (Admittedly, there is no evidence that the question was ever considered.) Moreover, such an interpretation is fraught with practical difficulties, since the termination owner may choose to sell the rights on a basis that makes computation of the amount due under the original agreement difficult or impossible. To take a simple example, although the original grant was for a royalty on each copy sold, the termination owner may choose to sell the rights outright or transfer them in return for a share of the new grantee's profits. It seems undesirable to limit the form of compensation under the re-sale of rights to one that is identical to the form of compensation under the original grant. An important part of the "second chance" in licensing rights may be the opportunity to devise a different form of compensation.

On balance, it seems more reasonable to conclude that the terms of the original grant are binding on the termination owner to the extent, but only to the extent, they define the uses he can make of the copyrighted work. The termination owner should not be required to continue the royalty payments set forth in the original grant, nor should he be required to fulfill any other terms of the original grant which do not define the permissible uses of the work. That distinction

¹³⁰ See n. 154, *infra*, and accompanying text.

will, of course, frequently be a difficult one to apply.¹³¹

As difficult as it is to decide the copyright owner's rights, it is equally difficult to determine whether his obligations to the original grantee must be rendered to the termination owner, once termination becomes effective. Again, any obligation that, in effect, defines the uses which the grantee can make of the work and the degree of exclusivity he is to enjoy in that use certainly should remain in effect (for example, an agreement by the copyright owner not to license certain competitive uses of the work or to license them only under certain conditions). But what of the copyright owner's other obligations, including perhaps an obligation to pay to the grantee a share of revenues from other uses of the work? (This question assumes, of course, the correctness of the argument in Part A(6) that such an obligation to the transferee is subject to termination.) Must the copyright owner continue to account for a share of such revenues, but now to the termination owner, or can he simply retain 100% of those revenues?

It might seem most reasonable to allow the copyright owner to retain all such revenues. In that event, the copyright owner and the termination owner would each be free of any obligation to account to the other under the terms of the original grant. But such a conclusion, however reasonable, seems inconsistent with the statutory scheme. Under the termination provisions, the terminated rights belong entirely to the person or persons specified in the Code and not to the devisees of the author or other grantor. Therefore, if the right to receive a share of revenues is terminable at all, it must belong to the termination owner, and not the copyright owner, after termination.¹³²

¹³¹ Under the language of some grants, for example, the continued payment of royalties at or above a certain level may be just as explicit a limitation on the duration of the grant as a limitation to a specific number of years. Perhaps, in such cases, the termination owner *would* be required to pay royalties to the copyright owner, in order to prevent the lapsing of his rights.

¹³² As with royalties due from sublicensees (*see* the end of Part C(1) *supra*), the termination owner would probably be entitled to insist upon direct payment from the copyright owner.

It may be noted that, if the original grant was non-exclusive, then the copyright owner and the termination owner will each have non-exclusive rights after termination. It might seem sensible, in such circumstances, to treat them as tenants-in-common, under an obligation to account to each other for any profits from the exploitation of the rights. But they are not tenants-in-common. As argued above, the termination owner stands in the shoes of the grantee and his relationship to the copyright owner is defined by the terms of the grant and the statutory rules discussed above.

The argument and conclusions in this section concerning the respective rights of the copyright owner and the termination owner are, by necessity, among the most tentative advanced in this article. The Code, instead of clarifying their respective rights, simply obscures the problem. It states, for example, that terminated rights "...revert to the author, authors, and other persons owning termination interests...",¹³³ as if the termination owner and the copyright owner were necessarily the same. In view of that obscurity, it is impossible to state with any real assurance how the questions raised above will finally be resolved.

D: NEW GRANTS

The termination provisions are not limited to defining the circumstances and procedures for terminating old grants. They also impose important restrictions on the resale of terminated rights, restrictions that both authors and grantees must carefully observe if their new agreements are to be enforceable.

1. Who Can Make New Grants?

Generally speaking, the terminated rights belong to all those who could have joined in the notice of termination, whether or not they actually did so.¹³⁴ The only exception involves the termination under §304(c) of grants made by joint authors. As noted above, in such circumstances, the grant is not terminated as a unit, but only as to each particular author's share in the grant.¹³⁵

The class of beneficiaries and their respective shares are determined at the time the notice of termination is served. At that point, "[t]he future rights that will revert upon termination of the grant become vested"¹³⁶ If, for example, the author making a grant is survived only by three children, one of whom dies immediately before the notice of termination is served and one of whom dies immediately thereafter, the former's estate will have no interest in the rights that were the subject of the grant, whereas the latter's estate will have a full one-half share.

Under section 203, applicable to grants made after January 1, 1978, any new grant of terminated rights must be joined in by the

¹³³ §203(b). The language of §304(c) (6) is similar.

¹³⁴ See §203(b); §304(c) (6). See pp. 33-35, *supra*, on whether all those who owned the rights conveyed in the original grant, or only those who actually signed it, are entitled to terminate (and therefore own the terminated rights).

¹³⁵ See p. 32, *supra*.

¹³⁶ §203(b) (2); §304(c) (6) (B).

same number and proportion of owners as were required to terminate the grant (and those not joining in the grant are bound by the new grant, just as those not joining in a notice of termination are nevertheless bound by the termination).¹³⁷ This seemingly simple provision represents a dramatic departure from the normal rules of copyright licensing by co-owners. An exclusive grant of terminated rights may be made by a majority of the owners of the termination interest, whereas normally all of the co-owners of a copyright must join in a grant to make it exclusive. A non-exclusive license also apparently requires a majority, although normally any co-owner of a copyright can make such a non-exclusive grant (subject to an obligation to account to his co-owners for any profit).¹³⁸

The same rules apply under §304(c) to grants by a single author and in deciding how a particular author's interest will be exercised.¹³⁹ However, just as termination under that section may be effected as to a particular author's interest, so too each author's interest may be sold separately. Moreover, where a grant made by persons other than the author is terminated by the surviving grantors under §304(c), the interest of each of those survivors apparently can be sold separately,¹⁴⁰ although the unanimous action of the survivors is required to

¹³⁷ §203(b) (3). Thus, if the required majority can be found to terminate the old grant but not to join in a new grant, the rights will remain unlicensed (although presumably they may be used by one or more of the persons to whom the rights have reverted, subject to an accounting to their co-owners and subject to the possibility that a majority will thereafter negotiate an exclusive grant that would cut off all of the owners' rights to use the work).

¹³⁸ If the original grant was non-exclusive, any co-owner of the termination interest who was also a co-owner of the underlying copyright could make a non-exclusive grant on his own in the latter capacity, without the concurrence of his co-owners of either the underlying copyright or the termination interest. But if the original grant was exclusive, a co-owner of the termination interest cannot have any interest in the rights conveyed in his capacity as a co-owner of the underlying copyright and, accordingly, a non-exclusive grant can be made only in his capacity as co-owner of the termination interest and subject to the statutory requirement that a majority must join in any new grant of terminated rights.

¹³⁹ §304(c) (6) (C) and subsection (c) (6) in general.

¹⁴⁰ There is no provision in section 304(c) stating explicitly that each author's interest and each surviving non-author's interest can be sold separately. There simply is no restriction similar to that in §304(c) (6) (C) on new grants by the multiple survivors of a single author. According to the House Report at 141, the reason for permitting separate sales by the survivors is the same as the reason for requiring unanimity for termination—namely, uncertainty as to the respective shares of members of a renewal class (*see* n. 49, *infra*). Of course, this approach merely shifts to the courts the problem of sorting out the parties' respective shares.

terminate the grant. The Congressional reports explain that the normal rules of co-tenancy are to apply in such situations:

"Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would have an independent right to sell his share, or to use or license the work subject to an accounting."¹⁴¹

2. *When Can New Grants Be Made?*

The Code prohibits the sale of terminated rights to anyone other than the original grantee until the termination has become effective.

"A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between [the persons owning the terminated rights] and the original grantee or such grantee's successor in title, after notice of termination has been served . . ."¹⁴²

The avowed purpose of this provision is "to avoid trafficking in future interests by third parties, which would deprive the original grantee of the opportunity to negotiate a further transfer . . ."¹⁴³ But that cannot be its sole purpose, since the provision also purports to prohibit further grants to the original transferee until the notice of termination has been served.¹⁴⁴

¹⁴¹ House Report at 141-142. Unfortunately, the rules to be applied among co-tenants are not quite as simple or clear as the draftsmen seemed to presume. See 2 NIMMER ON COPYRIGHT (1976 ed.) §§77-79.

¹⁴² §203 (b) (4); §304 (c) (6) (D). See Part B(2), *supra*, on the meaning of "successor in title."

¹⁴³ Supplementary Report of the Register, *supra* n. 64, at 76; House Report at 127.

¹⁴⁴ In fact, the provision as initially drafted did not prohibit further transfers to the original grantee. UNITED STATES COPYRIGHT OFFICE, COPYRIGHT LAW REVISION PART 5, 1964 Revision Bill With Discussion and Comments 10-11 (House Comm. Print, printed for the use of the House Comm. on the Judiciary, 89th Cong. 1st Sess. 1965) (proposed §16 (b)(2)) and see comments of Abe Goldman at 153. Presumably, its sweep was broadened at least partly in response to suggestions that authors would otherwise be at the mercy of the original grantee (*see id.* at 243, comments of Authors

It should be noted at the outset that this limitation cannot be applied in any sensible way to a second grant of non-exclusive rights. If the words of the Code were considered alone, it would certainly seem that, where one non-exclusive license in a work has been granted, an identical non-exclusive license to another party would involve the grant of a "right covered" by the first license and would therefore be invalid. But, in that event, every non-exclusive license would be exclusive in effect, except as to the grantor himself. Obviously, such a far-reaching and absurd result was not intended.¹⁴⁵ Therefore, whatever the words might initially appear to mean, a second non-exclusive grant, at least if made to a different party than the first,¹⁴⁶ should not be considered the grant of a "right covered" by the first.¹⁴⁷

The preferred position enjoyed by the original grantee after the notice has been served was described by the House Committee as "in the nature of a right of 'first refusal'."¹⁴⁸ In fact, when read in light of the Congressional Reports, there does not appear to be any real

League of America) and that year-by-year extensions of the original grant would be impracticable and contrary to the spirit of the termination provision (*see id.* at 165, comments of Bella Linden). However, the drafters obviously had no consistent view whether new grants to the original grantee should be limited significantly. As noted in the text *infra*, the Committee Reports state that the grantor can make a further grant to the original grantee, even prior to service of the notice, by agreeing to terminate the old grant and make a new one.

¹⁴⁵ The reason for this absurd result is probably that, as originally drafted, the termination of transfers provisions applied only to exclusive licenses. *See* COPYRIGHT REVISION PART 5 *supra* n. 144 at 10 (proposed §16(a)). When the termination provisions were expanded to include non-exclusive licenses, little consideration was evidently given to the effect of the provisions limiting new grants when applied to non-exclusive licenses.

¹⁴⁶ The theory would be that a non-exclusive license is, in effect, the same as a covenant not to sue and that a promise not to sue licensee A is not the same as a promise not to sue licensee B, but a second promise not to sue A is the same. Consider, however, what happens if licensee B later sells his non-exclusive rights to A (who might be interested in acquiring such rights if the grant to B was made at, and therefore terminable at, a substantially later date than the grant to A). Would the grant to B, which was valid when made, become invalid when transferred to A?

¹⁴⁷ However, if one of the two transfers was an exclusive grant (i.e. there was an exclusive grant followed by a non-exclusive grant, or vice versa) then they would cover the same rights, at least in part, and the second grant would be invalid. (But if the first was non-exclusive and the second exclusive, the latter might be given effect as a non-exclusive grant.)

¹⁴⁸ House Report at 127.

restriction at all upon new grants to the original grantee. According to the House Judiciary Committee,

"Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running."¹⁴⁹

A transferee is unlikely to terminate a valuable grant prematurely, unless he is assured that the author will bind himself to extend a new grant for a longer term. Presumably, the House Committee recognized that fact and intended that the author and the grantee could, in a single document, both terminate the old grant and make a new transfer of rights.¹⁵⁰

Yet the effect of termination combined with a simultaneous new grant is essentially the same as a further grant of far-off rights to the original transferee. Thus, the grantor is not *prevented* from selling his future rights in advance. Rather, he is *restricted* to selling them to his original grantee, who, as the only advance bidder, will be in a position to insist on more advantageous terms.¹⁵¹ There is also considerable danger that an author who is asked to terminate an existing agreement and make a new one on the same (or slightly improved) terms will not realize that this arrangement postpones, perhaps for many

¹⁴⁹ *Id.*

¹⁵⁰ The Register's comments on section 203 indicate even more clearly an intent that the agreement to terminate could be combined with, and conditioned upon, an agreement to make a new grant.

"There is nothing in section 203 to prevent the parties to a transfer or license from voluntarily *agreeing* between themselves to *terminate* an existing agreement and to *negotiate* another one, thus starting another 35-year period running." Supplementary Report of the Register, *supra* n. 64, at 76 (emphasis added).

It is admittedly difficult to reconcile the comments by the Judiciary Committee and the Register with the manifest intent to impose some time limitation upon all new grants, even to the original grantee. Certainly, a reasonable argument might be made that if the agreement terminating the original grant contained any obligation to make a new grant, such an agreement would be a "further grant, or agreement to make a further grant" and therefore invalid under §203(b) (4).

¹⁵¹ Though the Authors League complained that the original provision prohibiting further grants would place authors and their families "at the mercy" of the original grantee, the League recommended *eliminating* the prohibition rather than extending it to all grantees. See COPYRIGHT LAW REVISION PART 5, *supra* n. 144, at 243.

years, his right of termination.¹⁵²

Until the end of 1977, there is no comparable way to extend grants subject to termination under section §304(c). The termination date under that provision is measured from the time the copyright was originally secured, not from the date of the grant. Therefore, re-negotiating a new agreement before the end of 1977 will not cause "another 35-year period to start running." However, beginning in 1978, it will be possible to renegotiate earlier grants in advance of the termination notice, since any new grant will be governed by §203 rather than §304(c). (Of course, if the copyright in question is still in its first term at the time of such advance re-negotiation, the grantee must also be concerned with the question of whether the granting party will in fact prove to be the owner of rights in the renewal term.)¹⁵³

Following the logic of the Committee report, if the grantor has died, his legatees or heirs presumably could agree with the original grantee to terminate the existing grant and enter into a new grant, without awaiting service of the termination notice. This creates the potential for disastrous competition in the sale of future rights between the grantor's heirs or legatees and the statutory owners of the termination interest, which is likely to reduce the amount realized by termination and may even reduce the compensation for the author's work below the level received under the original grant.¹⁵⁴

¹⁵² There is nothing in the Committee reports to suggest that the validity of such an arrangement depends upon the author's recognition of its effect on his termination right. But where the author *is* aware of that effect, it would be best to recite his awareness in the agreement.

¹⁵³ See n. 21, *supra*.

¹⁵⁴ Suppose "Author" dies before termination, leaving "Son" and "Brother" as his only close relatives. Son would then be the sole owner of Author's termination interest. But suppose Author has willed his entire estate—including copyrights and contractual rights—to Brother. The grantee could then seek to renegotiate the transfer with Brother as soon as Author died or wait to negotiate with Son after the notice of termination had been served. Indeed, once the notice of termination had been served, he could probably negotiate concurrently with both relatives. (It would appear that Brother and the grantee could terminate and renegotiate at any time prior to the time termination became effective, even after notice of termination had been served, since the House Judiciary Committee spoke of parties terminating and re-negotiating at any time. On the other hand, the termination provisions refer to the "vesting" of future rights when the notice is served. Even if Brother's right to re-negotiate with the grantee ends with the service of the termination notice, the competition would not be ended. It would simply be accelerated to the period immediately before the termination notice was served.) Son and Brother, realizing that they could obtain terms to their greatest mutual advantage by presenting a united front,

The simplest way to eliminate such conflicts is to include in the original grant (or, if the grant has already been made, in a renegotiated grant to the original grantee) either (a) a provision that, if an effective termination notice is served under the Code, all rights lapse and revert to the author's heirs and devisees on the date specified in the notice, (b) a provision that all rights automatically lapse and revert to the author's heirs and legatees on the earliest date upon which termination could be effected under the Code (such reversion to take place whether or not a termination notice is actually served), or (c) a provision giving the grantor and his successors a contractual right to terminate within the period set forth in the Code. Under any of these provisions, the grantee has, by the terms of the grant itself, no rights at all at the time of termination and so the owner of the termination interest cannot succeed to any rights.¹⁵⁵ Since there may be a question as to the validity of the first alternative,¹⁵⁶ the latter two seem preferable.¹⁵⁷ To be acceptable to the gran-

would cautiously negotiate between themselves as to the division of the revenues to be extracted from the grantee. But if they were less than completely trusting, they would at the same time seek individual agreements with the grantee. Should the intra-family negotiations degenerate entirely, both would rush to arrange a sale to the grantee on whatever terms were offered. The situation thus created puts a premium on double-dealing and creates uncertainty whether either relative will realize the full value of the Author's termination interest. Indeed, as a result of the grantee's ability to "play off" one relative against the other, it is possible that Author's relatives will be left in a poorer over-all position than they would be in the absence of a right of termination. Similar conflicts will arise whenever the statutory owners of the termination interest differ from the grantor's legatees and heirs.

As originally proposed, the termination of transfers provisions gave termination rights to the author's "legal representatives, legatees, or heirs." COPYRIGHT LAW REVISION PART 5, *supra* n. 144, at 10 (proposed section 16(a)(1)). The Register stated that certainty of devolution and the avoidance of creditors' claims against the author's estate motivated the change. SUPPLEMENTARY REPORT OF THE REGISTER *supra* n. 64, at p. 73. As noted above, the change does not promote certainty.

¹⁵⁵ See p. 62, *supra*.

¹⁵⁶ It is arguable, though it seems doubtful, that a provision under which reversion to the copyright owner depends upon the actual service of a notice would violate the rule that "... [t]ermination of the grant may be effected notwithstanding any agreement to the contrary..." §203(a) (5); §304(c) (5). More important, there is a strong policy reason against upholding such a provision. Where the termination owner and the copyright owner are entirely different persons, such a provision would mean that the termination owner would have no reason to serve a termination notice and, as a result, neither the copyright owner nor the termination owner would regain the rights.

tee, such a provision should state (a) that it becomes effective only if, on the first date for serving a termination notice, there is a surviving person entitled to serve such a notice and (b) that the grantee retains the same rights to continue utilizing derivative works after contractual reversion to the copyright owner as he would enjoy in the event of termination under the Code provisions.¹⁵⁷

The new Code's restrictions on future grants will also complicate—and may even frustrate—the distribution and exploitation of a work during the last years of a grant. In many cases neither the author nor the original grantee will be in a position to sell the necessary rights to the prospective publisher or derivative user, unless the

¹⁵⁷ A possible problem in the second alternative from the grantee's point of view is that, arguably at least, since the reversion is automatic (or nearly so), the grantee does not acquire any rights at all in the period beyond the earliest termination date and, therefore, the author would be free to sell rights in the later period to a third party before the termination becomes effective. Therefore, the third alternative seems best from the grantee's point of view. The third alternative will also be more attractive to the grantee than the second, because it preserves the possibility that the grant will continue indefinitely because the author or his family have forgotten to serve the notice. (Even the third alternative may, however, somewhat decrease the likelihood of such an unintentional omission since, if the copyright owner and the termination owner are different persons, it will mean that two persons, rather than just one, have a right to terminate. Also, of course, the very benefit to the author and his family from such a provision—namely, the elimination of potential conflict between or among family members—may be a good enough reason for an unscrupulous purchaser to refuse to agree to such a provision, if he hopes to profit from that conflict.)

¹⁵⁸ Instead of including such a provision, an author may decrease the importance of such conflicts by leaving the rights under his existing contracts to the statutory owners of his termination interest. Unfortunately, an author cannot eliminate all possible conflict in that manner, since the termination owners cannot be determined with precision until the termination notice is actually served.

Also, if an author's existing agreements are reasonably satisfactory, he may decrease the importance of future conflicts by periodically agreeing with the original grantees to terminate their existing agreements and enter into new agreements on the same terms. The author does not eliminate all conflict in that way, of course. He simply puts off the conflict until as long as possible after his death.

Once the author has died, his executors and beneficiaries can consider immediate re-negotiation (particularly if they are satisfied with the existing agreements) rather than waiting until the termination notice is served. Such new grants, if made after December 31, 1977 by persons other than the author are not subject to termination. See Part A(2), *supra*.

original grant is renegotiated.¹⁵⁹ Indeed, if the work in question is itself a derivative work, several levels of prior transfers may have to be renegotiated. The cost and difficulty of such complex renegotiations may be very high compared to the value of the rights in question and may even preclude an otherwise promising undertaking.¹⁶⁰

CONCLUSION

Although the termination provisions are intended to cure the inequities arising from some authors' lack of sophistication, the provisions themselves are far from simple and contain many traps for the

¹⁵⁹ Suppose, for example, that the "Author" of a work copyrighted 54 years ago has previously assigned all his rights in the work to "Publisher" and no notice of termination has yet been served. Suppose further, that "Third Party" is interested either in creating a derivative work that may take three years to prepare or in publishing a new edition of the original work that, it is estimated, will return Third Party's original investment over three years. Third Party will be able to obtain rights for the first two years from Publisher, but he will be unable to obtain even non-exclusive rights for the third year (i.e., the 57th year after the original copyright date) from either Publisher or Author individually. Any right Publisher might transfer is subject to termination, and Author is prohibited from making any further grant to Third Party by the restrictions quoted above. Thus, Third Party will have to arrange a re-negotiation of the underlying Author-Publisher contract in such a way as to permit one of them to grant him the necessary rights. One way to accomplish this end would be to terminate the existing grant and enter into a new agreement by whose terms (1) those rights desired by Third Party either would be retained by Author or would be granted to Publisher for a period sufficient to permit his sublicensing Third Party, (2) a lump sum payment or a share in the revenues to be received from Third Party would be provided for whichever party gave up his share in the rights desired by Third Party, and (3) all other rights would be re-granted to Publisher for the remaining two years (thus maintaining the status quo with regard to those rights).

¹⁶⁰ The Register noted in 1961 that similar effects would follow from making the renewal term unassignable in advance and recommended against such a system in part for that reason.

"[D]uring the later years of that term, [the authors] might well find that publishers, motion picture producers, and other users who need assurance of continued use for an extended period, would be reluctant to undertake exploitation of the work." United States Copyright Office, Copyright Law Revision [Part I], Report of the Register of Copyright on the General Revision of the U.S. Copyright Law 74 (House Comm. Print, printed for the House Comm. on the Judiciary, 87th Cong., 1st Sess. (1961)).

See Chafee, *Reflections on the Law of Copyright*: II, 45 COLUM. L. REV. 719, 723 (1945); Kupferman, *Renewal of Copyright-Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 724-25 (1944).

unwary. It is perhaps not too surprising that some care is required on the purchaser's part, since the draftsmen plainly presumed that it is only authors, and never purchasers, who are unsophisticated and may require protection. It is more surprising—and certainly more disturbing—that considerable care and a thorough understanding of quite complex provisions is also required on the part of the author and his family if the right of termination is to be preserved and utilized most effectively. Unfortunately, those most in need of a "second chance" are least likely to be able to master on their own, or to afford competent counsel to guide them through, what the Register has called "... a complex assortment of conditions, time limits and procedural requirements. . . ."¹⁶¹

Unfortunately, even the greatest sophistication will not overcome all the problems inherent in the termination provisions. Many aspects are so dreadfully unclear that only the most tentative suggestions can be offered as to how the courts may ultimately rule. In all likelihood, it will be many years before even the most important ambiguities are resolved, and some may never be resolved definitively.¹⁶² Moreover, many of the problems cannot be solved by authoritative interpretation. Either the unambiguous language of the provisions clearly impose unfair burdens or the ambiguities, whichever way they are ultimately resolved, will impose such burdens on one party or another.

But an understanding of the complex new termination provisions (including their ambiguities) is an important first step toward coping with the problems and opportunities they create. Without repeating all of the concrete suggestions above, a few of the most important may be offered here in summary.

During the remainder of 1977, author and licensee should each consider whether it is best to make new grants before or after the end of the year (and the author should consider whether it is wise to try to copyright all or any part of his uncopyrighted works before the new Code takes effect). Thereafter, each must keep track of the passage of

¹⁶¹ Ringer, "Finding Your Way Around in the New Copyright Law," *Publishers Weekly*, December 13, 1976 at p. 40, reprinted in *THE COPYRIGHT ACT OF 1976: DEALING WITH THE NEW REALITIES* (A. Latman ed. 1977) at 47, 57.

¹⁶² It is striking that the Supreme Court did not resolve until 1943 whether rights in the renewal term under the 1909 statute were assignable in advance (*see* n. 10, *supra*) and, at least in the view of the Second Circuit, the question of whether a derivative work can continue to be exploited during the renewal term, where the author's original grant included the renewal term but the author died prior to renewal, was essentially a question of first impression when decided by the Second Circuit in 1977 (*see* n. 111, *supra*).

time since copyright was first secured, if the work was copyrighted and the grant made before the end of 1977, and keep track of the passage of time since the grant and since the initial "publication," if any, pursuant to the grant if the grant was made on or after January 1, 1978. Each may wish to consider the advisability of a new grant (after December 31, 1977) to the original grantee, rather than wait until the time arrives to serve a notice of termination.

In addition, the author and his family should try to minimize in advance the potential conflicts between owners of the rights under the existing grants and owners of the statutory right of termination. When the time does arrive for termination, they should take care to comply fully with the procedural requirements of the Code.

A potential purchaser should seek the broadest possible warranty against termination which is appropriate in the circumstances¹⁶³ and a warranty that, whether or not the rights are subject to termination, the seller will immediately advise the purchaser of any termination notice that affects (or purportedly affects) the purchaser's rights. If derivative works are involved, the purchaser should consider the desirability of a provision reducing the royalty in the event of termination and, as termination approaches, should prepare any appropriate new derivative works (and revise any existing ones). Finally, where termination under §203 or §304(c) would be particularly burdensome, the potential purchaser may consider the use of works made for hire or otherwise not subject to the termination provisions.

In general, caution and a constant awareness of the termination provisions' complexities and ambiguities must be the guide. Author, purchaser and sublicensee must each take care that he does not inadvertently lose his rights (or opportunities) under the new Code or rely too casually upon any seemingly obvious interpretation (including

¹⁶³ In the case of a seller other than the author, such warranties might include a warranty that none of the rights conveyed are subject to termination or, if such a warranty cannot be given, then a warranty that the rights are not subject to termination for at least a specified period. In the case of an author-seller, such warranties might include a warranty that the work does not include any material by any other person (and therefore the rights are not subject to termination by anyone other than the seller) and a warranty that the rights conveyed have not been the subject of any prior grant (unless that grant has already expired or the termination of that grant has actually become effective). Whenever feasible, such general warranties should be supplemented by more specific warranties, drafted to cover the facts of that particular agreement, concerning the authorship of the work, the date copyright was secured, the chain of title, etc.

those suggested in this article) which may leave him open to conflicting claims.

With these few points in mind, all one can do is await the courts' attempts to clarify—and hope they do not further becloud—these extremely murky provisions.

PART II

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

3. GEORGIA. *Laws, statutes, etc.*

An act to amend an act providing that it shall be unlawful for any person to avoid or attempt to avoid the payment for telecommunication services, approved April 25, 1975 (Ga. Laws 1975, p. 1534), as amended by an Act approved March 31, 1976 (Ga. Laws 1976), p. 1179, so as to include cable television services (CATV) within the provisions of the Act; to provide an effective date; to repeal conflicting laws; and for other purposes. 2 p. (Ga. Laws 1977, Act. 659, p. 1187).

The act would make it unlawful for anyone to avoid or attempt to avoid payment for tele-communication services, including CATV, by the use of any fraudulent scheme, means or method, or any mechanical, electric or electronic device.

4. U.S. CONGRESS. HOUSE.

H.R. 7848. A bill to establish a United States Design Council within the Department of Commerce. Introduced by Mr. Waxman, June 16, 1977, and referred to the Committee on Interstate and Foreign Commerce. 9 p. (95th Cong., 1st sess.)

The bill would establish a council of 17 members in the Department of Commerce, which would meet at least four times a year, and promote standards for design in industry, design education programs for the purpose of raising the quality of American products and assist in marketing them at home and abroad.

5. U.S. CONGRESS. HOUSE. *Kasten, Robert W., Jr.*

Broadcasting and the public interest. *Congressional Record*, vol. 123, no. 82 (May 13, 1977), pp. E2989-E2990.

Representative Kasten announced the introduction of a bill to extend broadcast licenses from three years to five years in order to reduce the paper-work, and also the introduction of a

resolution to prevent the possibility of having pay television stations outbid free stations for premium programming.

6. U.S. CONGRESS. HOUSE. *Nedzi, Lucien N.*

Television—the second great crisis in modern consciousness. *Congressional Record*, vol. 123, no. 85 (daily ed. May 18, 1977), pp. E3095-E3096.

The Librarian of Congress recently delivered a talk at the dedication of the National Humanities Center in Research Triangle Park, North Carolina. The Librarian characterized the first great crisis in modern consciousness as the invention of printing, which resulted in making the knowledge of a few available to many. The second crisis has been the invention of television, which has democratized experience and provides a stage on which the humanities can play a new role. Representative Nedzi had the talk read into the *Congressional Record* because the speech was only fleetingly reported in the press.

7. U.S. CONGRESS. HOUSE. *Subcommittee on Communications.*

Options papers prepared by the staff for use by the subcommittee on communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Cong., 1st sess., May 1977. Washington, Govt. Print. Office, 1977. 664 p.

Policy options analyzed here include FCC broadcast renewals, public broadcasting, emergency and mobile radio communications, international communications, cable television and the impact of communications technology and federal regulation on the right of privacy.

8. U.S. COMPTROLLER GENERAL.

Establishing a proper fee schedule under the Independent Offices Appropriation Act, 1952: Federal Communications Commission. Washington, May 6, 1977. 36 p. (CED-77-70).

The Government Accounting Office believes that sufficient guidance is contained in recent United States Court of Appeals decisions from which a proper fee schedule can be established for services provided by government agencies. GAO believes further that the Federal Communications Commission can make a good-faith effort to recalculate its fee schedules and refund only the excess portion of the fees collected from 1970 through 1976.

9. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Canadian television. List of stations and allocations within 250 miles of the Canada-U.S.A. border issued by FCC. May 11, 1977. *Federal Register*, vol. 42, no. 100 (May 24, 1977), pp. 26586-26610.

A list of Canadian television station assignments and channel allocations as supplied by the Department of Communications of Canada.

10. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR Part 73. Subscription television, repeal of movie restrictions. *Federal Register*, vol. 42, no. 128 (July 5, 1977), p. 34341. (Docket No. 21311; FCC 77-436).

Since the Federal Communications Commission's restrictions on the presentation of certain feature movies have been vacated by the District of Columbia Court of Appeals in *Home Box Office v. FCC* with regard to pay television, the Commission proposes to delete a similar restriction on movies presented on subscription television.

11. U.S. FEDERAL COMMUNICATIONS COMMISSION.

Title 47, C.F.R.—Telecommunication. Ch. 1—Federal Communications Commission. Pt. 1—Practice and Procedure—Pt. 73—Radio Broadcast Services. Requirement of broadcast licensees to maintain certain program records. *Federal Register*, vol. 42, no. 113 (June 13, 1977), pp. 30180-30188.

In amending sections 1.527, 73.116, 73.286 and 73.586 of its regulations relative to making radio program logs available for public inspection, the Federal Communications Commission has decided not to adopt a provision which would require the retention and disclosure of transcripts, or recordings of news and public affairs programs since the taping of the programs would contribute to the station's expense and there might be liability for copyright infringement, in the copying of the program.

12. U.S. LIBRARY OF CONGRESS. COPYRIGHT OFFICE.

37 C.F.R. Part 201. Recordation and certification of coin-operated phonorecord players. Extension of comment periods. *Federal Register*, Vol. 42, No. 96 (May 18, 1977), p. 25514. [Docket RM 77-4].

The period announced for comments to the notice of proposed rulemaking relative to a tentative regulation pertaining to the recordation and certification of jukeboxes has been extended to May 30, 1977 for initial comments and June 15, 1977 for the reply comments.

2. Foreign Nations

13. BAHAMAS. *Laws, statutes, etc.*

The industrial property (amendment) rules, 1975. S. I. No. 96, 1975. *Industrial Property*, vol. 16, no. 3 (Mar. 1977), Laws and treaties text 1-004, pp. 001-007.

These rules amend the 1967 rules concerning the forms and procedures for registering patents and designs. The text was published in the Official Gazette, No. 48 of November 27, 1975, and the rules entered into force on that date.

14. BAHAMAS. *Laws, statutes, etc.*

The industrial property rules, 1967, S. I. No. 33 of 1967. *Industrial Property*, vol. 16, no. 3 (Mar. 1977), Laws and Treaties Text 1-003, pp. 001-015.

Parts III and IV of these Industrial Property Rules of 1967 deal with forms and procedures for registering designs. The rules were originally published in the Official Gazette, no. 23 of June 8, 1967 and they entered into force on that date.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

15. COMMITTEES OF GOVERNMENTAL EXPERTS ON THE DOUBLE TAXATION OF COPYRIGHT ROYALTIES REMITTED FROM ONE COUNTRY TO ANOTHER (Paris, Nov. 3-10, 1975, and Dec. 8-16, 1976). *Copyright*, vol. 13, no. 2 (Feb. 1977), pp. 42-45.

Brief reports on the two meetings of experts with the text of the resolution adopted at the December 1976 meeting. The resolution recommended that Unesco and WIPO prepare the text of a multilateral instrument restricted to general principles and that it be accompanied by a model bilateral agreement which could serve to implement the multilateral convention.

PART V

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

16. AMERICAN SOCIETY OF AUTHORS, COMPOSERS AND PUBLISHERS. ASCAP—the facts. What is it; why it is; who belongs; how it works. New York, ASCAP, 1977. 3 leaves.

A brochure with a question and answer format that explains the purpose of the society and the advantages of membership.

17. The Copyright Act of 1976: dealing with the new realities. Co-sponsored by the New York Law Journal and the Copyright Society of the U.S.A., Alan Latman, chairman. New York, Law Journal Press. 1977. 347 p.

The volume contains a number of reprints of law review articles which deal with copyright law, as it will be affected by the 1976 revision. Interspersed are outlines of talks given by speakers at the workshop, and several important court decisions. An outline of the program, together with photographs of the speakers and biographical sketches are also provided in this workshop handbook.

18. HEILPRIN, LAURENCE B., *ed.* Copyright and photocopying: papers on problems and solutions, design for a clearinghouse, and a bibliography. College Park, University of Maryland, College of Library and Information Services, 1977. 158 p. (Student Contribution Series, No. 10)

The volume includes two class studies and a bibliography regarding the "photocopying problem." The 1975 class explored the possibility of statutory reform and a form of excise tax on photocopying machines. The 1976 class investigated the possibility of establishing a non-profit clearinghouse and also compiled an extensive bibliography covering many aspects of the problem.

19. HOUDEK, FRANK G. AND WILLIAM T. FORD. The motion picture industry and the law: a practitioner's guide to the literature. Los Angeles, Los Angeles County Law Library, Feb. 1977. 17 p.

A bibliography of books, PLI program materials, University of Southern California Entertainment Institute materials, and law review articles, on motion picture censorship, copyright, financing and taxation, and performers' rights, compiled from the holdings of the Los Angeles County Law Library.

20. LITTLE (ARTHUR D.) INC. Telecommunications and Society, 1976-1991. Report to Office of Telecommunications Policy, Executive Office of the President, June, 1976. 153 p. (U.S. Dept. of Commerce, National Technical Information Service, PB-256 829).

This report is concerned with some of the "impacts, conflicts, issues and changes that might arise during the next 15 years from the interaction between technological innovation in telecommunications and the social context in which it occurs." It specifically considers citizens' band radio, broadband distribution to telecommunications technology and public service satellite systems.

21. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU). Data base subcommittee report and additional reviews. Washington, D.C. 1977. 16, 2 p.

In this preliminary report by the Data Base Subcommittee of CONTU, it is recommended that the Register of Copyrights issue regulations to encourage registration and periodic updating of identifying material, rather than duplicate copies of the data bases themselves. Notice appearing on the initial display of any extract or extracts would comply with the statutory requirements. The subcommittee also suggested that section 117 of the new copyright law be deleted. George D. Cary, former Register of Copyrights, filed a two-page additional view.

22. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU). . . . Preliminary report to Congress and the President on the activities of the Commission's first year. Washington, D.C., Oct. 8, 1976. 58 p. (U.S. Dept. of Commerce, NTIS PB-260 373).

The report covers the legislative history of the commission, its data collection and planning activities, especially with regard to copyright protection of computer software. Photocopying guidelines have been developed during the first year. The future plans of the commission's activities are outlined, while appendices provide such information as the names and biographical data on the commissioners, the commission's budget and the text of the law under which it is operating.

23. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU). Software subcommittee report and additional views. Washington, D.C., 1977. 24, 10 pp.

Answering in the affirmative the question of whether computer software should be protected by copyright, the report also includes an alternative view by Commissioner John Hersey, and a draft Computer Software Protection Act prepared at the request of Commissioner Hersey, as an alternative to the proposals contained in the subcommittee's report.

24. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU). Transcripts of Meetings Nos. 12-14. Springfield, Va. National Technical Information Service, 1977. 3 v.

The transcript of Meeting No. 12, held February 24-25, 1977 in the McGraw-Hill Building in New York, dealt with copyright protection for computer software and automated data bases. Meeting No. 13, held at Columbia University on March 31, and April 1, 1977, covered methods for collecting payments of royalty resulting from photocopying, and the possible establishment of clearinghouses. Meeting No. 14, held in Washington, D.C., featured discussions of committee reports on both computers and photocopying.

25. WALLENSTEIN, GERD D. International Telecommunication agreements. Dobbs Ferry, N.Y., Oceana Publications, 1977. 1 v.

An explanation of the objectives and organization of the International Telecommunication Union (I.T.U.) and an analysis of the ways in which it promotes agreement and reciprocal assistance in the establishment of international lines of communication such as through telephone, telex, data and video systems.

2. Foreign Publications

1. In English

26. BRACK, HANS. The evolution of the EBU through its statutes from 1950 to 1976. Geneva, European Broadcasting Union, 1976. 179 p. (Legal and administrative series, Monograph No. 11)

A resumé of the statutes and by-laws or regulations under which the European Broadcasting Union has evolved in the past 25 years.

27. CRABB, GEOFFREY. Copyright and contract, a course workbook. London, Jordanhill College of Education and the Council for Educational Technology, 1976. 77 p.

An interestingly written workbook for use by British educators in learning about copyright and contracts for educational materials.

28. UNWIN, STANLEY. The truth about publishing. 8th ed., revised and partly re-written by Philip Unwin. London, George Allen & Unwin, Ltd., 1976. 256 p.

This most recent edition of a work by one of Great Britain's publishers on the British publishing industry as he had known it, has been updated by the author's nephew and reflects the changes in the industry since 1960 including conglomerate ownership, computers, the British copyright law, and public lending rights.

2. In German

29. OLENHUSEN, ALBRECHT GÖTZ VON. Schriftsteller, Recht und Gesellschaft; Beiträge und Materialien zum Urheber-, Verlag- und Presserecht. Freiburg, Universitätsverlag Becksmann, 1972. 227 p. (Schriftenreihe: Jurisprudenz, Reihe C Zivil-, Handels- und Wirtschaftsrecht, Bd. 1),

An analysis of authors' rights under the West German law, including copyright and related legislation since the revision of 1965.

3. In Italian

30. Diritto di autore e problemi dell'informazione e della cultura di fronte alle nuove tecniche di riproduzione e diffusione delle creazioni intellettuali. Atti del convegno—Roma 27/28 Ottobre 1975. Rome, Presidenza del Consiglio dei Ministri, 1976. 234 p.

A compilation of the papers submitted, the discussions held and the actions taken during a recent convention on "Copyright and the cultural and information problems presented by the new technical developments for the reproduction and distribution of intellectual creations." The convention was sponsored by the President of the Republic and the President of the Council of Ministers and was held at the International Institute for the Unification of Private Law in Rome on October 27-28, 1975.

B. LAW REVIEW ARTICLES

1. United States

31. FOGG, LOIS R. Copyright—author's script protected from excessive editing under doctrine of common law copyright and section 43(a) of the Lanham Act—*Monty Python v. American Broadcasting Cos.*, Civil Nos. 75-7693, 76-7023 (2d Cir., June 20, 1976). *Temple Law Quarterly*, vol. 50, no. 1 (1976), pp. 151-163.

An analysis of the factual background, legal basis, and possible ramifications of the *Monty Python* decision.

32. FRANK, GEORGE A. Intellectual property rights in the European Economic Community and the treaty of Rome—conflict or harmony. *Journal of the Patent Office Society*, vol. 59, no. 5 (May 1977), pp. 274-301.

After tracing the evolution of case law in the European Economic Community, the author concludes that there is a strong trend toward an ever more restrictive interpretation of intellectual property rights based on the national laws, and toward a more expansive reading of the Rome Treaty, to insure free flow of goods across national boundaries and undistorted competition within the common market. He suggests that in the near future the issues facing the European Economic Community will not be very different from the antitrust issues faced in the United States.

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33. HOFFER, MARK D. The power of the FCC to regulate cable pay-TV: jurisdictional and constitutional limitations. *Denver Law Journal*, vol. 53, no. 3 (1976), pp. 477-500.

The article argues that the anti-siphoning rules, as applied to pay-TV, violate the commands of the Federal Communications Act of 1934, and the first amendment. On the other hand the questions remain as to whether pay-TV, freed of such controls, will provide a solution to the growing monopolization of network programming, will prevent inflationary and self-destructive price wars over program material, and insure that low income audiences will continue to have the same program options as wealthier audiences.

34. LATMAN, ALAN. Copyright law. *1976 Annual Survey of American Law*, pp. 629-648.

In surveying legislative and judicial developments in the field of copyright during 1976, the enactment of a new copyright law is noted, together with reference to some of the major changes from the current 1909 copyright law. With regard to court decisions, opinions which dealt with the question of copyrightability of subject matter, notice requirements, infringement of copyright, record and film privacy are analyzed briefly.

35. The Monty Python litigation—of moral right and the Lanham Act. *University of Pennsylvania Law Review*, vol. 125, no. 3 (Jan. 1977), pp. 611-634.

This paper is being submitted in the Nathan Burkan Competition for 1977 at the University of Pennsylvania Law School. It observes that the decision in *Gilliam v. American Broadcasting Cos.* is noteworthy in that it recognized that section 43 (a) of the Lanham Act afforded a remedy to an author or artist when the work was "garbled" while being edited for television. It underscores the point that an artist's grant of the right to exploit his work for profit need not divest him of a congeries of non-economic rights in the work, and the availability of a federal cause of action under the Lanham Act allows the artist to avoid limitations inherent in state remedies for unfair competition and libel.

36. NIMMER, MELVILLE B. Termination of transfers under the

copyright act of 1976. *University of Pennsylvania Law Review*, vol. 125, no. 5 (Fall 1977), pp. 947-989.

An exploration of the problems to be anticipated by the new legislative provisions in the revision of the U.S copyright act regarding termination of transfers of copyright by the author or heirs of the author.

37. PATAKI, LOUIS PETER, JR. Copyright protection for computer programs under the 1976 copyright act. *Indiana Law Journal*, vol. 52, no. 2 (Winter, 1977), pp. 503-516.

P.L. 94-533 has clarified the protection available for computer programs under the copyright law. Subject to the fair use doctrine, the programmer-author has an exclusive right to copy his program and adapt all or parts of his program into other programs or "languages." Protection is analogous to that given business forms and architectural plans and should lead to wider acceptance of copyright as a means of protection, particularly since the courts have been reluctant to allow patent protection for programs.

38. PRICE, BRIAN R. Copyright in government publications: historical background, judicial interpretation, and legislative clarification. *Military Law Review*, vol. 74 (Fall 1976), pp. 19-65.

In examining American common law, statutory prohibitions, and actual practice, the author concludes that the current Army regulation, which prohibits officers or employees from claiming copyright in works prepared as part of their implied duties, is unclear and that it should be "clarified" to conform with judicial interpretations. He further concludes that "government agencies will remain able to secure copyright . . . by procuring the work by contract rather than having it produced by governmental officers or employees."

39. SEIDEL, DONNA L. Copyright—infringement—public performance for profit—radio reception as performance. *Duquesne Law Review*, vol. 14, no. 4 (Summer 1976), pp. 739-750.

An analysis of the U.S. Supreme Court decision in *Twentieth Century Music Corp. v. Aiken*. The question is asked as to why the court decided to limit copyright protection by contracting the scope of performance in view of the legislative trend in

the copyright revision to expand copyright protection of the performance right.

2. Foreign

1. In Belgian

40. BROCK, JOZEF. Le dépôt légal, hier et aujourd'hui. *IFLA Journal*, vol. 3, no. 1 (1977), pp. 62-69.

A history of depot legal in Belgium since its institution in the Spanish Netherlands in 1594 for the benefit of the Royal Library at Brussels, and the manner in which the system functions today.

2. In English, French and Spanish

41. BANTER, HARALD. The production of light music in broadcasting. La production de la musique légère á la radio. La producción de música ligera en la radio. *GEMA News*, no. 16 (Dec. 1976), pp. 12-32.

A report of a survey on the use of music by radio, reviewing the type of music played and the ages of the listeners who approved of the music, and during what periods of the day the various groups of listeners tuned into the stations. The report concludes that music is important to broadcasting and it should receive an adequate share of the financing for programs.

42. SCHULZE, ERIC. Correlation between neighboring rights and copyrights. Parenté entre la protection des artistes interprètes et les droits d'autuers. Afinidad de la protección de los artistas intérpretes con los derechos de autor. *GEMA News*, no. 16 (1976), pp. 4-7.

In an address to the IFPI General Meeting in Vienna on June 2, 1976, Dr. Schulze proposes the establishment of a licensing society for performers, and a revision of the Rome Convention.

3. In German

43. KUNSTADT, R. Abschluss des Antitrust-Verfahrens gegen amerikanische Buchverleger. *Gewerblicher Rechtsschutz und*

Urheberrecht, Int. Teil, Heft. 3 (Mar. 1977), pp. 123-124.

A case note on the anti-trust action against 21 American and British publishers instituted by the U.S. Department of Justice, which resulted in the outlawing of the British Market Agreement.

44. Das Neue U.S.-Copyrightgesetz; ein Auslandsbericht der GEMA. *Film und Recht*, vol. 21, no. 3 (Mar. 1977), pp. 156-159.

A resume in German of the major features in the new U.S. Copyright Law, stressing the compulsory licensing provisions, the protection of sound recordings and the function of the Copyright Royalty Tribunal.

45. REIMER, DIETRICH. Rechtsvergleichende Bermerkungen zur Vertragsfreiheit im Urheberrecht. *Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil, Heft 3* (Mar. 1977), pp. 85-93.

A comparative study of what various copyright laws in European countries contain relative to contracts between the author or creator and those who exploit his work.

4. In Italian

46. ALGARDI, ZARA OLIVIA. Evoluzione della figura dell' editore suoi diritti e sua attuale funzione. *Il Diritto di Autore*, vol. 48, no. 1 (Jan.-Mar. 1977), pp. 1-24.

A comparative study of the role of the publisher in his function as intermediary between author and public, as found in the national copyright legislation of several European countries and the international conventions. Comments on his responsibility for preserving the integrity of the work when published or adapted to other media are also included.

47. FERRARA SANTAMARIA, MASSIMO. I proventi dei films nel progetto Unesco di convenzione sulla doppia tassazione dei diritto d'autore. *Rassegna di diritto cinematografico, teatrale e della radiotelevisione*, vol. 25, no. 4 (Oct.-Dec. 1976), pp. 111-112.

A brief note discussing the effect Unesco's draft convention on double taxation may have in determining income and copyright royalties on motion picture films.

48. LOI, SALVATORE. Fotografie e diritto di autore. *Il Diritto di Autore*, vol. 48, no. 1 (Jan.-Mar. 1977), pp. 25-36.

A discussion of the copyright protection provided in the Italian Copyright Law of 1941 for photographs, and an analysis of the protection as it affects news photos, photo libraries and archives and the use of reproductions in anthologies and compilations used for scholarly, scientific or educational purposes.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

49. Ambiguities are found in copyright-law guidelines. *The Chronicle of Higher Education*, vol. 14, no. 11 (Nov. 15, 1976), p. 17.

A letter to the editor by Robert H. Hogan, Executive Secretary, National Council of Teachers of English, and one by Robert A. Gorman, S. E. Steinbach, Leo J. Raskind and John Stedman, commenting on the article by Karen Winkler and the guidelines.

50. BERKOWITZ, RHODA L. Law and the visual arts: an annotated bibliography. *Law Library Journal*, vol. 70, no. 1 (Feb. 1977), pp. 5-13.

A bibliography of books, monographs and periodical articles on art and the law.

51. BRIGHAM, SYBIL J. Selected bibliography of the general revision of copyright law. *News Bulletin of the Boston Chapter - SLA*, vol. 43, no. 1 (Jan.-Feb. 1977), pp. 9-12.

Recent publications of interest to librarians on the revision of the U.S. copyright law that will go into effect Jan. 1, 1977, have been arranged under the headings of general background, legislative history, general information and library photocopying and classroom use.

52. Broadcast Music issues new payment schedule. *The Hollywood Reporter*, vol. 247, no. 47 (June 10, 1977), p. 25.

A new license schedule for the performance of music and a new song bonus system will be put in operation by Broadcast

Music Inc. on July 1, 1977. New rates for the use of popular songs and concert works on local FM radio and network TV show a sharp increase over the old rates.

53. BUTTS, CHARLES A. Fair use and permissions: a publisher's assessment. *News Bulletin of the Boston Chapter SLA*, vol. 43, no. 2 (Mar./Apr. 1977), pp. 40-43.

The director of subsidiary rights and special sales for Houghton Mifflin discusses the fair use provisions contained in section 107 of the new copyright law. He explains that a number of educational programs are being instituted in the publishing industry to apprise personnel of the changes. With regard to the need for obtaining permissions, typical questions are being accumulated as a basis for discussion in these programs.

54. CARDOZO, MICHAEL H. Letter to the editor. *Journal of Legal Education*, vol. 28, no. 2 (1976), pp. 121-123.

The suggestion is made that the Association of American Law Schools might provide the necessary leadership in providing guidelines for writers who contribute to periodicals. These guidelines should spell out the various rights available to the writers and how the contracts should provide for the transfer or assignment of the rights. The opinion is expressed that the copyright notice should also incorporate the specifics of the fair use doctrine, left shaky by the split decision in *Williams & Wilkins* by the U.S. Supreme Court.

55. CHU, JAMES C. Y. Mainland China too has a television industry. *Television International*, vol. 22, no. 2 (Mar.-Apr. 1977), pp. 5, 14.

Television broadcasting began in mainland China in May, 1958 and has since increased to 47 stations as of January 1975, with approximately 200,000 sets, or one for every 4,000 persons. The stations operate three or four hours a day, and the programs include information, domestic and foreign news, political "debates" and entertainment.

56. COHEN, MORRIS L. Library photocopying and the new copyright law. *News Bulletin of the Boston Chapter SLA*, vol. 43, no. 2 (Mar./Apr. 1977), pp. 36-40.

A review of the history of the photocopying controversy and an analysis of the provisions contained in sections 107 and 108 of the new copyright law. These provisions leave many questions unresolved. Future changes in the law will be shaped by actual operation of the new law, by response from copyright owners and librarians, by judicial interpretations and the Register of Copyright's periodic review. CONTU is also making a continuing study of the problem, and Congress will be reacting to these factors. But, compliance with the new law shall be required by all libraries, and the effect of such compliance will be noted and recorded since the information will be needed to protect the interests of the libraries and their users.

57. CONGRAT-BUTLAR, STEFAN. A wonderful kafuffle: translators at Montreal congress press for their professional rights. *Publishers Weekly*, vol. 212, no. 2 (July 11, 1977), pp. 36-39.

A report on a week-long conference held under the auspices of the International Federation of Translators. Among the topics discussed were the Unesco-sponsored recommendations for a model contract, the establishment of an information clearinghouse, and publication of serials devoted entirely to translation rights.

58. Contour changes won't affect existing UHF's cable carriage. FCC grandfathers current rights and opens the door a little by relaxing some of the rules. *Broadcasting*, vol. 92, no. 19 (May 9, 1977), pp. 69-70.

The FCC has adopted a new method for predicting service contours, with the result that UHF stations may find their grade B contours reduced on an average of 15 miles. The cable bureau suggested that the impact be eased by permitting cable systems to carry UHF signals through their grade B contours, even where now barred by the so-called footnote 69 rule. "This prohibits the carriage of a small-market station into the overlapping grade B area of a station in a top-100 market and the carriage of a large-market station into the grade B area of a station in any other market."

59. C'right Office getting tougher on registration. *Daily Variety*, vol. 175, no. 54 (May 19, 1977), p. 9.

A brief note that the Copyright Office beginning Jan. 1, 1978, will require that deposit copies, or phonorecords must be

accompanied by an application and fee if they are to be registered in the Copyright Office.

60. Copyright suit filed against Alex Haley. *New York Law Journal*, vol. 177, no. 78 (April 22, 1977), p. 3, col. 1.

A brief news account of the infringement action filed by Dr. Margaret Walker Alexander against Alex Haley, author of *Roots*.

61. Disk biz yes, b'casters no in new D.C. perf. royalty debate. *Variety*, vol. 287, no. 5 (June 8, 1977), pp. 57, 58.

A summary of the arguments pro and con which have been filed with the Copyright Office following publication of a notice of inquiry in the Federal Register, regarding possible legislation to provide a performance royalty.

62. DITLEA, STEVE. The bullish boom in the record world. *The New York Times*, vol. 126, no. 43,597 (June 5, 1977), p. D-22.

In the midst of the phonograph's centennial, the recording industry is celebrating one of its most prosperous years. More albums are being sold than singles, performers are older, and the class of purchasers is changing. Economists are wary of the boom and predict that the industry is still vulnerable to economic slowdowns. Federal investigations into payola and price-fixing may also have an effect on the industry.

63. DOEBLER, PAUL D. Copyrights for book designs; a leading designer has copyrighted a complete book design and is selling reproduction rights just like authors—a breakthrough in the field of graphic rights. *Publishers Weekly*, vol. 212, no. 1 (July 4, 1977), pp. 59-60, 62.

Though copyrights on book jackets have produced resale rights for secondary uses, here the book and design was presented as a package. However, a foreign publisher has without explanation or request rearranged the title page and introduction to the book. Whether or not the designer will be able to assert her rights remains to be worked out. Though it may be possible to copyright book designs now, it will take a long time and much education to achieve widespread understanding of book design and what is permissible under a design copyright.

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64. DREBEN, RAYA S. The copyright act of 1976, a brief overview. *News Bulletin of the Boston Chapter SLA*, vol. 43, no. 2 (Mar./Apr. 1977), pp. 32-36.

In presenting a brief review of the rights embodied in the new copyright law, the author concludes that all copying is not an infringement, no matter what copyright owners will say. The law involves a balancing of the interests of copyright owners and users with both sides able to marshal arguments on their behalf based on morality, property rights and public interest. Librarians will need to make sure that their professional interests are also weighed in that balance.

65. The FCC wants to know: have the networks grown too big for the industry's good? *Television International*, vol. 22, no. 1 (Jan.-Feb. 1977), pp. 20-23.

The FCC has launched a wide-ranging inquiry into the domination of TV broadcasting that is being exercised by the three national networks. Many of the issues to be investigated were discussed in a petition filed last September by Westinghouse Broadcasting Co. Excerpts from the petition are presented here as being of interest to the television industry.

66. FLACKS, LEWIS I. Living in the gap of ambiguity; an attorney's advice to librarians on the copyright law. *American Libraries*, vol. 8, no. 5 (May 1977), pp. 252-257.

In an effort to explain to librarians the provisions contained in section 108 of the new copyright law, nine frequently encountered questions are asked and answers are given.

67. GROVER, STEPHEN. Film exodus; Hollywood, hurt by a tax bill, starts to make more movies in Europe, Canada. *Wall Street Journal*, vol. 189, no. 58 (Eastern ed. March 24, 1977), p. 42.

When Congress decided last year that money invested by U.S. citizens in movie production could no longer be sheltered from taxation, major studios began exporting their movie-making to Canada, Austria, West Germany and other countries where wealthy citizens can still avoid or defer taxes by investing in movies. Exportation of movie production is predicted to reduce the number of first-run films available to the theater owner, and thus reduce employment levels. The Screen Actors

Guild reports that joblessness among actors now exceeds 80%.

68. GURZA, AGUSTIN. Meet to shape strategy; U.S. & Mexico collaborating in drive on piracy. *Billboard*, vol. 89, no. 12 (Mar. 26, 1977), pp. 1, 74, 90.

At a recent meeting in Los Angeles, representatives of the RIAA and executives of the Latin record industry from Mexico and the United States as well as the FBI proposed to unite to reduce the international flow and production of pirated records and tapes.

69. HARWOOD, JIM. AGAC warns Madison Ave. against 'borrowing' music for blurbs; honors Fain. *Daily Variety*, vol. 175, no. 14 (Mar. 24, 1977), pp. 1, 9.

Ervin Drake, national president of the American Guild of Authors & Composers, has warned Madison Ave. advertising agencies against borrowing familiar music for commercials, at the organization's annual coast meeting.

70. HENRY, NICHOLAS. The new copyright act, or how to get into a heap of trouble without really trying. *PS*, vol. 10, no. 1 (Winter, 1977), pp. 6-8.

Writing as a political science author, Mr. Henry briefly discusses the significance of changes in the copyright law system which will come about when the new copyright law comes into effect on January 1, 1978. He notes that copyright from the moment of creation rather than from the moment of publication, plus the sections dealing with fair use and photocopying, and the exemptions of certain performances and displays are but a few of the important changes.

71. HOLLEY, EDWARD G. A librarian looks at the new copyright law. *American Libraries*, vol. 8, no. 5 (May 1977), pp. 247-251.

Calling the new copyright law a complex bit of legislation, with compromises that seldom satisfy anyone, the chairman of the American Library Association's Legislative Committee warns librarians to watch for additional regulations, administrative procedures, commission reports and even modifications of the bill itself. Librarians will need to become increasingly sophisticated on copyright law and how it affects library functions.

72. HOROWITZ, Is. Fox agency eyes mechanical rates on import disks. *Billboard*, vol. 89, no. 12 (Mar. 26, 1977), pp. 1, 17.

Article on the study the Harry Fox Agency is doing to determine the legal options music publishers have if they feel they are not receiving full mechanical royalties on imported records.

73. Hotter competition on video recorders. *Business Week*, no. 2480 (Apr. 25, 1977), p. 36.

A brief comment on the fact that both Zenith Radio Corp. and RCA Corp. have completed arrangements to market Japanese-made video recorders in the United States this coming fall. The Matsushita unit to be marketed by RCA will allow four hours of recording time on a single tape cassette. Sony hopes to have a two-hour unit available in the United States by Labor Day. They have already spent more than \$2 million on advertising to promote their Betamax.

74. Joplin estate awarded damages in resolution of copyright suit. *Record World*, vol. 34, no. 1562 (June 11, 1977), p. 14.

The estate of Scott Joplin's widow won damages in the resolution of a lawsuit that involved copyright infringement of Joplin's "Tremonisha." The complex series of copyright assignments and licenses was based on illegitimate claims by Wilbur Sweatman, trustee of the Lottie Joplin Thomas Trust prior to his death in 1961. The trustee had assigned the copyrights to himself, and his heirs had granted permission for the manufacture of the records without the Trust's knowledge.

75. KOEGEL, JOHN B. Art law; recent legislation. *New York Law Journal*, vol. 177, no. 96 (May 18, 1977), p.1, col. 1; p. 2, cols. 1-6.

A summary of bills recently introduced in the New York legislature that relate to the rights of visual artists and their works. One bill is concerned with merchants who sell "post-humously" cast sculptures or copies made without the personal consent of the artist. Another bill is an attempt to codify "droit de suite," and its provisions are compared with California's recently enacted "Resale Royalties Act." Several of the bills deal with tax exemptions for gifts of fine arts.

76. KOHN, ALAN. Copyright action dismissed over Holmes-Freud

book. Judge offers '100% solution' to suit. *New York Law Journal*, vol. 178, no. 126 (June 30, 1977), p. 1 cols. 2-4, p. 2, cols. 3-4.

Judge Bonsal recently handed down an opinion in the Southern District of New York granting summary judgment to the author of a book concerning the last years of Sherlock Holmes which was entitled "The Seven Percent Solution." The plaintiff was author of an article for a professional journal on the uses of cocaine in the nineteenth century, who alleged that his work had been infringed by the defendant's book.

77. MAY, JILL P. Copyright clearance problems in educational television: children's materials. *Journal of Education for Librarianship*, vol. 17, no. 3 (Winter 1977), pp. 149-160.

An evaluation of the results obtained from the teaching of a televised course on "Media for Children" at Purdue University in 1973. The evaluation is summed up as follows: "Good videotaping of a college literature program demands that the scripts be carefully written, the copyright clearances thoroughly pursued, and the production be as professional as possible. Often, it is difficult to find time and staff for such work. But if companies are willing to free materials for videotaping, it is the responsibility of the professional staff to create a worthwhile, lasting videotape production."

78. MCBRIDE, JOSEPH. Red tape delays U.S. distrib'n of Russ-Japan oscar winner. *Daily Variety*, vol. 175, no. 54 (May 19, 1977), p. 8.

A report on the months of haggling and negotiation which have finally resulted in the successful completion of arrangements for exhibiting a feature-length motion picture, co-produced by Russian and Japanese companies, which won the Academy Award a year ago for the best foreign-language film.

79. MITGANG, HERBERT. Behind Haley's suit against Doubleday. *The New York Times*, vol. 126, no. 43,530 (City ed., Mar. 30, 1977), p. C25.

Article revealing the complaints of Alex Haley, author of *Roots*, against Doubleday as listed in his \$5 million suit against the publisher. Mr. Haley said that in his suit he is speaking for two groups—the blacks and others struggling to make it in the country, and writers.

-
80. PRICE, JOE X. 18,000 Musecom II: a magical computer aids music publishing. *Billboard*, vol. 89, no. 12 (Mar. 26, 1977), p. 6.

Article on a new product called Musecom II which is a combination upright piano with a computerized keyboard. Whatever is played on the keyboard is instantly interpreted by the computer and displayed on a built-in television monitor; it has the ability to make any notational changes and can re-call the music as changed.

81. RAKOWSKI, SUSAN. What sells records in these zany times is good graphics. Album covers as art form: some simply gorgeous and others simply gory. *The Wall Street Journal*, vol. 189, no. 116 (June 15, 1977), p. 1, col. 4, p. 33, cols. 1-2.

A commentary on the art work and designs being used currently on sound recording albums for the purpose of attracting the public.

82. RAWLEY-SALDICH, ANNE. Access to television's past. *Columbia Journalism Review*, vol. 15, no. 4 (Nov.-Dec. 1976), pp. 46-50.

A brief presentation of the advantages of the Vanderbilt University Television News Archives versus the National Archives-CBS and NBC Agreement, from the viewpoint of a researcher.

83. Recording industry moves a step closer to electronic inventory via coding system. *Daily Variety*, vol. 174, no. 51 (Feb. 14, 1977), p. 15.

The Universal Product Code Council has given its approval to a coding system worked out by a joint committee of the Recording Industry Ass'n of America and the National Association of Recording Merchandisers, making the recording industry closer to an electronic inventory.

84. Restraints placed on copying c'righted works for edu use. *Daily Variety*, vol. 174, no. 38 (Jan. 26, 1977), p. 11.

Listing of the definition of "fair use" as set out by the Copyright Revision Act annex entitled "Agreement on guidelines for classroom copying by not-for-profit educational institutions."

85. RUDELL, MICHAEL I. Works for hire under new copyright law. *New York Law Journal*, vol. 177, no 49 (Mar. 14, 1977), p. 1, col. 1; p. 3, cols. 1-2.

An examination of sections 101, 201, 304 of the new copyright law regarding ownership of works made for hire, and how the new rights will affect the entertainment industry.

86. SCHULENBERG, RICHARD A., *ed.* My life in art: the autobiography of a copyright. *Songwriter Magazine*, vol. 1, no. 11 (Aug. 1976), pp. 22-23; vol. 2, no. 1 (Oct. 1976), pp. 20-21; vol. 2, no. 2 (Nov. 1976), pp. 26-27; vol. 2, no. 4 (Jan 15, 1977), pp. 32-33.

An autobiography of a musical composition, named "Need-ing You," animatedly learning about the numerous aspects of copyright and how each has an effect on its life.

87. SHAIN, MICHAEL. 'Action paper' tells President Carter he must appoint copyright commission. *Record World*, vol. 34, no. 1562 (June 11, 1977), pp. 1, 43.

It was learned two weeks ago that President Carter had been exploring legal avenues by which he might avoid appointing members to the Copyright Royalty Commission since he is reluctant to bring another regulatory federal agency into existence. Since his return from St. Simon's Island, President Carter saw a three-page memo which advised him that the five appointments would have to be made and that re-organization might be pursued at a later time. Some of the proposed appointees are said to be "unfamiliar to the copyright community", while Thomas Brennan, aide to Senator McClellan and an author of the copyright revision measure, is being mentioned as the Commission's first chairman.

88. SHAIN, MICHAEL. Copyright tribunal appointees set; expect Senate OK before August. *Record World*, vol. 34, no. 1567 (July 9, 1977), pp. 3, 44.

Thumb-nail sketches are given for five potential nominees to the Copyright Royalty Tribunal. Response to the possible appointments by government officials and copyright users has been sketchy with most wishing to wait until the appointments have been officially announced. It is expected that the Senate will confirm the appointments without much debate.

89. SHAIN, MICHAEL. Performers royalty; hearings foreshadow battle in Congress. *Record World*, vol. 34, no. 1567 (July 16, 1977), pp. 8, 54.

A summary of the testimony heard at the Copyright Office hearings on the feasibility of a performance royalty. NAB, one of the opponents, claims the new royalty might force marginal broadcasters out of business, and in view of the Zacchini decision might violate the broadcasters' First Amendment rights. The record producers have decided to wait until the West Coast meeting to be held in the latter part of July to have their say.

90. SHAIN, MICHAEL. President Carter said to be avoiding creation of mandated copyright royalty commission. *Record World*, vol. 34, no. 1561 (June 4, 1977), pp. 3, 71.

Appointment of members to the Copyright Royalty Commission has been delayed for two months, while questions concerning personnel and constitutionality plus relationship of the commission to the President's reorganization plan have been studied. Rep. Kastenmeier has indicated that he understands that most of the controversies have been resolved. Speculation has it that Thomas Brennan, aide to Sen. McClellan, will be the commission chairman, and at least one woman and a Hispanic-American will be included in the commission.

91. SISSONS, MICHAEL. After the Consent Decree (II); British agent finds indigenous publishing, not American competition, the factor to watch in the world book market. *Publishers Weekly*, vol. 211, no. 8 (Feb. 21, 1977), pp. 41-42.

On a twelve-week world tour, the author of this article sought to learn what after-effects might be developing since the U.S.—Addison-Wesley consent decree was finally signed. He found positive reactions developing since the end of the British Market Agreement.

92. STEDMAN, JOHN C. The new copyright law: photocopying for educational use. *AAUP Bulletin*, vol. 63, no. 1 (Feb. 1977), pp. 5-16.

Because of the complexities of the new copyright law regarding fair use and photocopying by libraries and educators,

the reader is cautioned to examine not only the law but its legislative history, even in the areas where the so-called guidelines purport to tell one what he may or may not do. Much law remains to be made, many on-going studies need to be prepared in order to keep up with the new technology and rapidly developing information sciences. Education specialists and libraries need to be prepared for change.

93. WAGNER, SUSAN. AAP to present plan for photocopying fees. *Publishers Weekly*, vol. 211, no. 13 (Mar. 28, 1977), pp. 27-28.

Article announcing that at the March 31, 1977 meeting of CONTU to be held at Columbia University, the Association of American Publishers will present their plan for a licensing arrangement and payment center for authorized journal photocopying.

94. WAGNER, SUSAN. AAP seeks bids to run copy payments center. *Publishers Weekly*, vol. 212, no. 2 (July 11, 1977), p. 28.

A task force of the Association of American Publishers' Technical, Scientific and Medical Division, has formulated plans for the establishment of a Copy Payments Center. The purpose is to relieve participating users of the necessity for obtaining individual licenses from publishers for "guideline" copying for classroom use and interlibrary transactions.

95. WEIL, STEPHEN E. Art and the law. *Law Library Journal*, vol. 70, no. 1 (Feb. 1977), pp. 1-4.

Noting that Justice Holmes in 1902 commented that it is dangerous for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, the author reviews cases and legislative attempts to benefit artists, likening art and the law to beauty and the beast, fully conscious of their separate backgrounds and incompatible worlds, yet being swept into each other's arms by the sheer complexity of 20th century life.

96. WHITE, ADAM. U.K. hardware levy urged; compensate copyright owners in 'home tape piracy'. *Billboard*, vol. 89, no. 12 (Mar. 26, 1977), pp. 63, 69, 72.

Discussion of the Whitford Committee Report recommendation that a levy be applied to tape recording equipment on sale in Great Britain to compensate copyright owners for loss of

earnings due to widespread "piracy".

97. Why Alex Haley is suing Doubleday: an outline of the complaint. *Publishers Weekly*, vol. 211, no. 14 (Apr. 4, 1977), p. 25.

An outline of Alex Haley's complaint against Doubleday alleging breach of contract for not promoting the sales of his book, *Roots*.

98. WINKLER, KAREN J. A sweeping revision of the copyright laws. After ten years of wrangling, Congress adopts the first major changes since 1909. *The Chronicle of Higher Education*, vol. 14, no. 6 (Oct. 11, 1976), pp. 1, 12.

A review of the major changes in the copyright law that will affect educators, with particular reference to the guidelines dealing with photocopying by non-profit educational institutions.

99. The word to TV: brace yourself for another round with ASCAP. Licensing group will try for raise, says Arries, who also asserts station use of music has dropped and rate reduction is in order. *Broadcasting*, vol. 92, no. 14 (Apr. 4, 1977), pp. 73-74.

Leslie Arries, chairman of the All-Industry TV Stations Music License Committee reported to the NAB convention that his committee has begun preliminary negotiations with ASCAP concerning licensing agreements to take effect when the current contracts expire this year. He warns of possible litigation.

2. Foreign

1. Australia

100. BANKI, PETER. The Attorney-General's Department's Working Party on the Protection of Aboriginal Folklore. *Australian Copyright Council Bulletin*, no. 22 (Feb. 15, 1977), p. 8.

The committee intends to file a final report soon which would propose amendatory legislation, not necessarily limited to the field of copyright. Among the suggestions are customs control of the exportation of folklore items.

101. BANKI, PETER. The East Asian-Pacific Copyright Seminar, 1976. *Australian Copyright Council Bulletin*, no. 22 (Feb. 15, 1977), pp. 4-5.

Fourteen countries and two international organizations sent representatives. A formal report on the papers and discussion offered at the meeting may be obtained either from the Council or the Attorney-General's Department, Canberra.

102. BANKI, PETER. The Franki committee's report. *Australian Copyright Council Bulletin*, no. 22 (Feb. 15, 1977), p. 8.

The Attorney-General of Australia tabled this report Dec. 9, 1976 requesting that comments be submitted by Mar. 1, 1977 so that amendatory legislation may be introduced in the Autumn session of Parliament.

103. BANKI, PETER. The Times-Life case. *Australian Copyright Council Bulletin*, no. 22 (Feb. 15, 1977), pp. 1-4.

When defendant book-seller purchased two lots of books from a dealer in the United States and imported them for sale in Australia, the Supreme Court of New South Wales found that he had violated section 37 of the Australian Copyright Law of 1968 which provided that books may not be imported "without the license of the owner of the copyright." Plaintiff, copyright owner, had granted an exclusive license for world distribution of the books, and the exclusive licensee had designated another dealer in Australia as its distributor.

104. BANKI, PETER. The U.S. copyright act, 1976. *Australian Copyright Council Bulletin*, no. 22 (Feb. 15, 1977), pp. 5-7.

A summary of the major provisions and changes in the new United States copyright law which is to go into effect Jan. 1, 1978.

2. England

105. Australia—Copyright and reprography. *The Bookseller*, no. 3728 (June 4, 1977), p. 2673.

The article expresses dissatisfaction on the part of the Publishers' Association with the Franki report, and suggests that Australia might benefit from the recommendations contained in the Whitford report.

106. Canadian inward mission; boosting Britain's share in a difficult market. *The Bookseller*, no. 3720 (April 9, 1977), pp. 2022-2027.

A report on a recent seminar in London and Oxford for British and Canadian book publishers. Such topics as finding markets for British books in Canada, the effect of copyright on the book trade, the promotion of American books in Canada, joint Canadian-British imprints, the possibility of Canada ratifying the Florence Agreement in July and the possible effect that will have on distribution were discussed.

107. FABINYI, ANDREW. East Asian-Pacific copyright seminar. *The Bookseller*, no. 3721 (Apr. 16, 1977), pp. 2094-2096.

A brief resume of the activities accomplished during the East Asian-Pacific Copyright Seminar held in August 1976. Comments are made on recent changes in national copyright laws in a variety of East Asian Pacific countries. The seminar was successful in that it informed the participating countries of each other's problems in the field of copyright, stressed the need for regional cooperation and squarely faced the interdependence of copyright with a wide range of social, economic and political problems.

108. P.A. annual report 1976-77; the tendency of government to control and interfere continues to grow. *The Bookseller*, no. 3719 (April 1, 1977), pp. 1940-1944.

Summation of the Publishers Association's annual report for 1976-1977.

109. Whitford report on copyright. *The Bookseller*, no. 3718 (Mar. 26, 1977), pp. 1842-1845; no. 3719 (Apr. 2, 1977), pp. 1934-1939.

This two-part commentary on the Whitford Report covers many of the recommendations by the committee which would affect the British book trade. The report had found that the Copyright Act of 1956 was "a remarkable feat of draftsmanship" but "a nightmare to those who have to try to understand it whether as laymen for their own purpose or as lawyers seeking to guide their clients." The recommendations reviewed deal with British relations under the multilateral conventions, moral rights, photocopying, library and educational uses of copyrighted material, works made for hire, protection of oral works, data bases, crown copyright and authors' agreements, as well as deposit requirements.

NEWS BRIEFS

110. **COPYRIGHT LAW AMENDED.** The Copyright law (Title 17 of the United States Code) has been amended by the Legislative Branch Appropriation Act, 1978, Public Law 95-94 (91 Stat. 653, 676, 682), which was signed by President Carter on August 5, 1977.

Title II of the Appropriation Act contains the following provision:

For necessary expenses of the Copyright Office, including publication of the decisions of the United States courts involving copyrights, \$7,945,500: *Provided*, That not to exceed \$3,000,000 of the funds credited to this appropriation during fiscal year 1978 under section 203 of Title 17, United States Code (as in effect prior to January 1, 1978), and under section 708(c) of such title (as in effect on and after January 1, 1978) shall be available for obligation during such fiscal year.

The amendments to the copyright law are contained in Section 406 of Title IV of the Appropriation Act, which is reprinted below:

Sec. 406. (a) Effective October 1, 1977, section 203 of title 17, United States Code, is amended by adding at the end thereof the following: "All moneys deposited with the Secretary of the Treasury under this section shall be credited to the appropriation for necessary expenses of the Copyright Office."

(b) Effective January 1, 1978, the first sentence of section 708(c) of title 17, United States Code, is amended to read as follows: "All fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriation for necessary expenses of the Copyright Office."

111. **PRESIDENT NAMES COPYRIGHT ROYALTY TRIBUNAL.** The following excerpt is taken from Vol. 42, No. 187 of the *Federal Register* for Tuesday, September 27, 1977 (p. 49435).

THE PRESIDENT

Order of September 26, 1977

Copyright Royalty Tribunal

Pursuant to the provisions of Public Law 94-553 of October 19, 1976, I hereby designate the order of seniority of the

Commissioners of the Copyright Royalty Tribunal as follows:

Thomas C. Brennan

Douglas Coulter

Mary Lou Burg

Clarence L. James, Jr.

Frances Garcia.

This Order shall be published in the **FEDERAL REGISTER**.

THE WHITE HOUSE,

September 26, 1977.

112. **CHANGE CONCERNING REGISTRATION FEE FOR FOREIGN WORKS**

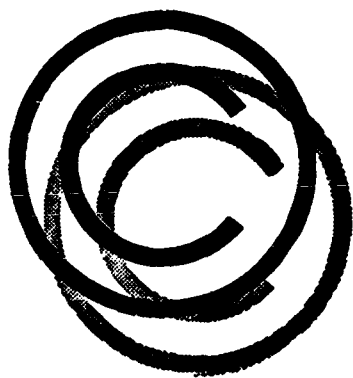
Beginning on January 1, 1978 (the effective date of the new copyright law), a registration fee of \$10.00 will be required for all works. The new law contains no provision allowing the registration fee for foreign works to be waived under certain circumstances.

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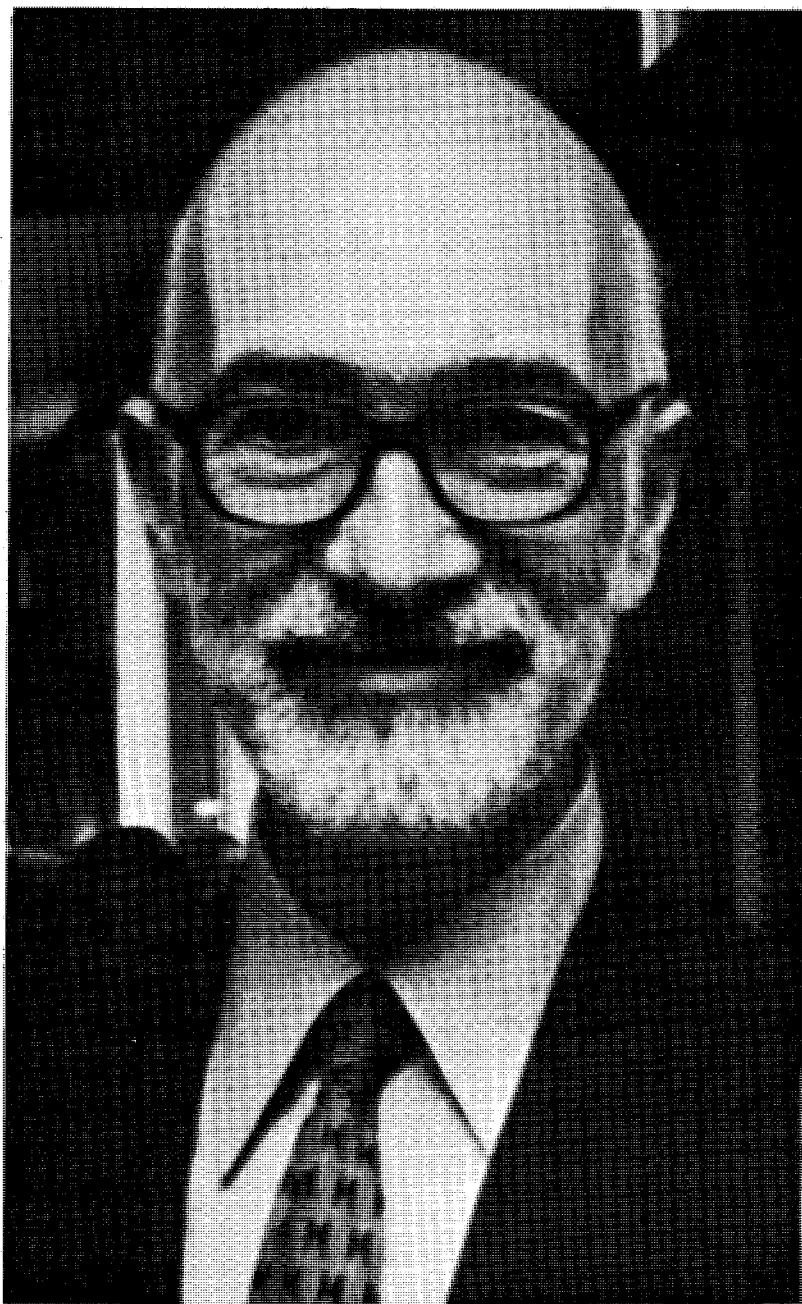
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ABRAHAM L. KAMINSTEIN

The death of Abraham L. Kaminstein has been a personal and professional loss to all in the copyright community. His enormous contributions to the development of copyright activities and legislation in this country were emphasized in the special award made to him at the annual meeting of the Copyright Society last May. This award saluted Mr. Kaminstein for "his inspiration, wisdom, time and unstinting efforts—before, during and after his service as Register of Copyrights—which invaluable contributed to the development and adoption of the 1976 revision of the U.S. Copyright Law."

The Executive Committee has determined that, as an ongoing tribute to "Kami" by our Society, the Legislative History Project on the 1976 Copyright Act, the research project intimately connected with his contributions being undertaken by the Society in conjunction with New York University School of Law (and the University of Detroit Law School), should be named for him.

We were all deeply gratified by the suggestion made by the Kaminstein family that persons wishing to make contributions in memory of Kami make such contributions to the Copyright Society. A number of contributions have already been received. The contributions will be applied to the Kaminstein Legislative History Project.

A tribute to Kami was made by Representative Robert W. Kastenmeier on the floor of the House of Representatives. His remarks, as well as letters of tribute (including our own), which were published in the Congressional Record, follow.

HON. ROBERT W. KASTENMEIER
of Wisconsin
In the House of Representatives
Congressional Record, September 14, 1977

Mr. KASTENMEIER, Mr. Speaker, it is with a deep sense of personal loss that, as chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the Judiciary Committee, I offer this tribute to Abraham L. Kaminstein, a prominent leader in national and international copyright, who died in Washington, D.C., on September 10, 1977.

Mr. Kaminstein was a gifted man of such tremendous accomplishments that it is not possible to record all of them here. His years of untiring leadership in connection with the general revision of the U.S. copyright law are well known to the Congress. As Register of Copyrights, he directed the Copyright Office, in the Library of Congress, from 1960 until his retirement in 1971. I came to know Abraham Kaminstein in 1962 when the Judiciary Subcommittee on Copyright and Patents, which I now chair, first dealt with copyright legislation in advance of general revision. However, it was in 1965, 1966 and 1967, that he made such an extraordinary contribution—unique, I believe, in the history of the legislative process in working directly with my subcommittee—to perfect the first general revision copyright bill. This legislation was the forerunner of the new U.S. copyright statute finally enacted in 1976 and effective, in its entirety, on January 1, 1978. Throughout his career and following his retirement Mr. Kaminstein kept a close watch on the progress of copyright legislation generously making himself available for consultation when needed and always supporting strongly the work of the subcommittee. His eloquence and perceptive insight made him an invaluable spokesperson for any cause he chose to champion, and copyright was the cause nearest to his heart. His first and lasting professional concern was the provision of adequate protection, through copyright, of the rights of those who create and for the products derived from that creativity.

A man of wide intellectual and cultural interests, Mr. Kaminstein identified with the writer, the painter, the musician; his most productive years were dedicated to seeking, in their behalf, full legal protection for the works resulting from the application of their talents. All Americans are in his debt because of this constant concern and continuous effort in their behalf. His courage and high sense of duty made him a natural leader among men and women. His enthusiasm and genuine liking for people, combined with his strong administra-

tive abilities, earned him the respect and admiration of his total staff as well as his colleagues at every level. He believed in the principles of democracy and integrity, and he applied them in his daily work and life. The subcommittee's tasks were assisted in no small part by the breadth of Abraham Kaminstein's knowledge and his ability and willingness to share that knowledge with others.

As a result of his efforts, and the efforts of those he selected to work with him and to continue his work, the Congress was able to adopt the broad revision of the copyright law that will stand as a lasting monument to his inspiring leadership and distinguished ability.

Mr. Kaminstein's career was a brilliant one. In addition to molding recommendations for the new statute and drafting a proposed revision bill, he participated actively in international copyright circles. He represented the United States in assemblies of the Intergovernmental Copyright Committee, established under the Universal Copyright Convention, which took effect in 1955 as the first worldwide multilateral copyright treaty to which the United States adhered. Among his most notable achievements was his work in resolving the critical controversies between developing and developed countries engendered by the Protocol Regarding Developing Countries adopted at the meeting, in 1967 at Stockholm, for the revision of the Berne Convention; the protocol, which would have permitted developing countries to make certain sweeping reservations and exceptions under the revised convention, brought a major crisis in international copyright.

Although the United States is not a party to the Berne Convention, Mr. Kaminstein as the head of the U.S. observer delegation was able to suggest alternatives that were the basis of a program that culminated in revisions of both the Berne Convention and the Universal Copyright Convention, which have brought the developing and developed countries into harmony. These revisions were adopted at conferences held in Paris in 1971, where Mr. Kaminstein was cochairman of the U.S. delegation and general rapporteur of the revision conference on the Universal Copyright Convention. He participated also in preparing the U.S. proposals for the original version of the Universal Copyright Convention and was adviser to the U.S. delegation in 1951 at the Paris meeting where the preliminary draft of the convention was prepared. He was chairman of the U.S. delegation to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, held at Rome in 1961, and was general rapporteur of the conference.

Born in 1912 in New York City, Mr. Kaminstein was a graduate of the College of the City of New York. He received the LL.B. and

LL.M. degrees from the Harvard Law School, where he was a research fellow in 1936-37. After some 10 years of Government service as an attorney for various Federal agencies, he came to the Library of Congress in 1947 as Chief of the Copyright Office Examining Division and later served as Deputy Register of Copyrights. He was a leading force in adapting the copyright registration system to the public interest.

He was the author of numerous articles on copyright law, including an important study on Divisibility of Copyrights. He was a member of the New York Bar, the Bar of the Supreme Court, the Federal Bar Association, the American Bar Association and the Copyright Society of the U.S.A. Upon his retirement the Librarian of Congress appointed him honorary consultant in domestic and international copyright affairs, a post he held until his death. In 1971, Mr. Kaminstein received the Richard Strauss Medal from the German Society of Performing and Mechanical Rights in Music, in recognition of his contributions to the development of copyright law; he was the first American to receive this medal. He also received, in 1972 the Jefferson Medal of the New Jersey Patent Law Association for exceptional contributions in the field of copyright.

On May 25, 1977, Abraham Kaminstein was honored by the Copyright Society of the United States of America "for his inspiration, time, and unstinting efforts before, during, and after his service as Register."

He will be remembered not only as a respected and distinguished public servant, but as a warm human being and as a gentleman by those of us who had the privilege to know him.

LETTERS OF TRIBUTE

HON. ROBERT W. KASTENMEIER
OF WISCONSIN
IN THE HOUSE OF REPRESENTATIVES
Congressional Record, Wednesday, October 5, 1977

Mr. KASTENMEIER. Mr. Speaker, on September 14 I engaged in the sad duty of informing my colleagues about the recent death of Abraham L. Kaminstein, former U.S. Register of Copyrights. At this time I would like to share with the House several letters which I have received from representatives of organizations among whose members Abraham Kaminstein spent his professional life.

The letters follow:

ASSOCIATION OF AMERICAN PUBLISHERS, INC.
Washington, D.C., September 15, 1977.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I am writing on behalf of myself and the Association of American Publishers to express our feelings of loss over the death of Abraham L. Kaminstein, former Register of Copyrights.

Mr. Kaminstein was dedicated to the principles of copyright and made a significant contribution to beginning the revision efforts. Much of his drafting and work are reflected in the new copyright law of 1976. Mr. Kaminstein was an outstanding Register and he will be greatly missed.

Sincerely,

TOWNSEND HOOPES.

THE AUTHORS LEAGUE OF AMERICA, INC.
New York, N.Y., September 14, 1977.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: Abraham L. Kaminstein, who died on September 10th, was a dedicated public servant and distinguished copyright expert who played a significant part in the creation of the 1976 Copyright Revision Act, by far the most important statute Congress has enacted to allow and encourage the production of literary, dramatic, musical, and artistic works by American authors.

The Authors League, on behalf of thousands of professional writers and dramatists, takes this opportunity of expressing to the Congress, through you, its sorrow at Mr. Kaminstein's passing, and its appreciation of his efforts to maintain effective protection for the rights of authors, composers, and artists.

As Register of Copyrights, during most of the decade in which Congress worked to fashion the new Copyright Act, Mr. Kaminstein labored mightily in this cause. Under his guidance, the Copyright Office produced multi-volumed studies of copyright law, held numerous hearings, prepared drafts of the complex Revision Bill, and frequently gave testimony before your Subcommittee.

Mr. Kaminstein's work in this important legislative process and in the day-to-day administration of the Copyright Act, touched every profession, craft, and industry engaged in the creation and communication of literary, dramatic, musical and artistic works. Mr. Kaminstein distinguished himself by his energy and devotion to these tasks, his professional ability, and—above all—by his fairness and coolheadedness in the face of often-bitter controversies that swirled about so many major provisions of the Copyright Revision Bill.

The Authors League and its members join with you and the members of your Subcommittee in paying tribute to this distinguished public official.

Sincerely,

JOHN HERSEY,
President.

THE COPYRIGHT SOCIETY OF THE U.S.A.

New York, N.Y., September 16, 1977.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The name "Kami" bespoke the informality of a distinguished national and world leader in intellectual property, Abraham L. Kaminstein. His combination of scholarship, commitment and humanity made him a uniquely effective public servant. In honoring him last May, the Copyright Society noted his "inspiration, wisdom, time and unstinting efforts" invaluable contributing to the Copyright Act of 1976 with which you and your Subcommittee are so familiar.

He will be missed.

Sincerely yours,

E. GABRIEL PERLE,
President.

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

Washington, D.C., September 19, 1977.

HON. ROBERT W. KASTENMEIER

*House of Representatives,
Washington, D.C.*

MY DEAR MR. CHAIRMAN: "Life is a flame," said Ralph Waldo Emerson of a young contemporary poet. Abraham Kaminstein's life was a flame of splendor which warmed and illumined all areas he touched.

In his long and constructive years as Register of Copyrights, Kami was the guardian of the incalculable intellectual treasure of America. Himself an intellectual, he knew the true value of the mind, and respected the intelligence of others. He knew that knowledge sheds its abundance among all humankind.

His achievements as Register will always be writ large in the multi-dimensional spheres of art and communication and expression.

Kami was a good man who radiated goodness. His example is our legacy.

JACK VALENTI.
President.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

New York, N.Y., September 14, 1977.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: I write on the sad occasion of the passing of our mutual friend and colleague in the copyright vineyard, Abraham L. Kaminstein.

More than 20,000 composers, authors and publishers of music who comprise the American Society of Composers, Authors and Publishers held Kami in high esteem and had warm affection for him. Many people worked long and hard and contributed, in greater or lesser degree, to the 1976 Copyright Act. Very few contributed as much as Kami.

Kami's contributions were made at considerable personal sacrifice, including sacrifices in his health. It was fitting that you called on him to be the second speaker, after the Acting Librarian of Congress, John Lorenz, and the first copyright authority to support H.R. 2223.

Listening to Kami that day was a heartwarming experience. He spoke with wisdom and with modesty and it was typical of him to conclude his remarks with the hope that you, Mr. Chairman, would "feel

the personal satisfaction that comes with a job well done."

Authors have lost a good friend. But not only authors. The entire intellectual and artistic community is the poorer today for the loss of Abe Kaminstein and that of course, means the whole country has suffered a real loss.

Sincerely,

STANLEY ADAMS.
President.

BROADCAST MUSIC INC

New York, N.Y., September 21, 1977.

Chairman ROBERT W. KASTENMEIER,

*Subcommittee on Courts, Civil Liberties, and the Administration of Justice,
Committee on the Judiciary, Washington, D.C.*

DEAR CONGRESSMAN KASTENMEIER: Abraham Kamenstein, or "Kammy" to his friends, was a true public servant, laboring earnestly for the rights of American creativity. His discerning intellect recognized early the meaning of "intellectual property" and he strove mightily for its increased protection. To him, as much as to any single individual, belongs credit for long-awaited revision of copyright law in the United States. It will be his monument.

Very truly yours,

EDWARD M. CRAMER,
President.

AMERICAN GUILD OF AUTHORS/COMPOSERS,

New York, N.Y., September 21, 1977.

Chairman ROBERT W. KASTENMEIER,
*House Judiciary Committee,
Washington, D.C.*

DEAR CHAIRMAN KASTENMEIER: The American Guild of Authors and Composers, representing over 3,000 songwriters expresses its condolences on the passing of the Hon. Abraham Kaminstein, former Register of Copyrights. It was through his untiring efforts while Register that our members have seen the fruits of his labors in the passage of Public Law 94-553. This long-needed legislation to whom our members owe a great debt to its many authors, including yourself and the present Register, Barbara Ringer, would still be a dream today if Mr. Kaminstein had not laid the groundwork for its enactment. We would appreciate the insertion of this letter in the Congressional Record to serve as a public notice to an estimable gentleman.

Sincerely yours,

ERVIN DRAKE,
President.

NATIONAL MUSIC PUBLISHERS
ASSOCIATION, INC.,

New York, N.Y., September 21, 1977.

HON. ROBERT H. KASTENMEIER,

*Chairman, Subcommittee on Courts, Civil Liberties and the Administration of
Justice, Washington, D.C.*

DEAR BOB: In accordance with the memo from Irwin Karp, I am sending herewith a tribute to Kami. I think this is so very appropriate and I am sure that everyone is as pleased as I to have an opportunity to say publicly what we feel so keenly individually.

NMPA as an organization and I as an individual share with all members of the world copyright community a feeling of deep sadness on the death of Abraham L. Kaminstein—a sadness tempered by a keen awareness and appreciation for that heritage which he has left. His contribution was by no means limited to his leadership, determination and intellectual influence in shaping our own new law, but also to his diplomatic participation in overcoming the international copyright crisis of the late 1960's and early 1970's. We recall, too, the breadth of his interests, his warm companionship and the pleasure of his company. We shall miss Kami, a rare good friend.

Sincerely,

LEONARD FEIST.

President.

113. LEGISLATING COPYRIGHT PROTECTION FOR WORKS USED IN PUBLIC BROADCASTING

By HARRIET L. OLER*

INTRODUCTION

It is a tribute to the bicentennial year and to the burgeoning cultural history of our country that Congress has, in 1976, at last enacted a long-overdue general revision of the 1909 copyright law.¹

The test of its success will be its adaptability to changing technologies, its stability in protecting authors' rights, and its balancing of a vast array of interests to serve the elusive "public interest."

The purpose of this article is to examine and analyze Congressional efforts to achieve an equitable balance of copyright interests in one rapidly expanding arena of new technology: public broadcasting. Television, of course, was unknown to the drafters of the current 1909 copyright law.² And the public television industry, with its somewhat unique financial position, demands for ready access to copyrighted material, and accompanying non-profit activities has been active for little more than a decade.³

Thus, public broadcasters are relative newcomers to the copyright legislation effort. Largely owing to the rapid expansion of the industry in the 1960's and the need for ready access to copyrighted materials, coupled with the uncertain state of these broadcasters' legal liability for use of copyrighted materials,⁴ they began in 1965 to voice their special concerns before the House Subcommittee then conducting hearings on copyright revision.⁵ In 1975, the Mathias amendment, embodying a proposed compulsory license for guaranteed access in return for guaranteed payment, was incorporated into the revision

*Ms. Oler is a Senior Attorney on the General Counsel's Staff of the Copyright Office. The views expressed in this article are those of the author, and do not necessarily reflect official positions of the Copyright Office or the Library of Congress.

¹ Copyright Act of March 4, 1909, as amended, 17 U.S.C. §§1—236 (1970 & Supp. V. 1975).

² For a history of the broadcasting industry, see S. Head, *BROADCASTING IN AMERICA*, Part II: "Origin and Growth of Broadcasting" (3d ed. 1976).

³ *Id.*, at 181—83.

⁴ See part II, *infra*.

⁵ See Hearings on H.R. 4347 *et. al.*, before Subcomm. No. 3 of the Comm. on the Judiciary, 89th Cong., 1st Sess. 479—534, 1571—74 (1965) (statements by representatives of educational broadcasters) [hereafter cited as 1965 House Hearings].

bill.⁶ And, finally, in 1976, the final version of the bill (as later enacted) contained a modified version of this proposal in Section 118's public broadcasting provision.⁷

This article will discuss that and other relevant provisions, the liability of public broadcasting's copyright-related activities under the current 1909 copyright law, and the balance of copyright interests reflected in the particular legislative provisions of the newly revised copyright law. Examination of the new law's provisions that will affect the public broadcasting industry also raises questions as to how the statutory provisions will be implemented: What areas must the Copyright Office regulate? Which questions will be resolved by the Copyright Royalty Tribunal? What business activities are untouched by the law? And, what matters will predictably be left to the courts to decide? Finally, the article will discuss the projected success of the new copyright law in guarding the rights and interests of both authors and users of copyrighted material in the arena of public broadcasting.

I. THE PUBLIC BROADCASTING INDUSTRY: STRUCTURE AND ACTIVITIES

This article adopts the industry distinctions and definitions established by the Carnegie Commission on Educational Television and reflected in legislative policy decisions in the newly revised copyright law. Noncommercial television consists of stations that do not carry advertising⁸ and are owned and operated by nonprofit educational organizations,⁹ and of nonprofit organizations that provide most of

⁶ The Mathias Amendment was first introduced as S. 1361, Amendment No. 1815, 93rd Cong., 2d Sess., Aug. 19, 1974 [hereafter referred to as "Mathias Amendment"].

⁷ Pub. L. 94-553, § 118.

⁸ Limited uses of advertising are permitted noncommercial stations. For example, they may credit a commercial underwriter of production costs or donors and sell items at auction. They may also contract for telecasting over-the-air classroom instruction. And some stations market production services. Head, *supra* n. 2, at 223. See also, Video-Tape Producers Charge Noncommercial with Unfair Competition, BROADCASTING at 28 (April 8, 1974).

⁹ Under current F.C.C. rules, noncommercial educational television broadcast stations may be licensed to nonprofit educational organizations or municipalities having no independent educational organization such as a school board. Licensees may transmit instructional, cultural and entertainment programs. 47 C.F.R. § 73.621.

With respect to public radio stations, § 73.503 contains a simpler provision to the effect that:

the important programming and with which the majority of stations are affiliated.¹⁰ Noncommercial television may further be categorized in terms of activities, for the new copyright law grants exemptions from certain exclusive copyrights in part on the basis of noncommercial program content. Noncommercial *instructional* broadcasts enjoy the most broadcasting privileges under the new copyright law, including those peculiar to themselves (e.g., Sections 110(2), pertaining to instructional broadcasts,¹¹ and 112(b) permitting the making of ephemeral recordings for limited times,¹² and those directed to public broadcasting generally (Section 114(b)(1), permitting the use of copyrighted sound recordings in the audio portions of educational radio and television programs,¹³ 110(8) permitting the use of non-dramatic literary work in transmissions to print or aural handicapped persons,¹⁴ 504(c)(2) permitting a court to remit statutory damages,¹⁵ and Section 118,¹⁶ in its entirety). The law thus reflects a legislative decision that copyright liability should depend not only upon the non-commercial character of the broadcaster (as under the present copyright law), but also upon the program content or the class of viewer to whom it is directed.

The term "noncommercial television" thus embraces both public television and instructional television. The latter includes noncommercial programming aimed at formal instruction, either directed to classrooms or for which academic credit is received.¹⁷ "Public television," the focus of this paper, is the residue of noncommercial television broadcasting; it "includes all that is of human interest and importance which is not . . . appropriate or available for support by advertising, and which is not arranged for instruction."¹⁸ Noncommercial and

A noncommercial educational F M broadcast station will be licensed only to a non profit educational organization and upon showing that the station will be used for the advancement of an educational program.

47 C.F.R. Sec. 73.503.

¹⁰ THE CARNEGIE CORPORATION, PUBLIC TELEVISION: A PROGRAM FOR ACTION: THE REPORT AND RECOMMENDATIONS OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION at 1 (1967) [hereinafter cited as the CARNEGIE REPORT].

¹¹ Pub. L. 94-553, § 110(2).

¹² Pub. L. 94-553, § 112(b).

¹³ Pub. L. 94-553, § 114(b).

¹⁴ Pub. L. 94-553, § 110(8).

¹⁵ Pub. L. 94-553, § 504(c)(2).

¹⁶ Pub. L. 94-553, § 118.

¹⁷ CARNEGIE REPORT, *supra* n. 10, at 116.

¹⁸ *Id.*, at 1. The term "public television" is used interchangeably with "educational television."

public broadcasting also embrace non-profit, non-instructional licensed *radio* programs.

The Carnegie Commission's proposal anticipated maximum local control over local programming: although the Corporation's backlog of programs would be available to local station affiliates, local broadcasters would determine whether to broadcast a program, whether to broadcast it live, and how many times to broadcast it.¹⁹

These recommendations formed the crux of the Public Broadcasting Act of 1967,²⁰ which established the nongovernmental, presidentially-appointed Corporation for Public Broadcasting (CPB)²¹ to conduct research and training, interconnect individual stations, sponsor national programming to be distributed through local stations, operate program libraries, and provide financial assistance to local stations.²²

National Educational Television (NET)²³ is the principal program production center, but it is now one of several supplying programs for national distribution by the Public Broadcasting Service.²⁴ PBS is a private, non-profit membership corporation, the members of which are the licensees of some 265 non-commercial stations located throughout the United States and its territories. The National Public Affairs Center for Television in Washington, (NPACT), which supplies PBS with news and public affairs programming, receives financial support from CPB and the Ford Foundation.²⁵ Two other production sources, in addition to production-oriented stations affiliated with PBS, are independent supplier organizations such as

¹⁹ See memo of law prepared by E. Jennes of Covington & Burling, Dec. 1966, reproduced in CARNEGIE REPORT, *supra* n. 10 at 115-34 and particularly at 118.

²⁰ Public Broadcasting Act of 1967, 47 U.S.C. §§ 396-98.

²¹ *Id.*, § 396(b).

²² *Id.*, § 396(g).

²³ NET became an offspring of WNET, New York, in 1970.

²⁴ See Head, *supra* n. 2, at 183; Millard, *The Story of Public Broadcasting*, 81 BROADCASTING at 30. 33 [1971]. Other major program production stations are WGBH, Boston ("Masterpiece Theatre"); KCET, Los Angeles; KQED, San Francisco; WQED, Pittsburgh; and WTTW, Chicago. J. MACY, *TO IRRIGATE A WASTELAND* at 145-46 (1974). PBS states that virtually all public broadcasting stations create programs—for local use, for state and regional networks, and for national distribution. Letter from PBS to Copyright Office dated June 3, 1976.

²⁵ Head, *supra* n. 2, at 184. It produces through station WETA, Washington, D.C. Macy, *supra* n. 24, at 145.

Children's Television Workshop (CTW)²⁶ and Family Communications, Inc. (FCI), a nonprofit corporation which produces "Misterogers Neighborhood" and other family programs,²⁷ and other outside suppliers.²⁸

Unlike its PBS counterpart, National Public Radio (NPR) produces some programs; and, it uses funds from CPB to contract with local stations for specific programs to be carried on the network.²⁹

The Carnegie Commission Report and its legislative progeny seem clearly to have been responsible for the rapid expansion of the public broadcasting industry.³⁰ As long ago as 1971, public broadcasting was widely recognized as a "major force" on the American television and radio scene.³¹ In 1965, the noncommercial broadcasting industry began actively lobbying for special consideration in the copyright revision legislation under consideration.³² By 1975, at the House hearings on copyright revision, both author and composer spokesmen vehemently argued that the explosive development of the public broadcasting industry signalled that its product competes with that of commercial broadcasters and that the industry therefore no longer needed special copyright consideration to thrive.³³

The legal copyright "privileges" and liabilities of public broadcasters under the current 1909 copyright law, and their efforts to expand

²⁶ Children's Television Workshop is one independent programming organization, whose only ties to public broadcasting are that it has received funds from CPB, as well as from the U.S. Office of Education and the Ford Foundation. Its most popular production is "Sesame Street." Millard, *supra* n. 24, at 35.

²⁷ Macy, *supra* n. 24, at 145.

²⁸ Head, *supra* n. 2 at 183. For a discussion of the relationship between funding and program content, see *id.* at 311-15.

²⁹ Millard, *supra* n. 24, at 33.

³⁰ In 1965, 259 noncommercial radio stations were operating. Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 94th Cong., 1st Sess. 930 (1975) (testimony of ASCAP), [hereinafter cited as 1975 House Hearings.]. Approximately 120 educational television stations existed in 1967. CARNEGIE REPORT, *supra* n. 10 at 1. One decade later, in 1975, the numbers of both operational educational television stations and radio stations had more than doubled. The ASCAP statement reports 254 public television stations and 660 public radio stations existed in 1975. 1975 House Hearings, at 930.

³¹ Millard, *supra* n. 24, at 30.

³² See 1965 House Hearings, *supra* n. 5 at 479-535, 1571-74 (comments of representatives of educational broadcasters).

³³ See 1975 House Hearings, *supra* n. 30 at 907-89 (statements of witnesses opposing the proposed public broadcasting compulsory license) and especially 930-33 (statement of ASCAP).

their exemptions from liability in the revised copyright law will be considered in the following pages.

II. COPYRIGHT LIABILITY OF PUBLIC BROADCASTERS UNDER THE CURRENT COPYRIGHT ACT

The question of copyright liability for public broadcasters under the 1909 copyright law may be considered in terms of those broadcasters' two principal activities: performances and recordings.

For most commercial television broadcasts, music performance rights³⁴ are granted by blanket licenses from the performing rights organizations: ASCAP, BMI, and SESAC,³⁵ and non-music performance rights are voluntarily negotiated. However, the present copyright statute does not expressly grant an exclusive right of performance or display for nondramatic pictorial, graphic and sculptural works;³⁶ and it exempts from copyright control performances of nondramatic literary and musical works that are not "for profit". 17 U.S.C. Section 1(c) grants the copyright owner the exclusive right:

To deliver, authorize the delivery of, read, or present the copyrighted work in public *for profit* if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced or reproduced; and to play or perform it in public *for profit*, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever.³⁷

Moreover, Section 1(e) exempts nonprofit performances of mu-

³⁴ Performance rights in these media derive from the statutory grant to the copyright owner of exclusive rights to perform the copyrighted work publicly. 17 U.S.C. §§ 1(c), (d), and (e).

³⁵ For a discussion of educational broadcasting licensing practices generally, see Aleinikoff, *Educational Television- A Non-commercial Viewpoint*, 53 IOWA L. REV. 880 (1968).

³⁶ § 1(a) gives the right to "print, reprint, publish, copy and vend the copyrighted work." 17 U.S.C. § 1(a); NIMMER ON COPYRIGHT § 107.1 (1976) [hereinafter cited as NIMMER]. As to whether display on television was the making of a "copy," compare *Patterson v. Century Productions, Inc.*, 93 Fed. 2d 489 (2d Cir. 1939) with *Mura v. CBS*, 245 F. Supp. 487 (S.D.N.Y. 1965).

³⁷ 17 U.S.C. § 1(c) (emphasis added).

sical compositions from copyright liability by granting the copyright owner exclusive rights:

To perform the copyrighted work publicly *for profit* if it be a musical composition. . . .³⁸

A performance generally is considered to be "for profit" if it is made with an expectation of direct or commercial advantage.³⁹ Thus, a live performance of a nondramatic literary work for purely educational purposes is generally thought to be exempt under the current law.⁴⁰ This is also true of the unsponsored performances of such works on instructional radio and television.⁴¹

But what of the potential liability of public broadcasters? They maintain that they come within the aegis of title 17's not-for-profit exemptions.⁴² That position has been challenged. Copyright owners have argued that the exemption is unavailable,⁴³ at least where public broadcasters accept money from business corporations and offer benefits of sponsorship.⁴⁴

Two federal cases comprise the principal legal precedents for determining the not-for-profit status of broadcast performances. In the earliest, *M. Witmark & Sons v. Bamberger & Co.*,⁴⁵ an announcement at the beginning and end of a radio program broadcast on station WOR in 1923, "L. Bamberger & Co., One of America's Great Stores, Newark, N.J."⁴⁶ was held to render the broadcast of copyrighted music a "performance for profit." The court reasoned that "a department store is conducted for profit, which leads us to the very sig-

³⁸ *Id.*, § 1(e) (emphasis added).

³⁹ NIMMER, *supra* n. 36, at § 107.32. See *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

⁴⁰ NIMMER, *supra* n. 36, at § 107.31.

⁴¹ *Id.*, § 107.32.

⁴² Educational broadcasters contend that they are clearly noncommercial, non-profit broadcasters, supported by public funds, active exclusively in public programming and prohibited by the F.C.C. from carrying advertising or selling air time. Letter from Chalmers Marquis, Vice President of PBS, to Congressman Kastenmeier on the copyright status of public broadcasters, dated Oct. 28, 1975. And, they believe, the 1909 Act's "for profit" restriction has never been judicially applied to public broadcasting. *Id.*

⁴³ 1975 House Hearings, *supra* n. 30, at 928-29 (statement of ASCAP).

⁴⁴ For the F.C.C. limits on permissible advertising and sponsorship for licensed noncommercial broadcasting stations, see 47 C.F.R. §§ 621(d), (e) and 73, 503(c).

⁴⁵ 291 Fed. 776 (D. N. J. 1923).

⁴⁶ *Id.* at 779.

nificant fact that the cost of the broadcasting was charged against the general expenses of the business. It was made a part of the business system."⁴⁷ That fact rendered the performance "for profit," regardless of whether the advertisements actually contributed to sales.

In *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*,⁴⁸ plaintiff brought an infringement action against the owners and operators of radio station WEVD, alleging that their unlicensed broadcast of plaintiff's copyrighted orchestral work constituted a public performance for profit in violation of his Section 1(e) exclusive rights. The Second Circuit Court affirmed the New York District Court's opinion and held for plaintiff on grounds that the performance was for profit, notwithstanding that the station was operated by a nonprofit corporation for eleemosynary purposes and that the performance was on a "sustaining" program on which there were no commercial advertisements. Augustus Hand wrote that in deciding the "for profit" question, whether the profit went to the radio station, to its employees, or to the advertisers was immaterial; the station devoted one third of its time to advertising programs and used advertising revenue to defray the station's operating cost, making the performance "for profit."⁴⁹

The fees for advertising are obtained in order to aid the broadcasting station to pay its expenses and repay the advances to it by the Forward Association. The "sustaining" programs are similarly broadcast in order to maintain and further build up the listening audience and thus furnish the field from which the paying advertisers may reap a profit. It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational. Both in the advertising and sustaining programs Debs was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury whereby it might repay its indebtedness to Forward Association and avoid an annual deficit . . . It is unimportant whether a profit went to Debs or to its employees [sic] or to the advertisers. The performance was for profit and the owner had the statutory right to preclude each and all of them from reaping where they had not sown.⁵⁰

⁴⁷ *Id.*

⁴⁸ 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 776 (1944).

⁴⁹ *Id.* at 855.

⁵⁰ *Id.*

Additionally, although the "for profit" issue was not expressly argued, in *Rohauer v. Killiam Shows, Inc.*,⁵¹ the District Court opinion contains suggestive *dicta* to the effect that an underwriter may be liable for a performance. The case involved movie rights in a literary and/or dramatic property entitled 'Sons of the Sheik.' The assignee's film, 'The Son of the Sheik,' starring Valentino, was based on the author's novel. The derivative work was shown on a New York Television channel owned by the Educational Broadcasting Corporation, and the showing was one of twelve films underwritten by defendant Bowery Savings Bank.

In the context of discussing whether defendant was vicariously liable, the court said that defendant bank, in financing a silent film series on educational television and "extensively advertising" its participation in the series, was a sponsor of the series and not a mere underwriter. "Here, in addition [to a 'sedate announcement of the bank's contribution'] the entire "Silent Years" series was extensively advertised in the press, on public buses, and in other media; all such advertising bore Bowery's name."⁵² Bowery also distributed posters and a still from the movie with its name; and, the court found that "its participation in the financing and promotion of the series qualifies it as a sponsor."⁵³

Nevertheless, since a sponsor may be held liable for infringement only if it has the power to supervise and control the content of a program⁵⁴ the court dismissed against Bowery, finding that plaintiff had failed to prove the extent of Bowery's participation. Under the 1909 copyright law, so long as no "copy" or "record" is made (such as a video tape or ephemeral recording), the prevailing view is that

a performance of a nondramatic literary or musical work in a broadcast to the public by an educational or other nonprofit radio or television station is not an infringement of copyright where, as is usually assumed to be true of such stations, no commercial element is involved in its broadcasts.⁵⁵

⁵¹ 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977), *cert. denied* —U.S.— (May 31, 1977).

⁵² 379 F. Supp. at 729.

⁵³ *Id.* at 730.

⁵⁴ *Davis v. E.I. DuPont de Nemours*, 240 F. Supp. 612 (S.D.N.Y. 1965).

⁵⁵ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 Revision Bill, May 1965, at 34 [hereinafter cited as SUPPLEMENTARY REPORT].

This exemption does not extend to other types of broadcasts, such as dramas and motion pictures. Although public broadcasters do not customarily license the right to perform copyrighted nondramatic works in their broadcasts, the legality of this practice with respect to some works may be questionable, in view of [F.C.C. condoned] corporate support of programs and limited program patron identification.⁵⁶

The second major copyright-related activity of public television broadcasters is recording or synchronization, i.e., recording in timed relation with visual images. It is a common practice of public broadcasters to make so-called "ephemeral recordings" or videotapes of their programs in advance, to be used for the initial broadcast and for subsequent rebroadcasts at various times.⁵⁷

With regard to musical works used in such recordings, the copyright owners maintain they have exclusive rights to record the work under Sections 1(e) and 1(a).⁵⁸ Broadcasters might, however, contend that that right is subject to a "for profit" limitation because of Section 1(e)'s grant of exclusive rights:

To perform the copyrighted work publicly for profit if it be a musical composition; *and for the purpose of public performance for profit and for the purposes set forth in subsection (a) hereof* [including the right to copy], to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record. . . .⁵⁹ [Emphasis added.]

Synchronization rights are typically licensed to producers of motion pictures and television programs.⁶⁰ In the early days of commercial television, ASCAP typically licensed synchronization rights free of charge for a single showing along with the performance license, with

⁵⁶ See 47 C.F.R. §§ 73.621 and 73.503.

⁵⁷ SUPPLEMENTARY REPORT, *supra* n. 54, at 35. The average public television station repeats about one-half of its programs during the same week. Most programs remain available for re-release for three years. Moreover, most programs are "pre-recorded for production, re-recorded for distribution by PBS, and again re-recorded by local stations for delayed and repeat broadcast." House hearings, *supra* n. 30, at 867 (Statement of Donald Quale, CPB's Senior Vice President for Broadcasting).

⁵⁸ But see n. 63, *infra*. Similar recording or transcription rights are apparently not asserted for radio sound recordings. C. Marquis letter, *supra* n. 42.

⁵⁹ 17 U.S.C. § 1(e).

⁶⁰ See 1975 House Hearings, *supra* n. 30, at 926-27 (testimony of ASCAP).

fees paid directly to the music publisher for reruns.⁶¹ Public broadcasters originally requested ASCAP to secure synchronization licenses as part of a performance agreement; but that agreement was never executed, and the broadcasters ceased payment of synchronization fees thereafter.⁶² Apparently, music owners have never legally pressed their alleged synchronization rights against public broadcasters during the past decade of attempts to negotiate a settlement; and public broadcasters have freely synchronized copyrighted music throughout that period.

Non-musical works such as dramas, sculpture, photographs, and motion pictures are presumably within the copyright owner's exclusive right to record.⁶³ However, some users maintain that recordings of copyrighted nondramatic literary works are subject to a "for profit" limitation by virtue of Section 1(c)'s phraseology and punctuation.⁶⁴ A

⁶¹ 1975 House Hearings, *supra* n. 30, at 926-27 (testimony of ASCAP). The practice apparently dated from the decision in *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), where the court suggested issuing combined synchronization and performing rights licenses to the producer. Despite the industry practice of licensing synchronization rights, controversy still exists over whether the § 1(e) compulsory mechanical license applies. See *NIMMER*, *supra* n. 36, at § 109.14. The arguments on both sides are set out in *Foreign and Domestic Music Corp. v. Licht*, 196 F.2d 627 (2d Cir. 1952); *Famous Music Corp. v. Melz*, 28 F. Supp. 767 (W.D. La. 1939); and *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946).

⁶² 1975 House Hearings, *supra* n. 30, at 927 (testimony of ASCAP). For a discussion of ASCAP and public broadcasting efforts to reach an agreement for performance and synchronization rights (an effort which continued from 1967 through 1975), see *id.* at 927-28.

⁶³ § 1(a) gives an exclusive right to copy; § 1(c) grants an exclusive right to make a record of a nondramatic literary work; § 1(d) grants a similar right in dramatic works; § 1(f) grants reproduction rights with respect to sound recordings fixed after Feb. 15, 1972. Some may argue that § 1(a), which gives the author the exclusive right to copy, does not give an exclusive right to control the use of works in such media as motion pictures or audio visual works because of Supreme Court language in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), carried over into the present law, that casts doubt on whether such works are "copies" of the copyrighted work. The Authors League of America, Inc. maintains that the copyright owner's permission is legally required to produce programs using literary works. Authors now voluntarily grant licenses for readings from books and other literary works on public broadcasts at modest rates. Memorandum from the Authors League and the Association of American Publishers to Senator Mathias on the proposed § 118, dated April 16, 1976.

⁶⁴ The ambiguity surrounding recording rights under § 1(c) derives from the statutory phrasing and punctuation, which leave unclear whether the "for profit" limitation can be read into the right "to make any transcription or

further possible qualification to the copyright owner's recording right is the argument that works falling within subsection 1(a) are exempt from exclusive rights because a record is not a "copy" under the *White-Smith* doctrine.⁶⁵ And finally, of course, adding to the legal liability uncertainties discussed above, is the question of fair use.⁶⁶ Under that judicially-created doctrine, one may well question whether a public broadcaster who makes only one or two recordings for archival purposes would not be free to do so under the fair use doctrine.

Under current trade practices, the matter of off-air videotaping and the permissible period for holding such tapes is a matter of voluntary or negotiated agreements. It has been reported that some copyright owners include a tape and seven day reply right in their agreements licensing broadcast of their material on public television.⁶⁷ In November 1975, the Public Broadcasting Service announced that schools which appoint a re-recording coordinator who maintains contact with the local public television station may record most public television programs off-air. The school may hold the recording for seven days, after which it must be erased or arrangements must be made with the copyright owners for audio-visual rights.

III. PRELIMINARY REVISION EFFORTS

Dissatisfaction with the current state of unclear liability under the 1909 law, the fractionalization of copyright rights, the clearance problems of public broadcasters, the demands of copyright owners for reimbursement for use of their works by public broadcasters and the inability of both sides to conclude satisfactory voluntary negotiations culminated in the introduction in 1974 of the Mathias Amendment to S. 1361.⁶⁸

record thereof." 17 U.S.C. Sec. 1(c). See Note, *Legal Problems of Educational Television*, 67 YALE L.J. 639, 663, note 110 (1958).

⁶⁵ See discussion in n. 63, *supra*.

⁶⁶ NIMMER, *supra* n. 36, at § 145.

⁶⁷ *Off Air Videotaping—When Is It Legal?* EDUCATIONAL AND INDUSTRIAL TELEVISION 21-23 (June 1976).

⁶⁸ The Senate Subcommittee rejected a public broadcasting amendment when reporting the 1969 revision bill to the full Senate Judiciary Committee. S. 543, 91st Cong., 1st Sess. (1969) [Committee Print]. The Senate Judiciary Committee again rejected inclusion of a public broadcasting provision when reporting S. 1361, 93rd Cong., 2d Sess. (1973), to the full Senate on July 3, 1974. See SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS OF THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, H.R. 2223 (unpublished report submitted to the House Subcomm. on Courts, Civil Liberties and the Administration of Justice, Dec. 1975) ch. VI, at 10 [hereinafter cited as SECOND SUPPLEMENTARY REPORT]. The Mathias Amendment, *supra* n. 6, was introduced on August 19, 1974.

The 1974 Mathias Amendment would have created a compulsory license for the public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic and sculptural works, *whether published or not*.⁶⁹ The Amendment was not actively considered by the 93rd Congress, but the issue was slated for full consideration by the 94th Congress.⁷⁰ During 1975, the House Judiciary Subcommittee conducted extensive hearings on H.R. 2223,⁷¹ during which time proponents and opponents of a compulsory license for public broadcasting were heard.⁷²

Public broadcasters argued strongly that public television's needs and functions were distinct from those of commercial broadcasters, in that it used far more copyrighted works and was financed by public support and donations. They reiterated earlier statements that, although they were willing to pay, they feared that clearing procedures would be administratively burdensome and costly.

Public broadcasters therefore lobbied for a compulsory license limited to non-dramatic and published works, for which statutory fees would be established after careful consideration following enactment, and which could be supplanted by voluntary arrangements between broadcasters and copyright owners.

Musical performing rights societies, on the other hand, argued that public broadcasting competes with commercial broadcasting and should be treated equally for copyright purposes. They maintained that compulsory licensing was uncalled for, and that it was objectionable in principle. And they restated their view that public broadcasters should pay for both performing and synchronization rights under the present law.

Authors' and publishers' representatives echoed the performing rights societies' views, adding that a compulsory license would create a dangerous precedent in reducing an author's exclusive right to control the use of his or her works. They vehemently preferred voluntary agreements to compulsory licenses.⁷³ Following the hearings the Register of Copyrights also prepared a Second Supplementary Report on General Revision of the U.S. Copyright Law to accompany the bill. It discussed policy and technical issues of the revision legislation, including public broadcasting, and opposed compulsory licensing schemes

⁶⁹ Mathias Amendment, *supra* n. 6, § 118(a).

⁷⁰ S. Rep. No. 94-473, 94th Cong., 1st Sess. 100 (1975).

⁷¹ H.R. 2223, 94th Cong., 1st Sess. (1975) contained no public broadcasting provision.

⁷² 1975 House Hearings, *supra* n. 30, at 857-989.

⁷³ SECOND SUPPLEMENTARY REPORT, *supra* n. 68, ch. VI.

involving primary uses of literary works, while acknowledging the advantages of voluntary centralized blanket licensing.⁷⁴

In the meantime, the Senate Subcommittee on Patents, Trademarks, and Copyrights had studied the issues reflected in the Mathias Amendment. At the Chairman's request, the parties continued their efforts to reach voluntary agreements which would guarantee access to copyrighted works in return for payment to the copyright owners. While progress continued, the Senate Subcommittee reported S. 22 to the full Senate Judiciary Committee on April 13, 1975, without a public broadcasting amendment.⁷⁵

The principal areas of dispute were the amount of royalties, procedures for arbitration, the need for clearance bodies for some copyrighted works, and the need for an antitrust exemption to permit voluntary agreements.⁷⁶ With the parties still unable to agree on these issues following the House Hearings, the Senate Judiciary Committee reported S. 22 on October 7, 1975, with a new Section 118 and corresponding Chapter 8 provisions.⁷⁷

A public broadcasting provision was first officially reported as an integral part of the copyright revision bill in Senate Report 94-473.⁷⁸ The Committee reported that the section would be modified to reflect whatever agreements were reached before enactment of the revision bill.⁷⁹ This version retained the earlier Mathias Amendment enumeration of works subject to a compulsory license, with the exception of sound recordings.⁸⁰ But it added a new subsection to clarify that the license did not apply to unpublished nondramatic literary or musical works or to dramatization rights for nondramatic literary or musical works.⁸¹ Moreover, it made the license available to broadcasting entities,⁸² rather than for the act of public broadcasting, as in the earlier Mathias Amendment. Section 802 started Royalty Tribunal rate pro-

⁷⁴ *Id.*

⁷⁵ S. 22, 94th Cong., 1st Sess. (June 1975) [Committee Print]. The Subcommittee issued a statement acknowledging "tentative understandings . . . on a number of issues" and opining that disputed issues might be resolved "if the parties seek reasonable accommodations." S. Rep. 94-473, *supra* n. 70, at 100, SECOND SUPPLEMENTARY REPORT, *supra* n. 68, ch. VI, at 13-14.

⁷⁶ S. Rep. 94-473, *supra* n. 70, at 100.

⁷⁷ S. 22, in S. Rep. No. 94-473, *supra* n. 70.

⁷⁸ *Id.*

⁷⁹ *Id.* S. Rep. No. 94-473, *supra* n. 70 at 100.

⁸⁰ *Id.*, S. 22 § 118(a). Sound recordings were deleted primarily because they are not subject to a performance right.

⁸¹ *Id.*, § 118(e).

⁸² *Id.*, § 118(a).

ceedings on January 1, 1980, and authorized the Tribunal to review and adjust them at ten year periods thereafter.⁸³ Finally, Section 110(8) reflected the parties' earlier discussions and retained Section 110(8) to exempt performances of literary works for public broadcasts to a print or aural handicapped audience.⁸⁴

Four days of floor discussions by the Senate on February 6, 16, 17, and 19, 1976, followed. At these debates, amendments were considered to lessen the period for rate review and adjustment by the Royalty Tribunal.⁸⁵ Senator Cranston introduced a compromise amendment which would have given owners of nondramatic literary works a 14-day veto over use of their works by public broadcasters.⁸⁶ And Senator Pastore introduced an amendment instructing the parties to cooperate with the Tribunal in establishing reasonable royalty fees.⁸⁷

Finally, representatives of authors and publishers proposed a five-point voluntary license system as an alternative to compulsory licensing. It would have established a clearinghouse for public broadcasting uses of copyrighted material, and a standard one-page license form, added a "quantitative definition of fair use" for public broadcasting, offered an antitrust exemption to cover attempts to reach agreement on a standard fee schedule, and offered broad exemptions for the use of copyrighted material in public broadcasting programs for the blind and deaf.⁸⁸

Of these proposals, only that to encourage the parties to cooperate with the Tribunal was adopted; but the bill as approved by the full Senate on Feb. 19, 1976, added a new Section 113 Transitional and Supplementary provision starting the Royalty Tribunal mechanism for establishing rates immediately upon enactment of the new law.⁸⁹ It added to subsection (f) a provision permitting off air videotaping by educational institutions for limited use in instructional activities during one week after the broadcast.⁹⁰

During the spring and summer of 1976, the House Subcommittee began a twenty-two day marathon public mark up of S.22, culminat-

⁸³ *Id.*, § 802(b).

⁸⁴ *Id.*, § 110(8).

⁸⁵ 122 Cong. Rec. S. 1607-11 (daily ed. Feb. 16, 1976); S. 2027-30 (daily ed. Feb. 19, 1976).

⁸⁶ *Id.* at S. 1756 (daily ed. Feb. 17, 1976).

⁸⁷ *Id.* at S. 1757-58 (daily ed. Feb. 17, 1976).

⁸⁸ *Id.* at S. 2045-2047 (daily ed. Feb. 19, 1976).

⁸⁹ S. 22, 122 Cong. Rec. S. 2062, Transitional and Supplementary Provisions, Sec. 113 (daily ed. Feb. 19, 1976).

⁹⁰ S. 22, 122 Cong. Rec. 2053, Sec. 118(f) (daily ed. Feb. 19, 1976).

ing in its favorable report of S.22 by a unanimous vote on August 3, 1976, with an amendment in the nature of a substitute. The amendment substantially changed Section 118. The full House Committee on the Judiciary reported that bill, as amended, without change.⁹¹ That Report's version of section 118 was later adopted without change by the Conference,⁹² and enacted into law. It will be discussed in the following pages.

IV. THE NEW COPYRIGHT LAW AND PUBLIC BROADCASTING

The broad principles adopted in Section 118 of the enacted law are those found in the previous Mathias amendments, but the scope of protection and the systems of implementation differ considerably from those in earlier revision efforts. This section attempts to explain the structure of Section 118 and point up issues raised by the language.

A. Compensation

The newly enacted law retains the earlier revision approach to author protection so that the copyright owner enjoys all the exclusive rights to his intellectual property enumerated in Section 106 except insofar as those rights are modified by succeeding sections of the law. The modification most relevant to public broadcasting is contained in Section 118. It enables noncommercial broadcasters to enjoy a compulsory license for the works covered by subsection (b) and the activities specified in subsection (d), provided that certain conditions are met. The salient principle in this section is that of compensation to the copyright owner for the use of his work. Unless a public broadcaster can prove that his use comes within one of the statutory exceptions to Chapter 1, the copyright owner is entitled to statutory rights, including compensation, for every use falling within the exclusive rights enumerated in Section 106, including those covered by the compulsory licensing provisions of Section 118. The question of the owner's right to payment under the current law have been resolved—in his favor.

B. Voluntary Negotiations Prevail

The second major principle embodied in Section 118 is that of

⁹¹ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

⁹² H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) [Conference Report].

the primacy of voluntary negotiations. With respect to works and activities otherwise covered by the compulsory licensing provision, voluntary negotiations between public broadcasters and copyright owners prevail in every case, even where a compulsory license would otherwise obtain, provided they are duly filed in the Copyright Office within the time limits prescribed by subsection (B) (3), and in accordance with Regulations prescribed by the Register of Copyrights.

Although the legislative intent to favor voluntary licensing over compulsory licensing is clear, one cannot be sure that the statutory scheme will realize this hope with respect to uses which would otherwise be covered by a compulsory license. The success of the voluntary principle will ultimately depend upon the willingness of parties to compromise and the wisdom of the Royalty Tribunal in fixing economically realistic compulsory licensing fees.

The statute enables public broadcasters and copyright owners to designate common agents to negotiate the terms and rates of royalty payments and the division of fees among various copyright owners with respect to works otherwise subject to the compulsory license⁹³ and to nondramatic literary works⁹⁴ without fear of violating the antitrust laws. But regarding works and uses covered by Section 118's compulsory license, a question is raised whether voluntary licenses (or at least rates other than those established by the Tribunal) will ever be agreed to.⁹⁵

If the Tribunal rate is artificially high, broadcasters who heretofore have paid little or nothing in reliance upon the not-for-profit limitations of the current law⁹⁶ will presumably forego the use and resort to public domain material, assuming the authors' representative is unwilling to go below this ceiling. If Tribunal rates are at market value, would either party enter negotiations or would reliance on compulsory rates be most expedient? To be consistent with the law's

⁹³ *Id.*, Pub. L. 94-553 § 118(b).

⁹⁴ *Id.*, § 118(e)(1).

⁹⁵ Irwin Karp, representing the Authors League of America, Inc., made a similar argument in a letter dated Jan. 28, 1975 to the Senate Subcomm. on Patents, Trademarks and Copyrights, Comm. on the Judiciary, speaking on the Mathias Amendment, which would have included nondramatic literary works within the umbrella of § 118's compulsory license. He expressed fear that Tribunal rates would be too low and would enable broadcasters "to seize the work at prices far lower than its reasonable value." 1975 House Hearings, *supra* n. 30 at 958, 961. *But see* the House Report's suggestion that the Commission "assure a fair return to copyright owners without unfairly burdening public broadcasters," H. Rep. No. 94-1476, *supra* n. 91 at 118.

⁹⁶ 17 U.S.C. §§ 1(c), (e).

principles of author protection,⁹⁷ Tribunal rates cannot be artificially low. Rather, they should arguably represent a ceiling fair market value to assure author compensation without risk of diminished usage by noncommercial broadcasters. Thus, although Congress intended to encourage voluntary negotiations, the statutory mechanism it established may raise some doubt whether such agreements will materialize.⁹⁸

Assuming that voluntary agreements are concluded, confusion may arise from statutory ambiguity about filing requirements. In addition voluntary licenses covering compulsory licensed activities supersede Tribunal rates if the agreements are filed in the Copyright Office within 30 days of their execution and meet the Office's regulatory requirements.⁹⁹ But, the law fails to specify when the voluntary agreements take effect: on the date of their execution, the date specified in the agreement, or the date of filing in the Copyright Office. It seems that accession to the legislative disposition favoring voluntary agreements would warrant recognizing their validity as of the date of execution, subject to their retroactive nullification if the parties fail to meet the condition subsequent of filing them in the Copyright Office within 30 days. This interpretation, although in accord with legislative policy, raises two objections.

First, it is literally inconsistent with the later statutory provision for filing voluntary agreements for the terms and rates of royalty payments for the use of nondramatic literary works by public broadcasters. Subsection (e) (1) makes such terms and rates effective "upon" filing in the Copyright Office.¹⁰⁰ Presumably, the word "filing" means the date of "recordation" rather than the date of submission to the Office. Since this section was included as an alternative to previous revision provisions embracing nondramatic literary works within public broadcasting's compulsory license,¹⁰¹ and since Congress may later re-

⁹⁷ One author-oriented action was the removal of nondramatic literary works from the scope of § 118's compulsory license.

⁹⁸ Prospects for realizing the legislative aim seem brighter when one considers that voluntary licenses have largely supplanted compulsory mechanical licenses for making phonorecords under § 1(e) of the current law. 17 U.S.C., § 1(e). And there, the statutory royalty in effect established a ceiling. See W. Blaisdell, *Study No. 6, The Economic Aspects of the Compulsory License*, STUDIES ON COPYRIGHT, Arthur Fisher Memorial Edition, 101-03 (1963); testimony of Ralph Peer, of the National Music Publishers Association, 1975 House Hearings, *supra* n. 30, at 1644-46.

⁹⁹ Pub. L. 94-553, § 118(b)(2).

¹⁰⁰ *Id.*, § 118(e)(1).

¹⁰¹ See discussion of Mathias Amendment in Part III, *supra*.

consider whether to expand the scope of this compulsory license to include nondramatic literary works,¹⁰² one may question the reason for differentiating between filing requirements for these and other voluntary broadcasting licenses.

Second, if voluntary licenses which were not filed [recorded] were divested after 30 days under Section 118 (b) (2), the parties to the invalidated agreement, and broadcasters in particular, would be faced with potential accounting problems if payment, or partial payment, of royalties had already been made. In rebuttal, one might argue that insofar as broadcasters would be indisposed to agree voluntarily to a rate higher than the Tribunal rate, any accounting errors would be in their favor. Moreover, the prospect of a costly bookkeeping problem might provide added incentive to the parties to record their voluntary agreements within the statutory period. On balance, then, in this writer's view, the statutory ambiguity as to the effective date of voluntary agreements would best be clarified by interpreting the 30 day filing requirement as a condition subsequent.

C. Compulsory Licensing

A third principle evident in Section 118 is compulsory licensing. The legal device of compulsory licensing is a concession to current technology's demands for quick access to copyrighted material without the need for complex, time-consuming clearance procedures.¹⁰³ It permits the user to use copyrighted materials without the copyright owner's permission, provided that the user complies with statutory conditions and compensates the owner on statutory terms—by paying “statutory royalties.” The author is assured compensation in return for relinquished control over the use of his work. Rates are determined and periodically readjusted¹⁰⁴ by a five-person independent, presidentially-appointed agency called the Copyright Royalty Tri-

¹⁰² § 118(e)(2) directs the Register to report to Congress on the problems and successes of voluntary licensing of nondramatic literary works by public broadcasters and to make legislative recommendations if warranted. Pub. L. 94-553, § 118(e)(2).

¹⁰³ See, e.g., statement of Eric Smith, Associate General Counsel of the Public Broadcasting Service, estimating that the cost of a clearance office for the smallest local station might approach \$50,000 annually. 1975 House Hearings, *supra* n. 30 at 889.

¹⁰⁴ Adjustment will occur at five year intervals following the conclusion of initial rate making procedures, in accord with Tribunal regulations. Pub. L. 94-553, § 118(c).

bunal.¹⁰⁵ Thus, statutory royalties may be revised to reflect current economic realities without the need for tedious legislative amendments. And, the relatively stable Tribunal membership¹⁰⁶ will possess some expertise about the economics of the industries within its jurisdiction.

Subsection (b) of Section 118 requires the Tribunal to publish notice of the initiation of rate proceedings within 30 days of its constitution,¹⁰⁷ and to publish a schedule of rates between 120 days and six months from the initiation of proceedings. Those rates will be in effect until the end of 1982.¹⁰⁸ The liability of broadcasters for activities covered by the compulsory license remains as it was before enactment of the new law until Tribunal rates become effective.¹⁰⁹

Section 118's compulsory license is limited both in the subject matter it encompasses and the activities it covers; these limitations are cumulative. Over the objections of broadcasters, nondramatic literary works and sound recordings¹¹⁰ were excised from the license's purview,¹¹¹ and its subject matter is now limited to published nondramatic, musical, pictorial, graphic and sculptural works.¹¹² It applies to songs, symphonies, photographs and illustrations but does not permit the use of literary works such as prose or poetry, of stage works such as plays, operas or ballets, or of motion pictures, documentary films, television programs, or other audiovisual materials. However, as discussed above, parties are encouraged to conclude voluntary agreements for the use of nondramatic literary works,¹¹³ and the Register of Copyrights will report to Congress on the status of such agreements on January 3, 1980, and make appropriate legislative recommendations.¹¹⁴

A compulsory license may be obtained for three enumerated ac-

¹⁰⁵ *Id.*, ch. 8.

¹⁰⁶ Commissioners are appointed for staggered terms of seven years, with a senior member acting as chairman for one year. *Id.*, § 802.

¹⁰⁷ The Tribunal must be appointed before April 19, 1977. *Id.*, § 801(c).

¹⁰⁸ *Id.*, § 118(b).

¹⁰⁹ *Id.*, § 118(b)(4).

¹¹⁰ *But see id.*, § 114(b).

¹¹¹ See discussion of legislative history, Part III, *supra*. Sound recordings were deleted because they are not subject to performance rights, whereas nondramatic literary works were felt to be more properly within the control of individual authors.

¹¹² Pub. L. 94-553, § 118(b).

¹¹³ *Id.*, § 118(e)(1).

¹¹⁴ *Id.*, § 118(e)(2).

tivities: (1) performances or displays¹¹⁵ of the specified work by a public broadcasting entity in the course of a noncommercial educational broadcast transmission; (2) production, reproduction and distribution of copies or phonorecords of such programs by a public broadcasting entity;¹¹⁶ and (3) simultaneous off air videotaping and performance or display of such transmissions by nonprofit institutions or governmental bodies for face-to-face teaching purposes within the conditions of Section 110(1) for a period of seven days from the transmission,¹¹⁷ with a provision that broadcasters are not liable for copies of programs they supplied which are not destroyed within this period if they inform the institution of its destruction obligation.¹¹⁸ Significantly, Section 118 (d) (3) is not restricted to instructional broadcasts; but off-the-air recordings made under this provision must be used only in face-to-face teaching activities. In addition, this compulsory license is available only for off-the-air recordings of the performance or display of a published nondramatic musical, pictorial, graphic or sculptural work, because it falls within the subject matter limitations of subsection (d). And the House Report emphasized:

This limited provision for unauthorized simultaneous or off-the-air reproduction is limited to nondramatic musical works and pictorial graphic and sculptural works included in public broadcasting transmissions. It does not extend to other works included in the transmissions, or to the entire transmission program.¹¹⁹

¹¹⁵ To "display" a work is defined as "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." *Id.*, § 101 (emphasis added). The section permits only the nondramatic presentation of such works and would not allow the staging of a musical selection or the adaptation of a photographic collection for a television program. *Id.*, § 118(b).

¹¹⁶ Congress intends that "'interconnection' activities serving as a technical adjunct to such transmissions, such as the use of satellites or microwave equipment, be included within the specified activities." H.R. Rep. No. 94-1476, *supra* n. 91 at 119.

¹¹⁷ § 118(d) cl. (3) of this subsection appears to be stylistically improper in that the off air videotaping rights are included as a subsidiary right of the general clause (d) rights of the public broadcasting entities, whereas it will be enjoyed by governmental bodies and nonprofit institutions. However, H.R. Rep. No. 94-1476, *supra* n. 91 at 119, clearly states the legislative intent.

¹¹⁸ The institution assumes infringement liability for failure to comply. Pub. L. 94-553, § 118(d)(3). And a school may be an infringer even if it did not copy. *Id.*

¹¹⁹ H. Rep. No. 94-1476, *supra* n. 91 at 119.

Subsection (f) clarifies that the Section does not apply to unauthorized dramatizations of nondramatic musical works, to program productions based on published compilations of pictorial graphic or sculptural works, or to the use of audio visual works, except as they may be considered "fair uses" within the meaning of Section 107.

Finally, the law adopts the Federal Communications Commission definition of "public broadcasting entity"¹²⁰ and adds the circular definition of "any nonprofit institution or organization" engaged in Section 118(d)(2) activities.¹²¹ By making compulsory licenses available to public broadcasting entities, rather than to the act of public broadcast as did the Mathias amendment, Section 118(d) expands the number of potential compulsory licensees, for "public broadcasting entities" are defined as "any licensee or permittee of a noncommercial educational broadcast station, or any nonprofit institution or organization engaged in public broadcasting." The term is expanded by subsection (g)'s incorporation of the Communications Act definition, which, in turn, refers to the open-ended F.C.C. definition. For example, if a noncommercial station buys time to show one of its programs on a commercial station, one could argue that that activity falls within the radius of Section 118, although such an interpretation was not considered by Congress.

Terms and rates of the compulsory license are to be established by the Copyright Royalty Tribunal, between 120 days and six months after it publishes a notice of the initiation of proceedings. The statute

¹²⁰ Pub. L. 94-553, § 118(g) defines a "public broadcasting entity" as a "non-commercial broadcast station as defined in Sec. 397 of title 47 and any nonprofit institution or organization engaged in the activities described in clause (2) of subsection (d)." 47 U.S.C. § 397(7), in turn, defines "noncommercial educational broadcast station" as:

a television or radio broadcast station which (A) under the rules and regulations of the Federal Communications Commission in effect on November 7, 1967, is eligible to be licensed or is licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes. 47 U.S.C. Sec. 397(7).

See n. 9 *supra*. A cable system cannot qualify as a noncommercial educational station under these regulations. Telephone interview with an attorney in the F.C.C. Cable Bureau, Feb. 2, 1977.

¹²¹ Subsection (d)(2) refers to activities of nonprofit institutions for transmissions specified in clause (1), which, in turn, refers to noncommercial stations referred to in subsection (g). Despite this circuitry, the legislative intent is once again clear. H.R. Rep. No. 94-1476, *supra* n. 91 at 116-20.

required the notice to be published by May 19, 1977,¹²² but this has not taken place because of the delay in Presidential appointment of the Tribunal. Unlike the three other compulsory license provisions of the new copyright law, Sections 111, 115 and 116, no initial rates have been established by statute for public broadcasting licenses; nor does the Tribunal collect or distribute monies. Rather, the Tribunal will devise a schedule of rates and terms based upon proposed licenses filed by copyright owners or broadcasting entities within 120 days of the initiation of proceedings.¹²³ In addition, "any interested party" may submit relevant information.¹²⁴ Although the statute sets no time limits for these filings, presumably such initial submissions must be made within 120 days, since the Tribunal is authorized to publish its schedule of rates and terms after this date.¹²⁵

The term "interested party"¹²⁶ is not clear. Because the subsection deals with licenses, the term "party" might consistently be defined as a copyright owner or public broadcaster. Yet the qualifiers "any" and "interested" and the fact that this term is supplemental to an earlier mention of owners and broadcasters indicates a legislative intent to interpret the term more broadly. Either reading is possible, and the Tribunal should decide who is entitled to make submissions, consistent with its power to adopt regulations governing its procedure and methods of operation.¹²⁷

The Section also raises a more serious question as to what type of rate structure will be established.¹²⁸ Although the subsection (b) preamble's grant of antitrust exemption and subsection (b)(3)'s provision that the rate schedule applies to "all owners of copyright" and public broadcasting entities¹²⁹ (except those who have reached voluntary agreement) suggests a blanket structure,¹³⁰ that would be out of line with subsection (d)'s grant of licenses in terms of particular ac-

¹²² See n. 120, *supra*. See also SECOND SUPPLEMENTARY REPORT, *supra* n. 68, at ch. VI, 21.

¹²³ Under § 118(b), the notice of initiation of proceedings must be published within thirty days of the Tribunal's constitution. Under § 801(c), the President must constitute the Tribunal within six months of the new law's enactment date, which was Oct. 19, 1976. Pub. L. 94-553, §§ 118(b), 801(c).

¹²⁴ *Id.*, § 118(b)(1).

¹²⁵ *Id.*, § 118(b)(3).

¹²⁶ *Id.*, § 118(b)(1).

¹²⁷ *Id.*, § 803(a).

¹²⁸ The statute delineates initial rates and specific standards for later adjustment for all other compulsory licenses. *Id.*, §§ 111, 115, 116 and 801.

¹²⁹ *Id.*, § 118(b)(3).

¹³⁰ Some spokesmen at the recent 1975 House hearings contemplated the evolution of blanket licensing. For example:

tivities or uses. Neither would a blanket structure seem amenable to an industry whose members' markets vary greatly in size.¹³¹ Will the compulsory schedule reflect the size of the market and the commercial impact of the particular use through adoption of F.C.C. standards as in the case of cable retransmission licenses?¹³² Or, will the Tribunal base rates on identified classes of broadcasters? Or, will rates be based on usage alone?

And when will the compulsory rates take effect? Clause (b)(4)'s preservation of the legal status quo of liability for activities falling within subsection (d)'s compulsory license provision ends with the Tribunal's publication of its schedule of rates and terms.¹³³ Although under Section 809, Tribunal determinations do not become effective for thirty days following publication,¹³⁴ that provision arguably does not apply to Section 118 provisions, inasmuch as they are Chapter 8 determinations. Such an interpretation is important to avoid a thirty day gap in the applicability of compulsory licensing provisions.

Finally, Section 118 leaves unclear when compulsory licensing rates must be paid. Subsection (d) affords a compulsory license to public broadcasting entities "upon compliance with provisions . . . including the rates and terms established by the . . . Tribunal."¹³⁵ Literally, one might conclude that payment must precede the enumerated activities. But subsection (b)(3)'s dictate to the Tribunal to "establish requirements by which copyright owners may receive reasonable notice of the use of their works . . . and under which records of such use shall be kept by public broadcasting entities"¹³⁶ would seem unnecessary unless payment were to succeed usage. Since payments for compulsory licenses under all other relevant sections of the law follow the use, and since the broadcasters' primary argument in favor of the Section 118 licenses was their need to gain quick access without undue clearance procedures, the second interpretation must obtain, permit-

Rather, it is to be assumed that blanket licenses and standard practices will soon be solved [sic] under the direct guidance of the Copyright Royalty Tribunal. . . .

1975 House Hearings, *supra* n. 30 at 889. (Statement of Eric Smith, Associate General Counsel of PBS).

¹³¹ See, e.g., concerns expressed in 1975 House Hearings, *supra* n. 30 at 958-61 (statement of Authors League of America).

¹³⁷ § 111 incorporates F.C.C. standards of local service areas, distant signal equivalents, licensed stations and signals, and the like. Pub. L. 94-553, § 111.

¹³³ *Id.*, § 118(b)(4).

¹³⁴ *Id.*, § 809.

¹³⁵ *Id.*, § 118(d) (emphasis added).

¹³⁶ *Id.*, § 118(b)(3).

ting educational broadcasters to pay on a periodic basis *after* usage of copyrighted materials.¹³⁷

Some of the aforementioned statutory ambiguities in Section 118 were undoubtedly intentional. In the public broadcasting area, Congress determined that the parties' volition should prevail, with governmental supervision only where voluntary agreements could not be consummated. With respect to the use of nondramatic literary works, Congress promised to keep an eye on the question and provide relief if the statute's suggestions did not work out. Moreover, Congress intended to assure statutory flexibility by refusing to set initial rates as it did for other compulsory licenses. In fact, Section 118's compulsory licensing scheme is little more than bare bones, with most of the implementation and administrative determinations left to the parties in cooperation with the Tribunal.¹³⁸ Even where a statutory license is employed, parties are responsible for the distribution of funds and for the settlement of disputes arising therefrom with minimal government intervention.¹³⁹ Thus, the success of Section 118's compulsory licensing system depends principally upon copyright owners' and public broadcasters' willingness to compromise and upon the economic viability of the Tribunal's rate scheme.

In sum, Section 118 sets out a fairly comprehensive statutory scheme embodying principles of compensation, voluntary licensing, and compulsory licensing for published nondramatic musical, pictorial, graphic and sculptural works. It covers both the performance and recording activities of public broadcasters, resolves the uncertainty surrounding their liability under current law, and adopts the F.C.C. definition of public broadcasting entities.

Several other statutory provisions also directly affect public broadcasting activities. Although the thirty-copy, seven-year recording privileges of Section 112(b) apply only to instructional broadcasters authorized to transmit a performance or display of a work under Section 110(2), or under the limitations on exclusive rights in sound recordings specified by Section 114(a), and not to public broadcasters generally,¹⁴⁰ the latter may enjoy liability-free privileges under Section 114(b). That section nullifies exclusive anti-dubbing rights in sound

¹³⁷ The better view is that "compliance" can include later payment, and this was clearly Congress' intent. H.R. Rep. No. 94-1476, *supra* n. 91 at 118.

¹³⁸ Note that the preliminary paragraph of subsection (b) admonishes the parties to "negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results." Pub. L. 94-553, § 118(b).

¹³⁹ The Tribunal performs these functions for licenses under §§ 111 and 116. *Id.*, § 801(b)(3).

¹⁴⁰ *Id.*, § 112(b).

recordings included in educational television and radio programs, as long as copies are not commercially distributed to the general public.

Further, Section 110(3) in its final, more limited form, permits the performance of a nondramatic literary work during a noncommercial educational broadcast transmission to a print or aural handicapped audience, and Section 112(d) allows ten recordings to be made of such performances, to be retained indefinitely and to be exchanged with other nonprofit organizations. Section 110(9) exempts single nonprofit performances of dramatic works published at least ten years earlier which are transmitted by radio to blind audiences.

Of course, the liabilities of all users, including public broadcasters, apply only if a given use exceeds a "fair use" as legislated in Section 107. Moreover, in the case of public broadcasts, statutory damages may be remitted under Section 504(c)(2) for all public broadcasting entities who reasonably believed a performance was "fair" within the meaning of Section 107.

CONCLUSION

In the new copyright law, Congress has made a firm commitment to the philosophy that the Constitutionally consecrated progress of science and the useful arts in the United States demands strong author protection. The law deviates substantially from its predecessor in this author-orientation.¹⁴¹ For example, it assures that the author is the first owner of all copyright rights;¹⁴² it allows the author to divide intellectual property rights and to retain those not expressly transferred;¹⁴³ absent written agreement to the contrary, it presumes that a publisher acquires only first serial and limited reprint rights to works first published as contributions;¹⁴⁴ it provides that commissioned works are not "for hire," except where, in the case of certain such works, it is expressly agreed in writing;¹⁴⁵ it gives the author or the author's heirs optional termination rights which cannot be waived or assigned in advance;¹⁴⁶ and, it stipulates that involuntary transfers will not be given effect.¹⁴⁷

At the same time, the law also differs from its precursor in recognizing realities of a business world in the throes of an advancing

¹⁴¹ See generally, B. Ringer, *Finding Your Way Around in the New Copyright Law*, PUBLISHERS WEEKLY 38-41 (Dec. 13, 1976).

¹⁴² Pub. L. 94-553, § 201(a).

¹⁴³ *Id.*, § 201(d).

¹⁴⁴ *Id.*, § 201(c).

¹⁴⁵ *Id.*, § 101.

¹⁴⁶ *Id.*, § 203(a).

¹⁴⁷ *Id.*, § 201(e).

communications and technology revolution. Current and comprehensive information is the girder of progress and cultural growth in today's world; and that maxim is proved by the public broadcasting industry. Nowhere is the requirement for prompt availability of copyrighted material—both pictorial and verbal—more evident. Congress has balanced the author's interest in remuneration for use of his or her intellectual property with the broadcaster's needs for easy access in light of the public's thirst for culture and education. It arrived at what may be the salient characteristic of the new copyright law: workable compromise. Through compulsory licensing, the author is assured compensation, and the broadcaster is assured access. The author relinquishes control, and the broadcaster no longer enjoys a free ride. At the same time, voluntarily negotiated licenses by statute supersede Commission-established rates. And, even where the latter determine payment terms for usage of copyrighted materials, the law provides for periodic review of rate structures tailored to specific uses. Moreover, the compulsory license available to noncommercial educational broadcasters under Sec. 118 is limited: in subject matter to published nondramatic musical, pictorial, graphic and sculptural works; and in activities to performances or displays of works in the course of a transmission, to the production and reproduction of transmission programs, and to off-the-air videotaping within strict limitations. To avail themselves of the compulsory license, broadcasters must meet statutory requirements of notifying copyright owners of the use, recording such uses, and paying Tribunal-prescribed fees. Although some questions remain as to how these formality requirements will be implemented and how they can be executed, they clearly evidence a legislative intent to protect authors' rights. Unless the formalities are met, a given use will presumably constitute a statutory infringement, subject to statutory remedies.

In addition to the compulsory licensing provisions of Section 118, Congress has legislated compromises which affect the public broadcasting industry in the areas of fair use, infringement, instructional and handicapped audience broadcasting, and recording rights. Here, too, the new law raises questions, particularly as to the perimeters of fair use and the effect of the ephemeral recording provision of Section 112(b) on other sections of the bill. Nonetheless, to this writer it seems that in its attempt to direct the copyright business relations of the public broadcasting industry, Congress has balanced interests equitably in a rapidly changing industry, and has provided a reasonably stable framework of author-oriented protection which is sufficiently flexible to prove operable.

114. LETTER FROM AUSTRALIA: REPORT OF THE FRANKI COMMITTEE AND THE *TIME/LIFE* CASE

By DAVID CATTERNS*

INTRODUCTION

This is an interim report on two recent developments in Australian copyright law, both of which have international importance. These are the Report of the Copyright Law Committee on Reprographic Reproduction ("The Franki Committee")¹ and the judgment on book importation of the Supreme Court of New South Wales in *Time-Life International (Nederlands) BV. v. Interstate Parcel Express Co. Pty. Ltd.*².

My report is of an interim character because as of today, July 6, 1977, amendments to the Copyright Act 1968 embodying the Franki Committee's recommendations have not yet been tabled in Parliament and because the appeal in the *Time-Life* case has been heard in the High Court of Australia, but judgment has not yet been given.

I. A. THE REPORT OF THE FRANKI COMMITTEE

The Franki Committee was appointed by the Attorney-General of Australia on 20 June, 1974, less than four weeks after judgment was passed by the Supreme Court of New South Wales in the *Moorhouse* case.³ Its terms of reference were

To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interest between owners of copyright and the users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.⁴

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¹ Australian Government Publishing Service, Canberra, 1976.

² (1976) 12 ALR 1.

³ *Moorhouse and Angus & Robertson (Publishers) Pty. Ltd. v. University of New South Wales* (1974) 3 ALR 1.

⁴ *Report of the Copyright Law Committee on Reprographic Reproduction* (hereafter called *Report*), at 3.

The Committee's Report was tabled in the House of Representatives on 9 December 1976. The Report is probably the most comprehensive study at a national level of the special problem of copyright and reprography. Its principal features include a quantification of fair dealing,⁵ extensions of library copying privileges and a statutory licence for multiple copying in non-profit educational establishments, subject to recording and to payment in response to the owner's claim.

*a. Summary of Recommendations*⁶

1. Fair Dealing

- Extension of the purpose from "research or private study" to either⁷ "research or study" or "purposes such as research, study, private or personal use".⁸
- Removal of the librarian's liability in "authorizing"⁹ infringements on self-service copiers, provided prescribed notices are displayed.¹⁰
- Inclusion of "factors to be considered" in determining "fair dealing". These are based on those in 17 USC 107 (1)-(4) but also include "whether the work can be obtained within a reasonable time at a normal commercial price".
- A quantitative definition of fair dealing.

Without restricting the meaning of the expression 'fair dealing,' the making of one copy for (*research or study),

- (i) in the case of copying from a periodical publication, of not more than a single article or, where more than one article relates to the same subject matter, those articles; or
- (ii) in the case of copying from an edition of a work, of not more than one chapter or 10 percent of the number of

⁵ The term "fair dealing" for certain purposes is used in a similar way in Australia and the U.K. to "fair use" in the U.S.

⁶ *Report*, at 139-144.

⁷ Each alternative was supported by two of the four members of the Committee.

⁸ *Cf.*, 17 USC 107.

⁹ This was the key issue in the *Moorhouse* case, *University of New South Wales v. Moorhouse and Angus & Robertson (Publishers) Pty. Ltd.* (1975)

¹⁰ *Cf.*, 17 USC 108 (f)(1). The Committee recommends that installation of self-service copiers should not "of itself" give rise to such liability.

pages in that edition, whichever is the greater,
is a fair dealing with the work.¹¹

2. *Copying by Libraries for Users*

- The recommendations here have the effect of allowing librarians to copy for a library user similar amounts to those he could copy for himself as a fair dealing.
- In addition, librarians may copy more than the quantitative amounts of fair dealing¹² where the "librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price".¹³

3. *Copying by Libraries for Other Libraries*

- The recommendations permit copying for inter-library loans to the same extent as copying under 1 and 2 above. There is no prohibition of systematic reproduction or distribution.¹⁴

4. *Multiple Copying in Non-Profit Educational Establishments*

- (1) A library of a non-profit educational establishment be permitted to make up to six copies of a single article in a periodical without infringement of copyright and without remuneration to copyright owners for use within the library provided that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed.
- (2) If multiple copies of more than an insubstantial part of a published work other than an article in a periodical are required in a library conducted by a non-profit educational establishment, the library be permitted to make up to six copies of that work thereof without remuneration in any

¹¹ *Report*, at 139.

¹² In respect of library copying, the term used is "reasonable portion".

¹³ *Cf.*, 17 USC 108(e). The librarian would be required to make a declaration to this effect.

¹⁴ *Cf.*, 17 USC 108(g).

case where the work has not been separately published, or if it has been separately published, it has been ascertained after reasonable inquiry that copies cannot be obtained within a reasonable time at a normal commercial price. This right should be subject to the condition that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed.

- (3) (a) The Act be amended to provide for a statutory licence scheme permitting a non-profit educational establishment to make multiple copies of parts of a work and in some cases of whole works for classroom use or for distribution to students, subject to recording any copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time (say three years).

- (b) The records to be kept in respect of this copying to show as a minimum, the title of the work copied, the number of pages copied, the number of copies made, the author of the work (where known) and the publisher of the work.

The proposed statutory licensing scheme to extend to the making of copies of published literary, dramatic or musical works in the following circumstances:

- (i) where the work concerned is not separately published—the whole of that work may be copied;
 - (ii) where the work concerned has been separately published, but copies cannot be obtained within a reasonable time at a normal commercial price—the whole of that work may be copied;
 - (iii) not more than one article in the same periodical publication may be copied unless the articles relate to the same subject matter;
 - (iv) in any other case, not more than a reasonable portion of the work may be copied.
- (d) Where a work or part of a work that may be copied under the proposed scheme contains an artistic work by way of illustration or explanation, then the making of the copy not be an infringement of the copyright in the artistic work.
- (e) Legislation provide that up to 10 per cent of the number of pages in an edition of a work or one chap-

ter, whichever is the greater, should always be regarded as a reasonable portion.

- (4) The making of multiple copies in any non-profit educational establishment of up to two pages or 1 per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days be permitted without remuneration and without infringement of copyright provided (except in the case of a diagram, map, chart or plan) the part copied does not comprise or include a separate work.
- (5) The Act to permit a teacher or lecturer to make without remuneration and without infringement of copyright of up to three copies of a copyright work or part of a work for the purpose of classroom instruction within the limitations described in paragraph 6.58.
- (6) A non-profit educational establishment conducting educational courses by correspondence or on an external study basis for students be allowed to prepare, without requests from students, such copies as may be appropriate for the students of journal articles or reasonable portions of works to the same extent as a librarian could provide copies for a person on request made under section 49 of the Copyright Act. This should not extend to material reproduced as part of lecture notes.¹⁵

5. *Miscellaneous*

- Extension of privileges to libraries for copying for preservation purposes.
- A special extension of fair dealing “for the purpose of or in the course of provision of professional advice by a legal practitioner or patent attorney”.¹⁶
- Amendment to allow copying of statutes, court judgments and similar material.

¹⁵ *Id.*

¹⁶ Two members of the Committee would add, after “professional advice”, the words “as to the legal rights or obligations of a person”.

B. COMMENTS

The Franki Committee has largely followed the U.S. approach on fair use and library copying. The Committee goes beyond the new U.S. Copyright Act in two important respects: in the quantification of fair dealing and in the absence of limitation on systematic copying in inter-library networks. As in the U.S., all such copying is to be unremunerated.

I have argued against fair use in these pages before.¹⁷ In my view, it is an anachronism and it seems to me to be a pity that the hard case of reprography is going to lead us to enshrine the bad law of fair use when it appeared that we had a chance to abandon the concept before the realities of full-text storage and retrieval overwhelm us. I think that such vague terms as the "factors to be considered in determining fair dealing" are absurdly irrelevant to the student at a photocopier or the teacher at an offset duplicator or electronic stencil cutter. They are even more so to the library user at a computer terminal.¹⁸

The main difficulty in blanket licensing schemes for copying lies in the separation of free "fair use" copying from remunerated copying. One answer to this is to pay for all such copying—perhaps with a "fair use discount".¹⁹ In the U.K., the Report of the Committee to Consider the Law on Copyright and Designs ("the Whitford Committee"), states,

Apart from one factor, there is nothing in the present Act to prevent blanket licensing schemes from operating now. The one factor is the existing exception in Section 7 of the 1956 Act allowing the making of single copies, coupled with the low charges which libraries make in practice. We have already discussed the difficulties of deciding what is a single copy (paragraph 243). While this loophole exists there is little incentive for a library to take a licence. The librarian no doubt feels that the law excuses him from any need to do so. We therefore recommend that as and when blanket licensing schemes are in existence, the latitude given by Section 7 should no longer apply. At the same time it should be made clear that Section 6 of the

¹⁷ Catterns, "*The Americans, Baby*," By Moorhouse, 23 BULL. COPR. SOC'Y, 213 at 222-228, Item 255 (1976).

¹⁸ *Id.* at 225.

¹⁹ *Id.* at 227-228.

1956 Act (fair dealing for research or private study) should not allow the making of facsimile copies but only those made by hand or by using a typewriter.²⁰

The Franki Committee's answer to this problem is to define one area of copying which is to be remunerated—multiple copying in non-profit educational establishments—and to leave the rest to “fair dealing”. At first, this seems attractive—there is no doubt that recording and paying for individual copying poses tremendous practical difficulties. Its main weakness, however, arises from its assumption that traditional educational practices will continue—a centralized library where students copy “fair dealings” for themselves and large classes where teachers hand out multiple copies.

The absence of limitation on systematic library reproduction and distribution is justified by the Committee thus:

As we have said, we consider that most of the photocopying which is likely to take place in respect of inter-library loans will be in the technical and scientific field. In this situation we think that no special legislative provision at present is required to restrict the supply of copies of articles on a systematic basis through the inter-library loan scheme, but the situation should be kept under review.

There does not appear to be much demand for the copying for inter-library loans of works other than technical or scientific works. In addition, as we have said, apart from the cost of photocopying itself, the cost of handling an inter-library loan is substantial and in the field of general literature we consider it is very unlikely that any copying for inter-library loan would take place which would be detrimental to the interests of the author. We do not therefore think that it would be practical or appropriate to recommend any system of royalty or other remuneration in respect of inter-library loans falling within the provisions of the section of the Act dealing with copying by libraries for other libraries which is now section 50.²¹

A considerable amount of documentation already takes place with each inter-library loan. It seems to me that it would be simple to de-

²⁰ *Copyright and Designs Law*, H.M.S.O., London, 1977, paragraph 276 at 70.

²¹ *Report*, paragraphs 4.08, 4.09, at 38.

sign request forms so they could act as a record of copying and, thus, as a basis for remuneration. This will be a point of even greater importance as computer-based library loan networks grow.

The Franki Committee's most radical recommendations are those for the statutory licensing scheme for multiple copying. The arguments against compulsory licensing have frequently been stated in these pages.²² I think that they apply forcibly to the Franki Committee's scheme. The main practical questions to be decided about the Franki Committee's statutory scheme are the form of recording and the means of determining remuneration. With a compulsory licence, the owners of copyright can have no bargaining power in negotiating with users about these two questions—their only "right" is to claim. The form of records and the amount of remuneration will have to be fixed by government regulation or the Copyright Tribunal.

It could be thought that this "helplessness" of the individual author²³ is at least to the educational user's advantage—he can get on with the business of the free flow of information. This is not so, however. With a compulsory scheme, there is no possibility of agreement between users and owners, for example, on minimum amounts of recording, on sampling, or on flat fees. Unless governments are prepared to impose a sampling system or other means of reducing recording, users are left with the Franki Committee's copying licence "subject to recording any copying taking place"—that is, to recording all copying. The burden of recording falls on the copier.

On the other hand, as the Whitford Committee states, under a voluntary scheme,

The general terms and conditions, including whether returns would be required, would all be subject to negotiation. Obviously the administration should be as simple as possible in order to avoid the cost of collection and distribution exceeding the sums collected. In the early stages costs may indeed swallow up most of the income, but this is unlikely to last for long. It may be possible to arrange for charges to be made on a capita-tion basis, particularly in education. We see no reason why,

²² E.g., Ulmer, *International Copyright After the Paris Revisions*, 19 BULL. COPR. SOC'Y, 263 at 275, Item 180 (1972); Ringer, *Copyright in the 1980s*, 23 BULL. COPR. SOC'Y, 299 at 303-308, Item 333 (1976).

²³ Ringer, n. 22 at 308.

when the teething troubles are over, the administration costs should exceed the 10 to 15 per cent which holds in other fields.²⁴

C. AN ALTERNATIVE

At the time of writing, no draft amendments to the Copyright Act have been made public. The Australian Copyright Council has proposed to the Australian Government that the Franki Committee's statutory licence should be replaced with a voluntary licence supplemented by a statutory licence.²⁵ The legislative framework would be as follows:

1. The statutory licence would have the same limits as those proposed by the Franki Committee.
2. There would be no obligation to record or to pay for any copying under this licence.
3. The statutory licence would not apply to cases to which a voluntary licence scheme applies.²⁶
4. The jurisdiction of the Copyright Tribunal would be widened to cover reprographic licensing schemes.²⁷
5. Works which are specially vulnerable, whether economically or morally, should be able to be excluded from licensing by the filing of a prescribed notice.²⁸

Such a scheme would give users the same freedom to copy as that proposed by the Franki Committee.²⁹ Unlike the latter scheme, the Australian Copyright Council's proposals would enable owners and

²⁴ *Copyright and Designs Law*, paragraph 281, at 72.

²⁵ Catterns, n. 17 at 229.

²⁶ Part VI of the (AUS) *Copyright Act* deals with the Copyright Tribunal. At present, its jurisdiction relates to the exercise of performing and broadcasting rights in music and in sound recordings. Section 137 contains a definition of "a case to which a licence scheme applies".

²⁷ See n. 26. This is proposed to be achieved by adding to the definition of "licence" in § 136, the words "to make multiple copies of the work" and by adding a definition of multiple copies.

²⁸ Catterns, n. 17 at 229.

²⁹ Except in cases where the prescribed notice has been given.

users to negotiate on the records to be kept and on the amount of payment. With the Franki Committee's scheme, owners who do not claim will not be paid. In practice, this would mean authors who do not join a collecting society. The Australian Copyright Council's scheme has the same effect. The Franki Committee's scheme requires the recording of all copying—this obviously includes recording for authors who later will not claim payment; the Australian Copyright Council's scheme requires recording only for those authors who have joined a collecting society or who have offered a voluntary licence individually.

D. CONCLUSION

In the eight years since the coming into force of the Australian Copyright Act, the debate on reprography has moved through the courts and through an administrative enquiry. It is now in the parliamentary arena. Students, librarians and teachers are still copying pretty much as they like; it does seem, however, that authors and publishers may soon begin to be paid something for this use of their work.

*II. TIME/LIFE INTERNATIONAL (NEDERLANDS) BV v. INTERSTATE PARCEL EXPRESS CO. PTY. LIMITED*³⁰

The international territorial division of rights in books and other copyright materials depends on the "importation" clauses in each country's domestic legislation. The relevant provisions in Australia's Copyright Act is section 37:

The copyright in a literary, dramatic, musical or artistic work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Australia for the purpose of—

- (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;
- (b) distributing the article—
 - (i) for the purpose of trade; or
 - (ii) for any other purpose to an extent that will affect prejudicially the owner of the copyright; or
- (c) by way of trade exhibiting the article in public, where, to his knowledge, the making of the article would, if the

³⁰ (1976) 12 ALR 1.

article had been made in Australia by the importer, have constituted an infringement of the copyright.³¹

This section appears to be similar in effect to section 602 of the new U.S. Copyright Act. The importation of editions authorized elsewhere is an infringement just as is the importation of piracies: the only person who can import copies of a work into Australia (for the purpose or to the extent specified) is the owner of the Australian rights, or someone who has the owner's licence.

For a number of years there have been arguments between book-sellers and publishers in Australia regarding the importation of books here. One casualty of this argument was the British Publishers' Traditional Market Agreement, which ended with the U.S. Justice Department's Consent Decree.³² Another effect was the *Time-Life* case.

A. THE FACTS

The case concerned the Time-Life cookbooks. There are two editions, that published by Time Inc. in the U.S. and the international edition, published by Time-Life International (Nederlands) B.V. In its agreement with Time Inc., Time International received certain rights in Australia, among other countries. The relevant clause stated

3(a) Subject to and upon the terms and conditions herein set forth, Licensor hereby grants and assigns to Licensee the exclusive right and licence, throughout the world, excluding the United States, its territories and possessions, and Canada, for the full term of all copyrights in the respective Works and any and all extensions and renewals thereof;

- (1) to publish, republish, or cause to be published or republished, each of the Works in volume form, in the English language and in translations, including, without limitation, editions, adaptations, book club editions, digests, abridgements and condensations thereof;
- (2) to publish, republish, or cause to be published or republished, each of the Works in the English language and in translations, in newspapers, magazines and

³¹ There are also provisions in the Act concerning the commission of summary offences by importation (ss. 132 and 133) and for customs seizure of infringing copies (s 135).

³² U.S. v. Addison-Wesley Publishing Co.

- periodicals, in instalments or otherwise; and
 (3) to sublicense others, subject to the provisions hereof,
 to exercise any of the rights herein granted; . . .

The Supreme Court of New South Wales construed this grant as an "exclusive licence" under Australian law.³³

Time International's Australian distributor was Hodder & Stoughton (Australia) Pty. Limited. Under a practice common in Australia, Hodder & Stoughton had a "closed market" in the books: that is, although Time International held the Australian rights,³⁴ Hodder & Stoughton had the exclusive right to distribute the books.³⁵ Hodder & Stoughton's only recourse when a bookseller "bought around" its closed market was to rely on its contract with the holder of the rights to compel the latter to proceed under section 37.³⁶

The defendant carries on business, among other things, as Angus & Robertson Book Shops. In February 1976, Angus & Robertson ordered 8,400 of the U.S. edition of the cookbooks from the wholesaler, Raymar Inc. of California. In June 1976, Time-Life International notified Angus & Robertson of the copyright position³⁷ and threatened legal action if further books were sold. In July, Angus & Robertson ordered a further 8,400. In October, 1976, when the books arrived, Time-Life International sought a declaration in the Supreme Court of New South Wales that the copyright had been infringed and an injunction restraining further infringement.

In December 1976, Mr. Justice Bowen, Chief Justice in Equity, granted the injunctions sought by Time-Life International. The Court held that there was

no doubt that Angus & Robertson imported books into Australia without the express licence of the owner of the copyright for the purpose of selling or by way of trade offering or exposing for sale the books where, to its knowledge, the making of

³³. (1976) 12 ALR 1. per Bowen C.J. in Eq. at 3. There was little argument on the rights clause. In my opinion it is possible that the clause amounts to an assignment of part of the copyright, rather than a licence.

³⁴ Time International "held" the rights by way of exclusive licence; *but see* n. 33.

³⁵ In fact, Time International retained the right to distribute by mail order.

³⁶ It appears to be at least arguable that the holder of an exclusive distribution contract may be an "exclusive licensee" of the right to publish.

³⁷ Thus, the requirement in § 37 of "to his knowledge" was satisfied.

the articles would, if they had been made by it in Australia, have constituted an infringement of copyright (section 37).³⁸

Although a number of points were argued, the main issue in the case can be simply stated. The key defence raised by Angus & Robertson was that they had an implied licence from Time Inc. or a licence that flows inevitably from their purchase of the goods in the United States in the ordinary course of trade and without any restriction being placed on them and, thus, that they had a defence against an action brought by Time Inc., the owner of copyright, even though the latter was not the direct seller.³⁹ (The Court had found that Angus & Robertson had purchased the books in the ordinary course of trade from Raymar Inc., who had purchased them similarly from Little, Brown & Co. of Boston, Time Inc.'s distributors).

In response to this argument, His Honour said

It does not appear to me that the mere sale in the ordinary course of trade without restrictions should be treated as having the effect of removing from the shoulders of the purchaser the obligation of complying with the municipal laws of other countries, including the copyright laws in force in those countries. Nor does it appear to me that the mere sale of goods in the ordinary course of trade should, for the purposes of copyright law, be treated as importing a "licence" to import for the purposes of sale or a "licence" to sell.⁴⁰

Accordingly, the Court held that the licence defence failed and that the defendant had infringed the plaintiff's copyright.

B. THE CONCLUSION

The defendants appealed to the High Court of Australia against the judgment of the Supreme Court. The appeal was heard by a Full Bench of five judges in April 1977. Again, the key issue argued was whether Angus & Robertson had an implied licence from Time Inc.,

³⁸ (1976) 12 ALR 1 at 11.

³⁹ The defendants then relied on § 121 of the (AUS) *Copyright Act*, which provides that a defence against the owner of copyright is also available against his exclusive licensee.

⁴⁰ (1976) 12 ALR 1 at 16.

⁴¹ *Id.*

the owner of copyright, to import the books into Australia.

On September 29, 1977, the High Court of Australia dismissed the appeal, i.e., affirmed the judgment of the Supreme Court of New South Wales. In several concurring opinions, the Justices generally agreed that the pertinent statutory provisions required affirmative permission from the copyright owner to avoid infringement. The acts of Time, Inc., it was held, could not serve as the basis of a "licence of the owner of the copyright" within the meaning of the statute.

115 ORAL COPYRIGHT CONTRACTS AND THE STATUTE OF FRAUDS*

By STANLEY ROTHENBERG**

Modern copyright law is usually said to have begun with the Statute of Anne in England in 1710¹. This earliest statute recognized the assignability of copyright and the assignability of the right to secure copyright.

The first English case which acknowledged that the author's right may, before statutory copyright, be conveyed without a writing was *Jefferys v. Boosey*, in 1854, heard in the House of Lords.² The statute in force in England at that time, the Copyright Act of 1842, did not expressly require an assignment of copyright to be in writing but it did, as did the Statute of Anne, prohibit the printing, sale, publication and importation of any book in which there was copyright unless consent of the copyright proprietor was obtained in writing.³ This provision was interpreted to mean that an assignment of an existing copyright had to be in writing, but that it did not apply to an unpublished work protected under the common law.⁴

The absence of a precise statement in the Statute of Anne and in the 1842 English statute requiring assignments to be in writing was remedied in the Act of 1911, in which it was clearly stated,

"The owner of the copyright in any work may assign the right, either wholly or partially, . . . and may grant any interest in the right by license, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in re-

*Adapted from a talk before the Copyright Luncheon Circle in New York City on October 15, 1976.

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¹ 8 Anne, c. 19.

² 4 H.L.C., 815.

³ 5 & 6 Vict. c. 45, sec. 15.

⁴ MACGILLIVRAY, *THE LAW OF COPYRIGHT* 77 (1902), and cases cited thereat. The distinction between common law copyright in unpublished works and statutory copyright in published works was abolished by the English Copyright Act of 1911, (1 & 2 Geo. 5, c. 46) resulting in a single system of copyright. This concept our Congress has only recently and belatedly adopted for the United States, effective January 1, 1978, 90 Stat. 2541, Public Law 94-553, October 19, 1976.

spect of which the assignment or grant is made, or by his duly authorized agent.”⁵

No distinction was made between exclusive and non-exclusive licenses, and all licenses, as well as all assignments, had to be in writing.⁶

The United Kingdom Copyright Act of 1956,⁷ currently in force, preserved most but not all of that section. It provides that “no assignment of copyright (whether total or partial) shall have effect unless it is in writing signed by or on behalf of the assignor.” Partial assignments, however, are defined as exclusive licenses. Thus, today, non-exclusive licenses need not be in writing.

The United States’ counterpart of the English statutory development is equally interesting. Our initial federal copyright law of 1790⁸ provided for copyright to be obtained by the author or his assigns⁹ and, in language quite similar to that found in the Statute of Anne and in the later English Act of 1842, prohibited any printing, sale, publication and importation of copies of any copyrighted work without the consent of the author or proprietor thereof first had and obtained in writing.¹⁰ In addition, publication of manuscripts without the consent of the author or proprietor was prohibited.¹¹ Thus, by statute, our first federal copyright law preserved the rights in unpublished works at common law but made no mention of the required consent being had in writing. And so *Callaghan v. Myers*¹² held that an oral assignment was sufficient to effect a transfer of common law copyright. In other words, from the outset, the copyright laws of both England and the United States treated the transfer of rights in copyrighted works differently from the transfer of rights in their unpublished works, or manuscripts, protected at common law.¹³

The Act of 1870¹⁴ in addition to the prohibition against printing, sale, publication and importation without written consent, specified

⁵ Section 5 (2).

⁶ Section 36(3).

⁷ 4 & 5 Eliz. 2, c. 74.

⁸ 1 Stat. at L. 124.

⁹ Section 1.

¹⁰ Section 2.

¹¹ Section 6.

¹² 128 U.S. 617 (1888).

¹³ However, it was not uniformly so in the copyright laws passed by the original states, 1783–1786. E.g., whereas Connecticut’s Act of 1783 followed the Statute of Anne, Massachusetts’ Act of April 21, 1783, did not refer to manuscripts and did not provide that the required consent be in writing.

"That copyrights shall be assignable in law, by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice."¹⁵

These provisions, requiring consent in writing for published works and requiring consent, but without mentioning written instruments, for manuscripts, were contained in the intervening statutes until the general copyright law revision of 1909.¹⁶ The 1909 law is, for the most part, the law we operate under today.

Section 2 thereof provides that:

"Nothing in this . . . [Act] shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

The House Committee Report¹⁷ on the 1909 Act said that

"Section 2 is new in phraseology, although substantially the same provision is found in Section 4967 of the Revised Statutes [of 1874]".

Thus, insofar as the Copyright Act is concerned, rights in the unpublished work protected by the common law may be assigned orally.¹⁸

Note, however, that Section 42 of the 1909 statute, renumbered in the codification of 1947 so that it is now Section 28, reads as follows:

"Copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, and may be bequeathed by Will."¹⁹

¹⁴ 16 Stat. 212.

¹⁵ Section 89.

¹⁶ 25 Stat. 1075.

¹⁷ H.R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909).

¹⁸ *Witmark v. Calloway*, 22 F.2d 412 (E.D. Tenn. 1927).

¹⁹ 17 U.S.C. §28.

Was the change from the mandatory "shall" in the pre-1909 statutes, with respect to assignment of the copyrighted work, to the permissive "may" in 1909, significant? There is no indication in the House Committee Report that any substantive change was intended. Indeed, regardless of the instrument, whether statute or contract or whatnot, courts frequently construe "may" as "shall" so that justice may not be the slave of grammar.²⁰

Moreover, according to the cases, such as, for example, *Public Ledger v. Post Printing & Pub. Co.*,²¹ and *Davenport Quigley Expedition v. Century Productions, Inc.*,²² and according to the contemporary commentaries, including this writer's "Legal Protection of Literature, Art & Music",²³ Latman's "Howell on Copyright",²⁴ Nimmer on Copyright,²⁵ "Copyright Law Revision Study No. 19,"²⁶ and "Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law,"²⁷ it is uniformly stated that an assignment of copyright which is not evidenced by a written instrument signed by the proprietor or his agent is not effective to transfer the copyright; thus the change in the assignment provision in 1909 from *shall* be assignable by any instrument in writing to *may* be assigned by an instrument in writing, would not appear to have effected any change in substance.²⁸

It should be noted that in the *Public Ledger* case, the controversy was not between an alleged assignor (copyright proprietor) and an alleged oral assignee. Rather, the dispute was between an alleged assignee (of the right to secure copyright by reason of an alleged oral assignment) and an alleged infringer of the copyright claimed by the alleged assignee. The court recognized that such an alleged assignment did not have to be in writing, stating that

"It seems to be conceded and is undoubtedly true that a written assignment is necessary to transfer the proprietorship of a literary work . . . after the copyright has been secured."

²⁰ BLACK'S LAW DICTIONARY.

²¹ 294 Fed. 430 (8th Cir. 1923).

²² 18 F. Supp. 974 (S.D.N.Y. 1937).

²³ (1960) at 107-108.

²⁴ (1962) at 54-55.

²⁵ (1963) at 524.

²⁶ SENATE JUDICIARY COMM., 86TH CONG., 2D SESS., 116 (Comm. print 1960).

²⁷ HOUSE JUDICIARY COMM., 87TH CONG., 1ST SESS., 95 (Comm. Print. 1961).

²⁸ The author of WEILON COPYRIGHT (1917) said at 543-547, that the question was open. However, he wrote his excellent treatise prior to the cases cited at notes 21-23, *supra*.

This statement, however, was dictum since the action involved an alleged oral assignment *before* copyright. Nevertheless, the plaintiff (alleged oral assignee whose claim was supported by the alleged assignor) did not succeed because there was written evidence contradicting his claimed right to secure the copyright.

In *Davenport Quigley*, the controversy also was not between an alleged assignor (copyright proprietor) and an alleged oral assignee. Here, too, the dispute was between an alleged oral assignee of the copyright proprietor and an alleged infringer of the copyright. Again the Court recognized the distinction between oral assignment "of the literary product before publication and copyright" and an assignment afterwards which "must comply with the statutory requirements." Since the plaintiff, an alleged assignee whose claim was supported by the alleged assignor, had not had a written assignment, the alleged infringer's defense was successful. The court quoted from *Public Ledger*, to the effect that, "'the burden was on the plaintiff to prove a valid copyright in itself,' a burden which it has not sustained."

It is submitted that if the "technicality" (as it was called in *Davenport Quigley*) of Section 28 can be invoked by an alleged infringer, *a fortiori* in a case between a copyright proprietor, for whose benefit the provision was enacted, and his alleged oral assignee.

But what about the owner of exclusive publishing rights or motion picture rights or stage rights—is he protected against a claim of an oral assignment or contract? In this writer's opinion, "yes," based on the following reasoning. Section 28 of the Copyright Act,²⁹ which requires that the assignment of copyright be in writing, is closely related to Section 30³⁰ which requires that the assignment be recorded in the Copyright Office failing which it will be void as against a subsequent purchaser for a valuable consideration without notice.

The close relationship was more evident in the Act of 1870, in which both requirements were combined in a single sentence.³¹ Judge Learned Hand was confronted with the case of an author who granted exclusive dramatic rights, including moving picture rights, to one party, who did not record his grant, followed by a grant of motion picture rights to a second party. Judge Hand treated both grants as assignments in *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.*³² Judge Hand stated, moreover, that even if the first grant were a license and not an assignment, recordation was necessary. He

²⁹ 17 U.S.C. §28.

³⁰ 17. U.S.C. §30.

³¹ Section 89, quoted in the text at n. 15, *supra*.

³² 213 Fed. 374 (S.D.N.Y. 1913), *aff'd* 220 Fed. 488 (2d Cir. 1915).

reasoned that, to protect a subsequent purchaser against a prior unrecorded assignee but to leave him open to defeat by a prior unrecorded license would be absurd.³³ Using the same reasoning, it is logical to assume that an alleged grant of exclusive motion picture or dramatic or publishing rights, etc., under copyright, would be held to require a written instrument signed by the proprietor in order to be enforceable. Otherwise, the copyright owner could be shorn of his most valuable rights merely because the villain did not falsely claim *all* of the owner's rights.

The new Copyright Law effective January 1, 1978³⁴ provides that:

"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 such owner's duly authorized agent."³⁵

A "transfer of copyright ownership" is defined in the new law as

"an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."³⁶

Thus, the new law will parallel the English law previously described:³⁷ An exclusive license will be treated as an assignment for purposes of requiring a written instrument.³⁸

Moreover, Section 205 of our new copyright law provides:

"(d) Recordation as Prerequisite to Infringement Suit.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled

³³ To the same effect, *MacLoon v. Vitagraph*, 30 F.2d 634 (2d Cir. 1929) (before Circuit Judges Manton, L. Hand and A. Hand) and *Vidor v. Serlin*, 7 N.Y. 2d 502 (1960).

³⁴ 90 Stat. 2541, Public Law 94-553.

³⁵ Section 204(a).

³⁶ Section 101.

³⁷ Copyright Act of 1956.

³⁸ For a discussion of the English law, *see* the leading treatise *COPINGER & SKONE JAMES ON COPYRIGHT* (11th ed. 1971).

to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation."

Obviously, recordation of an oral assignment of copyright or of any exclusive right under copyright is impossible and, furthermore, would not satisfy the requirement of an "instrument of transfer," since the term "instrument" means a written document, especially one "which gives formal expression to a legal act or agreement."³⁹ Further, Section 205(a) requires as a condition for the recordation of any document pertaining to copyright that the document bear "the actual signature of the person who executed it," or be "accompanied by a sworn or official certification that it is a true copy of the original, signed document," which condition could not be met by an oral transfer. Therefore, the absence of a written document of transfer of ownership precludes recordation of the transfer, which in turn precludes the commencement of an action for infringement of copyright. And the law at present, preempts prior copyright laws!⁴⁰ It is virtually axiomatic that without the remedy of an action for infringement, a copyright retains little of its value. Thus, the new law demonstrates implicit Congressional recognition of the view that Section 28 of the present law requires an assignment of copyright or *exclusive license* thereunder to be in writing in order to be valid; otherwise, Congress would be chargeable with depriving copyright owners of their property without due process of law.⁴¹

The reader may say, that is fine for the protection of copyright proprietors and owners of exclusive rights in a copyrighted work, but how do we protect the *common law* proprietor against possible fraudulent and perjured allegations of oral contracts for the sale of his

³⁹ BLACK'S LAW DICTIONARY.

⁴⁰ "Section 301. Preemption with respect to other laws.

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright. . . , whether created before or after that date and whether published or unpublished, are governed exclusively by this title.* * *

⁴¹ This charge will have to be met if an attempt is made to apply Section 301 literally in all situations since rights have been fixed under the old statute, under generally accepted interpretations thereof and according to trade practices which developed in response thereto. For example, do we look to the new definition of an "employee for hire" to ascertain rights based upon pre-1978 relationships?

common law copyright or exclusive rights? The answer is the Statute of Frauds under state law.

Consider this set of facts: Author writes a play—does not register it for copyright, relying upon his rights at common law. A motion picture company, whom we'll call plaintiff, attempts to acquire exclusive motion picture rights in the play. For whatever reason, the deal is not consummated with a written instrument. Author sells the rights to another motion picture company, whom we'll call defendant, assuring it that he, Author, had not made a "deal" with plaintiff notwithstanding plaintiff's claim to the contrary.

Plaintiff sues Author in New York for breach of the alleged oral contract, and in the same action sues the motion picture company for inducing breach of the contract. The Author defendant moves to dismiss the complaint on the grounds that (1) an oral contract which cannot be performed within one year of its making is *void* under the Statute of Frauds embodied in the New York General Obligations Law, §5-701(1):

"Agreements required to be in writing—Every agreement, promise or undertaking is void, unless it or some note of memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime; * * * *

and (2) also is *unenforceable* under the Statute of Frauds embodied in the New York Uniform Commercial Code, §1-206, which requires the sale of a chose in action (which would include rights under common law copyright) for \$5000 or more in amount or value to be evidenced by a writing signed by the party to be charged.

The defendant motion picture company moves to dismiss the claim against it on the grounds that one cannot be charged with inducing breach of contract *void* by reason of General Obligations Law §5-701(1). Note that the defendant Author invokes two grounds, the defendant motion picture company only one, because of the distinction between a "void" contract and an "unenforceable" i.e., voidable, contract.

The Author's motion to dismiss the complaint against him was granted in an actual case similar to the hypothetical set of facts. Although the defendant motion picture company's motion was initially

denied, the motion was granted on appeal to the Appellate Division. On appeal by plaintiff to the Court of Appeals, New York's highest state court, the Appellate Division decision was affirmed. The parties to the actual case were plaintiff Warner Bros., defendants Neil Simon and Paramount pictures; the play was "Barefoot In the Park."⁴²

Note well, just as the common law may and does vary from state to state, so, too, does the Statute of Frauds, both in its precise language and in the interpretation and application thereof by the particular state's courts. For example, in most states partial performance will take an oral contract out of the Statute of Frauds, but in New York,⁴³ partial performance will not save a void contract. In some states, one cannot invoke the defense of a void contract to a charge of inducing breach of, or intentionally interfering with, said contract, but such a defense has been frequently raised and uniformly upheld in New York, ever since the Court of Appeals in *Dung v. Parker*⁴⁴ held that no claim against third parties can be founded on a void contract. Similarly, the copyright law and the law of oral contracts vary from country to country. Thus, an alleged oral grant of worldwide motion picture rights in a work protected by copyright worldwide should present a field day to students of international comparative copyright law and conflicts of laws.⁴⁵

Of course, beginning January 1, 1978, unpublished works will automatically secure statutory copyright and thus the benefit of the Copyright Act's built-in Statute of Frauds. But here, too, a bevy of problems will be encountered. Assume an alleged purchase of common law copyright prior to January 1, 1978, for which copyright was not previously obtained by either publication or registration (if available). If an Author repudiates an alleged oral agreement, can he invoke the requirement of the new law that the alleged purchaser evidence his claim by an instrument of conveyance, or a note or memorandum of the transfer in writing and signed by the owner of the rights conveyed?⁴⁶ It is submitted that in this regard the courts should follow the majority view in the application of state Statutes of Fraud, to wit, partial performance should take the oral contract out of the Statute. Clearly, if statutory copyright was obtained by the alleged purchaser prior to January 1, 1978, and there is evidence of partial

⁴² Warner Bros. Pictures, Inc. v. Simon, 21 App. Div. 2d 863 (1964), *aff'd mem.* 15 N.Y.2d 836 (1965).

⁴³ Tyler v. Windels, 186 App. Div. 698 (1919), *aff'd* 227 N.Y. 589 (1919).

⁴⁴ 52 N.Y. 494 (1893).

⁴⁵ For a microcosmic view of the problem, see Khan v. Feist, 165 F.2d 188 (2d Cir. 1947) (opinion by A. Hand).

⁴⁶ Section 204(a).

performance, proof of the alleged contract should not be denied solely because of the application of the Statute of Frauds.

In sum, the proprietor of literary property has had the protection of the Statute of Frauds and a variation thereof under copyright statutes going back to the Statute of Anne. This protection has been continued in strengthened form under the new copyright law which in turn will more than likely bring about a re-examination of this complex subject, oral copyright contracts and the statute of frauds.

PART II.**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. United States of America and Territories****116. U.S. CONGRESS. HOUSE.**

H.R. 7896. A Bill to amend the Internal Revenue Code of 1954 to disregard, in the valuation for estate tax purposes of certain items created by the decedent during his life, any amount which would not have been capital gain if such item had been sold by the decedent at its fair market value. Introduced by Mr. Richmond, June 20, 1977, and referred to the Committee on Ways and Means. 3 p. (95th Cong., 1st sess.).

The bill would add a new section 2032B to the Internal Revenue Code, and would define "qualified creative property" as any copyright, literary, musical or artistic composition, letter or memorandum, held by the decedent at the time of his death and created by his personal efforts. The purpose of the bill is to lessen the tax burden on heirs of the author or artist, where the value of the work has increased since its creation.

117. U.S. CONGRESS. HOUSE.

H.R. 8089. A bill to amend title 17, United States Code, relating to copyright, for the purpose of extending certain exemptions, and removing certain limitations, pertaining to the transmission of performances of dramatic literary works, which performances are designed specifically for blind or other handicapped persons. Introduced by Mrs. Spellman (for herself and Mr. Fraser) on June 29, 1977, and referred to the Committee on the Judiciary. 2 p. (U.S. 95th Cong., 1st. sess.)

The amendment would change section 110 of the new copyright act to increase the number of authorized copies of dramatic literary works used in the transmission of programs specifically designed for blind and other handicapped persons.

118. U.S. CONGRESS. HOUSE.

H.R. 8261. A bill to amend the copyright law to secure the

rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, and for other purposes. Introduced by Mr. Drinan on July 13, 1977 and referred to the Committee on the Judiciary. 2 p. (95th Cong., 1st sess.)

The bill would amend section 113 of P.L. 94-553 by adding a subsection (d) which would provide a moral right to the author or his legal representative for the entire term of the copyright. Thus the author could prevent having his honor or reputation prejudiced in any way by distortions, mutilations or alteration of his pictorial, graphic or sculptural work.

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

Commission on new technological uses of copyrighted works. Report to accompany H.R. 4836, submitted by Mr. Kastenmeier from the Committee on the Judiciary, April 6, 1977. 4 p. (95th Cong., 1st sess., H. Rept. No. 95-187.)

The purpose of the proposed legislation is to extend the date for submission of the final report of the National Commission from December 31, 1977 to July 31, 1978. The committee reported favorably on the bill without amendment and recommended that the bill be passed.

2. Foreign Nations

120. ARGENTINA. *Laws, statutes, etc.*

Decree concerning Article 56 of Law No. 11723 (No. 746, of December 18, 1973). *Copyright*, vol. 13, no. 4 (April 1977), p. 93.

An English translation of a decree which defines who shall be considered a performer and by what means a performance is considered to be transmitted. The text of the decree was published in the *Boletín Oficial* of Dec. 28, 1973.

121. ARGENTINA. *Laws, statutes, etc.*

Decree containing rules for the microfilming of periodical publications. (No. 447, of August 7, 1974). *Copyright*, vol. 13, No. 4 (April 1977), p. 93.

The decree requires that proprietors of periodical publications who microfilm must deposit copies with the National Copyright Office for one year and then send copies to the Na-

tional Library. Where only microfilm copy of a publication is available the National Copyright Office may require deposit of a legible enlargement.

122. ARGENTINA. *Laws, statutes, etc.*

Decrees containing rules on the public utilization of phonographic reproductions. (No. 1670, of December 2, 1974). (No. 1671, of December 2, 1974). *Copyright*, vol. 13, no. 4 (April 1977), pp. 94-95.

English translations of two decrees which amend sections 35 and 40 of the Argentina Copyright Law and deal with public performances of sound recordings and the collection and distribution of royalties for such public performances. The texts of these two decrees were published in the *Boletín Oficial* of Dec. 12, 1974.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

123. Recommendation on the legal protection of translators and translations and the practical means to improve the status of translators. *Unesco Copyright Bulletin*, vol. 10, no. 4 (1976) pp. 9-14.

The recommendation is that member states should provide similar protection to translators as they accord authors under the provisions of the international copyright conventions to which they are party and under their national law, without prejudice to the rights of the authors of the original works that have been translated. This recommendation is to be brought to the attention of the proper authorities and organizations in each member country, and, should any action be taken, it is to be reported back to the General Conference.

124. WORKING GROUP ON THE LEGAL PROBLEMS ARISING FROM THE USE OF VIDEOCASSETTES AND AUDIO-VISUAL DISCS (Geneva, Feb. 21-25, 1977). Report prepared by the secretariat and adopted by the working group. *Copyright*, vol. 13, no. 4, (April 1977) pp. 87-92.

At this session of the Working Group a set of terms to describe various forms of audio-visual materials was agreed upon. In determining the legal status of audio-visual material in the two international copyright conventions and the Rome convention, the group finally concluded that national legislation rather than the international conventions should be amended to grant proper protection.

PART IV

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. Decisions of U.S. Courts

1. Federal Court Decisions

125. *MCA Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. October 21, 1976) (Cooper, D.J.).

Action for infringement of plaintiff's copyright in its song "Boogie Woogie Bugle Boy" ("Bugle Boy") by the alleged copying thereof by defendants in "The Cunnilingus Champion of Co. C" ("Champion"), which is part of defendant's play "Let My People Come—A Sexual Musical" ("Musical"). Plaintiff's work was initially registered in unpublished and then in published form and was duly renewed in 1968. The song was originally popularized in the 40s by the Andrew sisters, and was revived in 1973 by Bette Midler, whose version was highly successful.

Held, judgment for plaintiff.

Based on admissions of defendants' persuasive expert testimony and the testimony of the cast of Musical, the court concluded that defendants indeed had copied from plaintiff's work, that the copying was substantial, that the two works were "substantially similar" and that such similarity resulted from such copying and not from what defendants described as "common musical form." For example, the individual composers were well acquainted with Bugle Boy and not only conceded incorporating the bass line and other portions but also admitted having played Bugle Boy while Champion was being composed. Bugle Boy was also played at rehearsals for "Musical". Testimony of cast members reflected even more intentional copying. They recalled, for example, that one of the composers had said he wanted sufficient notes changed in Champion to avoid getting "into trouble." Moreover, plaintiff's expert testimony, upon which the court relied heavily, was to the effect that the extent of similarity exceeded the bounds of coincidence and that such similarity related not only to specific passages, but to the general harmonic and rhythmic characteristics as well. Finally, recognizing the importance of the reaction of ordinary observers, the court allowed in as admissible and relevant, and over defendants' hearsay objections, the testimony of cast mem-

bers that they heard other cast members and audience members say that "Champion" sounded like "Bugle Boy". The court, the "ultimate judge" of similarity, was left with "the unmistakable impression" that the two works were substantially similar.

The court categorically rejected defendants' defense that any similarities resulted from the similarities in "boogie woogie" music in general, since they failed to introduce any evidence that they had referred to any other such songs:

"Hence, we are left with the firm impression that, while there may be many forms of "boogie woogie" music, Wilson, Oesterman and Cunningham relied on, and copied in substantial part, the lyrics and music of one particular "boogie woogie" song, Bugle Boy. Accordingly, we categorically rejected the defendants' contention that any similarity between Champion and Bugle Boy is attributable to common musical forms and hence noninfringing. See *Detective Comics Inc. v. Bruns Publications*, 111 F.2d 432, 433 (2d Cir. 1940); *Hartfield v. Peterson*, 9 F.2d 998, 1000 (2d Cir. 1937).

The court also rejected defendants' argument that Champion was a burlesque. It therefore refrained from immunizing the defendants from liability on "fair use" grounds:

"Defendants may have sought to parody life, or more particularly sexual mores and taboos, but it does not appear that they attempted to comment ludicrously upon Bugle Boy. During cross-examination, defendant Wilson admitted that he was not really burlesquing Bugle Boy, but rather, using 'Cunnilingus Champion' as a vehicle to do a burlesque of the 40's, and World War II activity. . . . Wilson further testified that he did not intend Champion to be a parody of Bugle Boy. . . . His intent was to 'take an innocent style of music and combine it with words that are often considered to be taboo to make a very funny point'."

The court accordingly held both composers liable. It also held liable the proprietor of the leased premises where Musical was performed, since he had received a percentage of the proceeds for the sale of tickets.

"We emphasize that the law contemplates the liability of defendant even if he had no personal knowledge of the infringing

song. As the Court said in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963), the proprietor is liable for copyright infringement, 'whether or not the proprietor has knowledge of the compositions to be played or any control over their selection'. *Id.*, at 307 (citing numerous cases)."

126. *Novelty Textile Mills v. Joan Fabrics Corporation*, 426 F. Supp. 1008 (S.D.N.Y. Jan. 31, 1977) (Werker, D.J.).

Action for infringement of plaintiff's federally registered copyright in a bias plaid upholstery fabric design arising out of defendant's manufacture and sale of a similar design. Plaintiff's design was created and first displayed at a show in April, 1976, where defendant's employees saw it and learned of the customer demand for bias plaids. Defendant subsequently designed, manufactured and sold the allegedly infringing design. Plaintiff asserted its sales simultaneously dropped.

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

Based on plaintiff's certificate of registration, the court assumed for the purposes of the motion that plaintiff's copyright was valid. However, it decided that the differences in the designs, considering how the relevant market would observe them, outweighed any similarities. While using the "ordinary observer test" to evaluate the degree of similarity, the court cautioned that the "'ordinary observer' should not be confused with the 'casual observer'." Following Judge L. Hand in *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960), the court held:

"Since Novelty sells most of its upholstery fabrics to furniture manufacturers, the degree of similarity between Style 253 and the alleged Joan copies should be evaluated from the perspective of such individuals or firms.

While each of these disparities [listed in the opinion] considered separately constitutes but a slight modification of Novelty's copyrighted design, the field of bias plaids appears to be a 'well-ploughed' one, and striking distinctiveness is, therefore, not necessary in order to establish lack of infringement. Any variation beyond the trivial may properly be considered an independent creation."

Requiring that plaintiff must show *some* likelihood of irreparable injury, the court also indicated that no showing was made as to why

money damages would be inadequate. Apparently, nothing in the record indicated any confusion of customers. Therefore, temporary injunctive relief was denied.

127. *Moore v. Lighthouse Publishing Company*, 429 F. Supp. 1304 (S.D. Georgia, April 5, 1977) (Lawrence, D.J.).

Action for alleged infringement of plaintiff's copyright in an illustrated map of historic Savannah depicting streets, squares, and rough drawings of public and other buildings of interest, all surrounded by a contracted view of the outlying territory. Defendant's map was quite similar in method and appearance, and contained "duplications and near duplications." However, it also contained "numerous differences." These included the fact that a section not in plaintiff's map was added to defendant's.

On plaintiff's motion for a preliminary injunction, and on defendant's motion for summary judgment, *held*, defendant's motion granted.

While recognizing that maps are copyrightable, the court immediately noted that they are entitled to limited protection only. And, with regard to the particular type of map in issue, it stated:

"The streets, squares and various historic landmarks in 'Old Savannah' cannot be exclusively appropriated. Nor can one acquire an exclusive right to identify by symbolic drawings buildings, forts and points of interest. Even if there be a modicum of art in the drawings involved here, the necessary originality and creativity is lacking. To be sure, no one has a right to slavishly copy a copyrighted map. Such is not authorship. 1 Nimmer, the Law of Copyright § 6 at 10.2. However, two mapmakers setting out independently to depict in elementary, miniature form a landmark normally will end up with a similar result."

* * * *

"If plaintiffs are correct that the highly simplified representations on their map containing drawings of that type used to depict certain landmarks and structures are copyrightable, no one can publish, except at peril, a guide map in which that device is used."

The court also found that the plaintiff's map had drawn heavily on a prior map, and thus its rights were limited to its copyrightable additions to the prior work:

"[Plaintiffs] are in the ambivalent position of asserting that the defendant has infringed on what they themselves took from a work copyrighted by a third party. Originality justifying a copyright means that the work must owe its creation to the author and this in turn means that the work must not consist of actual copying". *Batlin & Son, Inc. v. Snyder*, *supra*, 536 F.2d 490.

Holding that the question of infringement may be one of fact, and that the question of whether or not variations are trivial is for the court, the District Court granted defendant's motion for summary judgment.

PART V

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

128. SEIDEL, ARTHUR H. What the general practitioner should know about trademarks and copyrights. 3d ed. Philadelphia, American Law Institute-American Bar Association Committee on Continuing Professional Education, 1976. 254 p.

This handbook for practitioners, on trademarks and copyrights, was prepared just prior to the enactment of the new copyright law. A supplement has been inserted which gives the text of P.L. 94-553, and there is also a reprint of an article entitled "The New Copyright Statute" written by Arthur H. Seidel and Roberta L. Jacobs, first published in *The Practical Lawyer* in April 1977. The reprint is a summary of the major changes in the new copyright law which goes into effect Jan 1, 1978.

2. Foreign Publications

1. In English

129. CROTTI, ALFRED F. Trading under EEC and U.S. antitrust laws. London, Butterworths, 1977. 361 p.

Chapter 14 of the volume deals with the unlawful use of copyright and trademarks. Several cases are analyzed and the author finds that "once a copyright material has been placed in the flow of commerce by the copyright owner or by one authorized by him, the copyright protection has been exhausted. It cannot be reasserted to prevent its movement in trade within the Common Market."

B. LAW REVIEW ARTICLES

1. United States

130. Anatomy of cable regulation; an outline of federal cable television rules, including current regulations and developments.

Broadcasting Cable Sourcebook, 1977, pp. 4-5.

A brief review of cable regulations including certificates of compliance, franchises, signal carriage, and definitions of terms.

131. BEAVERS, LUCIAN WAYNE. Copyright: *Twentieth Century Music Corp. v. Aiken*—Infringement liability of a restaurant owner for reception of radio broadcast for the enjoyment of his customers. *Oklahoma Law Review*, vol. 30, no. 1 (Winter 1977), pp. 201-213.

This case note was awarded second place in the University of Oklahoma Nathan Burkan Memorial Competition. It analyzes the holdings in *Buck v. Debaum* and in *Buck v. Jewell-LaSalle* and attempts to reconcile them with the U.S. Supreme Court's decision in *Twentieth Century v. Aiken*. The note concludes that under the new functional test, it will be highly unlikely that the hotel or restaurant proprietor will be found to have performed the radio broadcast no matter whether the broadcast was authorized or unauthorized by the copyright owner, and he may avoid liability on the theory that the license to the broadcaster may constitute an implied license in law to the receiver of that broadcast to reuse it, even if the reuse constituted a public performance for profit.

132. CONINE, GARY B. Copyright: Unfair use in fair competition—a search for a logical rationale for the protection of investigative news reporting. *Oklahoma Law Review*, vol. 30, no. 1 (Winter 1977), pp. 214-238.

The paper was awarded first place in the University of Oklahoma Nathan Burkan Memorial Competition for 1976. The conflicting interests embodied in the copyright law and the first amendment's guarantee of freedom of the press have been minimal so far. Despite the omission of any reference to copyright of newspapers in section 102 of the revised copyright law of 1976, and the codification of fair use in section 107, protection afforded news reporting has been left in the status quo. Inconsistencies of the traditional law related to news reporting are ignored. If the appropriation of news events is to be deemed "fair competition," the doctrine of "unfair use" could be utilized to insure continued protection of both the interests of the news industry and the public.

133. LAFF, CHARLES A. and LARRY L. SARET. Further unraveling of

Sears-Compco: of patches, Paladin and Laurel and Hardy. *The Trademark Reporter*, vol. 66, no. 6 (Nov.-Dec. 1976), pp. 427-451.

This article is a revision of one that appeared previously in the *Loyola University of Chicago Law Review* (Winter 1976). Federal preemption of state laws concerning protection of intellectual property is discussed. The authors find that traditional boundaries of intellectual property are no longer sufficient to afford adequate protection for modern commercial practices. Case law has developed a drastic modification of the boundaries, and a recognition of new property rights or equitable considerations, not normally invoked to protect intellectual property. Courts should state which of the premises is being used in their decisions so that a clear and uniform body of law may be developed.

134. SOLOMON, SUSAN L. *Monty Python* and the Lanham Act: in search of the moral right. *Rutgers Law Review*, vol. 30, no. 2 (Winter 1977), pp. 452-477.

The decision in *Gilliam v. American Broadcasting Co.* is analyzed from the viewpoints of contract, copyright and the Lanham Act. The conclusion is reached that in order to permit an artist to protect his rights of paternity and integrity he must be able to claim them notwithstanding the transfer of his work to others for the purpose of economic exploitation. Congress is charged by the Constitution with the preservation of American society. Hence, it should adopt the theory of moral right by providing an inalienable interest in the U.S. copyright law.

2. Foreign

1. In English

135. HADL, ROBERT D. The copyright liability of cable television systems under the new United States copyright act. *EBU Review*, vol. 28, no. 2 (March 1977), pp. 40-47.

A review of the provisions concerning cable television contained in the new Copyright Law of 1976 in the United States. The author concludes that the resulting provisions are favorable to the cable industry. Though copyright liability was established, the royalties are extremely low, and are paid

pursuant to a compulsory license only for retransmission of distant non-network programs. A Copyright Royalty Tribunal may readjust the rates if and when the FCC changes regulations.

136. MASOUYÉ, CLAUDE. The protection of international works and the activities of WIPO in this field. *EBU Review*, vol. 28, no. 1 (Jan. 1977), pp. 31-36.

A lecture given at the East Asian-Pacific Copyright Seminar convened by the Australian Government in Sydney in August 1976. The purpose of this talk was to explain the operations of WIPO in the field of international copyright, and the multilateral conventions which that organization administers.

137. PEARCE, D. C. Letter from Australia; report of Australian Copyright Committee on reprographic reproduction. *Copyright*, vol. 13, no. 4 (April 1977), pp. 96-100.

A summary of the Franki Report, which notes that the Committee's report makes recommendations that limit some of the existing rights of copyright owners and extends the rights of librarians and educational institutions to make copies of works. Reproductions of sound recordings, motion picture films and radio or television broadcasts were not included. The Committee also recommended that Crown copyright be limited to permit reproduction of legislative material and court decisions.

2. In German

138. DIETZ, ADOLF. Werkänderungen durch die Regie; rechtliche Schlüsse aus der Sonderstellung der Bühnenszenierung. *Film und Recht*, vol. 20, no. 12 (Dec. 1976), pp. 816-829.

A discussion of the contributions to the value of a dramatic work which are made by the stage-designer, whether such contributions are protectible, and when, how and by whom they might be enforced.

139. DÜNNWALD, ROLF. Regie—Interpretation, Bearbeitung oder Werk? Fragen der rechtsbegrifflichen Zuordnung. *Film und Recht*, vol. 20, no. 12 (Dec. 1976), pp. 804-816.

A note, based on recent court decisions, concerning the adaptation of works to the stage, film and television, and a

discussion of the overlapping rights of the various creators and producers.

140. FLECHSIG, NORBERT P. Urheberrechtliche Abwehransprüche und ambivalente Regieleistung. *Film und Recht*, vol. 20, no. 12 (Dec. 1976), pp. 829-847.

A discussion of the rights of the producer in a dramatic work contra the rights of the performer as described in sections 2, 3, 23, and 73 *et seq.* of the German Copyright Law of 1965, as well as the remedies made available under section 97.

141. RIE, ROBERT. Der Amerikanisch-Kanadische Fernsehkrieg; ein Lagebericht. *Film und Recht*, vol. 21, no. 4 (April 1977), pp. 231-236.

A brief note on the problem between Canada and the United States concerning the carriage of U.S. television programs in Canada prior to the scheduled release in the United States, and the deletion of U.S. commercials in Canada.

142. SCHULZ, ECKHARD. Das neue Erhebungssystem für Urhebertantiemen an den Bühnen. Statt der früheren Prozentualabgabe von den Kasseneinnahmen nunmehr Urheberabgabe pro Besucher. *Film und Recht*, vol. 21, no. 4 (April 1977), pp. 220-231.

A brief explanation of the new royalty system for compensating producers of dramatic works in Germany.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

143. Answers begin to emerge on how OTP's functions are to be absorbed. But there are still questions being asked about shift of work to Commerce and role of OMB in dispute over allocations. *Broadcasting*, vol. 93, no. 5 (August 1, 1977), pp. 28, 30.

The Office of Management and Budget is to take responsibility for federal telecommunications procurement and management policy, and arbitration of interagency disputes

about frequency allocation. Other functions of the OTP will be transferred to the Department of Commerce under a new assistant secretary for communications and information. Policy decisions requiring presidential attention will be referred through the Domestic Council. Senator Hollings and Rep. Van Deerlin have urged creation of a National Telecommunications Administration within the Department of Commerce. Meanwhile hearings have begun on the proposed reorganization of OTP in the Senate Government Affairs Committee.

144. GLUECK, GRACE. For artists, a way to stop ripoffs? *New York Times*, vol. 76, no. 43656 (August 3, 1977), p. 17.

A law firm in New York has been working to combat an increase in art piracy in this country. They represent two large European artists' groups in protecting the interests of their members, including Marc Chagall, Joan Miró, and the estates of Magritte and Pablo Picasso. The U.S. copyright law has not been particularly helpful in combatting piracy, because if the artist is not willing to register his creation and have an unesthetic © stamped on the work, it goes into the public domain. Licensing, though stimulating commercialization of art, does provide for careful supervision of reproductions. The new copyright law will provide a partial remedy to the current piracy of works of art.

145. Hangup at FCC over waivers on nonduplication; broadcast and cable bureaus split over criteria to be used. *Broadcasting*, vol. 93, no. 1 (July 4, 1977), pp. 31-32.

While both bureaus at FCC agree that a waiver should be granted if the distant signal is superior to the local signal, and that the distant signal should have a significantly large number of viewers in the community, there is disagreement as to other requirements. In the meantime current petitions for waivers are being held pending resolution of the standards to be applied in granting waivers.

146. HENNESSEY, LIZA KEVIN. Sources of revenue for the songwriter. *Songwriter*, vol. 2, no. 11 (Aug. 1977), pp. 36-37.

A brief article on the different types of royalties a songwriter might expect to earn from his composition, and the bases by which the percentage is determined.

147. Industry continues assault on FCC's cable regulatory program. *Vue*, vol. 11, no. 13 (June 20, 1977), pp. 8-9.

At the Senate Communications Subcommittee hearings on CATV, June 6-8, the industry representatives pleaded for congressional action to establish new regulatory standards for CATV. Some complaints were filed on the complicated forms and filings required, and Congress was also asked to clarify the extent and purpose of FCC's regulatory power over cable television.

148. Interpol to fight film pirate gangs. *Variety*, vol. 287, no. 7 (June 22, 1977), pp. 1, 100.

A plan for taking action against film piracy on an international scale has been placed on the agenda for the Interpol general assembly to be held in Stockholm in September.

149. KARP, IRWIN. Authors guild clips costs of estate renewals. *Variety*, vol. 287, no. 7 (June 22, 1977), p. 34.

The attorney for the Authors Guild reports on a case in which the Guild received assignments of the renewal rights in the copyrights of two books from the executor of a deceased author's estate. The Guild had been bequeathed the renewals under the author's will. Applications for these renewals were registered under the Copyright Office's "Rule of Doubt" and the text of the Office's letter is reproduced.

150. KATZ, ARTHUR STANLEY. Videotapes and the copyright act: no protection—no infringement. *The Los Angeles Daily Journal* (July 14, 1977), pp. 3-12.

The author advances the thesis that videotapes are not a species of motion pictures and thus are not copyrightable under the new Copyright Law, in view of transitional section 103 which states that copyright protection is not extended to works in the public domain before January 1, 1978. He claims that a videotaped work reproduced from the performance of a conventional sprocketed motion picture is not a "copy" of the motion picture, since the device that produces the tape converts inchoate electronic signals into images and sounds, thus preserving signals which can be converted into transitory images and sounds.

151. MACHALABA, DANIEL. One way to create a design is to buy it at a nearby library. Fashion ideas are sometimes fabricated, not invented; children at Bloomingdale's. *Wall Street Journal*, vol. 289, no. 121 (June 22, 1977), p. 1, col. 4; p. 30, col. 3.

An explanation of the scope and functions of textile design libraries, where scraps are purchased from mills and apparel designers and are later sold to customers who copy or adapt them to new uses. A recent line of clothes at Bloomingdale's was manufactured from such adapted textile designs.

152. NCTA panelists see clear skies, but a few clouds. More favorable Washington climate, a growing attraction for customers as well as investors are plusses; Geller criticizes copyright stance, Kahn cites fiber optics potential and is concerned about Bell's role. *Broadcasting*, vol. 92, no. 17 (April 25, 1977), p. 48.

While the consensus seemed to be that with the new mood in Washington the cable television industry will be growing, Henry Geller, former FCC general counsel, predicts problems with copyright holders, because of the "bargain basement" rates in the copyright bill. The workshop also heard comments on the use of fiber optics as being a technology whose time had come.

153. Royalty tribunal picked by Carter; five members of copyright board are nominated; one is former broadcaster Mary Lou Berg. *Broadcasting*, vol. 93, no. 1 (July 4, 1977), pp. 25-26.

The five members of the Copyright Royalty Tribunal have reportedly been selected by President Carter. Though one was formerly connected with a radio station, the National Cable Television Association said that they would have no objection, that they felt no one on the tribunal would represent a private interest.

154. SCHOENFELD, HERM. Home disk & tape sets to hit market, late '77; blow to film theatres? *Variety*, vol. 287, no. 11 (July 20, 1977), pp. 3, 28.

A comment on the expected impact of the various video systems that are expected to appear on the market in the Fall of 1977. The fact that the competing systems are not compatible and the high price of the playback equipment will be factors to be watched. A number of audio-visual seminars

are being held, including one on educational publications.

155. SHAIN, MICHAEL. ASCAP, radio industry negotiations reach impasse. *Record World*, vol. 35, no. 1572 (Aug. 20, 1977), pp. 4, 57.

Negotiations between ASCAP and the radio industry over a new five-year licensing contract have reached an impasse over the issue of fees. ASCAP feels its repertory and distribution is much larger, therefore more valuable. The radio broadcasters feel that non-exclusive licensing for an increasing number of stations should lower the fees.

156. SHAIN, MICHAEL. Carter delay on tribunal continues. *Record World*, vol. 35, no. 1570 (Aug. 6, 1977), p. 12.

A rising tide of frustration and anxiety is mounting on Capitol Hill because of the unexplained delay by the Carter administration in announcing the Copyright Tribunal personnel. In the meantime, Thomas Brennan, one of the nominees, has quietly secured office space and clerical assistance for the group. Rumor has it that one of the commissioners had delayed in filing financial disclosure information and that has been given as the reason no announcement has been made.

157. STENGEL, ROB. The Orth-o-Vision case: what's a cable system? *Vue*, vol. 11, no. 13 (June 20, 1977), pp. 6-7.

The New York State Cable Commission ruled last fall that any MATV system carrying pay television would not be exempt from regulations applying to cable systems. New York City has refused to franchise any MDS-supplied MATV except in conjunction with a full-fledged cable system. Orth-o-Vision has filed a petition with the FCC to preempt state and local regulation of pay television provided by MDS. As a Home Box Office affiliate, Orth-o-Vision provides pay programming to just under 4,000 MATV subscribers in Queens. Under the present state commission ruling, Orth-o-Vision cannot expand without a city franchise, and it will have to abandon its existing service by next summer.

158. Supreme Court rules WEWS erred in taping circus act without permission. Use on newscast called unlawful appropriation of

Hugo Zacchini's 'professional property'. *Broadcasting*, vol. 93, no. 1 (July 4, 1977), pp. 34-35.

A summary of the U.S. Supreme Court decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, decided by a five-four vote.

159. SUTHERLAND, SAM and MIKE FALCON. Key issues raised at copyright hearings. *Record World*, vol. 35, no. 1570 (Aug. 6, 1977), pp. 3, 107.

A summary of the testimony offered at the Copyright Office hearings in Los Angeles on the proposed performer's royalty. The Danielson bill with its rate structure drew criticism from both sides of the issue. The Register of Copyrights noted that comments will be accepted until August 26th, and that there may be hearings on the economics of the possible performer's right before the study is completed for Congress in January.

160. TURK, A. MARCO. Legally speaking; how to make a deal with a publisher . . . simply a game of monopoly. *Songwriter*, vol. 2, no. 11 (Aug. 1977), pp. 29, 32, 39.

The article was prepared by a member of the California Bar as a public service for songwriters. It explains in simple terms what the songwriter should look for in his agreements with music publishers.

161. Van Deerlin panel gets 850 pages of ways to go in rewriting act. Pointed questions are raised about most cherished principles of communications regulation. *Broadcasting*, vol. 92, no. 17 (April 25, 1977), pp. 21-23.

A commentary on the various option papers recently filed with the House Communications Subcommittee concerning the ways in which the Communications Act of 1934 might be rewritten. One of the option papers deals with cable television; another deals with public broadcasting.

162. ZAVIN, THEA. ASCAP vs. BMI; the facts you need to know to choose a performing rights society. *Songwriter*, vol. 2, no. 11 (Aug. 1977), pp. 16-22.

An edited transcript of a recent session sponsored by the American Guild of Authors and Composers which furnishes a

forum to prominent spokespersons in the field of music. The interviewee during this session was Thea Zavin, senior vice-president of performing rights administration for BMI. She explains BMI's logging system for songwriters.

2. Foreign

1. England

163. Australia in the new era. *The Bookseller*, no. 3729 (June 11, 1977), pp. 2749-2751.

A summary of views expressed by the director of the Australian Book Publishers Association during a seminar held by the international division of the Association of American Publishers. Buying around would continue despite the Consent Decree, some will be done in willful defiance of the law. "Any U.S. book with a significant 'commonwealth' sales potential will still most likely be sold to a British trade house." It is unlikely to be economic for major U.S. trade houses to set up their own companies in Australia as British houses are now doing in America.

164. BROPHY, BRIGID. Whitford report. *The Bookseller*, no. 3722 (April 23, 1977), p. 2172.

As a member of the Writer's Guild of Great Britain, Miss Brophy finds the Whitford Committee's recommendations rather anti-creator, particularly since it refuses to espouse (1) the right to renegotiate contracts in certain circumstances, also (2) the right of *domaine publique payants* and (3) *droit de suite*.

165. Copyright in South Africa. *The Bookseller*, no. 3726 (May 21, 1977), p. 2500.

A brief note concerning the fact that booksellers in South Africa have not been respecting market rights. A publisher who was the exclusive marketing licensee for the country has recently obtained an injunction from the Supreme Court to enjoin the exhibition or sale of one of the plaintiff's titles.

166. FRANKLIN, NORMAN. After the consent decree. *Bookseller*, no. 3732 (July 2, 1977), pp. 46-47.

The consent decree has had a major effect on British publishers and their decision-making. Commonwealth publishers have suddenly developed an enthusiasm for local editions of books. Australian publishers are expanding their territories, and American publishers are looking for selling organizations in Australia and New Zealand. On scholarly books there will be less sharing of runs with American publishers. The American "manufacturing clause" in their new copyright law discourages publishing by British publishers in the U.S., an unnecessary protection in the richest country in the world.

167. Public lending right—death by filibuster. *The Author*, vol. 87, no. 4 (Winter 1976), pp. 121–122.

An account of the parliamentary maneuverings in the House of Commons in November 1976 which ended in having the House suspend operations on the Public Lending Right bill before the completion of the Report stage and Third Reading.

168. WAGNER, SUSAN. The new U.S. copyright law. *The Author*, vol. 87, no. 4 (Winter 1976), pp. 125–129.

A resumé of the major changes incorporated in the new United States copyright law, with particular emphasis on the photocopying compromises.

169. WHITE, HAROLD T. "Close and be damned"; the closed market problem in New Zealand. *The Bookseller*, no. 3729 (June 11, 1977), p. 2758–2760.

The secretary of the Booksellers Association of New Zealand reports that booksellers have come to accept the necessity and efficiency of closed markets in paperbacks in New Zealand, but the librarians are becoming increasingly hostile to closed markets on the grounds of inefficiency and price. Recently a party of booksellers visited the United States and attended a trade convention. Interest in American books has increased and the future of British books in New Zealand may be decreasing.

170. Whitford report, *The Bookseller*, no. 3723 (April 30, 1977), p. 2262.

Letters to the editor contain comments on the Whitford Committee report such as the need for unity in the British

publishing trade in order to survive, "fair dealing" and criticism that the report was pro-publisher.

171. ZIFCAK, MICHAEL, F. . . . And in Australia. *Bookseller*, no. 3729 (June 11, 1977), pp. 2760-2761.

In discussing the closed market trade among booksellers in Australia, the question is how can a bookseller be in breach of copyright when importing a British Commonwealth edition of a book and similarly be in breach of copyright when importing a U.S. edition of a U.S. copyright book if the same U.S. edition is legitimately distributed in Australia on a closed market basis? Australian booksellers feel that section 37 of the Australian Copyright Act is unduly restrictive, that it was never intended to protect closed market operations. Publishers will have to modify some of their practices.

NEWS BRIEFS

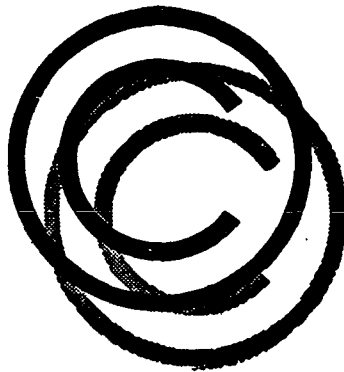
172. COPYRIGHT SOCIETY INITIATES EMPLOYMENT INFORMATION EXCHANGE

The Copyright Society is initiating a service to the copyright community in the exchange of employment information. Anyone who wishes to submit a resume seeking a position or an announcement of the availability of a position may submit such material to:

The Copyright Society of the U.S.A.
New York University School of Law
40 Washington Square South
New York, New York 10012
Attn: Mrs. Patricia Root

These will be kept on file for inspection by any interested persons.

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PART I.
ARTICLES

173. SYMPOSIUM ON THE NEW COPYRIGHT LAW AT THE
1977 MEETING OF THE AMERICAN BAR ASSOCIATION*

EDITOR'S NOTE:

The BULLETIN has recently presented in-depth studies of key provisions in the new copyright law. To complement these studies, we offer thirteen capsules by outstanding copyright experts which span the statute. These articles are based on talks given by the respective authors at a meeting of the ABA section on Patents, Trademarks and Copyrights held on August 9, 1977 in Chicago. Each speaker was asked to compress his remarks into ten minutes. We trust that these articles, reflecting the analyses of knowledgeable attorneys on the eve of the general effectiveness of the new copyright law, will prove helpful.

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174. LEGISLATIVE BACKGROUND

By BRUCE A. LEHMAN*

The burden of making copyright law is greater for Congress than its concurrent burdens in other areas because copyright policy is uniquely a matter for Congressional consideration. In many other areas of national policy the Legislature has the benefit of leadership and suggestions from the Executive Branch of government with all the resources that branch has available to it. For example, in the area of patent law we have the Patent Office, which is a part of the Department of Commerce in the Executive Branch. However, copyright law is not the province of a particular executive department of the government. The Copyright Office, in fact, is a creature of the Legislative Branch; the Register of Copyrights is an officer of the Library of Congress. Thus, while congressional policy makers received testimony from executive agencies such as the Departments of Commerce and Justice, they were required to look inward for the most authoritative leadership in the field of copyright revision.

In spite of the fact that 68 years elapsed between the 1909 and 1976 revisions, I don't believe that Congress can be blamed for lack of effort during those years.

As early as 1922 and 1923, revision bills which would have permitted the United States to adhere to the Berne convention were introduced. In 1931 a bill actually passed the House of Representatives.

In 1955, Congress authorized what became a six year study of needed revisions under the supervision of the Register of Copyrights. This led to the introduction of a new revision bill in 1964—the direct ancestor of the 1976 law. Hearings were held beginning in 1965, and in 1967 a bill passed the House of Representatives only to die in the Senate because of a controversy over the cable television provisions. It was during this period that my boss, Bob Kastenmeier, first became involved with the revision project, chairing 21 days of public hearings and 51 days of drafting sessions during the 89th Congress.

The scene having shifted to the Senate in 1967, the House of Representatives awaited further consideration of the measure by that body before proceeding further on its own. Senate action finally came late in the 93rd Congress with passage of a bill in September, 1974—too late for House consideration during what remained of that session. Finally, in 1975 Senator McClellan introduced the 1974 Senate-

*Mr. Lehman is the Chief Counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice, United States House of Representatives.

passed bill as S.22, the bill which 22 months later became law.

The story of S.22 must certainly be that of one of the most laborious and painstaking legislative projects ever undertaken in the Congress. Much of the bill, by 1975 and 1976, was no longer subject to dispute by interested parties. Issues such as extension of term to life of the author plus 50 years, or a flat 75 years for existing works, were not disputed. Similarly, old battles such as that surrounding the decision to subject jukebox performances to a compulsory license with a mandatory \$8 per box annual payment had been resolved. However, a number of issues significant enough to warrant 17 days of House Subcommittee hearings and 25 days of markup, remained to be worked out. The most troublesome of these issues were:

- The scope of the fair use doctrine as it applies to teachers;
- photocopying by libraries;
- the copyright liability of cable television systems;
- the liability of public broadcasting organizations for use of non-dramatic literary and musical works as well as pictorial, sculptural and graphic works;
- the issue of a performer's right in sound recordings;
- the question of whether to create a new form of copyright protection for ornamental designs, and
- the amount of mechanical royalties to be paid in making and distributing sound recordings.

Most of these issues involved the vital interests of competing industries and interest groups, and compromising and accommodating these groups within the general context of the public interest was the prime task facing the subcommittee and the Congress.

With the help of a number of the affected groups, the Congress was able to accomplish this and, on the day before adjournment of the 94th Congress, the House and Senate were able to agree on a final version to send to the President for his signature.

With respect to the difficult question of scope of fair use for teachers, we were finally able to secure the support of the National Educational Association after slightly amending the original text of the bill to state specifically that an element to be considered in determining fair use is whether or not the particular copyrighted work in question is being used for classroom teaching purposes. We also mandated automatic remission of statutory damages in infringement suits against a teacher who thought he was copying pursuant to the fair use doctrine.

On the issue of library photocopying, we were able to secure the

support of both the library and the publishing communities after specifying that libraries may photocopy for purposes of interlibrary loan as long as such photocopying is not systematic or a substitute for subscription or purchase.

With respect to both of these issues—educational use and library photocopying—written guidelines were agreed to by the associations representing the affected groups. These guidelines have been reprinted in the official Congressional reports accompanying the actual legislation. The question of the nature, scope and royalty of the compulsory license for retransmission by TV cable systems was resolved after the National Cable Television Association, the National Motion Picture Association and various sports interests agreed on a compromise package.

The scope of the compulsory license for Public Broadcasting was battled out in subcommittee, but the task was made easier by agreement between the public broadcasting industry and the publishing interests to subject use of non-dramatic literary works to full copyright liability.

The AFL-CIO, prime proponent of the performer's right in sound recordings, agreed to support the bill without such a right with the promise of a study of the issue by the Register of Copyrights and future review by Congress. With respect to mechanical royalties, House members were able, in the final stages of conference committee negotiations, to agree on a compromise with the Senate whereby the statutory royalty rate would be raised to the House figure of 2-3/4 cents per record but the per minute rate would remain at the Senate rate of .5 cents rather than the House's .6.

Title II, that portion of the Senate bill which would have provided for a maximum period of copyright type protection of 10 years for ornamental designs, was deleted by our subcommittee, and the deletion was later accepted by the Senate, when it was determined that not enough time remained in the session to fully debate the merits of the provision. The House Committee report promises, however, that the issue will be reconsidered in a later Congress.

Although several important copyright issues remain unresolved, I believe that the new law will largely satisfy the needs of the copyright user and proprietor communities. The creation of the new Copyright Royalty Tribunal will relieve the Congress of the necessity of continual review of the details of compulsory license royalty rate structures.

With the help of the Tribunal and the continual monitoring of the law by the Register of Copyrights, I believe that the new Code is sufficiently comprehensive and flexible to see us through the remainder of the century with a limited amount of fine tuning. This never

could have been achieved without the constructive efforts through the years of many individuals: members of Congress, their staffs, representatives of affected industries and interest groups, and, of course, the Copyright Office of the Library of Congress. The spirit of compromise reflected in the new Copyright Code is a striking example that the democratic lawmaking process can and does work.

175. THE COPYRIGHT ROYALTY TRIBUNAL

By THOMAS C. BRENNAN*

The dominant public policy trend reflected in the Copyright Act of 1976 is the utilization by the Congress of compulsory licensing, to balance the rights of the creators of copyrighted materials and the needs of the users of such materials. The one compulsory license found in the Copyright Act of 1909—relating to the use of musical compositions by the manufacturers of phonorecords—is retained, while three new compulsory licenses are established—for jukeboxes, cable television, and public broadcasting. Furthermore, it is likely that any new rights of economic importance created in the future will also be subject to compulsory licensing.

A major objective of the drafters of the new act was to employ flexible language that would permit the statute to remain viable in an era of rapidly developing technology. I believe that objective was generally accomplished. Yet, by the use of compulsory licensing, including statutory fee schedules, the Act was foreclosing the opportunity for appropriate evolution in the important areas subject to compulsory licensing. Experience with the Act of 1909 suggests that it would not be easy to obtain amendment of the statute, especially in areas of controversy. Therefore, at a rather late date in the protracted history of the revision legislation, Senator John L. McClellan proposed the creation of the Copyright Royalty Tribunal, principally to periodically review and adjust the terms of the statutory licenses. The processing of this proposal in the Congress raised a number of fascinating questions of constitutional and administrative law, which are beyond the scope of this particular program.

As enacted, the Tribunal is an independent agency within the Legislative Branch of the Federal Government. It is not a part of the Copyright Office, and its location in the Legislative Branch is purely the result of historical factors related to the development of the American copyright system.

The Tribunal consists of five commissioners, nominated by the President for specified terms, with the advice and consent of the Senate. The terms of the Administrative Procedure Act generally apply to the Tribunal, and its final decisions may be appealed to the U. S. Court of Appeals on the hearing record. The initial rate proceeding

*Mr. Brennan is the Chairperson of the Copyright Royalty Tribunal and was formerly the Chief Counsel of the United States Subcommittee on Patents, Trademarks and Copyrights

will be to establish the royalty fees to be paid by public broadcasters for the use of copyrighted nondramatic musical works, and pictorial, graphic, and sculptural works.

Since no one else on the program is discussing cable television, I will use cable television as an illustration of the operations of the Tribunal. The Copyright Act does not determine which broadcast signals may be carried by a cable system. It grants the cable operator a copyright compulsory license covering the signals authorized by the regulations of the Federal Communications Commission. The license is contingent upon compliance with certain conditions, the most important of which is the payment of a royalty fee calculated on the basis of a very complicated fee schedule in the statute. The Tribunal is authorized to review the cable rates in 1980 and at five year intervals thereafter. But the statute limits any adjustment to consideration of national monetary inflation or deflation, and changes in the average rates charged cable subscribers for the basic service of secondary transmissions of broadcast signals. In addition, the Tribunal may make appropriate rate adjustments at any time if the F.C.C. rules are amended to permit the carriage of additional television signals beyond those authorized as of April 15, 1976 or if the F.C.C. changes its program exclusivity regulations.

A cable operator pays the required royalty fee to the Register of Copyrights and then is spared the burden of having to deal with a variety of copyright owners. The owners of copyrighted works used by cable systems file claims with the Tribunal. To encourage private agreements among the copyright owners as to the distribution of the royalty fees, the statute contains an antitrust exemption which will permit the parties to negotiate a private agreement. If a controversy exists concerning such distribution, the Tribunal will have to determine the formula.

In addition to the cable television and public broadcasting rates, the Tribunal, in 1980 and at periodic intervals thereafter, will also review the royalty rates established in the act for the jukebox license and the so-called mechanical royalty, which is the use of musical compositions by the makers of phonorecords.

The legislative history clearly reflects the desire of the Congress that the Tribunal not become involved in the affairs of the various industries subject to compulsory licensing any more than is absolutely essential to implement the purposes of the Copyright Act. It is hoped—perhaps wistfully—that the parties will achieve their own agreements, utilizing the services of the Tribunal only when necessary.

176. THE NEW COPYRIGHT LAW: DOMESTIC AND INTERNATIONAL IMPACT

By WALDO H. MOORE*

I have been asked to speak on the domestic and international impact of the new copyright law.

First, let me say a few words about the direction in which it seems that the U.S. copyright law may be going, and then I will turn to the changes that are taking place in the Copyright Office.

We all know that copyright legislation in our country is based on the clause of the Constitution which provides that "Congress shall have the Power to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This is the only place in the Constitution where the word "progress" is used, and it seems to me that we can see each day, particularly as regards copyright, how wise the choice of this word was. "Progress" embodies both a fact and a challenge. The unescapable fact is that we live in a world of change. The challenge is to see that this change is for the common good.

The change that calls for constant adjustment in our copyright law, or in its interpretation, is *technological* change.

The challenge is to strive constantly to see that adequate and appropriate rewards are provided to our writers, artists, and musicians, and to see that these rewards comport with the public interest.

In specific terms, how far should we go, how much should we encourage, the use of such devices as the compulsory license? What is the appropriate role for the clearinghouse? Will the recognition of the contribution of the individual author be lost in all of this? Will structures be created that will eventually fall from the weight of their own complexity? These and other serious questions face us, and answers will be found only with the dynamics of passing time.

Let me turn now from speculation to what is being done in the Copyright Office. The new law calls for a number of changes by the Copyright Office in its operations and also provides for a number of new Office functions.

I will say a few words about some of these functions, which are described in detail in the Status Report of the Copyright Office Revision Coordinating Committee on Implementation of the New Copyright Act.

*Mr. Moore is the Assistant Register of Copyrights of the United States.

We are preparing new application forms to conform to the new law; and samples of these, along with printed instructions for their use, have been available since well before January 1, 1978, the date when they came into use for all registrations. The new forms are required even for works published before January 1, 1978, if registration is made after that date.

Also, new circulars are in preparation, which will embody the new provisions and the new fee schedules.

Work is also going forward towards the formulation of a new body of Copyright Office Regulations. These will all be published in the Federal Register as proposed regulations, with appropriate allowance for public responses in accordance with the Administrative Procedures Act. Not only will the new body of Regulations deal with the general administration of the Copyright Office, but they will also cover a number of special areas where the new statute specifies that the Register of Copyrights shall provide regulations. Indeed, in several of these areas new regulations are already in effect; and in a number of other areas notices of proposed rulemaking have been issued and hearings have been held or comments invited.

I should add, as a practical note at this point, that one good way of keeping up with these developments is to have your name added to the Copyright Office Mailing List, since we send out copies of all such copyright announcements that appear in the Federal Register, along with other printed matter that we issue.

In addition, I should mention among our other activities that the Copyright Office is making preparations to issue certificates next year for the more than 400,000 jukeboxes in the country that will be recorded under section 116 of the new law. This entails the creation, staffing and training of a new division.

Finally, we are making general preparations in the Office for coping with the new law. An important new dimension will be the registration, for the first time in the history of the Office, of *unpublished* nondramatic literary material—unpublished articles, poems, fiction, and the like—the volume of which will be considerable, we believe.

Let me conclude with a few words about the international picture.

The new statute brings U.S. law into general consonance with the copyright laws of most of the developed countries of the world for the first time.

Since 1891, United States has had bilateral arrangements, based on national treatment, with a number of countries. The United States is also a party to the Buenos Aires Convention and the Universal Copyright Convention, both of which provide a system based on national treatment with a small number of minimal requirements. But

the United States has never been a member of the Berne Union, which is essentially a series of multilateral copyright treaties that require member countries, with some exceptions, to have laws that conform to high standards of protection. Essentially the Berne Conventions reflect the view of certain European countries that copyright is a natural right of man, and that formal requirements imposed as conditions of copyright are inimical to that right.

Now, since the new U.S. law has removed or softened a number of its formalities, the question arises whether, with the passage of time, the United States can or will adhere to the Berne system, in addition to Buenos Aires and the Universal Copyright Convention.

Among the questions that arise in this connection are whether certain provisions of the U.S. law can be interpreted to comply with the Berne Convention. Areas of uncertainty include the concern of Berne countries with (1) the copyright notice question; (2) the moral right of the author, (3) the copyright protection of works of architecture, and (4) retroactivity as regards the term of protection. No formal steps have been taken on either side, but it is obvious that study on both sides is appropriate.

One final word: For all of us who are interested in copyright, now is the time to stay in touch. Get our kits of printed matter, get on our mailing list, and let us have your thoughts on anything we do that concerns you.

177. SUBJECT MATTER OF COPYRIGHT

By ARTHUR J. LEVINE*

The general subject matter of copyright is stated in Section 102 of the Act:

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The phrase "original works of authorship" in Section 102 replaces the standard in the 1909 Act that copyright protects "all the writings of an author." That language "all the writings of an author" tracks the language of the Constitution and it was Congress' intention, in avoiding that language, to eliminate the uncertainty of whether the statutory and Constitutional standards are coextensive.¹ The House and Senate Committee Reports make clear that Congress specifically used the language "original works of authorship" to avoid exhausting the constitutional power of Congress for further legislation.

The Committee Reports also make clear that the standard of originality as it has been defined by the courts under the 1909 law is to be incorporated without change under the new law.²

Under Section 102, in order to come within the Act an "original work of authorship" must be "fixed" in a tangible medium of expression.

Section 101, which contains definitions of terms in the Act, says that a work is "fixed"

. . . when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

*Mr. Levine is a member of the bar of the District of Columbia and is the Executive Director of the National Commission on New Technological Uses of Copyrighted Works (CONTU).

¹ *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

² *Alfred Bell & Co. v. Cataldo Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

The intent in so defining "fixed" was to avoid the results in cases such as the old piano roll case, *White Smith Publishing Co. v. Apollo Co.*,³ where the Supreme Court found that a piano roll was not a "copy" of the musical composition which it played.

Fixation not only tells us whether the provisions of the new law apply to a work but, as Sidney Diamond will tell you in greater detail in his talk, fixation is also the dividing line between common law and statutory copyright protection. An unfixed work of authorship such as a performance or live broadcast would not be protected under statutory copyright although it may be entitled to protection under state law.

Even a live broadcast may come under the new law if at the time of the transmission a fixation of the transmission is being made. Thus a live broadcast of the Army-Navy football game, if it were being simultaneously videotaped, would be entitled to copyright protection.

A work would not be "fixed" and therefore would not be within the statute according to the House Report if its reproduction were evanescent or transient such as the image shown briefly on a cathode ray tube or captured only momentarily in the memory of a computer.

The 1976 law contains seven broad categories of works of authorship. All of the 14 separate categories in Section 5 of the 1909 Act are included in these seven categories.

"Literary works" is the first of the categories listed in Section 102(a). Literary works are defined in Section 101 as:

Works . . . expressed in words, numbers, or other verbal or numerical symbols or indicia regardless of the nature of the material, such as books, periodicals, manuscripts, phonorecords, filing tapes, discs or cards, in which they are embodied.

In 1964, the Copyright Office announced that it would accept computer programs for registration since the Register of Copyrights believed that copyrightable authorship might be involved in the creation of a computer program. The questions of the copyrightability of programs has not been tested in the courts. The ambiguous status of programs may be clarified somewhat by the House Report which says that "literary works" in Section 102 includes computer programs to the extent that the programs incorporate authorship in the programmer's expression of original ideas.

Section 102(b) states a well established principle of copyright law that ideas, methods, systems and the like are not protected by

³ 209 U.S. 1 (1908).

copyright but that only the expression thereof is entitled to protection.⁴

Section 102(a) (4), dealing with pantomimes and choreographic works, is the only recognizably new category of copyrightable subject matter. Under the 1909 law a pantomime or choreographic work was protected only if it could be considered a dramatic work, that is if it told a story. Under the new Act a choreographic work or pantomime will be protected without the necessity that it be dramatic in nature.

"Works of art," a separate class of copyrightable works under the 1909 Act, are now subsumed within the broader category of pictorial, graphic and sculptural works in Section 102.

The troublesome problem with works of art arises in the "applied arts" area. Under *Mazer v. Stein*,⁵ a work of art is entitled to copyright protection even if it is embodied in a useful article.

Included under the definition of "pictorial, graphic and sculptural work" in Section 101 are:

Works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that such design incorporates pictorial, graphic or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article.

Section 103 codifies existing law concerning copyright protection for compilations and derivative works. Both compilations and derivative works are defined in Section 101.

It should be noted that the 1976 Copyright Act does not materially change either the subject matter of copyright as specified under the 1909 law or the concept of originality as defined by the courts under that law. The major change in subject matter arises out of the preemption provision of Section 301, which subjects material to statutory copyright much sooner under the 1976 Act than the 1909 Act did.

⁴ *Baker v. Selden*, 101 U.S. 99 (1879).

⁵ 347 U.S. 201 (1954).

178. PREEMPTION OF STATE LAW

By SIDNEY A. DIAMOND*

Ever since the first Copyright Act of 1790,¹ the United States has operated under a dual system of copyright.² Federal law is designed to protect published works, while an enormous body of unpublished works is governed by state law.³ The 1909 Act expressly preserves the common law rights of authors in their unpublished works.⁴

This dual system has come under increasing criticism. It does not promote national uniformity in copyright as envisioned by Madison in *The Federalist*. It places too much emphasis on the concept of publication, the dividing line between common law and statutory protection, especially in light of the communications revolution of the twentieth century. The dual system allows perpetual protection for unpublished works under common law, which is at odds with the Constitutional plan of "limited times." And the dual system is completely out of step with the rest of the world.⁵

One of the major innovations of the Copyright Act of 1976 is the substitution of a single federal system of copyright for the archaic dual system.⁶ Federal copyright protection attaches to a work the

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¹ 1 Stat. 124 (1790).

² The early federal copyright statutes, unlike the current Act of 1909, provided a statutory remedy against the printing or publishing of any manuscript without the prior consent of the author or proprietor; but this provision was interpreted not to preempt the states from concurrently protecting the common law copyright in unpublished works. *See, e.g., Palmer v. DeWitt*, 47 N.Y. 532, 535-36 (1872).

³ § 12 of the Act of 1909, 17 U.S.C. § 12, however, establishes an optional procedure for statutory protection of certain types of works in unpublished form (lectures, dramas, musical compositions, motion pictures, photographs, works of art—not books, periodicals or maps).

§ 2, 17 U.S.C. § 2 reads as follows: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

⁵ S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) [hereinafter "Senate Report"] 113; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"] 129-30.

⁶ § 301; Senate Report 112; House Report 129.

moment it is fixed in tangible form.⁷

The Supremacy Clause of the Constitution⁸ would have preempted state copyright law when the single federal system went into effect. But simply allowing the Supremacy Clause to operate of its own force could have created endless controversies. Congress accordingly chose to legislate explicitly on the subject of preemption.

The key provision is § 301 of the Act of 1976.⁹ This is the place

⁷ § 302(a). § 101 includes the following definitions: "A work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work"; "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

⁸ U.S. Const. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

⁹ § 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings

where, among other things, the law of unfair competition meets the law of copyright.

Section 301 (a) provides that, beginning on January 1, 1978, the effective date of the Act, all legal or equitable rights equivalent to any of the exclusive rights within the general scope of copyright are governed entirely by the new Act. No person thereafter is entitled to any such right under the common law or statutes of any state.¹⁰

The rights § 301 deals with are those listed in § 106 of the Act: the rights of reproduction, adaptation, distribution, performance and display.¹¹ Section 301 is further limited, as the entire Copyright Act

commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

¹⁰ The Committee Reports state: "The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been." Senate Report 115, House Report 131. For example, sound recordings are specifically denied any right of performance under §114(a) (*but cf.*, §114(d), and under the interpretation stated in the Committee Reports no state could protect a copyrighted sound recording against unauthorized performance. *Cf.*, *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937). Yet the language of §301 seems poorly chosen for this purpose, since it constantly refers back to the exclusive rights appertaining to a copyright under §106 and not merely to the categories of copyrightable works under §§102 and 103; i.e., the preemption appears to be primarily in terms of rights (publication, performance, etc.) rather than in terms of types of works (literary, musical, etc.).

¹¹ §106. Exclusive rights in copyrighted works

Subject to sections 207 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (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;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (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.

must be under the Constitution.¹² to "works of authorship that are fixed in a tangible medium of expression." It also is limited to works that come within the subject matter of copyright as specified by §§ 102 and 103, i.e., the seven categories of works, such as literary, musical, and dramatic, listed in § 102,¹³ plus compilations and derivative works as described in § 103.¹⁴ The preemptive effect of § 301 applies whether the work was created before or after the effective date of January 1, 1978, and regardless of whether the work is published or unpublished.

Section 301(b) complements §301(a) by expressly preserving rights under state law in subject matter that is excluded from § 301(a). Thus, § 301(b)(1) leaves state law free to operate on subject matter outside the scope of copyrightable works specified by §§ 102 and 103, "including works of authorship not fixed in any tangible medium of expression." The Senate and House Committee Reports supply some examples: an extemporaneous speech, works communicated only through conversations or live broadcasts,¹⁵ improvised dramatic sketches or musical compositions that are neither recorded nor written down, and choreography that has not been either filmed or notated.¹⁶

Section 301(b)(2) exempts from preemption any cause of action arising from undertakings commenced before January 1, 1978.

Finally, § 301(b)(3) provides that there shall be no preemption with respect to rights that are not equivalent to the exclusive rights within the scope of copyright, referring again to the five rights listed in § 106. This crucial subparagraph will be discussed further after the analysis of the entire section has been completed.

Section 301(c) contains special provisions exempting from preemption state law rights in sound recordings fixed before February

¹² U.S. Const. art. I, §8, cl. 8 refers to the "Writings" of "Authors."

¹³ §102 reads as follows: "... Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; and (6) sound recordings."

¹⁴ §103 reads as follows: "(a) The subject matter of copyright... includes compilations and derivative works, ... (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, ..." The terms "compilation" and "derivative work" are defined in §101.

¹⁵ *But note* that §101 provides: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."

¹⁶ Senate Report 114; House Report 131.

15, 1972, until February 15, 2047, in order to prevent a large body of recordings from being thrown into the public domain.¹⁷ This subsection preserves rights in sound recordings under state law for a period of 75 years¹⁸ from the date when federal copyright protection first became available for that class of work.¹⁹

The last paragraph, § 301(d), provides that there shall be no preemption of "any other Federal statute." While this might seem obvious, it is a reminder that such statutes as the Patent Act and the Lanham Trademark Act are unaffected by the new Copyright Act.²⁰ In particular, § 43(a) of the Lanham Act²¹ may assume even greater importance as the source of federal unfair competition law.²² The proposed Federal Unfair Competition Act²³ also would be exempt from preemption under § 301(d).²⁴

The balance of this paper will be devoted to § 301(b)(3), potentially the most troublesome portion of the preemption provisions.

Section 301(b) states that:

"Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

* * * *

¹⁷ Senate Report 116; House Report 133.

¹⁸ 75 years is the time period specified in the Act for various other circumstances. *E.g.*, §§302(c), 304(a), 304(b).

¹⁹ Pub. L. 92-140, 85 Stat. 391 (1971).

²⁰ The Federal Communications Act, 47 U.S.C. §151 et seq., is another example. *Compare* Black Hills Video Corporation v. F. C. C., 399 F.2d 65 (8th Cir. 1968) (regulation of cable television) with Copyright Act of 1976, §111.

²¹ 15 U.S.C. §1125a.

²² *E.g.*, Joshua Meier Co. v. Albany Novelty Mfg. Co., 236 F.2d 144 (2d Cir. 1956); L'Aiglon Apparel Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954); Mortellito v. Nina of California, Inc., 335 F. Supp. 1288 (S.D.N.Y. 1972); Geisel v. Poynter Products, Inc., 283 F. Supp. 261 (S.D.N.Y. 1968). One of the most recent cases, Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976), uses §43(a) of the Lanham Act as the basis for enforcing the moral right doctrine (the right of an author or artist to protect his work against mutilation), which finds its roots in European copyright law. *Id.*, at 23-25.

²³ S. 1416 (95th Cong., 1st Sess.).

²⁴ "[P]reemption does not extend to . . . subject matter outside the scope of the revised Federal copyright statute." Senate Report 115; House Report 131. There would seem to be no limitation on what Congress might choose to enact under some other clause of the Constitution.

"(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106."²⁵

An earlier version of § 301(b)(3) concluded with the following list of examples:

"including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation."²⁶

Later, this clause was revised to insert as the first of the examples:

"misappropriation not equivalent to any of such exclusive rights . . ."²⁷

"Trespass" and "conversion" also were added to the list.²⁸

Both the Senate and House Committee Reports accompanying the full-length version of § 301(b)(3) state:

"The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute."²⁹

Both Committee Reports also explain that:

"'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto."³⁰

The Committee Reports then refer approvingly to the *International News Service* case³¹ and present some sophisticated examples of wrongs

²⁵ §106 enumerates the exclusive rights of reproduction, adaptation, public distribution, public performance and public display. See n. 11, *supra*.

²⁶ S. Rep. No. 93-983, 93d Cong., 2d Sess. (1974) 44.

²⁷ Senate Report 20.

²⁸ *Id.*

²⁹ Senate Report 115; House Report 132.

³⁰ Senate Report 116; House Report 132.

³¹ *International News Service v. Associated Press*, 248 U.S. 215 (1918).

against which state law could provide a remedy, including unauthorized appropriation of the facts constituting "hot" news, electronically breaching the security arrangements of a computerized data base, the interception of data transmitted by wire, microwave or laser, and unauthorized printouts of data displayed on the cathode ray tube of a computer terminal.³²

The Department of Justice wrote two letters in 1976 raising strong objections to the inclusion of "misappropriation" as one of the examples of rights not preempted.³³ The letters refer to the *INS. v. AP* decision³⁴ as "much-criticized" and "contrary to the great weight of authority." They rely heavily on the *Sears* and *Compco* cases³⁵ and also cite a number of Learned Hand decisions, including *Ricordi v. Haendler*,³⁶ in which he expounded his theory of constitutional preemption. The letters cite the First Circuit case that has become known as *DeCosta I*³⁷ for the proposition that *Sears* and *Compco* overruled *INS*.³⁸

The Department of Justice letters ignored the fact that many courts, both before and since *Sears* and *Compco*, have found the basic principle of *INS* persuasive.³⁹ They did not mention the statement of

³² Senate Report 116; House Report 132.

³³ Letter dated February 13, 1976 to Hon. Hugh Scott from Thomas E. Kauper, Assistant Attorney General, Antitrust Division. COPYRIGHT REVISION ACT OF 1976, 269-272 (Commerce Clearing House, Inc. 1976); letter dated July 27, 1976 to Hon. Robert Kastenmeier from Michael M. Uhlmann, Assistant Attorney General, Legislative Affairs, THE COPYRIGHT ACT OF 1976: DEALING WITH THE NEW REALITIES 177-192 (Law Journal Press 1976). The portions of both letters dealing with the topic of misappropriation are substantially identical; however, the final recommendations differ. See n. 49, *infra*. It is worth noting that, despite its opposition to the misappropriation doctrine, the Department of Justice was a strong supporter of an exemption from preemption for sound recordings fixed before February 15, 1972 (*e.g.*, Senate Report 116; House Report 133) so that they can continue to be protected by state law, although most of the decisions protecting such recordings are based on misappropriation.

³⁴ N. 31, *supra*.

³⁵ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964).

³⁶ *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952); *cf.*, L. Hand, dissenting, in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

³⁷ *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315, 318-9 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967).

³⁸ Although *INS* was not even cited in either *Sears* or *Compco*, which were cases involving product simulation rather than misappropriation.

³⁹ *E.g.*, *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974), *appeal dismissed and cert. denied*, 420 U.S. 914 (1975); *Tape Industries Association of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970), *appeal dismissed*, 401 U.S. 902 (1972);

U. S. District Judge McLaren, former head of the Antitrust Division, in the *Compumarketing* case that: "[T]he great majority of the courts which have considered the question have ruled that misappropriation is not within the scope of *Sears-Compco*. . . ."⁴⁰ The letters did not cite *Goldstein v. California*,⁴¹ the state record piracy case which the Supreme Court decided on the basis of Congressional preemption, thus repudiating Learned Hand's constitutional preemption theory;⁴² or *Kewanee Oil v. Bicon*,⁴³ in which the Supreme Court, following *Goldstein* and distinguishing *Sears-Compco*, held that state trade secret law was not preempted.⁴⁴ Also, the letters failed to point out that the First Circuit, in *DeCosta II*,⁴⁵ acknowledged it had gone too far in *DeCosta I* in allowing *Sears-Compco* to influence its interpretation.⁴⁶

Flexitized, Inc. v. National Flexitized Corp., 335 F.2d 774 (2d Cir. 1964), *cert. denied*, 380 U.S. 913 (1965); *Pottstown Publishing Co. v. Pottstown Broadcasting Co.*, 411 Pa. 383 (1963), 192 A.2d 657, *on motion to remand*, 247 F. Supp. 578 (E.D. Pa. 1965); *Metropolitan Opera Assn. v. Wagner-Nichols Recording Co.*, 199 Misc. 786, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dept. 1951); *Mutual Broadcasting System, Inc. v. Muzak Corp.*, 177 Misc. 489, 30 N.Y.S.2d 419 (N.Y. Sup. Ct. 1941); *Pittsburgh Athletic Club v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937).

⁴⁰ *Compumarketing Services Corp. v. Business Envelope Manufacturers, Inc.*, 342 F. Supp. 776, 777-8 (N.D. Ill. 1972).

⁴¹ *Goldstein v. California*, 412 U.S. 546 (1973).

⁴² "[U]nder the Constitution, the States have not relinquished all power to grant to authors 'the exclusive Right to their respective Writings.'" 412 U.S., at 560. See NIMMER ON COPYRIGHT §59, at 231 (1976 ed.).

⁴³ *Kewanee Oil Co. v. Bicon Corp.*, 416 U.S. 470 (1974).

⁴⁴ The trend to distinguish *Sears-Compco* has continued. *E.g.*, *Truck Equipment Service Company v. Fruehauf Corporation*, 536 F.2d 1210 (8th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976). *Cf.*, *Zacchini v. Scripps-Howard Broadcasting Company*, 45 U.S.L.W. 4954 (U.S. 1977), in which the Supreme Court held that the first Amendment does not prevent a state from affording relief for the broadcasting of an unauthorized film of the entire fifteen-second act of a "human cannonball" on the ground that it violated the performer's right of publicity (citing *Goldstein*, n. 41, *supra*, and *Kewanee*, n. 43, *supra*). In a different jurisdiction, the performer might have pleaded misappropriation.

⁴⁵ *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499, 510 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

⁴⁶ The Department of Justice letters also omit any reference to the criticisms of *DeCosta I* by well-known commentators, *e.g.*, Derenberg, *Consumerism and "Old-Fashioned Commercial Honesty"*, 15 IDEA 45, 56-7 (Special Conference Issue, 1972); 2. R. CALLMANN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §61.3, at 350-1 (3d ed. 1968). In addition to other errors, the letters state incorrectly that the INS doctrine has been codified in New York General Business Law §368-d; the cited section actually is New York's antidilution statute, a distinctly different subject.

The first Department of Justice letter resulted in a floor speech by Senator Scott in which he said that misappropriation is rejected in most states, and gave the rather ridiculous example of the author of an uncopyrighted book obtaining a perpetual injunction in a state court on a misappropriation theory.⁴⁷ The second Department of Justice letter was the basis for a floor statement by Congressman Seiberling, who said that the misappropriation doctrine was created by the Supreme Court in 1922 [sic] and "has generally been ignored by the Supreme Court itself and by the lower courts ever since." He argued that "a misappropriation law could be so broad as to render the preemption section meaningless";⁴⁸ and he offered an amendment to strike the entire list of examples, stating that this was "strongly supported by the Justice Department."⁴⁹

The amendment passed, after Congressman Railsback asked Congressman Seiberling to confirm that the purpose of his amendment was not to change existing law in states that recognize the misappropriation doctrine, and Congressman Seiberling replied: "That is correct. . . . I am trying to have this bill leave the State law alone and make it clear we are merely dealing with copyright laws. . . ."⁵⁰ The Conference Report simply states that the House amendment of § 301 was adopted.⁵¹

Where does this leave us? There are no illustrative examples in the Act as passed. Have misappropriation, breaches of contract, defamation, and the other causes of action that used to be listed been preempted, or not? The floor debate in the House seems to establish that the deletion had no substantive effect. The amendment which accomplished it came about through a series of misstatements and misunderstandings. I submit that the public would be better served if the last previous version of § 301(b)(3) could be restored to the statute, giving us the benefit of the list of examples and permitting us to use the extensive comments in the Senate and House Committee Reports as guides for interpretation.

⁴⁷ CONG. REC. (daily ed.) Feb. 19, 1976, pp. S 2042-44.

⁴⁸ CONG. REC. (daily ed.) Sept. 22, 1976, p. H 10910.

⁴⁹ The earlier Department of Justice letter recommended only that "the phrase 'rights against misappropriation not equivalent to any of such exclusive rights,' be omitted from proposed section 301(b)(3)." See n. 33, *supra*, at 272. The second letter, although directed (in this portion) primarily against misappropriation, concludes with the recommendation that the entire final clause beginning with the word "including" be stricken. See n. 33, *supra*, at 183.

⁵⁰ CONG. REC. (daily ed.) Sept. 22, 1976, p. H 10910.

⁵¹ H.R. Rep. 94-1733, 94th Cong., 2d Sess. (1976) 79

179. DURATION OF COPYRIGHT

By SEYMOUR BRICKER*

My subject matter is duration of copyright. An increase in the term of protection was a major—in fact, probably the primary—objective of the author groups in the revision effort. More surprising, an increased term was favored—for the most part—by the user groups as well. A user prefers to base his investment on exclusive rights in the basic material rather than risk the possibility of a competitor producing a work utilizing the same basic material. Therefore, from the inception of the revision effort, there was agreement on increasing the term of copyright.

I think the public interest has also been served by increasing the period of copyright. Our policy, as set forth in the constitutional clause and in court decisions, is to promote the progress of science and the useful arts by encouraging creation of works through personal gain to the creator. At a minimum, the term of protection should be long enough to permit the individual author and his immediate family to obtain the economic benefits of the creation. With substantial increases in life expectancy, the maximum term of 56 years provided by the 1909 Act did not insure a fair return to the author and his family. It became quite common for an author to see some of his earlier works fall into the public domain during his lifetime, and, in a great many cases, works fell into the public domain within short periods following the author's death.

The public rarely benefits from having a work fall into the public domain. The box office price to a motion picture or stage play is not reduced by reason of the fact that the basic material is unprotected. Similarly, the same price is paid for a phonograph record whether or not the song embodied therein is in the public domain.

With agreement on the principle of increasing the term of protection, there were, of course, a number of possibilities available. The renewal system could have been retained and the original term or the renewal term or both could simply have been increased. Although the renewal system has been part of the American copyright law from the first Copyright Act passed by Congress, this approach was never seriously considered. The renewal system is full of technicalities which have resulted in many works falling into the public domain inadver-

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tently. Moreover, after the decision in *Fisher v. Witmark*,¹ the system never served the primary purpose for which it was designed—namely, to give the author a second chance to value his work.

Other possibilities were to adopt a single term of copyright measured from publication or registration—75 years was the most frequently mentioned period—or to adopt a system which protects the work from creation until the expiration of a specified number of years after the death of the author. There are a number of reasons why life plus 50 years was adopted.

One of the other major objectives of the revision effort was to lay to rest the dual system of protection under which federal law protects published or registered works and state law protects the vast bulk of unpublished works. A term of copyright protection which commences with creation of the work is a comfortable correlative of the adoption of a single system of copyright protection.

Secondly, the life plus concept causes the entire body of an author's work to fall into the public domain at the same time. This is a benefit to users who desire to make use of the bulk of an author's works and, from the viewpoint of the copyright proprietor, avoids the possibility of having protected works compete against works that have fallen into the public domain.

Finally, the adoption of life plus 50 years gives us a term which has been adopted by most other countries of the world.

You should note that life plus 50 years is a shorter term than 75 years from publication with respect to all works created during the last 25 years of the author's life.

Having given you some of the background to the subject, let me now be more specific with respect to the provisions of the new Act. First let me deal with works which are created on or after January 1, 1978, which is the effective date of the new Act.

The general principle is that the work is protected from creation and that copyright endures for a term consisting of the life of the author plus 50 years. The work is created when it is fixed in tangible form—either in a copy or in a phonorecord—for the first time. If a work is created over a period of time, then the version of the work fixed at any given time constitutes the protected work as of that date.

In the case of joint works, the Act provides that the copyright continues until 50 years after the death of the last surviving author. This is the most common rule adopted by other nations. It is a substantial advantage to the beneficiary of the author or authors who died first. I contemplate that many children and grandchildren will

¹ 318 U.S. 643 (1943).

become very creative after January 1, 1978.

It is obvious that the date of the author's death is critical in determining the duration of the copyright period. Where well-known authors are concerned, the date of death is no problem. However, there will be cases where the date of death is difficult to determine. The Act sets up certain rules and presumptions to ease the problem.

First, the Act provides that all copyrights continue to the end of the calendar year. For example, if the author dies on July 1, 1980, the copyright will subsist until December 31, 2030. Only the year of death is material.

Secondly, any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of an author or a statement that an author is still living on a particular date. In addition, the Register of Copyrights is obligated to maintain current records of information relating to the date of death of authors based on the recorded statements and, to the extent that the Register considers practicable, on data contained in other records of the Copyright Office or other reference sources.

Finally, after a period of 75 years from first publication of the work or a period of 100 years from the date of creation of the work, whichever is first, any person who obtains from the Copyright Office a certified report that the records of the Office disclose nothing to indicate that the author of the work is living or has been dead less than 50 years is entitled to the benefit of a presumption that the work is in the public domain. Reliance in good faith upon the presumption is a complete defense to any action or infringement.

I have been discussing the general rule of duration of copyright with respect to works created after January 1 of next year. The general rule cannot be used in connection with anonymous works, pseudonymous works and works made for hire. With respect to such works, the copyright endures for a term of 75 years from first publication or 100 years from creation, whichever first occurs. If before the end of such term, the identity of one or more authors of an anonymous or pseudonymous work is revealed in a registration under the Act, the general rule of duration becomes applicable based on the date of death of the revealed author.

All that I have said before relates to works created on or after January 1, 1978. With respect to works created before January 1 and not in the public domain, the following rules apply.

If the work was not copyrighted under the federal act, the new rules are applicable. However, since the author of an unpublished work may already be deceased, in no case does the term of such a work expire before the end of 2002, and, if work is published on or

before the end of 2002, the term cannot expire before the end of 2027.

With respect to works which are in their original or renewal term as of the end of 1977, the new Act continues the provisions of the 1909 Act except that the renewal term has been extended from 28 years to 47 years. If I can make one point during this short talk, I hope this is it. If a work is in its original term of copyright as of the end of 1977, it is still necessary to apply for the renewal copyright. If the renewal copyright is not obtained, then the work will fall into the public domain at the end of the first term of 28 years. For works in the renewal period as of the end of this year, the extension from 28 years to 47 years is automatic and no affirmative action is required.

I have also been asked to say a few words about the provisions in the new Act dealing with termination of grants. The applicable sections of the Act—203 and 304(c)—are extremely complex and, although similar, are not identical. Therefore, all I can hope to do is make you aware that the provisions exist.

Although the author and user groups were in agreement with respect to the term of copyright, there was sharp disagreement with respect to the period for which an author could grant rights. The author groups wanted, in effect, a foolproof renewal system and took the position that any grant of rights would automatically terminate after a specified number of years. The user groups took the position that parties should have complete freedom to contract and that an author should be permitted to grant the entire term of copyright. If these extreme positions had not been compromised, I doubt that we would have a new Copyright Act.

Basically, each side achieved its bottom line position. For the author groups a system has been developed which permits an author or his beneficiary to terminate grants under any and all circumstances. No longer will we have the strange situation in which an author's family can obtain economic benefits by reason of the death of the author. For the user groups, the right of termination, although absolute, requires an affirmative act on the part of the author or his successors under quite complex provisions. In many cases there is little doubt that the termination right will not be exercised. In addition, the user groups achieved a minimum period—35 years—for each grant. Under the renewal system, a user could lose his rights after the expiration of the first term of copyright, which meant a period of 28 years and in many cases a much shorter term.

Briefly, the applicable provisions are as follows:

Section 203 contains the general provisions of the Act with respect to the termination right. Under that Section, any exclusive or

nonexclusive grant of rights by an author made after January 1, 1973 may be terminated effective at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant. If, however, the grant covers publication rights, then the five-year period begins at the end of 35 years from the date of publication of the work or at the end of 40 years from the date of execution of the grant, whichever term ends earlier. Please note that the foregoing relates to grants executed after the beginning of next year. With respect to grants executed this year or earlier by the author or by any beneficiary of the renewal copyright under the 1909 Act, Section 304(c) applies and permits the recapture of the additional 19 years which Congress has added to the renewal term.

Under both Sections a derivative work created prior to the recapture of rights may continue to be exploited. This was, of course, a key victory for the user groups, and the provision played, I believe, a major part in the recent decision in the *Rohauer*² case which held that a derivative work created during the original term of copyright could continue to be exploited during the renewal term notwithstanding the fact that the copyright in the basic material had been renewed by a party who had not granted rights for the renewal period to the owner of the derivative work.

One other victory obtained by the user groups is that neither of the Sections is applicable to a work made for hire.

There is obviously insufficient time to discuss the numerous problems relating to who can exercise the right of termination, when the right must be expressed, the division of ownership of the recaptured rights, the procedure for effecting termination and similar matters.

I feel I will have accomplished my purpose if you take from this talk the following summary on the subject of termination.

With respect to works which are in copyright as of the end of this year, the Act sets forth a procedure by which the last 19 years of the new renewal term of 47 years can be recaptured by an author or his statutory beneficiaries. With respect to works created after the first of the year, the Act sets forth a procedure by which a grant by the author can be terminated 35 years after the date of execution of the grant.

² *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 97 S. Ct. 2666 (1977).

180. NOTICE, DEPOSIT AND REGISTRATION

By ROBERT D. HADL*

Chapter 4 of the recently enacted revision legislation contains detailed provisions governing notice of copyright, deposit of copies and registration—often referred to as the formalities of copyright. The provisions of this Chapter of the 1976 Act are generally intended to liberalize the rigid formalities which condition the acquisition of copyright under current law. It remains to be seen, however, whether the so-called “liberalization” will greatly reduce the chances for error which have previously resulted in unintended forfeitures of copyright or whether the new provisions, in fact, are equally, if not more, burdensome, than those presently in effect.

1. *Notice*

The 1976 Act retains the general requirement that notice be placed on all publicly distributed copies of a work and incorporates the basic elements of a proper notice: the word or abbreviation for copyright, or its symbolic variation, the name of the copyright owner, and the year date of first publication. At the same time, the new Act contains a much greater flexibility than the present law by authorizing recognizable substitutes for the copyright owner's name for all works and by providing that the notice may be affixed in any location giving “reasonable notice of the claim of copyright.”

Further, the new Act attempts to reduce the chances for error and provides reasonable opportunities to correct mistakes and omissions. For example, omission of notice from “no more than a relatively small number of copies or phonorecords distributed to the public” is excused—subject to certain protection for innocent infringers—and so are cases where the notice is omitted in violation of a written requirement or is removed without authority. Moreover, even where the notice is left off the entire work the copyright is not invalidated if registration is made within five years of publication and “a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

This last condition raises interesting questions under the Berne Convention which prohibits member countries from providing formalities as a condition of copyright protection. In effect, it means that

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a foreign edition published without any notice may obtain U.S. copyright protection provided only that registration is made within five years of publication. It should be noted that the "reasonable effort" clause does not apply to copies distributed without notice outside the United States.

Whether the foregoing provisions are truly "liberalizing" is subject to some dispute. For example, under present law, the omission of notice from no more than a relatively small number of cases is presently excused. Further, by requiring that a copyright owner expressly require in writing that any licensee specifically include a notice on all copies publicly distributed, the new Act appears to go beyond present law under which the necessity of including a notice on all licensed copies is implied from the license agreement. And, while the five-year registration provision does go beyond present law in saving works published without notice, it raises substantial questions as to what constitutes a "reasonable effort" to add the notice to all copies distributed after the omission has been discovered.

Innocent infringers are specifically protected by the new Act. One honestly misled by the absence of notice from "an authorized copy or phonorecord" is not liable for actual or statutory damages for any infringement that occurred before receiving actual notice that the work has been registered. However, profits earned from the innocent infringement may be paid to the copyright owner at the discretion of the court, and the court may enjoin the continuation of the infringing activity or require as a condition thereof that the innocent infringer pay a "reasonable license fee."

Finally, copyright is never invalidated by an error in the name of the copyright proprietor in the notice or by reason of an earlier year date than the actual year of first publication. Post-dated notices of more than one year are treated as if the work were published without any notice at all and may be cured by the five year registration provisions of Section 405.

2. *Deposit*

Under the 1909 Act, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. When copies are submitted for registration, they were automatically available for selection by the Library.

Under the new Act, the basic approach is to regard deposit and registration as separate, though closely related, matters.

The basic requirement of the deposit provision is that within

three months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is given broad authority to exempt any categories of material from the deposit requirement or to require deposit of only one copy or phonorecord. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply is punishable by a fine. The new law makes clear, however, that "deposit" is not a condition of copyright protection and that a fine rather than any loss of copyright is the sanction for failure to comply with the deposit requirements.

3. *Registration*

Registration, like deposit, is not a condition of copyright protection. Nevertheless, the new Act offers certain inducements for registration. The most important of these are that registration is a prerequisite to an infringement suit and that if registration is not made within three months from first publication, no award of statutory damages or of attorney's fees may be made for any infringement occurring before the effective date of a subsequent registration.

The general thrust of the registration provision is to permit registration of a claim to copyright in any work, whether published or unpublished, at any time during the copyright term by "the owner of copyright or of any exclusive right in the work." Thus, for the first time, the new Act permits the registration of certain classes of unpublished works (e.g., books). Any claim for registration, however, must be accompanied by a deposit of copies or other material as required by the Register, together with an application and fee. In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work and two complete copies of the best edition in the case of published works.

The new Act recognizes the relationship between the separate deposit and registration provisions by providing that a single deposit will satisfy both the deposit and registration provisions if the deposit is accompanied by the necessary materials for registration. Thus, after the new Act goes into effect, it is imperative to submit an application and fee with any materials sent to the Copyright Office. Otherwise, the deposit will be used for the Library and not for registration and additional copies will have to be sent to accompany any subsequent application for registration of the work.

181. HIGHLIGHTS OF OWNERSHIP AND TRANSFER PROVISIONS OF THE NEW COPYRIGHT LAW

By RAYMOND D. WEISBOND*

In the brief amount of time I have, I will try to convey an overall impression of the highlights of the ownership and transfer provisions of the new law. Inasmuch as I will not be mentioning most of the exceptions and qualifications, I must point out that I will necessarily be oversimplifying many of the points.

A. WHEN AND HOW DOES COPYRIGHT OWNERSHIP COME INTO BEING?

Under the concepts of the new law—particularly the concept of a single system of copyright—copyright ownership arises immediately and automatically when a work is “created.” That is to say, copyright protection is said by the statute to “subsist” in original works “fixed” in any tangible medium of expression.¹

In other words, there is nothing to do in order to secure a copyright except to create the work.

Even though it is possible, under the dictionary sense of creation, to imagine a work being created before it is written down or recorded in some way, the new statutory definitions provide that a work is “created” when it is “fixed” in a copy or phonorecord for the first time; and a work is considered “fixed” in a tangible medium of expression when it is embodied in a copy or phonorecord by or under the authority of the author.²

So the creation and the first embodiment of a work in a concrete mode of expression are merely different facets of the same event, and they occur at one and the same time.

The single system, under which a work is protected by federal statutory copyright from its creation until it falls into the public domain, differs from the old system. Under the old system, a work of the type that would be considered copyrightable under federal law, is initially protected by a common law copyright under state law, and

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¹ Sec. 102(a). *Cf.*, Sec. 302(a). Except where otherwise indicated, all citations to section numbers are to the 1976 amendment to Title 17 of the United States Code, Pub. L. 94-553, 90 Stat. 2541.

² Sec. 101.

this protection continues until a work is "published." What is considered "publication" has been the subject of much discussion, controversy, and case law over the years, but, in an oversimplified way, it can be regarded as the distribution, or offer to distribute, copies of the work to the general public. When "publication" occurs, common law protection ends. At that point, the work is protected by federal statutory copyright, provided that the published copies bear a proper copyright notice, or else, if the notice requirements are not met, the work falls into the public domain and protection is lost forever.

B. WHO IS THE OWNER?

1. *In general:* Generally speaking, the initial owner is the "author,"³ using that word in the broad Constitutional⁴ and statutory sense, which is not confined to writers of literary works. In most instances, the author is the individual writer, composer, artist or other creator of the work. You will note that this is consistent with—if not inescapable from—the concept of creation that I mentioned before. To put it briefly, when the author creates the work, copyright subsists, and he is the owner. He may of course transfer all or any part of the copyright, and I shall mention more about this later. But first, I would like to mention some exceptions or qualifications to the general notion of who the owner is.

2. *Joint Work:* If the work is a joint work, the authors are the co-owners.⁵ A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary work.⁶ A Gilbert and Sullivan operetta is a joint work. The Bernstein-Woodward book on Watergate is a joint work. There may be a gray area question in connection with a Broadway musical, as to whether the writer of the book, that is, the spoken words, is a joint author together with the writer or writers of the music and lyrics; the answer to this may depend on whether the requisite intention was present on the part of the bookwriter as a factual matter, or whether the book can be separated out from the overall musical. Other interesting questions may come up when the separate contributions are created at different times, but it is safe to say that it is certainly possible, as an example, to complete the writing of

³ Sec. 201(a).

⁴ U.S. Const. art. I, § 8.

⁵ Sec. 201(a).

⁶ Sec. 101.

lyrics for a song, with the intention of subsequently finding someone to write the music.

3. *Work made for hire*: Another special ownership situation is the work made for hire. If a work is made for hire, the employer or person for whom it was prepared is the "author," and hence the initial owner, unless the parties expressly agree otherwise in writing.⁷

A work made by an employee in the scope of his employment is a work made for hire.⁸

However, if there is no employment relationship but the work is ordered or commissioned, the statute provides that only nine specific kinds of works can be considered works made for hire, and then only if there is an express written instrument for the work to be considered as such. The nine categories are: a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas.⁹

I think it is unfortunate that this list is limited to these 9 categories, since it precludes work-made-for-hire treatment in certain classic situations, such as where a painter is commissioned to do a portrait or a sculptor is commissioned to do a sculptural work. While it is true that the painting or sculptural work would qualify as a work made for hire if the painter or sculptor were engaged as an employee, he may not be willing to work as an employee, and in addition an employment relationship might introduce other problems or impediments.

At first glance, it may seem that a perfect solution would be merely to get an assignment of the copyright from the artist. However, this would not free the new owner from the possibility that the artist might later exercise his statutory right to terminate the transfer. This statutory right,¹⁰ which is non-assignable under the statute, would not have applied if the work had been made for hire. (The subject of the statutory termination of transfers is covered in more detail elsewhere in the symposium.)

4. *Contributions to collective works*: When separate and independent works are assembled together, such as in a periodical, anthology, or encyclopedia, the work is called a "collective work."¹¹ Each of the

⁷ Sec. 201(b).

⁸ Sec. 101.

⁹ Sec. 101.

¹⁰ Sections 203(a) and 304(c).

¹¹ Sec. 101.

separate contributions, being a separate work, has its own copyright, which is distinguished from the copyright in the overall collective work (unless of course the owner of a contribution transfers his copyright to the owner of the copyright in the overall collective work).¹²

5. *Nationality and domicile*: The author owns his copyright regardless of his nationality or domicile, so long as the work is unpublished. When the work is published, the work may be disqualified from copyright protection if the author is a foreign national or domiciliary, although it is far more likely that the work will continue to be protected as a result of the broad range of protection provided by treaties, the Universal Copyright Convention, and certain Presidential proclamations.¹³

C. DIVISIBILITY AND TRANSFERABILITY:

1. *In General*: Leaving the subject of who the copyright owner is we will now turn to the topics of divisibility and transferability. One of the fundamental policies of the copyright law is to permit the broad transferability of copyrights and rights under copyrights, but in the past this policy has often been difficult to square with the historical concept that a copyright was regarded as indivisible.

In order to understand the problem presented by indivisibility, one must be aware that the original copyright proprietor owns a so-called "bundle of rights." Depending on the nature of the work, the bundle may include exclusive rights to reproduce, copy, record, prepare derivative works from, arrange, adapt, distribute, sell, publish, perform and display the work. No matter how many separate agreements the copyright owner may have under which third parties are authorized to exercise various of these rights for various terms and in various geographical areas, the third parties were regarded as licensees, rather than owners, even if their rights were exclusive and for the entire term of copyright.

There could be only one copyright, no matter how many licenses were granted under it, and for everyone concerned it was impractical for the various licensees, with their dissimilar spheres of activity, to be vested with undivided interests in the indivisible copyright. One of the most important consequences of this was that a licensee could not sue third parties to protect his rights unless he could get the copyright

¹² Sec. 201(c).

¹³ Sec. 104.

owner to sue as well, or unless he had obtained the right to bring suit in the name of the copyright owner.

Under the new law, ownership may be transferred in whole or in part,¹⁴ a "transfer of copyright ownership" being defined to include any assignment or exclusive license, although not a mere non-exclusive license.¹⁵ Any of the exclusive rights or any subdivision thereof can be owned separately, and the owner of any right, so long as he has an exclusive right and is not just a non-exclusive licensee, has all of the protection and remedies accorded to the copyright owner,¹⁶ including the right to sue for infringement.¹⁷ He is in fact, according to the statutory definition, himself a "copyright owner."¹⁸

Thus, a producer who obtains the exclusive rights to make a motion picture based on a novel will be the "copyright owner" of those rights under the new law, in addition to which he may obtain his own separate copyright in the motion picture itself, which is considered a new "derivative work" based on the pre-existing novel.¹⁹

You may note that since both the original copyright owner and every exclusive licensee are defined as "copyright owners," a certain amount of confusion begins to creep in. This reflects the fact that the new statute fails to provide separate definitions to distinguish between, on the one hand, the first owner, with his full bundle of rights, or anyone he may have assigned the full bundle to, and, on the other hand, any of these exclusive licensees. I think this will cause problems in a number of areas, one of which is, whose name ought to go into the copyright notice?

2. *Intangible rights distinguished from material objects:* In connection with the subject of transfers I should like to mention, at least in passing, the relationship between the intangible rights and the rights in the material objects in which the works are fixed, because the transfer of a copy or phonorecord as a material object does not transfer any of the intangible rights under the copyright of the work,²⁰ and a person who owns a copy or phonorecord does not have to get the copyright owner's permission to sell or otherwise transfer the copy or phonorecord.²¹ My later remarks about transfers are addressed to the

¹⁴ Sec. 201(d)(1).

¹⁵ Sec. 101.

¹⁶ Sec. 201(d)(2).

¹⁷ Sec. 501(b).

¹⁸ Sec. 101.

¹⁹ Sections 101 and 103.

²⁰ Sec. 202.

²¹ Sec. 109(a)

intangible rights, that is, the copyright itself and the rights under the copyright.

3. *Transfer of copyright must be written:* Although it only takes a moment to mention it, a most important point to keep in mind is that a transfer of copyright is not valid unless it is in writing.²²

4. *Recordation of transfers:* It is not a violation of law to refrain from recording the written agreement in the Copyright Office, but it is advisable to record. If the agreement is recorded, the recording gives constructive notice of the contents of the agreement to the rest of the world, although this is true only if the copyright in the work has been registered in the Copyright Office.²³ Recordation is also a prerequisite to bringing an infringement action. It is not necessary that the recording precede the infringement, but only that it precede the bringing of the suit.²⁴

If there are two conflicting transfers, the earlier one prevails, provided that it is recorded within one month after it is executed in the United States or two months after it is executed outside of the United States, or before the later transfer is recorded.²⁵ Please note that this provision fails to provide the reliability that should be afforded by a recording statute. If you accept an assignment of copyright and immediately record it, you will still not know for one or two more months whether someone else may come along and record an earlier assignment of the same copyright; if he does, he will have priority over you, even though you recorded first.

Generally speaking, a written nonexclusive license that was granted before a transfer of copyright, or before the recording of the transfer, is protected, whether or not the nonexclusive license is recorded.²⁶

5. *Termination of transfers and licenses granted by the author:* I do not want to close my speech without recommending that you make a note to cross-reference my remarks about ownership and transfer of copyright with the subject of the right of an author to terminate transfers and licenses, which is dealt with elsewhere in the symposium.²⁷

²² Sec. 204(a).

²³ Sec. 205(c).

²⁴ Sec. 205(d).

²⁵ Sec. 205(e).

²⁶ Sec. 205(f).

²⁷ Sections 203(a) and 304(c).

182. SOUND RECORDINGS

By DAVID GOLDBERG*

1. Introduction and Background

While musical works have long been the subject matter of copyright and have long been recognized as works of authorship, federal copyright protection for sound recordings is of recent origin and limited scope. It began tentatively with the sound recording amendment of 1971, which for the first time granted federal statutory copyright protection to sound recordings, but only against piracy by unauthorized duplication (not against unauthorized public performance), and only for recordings fixed and published between February 15, 1972 (the effective date of the amendment) and January 1, 1975 (the expiration date of the amendment).¹ This limited Copyright protection for recent sound recordings became an effective weapon against record and tape pirates, and on the last day of 1974, the 1975 cut-off date was eliminated. In addition to making copyright in sound recordings a permanent part of the law, Congress strengthened the criminal penalties for commercial piracy.²

The Copyright Act of 1976, which goes into effect January 1, 1978 with minor exceptions, continues this limited federal protection of post-February 15, 1972 sound recordings.³ In doing so, the Act clarifies some previously unsettled questions and to some extent strengthens the remedies against pirates, although it also carves out some new limitations on the exclusive rights of the sound recording copyright owner.

Special terminology, some of it new, is used in the Copyright Act. A "sound recording" is a series of musical, spoken, or other sounds (such as performances of music, drama or narration) fixed in a material object which is known as a "phonorecord" (such as a disc or tape). Sounds accompanying images, such as in motion pictures, are not "sound recordings"; instead they are "audiovisual works" which are

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¹ Pub.L. No. 92-140, 85 Stat. 391 (Oct. 15, 1971). The constitutionality of this amendment was upheld in *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).

² Pub. L. No. 93-573, 88 Stat. 1873 (Dec. 31, 1974).

³ 17 U.S.C. § 102(a)(7). Pub.L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976) (hereinafter called "Act").

treated quite differently. A recording is "fixed" when the audio tracks are first recorded, and the final version is "fixed" when the audio tracks are first recorded, and the final version is "fixed" when the complete series of sounds is embodied in a final master recording. The recording is "published" by distribution to the public of phonorecords embodying it by sale or other transfer of ownership, or by rental, lease or lending. It can also be "published" by offering to distribute phonorecords to a group of persons for further distribution, public performance or public display.

A sound recording is a "derivative work" which is independent of and should be distinguished from the underlying musical composition or other work performed in the recording.⁴ The copyright in a sound recording also should be distinguished from the copyright in the text and artwork of the packaging in which phonorecords are sold. Thus, a long-playing record album may involve three separate copyrightable elements: the underlying musical compositions, the album cover artwork and liner notes, and the sound recording itself.⁵

II. *Scope of Exclusive Rights.*

The bundle of rights granted is set forth broadly in Section 106 of the Act, subject to later limitation in Section 114.

A. *Rights Granted.* A sound recording copyright owner has the exclusive right to *reproduce* it in the form of phonorecords, motion pictures or other audio-visual works, to *prepare derivative works* in which the actual sounds are rearranged, remixed or otherwise altered in sequence or quality, and to *distribute it* to the public, or to authorize others to do any or all of these things⁶

B. *Rights Excluded.* The exclusive rights in a sound recording copyright do not include the following:

(1) *Performance Rights.* Although the owner of the copyright in a song, play or lecture has the exclusive right to perform that work publicly with some specified exceptions, the owner of the copyright in a sound re-

⁴ See Act. § 101. Pirated sound recordings are not "derivative works" and cannot be copyrighted. See Act. § 103(a).

⁵ See, Act. § 103(b).

⁶ Act. §§ 106, 114(b).

cording has no performance right.⁷ This means that a sound recording copyright cannot be used to obtain royalties for the playing of phonorecords by radio stations, discotheques, juke box operators and the like. Such entities generally pay royalties to performance rights societies like ASCAP, BMI and SESAC for distribution to music publishers and songwriters but not to phonorecord distributors, recording producers, vocalists or musicians;

(2) *Independent Fixations*. The making or duplication of cover records, or what are commonly called "sound-alikes," which are completely independent fixations, is specifically permitted even though they imitate or simulate the copyrighted sound recording.⁸ The imitative recording must consist "entirely of an independent fixation of other sounds" in order to escape a finding of infringement;⁹

(3) *Public Broadcasters*. The Act permits reproduction, preparation of derivative works from, and non-commercial distribution over public broadcasting facilities of, educational radio or television programs embodying copyrighted sound recordings;¹⁰

(4) *Libraries and Archives*. Reproduction and distribution without commercial advantage of a single phonorecord on isolated occasions, by a library or archives open to the public or to unaffiliated researchers, is permitted if the reproduction bears a copyright notice and is for purposes of archival or research use (if unpublished), for replacement (if published but unavailable), or for private study (if a small part of an available recording or a substantial part of an unavailable recording);¹¹

⁷ Act. §§ 114(a), (c). The Register of Copyrights is to submit recommendations to Congress on this subject on January 3, 1978. Act, § 114(d). The Copyright Office published a Notice of Inquiry in the Federal Register, pp. 21527-8 (April 27, 1977). Hearings also have been held by the Office. See also H.R. 6063, introduced April 5, 1977 by Rep. George E. Danielson (D. Calif.).

⁸ Act. § 114(b).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Act, § 108. The Register of Copyrights is to submit a report to Congress on this subject on January 1, 1983, and at five-year intervals thereafter. Act, § 108 (i).

(5) *Transfer of Particular Phonorecords*. Sale or other disposition can be freely made by the owner of a particular phonorecord which was lawfully made, although he would still be subject to an action for conversion if he did not lawfully obtain the phonorecord;¹²

(6) *Ephemeral Recordings*. Reproductions of a transmission program containing a sound recording can be made for archival purposes or by a transmitting organization for its own limited use. Various governmental and non-profit organizations may make reproductions for limited purposes;¹³

(7) *Fair Use*. Reproduction for purposes such as criticism, comment, news reporting, teaching, scholarship or research is permissible under appropriate circumstances.¹⁴

III. *The Compulsory License*

In the vast majority of cases, one seeking to record a musical composition obtains a license from the copyright proprietor of the musical composition. The statute, however, provides for a compulsory license for recordings. Although rarely utilized in practice, the compulsory license procedure serves as a basis for negotiated licenses and provides a safety valve for record producers.

A. *Availability and Scope*. Under the 1909 copyright law, once the copyright owner of a nondramatic musical composition has "used or permitted or knowingly acquiesced in the use of the copyrighted work" for a recording by anyone, a compulsory license on statutory terms is available to everyone to make mechanical reproductions of similar recordings of that composition.¹⁵ This has been continued in the 1976 Act with some clarifications and modifications. The compulsory license is now available when a recording has been "distributed to the public in the United States under the authority of the copyright owner."¹⁶

¹² Act, §§ 109, 202. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 133 (1976).

¹³ Act, § 112.

¹⁴ Act, § 107.

¹⁵ Copyright Act of 1909, § 1(e).

¹⁶ Act, § 115(a)(1).

Under the prior law, the composition copyright owner had to engage in the cumbersome procedure of filing a notice of use regarding the first recording.¹⁷ His failure to do so barred recovery for any act of infringement which occurred prior to filing the notice.¹⁸ This will no longer be necessary since distribution to the public in the United States of the first authorized recording automatically will make the compulsory license available. In addition, it will be sufficient that the copyright owner be identified in the records of the Copyright Office, which will occur upon registration of the composition copyright.¹⁹

The 1976 Act also clarifies that the compulsory license is available only for the primary purpose of making phonorecords for distribution to the public for private use; therefore, it is not available to broadcasters, jukebox operators or background music services. The Act further expressly adopts the judge-made rule that the compulsory license is not available to record and tape pirates who make unauthorized duplications of another's sound recording. In addition, it is now expressly provided that an arrangement of the composition can be made if it does not change the basic melody or fundamental character of the work.²⁰

B. *Procedures for Obtaining License.* To obtain a compulsory license, the phonorecord producer must serve a notice of intention to do so on the composition copyright owner, if his name and address are in the public records of the Copyright Office, or else on the Copyright Office itself, and must pay a fee of \$6. This notice must be served before or within 30 days after making and before distributing any phonorecords of the composition, and the failure to do so forecloses the possibility of a compulsory license.²¹

¹⁷ Copyright Act of 1909, § 1(e).

¹⁸ *Norbay Music, Inc. v. King Records, Inc.*, 290 F.2d 617 (2d Cir. 1961).

¹⁹ Act, § 115(c)(1).

²⁰ Act, § 115(a); see H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 107-108 (1976).

²¹ Act, §§ 115(b), 708. Compulsory licensees under the prior law need not obtain a new compulsory license, but the new Act's provisions apply to phonorecords made on or after January 1, 1976. Act, Trans. & Supp. Provisions § 106. The Copyright Office held hearings April 26 and 27, 1977 pursuant to Advance Notice of Proposed Rulemaking published in the Federal Register, p. 16837 (March 30, 1977).

C. *Royalty Rate and Accounting Requirements.* The composition's copyright proprietor is entitled to a statutory "mechanical" royalty of 2-3/4 cents for the first 5 minutes of playing time and 1/2 cent per minute or fraction thereafter for every phonorecord "made and distributed" (voluntarily and permanently) after he becomes identified in the public records of the Copyright Office (as compared with the old rate of 2¢ for all records manufactured whether or not distributed). The royalty is not payable on phonorecords which are returned, unless they are subsequently redistributed. Royalties are payable on promotional records, bonus records or free goods.

Royalty payments must be made 20 days after the end of each month under oath, and cumulative annual CPA certified statements must be made. Defaults can be remedied within 30 days after the owner gives the licensee notice.²² The mechanical royalty rate will be reviewed in 1980, 1987 and each subsequent 10 years by a five member Copyright Royalty Tribunal appointed by the President and confirmed by the Senate.²³

²² Act. § 115(c). Failure to remedy a default causes all phonorecords for which a royalty has not been paid to become infringements, subject to all normal remedies. *Id.*

²³ Act. § 804(a).

183. PERFORMING RIGHTS IN MUSICAL COMPOSITIONS

By BERNARD KORMAN*

I. INTRODUCTION: THE PERFORMING RIGHT

Section 1(e) of the 1909 Act grants to owners of copyrights in non-dramatic musical compositions the right "to perform the copyrighted work publicly for profit." The 1976 Act (§106(4)) grants the right "to perform the copyrighted work publicly".

The definitions of the terms "perform" and "publicly" under the new law are very broad (§101):

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible. To perform or display a work "publicly" means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

II. LIMITATIONS ON THE PERFORMING RIGHT (§110)

1. *Non-profit performances* (§110(1)-(4)).

Significantly, the law no longer contains a limitation that public performances be "for profit". In place of this general restriction, we find four specific limitations on the copyright owner's exclusive right of performance in non-profit situations:

Section 110(1) exempts performance by instructors or pupils, in the course of face-to-face teaching activities of a non-profit educa-

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tional institution, in a classroom or similar place devoted to instruction.

Section 110(2) exempts performance in the course of educational broadcasts, if the performance is a regular part of systematic instructional activities of a governmental body or non-profit educational institution, is directly related and of material assistance to the teaching content of the broadcast, and the broadcast is made primarily for reception in classrooms or similar places or by the handicapped or by governmental employees.

Section 110(3) exempts performance of non-dramatic literary or musical works of any kind, or dramatico-musical works "of a religious nature," in the course of services at a place of worship or other religious assembly. Dramatico-musical works "of a religious nature" include sacred music such as oratorios, cantatas and musical settings of the mass, but do not include secular operas, musical plays and motion pictures even if they have an underlying religious or philosophical theme.

Section 110(4) is a catch-all provision relating to all other non-profit and non-commercial performances. It exempts such performances if all of the following conditions are met:

- (1) The performance must be without any purpose of direct or indirect commercial advantage;

- (2) The performance must be without payment of any fee or other compensation for the performance to any performers, promoters, or organizers; and

- (3) There must be no direct or indirect admission charge; or, if there is such a charge, the proceeds (after deduction of reasonable production costs) must be used exclusively for educational, religious or charitable purposes and not for private financial gain. In the latter case, the copyright owner has a right to veto the performance in advance upon compliance with certain notice requirements

2. *Performances at public establishments by means of radio broadcasts (§110(5))*

In 1975, in *Twentieth Century Music Corp. v. Aiken*,¹ the Supreme Court held that a restaurant owner who used a radio receiver and a system of loudspeakers in his establishment was not "performing" under the 1909 Act, and so did not infringe the copyrights of the mu-

¹ 422 U.S. 151.

sical compositions contained in those broadcasts. This decision was contrary to a 1931 Supreme Court decision, *Buck v. Jewell-LaSalle Realty Co.*,² which had held that one who did such acts was "performing".

Section 110(5) of the new law overturns the basis for the Supreme Court's decision in *Aiken* and restores the principle of the *Jewell-LaSalle* case. It does grant an exemption for very limited uses of radio and television broadcasts.

The rendition of broadcasts in a public establishment is a "performance" and is subject to licensing by the copyright proprietor, unless: (1) the establishment is using a single receiving apparatus of a kind commonly used in private homes; (2) no direct charge is made to see or hear the transmission; and 3) the transmission is not further transmitted to the public by means of an extensive loudspeaker system.

The legislative history indicates the Congressional intent that, while a small establishment of the *Aiken* type which "merely augmented a home-type receiver" would be exempt, establishments using radio over loudspeakers which were large enough to justify subscription to a commercial background music service—that is, all potential subscribers to such a service—would be fully liable.

3. *Miscellaneous limitations on musical performing rights (§110(6) and (7))*

Section 110(6) exempts performance at state fairs sponsored by governmental bodies or non-profit agricultural or horticultural organizations. The concessionaries at such fairs remain liable for copyright infringement.

Section 110(7) exempts performance of nondramatic musical works by retail establishments such as record stores where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and where the performances are rendered only within the immediate area where sales are made.

(Sections 110(8) and (9) contain exemptions for the use of copyrighted literary works for the handicapped, which I shall not discuss here.)

III. JUKE BOXES (§ 116)

The 1909 Act contained an anomalous provision in §1(e) which,

² 283 U.S. 191.

in effect, exempted most performances by means of coin-operated machines - juke boxes. Congress included this exemption because the coin-operated machine of the day was installed in a "penny parlor" and regarded as a novelty. The performance might be heard by a single listener, through earphones.

The modern juke box developed in the 1920s and 1930s was very different from the "coin operated device" Congress had in mind in 1909. A huge and highly profitable industry arose which, because of the exemption, never paid one cent for the musical performances for which the public paid. After decades of attempts to repeal this inequitable provision, the new law finally provides liability for juke box performances. However, the juke box operators obtained a compulsory license at a fee of only \$8 per year per juke box for all non-dramatic copyrighted music. This is far below the amounts paid in other, less wealthy, countries. It is subject to periodic review and adjustment by the Copyright Royalty Tribunal. The royalties collected will be divided among performing rights organizations, such as ASCAP, BMI and SESAC. The compulsory license does *not* apply if there is a charge for admission to the establishment.

IV. PUBLIC BROADCASTING. (§118)

Public broadcasting has never entered into license agreements with copyright proprietors for the non-dramatic performance of copyrighted musical compositions. Public broadcasters have claimed that they are not performing "for profit" under the 1909 Act, a claim copyright proprietors strongly contest. The public broadcasters sought an exemption but were unsuccessful. There is no question that public broadcasting is liable under the new law. But the public broadcasters were able to obtain a compulsory license for the use of published non-dramatic musical works and pictorial, graphic and sculptural works.

Section 118 encourages public broadcasters and copyright owners to reach license agreements voluntarily. In the absence of such an agreement, the law provides a compulsory license fee, to be determined by the Copyright Royalty Tribunal. Copyright owners and public broadcasters are granted an antitrust exemption if they wish to negotiate jointly, but joint negotiations are not mandated. This section went into effect upon enactment of the new law—rather than the general effective date, January 1, 1978—to enable a compulsory license fee to be set as quickly as possible and before January 1, 1978, if no voluntary agreement is reached.

184. INFRINGEMENT AND REMEDIES UNDER THE COPYRIGHT ACT OF 1976

By ROBERT YALE LIBOTT*

The Copyright Act of 1976 is in many respects brand new. The law of copyright is old indeed. In fact, we are told that the first infringement in the British Isles occurred when St. Columba sat up at night copying out the breviary of his tutor, Abbot Finan of Moreville. The good abbot protested. The case was heard at the Court of the High King at Tara. The High King determined that the calf should stay with the kine. The offending saint, complete with infringing copies, made off for England to which he brought Christianity and, it would seem, copyright law. Infringement suits have been with us ever since.

Registration as Prelude to Remedies for Infringement (Sections 411 & 412)

Far from diminishing under the new law, the number of copyright infringement actions will at least insofar as the federal courts are concerned, increase substantially since the state law protection of unpublished works has been eliminated. For this reason, the formalities of copyright take on an increasing importance. In particular, the provisions of Section 411 and 412 should be noted.¹ Each of these sections makes registration a prerequisite to litigation. In making registration a condition precedent to any suit for infringement,² the new law, in fact, echos the 1909 Act.³

In addition, failure to register precludes the award of statutory damages or attorney's fees, as elsewhere provided, unless the infringement occurred after registration or, with regard to a published work, even before registration if registration was made within three months of the first publication of the work.⁴ This latter provision is new, and would seem to work some hardship on the copyright proprietors of

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¹ Copyright Act of 1976, Pub. L. 94-553, 94th Congress (hereinafter, "Copyright Act"), §§ 411, 412.

² Copyright Act, § 411 (a).

³ 17 USC § 13 (hereinafter "1909 Act"). See also *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958).

⁴ Copyright Act, § 412

works published under the old law which have not yet been registered. Such proprietors would be well advised to promptly register all works in order to protect their special rights in an infringement action against infringers who may come along during the life of that copyright obtained prior to 1978.

Provision is made in Section 411(a) for the bringing of a suit by one who has sought copyright registration but who has been refused registration by the Register of Copyrights. The provision is contrary to prior case law and practice⁵ and offers added protection with respect to those items for which the right to copyright is questionable or contested. A comment might further be made that the denial of the special remedies to unpublished registered works in Section 412 results in no less a remedy than was formerly available under state law in so-called "common law copyright" cases.

Infringers, Plaintiffs and Parties (Section 501)

The main provisions concerning copyright infringement and remedies are provided in Chapter 5 of the Copyright Act of 1976. Section 501 sets forth a definition of infringement: an infringer is anyone who violates the exclusive rights of the copyright owners provided for in Sections 106 through 118 or who imports copies or phonorecords in violation of certain importation provisions.⁶ This constitutes something of a change since the definitions of copyright infringement were previously judge-made, though substantively similar. (Making wrongful importation an infringement is, however, new.)

A far greater change has come about with respect to the parties to copyright litigation. Previously the only proper party plaintiff was the copyright proprietor, that is, the author or his assignee for the whole undivided copyright.⁷ The owner of a separate right, such as motion picture rights, television rights, music rights, publishing rights in a given area, etc., often had no right to sue in his own name if the right was limited, and could never sue without joining the copyright owner as plaintiff.⁸ This has all been changed, and provision is made for the exclusive owner of any divisible portion of the copyright, whether divided by field of use or by area, to bring suit in his own

⁵ See, *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co.*, *supra*; n. 3.

⁶ Copyright Act, §§ 602, 603.

⁷ See, *Widenski v. Shapiro, Bernstein & Company, Inc.*, 147 F.2d 909 (1st Cir. 1945).

⁸ See, *Field v. True Comics Inc.*, 81 F. Supp. 611 (S.D.N.Y. 1950).

name.⁹ Provision is made for the notification of other interested parties by the court. Furthermore, the court may require the service of the complaint upon any person who appears to have an interest in the copyright and *shall* require such notice to be served on any person whose interest is likely to be affected by the decisions in the case.¹⁰ Finally, provisions are made in sub-sections (c) and (d) regarding television stations or "primary transmitters," in relation to infringement by cable television. These should be attended to closely by those lawyers having clients in the cable television field.

Injunctions, Impounding and Pounding to Death (Sections 502 and 503)

Under the new law, the power of the court to grant both temporary and permanent injunctions against infringement subject to general federal law is continued under the new law.¹¹ Provisions of the prior law permitting the injunction to be served anywhere in the U.S. and to have national force and scope are also continued in section 502 of the new copyright act.¹²

Similarly, the provisions for impounding during litigation of allegedly infringing works at the court's discretion, on such terms as the court deems reasonable, are covered by section 503 and include provision for impounding of matrices, masters, film negatives etc.¹³ The new statute also maintains the power of the court to destroy utterly by grinding into dust infringing copies and material from which such copies can be made as part of a final decree.¹⁴ (An alternative disposition, in lieu of destruction can also be ordered.) This remedy is quite commonly sought in cases of film and record piracy, but is frequently ignored in other fields. The ability to have a work impounded during litigation is a strong weapon in the hands of the plaintiff and, it may be suggested, one which should be more frequently requested by plaintiff's counsel.

The Money Sign—Damages and Profits (Sections 504 and 505)

The *principle* concerning damages and profits awardable to the

⁹ Copyright Act, § 501 9 (b).

¹⁰ Copyright Act, § 501 (b).

¹¹ Copyright Act, § 502 (a).

¹² Copyright Act, § 502 (b); 1909 Act, § 112.

¹³ 1909 Act, § 101 (c); *see also*, *Dutchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972).

¹⁴ 1909 Act, § 101 (d).

victim of an infringer of a copyright remains essentially the same under the new law as under the old.¹⁵ The *practice* varies substantially. In both cases the plaintiff is entitled to recover all of his actual damages as well as the profits gained by the infringer.¹⁶ Damages are subject to proof, but with respect to profits, plaintiff need merely prove the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.¹⁷

In place of the old copyright concept of "in lieu" damages,¹⁸ the new law provides for statutory damages. These are no longer attributed on a per infringing copy basis but have a maximum and a minimum. Also, it is no longer in the discretion of the court whether or not to award such damages in the event that infringement is proved. It is entirely optional with the plaintiff. At any time prior to judgment the plaintiff may elect to be awarded statutory damages instead of actual damages or profits.¹⁹ In that event, the court must award such damages, assuming liability, for any one work for which any one infringer is liable or for which two or more infringers are liable jointly and severally of not less than \$250.00 and not more than \$10,000. (For purposes of this section, all of a compilation or derivative work are considered to be one work).²⁰ This sum can be substantially increased if the copyright owner has sustained the burden that the infringement was committed willfully. The damages can then be as great as \$50,000 for any one work for which any one infringer or joint or severally liable infringers are responsible.²¹ However, if the infringer sustains the burden of proving that he was not aware and had no reason to believe his acts constituted an infringement of copyright, the statutory damages can be reduced to \$100.²² And where the infringer reasonably believes his or her use was a fair use, even if it wasn't, and the infringer was an agent of a non-profit educational institution library or archive or public broadcasting entity, the entire statutory damage award is mandated to be remitted by the court.²³

¹⁵ 1909 Act, § 101 (b).

¹⁶ *Id.*, see also, *Peter Pan Fabrics Inc. v. Jobela Fabrics Inc.*, 329 F.2d 194 (S.D.N.Y. 1964).

¹⁷ Copyright Act § 504 (b); 1909 Act, § 101 (b).

¹⁸ 1909 Act, § 101 (b).

¹⁹ Copyright Act, § 504 (c) (1).

²⁰ *Id.*

²¹ Copyright Act, § 504 (c) (2).

²² *Id.*

²³ *Id.*

In addition to the other money remedies available, the court may, in its discretion, award costs against any party other than the U.S. or its officers and may award the prevailing party attorneys' fees.²⁴

Crime and Time (Sections 506-510)

Criminal penalties are provided, as before, for copyright infringements by those who plagiarize willfully for purposes of commercial advantage or private financial gain,²⁵ and greater penalties are provided for those who pirate motion pictures or phonograph records.²⁶ Forfeiture and destruction is provided²⁷ along with fines and imprisonment. Fines are provided for lesser crooks who commit such terrifying acts as providing fraudulent copyright notice or fraudulently removing copyright notice or lying to Ms. Ringer and her staff.²⁸

A limitation on actions of three years from the time the criminal cause of action arose or the civil action accrued²⁹ continues as in the prior statute.³⁰ There are further provisions for notification of the progress of the action to the office of the Register of Copyrights by the court;³¹ for seizure and forfeiture of copies or phonorecords produced in violation of the criminal statutes,³² and for alteration of programming by cable systems,³³ which are punished by a silencing worthy only of West Point and worthy of note only by those lawyers concerned with the field.

The 007 Syndrome—Smuggling and Importation (Sections 602, 603)

The law makes provision against the importation of copies and phonorecords imported without authority into the United States, deeming that to be an infringement of the exclusive right to distribute copies and phonorecords under section 106 and making it actionable under section 501.³⁴ Exceptions are made for imports under the authority of the government or of any state or local government, not in-

²⁴ Copyright Act, § 505.

²⁵ Copyright Act, § 506 (a).

²⁶ *Id.*

²⁷ Copyright Act, § 506 (b).

²⁸ Copyright Act, § 506 (c) through (e).

²⁹ Copyright Act, § 507 (a).

³⁰ 1909 Act, § 115 (a).

³¹ Copyright Act, § 507 (b); 1909 Act, § 115 (b).

³² Copyright Act, § 508.

³³ Copyright Act, § 509.

³⁴ Copyright Act, § 510.

cluding copies or phonorecords for use in schools. A further exception is made for single copies brought in for private use as well as for all copies of works and phonorecords forming part of the personal baggage of a private individual. In addition, importation by a scholarly, educational or a religious organization not for private gain, of one copy for archival purpose and no more than five copies or phonorecords for library lending or archival purposes is also exempted.³⁵ The Secretary of the Treasury is authorized to prescribe by regulations the procedures by which interested persons can obtain notification of such importations as are forbidden by the law,³⁶ and regulations for enforcement may be made by both the Treasury and the Postal Service. Also, of course, articles seized in violation of these regulations may be pounded to bits or subject to some other form of destruction.³⁷ Alternatively, the items may be required to be sent back to the country from which they were imported.³⁸

A Final Note

Nothing in the new law will change the essential thrust of copyright litigation. Plaintiff's right to sue and the copying of the infringed work must still be proved. Questions of access to the work and taking, proved by substantial similarities, will still be among the chief issues involved. Similarities to other works in the public domain as well as such specific defenses as fair use and such equitable defenses as estoppel and unclean hands will continue to stud copyright litigation like the fruit in Post's Raisin Bran. The originality of the plaintiff's work will continue to be a major factor in each defense. Questions of the plaintiff's compliance with statutory formalities and of his chain of title will continue to be probative although the increased registration procedures for parties having rights to less than the total copyright will probably make such proof far easier. And finally, without doubt, Professor Mel Nimmer will continue to be quoted by both sides in their briefs at length and with varying success.

³⁵ Copyright Act, § 602; 1909 Act. §§ 106, 107.

³⁶ Copyright Act, § 602 (a).

³⁷ Copyright Act, § 602 (b).

³⁸ Copyright Act, § 603.

185. LIBRARY PHOTOCOPYING UNDER THE 1976 COPYRIGHT LAW

By CHARLES H. LIEB*

My assignment is to discuss the troublesome problem of library photocopying—troublesome because in given instances it is difficult to draw the line between copying permitted either as fair use under Section 107 or as an additional library copying privilege under Section 108 of the new copyright law, and copying not permitted by either of those sections and which will therefore constitute infringement unless authorized by the copyright owner.

I will not discuss in detail the equitable doctrine of fair use, as codified in Section 107 of the new Act, or the additional limited library copying rights specifically afforded by Section 108 of the Act. To do these subjects justice would require far more time than is now available.

I do want to highlight the following points however.

1. There is neither a "not-for-profit" nor an "educational" exemption as such. Nevertheless, the character of the copying activity is a factor to be weighed, under both Section 107 and Section 108. For example, the purpose and character of the copying, including whether it is "of a commercial nature or is for non-profit educational purposes" is one of the factors which under Section 107 is required to be considered in determining whether the copying is a fair use. (Other factors include the nature of the copyrighted work, the amount copied in relation to the copyrighted work as a whole, and of course the effect of the copying upon the potential market for the copyrighted work).

Copying "without any purpose of direct or indirect commercial advantage" is a condition specifically required by Section 108 if a library is to take advantage of the copying privileges afforded by that section. That requirement would seem to bar industry-related libraries from Section 108 protection and force them to seek permission for all their copying other than that which is clearly fair use. That is how the Senate viewed it, in any event.

The 1975 Senate Report says that Section 108 is intended to preclude a library in a profit-making organization from making photocopies for employees unless the copying "qualifies as a fair use", or the organization obtains the necessary copyright licenses. "A commer-

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cial organization", it says, "should purchase the number of copies *** that it requires or obtain the consent of the copyright owner to the making of the photocopies".

The 1976 House Report, on the other hand, says that "isolated, spontaneous making of single photocopies" by such a library "without any systematic effort to substitute photocopying for subscriptions or purchases" would be permitted by Section 108. The 1976 Report of the House and Senate conferees says that as long as the library "meets the criteria in Section 108(a)" (one of which is the no "commercial advantage" condition quoted above) and meets the other requirements of the Section including the prohibition against multiple and systematic copying, isolated and spontaneous copying would be allowed by Section 108.

But the Senate Report is as authoritative as the House Report, and Thomas C. Brennan, who was chief counsel to the Senate subcommittee which wrote Section 108 in its present form, says that the Senate conferees were able to accept the language in the Conference Report "since it may well be construed merely as an application of the fair use criteria (of Section 107) to the making of single photocopies by libraries in commercial enterprises." And, he adds, "the legislative history suggests that the criteria for this exemption (to libraries within profit-making institutions) should be strictly interpreted".¹

To say the least therefore, the situation with respect to industry-related libraries is unclear.

2. Section 108 gives copying rights to libraries qualifying under that section over and beyond those they have under the fair use doctrine. The Section states that nothing stated therein in any way affects the right of fair use as provided by Section 107, and the House Report, in elaboration, says that "To the contrary, Section 108 authorizes certain photocopying practices which may not qualify as a fair use." A suggestion recently made at a library association meeting that a library may exhaust its copying privileges under section 108 and then turn to Section 107 for additional copying rights is erroneous and unfounded.

3. The three examples of "systematic copying" prohibited by Section 108(g), as stated on page 70 of the 1975 Senate Report, are not in any way modified or limited by the 1976 House Report or the Conference Report. On the contrary, as stated by Senator McClellan, they are "the most authoritative expression of the intent of the section." (The correspondence with Senator McClellan in which he makes this statement appears at the end of this paper).

¹ *Some Observations on the Revision of the Copyright Law from the Legislative Point of View*, 24 BULL. COPR. SOC'Y 151, 158, Item 173 (1977).

The three examples to which the correspondence refers are as follows:

"(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches."

These are examples only, and are not intended to be exclusive. Clearly, however, copying similar to that given in the examples will be "systematic" and hence prohibited.

4. It has been suggested that librarians should continue their present library copying practices, and that notwithstanding that some of their copying may be held to constitute copyright infringement, they will be relieved of statutory damages under the "innocent infringer" provisions of Section 504(c)(2). This is true, but only partially true. First, the remission of statutory damages is available only to a librarian who has reasonable grounds for believing that his copying is fair use under Section 107. His good faith but erroneous belief that his copying is permitted under Section 108 will not protect him. Second, the "innocent infringer" rule does not provide relief from costs or attorneys' fees, which under Section 505 may be awarded by the court in its discretion. And, finally, the 504(c)(2) provisions afford at best a one-time relief. Like the dog who is entitled to one bite, the presumption of innocence disappears after the first determination of infringement, and after that a claimed belief that copying in like circumstances is fair use will provide no protection.

5. Neither a statute nor its legislative history can specify precisely

which library copying requires permission and which may be done without permission or payment. Congress has therefore recommended that the interested parties formulate appropriate photocopying guidelines. Some guidelines have in fact been agreed upon, and hopefully more will come. Those agreed upon are for classroom copying, for classroom use of music, and for limits on photocopying for interlibrary arrangements under Section 108(g)(2) of the Act.

The last mentioned, the so-called CONTU (National Commission on New Technological Uses of Copyrighted Works) guidelines refer only to the transactions most frequently encountered in interlibrary arrangements;—a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from issues of periodicals published within five years of the date of the request. They do not refer to on-the-premises copying, nor to copying from periodical issues published prior to that five year period, and they disclaim any purpose to approve unauthorized copying such as that done by the British Lending Library Division at Boston Spa in England, or by any similar operation which may be initiated by the Library of Congress or by any other organization in this country.

6. Congress has also recommended that clearance and licensing mechanisms be established for photocopying not permitted by Sections 107 and 108. The Copyright Clearance Center, Inc. has been organized under the New York State Not-for-Profit Corporation Law for that purpose; it hopes to be in operation by January 1, 1978, and I will be glad to tell those of you who are interested more about that after this session is over.

In closing, let me summarize the photocopying situation as I see it, with respect to journal articles.

1. Virtually all of the photocopying done by industry-related libraries will require clearance, most of it through the Copyright Clearance Center, some of it by individual licensing arrangements.

2. Some part of the photocopying done by non-profit libraries for supply to other non-profit libraries through interlibrary arrangements will be permissible under the CONTU guidelines; some part will require clearance, and some small part will fall into a gray area, as for example, the supply of copies of an article published more than five years before the request. It remains to be seen how much will fall into each category.

3. All of the copying done by institutions established to serve as a central source of photocopies through interlibrary arrangements will require clearance.

4. The degree to which "on-the-premises" library copying, i.e., copying done by the library for its own patrons, will require clearance

is still an open question. Some have suggested that the so-called CONTU interlibrary "rule of 5" be adopted, namely, that a library in any calendar year may make not more than 5 copies of an article or articles published in any particular periodical within five years prior to the date of the patron's request, but there has been no agreement as yet on this. CONTU has offered to help the parties prepare guidelines to cover this and other questions open under Section 108, and hopefully this will be accomplished before the end of the year.

5. A non-profit library is not liable for copies made by its patrons on reproducing equipment located in its premises, provided that the equipment displays a notice in the form required by the Register of Copyrights that cautions the user against infringement. On the other hand, as the House Report states, this exemption is not available to an industry-related library, nor of course to the industry itself.

We entered a new era on January 1 of 1978. Imperfect and uncertain in some respects as Sections 107 and 108 are, all of us, lawyers and those for whom we speak, must cooperate to make the law work. Otherwise, the social compact fails and we return to years of antagonism and chaos.

December 22, 1976

The Honorable John L. McClellan
Chairman
Subcommittee on Patents, Trademarks
and Copyright
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator McClellan:

We have noted recent suggestions by the American Library Association and others that the legislative history of the Copyright Revision Act of 1976, Pub. L. 94-553, is to be found in the House Report 94-1476 and the Conference Report 94-1733.

It has been our understanding that, except where the House or Conference statutory language replaced the provisions of S.22 as passed by the Senate, the Senate Report, No. 94-473, is to be read together with the House and Conference Reports and that each supplements the others. If our understanding is correct, there will be many instances where a proper understanding of the interrelationship of the three Reports will be of importance. One of them, of course, is with respect to the explanation of "Multiple copies and systematic re-

production" appearing on pages 70-71 of the Senate Report.

We would very much appreciate it if you would give us your views on this matter.

Yours respectfully,

Townsend Hoopes, President
Association of American Publishers, Inc.

January 12, 1977

Mr. Townsend Hoopes, President
Association of American Publishers, Inc.
1707 L Street, N. W. Suite 480
Washington, D. C. 20036

Dear Mr. Hoopes:

I have your letter of December 22nd concerning the legislative history of Public Law 94-553, which originated as my bill, S. 22. You state that certain suggestions have been made that the legislative history of the bill consists only of the House Committee Report and the Conference Report. I am not acquainted with the statements to which you make reference, but if they have been made they are clearly erroneous.

The legislative history consists of the Committee Reports, of both the Senate and the House, the Conference Report and the Floor debates. Unless the Conference Report modified language in the Senate Bill or Report, the most authoritative expression of the intent of S. 22 would be the Report of the Senate Committee on the Judiciary. There are several sections of S. 22 where major changes were made by the House of Representatives and accepted in the Conference Committee. This, however, is not the situation with respect to the library photocopying provisions. Section 103 was principally developed in the Senate, and all the language of the Senate Bill was retained by the House of Representatives. The amendment made by the House to Section 108 (g)(2) and accepted by the Senate managers of the bill incorporates in the statute the legislative intent of the Senate Report relating to "systematic reproduction or distribution."

I have examined the Report of the House Committee on S. 22 and there is nothing contained in that document which in any way purports to modify the intent of the Senate language. Furthermore, it is significant that the Conference Report does not contain any lan-

guage modifying the language of the Senate Report on "systematic reproduction", although on other subjects the Conference Report does directly modify language in either the Senate or House Reports.

I trust this information is responsive to your inquiry, and with kind personal regards, I am

Sincerely,

John L. McClellan

Chairman

United States Senate Committee on the Judiciary, Subcommittee on
Patents, Trademarks, and Copyrights

186. COPYRIGHT AND NEW TECHNOLOGY

By E. GABRIEL PERLE*

The title, "Copyright and New Technology," is actually a misdescription of this portion of the program because what I will try to do is bring you up to date on the National Commission on New Technological Uses of Copyrighted Works—CONTU.

CONTU really started from a classic cop-out on the part of Congress . . . In the words of the House Committee Report (94th Congress, 2d Session Report No. 94-1476, p.116)

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information." The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

What Congress really meant, however, was not that "problems are not sufficiently developed for a definitive legislative solution . . ." but rather that the Congress had not studied the problem sufficiently to attempt to try a legislative solution.

So Congress adopted and President Ford signed into law, at the end of 1974, Public Law 93-537. That law, in setting up CONTU, assigned to the Commission the basic task of studying and compiling data on:

- (1) The reproduction and use of copyrighted works of authorship—

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- (A) in conjunction with automatic systems capable of storing, processing, retrieving and transferring information, and
- (B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and

(2) the creation of new works by the application or intervention of such automatic systems or machine reproduction

Congress also instructed CONTU to "... make recommendations as to such changes in copyright law and procedures that may be necessary to assure ... access to copyright works, and to provide recognition to all rights of owners."

After an inordinate delay in the appointment of Commissioners, CONTU got under way in the fall of 1975 with 13 commissioners and a superb staff under Arthur Levine as Executive Director. CONTU has held numerous hearings which have opened to the Commission the science-fiction world of technology in the communication of ideas, literary property between people. In addition, CONTU has commissioned studies on related subjects and has had liaison with other commissions and organizations in related fields. For patent lawyers there should be particular interest in CONTU because CONTU recommendations, if acted upon, will resolve the question of how software and computer programs are to be protected in the future.

Throughout the course of CONTU's activities, the theme has been the way of achieving a balance between the benefits to society from access to copyrighted work on the one hand and the rights of authors and proprietors on the other.

At present, even while hearings and studies continue, CONTU has divided itself into four subcommittees as follows:

- 1) Data bases
- 2) Software
- 3) Machine reproduction or photocopying
- 4) Creation of new works by the application and intervention of computers

The process of developing and issuing of subcommittee reports is under way. Reports of the Data Base and Software Subcommittees were widely circulated in June of this year for public review and comment.

The reports of both Subcommittees suggest the deletion of the

"cop-out" section 117 of the new copyright act, and both reports suggest that, with some statutory revisions or additions, basic copyright concepts would effectively protect the interests of both the public and copyright owners.

The Data Base Subcommittee Report deals with long-standing concerns about the copyright consequences of computer input or output. It recommends that "[t]he introduction of a work into a computer memory would, consistent with the new law, be a reproduction of the work which is one of the exclusive rights of the copyright proprietor." Thus it would appear that copyright liability would attach at the time when a work is copied onto a magnetic medium such as tapes or disks directly fed into the memory of a computer. The Subcommittee likewise is of the opinion that the output in any medium of a work protected by copyright and stored in a computer system would constitute an infringement unless authorized or sanctioned by fair use principles.

In regard to data bases as such, two main concerns arise from the potential for change inherent in a computer-based information store. First, many data bases are dynamic, constantly changing. So the first problem is how to effect the fixation of the data base, how to evidence the content of the data base at any given time, and how to deposit a data base in the copyright office for registration purposes. The second question is, what rights should the data base proprietor have in extracts of information prepared by others in the course of authorized searches of the data base?

With respect to deposit requirements, for a constantly changing base it is suggested that the Register of Copyrights promulgate regulations to permit the deposit of identifying materials in lieu of the entire data base. As to rights in extracts, it is submitted by the subcommittee that conventional copyright principles, supplemented by principles of unfair competition, should be applicable to the unauthorized taking of a proprietor's data base or segments thereof.

The Software Subcommittee Report recommends that a new Section 117 be adopted to more definitely set forth proprietors' rights in computer programs and to provide a definition of a computer program. These recommendations are based on the Subcommittee's conclusion that computer programs are instructions fixed in a tangible form of expression squarely within the scope of traditional American copyright. Computer programs, in this view, are not instructions which direct the operation of a machine but are rather writings which set forth instructions. The proposed definition of a computer program would read, "A computer program is a fixation of a series of statements or instructions to be used in conjunction with a computer

in order to bring about a certain result." It is an explanation or expression of a process and not the process itself.

Based upon this conclusion, it is suggested that copyright should provide for computer programs, as it does for all works of authorship, an appropriate balance between society's desire for access and the proprietor's desire for protection. This balancing is reflected in the inherent limitation of copyright protection to the expression of an idea and not the idea itself. Both the legislative history of the new Act and the case law relevant to the 1909 Act make clear that copyright cannot be used to block access to an idea although it will provide substantial protection against the misappropriation of an author's work by copying. In view of this, the Subcommittee has suggested that the law provide that a rightful possessor of a copy of a computer program be permitted to copy the program for purposes of use and for archival purposes. It would thus be made clear that only limited copying is permitted an authorized possessor and that any copying by a wrongful possessor would constitute an infringement of the rights conferred by §106 of the new copyright law.

The Software Committee report also deals with preemption. It recognizes the significance of Section 301 in that section's preemption of trade secret protection to the extent that trade secrecy is not "different in kind from copyright infringement." Thus trade secrecy protection could not be obtained if the purpose were to prevent copying of a published program.

The remaining computer-related area, the application or intervention of the computer in the creation of new works of authorship is currently being studied by the Commission. We are all familiar with examples of computer produced graphics or computer generated music but there are many other works produced by the interaction of man and machine, for example: the citations and search results produced by the use of a computerized legal research system such as LEXIS or WESTLAW; management, financial or accounting printouts used in nearly all businesses; the form letter produced by text editing and word processing systems in your offices and many others, some mundane, some esoteric.

The creation of such works may involve the use of programs and data bases, each of which may be protected by copyright. The key question for CONTU and the Subcommittees is what quantum of human creativity is required to entitle such works to copyright and what should be its source. Is the author of such works the programmer, the compiler of the data base, or the computer operator? Or, do all of these persons have some right in the output? The answer is not readily apparent and is the subject of continuing investigation.

The final principal area of Commission activity is that of photocopying. CONTU has already been significantly involved in this area through the development of guidelines which Mr. Lieb has already mentioned.

In order to fulfill its responsibilities regarding the long term implications of photocopying, the Commission has sponsored a series of studies to (1) gather information on the nature and extent of library photocopying, (2) learn the current practices and attitudes of scientific and technical journal publishers about supplying or authorizing the photocopying of articles in their publications and (3) construct an economic model to compare costs of subscribing to periodicals with the costs of obtaining copies through interlibrary loan. The results of these studies, which will be made available to the public through the National Technical Information Service, will provide valuable data for further Commission study of how the copyright law should deal with photocopying.

The Commission has also undertaken a major project to assure that the viewpoints of consumer and public interest organizations are effectively presented. The Public Interest Economics Center (PIE-C) prepared a report on the impact of computer and photocopying copyright issues from the point of view of the ultimate consumer and the general public which was discussed by representatives of concerned consumers and the general public interest organizations at two meetings convened by the Public Interest Satellite Association (PISA). Representatives of PIE-C and PISA appeared at the July 1977 meeting of the Commission to present the results of these studies. The transcripts of this meeting as well as all other CONTU meetings are available from the National Technical Information Service.

CONTU's efforts will culminate in the delivery of its final report to the President and the Congress either on December 31, 1977 or on July 31, 1978, depending on whether or not a pending bill to extend the life of CONTU for a period equal to the delay in the appointment of its commissioners is enacted. Then it will be up to the Congress to work the ultimate solutions, and solutions which are properly in the province of the legislature, not the courts. It is submitted that the interests of the public, the interests of users, and the interests of authors and proprietors in this area must not be determined in the courts, which must be involved in the context of the facts in a given case. Rather, these issues must be resolved by the legislature in the context of a broad base of knowledge and a philosophy of how men will or should create and communicate expressions of ideas in the future.

PART II

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENT

1. United States of America and Territories

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

An act to extend by seven months the term of the National Commission on New Technological Uses of Copyrighted Works. Approved Oct. 28, 1977. 1 p. (P.L. 95-146, 91 Stat. 1226).

The life of the commission has been extended until July 31, 1978.

188. U.S. COPYRIGHT OFFICE.

Annual report of the Register of Copyrights, 1976. Washington, D.C., Library of Congress, 1977. 30 p.

This report has been reprinted from the Annual Report of the Librarian of Congress and covers the fiscal year ending June 30, 1976 and the transitional quarter July 1-September 30, 1976. It summarizes the work of the Copyright Office, and the National Commission New Technological Uses of Copyrighted Works, judicial and international developments. Statistical charts giving information on the number and types of registrations, etc. are also included.

189. U.S. COPYRIGHT OFFICE.

Applications for registration of claim to copyright under revised copyright act. Inquiry. [Docket No. RM 77-9]. *Federal Register*, vol. 42, no. 186 (Sept. 26, 1977), pp. 48944-48948.

The inquiry concerns the forms to be used for the basic registration of a work under the new copyright law, the persons who will be entitled to the basic registration of a work, and the type of information which must be included on the form.

190. U.S. COPYRIGHT OFFICE.

37 C.F.R., 201. Nondramatic literary or musical works. Objection to noncommercial performances. *Federal Register*, vol.

42, no. 171 (Sept. 2, 1977), pp. 44247-44249.

Section 110 (4) of the revised copyright law provides for the filing of a notice of objection to prevent certain noncommercial performances of nondramatic and musical works. A proposed regulation concerning the form and contents of such a notice is published for comments by the public.

191. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Patents, Trademarks and Copyrights. Ch. II—Copyright Office, Library of Congress. Part 201—General Provisions. Termination of transfers and licenses covering extended renewal term. [Docket RM 76-1; Rules Doc. C]. *Federal Register*, vol. 42, no. 177 (Sept. 13, 1977), pp. 45916-45921.

An announcement of the adoption of a new regulation which implements section 304(c) of the Copyright Act, revised in 1976. The regulation deals with the termination of transfers and licenses covering the extended renewal term of the copyright.

2. Foreign Nations

192. ECUADOR. *Laws, statutes, etc.*

Law on copyright (no. 610 of 1976). *Copyright*, vol. 13, no. 5 (May 1977), pp. 116-129.

This is an English translation of the law which was published in the *Registro Oficial* of Aug. 13, 1976.

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

The copyright (international conventions) (Amendment) Order 1977. (No. 56, of January 17, 1977, coming into force on February 23, 1977). *Copyright*, vol. 13, no. 5 (May 1977), p. 130.

The order recognizes the accession of Surinam to the Berne Copyright Convention and extends its application to the dependent countries of the Commonwealth.

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

The Copyright (International Conventions) (Amendment No. 2) Order 1977. (No. 830, of May 11, 1977, coming into force on June 9, 1977). *Copyright*, vol. 13, no. 9 (Sept. 1977), p. 253.

The Order takes account of the accession of the Arab Re-

public of Egypt to the Berne Copyright Convention and of the Bahamas and Poland to the Universal Copyright Convention. The Order extends the application of these international conventions for the new adherents to the dependent countries of the Commonwealth.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

195. WIPO permanent program for development cooperation related to copyright and neighboring rights; permanent committee, first session. (Geneva, Mar. 17 to 21, 1977). *Copyright*, vol. 13, no. 5 (May 1977), pp. 111-114.

The Committee noted its role in accordance with its rules and covered the status of membership and ratifications of the Berne, Rome, Phonogram and Satellite conventions, the regional meetings and seminars. Discussions were held concerning programs for helping developing countries, assistance in drafting legislation and organizing copyright administrations, training and promotion relative to protection of indigenous intellectual creativity. A list of member and observer states, and delegations from international organizations is included.

196. Working group on the problems in the field of copyright and so-called neighbouring rights raised by the distribution of television programmes by cable. (Paris, June 13-17, 1977). Report presented by the Secretariat and adopted by the working group. *Copyright*, vol. 13, no. 9 (Sept. 1977), pp. 246-251.

A discussion of the regulation of distribution of programs by cable or satellite, under such international conventions as Berne, U.C.C. and Rome, and the criteria to be suggested for legislation at the national levels. A list of participants and observers is included.

PART V

BIBLIOGRAPHY

A. BOOKS, TREATISES AND CASSETTES.

1. United States Publications

197. AMERICAN LIBRARY ASSOCIATION. The new copyright law: questions teachers & librarians ask. A joint project of American Library Association, National Council of Teachers of English, and National Education Association. Washington, D.C., National Education Association, 1977. 76 p.

A handbook for teachers which presents some of the highlights of the new law of particular interest to teachers and librarians. The most frequent questions are addressed in an attempt to clarify some of the uncertain language of the new law, and to provide simple definitions where possible. The photocopying guidelines are also included in the appendix.

198. Bowker annual of library & book trade information. New York, R. R. Bowker Co., 1977-.

Part 1 contains reports on the National Commission on Libraries and Information Science, and CONTU, national libraries, and library associations. Part 2 covers legislation affecting librarianship, including an overview of the new copyright law. References are also made to federally funded grants and foundation grants. Part 3 deals with library and book trade statistics, while Part 4 reports on library education, manpower and salaries. Part 5 touches upon international library and book trade news and Part 6 lists the books and authors achieving awards in 1976 and library and book trade directories.

199. CRAWFORD, TAD. Legal guide for the visual artist. New York, Hawthorn Books, Inc. 1977. 257 p.

A handbook for painters, sculptors, illustrators, print-makers, photographers and other visual artists, the volume contains information on the new copyright law, artist's rights, reproduction rights, publishing and dealer contracts, leases, es-

tate planning and donations to museums. Such items as defamation, right to privacy, obscenity, unfair competition, patents, trademarks, associations and professional groups are mentioned.

200. FRY, BERNARD M., HERBERT S. WHITE AND ELIZABETH I. JOHNSON. Scholarly and research journals; survey of publisher practices and present attitudes on authorized journal article copying and licensing. Bloomington, Inc., Research Center for Library and Information Science, Graduate Library School, Indiana University, June 30, 1977. 210 p.

The report contains an analysis of the questionnaires which were developed and distributed in behalf of the National Commission on New Technological Uses of Copyrighted Works to scholarly and research journals and their material, and ability to provide back issues, reprints and photocopies of articles upon request.

201. LOSS, JACK R. The copyright law and the teacher, 1976. 90 leaves.

A guide for teachers using various media in teaching to determine the copyright aspects of their uses, and how to cope with them.

202. MACAVOY, PAUL W., *ed.* Deregulation of cable television. Washington, D.C., American Enterprise Institute for Public Policy Research, 1977. 169 p.

The Federal Communications Commission in the past five years has developed a set of restrictions on cable television as part of its regulation of the broadcasting industry. This volume is a compilation of studies undertaken under the regulatory reform program or elsewhere in the government in 1975-1976 to evaluate these restrictions.

203. MILLER, ARTHUR. Copyrights. Minneapolis, Midwest Practice Institute (1977). 4 cassettes.

A continuing legal education workshop devoted to the new Copyright Act of 1976 was conducted by Prof. Arthur Miller. The four cassettes represent a recording of his analyses of the various sections in the new law.

204. SALTMAN, ROY G. Computer science & technology: Copyright in computer-readable works; policy impacts of technological change. Washington, D.C., National Bureau of Standards, Oct. 1977.

This study examines the basic principles of copyright, the judicial history of copyright in the twentieth century, and the impact of technological change on judicial decision-making. Recommendations on the conditions of copyrightability for computer-readable data bases and computer programs based on findings developed during the study are described.

205. RINGER, BARBARA A. The new copyright law: a general revision. Recorded at the House of the Association of the Bar of the City of New York, January 19, 1977. Philadelphia, ALI-ABA Committee on Continuing Professional Education, 1977. 1 cassette.

The author reviews the legislative history of the revision and discusses some of the major changes in the new copyright law. She also answers a number of pertinent questions from the floor.

206. NEW YORK LAW SCHOOL LAW REVIEW. The complete guide to the new copyright law. Published originally in the New York School Law Review, vol. 22, nos. 2 and 3. New York, Lorenz Press, 1977. 448 p.

A reprint in volume format of the series of papers submitted at a workshop or symposium held by the New York Law School.

2. Foreign Publications

1. In Danish

207. WEINCKE, W. Ophavsret. Reglerne—Baggrunden—Fremtiden. Kobenhavn, G. E. C. Gad, 1976. 272 p.

A treatise on copyright law, regulations, etc. for the author or creator with particular reference to Danish law, and the international copyright agreements that affect those rights.

2. In French

208. DIETZ, ADOLF. Analyse comparative des législations nationales relatives au droit d'auteur face aux dispositions du Traité instituant la Communauté Economique Européenne. Etude réalisée à la demande de la Commission des Communautés Européennes. Munich, 1976. 365 p.

An analysis of the effect articles 36, 85, 86, and 222 of the Treaty for the European Economic Community would have on the national legislation of the member countries, and on the collection societies.

B. LAW REVIEW ARTICLES

1. United States

209. BROWN, RALPH S., JR. Unification: a cheerful requiem for common law copyright. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1070-1106.

A discussion of the provisions in section 301 of the new copyright act of 1976. These end the dual system of common law and statutory copyright, and in some instances bring authors into the federal courts for the first time. It also requires a new look at state legislation and their grants of equivalent rights for the protection of authors' rights.

210. BRYLAWSKI, E. FULTON. The copyright royalty tribunal. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1265-1286.

In discussing the function of the copyright royalty tribunal, possible problems in assessing the proper distribution of royalties are outlined. Whether the tribunal will be able to operate within its present legislative borders will depend upon how some of the problems are resolved and how the various competitive interests fare in the periodic rate reviews and royalty controversies.

211. BUDWIG, MARK W. The misappropriation doctrine after the copyright revision act of 1976. *Dickinson Law Review*, vol. 81, no. 3 (Spring 1977), pp. 469-493.

The paper was submitted as a contribution to the Nathan Burkan Memorial Copyright Competition at Dickinson School of Law. It traces the evolution of the doctrine of misappropriation as it has been applied in the field of copyright and literary property, from *Millar v. Taylor* (1769) to the present. "Under the Copyright Act of 1976 the boundaries of federal preemption are finally made explicit. All state law granting protection equivalent to copyright to works within the scope of the Act is abrogated. The misappropriation doctrine survives the Act in its original form, limited to competitive situations. Although liberalization of notice requirements will greatly reduce the need for an alternative form of protection in the case of works of evanescent commercial value, misappropriation is a particularly appropriate basis for relief."

212. COHEN, SAUL. Duration. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1180-1231.

After tracing the history of duration of copyright in prior legislation, the author discusses the provisions contained in the new copyright act of 1976 and their potential problems, such as determination of date of death, subsisting copyrights, unpublished works, forfeiture and abandonment. The article concludes with the statement that "the United States has done well in choosing to honor its creative talents with a life-plus-fifty term and has exercised sound judgment in not extending copyright protection beyond fifty years after the author's death."

213. COOK, MELANIE. Moving to a new beat; copyright protection for choreographic works. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1287-1312.

"The art of choreography has fought an uphill battle to achieve its status as a protectible art form. To secure complete protection, it is necessary to give a broad and unrestricted interpretation to the phrase choreographic works and also to recognize that common law copyright protects unfixed choreographic works. The implementation of these suggestions would not only benefit choreographers, but would also provide for certainty and continuity in the law without inhibiting freedom of artistic expression."

214. GOLDSTEIN, PAUL. Preempted state doctrines, involuntary transfers and compulsory licenses: testing the limits of copyrights.

UCLA Law Review, vol. 24, nos. 5-6 (June-August 1977), pp. 1107-1140.

An analysis of the sections of the new copyright law which deal with preemption of state laws, involuntary transfers, compulsory licensing for cable television, phonorecords, jukeboxes and public broadcasting. With the new technologies joining the printing press as media for transmission of copyrighted materials, Congress will have to continue to adapt to new developments as well as keep copyright's first principles in mind.

215. KACHIGIAN, MARK. The new copyright law and cable television, interpretation and implications. *Performing Arts Review*, vol. 7, no. 2 (1977), pp. 176-195.

The paper has been entered in the Nathan Burkan Memorial Competition at Tulsa Law School in 1977. "Recognizing the fact that Congress has spoken affirmatively on the issue of cable television copyright liability, this paper attempts to serve two purposes. First, a review and analysis of the statute as it pertains to cable television is undertaken. Second, the implications of the new law for the cable television industry are viewed."

216. LEVINE, ARTHUR J. AND JEFFREY L. SQUIRES. Notice, deposit and registration: the importance of being formal. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1232-1264.

Under the new copyright act of 1976, failure to comply precisely with the formalities on which copyright is conditioned is less likely in the future to cause inequitable forfeitures of an author's rights. Authors are entitled to certain rights in their creations and these are not made to be dependent on essentially ministerial functions.

217. NIMMER, MELVILLE B. The subject matter of copyright under the act of 1976. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 978-1024.

The new copyright law contains many substantive changes, and the types of works which may qualify for copyright protection were expanded. Still other types of works mentioned will probably generate controversy in the years ahead.

218. Patentability of computer software: the nonobviousness issue. *Iowa Law Review*, vol. 62, no. 2 (December 1976), pp. 615-635.

A case note on *Dann v. Johnston* with a history of program

producers' struggles to obtain proprietary protection for their products. "While the protections afforded by copyrights and trade secrets are available to computer program developers, patents offer software producers the most comprehensive protection against the misappropriation of their programs by rivals, and, therefore, are the most desirable form of protection."

219. PITT, DON LAWRENCE. Education and the copyright law: still an open issue. *Fordham Law Review*, vol. 46, no. 1 (Oct. 1977), pp. 91-138.

The new copyright law specifically exempts some educational uses of copyrighted material from infringement actions, but many are to be judged on the basis of "fair use", and guidelines have been written into the legislative history to bridge the gap of uncertainty. The author proposes a new education section to be inserted in the law which would define more clearly the relationship between the educator and copyright.

220. RINGER, BARBARA. The unfinished business of copyright revision. *UCLA Law Revision*, vol. 24, nos. 5-6 (June-August 1977), pp. 951-977.

As society moves into a "post-industrial" life, where livelihoods are earned through the sale of information, expertise, and personal services, the extent to which copyrightable creations are protected by exclusive property interests will possibly become central to national growth. The areas which the new law leaves unsettled are "post-industrial" such as educational uses of copyrighted works, the changing roles of libraries and information networks, special treatment of the not-for-profit sector, and other issues involving mass communications.

221. SILVERMAN, NOEL L. The new copyright act: an overview of the new law. *1977 Patent Law Annual*, pp. 363-392.

The United States copyright law was in dire need of revision not only because of changing technology, but also because of the social consequences created by the change. While the changes are for the better, the new law has made no attempt to deal with computer technology and its impact on information storage and retrieval. A brief look at the historical and legislative background is followed by a survey of the major changes.

222. STEIN, MARC R. Termination of transfers and licenses under the new copyright act: thorny problems for the copyright bar. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1141-1179.

The provisions which confer a right to terminate transfers are new to the copyright law; their analog is found in the renewal provisions of the Copyright Act of 1909. The new provisions will present many new and challenging issues. Assignments, joint works and works made for hire will add to the uncertainty of retrieval rights, but the procedures are not beyond mastery.

223. TREECE, JAMES M. Library photocopying. *UCLA Law Review*, vol. 24, nos. 5-6 (June-August 1977), pp. 1025-1069.

The Copyright Act of 1976 has established a complex statutory scheme which provides guidelines for the photocopying of journals or portions of other copyrighted works that substitute for library loans. It is not clear whether the library photocopying authorized by the copyright act will bankrupt journals.

224. WEAVER, C. STEPHEN. Copyright—the doctrine of indivisibility: the final chapter. *Memphis State University Law Review*, vol. 7, no. 4 (Summer 1977), pp. 637-654.

The history of the doctrine of indivisibility of copyright is traced from *Jefferys v. Boosey*, 10 Eng. Rep. 681 (H.L. 1854) through the *Goodis* case and down to the new copyright law. "The United States is virtually the only country which still recognizes the doctrine of indivisibility, a doctrine which has largely been ignored in commercial practice and avoided by the courts whenever possible. The Copyright Revision Act of 1976, by abrogating that doctrine, will therefore bring American law in line with commercial reality and international practice."

2. Foreign

1. In English

225. DESJEUX, XAVIER. Reprography and scientific publications: the

creation of a form or the retailing of ideas? (Contribution to the study of the relationship between copyright and culture). *Copyright*, vol. 13, no. 9 (Sept. 1977), pp 254-259.

An overview of the short-term and long-term solutions available to the copyright owner in his effort to control the reproduction of his work, such as clearance centers for collecting royalties or sales taxes on equipment used for reproducing copyrighted material.

226. EMERY, MIGUEL ANGEL. Current legislative trends in the field of copyright and neighboring rights in Latin America. *Copyright*, vol. 13, no. 5 (May 1977), pp. 131-141.

Copyright in Latin America is establishing itself as a right which dignifies and promotes the creative profession as a necessary solution to the growing cultural needs of the people. The copyright laws of Chile, Brazil and Ecuador are analyzed, and adherences to the various international copyright conventions by Latin American nations are mentioned.

227. NOMURA, YOSHIO. Letter from Japan. *Copyright*, vol. 13, no. 9 (Sept. 1977), pp. 260-265.

The letter reviews copyright developments in Japan since 1974 touching upon that country's adherences to various pertinent international conventions, an evaluation of the Copyright Law of 1970 and its effectiveness, and a comment on a recent decision in Tokyo which involved the question of whether a montage of a photographer's work constituted an infringement of his copyright.

228. OLSSON, HARRY R., JR. Teleprompter v. CBS, and the United States copyright act of 1976. *EBU Review*, vol. 28, no. 4 (July 1977) pp. 51-56.

The U.S. Supreme Court considered the economic issue in deciding the case of Teleprompter v. CBS. The article analyzes the effects of CATV on the program supplier, the originating station whose signals are being carried into distant communities, and on the advertiser who has sponsored the program. After taking a look at the pertinent provisions of the new copyright law, the conclusion is reached that it is difficult to predict what effect the new law will have on the CATV marketplace.

2. In Italian

229. LEONELLI, LEONELLO. Il diritto d'autore nelle repubbliche socialiste dell'Europa Orientale. *Il Diritto d'Autore*, vol. 48, no. 2 (April-June 1977), pp. 131-172.

A comparative analysis of the treatment of copyrighted works in the Communist countries of Eastern Europe and Russia.

C. ARTICLES PERTAINING TO COPYRIGHT
FROM MAGAZINES

1. United States

230. ABRAMOFF, ALEX. 3 Japanese groups urge fee on home taping units. *Billboard*, vol. 89, no. 15 (April 16, 1977), pp. 1, 12.

The Japanese Phonograph Recording Assn., the Japanese Society for Rights of Authors, Composers, & Publishers and the Japan Council of Performance Organizations have petitioned their government to have a percentage of the retail selling price on home recording equipment be assigned to copyright owners, performers and record companies. A similar recommendation was made by the Whitford Committee in Great Britain.

231. Appellate division bars six privacy claims. Wife of bank robber suffers setback in suit over hit film. *New York Law Journal*, vol. 177, no. 113 (June 13, 1977), pp. 1, 5.

The names, portraits or pictures of the wife and children of an unsuccessful bank robber, whose exploits were depicted in a motion picture film, were used in the movie or the book published after the film was made. The Appellate Division of the New York courts dismissed six counts of invasion of privacy.

232. CHEE, LUCIANA. How to research copyright law. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 171-183.

"This selective bibliography—confined to intangible personal property to which copyright is applicable—attempts to

gather the principal primary and secondary sources essential for retrospective and current general copyright research. Significant sources have been classified by type of material, namely, legislative, judicial and administrative. Separate sections deal with United States copyright in relation to foreign countries."

233. CLARK, TED. Mob organizes global pix piracy. *Variety*, vol. 286, no. 12 (April 27, 1977), pp. 1, 33.

Film piracy in African and Middle Eastern countries is being controlled by international drug rings and arms smugglers. While the Berne and Universal Copyright Conventions grant protection against film piracy and unauthorized commercialization of both films and other works, some of the member nations do not have adequate means to enforce that protection. There has been heavy piracy of Indian films, Hong Kong karate features and porno films.

234. Copyright Center sets operational details. *Publishers' Weekly*, vol. 212, no. 15 (Oct. 10, 1977), p. 23.

The Copyright Clearance Center has selected an operational contractor, and David Waite, formerly president of Information Dynamics Corp., has been appointed as the new president of the Center.

235. FISHBEIN, ED. O'seas tune orgs agreeing to stiffer demands in pacts. *Daily Variety*, vol. 125, no. 39 (April 28, 1977), pp. 1, 11.

National Association of Recording Arts and Sciences president Jay Cooper, at a monthly meeting of the California Copyright Conference, noted that in recent years American recording artists have been insisting on more control over what record companies do with their products, especially the foreign licensees. He outlined the areas in which the recording artist should take advantage of their increasing control, and noted that despite contractual safeguards "an awful lot of money escapes."

236. GOLUB, MELINDA V. Not by books alone; library copying of non-print copyrighted material. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 153-170.

"In the debate over library photocopying, the widespread practice of copying of nonprint copyrighted material has been

largely ignored. The *Williams & Wilkins* case, the cable television cases and the *Aiken* case are all useful in assessing the legality of this form of library copying under the 1909 copyright law. Public Law 94-553, the new copyright statute, helps to clarify the rights of libraries in this area, yet many ambiguities remain."

237. HAMBURG, MORTON I. Deregulation of pay-cable television? *New York Law Journal*, vol. 177, no. 89 (May 9, 1977), p. 1, col. 1, p. 3, cols. 1-2.

In analyzing and discussing the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc. v. FCC*, characterized as a "decision that may be one of the most significant in the annals of communications law," and that of the U.S. District Court for the Northern District of New York in *Brookhaven Cable TV, Inc. v. Kelly*, the author concludes that, assuming both decisions are affirmed on appeal, "state cable commissions will be deemed not to be able to regulate pay-cable rates because of FCC regulatory authority and, on the other hand, the FCC will have been found to be without authority to regulate in the pay-cable area."

238. HARWOOD, JIM. AGAC jangles ad agencies whose jingles copycat the hits. *Variety*, vol. 286, no. 8 (March 30, 1977), p. 63.

The American Guild of Authors and Composers have given Madison Avenue warning that the copying of hit tunes for jingles may result in possible law suits. AGAC takes the position that imitation is not the sincerest form of flattery.

239. KERNAN, MICHAEL. Occupation: naming that tune. The monitor protects the musician, with a little help from solfeggio. *The Washington Post*, vol. 100, no. 292 (Sept. 23, 1977), pp. C1, cols. 1-2; C18, cols. 3-6.

An account of how ASCAP monitors performances of musical compositions in their catalogs.

240. KOHN, ALAN. 'Disconcerting' defense in copyright case. Distributor loses suit; can't prove movie is obscene. *New York Law Journal*, vol. 178, no. 8, (July 13, 1977), pp. 1, 2.

In a copyright infringement action, the defendant distributor accused of attempting to distribute an award-winning

Japanese film illegally, cited the decision in *Mitchell Bros. Film Group v. Cinema Adult Theater* as a defense. The judge found the *Mitchell* holding, that because a film was found to be obscene, the copyright on it was not valid, to be disconcerting. However, since the film had been shown for substantial periods in major cities without intervention by law enforcement officers, the defendants had failed to satisfy their burden of proving the film obscene.

241. MARKE, JULIUS J. United States copyright revision and its legislative history. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 121-152.

"A comprehensive legislative history and summary and analysis of the new copyright law prepared for the guidance of researchers, librarians, teachers and institutional administrators."

242. MAYER, BILL. BMI's Thea Zavin puts damper on coin from new copyright law. *Variety*, vol. 286, no. 8 (March 30, 1977), pp. 59, 63.

At the California Copyright Conference, senior vice-president of BMI, Theodora Zavin, stated that the distribution of monies from jukeboxes should not be counted as a means of making anyone financially happy. Once the costs have been divided amongst the Copyright Tribunal, which will monitor the new law's application and work on rate adjustments, and the "unaffiliated copyright holders," or nonmembers of BMI or other similar organizations, there won't be much left of the \$4,000,000 collected from the 500,000 jukeboxes in the United States. Those records getting little play will produce the same awards as those records that are hits.

243. McLELLAN, JOSEPH. 'Pirates' and 'Gondoliers' sound better out of the D'Oyly Carte. *The Washington Post*, vol. 100, no. 299 (Sept. 30, 1977), Washington Weekend, p. 32.

In announcing the re-recording of popular Gilbert and Sullivan operettas, the article tells how the expired copyrights were originally transferred to the D'Oyly Carte Company in order to preserve the performances from distortion or mutilation.

244. MITGANG, HERBERT. Publishers basking in prosperity's glow;

book convention plans distribution computers and a center for photocopying payments. *New York Times*, vol. 126, no. 43,578 (city ed., May 17, 1977), p. 26.

The Association of American Publishers met in Bermuda to discuss plans for stimulating every form of book selling,—trade, paperback, textbooks, juveniles and technical. Computerized distribution and a payments center to oversee photocopying of copyrighted material were also discussed. Dr. Boorstin, Librarian of Congress, also disclosed that Congress was moving toward approving a "Library of Congress Center for the Book" to stimulate interest in books in a television-dominated age.

245. NAB wants drive vs. perf. royalties in copyright memo. *Variety*, vol. 288, no. 1 (Aug. 10, 1977), p. 53.

The National Association of Broadcasters is asking its members to submit factual material on how they promote sales of recordings as an effort to prevent the establishment of a performance right. The Register of Copyrights is to submit a recommendation to Congress at the end of the year, and whatever is recommended, the broadcast industry's opinions must be included.

246. New classification system designed for copyrights; single-page application form also recommended. *New York Law Journal*, vol. 178, no. 52 (Sept. 14, 1977), p. 1, cols. 2-3.

A brief summary of the six months' report filed by the Revision Coordinating Committee of the U.S. Copyright Office. The new classification system will require authors or artists to classify their works as text, performing arts, visual arts, sound recordings or renewals. Each class is subdivided into published and unpublished works. The cataloging system will be changed to make it compatible with that of the Library of Congress. The balance of the time prior to January 1, 1978, will be spent on designing application forms, and completing recommendations for acquisition and storage of deposit copies, as well as determining the impact of the FOIA and Privacy Act on the Copyright Office.

247. New York Times sues over index. *Publishers' Weekly*, vol. 211, no. 25 (June 20, 1977), p. 28.

Whether a copyrighted work may be indexed by an outsider, without permission from the copyright owner, is an interesting question currently being litigated in the federal district court of New Jersey. A preliminary injunction has been granted.

248. ROBINSON, TIMOTHY S. Five arrested in probe of tape pirating. *The Washington Post*, vol. 100, no. 240 (Aug. 2, 1977), p. C-2.

As a result of an FBI undercover operation to seek the source of pirated tapes in the Washington area, five persons were arrested in an alleged scheme to purchase "pancakes" (lengthy reels) which would be repackaged into regular eight-track stereo tape containers for retail sales. One of those arrested was a retired Air Force officer double-dipping as a GS-14 at Andrews Air Force Base who said he had produced 5 million pirated tapes "for retirement purposes."

249. ROSOVSKY, PAUL. As usual, everybody is making money except Tchaikovsky. *Variety*, vol. 286, no. 9 (April 6, 1977), p. 112.

Royalty-free classics are paying off in the pop field. Music groups are incorporating classical elements, if not themes, into rock format. Danceable arrangements of the classics became hits in the 1940's and many of these form the basis for current disco arrangements.

250. RUDELL, MICHAEL. Entertainment law; The 'fourth network'. *New York Law Journal*, vol. 177, no. 113 (June 13, 1977), p. 1. col. 1; p. 2, cols. 2-3.

A discussion of the economic and legal effects possible fourth networks might have on the television industries.

251. RUDELL, MICHAEL I. Entertainment law: Re-recording restriction—"Could It Be Magic?" *New York Law Journal*, vol. 178, no. 50 (Sept. 12, 1977), p. 1. col. 1; p. 24, cols. 1-2.

A case comment on *Thau-Merenstein Prod. Inc. v. Arista Records, Inc.* (N.Y. Sup. Ct., Spec. Term, Pt. 1, Index No. 51-504/76, decided March 16, 1977). After expiration of a production contract the performing artist re-recorded a song which became a hit. Plaintiff sued for a share of the royalties claiming a "re-recording restriction" was a trade custom even though not in the contract. Court found that proof of the general trade

custom may not be interposed to vary or contradict an unambiguous contract, and plaintiff was not entitled to the presumption that a "re-recording restriction" was intended by the parties.

252. RUDELL, MICHAEL I. Entertainment law; the Springsteen case. *New York Law Journal*, vol. 178, no. 8 (July 11, 1977), p. 1, col. 1; p. 3, col. 1-2.

A brief commentary on a recent decision in the New York courts which interpreted the right of an assignee of an exclusive, personal services contract by a recording star to choose an album producer without the approval or disapproval of the assignor. A preliminary injunction was granted to enjoin the performer, producer and assignee from making any albums without the approval of the assignor.

253. RUDELL, MICHAEL I. Entertainment law; works for hire under new copyright law. *New York Law Journal*, vol. 177, no. 49 (March 14, 1977), pp. 1, 3.

The new copyright law specifies that an employer will be considered the author of works created by employees within the scope of employment unless both parties have signed an agreement to the contrary. Those works commissioned by an independent contractor will be considered works made for hire in certain categories with a signed express agreement by both parties. Musical compositions have been excluded from these categories, so that commissioned compositions may not be considered works made for hire.

254. RUDELL, MICHAEL I. *MGM v. Scheider*. *New York Law Journal*, vol. 177, no. 89 (May 9, 1977), p. 1, col. 1, p. 2, cols. 1-4.

A review of the history of the case of *Metro-Goldwyn-Mayer, Inc. v. Scheider* with emphasis on the legal issues involved as well as the customs and practices of the television industry.

255. Supreme Court rules WEWS erred in taping circus act without permission. Use on newscast called unlawful appropriation of Hugo Zacchini's 'professional property'. *Broadcasting*, vol. 93, no. 1 (July 4, 1977), pp. 34-35.

In a 5-4 decision, the Supreme Court held a broadcaster liable for broadcasting a film of the Human Cannonball act

without permission. Justice White wrote that "if the public can see the act for free on television, they will be less willing to pay to see it at the fair."

256. TANNENBAUM, JEFFREY A. Artist and writer; the translator's role is crucial and delicate, and widely unnoticed. Gregory Rabassa is a star, but the pay is still low; lyricism, style and puns. Beware of 'Prof. Horrendo.' *The Wall Street Journal*, vol. 190, no. 53 (Sept. 15, 1977), pp. 1, col. 1; 31, col. 3-4.

A presentation of some of the problems encountered by one translator of Spanish and Portuguese novels. These include puns and word-play by the authors, editing by the publishers, and the low pay, without a share in the royalty. English translations of foreign works are finding a greater market in the United States. 'Prof. Horrendo' is a collective term to describe the "Nit-picker" who reports incorrectly translated words or terms in the translation after it is published.

257. WAGNER, SUSAN. Authors Guild asks U.S. to halt "sinister" merger trend. *Publishers' Weekly*, vol. 211, no. 25 (June 20, 1977), pp. 21-22.

A request from the Authors Guild addressed to the Department of Justice and the Federal Trade Commission, to initiate proceedings under the Clayton Antitrust Act to reverse the merger trend in book publishing, has resulted in having the book publishing industry included in the Competition Review Act currently before Congress. Since more than 300 mergers or acquisitions during the past 20 years have reduced the number of publishing houses, authors Hersey and Wouk called it a "sinister process".

258. WAGNER, SUSAN. Clearance center forms amid photocopying uncertainty. *Publishers Weekly*, vol. 212, no. 6 (Aug. 8, 1977), pp. 19, 22.

A non-profit Copyright Clearance Center has been organized as a payment mechanism for royalty fees arising from photocopying in conjunction with §107 and §108 of the 1976 copyright revision. Reference is made to three problem areas which may cause economic loss to periodical publishers through the systematic copying of libraries and research centers.

259. Wall Street Transcript is rebuffed on appeal in copyright rul-

ing. *Wall Street Journal*, vol. 189, no. 118 (June 17, 1977). p. 3.

The U.S. Court of Appeals upheld an earlier federal court injunction that prohibits the Wall Street Transcript from publishing abstracts of copyrighted research reports prepared by Wainright Securities. The judge who wrote the opinion said the fair use doctrine distinguishes between a "true scholar and a chiseler who infringes a work for personal profit," citing a comment made at hearings on the revision of the copyright law.

2. Foreign

1. England

260. MACLIESH, PHILIPPA. First reactions to Whitford. *The Author*, vol. 86, no. 2 (Summer 1977), pp. 58-62.

The Whitford report is admirably readable and sets out its recommendations in a straightforward style. It warns that the European Economic Community is making serious inroads on the profitable exercise of authors' rights. It recommends that specific provision be made for providing moral rights; that a new copyright act provide machinery for a blanket-licensing system for photocopying; that a percentage of the retail sales price on recording equipment be collected for authors; that crown copyright be ended; and that protection for unpublished works be treated the same as in the new U.S. copyright law.

2. Russia

261. SHCHERBAKOV., K. Our business associates ZAIKS, the Polish copyright society. *VAAP Books and Art in the U.S.S.R.*, vol. 1, no. 12 (1977), p. 16.

Soviet publishers are bringing out an increasing number of Polish books, while the Polish publishers are reproducing a number of books by Soviet authors. The Polish Copyright Society also assists in providing translators, and social security for its member authors. It presents annual awards for the best translations from and into Polish.

-
262. VAAP legal advice; Eduard Gavrilov, head of VAAP Legal Department, answers readers' queries. *VAAP, Books and Art in the U.S.S.R.*, vol. 2, no. 13 (1977), p. 25.

An analysis of the contracts available to an author in securing publication of his work. The copyright contract on the use of a work is rather limited; a license agreement may include broader terms. The standard publishers' contract is for three years from the day the work was approved. The author is not allowed to publish his works until the three-year period expires.

263. VAAP legal advice: an interview with Vitaly Kharuto, chief of the legal advice department, VAAP. *VAAP, Books and Art in the U.S.S.R.*, vol. 1, no. 12 (1977), p. 15.

Copyright protects only those photographs which contain elements of creative originality. They may be published or unpublished, and the period of protection is limited as to time and territory within the Soviet Union.

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ELISABETH STEUP

PART I
ARTICLES

264. THE RULE OF NATIONAL TREATMENT FOR FOREIGNERS AND ITS APPLICATION TO NEW BENEFITS FOR AUTHORS—*The Fifteenth Annual Jean Geiringer Memorial Lecture on International Copyright Law**

By ELISABETH STEUP**

The rule of national treatment for foreigners is often called, and rightly called, the cornerstone of international copyright. This is in particular true for the Universal Copyright Convention which, in contrast to the Berne Convention, does not contain detailed provisions on a number of rights to which authors from other member countries are entitled. Under the UCC, authors' protection in foreign countries depends in essence on the rule of national treatment. Even under the Paris Act of that Convention, which ensures to foreign authors four minimum rights but leaves—except with respect to the translation right—the details of implementation to national legislation, the equalization of the treatment of foreigners and nationals is the foreign author's real safeguard for adequate and effective protection abroad. It is of utmost importance to authors that, as the UCC provides, their works enjoy in foreign member countries the same protection as those countries accord to works of their own nationals and that this rule will be faithfully applied in all member countries of the Convention.

The rule itself seems very clear and very simple, but as different interpretations of this rule and its counterpart in the Berne Convention (which expresses the same idea in a slightly different way, speaking of the rights which are or may hereafter be granted to nationals) have shown, at least two of its key words are open to interpretation: "works" on the one hand and protection, or "rights in respect of works" on the other hand.

This lecture will restrict itself to the question of what is meant by "protection" and by "rights in respect of works." It will deal only with the economic rights of the author, not with his moral rights.

*This lecture was delivered on February 27, 1977, in the Auditorium of the New York University School of Law in New York City.

**Ms. Steup is the Counselor of the Federal Ministry of Justice of the Federal Republic of Germany.

The notions of "protection" or "rights in respect of works" were basically unproblematic as long as copyright consisted essentially in granting authors exclusive rights to authorize certain uses of their works and the correlated procedural means for the exercise of those rights. The same protection for foreigners simply meant to grant them the same exclusive rights and correlated means as were granted to nationals. Difficulties arose when authors were granted, besides the exclusive rights, certain other rights to a financial compensation for certain uses of their works or to an interest in sales of a manuscript or the original of a work of art after the first transfer by the author. During the last decades there has been a growing tendency in a number of states to grant authors financial benefits as a compensation for certain uses of their works; some states grant them exclusively to national authors, while others treat those benefits as part of the basic copyright protection accruing to foreigners as well as to nationals.

Two examples may illustrate this development. The first is the so-called public lending right, the right of the author to a financial compensation paid directly or indirectly by libraries, for the public lending of protected works.

In my country the public lending right is regulated under the copyright law. In other countries, in particular the Scandinavian countries, it is regulated outside the copyright laws and is strictly limited to works, including translations, of national authors.

On the same lines, the Parliamentary Assembly of the Council of Europe last year passed a resolution asking for a recommendation of the Council to grant authors a statutory right for compensation in respect of public lending. Under the resolution, however, the entitlement of foreigners was not to be based on the national treatment rule but on reciprocity, with the further restriction that there should be no prejudice to smaller linguistic areas.

The second example relates to photocopying. While many countries consider the compensation of authors for the reprographic reproduction of their works an eminent copyright problem, France, in a Finance Law of 1976, introduced a tax on the sale and importation of reprographic apparatus, part of the amount being set aside for a compensation of national authors and publishers for the photocopying of copyrighted material.

These examples show that an international consensus on what has to be considered as copyright protection and in particular whether and to what extent financial compensations for utilizations of protected works are or at least should be included into copyright protection does not exist. The lack of consensus can have grave implications for the situation of foreign authors protected under the Copyright

Conventions. In the field of public lending and in the field of reproduction and public communication, where new technologies are and will be used to a growing degree for a broad scale multiplication of copyrighted works, the grant of exclusive rights and the necessity for prior authorization by an extremely large number of authors, whose works are used, would put an extreme burden on the user. In balancing the interests of users and copyright owners, national legislations might grant in future more and more rights to a financial remuneration instead of new exclusive rights or an extension of existing exclusive rights. Such a development can create a considerable danger for foreign authors, when rights to remuneration are and will be restricted to nationals. Traditional ways of communicating protected works to the public, which are safeguarded to the author by exclusive rights, will be supplanted more and more by new methods of communication. If the only claim authors have under these methods is a claim for remuneration, and if the rule of national treatment itself remains unaltered, the protection of foreign authors in practice may slowly disappear.

The basic problem is that of the interpretation of the national treatment clause and in particular, whether states are free under the Conventions to grant rights to authors within or outside copyright protection, applying the national treatment rule only to rights included in the copyright law itself.

It is true that under the copyright conventions the freedom of states to grant more rights than the minimum protection provided for in the respective Convention remains untouched. From this fact the argument is drawn that states are also free to decide whether a right granted above the minimum protection shall be included in, or apart from the copyright law. In my opinion, the starting point of this argument is wrong. The freedom of member states of an international treaty to grant or not grant rights does not necessarily include the freedom to decide whether a granted right belongs to the subject matter of the treaty or not. Even where an international treaty refers to rights granted under national law, such reference does not mean in itself that only those rights are covered that under national law are qualified as part of the subject matter of the treaty and are "labeled" accordingly. A reference in an international treaty to the national legislation or the respective national laws relates to the legislation on the *subject matter* of the treaty, whatever that subject matter is called in national law and in whichever national law the subject matter is treated. The subject matter of the treaty, its contents and extent, are governed by the treaty itself and must be interpreted, when necessary, by the rules of interpretation of international law. In the copyright

conventions, therefore, the entitlement of foreigners does not depend on the qualification national legislation gives to a certain right. Neither does it depend on whether the right is listed among the rights of authors in the national copyright law or is regulated in another law under another title. The entitlement of foreigners depends exclusively on whether the right has to be considered as a right of copyright according to the international treaty. It is the qualification given by the international conventions which is decisive and not the qualification given by national law.

Thus the question is, what is meant by protection of works according to international law. For the interpretation of an international treaty, we must look to the Vienna Convention on the Law of Treaties which, although not yet in force, reflects already existing customary international law. This Convention states in Article 31 that a treaty shall be interpreted in accordance with the ordinary meaning to be given to its terms in context and in the light of its object and purpose.

According to this rule, three elements always have to be considered—the context of the terms, the object, and the purpose of the treaty. Based on these three elements the ordinary meaning of the terms has to be ascertained. Where a treaty uses notions, which were originally formed in the national legislations of certain or all member states but are defined or interpreted in those national legislations in a more or less different way, no state may continue, after the coming into force of a treaty, to continue to use exclusively its traditional understanding of the notion or declare its understanding to be the “ordinary meaning” of the notion. Where a treaty is involved, the meaning of a notion may change considerably, either because of an express definition in the treaty, or because of an interpretation according to the object and purpose of the treaty and the context of its terms.

The UCC must be interpreted according to the international rules of interpretation, considering in particular the object and purpose of the treaty. Thus, one basic element must be taken into account: The UCC was created with the object of ensuring worldwide copyright protection to authors, particularly in those states where the Berne Convention, with its restricted number of members, could not safeguard the rights of authors. The UCC, not having exactly the same members as the Berne Convention, certainly is a separate treaty, standing and to be interpreted on its own. However, the subject matter of the UCC is the same as the subject matter of the Berne Convention. Also, one of the purposes of the Berne Convention is to equalize the treatment of foreign authors and national authors, and that is also a purpose of the UCC. In interpreting the UCC, therefore, answers given by the Berne Convention to certain questions are not without relevance to the UCC.

but must be taken into account.

In my opinion what all this means is, for instance, that the minimum rights which are specially granted by the Berne Convention to all protected authors and which have thereby been qualified as the minimum protection of copyright under that convention must be considered also under the national treatment clause of the UCC. This is so because the objects and purposes of the treaties are the same and the UCC contains no provisions which, in the context of its terms, would permit an interpretation to the contrary. States which belong exclusively to the UCC surely are not bound to grant those rights. Such states do not violate the requirement in Article I to grant adequate protection if they do not grant all of the rights provided for in the Berne Convention. However, if such a state decides to grant certain of those minimum rights, an interpretation of the UCC according to the "object and purpose of the treaty" leads to the result that these rights are covered by the UCC Article II "protection" notion. The state is then obliged to grant those rights to all authors protected under the UCC.

The relevance of the Berne Convention in interpreting the UCC is not restricted to this one case. In my opinion, an interpretation of provisions of the UCC has to take into account specifications in corresponding provisions of the Berne Convention even though the UCC provisions have the same object and purpose as provisions of the Berne Convention, are more general and perhaps more vague in the drafting.

The national treatment rule of the UCC, for instance, does not expressly specify that rights which may be granted in the future are included. However, since there is no provision in the UCC requiring that national treatment deviate from the Berne Convention only to the extent of already existing protection, the UCC has to be interpreted in this respect as the Berne Convention expressly states.

Furthermore, interpretations of the Berne Convention in the same subject matter which were generally accepted at the time the UCC was created have to be considered carefully when interpreting the UCC. Certainly, as said before, every international treaty has to be interpreted on its own merits, and the interpretation of two international treaties on the same object and for the same purpose may lead to different results. But the close connection between the Berne Convention and the UCC and the fact that the UCC was created with knowledge of the Berne Convention and its historical development, establishes at least a *prima facie* case that where no deviation was intended, the UCC is to be interpreted in the same manner as the Berne Convention. This means, for the national treatment rule in the

UCC in particular, that the interpretation of the notion of protection has to start from the generally acknowledged interpretation of the national treatment rule of the Berne Convention.

With regard to the national treatment rule in the Berne Convention, it was and is unquestioned that authors' rights and benefits that do not relate to the utilization of their works are not covered by the copyright protection. Rights and benefits which are granted to authors in respect of their profession as writers and artists, such as social security systems, tax reductions or subsidies for the publication of their works, are not to be considered as copyright. These are but the traditional ways of promoting the welfare of national authors and national literature and arts. In these areas, foreigners have no right to equal treatment, and many if not all states have developed schemes in these areas for the benefit of national authors exclusively. Copyright protection includes as essential elements the following—that a right is granted to (1) a person in his capacity as author (2) of a determined work, and, (3) the right being related to the utilization of that work. If any one of the elements—the author, his determined work or the relation to the utilization of that work—is missing, the protections of copyright per se are withdrawn. Similarly, the *domaine public payant*, whereby living authors benefit from the utilization of works of dead authors, and the protection of folklore for the benefit of the state of origin are two other schemes which are not covered by copyright within the meaning of the international treaties, even though they may be codified in the copyright laws of a number of states and have been dealt with by diplomatic conferences or intergovernmental bodies established by the copyright treaties. The question remains whether further conditions have to be added, when defining copyright protection in the context of the terms and in the light of the object and purpose of the international copyright conventions. The question was raised and discussed fervently in connection with the so-called *droit de suite*, which gives the author an interest in the resale of a manuscript or an original of a work of art. As you know, the member states of the Berne Convention have by a unanimous decision at the Brussels Revision Conference settled the problem of *droit de suite* by including it under the reciprocity rule rather than under the usual national treatment rule. These states did consider the new provision on the *droit de suite*, as can be seen from the drafting, not as an exception to the national treatment rule that remained as it existed in the earlier acts of the convention, but as a provision of a right granted in addition to the protection ensured by the national treatment rule.

In legal literature the decision of the Brussels Revision Confer-

ence and the reasoning behind it was not generally accepted. The discussions in many countries are still going on, especially with a view toward whether the UCC, by not mentioning the *droit de suite* and not including it under the reciprocity rule, covers this right in its national treatment clause.

Three main arguments were and are put forward in supporting the decision of the Brussels Conference. The first argument relates to the fact that all states granting the *droit de suite* before the Brussels Conference did not consider it a copyright in the strict sense. Also, in intergovernmental studies before the Brussels Conference it was proposed to regulate the *droit de suite* in a neighbouring rights convention and not in the Berne Convention itself. This argument seems to me not to be convincing since it relies only on the qualification of the right given in national laws and on intergovernmental studies, the proposals of which were not followed. An interpretation based on these two elements is hardly in line with the generally acknowledged method of interpreting an international treaty, as reflected in Article 31 of the Vienna Convention on the Law of Treaties.

The second argument is that copyright protection means the granting of exclusive rights; the *droit de suite*, however, gives no exclusive right but only a claim to an interest in the resale price. This argument in my opinion is of greater importance than the first one, it being a fact that all rights except the *droit de suite* which are regulated in the international copyright conventions are exclusive rights. It is therefore possible to argue that the context of the terms of the convention shows that copyright protection means only exclusive rights granted with respect to certain utilizations of the work. However, the notion of exclusive rights and the notion of right to remuneration cannot be thought of as mutually exclusive.

The Berne Convention and the UCC permit in certain cases the grant of nonvoluntary licenses against remuneration, and it is without doubt that in these cases also the protected foreign author is entitled to remuneration, if his work is utilized under a non-voluntary license. Under national legislation, it is often only a question of legal methods whether they first grant a broad exclusive right and restrict it by a legal license in certain cases or whether they grant a restricted exclusive right and add a right to remuneration for further cases. An example of a possible arrangement under the UCC may illustrate this. If a national legislation grants a broadcasting right, including the right of retransmission by cable, and restricts that right by a legal license permitting certain cable transmissions of broadcasts against payment of an equitable remuneration, no doubt, national treatment would apply to the right to remuneration under the legal licence. If, how-

ever, another state grants a broadcasting right, excluding cable retransmission, but giving in addition a right to remuneration for certain cable retransmissions, according to the interpretation that copyright encompasses only exclusive rights, national treatment would not apply. This interpretation therefore leads to the strange result that national treatment could be avoided only by using a different legal method.

Even in the extreme case where under two national laws the kinds of utilization which give rise to the remuneration are exactly the same, the legal method used in the respective national law would be decisive for the obligation to grant national treatment. This, in my opinion can not be considered an interpretation in the light of the object and the purpose of the copyright conventions, since it would allow a different application of the treaties to exactly the same factual circumstances and make the treaties and their application dependent on the different methods of implementation by national legislations.

The third argument used is that copyright means rights with relation to a communication of the protected work to the public. If one includes as part of the "communication to the public" acts of preparing such communication, for instance, the reproduction of the work, this argument certainly has a sound basis in the copyright conventions. All rights regulated in the conventions are rights with respect to acts by which in one way or the other the work is made available to the public or by which the communication to the public is prepared. The question, however, is whether these rights already existing at the time of the conclusion of the conventions can be considered as the basis for the interpretation of the term "protection" as far as it extends to future rights. At the time the treaties were concluded public knowledge depended in every case on a communication, and an effective protection of copyright could be achieved by granting rights with respect to that communication and against the communicator. Today, however, the factual circumstances have changed considerably. For many utilizations of protected works a communication to the public is no longer necessary, members of the public themselves making their copies of protected works. I, therefore, think that an interpretation in the light of the object and purpose of the copyright conventions has to be a more basic one, the fundamental question being that of the purpose of copyright itself and why copyright protection and in particular the economic rights of the author are necessary.

Copyright in essence is intended to safeguard the cultural right of the individual to a protection of the moral and material interests resulting from his scientific, literary or artistic production. Works normally are created with a view to making them available to the public.

Public knowledge depends on a reproduction of the work, be it in a material, embodied form or in an immaterial form. The vulnerability of the position of author with respect to its economic aspects lies in the fact that when the work has left the sphere of the author he can not control the reproduction; since the work can be reproduced and put at the disposal of the public by everybody in every country. Taking into account new methods of reproduction, today even the public itself causes broad-scale reproduction of the work. The purpose of copyright with respect to safeguarding the economic position of the author is to enable him to control the reproduction or at least to get an equitable remuneration for the reproduction of his work. Therefore, an interpretation of copyright protection in the light of its purpose in my opinion has to cover all rights related to the reproduction of the work for the public whether the rights are directed against a communicator making the work available to the public, or against an enterprise, producing the equipment permitting multiplication by the public or even against members of the public itself. Therefore, rights of the author with respect to the multiplication of his work by reprographic reproduction, whether they are directed against libraries or other institutions making photocopies for the public or against the public making photocopies for itself, or whether they are directed against manufacturers of equipment for photocopying or against industrial enterprises or private persons, making photocopies for their own use, belong to copyright within the meaning of the copyright conventions. It does not matter whether those rights are exclusive rights to authorize the acts of reproduction or rights to a remuneration for the reproduction. Nor does it matter whether the rights directly or indirectly serve to ensure the control of or an equitable remuneration for the reproduction.

Not only are the procedural rights for the exercise of the exclusive rights or claims to remuneration covered but also, in my opinion, the rights of the author with respect to contracts on reproduction are covered. If, for instance, a national law grants to the author the right to terminate a license agreement under certain conditions or to require a variation of the license agreement, securing the author an equitable share of the income from the utilization of his work, if the agreed consideration becomes grossly disproportionate, these rights relate to the reproduction of the work and are covered by the national treatment rule. It is, by the way, not the question here, whether the parties to a license can choose the law governing the license agreement or whether under the applicable rules of conflict of laws a license agreement is governed by another national law than that providing for those rights. The pertinent principle is, where such na-

tional law is applicable to the license, the right of the author has to be considered as belonging to copyright protection and may not be restricted to nationals.

On the other hand, the interpretation of copyright protection as related to the reproduction of the work means that the *droit de suite*, as was confirmed by the Brussels Revision Conference on the Berne Convention, does not qualify as copyright protection. *Droit de suite* is based on circumstances which have nothing to do with a multiplication of the work but which relate to a later increase in value of one specimen of the work. I will not argue here, whether for reasons of justice foreign authors ought to have been included, even if their country of origin does not grant reciprocity. I only want to state that a legal analysis in my opinion justifies the decision of the Brussels Conference to add the new right and place it under the reciprocity rule, without making it an exception to the national treatment clause.

Regarding the UCC, which does not mention the *droit de suite*, this legal analysis means that the national treatment clause does not extend to that right. The additional argument, perhaps weak if used alone, that the Geneva Diplomatic Conference did not intend to include the *droit de suite* in the national treatment clause of the UCC and, had the matter been raised in the conference, would have excluded it expressly because of the state of the international legal discussion at that time, supports the result based on the legal analysis.

Rights like the *droit de suite* are very unusual, since the main concerns of authors relate to rights with respect to the reproduction of their works. The national treatment clause, covering those rights, therefore in general seems to be an effective means of safeguarding the legitimate interests of foreign authors. But one has to underline that the clause only applies where rights are given to the author with respect to the reproduction of his determined work. This gives no guarantee to equal treatment for foreign authors in instances where, while the aim is to compensate the author for acts of reproduction, the national legislation grants no real right to the author with respect to the multiplication of his work. Where, as in the case of the new French law providing for a tax on photocopying equipment and in some of the national laws on public lending, the individual author whose work has been utilized does not get an individual right to remuneration the rule of national treatment does not apply. Instead, a collective fund is amassed and payments out of this fund to individual authors are not dependent on the utilization of their works. Collective forms of compensation for the reproduction of the works of authors can legally be restricted to national authors; however this may be the beginning of a road leading to an erosion of national treatment.

The safeguard of the legitimate interest of authors to get a fair compensation for the reproduction of their works in foreign countries therefore depends not only on a strict and faithful application of the rule of national treatment by member states of the international conventions but also on their willingness to refrain from collective forms of compensation restricted to national authors. The lawyer's answer to the problem is, as so often, only half the answer, and the question remains how those interested in international copyright can promote, with respect to new kinds of reproduction of protected works, copyright legislations in the member states of the conventions.

The arguments advanced in support of schemes excluding foreign authors are manifold. I only want to deal briefly with three of them, which to me seem to be of particular importance:

The first argument denies the justification of granting rights to foreign authors for utilizations of their works for which foreign countries do not grant reciprocal treatment. This argument has proven to be of great weight in cases where the funds necessary for the compensation of authors have to be allocated by the state or some other public institution. It is a real dilemma that very often it is the smaller states with a small number of authors who, in the interest of their national culture and in the interest of safeguarding the economic interests of their authors, feel compelled to legislate first. For authors with a normally restricted market for their works because of the language, an extensive protection is necessary. The detrimental effects of new techniques of reproduction of such authors' works without any compensation are very grave and call for immediate legislation to remedy the situation. For the national legislator, the adoption of a copyright solution implies, in view of the great number of protected foreign authors, a heavy obligation on its own nationals or public institutions. The chances for an adoption of a copyright solution including foreign authors will depend greatly on the probability that similar legislation will be passed in the other member countries of the international copyright conventions.

An equivalent level of copyright protection in my opinion is essential for the future of international copyright, at least in those countries where new techniques of reproduction of protected works are widely used. I can understand the hesitation of developing countries to look for solutions to problems which for them are problems of the future, while they have a bulk of present and more urgent problems with which to cope. For a national legislator in a developed country, when deciding whether to adopt a copyright solution, the important consideration is the level of protection in other developed countries and whether the benefits he grants to authors from those countries

are or will probably be balanced by equivalent benefits to his nationals. The work of the two intergovernmental copyright committees to study and prepare copyright solutions to problems created by new techniques in my opinion is of eminent importance, because this work can form the basis for equivalent solutions in all member states of the copyright conventions to safeguard international copyright and the interests of all authors. Authors and their associations in all countries should strive for an equivalent level of protection and for copyright solutions which include foreign authors. Certainly, a solution restricted to nationals may give national authors an immediate advantage and it is therefore very alluring. But in my opinion it is shortsighted, since solutions restricted to national authors will set examples for other national legislators and initiate a backward development from international protection to nationalism at a time when the international exchange in culture is growing and the international protection of authors is more needed than ever before.

The second argument, often used, contends that, while the legal beneficiary of copyright is the author, in reality and especially in respect of new ways of reproduction and rights in foreign countries, the benefits accrue to publishers and other primary users of copyrighted works. Therefore, the argument goes, copyright solutions, instead of improving the economic situation of needy authors, improve the situation of industries, often powerful *foreign* industries. If this allegation can be proven by practice, it might turn out to be a strong incentive to solutions excluding foreigners. One certainly should not underestimate the necessity and importance of copyright protection for publishing and other industries in the field of culture. However, it should not be overlooked that for many countries, and not only developing ones, the granting of rights benefiting industry and especially foreign industry is governed by other considerations than those for the granting of rights to individual authors.

The strongest argument for equal treatment of foreigners in copyright is the qualification of copyright as a cultural right of the individual. It is my conviction that the inclusion of foreign authors into schemes of compensation for the utilization of protected works will depend greatly on our ability to find solutions that will benefit authors themselves, including foreign authors so that at least a considerable part of the compensation granted will help improve the economic situation of authors.

This leads me to the third and last reflection which seems to me also of crucial importance: The problems cannot be solved by legal measures alone; implementation by practical means is likewise important. With regard to certain multiplications of protected works such as

public lending, reproduction for personal use or cable retransmissions, the individual exercise of rights seems almost impossible even on the national level, and the difficulties become immense where the international level is concerned. In those cases also the users cannot be expected to contact every national and foreign copyright owner individually. A workable solution based on individual rights of authors including foreigners in my opinion can be found only if the collective exercise of the individual rights and a fair distribution of the payments received can be ensured.

In most states the administration of copyright and the exercise of the rights granted by the national legislation is left to the owners of the rights themselves. Therefore, it is up to the owners of the rights to establish a mechanism for the collective exercise of the rights of all protected authors in all member countries of the international copyright conventions, including a mechanism for fair distribution. The authors and publishers of works of music realized very early the necessity of such a mechanism to remedy the inability of individuals to exercise their rights with respect to certain utilizations of their works. They created a network of collecting societies administering copyrights on the international level. Writers and other copyright owners who, until now, were able to rely on individual exercise of rights in view of the individual exploitation of their works, are now in the same situation authors of musical works have been in for decades. Nevertheless, they still hesitate to follow the example of the composers. It is true that their difficulties are greater, in the sense that there are more authors than composers. Nonetheless, in my opinion they too will have to find ways of administering copyrights on an international level, if they want to cope with the new forms of multiplication of their works and if they want to safeguard their legitimate interests in all member countries of the conventions. I am convinced that the authors of musical works would never have achieved the world-wide protection of their rights with respect to a great variety of utilizations of their works if their collecting societies, cooperating internationally, had not set up an efficient international mechanism for the collective exercise of individual rights. Copyright owners of other protected works in my opinion are today at a crossroads. If they want to take the road to world-wide protection against broad-scale, uncompensated exploitation of their works by new technical means, the creation of an international mechanism for the collective exercise of their rights seems to me indispensable. If such international mechanism is not established, the other road in my opinion will lead either nowhere, because national legislators will refrain from extending the protection, or to schemes of collective compensation restricted to national authors

and excluding foreign authors.

I am convinced of the value of and the justification for equal treatment of authors, nationals and foreigners alike, with respect to the utilization of their works. I hope that the international cooperation of authors and other copyright owners which brought about in the past many great improvements in the international protection of copyright, will also in the future bring about new ways of coping with the new difficulties and, with respect to the new forms of multiplication of protected works, that such cooperation will pave the way for a comprehensive application of the national treatment rule.

PART II**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. United States of America and Territories****265. U.S. CONGRESS. HOUSE.**

H.R. 9096. A Bill to amend the communications act of 1934 to provide that the operation of pay television systems shall be licensed by the Federal Communications Commission. Introduced by Mr. Hefstel, and referred to the Committee on Interstate and Foreign Commerce, Sept. 14, 1977. 3 p. (95th Cong., 1st Sess.)

The bill would authorize the Federal Communications Commission to grant an operating license for a period of three years, with a right to renew for three years to pay television systems and to prescribe regulations designed to limit, preclude, or protect against any undue preemption of existing television programming.

266. U.S. CONGRESS. HOUSE

H.R. 10429. 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 compositions, or similar property. Introduced by Mr. Lujan, and referred to the Committee on Ways and Means, Jan. 19, 1978.

The bill would amend section 170(e) of the Internal Revenue Code by adding a provision that would permit property contributed to a charity which had been created by the taxpayer to be treated as having been sold at its fair market value for purposes of tax deduction.

267. U.S. CONGRESS. HOUSE.

H.R. 10445. A bill to amend the Internal Revenue Code of 1954 to allow a tax credit for certain contributions of literary, musical, or artistic compositions. Introduced by Mr. Richmond, and referred to the Committee on Ways and Means, January 19, 1978.

The bill would insert a new section 44B which would per-

mit a taxpayer to receive a credit of 30% of the fair market value of a literary, musical or artistic composition created by his personal efforts and contributed to a recognized charitable organization, with certain limitations and a requirement for a certification from the donee as to its use. Credits claimed by taxpayers under this new provision would not be allowable under section 170(e).

268. U.S. CONGRESS. HOUSE.

H.R. 11403. A bill to establish a National Commission on the Visual Arts, to require payments to the Commission by certain sellers of works of visual art; to establish in the Treasury a Visual Arts Fund, and for other purposes. Introduced by Mr. Waxman (for himself, Mr. Richmond, and Mr. Drinan) March 8, 1978, and referred to the Committee on the Judiciary. (95th Cong., 2d Sess., H.R. 11403)

269. U.S. CONGRESS. HOUSE. *Carter, Jimmy.*

Proposals to strengthen public broadcasting system—Message from the President of the United States (H. Doc. No. 95-239). *Congressional Record*, vol. 123, no. 160 (Oct. 6, 1977), pp. H-10715—H-10718.

President Carter's proposals are intended to assure long-range funding, clarify functions of national organizations, increase funds allocated for national programming, reduce the percentage of funds the public broadcasting systems must raise to match the CPB funds, encourage journalistic independence; require public accountability and increase participation of minorities and women in the program. The same message was read in the Senate under the title *Public broadcasting—P.M. 120*. See *Congressional Record*, vol. 123, no. 160 (Oct. 6, 1977), pp. S-16553-S16555.

270. U.S. CONGRESS. HOUSE. *Drinan. Robert F.*

The moral rights of artists. *Congressional Record*, vol. 123, no. 165 (Oct. 13, 1977), pp. E6270-6272.

A lengthy comment on the purpose of H.R. 8261 introduced by Father Drinan July 13, 1977.

271. U.S. CONGRESS. HOUSE. *Fraser, Donald M.*

Closed-circuit radio reading services—copyright exemption

for dramatic works. *Congressional Record*, vol. 123, no. 160 (Oct. 6, 1977), p. E6164.

Representative Fraser's home state of Minnesota inaugurated radio reading service for the blind in 1969. Now 17 closed-circuit channels operate across the country on Subsidiary Carrier Authorization. The amendment, H.R. 8098, introduced by Rep. Fraser and Spellman, would permit these services to transmit a performance of a dramatic work more than 1 year old two times and to make three copies for lending at no cost without the necessity of obtaining copyright clearance.

272. U.S. CONGRESS. SENATE.

S. Res. 152. Resolution expressing the sense of the Senate that the President bring to the attention of the Government of Canada the adverse effect on the United States broadcasting industry of certain provisions of the Canadian tax code. Introduced by Mr. Moynihan and referred to the Committee on Foreign Relations, Aug. 5, 1977. 2 p. (95th Congress, 1st Sess.)

The resolution would call on the President to raise with the Government of Canada the question of the impact of the recent provisions of the Canadian tax code on the U.S. broadcasting industry with a view of adjusting outstanding differences.

273. U.S. CONGRESS. SENATE. *Subcommittee on Communications*.

Cable television. Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, U. S. Senate, on oversight hearings on cable television, June 6, 7, and 8, 1977. Washington, D.C. Gov't. Print. Office, 1977.

Testimony offered at the fourth in a series of inquiries into the present state and future potential of communications, particularly the interrelationship of cable television with other means of communication.

274. U.S. CONGRESS. SENATE. *Committee on Foreign Relations*.

Canadian tax provisions on U.S. broadcasting. Report to accompany S. Res. 152, submitted by Mr. Byrd (for Mr. Sparkman), August 5, 1977. 3 p. (95th Cong., 1st Sess., S. Rept. 95-402)

In 1971 the Canadian Radio-Television Commission pro-

posed an amendment to Canada's Income Tax Act to prevent Canadians from deducting as a business expense their advertising on foreign stations even though their purpose was to reach Canadian audiences. The Canadian parliament approved such a measure, and the present resolution was introduced to see whether a compromise could be attained. The Committee requested comments of the State Department, and the report includes a statement to the effect that the Department of State has no objection to the resolution.

275. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Compulsory license for cable systems. Final regulations. *Federal Register*, vol. 43, no. 3 (Jan 5, 1978), pp. 958-964. [Docket No. 77-2].

The regulations amend section 201.11 and add a new regulation section 201.17, thereby implementing section 111 (d) (1) and (2) of the new copyright law. These regulations establish the form, content and filing of notices and statements required in order for cable television systems to secure a compulsory license under the new copyright law.

276. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Compulsory license for making and distributing phonorecords. Interim regulations. *Federal Register*, vol. 42, no. 250 (Dec. 29, 1977), pp. 64889-64894.

Section 115 of the Copyright Law, which entered into force on January 1, 1978, establishes a compulsory license for the making and distribution of phonorecords of nondramatic musical works. These interim regulations permit persons to invoke the compulsory license on and after January 1, while permitting the public to comment on them before the issuance of final regulations.

277. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Corrections and amplifications of copyright registrations; import statements; and recordation of transfers and other documents. Interim regulations. *Federal Register*, vol. 43, no. 2 (Jan. 4, 1978), pp. 771-774. [Docket No. 77-15].

These interim regulations are being adopted to implement sections 205, 408(d) and 610 (b)(2) of the Copyright Revision Act of 1976. Section 205 pertains to recordation of transfers

and other documents related to copyright. Section 408(d) deals with supplementary registrations to correct or amplify information contained in prior registrations, and section 610(b)(2) is related to importation statements.

278. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Nondramatic literary works; voluntary license to permit reproduction solely for use of the blind and physically handicapped. Final regulation. *Federal Register*, vol. 42, no. 244 (Dec. 20, 1977), pp. 63778-63779. (Docket No. 77-01).

The regulation implements Section 710 of the new copyright law. That section directs the Register of Copyrights to establish procedures whereby the owner of a copyright in a nondramatic literary work may, at the time of registration, grant the Library of Congress a license to reproduce and distribute the work for the use of the blind and physically handicapped.

279. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. Recordation and certification of coin-operated phonorecord players. Final regulations. *Federal Register*, vol. 42, no. 244 (Dec. 20, 1977), pp. 63779-63781. (Docket No. 77-4).

Section 116(b) of the new copyright law is hereby implemented to prescribe conditions under which operators of coin-operated phonorecord players may obtain a compulsory license for the public performance of nondramatic musical works. The effect of the regulation is to establish requirements governing the application for the license and to prescribe the information needed for the certificate which is to be affixed to the player machines.

280. U.S. COPYRIGHT OFFICE.

37 C.F.R. 201. [Docket RM 77-5]. Warning of Copyright for Use by Libraries and Archives. *Federal Register*, vol. 42, no. 221 (Nov. 16, 1977), pp. 59264-59265.

Under the provisions of sections 108(d) and (e) of the Copyright Law of 1976, libraries and archives must "display prominently, at the place where orders (for copies of phonorecords) are accepted, and include on its order form, a warning of copyright in accordance with the requirements that

the Register of Copyrights shall prescribe." Regulation section 201.14 gives the text of the warning and specifies where and how it shall be displayed.

281. U.S. COPYRIGHT OFFICE.

37 C.F.R. 202. Registration of claims to copyright. Interim regulation. *Federal Register*, vol. 43, no. 3 (Jan. 5, 1978), pp. 965-967. [Docket No. 77-16].

This interim regulation proposes a revision of section 203.3 of the Code of Federal Regulations for the purpose of implementing the provisions of sections 408, 409 of the new copyright law. The regulation would establish requirements governing the classification of works to be registered in the Copyright Office and the form and content of the applications filed for such registration.

282. U.S. COPYRIGHT OFFICE.

37 C.F.R. 202. Registration of claims to copyright; deposit requirements. *Federal Register*, vol. 43, no. 2 (Jan. 4, 1978), pp. 763-771. [Docket No. 77-11].

Sections 202.19, 202.20, and 202.21 implement the deposit requirements found in sections 407 and 408 of the new copyright law. Under these regulations certain categories of published works are exempted from mandatory deposit for the Library of Congress, while requirements are spelled out for other classes of material to be deposited.

283. U.S. COPYRIGHT OFFICE.

37 C.F.R. 202. Registration of claims to copyright; renewal of copyright. Interim regulation. *Federal Register*, vol. 43, no. 3 (Jan. 5, 1978), pp. 964-965. [Docket No. 77-17].

Interim regulation, section 202.17, pertains to renewal of subsisting copyrights as of January 1, 1978 and is designed to implement the provisions contained in section 304(a) of the new copyright law.

284. U.S. COPYRIGHT OFFICE.

37 C.F.R. 203. Freedom of information act: Policies and procedures. 37 C.F.R. 204—Privacy Act: Policies and procedures. *Federal Register*, vol. 43, no. 2 (Jan. 4, 1978), pp. 774-777. [Docket No. 77-12].

These final regulations establish rules and procedures by which members of the public may obtain information as authorized under the Freedom of Information Act and the Privacy Act provisions of the Administrative Procedure Act.

285. U.S. COPYRIGHT OFFICE.

Performance rights in sound recordings. Report. Notice of report. [Docket S77-6-C]. *Federal Register*, vol. 43, no. 7 (Jan. 11, 1978), pp. 1655-1656.

A letter from the Register of Copyrights to Congress submitting a major portion of the study requested by Congress in accordance with the provisions contained in section 114(d) of P.L. 94-553, the Act for the General Revision of Copyright. Addenda consisting of independent labor union and economic studies, a bibliography and an analysis by the Register of Copyrights with possible legislative proposals was submitted in February, 1978.

286. U.S. COPYRIGHT OFFICE.

Privacy Act of 1974. Systems of records and notice of proposed routine uses. Docket RM 78-1. *Federal Register*, vol. 43, no. 26 (Feb. 7, 1978), pp. 5113-5114.

Two additional systems of records of the Copyright Office of the Library of Congress are published. The routine uses of these additional systems are set out for public comment. These systems are: (1) notices of institution of actions for infringement of works which have been refused registration and (2) deposit recordation files.

287. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Nomination of five persons to be commissioners. September 26, 1977. *Weekly Compilation of Presidential Documents*, vol. 13, no. 40 (Oct. 3, 1977), pp. 1420-1421.

288. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Order designating order of seniority of the commissioners. September 26, 1977. *Weekly Compilation of Presidential Documents*, vol. 13, no. 40 (Oct. 3, 1977), pp. 1420-1421.

289. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 C.F.R. 76. Cable television systems; proposed importation of

radio signals; order terminating rulemaking proceeding. *Federal Register*, vol. 43, no. 26 (Feb. 7, 1978), pp. 5012-5019.

The FCC is terminating the rulemaking proceeding in Docket 19418 concerning cable television systems' carriage of radio broadcast signals. Because the record in the proceeding does not demonstrate the need for rules in this area, no rules have been adopted. The FCC is also denying two related petitions for rulemaking having to do with cablecast radio programming.

290. U. S. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS.

Formulation of guidelines for interpreting library photocopying provisions. H.R. Bill 4836. *Congressional Record*, vol. 123, no. 165, (Oct. 13, 1977) p. S17154.

Development of workable clearance and licensing procedures. No necessity for a single clearance mechanism as a number of copyright clearing houses could be developed. Clearing house before Jan. 1, 1978 is desirable.

291. NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS.

Final report. March 31, 1977. Records and documents to be public property of the United States. pp. 3-5.

The report states that any official in public office whose materials are created in the discharge of the business of the public belong to the public.

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

La loi du 19 Octobre 1976. *Revue Internationale du Droit d'Auteur*, No. 94 (Oct. 1977), pp. 100-232.

A French translation of the United States Copyright Law of 1976 is reproduced in parallel columns with each section of the English text.

2. Foreign Nations

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

Copyright. The copyright (international conventions) (Amendment no. 3) Order 1977. Made 26th July 1977; laid before Parliament 3rd August 1977, coming into operation 24th

August 1977. London, Her Majesty's Stationery Office, 1977.

The order amends the schedule of countries adhering to the Rome Convention by adding Uruguay. A copy of this Order may also be found in *Copyright*, vol. 13, no. 10 (Oct. 1977), p. 273.

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

The Copyright (International Conventions) (Amendment no. 4) Order 1977 (no. 1632, of October 11, 1977). *Copyright*, vol. 13, no. 12 (Dec. 1977), p. 336.

This Order further amends the Copyright (International Conventions) Order 1972. It takes account of the accession of the Central African Empire to the Berne Copyright Convention. The Order extends to dependent countries of the Commonwealth to which the 1972 Order extends.

295. SOVIET UNION. *Laws, statutes, etc.*

I. Decree of the Presidium of the Supreme Soviet of the USSR on the addition to Article 103 of the Fundamentals of the Civil Legislation of the USSR and the Union Republics (of October 13, 1976). II. Decree of the Presidium of the Supreme Soviet of the RSFSR (of October 18, 1976).

Both amendments provide for publication of published works by means of raised-dot characters for the blind. *Copyright*, vol. 13, no. 12 (Dec. 1977).

296. SUDAN. *Laws, statutes, etc.*

The copyright protection act, 1974 (No. 49, of 1974). *Copyright*, vol. 13, no. 11 (Nov. 1977), pp. 301-305.

An English translation of the law which was published in the Official Gazette on June 15, 1974.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

297. **ADVISORY GROUP OF NON-GOVERNMENTAL EXPERTS ON THE PROTECTION OF COMPUTER PROGRAMS.** *4th Session*, Geneva, June 1-3, 1977, *Copyright*, vol. 13, no. 10 (Oct. 1977), p. 271.

A brief note stating that the group had reviewed a draft model law on the protection of computer software and the explanatory notes that accompany the draft. After corrections and amendments are made, the final text will be reproduced in an issue of *Industrial Property*.

298. **FIRST CONTINENTAL CONFERENCE ON COPYRIGHT AND FIRST BRAZILIAN CONGRESS ON COPYRIGHT.** (Sao Paulo, Brazil, June 5-10, 1977). *Copyright*, vol. 13, no. 10 (Oct. 1977), pp. 287-289.

Topics discussed at this combined meeting included the desire for greater participation by the Latin American countries in international organizations which deal with copyright and intellectual property; a study of the model law for copyright for developing countries; the possibility of achieving greater uniformity in copyright legislation, its enforcement and remedies, and the growing program of reprographic reproduction.

299. **GOVERNING BODIES OF WIPO AND THE UNIONS ADMINISTERED BY WIPO.** Eighth series of meetings. Geneva, Sept. 26-Oct. 4, 1977. *Copyright*, vol. 13, no. 11 (Nov. 1977), pp. 295-300.

A report on the progress of various projects and activities being sponsored by the World Intellectual Property Organization.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY

A. Decisions of U.S. Courts

1. Federal Court Decisions

300. CONTEMPORARY MISSION, INC. v. FAMOUS MUSIC CORPORATION, 557 F.2d 918 (2d Cir. May 18, 1977) (Meskill, C.J.).

Appeal from District Court judgment for plaintiff-composers on breach of contract action against producer of recordings for nationwide distribution. Cross-appeal from ruling excluding plaintiff's evidence concerning prospective damages.

Held, affirmed except for the lost royalties ruling, which was reversed and remanded.

Plaintiff had entered into two recording agreements (Virgin and Crunch) both of which were found to have been breached by the defendant's failure to promote the records either before or after the sale of its record division and assignment of the contracts to the buyer, ABC.

The issues on appeal were whether: (1) the evidence was sufficient to show that defendant had failed adequately to promote the rock opera, "Virgin"; (2) defendant was liable for non-performance of the Crunch agreement; (3) plaintiff complied with the notice of breach provision of the Crunch agreement; (4) plaintiff was estopped from suing for a breach of the Crunch contract because it claimed the assignment was void *ab initio*. The issue on cross-appeal was (5) whether the plaintiff's evidence of lost benefits was properly excluded on the ground that the evidence was speculative.

The court decided the above issues as follows:

(1) The defendant had fulfilled some of its contractual obligations by spending \$50,000 to promote "Virgin" (oral proof of the contents of defendant's lost business record was not challenged) and by appointing a person to oversee the sales promotion. But in meeting only two of many obligations created by the agreement, the defendant did not fulfill the standards of *Wood v. Lucy Lady Duff-Gordon*, 222 N.Y. 88 (1917), which would require that the defendant "use its reasonable ef-

forts to *promote* VIRGIN on a nationwide basis." Evidence was presented showing that one record was not promoted nationwide, another was dropped shortly after its release, and that the defendant had made budget and personnel cuts from which "the jury could infer that the promotional effort was reduced to a level that was less than adequate."

(2) The Crunch agreement was deemed to be assigned by defendant's sale of its record division. But the Court pointed out that when a bilateral contract is assigned there is both an assignment of rights and a delegation of duties and "[i]f the delegate fails to perform, the delegant remains liable." All the plaintiff had to prove was that after the sale to ABC no one promoted the sale of its records; it did not, as defendant argued, have to prove ABC's breach.

(3) A provision in the Crunch agreement required that the plaintiff give defendant written notice specifying the alleged breach and an opportunity to cure it within 30 days before the breach was to be considered material. Even though a telegram and letter sent by the plaintiff did not specify a breach that was the basis for plaintiff's ultimate recovery, the court found that the letter, plus the telegram considered in the light of a conversation between the parties, gave sufficient notice of breach to alert defendant of its duty "to insure that the contract was being performed according to its terms." The court, unlike the dissenting judge, reasoned that "it would be hypertechnical to upset the verdict on the ground that the notice was insufficient. We decline to construe the notice provision as if it were a common law pleading requirement under which every slip would be fatal."

(4) Defendant argued that if, as plaintiff asserted, the assignment of the Crunch agreement was void *ab initio*, then ABC owed no duty and breached none and therefore plaintiffs should be estopped from holding defendant vicariously liable. The court reiterated that "[t]he basis for the recovery is not a breach by ABC, it is a breach by Famous after the sale to ABC."

(5) Before the record was withdrawn from the market as a result of defendant's sale, one of plaintiff's songs had reached number 61 on Billboard magazine's "Hot Soul Singles" chart. Plaintiff's proffered statistical analysis traced the progress of all other records that had hit 61 on the charts in 1974 and showed that only 24% of those records had failed to reach the top 40. Had the lower court allowed the statistical analysis, an expert witness would have converted the chart ratings to projected sales figures and then to lost royalties.

However, defendant protested at both trials that the following significant data were not included, invalidating the analysis: "Speed

with which the various records rose upward; . . . the reputations of the various artists performing the recordings; . . . and the size and ability of the company promoting the recordings."

The court ruled that the omission of the above data affects the weight of the evidence but not its admissibility: "Evidence need not be conclusive in order to be relevant." *Freund v. Washington Square Press, Inc.* 34 N.Y.2d 379 (1974), did not bar proof of lost royalties, so under Rule 402 of the Federal Rules of Evidence, the court was bound to admit evidence of lost royalties unless the use of the statistics and testimony would be misleading and prejudicial under Rule 403. Dissenting Judge Van Graafeiland felt that District Court Judge Owen had applied the balancing test of Rule 403 and that his evidentiary ruling should not be disturbed since his discretion had not been clearly abused. The court, however, found that there had been no balancing and remanded the case so that a Rule 403 determination could be made.

In order for the evidence discussed above to be admissible to show substantial damages, the existence of damage must be certain; if it is uncertain or speculative, only nominal damages may be awarded. Under the New York rule, "when the existence of damages is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied a recovery of substantial damages." The court quoted from *Freund v. Washington Square Press, Inc.*, *supra*, "The plaintiff need only show a 'stable foundation for a reasonable estimate of royalties' " and concluded:

"We are confident that . . . the exclusion of the evidence proffered by Contemporary was error. This is not a case in which the plaintiff sought to prove hypothetical profits from the sale of a hypothetical record at a hypothetical price in a hypothetical market. At the time of the sale to ABC, the record was real, the price was fixed, the market was buying and the record's success, while modest, was increasing."

However, the court found damages based on the possibility that the record's success would have led to a nationwide concert tour to be "speculative and uncertain" under *Freund* and therefore properly excluded by the district court.

301. HUK-A-POO SPORTSWEAR, INC. v. LITTLE LISA, LTD.,
74 F.R.D. 621 (S.D. N.Y. June 13, 1977) (Tenney, D. J.)

Action for infringement of plaintiff's copyright in a shirt design.

On defendant's motion to dissolve preliminary injunction and plaintiff's cross-motion for partial summary judgment, *held*, motions denied.

At the preliminary injunction hearing the defendant did not submit opposing papers but instead chose to "await the more precise results of extended discovery" which it then used to challenge the validity of the copyright registration. The defendant sought to vacate the injunction on the basis of changed circumstances under FRCP Rule 60 (b) (5). Since Rule 60 (b) (5) applies to final orders only, the court instead considered the defendant's motion under its continuing plenary power over its interlocutory orders and applied general equitable principles rather than Rule 60 (b) (5)'s standard of changed circumstances.

The court found that the defendant could have made objections to the preliminary injunction and that wise judicial policy forbids allowing a party "to withhold its objections to a preliminary injunction until such time as it can present the strongest possible case and allow it to then obtain a dissolution of the injunction."

The standard to be used in vacating a preliminary injunction set forth by the Second Circuit and the New York Court of Appeals is that only "truly new evidence" concerning issues not previously decided need be considered. Because the defendant's new arguments challenged the validity of copyright registration and the plaintiff claimed that any inaccuracies were the result of "innocent clerical error," the court applied the established policy of preserving copyrights to deny the defendant's motion. However, because many important factual issues remained in dispute, the plaintiff's motion for partial summary judgment was denied and the defendant's defenses and objections were preserved for trial.

302. CAMERON v. KELLNER, 195 U.S.P.Q. 138 (S.D. N.Y. May 12, 1977) (Brieant, D. J.).

Action by plaintiff for declaratory judgment of non-infringement and for unfair competition; counterclaim by defendant for copyright infringement.

Held, plaintiff did not infringe and defendant did not engage in unfair competition; all relief denied to both parties.

Beginning in 1974, defendant marketed a sterling silver fortune cookie which was copyrighted as a sculpture but which had attached to it a braided loop so that it could be worn as jewelry. In 1976 the plaintiff began to sell her slightly larger bronze (sometimes silver plated) fortune cookie to be used as a paperweight or similar object and

not designed to be worn. Although plaintiff may have had access to defendant's work through store displays and advertisements, access was not proved and even if it had been, copying was not shown.

The court compared the appearance of the parties' cookies and the method of their manufacture with that of edible Chinese fortune cookies and concluded that the defendant's and plaintiff's cookies "differ in size, texture, weight, physical appearance, sales price and in end usage" and therefore would not be found substantially similar by the average lay observer or purchaser. Furthermore, both parties offered convincing testimony of independent creation.

Elaborating on the concept that copyright protection extends only to expression and not to the idea itself, the court stated:

"Since all edible Chinese fortune cookies are created more or less along the same lines, defendants cannot, by obtaining a copyright upon one design of a Chinese fortune cookie rendered in metal, exclude all others from manufacturing metal Chinese fortune cookies on the ground that they are substantially similar in appearance."

Although the defendant's claim of infringement was found to be without merit, the court determined that her letters to plaintiff's customers asserting copyright infringement were sent in good faith and were not unfair or abusive. The court reasoned that "were we to mulct defendant for asserting an invalid claim . . . we would be placing an unreasonable roadblock in the way of persons seeking to adjudicate their rights." Therefore, even though plaintiff, as a consequence of the letters, lost sales to a substantial customer, her claim of unfair competition or interference with contractual rights was defeated.

303. *BIRNBAUM v. UNITED STATES*, 436 F. Supp. 967 (E. D. N.Y. August 17, 1977) (Weinstein, D. J.)

Action against the United States to recover damages under the Federal Tort Claims Act brought by plaintiffs individually and as a class. The factual basis of the action was that plaintiffs either sent or received first class mail that was intercepted, opened and copied without a warrant by the Central Intelligence Agency. Violation of New York common law copyright was one of three tort theories under which the plaintiffs claimed damages.

Held, each plaintiff entitled to damages of \$1,000, the statutory maximum of 25% to be used for attorney fees. The award was conditioned on the Government's ameliorating the harm by issuing to

each plaintiff a letter of regret and assurance of nonrecurrence. The suit was not certified as a class action primarily because the class could not be easily identified: some persons whose mail was opened would not know about it, others would not object, and those who did know and object might well suffer different degrees of injury which would have to be determined at separate trials despite class certification.

For twenty years prior to 1973 the CIA had a program of opening and copying first class mail, particularly correspondence to or from the Soviet Union. Plaintiff Birnbaum, a college professor, sent a letter concerning a meeting to a colleague at Moscow State University; Ms. MacMillen wrote to a Soviet dissident; and Mr. Avery received a letter from his son, an exchange student in Moscow. All three letters were intercepted at a New York airport and therefore, under the federal act, New York law applied.

In discussing the common law copyright theory of recovery, the court found that English case law precedent shielded "writers of ordinary, nonliterary letters against the misappropriation and nonconsensual publication of their correspondence" on the ground of property rights. (*Gee v. Pritchard*, 36 Eng. Rep. 670, Ch. 1813.) An early First Circuit decision, *Folsom v. Marsh*, 9 Fed. Cas. 342 (1841) adopted the theory of *Gee* but *Woolsey v. Judd*, 11 Super. Ct. (4 Duer) 379 (1855) and subsequent New York cases stressed the idea that common law copyright protects not only professional authors but also persons having a "nonpecuniary interest in the privacy of letters." Furthermore, the court found that federal copyright law does not preempt state law "as long as the causes of action contain elements, such as invasion of personal rights . . . that are different in kind from copyright infringement."

The court found that the letters opened by the CIA were published under common law copyright precedents in New York, Pennsylvania and Wyoming in that their contents were communicated to unauthorized persons.

A recipient may have property and privacy rights in a letter just as its author does. In *Folsom v. Marsh*, *supra*, Justice Story indicated that a recipient may publish the letter over the author's objections in the course of a law suit or "to vindicate his character and reputation." The Supreme Court in *Procurier v. Martinez*, 416 U. S. 396 (1974), a case concerning prison censorship of mail, stated that "the interests of both [sender and receiver] are inextricably meshed" and found that the first and fourteenth amendments protect both against "unjustified governmental interference."

Although plaintiff Avery's letter was intercepted before it was delivered to him, the court found he had "at the very least, an inchoate

property interest sufficient to render his right of privacy protectible."

The court assembled an advisory jury because no precedents were available to determine the amount of damages. The advisory panel confirmed the court's conclusion that the plaintiffs' injuries were substantial and recovery should be awarded for mental distress. Since New York courts grant damages for mental anguish in other actions where privacy is a related issue, the court found that mental distress damages could be awarded for a common law copyright violation. Such damages could also be awarded under the plaintiffs' other two tort theories, common law right to privacy and conduct violating constitutional rights.

304. *SAMET & WELLS, INC. v. SHALOM TOY CO., INC.*, 195 U.S.P.Q. 40 (E.D. N.Y. April 1, 1977) (Neaher, D J.).

In its action for infringement of copyright in a stuffed toy turtle, plaintiff asked for an injunction, damages, and accounting for profits. Defendants counterclaimed for a declaratory judgment of copyright validity.

Held, permanent injunction and attorney's fees granted. Amount of attorney's fees and computation of damages referred to the United States Magistrate as Special Master.

The trial judge died before the case was decided so the parties stipulated that the present decision could be rendered based on all of the papers, transcripts, etc. previously before the court.

Because a designer sold the same turtle design to both the plaintiff and the defendants, the significant issue in this litigation was not whether copying had occurred but whether plaintiff had obtained exclusive rights to the design first. Plaintiff was not only the claimant of the copyright but also the presumptive author of the design under the work for hire doctrine which applies to the work of an independent contractor as well as to that of a regular employee unless the actual author has reserved the copyright by contract. The intent of the parties was shown by (a) plaintiff's commission and acceptance of the designs and payment for them; (b) the designer's handwritten notation "2 copyright" on wrapping paper that had contained samples; (c) a course of dealing during which the designer had allowed plaintiff to copyright his previous designs; (d) testimony showing that the practice of the industry was that the purchaser received exclusive rights to the design. Thus, the court concluded that plaintiff, which had completed its dealings with the designer before the defendants, had the right to claim authorship of the design.

Defendants argued that they sold the turtle without a copyright notice prior to plaintiff's first sale, thus publishing the design and ded-

icating it to the public. Although the court was not convinced that defendants' sale had occurred first, it declined to make a finding on this issue. Instead it found that plaintiff had possessed a common law copyright in the unpublished design for at least three months prior to defendants' sale. Therefore, defendants' unauthorized sale did not destroy plaintiff's right to first publication but instead constituted an infringement of the common law copyright.

The court cited case precedent from the Eastern and Southern Districts of New York to hold the corporate officer defendant personally liable whether or not he had an intent to infringe or knowledge of infringement. However, the defendant officer's actual knowledge of infringement was one reason attorney's fees were awarded to plaintiff.

305. FRANKLIN MINT CORP. v. NATIONAL WILDLIFE ART EXCHANGE, INC., 195 U.S.P.Q. 31 (E.D. Pa. March 15, 1977) (Cahn, D. J.).

Consolidation of three cases, one (National) asserting copyright infringement and the other two (Franklin and Gilbert) asking for a declaration of noninfringement. Defamation and unfair competition also were alleged, and injunctive relief and money damages were sought.

Held, judgment against National on its claim of infringement, defamation and unfair competition; judgment for Gilbert in his claim against National for defamation.

Gilbert, a wildlife artist, sold a painting of cardinals to Stewart who later incorporated National in order to publish and market wildlife prints. On the back of the check Stewart gave to Gilbert he wrote "For Cardinal painting . . . including all rights—reproduction, etc." Stewart was reimbursed for the painting by National upon its incorporation. Several years later Franklin commissioned Gilbert to paint four bird pictures, including one of cardinals, to be made into prints and sold as a set.

The major issues considered by the Court were: (1) whether National, through the actions of Stewart, was entitled to the copyright for Gilbert's first painting; (2) whether publication without notice occurred, causing National to forfeit its right to secure a copyright (3) whether Gilbert's second painting of cardinals was a copy of the first painting.

The above issues were decided as follows:

(1) National's copyright registration listing the painting as a work for hire was based on notes made at a meeting between Gilbert and Stewart and signed by them. The court found that under Florida law

(stipulated by the parties to be applicable to the notes) title to the painting could not pass on the basis of the notes, which were merely an unenforceable agreement to enter into an agreement. Furthermore, the subject matter of the notes did not include the painting at issue.

Nevertheless, title did pass when Stewart paid Gilbert because in every state except California and New York all rights to copyright pass to the purchaser of a work of art unless otherwise specified. Noting Nimmer's disapproval of this rule and his suggestion that instead the intention of the parties should govern, the court found that Gilbert, being aware of Stewart's desire to reproduce his work, should have reserved the copyright to himself in writing or should not have cashed the check.

Gilbert and Franklin charged that Stewart and National had obtained the copyright registration through fraud. The court found that the same "clear, unequivocal and convincing" proof required to establish fraud on the Patent Office was required to establish fraud on the Copyright Office and this burden had not been met.

(2) Before registering the copyright Stewart had the design of the painting embossed, white on white, on his business cards. Because of the reduction in size of the design, its bas relief quality and lack of color, the court determined that the painting had been reproduced neither in its basic nor in a derivative form and therefore that no publication had occurred. Before registration National also had allowed a picture of the painting to appear in a college ornithological publication. The C in a circle copyright notice that Gilbert had placed on the picture before sale, even though barely discernible in the journal, saved the picture from being published without notice.

(3) National relied on a 1914 case, *Gross v. Seligman*, 212 Fed. 930, for its contention that an infringement occurs when an artist sells a painting (thus transferring the copyright to the purchaser) and then uses the same model to repaint the picture "with only trivial variations of detail" and offers it for sale. Expert testimony and a courtroom painting demonstration brought out the wildlife painter's special need to return to certain source material such as sketch books, slides, and stuffed specimens. Referring to an opinion of Mr. Justice Holmes, *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239 (1903), the court concluded that "an artist is permitted to portray cardinals in their natural state as often as he wishes without fear of infringement unless he copies from a previous artistic rendition, including his own." Although Gilbert had access to his working drawings of the first painting, the court found a number of differences between the two paintings which negated any inference of tracing or freehand copying. The

absence of a large yellow butterfly in the second painting was found to negate any striking similarity.

Even though National in good faith wrote to the Audubon Society stating that Gilbert had committed plagiarism, the court entered judgment against National for defamation. But because Gilbert proved no special damages and his reputation was not found to be tarnished by the letter, no damages were awarded to the artist.

306. *HEILMAN v. BELL*, 434 F. Supp. 564 (E. D. Wisc. July 14, 1977) (Reynolds, D. J.).

Action for declaratory and injunctive relief against the Attorney General because of threatened federal criminal prosecution for alleged copyright infringement. On cross motions for summary judgment, *held*, defendants' motion granted.

The 1909 Copyright Act gave composers an interest in mechanical reproductions of their works such as records and tapes, but to avoid creating a recording industry monopoly it also provided in 17 U.S.C. § 1 (e) for a compulsory license: "any other person may make similar use of the copyrighted work upon the payment . . . of a royalty."

Four Circuit Courts (the 3rd, 5th, 9th, and 10th Circuits) have interpreted "similar use" to mean that a completely new recording of a composition may be made but that a mere duplication of an existing recording is not similar use but is an infringement. Therefore, the court in the earlier decision of this case, *Heilman v. Levi*, 391 F. Supp. 1106 (1975) held that "'tape pirates' are not entitled to avail themselves of the compulsory licensing provision"; only when a similar use has occurred does the compulsory license come into play.

The Sound Recording Act of 1971, which became effective February 15, 1972, made two changes in the copyright law: (1) the sound recording itself may be copyrighted by the producer; (2) a willful infringement for profit renders the infringer liable to criminal prosecution. An infringement in both the 1909 and the 1971 Act is defined as "the unauthorized manufacture, use, or sale of interchangeable parts [discs or tapes]." By January 1975 the Justice Department decided actively to investigate and prosecute tape piracy and announced its intention through trade publications from which plaintiffs admit they received notice.

Plaintiffs' alleged infringement consisted of copying old records, many of which were no longer on the market, and compiling them into thematic anthologies. In the earlier hearing plaintiffs had asserted that the legislative history of the Sound Recording Act showed

that members of Congress and the Justice Department believed that as long as duplicators tendered the compulsory licensing royalty they could not be prosecuted under the new criminal provisions. The court pointed out that legislative history should only be considered if the statute were ambiguous, and in this case it was not. An alternative argument from the plaintiffs was that the term "unauthorized" was unconstitutionally vague, but the court differed: "any use which is neither 'similar' nor explicitly authorized is 'unauthorized'."

In the present action the plaintiffs argued that their presentation of the compositions in an anthology created a desirable new product that did not compete with the sales of the original records. The court rejected their reasoning as not relevant to the issue which was "whether the plaintiffs in the first instance have the right to copy sound recordings fixed prior to February 15, 1972 without the authorization of the composition copyright holder." After the effective date of the Sound Recording Act, the producer of a copyrighted record could authorize duplication but in this case, since duplicating is not the similar use that would trigger the issuance of a compulsory license, the composition copyright holder must specifically authorize the duplication.

Plaintiffs contended that the court's interpretation of similar use fosters monopoly in an already oligopolistic record business. In its earlier decision *Heilman v. Levi, supra*, the court explained that duplication should not be considered similar use because the duplicator bears none of the burdens, risks and expenses of selecting the artists, studio and technicians and promoting sales. Instead, the pirate may choose only those records that are successful. The court found that no monopoly exists under a compulsory licensing system which allows an unlimited number of new renditions to be made and merely prohibits duplication. It further suggested that the remedy for the plaintiff's attack on the music publishing and recording industries as oligopolistic would be an action under the antitrust laws.

307. CONRAD MUSIC v. MODERN DISTRIBUTORS, INC., 433 F. Supp. 269 (C.D. Cal. June 20, 1977) (Hauk, D. J.).

Action for infringement of plaintiffs' copyright in nine musical compositions.

On plaintiffs' motion to strike the defendants' answer and to enter a default judgment based on the defendants' failure adequately to answer plaintiffs' interrogatories, *held*, motion granted.

The court found that the defendants' answers were "unintelligible, nonresponsive and evasive" and showed bad faith and gross indif-

ference to the plaintiffs' right to conduct pretrial discovery. As a result, defendants were ordered to pay maximum statutory in lieu damages of \$45,000 as well as \$5,000 for attorneys' fees and plaintiffs' costs. Defendants were also permanently enjoined from "directly or indirectly infringing the copyrights of plaintiffs in any manner" and were required to deliver up for destruction not only infringing sound recordings but also the means for making them.

308. **RUSSELL v. PRICE**, Docket No. CV 75-1600-JWC (C.D. Cal. September 20, 1977) (Curtis, D. J.). [Not reported]

Action for infringement of plaintiffs copyright in the play "Pygmalion" by defendants' distribution of a film produced under a license granted by the author of the play.

Upon plaintiffs' motion for a summary judgment, *held*, partial judgment on the issue of infringement granted.

Information as to whether or not the license had expired was not available to the court, but the film's copyright had been allowed to expire and the defendants argued that the film had fallen into the public domain, free of any claims made by the copyright proprietors of the film or of the play. Their defense was based on *Rohauer v. Kilian Shows, Inc.*, 55 F.2d 484 (2d Cir. 1977), in which "the film owner's right to display the film over the objection of the proprietor of the underlying copyright" was upheld.

However, the court pointed out that in *Rohauer* a copyright heir assigned movie rights to another person contrary to the author's intentions. At the time of the original assignment, the author agreed to renew her copyright and assign the movie rights for the renewal period to the same producer. Therefore the question, answered in the affirmative, was whether the author's agreement was enforceable against her heirs and successors. *Rohauer* is not in point because it turned on a discontinuity or betrayal of the author's intent, and no such discontinuity or betrayal is found in the instant case.

In the present action the issue was whether the proprietor of the underlying work had a right to assert a claim against the owner of a derivative work that has fallen into the public domain. Since only the new matter in a derivative work is entitled to copyright production, "to the extent that it partakes of the original work it cannot be used without the consent of the proprietor of the underlying copyright."

Originally the current licensee, Janus Films, Inc., had brought an unfair competition action in state court against Budget Films, Inc. which resulted in a finding that the suit should be tried instead under the federal copyright law. Thereupon the copyright proprietors gave

Janus a power of attorney to prosecute the copyright action. When the defendants questioned Janus' standing, the court also noted that "it is well settled that an exclusive licensee . . . may sue for copyright infringement so long as it joins the copyright proprietors."

Defendants' assertion of laches did not apply because "the controversy is one of long standing and the plaintiffs have aggressively sought to protect their interests, first in the state court and now in this court."

B. Decisions of Foreign Courts

1. Japan

309. K. K. FUJI TELEVISION v. K. K. SAPPORO DOLLS, Patents & Licensing 7 (December 1977): 17-18 (Tokyo District Court March 30, 1977).

Action for infringement of plaintiff's assigned copyright in an anthropomorphic drawing of a fish (Taiyaki Kake).

Held, defendant manufacturer's fish-shaped terry-cloth dolls, which looked almost exactly like the drawing, were an unauthorized transformation of the drawing.

Under Article 27 of the Japanese copyright law, the copyright proprietor has an exclusive right in the transformation of a copyrighted work. Therefore, damages, computed on the basis of 5 percent of the manufacturer's sale price of each doll, multiplied by the number of dolls sold, were awarded. Plaintiff was further awarded 5 percent interest per annum until damages are fully paid.

PART V

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

310. ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY. Copyright and educational media. A guide to fair use and permissions procedures. Washington, D.C. April 1977. 28 p.

The booklet, published by the Association for Educational Communications and Technology and the Association of Media Producers, is intended to provide answers to questions from students and staff in educational institutions concerning "fair use", library copying of audiovisual materials and off-the-air copying of broadcast materials, insofar as the new copyright law is applicable.

311. ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY. The guide to copyright: new law, new directions. Washington, D.C. Assoc. for Ed. Communications and Technology.

A script, and sound filmstrip explaining sections 107 and 108 to educators, librarians and media personnel. Excerpts from the General Revision of the Copyright Law, P.L. 94-553, and H. Rep. No. 941476 with reference to the guidelines for classroom copying in not-for-profit educational institutions, and guidelines for educational uses of music are included.

312. AUSTRALIAN BROADCASTING COMMISSION. Educational broadcasting in Australia 1932-75. Sydney, Australian Broadcasting Commission, 1975.

A report on the evolution of the Australian Broadcasting Commission and its educational programs. The booklet has many illustrations and charts.

313. BOWER, RICHARD S. and MORTON I. HAMBURG. The bright future of cable and pay television: economic, legal, regulatory

strategies. Co-sponsored by the New York Law Journal and the Amos Tuck School of Business Administration of Dartmouth College. New York, Law Journal Press, 1977. 323 p.

Since 1972, FCC Rules and Regulations on cable television have been promulgated and amended, Congressional hearings have been held, state and local governments have issued new franchises and regulations and a new copyright law has been enacted. New technologies are being developed almost daily. The national communications industry may soon become over-regulated, with extraordinary economic and legal problems. This handbook has been developed as an aid for those interested in the field.

314. COPYRIGHT AND EDUCATIONAL MEDIA. A guide to fair use and permissions procedures. Association for Education Communications and Technology/Association of Media Producers (Washington, D.C. April 1977).

Contents: Copyright law, Fair Use, Library Reproduction and Noncommercial Broadcasting, Off-the Air Copying of Television Programs, Public and Instructional TV Programs, Permission for One-Time Duplication or Transmission, Licensing Agreements, Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions.

315. COPYRIGHT CLEARANCE CENTER, INC. Handbook for libraries and other organizational users which copy from serials: procedures for using the programs of the Copyright Clearance Center, Inc. New York, Copyright Clearance, Inc. October 1977. 20 p.

Participating publishers will set their own article copying fees and in 1978 will begin coding the articles which may be copied. User-organizations may register with the Copyright Operations Office and obtain a number in order to report the number of copies made and the fees owed. The handbook provides instructions and sample forms for user organizations.

316. CRAWFORD, TAD. The Writer's Legal Guide. New York, Hawthorn Books, Inc., 1977. 271 p.

The financial success of a literary work is not necessarily guaranteed by the popularity of its author or the novelty of its

subject matter. Rather, it is often determined by how well the writer knows his legal rights and knows when to consult a lawyer. Responding to this need, Tad Crawford, an attorney and author himself, in "The Writer's Legal Guide", presents a concise and intelligible guidebook to the varied legal issues writers confront in negotiating and controlling the multitude of rights arising from their authorship.

Although "The Writer's Legal Guide" is a simplified presentation it is not a simple minded one. Obviously it can never substitute for the advice of a lawyer. However, since it is clear and well written, it can play an important role in alerting writers to the ramifications of the law affecting literary endeavors.

The topics discussed are well selected. Included are an explanation of the new copyright law revision, general rights of writers, censorship, defamation, the right of privacy, contracts, vanity presses, income taxation, estate planning and public support for writers. A model author-publisher contract and a model agency agreement suggest the pitfalls authors encounter and should avoid in negotiating their rights in a publication. Appendices listing state art agencies and lawyers' groups assisting writers, and a selected bibliography of law books and other reference works which can be consulted, add considerably to the value of the book.

Some of the topics, such as the fair use doctrine, are treated in a sketchy fashion, although Crawford does suggest on occasion other materials to read. Business considerations in choosing a publisher are well presented, however, as are the intricacies of contract negotiation.

Mr. Crawford refers to actual cases involving well known authors to provide, by way of illustration, an entertaining backdrop to examples of poor legal strategy in policing authors' rights. The fledgling writer has much to learn from these examples.

"The Writer's Legal Guide" deserves a place in the writer's library. Lawyers can well recommend it to their writer-clients as a ready reference tool providing a quick background for an intelligent approach to recognizing when an attorney's advice should be sought.

ELISA H. MARKE

317. Essential elements of a copyright clearinghouse. Proceedings of a conference, February 11-12, 1976, Washington, D. C. Spon-

sored by the Association of American Publishers and the Information Industry Association. Bethesda, Information Industry Association, 1977. 136 p.

In November 1975, the U.S. Senate Judiciary Committee recommended that a workable copyright clearance and licensing procedure be developed in view of the growing photocopying/republishing practices in the publishing and information industries. This February 1976 meeting provided a means for discussing the problems and determining the framework for a copyright clearinghouse mechanism.

318. GARDNER, RONALD. Copyright—A Review of Selected Material. Shipman Library, Adrian College, Sept. 1977.

This is a guide to Books in Print and periodical literature cited by subject and time and retrieval services.

319. GOODALE, JAMES C. Communications law, 1977. New York, Practising Law Institute, 1977. 2 v. (G4-3631/G6-3628)

A compilation of supplementary material to illustrate points discussed in a workshop or seminar on legal aspects of communication in various fields of mass media.

320. JOHNSTON, DONALD. *Copyright Handbook*, New York & London, Bowker, 1978. 275 p.

Includes discussions of the following areas covered by the new law: copyright registration, subject matter, ownership, infringement remedies, exclusive rights, copyright duration, international considerations, fair use, library reproductions, compulsory license, performance and display rights.

321. KING RESEARCH, INC. Library photocopying in the United States: with implications for the development of a copyright royalty payment mechanism. A report on studies jointly funded by the National Commission on Libraries and Information Science, the National Science Foundation, and the National Commission on New Technological Uses of Copyrighted Works. Washington, GPO, Oct. 1977. 251 p.

This report, funded jointly by the National Commission on Libraries and Information Science and the National Commission on New Technological Uses of Copyright Works, presents

an evaluation of information and data collected from samplings of public, academic, special and federal libraries to determine the annual volume of photocopying undertaken for interlibrary loans, local users and intrasystem loans. It also includes information on the effect various royalty collecting systems might have on the libraries.

322. The publication of poetry and fiction; a conference, held at the Library of Congress, Oct. 20, and 21, 1975. Washington, Library of Congress, 1977.

A report of the panel discussions on trade publication, publication by university and small presses, publication in magazines, and the survival of authors, which occurred during a conference held at the Library of Congress in October 1975.

323. SHEMEL, SIDNEY and M. WILLIAM KRASILOVSKY. This business of music. Edited by Paul Ackerman. Revised and enlarged Copyright Act Edition. New York, Billboard Publication, Inc., 1977. 575 p.

This handbook on the music industry in the United States contains in its appendices excerpts from the new 1976 copyright act, the 1909 copyright act, the fair use guidelines for educators, copyright office regulations, texts of the U.C.C. and Berne Conventions, and writer-publisher contracts as well as various licensing agreements.

324. SILFEN, MARTIN E. Counseling clients in the Entertainment industry. New York, Practising Law Institute, 1977. 624 p. (G4-3614)

A compilation of supplementary material for use in a seminar or workshop on the rights of the performing artist, model contracts, and possible remedies or litigation available to protect the performer's or artist's rights.

325. Three ways to play it safe when making or requesting photocopies of copyrighted works. New York, Copyright Clearance Center, 1978. 5 p.

A new brochure explaining the purpose of the Copyright Clearance Center and how it will be working to collect permission-fees.

2. Foreign Publications

1. In French and English

326. PESSIS-PASTERNAK, GUITTA. Dictionnaire de l'audio-visuel, français. Cinéma, photographie, presse, radio, télévision, télé distribution, video. Paris, Flammarion, 1976.

An English-French, French-English dictionary of equivalent terms used in motion pictures, photography, radio, television and news industries.

2. In German

327. PEDRAZZINI, MARIO M. Über den Leistungsschutz der Interpreten, der Ton- und Tonbildtragerhersteller und der Sendeunternehmen. Basel. Helbing & Lichtenhahn Verlag, 1977. (Schweizerischer Juristenverein, Referate und Mitteilungen, 111. jahrgang 1977). 113 p.

A general analysis of the rights of the performer, the producers of sound recordings, and the broadcaster who transmits the performance. Both the present Swiss law and international conventions are examined.

3. In Portuguese

328. Conselho Nacional de Direito Autoral, Legislação E. Normas, Departamento de Documentação e Divulgação, Brasília, DF, 1976 (Ney Braga, Ministro da Educação e Cultura), pp. 16-66.

Regulations and definitions concerning copyright, the protection of intellectual works, moral rights, patrimonial rights and duration, limitation to copyrights, expiration, use of intellectual work, phonograms, motion pictures, rights of performers, radio broadcasting, sports rights, National Copyright Council, penalties for violation of copyright, and internal regulations of the National Copyright Council.

4. In Russian

329. BARNASHOV, VLADIMIR. VAAP legal advice; how is remuneration to translators effected in the Soviet Union. Interview with senior consultant with the VAAP legal department. *VAAP, books*

and art in the USSR, no. 3 (14), 1977, p. 25.

An explanation of the system used in determining the rate of payment for translations of works into Russian. The rate depends on the type of work being translated and the size of the translation, not the size of the basic or original work.

330. VORONKOVA, MARGARITA. VAAP legal advice: What are the procedures for obtaining rights to perform literary and musical works in public according to Soviet legislature? *VAAP, Information Bulletin of the USSR Copyright Agency*, 2(9), 1976, p. 29.

The right to perform an unpublished literary or musical work in public must be contracted for with the author or his heirs. The right to perform a published literary or musical work may be obtained without the permission of the author provided he is given credit for his work, and the quality of the work remains unchanged. Remuneration is determined by the Council of Ministers for each of the republics, and differs also for the various classes of the works performed.

B. LAW REVIEW ARTICLES

1. United States

331. CIAGLO, CATHLEEN M. Copyright protection for live sports telecasts. *Baylor Law Review*, vol. 29, no. 1 (Winter 1977), pp. 101-117.

This prize-winning paper in the 1976 Nathan Burkan Memorial Competition at Baylor School of Law concludes that live sports telecasts are more susceptible to piracy than are other types of live telecasts because of the public interest, and compulsory licensing will not give them meaningful protection. State law has been applied to infringement cases, and though such laws are usually consistent with federal policy, there is no guarantee that they will continue to be so. A uniform federal standard must be applied to live sports telecasts in order to achieve a consistency in protecting their rights.

332. CARDOZO, MICHAEL H. To copy or not to copy for teaching and scholarship: what shall I tell my client? *Journal of College and University Law*, vol. 4, no. 2 (Winter 1976-77), pp. 59-81.

The article was intended to provide educators, scholars.

and students with a simple, clear description of what they would be able to do under the provisions of the new Copyright Act of 1976. However, the effort bogged down in the uncertainty of the language of the act.

333. DUFFY, ROBERT E. Royalties for visual artists. *Journal of the Beverly Hills Bar Association*, vol. 11, no. 1 (Jan.-Feb. 1977), pp. 27-36.

A discussion of the pros and cons of *droit de suite* legislation for artists, similar to the recent law enacted in California.

334. EATON, JO WALTON. Copyright—originality—confusing the standards for granting copyrights and patents. *West Virginia Law Review*, vol. 79, no. 3 (Spring, 1977), pp. 410-422.

In an article submitted for the Nathan Burkan Memorial Competition, the standards of originality as outlined in the *Batlin* and the *Vogue Ring Creations* cases are analyzed. The conclusion is reached that the Second Circuit departed from the standards which customarily have been applied in assessing originality, and that the impact caused by confusing copyright tests with patent tests may have far-reaching impact.

335. FISHMAN, JAMES J. Art law: Artist's moral right in art works. *New York Law Journal*, vol. 178, no. 118 (Dec. 21, 1977), p. 1, col. 1; p. 2, col. 1-3.

A comment on what has happened to David Smith's sculptures since his death, and the advocacy of a moral right for artists in order to prevent alterations to their works after the first sale. Reference is also made to the California Art and Public Buildings Act which has recently been enacted.

336. JONES, MARVIN C. The Sears-Compco Doctrine: conception, birth, and early years. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 197-242.

The overlap between copyright and unfair competition is analyzed by this prize-winning paper. To understand the relationship between these two areas of legal protection, the practicing attorney who must decide how he is going to litigate his case should note that the property concept has been constantly changing. As to the future of unfair competition, a reassertion of the *Sears-Compco* doctrine will assure the demise of misap-

propriation in the field of literary works, except to "prevent customers from being misled as to the source."

337. KIRIOS, ALAN G. Territoriality and international copyright infringement actions. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 53-79.

The paper was awarded the second national prize in the ASCAP Copyright Symposium of 1972. It investigates the possibility of obtaining in a single national court relief against multiple acts of infringement occurring in a plurality of states. Two theories by which an American author who has secured copyright protection in the United States and in foreign countries by virtue of the UCC might seek protection in the United States courts are discussed.

338. LOEBER, DIETRICH A. Commentary. Copyright law and publishing in the People's Republic of China. *UCLA Law Review*, vol. 24, no. 4 (Apr. 1977), pp. 907-913.

While literature and art receive limited copyright protection because of the socialist principle requiring exploitation for the proletariat, foreign works used in China may be granted rights on an ad hoc basis if Chinese law or administrative practice permits.

339. Moral rights for artists under the Lanham Act; *Gilliam v. American Broadcasting Cos. William and Mary Law Review*, vol. 18, no. 3 (Spring 1977), pp. 595-611.

A case note on the Monty Python litigation which concludes that while the court recognized a distinction between an artist's property rights in his creation and his moral rights in the same work, the application of the Lanham Act failed to provide an adequate American substitute for *droit moral*, since it deals with misdescription or mislabeling as to the source, and not with the integrity of the copyrighted work. A uniform scheme of protection which will protect the integrity of a creative endeavor is still a necessity.

340. NOLAN-HALEY, JACQUELINE. Obscenity, copyright and community standards. *New York Law Journal*, vol. 178, no. 120 (Dec. 23, 1977), p. 1, cols. 2-4; p. 2, cols. 3-4.

In a comment on the recent decision in *Argos Films v. Barry*

International Properties, the question of whether obscenity should be a defense against copyright infringement is discussed.

341. OBERMAN, MICHAEL S. Copyright protection for computer-produced directories. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 1-52.

This article was awarded the first national prize in the ASCAP Copyright Law Symposium for 1972. After analyzing the product-value and labor-value tests of originality in protecting the compilation of directories, it concludes that the introduction of computer technology in the production of directories requires a reevaluation of the application of copyright protection to the selection of facts stored in computer data banks, and the protection of their visual arrangement. Private monopolies granted the first publisher should not be allowed to control the flow of information.

342. PARRIS, DON. The copyright revision act of 1976: an overview. *The Los Angeles Bar Journal*, vol. 52, no. 11 (May 1977), pp. 564-578.

Claiming that the act was born of exhaustion following more than twenty years of serious congressional consideration, the author briefly states the legislative history, and then touches upon federal preemption, the subject matter and scope of copyright, the compulsory licenses, ownership and duration, statutory formalities, the transfer of copyright, termination and recapture of copyrights, and works in the public domain.

343. PITTS, DON. Comment, education and the copyright law: still an open issue. *Fordham Law Review*, vol. 46, no. 1 (October 1977), pp. 91-136.

The article examines the new copyright law as it relates to educators, directing attention to the concept of fair use. The author fears that legislative guidelines which seek to explain fair use may damage the flexibility of the concept. He therefore proposes substituting specific legal boundaries for the present guidelines while making it clear that the doctrine of fair use is always available to uses outside the given boundaries.

344. PRAGER, EILEEN CAROLL. Note, public figures, private figures and public interest. *Stanford Law Review*, vol. 30, no. 1 (November 1977), pp. 157-189.

Compares recovery in libel actions between public figures and private figures. Discusses *New York Times Co. v. Sullivan*; *Gertz v. Welsh, Inc.*; *Time, Inc. v. Firestone*. The Note proposes a proper accommodation between First Amendment and reputational interest with gradations in the weight assigned to First Amendment interests, so as to protect both interests. Analyzes *Firestone* case in depth.

345. RENAUD, RAOUL ANTHONY. Pretrial remedies in infringement actions: the copyright holder's impound of flesh? *Santa Clara Law Review*, vol. 17, no. 4 (Fall, 1977), pp. 885-918.

The paper was awarded the first prize in the 1977 Nathan Burkan Memorial Competition at Santa Clara School of Law. The discussion centers on U.S.C., Title 17, sec. 503 which provides the copyright holder with the right to an *ex parte* hearing before bringing an infringement action, by which he can institute an impoundment procedure upon posting a bond of at least twice the value of the impounded articles. The provision fails to determine the amount of discretion the trial court has in granting impound, and the language is vague in defining the scope of seizure permissible under the statute.

346. RUDELL, MICHAEL I. Registration under the new copyright act. *New York Law Journal*, vol. 179, no. 5 (Jan. 9, 1978), pp. 1, 15.

Highlights the changes in registration requirements and application forms in effect under the new copyright law.

347. SHERMAN, JEFFREY G. Musical copyright infringement: the requirement of substantial similarity. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 81-145.

This paper, having been awarded the third national prize in the ASCAP Copyright Symposium for 1972, analyzes the copyright infringement cases which have dealt with musical compositions, and concludes that liability for infringement should be limited to substantial similarity, either quantitatively or qualitatively, of the infringed composition and that the sound should be so similar that the lay audience would recognize it as being similar.

348. SMITH, JERRY E. Government documents: their copyright and

ownership. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 147-196.

A prize-winning paper in the ASCAP Copyright Law Symposium of 1972, it points out that the law of copyright as developed in the United States fails to recognize a dual nature of the term "public domain", and thus legal rights regarding the presidential papers and other government documents remain unresolved. Included also is a study of works, prepared by government employees and officials, in which an individual or organization later seeks protection under the Copyright Act.

349. TOWE, TERI NOEL. Record piracy. *Copyright Law Symposium*, no. 22 (New York, Columbia University Press, 1977), pp. 243-277.

The article suggests that the Sound Recording Act be amended to require the name and address of the manufacturer to be printed on the album cover or jacket. It also suggests that a licensing statute similar to the German law be enacted so as to require the licensing of all recording equipment, and that an annual license fee be charged, upon payment of which the owner of the recording equipment would be permitted to record from broadcasts and from records. The fees thus collected would be paid to performing rights societies for distribution to copyright proprietors.

350. TROXELL, GREGORY A. Copyright reform and the author's right to "vend"; the case of the unpaid manufacturer. *Indiana Law Review*, vol. 10, no. 2 (Jan. 1977), pp. 507-531.

When a creator fails to pay the manufacturer for the reproduction of his copyrighted product, the manufacturer's right to resell is in conflict with the copyright owner's exclusive right to "vend". A court thus must either subordinate the state law remedy to the federally granted copyright, or develop a compromise. The article looks at past decisions and determines whether Public Law 94-533 will affect this right of resale.

351. WEAVER, C. STEPHEN. Copyright—the doctrine of indivisibility: the final chapter. *Memphis State University Law Review*, vol. 7, no. 4 (Summer 1977), pp. 637-654.

After surveying the history of case law on the doctrine of

indivisibility of copyright, and the legal effect of such a doctrine on the ability to sue or secure a copyright, the author notes the changes incorporated in the general revision of copyright law, enacted in 1976, and states that by abrogating the indivisibility doctrine, American law has been brought in line with commercial practice as well as international.

2. Foreign

1. In English

352. ABDALLAH, EZZEDINE. Basic principles of the Tunis model law on copyright for developing countries. *Copyright*, vol. 13, no. 11 (Nov. 1977), pp. 306-314.

An appraisal of the Civil Law and Anglo-American legal concepts of copyright protection embodied in the Tunis Model Law on Copyright for Developing Countries. The author is an Egyptian law professor.

353. BENCHENEB, ALI. Letter from Algeria; The position of the author in relation to Algerian taxation of non-commercial-profits. *Copyright*, vol. 13, no. 12 (Dec. 1977), pp. 342-345.

An examination of the tax status of authors who have a permanent professional establishment and those who have none under the Algerian Code of Direct Taxation. Includes a study of the principle of taxation at source and its implications, and a study of the derogative character of the taxation of authors for non-commercial profits.

354. ESEZOBOR, DR. J.E. General study: implications of the copyright law for authors, artists and other originators of creative work with particular reference to Nigeria. *Unesco Copyright Bulletin*, vol. 10, no. 4 (1976) pp. 40-51.

Examines the scope of copyright protection in Nigeria including the determination of authorship, the problem of transferring the author's rights, the nature of the author's rights under Copyright Decree 1970, and the place of 'moral right' under the new law.

355. KALTENECKER, DR. H. Direct broadcasting by satellite. An overview of the work of the United Nations. *EBU Review*, vol. 28, pp. 90-96.

Copyright and neighbouring rights are protected by appropriate agreements between the States, with special consideration given to developing countries to accelerate their national development by use of direct television broadcasting. Outer Space Committee's legal Sub-Committee in March and April 1977 will deal with problems of spill-over and illegal broadcasting.

356. KEYES, ANDREW A. Letter from Canada. *Copyright*, vol. 13, no. 10 (Oct. 1977), pp. 281-286.

The letter includes a summary of the report by Keyes and Brunet on proposals for a revision of the Canadian copyright law, and reports briefly on recent court decisions involving CATV and record piracy.

357. KOUTCHOUMOW, J. A. Publishers and reprography. *Copyright*, vol. 13, no. 11 (Nov. 1977), pp. 315-317.

A defense of publishers in answer to the criticism offered by Xavier Desjeux in his article "Reprography and Scientific Publications: The Creation of a Form or the Retailing of Ideas?" which appeared in the Sept. 1977 issue of *Copyright*.

358. NORDEMANN, WILHELM. The "droit de suite" in Article 14 of the Berne Convention and in the Copyright Law of the Federal Republic of Germany. *Copyright*, vol. 13, no. 12 (Dec. 1977), pp. 337-342.

The article examines the legal consequences of the conflict of the Berne Convention and the Universal Copyright Convention with the German Copyright Act. The author concludes that since the German laws ratifying the Paris texts of the Conventions made no reservation, with respect to national law, the restrictive droit de suite provisions of the German Copyright Act were superseded by the more extensive protection of the Berne Convention and the Universal Copyright Convention.

359. PLAISANT, ROBERT. The employee-author and literary and artistic property. *Copyright*, vol. 13, no. 10 (Oct. 1977), pp. 274-280.

A comparative study of the case law in the United Kingdom, the United States and France relative to the rights of the employee-author, enforcement of the moral rights, limitation of transfer and payment of royalties beyond contractual obligations for exploitation of the created work.

360. Second committee of governmental experts on the double taxation of copyright royalties remitted from one country to another; Paris, 8, 16, Dec. 1976. *Unesco Copyright Bulletin*, vol. 10, no. 4 (1976), pp. 15-39.

Report reaffirms the necessity of eliminating double taxation of copyright royalties remitted from one country to another so as to avoid prejudicing the interests of authors whose works contribute to development, particularly in developing countries.

2. In English, French and Spanish

361. BRUNET, CLAUDE. Copyright in Canada: proposals for a revision of the law. *Revue Internationale du Droit d'Auteur*, no. 95 (Jan. 1978), pp. 62-93.

In March 1977, the Consumers and Corporate Affairs of Canada released a study on proposals for a revision of the copyright laws. This report is by one of the co-authors of the study. Its purpose was to delineate copyright problems in Canada, to make some proposals which would serve as a basis for comment prior to drafting new legislation. This summary is in French, English and Spanish.

362. CHAVES, ANTONIO. News from Brazil. *Revue Internationale du Droit d'Auteur*, no. 93 (July 1977), pp. 42-83.

A legislative history of the Copyright Law No. 5988 of Dec. 14, 1973, and the creation & function of the National Copyright Council, the management societies and the Central Bureau for the Collection and Distribution of Royalties, is followed by a report on the copyright law seminars that have recently been held in Brazil. This summary of recent developments in Brazil is reproduced in English, Spanish and French.

363. CORBET, JEAN. Panorama of Belgian case law since 1970. *Revue Internationale du Droit d'Auteur*, no. 92 (Apr. 1977), pp. 74-129.

A detailed resume of recent Belgium court decisions and one European Economic Community adjudication, which involved different aspects of copyright law. A 1970 decision analyzed the rights of a foreign author whose work was first published in a country not a member of the Berne Copyright Convention. Another case involved the question of whether a

corporation was an author. Another action concerned cable television, while two other decisions required an interpretation of the EEC Treaty and Commission's exercise of power over the rights of authors.

364. CRAMER, EDWARD M. Some observations on the copyright law of 1976; not everything is beautiful. *Revue Internationale du Droit d'Auteur*, no. 94 (Oct. 1977), p. 5097.

While revision of the U.S. copyright law was long overdue, some areas of protection were touched upon too lightly and others were not treated at all. The expansion of the compulsory license is deplored, and the failure of the Congress to resolve the *Aiken* case situation satisfactorily is commented on. A prognosis of the economic impact on creators and media suggests that the new law will not result in substantial benefits. It is hoped that amendments and corrections to the law will help to bring the interests in balance and still remain administratively manageable. French and Spanish translations are reproduced.

365. DUFOUR, BERNARD. Electro-acoustic music, copyright and neighboring rights. *Revue Internationale du Droit d'Auteur*, no. 93 (July 1977), pp. 84-137; no. 95 (Jan. 1978), pp. 2-61.

The creation of computerized or synthesized music, the lack of score, and the methods of manufacture as each plays a controlling part of the composition is discussed with a view of the rights to be protected. Who is the composer, the performer or the owner of the machines? The application of the Rome Convention to such phonorecords is analyzed, as to beneficiary and protection. The holding in the *Furtwaengler* case, that a performer is entitled to prohibit any use of his performance other than the one he had authorized, is applied to synthesized performances, and the recording thereof, with the conclusion that a new form of secondary use, not covered by the Rome Convention, has been evolved. This two part article is reproduced in English, French and Spanish.

366. FABIANI, MARIO. News of Italy. *Revue Internationale du Droit d'Auteur*, no. 92 (Apr. 1977), pp. 54-73.

Italy has recently ratified the 1971 revisions of the Berne Copyright Convention and the Universal Copyright Convention. It has also adhered to the Geneva Convention of 1971 on

Unauthorized Reproductions of Phonograms. and the 1960 Rome Neighboring Rights Convention. Implementing legislation has been enacted. Recent court decisions in Italy involved the constitutionality of the penalty provisions of the Copyright Law, and the rights of the director contra the rights of the producer of motion pictures. In a recent symposium one of the more important issues involved discussion on the question of the author's right to control the use and reproduction of copies versus the public interest. The article is printed in English, Spanish and French translation.

367. KORMAN, BERNARD. The United States Copyright Act of 1976. *Revue Internationale du Droit d'Auteur*, no. 94 (Oct. 1977), pp. 14-49.

A brief comment on the lengthy revision efforts in the United States followed by a review of the important changes in the new U.S. copyright law. The article concludes with the statement: "The new law is complex and raises many questions. It is, obviously, the product of many compromises. On balance, it is a step forward for creators and copyright proprietors." Translations of the article in French and Spanish are printed in parallel columns.

368. LJUNGMAN, SEVE. News from Sweden. *Revue Internationale du Droit d'Auteur*, no. 95 (Jan. 1978), pp. 94-125.

A summary of legislative activity in the field of copyright, and litigation in Sweden and the neighboring Scandinavian countries. The cases have dealt with questions of droit moral, fair use, neighboring rights, protection of book titles, and importation of records. The report appears in English, Spanish and French.

369. REIMER, DIETRICH. Remarks concerning comparative law on the freedom of copyright contracts. *Revue Internationale du Droit d'Auteur*, no. 92 (April 1977), pp. 2-53.

An analysis of the legislation and customs in countries representing the German, Latin, Anglo-Saxon, Nordic and Socialist systems of law which dealt with or affect contracts by which authors and creators transfer rights or promote the utilization of their works. The report was originally presented in German at a symposium in Berlin in October 1975, and ap-

pears here in English, Spanish and French translation.

370. ULMER, EUGEN. Protection of authors in relation to the transmission via satellite of broadcast programmes. *Revue Internationale du Droit d'Auteur*, no. 93 (July 1977), pp. 4-41.

A discussion reproduced in English, French and Spanish of the problems in applying copyright protection under national law and under the international copyright conventions to programs used in point-to-point satellite and direct-broadcasting satellites.

3. In German

371. BEIL, HANS. Das Urheberrecht als letzte Hilfe bei nicht rechtsbeständigen Geschmacksmusterregistrierungen. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 1-8.

Where designs have failed to meet the standard required for registration, this article argues that copyright protection, as a last resort, should not be granted.

372. DEUTSCH, ERWIN. Die Ershöpfung des Verbreitungsrechts im internationalen Verkehr mit urheberrechtlich geschützten Werken. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 9-24.

A study of the effect of the European Economic Community treaty on the right of distribution of copyrighted works as described by article 17 of the German Copyright law.

373. GÖTZ VON OLENHUSEN, ALBRECHT and ELISABETH MARTENS. Immaterialle Wirtschaftsgüter im Steuerrecht unter Berücksichtigung des Urheber- und Verlagsrechts. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 25-46.

A discussion of the classifications available for treatment of authors' and publishers' rights for tax purposes. The distinction between tangible and intangible assets, insofar as modern technology is concerned, becomes increasingly obfuscated.

374. LÖGDBERG, AKE. Zu den Voraussetzungen des Urheberrechtsschutzes nach schwedischem Recht, insbesondere zur Gestaltungshöhe. *Gewerblicher Rechtsschutz und Urheberrecht*, Int. Teil, no. 7 (July 1977), pp. 255-260.

An overview of copyright protection in Sweden, particularly with regard to the protection granted artists, performers, photographers and translators.

375. ROCHLITZ, BURKHARD. Der Erlass und die Vollstreckung einstweiliger Verfügungen in Wettbewerbs-, Presse- und Urheberrechtssachen an den Hamburgischen Gerichten. *Osterreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht*, vol. 25, no. 5 (Sept.-Oct. 1976), pp. 121-122.

A brief comment on recent court decisions in Hamburg which dealt with unfair competition and copyright. One of the decisions involved an interpretation of section 85 of the Copyright Law of 1965.

376. ROEBER, GEORG. Überlegungen für ein Urhebervertragsgesetz. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 105-126.

Since the provisions in the German Copyright Law are not all-inclusive with regard to copyright contracts, the author suggests that commissions be established to explore case law and to perform academic research preparatory to drafting guidelines for a reformation of the German Copyright Contract Law.

377. SCHONHERR, FRITZ. Gedanken zur Regelung des Rechts der Verwertungsgesellschaften in Österreich. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 143-150.

A critical comment concerning the proposed Austrian Performing Right Society bill published in January 1976. The bill fails to include methods of arbitration or appeal, and the duty to publish collective agreements in the *Amtsblatt zur Wiener Zeitung* is considered to be too far-reaching.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

378. AAP & authors clash over copy fee scheme. *Library Journal*, vol. 102, no. 10 (May 15, 1977).

CONTU and AAP proposed scheme for Copy Payment Center to handle fees for the photocopying, in excess of fair use, of journal articles. Assn. of American Publishers' Counsel Charles Lieb denied that publishers would charge what the market will bear. Flat per copy or uniform price for all articles was rejected. Question if author would have to agree to photocopying fees in order to get published.

379. AGAC basic pact revised in light of new copyright act. *Variety*, vol. 289, no. 7 (Dec. 21, 1977), p. 61.

The American Guild of Authors and Composers has revised its popular songwriter's contract in order to conform with the new copyright law. Duration of the contract may be negotiated, but in no event is it to be for more than 40 years from the date of its execution or 35 years from the release of the commercial sound recording, whichever is shorter. Royalties will be based on a percentage of the wholesale selling price of the composition. Generally a commercial sound recording must be released within one year of the date of the contract, and no derivative work may be used after expiration of the contract.

380. ADAMS, STANLEY. ASCAP moving into 1978 with challenge of new copyright act. *Variety*, vol. 289, no. 9 (Jan. 4, 1978), p. 142.

Since there are many parts of the new copyright law that call for the highest interpretive skill and analysis, there is a great deal of difficult work ahead for both the Copyright Royalty Tribunal and the entire music industry. ASCAP has just completed a major program of relicensing 20,000 operators of taverns, lounges and nightclubs, and in 1978, they expect to be working to insure fair compensation from cable, public broadcasters and a whole new range of licensees who are not clearly subject to copyright responsibilities.

381. ADAMSON, DALE. How to get to your song published . . . There's a standard way to go about it, but lots of people have tried other routes—and some of them worked. *Houston Chronicle* (Aug. 6, 1977), pp. B1-B3.

A commentary on the various methods people have used to get their songs heard, sung and published.

382. ARIEFF, IRWIN B. Broadcasters attack performers right; RIAA

supports govt. study's conclusions. *Record World*, vol. 35, no. 1588 (Dec. 17, 1977), pp. 3, 89.

The broadcast industry is mounting a lobby against possible performers' royalties, while the right has the support of the recording industry. Focal point of the controversy is the economic impact study prepared by Stephen Werner for the Copyright Office.

383. ARIEFF, IRWIN B. Home taping will be tribunal's first battle. *Record World*, vol. 15, no. 1588 (Dec. 17, 1977), p. 18.

The late Sen. McClellan proposed that the Copyright Royalty Tribunal undertake a study of the problem created by the home-taping of audio-visual material. In a Nov. 23 letter, the Senator said "complex issues arising from the rapid expansion of taping machines utilized copyright materials" and ultimately the courts will seek to ascertain legislative intent, but as with the cable television problem with which we struggled for so long, it is clear that judicial decision may not provide the just and practical solution. Ernest Meyers has suggested that Congress impose a license fee on taping machines at time of purchase or tax blank tapes.

384. ARIEFF, IRWIN B. RIAA rebuts broadcasters' charges on performance royalty proposal. *Record World*, vol. 35, no. 1589 (Dec. 24, 1977), p. 4.

The Recording Industry Association of America filed a comment with the Copyright Office in which it takes strong issue with the broadcasters' criticism of the economic impact study prepared under contract for the Copyright Office on the question of whether to enact a performer's royalty right. RIAA claimed that the issue was not whether creativity would be encouraged but rather whether it would be "fair compensation for the exploitation of another's creative work."

385. ASCAP licenses for TV music ruled to violate Sherman Act. *New York Law Journal*, vol. 178, no. 28 (Aug. 10, 1977), pp. 1, 20.

The U.S. Court of Appeals for the Second Circuit ruled that price fixing in violation of the Sherman Antitrust Act could not be saved by a 'market necessity' defense. In *CBS v. ASCAP*, Aug. 8, the court reversed the dismissal of the suit by a

district judge and gave the judge the option of finding a remedy that would prohibit the licensing in "all circumstances." In the suit CBS had challenged the licenses issued by ASCAP and BMI for the use of music on television programs.

386. BAIRD, PAT. AGAC sends out revised writers contract. *Record World*, vol. 35, no. 1589 (Dec. 24, 1977), pp. 3, 20.

The American Guild of Authors and Composers sent out sample copies of their revised Popular Songwriters Contract to approximately 400 publishers. The contract has been revised for the first time since 1947 and was intended to reflect the changes in the copyright law which went into effect on January 1, 1978.

387. BARRETT, CHARLES A. Ad agencies reported easing spot tune copyright demands. *Hollywood Reporter*, vol. 246, no. 29 (May 16, 1977), p. 3.

The Society of Advertising Music Producers, Arrangers and Composers, concerned with finding a "fair" solution in maintaining ASCAP performances, is talking with ad agencies about setting up pacts that let clients keep the full range of commercial use while the composer retains the right to earn credits via ASCAP.

388. BARRETT, CHARLES A. AGAC meeting helps educate on new copyright bill. *Hollywood Reporter*, vol. 259, no. 2 (Nov. 10, 1977), p. 13.

In reporting on a west coast meeting of the American Guild of Authors and Composers wherein Alvin Deutsch, counsel for the organization, explained the new copyright law, mention was made of a publisher's letter in which he sought to persuade a member of the organization to cancel his notice of termination concerning the copyright in his musical composition.

389. BARRETT, CHARLES A. Arranger royalties sought by ASMA president Manson. *Daily Variety*, vol. 247, no. 36 (Aug. 5, 1977), p. 3.

The president of the American Society of Music Arrangers, Eddy Lawrence Manson, calls upon the Register of Copyrights to give arrangers their share of performance, mechanical and print royalties. Manson points out that arrangers are the forgotten men of the music industry. He points out examples of ar-

rangers receiving from \$5-\$200 dollars for their efforts while songs can soar to seven figures in monetary terms. He also cites other countries which pay arrangers from one-sixth to 35% percent of the royalties, while in Russia arrangers receive performing rights and are recognized as composers.

390. BARRETT, CHARLES A. Musicians group files suit seeking \$5 mil in residuals. *Hollywood Reporter*, vol. 248, no. 42 (Oct. 27, 1977), pp. 1, 17.

The residual committee, an ad hoc group representing a number of Hollywood studio musicians, has filed suit against the major networks, TV variety program producers and the American Federation of Musicians for unpaid residuals derived from re-use of programs having second showings in Canada and the United States. They are asking for lists of kinescopes and videotapes in order to help them collect the unpaid royalties.

391. BARRETT, CHARLES A. Record firm seen benefiting from revised copyright act. *Hollywood Reporter*, vol. 249, no. 24 (Dec. 13, 1977), pp. 1, 40.

A comment on an economic study, not yet released to the public, which deals with the possible effect a performance royalty amendment to the copyright act might have on the recording industry, broadcasters and performers. The study finds that while sales of recordings are up, fewer small companies are getting into the business, and the average musician and singer is earning \$7000 a year or less.

392. BARRETT, CHARLES A. Record industry setting sights on home copy issue. *Hollywood Reporter*, vol. 249, no. 28 (Dec. 19, 1977), pp. 1, 29.

After a hard campaign on the Performance Rights Amendment in 1977, the next objective for the Record Industry Association of America will be to determine how to deal with the growing problem of home copying of phonorecords, and radio and television programs containing copyrighted material.

393. Battle royal over artists' royalties predicted by NAB. *Variety*, vol. 298, no. 4 (Nov. 30, 1977), p. 1.

The National Association of Broadcasters is predicting

another legislative battle over performers' royalties. The organization was commenting on a report to be filed with Congress by the Copyright Office in which it is expected to recommend adoption of legislation omitted from the copyright revision bill last year. The organization is also opposed to proposed reporting reforms being recommended by the FCC.

394. B'cast industry spurns invite to help revise communications act. *Daily Variety*, vol. 178, no. 7 (Dec. 14, 1977), p. 30.

House Communications Subcommittee chairman, Lionel Van Deerlin, invited the broadcasters to submit a list of proposals the industry could live with in revising the Communications Act. The invitation was declined on grounds that the act did not need revision. Van Deerlin's counterpart in the Senate, Sen. Hollings, is also unconvinced that a rewrite job is sound.

395. BISTLINE, SUSAN. The snarls are still there. *Media & Methods*, vol. 14, no. 2 (October 1977), pp. 36-68.

The tangled mess of off-air taping was not resolved by Congress when it passed the General Revision of the Copyright Law in 1976. A recent meeting of concerned parties outlined only the most preliminary steps toward a solution. Indications are that resolution of the problem will take a long time.

396. Broadcasters seek new procedures for copyrighting. *Hollywood Reporter*, vol. 249, no. 26 (Dec. 15, 1977), p. 3.

The National Association of Broadcasters has asked the Copyright Office to consider monthly deposit of a limited number of sample programs for daily programs, to consider registration of a regularly scheduled program as a single work or to consider programs as being published only when they have been authorized to be taped off-the-air for educational purposes.

397. Broadcasters tune out copyright office study of performer royalties. *Variety*, vol. 289, no. 5 (Dec. 7, 1977), pp. 1, 81.

The National Association of Broadcasters has taken a dim view of the economic study submitted to the Copyright Office which recommends a royalty for performers based on the number of sound recordings. The organizations claims that the

conclusions reached are unsupported. They also claim that the Copyright Office should have allowed comments on methodology before requesting the study.

398. BRUNS, F. R. Stamps and coins. *The Washington Post* (Sunday, November 27, 1977), p. G-13.

U.S. Postal Service will copyright all designs for its postage stamps, postal stationery items, souvenir cards, souvenir sheets and other philatelic works. Notice of copyright will be printed on the stamp panes, on inside covers of stamp booklets and labels. Regulations are being prepared for permission to reproduce designs for newspapers.

399. Cable argues against tough requirements for copyrights. It wants minimal reporting rules; MPPA, ASCAP and others want more detailed information. *Broadcasting*, vol. 92, no. 16 (Apr. 18, 1977), pp. 61-62.

A hearing of the Copyright Office on signal carriage filing requirements to determine how to set up semi-annual reports that will determine royalties to be forwarded to copyright holders by the copyright tribunal sets forth the arguments for strict requirements by the copyright interests while the cable industry sought simplicity in regulation and reporting procedures.

400. CARLSON, GERALD L. and D. H. MICHAEL BOWEN. Copying difficulties. *Chemical and Engineering News*, vol. 55, no. 29 (July 18, 1977), pp. 2, 28.

Two letters to the editor relative to the reproduction of articles in scientific journals, Dr. Carlson objects to the proposed Copyright Clearinghouse, and suggests that the authors be permitted to copyright their articles before publication. Michael Bowen states the publishers' point of view.

401. CBS-TV wins round in suit for per-use ASCAP licenses. *Variety*, vol. 288, no. 2 (Aug. 17, 1977), pp. 45-49.

A three-judge court of appeals decision found that ASCAP's blanket licensing procedure does involve price-fixing because it reduces price competition among members and provides a disinclination to compete.

402. CBS wins right for networks to get per-use music license. *Broadcast*, vol. 93, no. 7 (Aug. 5, 1977), pp. 29, 30.

CBS in a suit against ASCAP and BMI has won a reversal by the Second Circuit Court of Appeals in New York to bargain with the two organizations for a per-use license. The court ruled that ASCAP and BMI were using a form of price-fixing by requiring the network to pay a flat fee for a blanket license regardless of how much of the music they used. CBS's suit claimed that they should be required to pay only for that music that they actually use.

403. CHARLTON, LINDA. U.S. officials' job-related papers should belong to public, panel says. *New York Times*, vol. 126, no. 43560 (city ed. April 29, 1977), p. A 19.

All job-related papers of the President, Congress and federal judiciary become public property. With Presidential papers it is recommended that the President transfer his public papers to the national archivist at the conclusion of his term and that there be restrictions on the use of Presidential public papers for up to 15 years after the conclusion of his office. Personal diaries, letters to family members and friends and other personal papers not connected to Presidential duties are President's personal property.

404. CHEE, LUCIANA. How to research copyright law. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 171-183.

This bibliography selectively gathers the primary and secondary sources necessary for general copyright research. Sources are classified as legislative, judicial, and administrative. Separate sections cover United States copyright in relation to foreign nations.

405. CHERNOW, BURT. Artworks: artists right subject of workshop. Westport, Conn. Fairpress (July 27, 1977), p. B-17.

The Connecticut Commission on the Arts is sponsoring a series of statewide meetings for artists to focus attention on the recent legislative proposals that affect artists and their rights. Among some of the topics being presented are tax benefits for donations to charitable organizations, and artists' estates, droit de suite, and copyright reform.

406. CLARK, TED. Organized crime linked to int'l piracy of films. *Daily Variety*, vol. 175, no. 38 (Apr. 27, 1977), pp. 1, 3.

Major film piracy involving organized crime in Europe, Africa and the Middle East is the target of a sweeping security operation led by a retired national police chief of a leading European nation with the cooperation of the police forces of several Western European countries. Involvement of organized crime has led courts and police to take an active interest in piracy suppression.

407. COLBY, RICHARD. Letter to the editor: refuting Katz' opinion on tape programs & copyright. *Daily Variety*, vol. 176, no. 41 (Aug. 3, 1977), p. 6.

Letter concerns question of whether or not videotaped programs produced before January 1, 1978 are protected by the Copyright Act of 1909. Mr. Colby feels that Congress interpreted the law in 1912, to the effect that any motion picture or form that could be recorded was covered by the Act although the machinery is different and more complex.

408. Copyright Office eases deposit regulations. *Record World*, vol. 35, no. 1594 (Jan. 28, 1978), p. 14.

The Copyright Office has issued a regulation under the General Revision of the Copyright Law, which provides that copies of theatrical, symphonic and choral works published only by means of rental, lease or lending will be acceptable on a "best edition" basis, defined to mean one score, rather than two scores and one full or conductor's score containing two sets of all instrumental and vocal parts. The ruling applies to deposits for copyright registration as well as for Library of Congress collections.

409. Copyright royalty tribunal, mostly 'innocents', will listen to voices of 'anxious' groups. *Variety*, vol. 288, no. 13 (Nov. 2, 1977), pp. 2, 80.

After 10 years' legislative effort and last minute delays, the Copyright Royalty Tribunal has finally been established. Representatives of trade associations and media businesses have been invited to prepare the tribunal on issues it will be facing. One of its first efforts will be to provide for a jukebox license. Most

of the tribunal members are new to the subject of copyright and compulsory licensing.

410. Copyright study says b'casters can afford performer royalties. *Variety*, vol. 289, no. 1 (Nov. 9, 1977), p. 49.

A comment on an economic study prepared for the Copyright Office as part of its report to Congress on the feasibility of amending the new copyright law to include a performer's royalty. The study noted that only 23% of the performers rate copyright royalties as composers, and the royalties constitute 1% of their earnings. Musicians participate in the making of from 10 to 15 records a year at the most, with most making only one or two.

411. Copyright study says stations can afford new royalties. Consultants think profits hidden in station reports to FCC. *Broadcasting*, vol. 93, no. 20 (Nov. 14, 1977).

Consultants to the Copyright Office analyzed station financial reports and concluded that radio stations could pay a new record music license fee without "significant impact" on profits or number of stations in operation. The searchers hypothesized: (1) that profits were not a major concern to broadcasters; (2) FCC financial reports show losses for tax purposes and (3) stations would have little difficulty passing royalty costs on to advertisers.

412. Copyright: the clauses of '78. *Writer's Digest*, vol. 57, no. 8 (Aug. 1977), p. 22.

Questions of authors are answered, giving general information on the copyright revision.

413. Copyright tribunal gets an earful from future petitioners. *Variety*, vol. 289, no. 6 (Dec. 14, 1977), pp. 2, 95.

The copyright royalty tribunal heard representatives from the industries they will be working with under the new copyright law, during a meeting the first week of December. Their first regular meeting will be held January 30-31, 1978, at which time they will begin deliberations on the rates to be paid by broadcasters.

414. Cost of copyright protection; Authors League asks 'single fee' on 'bundles' of related works. *Variety*, vol. 288, no. 13 (Nov. 2, 1977), p. 21.

The text of a letter from the Authors League to the general counsel of the Copyright Office is given in which they ask that the new regulation on registration of claims to copyright be written so that a single registration of a work will suffice to protect the variety of versions possible for an underlying work to be used. They would also like to see it possible to file a single registration for a collection of unpublished, related works, such as a compilation of poems, etc.

415. COUGHLIN, ELLEN K. Are limits on copying unconstitutional? *Chronicle of Higher Education*, July 5, 1977.

L. Ray Patterson, Dean of Emory University, says that the new law that increases a copyright proprietor's control of access to copyrighted material may be unconstitutional. He is critical of the term "fair use", and lists the guidelines set up by an ad hoc committee of educators, publishers, and authors.

416. Diskers, broadcasters debate performer's rights to royalties. *Variety*, vol. 287, no. 13 (Aug. 3, 1977), pp. 2, 76.

Performers and diskers are asking that broadcasters and picture producers pay some form of royalty because at the present time broadcasters and producers do not have to pass on any of the profits to performers and diskers. Broadcasters claim that if any more compensation is due to performers, then it is the responsibility of the record companies.

417. DOEBLER, PAUL. Soviet-produced art books make debut in U.S. *Publishers Weekly*, vol. 212, no. 10. (Sept. 5, 1977), p. 50.

Henry R. Abrams, Inc. has an agreement with the Soviets for publication of English-language art books from other Soviet publishers. Rights for exclusive world-wide English distribution is possible since the Soviet Union created an international copyright licensing agency of its own several years ago.

418. DYSTERL, OSCAR. A leading publisher asks: The paperback revolution: where has it gone? *Publishers Weekly*, vol. 212, no. 20 (Nov. 14, 1977), pp. 31-33.

A summary of some of the problems and possible solutions concerning the mass market paper-back industry, currently stagnating on a plateau.

419. Far East disk piracy draining up to \$500-mil from legit sales; up a crooked creek in Thailand. *Variety*, vol. 289, no. 8 (Dec. 28, 1977), pp. 45, 47.

Commenting on a recent television news broadcast by Ken Kashiwahara showing a pirate operation in Thailand, Stanley Gortikov, president of the Recording Industry Association of America, stated that inroads are being made on the illegal reproduction of American-made sound recordings in the Far East. Local governments are being shown that piracy hurts their local talent and industry.

420. FCC leaves cable rules at discretion of local areas. *Hollywood Reporter*, vol. 247, no. 39 (Aug. 10, 1977), p. 1.

The FCC has streamlined its franchise rules for cable TV systems which will in effect leave the responsibility for such regulations up to local communities. Excepted from this new rule are a handful of systems that began operation before March 31, 1972, which will have to wait until their franchises expire, or 15 years from the franchise grant—whichever comes first before the limit applies.

421. Federal court case tests copyright of show on video-tape. *Variety*, vol. 287, no. 13 (Aug. 3, 1977), p. 58.

In a case that may test the extension of copyrights to videotape on commercial cable TV, the New York Federal Court has enjoined Video Tape Network and Satori Productions from further distribution and TV broadcasting of a Star Spangled Washboard performance taped at Pace University in 1974. VTN was granted a contract to distribute the tape to noncommercial college markets, but instead allegedly distributed it to commercial cable TV stations for "Celebration," a rock concert series produced by Satori.

422. Fifteen Soviet publishers to visit U.S., Nov. 13-20. *Publishers Weekly*, vol. 212, no. 18 (Oct. 31, 1977), p. 18.

The delegation will spend five days in New York and two

in Washington, D.C. In addition to meetings open to the public, there will be several closed-door sessions, dinner meetings and sightseeing trips planned.

423. FISHMAN, JAMES J. Art law, artist's moral right in art works. *New York Law Journal*, vol. 178, no. 118 (December 21, 1977), pp. 1, col. 1; 2, cols. 1-3.

Discusses rights of purchaser of art work, the right of personality or moral right of the artist, 1950 sculpture of David Smith "17h's" and acts of vandalism. Discusses *Gilliam v. American Broadcasting Companies, Inc.*, involving the Monty Python Group and infringement of copyright, and Congressman Drihan's bill to secure moral rights for authors.

424. Five arrested, tapes seized in D.C. piracy raid, *Daily Variety*, vol. 176, no. 41 (August 3, 1977), p. 1.

Investigation by F.B.I. into tape pirating operation leading to arrest and seizure of 50,000 tapes. D.C. has become one of the major markets for pirated tapes. Charges were violation of copyright law, conspiracy and interstate transportation of stolen property.

425. 14 Soviet publishers have "useful" visit in U.S. *Publishers Weekly*, vol. 212, no. 22 (Nov. 28, 1977), pp. 11-12.

A report on a meeting of a delegation of Russian publishers with American publishers at Mount Kisco, New York in November, 1977. There was some clash in ideologies which served to point up the differences between state-controlled and free-for-all publishing. Proposals were made, however, to increase translations of U.S. and Russian text-books, and to increase commercial outlets for the other country's books.

426. FOX, MARIA. NYU copyright library a Derenberg memorial. *N.Y. L.J.* vol. 175, no. 98 (May 20, 1976), p. 1, cols 2-3; p. 3, col. 3.

Derenberg Copyright Library contains copies of every government document ever published by U.S. Copyright Office. It also provides a permanent home for the Copyright Society of the U.S.A. and serves as copyright center for metropolitan N.Y. The project will be an expansion of the Continu-

ing Education Program which will fund additional fellowships in copyright and trademark law.

427. GINGRAS, ANGELE DE T. Valenti lectures copyright tribunal about cable TV. *Hollywood Reporter*, vol. 249, no. 22 (Dec. 9, 1977), pp. 1, 4.

The president of the Motion Picture Association of America appeared as a witness before the Copyright Royalty Tribunal. He claimed that the cable industry could possibly damage TV production by drawing viewers away from local TV broadcasters with their distant signal transmissions, thereby reducing advertising revenues. CATV could also seriously affect the syndication market with their distant signals.

428. GOFFA, DEBBIE. Bootlegged movies. *The Washington Post*, vol. 100, no. 364 (Dec. 4, 1977), p. F-11, cols. 3-4.

A note on the methods used by motion picture pirates to make copies and market them, often before the original has been released. It is difficult to estimate just how much money is being lost to film pirates. Since a federal crackdown began in 1973, there have been approximately 100 prosecutions in Los Angeles which have resulted in only 25 convictions. In 1975, the Motion Picture Association of America set up a Film Security Office as an attempt to cope with the problem.

429. GOLUB, MELINDA. Not by books alone: library copying of non-print copyrighted material. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 153-170.

Assesses the legality of copying nonprint copyrighted material under the 1909 law, discussing the *Williams & Wilkins* case, the cable television cases, and the *Aiken* case. The author believes that many ambiguities remain under the new law, although in some cases, the rights of libraries are clarified.

430. GRAHAM, GORDON. Publishers, librarians and photocopying. *The Bookseller*, no. 3744 (Sept. 24, 1977), pp. 2148-2151.

U.S. copyright law requiring photocopying fees for multiple copies is the culmination of extensive dialogue between those who will be making and receiving payments for photocopies. The U.K. Whitford Report envisions blanket licenses

to cover single copies and the dialogue yet to come should explore the American experience.

431. GRAHAM, GORDON. U.K.'s Whitford Report: faith, hope, clarity. *Publishers Weekly*, vol. 211, no. 17, (Apr. 25, 1977), p. 49.

The report on the Law of Copyright and Designs by a British government-sponsored committee headed by Mr. Justice Whitford stages the quest for a more effective and simpler copyright law. The report is tougher on the concept of fair use than the new U.S. copyright law, suggesting blanket license fees for libraries and other users.

432. GUILD, HAZEL. Books get under tax shelters at Frankfurt Fair. *Variety*, vol. 288, no. 12 (Oct. 26, 1977), pp. 1, 84.

With more stringent U. S. tax laws controlling tax shelters, investors were more interested in buying publishers' interests in books and records and copyrights this year at the Frankfurt Book Fair. Fear was expressed that this tax loophole may soon be plugged in the same way as film tax shelters are. Other highlights of the world's largest book fair are mentioned, particularly the celebrity tie-ins.

433. GUILD, HAZEL. Pirates clip disk, book biz in W. Germany. *Variety*, vol. 289, no. 9 (Jan. 4, 1978), p. 142.

Despite efforts of the German police, record and book piracy continues to make inroads into the legitimate media industry. GEMA is losing money due its composers and lyricists. Socialist publishers are using the photocopy machine to reproduce leftist publications by famous writers, and pirate radios on ships stationed outside territorial waters are advertising illegal pop records.

434. HACK, RICHARD. Celebrating 100 years of recorded sound. *Hollywood Reporter*, vol. 249, no. 26 (Dec. 15, 1977), pp. 6, 8.

A brief, illustrated history of the evolution of the phonograph and phonorecord industry.

435. HARRIS, GAYLE T. New U.S. Copyright Law recognizes choreography and pantomime. *Dancemagazine*, vol. LI, no. 10 (October 1977), pp. 5, 8.

The new law recognizes pantomimes and choreography as copyrightable subject matter. The article explains terms such as publication, notice of copyright, registration, and copy of a choreographic work, and it describes the scope of protection.

436. HARRISON, GREG. Legally speaking—an overview of the new Copyright Act—now it affects the songwriter. *Songwriter Magazine*, vol. 2, no. 6 (March 15, 1977), pp. 14, 40.

The article contrasts the new copyright act with the Act of 1909. It discusses renewals, licenses, terminations, publications, published and unpublished works and how they are protected, royalty fees and registration.

437. HBO, Tele-Communications in new pay TV agreement. *Hollywood Reporter*, vol. 247, no. 41 (Aug. 12, 1977), pp. 1, 20.

Home Box Office and Tele-Communications Inc. have announced an agreement in principle that will eventually give HBO access to most of TCI's 700,000 cable TV homes. The agreement involves a six-year program which includes the installation of satellite earth stations in more than 50 communities.

438. HOLLAND, BILL. Copyright office favors performer royalty rights. *Record World*, vol. 35, no. 1592 (Jan. 14, 1978), pp. 3, 17.

The Copyright Office delivered a study to Congress on performers' royalty rights, reserving the right to wait until the end of February to draw its final conclusions and offer specific legislative proposals. The House Judiciary Subcommittee will then decide whether or not it will proceed on the issue before the next session of Congress.

439. HOROWITZ, Is. Publishers eye mechanical payload from new sources. *Billboard*, vol. 39, no. 15 (Apr. 16, 1977), pp. 1, 49-50.

Publishers are eyeing the copyright statute provisions on licensing with respect to securing mechanical income from legal tape duplicators in addition to performance royalties already being received.

440. How Soviet publishing works. *Publishers Weekly*, vol. 213, no. 4

(Jan. 23, 1978), pp. 292-294; vol. 213, no. 5 (Jan. 30, 1978), pp. 43, 46, 48.

In the second of a series of projected seminars between Russian and United States publishers, held in New York in November, a group of Russian publishers explained the publishing industry as practiced in Russia, in what was described as a presentation of the most comprehensive information American publishers have ever had. The operation of the Russian Copyright Organization, VAAP, was explained, and translation and distribution systems were also discussed. Specialized fields of publishing such as fiction, dictionaries and textbook, scientific and technical books, art and medical literature publishing in Russia were covered during the meeting.

441. Indict disk op in Puerto Rico on disk piracy rap. *Variety*, vol. 287, no. 13 (Aug. 3, 1977), p. 60.

The owner of a record company in Puerto Rico was arrested and charged, by a Federal Grand Jury, with nine counts of copyright violations, interstate transportation of sound recordings with counterfeit labels, mail fraud and violation of the Racketeer Influence and Corrupt Organizations statute (RICO).

442. JACOBSON, HARLAN. Porno pic industry open territory for piracy, 'Senses' Judge concludes. *Daily Variety*, vol. 176, no. 42 (Aug. 3, 1977), p. 2.

The pornographic film industry is wide open territory for piracy, according to federal judge Edmund Palmieri in a case involving the film, "In the Realm of The Senses." The reasoning behind this conclusion is that what is determined obscene cannot be copyrighted.

443. KAWAKBATA, SHIGERU. Publishing: a major industry force. *Billboard*, vol. 89, no. 17 (April 30, 1977), pp. 70, 81.

Music publishers have used their status as copyright owners to do away with the per-work and per-use licensing system. JASRAC is the sole musical copyright licensing organization in Japan and its administration covers all the rights under copyright including rights for theatrical production, public performance, mechanical reproduction, film synchronization, video-tape recording and publication. Nightclubs have the largest share of performance royalties.

444. KIRKEBY, MARC. Jukebox rules favor operators; 'location lists' are not required. *Record World*, vol. 35, no. 1590 (Dec. 31, 1977), pp. 3, 44.

A comment on the new regulations for jukebox licensing issued by the Copyright Office, on Nov. 5, 1977. The Copyright Royalty Tribunal will draw up rules governing access by performing rights societies and others to the boxes, and yet may require some information as to the location of the machines.

445. KOH, EDGAR. Far Eastern tape pirates run rampant; take over 80% of biz. *Variety*, vol. 286, no. 9 (Apr. 6, 1977), pp. 2, 126.

The recording business in Singapore and Malaysia, plagued by piracy, is consolidating bona fide manufacturers to push for government clamp-down in those locales where piracy accounts for an estimated 80% and 85% of the markets.

446. LANDRY, ROBERT J. 'Dickens of London' recalls yanks shock in 1842 at royalty demand. *Variety*, vol. 287, no. 12 (July 12, 1977), p. 37.

A recent British biography of Charles Dickens recalls Dickens' visits to the United States, and his fight to secure royalty payments for the publication of his work. The book will be the basis of an educational television series.

447. Legality of federal-owned copyright rights to get court test. *Daily Variety*, col. 178, no. 10 (Dec. 19, 1977), p. 3.

Suit was filed in the U.S. District Court by M. B. Schnapper of Public Affairs press against the director of the Administrative Office of the U.S. Courts and the Public Broadcasting Service for copyrighting five bicentennial films commissioned by the U.S. Supreme Court. The claim is made that \$500,000 in bicentennial funds provided the U.S. Supreme Court were used for the production of the films, and the contract prevents commercial use of the films where admission is charged.

448. LEVIN, GERRY. High Court ruling on 'Cannonball' of 'little concern'. *Daily Variety*, vol. 247, no. 34 (Aug. 3, 1977), pp. 1, 13.

The U.S. Supreme Court has ruled that filming an act of a performer was akin to infringement of a copyright. If a news

program wishes to use an act as part of its nightly TV news, then permission should be acquired.

449. LOTTMAN, HERBERT R. Copyright Center gets anti-trust Clearance. *Publishers Weekly*, vol. 212, no. 14 (October 3, 1977), p. 40.

Justice Dept. gives anti-trust clearance to Assoc. of American Publishers to establish Copyright Clearance Center to collect fees for photocopying beyond limits set by new copyright law. Center will receive copyright license fees and transmit to copyright owners. Copyright owners will be able to negotiate separate licensing arrangements with users outside the system.

450. LOTTMAN, HERBERT R. Despite aura of censorship, first Moscow Book Fair has positive results. *Publishers Weekly*, vol. 212, no. 14 (October 3, 1977), pp. 46-53.

The Soviet Copyright Agency VAAP now deals regularly with 750 publishers around the world, primarily sci-tech and academic houses. 10,000 contracts had been signed by VAAP from its founding to the opening of the fair. The USSR is now selling 5,000 licenses a year, 8,000 titles a year. (First Moscow International Book Fair—Sept. 6 to 14).

451. LOTTMAN, HERBERT R. World copyright group to discuss double taxation. *Publishers Weekly*, vol. 212, no. 14 (Oct. 3, 1977), p. 40.

A third meeting of governmental experts on double taxation of copyright royalties is scheduled for 1978 under the joint sponsorship of Unesco and WIPO. The drafting of both a multilateral convention and a model bilateral agreement will be made available for study.

452. LUBOFF, PAT and PETE. How to copyright your songs. *Songwriter Magazine*, vol. 2, no. 8 (May 15, 1977), pp. 18-20.

Topics discussed are: definition of copyright, differences between published and unpublished works, how to fill out an application form for registration, where to get free information about instructions.

453. MARKE, JULIUS. United States copyright revision and its legislative history. *Law Library Journal*, vol. 70, no. 2 (May 1977), pp. 121-153.

A comprehensive legislative history, summary, and analysis of the new law designed for the guidance of librarians, teachers, researchers, and institutional administrators.

454. MARKS, MARLENE ADLER. Will Hollywood sing Betamax? *More*, vol. 7 (November 1977), pp. 26-29.

Discusses charges of copyright infringement by Universal and Disney studios against Sony for the production of home video tape recording equipment. The controversy centers around the conflict between the exclusive ownership and fair use provisions of the copyright law. Discusses the impact of video tape recording on the problem of film privacy.

455. MAYER, BILL. Study fingers reported radio 'loss' figures. *Daily Variety*, vol. 178, no. 3 (Dec. 8, 1977), pp. 1, 15.

A study of radio station incomes for the past five years as reported to the FCC contends that bookkeeping changes could nearly double the number of stations reporting no losses. The study commissioned by the Copyright Office found that general and administrative payrolls, depreciation and amortization, etc. covered vague areas and that almost 11% of the stations reported losses all five years. The study concluded that the stations could pay 1% royalty for the use of recorded music and pass cost increases to the purchasers of advertising time.

456. MAYER, BILL. Tunesmiths advised not to expect a copyright bonanza. *Daily Variety*, vol. 175, no. 14 (Mar. 24, 1977), pp. 1 and 11.

At a dinner at the Sportman's Lodge with members of the California Copyright Conference, senior vice president of BMI, Theodora Zavín, stated that distribution of monies from the juke boxes should not be counted upon as a means of making anyone blissfully happy. She said that once the pie has been sliced among the copyright tribunal, administration, unaffiliated copyright holders, and others, there would not be much money left.

457. McDONALD, KEVIN. Aggressive cable TV group's goals outlined at meeting. *Hollywood Reporter*, vol. 259, no. 3 (Nov. 10, 1977), pp. 1, 4.

Among the goals of the National Cable Television Associations for 1978 are the elimination of distance, syndicated or simultaneous signal restrictions, to provide a blueprint for revision of the Communications Act for use by Congress, which will include an expeditious procedure for appealing denials of applications, and prohibit regulation of premium channel programming and rates.

458. McDONALD, KEVIN. MPAA to open security offices in antipiracy fight. *Hollywood Reporter*, vol. 249, no. 26 (Dec. 15, 1977), pp. 1, 27.

The Motion Picture Association of America announces that it is planning to open at least three more security offices to police motion-picture piracy on a global scale. One of the new offices may be located in New York, while the others may possibly be in the Mideast and the Far East. Current emphasis in the enforcement of copyright protection against piracy will be on the unauthorized duplication of motion pictures by videotapes.

459. McDONALD, KEVIN. Pay TV turns the corner. *Hollywood Reporter*, 47th Anniversary Edition (Nov. 1977), p. 143.

In summing up developments in pay television for the year, mention is made of the dominant position of Time, Inc. which through its Home Box Office and Telemation Program Services supplies close to 80% of the United States market. Its size has allowed it to deflate the price paid for its product, paying a lower price per subscriber than its competition.

460. MERZER, MARTIN. Recordings boom as consumers stay in musical groove. *The Washington Post*, vol. 101, no. 34 (Jan. 8, 1978), p. F19.

In an interview, Walter Yetnikoff, president of CBS Records, comments on the continuing growth of the sound recording industry, and the changes in market and popular classes of music over the past two decades.

461. MICHIE, LARRY. Rewrite may be running out of ink; indies are cool to cable plugs. *Variety*, vol. 289, no. 13 (Feb. 1, 1978), p. 47.

In a speech to the fifth annual Association of Independent Television Stations convention, Rep. Van Deerlin received a cool reception to his comments on the rewriting of the Federal Communications Act of 1934. Even the White House, busy with urgent matters, has shown little interest in drafting a new communications law for consideration in the next Congress.

462. The momentum: Schmidt says that cable's got it now. *Broadcasting*, vol. 92, no. 16 (Apr. 18, 1977), pp. 31-32.

As a result of the copyright bill (1976) and the pay-cable decision (Mar., 1977), the president of the National Cable Television Association anticipates substantial increases in cable penetration for the next decade.

463. MOORE, REBECCA. Copyright revision spells change for artists, broadcaster, CATV. *Television*, vol. 4, no. 2 (Summer 1976), p. 18.

The article discusses the following changes affecting TV people by the copyright revision bill: CATV operators pay royalty fees to broadcasters; public TV will have a compulsory license to use copyrighted non-dramatic literary, musical, pictorial and graphic works; the new Copyright Tribunal; taping off the air for scholarship. A controversial issue is the Mathias Amendment Sec., 118 (provides TV with compulsory license to use a variety of copyrighted works). Literary works would come under compulsory license. There is a fear of loss of control by broadcasters, book publishers, authors under Sec. 118.

464. More on photocopies and the reserve collection. *LJ/SLJ hotline*, vol. 6, no. 42 (Dec. 19, 1977), pp. 4-5.

The ALA Executive Director, Robert Wedgeworth, suggests that possession of illegal photocopies by libraries could possibly make them infringers of the copyright law. He advises that when given copies, the librarian inquire of the donor whether they are authorized copies.

465. MORRISON, HOBE. New court ruling blocks piracy of live stage shows. *Variety*, vol. 287, no. 2 (May 18, 1977), pp. 1, 126.

Illegal taping or recording or the sale or distribution of unauthorized tapes or records of live musical shows was en-

joined by the court. The *Rodgers v. Lerner* case is distinct in that it involved unauthorized taping of public performances rather than copying of existing tapes, films and records.

466. MPAA asks for disclosure of copyright data. *Hollywood Reporter*, vol. 249, no. 27 (Dec. 16, 1977), p. 4.

The Motion Picture Association of America has asked the Copyright Office to require cable operators to disclose information which would assist copyright proprietors in determining the royalty fees due them. It is suggested that data concerning part-time signals, the number of subscribers and their fees would be helpful.

467. MPAA protesting pending changes re copyright reels. *Variety*, vol. 289, no. 8 (Dec. 28, 1977), p. 5.

The Motion Picture Association of America has filed comments regarding the proposed regulations on registration and deposit of motion pictures. The Copyright Office has proposed to eliminate the option for return of the deposit copies under the motion picture agreement. MPAA also wants to have the regulation concerning soundtracks rethought.

468. Music dealer is held in contempt; sold pirated Rodgers & Hart tapes. *New York Law Journal*, vol. 178, no. 68 (October 6, 1977), p. 1.

Rodgers v. Lerner was a case involving two unauthorized tapes made at a performance of a Rodgers & Hart musical. The charge made in U.S. District Court for the Southern District of New York was contempt of a previous consent injunction entered into by Mr. Lerner. In March, Lerner agreed not to sell such recordings.

469. News brief. *VideoNews*, vol. 8, no. 5 (March 1, 1978), p. 2.

At a meeting of 40 producers of training, educational and industrial films, FBI copyright sleuth Homer Porter stated that 75 to 90 percent of such films are illegally copied and sold, frequently prior to the release of the legitimate film. Many of the producers met privately to create a new trade group, the Training Media Distributors' Association, which will present a united industry front against motion picture and video cassette copyright infringement and piracy.

470. OELSNER, LESLEY. Justices voice doubt on Nixon Tapes law. *New York Times*, vol. 126, no. 43552 (city ed. April 21, 1977), p. A21.

Supreme Court Justices express concern over the 1974 statute that gave the federal government control over Richard Nixon's presidential papers and tape recordings and over the screening process. Mr. Nixon argues that the statute works as a bill of attainder, that it is a violation of privacy and an unlawful seizure.

471. Par TV 'threatens' 'ex-pirate' of its 'Star Trek' series. *Variety*, vol. 288, no. 2, (Aug. 17, 1977), p. 1, 55.

Paramount is threatening Thunderbird Films for making copies of a "Star Trek" segment. He claims that he acquired the segment from a collector and that the material was not copyrighted since it had not been registered until two years after it was released. He states that he has no intention of selling his copies to commercial television.

472. PAULY, DAVID. Crime: the film pirates. *Newsweek*, vol. 90, no. 16 (Oct. 17, 1977), pp. 90-91.

Castro boasts that Cuba never buys U.S. films—it simply copies them or buys someone else's illicit copies in defiance of U.S. copyright laws. Plagued by film piracy that is becoming more gargantuan and sophisticated, the industry has set up its own Film Security Office to tighten studio security, while the Federal government has won 35 film-piracy convictions since 1975 and made second offenders subject to \$50,000 fines and two-year terms under the new copyright law.

473. Publisher accuses Catholic churches of pirating hymnals. *Wall Street Journal* (Nov. 22, 1977), p. 21.

Publisher of religious folk music sued the National Conference of Catholic Bishops charging that it has failed to stop Catholic churches from illegally pirating the company's music. Illegal pirating cost \$8.6 million in lost revenue. Suit seeks temporary and permanent injunction to stop dissemination of hymnals.

474. RCA files 3rd suit against Singleton. *Record World*, vol. 35, no. 1959 (Jan. 28, 1978), p. 18.

RCA is attempting to collect a judgment against Singleton for the unauthorized release of Elvis Presley lp's. Previous legal actions included an attempt to gain possession of whatever records defendant still had.

475. Resale royalties. *Art Letter; Artworld Intelligence for Professionals*, vol. 7, no. 2 (Feb. 1978), p. 1.

Howard Morseburg is challenging the California royalty law in the U.S. District Court. Oral arguments were heard by Judge Robert Takasugi in Los Angeles on Dec. 28. Parties defendant include Richard Mayer, president of Artists Equity of Northern California, Peter Alexander, a painter and sculptor, Andre Balyon and the California Arts Council.

476. REUTER, MADALYNNE. Writers blast copyright registration concept. *Publishers Weekly*, vol. 212, no. 17 (October 24, 1977), p. 35.

AAP opposed the suggestion that second basic registration may be made by a writer who is employed or who is commissioned to prepare a work made for hire. AAP agreed that an author who retains a royalty interest in the exploitation of his work should be permitted to apply for a basic registration if earlier basic registration has been made. AAP questioned the concept of divisibility of copyright embodied in the new law.

477. RINGER, BARBARA. Current copyright problems. *Performing Arts Review*, vol. 7, no. 1 (1977), pp. 79-90.

Discussion of the changes in copyright law over the past 25 years. Remarks on the political problems and temperament of the sixties; the role of cable television, the purposes of copyright law, and of the revision bill—particularly protection of authors.

478. RUARK, HENRY CLAY. Copyright and wrong: what the new law does and how to live with it. *Technical Photography* (Oct. 1977), pp. 22, 23, 24, 54, 55.

Discusses major changes in the new law. Explains the five fundamental rights granted to any copyright holder: Reproduction, preparation of derivative works, distribution, performance and public display. Writings of an author vs. original works of authorship are discussed along with fair use, copyright dura-

tion, the manufacturing clause, the Copyright Royalty Tribunal, and the American Television and Radio Archives established in the Library.

479. RUDELL, MICHAEL I. Registration under the new copyright act, *New York Law Journal*, vol. 179, no. 5 (January 9, 1978), pp. 1, 2, cols. 1-2.

Discussion of sections 408, 411 (b) and 412. Describes new protection, changes in common law copyright. Explains Classes TX, PA, VA, SR, RE and the new forms of necessary to fill out registration applications for these classes.

480. SCHOENFELD, HERM. Home disc & tape sets to hit market, late '77; blow to film theatres? *Variety*, vol. 287, no. 11 (July 20, 1977), pp. 3, 28.

RCA and others are preparing to enter the home video market in early '78 with non-compatible systems. All of these are threatened by the copyright infringement suit brought by Universal Studios and Walt Disney Productions against Sony.

481. SCHREGER, CHARLES. Court fades out pix-title ripoffs; landmark ruling protects films as 'goods'. *Variety*, vol. 288, no. 12 (Oct. 26, 1977), pp. 1, 87.

A federal district court in Massachusetts has found that film titles are protected by the same federal statutes which outlaw false description and representation for goods and services crossing state lines. Defendant tried on several occasions to buy a print of plaintiff's motion picture film, and was refused. A year later, plaintiff found a similar title in defendant's catalog and had a friend rent a copy. The court found that defendant's film dealt with the same theme and contained several identical scenes. Plaintiff was awarded a permanent injunction against distribution of defendant's film and damages based on the sales and rentals of defendant's film for three years.

482. SCHULENBERG, RICHARD A. The autobiography of a copyright (Part IX). *Songwriter Magazine*, vol. 3, no. 1 (October 1977), pp. 12, 13.

Discussion of compulsory licensing, distributing of records, notice of use and rates.

483. SCHUYTEN, PETER J. A \$1,300 Christmas toy made in Japan. *For-*

tune, vol. XCVI, no. 3 (September, 1977), p. 179-184.

Sony and Matsushita are squaring off against each other with incompatible home video recorders. Both are warning in their advertising and promotional literature that the machines should not be used to violate the copyright law. The copyright problems raised by home video recorders may take years to resolve.

484. SCHWARTZ, MICHAEL F. The author & moral rights. *Variety*, vol. 289, no. 9 (Jan. 4, 1978), p. 156.

"American jurisprudence does not recognize the European doctrine of moral rights or *droit moral*. Essentially, this doctrine focuses on two critical rights: the right of paternity and the right to integrity of the work." Recent litigation involving mutilation of a television script by the television network held that distortion of a copyrighted work was protectible under the Lanham Act. Although recognition of such a federal right as being applicable to created works is to be lauded, still the only safe recourse a writer has is to contractual limitations.

485. SEARCY, SETH S. Privacy and public records: the emerging conflict in values. *Public Affairs Comments*, vol. XXIV, no. 1, Lyndon B. Johnson School of Public Affairs, the University of Texas at Austin (Nov. 1977), pp. 1-5.

Discussion of governmental records, the increasing use of computers, and the dangers to personal privacy. Defines privacy and discusses *Cox Broadcasting Corp. v. Cohn*, the history of the Freedom of Information Act, the Texas Open Records Act, and recommendations for protection of private information.

486. SHAIN, MICHAEL. Confirmation of copyright tribunal member could be held up by bureaucratic snafu. *Record World*, vol. 35, no. 1581 (Oct. 22, 1977), p. 4.

A White House snafu may hold up confirmation of a Copyright Royalty Tribunal nominee. Douglas Coulter's residence has been listed as Virginia, when he was actually a resident of New Hampshire. Hence a new set of "blue slips" from the Senators of his resident state must be secured to show their support.

487. SHAIN, MICHAEL. Copyright Tribunal appointees set; expect Senate OK before August. *Record World*, vol. 33, no. 1567 (July 9, 1977), pp. 3, 44.

The unofficial list of the five appointees to the Copyright Royalty Tribunal includes backgrounds and responses to their appointment.

488. SHAIN, MICHAEL. Government readies jukebox regulations. *Record World*, vol. 35, no. 1582 (Nov. 5, 1977), pp. 3, 62.

The performing rights societies and the jukebox owners and operators are locked in dispute over how far new government regulations ought to go in accounting for location, size, and charges per play of nearly half a million machines. The Copyright Office is expected to promulgate regulations which will govern the licensing of jukeboxes for the first time under the copyright law.

489. SHAIN, MICHAEL. Grand jury hands down indictment in Philadelphia copyright case. *Record World*, vol. 35, no. 1581 (Oct. 22, 1977), p. 4.

A Philadelphia grand jury has indicted John D. La Monte and his House of Sounds on 140 counts of racketeering, wire fraud and copyright infringement. The FBI claims that 2.5 million records found in the House of Sounds warehouses are probably counterfeit.

490. SHAIN, MICHAEL. Kaminstein, former register of copyrights, dead at 65. *Record World*, vol. 35, no. 1577 (Sept. 24, 1977), p. 20.

The former Register of Copyrights died Sept. 10, 1977. He had played a major role in getting a revision of the copyright law through Congress.

491. SHAIN, MICHAEL. Newly confirmed copyright tribunal races with the clock. *Record World*, vol. 35, no. 1582 (Nov. 5, 1977), p. 8.

On November 26, the five members of the Copyright Royalty Tribunal were confirmed by the Senate in an unrecorded vote. The Tribunal will now be busy establishing the fees public television and radio will be paying for music and the fees that cable television will be paying. Eventually the tribunal will also be reviewing mechanical fees and jukebox fees.

492. SHAIN, MICHAEL. New royalty puts squeeze on colleges. *Record World*, vol. 35, no. 1583 (Nov. 12, 1977), pp. 8, 32.

The exemption from payment of royalties by schools and

colleges for use of music for educational purposes has come to an end. Under the new copyright law, the "not for profit" exemption is no longer included. The performing rights societies and school representatives have been working on model agreements which would be acceptable to most parties.

493. SHAIN, MICHAEL. Performers right study: an in-depth analysis. *Record World*, vol. 35, no. 1586 (Dec. 3, 1977), pp. 3, 63.

A brief analysis of some of the statistics contained in the economic impact study prepared for the Copyright Office on the feasibility of including a performers' royalty right in the U.S. Copyright Act.

494. SHAIN, MICHAEL. The performers' royalty: a question of concern. *Record World*, vol. 35, no. 1583 (Nov. 12, 1977), pp. 4, 32.

A brief summary of the legislative history of the performers' royalty right, and a survey of the various arguments pro and con.

495. SHAIN, MICHAEL. Royalty tribunal officially named; group faces possible court challenge. *Record World*, vol. 35, no. 1579 (Oct. 8, 1977), pp. 1, 87.

The President delayed five months past the April 19 date provided in the Copyright law before appointing the Copyright Royalty Tribunal. The question of the tribunal's legality is expected to be challenged, since it is located in the Congressional branch of the government. If it is challenged, the question is whether it can be defended by the U.S. Department of Justice. The Office of Management and Budget has already been asked to investigate the possible reorganization of the tribunal in order to make it fit within the government bureaucracy.

496. SHAIN, MICHAEL. Upcoming Supreme Court decisions of importance to the record industry. *Record World*, vol. 35, no. 1580 (Oct. 15, 1977), pp. 4, 152.

A resume of cases pending in the United States courts that are of interest to the music industry and broadcasters.

497. SHAIN, MICHAEL. U.S. Copyright Office study concludes b'casters can afford performers royalty. *Record World*, vol. 35, no. 1584 (Nov. 19, 1977), pp. 3, 74.

The economic impact study, commissioned by the Copyright Office as part of its study of performers' royalty rights for Congress, concludes that the right would be feasible.

498. SHAIN, MICHAEL. U.S. officials to meet with international copyright community. *Record World*, vol. 35, no. 1584 (Nov. 19, 1977), pp. 4, 65.

A delegation of United States representatives will be attending a meeting of the Unesco-sponsored executive committee for the Universal Copyright Convention in Paris. Also on the agenda is a meeting with officials of WIPO to discuss the possibility of having the United States join the Berne Copyright Convention, now possible in the light of the U.S. Copyright Law of 1976.

499. Spanish authors society charged with coin misuse. *Variety*, vol. 288, no. 2 (Aug. 17, 1977), p. 45.

Irregularities in the distribution of royalties to artists are being investigated by the Spanish Ministry of Education, according to an announcement by members of the Madrid Society of Authors. Charges against the Society claim that authors are being short-changed by about \$3 million a year.

500. Strong start reported for Copyright Clearance Center. *Publisher's Weekly*, vol. 213, no. 9 (Feb. 27, 1978), pp. 78, 80.

The Copyright Clearance Center is now fully operable. As of February 1, 1978, 122 publishers had registered 1120 periodicals. The median price set by publishers for photocopying an article published prior to January 1, 1978 is approximately \$2.25. For articles published after that date, the price is expected to be comparable.

501. TRAIMAN, STEPHEN. EIA/CEG & suppliers eyeing home video 'copyright levy'. *Billboard*, vol. 89, no. 16 (Apr. 23, 1977), pp. 53, 55.

A 5% tax in the U.S. patterned after the prevailing 5% wholesale levy on audio recorders in Germany is likely. Video systems will be the next big consumer electronics breakthrough. German copyright society is considering a hardware levy and a software tax. In Britain, the Whitford Report on copyright revision recommended a hardware levy with proceeds to copyright

owners based on the German system.

502. TUSHER, WILL. Valenti: Justice and FBI spent \$22 mil fighting piracy in '76. *Daily Variety*, vol. 175, no. 19 (March 31, 1977), pp. 1, 6.

Jack Valenti released figures from the FBI and the Justice Dept. on the estimated \$22,000,000 fight against film piracy, and commented on the MPAA decision to relax restrictions on accommodation screening while maintaining strong security safeguards and limited access.

503. U.S. seals off no-risk tax shelters. IRS bans film, disk writeoffs. *Variety*, vol. 288, no. 13 (Nov. 2, 1977), pp. 1, 88.

The Internal Revenue Service has closed the door on several tax shelters, one of which has permitted an investor to purchase a master recording, by paying a portion of the sales price in cash, and giving a note for the balance which he pays off only to the extent of the earnings. In the meantime the investor takes the total purchase as a tax deduction. The IRS now requires that such tax-payers have their money at a risk before taking a deduction.

504. VALENTI, JACK. Valenti values film-TV coin in Oseas mart. *Variety*, vol. 289, no. 9 (Jan. 4, 1978), pp. 1, 64.

In an annual survey of the American motion picture industry insofar as the world market is concerned, the president of the Motion Picture Association of America finds that the U.S. is doing 20% of the world's gross motion picture business, and mentions briefly the steps being taken to counteract film piracy.

505. WOLTERS, RICHARD. Pictures; the case for copyrighting. *Writer's Digest*, vol. 58, no. 2 (Feb. 1978), pp. 50-51.

A comment on copyrighting photographs by a freelance photographer and former art director of *Business Week* and *Sports Illustrated*. While recommending that every photograph not be copyrighted, he suggests that use be restricted by contract, and emphasizes that photographers need be aware of the changes in the copyright law. He refers erroneously to Form J, instead of the new AV Application Form.

2. Foreign

1. Australia

506. BANKI, PETER. Photography and copyright. *Australian Copyright Council Bulletin*, no. 24 (12 July 1977), pp. 2-12.

An analysis of the pertinent provisions of the Australian copyright law concerning the rights of photographers or copyright proprietors in their photographs, snapshots and negatives.

507. CATTERNS, DAVID. Architects and copyright. *Bulletin of the Australian Copyright Council*, no. 25 (18 Aug. 1977), pp. 2-23.

A review of Australian law and cases dealing with the architect's copyright in his plans and buildings, and the licensing and assignment of his rights to his clients.

508. CATTERNS, DAVID. The United States Copyright act of 1976. *Australian Copyright Council Bulletin*, no. 26 (1 Oct. 1977), pp. 2-21.

An analysis of the new United States copyright law from the viewpoint of Australian authors and publishers.

2. England

509. "...the whole structure on which this complex industry is based is about to come apart at the seams". An Australian view of scholarly publishing. *The Bookseller*, no. 3740 (Aug. 27, 1977), pp. 1688-1689.

Publishing of scholarly works, while peaking in the sixties, is predicted to suffer during the next ten years from overproduction, contracting markets, inflation and withdrawal of capital, as well as the spread of photocopying.

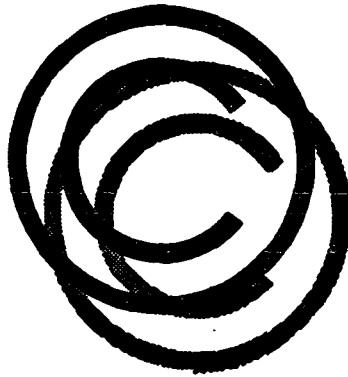
CORRECTION

Page 248 of the February 1978 issue of the BULLETIN contained a typographical error ten lines from the bottom. The full paragraph, comprising part of a letter from Senator John L. McClellan to Mr. Townsend Hoopes, should read as follows:

The legislative history consists of the Committee Reports, of both

the Senate and the House, the Conference Report and the Floor debates. Unless the Conference Report modified language in the Senate Bill or Report, the most authoritative expression of the intent of S. 22 would be the Report of the Senate Committee on the Judiciary. There are several sections of S. 22 where major changes were made by the House of Representatives and accepted in the Conference Committee. This, however, is not the situation with respect to the library photocopying provisions. Section 108 was principally developed in the Senate, and all the language of the Senate Bill was retained by the House of Representatives. The amendment made by the House to Section 108 (g)(2) and accepted by the Senate managers of the bill incorporates in the statute the legislative intent of the Senate Report relating to "systematic reproduction or distribution."

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PART I

ARTICLES

510. COPYRIGHT REVISION AND THE PREEMPTION OF STATE "MISAPPROPRIATION" LAW: *A Study in Judicial and Congressional Interaction**

By HENRY DAVID FETTER**

I. THE PROBLEM AND ITS SETTING

On October 19, 1976, President Ford signed the bill of the general revision of the United States copyright law (the "Revision")¹. Section 301² of the law, entitled "Preemption with Respect to Other Laws", replaces the dual system of federal and state copyright protection which has existed since 1790, with a unitary system of federal protection for all copyrightable works. Section 301 spells out in detail what in state law has and has not been preempted by the Revision. This article examines the status of state law relief for "misappropriation," as expounded in *International News Service v. Associated Press*,³ within the general preemptive design of the statute. It will begin with a brief survey of the doctrinal and institutional setting in which the current post-Revision problem of "misappropriation" preemption arises.

In 1918 the United States Supreme Court, in *International News Service v. Associated Press*, recognized the tort law doctrine of "misappropriation." Mr. Justice Pitney, writing for the Court, concluded that "the news has an exchange value to one who can misappropriate it"

*This article won first prize in the 1977 National Nathan Burkan Memorial Competition conducted by ASCAP.

**Mr. Fetter is an associate in the Beverly Hills, California law firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin. He wishes to thank his third year written work supervisor, Prof. Raya S. Dreben, for her guidance and encouragement and for making available the Justice Department Letter which appears in Appendix IV and is discussed in some detail in the text. Mr. Fetter is also grateful to his classmates, Barry Klayman and James Lopes, for lending him important and useful material which greatly facilitated his work.

¹ General Revision of the United States Copyright Law, Pub.L. No. 94-553, 90 Stat. 2541 (codified as 17 U.S.C.)

² The text of Section 301 is set out in Appendix I.

³ 248 U.S. 215 (1918).

and held the Associated Press ("AP") entitled to relief against INS' copying (or paraphrasing) and competitive use of the AP's *non-copyrighted* news reports.⁴ The injunction issued entirely apart from the remedial machinery of federal copyright law. An expansive "unfair competition" analysis, focusing on the profit accruing to INS as a result of AP's expenditures and efforts (and wholly divorced from traditional conceptions of false representation), was the basis for decision.⁵

Concurring in *INS*, Justice Holmes pronounced as a general principle that

"When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them—in other words, there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value. . . . Property depends upon exclusion by law from interference. . . ."⁶

Without having recourse (or at least apparent recourse) to the property protection offered by the *federal copyright act*, AP successfully obtained protection under an alternative common law theory: a judicially crafted remedy substituted for an unavailable statutory one. To adopt

⁴ 248 U.S. at 239-240.

"The International News Service (INS), its correspondents barred from the European battle fields for breaches of censorship regulations, had been supplying war news to its West Coast subscriber newspapers by copying the "news" as reported by the Associated Press in the East, and transmitting verbatim or paraphrased news reports westward, where the news was still "fresh" and competitive with the reports in the AP member papers." See, B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 86 (1967).

⁵ "Defendant, by its very act, admits that it is taking material that has been acquired by complainant [AP] as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant [INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises the process amounts to an unauthorized interference with the normal operation of complainant's business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news." 248 U.S. at 239-240.

⁶ 248 U.S. at 246.

Holmes' analysis, property rights supplementary to those recognized by the copyright statute were created. That which was open to copying under the copyright statute was to be protected under the common law of tort.

After the decision of *Erie R. v. Tompkins*,⁷ this tension between statute and common law was recast into a more pointed, though for a time, latent, confrontation between federal and state law. The holding in *Erie*, of course, did potentially undermine the continuing authority of *INS* as a decision of "federal general common law" uprooted by that case. Whatever this fall-out effect of *Erie* on the subsequent precedential force of *INS*, the misappropriation doctrine found a secure place in state tort jurisprudence. (This was especially true in the law of New York—by happenstance or not—then home base to the lion's share of the intellectual property industries.)⁸ Once "misappropriation" relief provides under state law protection not available under federal law, clear preemption issues are apparent. Preemption problems come before the courts in the course of the judicial exercise of the obligation to decide cases and controversies.⁹ Decision of cases, in turn, requires judicial adherence to the Constitutional command that federal law be supreme with respect to state law. The judicial function is both premise and condition of the court's preemptive role.¹⁰

The 1909 Copyright Act made no general provision for the adjustment of federal and state law respecting intellectual property, save for the traditional preservation of state common law authority over "unpublished" works in section 2. This failure of explicit statement is, of course, the general pattern; it is the rare federal statute which explicitly confronts the question of the preemption or "saving" of state law operating within the ambit of federally affected subject matter.¹¹

The Revision Bill is such a statute. Section 301 of the 1976 Act is an express preemption provision intended by Congress

⁷ 304 U.S. 64 (1938).

⁸ See, e.g., *Metropolitan Opera Ass'n., Inc. v. Wagner-Nichols Recording Corp.*, 199 Misc. 786 (1950).

⁹ See generally, Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Note, *The Preemption Doctrine*, 75 COL. L. REV. 623 (1975); *Nuclear Moratorium Legislation*, 76 COL. L. REV. 392 (1976); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. I., L. FOR. 515

¹⁰ The analysis in Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COL. L. REV. 623 (1975), tends to advocate a role for the courts in adjusting federal-state relations that appears to overstep the limits of the judicial function in these cases.

¹¹ See, the material cited in note 9, *supra*.

"to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."¹²

Has "misappropriation" then been withdrawn from the "vague borderline" between federal and state law, its status definitely settled by Congress? The legislative history suggests that this question remains open.

Section 301(b) (3) of the Senate Revision Bill (S.22)¹³ and the bill as reported favorably by the House Judiciary Committee in 1976¹⁴ specifically referred to state law "rights against misappropriation" as rights expressly *not* preempted by the federal statute; and the illustration provided in the accompanying report on the revision bill was the *INS* case itself.¹⁵

The continuing legitimacy of *INS*-type relief within the preemptive scheme of the Revision bill was, however, pointedly put into question by an amendment suggested by the Justice Department¹⁶ and introduced in final debate in the House of Representatives in September 1976,¹⁷ to strike out the specific "saving" reference to "rights against misappropriation" contained in the Senate Bill. In the debate, the potential post-Revision availability of state law "misappropriation" relief under the general, as enacted, "saving" language of section 301 (b) (3) was evaluated in confusing and sharply contradictory terms. Whether any cut-back of existing law was intended was left unclear by

¹² S. REP. NO. 473, 94th Cong., 1st Sess. 114 (1975). The explanatory language of this Senate Report was repeated verbatim in H.R. REP. NO. 1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S. Code Cong. 2nd Ad. News 5659, 5746.

¹³ S.22, 94th Cong., 1st Sess. sec. 301 (1975). The text of the Senate Bill is set out in Appendix III.

¹⁴ H. R. REP., *supra* note 12.

¹⁵ S. REP., *supra* note 12, at 116.

¹⁶ Letter from Michael M. Uhlmann (Assistant Attorney General, Legislative Affairs) to Congressman Robert Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, (July 27, 1976). The relevant portions of the text of the letter are set out in Appendix IV.

¹⁷ 122 CONG. REC. H10910 (daily ed. September 22, 1976).

the colloquy in the House preceding its passage.¹⁸ The accepted amendment was agreed to by the House-Senate conference and enacted as law.¹⁹ Therein lies the specific problem of statutory interpretation to which this paper will eventually turn: working out the consequences of this express preemption provision absent clear-cut exposition of legislative intent.

Such an exploration of the Revision preemption plan must be placed in the context provided by the previous developments that its own evolution and formulation reflect. The "misappropriation" preemption problem is not the novel, unprecedented product of the Revision, but instead has been cognizable ever since *INS* was decided. Its resolution has heretofore been weighed, not in the Congress, but in the courts, subject to some of the vagaries of the amorphous doctrine at issue.

Preemption adjudication, however, came slowly to this area of law. That judicial resolution of any such claim was not demanded for so long a period of time may have been, in part, because the formulations of "misappropriation" claims allegedly implicated interests separate from those involved in copyright litigation. Starting with *INS*, judges analyzed misappropriation problems in terms of the wrongful taking of the fruits of the labors and investments of others. Copyright claims turned, on the other hand, on allegations and proofs of "copying."

This skewing of analyses may account, in part, for the delayed arrival of preemption adjudication to the area. To further complicate and confuse matters—and to postpone conclusive adjudication—the "misappropriation" doctrine expanded over time; and when preemption challenges were raised, they were addressed to fact situations quite dissimilar to that posed in *INS* itself. Three main lines of "misappropriation" cases appear to have emerged. First, *INS* and the opinion of New York Supreme Court Justice Greenberg in *Metropolitan Opera Ass'n v. Wagner-Nichols Recording Corp.* exemplified classic, straight-forward judicial justifications of relief founded on characterization of the charged party's *conduct* as wrongful: that "the effort to profit from the labor, skill, expenditures, names and reputation of others which appears in this case constitutes unfair competition which will be enjoined" and that in such a case the issuance of an injunction "simply quarantines business conduct which is abhorrent to good con-

¹⁸ *Id.* The House of Representatives' debate is discussed in the text at note 138, *infra*.

¹⁹ House Conference Report 94-1733, reprinted in U.S. Code Cong. and Ad. News 5810, 5819-5820. The change was noted without comment.

science and the most elementary principles of law and equity."²⁰

Second, however, are cases in which state protective power in the face of a failure of federal protection is grounded on the exclusion from the federal scheme of the *subject matter* in question; such cases have also fallen under the "misappropriation" rubric—with the consequences in *Goldstein v. California*²¹ traced below. This line of analysis developed in the course of judicial response (a notable example being the second Circuit's influential opinions in *Capitol Records v. Mercury Records*),²² to preemptive problems not faced by the pioneering exponents of the "misappropriation" doctrine. Further confusion is provided by the *sub silentio* interweaving between these two classes of cases: the same issue—that of the availability of "misappropriation" relief for the unauthorized duplication of sound recordings—was considered in both *Metropolitan Opera Ass'n* and *Capitol Records*—and in entirely different analytical frameworks. A third type of "misappropriation" case is *Grove Press v. Collectors Publishing, Inc.*,²³ in which state relief was held not preempted, on reasoning which leaves the basis for decision obscurely balanced somewhere between the conduct and subject-matter foci.

These threads of judicial response to preemption issues as litigated under the 1909 Act and of the complications introduced into the judicial delineation of preemption by the existence of these varieties of "misappropriation" claims will continue to engage attention as the background to section 301 of the Revision is developed in closer detail. First, this article will explore the climax of judicial preemption analysis in *Goldstein v. California*, and that case's implications for decision under the 1909 Act. Second, the congressional history of section 301, with particular scrutiny of the interpenetration of judicial and legislative developments will be described. Finally, the article will assess the continued legitimacy of *INS*-type "misappropriation" relief under the regime established by the Revision law, which entered into force after January 1, 1978.

II. GOLDSTEIN v. CALIFORNIA: JUDICIAL PREEMPTION METHODOLOGY

In *Goldstein v. California*,²⁴ a "misappropriation" preemption case finally came before the Supreme Court. Within the "universe" of mis-

²⁰ 199 Misc. 786 (1950), *aff'd* 279 App. Div. 632 (N.Y. Sup. Ct., 1st Dept. 1951).

²¹ 412 U.S. 546 (1973).

²² 221 F.2d 657 (1955).

²³ 264 F. Supp. 603 (C.D. Cal. 1967).

²⁴ 412 U.S. 546 (1973).

appropriation cases two points distinguished the facts in the case. First, the state statute challenged as preempted by the federal copyright scheme asserted protective power over the specific subject matter category of sound recordings. California was not exercising corrective process to remedy a general, wrongful business practice—*sub nomine* unfair competition, or “misappropriation”. The subject matter defined the actionable wrong. Second, the state policy was enforced through a criminal statute, not through a judicial decision. The statute, unlike an opinion announcing a common law right, defined specific, proscribed conduct, *without*, however, framing its analysis in traditional “misappropriation” terms. The validity of what the Court confidently labelled a state copyright statute was the preemption issue squarely presented by *Goldstein*.

For the first time, the Court essayed a full-dress discussion of the preemptive force of federal constitutional and statutory law regarding copyright. The Court elaborately reconstructed and formulated the balance struck by the Framers and, subsequently, legislators between federal and state regulation of intellectual property, all of which was set within an analytical framework explicitly borrowed from the *general* mode of preemption adjudication.²⁵

The implications of this methodological choice will be explored below. What merits emphasis now is that it was not an inevitable approach to the specific preemption issues posed in *Goldstein*. The novelty of the Court’s analysis may be gauged by comparison with a case which rested on very similar facts,²⁶ decided by the Second Circuit in 1956, *Capitol Records v. Mercury Records*.²⁷

In *Capitol Records*, both the majority opinion of Judge Dimock and the dissent of Judge Learned Hand were crafted along analytical lines specific to intellectual property law. In fact, the area of agreement shared by the two opinions was quite extensive. Both concluded that recorded renditions were potentially copyrightable under the Con-

²⁵ *Id.*, at 555-557.

²⁶ *Capitol Records v. Mercury Records Corporation*, 221 F.2d 657 (1955), presented facts quite comparable with *Goldstein*. The actionable wrong in *Capitol* could not easily be framed in the typical “misappropriation” language of the taking of another’s skill, enterprise, or investment. The recordings of public domain compositions had not been originally produced by either party to the action. The defendant did not “misappropriate” time and labor that the plaintiffs had invested in the recording process. Both parties had pressed their records from matrices originally produced by a common third party source. The “misappropriation” issue in the case—decided by the majority under the law of New York—turned squarely on the simple sale of copies by the defendant: the wrong defined by statute in *Goldstein*.

²⁷ 221 F.2d 657 (1955).

stitution but had not been made copyrightable under federal statutory law. Both held that the Copyright Act²⁸ by itself exercised no preemptive force barring state protection respecting such non-copyrightable material. Finally, the two opinions agreed that "publication" extinguished the possibility of state law relief against unauthorized copying: but here significant divergence is evident. The majority only impliedly accepted such a conception—which *could be* so derived as the history of the Revision Bill will demonstrate below—as the traditional rule in American copyright law, the consequence of *Wheaton v. Peters*.²⁹ This is nowhere spelled out, yet without such an implied assumption, the labored exposition of the majority on the issue upon which the decision turned makes little sense. For Judge Hand, "publication" cut off state law because of the force of the Constitutional copyright clause itself, with its prescription of limited times and implication of a uniform national rule.³⁰

Beyond these points of agreement, majority and dissent divided on the specific issue of whether New York State law or federal law determined whether the plaintiffs' sales of the recordings had "dedicated" the recorded renditions to the public, that is, which law provided the applicable standard to test whether "publication" had occurred. Hand argued that the Constitution itself required a federal standard to apply: and tested by that standard, the records had been "published" and dedicated. Finding no preemptive mandate in the Copyright statute, the majority, however, held state law dispositive to conclude that, under state law, sale did not constitute a "dedication" to public use, relying on Justice Greenberg's holding in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*³¹ (an opinion, of course,

²⁸ 17 U.S.C.

²⁹ 33 U.S. (8 Pet.) 591 (1834).

³⁰ "I cannot believe that the failure of Congress to include within the Act all that the Clause covers should give the states so wide a power. To do so would *pro tanto* defeat the overriding purpose of the Clause which was to grant only for "limited Times" the untrammelled exploitation of an author's "writings". Either he must be content with such circumscribed exploitation as does not constitute 'publication', or he must eventually dedicate his 'work' to the public. . . . I would hold that the clause has that much power *ex proprio vigore*; and that the States are not free to follow their own notions as to when an author's right shall be unlimited both in uses and in duration. Such power of course they have as to 'works' that are not 'Writings'; but I submit that, once it is settled that a 'work' is in that class, the Clause enforces upon the author the choice I have just mentioned; and if so, it must follow that it is a federal question whether he has published the 'work'." 221 F.2d at 667.

³¹ 199 Misc. 786 (1950).

in which none of the preemption-“publication” questions at issue in *Capitol Records* had been considered).

In *Goldstein v. California*, the issues as argued and decided were considerably recast from the approaches taken in *Capitol Records*. The shared assumptions, as well as the points of division, were brushed aside in *Goldstein*. *Capitol Records* had pointed a way to resolve the legality of state protection of sound recordings through an analysis closely geared to the particular problems of copyright law. In *Goldstein*, the very focus of *Capitol*—the issue of “publication”—was virtually dismissed. Impetus for *Goldstein*’s broader inquiry was provided by the ambiguous legacy of *Sears, Roebuck & Co. v. Stiffel Co.*,³² and *Compco Corp. v. Day-Brite Lighting, Inc.*³³ *Sears-Compco*, once carried over from the patent to the copyright area. Decided in 1964, *Sears-Compco* could be read—and were so read by *Goldstein*³⁴—as dramatically departing from the view of both Dimock and Hand in *Capitol Records* that the Copyright Act itself held no preemptive consequences as to material not brought within its coverage. The conclusion appeared to be that material that could not be federally copyrighted could not then find alternative protection under state law.

The sound recording preemption question therefore took on a different cast after *Sears-Compco*. The petitioners in *Goldstein* relied on the copyright statute to support their claim that the California criminal sanctions were preempted—an argument rejected all around in *Capitol Records*; and they also pressed arguments based, following the *Capitol Records* dissent, on the Constitution itself.

In *Sears*, the Court found that a national policy for uniformity was manifested in both patent and copyright laws. The Court concluded that “the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition.” State encroachment—direct or indirect—upon federal law was barred, of course, by the Supremacy clause. “An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so.”³⁵

Although *Sears* and its companion case, *Compco*, treated matter

³² 376 U.S. 225 (1964).

³³ 376 U.S. 234 (1964).

³⁴ At least this is true to the extent that *Goldstein v. California* did in fact “reaffirm today” those holdings, departing from them only to the extent required by the results of the factual inquiry conducted as to Congressional intention regarding sound recording protection.

³⁵ 376 U.S. at 231.

that had not qualified under the *patent laws*, their preemptive example had certain—if unclear—implications for copyright adjudication and the reconciliation of state unfair competition or “misappropriation” protection with the federal copyright law’s failure to protect. Distinctions between copyright and patent could be drawn.³⁶ But the general teaching derived from *Sears-Compco* appeared to be that statutory enactments under the copyright clause should be seen as reaching to the full extent of the constitutional power, effectively barring state entry into the field.³⁷

To frame the statutory preemption issue, the Court in *Goldstein* began with a reconstruction of the first principles embodied in the Constitutional grant of federal copyright power. Next, it applied the general tenets of preemption analysis to evaluate the preemptive impact of the Copyright Act’s failure to protect sound recordings upon protection under state law for such a class of “writings”. In a brief footnote to this line of analysis, the Court summarily denied that the concept of “publication” provided a demarcation point between state and federal power.³⁸

Goldstein’s rejection of the *Capitol Records* approach was implicit but fundamental. Analysis focused on the particular nuances of copyright law was transformed into an analysis framed in terms of general preemption principles. The relevance of these principles was not accorded any critical self-examination but was accepted *a priori*. Derived from the classic fount of preemption litigation—commerce power cases—they offered the Court a readily available framework for resolution of the *copyright* preemption issue facing it.

Throughout our legal history, preemption adjudication has been preeminently a matter of the adjustment of federal and state power to regulate commerce. Preemption cases have traced out the changing distributions of power in the federal system, with solicitude for the uniform, national sway of federal law alternating with greater toleration of state exercises of local regulatory and police power.³⁹

Within the commerce context three general guides to preemption

³⁶ As was noted in the aftermath of *Goldstein v. California* in Brown, *Publication and Preemption in Copyright Law: Elegaic Reflections on Goldstein v. California*, 22 U.C.L.A. L. Rev. 1022 (1975).

³⁷ For a range of views of the time see, Leeds, Handler, Derenberg, Brown and Bender, *Product Simulation: A Right or a Wrong?* 64 COLUM. L. REV. 1178 (1964).

³⁸ 412 U.S. at 570 (n. 28).

³⁹ Influential recent accounts of this history of preemption adjudication appear in Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Hirsch, *supra* note 9; and *The Preemption Doctrine*, *supra* note 10.

adjudication have emerged in recent decades.⁴⁰ First, the exercise of state police powers was not to be superseded unless such was "the clear and manifest purpose of Congress." Second, state regulatory and police power enactments had to be measured against, as a fundamental structural limit, the Constitution's affirmative grant of power to regulate interstate commerce to the Congress. The decision of *Cooley v. Board of Wardens*⁴¹ had fashioned the *Constitutional* standards for testing state commerce legislation: matters inherently national, requiring one uniform rule, were declared by force of the constitutional provision itself to be beyond the legislative capacities of a state. Third, state legislation which trenched upon activities already subject to some federal legislative enactment had to be examined by the courts to determine whether their enforcement would frustrate the federal policies represented by the federal statute in question. This task is imposed upon the courts by the Constitution's Supremacy Clause.

As federal legislation proliferated, preemption problems increased. If the appropriate test for preemption had once been *actual* conflict or *explicit* congressional intent to displace state law, such formally exacting standards could not long be maintained. Intent, of course, had never been the Constitutional command; the assurance of Supremacy of federal law always was. To see judicial analysis of preemption problems as narrowly focused on the explication of a platonic congressional intent misunderstands the judicial function in cases where state law is challenged as preempted by federal law. Congressional intent is not of itself the relevant constitutional standard. The command of the supremacy clause is. Intent provides an index of potential conflict by delineating what the operative scope of *supreme* federal law is to be; but it is only an index. The judicial role in preemption cases is, in this critical way, necessarily independent of specific tracings of congressional intention, nebulous as they so frequently are. This independent judicial role in determining whether state law has been preempted is most clearly exercised when Congress has in enacting legislation made no explicit provision as to its impact on state law. However, even where an express preemption statute (such as section 301) is involved, the statutory language may not clearly indicate its preemptive scope and Congressional intention may similarly fail to provide a court with definitive guidelines for judgment. The court is remitted therefore to its general techniques of adjudicating preemption claims to assure that the supremacy of federal

⁴⁰ These principles have been distilled from the leading cases, especially *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

⁴¹ 53 U.S. (12 How.) 299 (1851).

law is not frustrated. That such is the necessary judicial response to section 301 as its respects state "misappropriation" rights will be argued in the text accompanying notes 158-160, *infra*.⁴² As federal regulation expanded, discrete standards for testing congressional intent to preempt tended to merge together.⁴³ A finding of "occupation of the field" could be rephrased as reflecting a judicial finding that the Congressional legislation in question had fixed the balance of rights or powers to prevail and that supplementary state legislation would upset that balance.⁴⁴ The case becomes one of actual conflict and clearly appropriate for a preemptive holding. This pattern of analysis was especially marked in the labor law cases.⁴⁵

These premises and principles were primarily fashioned in commerce cases. Preemption analysis came very belatedly to other areas. Not until 1941 and the decision of *Hines v. Davidowitz*⁴⁶ did a preemption case involve legislation which did not regulate commerce. In *Hines*, state (Pennsylvania) registration requirements for aliens were challenged as barred by the Constitution's grant of naturalization power to Congress and by federal legislation regulating alien presence in the United States. The *Hines* case produced a frequently cited distillation⁴⁷ of the test for preemption, carried over, in turn, into commerce cases.

An emphasis on the *subject matter* at issue emerged from this development of preemption standards. Characterization of subject matter enters the preemption inquiry at two stages. First, irrespective of

⁴² Note, *Pre-Emption as a Preferential Ground*, 12 STAN. L. REV. 208 (1959).

⁴³ The criteria enumerated in the leading case of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), were the pervasiveness of the federal scheme, the dominant federal interest in the field affected, the evidence of the object to be obtained or obligations imposed, and whether state and federal results would be inconsistent. All these criteria of intent are rarely run through in any single case; for one notable example see *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

⁴⁴ For a survey of "occupation of the field" cases, see Note, "*Occupation of the Field*" in *Commerce Clause Cases, 1936-1946; Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946).

⁴⁵ See, e.g., *Hill v. Walton*, 325 U.S. 538 (1945), and *Garner v. Teamsters, Chauffeurs, and Helpers Local Union No. 776*, 346 U.S. 485 (1953), for analysis basically rooted in the conception that labor law regulation, once undertaken by Congress, becomes a subject for which only national uniform action is permissible to avoid upsetting the federal scheme. Conflict is a function of subject matter description.

⁴⁶ 312 U.S. 52 (1941).

⁴⁷ "Our primary function is to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. This was cited in *Goldstein v. California*, 412 U.S. 546, 561 (1973).

Congressional intention of purpose, the Constitution itself poses a fundamental limit on state action affecting a certain range of subject matter—that “inherently national”.⁴⁸ Second, Congressional action upon subject matter that is not so “inherently national” may yet remove that subject matter from the range of permissible state action. Such a finding of subject matter as statutorily national is a basic pivot for the various tests of preemption. Such preemption tests as intent, conflict, and occupation of the field may be reduced in many cases to the determination that the affected subject matter requires national treatment. Characterization of the subject matter may determine preemption or preservation of state law.⁴⁹

This approach to subject matter characterization was reflected in *Goldstein*. Paul Goldstein commented that the Court “comfortably rephrased” the preemption issue in *Goldstein* “to reflect an emphasis more congenial to an expansive view of state power.”⁵⁰ Set within the chosen context of general preemption analysis, the Court’s issue-framing was not surprising. *Goldstein* was decided within a framework taken over from the commerce cases; and we see the Court commencing in familiar fashion, by postulating the validity of state regulatory legislation,⁵¹ the basic starting point of modern preemption adjudication.

The Court then spun out a commerce clause-type inquiry. The focus was on the subject matter, the sound recordings. The Court reasoned that no constitutional withdrawal of the states’ “reserved” powers to grant copyrights existed. Explicitly drawing on *Cooley v. Board of Wardens*, the Court reaffirmed Congress’ exclusive power “to legislate over matters that are necessarily national in import”; however, categories of intellectual property did *not* necessarily require such uniform, federal treatment.⁵²

The copyright clause issue settled in favor of the reserved power of the states, the Court turned to the Supremacy clause, distinguishing

⁴⁸ For example, in the trial court in *Hines*, the state law had been struck down as barred by force of the “naturalization” clause of the Constitution, U.S. CONST., art. I, §8, cl. 4. *Davidowitz v. Hines*, 30 F. Supp. 470 (1939).

⁴⁹ *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

⁵⁰ Goldstein, “Inconsistent Premises” and the “Acceptable Middle Ground”: A Comment on *Goldstein v. California*, 21 BULL. COPR. SOC’Y 25, 28 (1974).

⁵¹ 412 U.S. at 552.

⁵² *Id.*, at 557-558:

“it is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects. Since the subject matter to which the copyright clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to exclusive federal control.”

the state laws struck down in *Sears-Compco*. California's statute prohibiting recording duplication, the Court held, did not conflict with federal law, despite the failure of the 1909 Act to protect sound recordings. Congress had not occupied the field to the exclusion of state law as to subject matter not within the federal scheme: no balance had been drawn.⁵³

The Court's handling of copyright subject matter again parallels treatment of commerce subject matters. No special inferences were drawn from the Copyright Act. Rather, the focus was on subject matters considered as discrete entities—not as part of any overall scheme of federal regulation of protection and competition. The Court's handling of the statutory issue rather disingenuously tracks the constitutional analysis, once no manifest Congressional intent to withdraw protection is found. The field to be occupied appears to be made up of each separate category of "writings" and in the absence of manifest Congressional intent, the Constitutional finding that "writings" may be of local character will, of course, control resolution of this analytically distinct question.

At this point, a problem with the Court's assimilation of copyright preemption to commerce preemption becomes clear. In commerce cases, the *Constitution itself* provides an outer limit to state power.⁵⁴ This is a limit not found by the Court in the copyright area. No "writings" category is described as necessarily national; all are open to state action in the absence of Congressional directive.⁵⁵ The Court's com-

⁵³ *Id.*, at 570:

"The application of state law in [*Sears-Compco*] to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution. No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of 'Writings', Congress has drawn no balance;"

⁵⁴ See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

⁵⁵ 412 U.S. at 560. This aspect of the reasoning in *Goldstein* was vigorously criticized in *The Preemption Doctrine*, *supra* note 9, at 641:

"... considering the nature of the modern communications industry . . . the viability of local copyright regulation is doubtful. The promotion, distribution and marketing of sound recordings can hardly be deemed an 'intra-state' activity. If the 'necessarily national' character leg of the Court's test is to have any practical applicability, recordings should have come within it. The Court therefore seems to have extended protection to questionable state interests and in the process ignored potential federal interests in uniform regulation of a subject matter which does not admit of local treatment."

This article was, in general, more favorably disposed to the *Goldstein* decision, viewed from the framework of preemption adjudication generally, than were the more specialized critiques of Brown, *supra* note 36, or Goldstein, *supra* note 50.

merce analogy is incomplete—fatally incomplete from the standpoint of the federal interest in copyright regulation. The Court did not close the Constitutional circle which restrains state exercises of commerce and police power. There is no Constitutional barrier to state copyright legislation; only positive Congressional action can cut off state law-making. And even the vast industry of music recording is left open to state copyright activity.

This imperfect symmetry between the copyright and commerce clauses was accepted without qualm by the Court. The *Goldstein* emphasis on subject matter dovetailed with an established body of preemption law which organized its lines of inquiry around the characterization of subject matter as national or local. The commerce clause analogy provided a ready-made approach to the sound recording problem posed by *Goldstein*; and its application in that case, however unsatisfactory in terms of copyright law tradition, could gain some plausibility as a simple and natural extension of general preemption principles. But if it was a simple extension, it also was a limited one. Once the focus of preemption analysis is no longer the protectibility of a particular, discrete category of subject matter, its analytic powers are exhausted.

III. AFTER GOLDSTEIN: PROBLEMS

The decision in *Goldstein v. California* recast the "misappropriation" preemption issue. A recent district court case illustrates the shifting dimensions of the problem, as it appeared after *Goldstein* and before the Revision.

In *Triangle Publications v. Sports Eye, Inc.*,⁵⁶ plaintiff, publisher of *The Daily Racing Form*, brought suit for a preliminary injunction alleging that the defendant's publication had infringed plaintiff's copyright and had violated state unfair competition law.

Judge Lord began his statement of the case by explaining that plaintiff's newspaper (specifically its "Past Performances" section) "contains a wealth of information about horse races which are to be run at various tracks around the country" gathered at considerable expense.⁵⁷ Defendant's publication, *Fast Performances*, provided analy-

⁵⁶ 415 F. Supp. 682 (E.D. Pa. 1976).

⁵⁷ *Id.*, at 683-684. As Judge Lord explained the plaintiff's business procedures:

"The information published in plaintiff's paper is gathered at considerable expense and effort. Plaintiff has employees at all operating tracks in North America and receives reports from them for each race. Plaintiff compiles and maintains these statistics using data processing equipment at its plant in New Jersey." *Id.*

tic charts of upcoming races with evaluations of horses' performances⁵⁸ based upon information appearing in *The Daily Racing Form* and compiled by referring to the *Form*.⁵⁹

The court denied plaintiff's motion for relief.⁶⁰ There was no dispute that plaintiff had obtained a valid copyright of the *Form* and its "Past Performances" section.⁶¹ But, comparing the publications in question, the Court found that "both in visual and factual apprehension . . . the two papers differ substantially" and therefore the "substantial similarity" standard for infringement had not been met.⁶²

⁵⁸ *Id.*, at 684. Describing the content of *Fast Performances*, Judge Lord compared it to plaintiff's publication:

"[*Fast Performances*] contains some thirty-two categories in four broad areas for each race covered. For each such race, *Fast Performances* names only those horses which fall into these categories. For example, one category is 'Beaten Within One Length of Winner Last Race' Other categories are comparative, such as 'Fastest Comparative Speed in Recent Races'. Thus, unlike *Past Performances* which give a plethora of facts about each and every horse entered in a given race, *Fast Performances* only mentions a given horse if it falls within one or more of its categories." *Triangle* at 684.

⁵⁹ *Id.*, at 684.

"... [D]efendant obtains the information which it uses to prepare *Fast Performances* from plaintiff's publication. When the *Form* is first published, an employee of defendant purchases a copy and using blank forms, prepares a draft copy of *Fast Performances*. The information is then telephoned to defendant in New York. Defendant's employee was apparently able to prepare an issue of *Fast Performances* in less than an hour and upon occasion in fifteen or twenty minutes. At times he would be eating dinner or talking simultaneously with his preparation of the charts."

⁶⁰ At this preliminary injunction stage the motion was, of course, subject to the general restrictions imposed on the issuance of such relief. The case will be read here for more than its procedural content with attention focused, for present purposes, on the issues raised without special regard for the plaintiff's particular unmet burdens here of making "a clear showing of probable success on the merits" and sufficient affirmative showing of irreparable injury. See *id.*, at 684, for treatment of this aspect of the case.

⁶¹ *Id.*, at 684. Judge Lord relied here on *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942) (Wyzanski, J.), the leading case holding that racing charts and past performance compilations were copyrightable. It was in that case that Judge Wyzanski offered the celebrated observation, "I could hardly be unmindful of the probability that a majority of the present justices of the Supreme Court of the United States would follow the dissenting opinion of Mr. Justice Brandeis in the *International News* case. . . ." See KAPLAN, *supra* note 4 at 61.

⁶² 415 F. Supp. at 685.

Judge Lord perceptively observed that plaintiff's complaint was grounded in the defendant's "use of the *Form*, without significant cost to prepare is own publication. . . ."⁶³ But,

"[i]n applying this test [of copying and substantial similarity] it must be remembered that while the form or mode of expressing an idea (or in this case data) may be copyrighted, the data or ideas may not be."⁶⁴

Precisely in these respects, however, allegations insufficient to support relief grounded on copyright infringement appear to present a classic case for "misappropriation" relief, congruent with the plaintiff's claim in *INS* itself.

The court recognized this linkage between the plaintiff's two allegations when it addressed the "unfair competition" plea for relief. Without any critical analysis⁶⁵ of the "fit" between plaintiff's claims and the law of unfair competition, the court simply commented that "[t]his cause of action was recognized and expounded upon by the Supreme Court in *INS. v. AP*."⁶⁶ Relying on *Sears-Compco* and carefully limiting the plaintiff's use of *Goldstein*, Judge Lord qualified the continuing authority of *INS*⁶⁷ and concluded that no relief could be had on the state law claim, which was held to be preempted by federal law.

⁶³ *Id.*, at 685-686:

"Plaintiff's real complaint in this case, as it was in *Salkeld* [Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975), *cert. denied sub. nom.* Universal Athletic Sales Co. v. Pinchock, 423 U.S. 863 (1975)], is defendant's use of the *Form*, without significant cost, to prepare its own publication—a publication which then competes in the marketplace with the plaintiff's paper. But, the answer is, as it was in *Salkeld*, that it is only the method or form for expressing the data that is copyrightable. [citation omitted] And on the present state of the record, plaintiff has not demonstrated a copyright infringement of its mode of disseminating the horseracing data it gathers."

⁶⁴ *Id.*, at 685.

⁶⁵ *Triangle v. Sports Eye* can be distinguished from the facts in *INS* to a point. *Sports Eye* was "using" *Triangle's* information to prepare its abstracts rather than simply directly "copying" or rewriting the "news" (the *INS* situation).

⁶⁶ 415 F. Supp. at 686.

⁶⁷ "Since that time [when *INS* was decided], however, the Court has cut back substantially on the protection which a state may afford under the rubric of unfair competition." 415 F. Supp. at 686.

Triangle's analysis took as a starting point the view that

"the *Sears-Compco* decisions have been understood as holding that state regulation of unfair competition is pre-empted as to matters falling within the broad confines of the copyright clause of the United States Constitution. U.S. Const. Art. I, sec. 8."

Goldstein "merely limited *Sears-Compco*, holding that the copyright and supremacy clauses by themselves, in the absence of Congressional expression, did not prohibit any state incursions on the area." Unlike *Goldstein* which treated a field where Congress had not acted, "in the instant case Congress has taken action to afford copyright protection to the paper which plaintiff publishes. This is precisely the situation where the *Sears-Compco* preemption doctrine remains applicable." To grant plaintiff relief would precipitate a conflict, to quote *Goldstein*, between state protection and "that which Congress intended to be free from restraint."⁶⁸

Without reference to the briefs and arguments to the court it is not, of course, possible to fully reconstruct the patterns of reasoning which provided the basis for the court's reading of the authoritative cases.⁶⁹ And much that can be extrapolated from the *Triangle* analysis was either left implicit or only developed in conclusory fashion. Taking up, first, *Triangle's* reading of the constitutional implications of *Sears* and, second, its treatment of *Goldstein's* limitation of this constitutional analysis will, however, open the way for a reconstruction of the potential preemption problems raised by *Goldstein*.

Triangle explicitly treated the *Sears-Compco* preemption rule as having a basis in the Constitution as well as the Copyright Act.⁷⁰ Rest-

⁶⁸ *Id.*, at 686.

⁶⁹ For example, the point of plaintiff's argument that grant of the injunction would not contravene federal policy and so should be authorized remains obscure in the opinion. Whether it is a *Goldstein* argument at all is questionable; it appears to owe more force to the subsequent opinion in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). In *Kewanee*, state trade secret protection for patentable (but not actually patented) articles was held not preempted. Plaintiff's argument may have been that since it had obtained federal statutory copyright, state law relief would not have conflicted with a federal policy that authors rely on statutory copyright for copyrightable subject matter.

⁷⁰ *Triangle* quote from *Compco* as follows:

"Today, we have held . . . that when an article is unprotected by a patent or copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, §8, cl. 8 of the Constitution and in the implementing federal statutes, of allowing free

ing the *Sears-Compco* doctrine on the force of the Constitutional copyright clause is, however, problematic. Although the two cases may be read in tandem as announcing one common doctrine, it is curious that the quoted language from *Compco* comes from that opinion's explication of *Sears*, and application of its holding over the *Compco* case facts. The holding in *Sears* itself directly relies on the Constitution only to establish the basis for the statutory exercise of patent power. In an imprecise analysis of the role of state unfair competition law within the federal patent system, Justice Black in *Sears* relied primarily on the policy of the patent *statute* as the bar to the challenged state laws.⁷¹ However, the opinion did observe that the state law of unfair competition might allow protection for articles unqualified "under *federal constitutional standards*" [emphasis added] and therefore should be held invalid.⁷²

The shifting between constitutional and statutory references by Justice Black leaves unclear the source of the federal patent policy being applied to bar state protection of articles not qualifying under federal standards. Implicit in the *Sears* analysis is the apparent identi-

access to copy whatever the federal patent and copyright laws leave in the public domain." 415 F. Supp. at 686, quoting 376 U.S. at 237.

⁷¹ Although some reference was made to the "limited times" standard that controls the federal patent system by force of the Constitutional enabling clause, the description offered of the federal patent system's relationship to state law concentrated on the *statutory* policies at stake:

"... the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, *consistently with the Supremacy Clause of the Constitution*, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for patents. To do either would run counter to the *policy of Congress of granting patents only to true inventions*, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the *objectives of the federal patent laws*." [Emphasis added]. 376 U.S. at 231.

⁷² As Justice Black explained:

"To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that *while federal law grants only 14 or 17 years' protection to genuine inventions*, [citation omitted], States could allow perpetual protection to articles too lacking in novelty to merit any patent at all *under federal constitutional standards*. This would be too great an encroachment on the federal patent system to be tolerated." [Emphasis supplied]. 376 U.S. at 232.

cation of the constitutional and statutory requirements of "invention,"⁷³ which state law may not ease. In this reading, *Sears* announces a statutory policy whose contours are informed by the Constitutional definition of what is deserving of patent under federal law—and which *pro tanto* determines what may not be protected by the states.

Recasting the *Sears* constitutional argument in the copyright area has not squarely been done—although Judge Lord applied his constitutional perception of *Sears* to *Triangle's* facts despite the problems of transference.⁷⁴ If *Sears* is read as enforcing a federal policy⁷⁵ derived from a Constitutional definition (incorporated by the patent statute) of "discovery" or "invention," the Constitutional limit on state power manifested by the Patent/Copyright clause itself (apart from statutory preemption by virtue of the Supremacy clause), the analogous copyright law issue would turn on the power of states to protect subject matter that are *not* Constitutional "writings" at all. This is the conclusion to which the *Sears* constitutional analysis pushes when brought to bear on copyright.⁷⁶ But Judge Lord did not follow this through.

The need to accommodate the decision in *Goldstein v. California*

⁷³ The Constitutional Provision respecting copyright and patents (U.S. Const. Art. I, sec. 8, cl. 8) provides that

"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*." [Emphasis added].

⁷⁴ Ralph Brown, discussing the potential carryover of *Sears-Compco* into copyright adjudication, attempted to recast that holding into comparable literary property terms in a formulation that may have been overbroad:

"[T]he objects in *Sears* and *Compco* were unpatentable because they did not meet the qualitative standards of invention, not because lamps and lighting fixtures as such were not patentable machines or patentable designs. The copyright equivalent to the lamp in *Sears* would be works that are unoriginal or that are too abstract to be considered expressions." Brown, *supra* note 36, at 1037.

⁷⁵ The policy as described by Justice Black: "[T]he patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition." 376 U.S. at 232.

⁷⁶ Interestingly, when so pushed, the analysis ends up with a different formulation of the Constitutional restrictions on state power than the one which it originally advanced. Judge Lord described *Sears-Compco* as "understood as holding that state regulation of unfair competition is pre-empted as to matters falling within the broad confines of the copyright clause of the United States Constitution"; but the *Sears* constitutional point is that state law is barred as to matters falling outside the constitutional standard. This simply indicates the difficulty of giving lucid explanation of the *Sears* result, understood as a constitutional decision.

with *Sears-Compco* intervened at this point—with a consequent confusion of what the constitutional force of *Sears-Compco* could have been as decided. We return to *Triangle* to trace the impact of *Goldstein* on Judge Lord's analysis.

Goldstein, Judge Lord indicated, had undercut the constitutional basis of *Sears*⁷⁷—and it deflected his reasoning away from the constitutional conclusion toward which his use of *Sears* appeared to be heading. Nevertheless, *Triangle* held that plaintiff's reliance on state law was barred and that *Sears-Compco*, even as "limited" by *Goldstein*, compelled preemption.⁷⁸ Judge Lord found support for this continued preemptive reading of *Sears-Compco* in a recent decision of a federal district court in New Hampshire, *Jacobs v. Robitaille*.⁷⁹

Jacobs was an unsuccessful action by a publisher of a weekly classified advertisement booklet to enjoin a competitor who had issued his own booklet reprinting plaintiff's published material. Plaintiff alleged copyright infringement and unfair competition. The copied advertisements were copyrightable under the federal law.⁸⁰ Plaintiff had not, however, obtained statutory copyright before publication. The court held that such a publication dedicated the booklet to the public. *Goldstein* did not authorize state protection of copyrightable advertisements which were not, in fact, copyrighted. The court concluded that what had been thereby placed in the public domain could not be subsequently removed by state action.⁸¹

Judge Lord concluded that *Jacobs* presented "indistinguishable facts" with *Triangle*.⁸² Concentrating on *Jacobs* for a moment, plaintiff's suit was aimed at enjoining the "copying" *per se* of the advertisements first published in his booklet. The result does not surprise when the allegations of wrong-doing are viewed from this perspective.

State law was invoked in *Jacobs* precisely to provide the protection

⁷⁷ "*Goldstein* merely limited *Sears-Compco*, holding that the copyright and supremacy clauses by themselves, in the absence of congressional expression did not prohibit any state incursions into the area." 415 F. Supp. at 686.

⁷⁸ Judge Lord concluded:

"In the instant case Congress has taken action to afford copyright protection to the paper which plaintiff publishes. This is precisely the situation where the *Sears-Compco* pre-emption doctrine remains applicable. Otherwise a 'conflict would develop if a State attempted to protect that which Congress had protected.' *Goldstein*, supra 412 U.S. at 559." 415 F. Supp. at 686-687.

⁷⁹ 406 F. Supp. 1145 (D. N.H., 1976).

⁸⁰ And necessarily, therefore, Constitutional "writings".

⁸¹ *Id.*

⁸² 415 F. Supp. at 419.

against unauthorized copying that had been forfeited by failure to secure federal copyright. The copied advertisements were "writings" in both constitutional and statutory senses. Preemption could be held even within the "subject-matter"-focused framework that *Goldstein* had applied to limit the reach of *Sears-Compco*. *Goldstein* had concluded that "sound recordings of original artistic performances were constitutional, but not statutory, 'writings.'" Therefore, premised on the Constitutional reservation of state power, subject matter that was not under the statute could be protected by state law. In holding that as to a "writing" copyrightable under the statute the state law protection, *sub nomine* unfair competition, claimed by the plaintiff was barred, *Jacobs* simply worked out the preemptive consequences of *Goldstein*'s protective result.⁸³

Judge Lord applied a similar understanding of *Goldstein*'s acceptance of preemption with respect to "writings" that Congress had brought within the copyright statute. Plaintiff's newspaper was afforded copyright protection by Congress. State law could not—to fill in what the opinion left unarticulated—be relied upon in such a situation; federal law *exclusively* determined the range of protection available. And, support for preemption of *additional* state relief was found in *Jacobs v. Robitaille*.⁸⁴

Accepting Judge Lord's own characterization of plaintiff's allegations, the intermediate conclusion that *Jacobs* rested on "indistinguishable facts" is open to question; and the resulting treatment of *Goldstein* may be queried as not adequately reflecting that decision's potential impact—or range of impacts—on misappropriation cases.⁸⁵

The extent of *Goldstein*'s reservation of state protective powers over subject matter not within the scope of the federal statute had not been settled by that decision. In its aftermath, emblematic of the destabilizing effect of *Goldstein* on traditional and rather settled conceptions of the federal system allocation of intellectual property power, speculative commentaries charted the consequences of *Goldstein*'s

⁸³ The reasoning in *Jacobs*, limiting *Goldstein*, was:

"I do not believe that *Goldstein* can be read to allow the states, under the aegis of their common law, to exercise control over 'writings' which are copyrightable. . . . I find that the advertisements were copyrightable 'writings' and that the *Sears-Compco* decisions, even as refined by *Goldstein*, preempt a state action for unlawful competition." *Jacobs v. Robitaille* at 1153.

⁸⁴ 415 F. Supp. at 687.

⁸⁵ The issue here is not the "correctness" or "justice" of the *Triangle* decision, but rather whether its reasoning adequately canvassed the implications of *Goldstein*.

subject-matter analysis.⁸⁶ In *Goldstein*, Ralph Brown observed,

"[w]e have a new recognition of a state copyright power that may extend to any kind of work that is not explicitly preempted. . . . It is also possible that another historic dividing-line in copyright is threatened, namely the separation between 'ideas', which cannot be monopolized, and their 'expression'—which is essentially the sphere of copyright."⁸⁷

Such a reading of the possible reach of *Goldstein* places the *Triangle* plaintiff's "misappropriation" claim in a novel light—and suggests that *Triangle*'s facts are not "indistinguishable" from those in *Jacobs*. For *Triangle*'s "misappropriation" claim, as recast following *Goldstein*, can be seen as involving two distinct subject matter categories: copyrightable (under statute) "literary expression" and the non-federally copyrightable "facts" compiled and reported. Since the "facts", considered as a category of subject matter *per se*, could not be federally copyrighted, *Goldstein* might be read to open the way for non-preempted state law protection thereof.

This is the configuration of subject-matter claims that exist in all classic *INS* "misappropriation" claims, but which was not present, for example, in *Jacobs v. Robitaille*. The misappropriation preemption issue posed in *Triangle* becomes, after *Goldstein*, a more difficult one. To see *Triangle* as involving two tiers of subject matter transforms analysis of classic misappropriation cases: the analysis emerges as the curious fall-out of *Goldstein*, itself a misappropriation case only by virtue of the skewed evolution of the doctrine. Set within the factual situation of an *INS* "misappropriation" case, an open-ended reading of *Goldstein* poses the question whether federal law preempted state protection of the non-copyrightable subject matter involved: the *data* collected by the plaintiff in *Triangle*, the use of which, by the defendant, as Judge Lord had accurately noted, was crucial to plaintiff's complaint.

Judge Lord could have rejected plaintiff's "misappropriation" claim by pursuing the constitutional line developed in *Sears-Compco* and holding that such *data* was not a "writing" and, much like a non-"discovery" in patent law, was not within state protective purview by force of the Constitution. This conclusion could have been reached without upsetting the *Goldstein* holding. *Goldstein* had, of course,

⁸⁶ See, e.g., Kaul, *And Now State Protection of Intellectual Property?*, 60 A.B.A.J. 198 (1974).

⁸⁷ Brown, *supra* note 36, at 1037.

treated preemption problems concerning state protection of constitutional "writings". The Supreme Court in *Goldstein* had found no constitutional preclusion of state power to protect "writings" as an original proposition; and the simple failure of Congress to accord copyright to a class of "writings"⁸⁸ did not preempt—as a matter of statutory construction—state protective action.⁸⁹ As to the Constitutional preclusion analysis apparently developed in *Sears-Compco*, *Goldstein*—in its focus on "writings"—might have been regarded as simply not relevant.

Judge Lord did not pursue such a line of analysis, however. His failure to do so—although subject to the problems below, makes puzzling the forthright reiteration of *Sears-Compco* as constitutional, as well as statutory, decisions, since their ascribed constitutional rationale was not at issue in *Goldstein*. The judgment of preemption, shorn of such a constitutional basis, lacks a clear foundation as a result.

Problems with pushing this constitutional argument as far as this are quite apparent. First, the extension of this constitutional definitional limit on state power from patent "discoveries" to copyright "writings" would have run headlong into considerable authority to the contrary, including that of Judge Hand, dissenting in *Capitol Records v. Mercury Records* itself. Concluding that the application of state law to protect publicly disseminated sound recordings (constitutional "Writings") was preempted, Hand also confidently asserted the reservation

⁸⁸ The classification of "sound recordings as renderings of original artistic performances" as Constitutional "writings" presented no problem in *Goldstein*. 412 U.S. at 561.

⁸⁹ *Goldstein* distinguished *Sears-Compco*:

"*Sears and Compco*, on which petitioners rely, do not support their position. . . . In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution. No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of "Writings", Congress has drawn no balance; rather, they have left the area unattended, and no reason exists why the State should not be free to act." 412 U.S. at 561.

of state power over "'works' that are not 'writings.'" ⁹⁰ Second, the dimensions of the general class of constitutional "writings" exceeds the usage we might ordinarily apply to the concept.⁹¹ Judicial enforcement of a perceived constitutional bar to state protection of non-"writings" would, as a result of the elasticity ascribed to the Constitutional language, build an enduring tension between courts and Congress into the copyright system. The range of future Congressional extension of statutory copyright, assumedly limited to "writings", would be subject to the considerable volume of previous judicial clas-

⁹⁰ "[T]he states are not free to follow their own notions as to when the author's right shall be unlimited both in uses and duration. Such power of course they have as to 'works' that are not 'writings'." *Capitol Records v. Mercury Records*, 221 F.2d 657, 667 (1955) (Hand, J., dissenting).

⁹¹ *Goldstein* expressed the standard view on this question of construction: "By Art. I, sec. 8, cl. 8 of the Constitution, the States granted to Congress the power to protect the 'Writings' of 'Authors'. These terms have not been construed in their narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an 'originator', 'he to whom anything owes its origin.' [Citation omitted.] Similarly, although the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor. [Citation omitted.]" 412 U.S. at 561. The 1909 and Revision statutes both observe such a "physical rendering," or "fixation," standard. But whether even it provides an outer limit to the scope of constitutional "writings" may be an issue. Without jumping ahead too much, this passage from the House Committee Report of 1967 commentation of the Revision's—as then proposed—exclusions from subject matter coverage, probed the permeable boundaries of the Constitutional grant:

"Without implying that they would be wholly without protection [under the statute], or that they are *necessarily* [emphasis supplied] the 'writings' of an author in the constitutional sense, we cite the following as examples. These are areas of subject matter now on the fringes of literary property but not intended, solely, as such, to come within the scope of the bill: typography, unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans and similar expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from the compilation or expression. . . . any protection for them as separate copyrightable works is not here intended and will require action by a future Congress."

H.R. REP. NO. 83, 90th Cong. 1st Sess. 98 (1967). For further discussion of H.R. REP. NO. 83 *see* text at note 144, *infra*.

sifications, requiring continual constitutional re-examination by the courts. At the same time, judicial readiness to avoid this barrier by holding various state-protected subject matter to be "writings" would lead the inquiry to the level of potential statutory preemption.

Preemption in *Triangle* did not take this difficult constitutional tack. Rather, state law was barred on the ground that the copyright offered as to the form for expressing the data by Congress—and accepted by the plaintiff—determined the limits of protection available. State law could not supplement the degree and kind of protection provided by federal law.⁹² Unlike *Goldstein*, Congress had acted; and state law cannot be applied within the ambit of federal law.

Goldstein's suggestive implications as to the possibility of state protection of "facts" or ideas—by extension, racing data or "news"—considered as a category of subject matter not included within the federal statute, and not preempted, are not treated at all.

A holding analogous to *Triangle* in *Goldstein* itself could have barred state protection on the ground that Congress had indeed afforded copyright protection in the *area* at issue, limited simply to the underlying musical composition recorded. It must be assumed that Judge Lord accepted *Goldstein's* holdings with respect to its facts. Nothing was said, however, in *Triangle* to distinguish and limit *Goldstein* on this point.⁹³ Any special problems raised by the consideration of "facts" or information as a subject matter class were not raised or faced; the potential recasting of misappropriation complaints in such a subject matter framework went unmentioned.

This discussion of *Triangle* is open-ended, even speculative, intended to throw into relief some of the complications introduced into preemption analysis by *Goldstein*, but not to settle them. The enactment of the Revision has, of course, placed the misappropriation

⁹² 415 F. Supp. at 686.

⁹³ To be sure, *Goldstein* disclaimed the possibility of restraint "on the use of an idea or concept." However, this caveat was then specifically explained on the narrower grounds that "petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared in the original recording." 412 U.S. at 571. This freedom is, of course, due to the particular provisions of the Copyright Law respecting compulsory licensing; it does not necessarily cut across the entire sphere of intellectual property. The implications we have derived from *Goldstein* were not definitively foreclosed, although sound policy reasons could surely be urged for a broad reading of this language in *Goldstein*. The points we focus on here are, again, simply the problems opened up by *Goldstein's* preemptive method and the difficulty in assimilating the particular interest balancings of copyright law within its generalized and abstracted approach.

preemption problem in a new context. Discussion of these issues must move on to consider them in this transposed key. The Revision's preemption provisions were expressly intended to clearly and definitely mark out the border between federal and state intellectual property law.⁹⁴ Whether definite answers will, even so, be forthcoming, is the next subject for analysis.

IV. AFTER REVISION: SOLUTIONS?

Section 301,⁹⁵ "one of the bedrock provisions of the bill,"⁹⁶ sets out the Revision's plan concerning "Preemption with Respect to other Laws". The provisions outlined briefly are:

1. Subsection (a) provides that all legal or equitable rights "equivalent" to the "exclusive rights within the general scope of copyright" specified in section 106 (i) in works of authorship; (ii) fixed in a tangible medium of expression; (iii) within the subject matter of copyright specified by sections 102 and 103; (iv) whether published or unpublished, "are defined exclusively by this title."

2. Subsection (b) provides that the federal copyright statute *shall not preempt* state law rights or remedies with respect to (i) subject matter *not* within the subject matter of copyright specified by sections 102 and 103 (subsection (b) (1)), or (ii) activities violating rights not within the scope of copyright as specified by section 106 (subsection (b) (3)).⁹⁷

Section 301's preemption scheme takes this general form. Subsection (a) sets out the general rule of preemption of state law respecting intellectual property "fixed in a tangible medium of expression." Subsection (b) complements (a), qualifying federal preemption by explicitly preserving state law with respect to both subject matter and activities considered beyond the scope of the preemptive regime. The contours of what is preempted and what is "saved" in state law are, in turn, defined by reference to the sections of the Act which describe the subject matter of copyright and the rights within the scope of copyright. Determining the impact of section 301 therefore requires reference to sections 102 and 103 ("subject matter of copyright") and

⁹⁴ See, S. REP., *supra* note 12 and H.R. REP. *supra* note 12.

⁹⁵ The text of Section 301 is set out in Appendix 1.

⁹⁶ H.R. REP., *supra* note 12, at 129, reprinted in 1976 U.S. Code Cong. and Ad. News, *supra* note 12, at 5745.

⁹⁷ Section 301(b) (2) simply preserves state law rights or remedies with respect to those causes of action "arising from undertakings commenced before January 1, 1978," the effective date of the Copyright Act.

106 ("Exclusive rights in copyrighted works").⁹⁸

Whether "misappropriation" remains a permissible state law-based cause of action must be determined by testing it against the interacting preemptive-saving provisions of section 301. Ultimate pronouncement of preemption remains a judicial task; but enactment of section 301 provides an attempt by Congress to express an explicit design for the relationship between state and supreme federal law. Before working through the Revision, however, important background for evaluating its relative success or failure in providing a conclusive solution to the misappropriation preemption problem will be presented. Several pages of history—even of legislative history—illuminate much, especially in an area of the law where logic has consistently been slighted in favor of accommodating special interests.

Section 301 has a lengthy history behind it.⁹⁹ The inclusion of a preemption provision in the Revision bill had its conceptual origins in the desire to resolve the tensions generated by the interaction of the intransigent doctrine of "publication" with modern technological developments in the arts,¹⁰⁰ and not in the interaction between state law protectionism and the federal public domain, the flash point of "misappropriation" preemption problems. "Publication" had traditionally

⁹⁸ Set out in Appendix III.

⁹⁹ The legislative process which culminated in the enactment of the Revision Bill of 1976 began with efforts by the Copyright Office to assemble a body of information, analysis and interested comment which, taken together, would provide the revision task with a firm point of departure. Beginning in the mid-1950's, the Copyright Office commissioned expert studies on legal and business aspects of copyright law, assembled panels of practitioners (leavened with a few academics) for discussion of particular problems, and eventually prepared a draft bill which was introduced in Congress in 1964. These efforts are traced in considerable detail in *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess.* 101 (Statement of Barbara Ringer). Considerations of federal preemption of state laws has been a part of the Revision effort, "a key provision of the statute," since it commenced in the latter 1950's. Provisions effectuating preemption have appeared in the successive Revision drafts beginning with the Preliminary Draft for Revised U.S. Copyright Law submitted by the Copyright Office in July 1964. "Preliminary Draft for Revised U.S. Copyright Law" appearing in REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, Pt. 3, printed for the use of the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1964).

¹⁰⁰ See REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, printed for the use of the House Comm. on the Judiciary, 87th Cong., 1st Sess., at 39 (Comm. Print 1961).

marked the dividing line between state and federal intellectual property jurisdiction. It provided the foundation for the dual system—of state common law and federal statute—of protection which had prevailed since 1790. The continuing coherence of this dual system had fallen victim to the attenuated significance of the traditional “publication” concept. The first preemption proposals of the Copyright Office were narrowly drawn and rather tightly directed at meeting the “publication” problem.¹⁰¹

When the Copyright Office submitted a Preliminary Draft Revision Bill in 1963¹⁰², section 19(a), entitled “Pre-emption with Respect to other laws,” set out—as the precursor of section 301(a) of the enacted Revision—the general rule of preemption, abolishing state copyright for works copyrightable under the statute. Whether published or unpublished, all rights in such a work in the nature of copyright would be governed by federal law exclusively. This general rule of preemption was restated in section 19(a) of the 1964 Revision Bill and subsequently in section 301(a) of the 1965 bill.¹⁰³ It retains a very similar formulation in the 1976 Act.

The complement to this primary focus on creating a unified sys-

¹⁰¹ In the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (the “1961 Report”) the Copyright Office distilled from previous studies and discussions a recommendation to recast the dual scheme, replacing “publication” with a less technical concept of “public dissemination.” State law protection would be reserved only for copyrightable works that had not been “publicly disseminated.” The scope of federal law would be extended, but the dual system would not be entirely superseded. REPORT, *supra* note 100, at 43. This proposed substitution of “publication” by “public dissemination” as the trigger for protection under federal law within a dual system was sharply criticized at the panel discussions convened by the Copyright Office in 1961–1962 to work over the proposals in the 1961 Report. See COPYRIGHT LAW REVISION, Pt. 2 (1963), at 72–84. Copyright Office advocacy of the scheme was hamstrung by its forthright recognition of the advantages that would be gained by creating a single system of federal protection of copyrightable works. REPORT, *supra* note 11, at 41.

¹⁰² Preliminary Draft, *supra* note 99.

¹⁰³ The text of section 19(a) of the Preliminary Draft appears in Appendix 11. The comparative texts of the successive preemption provisions of these Bills are set out in Appendix 111. The 1964 Revision Bill (introduced as H.R. 11947 and S. 3008 on July 20, 1964 in the 88th Cong., 2d Sess.) was described and discussed in COPYRIGHT LAW REVISION, Pt. 5 (1965); The 1965 Bill (introduced as H.R. 4347 and S. 1006 on February 4, 1965 in the 89th Cong., 1st Sess.) was discussed in COPYRIGHT LAW REVISION, Pt. 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS (1965), reporting the relevant panel discussions.

tem of federal copyright protection to resolve the "publication" problem was the lack of close analysis of the limits—set out in subsection (b) of successive drafts and bills—of the preemptive regime. Beginning with the Preliminary Draft prepared by the Copyright Office, the preemption section of the Revision was drafted to provide that "preemption is not intended to extend to subject matter or to causes of action outside the scope of the Federal Copyright Statute."¹⁰⁴ Section 19(b) (3) of the Draft set out a specific listing of non-preempted causes of action,¹⁰⁵ primarily involving deceptive business practices but pointedly omitting the modern extensions of "unfair competition law."¹⁰⁶ This exclusion of "unfair competition" from the listing of non-preempted causes of action was repeated in both the 1964 and 1965 Revision Bills.¹⁰⁷ Prepared in the expansive aftermath of *Sears-Compco*, the 1965 Supplementary Report of the Register of Copyrights¹⁰⁸ (analyzing the 1965 Revision Bill) justified the omission

¹⁰⁴ The 1961 Report, *supra* note 100, of the Copyright Office had not discussed at all the accommodation of the Federal copyright system to state causes of action outside the statute's scope.

¹⁰⁵ The text appears in Appendix II.

¹⁰⁶ A panel discussion on section 19(b) of the Draft concentrated on expanding this listing and on abandoning itemization in favor of the expression of a general principle. There was considerable comment urging incorporation of "acts of unfair competition" within section (b) (3) to reflect the fact that "[n]either fraud nor actual confusion is necessary under modern concepts of the law of unfair competition." Nowhere—in the public panel discussions at any rate—was explicit, extended consideration given to the place of the *INS* holding within the preemptive design. However, the remarks of Harry R. Olsson, Attorney for the American Broadcasting Company, at the panel convened to discuss the Preliminary Draft in August 1963, are suggestive in the context of subsequent developments. Olsson noted that "for a long time there has been a tendency in some of the State courts to supply protection for matter to which the Federal Courts of the United States have decided no copyright protection should be given. . . . Frequently, the misappropriation theory is invoked." Olsson explained that "[t]here are very definitely 'idea' cases in which state courts have given property-type protection to ideas. . . . The State Courts to a very large extent, under the guise of unfair competition, have tended to supply copyright protection for things which the federal courts have decided should not be protected over a very, very long period of time on policy grounds." One question elicited by these remarks—"Are you trying to overrule the *INS* case?"—was more the occasion for laughter than for continued analysis, unfortunately. COPYRIGHT LAW REVISION, Pt. 4 (Further Discussion and Comments on the Draft Revision Bill) (1964), at 4, 9-10.

¹⁰⁷ Texts of (b) (3) in both bills in Appendix III.

¹⁰⁸ SUPPLEMENTARY REPORT, *supra* note 103, at 81.

of "unfair competition" from clause (3)'s illustrative¹⁰⁹ listing of rights under state law not equivalent to copyright:

"The language of clause (3) has been worded very carefully in an effort to avoid saying too much or too little. In particular, we have resisted use of the ambiguous term "unfair competition", which in recent years has gone through some wide shifts in meaning. In some States it was greatly broadened to become, under the name "misappropriation", the virtual equivalent of copyright; and it has been cut back, by the Supreme Court's decision in *Sears, Roebuck, and Co. v. Stiffel Co.*, to the traditional concept of "passing off". There is no intention to pre-empt causes of action for unfair competition involving false labeling and fraudulent representation but, *to the extent that a right against 'unfair competition' is merely copyright by another name, section 301 is intended to abolish it as a common law cause of action.*" ¹¹⁰ [Emphasis supplied.]

This position was taken, however, without specific attention to "misappropriation," understood in the distinctive framework of *INS*. The framework of preemption was set by 1965. The system proposed in the 1965 Bill reflected preemption's origins in the "chaotic" situation produced by the role of "publication" in the traditional dual system.¹¹¹ What to do about "misappropriation" never received focused consideration. The 1965 Bill appeared to preempt its extensive appli-

¹⁰⁹ Note that in each of the Revision Bills, unlike the Draft, the listings in b (3) of specific state law causes of action are stated only to illustrate the general principle that the Federal law does not preempt state law "with respect to activities violating rights that are not equivalent to any of the exclusive rights of copyright..." The Supplementary Report of the Register of Copyrights, discussing the 1965 Bill in detail, explained:

"While the third clause of section 301(b) is not intended to represent an exhaustive listing, its purpose is to illustrate rights and remedies that are different in nature from copyright and that are preserved under State common law or statute. Some examples might include, depending upon the particular circumstances in the case:

The unauthorized exploitation of a person's name or photograph for commercial advertising;

The unauthorized use of the title of a work in such a way as to constitute passing off or fraud;

The unauthorized disclosure and exploitation of a trade secret."

Id., at 85.

¹¹⁰ *Id.*, at 85.

¹¹¹ *Id.*, at 81.

cation, but this result was based on an undifferentiated assimilation of the *INS* holding to the general law of "unfair competition," or to *Goldstein*-type facts.

An indication of the relatively marginal place held by the "misappropriation" preemption problem within the overall design of the unified federal system can be gleaned from the testimony of the Register, Barbara Ringer, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, in 1975.¹¹² The Supplementary Report (1965) had described preemption as "perhaps the most fundamental issue underlying the entire revision program."¹¹³ Reviewing preemption's progress in the intervening decade, Ringer observed that

"at one time [preemption], was unquestionably the most controversial and debated issue in copyright revision. This has not, however, been true for at least 10 years and probably quite a bit longer than that. I believe that the concept of a single Federal system of copyright is now almost universally accepted. There was no opposition to this concept in your hearings in 1975."¹¹⁴

Ringer continued, laying a foundation for several recommended changes to the 1965 Bill's text:

"The Federal preemption provision in the bill has stayed pretty much the same since the early 1960's. What has happened is the result of a series of decisions by the courts, including the Supreme Court, which have had a sort of roller coaster effect with respect to Federal preemption, but which under the present law, as I think most people interpret it, requires *some technical changes in section 301*.¹¹⁵ [Emphasis added.]

What Ringer termed "technical changes" entailed, in fact, a sweeping transformation of the place to be accorded—by explicit legislative command—"misappropriation" within the preemptive scheme. To term this a "technical change" suggests that as a general matter of law-making, the status of "misappropriation" had not been canvassed thoroughly.

¹¹² *Hearings*, *supra* note 99, at 1910.

¹¹³ SUPPLEMENTARY REPORT, *supra* note 103, at 81.

¹¹⁴ *Hearings*, *supra* note 99, at 1910.

¹¹⁵ *Id.*, at 1910.

Consideration of these "technical changes" made in section 301 in response to *Goldstein v. California* provides a further piece of the background against which the enacted preemption provisions should be evaluated. The impact of *Goldstein* on the Revision program was an accident of legislative history. In April 1967, the House of Representatives passed a Revision Bill which bodily incorporated the preemption section first included in the 1965 Bill. Preemption—and the specific form given it in the Revision legislation—had ceased to be a disruptive issue. Other problems, however, remained unresolved and the subject of profound disagreement. In 1967, the "legislative momentum began to slow more and more" and "it was increasingly apparent that cable television had become the make-or-break issue for copyright revision." Legislative progress stalled out, starting up only in the early 1970's (after a Supreme Court decision helped clear the contentious cable television air).¹¹⁶

Meanwhile, the *Goldstein* decision had been handed down in 1973. When the House Subcommittee on Courts, Civil Liberties and the Administration of Justice convened hearings on the Revision Bill in 1975, the Copyright Office submitted a Report¹¹⁷ recommending the acceptance of changes made in the preemption section of the Senate Revision bill passed earlier that year. This section had not been modified since 1965. The 1975 Copyright Office Report concluded that:

"In view of the recent Supreme Court decisions in the *Goldstein* and *Kewanee* cases, referred to above, Congress should reconsider the wording of section 301 and subsection (b) in particular. The word 'unpublished' in clause (1) of subsection (b) is probably inconsistent with the *Goldstein* decision, and additions to the specific references in clause (3) appear justified by this judicial trend."¹¹⁸

The Senate draft of section 301(b) provided:

"(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) *subject matter* that does not come within the subject

¹¹⁶ The legislative history is laid out in *Hearings*, *supra* note 99, 101 ff. (statement of Barbara Ringer).

¹¹⁷ *Hearings* Pt. 3, *supra* note 99, at 2079 (*Draft Report of the Copyright Office*).

¹¹⁸ *Id.*, at 2081-2082. The reference is to *Kewanee Oil Co. v. Bicron Corp.*, *supra* note 69.

matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) ****

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including *rights against misappropriation not equivalent to any of such exclusive rights*, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation."¹¹⁹ [Emphasis supplied.]

The Senate Committee Report passed over the change made in clause (1) without comment, but did discuss its "novel" inclusion of "misappropriation" among the illustrative non-equivalent causes of action in clause (3). For the first time in the legislative process, the *INS* problem was considered.

" 'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a *remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e. not the literary expression) constituting 'hot' news*, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business or financial data bases."¹²⁰ [Emphasis supplied.]

The direct impact that *Goldstein* had on preemption legislation is somewhat surprising. *Goldstein*, by rejecting preemptive inferences drawn from the Constitution, had, after all, based its holding squarely on the Congressional design manifested in the 1909 Act: Chief Justice Burger specifically left the distribution of protective power inferred from the statute open to future adjustment by Congress.¹²¹ The limi-

¹¹⁹ S. 22, *supra* note 13.

¹²⁰ S. REP., *supra* note 12.

¹²¹ "At any time Congress determines that a particular category of "writing" is worthy of national protection . . . federal copyright protection may be authorized. Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all protection." 412 U.S. at 559.

tation on state protection of subject matter contained in section 301 (b) (1)—*unpublished*¹²² subject matter outside the scope of the Federal act—was, even under *Goldstein*, clearly within Congress' power to enact. It is perhaps even more obscure why *Goldstein*—taken together with *Kewanee*—should have been read to create an apparently affirmative command to specifically include rights against "misappropriation" in clause (3) of section 301(b). These decisions, based on statutory construction and inference, did not extend of their own force beyond the particular statutory scheme—the 1909 Act—with which they worked.

Explanations may be suggested, however, for the decision of the Copyright Office and Congress to consciously tailor the Revision to these recent decisions under the 1909 Act; but only "suggested" since authoritative, official views as to the necessary inter-relationships between the 1909 statute, the Supreme Court holdings, and the Revision Bill were not spelled out.

First, most generally, the changes in section 301(b) can be seen as an effort to bring the Revision into line with the current understanding of the distribution of protective powers in the federal system. The Revision is intended as a codification of preemption doctrine, not as a total departure from the existing accommodation of state and federal law even when placed within a greatly extended preemptive framework.

Second, and this may be true especially with respect to clause (3), the changes made signalled recognition that

"until recently, the wording as well as the underlying intent behind section 301 appeared to be consistent with the *judicial trend of limiting the rights of States to enforce rights similar to patent and copyright protection.*"¹²³ [Emphasis supplied.]

And *Goldstein* and *Kewanee*, without explicitly overruling *Sears-Compco*, did appear to rest on "different views of the Federal system." The Revision is here being attuned to current judicial attitudes, broadly gauged, concerning the bounds of protection under state law.

A third explanation cuts specifically at one change: the extension of permissible state protection under clause (1) to "published" as well as "unpublished" subject matter outside the subject matter scope of the federal act. In its bold recognition of a reserved power in the states to protect published, as well as unpublished, works, as a matter of fundamental federal-state relations, *Goldstein* squarely upset the

¹²² Publication is to be tested by a federally defined standard; see section 101 ("Definitions") in the 1965 Bill.

¹²³ *Draft Report in Hearings*, *supra* note 117, at 2081.

reasoning which underlay the Revision's previous limitation on state power over non-federal subject matter.

This expansion of state power in clause (1) marked an apparent return to the range allowed for state protection in the Preliminary Draft (1963).¹²⁴ In that first attempt at providing a counterpoint to the general federal preemptive rule, section 19(b) (1) "saved" state law "with respect to material for which copyright protection is not available under sections 1 and 2." Only in the Revision Bill of 1964 was this non-preempted state power limited to "unpublished material that does not come within the subject matter of copyright as specified by sections 1 and 2."¹²⁵ [Emphasis supplied.] This more narrow reservation of state power was repeated in the 1965 and 1967 bills.¹²⁶

The broad wording of clause (1) in the Preliminary Draft had been neither explicated nor discussed in the subsequent panel discussions. The Supplementary Report (1965) however, carefully explained the 1965 Bill's restriction of state power to "unpublished material":

"In the United States, under the doctrine established by the Supreme Court in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), common law copyright protection has consistently been held to terminate upon publication of the work. The word 'unpublished' was therefore added to this clause to avoid any implication that common law equivalent to copyright, for material not coming within the subject matter of the statute, might continue after its publication. What constitutes "publication" for this purpose, which is now a matter of some uncertainty, would be governed by the definition of that term in the statute."¹²⁷

This stated the traditional understanding of the significance of "publication," which underlay the opinions in *Capitol Records v. Mercury Records*.¹²⁸ *Goldstein* summarily dismissed the conception that "publication" had such a general systemic significance, relegating it to the status of a "term of art," having significance only within the bounds of the copyright statute itself.¹²⁹ It was not an independent check on state power. The impact of *Goldstein* was clearly manifested here: "un-

¹²⁴ The Preliminary Draft, *supra* note 99, did not explicitly bar state protection of "published" writings not eligible for federal copyright and did not refer to the *Wheaton v. Peters* doctrine in this connection.

¹²⁵ 1964 Revision Bill, *supra* note 103. Texts of the Preliminary Draft and 1964 Bills appear in Appendix III.

¹²⁶ See Appendix III.

¹²⁷ SUPPLEMENTARY REPORT, *supra* note 103, at 85.

¹²⁸ See text at note 29, *supra*.

¹²⁹ 412 U.S. at 570, n. 28.

published" was stricken from the 1975 Senate Bill (S. 22), the Judiciary Committee Report explaining summarily that "preemption does not extend to . . . subject matter outside the scope of the revised Federal copyright statute."¹³⁰

Commenting—after *Goldstein*—on the 1967 House Bill and the accompanying House Report, Professor Brown observed, with satisfaction, that "[w]ith its tolerance of state authority in (b) (3) essentially limited to passing off and false representation cases, a stern banishment of the misappropriation tort is evident."¹³¹ The 1975 Senate version upset this expectation and explicitly declared "misappropriation" a non-preempted state remedy under section 301(b) (3). The answer therein provided to our preemption inquiry was forthright: "misappropriation" of the *INS* type would be tolerated, limited by "traditional principles of equity," within the preemptive regime.¹³² As to the preemption of those varieties of "misappropriation" which turned explicitly on state protection for subject matter not copyrightable under federal law (exemplified by *Goldstein* itself with respect to the 1909 Act) the 1975 Senate bill offered a similarly decisive answer: state power to protect was extended by clause (1), whether the subject matter concerned was "published" or "unpublished." The specific holding of *Goldstein* was here directly translated into the Revision bill,¹³³ squarely reversing the projected result under the previous Revision text. As a consequence, the open-ended implications of *Goldstein* traced out in the analysis of *Triangle v. Sports Eye* remained live issues, to be considered again in the Revision context.

These were the changes induced in section 301 by the decision in *Goldstein*. Although not compelled to do so, Congress thereby tailored the legislation to conform to the patterns perceived by the Court in the very system that the Revision Bill was intended to replace.¹³⁴ Only

¹³⁰ S. REP., *supra* note 12, at 115.

¹³¹ Brown, *supra* note 36, at 1050.

¹³² S. REP., *supra* note 8, at 116.

¹³³ Again, Professor Brown's comments on the *pre-Goldstein* Revision bill are instructive as to the changes wrought: "If unpublished material not within section 102 is left to the states, published material in these categories is pre-empted. It is, for the present, left unprotected either by state law or the statute." Brown, *supra* note 36, at 1050.

¹³⁴ The history of the drafting of these changes in response to *Goldstein* is somewhat troubling. These modifications greatly extended the scope of state protection within the preemptive system. Apparently they were drafted by members of the copyright bar—whose general inclinations, to judge from the objective conditions of their employment and from the views expressed in the earlier panel discussions—are favorably disposed to protection at the expense of competition. See *Hearings* Pt. 3, *supra* note 99, at 1910 (Statement of Barbara Ringer) for a brief comment on the drafting of the changes.

at the very last minute, upon the initiative of the Justice Department (in a letter to Representative Kastenmeier, the Chairman of the Subcommittee which had considered the bill)¹³⁵ was the reference to "misappropriation" stricken (along with the other specific listings of non-equivalent state causes of action) from the text of section 301.¹³⁶ Congressional understanding of the effect of this proposed change was, however, confusing and unclear.¹³⁷

Congressman Railsback accepted the amendment based on his understanding that

"by striking the word 'misappropriation', the gentleman in no way is attempting to change the existing state of the law, that is as it may exist in certain states that have recognized the right of recovery relating to misappropriation."

Congressman Seiberling, who introduced the amendment, accepted this formulation, whereupon Representative Kastenmeier added that the amendment was agreeable to him because "the amendment . . . is consistent with the position of the Justice Department."¹³⁸ The Justice Department view, as expressed in the letter, was decidedly against

"any attempt to limit nondeceptive copying of uncopyrighted or unpatented subject matter by the general public. We believe that sound policy reasons underlie the weight of authority that opposes the *INS* 'misappropriation' doctrine."¹³⁹

If Railsback's expressed understanding is added to Kastenmeier's apparent endorsement of this Justice Department position, we can see that their expression of agreement is illusory, the amendment's preemptive force unresolved.

Upon this uncertain foundation, section 301 (as enacted) can be tested as a solution of the misappropriation preemption issue by examining the provisions of the statute in more detail.

Section 301's resolution of the misappropriation preemption issue cannot be worked out without reference to sections 102 and 103 (specifying the subject matter of copyright) and section 106 (specifying

¹³⁵ Letter, *supra* note 16. The letter appears as Appendix IV.

¹³⁶ The comparative texts are in Appendix III.

¹³⁷ As evidenced by the debate on the House floor reported in CONG. REC., *supra* note 17.

¹³⁸ *Id.*, at H10910.

¹³⁹ Letter, *supra* note 16, at 5, set out in Appendix IV.

the rights within the scope of copyright). The preemptive scope of 301(a) as well as the non-preemptive counterpoint provided by section 301(b) are determined by the contours of the federal system as drawn in these other sections of the Act.¹⁴⁰ The premise of the analysis offered is that *both* clauses (1) and (3) of section 301(b) must be examined to gauge whether, in fact, the Revision has preempted state law relief for "misappropriation," as specifically represented by the *INS* case.

Two points about the enacted text of section 301(b) may be quickly made. First, section 301(b) (1) provides a clearcut answer to the preemption issues faced by the judiciary in cases such as *Goldstein v. California* and *Grove Press v. Collectors' Editions*.¹⁴¹ Both cases could be analyzed as involving claims to state law protection for subject matter not copyrightable under federal law: sound recordings of performances in *Goldstein* and typography in *Grove Press*.¹⁴² Section 301(b) (1) explicitly endorses state law protection for subject matter not within the coverage of the federal statute. It enacts into law the *Goldstein* approach: excepting from preemption state law actions against the copying of such subject matter *whether published or unpublished*.¹⁴³ Clause (1) both announces a generous, protective policy and—by offering a route for the exercise of state copyright authority will result in an analytically more controlled application of the "misappropriation" doctrine. This clause effectively cuts the varieties of "misappropriation" back to the *INS* core, providing affirmative federal statutory legitimacy for claims that have previously sailed under that doctrine's confused colors.

Second, the Justice Department letter to Representative Kastemeier did succeed in provoking the deletion of "rights against misappropriation not equivalent to any of such exclusive rights"¹⁴⁴ from the draft that was finally enacted and signed into law. No explicit federal statutory sanction of such state law rights appears in section 301(b) as enacted.

The Justice Department, expressing the concern that statutory sanction of state "misappropriation" rights "is almost certain to nullify preemption" concentrated its fire on the inclusion of "misappropriation" among the non-preempted causes of action enumerated in

¹⁴⁰ Texts in Appendix I.

¹⁴¹ 264 F. Supp. 603 (C.D. Cal. 1967).

¹⁴² It is not clear, however, that this was how the facts were analyzed in *Grove Press*. That case's issue-framing is discussed in Text at note 23, *supra*.

¹⁴³ Sound recordings themselves are covered in section 301(c).

¹⁴⁴ The reference is to the "exclusive rights within the general scope of copyright as specified by section 106."

clause (3).¹⁴⁵ Tracing the development of the "misappropriation" doctrine back to the "much-criticized" *INS* decision, the Department's letter argued,

"The misappropriation theory is vague and uncertain. The 'misappropriation' provision of section 301 does not indicate what it is that is not to be appropriated. . . . Neither the *INS* case, other cases, nor proposed paragraph (3) adequately defines the conduct prohibited, or establishes any standard for distinguishing improper, as opposed to proper, copying."¹⁴⁶

"Under the amorphous theory of misappropriation," state action could be undertaken precisely in the realm of avowedly exclusive federal jurisdiction:

"This apparently would permit states to prohibit the reproduction of the literary expression itself. . . . Any copying of copyrightable subject matter that has not been federally protected could be prohibited. . . ."¹⁴⁷

This analysis of the potential effect of clause (3) apparently derives from a paradigmatic conception of the thwarting of a federal preemption if "misappropriation" under state law is available: the reliance on state law where federal protection has been forfeited.¹⁴⁸ This is, however, not a direct response to the declared Congressional intention behind the "saving" or "rights against misappropriation." The Senate Report supported the draft of clause (3) that was challenged by the Justice Department as preserving state flexibility to bar a "consistent pattern of unauthorized appropriation by a competitor of the

¹⁴⁵ While emphasizing the special threat to preemption posed by clause (3)'s incorporation of "rights against misappropriation," the Justice Department advised striking all of the illustrative non-preempted causes of actions from the clause:

"While 'misappropriation' is almost certain to nullify preemption, any of the causes of action listed in paragraph (3) . . . may be construed to have the same effect. For example, a court could construe the copying of an uncopyrighted, published book to be an invasion of the author's right to privacy, i.e. the right to keep the control of the publication of his book privately to himself."

Letter, *supra* note 16, at 5-6.

¹⁴⁶ *Id.*, at 5-6.

¹⁴⁷ *Id.*, at 7.

¹⁴⁸ This was the type of state law claim rebuffed in *Jacobs v. Robitaille*, *supra* note 79, discussed in Text at note 79, *supra*.

facts . . . constituting 'hot news',"¹⁴⁹ impliedly recognizing that a state bar to the copying of the "literary expression" would be merely a replication of an *exclusive federal right conferred by section 106*. Such protection against use of the facts (or "hot news") *itself* by a competitor is not an exclusive federal right under section 106. This particular application of the misappropriation doctrine—the original one as expressed in *INS*—is not discussed in the Justice Department letter. Its own status as a right not equivalent to the rights granted by federal copyright law is not evaluated. The letter is instead a caveat of the potential emanations of an "amorphous" doctrine.

The coherency of the Justice Department position with respect to preemption of core "misappropriation" is further undercut by the letter's exclusive attention to clause (3)'s enumeration of "rights against misappropriation." The letter implicitly recognizes the broad concession of state protection of non-copyrightable subject matter made by the preemption provisions, by not questioning or limiting section 301 (b) (1). The possible interplay between "misappropriation" and section 301(b) (1) (which enacts this subject matter reservation) is not considered.

To the extent that clause (1) adopts the *Goldstein* perspective—and rejects "publication" as a barrier to the exercise of state power—the clause raises anew the implications of *Goldstein* canvassed in the discussion of *Triangle v. Sports Eye*.¹⁵⁰ If "facts" or "hot news" is considered as a distinct subject matter category, then it is arguable that *INS*-misappropriation rights may find an enabling authority under clause (1), wholly apart from clause (3). The Senate Report on sections 102 and 103 does not treat the range of subject matter which exists beyond those sections' specifications of what is within the federal domain (and therefore preempted under section 301(a)). The House Report of 1967 did (in the passage quoted earlier)¹⁵¹ observe that there are "areas of existing subject matter that this bill does not propose to protect," and specifically included "news and factual information considered apart from its compilation or expression" in its listing.¹⁵² The consequence of toleration of state protection over such subject matter was, in the context of the 1967 bill, limited by the reservation of state power to "unpublished" material only, with publication to be tested by a uniform federal standard.

The 1975 Senate Report does comment on the "nature of

¹⁴⁹ S. REP., *supra* note 12, at 116.

¹⁵⁰ In Text beginning at note 69, *supra*.

¹⁵¹ Text of Report in note 91, *supra*.

¹⁵² H.R. REP., *supra* note 91.

copyright" as illuminated by section 102(b).¹⁵³ The Report stated:

"Copyright does not preclude others from using the *ideas or information* revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts.

.... Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic *dichotomy between expression and idea* remains unchanged."¹⁵⁴ [Emphasis supplied.]

The implications of this for the scope of state protection under section 301(b) (1) are not clear. It might be read as expressing a basic policy of federal copyright law which *the states* cannot abridge or infringe upon. That is, state protection for "hot news" under clause (1)'s enabling grant would trench on section 102's limitation of federal subject matter protection¹⁵⁵ to the literary expression embodied in the newspaper which reported the "news." Yet the force of this reading of 102(b) as expressing a limit which both operates *within* the federal statute and enforces a consequent condition on the grant of state power under 301(b) (1) is undercut by the simultaneous—until it was deleted—safeguarding of state misappropriation rights in section 301 (b) (3). The Senate Report describes the federal copyright non-equivalence of "misappropriation" required for inclusion in clause (3) as turning on *the possible protection under state law of "hot news" or facts* not available under section 106 of the federal law. To coherently read section 102(b) together with the Senate version of 301(b) (3) (remembering they were both part of the same legislation) suggests that section 102(b) and the Senate Report's analysis simply restates well-understood standards pertinent only to qualification for federal copyright protection. On its face, section 301(b) (1) leaves the final reckoning of *Goldstein's* implications—as filtered through *Triangle*—inconclusively resolved.

After the amendment secured by the Justice Department, how well are the contours of federal preemption of state "misappropria-

¹⁵³ Section 102(b) provides:

"In no case does copyright protection for an original work of authorship extend to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

¹⁵⁴ S. REP., *supra* note 12, at 54.

¹⁵⁵ As a "literary work" described in section 102(a) (1).

tion" doctrines defined? Section 301(b) (1) still awaits a more definite reading; its scope is uncertain. Section 301(b) (3) would "save" "misappropriation" rights provided the general non-equivalence standard is met—and the Senate Report did provide an explanation of how *INS*-type "misappropriation" might do so. "Misappropriation" is, however, something of an anomaly¹⁵⁶ as a clause (3) action, its non-equivalence defined in terms of the scope of protection provided, not in terms of activities condemned under state law for reasons which are extraneous to the law of intellectual property and to the *fact* of copyright (and which express general state policies of proper conduct). The *underlying conduct* implicated in a "misappropriation" claim and expounded as the classical basis for the action does not stand scrutiny as non-equivalent in this sense. To grant relief against a competitor's "misappropriation" of one's labor and investment by imitation, use or copying of material is to act on a restatement of the policies which underlie the grant of exclusive federal rights under section 106; yet the Senate Report's own analysis and justification of non-equivalence remains to be tested.

V. BEYOND THE REVISION

With the reconstruction and explication of the statute, a significant end-point of this inquiry is reached. Our conclusions, thus far, are limited, derived from an examination of the statutory language; they simply do not respond to deeper structural questions about the accommodation of state and federal law. A few thoughts will now be offered regarding the "misappropriation" preemption issues whose resolution lies beyond the text of section 301.

The Justice Department letter had attacked "misappropriation" relief as a challenge to federal copyright preemption. A "misappropriation" (as raised in *INS* or *Triangle*) claim can arise in two copyright settings. First, the "literary expression" involved may have been copyrighted under federal law. If a "misappropriation" claim to bar the use of "hot news" by a competitor is pressed as to a work whose "literary expression" has been copyrighted, state law would be providing more protection than the federal statute; but it would not be invoked as a substitute for compliance with federal law.

Second, it could be used as a *substitute* for federal *copyright* protection. Where no federal copyright had been taken out for the "literary expression" published, the consequences of state relief are disturbing: the state protection would be more sweeping than the federal rights

¹⁵⁶ As compared with actions for breach of contract, defamation, etc.

which had been forsaken. A state injunction to bar a competitor's publication of facts or "hot news" which had been "published" *without* securing federal copyright protection represents the paradigmatic threat to preemption set out by the Justice Department: the erosion by state law of the dimensions of the public domain as defined by federal law.¹⁵⁷ Simple compliance with the federal law is undermined. Here, state and federal law appear to collide; and state law should fall under the Supremacy Clause.

This would be the probable result under *Kewanee Oil Co. v. Bicron Corp.*,¹⁵⁸ the Supreme Court's exercise in the judicial preemptability of state law causes of action which, in part, effectuate policies that are separate from those represented by federal copyright and patent law (i.e., non-equivalent in the clause (3) sense). In *Kewanee*, the Court tested state trade secret law (concerned with the maintenance of standards of commercial ethics *as well as* the patent law objective of encouraging invention) and concluded that its operation did not obstruct or frustrate the policy balances struck by the patent laws. State law did not, therefore, fall under the Supremacy Clause.¹⁵⁹

With respect to section 301, however, express preemption has failed as a mechanism of clear statement: the legislative history appears thoroughly confusing.¹⁶⁰ The force of the *Kewanee* methodology *after* the Revision's legislative preemption scheme is, however, problematic. Under the statute, a finding of non-equivalence¹⁶¹ substitutes for the *Kewanee* examination of impacts on federal policy: non-equivalence states the federal policy under the Revision. Yet, for the working out of a clear-cut solution to the *INS*-preemption issue, the

¹⁵⁷ See Letter, *supra* note 16.

¹⁵⁸ 416 U.S. 470 (1974). The case is briefly discussed in note 68, *supra*.

¹⁵⁹ "Although an express preemption provision does not automatically supersede all state laws, it does establish a more certain rule of preemption than that available under the doctrine of implied preemption. When there is no congressional declaration, the court is free to consider the degree of conflict and various presumptive factors of intent to occupy the field—all in an effort to determine whether Congress intended preemption. This inquiry is significantly narrowed by an express preemption provision. The court's role is limited to an evaluation of a statute's legislative history and of congressional purpose in order to determine whether a particular state law or regulation is of the type which Congress intended to supersede. The contrast between these types of inquiry is not a subtle distinction without a difference; an express preemption provision substantially limits the court's role in determining the allocation of governmental power in our federal system." *Nuclear Moratorium Legislation*, *supra* note 9, at 444.

¹⁶⁰ As discussed in text, particularly at notes 137-138, *supra*.

¹⁶¹ The relevant standard of section 301(b) (3).

statute provides only a rough charting of the relevant terrain.

The drafting of the Revision was intended to explicitly declare the law regarding the scope of state protection,¹⁶² not simply to provide a basis for judicial reconstruction of that policy. However, the status of INS-“misappropriation” was not directly analyzed by the Justice Department letter. The vague conclusion of the colloquy between Representatives Seiberling and Railsback that “the existing state of the law” was not changed by striking the illustrative examples from section 301(b) (3) ironically illustrates the Justice Department’s concern about the uncertain ramifications of state “misappropriation” law. *INS* on its own facts—or on *Triangle’s*—slips through this express preemption net, its disposition uncertain. Despite these appearances, we are not, though, really back at the beginning. In the beginning was *Goldstein*; and *Goldstein’s* analysis cannot furnish a guide to decision of this “misappropriation” preemption question. In *Triangle*, Judge Lord clearly, if baldly, felt that it would be an infirm incongruity to allow state protection of the “facts” to supplement the federal grant of copyright for only the “literary expression” of the facts. Judge Lord insisted that federal law is the source and limit of such specifically intellectual property rights. The limits of *Goldstein’s* style of analysis of the preemption problem when applied to the distinctive issues and values of copyright law, are here revealed: discrete subject matter analysis, treated on a national-local scale, does not intelligently address, let alone resolve, the problem of explaining Judge Lord’s appealing position.

The problem goes to the fundamental nature of copyright as a protective mechanism with a disseminating goal. This is the view taken by the Constitutional copyright clause, a source for preemption analysis not seriously explored in *Goldstein*. The INS-“misappropriation” preemption issue may provide occasion for invocation of the Constitutional command, which necessarily frames all Congressional action. “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” represents the Constitutional delineation of purpose and right.¹⁶³ Within this framework Congress has been charged with striking a balance to secure the constitutional result: and one could argue that the states cannot either supplement or substitute the measure of protection made available under this mandate by Congress. “Literary expression” is protected precisely as a device to encourage the wide distribution of

¹⁶² S. REP., *supra* note 12, at 114.

¹⁶³ U.S. CONST., Art I, § 8, cl. 8.

“ideas” or “hot news” or “facts,” which cannot in turn be protected. The purpose of the copyright scheme is precisely to place such “hot news” in the public domain.

Similar reasoning about constitutional and Congressional balancing was rejected in *Goldstein*. The sharper conjuncture of the relationship of federal competitive and state protective determinations raised in the *INS* situation may yet invite a different result, but it has been *Goldstein’s* legacy to couch the problem in the troublesome subject-matter formulation. Whether state “misappropriation” law is preempted remains for the judiciary to determine. Congress, by its Revision, has not done so.

APPENDIX I

THE ENACTED PREEMPTION PROVISIONS

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expres-

sion, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

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

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (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;
- (4) in the case of literary, musical, dramatic, and choreo-

graphic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(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.

APPENDIX II

THE PRELIMINARY DRAFT TEXT (1963)

§ 19. Pre-emption with respect to other laws.

(a) On and after the effective date of this act, all rights in the nature of copyright in works for which copyright protection is available under sections 1 and 2, whether created before or after that date and whether published or unpublished, shall be governed exclusively by this title. Thereafter, no person shall be entitled to copyright, to literary or intellectual property rights, or to any equivalent legal or equitable right in any such work under the common law or statute of any State.

(b) Nothing in this title shall annul or limit any rights or remedies under the law of any State:

(1) With respect to material for which copyright protection is not available under sections 1 and 2;

(2) With respect to any cause of action arising from undertakings commenced before the effective date of this act;

(3) With respect to activities constituting breaches of trust, invasion of privacy, or deceptive trade practices including passing off and false representation.

APPENDIX III

COMPARATIVE TEXTS

Preliminary Draft

§ 19. Pre-emption With Respect to Other Laws.

(a) On and after the effective date of this act, all rights in the nature of copyright in works for which copyright protection is available under sections 1 and 2, whether created before or after that date and whether published or unpublished, shall be governed exclusively by this title. Thereafter, no person shall be entitled to copyright, to literary or intellectual property rights, or to any equivalent legal or equitable right in any such work under the common law or statute of any State.

(b) Nothing in this title shall annul or limit any rights or remedies under the law of any State:

- (1) With respect to material for which copyright protection is not available under sections 1 and 2;
- (2) With respect to any cause of action arising from undertakings commenced before the effective date of this act;
- (3) With respect to activities constituting breaches of trust, invasion of privacy, or deceptive trade practices including passing off and false representation.

1964 Bill

§ 19. Pre-emption with respect to other laws.

(a) On and after January 1, 1967, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 1 and 2, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the law of any State with respect to:

- (1) unpublished material that does not come within the subject matter of copyright as specified by sections 1 and 2;
- (2) any cause of action arising from undertakings commenced before January 1, 1967;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 5, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

1965 Bill

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1967, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the law of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103;

(2) any cause of action arising from undertakings commenced before January 1, 1967;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

1967 House Bill

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1969, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103,

including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1969;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

1975 Senate Bill

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

APPENDIX IV

THE JUSTICE DEPARTMENT LETTER (pp. 1-7)**Department of Justice****Washington, D.C. 20530****July 27 1976**

Honorable Robert Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On May 8, 1975, Deputy Assistant Attorney General Irwin Goldbloom represented this Department before your Subcommittee on Courts, Civil Liberties and the Administration of Justice during hearings on H. R. 2223, a bill "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes."

For a number of reasons, which will be discussed separately below, we would like to supplement the Department's earlier testimony.

I.

Because we were principally concerned with the many changes which the bill would make to the existing law of copyright, we did not discuss an issue which we now believe should be brought to your attention. In our view, the function and structure of the proposed Copyright Royalty Tribunal, which would be established by a new chapter 8 to title 17, raises possible constitutional questions.

Proposed section 803 would authorize the Register of Copyrights to appoint a Copyright Royalty Tribunal consisting of three persons named by the American Arbitration Association. Section 801 would authorize this Tribunal to make determinations concerning the adjustment of copyright royalty rates specified by sections 111 and 115 and to make changes in the royalty rate, or the revenue basis on which the

royalty fee is assessed, or both, to assure a reasonable royalty fee. The Tribunal would also determine in certain circumstances the distribution of the royalty fees deposited with the Register under sections 111 and 116. Section 111 concerns secondary transmission; section 115 and 116 concern phonorecords and coin-operated phonorecord players.

A final determination of the Tribunal in any proceeding for adjustment of a statutory royalty would be required by section 806 to be transmitted to the Secretary of the Senate and the Clerk of the House for reference to the Judiciary Committees. Proposed section 807 provides that either House of Congress may veto the "recommended royalty adjustment" by adopting a resolution of disapproval within ninety days. Proposed section 809 would attempt to limit judicial review of a final determination of the Tribunal to situations where the determination was procured by fraud, where partiality or corruption of any member of the panel was evident, or where any member of the panel was guilty of any misconduct which may have prejudiced a party.

The absence of meaningful standards for the Tribunal's decision making, the Tribunal's transient and inexperienced membership, its lack of continuity in establishing policy and precedent, and the very restricted judicial review provision, taken together, raise questions whether petitioners before the Tribunal can be assured of due process of law.

Moreover, the Tribunal, with its administrative (rate-making) and judicial (dispute resolution) functions, would be lodged within the Library of Congress, an arm of the Congress, thereby raising separation of powers questions. Both executive and judicial prerogatives may be jeopardized by placing within the exclusive control of Congress powers which are not legislative in nature. Indeed, separations of powers questions have already been raised with respect to the existing location of the Copyright Office within the legislative branch. See Brylawski, "The Copyright Office: A Constitutional Confirmation," 44 *Geo.Wash.L.Rev.* 1 (1976).

Furthermore, in our view, the one-House veto mechanism raises questions concerning Article I, section 7, of the Constitution which prescribes the procedures by which the Congress legislates. The Constitution has created a process whereby both Houses and the President have a role in creating legislation and mentions no procedure whereby one House can take actions which have the force of law.

II.

On February 19, 1976, the Senate passed S. 22, the Senate om-

nibus copyright reform bill, making certain changes to section 301. We believe that these changes have anticompetitive implications which should be called to your attention.

Section 301 would provide that the federal Copyright Act would preempt all state regulation of rights in the nature of copyright protection. However, certain exceptions to complete preemption would be made by subsection (b) of section 301. The Senate-passed bill made two significant additions to the exceptions, both of which are opposed by this Department. These additions seemingly allow (1) protection under the theory of misappropriation, and (2) less preemption than the committee intended with respect to state law regarding sound recordings made prior to 1972.

A. Misappropriation

Paragraph (3) of section 301 (b) would exempt from preemption, state common law or statutory rights that are not equivalent to the exclusive rights granted by the Copyright Act. The Copyright Act would grant rights such as the exclusive right to make copies of the copyrighted work (Section 106). In addition to the rights that paragraph (3) previously specifically listed as non-equivalent rights (e.g., breach of contract and breach of trust) the committee has now added "rights against misappropriation not equivalent to any of such exclusive rights" The committee report accompanying the bill asserts that there is a need for this provision because "state law should" be able to permit the misappropriation theory to apply. S. Rep. 94-473, 94th Cong., 1st Sess. 116 (1975) (hereinafter, "Senate Report").

This Department is concerned that inclusion of the above quoted phrase in section 301 would sanction use of the highly anticompetitive "misappropriation" theory, and may defeat the underlying purpose of the preemption section.

1. The Misappropriation Doctrine is Anticompetitive

This Department strongly opposes allowance of monopolies based on the theory of "misappropriation." This term is not defined in the proposed Act, but the concept apparently stems from the much-criticized decision of the Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (hereinafter, the "INS" case). In *INS*, the Supreme Court held that the defendant news service committed an unlawful act of unfair competition by copying the plaintiff's uncopyrighted published new stories from east coast newspapers and wiring them west coast subscribing newspapers. The Court found that

even though the plaintiff would have had no rights against the public, who were entitled or privileged to copy the articles, nonetheless the defendant had "misappropriated" the published work done by the plaintiff and was therefore liable to the plaintiff. The Court's theory was that the defendant's conduct was unlawful because it sought to "reap where it has not sown" (248 U.S. at 239). This unjust enrichment theory could be used broadly to prohibit the copying of uncopyrighted published materials, the manufacture by others of unpatented goods, the use by a doctor of a surgical technique developed by another doctor, or the use of an advertising technique which another has developed at his own expense. The effect of the theory is boundless—it is potentially applicable each time a person engages in conduct that imitates some work that was developed at another's expense.

The courts generally have declined¹ to follow the suggestion in the *INS* case that the traditional unfair competition doctrine be expanded to cover so-called "misappropriation."² See, e.g., *G. Ricordi & Co. v. Haendler*, 194 F.2d 914, 916 (2d Cir. 1952); *National Comics Pub., Inc. v. Fawcett Pub., Inc.*, 191 F.2d 594, 603 (2d Cir. 1951); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 90 (2d Cir.), cert. denied, 311 U.S. 712 (1940); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930). Indeed, District Judge Wyzanski once stated his belief that the Supreme Court would follow the Brandeis dissent in *INS* and overrule *INS* if given the opportunity. *Triangle Pub., Inc. v. New England Newspaper Pub. Co.*, 46 F. Supp. 198, 204 (D. Mass. 1942). This view is supported by the recent *Sears* and *Compco* decisions,³ in which the Supreme Court reversed decisions from a court of appeals that prohibited copying of unpatented products, without even attempting to distinguish *INS*. See also *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315, 318 (1st Cir.), cert. denied, 389 U.S. 1007 (1967), in which the court found both that *INS* was no longer authoritative, since it occurred before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938),⁴ and that it was overruled by *Sears* and *Compco*.

The New York State courts, in a series of cases beginning with appropriation of news and artistic productions, retrieved the "misap-

¹ See 2 R. Callmann, *Unfair Competition, Trademarks & Monopolies*, § 60.2 at 505, 507 (3d ed. 1975).

² The *INS* decision predates *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is thus no longer binding on federal courts.

³ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964).

⁴ Under *Erie*, federal courts are to apply local law to non-federal causes of action.

propriation" theory of *INS* from innocuous desuetude and gradually extended the doctrine into the area of unfair competition in the sale of ordinary merchandise.⁵ The *INS* doctrine has also been codified in the New York General Business Law (§ 368-d). The bulk of authority elsewhere in the United States, however, is against the recognition of "misappropriation" as an independent basis for recovery in imitation cases (*West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581, 598-99 (6th Cir. 1955) (misappropriation is "contrary to the great weight of authority")).

This Department supports the position taken in the foregoing majority line of cases, and opposes any attempt to limit nondeceptive copying of uncopyrighted or unpatented subject matter by the general public. We believe that sound policy reasons underlie the weight of authority that opposes the *INS* "misappropriation" doctrine.

The "misappropriation" theory is vague and uncertain. The "misappropriation" provision of section 301 does not indicate what it is that is not to be appropriated. It may extend beyond an appropriation of the forms or styles of ordinary merchandise to include an appropriation of mere ideas, or technology or other know-how long in the public domain. Neither the *INS* case, other cases, nor proposed paragraph (3) adequately defines the conduct prohibited, or establishes any standard for distinguishing improper, as opposed to proper, copying.⁶

The "misappropriation" doctrine may be used contrary to copyright and antitrust policies to sustain perpetual monopolies over printed matter, and contrary to patent and antitrust policies to sustain perpetual monopolies over alleged inventions which do not qualify for patent protection. In the *Sears* and *Compco* cases, noted above, the Supreme Court set aside such grants and held the states to be without power to block off from the public the non-deceptive copying of an unpatentable article. The Court held this in the ground that such grants contravene the federal patent statutes and constitutional provisions.

Furthermore, imitation is the life-blood of competition. Mere commercial copying is neither unlawful, nor immoral; instead it is often a commercial and economic necessity. Copying very often supports and promotes competition—it spurs further invention and innovation,

⁵ Cases reviewed in Kaplan & Brown, *Cases on Copyright, Unfair Competition, and Other Topics* 614-19 (2d Ed. 1974).

⁶ Such vague language, of course, may present serious due process problems under the United States Constitution. See *United States v. Cardiff*, 344 U.S. 174 (1952); *United States v. Evans*, 333 U.S. 483 (1948).

permits newcomers to enter markets, and generally, by bringing forward functionally equivalent products and services, is a necessary condition for the competitive forces of the marketplace acting to lower prices, satisfy consumer demand, and allocate production optimally.

2. Preemption Would Be Nullified

Paragraph (3), as noted above, lists causes of action, such as for breach of contract, that are specifically identified in the introductory phrase as giving "rights that are not equivalent to any of the exclusive rights" that would be granted by section 106 of the proposed Copyright Act. These are causes of action different in nature from that for copyright infringement (see Senate Report, p. 115). Apparently what is meant is that, for example, one may sue to enjoin reproduction of an uncopyrighted book if there is a contract between the parties prohibiting the defendant from reproducing it. Thus, reproducing the literary expression itself may be prohibited under a cause of action for breach of contract.

Similarly, paragraph (3) exempts from preemption "rights against misappropriation not equivalent to any of such rights" specified in section 106. This apparently would permit states to prohibit the reproduction of the literary expression itself under a "misappropriation" theory. "Misappropriation" would stand in the place of breach of contract as a cause of action in the book example above. Any copying of copyrightable subject matter that has not been federally protected could be prohibited under the amorphous theory of "misappropriation."

The Senate Report states (p. 116) that reproduction of "the literary expression" itself should be preempted and should not be able to be prohibited under the "misappropriation" theory; yet that is what inclusion of the term "misappropriation" in paragraph (3) would prohibit. The preemption sought by the omnibus Copyright Act revision bill would be nullified by paragraph (3).

While "misappropriation" is almost certain to nullify preemption, any of the causes of action listed in paragraph (3) following the phrase "as specified by section 106" may be construed to have the same effect. For example, a court could construe the copying of an uncopyrighted published book to be an invasion of the author's right to privacy, i.e., the right to keep the control of the publication of his book privately to himself. In order to more clearly delineate the courts the area to be preempted, we recommend striking the specific causes of action listed in paragraph (3) so as to amend that paragraph to preempt only: "(3) activities violating legal or equitable rights that

are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106;”

3. Recommendation

For the reasons discussed, this Department recommends that section 301(b) (3) be amended as suggested above.

PART II

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. United States of America and Territories

511. U.S. DEPARTMENT OF JUSTICE.

28 CFR Part 0. Seizure and forfeiture of materials under copyrights act. Final rule. [Order No. 766-78.] *Federal Register*, vol. 43, no. 31 (Feb. 14, 1978), p. 6228.

This order adds the copyright act to the list of Federal statutes under which the Criminal Division of the Justice Department may bring civil penalty actions as a result of the criminal provisions in the new law (17 U.S.C. 509).

512. U.S. LIBRARY OF CONGRESS. COPYRIGHT OFFICE.

37 CFR Part 202. Deposit requirements-motion pictures. Interim regulations. [Docket RM 78-3.] *Federal Register*, vol. 43, no. 58 (Mar. 24, 1978), pp. 12320-4.

This notice of interim amendments to regulations in 37 C.F.R. S202.19-202.20 allows public comment while permitting immediate effect by making available a special agreement for published motion pictures which would: (1) provide for the return of the copy of the work to the depositor under certain conditions, and (2) establish certain rights and obligations of the Library of Congress with respect to the copies of these works.

513. U.S. LIBRARY OF CONGRESS. COPYRIGHT OFFICE.

Implementation of the Privacy Act of 1974. Systems of Records and Notice of Proposed Routine Uses. [Docket No. RM 77-13.] *Federal Register*, vol. 42, no. 233 (Monday, Dec. 5, 1977), pp. 61574-61585.

A listing of Privacy Act systems of records of the Copyright Office, including system location, categories of individuals covered by the system, authority for maintenance of the system, routine uses of records maintained in the system, including categories of users and purposes of such uses, storage, retrievability, safeguards, and record access procedure.

514. U.S. LIBRARY OF CONGRESS. COPYRIGHT OFFICE.

Performance rights in sound recordings. Addenda to report. Notice of addenda to report. [Docket S77-6-D.] *Federal Register*, vol. 43, no. 55 (Mar. 21, 1978), p. 11773.

This notice advises the public that addenda to the Register's report to Congress (January 3, 1978) on the performance rights amendment have been transmitted to Congress and are available for public inspection.

515. U.S. LIBRARY OF CONGRESS. COPYRIGHT OFFICE.

Performance rights in sound recordings. Addenda to report [Docket No. S77-6-D.] *Federal Register*, vol. 43, no. 59 (Mar. 27, 1978), p. 12763-12768.

This notice includes the letter of transmittal for the addenda to the report of the Register on performance rights in sound recordings and the statement of the Register. The statement contains a summary of conclusions and specific legislative recommendations based on the issues of public policy, constitutional law, economics, and federal statutory law raised by proposals for performing rights in sound recordings.

516. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS.

Draft report of the Subcommittee on Photocopying, issued for public comment only, Mar. 15, 1978.

CONTU's Draft Report recommends only one change in the 1976 Copyright Act's photocopying provisions. The one suggested revision is a more detailed explanation of what copying may be considered "fair use" when the copying is done by commercial organizations for their customers. The report further recommends that review of the photocopying provisions, as they relate to for-profit photocopying, be undertaken by the Copyright Office after experience is acquired under the new law; such review most logically to be made in conjunction with the mandated five-year review reports on photocopying, the first of which is to be given to Congress by January 1, 1983.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

517. COMMITTEE OF EXPERTS ON THE LEGAL PROTECTION OF FOLKLORE. Tunis, July 11-15, 1977. Report. *Copyright Bulletin (Unesco)*, vol. 11, no. 3 (1977), pp. 28-36.

The Committee's report discusses the definition and identification of folklore, its conservation and preservation, and its use. No conclusions are drawn from the Committee's discussions.

518. UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION: GENERAL CONFERENCE. *Nairobi, Oct. 26-Nov. 30, 1976*. Document. *Copyright Bulletin (Unesco)*, vol. 11, no. 1 (1977), pp. 27-35.

The text of a recommendation adopted by the Conference concerning the international standardization of statistics on radio and television.

519. WORKING GROUP ON THE LEGAL PROBLEMS ARISING FROM THE USE OF VIDEOCASSETTES AND AUDIOVISUAL DISCS: Report. Geneva, 21-25 Feb. 1977. *Copyright Bulletin (Unesco)*, vol. 11, no. 3 (1977), pp. 5-12.

This report encompasses a discussion of the legal status of videocassettes and audiovisual discs in light of the copyright conventions and the Rome Convention. It also explores the scope of the exceptions to protection permitted by those conventions.

520. WORKING GROUP ON THE PROBLEMS IN THE FIELD OF COPYRIGHT AND SO-CALLED NEIGHBORING RIGHTS RAISED BY THE DISTRIBUTION OF TELEVISION PROGRAMMES BY CABLE. Report. Paris, 13-17 June 1977. *Copyright Bulletin (Unesco)*, vol. 11, no. 3 (1977), pp. 17-24.

The Working Group's study of legal problems engendered by cable distribution identifies three kinds of cable distribution: a) that of the cable distributor's own programmes; b) that of broadcast programmes retransmitted by the original broadcasting organization; and c) that of broadcast programmes by an organization other than that of the original broadcasting or-

ganization. The Group's conclusion was that the most adequate solution to the problems discussed was not through exclusive rights or compulsory licensing systems, but through the collective exercise of exclusive rights, subject to specified exceptions and limitations. Also discussed in this report are cable distribution by satellite and the inadequate cable distribution protection provided to performers, phonogram producers, and broadcasting organizations by the Rome Convention.

521. SEMINAR ON COPYRIGHT FOR THE ARAB STATES. Rabat, 23-26 May 1977. *Copyright Bulletin (Unesco)*, vol. 11, no. 3 (1977), pp. 15-16.

This seminar, convened jointly by Unesco and WIPO in cooperation with the Arab States, was intended to examine the practical problems raised by the application of the international copyright conventions and national copyright laws in the Arab States. Noting the disparities between the copyright laws of the Arab countries, and the consequent implications for membership in the international conventions, the Seminar recommended a meeting of government experts to establish broad principles on which to base more uniform copyright laws in the Arab states.

PART IV

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. Decisions of U.S. Courts

1. Federal Court Decisions

522. NOVELTY TEXTILE MILLS, INC. v. JOAN FABRICS CORP., 558 F.2d 1090 (2d Cir. July 12, 1977) (Gurfein, C. J.).

Appeal from District Court judgment for defendant upholstery manufacturer on copyright infringement action requesting a preliminary injunction. In present action plaintiff sought a permanent injunction, impoundment, destruction, and damages.

Held, order denying preliminary injunction reversed and remanded with respect to one of defendant's fabrics; District Court instructed to determine whether other of defendant's fabrics are substantially similar and whether an injunction should be granted.

Plaintiff created and copyrighted a bias or argyle plaid furniture upholstery fabric which was purchased and displayed on furniture models at a trade market attended by the defendant's representatives. Defendant admitted its designers actually viewed plaintiff's fabric design before its own designs were created. However, the lower court found no substantial similarity between the parties' designs, on the basis that differences would be apparent to a furniture manufacturer or a serious consumer.

The court ruled that the correct test for determining substantial similarity was whether the ordinary observer "would recognize the alleged copy as having been appropriated from the copyrighted work." Defendant argued that the existence of similar prior works in the public domain required a second test for evaluating substantial similarity and that such works might limit plaintiff's copyright protection. This reasoning was rejected, however, because neither party was shown to have copied its design from a work in the public domain; on the contrary, both plaintiff and defendant claimed independent creation.

Having viewed both fabrics in question, the court found them to be "almost identical" in "design, dimensions and colors." But the question of whether defendant's other fabrics with the same design but a different color scheme also infringed was specifically referred to the District Court for resolution. Whether color is an ingredient of the

copyright becomes important when, as here, the colors of the alleged infringement are "so different from those used in the fabric of the copyrighted design that no substantial similarity results." Dissenting Judge Mansfield pointed out that the similarity of colors was one of the deciding factors in finding infringement in this case but also noted that color plays a greater role in creating an overall impression when the design is simple than when it is complex. He urged that "if color is to be taken into consideration for infringement purposes, it must inevitably be considered as an element of the copyrighted subject matter."

523. **BROWN v. COSBY**, 433 F. Supp. 1331 (E.D. Pa. July 13, 1977) (Luongo, D. J.).

Action for breach of oral and written contracts; plaintiff alleged that defendants infringed his common law copyrights, unlawfully appropriated his property and were unjustly enriched. He also asserted breach of a fiduciary relationship, fraud, and conspiracy and asked for an injunction and damages.

On defendants' motions to dismiss and for summary judgment, *held*, plaintiff's action was barred by the applicable statutes of limitations; the court lacked personal jurisdiction over two defendants and their motion to dismiss on this ground was granted.

Having been commissioned to do so by defendant Cosby, plaintiff created cartoon characters of their mutual childhood friends that Cosby used in his comedy act. Plaintiff was paid a weekly salary during the several months that he worked on the characters. After their completion plaintiff entered into a written agreement to produce a series of comic strips and at about the same time was promised that he would receive "no less than 25% of the profits generated by the Characters" when they were commercially exploited. Six months later relations between the parties broke down but defendants nevertheless exploited plaintiff's characters on a television show, in films, books, and novelty products without further payment to him.

Defendants based their motion to dismiss plaintiff's action for copyright infringement and unlawful appropriation on their contract with plaintiff which stated that although he was an independent contractor, his work product, including copyright thereto, would be owned exclusively by defendant "as though you were our employee-for-hire."

The court referred to **NIMMER ON COPYRIGHT** in proposing that "if the employer materially breaches the employment contract, the employee may rescind the contract and claim back the rights to the copyright." It further found that plaintiff's complaint successfully al-

leged material breach of the contract and therefore stated a cause of action for copyright infringement. Nevertheless, because plaintiff was barred by the statute of limitations from proving breach of contract, he was also precluded from proving a right to reclaim his copyright: "Thus the limitations bar on plaintiff's contract claim also bars his claim for copyright infringement or unlawful appropriation."

PART V

BIBLIOGRAPHY

A. BOOKS, TREATISES AND CASSETTES

1. United States Publications

524. DUFFY, ROBERT E. Art law: representing artists, dealers, and collectors. Practicing Law Institute, 1977. 517 p.

A textbook on legal problems in art transactions. This book is divided into ten sections. Emphasis is placed on American law, although French law is incorporated for comparison. There are sections on Copyright Law, Royalties on Resale of Art Works, Moral Rights, Preservation and International Transport of Art and Cultural Property, Dealing with Fine Art, the Collector, and an appendix on Public Support for the Arts in the U.S. and Abroad.

525. GOLDSTEIN, JACK C. The performance of copyrighted music: questions and answers. Distributed by Broadcast Music, Inc., 1978.

This pamphlet answers pragmatic questions about how performances of copyrighted music may constitute copyright infringement, emphasizing issues relating to the place of performance, the potential liability of establishment proprietors under varying circumstances, and the sanctions which federal courts may impose upon copyright infringers. Footnoted references at the end of the pamphlet cite to pertinent legal authorities.

526. Librarian's copyright kit. American Library Association, 1977.

This kit includes a collection of materials intended to instruct the library community in the provisions and ramifications of the new copyright law. The kit includes the following: "A Librarian Looks at the New Copyright Law" (article reprinted from *American Libraries*); "Proposed Copyright Clearance Procedures" (Guidelines and bibliography prepared by the American Library Association and the Association of Research Libraries); "Copyright Law Prompts New ILL Form" (reprinted from

American Libraries); "The New Copyright Law: Questions Teachers and Librarians Ask" (prepared jointly by the National Educational Association, the National Council of Teachers of English, and the American Library Association); "Living in the Gap of Ambiguity: An Attorney's Advice to Libraries on the Copyright Law" (article reprinted from *American Libraries*); "Librarian's Guide to the New Copyright Law" (a discussion of Public Law 94-553 arranged by the topics under which a librarian might seek information); "An Interim Look at the Copyright Revision Act of 1976" (paper prepared by legal counsel to the ALA); "Guidelines: Records of Interlibrary Photocopying Requests" (paper prepared by the RASD Interlibrary Loan Committee of the ALA); "Language and Specifications for 'Display Warning of Copyright' and for 'Order Warning of Copyright'" (issued by the U.S. Copyright Office).

527. NEWCITY, MICHAEL A. Copyright law in the Soviet Union. Praeger Publishers, 1978. 212 pp.

This study of Soviet copyright law is divided into three parts. The first describes the history of Soviet copyright law from the days of the tsarist regime to the present. Part II concentrates on the content of modern Soviet copyright law and the procedures and regulations established to administer that law. Part III analyzes the developments and controversies that have arisen as a result of the Soviet Union's accession to the UCC.

528. SCOTT, MICHAEL. The crafts business encyclopedia. Harcourt, Brace, Jovanovich, 1977. 320 pp.

A comprehensive reference book for artists in the crafts field which is arranged alphabetically and by subject matter. Legal and business topics are included with in-depth coverage of copyright law and cross-references to patent and trademark law.

529. TANSALLE, G. THOMAS. Copyright records and the bibliographer. *Studies in Bibliography*, vol. XXII, 1969.

To apprise bibliographers of the importance of copyright records as valuable bibliographic tools, the author discusses the U.S. and English copyright systems from their beginning to the present. Attention is also given to the significance of the published copyright registers of these countries.

530. THATCHER, SANFORD G. A publisher's guide to the new U.S. Copyright Law. 1977.

A synopsis of the 1976 Copyright Law as it relates to printed matter, organized according to categories of works.

531. Writers' and artists' yearbook 1978. Published in the U.S. by The Writer, Inc. 1977. 480 pp.

This directory for writers and artists is divided into five sections: Newspapers and Magazines; Book publishers; Theatre, TV, Radio, Agents; Art, Music, Prizes, Clubs; and Copyright, Tax, Services.

The copyright section provides a general overview of British and American copyright law, as well as information on subsidiary rights and the law of libel.

532. You and the music you use. Broadcast Music, Inc., 1978.

A series of questions and answers, in pamphlet form, explaining the concepts of "copyright" and "public performance" as these concepts relate to music. The pamphlet also describes the operation of BMI, its license fee distribution procedures, and the advantages to a music user of acquiring a BMI license.

2. Foreign Publications

1. In French

533. DESBOIS, HENRI, ANDRÉ FRANCON *and* ANDRÉ KEREVER. Les conventions internationales du droit d'auteur et des droits voisins. Paris: Dalloz, 1976. 452 pp.

This work addresses, from the French point of view, international copyright and neighboring rights conventions. The book emphasizes the basic structure and principles of these conventions, focusing on the work of the convention delegations rather than related literature and court decisions.

B. LAW REVIEW ARTICLES

1. United States

534. Annual meeting of the American Association of Law Libraries—address on copyright by Ms. Barbara A. Ringer, Reg-

ister of Copyrights. *Law Library Journal*, vol. 70, no. 4 (Nov. 1977), pp. 453-463.

Ms. Ringer's address focuses on the impact of the new copyright law on law librarians, emphasizing problems related to photocopying for classroom uses, library photocopying per se, and the special problems of interlibrary loans. The guidelines of section 108 are explained, with a caution that these guidelines represent a minimum standard and exceeding them simply subjects one to the general fair use provisions of section 107. Also included in the text are audience questions and Ms. Ringer's responses.

535. Comment, the middleman as price fixer: *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers*. *Harvard Law Review*, vol. 91, no. 2 (Dec. 1977), pp. 488-498.

An analysis of *CBS v. ASCAP*, 562 F. 2d 130 (2d Cir. 1977), which applied the rule that price fixing is per se an antitrust violation to blanket licensing systems established by copyright holders. The Second Circuit, in spite of its decision, raised the possibility that the special problems of performance licensing might require some form of price fixing. The court finally concluded that BMI and ASCAP might continue their blanket licensing systems if they provided an alternative form of license allowing more competition and if it was found that blanket licenses serve a "market need" for users who desire it for "business reasons." The author argues that the court's approach is simplistic and that a "rule of reason" should be applied when price fixing by middlemen offers general economic benefits sufficient to overshadow anticompetitive effects.

536. FABE, JACQUELINE. The fine artist's right to the reproduction of his original work. *Copyright Law Symposium*, no. 23, Columbia University Press (1977).

This analysis of the reproduction rights of the fine artist took third prize in the 1973 Nathan Burkan Memorial Competition. The author's conclusion is that the U.S. should adopt the French concept of "droit de suite" to fully protect its fine artists.

537. FRIJOUF, ROBERT F. Simultaneous copyright and patent protection. *Copyright Law Symposium*, no. 23, Columbia University Press (1977).

This article, which took 4th prize in the 1973 Nathan Burkan Memorial Competition, analyzes the possibilities and advantages of simultaneous copyright and patent protection, advocating that such protection be given those who can qualify as both author and inventor.

538. GIBBS, FRANK. Copyright misuse: thirty years waiting for the other shoe. *Copyright Law Symposium*, no. 23, Columbia University Press (1977).

This article, which won second prize in the 1973 Nathan Burkan Memorial Competition, explores the murky ground between copyright and antitrust law, and the development of the doctrine of copyright misuse.

539. MENTLIK, WILLIAM L. Federal preemption in the field of intellectual creations—an end to the common law copyright. *Copyright Law Symposium*, no. 23, Columbia University Press (1977).

This article, which won the 5th prize in the 1973 Nathan Burkan Memorial Competition, analyzes section 301 of what was then the revision bill. The author questions whether it would have been wiser to retain in the states the power to protect undisseminated works of authors.

540. Note, libel-new standard of liability for media defendants—*Taskett v. KING Broadcasting Co.*, 86 Wn. 2d 439, 546 P.2d 81 (1976). *Washington Law Review*, vol. 52 (1977), pp. 975-987.

An analysis of *Taskett v. King Broadcasting Co.*, which brought defamation law in the state of Washington into conformity with the Supreme Court's decision in *Gertz v. Robert Welch, Inc.* *Taskett* held that where a publication concerns a subject of public interest and the content makes apparent the danger to reputation, a private individual may recover in a defamation action against a publisher or broadcaster upon a showing that the defendant knew, or in the exercise of reasonable care, should have known, that the publication was false or would create a materially false impression. Recovery, however, would be limited to actual damages unless malice is shown.

The article traces the history of defamation law in Washington and speculates upon future development and application of the *Taskett* standard. The author's primary concern

is balancing the tension between the need for a vigorous, uninhibited press and the need to redress wrongful injury to reputation.

541. RADLAUER, LEONARD A. The USSR joins the Universal Copyright Convention. *Copyright Law Symposium*, no. 23, Columbia University Press (1977).

This article, which took 1st prize in the 1973 Nathan Burkan Memorial Competition, analyzes the reasons for and effects of the USSR's adherence to the Universal Copyright Convention.

542. TAUBMAN, JOSEPH. Some implications of copyright to the arts and education. *Performing Arts Review*, vol. 7, no. 3 (1977), pp. 296-327.

The author presents his thesis that art is not separable from the restrictions placed on it by copyright and that knowledge of the fundamentals of copyright is essential to understanding art and the creative function. With this thesis in mind, the article elaborates on the copyright concepts of authorship, expression, adaptation, translation, public domain, infringement, fixation, and fair use.

2. Foreign

1. In English

543. Double taxation of copyright royalties. *ICIC*, no. 6 (July 1977), p. 1-8.

Problems of double taxation of copyright royalties remitted from one country to another. The question of international agreement to avoid double taxation was the subject of a UNESCO conference (Oct., Nov. 1974). Findings of that meeting are reported.

544. Guidelines for the establishment of national or regional copyright information centers. *ICIC*, no. 6 (July 1977), p. 1.

Guidelines have been drafted by the Secretariat of UNESCO in accordance with the Work Plan relating to resolution 6,122. The Guidelines establish copyright information centers where they do not already exist to facilitate the access of de-

veloping countries to protected works and thus to contribute to the advancement of education, science and culture.

2. In German

545. GOTZEN, FRANK. Gibt es im belgischen Urheberrecht ein Rückrufsrecht wegen gewandelter Überzeugung? Zu einer Entscheidung des belgischen Kassationshofs. *Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil*, no. 5 (May 1977), pp. 177-180.

A case comment involving the question of copyright protection where the contract or license has been revoked on the ground of *droit moral*.

546. HEFTI, ERNST. Die Parodie im Urheberrecht; zum Problem der Parodiebehandlung in Rechtsprechung und Pechtslehre (Zusammenfassung). *Film und Recht*, vol. 21, no. 8 (Aug. 1977), p. 524.

A comparative analysis of the treatment given parodies in law and court decisions during the past five years in Switzerland, France, Italy, the United States, and West Germany.

547. HERSCHEL, WILHELM. Die Rechtsantur des Vertrags der arbeitnehmerähnlichen freien Mitarbeiter geistiger Berufe. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 47-66.

Under section 12a of the Wage Agreement Act in Germany, collaborators engaged in the production of an intellectual work must carefully choose the type of contract, whether it is for services or for manufacture and production, since the rights under each of the different types of contracts differ.

548. HUBMANN, HEINRICH. Zulässigkeit und Grenzen der wissenschaftlichen Kritik im ausserwettbewerblichen Bereich. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 67-88.

An essay on the scope of criticism permitted by the German Federal Constitution as applied to scholarly works. Criticism which would damage commercial or professional reputation, one's business, or one's personal reputation and the general integrity of one's personality is restricted by sections 823 and 824 of the German Civil Code.

549. KELLER, HANS-JOACHIM. Zum Verhältnis von Persönlichkeitsschutz und Kunstfreiheit. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 89-97.

Recent case law has held that the author or artist must so disguise his characters that the public will not recognize the original living person. Thus the right of privacy impinges on the right of the author or artist to find expression of his idea. The author of this article suggests that more stress should be laid upon whether the person concerned has created the occasion for a public representation, whether he is seriously damaged by the artistic or literary production, and also to what extent he has adequate remedies for the injuries incurred.

550. KNAP, KAREL. Grundzüge der persönlichkeitsrechtlichen Theorie im sozialistischen Urheberrecht. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 99-122.

In the socialist countries the protection of a work of art is based upon the manner in which the personality of the artist has found expression and upon the contribution the work makes to society. The artist's method of expression is regarded as a uniform personal right. This distinction between the dual rights becomes important when the work has been published, the author dies or the period of protection has expired. Protection of the rights after the death of the artist becomes a civil rather than an administrative law matter.

551. KNÖPFLE, ROBERT. Das Recht des Urhebers zur Abwehr von Importen und das Europäische Recht. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 123-151.

Recent court decisions are reviewed for the purpose of determining how articles 85 and 86 of the European Economic Community Treaty affect an author's right to control importation of his work into the various member countries.

552. LARESE, WOLFGANG. Werk und Urheber in der schweizerischen Urheberrechtsreform. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 153-173.

Under the revision of copyright law now being drafted in Switzerland, the form of the work will determine who its author is. Consequently the concept of authorship must be reconsidered. After exploring the concept, the conclusion is reached that the actual creation of a work no longer determines the au-

thorship, the definition of author is no longer dependent on creation but rather on particular need of legal protection, and there may be a multiplicity of authors for each work.

553. LOEWENHEIM, ULRICH. Urheberrecht und Kartellrecht; Überlegungen zur Anwendung des GWB bei der Verwertung von Urheberrechten und verwandten Schutzrechten. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 175-211.

In discussing the commercial exploitation of copyrighted works by German corporate organizations, sections 31 et seq. of the German Copyright Law are examined in the light of the German Copyright Law. The rights arising from economic and technical investments in the performances of musical and dramatico-musical works are also explored as well as the rights arising from the use of exclusive or non-exclusive licenses, and certain forms of unfair competition are found to be protected without the application of cartel law restrictions.

554. LOGDBERG, AKE. Zu den Voraussetzungen des Urheberrechtsschutzes nach schwedischen Recht, insbesondere zur Gestaltungshöhe. *Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil*, no. 7 (July 1977), pp. 255-260.

An overview of Swedish case law dealing with related rights, droit moral, works of art, coin catalogs, maps, and duration of copyright.

555. MOVSESSIAN, VERA. Urheberrechte und Leistungsschutzrechte an Filmweken. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 79 (1977), pp. 213-238.

Articles 88-95 of the Germany Copyright Law are analyzed, and it is found that the rules of construction and interpretation do not give any new rights to film producers, and that the assignment rights have been left unrestricted.

556. NIRK, RUDOLF. Urheberrecht und angewandte Kunst. Ein Beitrag zu der Thoma-Stühle-Entscheidung des Bundesgerichtshofes. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 1-19.

Though Germany's first copyright law was enacted in 1870, works of fine or pure art were not protected until 1876, and works of applied art were granted copyright protection in 1907.

A 1976 Supreme Court decision decided that the drawings of wood carved chairs designed by Hans Thoma in 1900 could not be protected retroactively since the chairs themselves could not have been protected as works of "pure" or fine art prior to 1907, because the design or work had a utilitarian purpose.

557. NORDEMANN, WILHELM. Das Verhältnis der Regelung des Art. 14ter RBU über das Folgerechts zum deutschen Recht. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 21-34.

A discussion relative to the application of art. 121, paragraph 5 of the German Copyright Law, to the works of foreign authors who wish to claim *droit de suite* in Germany.

558. PAKUSCHER, ERNST KARL. Rechtsschutz der Computerprogramme. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 35-46.

Since, according to German court decisions, computer programs may not be protected as patents, it has been found that such programs may be protected under art. 2 of the Copyright Law, as literary works. Computer programs embodying scientific works are exempt from copyright protection and may be offered for use by libraries. Programs may also find protection under the Civil Code by reason of the provisions dealing with contracts, torts and unfair competition.

559. PETER, FRANZ WILHELM. Zur erforderlichen Änderung der §§ 53, 54 des Urheberrechtsgesetzes (sog. Fotokopierrecht). *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 47-72.

Because of recent developments in technology and the improved quality of photocopies, together with the fact that 12.7 million photocopies were reproduced in Germany during 1976, the present regulations governing arts. §§ 53 and 54 have become obsolete. A reasonable compromise between the interests of the public and the interests of authors and publishers must be sought before scholarly monographs and periodicals disappear completely. A system of collecting royalties, or levying duty on the purchase of equipment, similar to that on tape-recorders, is suggested.

560. REHBINDER, MANFRED. Kann für Allgemeine Geschäftsbedin-

gungen Urheberrechtsschutz in Anspruch genommen werden? *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 73-80.

The author raises the interesting question of whether commercial agreements or contracts are literary works under art. 2, par. 1 of the German Copyright Law, or official documents under art. 5, and thereby exempt from copyright protection.

561. REICHARDT, ERNST. Anhängige Probleme des Urheberrechts. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 81-104.

A review of some of the interesting copyright problems now pending before the courts in Germany. Among them is the question of copyright liability for programs carried on a community antenna television system maintained by the German Post Office; the copyright liability of buyers of re-recording equipment under section 53, paragraph 5 of the German Copyright Act; the right to import phonorecords from one member country of the EEC to another; and the duration of the copyright term for an American author where the term is life of the author, plus 50 years and the German term is 70 years, in light of the bilateral agreement.

562. SCHMIEDER, HANS-HEINRICH. Der Wettbewerbsgedanke im Urheberrecht; Dargestellt an Fragender Werkfortsetzung, des Selbstplagisats und der Parodie. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 127-141.

An interesting question is discussed here concerning the application of the moral right doctrine, where the author uses his characters in sequels and parodies, and thus is in economic competition with himself.

563. SCHULTZE, ERICH. Tarife und Gesamtverträge der Verwertungsgesellschaften. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 151-158.

An explanation of the German Law on the Administration of Copyright-Neighboring Rights Royalties, particularly Art. 13, relative to the establishment of rates under the supervision of the Patent Office, and the negotiation of collective agreements with foreign associations engaged in the licensing of copyrighted works and performances.

564. SINGOWITZ, BERNHARD. Zur Urheberrechtlichen Vergütung von Reprographien. Pläne der Verleger in der Kritik der Bibliothekare. *Film und Recht*, vol. 21, no. 9 (Sept. 1977), pp. 575-584.

A discussion of the need to draft new regulations regarding photocopying by libraries with a view of securing copyright royalties for authors and publishers. The German Publishers Association has become alarmed at the economic impact photocopying has had on their market.

565. TRAUB, FRITZ. Umformung in einen anderen Werkstoff oder eine andere Dimension; ein Beitrag zur Entstehung von Bearbeiter-Urheberrechten an Werken der bildenden Kunst. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 159-171.

A discussion of the standards required in adapting a work of art, even though in the public domain, to another medium in order to have the work support a copyright for the adaptor.

566. TROLLER, ALOIS. Die Bildung des Urhebervertragsrechts. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 173-207.

A critical comment on a proposed Copyright Contracts Law submitted by G. Frotz for consideration during the work on revision of the Swiss copyright law.

567. WINDISHCH, ERNST. Funktionen der unbestimmten Rechtsbegriffe im Immaterial güterrecht. *Archiv für Urheber- Film- Funk- und Theaterrecht*, bd. 80 (1977), pp. 209-220.

The role of the indefinable or indistinct legal term in statutory language has a distinct purpose in that it permits the practitioner to develop methods for full interpretation of knowledge and experience. These indefinable terms are especially applicable to the regulation of intangible property in civil and administrative law.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

I. United States

568. Copyright regulations. *Art Letter; artworld intelligence for professionals*, vol. 7, no. 2 (Feb. 1978), p. 2.

In a proposed regulation, published in the *Federal Register*, on Dec. 23, 1977, for the first time, acceptable locations for copyright notices on artwork have been spelled out. Deposit requirements will allow creators of two-dimensional artworks to deposit identifying material with the Library of Congress instead of copies of the works themselves in cases where the work is unpublished or exists in fewer than five copies. The regulations on deposit are final and were published in the *Federal Register* on Jan. 4, 1978.

569. JONES, PETER. IFPI urging piracy fight—or perish in about five years. *Billboard*, vol. 89, no. 13 (Apr. 2, 1977), pp. 5, 60.

40% of all disks and cassettes sold in continental retail outlets are pirate copies, particularly in Germany and Italy. To stop this trend, unity of all branches of the industry is necessary, including producers, disk pressers, cassette manufacturers, wholesale and retail stores. The problem is not serious in France yet, according to Pierre Chinais, Director General of the French record industry association.

570. LINGEMAN, RICHARD R. Book ends: the sheltering book. *The New York Times Book Review*, Section 7, vol. CXXVII, no. 43, 716 (Oct. 2, 1977), p. 55.

Wealthy people who are now looking for new tax shelters are buying assignments of copyrights from authors and publishing houses.

571. MPAA out to stop WTCG-type spread via cable, satellite. Movie producers seek FCC rule that would examine phenomenon of 'super station' and determine whether it violates commission's policy to foster localism in TV. *Broadcasting*, vol. 93, no. 9 (Aug. 29, 1977), p. 20.

The Motion Picture Association of America questions whether the development of the "super station" using satellite delivery systems is in the public interest. MPAA estimates that producers will derive only \$10 million from copyright payments in the first year which will not be enough to offset losses resulting from lack of control over where or when their pictures are played.

572. News brief. *VideoNews*, vol. 8, no. 5 (March 1, 1978), p. 2.

The new copyright law mandates the creation of an American TV and Radio Archive at the Library of Congress. Scholars and researchers met at the Library in February to explore ways to establish such an archive without promoting or engendering copyright infringement. The initial sessions were limited to the creation of methods to catalogue, preserve and maintain TV collections. Another meeting is planned for late summer or early fall.

573. NOLAN-HALEY, JACQUELINE. Obscenity, copyright and community standards. *New York Law Journal*, vol. 178, no. 120 (December 23, 1977), p. 1, cols 2-4.

The article discusses the copyright Act and its non-involvement with obscene works. Cases discussed are *Argos Films v. Barry International Properties*; *Mitchell Brothers Film Group v. Cinema Adult Theater*; *Miller v. California*. A discussion of community standards vs. national community standards is included.

574. U.K. diskeries can keep lid on royalty rate. *Daily Variety*, vol. 176, no. 23 (July 7, 1977), pp. 1, 33, col. 5.

The English royalty tribunal recommended that the statutory rate of 6.25% maximum remain. The decision not to alter the royalty rate was based on the fact that disk prices have increased considerably along with sales, thus increasing the value of mechanical royalties paid to composers.

575. U.S. copyright law stirs MIDEM interest; lawyers see it as a focus of litigation. *Record World*, vol. 35, no. 1595 (Jan. 28, 1978), p. 65.

The MIDEM Lawyers Conference in Cannes foresees considerable litigation in the next few years since many sections of the new U.S. copyright law need clarification. A French panelist

felt that the new publication requirements could violate article 3 of the Universal Copyright Convention. The delegates also heard reports from West Germany, Brazil, France and the United Kingdom on the copyright laws in those countries. The Germans felt that their "neighboring rights" coverage would provide a model for legislation in other countries.

576. VTR's: breaking and entering the home market. If all goes according to the optimists' plans, consumer video recorders are going to change America's television-viewing patterns. *Broadcasting*, vol. 93, no. 17 (Oct. 24, 1977), pp. 28-34.

The home video-tape recording industry anticipates a surge in consumer sales based on improved technology and consumer readiness. The biggest problem faced by the industry is the infringement suit filed by MCA's Universal City Studios and Walt Disney Productions against Sony, several retailers and an individual Betamax owner in which Betamax sellers are accused of duplicating copyrighted films and TV programs and encouraging consumers to do so as well.

577. WAGNER, SUSAN. AAP, authors set guidelines for corporate library photocopying. *Publisher's Weekly*, vol. 213, no. 3 (Jan. 16, 1978), pp. 27-28.

Publisher and author representatives have developed guidelines for photocopying by corporate libraries. The guidelines cover all reprographic reproduction by libraries and information centers that cannot be done without permission or payment. They also cover related areas of reproducing copyright notices on copied works, the boundaries of fair use, and restrictions on interlibrary copying.

578. WAGNER, SUSAN. AAP spells out clearing house plan for photocopying at CONTU meeting. *Publishers Weekly*, vol. 211, no. 15 (Apr. 11, 1977), p. 28.

The Association of American Publishers' plan calls for copying fees to be paid to copyright proprietors, codes for articles, and creation of a copyright payments center where user organizations and information services may pay centrally for journal-article copying that exceeds fair use.

579. WAGNER, SUSAN. Authors league protests tax reform act inequities. *Publishers Weekly*, vol. 212, no. 23 (Dec. 5, 1977), p. 19.

Under the previous law, authors' estates were taxed on the fair market value of their literary property, but under the 1976 reform, heirs must pay a higher income tax when they sell inherited literary property because they are now required to use the author's basis, rather than fair market value on which the estate tax is levied. Authors are denied capital asset status and treatment for their works during their lifetimes. The 1969 amendment deprived authors of the right to deduct the fair market value of manuscripts and papers contributed to tax-exempt institutions, and this has resulted in a severe reduction of donations of manuscripts to libraries.

580. WAGNER, SUSAN. Copyright Center gets antitrust clearance. *Publishers Weekly*, vol. 212, no. 14 (Oct. 3, 1977), p. 40.

Since the Copyright Clearance Center will be operating on a not-for-profit basis, and copyright owners will be free to negotiate separate licensing arrangements with users outside the system, the Department of Justice has determined that the Copyright Clearance Center will not be operating in violation of the antitrust provisions.

581. WAGNER, SUSAN. Copyright Office adopts termination notice ruling. *Publishers Weekly*, vol. 212, no. 14 (Oct. 3, 1977), p. 40.

Section 304(c) of the new copyright law permits termination of grants of renewal copyrights and rights thereunder. The new regulation has been modified and simplified to meet author and publisher objections and is to go into effect October 13, 1977, but leaves it to the courts to determine the legality of notices served before the copyright law goes into effect January 1, 1978.

582. WAGNER, SUSAN. Copyright Office to rule on book jacket registration. *Publishers Weekly*, vol. 215, no. 8 (February 20, 1978), pp. 29-30.

Discusses regulation on registration of dust jackets for books published after the new law went into effect. Copyright Office to make ruling about registration forms, failure to register, placement of copyright notices on book jackets.

583. WAGNER, SUSAN. Copyright tribunal begins review of royalty rates. *Publishers Weekly*, vol. 212, no. 22 (Nov. 28, 1977), p. 14.

The Copyright Royalty Tribunal, sworn in on November

10, began work on reviewing and adjusting royalty rates for cable television, phonorecords and jukeboxes. It will also determine rates for the use of nondramatic, musical, sculptural and graphic works on public broadcasting.

584. WAGNER, SUSAN. Copyright workshop sees new forms, is cautioned on problems ahead. *Publishers Weekly*, vol. 212, no. 20 (Nov. 14, 1977), pp. 23-24.

The New York Rights and Permissions Group of the Association of American Publishers held a workshop with representatives of the Copyright Office to discuss changes in procedures under the new copyright law, to look at the new application forms and to discuss possible problems.

585. WAGNER, SUSAN. Kissinger papers are "wrongfully removed". *Publishers Weekly*, vol. 213, no. 2 (Jan. 9, 1978), p. 25.

A federal judge has ruled that the Henry Kissinger transcript of telephone conversations made while he was Secretary of State were wrongfully removed to the Library of Congress. He cited the copyright law rule that "work created by an employee within the scope of the employment is the property of the employer." The ruling was that the secretarial notes were produced in accordance with department regulations on government time and with the aid of the department employees, equipment and materials.

586. WAGNER, SUSAN. Libraries urged to display copyright warning notices. *Publishers Weekly*, vol. 212, no. 10 (September 5, 1977), p. 24.

Contains examples of statements for warnings. Explains liability of nonprofit libraries, how order of warning should be printed, forms necessary.

587. WAGNER, SUSAN. Library groups balk at new photocopying guidelines. *Publishers Weekly*, vol. 212, no. 18 (Oct. 31, 1977), pp. 20, 22.

In a meeting with the National Commission on New Technological Uses of Copyrighted Works, library representatives stated that they were prepared to adjust operations to meet the photocopying guidelines under the new copyright law, but were reluctant to participate in the Copyright Clearance

Center being established by the American publishers.

588. WAGNER, SUSAN. Mexico balks at revised copyright procedures. *Publishers Weekly*, vol. 212, no. 24 (Dec. 12, 1977), pp. 26, 28.

At a recent meeting in Mexico City of the international group of Scientific, Technical and Medical Publishers, a Mexican representative complained that the procedures called for by the 1971 revisions of the Berne and UCC conventions for securing clearances for translations and reproduction of printed material were proving long, costly, and inefficient for the developing countries. The U.S. representative reported on the state of unauthorized reprinting in several other countries. On the other hand, copyright was not the problem in the nine Latin American countries which adhere to the UCC; the primary problems were taxes, duties, and other import restrictions.

589. WAGNER, SUSAN. New copyright law primer. Part 1: the basics. Part 2: the formalities. *Publishers Weekly*, vol. 212, no. 25 (Dec. 26, 1977), pp. 37-42; vol. 213, no. 5 (Jan. 30, 1978), pp. 65-70.

A question and answer format which touches on the essential elements of the new law, and makes useful comparisons to the old law. Part 2 deals with provisions on registration, notice, deposit, fees, etc.

590. Watermark sues station in Memphis over use of Presley program. Syndicator says WMPS had no right to broadcast documentary; station says it tried to negotiate contract. *Broadcasting*, vol. 93, no. 9 (Aug. 29, 1977), p. 44.

Watermark Inc. files suit accusing Plough Broadcasting Co. of copyright infringement, unfair competition and breach of contract among other things. Watermark claims to have sent telegrams to all the stations telling them not to air a 13-hour documentary, *The Elvis Presley Story*. Plough claims to have made good faith efforts to purchase an extension of a license they already had to broadcast this documentary as a public service to the Memphis community.

591. WEIL, MARTIN. Five arrested in pirating of stereo tapes. *The Washington Post*, vol. 100, no. 238 (July 31, 1977), pp. C-1, C-7.

As a result of a nine-month undercover FBI investigation,

five persons were arrested in connection with alleged violations of laws on copyright, conspiracy and interstate transportation of stolen property. Additional arrests are anticipated, stemming from the investigation of an extremely lucrative form of white collar crime, with a high profit margin, guaranteed market and low risk. Illicit tapes are generally pirated from the top 20 songs from *Billboard* and cost the legitimate industry about \$150 million a year in sales.

592. The year in review, 1976. A new copyright law at last. *Publishers Weekly*, vol. 211, no. 7 (Feb. 14, 1977).

This article discusses the passage by the House and Senate of the new Copyright Act. The U.S. Court of Appeals in Cleveland declares that a library is "a forum of silent speech", protected by the First Amendment.

593. The year in review, 1976. The view from Washington. *Publishers Weekly*, vol. 211, no. 7 (Feb. 14, 1977).

The breakthrough in the passage of the new copyright law came when educators agreed to set a guideline for classroom photocopying.

2. Foreign

1. England

594. ABBEY, RON. Letter to the editor. *The Bookseller*, no. 3755 (Dec. 10, 1977), p. 3134.

Comments from the text of the judgment in *Angus & Robertson v. Time-Life International* would lead Australian book distributors to believe that the exclusive license to distribute under the provisions in SS37-38 of the Copyright Act stands alone. This writer warns that the breach of the monopoly clause of the Trade Practices Act and injury to the public interest must be considered.

595. The book trade in 1977: copyright. *The Bookseller*, no. 3760 (Jan. 14, 1978), p. 120.

Notice of a meeting of eight organizations representing owners of rights in copyright to consider licensing arrange-

ments. The meeting resulted in the creation of a steering committee under Lord Wolfenden.

596. The book trade in 1977: copyright appeal. *The Bookseller*, no. 3760 (Jan. 14, 1978), pp. 123-124.

There is disgruntlement over the failure of an appeal by Angus & Robertson before the Australian High Court against a lower court ruling that they infringed a Time, Inc. copyright when they imported certain books from a Californian wholesaler. Though the judges felt themselves bound by Australian copyright law, they seemed to indicate displeasure with Australia's closed market stance.

597. Copyright in developing countries. *The Bookseller*, no. 3760 (Jan. 14, 1978), p. 114.

At a recent Unesco/WIPO meeting, developing countries expressed concern about acquiring translation rights for educational materials for use in their countries under the international copyright conventions. The Publishers Association held a meeting in February to explain to British publishers the operation of these conventions and to discuss the needs of developing countries.

598. HOLBROOK, DAVID. The freedom to quote in critical works. *The Bookseller*, no. 3739 (Aug. 20, 1977), pp. 1561-1562.

In reviewing documents dealing with British copyright law, the author points out that many authors are wasting considerable time and money requesting permission to quote in works of criticism or review or in reporting current events. Though publishers may wish to suppress criticism and debate via the permission system, there is no infringement if proper acknowledgment of author and title is given.

599. MACLIESH, PHILIPPA. First reactions to Whitford. *The Author*, vol. LXXXVIII, no. 2 (Summer 1977), pp. 58-62.

Contains discussions on integrity of copyright, moral right, reprography, private recordings, ownership, term of copyright protection.

600. Public lending right in Europe and at home. *The Bookseller*, no. 3755 (Dec. 10, 1977), p. 3119.

An up-date on the status of the public lending right in Great Britain and in Europe. A summary of a two-day meeting at Strasbourg of representatives of literary societies in seven member states is included. The public lending right systems in Sweden and West Germany are described, and a campaign in behalf of such a right is being waged in Switzerland as part of that country's copyright revision.

2. Japan

601. DOI, TERUO. Digest of court decisions: copyright infringement. *Patents & Licensing*, vol. VIII, No. 1 (Feb., 1978), pp. 18-19.

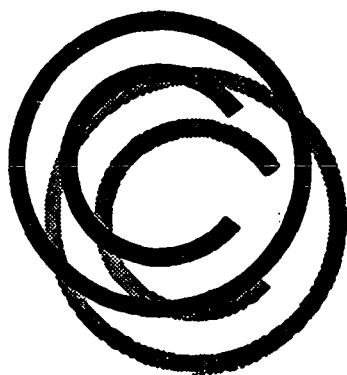
Reports *Mitsuru Nakamura v. Toei Co., Ltd.* Tokyo To Kigya, Dec. 1977, p. 51 (Tokyo District Court, Nov. 14, 1977), an action to ascertain whether the copyright owner of a TV film can enjoin plaintiff manufacturer of plastic masks of "Riderman," a fictional character of defendant's film "KAMEN RIDER V3." The court held the manufacturer's plastic masks utilized the character of Riderman, thus infringing defendant's copyright. Plaintiff's action was dismissed.

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PROFESSOR HARRY G. HENN

PART I

ARTICLES

602. CASSANDRA CONSIDERS COPYRIGHT*: *The Eighth Donald C. Brace Memorial Lecture**

By HARRY G. HENN**

Our Society honors me by its invitation to deliver this Eighth Brace Lecture, joining a distinguished roster of Brace lecturers.

The inaugural lecture in 1970 was by the inimitable Professor Melville B. Nimmer,¹ followed by the late John Schulman,² Justice Theodore R. Kupferman,³ former Dean Robert B. McKay,⁴ William Jovanovich,⁵ Register of Copyrights Barbara A. Ringer,⁶ and last year, Irwin Karp,⁷ most of them long-time friends.

When I was invited to give this "Eighth Brace Lecture," I thought that I should learn more about Mr. Brace, whom I had never met. In my ignorance, I first thought that his name was Harcourt Brace.

Who Was Who revealed his name as Donald Clifford Brace, and the book publishing firm he co-founded as Harcourt, Brace & Co., now Harcourt, Brace & Jovanovich. Mr. Jovanovich, as mentioned, was the fifth Brace lecturer.

Having invested considerable time and effort procuring a microfilm print of Mr. Brace's obituary in the *New York Times*,⁸ at a cost

* Copyright 1978 by Harry G. Henn. All rights reserved.

This lecture was delivered at the annual meeting of the Copyright Society of the U.S.A. at Buck Hill Inn, Buck Hill Falls, Pennsylvania, on May 1, 1978.

**Mr. Henn is the Edward Cornell Professor of Law at Cornell University School of Law.

¹ Nimmer, *Copyrights vs. The First Amendment*, 17 BULL. CORP. SOC'Y 255 (1970).

² Schulman, *The Battle of the Books Revisited—Copyright Law Revision in the Year 1971*, 18 BULL. CORP. SOC'Y 397 (1971).

³ Kupferman, *Copyright and Judges*, 19 BULL. CORP. SOC'Y 343 (1972).

⁴ McKay, *One Nation Divisible—With Pornography for Some*, 21 BULL. CORP. SOC'Y 73 (1973).

⁵ Jovanovich, *Writing and Reading for Love and Money*, 22 BULL. CORP. SOC'Y 235 (1975).

⁶ Ringer, *Copyright in the 1980's*, 23 BULL. CORP. SOC'Y 299 (1976).

⁷ Karp, *From Roth to Rohauer: Twenty Years of Amicus Briefs*, 25 BULL. CORP. SOC'Y 1 (1977).

⁸ N.Y. Times, Sept. 22, 1955, at 31, col. 1 (City ed.).

of ten cents, all, I trust, within the doctrine of fair use, I share with you what I learned.

Mr. Brace was born on December 27, 1881, in West Winfield, New York, where he is buried. Further research pinpointed West Winfield to be an incorporated village, with a present population of about 1,000, in the Town of Winfield, with a present population of about 2,000, on Route 20, in Herkimer County, in upstate New York.

Mr. Brace met Alfred Harcourt at the Columbia University School of Journalism, where they both were members of the Class of 1904. In 1919, incidentally my natal year, after 15 years with Henry Holt & Co., they formed their own book publishing firm, Harcourt, Brace & Co. They acquired early an impressive stable of authors such as Sinclair Lewis, Dorothy Canfield, John Maynard Keynes, and Carl Sandburg. They also published George Orwell's *1984*. Mr. Brace died in 1955, at age 73.

Now I prepare for the role of Cassandra. She was, as you know, a legendary Trojan, daughter of Priam, the last king of Troy and his wife, Hecuba, and incidentally sister of Hector and Paris. She was given the gift of prophecy by Apollo. When she did not return the favors requested by Apollo, he decreed that her truthful revelations would never be believed. She was generally regarded as mad! Of the prior seven Brace lecturers, Barbara Ringer was the only woman. Cassandra provides a feminine counterpart, although Barbara's views and Cassandra's revelations may not coincide. It should be remembered, however, that Cassandra, like most authors and users of copyrighted works, was not a lawyer.

We shall pose seven propositions for Cassandra.

The FIRST PROPOSITION is:

The new law provides for a single uniform national system instead of a dual federal-state system.

By way of perhaps excessive explanation, the old dual system, in general, provided for state common-law protection for unpublished works and for federal statutory copyright protection for published works. "Publication" was the dividing line, divestitive of common-law protection and investitive of statutory copyright—with risk of irrevocable loss of protection by publication without proper copyright notice.

The concept of "publication" was a more limited function under the new law. *Published* works are protected only if of eligible national origin.⁹ *Publication* on or before December 31, 2002, of works under common-law copyright prior to 1978, extends protection to December

⁹ 17 U.S.C.A. §104(b) (1958).

31, 2027.¹⁰ The copyright notice must be on *published* works,¹¹ and an element of the required copyright notice is the year of first *publication*.¹² Deposit of copies is required within three months after *publication*.¹³ Failure to register within three months after *publication* may result in no award of statutory damages of attorney's fees.¹⁴

The new law provides for federal preemption of rights equivalent to copyright, abolishing common-law copyright.¹⁵

What say you, CASSANDRA?

CASSANDRA SAYS:

A dual system should be commended rather than condemned, since your government constitutionally is a federal system, premised on the concept that the federal government should be one of limited powers, with reserved powers in the states. This was recognized in the first federal copyright statute of 1790 enacted by the First Congress, composed of your founding fathers and their contemporaries, and followed for 200 years, by preserving common-law protection for unpublished works and limiting statutory copyright, with some exceptions, to published works.

The old system may have been a dual one, but there was adequate uniformity of substantive law. To be sure, there was some disagreement as to whether the sale of phonograph records constituted publication of the recorded music,¹⁶ but this arguably was as much an issue of federal statutory law as an issue of state common law. Also, state statutes of limitation varied,¹⁷ but since actions were usually promptly brought, often for an injunction, the problem usually was an academic one. Incidentally, even Louisiana, a civil law jurisdiction, arguably provided protection equivalent to common-law

¹⁰ *Id.* §303.

¹¹ *Id.*, §401(a).

¹² *Id.*, §401(b)(2).

¹³ *Id.*, §407(a).

¹⁴ *Id.*, §412(b).

¹⁵ *Id.*, §301(a).

¹⁶ M. NIMMER, *NIMMER ON COPYRIGHT* §50 (1964) (Supp. 1976).

¹⁷ *Id.*, 135. In actions for common-law copyright infringement, reference had to be made to the applicable state tort statute of limitations. Periods ranged from one to six or more years. W. STINE, *STATE STATUTES OF LIMITATION AND COPYRIGHT INFRINGEMENT ACTIONS* (U.S. Copyright Office (1951)). Before the effective date of 17 U.S.C. §115(b), enacted in 1957, there was no federal statute of limitations applicable to civil actions for copyright infringement, with the result that the most analogous tort statute of the forum state was applied. These ranged from one to six or more years. N. ROTH, *FEDERAL STATUTE OF LIMITATIONS* (U.S. Copyright Office 1951-52).

protection.¹⁸ Whether because decisional law was sparse or for other reasons, the courts tended to follow available precedents of the courts not only of their own state but of other states. It was *common* law in the historical meaning of law common throughout the land. And it was state, not federal law, usually triable in the state courts, and not contributing to overcrowded federal court dockets.

The old system may have been old but it was not anachronistic. It had the great practical consequence of involving the federal government in the protection only of more significant works, namely, those published or those for which registration was sought prior to publication. The vast quantities of other writings of authors were left entirely to state common law. Under the new law, almost everything written, in any language or dialect, by anyone any place in the world is protected by federal statutory copyright.¹⁹ The sun never sets on the federal statutory copyright empire. Infringement actions are exclusively within the jurisdiction of the federal courts.²⁰

The new law is more anachronistic than the old law. The new law substitutes a completely formal system for the dual system with its substantial formality-free aspects.

The new law is also more uncertain, impractical, and highly complicated than the dual system, as subsequent revelations will show.

The concept of "publication," at least, had a 268-year judicial gloss. It is being replaced by the concept of "preemption." "Preemption," especially in the area of "misappropriation," has been confused with some last minute congressional language changes without adequate explanation.²² Even before that it had been muddled almost beyond comprehension by four United States Supreme Court cases

¹⁸ See *Authors Moral Rights: Can Louisiana Adopt Doctrine?*, 51 TULANE L. REV. 309 (1977).

¹⁹ 17 U.S.C. §104(a) (1978).

²⁰ 28 U.S.C. §1338(a) (1976 Supp.).

²¹ 17 U.S.C. §301(a) (1978).

²² Expressly nonpreempted are "any rights or remedies under the common law or statutes of any State with respect to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." *Id.*, §301(b)(3). Excluded in the final version was the Senate bill language: "including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation. S. 22, 94th Cong., 2d Sess. (1976) (passed Senate Feb. 19, 1976). For "explanation", see Goldberg, *Preemption and Duration under the New Copyright Law*, *Public Law* 94-533. 1 CURRENT DEVELOPMENTS IN COPYRIGHT LAW 1977, 209, 253 (Practising Law Institute 1977).

and their progeny.²³

Some limitations on perpetual common-law protection of unpublished works is probably desirable. The new law limits duration of preexisting common-law copyrights to the terms provided—usually life of the author plus 50 years—but in no case to a term ending prior to December 31, 2002, or if published before then, to December 31, 2027.²⁴ The same result could have been achieved by not completely preempting common-law copyright but preserving it with qualifications, such as by limiting the terms for prior-works to those terms mentioned above, and for new works to life-plus-fifty and its variations.

So far as international copyright relations are concerned, the new law is retrogressive. It offers no greater uniformity, is more difficult to understand than the old dual system, and its increased emphasis on formalities is contrary to the automatic copyright systems of most of the other developed nations of the world.

Our SECOND PROPOSITION is:

The new law replaces the old law.

First, the explanation. The 1976 enactment, entitled "General Revision of Copyright Law," "amends Title 17 of the United States Code in its entirety" by substituting the new law for the 1909 Act.

The impression given is that on January 1, 1978, a metamorphosis occurred, replacing an ugly caterpillar with a beautiful butterfly.

Even the new printing of Title 17 of the *United States Code Annotated* (U.S.C.A.) reproduces only the new law, quoting the Transitional and Supplementary Provisions, which are not part of new Title 17, as scattered historical notes to various sections, and with no reprinting of the 1909 Act. The "1976 Edition" of the official *United States Code* (U.S.C.) containing Title 17 has just been published. It contains Title 17 (as effective until January 1, 1978) and the new law as an "Appendix." It does not include the Transitional and Supplementary Provisions as such, but quotes them separately after the related provision of

²³ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974); *Goldstein v. California*, 412 U.S. 546, 93 S. Ct. 2303, 37 L. Ed. 2d 163 (1973); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1974); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964).

²⁴ 17 U.S.C. §303 (1978).

the new law.²⁵

CASSANDRA SAYS:

Much of the old law, with its judicial gloss, will outlive most of us.

As to all "causes of action" that arose under old Title 17, the Transitional and Supplementary Provisions provide that Title 17 as it existed when the "cause of action" arose governs.²⁶ Both the old and new statutes provide for three-year statutes of limitations for a criminal "cause of action"²⁷ and for a civil "claim."²⁸ Thus as to all preexisting "causes of action" (meaning criminal), the 1909 Act continues in full force until December 31, 1980. Quaere, as to civil "claims."

Since the new law, unlike the 1971 private legislation resurrecting the works of Mary Baker Eddy,²⁹ does not revive copyright in works in the public domain as of December 31, 1977,³⁰ the copyright status of preexisting works depends on the 1909 Act and possibly common law. Since the new terms of duration of protection for such preexisting works may extend from 1995 to possibly beyond 2050,³¹ many provisions of the 1909 Act and some common-law concepts will remain applicable for from 19 to 70 or more years.

Also, of continuing relevance are the 1909 Act provisions applicable to phonorecords made under the compulsory license provision prior to January 1, 1978;³² the provisions applicable to ad interim

²⁵ Secs. 102 and 103 appear in a note preceding §101. Sec. 104 appears in a note following §104; Sec. 106 in a note following §115; Sec. 107 in a note following §304; Sec. 108 in a note following §401; Sec. 109 in a note following §410; Sec. 110 in a note following §407; Sec. 112 in a note following §501; Secs. 114 and 115 in a note preceding §101.

²⁶ Pub. L. No. 94-533, sec. 112 (1976).

²⁷ 17 U.S.C. §115(a) (1971); 17 U.S.C. §507(a) (1978).

²⁸ 17 U.S.C. §115(b) (1971); 17 U.S.C. §507(b) (1978). "Claim" was used in the 1957 amendment to conform to the Federal Rules of Civil Procedure terminology.

²⁹ Priv. L. No. 92-60 (1971). Quaere, as to its constitutionality because revival and extension may not promote the progress of science and useful arts, and, in the case of The First Church of Christ Scientist (Christian Science Church), may violate the principle of separation of church and state. The constitutionality of the nine extension bills, since 1962, and also the actuarially increased duration under the 1976 Act for preexisting copyrights has also been questioned. See Nimmer, *supra* note 1, at 270-271; Nimnier, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1194-1196 (1970); cf., Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1007-1008 (1970).

³⁰ Pub. L. No. 94-533, sec. 103 (1976).

³¹ 17 U.S.C. §§303, 304 (1978).

³² Pub. L. No. 94-533, sec. 106 (1976).

copyrights extended by the new law to a 28-year original term and eligible for a 47-year renewal term;³³ and the provisions applicable to copyright notice,³⁴ registration,³⁵ recordation requirements,³⁶ and demand and penalty,³⁷ so far as pre-January 1, 1978 works are concerned. The August, 1977 issue of your COPYRIGHT BULLETIN contained a 36-page article detailing when the new law is effective.³⁸ It discussed provisions effective prior to 1978 and resultant issues and, where possible, suggested pre-1978 actions which might have been able to accommodate to the new law.

Now for the THIRD PROPOSITION:

The new law is a well-drafted statute.

By way of explanation. The 1976 enactment included *two* sets of provisions. One set was of 15 provisions designated as "Sec." 's. The first such section, Sec. 101, amended Title 17 in its entirety by substituting the new law for the 1909 Act.³⁹ The last 14 such sections, Secs. 102-115, not part of Title 17, are designated "Transitional and Supplementary Provisions."⁴⁰ The other set of provisions, designated by section signs (§§), is the new Title 17, the new law.

The sections ("Secs.") and the new law, with its section *signs*, already are creating confusion, as evidenced by the new Title 17 of the *United States Code* and the *United States Code Annotated*, with their omissions of the Transitional and Supplementary Provisions (Secs. 102-115) as such. Scattered as they are in notes to particular sections in the new Title 17, they can easily be overlooked.⁴¹ Why did not the draftsperson of the new law include the Transitional and Supplementary Provisions as Chapter 9 of the new Title 17 of the *United States Code*?

The new law contains more than 50 definitions, has eight chapters and 72 sections, and comprises some 60 pages. By contrast the 1909 Act had only two definitions and 64 sections, comprising 23 pages.

³³ *Id.*, sec. 107.

³⁴ *Id.*, sec. 108.

³⁵ *Id.*, sec. 109.

³⁶ *Ibid.*

³⁷ Pub. L. No. 94-533, sec. 110 (1976).

³⁸ Beckett, *The Copyright Act of 1976. When Is It Effective?* 24 BULL. COPR. Soc'y 391 (1977).

³⁹ Pub. L. No. 94-533, sec. 101 (1976).

⁴⁰ *Id.*, sections 102-115 (1976).

⁴¹ See note 25, *supra*.

The new law, especially in the more controversial highly-lobbied sections, is very detailed. One can almost estimate the degree of lobbying by the length of the section. Professor Latman describes the inter-library arrangements sub-sub-section and guidelines as "guidelines" to a "proviso" to an "exception" to an "exemption."⁴² The whole library photocopy section is two pages long.⁴³ The section on cable system secondary transmissions, the longest in the new law, is eight pages,⁴⁴ none of it in simple English.

By contrast, the 1909 Act was drafted in more general language, although its controversial compulsory musical composition recording license provision comprised somewhat more than one page,⁴⁵ and the manufacturing clause⁴⁶ and renewal provisions⁴⁷ were somewhat complex. All three have been retained in the new law, modified as to the compulsory license⁴⁸ and manufacturing clause,⁴⁹ but verbatim as to the renewal provisions, which remain applicable to any work under statutory copyright as of January 1, 1978.⁵⁰

CASSANDRA SAYS:

The new law is too long, too detailed, and too complicated to merit any drafting kudos.

Where Congress was unable to agree on legislative language, long explanations were included in the subcommittee reports.⁵¹ Sometimes, the Senate and House subcommittee reports interpret the same legislative language differently.⁵² Other subcommittee explanations are in-

⁴² Latman, et al, *The New Copyright Law*, 1976 APLA BULL. 684, 671 (Oct.-Nov. 1976).

⁴³ 17 U.S.C. §108 (1978).

⁴⁴ *Id.*, §111.

⁴⁵ 17 U.S.C.A. §1(e) (1971).

⁴⁶ *Id.*, §16.

⁴⁷ *Id.*, §24.

⁴⁸ 17 U.S.C.A. §115 (1978).

⁴⁹ *Id.*, §601 (equating Canadian with United States manufacture; manufacture clause to expire on July 1, 1982).

⁵⁰ *Id.*, §304(a).

⁵¹ *E.g.*, H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-74 (1976) (fair use).

⁵² *E.g.*, compare H.R. REP. NO. 92-487, 92d Cong., 1st Sess. 7 (1971) (prohibiting piracy of sound recordings) (no intention "to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it"), S. REP. NO. 93-983, 93d Cong., 2d Sess. 119 (1974) (discussion of off-the-air recording of instructional television programs), with H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 71-72 (1976) (more limited discussion).

accurate or inconsistent⁵³ or do not reflect later changes in legislative language.⁵⁴ Reliance thereon could be misguided.

Where consensus as to explanations could not be achieved, resort was made to guidelines, drafted in the case of photocopying in connection with interlibrary arrangements by the National Commission on New Technological Uses of Copyrighted Works ("CONTU"),⁵⁵ but otherwise drafted by ad hoc private groups with more or less limited constituencies.⁵⁶ These guidelines are under increasing attack, as inaccurate, misleading, and distortive of the new law.⁵⁷

More traditionally, some administrative implementation of the Act was left to the Register of Copyrights.⁵⁸

Of course, CONTU's final recommendations, due July 31, 1978, are still being awaited, and there will be future guidelines, but not necessarily with subcommittee blessing.

As for some specific drafting defects, the three-page definitional section may be cited.⁵⁹ Although it contains three pages of 39 definitions, its principal 33 definitions are listed in alphabetical order, with no further designations. Sometimes related terms are defined in the

⁵³ E.g., H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 122-123 (1976) (statement that basic presumption of section 201(c) "is fully consistent with present law").

⁵⁴ E.g., *id.*, at 132 (omission of examples intended to illustrate nonpreempted rights and remedies).

⁵⁵ CONTU offered its good offices to the subcommittees in bringing the interested parties together to see if agreement could be reached on a realistic definition of "such aggregate quantities." The CONTU guidelines under section 108(g)(2) are found in the Conference Report. H.R. REP. NO. 94-1733 (94th Cong., 2d Sess. 72-73 (1976)).

⁵⁶ The guidelines for classroom copying in not-for-profit educational institutions, prepared by representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc., and the Association of American Publishers, Inc., and the guidelines for educational uses of music, prepared by representatives of The Music Publishers' Association of the United States, Inc., The National Music Publishers Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of the Schools of Music, and the Ad Hoc Committee on Copyright Law Revision, appear in H.R. REP. NO. 94,1476, 94th Cong., 2d Sess. 68-70, 70-71 (1976).

⁵⁷ E.g., Editorial, *Flareup at the Fair Use Frontier*, 103 LIBRARY J. 601 (March 15, 1978). Earlier strong criticism had been expressed in behalf of the American Association of University Professors and the Association of American Law Schools. See note 138, *infra*.

⁵⁸ 17 U.S.C. §702 (1978). Witness the frequent Federal Register entries by the Copyright Office.

⁵⁹ *Id.*, §101.

same paragraph, with the result that the defined related term is not in alphabetical order.⁶⁰ It would have been better if each subdivision had some alphabetical or numerical designation.

The new law uses terms very similar to defined terms without defining them. For example, the term "copyright owner" is defined as the owner of any exclusive right,⁶¹ but the term "owner of copyright," used in many basic sections,⁶² is not defined. Neither are the terms "owner of the exclusive right of publication"⁶³ and "owner of any exclusive right,"⁶⁴ although presumably the latter term has the same meaning as "copyright owner." If so, why was the defined term not used?

A copyright notice is required wherever a work is published "by authority of the copyright owner."⁶⁵ "Copyright owner" is defined to refer, with respect to any one of the exclusive rights, to the owner of that particular right.⁶⁶ The authority triggering the copyright notice requirement thus would seem to have to come from the owner of the exclusive right of publication being exercised, but the law does not so state.

Although the new law has rather elaborate provisions concerning copyright notice,⁶⁷ the new law is not very clear as to whose name should appear in the copyright notice.

The statutory language is "the name of the owner of copyright."⁶⁸ This is like the 1909 Act requirement of "the name of the copyright proprietor,"⁶⁹ under the old indivisible copyright theory.⁷⁰ If the author has made no transfers, the author's name would be correct. On

⁶⁰ E.g., "machine" and "process" under "device"; "such as" under "including"; "widower" under "widow"; "supplementary work" and "instructional text" under "work made for hire".

⁶¹ 17 U.S.C. §101 (1978).

⁶² E.g., *id.*, §§106, 113(b), 114(a), 114(b), 114(d) ("owners of copyrighted materials"; "copyright owners of copyrighted materials"), 115(d) (along with "copyright owner"), 117, 118(b), 118(c), 201(c) 205(d) 401(b)(3), 402(b), 404(a), 404(b), 406(a) (along with "copyright owner"), 407(a), 408(a), 408(c)(2)(A), 602(a). Comparable confusion exists between ownership of any "exclusive rights under copyright" and "ownership of * * * copyright".

⁶³ E.g., *id.* §407(a).

⁶⁴ E.g., *id.* §§205(d), 408(a), 501(a). See also §202 ("ownership * * * of any of the exclusive rights under a copyright").

⁶⁵ 17 U.S.C. §401(a) (1978).

⁶⁶ See note 61, *supra*.

⁶⁷ 17 U.S.C. §§401-406 (1978).

⁶⁸ *Id.*, §401(b)(3).

⁶⁹ 17 U.S.C. §19 (1971).

⁷⁰ H. Henn, 'Magazine Rights'—*A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411 (1955).

the other hand, if the author has transferred all rights to an assignee, the assignee's name would be correct. But what if there have been several transfers of different exclusive rights to separate persons? The new law provides no answer.

There are other notice pitfalls. Suppose that a magazine acquires less than all rights from an author, which would be the "presumption" absent an express signed written understanding to the contrary.⁷¹ Then the magazine publishes the contribution under its general copyright notice without a separate notice on the contribution in the name of the author.⁷² The effect, so far as the contribution is concerned, is the same if there were an error in name in the copyright notice.⁷³

A similar ambiguity exists as to who is required to deposit copies. The new law requires deposit by "the owner of copyright or of the exclusive right of publication."⁷⁴

Where deposit is not made within three months after publication with notice of copyright in the United States, the Register of Copyrights is supposed to make written demand for the required deposit "on any of the persons obligated to make the deposit."⁷⁵ Subject to fines and other liability is the "person or persons upon whom the demand was made."⁷⁶

Also ambiguous are the registration requirements. Registration should be by "the owner of copyright or of any exclusive right."⁷⁷ This formulation—"the owner of copyright or of any exclusive right"—differs from the deposit section language—"the owner of copyright or of the exclusive right of publication"—even though deposit under the deposit section, when accompanied by application and fee, may satisfy the deposit provisions of the registration section.⁷⁸

Tentative Copyright Office regulations permit "supplementary copyright registrations"⁷⁹ even though the new law recognizes dual registrations only of the same work in unpublished and published form⁸⁰ and to correct or amplify a prior registration.⁸¹

⁷¹ *Id.*, §201(c).

⁷² *Id.*, §404(a).

⁷³ *Id.*, §404(b). See §406(a).

⁷⁴ *Id.*, §407(a).

⁷⁵ *Id.*, §407(d).

⁷⁶ *Ibid.*

⁷⁷ 17 U.S.C. §408(a) (1978).

⁷⁸ *Id.*, §408(b).

⁷⁹ Copyright Office Circular R8 (Supplementary copyright registration).

⁸⁰ 17 U.S.C. §408(c).

⁸¹ *Id.*, §408(d).

Also, while registration in accordance with the new law usually is a prerequisite to an infringement suit, the plaintiff need be only the "legal or beneficial owner" of the particular exclusive right infringed⁸² and need not be a registered owner.

Finally concerning registration, a single registration of an individual author's contributions to periodicals within a 12-month period is permitted by the new law.⁸³ Nothing is said about the general requirement that statutory damages and attorney's fees not be awarded if registration is not made within three months after publication.⁸⁴

Overwhelming is the new law's requirement that transfers of copyright ownership, other than by operation of law, to be valid, must be in writing and signed by "the owner of the rights conveyed or such owner's duly authorized agent."⁸⁵ Note that this requirement goes to validity and is more than a statute of frauds. Note also that the agency power need not be in writing.⁸⁶

A "transfer of copyright ownership" is defined to include any transfer other than a nonexclusive license.⁸⁷ It would include a right of first publication in Podunk, because such license is exclusive for Podunk until the work is published in Podunk. In short, just about everything, except a nonexclusive license, must be in writing and recorded in the Copyright Office.

Equally overwhelming are the new law's provisions for the recording of any "transfer of copyright ownership," the constructive notice effect of recordation,⁸⁹ and the priority given recorded transfers over unrecorded transfers.⁹⁰ The Uniform Commercial Code recording requirements pale into insignificance by comparison.

While recordation is prerequisite to an infringement suit by a transferee, it need be only of "the instrument of transfer under which such person claims."⁹¹ Missing links in the recorded chain of ownership apparently are tolerated. As a title recordation office, the Copyright Office will become involved in tremendous but not necessarily complete recording operations.

⁸² *Id.*, §501(b).

⁸³ *Id.*, §408(c)(2).

⁸⁴ See note 14, *supra*.

⁸⁵ 17 U.S.C. §204(a).

⁸⁶ The phrase is "such owner's duly authorized agent"; not "such owner's agent thereunto duly authorized in writing."

⁸⁷ 17 U.S.C. §101 (1978).

⁸⁸ *Id.*, §205.

⁸⁹ *Id.*, §205(a).

⁹⁰ *Id.*, §205(e), (f).

⁹¹ *Id.*, §205(d).

The FOURTH PROPOSITION is:

The new law is a modern statute.

CASSANDRA SAYS:

Continued emphasis on copyright formalities—somewhat decreased in the case of copyright notice but substantially increased for deposit and registration, and vastly expanded for execution and recordation—in the opinion of many in this country and most of the rest of the world with automatic copyright systems, is retrogressive.

The very detailed language of the new law was mentioned in our discussion of the third proposition. In formalizing the compromises of the problems of the 1970s, flexibility for resolving the problems of the future was lost.

Congress expressly deferred consideration of some copyright-related areas, such as recognition of performance rights in copyrighted sound recordings,⁹² protection for ornamental designs of useful articles⁹³ and typeface,⁹⁴ and limited protection for publications of the National Technical Information Service.⁹⁵

Congress, unable to cope with computer problems, froze the law as of January 1, 1978, concerning use of a work in connection with automatic systems capable of storing, processing, retrieving, or transferring information.⁹⁶ This subject was referred to CONTU for study and recommendations.⁹⁷ Also referred to CONTU were two other subjects: (1) the reproduction and use by various forms of machine reproduction other than by or at the request of instructors for use in face-to-face teaching activities; and (2) the creation of new works by the application or intervention of computer systems or machine reproduction.⁹⁸ To date, we have CONTU subcommittee reports and a

⁹² Conference Report, H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. 76-77 (1976). The Register of Copyrights has recommended proposed legislation, as required by 17 U.S.C. §114(d) (1978). *See* 43 Fed. Reg. 1655 (Jan. 11, 1978); *id.*, 11773 (Mar. 21, 1978); *id.*, 12763 (Mar. 27, 1978) (addendas).

⁹³ Conference Report, H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. 82 (1976).

⁹⁴ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 55 (1976).

⁹⁵ The NTIS exemption in the House bill was deleted in Conference and left to "early in the next session." Conference Report, H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. 69-70 (1976).

⁹⁶ 17 U.S.C. §117 (1978).

⁹⁷ To date, subcommittee reports on software and data base have been circulated by CONTU.

⁹⁸ Pub. L. No. 93-573 (effective Dec. 31, 1974). The final report originally due on December 31, 1977 was extended by seven months to July 31, 1978, presumably because of the seven-month delay in appointing the Commissioners.

dissent.⁹⁹ The final report is due July 31, 1978.

Congress, in some other areas, legislated but provided for periodic review by the Copyright Office or the Copyright Royalty Tribunal.

For example, the Copyright Office was required by the new law itself to make reports on performance rights in sound recordings (which it has done),¹⁰⁰ on library photocopying,¹⁰¹ and on voluntary licensing arrangements with public broadcasters.¹⁰²

Similarly, the Copyright Royalty Tribunal must set the reasonable terms and rates of royalty payments by public broadcasters.¹⁰³ It is also empowered to adjust the royalty rates under all four compulsory licenses.¹⁰⁴

CASSANDRA ADDS:

Delegation by Congress to others for the resolution of complicated problems is, of course, not unique to copyright. Powerful lobbying tends to result in highly detailed technical language. In the new law, this is evident in the section on cable television secondary transmission,¹⁰⁵ which requires implementation by the Copyright Royalty Tribunal,¹⁰⁶ and the subsection on photocopying in connection with interlibrary arrangements,¹⁰⁷ which still required guidelines, by CONTU.¹⁰⁸

These statutory formulations sometimes are accompanied by extensive language in the subcommittee reports, including guidelines.¹⁰⁹

Where detailed legislative language could not be formulated, the same phenomenon is found in subcommittee reports and guidelines. Witness the more than 10-page subcommittee discussion of "fair use."¹¹⁰

⁹⁹ On software, data base, and photocopying.

¹⁰⁰ See note 92, *supra* (with proposal for a fifth compulsory license).

¹⁰¹ 17 U.S.C. §108(i) (1978) (at five-year intervals).

¹⁰² *Id.*, §118(e) (by Jan. 3, 1980).

¹⁰³ *Id.*, §118(b) (also between June 30 and Dec. 31, 1982), and at five-year intervals thereafter).

¹⁰⁴ *Id.*, §801.

¹⁰⁵ *Id.*, §111.

¹⁰⁶ *Id.*, §801(b)(2).

¹⁰⁷ *Id.*, §108(g)(2).

¹⁰⁸ See note 55, *supra*.

¹⁰⁹ See notes 51, 55-57, *supra*.

¹¹⁰ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-74 (1976).

We proceed now to the FIFTH PROPOSITION:

The new law is author-oriented.

First some explanation. The basis for this proposition is that the new law provides that the author of a work is vested initially with the copyright.¹¹¹ However, in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author.¹¹² Only a limited category of specially ordered or commissioned works, as distinguished from works prepared by an employee within the scope of employment, may qualify, by joint signed written instruments, as works made for hire.¹¹³

In the case of contributions to collective works, copyright vested initially in the respective authors, and absent an express signed written transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing it as part of that collective work.¹¹⁴ Quaere, as to the rebuttability of the presumption.

CASSANDRA SAYS:

Arrangements with writers by knowledgeable negotiators with sufficient bargaining power, whenever possible, will be structured to take the form of either:

- (1) A work made for hire; or
- (2) A transfer of all exclusive rights.

A *work made for hire*¹¹⁵ enjoys a preferred status, quite apart from the employer's preferred position as "author" and "owner of copyright" who has the exclusive rights in copyright works. The duration of a work made for hire is 75 years from year of first publication or 100 years from year of creation, whichever expires first.¹¹⁶ Transfers of rights in works made for hire are not subject to termination,¹¹⁷ and if the renewal provisions are applicable, the renewal is under the

¹¹¹ 17 U.S.C. §201(a) (1978). The same was true under prior copyright statutes.

¹¹² *Id.* §201(b) ("unless the parties have expressly agreed otherwise in a written instrument signed by them," which only affects the ownership of rights and not the "work made for hire" status of the work). Quaere, whether such agreement is a "transfer of copyright ownership" subject to the execution and recordation requirements.

¹¹³ *Id.*, §101. Quaere, whether such instrument is a "transfer of copyright ownership."

¹¹⁴ *Id.*, §201(c) (or "any revision of that collective work, and any later collective work in the same series").

¹¹⁵ *Id.*, §101, 201(b).

¹¹⁶ *Id.*, §302(c) (also for anonymous and pseudonymous works).

¹¹⁷ *Id.*, §304(c).

first proviso by the "proprietor" rather than under the second proviso with its four priorities of unpredictable renewal claimants.¹¹⁸

The employer or other person for whom the work was prepared is considered the author¹¹⁹ and, absent a signed express agreement to the contrary, owns all of the rights comprised in the copyright.¹²⁰ As the owner of all rights, such person is the "owner of copyright," whose name should appear in the copyright notice, and who should deposit and register, and as the "copyright owner" has standing to sue for infringement of any of the rights of copyright.

Thus, the previously-discussed problems of the correct name in copyright notice and of the correct person to deposit and register can be resolved easily by anticipatory structuring.

As an alternative to work made for hire status, the transfer of all exclusive rights can also resolve those notice, deposit, and registration problems, since such transferee, assuming that the transfer is in writing and signed and duly recorded, would be the owner of all rights and thus the "owner of copyright."

But the greatest threat to authors' rights is the new law's quadrupling of compulsory licenses,¹²¹ the greatly expanded role of the Copyright Office, and the intrusion of governmental control in the form of the Copyright Royalty Tribunal.

Now for the PENULTIMATE PROPOSITION:

The new law provides for its sound administration.

CASSANDRA SAYS:

The new law not only greatly expands the functions of the 81-year old Copyright Office but also creates a second administrative agency, the Copyright Royalty Tribunal. All of this in addition to the

¹¹⁸ *Id.*, §304(a).

¹¹⁹ *Id.*, §201(b).

¹²⁰ *Ibid.* Even if the agreement provides that the person who prepared the work owns all of the rights, the work remains a "work made for hire" and the employer or other person for whom the work was prepared remains the "author." Quaere, whether the agreement is a "transfer of copyright ownership."

¹²¹ Secondary transmissions by cable systems (§111(c), (d)); making and distributing phonorecords of nondramatic musical works (§115); public performance of nondramatic musical works by means of coin-operated phonorecord players (§116); use of certain works in connection with non-commercial broadcasting (§118). See Cramer, *Some Observations on the Copyright Law of 1976: Not Everything Is Beautiful*, 1-COMM/ENT 157, 259-163 (1977).

178-year old parent, the Library of Congress, vested with copyright matters since 1870. Besides, there is CONTU, scheduled to expire on July 31, 1978.

Already, the 1978-79 appropriation for the Copyright Office is more than \$12,500,000, almost doubled since 1975-76 and more than quadrupled since 1968-69. Its employees now number more than 600, including 25 attorneys, compared to 378 five years ago and 329 ten years ago.¹²² It should be noted, of course, that some 40 percent of the cost of operating the Copyright Office is recovered from fees¹²³ and there are substantial additions to the collections of the Library of Congress—more than 325,000 pieces annually or about one-fourth of the Library's annual acquisitions.¹²⁴ Of course, there could be other systems, apart from copyright, whereby the Library of Congress could acquire free copies.

Also, the Federal Register is publishing a steady flow of Copyright Office pronouncements. And the Copyright Office is publishing new forms—no longer simply Form A, Form B, Form C, et cetera, but now Forms TX, PA, SR, VA, GR/CP, RE, JB, and IS, with more to come.

As for the Copyright Royalty Tribunal, the Senate bill provided for ad hoc panels of arbitrators.¹²⁵ The House bill provided for three members with compensation "at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates,"¹²⁶ and limited the Tribunal's annual appropriation to \$500,000.¹²⁷ The bill which emerged from Conference, without any explanation, dropped the \$500,000 annual appropriation limitation, increased the number of members to five, and lengthened their terms from five to seven years.¹²⁸ Each Copyright Royalty Tribunal member receives, as of the

¹²² Letter to author from Michael P. Pew, Assistant Register for Automation and Records, dated April 5, 1978; Annual Report of the Librarian of Congress—1969, 120-121, 134 (1970). Brylawski, *The Copyright Office: A Constitutional Confrontation*, 44 GEO. WASH. L. REV. 1 (1975) (Questioning constitutionality of copyright office and then proposed copyright royalty tribunal in legislative branch in violation of principle of separation of powers).

¹²³ *Ibid.*

¹²⁴ Annual Report of the Librarian of Congress—1975, Appendix 2 (1976).

¹²⁵ S. 22, 94th Cong., 2d Sess. §803 (1976).

¹²⁶ Substitute Amendment, §802(a), H.R. REP. NO. 94-2476, 94th Cong., 2d Sess. 42 (1976). 17 U.S.C. 802(a) (1978).

¹²⁷ Substitute Amendment, sec. 114, H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 46 (1976).

¹²⁸ 17 U.S.C. §802(a) (1978).

October 1, 1977 pay schedule, \$47,025 compensation.¹²⁹ In comparison, the basic salary of the Register of Copyrights, although scheduled at \$58,245, has been frozen at \$47,500.¹³⁰ The 1979 Tribunal appropriation probably will approximate \$1,000,000.¹³¹ The total personnel, besides the five commissioners, are a secretarial assistant for each and an administrative officer, implemented possibly by a small professional staff. Besides their statutory duties, the Tribunal is conducting studies relating to copyright licensing and arrangements, including the impact of home taping devices upon traditional procedures.¹³²

It should not be forgotten that before royalties and fees received by the Copyright Office are deposited, the Copyright Office first deducts its reasonable costs.¹³³ Before any such balances are distributed by the Copyright Royalty Tribunal, the Tribunal deducts its reasonable expenses of any proceedings.¹³⁴ Quære, as to how much will be left for ultimate distribution after such double dipping.

CONTU, with 11 commissioners and 12 staff members, was allotted, for its three-year duration, more than \$1,500,000, but its total expenditures will probably approximate two-thirds of the appropriations, or about \$1,000,000.¹³⁵ Subcommittee draft reports on computers and on photocopying have been released for public comment. The final reports are due by July 31, 1978, and there will be two months more for winding-up.

The SEVENTH AND FINAL PROPOSITION is:

The new law, with periodic amendments, will meet copyright needs for decades to come

Copyright revision, after the first federal copyright statute of 1790, until this century, came at approximately 40-year intervals, in

¹²⁹ *Ibid.*; 5 U.S.C. §5332, 42 Fed. Reg. 52,366 (Sept. 30, 1977).

¹³⁰ *Ibid.*

¹³¹ Letter to author from Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, dated April 25, 1978.

¹³² On the basis of "the request of the then Chairman of the Senate Subcommittee having jurisdiction over this agency." *Ibid.* See Brylawski, *The Copyright Royalty Tribunal*, 24 U.C.L.A. L. REV. 1265 (1977).

¹³³ 17 U.S.C. §111(d)(3) (1978).

¹³⁴ *Id.*, §807.

¹³⁵ Letter to author from Arthur J. Levine, Executive Director, National Commission on New Technological Uses of Copyright Works, dated April 13, 1978. The Commission, which required seven months for appointment, had its term extended seven months by Pub. L. No. 95-146, which required the final report by July 31, 1978 rather than by December 31, 1977.

1831, 1870, and 1909. It required almost 70 years to effect the 1976 revision. This suggests that the next general revision is many decades in the future.

CASSANDRA PROPHECIES that each year from now on there will be many proposed and some enacted amendments until the new copyright system collapses under its own weight, and that before 2,000 A.D., the United States will need a new, well-drafted, formality-free copyright statute.

The 21st century copyright statute will employ more general language and be more durable and understandable. It will conform to the copyright systems of the other developed nations of the world.

Since notice, deposit, registration, execution, and recordation requirements will be eliminated, the Copyright Office can be phased out of existence before its 100th anniversary in 1997. The new Register of Copyrights should be a liquidator to preside over the liquidation of the new copyright empire.

The basic term of protection will be life of the author plus 50 years, and renewal and termination provisions will be eliminated, subject only to any constitutional limitations.

An alternative method for procuring free copies for the Library of Congress will be devised. The Library's contemplated computerized catalog can be programmed to contain any desirable copyright information, including dates of deaths of authors. The necessary information can be required to accompany the deposit copies. Fifty years are available to compile dates of deaths.

But, *CASSANDRA*, how much sentiment will there be for a general revision so shortly after the 1976 revision with its 20-year revision program background?

CASSANDRA would point out the growing public awareness of copyright. Witness the conspicuous notices required to be posted by photocopy machines¹³⁶ and jukeboxes.¹³⁷ Consider the growing irritation of educational users and librarians, their restiveness with existing guidelines and their feeling of misplaced reliance on legislative history.¹³⁸

¹³⁶ 17 U.S.C. §108(d)(2), (e)(2), f(1).

¹³⁷ *Id.*, §116(b)(1)(C.).

¹³⁸ E.g., *Library Photocopying and the U.S. Copyright Law of 1976: An Overview for Librarians and Their Counsel* (Special Libraries Association 1977); *A Statement of Position with Respect to the Photocopying of Journal Articles and Other Short Works by Corporate Libraries under the New Copyright Law, and Answers to Some Questions Frequently Asked* (Association of American Publishers, Inc. and Authors League of America, Inc. 1978). See note 57, *supra*.

The paradox of expanded rights for longer duration, on the one hand, and, on the other hand, four compulsory licenses, with a fifth already in the wings, administered by a burgeoning bureaucracy, is bound to result in public resentment.

With the new law's elimination of the not-for-profit exemption for public performance of music,¹³⁹ licenses and royalty payments, modest at present, are now being exacted, for example, from the nation's 3,000 universities and colleges. Perhaps the performing rights societies are establishing a principle—spelled both ways—but their attitudes, like much of the new law, may not display the soundest public relations in the interests of copyright generally.

And those who deal and wheel with the Copyright Office and Copyright Royalty Tribunal may become increasingly disenchanted.

THANK YOU. CASSANDRA, you ARE mad!

And, Ladies and Gentlemen, thank you all. We hope that we have not made you mad.

¹³⁹ 17 U.S.C. §106(4) (1978); *cf.*, 17 U.S.C. §1(e) (1971).

PART II**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****1. United States of
America and Territories****603. U.S. FEDERAL COMMUNICATIONS COMMISSION**

47 CFR Part 76. Network program exclusivity protection by cable television systems. Earlier decision reconsidered and rule change adopted. [Docket No. 19995; RM-2275; FCC 78-217.] *Federal Register*, vol. 43, no. 75 (Apr. 18, 1978), pp. 16337-16340.

47 C.F.R. 76.92 is amended by the addition of section (g) which changes cable television network nonduplication rules so that such systems are no longer required to delete network programming on any station which has a significant number of viewers among noncable subscribers in the area. Concurring and dissenting opinions of Commissioners in the reconsideration of this rule (earlier decision 41 F.R. 53168) are included.

**604. U.S. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF
COPYRIGHTED WORKS**

Meeting transcript: CONTU announces that the transcript of its eighteenth meeting is now available for purchase. 374 PTCJ A-23 (Apr. 13, 1978).

Paper copies of the transcript of CONTU meeting No. 18 are \$8.00 each; microfiche copies are \$3.00. Contact the National Technical Information Service, U.S. Department of Commerce, Springfield, Virginia 22161.

**605. U.S. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF
COPYRIGHTED WORKS.**

Notice of meeting: *Federal Register*, vol. 43, no. 93 (May 12, 1978), p. 20570.

Notice of CONTU's 22nd meeting at the McGraw Hill Building, 1221 Avenue of the Americas, New York, N.Y. in Room 206, at 2 p.m. on Thursday, May 18, and in the Second Floor Gallery, 9:30 a.m. Friday, May 19, 1978.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

1. State Court Decisions

606. **LOMBARDO v. DOYLE, DANE & BERNBACH, INC.**, 396 N.Y.S. 2d 661 (Sup. Ct. App. Div. June 20, 1977) (Hopkins, J.P., Margett, Shapiro, Titone, Suozzi, JJ.).

On plaintiff's action against advertising agency and automobile manufacturer for breach of contract, invasion of privacy, and the appropriation of his public personality for commercial purposes, defendants appealed from an order of the Supreme Court denying their motion to dismiss the second and third causes of action.

Held, order modified and motion to dismiss granted as to the invasion of privacy action.

After an unsuccessful attempt to employ plaintiff for the job, defendants made a television commercial using an actor conducting an orchestra playing Auld Lang Syne at a New Year's Eve party. The invasion of privacy action under sections 50 and 51 of the New York Civil Rights Law was dismissed because the statute prohibits the unauthorized use of a "name, portrait or picture" and neither plaintiff's name nor picture was used. Citing precedents, the Court refused to equate "reputation" to "name" and "mental image or likeness" to "picture." It found that the statute should be construed narrowly rather than "so as to prohibit the portrayal of an individual's personality or style of performance." The Court pointed out that the theoretical basis of the statutory right is to prevent injury to feelings and that usually only nominal damages are awarded.

However, the Court recognized the common law right to publicity or property right in public personality, based here on plaintiff's forty-year effort in building a marketable public personality as Mr. New Year's Eve. The crux of the action, according to the Court, was that "the imitation is completely unfair, amounts to a deception of the public, and thus exploits the respondent's property right in his public personality."

The two dissenting justices asserted that the heart of the statutory right to privacy action was whether the public associated a particular

representation with a particular plaintiff and that this issue should be submitted to the trier of the facts.

607. SEAY v. VIALPANDO, 567 P.2d 285 (Sup. Ct. Wyo. August 3, 1977) (Rose, J.).

On appeal from summary judgments for defendants in action by plaintiffs seeking actual and punitive damages for violation of their common law copyright in architectural blueprints, *held*, summary judgments reversed. Plaintiffs also sought quantum meruit recovery and, in the alternative to the copyright action, damages for conversion.

One plaintiff gave blueprints he had drawn to defendants so that they could build a house for him. Later, without plaintiff's permission, they used his plans to build another house. The important determination on appeal was whether a genuine issue of fact existed concerning publication of the blueprints.

Defendants asserted that a general publication occurred when plaintiff gave them the blueprints without indicating that he claimed a property interest in them and also when the house was completed and thus could be copied by anyone. The Court found flaws in these two arguments, stating, "standing alone, the delivery of plans to contractors for building purposes, and to successful bidders to assist them in constructing the house, is generally a limited-purpose publication." It also held that even though a completed building may be copied from visual observation, nevertheless the unauthorized use of that building's plans constitutes an infringement of common law copyright.

However, whether the plaintiff intended a general or a limited publication remained an issue. An objective test—the plaintiff's outward actions as they would be interpreted by a reasonable outsider (rather than his "unexpressed, subjective intention")—was found to apply and defendants were held to have the burden of proving a general publication at trial. Plaintiff's intention also was held to be relevant to his actions for conversion and recovery in quantum meruit.

PART V

BIBLIOGRAPHY

B. LAW REVIEW ARTICLES

1. United States

608. Comment, product simulation in the eighth circuit. *Nebraska Law Review*, vol. 57, no. 1 (1978), pp. 91-146.

This comment extensively surveys the history of product simulation law, emphasizing the *Sears/Compco/Lear/Kewanee* line of cases. A special section is devoted to copyright protection for designs. The last segment of the article analyzes the decision of the Eighth Circuit in *Truck Equipment Service Co. v. Fruehauf Corp.*, 536 F.2d 1210 (1976), which involved the design of a twin hopper bottom grain trailer. The author discusses the impossibility of according copyright protection to the design and critically analyzes the court's reversion to a pre-*Sears/Compco* acceptance of the misappropriation doctrine.

609. GERLACH, GARY G. Toward the wired society: prospects, problems, and proposals for a national policy on cable technology. *Maine Law Review*, vol. 25, no. 2 (1978), pp. 193-240.

This article primarily addresses the broad problems now confronting the American people on how to devise wise national policies that will put CATV to the best uses for the most people. Discusses the evolution of a contract theory of access to cable communications systems and explores cable communications as a new frontier for urban development.

2. Foreign

1. In English

610. LABRA, VICTOR BLANCO. The three subjects protected by the Rome Convention. *Copyright*, vol. 14, no. 1 (Jan. 1978), pp. 25-31.

The author analyzes the three subjects protected by the Rome Convention; physical persons (performers) and two legal entities (producers of phonograms and broadcasting organizations). For each subject, the author explores the possibilities and limitations for protection under the Rome Convention.

2. In German

611. CHARUTO, VITALI J. Einige Fragen des sowjetischen Urheberrechts und rechtliche Aspekte der Taetigkeit des VAAP. *Film und Recht*, vol. 21 (1977), pp. 371-380.

A detailed description of the operations of the Soviet All-Union Agency for Copyright including an overview of Soviet copyright law with emphasis on international aspects.

612. DITTRICH, ROBERT. Die Vertraege Oesterreichs mit den Europaeischen Gemeinschaften und das oesterreichische Urheberrecht. *Oesterreichische Blaetter fuer Gewerblichen Rechtsschutz und Urheberrecht*, vol. 26 (1977), pp. 81-88.

An analysis of the effects of the agreement between the European Economic Community and the Republic of Austria of July 22, 1972, in *Bundesgesetzblatt* (official law gazette of Austria) 466/1972 on Austrian competition law. The author concludes that the agreement does not affect Austrian copyright law, particularly the author's right of distribution.

613. FROTZ, GERHARD. Vertletzung von Urheberrechten beim Parallel-und Reimport von Tontraegern? *Oesterreichische Blaetter fuer Gewerblichen Rechtsschutz und Urheberrecht*, vol. 26 (1977), pp. 137-150.

Discussion about Austrian authors and the transference of their rights to the Austrian performing rights organization (Austro-Mechana Gesellschaft zur Verwaltung and Auswertung mechanisch-musikalischer Urheberrechte Gesellschaft mbh). By agreement, the Austrian organization grants licenses to foreign performing rights organizations to exercise multiplication and distribution rights in foreign countries. Imports from such countries give the importer a competitive advantage and violate the distribution and multiplication rights of the Austrian author. The remedies available under substantive Austrian law are analyzed.

614. GOELTZ, KARL FRIEDRICH. Die CDU zum Kabelfernsehen. *Film und Recht*, vol. 21 (1977), pp. 328-330.

Declaration of policy of the Christian Democratic Union Party on various issues of cable television pilot projects in the Federal Republic of Germany.

615. LARESE, WOLFGANG. Eine Revision des urheberrechtlichen Werkbegriffs? *Film und Recht*, vol. 21 (1977), pp. 362-371.

Comments on the definitions of "a work" as contained in two drafts for a new copyright statute in Switzerland. Emphasis on the criteria of original creation versus statistical uniqueness.

616. MAIWALD, CLAUS. Zum Verhaeltnis von Urheberrecht und Leistungsschutz. *Film und Recht*, vol. 21 (1977), pp. 381-388.

A description of the difference in copyright protection granted to composers and performers of musical works in the Federal Republic of Germany. The author criticizes the fact that less protection is provided to the performer even though interpretation of music is also a creative task.

617. REHBINDER, MANFRED. Hat das amerikanische Urheberrechtsgesetz das Reprografieproblem geloest? *Film und Recht*, vol. 21 (1977), pp. 357-361.

Description of fair use provisions of Section 107 of the United States Copyright Act of 1976, the Agreements on Guidelines for Classroom Copying in Not-for-Profit or Educational Institutions, and the Guidelines for Educational Uses of Music. These provisions are presented as the United States solution to the reprography problem.

618. RIE, ROBERT. Regelungen fuer Kinder und Frauen in amerikanischen und franzoesischen Reklamefernsehen. *Film und Recht*, vol. 21 (1977), pp. 590-597.

A detailed comparison of the provision for the protection of children in television advertisements in French and United States law, and a short description of the French provisions for the protection of women in this field.

619. SIEGER, FERDINAND. Vor EG/Urheberrecht wird gewarnt. *Film und Recht*, vol. 21 (1977), pp. 283-290.

The author asserts that the Commission of the European Economic Community (EEC) is ill-advised to prepare a unified copyright law for the EEC, or to harmonize the national copyright law of the member countries, as such a development would not be justified by the EEC treaty. The author emphasizes that all EEC member countries are members of the revised Berne convention and that a large degree of harmonization has been achieved. In unifying copyright law even further, significant changes in all areas of national law would be necessary.

620. WEBER, GUSTAV. *Persoenlichkeitsrecht und Tonbandaufnahmen in gerichtlichen Strafverhandlungen. Film und Recht*, vol. 21 (1977), pp. 297-299.

A decision of the Constitutional Court of the Federal Republic of Germany stating that tape recordings of the spoken word without the consent of the speaker violate constitutionally granted basic rights. The author investigates the applicability of this principle in criminal trials. He concludes that court statements made by defendants, witnesses, prosecutors and counsel, and recorded by the court for its internal use only, are unconstitutional.

3. In Italian

621. DE SANCTIS, LORENZO. *Brevi Appunti in Tema di Tutelabilita delle Edizioni Critiche. Il Diritto d' Autore* (Oct.-Dec. 1976), pp. 437-443.

The author offers a doctrinal and conceptual distinction between the "critical text" and the "critical edition". According to the author, the critical text constitutes the product of research activity and in a broad sense, the study product of the critic; the critical edition is the "entrepreneurial manifestation," the means of circulating the critic's study among the public.

The author regrets that Italian copyright law does not make this distinction and he cites the legislation of West Germany, which to his knowledge, is the only jurisdiction that has adopted this distinction.

622. PERILLI, ENZO. *Sulla contrattualistica di diritto d' autore. Rassegna di diritto cinematografico, teatrale e della radiotelevisione*, no. 3 (July-Sept. 1976), pp. 61-62.

This two-page article is a summary of the recommendations contained in the UNESCO document, "Directive Principles for the Drafting of Contracts Applicable to Rights of Translation, Reproduction and other Matters, Requested by Developing Countries, and Comment on those Principles."

Recommendations range from those aimed at the clear execution of the contract to those calling for specific mention in the contract of the legal and economic consequences attendant upon non-performance.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

623. Actors, writers supporting Disney suit against Sony. *Billboard* (Apr. 1, 1978), p. 40.

The Screen Actors Guild and the Writer's Guild of America asked permission to file an *amicus curiae* brief in support of the MCA/Universal and Walt Disney Productions copyright infringement suit against Sony. Both guilds contend Betamax would cause loss of employment as well as loss of residuals and income derived from future sales of prerecorded motion picture cassettes and videodisks.

624. AFM on license fees. *Variety*, vol. 290, no. 11 (Apr. 19, 1978), p. 123.

Victor W. Fuentealba, American Federation of Musicians president, sent a memo to members warning them that booking contracts with a license fee clause will be considered null and void. The memo also notified signatories that the responsibility for payment of licensing fees rested with the booker and not the band.

625. AGAC meet keyed to copyright law. *Record World* (Mar. 18, 1978), p. 45.

At the annual membership meeting of the American Guild of Authors and Composers, President Ervin Drake reported that membership increased by 1000 in the past three years. The meeting focused on the new copyright law, particularly the registration of words and music.

626. Another copyright dispute: SLA and AAP at odds. *Library Journal* (Apr. 1, 1978), p. 699.

The Special Libraries Association has refused to let the Association of American Publishers rent a portion of its mailing list for the purpose of sending its members the AAP guidelines for corporate library photocopying. The dispute centers on hostility toward unilaterally-issued guidelines. The Council of National Library Associations had condemned such guidelines, noting that they have no effect under the law.

627. Anti-Betamax suit delayed until next year. *VideoNews*, vol. 8, no. 7 (Mar. 29, 1978), p. 1.

The suit which Universal Pictures and Disney Studios brought against Sony et al., has been delayed until next year. Delay is attributed to the judge's feeling that he needs more time to "do the necessary discovery" and "digest what's been submitted in the case."

628. Arbitron settles suit against Va. FM outlet that used ratings free. *Variety*, vol. 290, no. 3 (Feb. 22, 1978), p. 44.

A Norfolk, Va. radio station agreed to pay Arbitron compensatory damages in settlement of a suit for copyright infringement of its April-May 1976 book of ratings data.

629. Arries insists flat fee for music is only equitable way for local tv's. *Broadcasting* (Apr. 27, 1978), p. 68.

Leslie Arries, chairman of the All-Industry Television Stations Music License Committee, told NAB conventioners they are negotiating with ASCAP and BMI to effect a change in the music license payments from a percentage of station revenues to a flat-fee basis. The committee contends the current formula is unfair because fees have increased over the years due to revenue gains while tv use of music has actually decreased. Stations are encouraged to litigate the issue if negotiations are unsuccessful in bringing about the change.

630. ASCAP announces Natl. Burkan winners. *Record World* (Apr. 8, 1978), p. 24.

Announces the winners of the 39th Nathan Burkan Memo-

rial Competition for outstanding law school essays on copyright.

631. ASCAP asks for commercial fee from public tv. *Variety*, vol. 290, no. 6 (Mar. 15, 1978), p. 94.

ASCAP's report to the Copyright Royalty Tribunal claims that because the difference between commercial and public broadcasters is minimal, there should be no difference in performance royalty fees. It proposes music fees for educators based on a percentage of their stations' income.

632. ASCAP, BMI set licensing terms on campus music. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 67.

ASCAP and BMI have submitted their first blanket licensing agreements, covering use of copyrighted music under the new law, to more than 3,000 colleges and universities.

633. ASCAP prize to Santa Monica man. *Billboard*, (Apr. 29, 1978, p. 16.

Henry David Fetter has won first prize in ASCAP's 39th Nathan Burkan Memorial Competition with his paper on "Copyright Revision And The Preemption Of State 'Misappropriation' Law." Second prize went to Mary S. Lawrence of Corvallis, Ore., for "Fair Use: Evidence Of Change In A Traditional Doctrine", and third prize was awarded to Craig Hayes of Pittsboro, N.C., for "Performance Rights in Sound Records—How Far To The Horizon?"

634. ASCAP reps seek blanket fee for non-commercial broadcasters. *Record World* (Mar. 18, 1978), pp. 4, 30.

A report of the Copyright Royalty Tribunal hearings at which ASCAP representatives stated that noncommercial broadcasters should pay a \$3,600,000 blanket license fee to ASCAP members this year. PBS representatives argued for a flat rate fee of \$750,000, of which \$300,000 would be paid to BMI and SESAC on voluntary terms already agreed to.

635. As to suit against Stallone pic: Lionel White, the original writer, 'uninformed' but lawyer thinks he'll be 'interested.' *Variety*, vol. 290, no. 7 (Mar. 22, 1978), p. 6.

Though listed as a co-plaintiff in an action to enjoin release

of the film "F.I.S.T.," Lionel White knew nothing of it until reports appeared in the paper. Attorney for Ralph Zerbe, assignee of the allegedly plagiarized novel, "Rafferty," said he invoked rights under the contract allowing the author to be included in any legal action.

636. BERRY, JOHN F. Show business antitrust suit. *Washington Post*, vol. 101, no. 137 (Apr. 21, 1978), p. C8.

Between 400 and 900 members of the Composers and Lyricists Guild of America have brought charges against the major movie production companies and two television networks. The plaintiffs claim that the defendants have conspired to deprive them of the copyrights to music and lyrics written by them for motion pictures and television shows produced by the defendants. The plaintiffs also claim that the defendants have monopolized the U.S. market for the publication and movie and TV music and lyrics. Currently, Judge Charles L. Brieant is deciding whether there should be a jury trial in the \$300 million show business antitrust suit.

637. Betamax goes to Europe. *VideoNews*, vol. 8, no. 7 (Mar. 29, 1978), p. 1.

Sony says it will begin marketing Betamax throughout Europe "soon." Several Japanese companies indicate they will follow suit.

638. BMI seeks simple setup to collect cable-tv royalties. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 69.

BMI has asked the Copyright Royalty Tribunal to determine a distribution share of cable licensing fees for each performing rights organization and then to let the societies make collection and distribution under their existing systems.

639. CAMPBELL, WALTER. Copyright Service Bureau to open Nashville office. *Record World* (Mar. 11, 1978), pp. 130-131 (Section II).

An announcement that the Copyright Service Bureau, which has branch offices in nine countries, will open a Nashville office in the summer of 1978.

640. Cardozo comments on copyright law. *ABA Journal*, vol. 64 (Mar.

1978), pp. 491-492.

An approving review of an article on educational photocopying by Michael Cardozo. The article, which appears in vol. 4, no. 2 of the *Journal of College and University Law*, attempts to explain to educators, scholars, and students what materials they may copy under the new law.

641. Clayton Moore files \$30 mil 'Ranger' suit. *Daily Variety*, vol. 179, no. 31 (Apr. 17, 1978), p. 14.

Clayton Moore, who portrayed the Lone Ranger for many years, has filed suit against the Wrather Corporation for its failure to remunerate him for the use of his likeness, voice and actual photographs and movie clips from the Ranger series. Apparently, the suit is an outgrowth of an announcement by the corporation, which controls the vidseries rights, of its intention to co-produce a film version of "The Lone Ranger."

642. Clayton Moore (Lone Ranger) sues Wrather Co. for \$30-mil. *Variety*, vol. 290, no. 11 (Apr. 19, 1978), p. 53.

Following Wrather Corporation's announcement of its intention to co-produce a feature film of the Lone Ranger, Clayton Moore, star of the Ranger TV series, filed suit in the Santa Monica Superior Court. The action charges the corporation, owner of the program's vidseries rights, with wrongfully depriving Moore of earnings for use of his likeness, voice and actual photographs and movie clips.

643. COCHRANE, DIANE. The new Copyright Revision Act. *American Artist*, vol. 42, issue 429 (Apr. 1978), pp. 92-97.

An article briefly answering copyright questions important to visual artists concerning registration, fair use, joint works, publication and the omission of notice.

The author provides examples of artists losing rights to royalties. This article emphasizes the need for copyright today, and mentions practical considerations for the placement of notice on sculpture and paintings.

644. Colleges, universities to be covered by new BMI blanket access musical fees. *Record World* (Apr. 1, 1978), p. 12.

Contracts providing blanket access to music owned by those

affiliated with BMI are being tendered to more than 3000 universities. The annual contract fee is 5½¢ per full time student and the minimum fee per institution is \$60. The contract, which is the result of negotiations between BMI and a panel brought together by the American Council on Education, is retroactive to January 1, 1978 and extends through December 31, 1979.

645. Copyright debate heats up; ALA rebukes AAP. *Library Journal* (Apr. 15, 1978), p. 797.

An examination of the escalating controversy between the library and publishing sectors. The most recent development: The American Library Association's Executive Director has sent members of the Association of American Publishers a tough letter describing the library position on copyright and rebuking the AAP for taking it upon itself to publish copyright guidelines for libraries.

646. Copyright file copies spared; many protested. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 5.

The Copyright Office has published an interim regulation in response to protests by the motion picture industry against replacement of the motion picture agreement with a deposit requirement. The regulation presents a revised MPA and invites comments.

647. CRAWFORD, TAD. Moral rights and the artist. *American Artist*, vol. 42 (Apr. 1978), pp. 98-100.

An article examining Congressman Drinan's bill (H.R. 8261) "Visual Artists' Moral Rights," European and American cases relating to moral rights, and the effects moral rights would have if enacted in the U.S.

The author discusses the rights of paternity, integrity, property, honor, disclosure and remedies for violations. For this bill to become a law, the author concludes that artists must give nationwide political support for moral rights. He suggests Congressman Drinan's bill be refined to clarify the answers to questions raised by this article.

648. David Barnes admits pic piracy; 'Star Wars', others to So. Africa. *Variety*, vol. 290, no. 9 (Apr. 5, 1978), p. 18.

David Barnes pleaded guilty to charges of illegally distributing and transporting films to South Africa, lying to customs officials and unlawfully using a "blue box" to make transatlantic calls. Several hundred reels of pirated films were seized during the investigation.

649. Deadline changed on copyright briefs. *Quill & Quire*, vol. 44, no. 5 (Mar. 16, 1978), p. 3.

The Ministry of Consumer and Corporate Affairs extended the deadline for submission of briefs on Canadian law revision to March 31.

650. DELANCY, WILLIAM. Carter's public speeches are copyrighted privately: book profits go to foundation. *Washington Star*, no. 223 (Aug. 22, 1977), p. A-1.

A book recently published under the President's name and copyrighted by the Carter Foundation for Governmental Affairs raises questions in the on-going debate over public versus private ownership of the words of officials.

651. Distribut'n clause dropped in 'F.I.S.T.' copyright suit. *Daily Variety*, vol. 179, no. 38 (Apr. 26, 1978), p. 12.

Constantine Films has decided not to move for an injunction opposing the distribution of "F.I.S.T." in its suit against United Artists and others. Reportedly, Constantine instructed its attorney to press for damages only. The action charges that the film's script is a plagiarism of "Rafferty" written by Ryan L. White.

652. DOHERTY, AUSTIN. Library photocopying: recent surveys indicate its nature and scale. *New York Law Journal*, vol. 179, no. 58 (Mar. 27, 1978), p. 24.

The results of several surveys on library photocopying activities under Section 108 of the new copyright law have been completed; others are expected to be available in the near future. This data should help to establish the objective conditions upon which mandated future reviews of the new law will be based. Special and private law libraries are asking to what extent these surveys are determinative of their photocopying activities.

653. Elmer Bernstein skeds c'right ownership talk. *Daily Variety*, vol. 179, no. 35 (Apr. 21, 1978), p. 19.

Brief notice of Elmer Bernstein's slated discussion of his class action suit against studios over copyright ownership of for-hire-scoring work at the California Copyright Conference.

654. FALCON, MIKE. Broadcasters, record execs square off at L.A. performers royalty hearings. *Record World* (Apr. 8, 1978), pp. 3, 65, 69, 70, 71.

A lengthy account of the Los Angeles-based House subcommittee hearings into the proposed performers royalty. Arguments on both sides are cited in detail, including the broadcasters' criticisms of the Copyright Office's study of the issue, recently submitted to Congress, which favored enactment of performers royalties.

655. FALCON, MIKE. For Jobete, quality copyrights are the key. *Record World* (Apr. 1, 1978), pp. 10, 50.

An interview with Robert Gordy and Jay Lowy of the Jobete Music Company, which has consistently been a leader in the pop and soul music fields. Both Gordy and Lowy attribute Jobete's success to the number of copyrights it controls on music which has proved to have enduring worth and economic value.

656. Film copying barred in N.Y. court ruling. *Library Journal* (Apr. 15, 1978), p. 800.

A brief notification of the decision in the BOCES case, which barred one of New York's regional school cooperative agencies from copying copyrighted films for use in the schools it serves.

657. French court lifts writ vs. Fechner's \$4-mil 'The Spat.' *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 39.

A Paris court vacated an injunction restraining the release of Christian Fechner's film "The Spat," only days before it was due to be released. The injunction stemmed from a claim by Jean-Pierre Mocky that the picture was a plagiarism of a script he had written entitled "The Noise."

658. Friend-of-court blitz disallowed in Betamax action. *Daily Variety*, vol. 179, no. 34 (Apr. 20, 1978), p. 1.

A U.S. District Court judge denied film companies' requests for leave to file amicus curiae briefs on behalf of plaintiffs in *MCA/Universal v. Sony et al.* However, Judge Ferguson said they could testify as interested parties in the case. To the disappointment of the industry, the judge also ordered a seven-month postponement of the pretrial hearing because of the complexity of the case.

659. Friends' nixed in betamax suit. *Billboard* (April 29, 1978), p. 22.

U.S. District Court Judge Ferguson has disallowed a friend of the court action sought by film production companies in support of the MCA/Universal and Walt Disney Productions lawsuit against Sony Betamax. Judge Ferguson made his decision on the basis that representatives of these various pro-MCA/Universal and Walt Disney groups will have an opportunity to testify in court during the trial. A May 2 pretrial hearing has been moved to Nov. 13 at which time Judge Ferguson is expected to set a 1979 trial date.

660. GRAHAM, SAMUEL. BMI advises licensees of restrictions on Presley dramatic performing rights. *Record World*, vol. 35, no. 1600 (Feb. 25, 1978), p. 10.

BMI sent notices to its licensees advising them that they are restricted from permitting live public performance at any one time of more than three of the musical compositions of Elvis Presley, in order to protect the dramatic performing rights therein.

661. GRAUBART, JEFFREY L. The validity of the publisher-songwriter agreement. *Songwriter*, (Feb. 1978), p. 34.

The author explores and analyzes the questions of consideration in publisher-songwriter agreements, the advantages of such contracts to publishers, and their unfairness to songwriters. He also gives an update of the English and American courts' position on these issues.

662. GREIN, PAUL. Heat at royalty hearings. *Billboard* (Apr. 8, 1978), p. 1.

The issue of performance royalties was debated at 2-day

Congressional hearings in L.A. Proponents argued that performance rights are needed to overcome the inequities of the present royalty system, to keep up with technological advances and to conform to international recognition of performance rights. Opponents claimed the present relationship between radio and record companies is an equitable one and argued that the proposed fees would unfairly tip the equation in the record industry's favor, that implementation of the legislation would be costly, and that performance royalties in other countries are government-subsidized.

663. GREIN, PAUL. Sesac traces roots in Europe & repertoire in U.S. *Billboard* (Apr. 22, 1978), p. 19.

Albert Ciancimino, SESAC vice president and counsel, explained SESAC's performing rights licensing system to the California Copyright Conference. He emphasized that the advantage of belonging to the Society was that a writer or publisher knew exactly what he would earn if he achieved a certain level of success.

664. HALL, DOUG. Performers' royalty spurs NAB oratory. *Billboard* (Apr. 22, 1978), p. 30.

Don Zeifang, NAB lobbyist, recommended that broadcasters explain the justice of their fight against the performance rights bill to their Congressmen. He told the NAB convention that both the radio and music industries admit that the present system is economically advantageous, and enactment of the proposed bill will destroy the balance that now exists.

665. HALL, JUDITH. Personalities. *The Washington Post*, vol. 101, no. 119 (Apr. 3, 1978), p. B2.

The American Council on Education predicts royalty fees will cost colleges \$1.5 million annually for airing copyrighted music on campus, at concerts, on radio stations and over loudspeakers.

666. HALL, MILDRED. Public b'caster fuss: ASCAP's royalty demand cut 50%. *Billboard* (Apr. 29, 1978), p. 1.

ASCAP has offered to lower its proposed \$3.6 million a year fee for the compulsory licensing of its music to public broadcasters to \$1.8 million for the years 1978-79. The non-

commercial broadcasters and ASCAP have not reached an agreement on their rate proposals. Under the new copyright law, the Copyright Royalty Tribunal must set rates for music use by noncommercial broadcasters by June 8 in cases where no voluntary licensing agreement has been reached.

667. HALL, MILDRED. Tribunal to set college radio rates. *Billboard* (Apr. 1, 1978), p. 1.

An American Council on Education spokesman told the Copyright Royalty Tribunal that educators were dismayed to learn that their negotiated agreements with SESAC and ASCAP did not cover music use by all campus radio stations. Therefore, they have asked the Tribunal to extend the "per capita" fee base to include all campus radio use under both of these agreements.

668. HARRISON, ED. SESAC campus license draw fire. *Billboard* (Apr. 1, 1978), p. 1.

NECAA feels SESAC's blanket license fee is unreasonable, and because its repertoire is rather small, it is outlandish to pay such fees. As a result, educators are carefully considering whether they need a SESAC license at all.

669. HERSEY, JOHN. Copyright for computers threatens to pollute new Act. *Authors Guild Bulletin* (Nov.-Dec., 1977), pp. 1, 10.

The author argues that computer programs should not be protected by copyright. He questions whether computer programs are writings of an author and discusses the advantages and disadvantages of copyright vs. patent protection for computer programs.

670. HOLLAND, BILL. ASCAP-PBS hearings conclude; a fee compromise is still possible. *Record World* (Mar. 25, 1978), p. 4.

Compromise seemed possible at the close of the Copyright Tribunal hearings between ASCAP and public broadcasters on the question of whether public broadcasters should pay ASCAP \$3,600,000 in a yearly blanket compulsory license fee. ASCAP indicated a willingness to negotiate though it clearly wants more than the \$400,000 the broadcasters are presently offering.

671. HOLLAND, BILL. Copyright Office performers royalty report

deemed 'totally unacceptable' by NAB. *Record World* (Apr. 1, 1978), pp. 4, 93.

A description of the National Association of Broadcasters' harsh criticisms of the Copyright Office report to Congress favoring the enactment of a performance royalty. The NAB calls the report "unfair" and "totally unacceptable" and intends to lobby against enactment of its proposals.

672. HOLLAND, BILL. Copyright tribunal will not hear children's TV workshop testimony. *Record World* (Apr. 8, 1978), p. 8.

A brief notification that the Copyright Royalty Tribunal will not hear testimony from members of the Children's Television Workshop in connection with the hearings involving ASCAP and PBS on the question of yearly blanket compulsory license fees.

673. HOLLAND, BILL. Ringer "Bill" sets stiff broadcaster fees. *Record World* (Mar. 25, 1978), p. 30.

The Register of Copyrights has submitted to Congress a "draft bill" which suggests specific fees that broadcasters should pay to performers based on formulas to be prescribed by the Copyright Royalty Tribunal. The article breaks down the most important provisions of the bill.

674. HOLLAND, BILL. Ringer urges copyright protection for performers and record producers. *Record World* (Mar. 25, 1978), pp. 3, 96.

Reports the Copyright Office's submission to Congress of its 2,500 page performance rights study. The author details the contents of the study and predicts that the study's recommendation that performance rights legislation be enacted will be a blockbuster within the record and broadcasting industries.

675. HOLLAND, BILL. State Dept. hosts c'right meet. *Record World* (Apr. 22, 1978), p. 18.

Notice of a meeting at the State Department, described by the author as "low-key and rather inconclusive," which concerned the advantages and disadvantages of the Rome Convention, the Satellite Convention, and the Berne Convention. The advisory meeting consisted basically of an informal exchange of

views between such groups as ASCAP, BMI, RIAA, NMPA, and various motion picture representatives.

676. Hong Kong halts pirate tape sale. *Billboard* (Apr. 29, 1978), p. 1.

Hong Kong's Custom and Excise Service, a special copyright unit, recently beefed up its efforts to halt tape pirating, and has caused pirated tapes to all but disappear from the retail scene. The record industry estimates that tape piracy formerly skimmed as much as \$10 million a year from legitimate producers.

677. *The Hurry Corporation v. Teleworld, Inc.* *New York Law Journal*, vol. 179, no. 70 (Apr. 12, 1978), p. 10.

Plaintiff, Hurry Corporation, sought judgment for payment of the last three installments under a licensing agreement authorizing defendant, Teleworld Inc., to distribute seven color tape musical and comedy television specials. The court entered judgment requiring the three payments to be made, since the defendant presented no evidence to support its claim that the plaintiff's rights to license showings of the tapes was defective.

678. HYER, MARJORIE. Publisher sues U.S. Catholic bishops. *The Washington Post* (Friday, Nov. 25, 1977), p. C-8.

A music publisher has filed an \$8.6 million damage suit against Catholic bishops charging them with copyright infringement through use of pirated hymnals throughout the country. The suit charges the bishops' conference with failing to provide adequate direction to dioceses and parishes regarding copyright restrictions.

679. Jerome Kern tunes in MBM's 'Clouds' still copyrighted. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 6.

Jerome Kern's attorney informed *Variety's* editor that the songs in the MBM musical, 'Till the Clouds Roll By' are still protected by copyright even though the picture is in the public domain. He warned that unauthorized distribution of the film would still be a violation of this protection.

680. JONES, PETER. U.K. publishers mull plan to cut cost of mech. royalty collection: commission falls to 8%. *Billboard* (Apr. 22,

1978), p. 77.

A new royalty agreement is being considered in the United Kingdom that could halve commissions to publisher and composer members of the Mechanical Copyright Protection Society. The proposal, which calls for the restructuring of collection procedures, should cut the administrative work of the Society as well as that of the record companies. The Music Publishers Assn. council has seen the agreement, but most of the publishing industry is waiting for full details before making any comments.

681. Judge holds BOCES strictly accountable for off-air tape distribution. *The Video Publisher*, vol. 7, no. 22 (Apr. 10, 1978), p. 1.

Judge John Curtain issued a restraining order on March 30th regulating the distribution of programs taped off the air by the Board of Cooperative Educational Services of Erie County NY. Time-Life Films, Encyclopedia Britannica Educational Corp. and Learning Corp. of America had won a preliminary injunction in February barring further taping. The judge said BOCES could continue to make and offer copies to over 100 schools "at its own risk" provided certain steps were taken.

682. Karmen suing over a jingle tune. *Billboard* (Apr. 29, 1978), p. 10.

Steve Karmen is suing NBC TV for alleged copyright infringement of his tune "Exxon Energy For A Strong America." Karmen claims the aforementioned jingle, used in a recent "Saturday Night Live" skit, caused irreparable injury.

683. KATZ, ARTHUR STANLEY. Videotapes and the copyright act: no protection—no infringement. *The Los Angeles Daily Journal* (July 14, 1977), pp. 3-12.

A synopsis of this article published in the December, 1977, issue of the BULLETIN, Vol. 25, page 184, item 150, stated the author's thesis incorrectly. The synopsis should read as follows:

The author advances the thesis that videotapes are not a species of motion pictures and thus videotapes created before January 1, 1978 are not protectible under the new Copyright Law, in view of transitional section 103 which states that

copyright protection is not extended to works in the public domain before January 1, 1978. He claims that a videotaped work reproduced from the performance of a conventional sprocketed motion picture is not a "copy" of the motion picture, since the device that produces the tape converts inchoate electronic signals into images and sounds, thus preserving signals which can be converted into transitory images and sounds. The writer recognizes that videotapes created on or after January 1, 1978 are protected as audiovisual works under the new Act.

684. KOEGEL, JOHN B. Art law. *New York Law Journal*, vol. 177, no. 96 (May 18, 1977), p. 1.

Several bills have been recently introduced in the New York State Legislature regulating the creation and sale of fine art. Opponents feel legislation is inappropriate in this area because of the nature of the art market. Proponents believe modern technology warrants enactment of extensive statutory regulation.

685. L.A. Judge says "no thanks" to potential friends in Betamax copyright case. *VideoNews*, vol. 8, no. 8 (Apr. 12, 1978), p. 8.

Federal Judge Warren J. Ferguson has rejected a proposal by several Hollywood studios and unions to become friends of the court in the case involving Disney and Universal against Sony et al., regarding Betamax copyright infringement. The judge said there were too many issues raised and so many firms involved that new "amicus" briefs would be "an insurmountable burden" for Sony to counter.

686. Lionel White sues UA; avers 'F.I.S.T.' infringes 'Rafferty,' a 1959 novel. *Variety*, vol. 290, no. 6 (Mar. 15, 1978), p. 7.

Lionel White, author of a novel entitled "Rafferty," filed suit against United Artists for infringement of copyright. White claims the film "F.I.S.T.," slated to be released in April, took extensively from his book.

687. Local tv music rates attacked: litigation to lower license fees may be recommended. *Billboard* (Apr. 22, 1978), p. 28.

Leslie Arries, chairman of the all-industry television music licensing committee, told the NAB convention that tv stations pay far too much for ASCAP and BMI music licenses. Negotia-

tions are under way to change the license fee formula, but if these should fail, the committee recommends litigation to its member stations.

688. LOWENS, IRVING. Copyright puzzles: The new law resolves old issues, with questions for a modern age. *The Washington Star*, vol. 126, no. 96 (Apr. 2, 1978), p. F-12.

The 1976 act represents the first general revision of the U.S. copyright law since 1909. It may have as much effect on education and the arts as the creation of HEW and the National Endowments for the Arts and the Humanities. In spite of its many complexities, many loopholes still exist. The author suggests that nothing should be taken for granted: The law is complicated, but you have to check it out to avoid trouble.

689. MCA stops t-shirt decals of Cassidy, 'Six Million.' *Daily Variety*, vol. 179, no. 35 (Apr. 21, 1978), p. 6.

Universal reports that the licensing division of Universal, Merchandising Corp. of America, was granted a preliminary injunction and a temporary restraining order prohibiting two companies from making and distributing T-shirt transfers of Shaun Cassidy and the "Six Million Dollar Man."

690. MCGEE, DAVID. Copyright Service Bureau: More than just administering catalogues. *Record World* (Mar. 11, 1978), pp. 4, 38 (Section II).

The Copyright Service Bureau added over 150 publishers to its roster in 1977, which now surpasses the 1000 mark. The Bureau provides a wide variety of services, from filing copyrights to collecting mechanical royalties. President Walter Hoffman expects continued expansion as smaller publishing companies react to the complexity of the new copyright law by farming out routine administrative chores to bigger firms such as the Bureau.

691. MYERS, EDITH D. Should software be copyrighted? *Datamation*, vol. 24, no. 3 (Mar., 1978), pp. 125-137.

Positions on extended copyright protection for software are presented by authors, industry representatives and reports from CONTU and the National Bureau of Standards. With no

litigation to date on copyright infringement of software, preemption of other existing forms of protection remains a concern to the industry.

692. NAB leaders appear confident perf. royalty bill won't happen. *Billboard* (Apr. 15, 1978), p. 22.

On the proposed performance rights legislation, Bill Carlisle of the NAB says there is a quid pro quo relationship between broadcasters and the record industry. As a leading lobbyist against the bill, he doesn't venture to make predictions. However, he says Congress would be hard pressed to pass the bill this year because of the Panama Canal and energy legislation.

693. New Clearance Center ready to handle photocopy fees. *Authors Guild Bulletin* (Nov.-Dec., 1977), pp. 1, 20.

The Copyright Clearance Center, which went into effect January 1, 1978, processes requests and receives payments from libraries and corporations that wish to make multiple copies of copyrighted material. The first use of the center will involve mostly technical journals.

694. New copyright law. *Songwriter* (Mar. 1978), p. 8.

An editorial note on the most significant changes of the new copyright law—application forms, registration of unpublished as well as published works, registration fees and deposit requirements. Readers are advised to contact the Copyright Office for further information.

695. New court ruling clarifies renewal rights in Britain. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 67.

In London, the high court recently ruled that a song, written by two or more persons whose contributions are indistinguishable, is a 'joint' work under the reversionary provision of the 1911 British copyright act. Earlier, however, the same judge found that a song, with words and music written by different people, was a 'collective' work, the rights to which do not revert to the author's estate.

696. No easy answers for the FCC in its cable inquiry. *Broadcasting* (Mar. 20, 1978), p. 28.

The FCC's notice of inquiry into the economic relationship between cable and broadcast television drew opposing comments from the National Assn. of Broadcasters and the National Cable Television Assn. NAB found that cable will divert audiences from local stations, causing losses in revenue and reduction in services. NCTA's study admitted minimal loss of audience but found the overall impact will be positive.

697. On campus royalties: AFM in warning to agents & acts. *Billboard* (Apr. 29, 1978), p. 10.

Prompted by the success of the University of Tennessee in getting Dan Hill to abide by a contract rider and assume the performance fee for his March 9 concert, the president of AFM issued an announcement stating, "Any contracts for the services of members of AFM containing such a clause, shall be considered null and void . . ." The payment of performance fees by the musician would put the performer in violation of article 25, section 16 of the AFM bylaws, which states that the performer is not liable for the payment of any royalty fees.

698. Palm Springs outlet: 36 copyright actions embroil KMIR-TV. *Billboard* (Apr. 29, 1978), p. 20.

ASCAP originally filed suit against KMIR-TV in 1975 charging copyright infringement. The suit was dismissed without prejudice when a settlement was contemplated. The settlement was never consummated, so ASCAP re-filed in April 1977, on behalf of a group of its publishers. Federal District Court Judge Lydick ruled against the joinder. As a result, 36 separate actions have been filed against the defendant within a three-day period.

699. Pay-for-play dispute sparks AFM warning. *Daily Variety*, vol. 179, no. 32 (Apr. 18, 1978), p. 6.

Apparently as a result of some collegiate opposition to payment of royalty fees, American Federation of Musicians' members have been warned not to enter into any booking agreements with colleges which require payment of performance license fees by the performer. Such agreements would be considered null and void by the AFM because the organization's bylaws specifically prohibit members from making such payments.

700. Pay for what you play is proposed by copyright chief. *Broadcasting* (Mar. 20, 1978), p. 32.

In a report requested by Congress, Barbara Ringer, Register of Copyrights, recommended the creation of performance royalties. She proposed specific legislation along the same lines as a bill introduced by Rep. George Danielson. The proposal suggests payment of royalties either by a pro-rated formula to be determined by the Copyright Royalty Tribunal or on a blanket basis as spelled out in the Danielson bill.

701. Perf. royalty debate on again; evidence & epithets fly on coast. *Variety*, vol. 290, no. 9 (Apr. 5, 1978), p. 73.

Performance royalty hearings before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice attracted many speakers from both sides of the spectrum on the Danielson bill. Opponent broadcasters testified that support for the legislation stems from the record industries' greed. Conversely, performers stated that the lack of a record royalty is tantamount to "legalized piracy" by broadcasters, and because the U.S., the largest exporter of copyrights, does not currently recognize performance royalties, a valuable source of income from other countries is lost.

702. Performer royalty gets big lift from copyright official. *Variety*, vol. 290, no. 7 (Mar. 22, 1978), p. 1.

Barbara Ringer strongly urged Congress to enact legislation creating a performance royalty in a statement to be presented to a House subcommittee holding hearings March 29-30. The Copyright Office submitted a report earlier analyzing the constitutional and legal issues, legislative history and economic impact of this legislation which was proposed by Rep. George Danielson (D-Calif.).

703. PILPEL, HARRIET. Cases of libel and the right to privacy raise serious—and inhibiting—questions. *Publisher's Weekly*, vol. 213, no. 13 (Mar. 27, 1978), pp. 48-50.

An analysis of several recent libel and right of privacy cases in which reporters, editors, and publishers have been held liable. The author concludes that the cumulative chilling effect of such decisions will result in a new species of censorship.

704. Portland distribs awaiting sentences. *Billboard* (Apr. 15, 1978), p. 10.

Two Portland men await sentencing in New York after being found guilty of 10 counts of criminal copyright infringement and conspiracy for distributing bootleg tapes.

705. Presley music owners move to protect dramatic rights. *Variety*, vol. 290, no. 3 (Feb. 22, 1978), p. 79.

To protect their dramatic performance rights in about 150 Presley songs, BMI has sent warnings restricting its licensees to no more than three performances at any one time. Recipients argue that their performances are not dramatic presentations and have decided to fight the ruling.

706. Publishers sue distrib. *Billboard* (Apr. 22, 1978), p. 80.

Morris Perlsman, a New York distributor of Latin music, has been sued in two separate actions for illegally manufacturing, reproducing and distributing copyrighted music. The plaintiffs, Edward B. Marks Music Corp. and the Peer-Southern Organization, seek damages in excess of \$50,000, destruction of the offending paraphernalia and statutory penalties.

707. Publishers suing over copyrights. *Variety*, vol. 290, no. 11 (Apr. 19, 1978), p. 117.

Two Latin music publishers, Peer-Southern and Edward B. Marks, filed separate actions in N.Y. against Morris Perlsman for unauthorized recording of their music. Both plaintiffs seek damages and forfeiture and destruction of the infringing works.

708. Revised copyright opens new royalty sources for music. *Variety*, vol. 290, no. 8 (Mar. 29, 1978), p. 1.

The Harry Fox Agency is seeking a formula for payment of mechanical royalties for any use of specific publishers' catalogs, while the performing rights societies attempt to license some users who were exempt under the old copyright law.

709. Revision of interlibrary loan form (ILL) including copyright law representations. *Special Libraries*, vol. 68, no. 11 (Nov. 1977), pp. 415-418.

Revisions in the interlibrary loan form are listed along with the reasons under the new copyright law for such revisions.

710. ROBINSON, TIMOTHY S. Mother Scott loses 'Nashville' copyright suit. *Washington Post*, vol. 101, no. 144 (Apr. 28, 1978), p. B4.

Esther Mae (Mother) Scott, sued the movie company that produced "Nashville," contending that they had infringed her common law copyright when they used the song "Keep A Goin". In dismissing the suit, Judge Barrington D. Parker said, "A copyright is not violated because a second work is similar when the two works stem from a common source." The common source was an 1800's poem. The judge felt that the two songs which used the words of the poem showed "a basic rather than a striking similarity."

711. Rosters set for first performer royalty hearing in Los Angeles: broadcasters, labor, record industry will all be on hand. *Broadcasting* (Mar. 27, 1978), p. 52.

Broadcasters dominate the list of witnesses testifying at the hearings of the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on performance royalties legislation held Wednesday and Thursday (March 29 & 30) in Los Angeles.

712. Royalties for record artists would amount to double billing, say radio people; at Kastenmeier hearing in L.A. they insist that public exposure is already sufficient payment. *Broadcasting* (Apr. 3, 1978), p. 38.

At the performance royalties hearings in Los Angeles, broadcasters insisted that the promotional benefit of airplay was sufficient exposure for record artists/companies and additional payment for records was unwarranted. On the other hand, radio industry representatives argued that radio stations gain unjust commercial benefits from playing records since they don't have to pay for the privilege.

713. Royalty hearing shifting to L.A. *Billboard* (Apr. 1, 1978), p. 3.

Record industry and union representatives testified at the record performance hearings held March 29-30 in Los Angeles before the subcommittee on Courts, Civil liberties and the Administration of Justice.

714. Schools violate musicians' rights, warns Fuentealba. *The Hollywood Reporter*, vol. CCLI, no. 11 (Apr. 18, 1978), p. 22.

Since the enactment of the new copyright law, many colleges and universities have refused to sign contracts with musicians unless the performers agree to pay the performance fees. Therefore, Victor W. Fuentealba, president of the American Federation of Musicians, has demanded that all AFM signatories report any schools following this practice. He also warned members that payment of such fees is prohibited by their bylaws and that contracts containing a license fee clause will be considered null and void.

715. SCHREGER, CHARLES. Copyright twist: sell licenses to TV show pirates. *Variety*, vol. 286, no. 9 (Apr. 6, 1977), pp. 2, 118.

In an effort to keep film pirates from stealing shows, some film companies are thinking of selling various schools the right to tape certain films, i.e. "Roots," "Ascent of Man" and "America." Many of the schools and universities are flaunting the copyright laws and taping the programming for their classes. Often, they are not aware that the copyright law forbids taping the programs.

716. SCHULENBERG, RICHARD A. The autobiography of a copyright. *Songwriter*, vol. 3, no. 6 (Mar. 1978), p. 30.

Part XII of a series of discussions on the new copyright law deals with the implication of subsections (a), (b) and (c) of Sec. 108 as they relate to reproduction of phonorecords by libraries and archives. Transfer of individually owned phonorecords under Section 109 is also briefly covered.

717. SCHULENBERG, RICHARD A. The autobiography of copyright. *Songwriter*, vol. 3, no. 7 (Apr. 1978), p. 30.

One of a series of articles dealing with various sections of the Copyright Act of 1976. Part XIII discussed limitations on exclusive rights under Section 110.

718. See early ruling on Betamax right to copy tv shows. *Variety*, vol. 290, no. 6 (Mar. 15, 1978), p. 7.

A Motion Picture Assn. representative told the International Tape Assn. copyright workshop that he predicts an early

ruling in the Betamax suit, noting a recent federal court decision finding off-air videotaping for later duplication and exhibition in local schools to be infringement. Another area of the home taping industry the panel dealt with was liability under the new copyright law.

719. SIPPEL, JOHN. Alleged pirates file suit against RIAA for 13 mil. *Billboard* (Apr. 29, 1978), p. 4.

Joseph James Martin, Pearl Music and National Music Corp., prior defendants in piracy civil actions, are among the six plaintiffs suing RIAA for \$3 million damages in Los Angeles' Federal District Court, charging that RIAA violated antitrust laws by hindering plaintiffs in attempting to do business. The plaintiffs argue that they tried to sell consumers on a deal where the party received a stereo sound system with AM/FM radio and agreed to buy a stipulated number of pre-recorded tapes, but the RIAA conspired to hamper their marketing. They claim that RIAA members would not license music to them, halted their acquisition of capital funds and fixed prices in the industry.

720. Songwriter Q & A. *Songwriter*, (May 1978), p. 46.

A Pasadena, Calif., resident asked *Songwriter* what protection is afforded by a copyright registration. The response was, "If you register your song with a reputable copyright registration organization such as SRS (Songwriters Registration Service), you are protecting your songs every bit as legally and completely as you would if you registered with the Copyright Office . . . D.C. The main advantage of going through an SRS is one of economy—SRS is a considerably cheaper way to go than paying the Copyright Office a fee of \$10 per song registered."

721. STANDISH, PETER D. After the consent decree: the effect on the traditional market agreement. *Publishers Weekly*, vol. 211, no. 17 (Apr. 25, 1977), p. 44.

Recurring territorial licensing arrangements between American and British publishers prompted the Justice Department to bring suit for violations of the Sherman Act. A Traditional Market Agreement, which has been in existence for more than 30 years, was recognized as the basis for these licensing arrangements. As a result, Justice was able to effect a settlement

by drafting a Consent Decree whereby the publishers agreed to terminate the traditional market.

722. State Dept. to host intl. copyright meet. *Record World* (Apr. 1, 1978), p. 8.

Announcement of an international copyright meeting hosted by the State Department on April 11, 1978.

723. STEINAU, LESLIE. New copyright law. *Craft Horizons*, vol. 36, no. 1 (Feb. 1978), pp. 36, 67.

The author uses a question and answer format to summarize the nature of copyright, the protection it affords, and the basic differences between the old and new copyright laws. The questions are representative of those most often asked at the 1977 American Crafts Council National Conference.

724. Supreme Court restricts access to Nixon tapes. *Daily Variety*, vol. 179, no. 33 (Apr. 19, 1978), p. 1.

In the case filed by broadcasters and diskeries over the availability of the tapes used in President Nixon's Watergate coverup trial, the Supreme Court ruled that the public's right of access to court records is not absolute because of the 1974 Presidential Recordings Act. While the decision prohibits distribution of the tapes used at the trial, it does not preclude their release to the National Archives. The other White House tapes currently in the custody of the General Services Administration are not affected by the ruling.

725. Suspect gets one year in piracy case. *Daily Variety*, vol. 179, no. 36 (Apr. 24, 1978), p. 4.

A Massachusetts man, Robert Cammarata, pleaded guilty to one of three charges relating to film piracy. The accused admitted threatening to kill George Mazzei, a film distributor, unless he provided him with prints of a number of films. The government dropped the other two charges.

726. 'Third Man' is public domain; who failed to renew copyright? *Variety*, vol. 290, no. 2 (Feb. 15, 1978), p. 7.

The Hollywood Films Exchange says copyright protection for "The Third Man" has expired, placing the film in the pub-

lic domain. According to a report requested by HFE from the U.S. Copyright Office, the copyright expired August 31, 1977 and was never renewed. The Exchange is, therefore, selling copies for as little as \$49.98.

727. Thursday in court. *Billboard* (Apr. 29, 1978), p. 14.

Thursday Music is suing Motown Records and Jobete Music, alleging that the song, "Love Machine," recorded by Motown and published by Jobete, is stolen from its copyright, "Land of a Thousand Dances" written by Fats Domino and Chris Kenner.

728. TIEGEL, ELIOT. Congressman rips performers' fee: Nevada's Santini. *Billboard* (Apr. 22, 1978), p. 3.

Congressman James Santini, broadcaster Len Hansel, NAB president Vincent Wasilewski and Don Zeifang of the FCC voiced their support of NAB's opposition to a record performance royalty at the broadcasters' annual convention. The Congressman urged conventioners to influence their respective congressmen and senators to vote against the bill.

729. TRAIMAN, STEPHEN. RIAA report scans critical loose ends and accomplishments. *Billboard* (Apr. 22, 1978), p. 15.

The RIAA annual report highlights a critical year of accomplishments and major unfinished business. The report generally reviews key provisions of the new copyright law, with emphasis on performance royalties, compulsory licensing and off-the-air home taping.

730. Trial to be set on claim issue in film suit. *New York Law Journal*, vol. 179, no. 59 (Mar. 28, 1978), p. 1.

The decision in *Filmvideo v. Hastings* dealt with a dispute over the ownership of the TV rights in 23 Hopalong Cassidy books. The judge found that though the plaintiff's interpretation of the agreements assigning motion picture rights in the works was supported by some of the evidence, it was contrary to the construction given it by the parties for several decades. The court therefore ruled that the motion picture agreements reserved television rights.

731. TUSHER, WILL. Guilds join showmen in Betamax war: residuals

as related worry. *Variety*, vol. 290, no. 6 (Mar. 15, 1978), p. 7.

Screen Actors Guild and Writers Guild of America have moved for permission to file friend of the court briefs supporting the MCA/Universal-Walt Disney suit seeking to outlaw taping of televised films on the basis of copyright infringement. The guilds fear that if copyright in motion pictures is not protected, the industry's ability to sustain employment, income and residuals will be severely jeopardized.

732. TV distributor barred from use of cowboy films. *New York Law Journal*, vol. 179, no. 57 (Mar. 24, 1978), p. 1.

A federal judge found that Clarence E. Mulford assigned motion picture rights in his Hopalong Cassidy stories but reserved the TV rights barring such use without specific permission.

733. 12 arrested in Japan: pirates nabbed. *Billboard* (Apr. 22, 1978), p. 77.

The Japanese Society for the Rights of Authors, Composers and Publishers joined the Japan Phonograph Record Assn. to deal with the problem of piracy. The alliance told police of seemingly illegal activities of individuals who had recorded and edited hit songs and then made and sold tapes. As a result of police investigation of the allegations, 12 bootleggers were arrested and are awaiting sentencing in Osaka, Japan.

734. WAGNER, SUSAN. Appeals court dismisses privacy claims in "Dog Day Afternoon." *Publisher's Weekly*, vol. 213, no. 10 (Mar. 6, 1978), p. 27.

Reports the dismissal by the New York Court of Appeals of a privacy suit based on the movie "Dog Day Afternoon" and subsequent adapted books. The court rejected the notion that, under present state statutes, an individual could bring an invasion of privacy suit in relation to films or books which do not use his name, portrait, or picture. The court noted that its decision left unsettled the question of defamation.

735. WAGNER, SUSAN. Commercial photocopying limits. *Publisher's Weekly*, vol. 213, no. 13 (Mar. 27, 1978), p. 30.

Reports the release of a draft report on photocopying

being circulated for comment by the National Commission on New Technological Uses of Copyrighted Works. The article also recounts the furor caused by the recent issuance, by the Association of American Publishers and the Authors League of America, of guidelines for photocopying by corporate libraries. When those organizations issue guidelines on academic and public library photocopying, another outcry is anticipated.

736. WAGNER, SUSAN. Library group balks at mailing photocopy proposal. *Publisher's Weekly*, vol. 213, no. 10 (Feb. 13, 1978), p. 58.

Reports the refusal of Frank McKenna, executive director of the Special Libraries Association, to release a portion of SLA's mailing list to the Association of American Publishers and the Authors League of America. The latter groups wish to use the list to mail copies of their photocopying guidelines to corporate libraries.

737. WAGNER, SUSAN. New copyright import rules draw fire from AAP authors. *Publisher's Weekly*, vol. 213, no. 16 (Apr. 17, 1978), pp. 28, 30.

The new Copyright Office form and rules for the importation of copies of English language nondramatic literary works not manufactured in the United States or Canada sparked criticism from the Association of American Publishers and the Authors League of America. The groups primarily object to: (1) the Copyright Office refusal to allow importation of 2000 copies of works published prior to January 1, 1978 and (2) the requirement that registration of a work must take place or must already have been made when requesting an import statement.

738. WAGNER, SUSAN. Will the U.S. join Berne? *Publisher's Weekly*, vol. 213, no. 13 (Mar. 27, 1978), p. 30.

Discusses the possibility of the U.S. joining the Berne International Copyright Convention. The author believes that moral rights legislation would have to be added to qualify the U.S. for entry into Berne. Most American publishers favor joining Berne but film producers appear reluctant to accept moral rights legislation.

739. Wyoming enacts anti-piracy law. *Record World* (Apr. 1, 1978), p. 4.

A brief notice that on March 9, 1978, Wyoming became the 49th state to enact legislation outlawing the manufacture and vending of pirate and bootleg recordings. Vermont is now the only state without an anti-piracy statute.

2. Foreign

1. England

740. Copyright. *The Bookseller*, no. 3768 (Mar. 11, 1978), pp. 1812-13.

A letter to the editor on the issue of multiple photocopying for classroom use. Though the author does not quarrel with the law's requirement that permission be requested before making such copies, he laments the time, expense, and difficulty of doing so. He suggests that publishers attempt to agree on a uniform, simple procedure and standard charges.

741. Illegal copying stops growth of record market. *The Bookseller*, no. 3767 (Mar. 4, 1978), p. 1678.

A brief note that the British record industry believes it is losing sales of between 40 and 50 million pounds a year because of home taping. In the past two years, sales of blank cassettes have doubled to 50 million while the record trade has remained stagnant. The industry desires implementation of the recommendation of the Whitford Committee that a levy be placed on the sale of home taping equipment.

742. The reprographic explosion. *The Bookseller*, no. 3762 (Jan. 28, 1978), p. 315.

Reports an article in the *London Times* which feared a vicious circle of increased copying which would raise costs, which would further increase copying. However, the Wolfenden Committee is working on practical solutions to the problem, and Mr. Denis de Freitas, chairman of the British Copyright Council, believes that the committee will come up with workable proposals which are fair to all interests.

743. Views on Whitford. *The Bookseller*, no. 3761 (Jan. 21, 1978), p. 215.

Details recent criticism of the Whitford Report, especially its recommendation for a blanket licensing system for reprography.

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